

By Michael L. Antoline, J.D.

Coming to Blows

Before you start sparring with that troublemaking employee, get familiar with “whistleblower” statutes.

KEN TARGETSON’S FIRST EXPERIENCE WITH A WHISTLE-blower started on the day that Becky Stabber first walked into his day spa to apply for a job as front desk receptionist. Stabber impressed Targetson with her confident demeanor and assertiveness, and, thinking he had a find, he hired her as a full-time employee. Unfortunately, over the six months following her hire, Stabber’s earlier can-do behavior seemed to transmogrify into obnoxious aggression. Her belligerent attitude toward everything from straightening a treatment room to booking a massage appointment started to alienate clients and fellow workers alike.

Targetson spoke to Stabber on at least two occasions about improving her attitude and cultivating more tact toward others, but staff members continued to report that she had a “take no prisoners” approach. She was one of those rare people who didn’t seem to want or need camaraderie from fellow employees. Targetson wanted to let Stabber go but, frankly, he was a little bit afraid of her. There was no question in his mind that if he were to fire her she’d cause even more trouble.

Below the Belt

One afternoon, Targetson got a call from the Occupational Safety and Health Administration

(OSHA) representative in his area. It appeared that someone had contacted OSHA and informed them that Targetson hadn’t provided staff members with Material Safety Data Sheets (MSDS) for the cleaning solution used on the spa’s hydrotherapy tub. The inspector wouldn’t divulge who filed the complaint, but Targetson knew that no client would be concerned with this kind of internal matter so it had to be an employee. Further, given Stabber’s history, he surmised that she was the culprit.

Acting on the complaint, OSHA was phoning Targetson to set up a time to conduct a full inspection of the spa’s premises. Targetson spruced up the place in anticipation but despite his efforts, OSHA ended up citing him for several violations. Although he wasn’t fined because he voluntarily complied with OSHA’s correction plan, it did cost him several thousand dollars to make the changes.

Targetson’s suspicion about Stabber calling OSHA was confirmed when he overheard the receptionist on the phone, bragging to her boyfriend about it. He decided he could no longer afford to have an employee like Stabber on staff and undertook a plan designed to encourage her to resign. He called her into his office and told her that her attitude was having a negative effect on both the employees and clients, so he was going to move her to a back-office position: She would be in charge of payroll. The position wouldn’t require full-time effort so her hours would be cut. Further, she’d be required to work in the computer room, which at Targetson’s spa amounted to a windowless closet.

Stabber took the news without comment and began training for the new position. And, in a development that should’ve surprised no one, the first payroll she handled was a catastrophe. All of the employees had their take-home pay cut due to the use of withholding figures so far over the mark that Targetson believed the error to be intentional. Fed up, he fired Stabber on the spot.

Several weeks later, Targetson’s nightmare recurred



when Stabber's attorney sent him a letter demanding that he pay his former receptionist \$25,000 in damages for wrongful discharge. He laughed at the document, certain that no one could have had a better reason for discharging an employee than he'd had in Stabber's case.

Round Two

The next communication Targetson received was a summons for an administrative hearing before OSHA about Stabber's discharge. Later that same day, he also received



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a summons from Stabber's attorney to appear in Superior Court. Apparently Stabber had a "take no prisoners" attitude about lawsuits as well; Targetson was being nailed again, this time under what has come to be called a "whistleblower" statute. A whistleblower is an informant who discloses a condition, usually to a law enforcement or regulatory agency, that's considered unsafe or unlawful, very often concerning an employer or former employer. A state or federal whistleblower statute protects the person making the disclosure from retaliation.

There are legitimate public policy reasons for protecting whistleblowers. First, their actions expose wrongdoing that otherwise would never come to light. This has been especially effective in environmental pollution cases. Further, they save a great deal of taxpayer money that would otherwise be lost to graft and corruption. Whistleblowers have caught large amounts of fraud and waste in the Medicare system. There's also an incentive for some private companies to appreciate whistleblower statutes. For example, insurance companies want more people to blow the whistle on insurance fraud.

Most states have some kind of statute to protect whistleblowers but the protection doesn't end at the state level. There are several federal laws that perform the same function and many federal agencies administer their own whistleblower programs. As you might have guessed, OSHA is one of those federal agencies.

Stabber had filed a retaliation complaint with OSHA. For a claim of retaliation, a whistleblower

must show all of the following four elements:

1. He or she is engaged in a protected activity—in other words, having exposed a legitimate unsafe or otherwise illegal condition.
2. The employer knew about the illegal condition.
3. The employer subjected him or her to adverse employment action.
4. The protected activity contributed to the adverse action.

An adverse employment action is defined as any material change in the terms or conditions of employment. It can include firing or laying off,

blacklisting, demoting, denying overtime or a promotion, disciplining, denial of benefits, failure to hire or rehire, intimidation, reassignment and reducing pay or hours. In the case of Targetson's treatment of Stabber, he met the majority of the conditions in determining whether there had been a material change in her conditions of employment.

Technical Knockout

You might argue that Targetson had lots of reasons for firing Stabber, and this is certainly true, so how can Stabber show that her revealing the OSHA violation contributed to an adverse employment action (element No. 4)? Well, it's essentially her word against her former employer's, and how do you think it'll look when it's discovered that although Stabber's performance had been in question from day one, it was only after the OSHA violation was disclosed that her hours were cut? I'll tell you how it'll look: bad.

Why did Targetson get two summonses? We know that some federal regulatory agencies have their own whistleblower programs but, as mentioned, there are also state statutes and, indeed, he was being sued in state court as well. If Targetson's spa were located in California, all Stabber would have to do is show, by a preponderance of the evidence, that her OSHA violation contributed to her demotion. Then the burden of proof would shift to Targetson to show by "clear and convincing" evidence that she would have been demoted anyway. This is sometimes a difficult burden to overcome.

If Targetson's spa were located in Illinois, he should

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have been aware that the whistleblower statute in that state makes it illegal for any employer to “make, adopt, or enforce any rule, regulation, or policy preventing an employee

from disclosing information to a government or law enforcement agency if the employee has reasonable cause to believe that the information discloses a violation of a state or federal law,

rule, or regulation.” Also, in Illinois, an employer can’t take action against an employee for refusing to participate in an activity that would result in the violation of a state or federal law, rule or regulation. The law provides that the employee can bring a civil action and receive 1) “reinstatement with the same seniority status that the employee would have had, but for the violation”, 2) “back pay, with interest” and 3) “compensation for any damages sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorney’s fees.” Contrast this with California, where the employer may be fined up to \$10,000 for each violation. By the way, law-abiding employers in California have information posted in the workplace that includes the telephone number for the whistleblower hotline, so employees know where and how to report a violation.

The whistleblower sword has two edges. Whistleblower statutes can be a pain for employers because sometimes an employee is the one retaliating for imagined wrongdoing on the part of the employer. On the other hand, you and all your fellow consumers paid \$80 billion for insurance fraud last year.

Still feeling vulnerable? Take heart in this exception in most whistleblower situations: “The act does not apply to disclosures that would constitute a violation of the attorney-client privilege.” Go ahead and tell your attorney all the bad things you’ve done and not be afraid he or she will tell. That should save you a black eye or two. ●

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