



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

Supervisor Scares Employees - Can They Refuse to Work With Him?

By Jim Curtis

Hypothetical, based upon a real fact pattern: Two female employees approach the HR Director and complain that their Supervisor's aggressive personality makes them nervous. While there has been no physical altercation, he frequently raises his voice, swears and has been known to slam doors closed, kick cubicles and throw files. The HR Director tells the employees that she will speak with the Supervisor, but weeks go by and nothing happens. Thereafter, a critical project is running behind and the Supervisor is very upset. In a loud and aggressive manner the Supervisor tells the two employees that he is "pissed off", that they "screwed up" and that they now have to stay after hours with him to complete the project after everyone else in the office will have left. The two employees decide not to stay late out of fear for their personal safety. They leave a voice message with the HR Director telling him what is happening and go home without notifying the Supervisor. The Supervisor now wants them both fired.

What should the Company do?

Not a week goes by without headlines of workplace violence in all segments of our society. Violence at schools and healthcare facilities occurs with alarming frequency as does seemingly random violence at retail, hospitality and even ordinary office settings. Because of the very real potential for death or serious bodily injury, employers should always take reports of aggressive behavior very seriously. Employers should establish a workplace violence policy with reporting procedures and a robust anti-retaliation clause. As part of this program, the employer should conduct a thorough job safety analysis, identifying the potential areas for workplace violence and, to the extent possible, modify or eliminate those tasks that could expose employees to workplace violence. Workplace violence policies are not one-size-fits-all. Each employer should carefully evaluate their workplace and implement a policy that best fits their business, their employees and their customers.

The fact scenario in our hypothetical presents several legal challenges. First, it is important to recognize that in some circumstances workplace violence constitutes a "recognized hazard" under the Occupational Safety and Health Act (OSHA). While there is no federal OSHA standard that requires employers to have a workplace violence policy, there have been frequent OSHA investigations and enforcement actions in recent years focused on this issue. Perhaps the most infamous is the citation issued by OSHA to SeaWorld following the death of a trainer who was allegedly attacked by a killer whale. While the [decision](#) upholding that citation is currently being appealed, OSHA has quietly issued numerous other workplace violence citations to employers in other industries--with a particular focus on health care and retail employers.

Regardless of whether workplace violence is deemed a “recognized hazard” for our hypothetical employer, by complaining about potential workplace violence and raising concerns about their safety, the employees in our example have engaged in protected activity under OSHA. Accordingly, under OSHA Section 11(c), the employees cannot be retaliated against for raising these safety concerns.

However, here the employees did more than simply raise a safety concern, they refused to work. Under OSHA an employee may refuse to work where they reasonably believe that the work in question exposes them to an “imminent danger”. Unlike other workplace hazards, it can be difficult to determine when the potential for workplace violence constitutes an “imminent danger” such that the employee could legally refuse to work. Assuming the employees’ position required them to stay late to complete projects such as this, and that there was not an imminent danger, their refusal to work could constitute a legitimate basis for discipline. Unfortunately, based upon the above facts, it is unclear whether there was a reasonable belief that there was an imminent danger. Obviously this situation is tricky.

In a perfect world, HR would have initiated an investigation of the initial complaint and implemented the findings of that investigation. Because there was no investigation, it is unclear whether there was, in fact, an imminent hazard in this situation. Accordingly, it would be very risky to terminate the two employees, especially since they previously raised potential workplace violence concerns. In fact, even disciplining the employees may trigger a retaliation complaint, especially if the employees followed the company’s internal reporting procedures for raising safety and employment issues. Rather, the employer should consider undertaking the investigation that should have been undertaken weeks before when the complaints were first raised, including in the investigation the most recent incident. If the employees’ complaints are substantiated, then appropriate action should be taken with regard to the Supervisor.

With regard to the two employees, the employer should let them know that their concerns regarding potential workplace violence are being investigated. The employees need not be informed of every aspect of the employer’s investigation but keeping them apprised of the status will alleviate the feeling many employees have that their concerns are being ignored. The employer should advise them that they will not be disciplined for raising safety concerns and that they should notify HR if they feel as though they are being retaliated against in any way. Still, there is nothing wrong with counseling these employees that leaving work without actually speaking with someone in HR or another management representative when they knew that the critical project needed to be completed was not an appropriate decision. The employees should be advised that in the future they should ensure that management is aware of the situation before they leave work so accommodations can be made to complete the project and protect the client relationship.

Jim Curtis is a partner and co-chair of Seyfarth’s Whistleblower Team. If you would like further information or to submit a question regarding this post please contact the Whistleblower Team at ask-whistleblower@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Workplace Whistleblower is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Workplace Whistleblower | January 21, 2014

©2014 Seyfarth Shaw LLP. All rights reserved. “Seyfarth Shaw” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.