

## **OSHA's Enforcement of Workplace Violence Prevention**

By Patricia D. Biles, M.A.,

Most practitioners of workplace violence prevention have some knowledge of how the Occupational Safety and Health Administration (OSHA) enforces workplace violence prevention. Discussions usually center around the usage of the **General Duty Clause §5(a)(1)**. Recent citations by OSHA have, however, involved usage of **Section 11(c)(1)**. This article will review what we know about OSHA's enforcement and cite recent cases utilizing this section.

The basic purpose of the **Occupational Safety and Health Act (OSH Act or the Act)** is "to assure so far as possible every working man and woman ... safe and healthful working conditions and to preserve our human resources ..." In 1970, when the OSH Act was enacted, there was neither a discussion nor a hint by Congress that it would ever be used to regulate human behavior. In order to achieve the purposes of the Act, employers were encouraged to "...reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions." (29 U.S.C. 651)

OSHA does not have a specific standard for workplace violence. However, the OSH Act of 1970 provides regulatory authority in two ways. The extent of an employer's obligation to address workplace violence is governed by the general duty clause:

Section 5(a)(1) of the OSH Act, or P.L. 91-596 (the "General Duty Clause") provides that: "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." (29 U.S.C. 654(a)(1))

OSHA is also committed to protecting employees who report workplace hazards or violations. This commitment applies equally to the hazard of workplace violence as it does to any other hazard. Section 11(c)(1) of the OSH Act provides this protection:

"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 or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." (29 U.S.C. 660 (c))

### **General Duty Clause §5(a)(1)**

As I indicated, the general duty clause requires an employer to keep his workplace free of recognized hazards that are likely to cause death or serious physical harm to his employees.

In order to prevail in a 5(a)(1) enforcement action, the following four elements must be proven:

*The employer failed to keep his workplace free of a "hazard";*

*The hazard was "recognized" either by the cited employer individually or by the employer's industry generally;*

*The recognized hazard was causing or was likely to cause death or serious physical harm; and*

*A feasible means was available to eliminate or materially reduce the hazard.*

Citations for violation of the general duty clause are issued when all four elements are present, and when no specific OSHA standard has been promulgated to address the recognized hazard. If any one of these elements is missing or cannot be proven, the citation is vacated or dropped. It is difficult many times to uphold a general duty clause citation, therefore OSHA has to be creative in its enforcement. Citations can also be issued through usage of prevailing standards such as personal protective equipment and as mentioned, the Sec 11(c)(1) of the OSH Act.

In January of this year, the United States Department of Labor (OSHA) filed a lawsuit in Montana alleging that a Dairy Queen franchisee illegally terminated an employee for making complaints regarding workplace violence at the company's facility. OSHA opened an investigation after the worker filed a whistle-blower complaint alleging retaliation by the company in violation of Section 11(c), which prohibits discharge or other retaliation against workers for filing a safety or health complaint, or for exercising other rights afforded to them by the act. The investigation revealed that the employee was fired shortly after raising concerns about workplace violence.

The department is seeking reinstatement of the employee, payment of lost wages and benefits and enjoining the company from future retaliation against its employees.

"Employees should be free to exercise their rights under the law without fear of termination or retaliation by their employers," said Gregory Baxter, regional administrator of the department's Occupational Safety and Health Administration in Denver. "This lawsuit underscores the department's commitment to vigorously take action to protect workers' rights." (OSHA press release)

In a similar case in February, the U.S. Department of Labor filed a lawsuit in Florida, against Duane Thomas Marine Construction LLC and owner Duane Thomas for terminating an employee who reported workplace violence, in violation of Section 11(c). The suit resulted from an investigation by OSHA that was initiated upon receiving a complaint from the employee, who worked at the company's custom marine dock installation services site on Marco Island.

The suit 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.

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.

"Employees have the right to raise workplace violence concerns without fear of retaliation," said Teresa Harrison, OSHA's acting regional administrator in Atlanta. "OSHA will continue to enforce the whistleblower provisions of the OSH Act to protect employees who report violations." (OSHA press release)

These recent cases indicate that OSHA is vigilant in its enforcement efforts regarding workplace violence. Employees may expect protection from OSHA when engaging in whistleblower activity. Employees who believe that they have been retaliated against for engaging in this protected activity may file a complaint for an investigation by OSHA's Whistleblower Protection Program. Information is available online at <http://www.whistleblowers.gov>

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