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Career and Public Policy Implications of Whistleblowing

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Policy Article

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ABSTRACT

In the past two decades, corporate fraud and other questionable practices within powerful business organizations have led to significant economic and social justice issues that demand attention of policy makers. Many insiders responsible for disclosures of these practices have paid dearly with shattered careers and disruption of family lives [1]. In spite of laws and regulations aimed at reforming ethical managerial conduct, current statistics show that unethical business practices endure to the detriment of social and personal interests of many stakeholders [2]. This paper updates an earlier version presented by the author at the 17th International Business Research Conference, Ryerson University, Toronto, Canada June 7-8, 2012 [3]. This update shows that no significant improvement has occurred in corporate governance or remediation efforts. The paper recommends aggressive enforcement and policing of existing laws and regulations and incorporation of open and non-punitive channels of communication to encourage internal, in lieu of external, disclosures of corporate misdeeds. Such channels, as part of regular corporate governance, would not only tend to minimize the chilling effect that absence of negative consequences has had on insider disclosures of corporate wrong doing but would also serve the best interest of all stakeholders. Although most of the businesses and cases referenced are U.S-based, the findings and suggestions proffered have international business import.

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1. INTRODUCTION

The past two decades have been marked by sensational stories of whistleblowing involving high-ranking officers of various companies and government agencies. Memories of some of the prominent actors like Wigand, Watkins and Durand of the early 2000's are fading and are being replaced by others of recent memory like Edward Snowden, Julian Assange, Chelsea Manning and Bradley Manning [4,5].

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 behaviours with inimical consequences to individuals and society at large [6]. A few individuals who have mustered the courage to disclose wrong-doing within their companies have paid dearly for speaking out, in spite of the laws and regulations meant to protect them for making such disclosures [7]. One now wonders whether employee exposure of such misconducts is worth the risks and consequences that attend to those who dare to do it. What happened to Jerry Wigand, the antagonist of the Big Tobacco scandal, Sherron Watkins, the heroine of the Enron financial scandal and Douglas Durand who brought forward fraud allegations that TAP Pharmaceuticals was charging Medicare for free medical samples? [4].

First, this paper attempts to provide insight on how individuals, organizations, and oversight agencies can impact organizational behaviours if whistle-blowing practices are understood and are used to promote sound business practices instead of viewing them as snitching on the employer, and therefore, unethical and undesirable [8]. Some people feel that if timely disclosure of wrong doing is incorporated as a natural part of internal corporate governance, it can be transformed into an extremely valuable aid [9].

Secondly, the paper explores the extent and justification for whistle blowing and how it has affected the lives of individuals and their organizations, the effectiveness of actions taken so far to protect whistle blowers and suggestions to promote ethical behaviour within organizations.

Some writers have suggested that corporate managers' unethical actions are driven by their desire to increase stock options and bonuses, to make profits that will make their divisions look good or to advance their own careers [10]. This also drives them to withhold information about defective products that might decrease sales and to ignore costly but needed measures to protect the environment [11].

Fig. 1 summarizes the extent of some of the motivations for corporate fraud as reported in a recent joint study by five international Accounting Firms (American Accounting Association, American Institute of CPA's, Financial Executives International, The Institute of Internal Auditors and The Association of Accountants & Financial Professionals in Business) under the name "The Committee of Sponsoring Organizations of the Treadway Commission (COSO)" in collaboration with Forbes Magazine [2]. The authors conclude that their findings represent an enduring phenomenon and state "COSO and our analysis concur that the methods of committing fraud remain unchanged: The majority of the fraud metrics included in Audit Integrity's Accounting and Governance Risk (AGR) model have remained relatively stable over the past decade" [2]. This study covers fraudulent practices in 347 companies from 1998-2007. It is important to note, from Fig. 1, the following varied techniques employed by these companies: improper revenue recognition, overstatement of assets, understatement of expenses and liabilities, misappropriation of assets, inappropriate disclosures, disguised transactions and insider trading [2]. None of these actions appear to be a function of oversight. The Enron and WorldCom cases awakened government and corporate agencies to seek ways to protect whistle-blowers and punish those who violate ethical business principles. But in most cases, the level of attention leaves much to be desired [12].

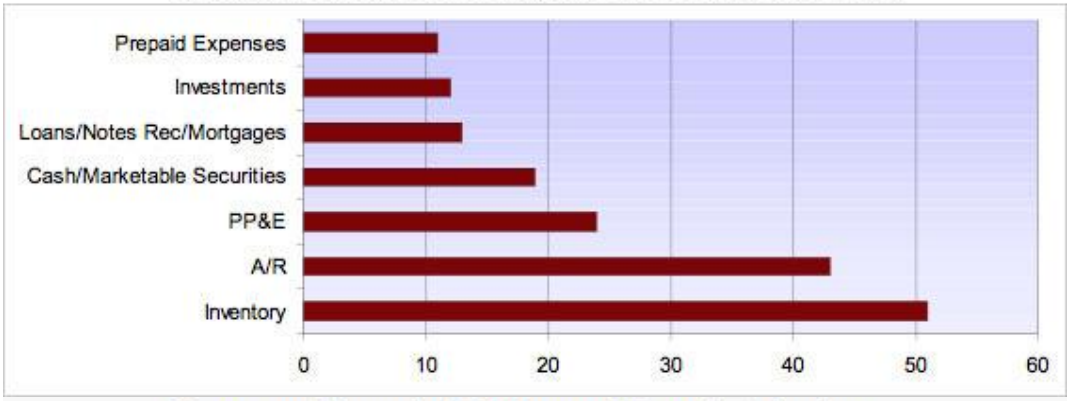
2. LITERATURE REVIEW

Corporate managers occupy fiduciary and agency positions which require them to pursue policies and activities that equitably balance the interest of stakeholders in proportion to their stakes in organizations and to do it in a way that can "maximize the sum of all the interests held by all the groups that bear residual risks and hold residual claims" [13]. This duty requires corporate directors to be diligent not only in safekeeping of assets but also for their efficient and effective use [13]. However, some scholars

admit that where the agent and principal are "utility maximizers" (as stockholders, employees and management seem to be), there is a temptation that the agent (managers) "will not always act in the best interests of the principal" [14]. These two polar views create a conflict that calls for mediation. Employees who care about justice and ethics find themselves thrust into this mediator role that compels them to public disclosure of insider wrong doing [15]. This behaviour rather conforms to the predictions of deontic model of justice and ethics which holds "witnesses to injustice will consider sacrificing their own resources if it is the only way to sanction an observed transgressor" [15].

2.1 Whistle-Blowing Defined

The term whistle-blowing is derived from the action of a referee, in a sport event, who blows the whistle to call attention to a player's infraction of a rule of the game that could result or has resulted in an injury to another player or that gives an unfair advantage to the offender or his team [16,19].



Common Financial Statement Fraud Techniques
347 Fraud Companies 1998-2007

Methods Used to Misstate Financial Statements	
Improper revenue recognition	**61%**
Recording fictitious revenues – 48%	
Recording revenues prematurely – 35%	
No description/"overstated" – 2%	
Overstatement of assets (excluding accounts receivable overstatements due to revenue fraud):	**51%**
Overstating existing assets or capitalizing expenses – 46%	
Recording fictitious assets or assets not owned – 11%	
Understatement of expenses/liabilities	**31%**
Misappropriation of assets	**14%**
Inappropriate disclosure (with no financial statement line item effects)	**1%**
Other miscellaneous techniques (acquisitions, joint ventures, netting of amounts, etc.)	**20%**
Disguised through use of related party transactions	**18%**
Insider trading also cited	**24%**

The subcategories such as premature revenues or fictitious revenues and assets do not sum to the category totals due to multiple types of fraud employed at a single company. Also, because the financial statement frauds at the sample companies often involved more than one fraud technique, the sum of the percentages reported exceeds 100 percent.

To avoid double-counting, the information about the overstatement of assets does not include overstatements of accounts receivable due to the revenue recognition frauds.

Fig. 1. Fraudulent corporate practices from 1998-2007
Source: The committee of sponsoring organizations of the treadway commission 2015

In business organizations or public agencies, whistle-blowing would refer to disclosure to the public by an employee or an organizational member of illegal or immoral behaviour of an employer or an organization that causes or could cause harm to a third party or to the public [16]. Other definitions include organizational "activities that are in violation of human rights, are illegal, run counter to the defined purpose of the institution, or are otherwise immoral" [17]. Near and Miceli [16] and Silverman [18] agree on the concept of whistle blowing as: "The disclosure by organizational members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action" [16,18,19].

Some consider these definitions too limiting in scope as they seem to exclude complaints emanating from investigative reporters, for example, who expose corporate malfeasance [20]. They argue that whistle-blowing should include exposure, by anybody, of corporate wrongdoings [20]. Others would include internal situations where organizational members disclose inappropriate conduct to someone inside the organization for remedial purposes [20]. They would exclude only disclosures based on malice or retaliation against the employer or firm [18]. What happens when the efforts of these inside vigilantes result in bare yield or no yield?

Deontic ethics predict that in such situations "third-party observers of injustice may engage in moral self-regulation that would lead them to conclude that the most ethical response is to do nothing" [15]. One would suspect that the current lack of effective enforcement of whistleblowing laws coupled with career hardships suffered by those who disclose wrongdoing is gradually producing the predictable and chilling self-regulation effect [8,12].

2.2 Motivations for and Extent of Whistle Blowing

Motivations for disclosing corporate wrong-doing run the gamut of reasons. 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 [20]. Other motivations range from a sense of duty, implicit in agency concept, to protect the public, to protect someone, or to protect the organization itself [14]. In very few instances, it is driven by a desire for vendetta. A few cases are driven simply by a sense of professional responsibility as evidenced by the case of 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" [21]. Another example would be F. Barron Stone who warned his bosses at Duke Power Company that they were overcharging rate payers in the Carolinas [22]. When they wouldn't listen, he told state regulators [22]. 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 [22].

Consider Cynthia Cooper, an internal auditor at WorldCom who discovering that some of the company's divisions were engaged in crooked accounting practices brought the matter to the attention of the firm's external auditor, Arthur Anderson, who assured her there was no problem [12]. 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, for weeks, began poring over company books, working late at night to avoid detection by management, before eventually exposing the accounting scams Sullivan and others were involved in [12]. "I'm not a hero," she told friends and colleagues. "I'm just doing my job" [12].

Some of today's whistle-blowing parallels the discussion of civil disobedience in the 1960's [23]. 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 [6,24] 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 [22]. 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 [22]. Her desire to do what was right took precedence over her lifelong love of the Bureau [22]. Although informants like Rowley are often stigmatized as "disloyal", many see themselves as acting in the best interest of the organization [18].

In the case of Noreen Harrington, the motivation was a little different [22]. A veteran of the mutual fund industry, she resigned from Stern Asset Management because her internal complaints about improper transactions were disregarded [22]. Initially, she had no intention of telling authorities [22]. Then a year later, her older sister who had lost a lot of her 401(k) retirement investment asked her for advice [22]. “All of a sudden, I thought about this from a different vantage point, Harrington explains [22]. “I saw one face – my sister’s face – and then I saw the faces of everyone whose only asset was a 401(k) [22]. “At that point I felt the need to try to make the regulators look into these abuses [22]”. 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 [22].

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 [6].

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 [25]. 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 [25].

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 disclosed that the nation’s largest intelligence organization could have foiled the 9/11 attack but for fraud, waste and abuse within the agency [26]. For this exposure of wrongdoing, he was charged with espionage against the U.S [26].

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 [27]. His Mississippi courtroom testimony eventually led to the tobacco industry's $246 billion litigation settlement [27]. His David-and-Goliath story was even made into a movie, *The Insider,* starring Russell Crowe [28]. Although he detests the term whistle-blower, his name is nearly synonymous with the term.

Wigand, after working for 25 years in health-care companies, joined Brown & Williamson Tobacco Corporation (B & W) in 1989, attracted by the company’s program to develop a safer cigarette [27,28]. A year later, the program was abandoned. 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 [19]. Exasperated and disillusioned, he wrote a sharply worded memo to his boss, then-CEO Thomas E. Sandefur. In March 1993, citing "a difficulty in communication," Sandefur fired Wigand causing him to go public [27].

Although Sherron Watkins is known as a whistle-blower, *Forbes Magazine* does not agree [9]. *Forbes* defines a whistle-blower as “someone who spots a criminal robbing a bank and blows a whistle, alerting the police” [9]. Forbes claims that Watkins does not fit into that category; 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]. *Forbes* remarked that Watkins’ 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 [9].

Forbes may disagree, but she is considered by many to be the whistle-blower that helped to uncover the Enron scandal in 2001 [27]. She testified before the U. S. legislatures at the beginning of 2002 and was selected as one of three "People of the Year 2002" by *Time Magazine* [29] after she left Enron in November 2002 [29]. 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 could be uncovered behind the veil of conspiracy of silence and cover-up.

2.4 Justification for Whistle-Blowing

Although the motivations for most whistle-blowers are praiseworthy, the act itself can be morally problematic [10]. This whistle can be blown in error or malice. It can cause invasion of privacy and breach of confidentiality and trust [10]. 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 [10]. 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 its abuse and misuse, some people have proposed several conditions for its justification [17]. 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 [10] presents the following moral template [17]:

1. It should be 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.
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 informant 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. Disclosure 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 modifying proposals 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 informant 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 through public disclosure, then he or she may well be morally obligated – not just morally justified or morally permitted – to do so [22].

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 analysed 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 its extent and justification, 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 informants 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 [1]. Employees were expected to be loyal to their organizations at all costs [1]. 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 [1]. In private industry, few real mechanisms for airing grievances existed [1].

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 [30].

In1972, 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 [31]. 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 [32]. Many of these laws contain provisions forbidding any employer retaliation against employees for reporting violations to public authorities [32]. Complaints about reprisals could be filed with agencies such as the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA) [33].

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 [12]. Many of these laws also contain provisions against reprisals for reporting violations [12]. In 1978, Congress passed the Civil Service Reform Act to protect the rights of government employees who report wrongdoing [33]. 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 [34]. 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 [34]. The Whistle-blower Protection Act of 1989 extends protections by the Merit Systems Protection Board through the Office of Special Counsel created in 1979 [35]. These laws protect disclosure of information as well as government employee's refusal to participate in wrongful activities at work [35]. 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 [36]. In the SOX Act, enacted after the 2002 Enron and MCI scandals, 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 [36]. 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 victim complaints,
4) Allow the Secretary of Labour to order a company to rehire a terminated employee with no court hearing, and
5) Give an informant the right to a jury trial, bypassing months or years of administrative hearings [36].

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 [36].

In 2002, trust and confidence in financial markets were eroded by the daily news of accounting irregularities and fraudulent acts occurring at major corporations [37]. To provide meaningful protection for whistle-blowers, and to deal with conflicts of interests that undermined the integrity of the capital markets [37], Congress attempted to protect the corporate whistle-blowers from punishment for having the moral courage to break the corporate code of silence by passing the SOX Act [36]. This law protects employees 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 [38]. In 2006, Congress extended retaliation protection to corporate ground transportation workers, defence contractors, and to some twenty million employees connected with the manufacture or sale of 15,000 retail products [39]. The new laws have "best practice" whistle-blower rights enforced by jury trials and address loopholes that deny coverage when it is needed most, either for the public or the harassment victim [40].

Between 1970 and 2008, a good number of laws were enacted that contained provisions to protect whistle-blowers [40]. 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 [40]. In 1986 Congress included anti-retaliation rights for government contractors challenging fraud in federal contracts or related payments such as Medicare [40].

Until SOX, the whistle-blower provisions found in each law were generally restricted to employees challenging specific violations laid out in that particular statute [40]. They were implemented through a multi-stage administrative process at Department of Labour (DOL) enjoying only limited review by federal appeals courts [40]. Table 1 lists a sample of these laws and a tabular summary of their major thrust.

4.2 Judicial/Administrative Protection or Roadblocks?

Although these laws appear to protect whistle-blowers, a 1976 study of OSHA showed that only 20 percent of the complaints filed that year were considered valid. About half were settled out of court and of the 60 claims taken to court, only one was won [12].

Following a 1977 study by Senator Patrick Leahy, *The Whistle-blowers,* reporting that federal employees were afraid to bring problems to the attention of their superiors [12], the U.S. Congress passed the Civil Service Reform Act in 1978. This and many other whistle-blower laws operate in much the same manner [12].

As a rule, corporate workers who challenge violations through internal or public disclosures and experience retaliation can file a complaint with the Department of Labour (DOL) whose order, following investigations, is non-binding if either side requests an administrative hearing before an Administrative Law Judge (ALJ) [16]. SOX added another option. As with equal employment opportunity laws there is now a "use it or lose it" rule for the administrative process [16]. 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 [41]. Government-wide and defence contractor laws can substitute an Office of Inspector General investigation for OSHA investigative and administrative proceedings [41]. Unlike other whistle-blowers, If defence contractor whistle-blowers do not obtain relief through Inspector General (IG) investigation, they can go to court for a jury trial [41].

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 that act [42]. The legal burden of proof decides how high the bar is for an employee to win [42].

SOX has modern burdens of proof from federal civil service law that are more realistic for whistle-blowers than traditional DOL standards [43]. A complainant must show by a "preponderance of the evidence" that his protected activity was a "contributing factor" in the unfavourable personnel action taken against him [43]. If he passes that test, he has established a *prima facie case*. But the employer can still win through an affirmative defence 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 [43].

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

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

Some legal scholars feel that employers now have a higher burden in SOX whistle-blower cases to rebut the employee's *prima facie* case with "clear and convincing" evidence than in some other federal anti-discrimination laws [43].

Table 1. 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 Transport. Assistance Act of 1982 (amended in 2007)	An employee of a commercial motor carrier.	Disclose any violation of safety/security standard or refuse to operate vehicle.	180 days	Yes, after a 210-day administrative exhaustion period.	Reinstatement, 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)

4.4 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 [44]. The bureaucracy, with its rules and regulations that are supposed to prevent capricious and arbitrary actions, is expected to provide better protection for informants against retaliation [44]. In actuality, both public and private sector whistle blowers share similar negative career consequences [40]. Hugh Kanfman, referring to his own ordeal 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" [45].

Jeffrey Wigand, referenced above, in the case of Brown and Williamson Tobacco Company, paid dearly for going public [28]. 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 termination from B& W, he taught science and Japanese at a high school 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 flavour caused cancer, how it encoded and hid documents that could be used against the company in lawsuits brought by sick or dying smokers [28]. 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" [46].

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 [46]. The man known as the first employee to seek protection under Sarbanes-Oxley law became another former employee whose case had failed [46].

A study by University of Nebraska law professor Richard Moberly revealed that the administrative review board never ruled in favour of a Sarbanes-Oxley whistle-blower, not even once in the first six years of the law's passage [47]. 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 [46]. 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 [46]. The company's appeal went on for years before the Appeals Court ruled against Welch. Mr. Welch and his family were financially drained [47,48].

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 [49]. 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 [49]. 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 [49]. 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 [49].

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 [50]. All the informants 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 [24].

One researcher has shown that sixty-eight percent of whistleblowers will have difficulty finding employment [24]. 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 [1]. Almost all are put on a "black-list" which denies them any access to sensitive information about the company, and limits their performances and possibility for advancement [6]. Another deterrent of such blacklist is that its mere existence serves to prevent any future whistle-blowing incidents [51]. 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 [51].

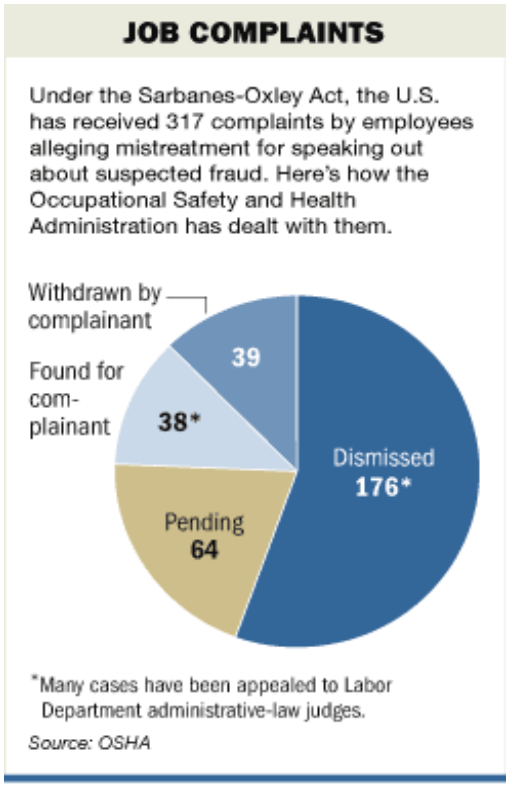


Fig. 2. Trends in OSHA resolution of SOX cases

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 from figure 2 above one wonders if 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, the laws are a patchwork of inconsistent protections. With scattered exceptions, one who files a lawsuit is sentencing oneself to an administrative process with 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 one challenged?

If there is no realistic chance of success, the law is a trap that offers legal wrongs, not rights. Unfortunately, many feel that that has been the case with DOL-administered corporate whistle-blower laws [52]. 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 [52].

Moberly's study of SOX, a law that is representative of the DOL legal system, found that in over 700 administrative decisions he analysed 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 [47]. 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 [47].

According to the Labour 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 favour of whistle-blowers and 841 against – a net-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 [53].

6. CONCLUSION

The foregoing presentation shows that in the last twenty years, in spite of an array of laws and regulations, whistleblowing incidents have been rising along with corporate misconduct and the trend is likely to continue. But how much does blowing the whistle hurt an individual's employment and career or hurt others working for the organization? Under the current system, whistleblowing seems to be a risky venture. There has been plenty of legislative engineering and what we need now is 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 to wrong doing. Even corporate and government watch dogs sometimes fall from grace, as demonstrated by Eliot Spitzer [54], a well-known crusading former Attorney General of New York who was charged with using state funds to pay a mistress; as was the recent case of Bernier Madoff who defrauded his victims in the staggering amount of $60 billion through a fraudulent investment pyramid [55]. 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 would require organizations to institute rigorous policies and training that will encourage employees to bring unethical and illegal practices to the attention of those best equipped to correct them.

7. 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 instil 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 mechanisms that permit employees to report suspected misconduct anonymously should be 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 or 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 and 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 whistle blowers 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 whistle blower [6].

DISCLAIMER

An earlier version of this manuscript was presented in the conference "Proceedings of 17th International Business and Social Science Research Conference" available link is "http://www.wbiconpro.com/434-Amaram.pdf" date 19-06-2012 new.

COMPETING INTERESTS

Author has declared that no competing interests exist.

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