



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

Employee changes OSHA 300 log and threatens to call OSHA, how should the employer respond?

By Emma Mata

Hypothetical, based upon a real fact pattern: New employee in EH&S department complains the Company's OSHA 300 log is not accurate based upon her previous experience at a different employer who recorded injuries differently. The employee refuses to acknowledge OSHA guidance documents and regulations showing that injuries are being properly recorded and changes the log to reflect her view of how to properly record injuries. The employee becomes abusive, threatening and insubordinate when challenged. Employee threatens to call OSHA if the log is not "corrected" as she has demanded.

What should the Company do?

If the Company has determined that the information in the OSHA 300 log is accurate and has addressed the employee's concerns by using OSHA guidance documents and regulations to show that the injuries are being properly recorded, it has no further duty to the employee. However, the Company does have a duty to properly record injuries and cannot allow the employee to change the log to add incorrect data. Thus, the Company should make sure the incorrect information added/deleted by the employee is immediately corrected. The Company may also want to consider restricting the employee's access to the OSHA 300 log.

The Company has the right to discipline the employee as the Company deems necessary, but should keep in mind that if the employee is disciplined, it is likely that the employee will file an OSHA whistleblower retaliation claim against the Company. The Company should be prepared to respond to an OSHA investigation:

- documenting the actions it took to ensure that the OSHA 300 logs were correct;
- documenting the actions it took to address the employee's concerns;
- documenting the employee's conduct in changing the log after it was explained to the employee that the information contained in the log was correct; and
- ensuring that the OSHA 300 log is complete and accurate.

What does the Company do about the threat to call OSHA?

Nothing. The employee has the right to call OSHA and the Company should under no circumstance reprimand or discharge the employee as a result of the complaints about the OSHA 300 log or the employee's threat to call OSHA.

OSHA Section 11(c), 29 U.S.C. § 660(c) states that "no person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act ..." To establish a prima facie case of retaliation under Section 11(c) of the Act, Complainant is required to show that (1) she engaged in protected activity, (2) the employer knew about that activity, (3) the employer subjected her to an adverse employment action, and (4) a causal connection existed between the protected activity and the adverse action. E.g., *Allen v. Administrative Review Bd.*, 514 F.3d 468 (5th Cir. 2008). In order to make a valid Section 11(c) claim, the protected activity must have been a motivating factor in the decision to terminate the employee.

Can the employee be reprimanded or discharged for her abusive, threatening and insubordinate behavior now that she has made a threat to call OSHA?

Yes, but because the employee's abusive behavior is bound up with her threat to call OSHA (i.e. protected activity), the employer must be very careful. To avoid a situation that looks like the employee was reprimanded or discharged as a result of the complaints or the threat to call OSHA, the Company should document every instance of "bad behavior" and counsel or "warn" the employee before a discharge. In other words, the Company wants to be in the best position possible to show that the protected activity was not a motivating factor in the decision to terminate the employee, but rather the decision to terminate was based on the employee's inappropriate conduct.

Emma Mata is an associate at Seyfarth's Houston office. If you would like further information or to submit a question regarding this post please contact the Whistleblower Team at ask-whistleblower@seyfarth.com.

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