

Policy Article

WHISTLE BLOWING: SAFEGUARD OR CAREER WRECKER?

ABSTRACT

Corporate wrongdoing is a persistent and unrelenting problem that has become an endemic dysfunctional black mark in modern organizational behavior. Its consequences include corporate brand embarrassment, detrimental safety and health burdens on society and life-shattering economic and psychological trauma on affected personnel. Legislative and social engineering aimed at prevention and remediation seem, so far, to have yielded more costs than benefits. This paper, using secondary data and information available in the general media, published journals, court decisions and government records, explores some major current whistle-blowing cases, their aftermaths in terms of winners and losers, effectiveness of current remedies, and policy suggestions. Although the thrust of the paper is with particular reference to the United States, the findings have international business import in view of the global reach of the companies examined.

Key words: Whistleblowing, laws, regulations, fraud, scandals, organizations, agencies, ethics.

1. INTRODUCTION:

What do Jerry Wiggand, Sherron Watkins and Douglas Durand have in common? They are all considered whistle-blowers, their names are beginning to fade from memory, but their respective employers gained notoriety when the news was brought to light of corporate wrong-doing within those organizations.

In spite of laws, regulations and policies aimed at corporate ethics, high-level executives in businesses, industries and government agencies continue to engage in fraudulent and immoral behaviors with inimical consequences to individuals and society at large. A few individuals who have mustered the courage to blow the whistle on these executives and their companies have paid dearly for speaking out, in spite of the laws and regulations meant to protect them for making such disclosures. One now wonders whether whistle blowing on such misconducts is worth the risks and consequences that attend to those who dare to do it.

Jerry Wiggand was the antagonist in the Big Tobacco scandal, Sherron Watkins is known for bringing to light the Enron financial scandal and Douglas Durand was the one that brought forward fraud allegations of TAP pharmaceuticals charging Medicare for free medical samples.

First, this paper attempts to provide insight on how individuals, organizations, and oversight agencies can impact organizational behaviors if whistle-blowing practices are understood and are used to promote sound business practices. Some view blowing the whistle as snitching on the employer, and therefore, unethical and undesirable. Others feel that if

44 whistle-blowing is incorporated as a natural part of internal corporate communications
45 system, it can be transformed into an extremely valuable aid.

46 Secondly, the paper explores the extent and justification for whistle blowing and how
47 whistle-blowing has affected individual whistle-blowers and their organizations, the
48 effectiveness of actions taken so far to protect whistle blowers and suggestions to promote
49 ethical behavior within organizations.

50 Far too often managers take unethical actions based on their desire to increase stock
51 options and bonuses, or to advance their own careers. They fudge the books to make
52 profits and to make their divisions look good; they hold back information about defective
53 products because such information might decrease sales, and they often fail to take costly
54 but needed measures to protect the environment. The notorious Enron and
55 WorldCom cases awakened government and corporate agencies to seek ways to protect
56 whistle-blowers and punish those who violate ethical business principles. But in most cases,
57 the level of attention whistle blowing cases get leaves much to be desired.

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59 **2. LITERATURE REVIEW**

60 **2.1. Whistle-Blowing Defined**

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62 The term whistle-blowing is derived from the action of a referee, in a sport event, who blows
63 the whistle to call attention to a player's infraction of a rule of the game that could result or
64 has resulted in an injury to another player or an unfair advantage to the offender or his team
65 [1].

66 In business organizations or public agencies, whistle-blowing would refer to disclosure to the
67 public by an employee or an organizational member of illegal or immoral behavior of an
68 employer or an organization that causes or could cause harm to a third party or to the
69 public. These would include organizational "activities that cause unnecessary harm, are in
70 violation of human rights, are illegal, run counter to the defined purpose of the institution, or
71 are otherwise immoral" [2]. Near and Miceli, and Silverman agree on the concept of whistle
72 blowing as: "The disclosure by organizational members (former or current) of illegal,
73 immoral, or illegitimate practices under the control of their employers, to persons or
74 organizations that may be able to effect action" [1, 3].

75 Some see these definitions too limiting in scope as they would exclude complaints
76 emanating from investigative reporters, for example, who expose corporate malfeasance.
77 They argue that whistle-blowing should include exposure, by anybody, of corporate
78 wrongdoings that are harmful, immoral, or contrary to the public interest or to the legitimate
79 goals and purposes of the organization. Others would include internal whistle-blowing
80 where organizational members disclose inappropriate conduct to someone inside the
81 organization for remedial purposes. They would exclude only whistle blowing based on
82 malice or retaliation against the employer or firm, [2].

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84 **2.2. Motivations for and Extent of Whistle Blowing**

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Motivations for whistle-blowing run the gamut of reasons and rationales. Almost all of them, however, share the common threads of intervention against illegality or immorality, against violations of ethical standards of conduct that threaten life or property or endanger national or individual security. Other motivations range from a sense of duty to protect the public, to protect someone, or to protect the organization itself. In very few instances, whistle-blowing is driven by a desire for vendetta. A few cases are driven simply by a sense of professional responsibility as evidenced by whistleblowers, Thomas Gerahty and Matthew Burke, former senior managers for Glaxo-SmithKline, who "were worried that blowing the whistle would hurt our careers but felt that it was the right thing to do [4]. Take F. Barron Stone, for example. He warned his bosses at Duke Power Company that they were overcharging ratepayers in the Carolinas. When they wouldn't listen, he told state regulators. That triggered an investigation, which led Duke Power to change its accounting procedures and reimburse over-charged customers. "I was just doing my job" is all Stone said [5].

Consider Cynthia Cooper, an internal auditor at WorldCom. She got wind that some of the company's divisions were engaged in crooked accounting practices and brought the matter to the attention of the firm's external auditor, Arthur Anderson, who assured her there was no problem. When the practices continued, she pressed on and ignored WorldCom's chief financial officer, Scott Sullivan, who told her that everything was fine and she should back off. Troubled and suspicious about what was still going on, Cooper and a few friends began doing what the external auditor was supposed to do. For weeks and weeks they pored over company books, working late at night to avoid detection by management, before eventually exposing the accounting scams Sullivan and others were involved in. "I'm not a hero," she told friends and colleagues. "I'm just doing my job" [2]. Some of today's whistle-blowing parallels the discussion of civil disobedience in the 1960's. Like civil disobedience of that time, many whistle blowers are driven by an inner conviction that their moral, ethical or civic duty to expose egregious wrongdoing overrides blind loyalty to the organization [6]. Coleen Rowley, for example was a veteran FBI agent with twenty-one years of experience who had never worked anywhere else and had wanted to be an agent ever since she was in fifth grade. Compelled by a sense of public duty, she decided to go public with evidence that her bosses had failed to follow up on information that might have thwarted the terrorist attacks of September 11, 2001, and were now misleading the public about what the FBI had known. Her desire to do what was right took precedence over her lifelong love of the Bureau. Although whistle-blowers such as Rowley are often stigmatized as "disloyal", many see themselves as acting in the best interest of the organization [2].

In the case of Noreen Harrington, the motivation was a little different. A veteran of the mutual fund industry, she resigned from Stern Asset Management because her internal complaints about improper transactions were disregarded. Initially, she had no intention of telling authorities. Then a year later, her older sister who had lost a lot of her 401(k) retirement investment asked her for advice since she wasn't sure that she would be able to retire. "All of a sudden, I thought about this from a different vantage point, Harrington explains. "I saw one face – my sister's face – and then I saw the faces of everyone whose only asset was a 401(k). At that point I felt the need to try to make the regulators look into (these) abuses." That's when she called the office of Eliot Spitzer, the then crusading New York State attorney General, who was trying to clean up the mutual fund industry [2]. On

September 15, 2008, following the exposure by an insider whistle blower, Matthew Lee, Lehman Brothers declared bankruptcy, the largest bankruptcy in history, in which 26,000 employees lost their jobs and tens of thousands of investors lost their retirement incomes [7].

For several years the federal government of the U.S. had known or suspected a serious problem with its super fighter jet, the F- 22. Its pilots were getting sick in flight from oxygen deprivation-induced disorientation and loss of memory, and yet nobody did anything about it. It was an agonizing decision fraught with career risks for two courageous pilots, Major Jeremy Gordon and Captain Josh Wilson, to break the chain of command and blow the whistle by granting an interview to CBS' 60 Minutes' Lesley Stahl [8].

After four frustrating years of going through internal and congressional channels trying to correct and stop fraud in his agency, Tom Drake, a former National Security Agency of the U.S. (NSA), went to the Baltimore Sun and blew the whistle that the nation's largest intelligence organization could have foiled the 9/11 attack but for fraud, waste and abuse within the agency. For this exposure of wrongdoing, he was charged with espionage against the U.S. [9].

2.3. Notable Whistle-Blowers

Jeffrey Wigand is the one-time tobacco executive who made front-page news when he revealed that his former employer knew exactly how addictive and lethal cigarettes were. He delivered a damning deposition in a Mississippi courtroom that eventually led to the tobacco industry's \$246 billion litigation settlement. His David-and-Goliath story was even made into a critically acclaimed movie, *The Insider*, starring Russell Crowe. Although he detests the term whistle-blower, his name is nearly synonymous with the term.

Following a 25-year career in health care at companies like Pfizer and Union Carbide, Wigand joined Brown & Williamson Tobacco Corporation (B & W) in 1989 to develop a safer cigarette. A year later, the program was scrapped. Over the next two years, he learned how the company engineered its products to make them more appealing and more addictive and used additives that it knew posed serious health risks -- all the while denying it. Exasperated and disillusioned, he wrote a sharply worded memo to his boss, then-CEO Thomas E. Sandefur. And in March 1993, citing "a difficulty in communication," Sandefur fired Wigand. Wigand went public.

Although Sherron Watkins is known as a whistle-blower, *Forbes* does not agree. *Forbes* defines a whistle-blower as "someone who spots a criminal robbing a bank and blows a whistle, alerting the police." They claim that Watkins does not fit into that category. They say that all Watkins did was "write a memo to the bank robber, suggesting he stop robbing the bank and offering ways to avoid getting caught. Then she met with the robber, who said he didn't believe he was robbing the bank, but said he'd investigate to find out for sure. Then, for all we know, Watkins did nothing, and her memo was not made public until congressional investigators released it six weeks after Enron filed for bankruptcy" [10] (**Ackman, 2002**). *Forbes* remarked that her actions cannot be considered whistle-blowing in a strict sense, because she only wrote a concerned internal email message to Enron CEO, Kenneth

Lay, warning him of potential whistle-blowers in the company and pointing out that there were misstatements in the financial reports.

Forbes may disagree, but she is considered by many to be the whistle-blower that helped to uncover the Enron scandal in 2001. She testified before the U. S. Congress and Senate at the beginning of 2002 and was selected as one of three "People of the Year 2002" by *Time*. She departed from Enron in November 2002 [10]. The cases cited are perfect examples of the hardship and stigma attached to whistle-blowing. These are just a tip of the iceberg. Many more incidents of corruption, discrimination, embezzlement and official misconduct abound behind the veil of conspiracy of silence and cover-up.

2.4. Justification for Whistle-Blowing

Although the motivations of most whistle-blowers are honorable and praiseworthy, whistle-blowing itself is a morally problematic action. This whistle can be blown in error or malice. It can cause privacy to be invaded, confidentially violated, and trust undermined. Not least of all, publicly accusing others of wrongdoing can destroy them. It, therefore, imposes an obligation to be fair to the persons and organizations accused. In addition, internal prying and mutual suspicion that accompany whistle blowing can make it difficult for any organization to function. And, finally, one must bear in mind that whistle-blowers are not saints but only human beings who sometimes have their own self-serving agenda [6]. To guard against the abuse and misuse of whistle blowing, some people have proposed several conditions that should be met for it to be morally justified. These conditions are not exhaustive but seem to provide a good starting point for further debate over the ethics of whistle-blowing.

Shaw, in agreement with Bowie presents the following moral template on which whistle blowing can be justified [2]:

1. The whistle-blowing is motivated by a desire to expose unnecessary harm, illegal or immoral actions, or conduct harmful to the public good. Desire for attention or profit or the exercise of one's general tendency toward stirring up trouble is not a justification for whistle-blowing.

2. The whistle-blower, except in special circumstances, has exhausted all internal channels for dissent before going public. The duty of loyalty to the firm obligates workers to seek an internal remedy before informing the public of a misdeed. This is an important consideration, but in some cases the attempt to exhaust internal channels may result in dangerous delays or expose the would-be whistle-blower to retaliation.

3. The whistle-blower has compelling evidence that wrongful actions have been ordered or have occurred. Spelling out what constitutes "compelling evidence" is difficult, but employees can ask themselves whether the evidence is strong enough that any reasonable person in possession of it would be convinced that an illegal or immoral activity has happened or is likely to happen.

4. The whistle-blower has acted after careful analysis of the danger, morality and immediacy of harm.

5. The whistle-blowing has some chance of success. In general, given the potential harmful effects, whistle-blowing that stands no chance of success is hard to justify

Other proposals that add, overlap or modify the foregoing include:
Seriousness and probability of consequences -- probability that the action will actually happen and cause harm to many people. Also, the more imminent a violation, the more justified is the whistle-blowing [11].

Finally, the whistle blower must be specific. General allegations that cannot pass justificatory tests won't do. But if the harm in question is great enough and if an employee is well positioned to prevent it by blowing the whistle on the organization, then he or she may well be morally obligated – not just morally justified or morally permitted – to do so. [5]

3.METHODOLOGY:

This exploratory policy paper has relied primarily on secondary data and information available in the general media, published journals, court decisions and government records. These pieces of information, spanning over many years, were collected and analyzed to find out how well or badly whistle blowing has worked against official abuse, fraud and unethical conducts that endanger the public interest. In addition to examining the extent and justification of whistle-blowing cases, attention was paid to two important issues: (a) what mechanisms are in place to protect whistle blowers and stem official corporate and agency misconduct, and (b) whether these mechanisms (laws/regulations etc) have actually ruined the lives and careers of whistleblowers without sufficient redeeming results to the public.

4.THE FINDINGS:

4.1.Legislative Protection for Whistle Blowers

Prior to the 1960s, corporations had broad autonomy in employee policies and could fire an employee at will, even for no reason. Employees were expected to be loyal to their organizations at all costs. Among the few exceptions to this rule were unionized employees, who could only be fired for "just cause," and government employees who have constitutional rights to criticize agency policies. In private industry, few real mechanisms for airing grievances existed [12].

The first law enacted in the United States specifically to protect whistle-blowers was the Lloyd-La Follette Act of 1912, which provides protection for civil servants in the United States from retaliatory or abusive job termination by requiring "just cause" proof for such dismissals [13].

In 1972, the U. S. enacted an environmental law, the Water Pollution Control Act, also called the Clean Water Act, which includes protection for employees against retaliation for blowing the whistle on offending companies. In the late 1970s, in the wake of the civil rights movement, federal and state laws were enacted to protect employees in private industry, including anti-discrimination legislation to regulate hiring and termination policies. Many of these laws contain provisions forbidding any employer to retaliate against employees for reporting violations to public authorities. Complaints about reprisals could be filed with agencies such as the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA) [14].

Other federal and state legislations, such as the Truth in Lending laws, the Fair Credit Reporting Act, and the Environmental Protection Act, protect the public from illegal or unethical business practices. Many of these laws also contain provisions against reprisals for reporting violations. In 1978, Congress passed the Civil Service Reform Act to protect the rights of government employees who report wrongdoing. Then, in 1989, the federal government extended whistle-blowing protection to nongovernmental employees through the False Claims Act, which allows private individuals to sue government contractors on behalf of the U. S. government if they believe the government is being defrauded. This act protects employees of such government contractors against reprisals and also provides incentives to blow the whistle by allowing the employee to collect at least 15 percent of damages awarded to the government. The Whistle-blower Protection Act of 1989 extends protections by the Merit Systems Protection Board through the Office of Special Counsel created in 1979. These laws protect disclosure of information as well as government employee's refusal to participate in wrongful activities at work. In the 1980's, states began to provide whistle-blower protections to employees as a result of the erosion of the at-will employment doctrine, which previously meant that private, nonunionized employees could be fired for any reason, including blowing the whistle[15].

With the enactment of the Sarbanes-Oxley Corporate Reform Act of 2002(SOX), internal and external whistle-blower protection was extended to all employees in publicly traded companies for the first time. In the Sarbanes-Oxley Act, enacted after the 2002 Enron and MCI scandals, some members of Congress attempted to replace 30 years of piecemeal corporate whistle-blower protection with one comprehensive law for publicly-traded companies that would protect some 42 million corporate employees [16] The provisions of the Act: 1) make it illegal to "discharge, demote, suspend, threaten, harass or in any manner discriminate against whistle-blowers, 2) establish criminal penalties of up to 10 years for executives who retaliate against whistle-blowers, 3) require board audit committees to establish procedures for hearing whistle-blower complaints, 4) allow the Secretary of Labor to order a company to rehire a terminated employee with no court hearing, and 5) give a whistle-blower the right to a jury trial, bypassing months or years of administrative hearings [15]. The law further protects those who file, testify, participate or assist in a proceeding that will be filed or has been filed regarding any of the previously mentioned violations within the knowledge of the employer. This simply implies that the employer must be aware that the employee has raised concerns.

In 2002, trust and confidence in financial markets were eroded by the daily news of accounting irregularities and fraudulent acts occurring at major corporations. SOX sought to establish a framework to deal with conflicts of interests that undermined the integrity of the capital markets. The Act is applicable to public companies only. In order to secure the integrity of the capital markets it was determined that meaningful protections must be provided for whistle-blowers. Congress attempted to "protect the 'corporate whistle-blower' from being punished for having the moral courage to break the corporate code of silence. This law protects whistle-blowers in publicly traded companies against retaliation or discrimination for reporting violations of the Act [17]. Also in 2005, Congress reaffirmed the mandate of jury trials for nuclear workers as part of the Energy Policy Act. In 2006,

Congress extended retaliation protection to corporate ground transportation workers, defense contractors, and for some twenty million employees connected with the manufacture or sale of 15,000 retail products. The new laws have “best practice” whistleblower rights enforced by jury trials and address loopholes that deny coverage when it is needed most, either for the public or the harassment victim [17].

Between 1970 and 2008, a good number of laws were enacted that contained provisions to protect whistle-blowers. In order to strengthen enforcement, Congress included remedial, anti-retaliation witness protection clauses in 50 laws, including 40 that protect workers of corporations, government contractors or government corporations. In 1986 Congress included anti-retaliation rights for government contractors challenging fraud in federal contracts or related payments such as Medicare. Until SOX, the whistle-blower provisions found in each law were generally restricted to employees challenging specific violations laid out in that particular statute. They were implemented through a multi-stage administrative process at Department of Labor (DOL) enjoying only limited review by federal appeals courts. The table below lists a sample of these laws and a tabular summary of their major thrust.

Laws with Whistle-Blower Protections

	WHO IS COVERED?	WHAT COUNTS AS PROTECTED CONDUCT	STATUTE OF LIMITATION	ACCESS TO COURT FOR JURY TRIAL?	AVAILABLE REMEDIES
Occupational Safety and Health 11(c) 1970	“Any employee” who discloses an occupational health and safety violation.	Initiating an OSHA complaint or testifying in an OSHA proceeding	30 days	No	Reinstatement and back pay.
Toxic Substances Control Act of 1976 (TSCA)	“Any employee” who discloses a violation of the TSCA.	Commencing, testifying or assisting in any proceeding under the Act.	30 days	No	Reinstatement, back pay, attorney’s fees, compensatory, and exemplary damages.
The Clean Air Act of 1977	“Any employee” who discloses a violation of the CAA.	Commencing, testifying, or assisting in a proceeding under the Act or related plan.	30 days	No	Reinstatement, back pay, attorney’s fees, compensatory damages.
Aviation Investment and Reform Act (AIR21) (2000)	An employee of an air carrier, subcontractor or contractor	Provide, file, or testify about any violation or any related provision or law.	90 days	No	Reinstatement, back pay, attorney’s fees, compensatory damages.
Sarbanes-Oxley Act, Sec. 806 (2002)	An employee of a publicly-traded company.	Disclose any violation of SEC rules or law relating to shareholders	90 days	Yes, after a 180-day administrative exhaustion period.	Reinstatement, back pay, attorney’s fees, special and compensatory damages.
Energy Reorganization Act of 1974, Sec. 5851 (amended in 2005)	An employee of a licensee of the NRC, an employee of DOE and NRC, and contractors	Disclose a violation of the ERA or Atomic Energy Act or refuse to assist in a violation.	180 days	Yes, after a 365-day administrative exhaustion period.	Reinstatement, back pay, attorney’s fees, compensatory damages.
Surface	An employee of a	Disclose any	180 days	Yes, after a 210-	Reinstatement,

Transport. Assistance Act of 1982 (amended in 2007)	commercial motor carrier.	violation of safety/security standard or refuse to operate vehicle.		day administrative exhaustion period.	back pay, attorney's fees, compensatory and punitive damages.
Consumer Product Safety Improvement Act of 2008	An employee of a manufacturer, distributor, or retailer of a CPSC product.	Disclose any violation of any rule related to product safety or refuse to violate.	180 days	Yes, after a 210- day administrative exhaustion period.	Reinstatement, back pay, attorney's fees, compensatory and special damages

(Devine, 2008)

4.2. Judicial/Administrative Protection or Roadblocks?

Although these laws appear to protect whistle-blowers, a 1976 study of OSHA showed only 20 percent of the complaints filed that year were considered valid. About half of them were settled out of court, and of the 60 claims taken to court, only one was won. In 1977 a study by Senator Patrick Leahy entitled *The Whistle-blowers* reported that federal employees were afraid to bring problems to the attention of their superiors. Congress responded by passing the Civil Service Reform Act in 1978. With the exception of drastic inconsistencies in court access, most whistle-blower protection statutes operate in much the same manner.

As a rule, corporate workers who challenge violations through internal or public disclosures and experience retaliation can file a complaint with the Department of Labor (DOL) whose order, following investigations, is nonbinding if either side requests an administrative hearing before an Administrative Law Judge (ALJ). SOX added another option. As with equal employment opportunity laws, there is now a "use it or lose it" rule for the administrative process. If DOL does not issue a final decision within 180 days and the delays are not caused by the complainant, he can move the case to federal district court *de novo* where a jury decides the outcome.

Government-wide and defense contractor laws can substitute an Office of Inspector General investigation for OSHA investigative and administrative proceedings. Unlike other whistleblowers, If defense contractor whistle-blowers do not obtain relief through Inspector General (IG) investigation, they can go to court for a jury trial.

4.3. Legal Burdens of Proof

Once the decision is made to blow the whistle, the dilemma is to prove that retaliation was directly linked to the act of blowing the whistle. The legal burden of proof decides how high the bar is for an employee to win. SOX has modern burdens of proof from federal civil service law that are more realistic for whistle-blowers than traditional DOL standards. A complainant must show by a "preponderance of the evidence" that his protected activity was a "contributing factor" in the unfavorable personnel action taken against him. If he passes that test, he has established a *prima facie case*. But the employer can still win through an affirmative defense by proving with "clear and convincing evidence" that it would have taken the same action even if the employee had not engaged in the protected activity.

In summary, to meet the legal burdens, a complainant must meet the following four criteria:

1. that he made a protected communication;
2. that employer knew or should have known of his disclosure;
3. that he suffered an unfavorable personnel action; and
4. that the protected activity was a “contributing factor” in the alleged retaliation.

4.4. Consequences of Whistle Blowing for Whistle Blowers

The public sector, which includes all kinds of government agencies from federal to local, is structured more bureaucratically than the private sector. The bureaucracy, with its rules and regulations that are supposed to prevent capricious and arbitrary actions, is expected to provide better protection for whistle blowers against retaliation. In actuality, whistle-blowers in both public and private sectors share similar personal and career-shattering consequences. A well-known whistleblower, Hugh Kanfman, referring to the ordeal of whistle blowing in government agencies, says “if you have God, the law, the press and the facts on your side, you have (only) a fifty-fifty chance of defeating the bureaucracy” [18].

Jeffrey Wigand, the one-time tobacco executive who blew the whistle on Brown and Williamson Tobacco Company paid dearly for going public. He was fired. Amid lawsuits, countersuits, and an exhaustive smear campaign orchestrated by the company, Wigand lost his family, his privacy, and his reputation. Unable to find a corporate job after his stint at B&W, he took a job at DuPont Manual High School, in Louisville, where he taught science and Japanese for \$30,000 a year -- one-tenth of his former salary [19]. Wigand considered himself a successful whistle-blower because he exposed how B & W, the country's third-largest tobacco company, misled consumers about the highly addictive nature of nicotine, how it ignored research indicating that some of the additives used to improve flavor caused cancer, how it encoded and hid documents that could be used against the company in lawsuits brought by sick or dying smokers. In his own words, he states, “I never expected death threats against me and my family. I never expected to find a bullet in my mailbox. I never expected a 500-page dossier that was part of a campaign to ruin me. But guess what? We were successful”.[19].

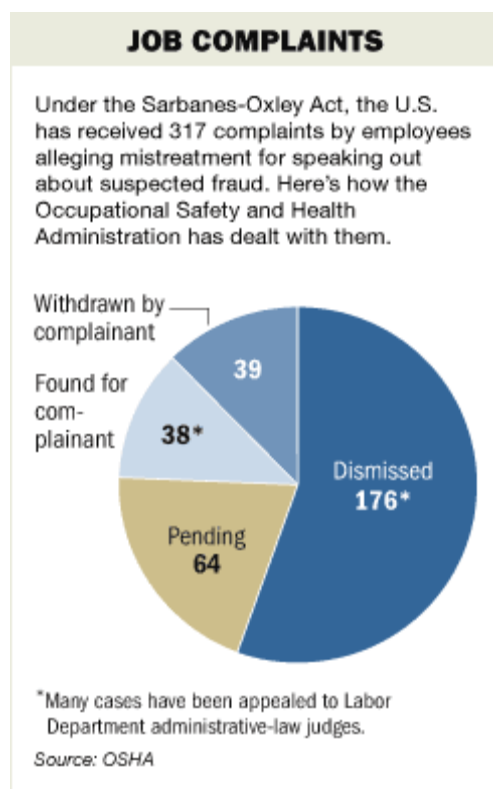
When the U. S. Court of Appeals for the Fourth Circuit upheld the dismissal of David Welch's retaliation claim against his former employer it was the end of a long journey. The man known as the first employee to seek protection under Sarbanes-Oxley law became another former employee whose case had failed.

A study by University of Nebraska law professor Richard Moberly revealed that the administrative review board never ruled in favor of a Sarbanes-Oxley whistle-blower, not even once in the first six years of the law's passage[20].

David Welch, chief financial officer of tiny Cardinal Bankshares Corporation based in Floyd, Virginia, sued just two months after the Sarbanes-Oxley law was enacted in 2002. His dismissal from his job was first upheld by an OSHA investigator who was overruled by an Administrative Law Judge who ordered reinstatement with back pay. The company's appeal went on for years before the Appeals Court ruled against Welch. Mr. Welch and his family were financially drained [20, 21].

In 2003, F. Barron Stone sued under the Sarbanes-Oxley Act of 2002, alleging that his employer, Duke Energy Corporation fired him for filing complaints of potential corporate fraud with the Securities and Exchange Commission and state utilities commissions, in violation of the whistle-blower protection provisions of the Act. In spite of the fact that an audit by North and South Carolina regulators found \$124 million underreporting and forced the company to reimburse \$25 million to consumers, in December 2004, the district court dismissed Stone's complaint for lack of subject matter jurisdiction. The U.S Fourth Circuit Court vacated the ruling and remanded the case for new hearing [2]. By 2008, the case was still pending and the whistle blower was financially exhausted. Since then, Stone has worked for the following four different companies: Bank of America, as Senior Audit Consultant, 2004 – September 2006; Hooker Furniture Corporation, as Manager - Financial Reporting and Planning September 2006 – June 2008; Resolute Forest Products, as SEC Financial Reporting Manager, July 2008 – March 2012, and Festiva Hospitality Group as Chief Accounting Officer, March 2012 – Present. This is the job-hopping profile of a man who worked diligently for Duke Company for more than 15 years before he blew the whistle [22]

Since Sherron Watkins of Enron fame lost her job, her main livelihood has been giving speeches at management congresses and proceeds from a book she has co-authored about her experiences at Enron and the problems of the US corporate culture [10]. All the whistle blowers discussed above lost or quit their jobs after blowing the whistle. All, except Douglas Durand of TAP Pharmaceuticals, went broke with a bleak hope of career resuscitation. One researcher has shown that sixty-eight percent of whistleblowers will have difficulty finding employment [6]. Agency and Administrative Law Judges' decisions to date do not inspire hope that whistle blowers' fate will become brighter in the near future as the chart below substantiates for the year 2008.



Whistle blowers who survive on the job are likely to face horrendous hostile environment at work. Almost all are put on a “black-list” which denies them any access to sensitive information about the company, and limit their performances and possibility for advancement [6]. Another specter of such blacklist is that its mere existence serves to prevent any future whistle-blowing incidents. Other employees become terrified that if they expose their organization’s wrongdoings, their names will be placed on the black-lists ending their careers permanently [23].

5. DISCUSSION AND SUMMARY

The legal environment has a primary influence on a worker’s decision to report or not to report perceived wrongdoing based on his or her analysis of the potential for retaliation, among other factors [24]. This shapes the entire workforce’s receptiveness to whistle-blowing and the organization’s ability to deal with internal corrupt practices that might have potential inimical results.

In the U.S, the laws designed to protect whistle blowers against retaliation look good on paper. But do they work? The problem that any law faces is enforcement. Although in theory, whistle-blowers are legally protected from employer retaliation, there have been many cases where employers have retaliated with impunity as has been pointed out elsewhere in this paper [10, 11, 12].

Unfortunately, there is little common ground between what is advertised and what is delivered. In practice, corporate whistle-blower laws are a patchwork of inconsistent protections. With scattered exceptions, one who files a lawsuit is sentencing oneself to an administrative process with unforgiving, short deadlines and a maze of bureaucratic procedures. Decisions are seldom issued in less than two to three years, and most statutes do not offer any chance for interim relief. When interim reinstatement is permitted, as under SOX, the employer may request that it be denied upon evidence that the employee would be dangerous or threatening back at work. And at the end of the process, what does one get after years of litigation and huge sums in legal fees for results that predictably rubberstamp whatever retaliation you challenged?

If there is no realistic chance of success, the law is a trap that offers legal wrongs, not rights. Unfortunately, that has been the case with DOL-administered corporate whistle-blower laws. The percentage of whistle-blowers who won formal victories, compared to those who filed complaints between 2003 and 2007 ranges from 2.9% (for nuclear workers under the Energy Reorganization Act) to 9.8% (2000 through 2007) for airlines whistle-blowers under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (aka AIR21 law. [25].

A comprehensive study by Moberly of SOX, a law that is representative of the DOL legal system, found that in over 700 administrative decisions he analyzed in the law’s first three years, the win rates for whistle blowers were only 3.6% at the OSHA level, and 6.5% at the Administrative Law Judges level. There was not a single case where the Administrative Review Board (ARB) ordered retaliation to stop. Similarly, OSHA went from 2005-2007 without backing a single SOX whistle-blower, despite receiving some 250 complaints of

SOX retaliations annually. According to the Labor Department's own statistics, it is getting worse. Through September 2, 2008 out of 858 SOX complaints since 2002 that were not settled, there were 17 rulings in favor of whistle-blowers and 841 against – a bottom line win rate for employers of over 98%. The silver lining is that a significant number of SOX complainants settle their cases, 11.6% at the OSHA level and 18.3% at the ALJs. Even then, with such a remote chance of winning, whistle-blowers negotiate their settlements from a position of weakness [20].

5.1 Policy Recommendations

Given such immense differences between protection promised and protection delivered to whistle blowers, there is an urgent need to fashion policies, procedures and practices that can effectively instill a sense of ethics and fair dealing in the corporate and government agency sectors that can inure to the benefit and protection of the general public. A strong corporate culture can dramatically reduce corporate misconduct and increase the likelihood of disclosures. Development of a strong, ethical, corporate culture depends heavily on commitment, communication and leadership.[26].

Some have suggested that establishment of reporting procedures that include help lines that permit employees to report suspected misconduct anonymously is one of the basic components of an ethics and compliance (E&C) program. Creating such work environment in which employees actually feel comfortable to report suspected misconduct, however is something that far fewer companies have managed to do [27].

Several ways that companies can help decrease the fear of retaliation and encourage reporting have been suggested:

1. **Providing ample avenues for employees to report concerns**- Examples would include reporting via telephone, email, reporting in person to members of management. Another reason to provide multiple avenues for in-person reports is to avoid requiring employees to report to the person responsible for the purported misconduct.

2. **Anonymity**- The option of anonymous reporting provides those employees who fear retaliation with a safer option of reporting, and it also conveys to employees the company's seriousness about encouraging reporting and preventing retaliation.

3. **Publicizing the availability and importance of reporting**- Reporting procedures must be publicized to employees, and in a way that fosters a climate of openness. Companies could publicize by posters, providing written policies and training materials, and briefings by management, and by internal company newsletters.

4. **Support of leadership**- It is critical that an organization's leadership clearly and consistently articulate its support for reporting and its condemnation of retaliation.

5. **Reporting up policy**- companies should provide guidance to management regarding what types of concerns or issues must be reported up to corporate headquarters (e.g. to the E&C or the legal departments). This is an important process in light of the fact that management typically would prefer to deal with things locally.

6. **Prompt and fair confidential investigations**- In order to encourage employees to report, companies should investigate reports promptly and appropriately, including maintaining confidentiality to the extent reasonably possible. Promptness provides

employees with confidence that their reports are not futile; the more time that the investigations take, the fuzzier things get.

7. **Discipline-** When companies fail to discipline violators in a reasonably consistent manner, employees may perceive reporting to be futile.

8. **Rewards-** Rewarding employees instead of alienating them for taking a hard stand to uphold ethical standards will be comforting and reassuring to these whistleblowers who risk their careers and reputation to expose wrongdoing. This avenue should be considered carefully to ensure that the intent is to support management goal and protect the whistleblower [6].

6. CONCLUSION

Can acting ethically in blowing the whistle hurt an individual's future employment potential or can it hurt others working for the organization? Under the current system, one must answer in the affirmative. There is enough of legislative engineering and now a need to embark on more aggressive and honest enforcement paradigm. Enforcement agents need more training and education in the complexities of the laws under their jurisdiction. They also need to be more insulated from partisan and self-serving politics that engender blatant miscarriage of justice in administrative and judicial decisions.

No model will guarantee perfect sanitization of the system, because no one is immune from wrong doing. Even corporate and government watch dogs sometimes fall from grace, as Eliot Spitzer, a well-known crusading former Attorney General of New York, demonstrated when he was charged with using state funds to pay a mistress; and as was the recent case of Bernie Madoff who defrauded his victims in the staggering amount of \$60 billion through a fraudulent investment pyramid. Nobody is immune or safe, but society, as a whole, has a need to call for action. Protection against the risks and costs of whistle blowing remains work in progress.

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