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***Secretary of Labor v. U.S. Steel Corporation, Inc.* and OSHA's Continued Stand Against Employer Retaliation**

Employers, do your safety policies and procedures require employees to immediately report their injuries? Do you discipline employees for failing to follow your safety policies and procedures?

Most employers with safety programs in place probably answered “yes” to both of those questions and probably believe that both of those propositions are central to managing their safety programs. Standing on their own, each of those propositions is fine. However, applying the discipline policy to an instance where an employee fails to immediately report an injury can run afoul of OSHA’s prohibition on employer retaliation.

Last month, the Secretary of Labor filed a lawsuit against U.S. Steel Corporation, Inc. (U.S. Steel) in the U.S. District Court for the District of Delaware on behalf of two U.S. Steel employees because U.S. Steel allegedly retaliated against them for failing to immediately report their workplace injuries, as required by company policy.

The complaint alleges, among other things, that U.S. Steel’s immediate reporting policy “discourages employees from reporting injuries as soon as they realize they have been injured because they must risk violating the company’s temporally stringent requirement under its immediate reporting policy.” Further, the complaint alleges that U.S. Steel’s immediate reporting policy “violates the governing regulations establishing a recordkeeping system for recording workplace injuries and illnesses by creating a barrier for reasonable employees to report workplace injuries and illnesses.” Accordingly, the Secretary of Labor seeks to reverse the disciplinary action taken against the employees and enjoin U.S. Steel from enforcing its immediate reporting policy and to nullify it.

Background

According to the Complaint, a utility technician at U.S. Steel's Clairton Plant, in Clairton, Pennsylvania, discovered a splinter lodged in his thumb and extracted it. Two days later, his thumb and hand were swollen and he received medical treatment for an infection. When he reported the incident to his supervisor, U.S. Steel suspended him for five days without pay for violating U.S. Steel's immediate reporting policy.

A laborer at U.S. Steel's Irvin Plant in West Mifflin, Pennsylvania suffered a similar fate. He bumped his head but did not experience any symptoms until a few days later. After he sought medical treatment for stiffness in his right shoulder, he reported his medical treatment to U.S. Steel as a possible workplace injury. U.S. Steel suspended him for violating the company policy.

Both workers filed complaints with the Occupational Safety and Health Administration (OSHA) alleging that U.S. Steel suspended them in retaliation for reporting the workplace injuries. OSHA found that in both cases the company violated the anti-discrimination provision of the OSH Act, section 11(c), when the company used its immediate reporting policy as a basis for sanctioning employees who reported injuries "late."

How We Got Here

Over the past few years, OSHA has continued to focus on eliminating retaliation under section 11(c) of the OSH Act. In 2012, OSHA's former Deputy Assistant Secretary Richard Fairfax published a memorandum to all OSHA Regional Administrators titled "Employer Safety Incentive and Disincentive Policies and Practices." In this memorandum, OSHA explained that reporting a work-related injury or illness is a "core" employee right and retaliating against an employee for doing so is illegal under section 11(c), and might also run afoul of the OSH Act's recordkeeping requirements.

OSHA then provided specific examples of employer policies that it believes dissuades an employee from reporting injuries or illnesses. One such example was a policy that was similar to U.S. Steel's. Indeed, OSHA believes that if an employee "who reports an injury or illness is disciplined, and the stated reason is that the employee violated an employer rule about the time or manner for reporting injuries and illnesses... there is a clear potential for violating section 11(c)."

Key Takeaways

While the Secretary of Labor has filed lawsuits against companies for allegedly retaliating against employees in violation of section 11(c) for raising safety and health concerns or filing complaints with OSHA, this is the first complaint where the Secretary of Labor alleges that a corporation retaliated against employees for reporting injuries in an untimely manner in violation of company policy and seeks to nullify the a company's injury reporting policy.

OSHA's position puts companies between a rock and a hard place, as their immediate injury reporting policy may serve to promote health and safety at its facilities and assist in preventing future injuries, but also, according to OSHA, may discourage employees from reporting workplace injuries and violate section 11(c) of the OSH Act.

Although the result of the lawsuit is uncertain, companies should review their injury reporting policy to determine whether it is similar to U.S. Steel's. If it is, companies should tread cautiously when an employee reports an injury shortly, but not immediately, after the injury occurred. Companies may want to consider investigating the reason(s) why the employee did not immediately report the injury before deciding to subject the employee to an adverse employment action for violating a company policy. Be sure to consult with employment counsel in these situations before disciplining or terminating an employee for failing to timely report an injury. As seen from *Secretary of Labor v. U.S. Steel*, OSHA believes doing so constitutes retaliation under section 11(c) of the OSH Act.

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