

Comprehensive Environmental Response, Compensation, and Liability Act (Superfund Act): Blowing the Whistle

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund Act) was created to find a way to deal with and clean up toxic waste discharge sites around the United States. The act instituted a tax on certain industries, with the proceeds of the tax going to create a fund used for toxic waste cleanup. It also set up a system to hold polluters liable for their messes.

CERCLA protects employees who tell the government about violations of the law, so long as they properly report the retaliation to the Department of Labor within 30 days of the retaliation. If CERCLA applies to your employer, it is illegal for your employer to retaliate against you for telling the government about a CERCLA violation. 42 U.S.C. § 9610.

Who is Covered?

The CERCLA whistleblower provisions apply to all employees, public and private. They do not cover employees fired or demoted for a legitimate reason, unless retaliation was a contributing factor to the employment action, or the legitimate reason was merely a pretense.

What Activity is Protected Against Retaliation?

CERCLA protects employees who file or institute a complaint alleging a violation of CERCLA, or who testify or are about to testify in a proceeding under the law. In all states except those on the Gulf Coast, it also protects employees who complain of a CERCLA violation to a supervisor. *Compare Passaic Valley Sewerage Com'rs v. U.S. Dept. of Labor*, 992 F.2d 474 (3rd Cir. 1993) (holding that the Clean Water Act protects purely internal whistleblowing) *with Macktal v. U.S. Dept. of Labor*, 171 F.3d 323, 327-29 (5th Cir. 1999) (holding that statute with identical language did not protect purely internal complaints).

What Must a Plaintiff Do to Prevail?

A successful complainant must prove the following by a preponderance of the evidence, meaning that it must be more likely than not that:

1. The employee engaged in protected activity;
2. The employer knew of the employee's reporting/protected activity;
3. The employer subjected the employee to unfavorable personnel action; and
4. The employee's protected activity was a "contributing factor" to the employer's decision to take unfavorable personnel action against the employee.

Complaints are made to the Department of Labor, and must be made within 30 days of the adverse employment action.

What is the Employer's Burden of Proof?

In order to avoid liability, the employer must demonstrate "clear and convincing evidence" that it would have taken the same unfavorable personnel action against the employee in the absence of the employee's protected activity.

What Retaliatory Acts are Prohibited?

SWDA prohibits any unfavorable personnel actions taken by an employer in retaliation for protected activity which have a negative effect on the employee's terms, conditions, or privileges of employment. "Unfavorable personnel actions" can include, but are not limited to:

- a. Termination of employment;
- b. Demotion;
- c. Denial of promotion;
- d. Failure to pay overtime;
- e. Failure to hire/rehire;
- f. Intimidation or other physically or verbally threatening behavior;
- g. Unwarranted discipline;
- h. Unwarranted negative performance review;
- i. Suspension or other forced leave;
- j. Reduction in pay or hours;
- k. Denial of benefits;
- l. Reassignment that negatively impacts promotion prospects, seniority, or other benefits;
- m. Blacklisting; or
- n. Alteration of job duties (removal or excessive addition).

What Remedies Are Available to a Successful Claimant?

If the Department of Labor finds that the evidence supports your whistleblower claim under CERCLA, you may be entitled to remedies that include:

- Reinstatement with previous seniority and benefits
- Back pay for lost wages, with interest
- Compensatory damages for harms like emotional distress and pain and suffering
- Other possible relief to make the employee whole, including attorneys' fees.

How Do I Decide Whether and How to Report a violation of CERCLA?

Whether to report concerns about violations of the law – and, if so, when, how and to whom – can be a very difficult decision for an employee, as blowing the whistle can have negative consequences. However, the law provides strong protections, and employees who raise these concerns can look to a number of resources for assistance. If you are thinking about reporting such concerns, or if you already have and are facing retaliation, [contact](#) the experienced whistleblower lawyers at Katz, Marshall & Banks, LLP for an evaluation of your whistleblower case with no further obligation.