



By James E. Leemann, Ph.D.

To be or not to be... a whistleblower?

Most are fired by their employers

What is whistleblowing anyway? For our purposes, a whistleblower is a current or past employee who attempts to disclose an alleged wrongdoing (e.g., safety/health violation) in their organization. The disclosure can be both internal and/or external.

Who typically blows the whistle?

According to Dr. Philip J. Maloney, the “typical whistleblower is a 47-year-old family man with seven years on the job and has a strong belief in universal moral principles.” Dr. Maloney notes that “most whistleblowers who work in the private sector are fired by their employers, 20 percent remained unemployed after six months, 25 percent report a decrease in family income, 17 percent lose their homes, 54 percent report harassment by their peers at work, 80 percent report physical deterioration and 10 percent attempt suicide. Interestingly, most whistleblowers admit few regrets and assert that they would do it again.”¹

What are your rights?

Activities protected by OSH Act Section 11(c) fall into five broad categories:

- Occupational safety and health complaints filed with OSHA or another agency of government, which has the effect of protecting employee safety (e.g. fire or health department);
- Complaints or other safety concerns communicated to the employee’s supervisor or higher management;
- Participating in an OSHA inspection or other proceeding under the Act;
- Providing testimony in the course



of a judicial or administrative proceeding; and

- Refusing to perform a task that the employee reasonably believes presents a real danger of death or serious injury.²

If you believe that your workplace safety and health “protected activity” was a contributing factor or motivated your employer to retaliate against you through one or more “unfavorable personnel actions” which may include firing or laying off, blacklisting, demoting, denying overtime or promotion, disciplining, denying benefits, failing to hire or rehire, intimidation, reassignment affecting promotion prospects, or reducing pay or hours, you may file a Section 11(c) complaint with OSHA.

Note there are specific filing timeframes that must be met. For OSH Act Section 11(c) complaint filings, you have 30 days to file your complaint from the date you actually learned — or think you have been, but are not sure — you were retaliated against.

To blow the whistle or not?

Before you go off half-cocked, think long and hard before filing a safety com-

plaint with OSHA, which could lead to a retaliation. You may afford yourself some protection if you file a complaint first with OSHA before your employer, but don’t assume that OSHA will automatically protect you. There is much more to the process. Read OSHA’s *Whistleblower Investigations Manual*.

If you decide to first register a complaint with your employer, do so with eyes wide open. Seek out co-workers’ perspectives to validate your safety and health concerns. Be careful to not become another employee’s fall guy for filing his or her safety complaint. Don’t be naïve in thinking your employer will not take some form of hostile action. Be prepared for an antagonistic response. Talk to your spouse and family, because they will be affected should your employer decide to pursue an unfavorable personnel action. Seek out and consider employing an attorney who specializes in employment law. Keep meticulous records regarding the entire situation from conditions prior to the safety complaint, to the safety complaint, to the people involved, to any actions taken, etc. Do not keep these records at work; you may be prevented from retrieving your notes. If you record your notes on a computer, do not use a company issued computer. Do not miss any deadlines for filing the safety complaint or subsequent deadlines.

If you believe your employer has retaliated against you, these are the questions you need to ask yourself:

- Were you involved in a protected activity?
- Did your employer take an unfavorable personnel action against you?
- Did the protected activity cause the unfavorable personnel action?

If you can answer, “Yes” to each of these questions with enough detail to convince OSHA, you may have a case; otherwise, OSHA will likely dismiss your complaint.

Two websites with good resources are the Washington D.C.-based National Whistleblowers Center at <http://www.whistleblowers.org/index.php> and the Ottawa, Canada-based FAIR (Federal Accountability Initiative for Reform) at <http://fairwhistleblower.ca/>. Both sites provide the stories of past and ongoing whistleblower actions.

What can employers do to avoid an OSHA investigation?

Labor and employment law attorney, Mark A. Lies II, and attorney Meagan Newman, both from Seyfarth Shaw LLP law firm, offer excellent advice for employers.

Employers should be aware of the potential liability associated with whistleblower discrimination and take all possible measures to ensure that employees who raise safety concerns do not face adverse action as a result of this protected activity. Along these lines, employers should develop a strategy, including:

- Employers should have written anti-discrimination and anti-retaliation

policies that clearly prohibit any adverse action against employees who have raised safety concerns or engaged in other forms of protected activity.

- Train supervisors to be aware of complaints and how to respond; employees do not have to use any unique language in order to raise a complaint that is protected under OSHA’s whistleblower provisions.

- Mandate reporting injuries and illnesses, but be aware that such activity is deemed by OSHA to be protected activity.

OSHA will closely scrutinize safety incentive programs to ensure that these programs are not programs that discourage workers from seeking and getting help when they’re hurt on the job, including programs that may award prizes or other incentives based upon the lack of recordable injuries or illnesses.

- Carefully investigate and document all complaints received and respond to employees after investigation.

- Carefully document all employee discipline. Often, discipline issued to an employee whose performance was lacking prior to any incidents of protected activity is the best way to show that later discipline or termination was not discriminatory, that is, not based upon protected activity.³

From a systems thinking point of view, employees and employers need to strive to work together to create a work environment that allows the freedom for safety and health concerns to be raised without the fear of retaliation.

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References

1 Maloney, P.J. *Ethical Treatment of Employees: Hiring and Firing, Worker Safety and Whistleblowing*. Philosophy 223 Lecture. Christian Brothers University, Memphis, TN.

2 U.S. Dept. of Labor. OSHA Instruction. Whistleblower Investigations Manual. DIS 0-0-9. August 22, 2003.

3 Lies, II, M.A. and M. Newman. OSHA Whistleblower Protection: Giving Sharper Teeth to a “Legal Dinosaur.” At <http://www.cdworld-mag.com/index.php/news/guest-commentary/166-osha-whistleblower-protection-giving-sharper-teeth-to-a-legal-dinosaur.html>