



Cussing Out Your Employee May Get You Sued By... OSHA??

Insights

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Hopefully you are aware of the continuing escalation of all forms of whistleblower and retaliation claims, including under the 21 Anti-Retaliation laws enforced by special investigators from OSHA's Whistleblower group. If not, check out [the News Room on OSHA's Whistleblower page](#).

A [recent OSHA's news press release](#) advised that:

The U.S. Department of Labor has filed a lawsuit in the U.S. District Court against Duane Thomas Marine Construction LLC and owner Duane Thomas for terminating an employee who reported workplace violence, in violation of Section 11(c) of the OSHAct.

Seems fairly standard. OSHA asserts that an employer fired an employee for complaining about unsafe work conditions. It's a bit unusual to hear that the alleged unsafe conditions involved fear of workplace violence, but who can blame an employee in the current environment? Such claims are increasing.

However, as you read on, it transpires that the complained of hazard was the owner!

- The employee alleged that, on numerous occasions between Dec. 9, 2009, and Feb. 25, 2011, Mr. Thomas committed workplace violence and created hostile working conditions. He allegedly behaved abusively, made inappropriate sexual comments and advances, yelled, screamed and made physically threatening gestures, in addition to withholding the employee's paycheck.
- The employee, who worked directly for Thomas, reported to him that he was creating hostile conditions. On Feb. 25, 2011, the employee filed a timely whistleblower complaint with OSHA alleging discrimination by Thomas for having reported the conditions to him.
- On March 18, 2011, Thomas received notification of the complaint filing. On March 23, 2011, Thomas had computer passwords changed in order to deny the employee remote access to files and then terminated the employee. OSHA's subsequent investigation found merit to the employee's complaint.

And we're not just talking reinstatement, OSHA seeks back wages, interest, and compensatory and punitive damages, as well as front pay in lieu of reinstatement. Additionally, it seeks to have the employee's personnel records expunged with respect to the matters at issue in this case and to bar the employer against future violations of the OSH Act.

Solis v. Duane Thomas Marine Construction LLC and Duane Thomas, individually, Civil Action File Number 2:13-cv-76-FTM-99-DNF).

Wow.... Ok,... our usual caveat. We do not personally know the facts. The employer may have made errors, behaved badly and given the complainant the ability to make out a viable claim. Or, the Complainant may have made up and exaggerated the whole thing. While we have yet to see an employee lawsuit that was completely accurate, We respect the Atlanta Regional Solicitors' office, who would be handling the case, so there must be at least some pretty bad facts.

Lessons and Action Points?

1. This atmosphere may or may not have presented a valid safety hazard, but guess what? Under 11©, the violation is the act of terminating the employee for complaining about a safety concern. The concern does not have to be valid (there is a different standard if the employee refuses to work because of an unfounded and unreasonable concern).

2. For all we know, the employee could have annoyed his boss with unfounded "safety" complaints until the boss fired him in a moment of anger... and that's a potential violation.

3. Or... the boss could have indeed cursed the employee, made sexual innuendo and threatened the guy. Maybe it was a safety hazard. Maybe it was not an unsafe situation. But, if the boss indeed engaged in the behavior alleged, than he succeeded in providing us with yet another opportunity to Blog about how foolish behavior gets a company sued (same-sex harassment and plain old vile racial comments were the causes in two entries I made on [another site](#)).

4. All of us need to simply eliminate from our vocabulary the two phrases:

"Boys will be boys,"

And

"You had to be there."

The problem is that lawyers and Uncle Sam will also be there if one's conduct is foolish enough.

6. We are reasonably confident that our readers will not dog-cuss their employees, albeit slightly less confident than I was one week ago, but is every supervisor aware that such behavior is unacceptable? Employers might want to point out to employees that the owner is listed as an individual defendant, along with the company. This entertaining law suit indicates that supervisors had better think twice before going off on employees.

7. Employers must effectively train employees and supervisors to behave professionally regardless of the setting,... and train supervisors to understand the many behaviors which may be protected as whistle blowing.

8. Take seriously workplace violence concerns, even when they may seem a bit odd or overblown. The [OSHA Workplace Violence site](#), with its new Workplace Violence investigation and enforcement procedures is a useful reference

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Our next four years are going to be busy.

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