

AN INTERNATIONAL PERSPECTIVE ON LITIGATED WHISTLE BLOWING CASES

Marsha Katz, Professor of Management—Governors State University
Helen LaVan, Professor of Management—DePaul University

ABSTRACT

The purpose of this study is to demonstrate the importance of whistle blowing protection throughout the world. Different countries view the behavior differently and have legislation that affords different protection to individuals who blow the whistle against their employers. This study looks at a variety of demographics, the organizational characteristics, legal environments and employment contexts in which whistle blowing takes place. HR outcomes refer to actions taken by the employer, including discharge, demotion, suspension, discrimination, forced retirement and negative performance evaluation. Of concern is whether the whistle blower, regardless of context, was protected. Cases of litigated whistle blowing in England, Ireland, Canada and Australia were analyzed and are presented as illustrative. Findings show when employees whistle blew on a variety of issues leading the employer either to dismiss or retaliate against the individuals, the whistle blower claimed protection under a variety of laws, which varied by the country. Of the 14 cases, eight were in favor of the employer. This means that the employer was legally permitted to take the action it intended to take against the whistle blower in the majority of cases. In six cases, the employers' actions were overturned by the court. Policy implications include increased employer liability, whistle blower protection expansion into the private sector, and the union grievance procedure as paramount in protection of whistle blowers.

INTRODUCTION

Importance of Issue of Protections for Whistle Blow ers

Whistle blowing is becoming an increasingly important issue in the workplace throughout the world. However, not all countries have the same perspective. Sometimes, it is viewed positively as a voice of conscience, other times it is viewed negatively as a disloyal act to their employer (Berry, 2004).

International Differences

In an extensive literature review, Applebaum (2006) concluded that although whistle blowing is an issue internationally, different countries view the behavior differently. He examined whistle blowing in England, China, Venezuela, Ireland, and Australia. Another recent study provides evidence of the different effects of societal culture on Canadian and Chinese reporting of unethical acts within organizations (Zhuang, Thomas and Miller, 2005). Individuals from different cultures do not necessarily have similar values or ethical beliefs (Gbadamosi, 2004). Varying perspectives on whistle blowing include: It is not a preferred form of conflict resolution; it is disloyal and unethical to one's employer and peers; it is a career-breaker; or it is a more viable means when one does not personally know the whistle blower.

According to Applebaum (2006), the British have a negative point of view with regard to conflict. Whistle blowing for the British does not appear to be the favored means of doing

things. Subtle methods for indicating dissent and resolution are in place and in most instances informal techniques will work (Vinten, 2004).

In China, a model employee may deem whistle blowing as undesirable and unethical behavior. This is because it disturbs the relationship between employees and employers, particularly since loyalty is a significant factor in this relationship. Furthermore, "Chinese virtue, which [advocates] ... social conformity and harmony," portrays whistle blowing as socially undesirable. Whistle blowing results in unfavorable outcomes, "such as the loss of employment, threats of revenge, and social isolation at work." (Chiu, 2002). Moreover, different legislation in different countries affects the nature of the protection afforded to individuals who blow the whistle against their employers (Drew, 2003). Applebaum noted that the rationale for not notifying corporate violations to the government in Venezuela include "strong loyalty, an employee might not have all the pertinent facts about the violation, it would make one's supervisors look bad, and an individual should quit instead of going to the government" (Vanasco, 1998).

Employment Contexts—What Actions Cause the Employee to Blow the Whistle?

Some of the behaviors that may be involved are safety, public harm, inappropriate financial reporting, inequity in employee treatments, sexual harassment, or ghost workers on payroll. However, reporting of these can lead to serious risks to these whistle blowers (Ramirez, 2007). Blowing the whistle for sexual harassment is beginning to have multi-national aspects. Domagalski (2008) found that the extraterritoriality clause in the Civil Rights Act of 1991 amended Title VII and the ADA to include employment discrimination protection for US citizens working abroad for US employers. Recent court rulings demonstrate an absence of lawsuits involving alleged violations of the extraterritorial provision. Instead, recent cases show that Americans working outside of the US are filing charges against foreign employers rather than US employers and applying state-level employment statutes rather than federal legislation. In addition, non-US citizens are exhibiting a trend toward invoking US federal and state statutes against US employers.

Rosenthal, Lockwood, & Budjonaovcanin, (2008) examined litigated cases of sexual harassment in Great Britain over a ten year period, interpreting of longitudinal case data at the appellate court level. While not examining whistle blowing directly, they view sexual harassment as an evolving legal issue and as a type of organizational conflict. They suggest that organizations put mechanisms in place to ameliorate sexual harassing behaviors, including alternative management/policy strategies for redressing sexual harassment, including whistle blowing.

Demographics of Whistle Blowers

Mesmer-Magnus and Viswesvaran (2005) researched whether it is feasible to predict whistle blowing. Meta-analytic examination of 193 correlations obtained from 26 samples (N = 18,781) revealed differences in the correlates of whistle blowing intentions and actions. Stronger relationships were found between personal, contextual, and wrongdoing characteristics and whistle blowing intent than with actual whistle blowing. Retaliation might best be predicted using contextual variables, rather than demographics.

Retaliation

Based on nationwide data of U.S. firms collected by Rothchild and Miethel (1999)

on whistle blowers and on silent observers, it was concluded that whistle blowing is more frequent in the public sector than in the private and that there are almost no sociodemographic characteristics that distinguish the whistle blower from the silent observer. Furthermore, whistle blowers suffer severe retaliation from management, especially when their information proves significant; and no special method of disclosure or personal characteristics can insulate the whistle blower from such retaliation. Furthermore, the authors found that retaliation was most certain and severe when the reported misconduct was systematic and significant—when the practices exposed were part of the regular, profit accumulation process of the organization. The authors conclude from their interviews that the journey to exoneration that follows a whistle blower's disclosures often alters the whistle blower's identity, leading them to see themselves as people who resist hurtful or criminal conduct in the workplace.

Fraud

In an extensive study of corporate fraud in the United States, it was found that detection of fraud relies on a wide variety of individuals such as: SEC (7%), auditors (10%), equity holders (3%), equity holders' agents (auditors and analysts) (24%), people who do not have any residual claim in the firms involved such as employees (17%), non-financial-market regulators (13%) and media (13%) (Dyck, Morse & Zingales (2008). Furthermore, while employee whistle blowers can gain from whistle blowing, they also face significant costs. When employees bring a qui tam suit that the company has defrauded the government, the employee can earn a substantial award. However, they also face significant costs such as being fired, retaliated against by discrimination or harassment. In fact, Dyck, Morse and Zingales quote many employees saying, "If I had to do it over again, I wouldn't." Furthermore, their findings suggest that to improve corporate governance abroad it would be insufficient and difficult to replicate the U.S. institutions of private enforcement such as class actions suits or public enforcement. In a study of Chinese current and future accounting and auditing professionals' intent to whistle blowers, Hwang, Staley, Chen & Lan (2008) found that a general sense of morality was the most important factor to encourage whistle blowing. However, guanxi, fear of retaliation and fear of media coverage may also discourage whistle blowing in Chinese firms.

HR Outcomes

HR outcomes refers to the HR actions taken by the employer. Some of the outcomes to employees are discharge, demotions, suspensions, discrimination, forced retirements and negative performance evaluation. The nature of the action taken may also be affecting the case outcomes in litigation.

Was the Whistle Blower Protected?

Ramirez (2007) reported that the law's protection of whistle blowers today is illusory at best, but that durable reform may be possible if the law is restructured appropriately. He notes that while some protections exist in the U.S., the variance in limitations periods for filing anti-retaliation provisions compound the difficulty faced by a given whistle blower.

What About Subsequent Civil Litigation?

Legal discussions of defamation commonly focus on defamation law, with relative neglect of struggles that take place over defamation matters (Gray and Martin, 2006). To understand defamation struggles, the authors use the concept of backfire theory: if something is perceived as unjust and information about it is communicated to relevant audiences, it has the potential to backfire against those held responsible. Defamation

suits have the potential to backfire when they are seen as oppressive or contrary to free speech. There are several types of actions by plaintiffs that can inhibit this backfire effect, including cover-up, devaluation of the defendant, reinterpretation and intimidation. Participants in these struggles see the matters in terms of reputation and free speech; backfire analysis allows an observer to put tactics used by participants in a coherent framework

HYPOTHESES

Rather than the formal testing of hypotheses, this initial phase will consider illustrative cases with respect to employment inputs—what caused the employee-whistle blower to blow the whistle? What HR actions transpired as a result? Was the whistle blower protected?

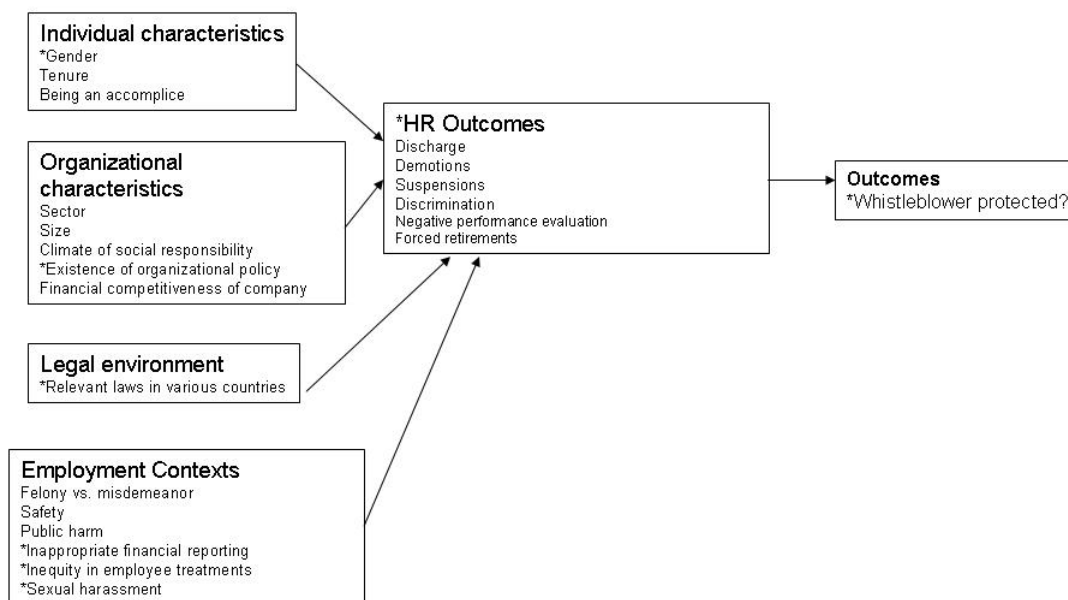
METHODOLOGY

This study is international comparison of litigated cases of whistle blower retaliation. A Lexis-Nexis search was conducted to discern litigated cases on the topic of “whistle blowing” in the following countries: England, Ireland, Canada and Australia were analyzed and are presented as illustrative. This study is preliminary to a larger study, which will include the following countries: This study is preliminary to a larger study, which will include the following countries: New Zealand; Hong Kong, Singapore, Malaysia and Brunei Hong Kong, Singapore, Malaysia and Brunei. It is generally acknowledged that litigated cases are not readily available online, outside of the United States. While this search was more straight forward in the United States, the following additional search terms may need to be used to identify comparable international cases: retaliation, reprisal, unfair dismissal. The cases selected for inclusion in this paper are intended to illustrate only the following: HR outcomes: retaliation, discrimination, termination and employment inputs: Fraud, negligence.

MODEL

The reader’s attention is directed to the Model portrayed in Figure 1. This model describes the hypothesized characteristics that lead individuals to blow the whistle. Included are the demographics, the organizational characteristics, the legal environment and the employment contexts, in which whistle blowing can be hypothesized to take place. HR outcomes refer to actions taken by the employer, including discharge, demotion, suspensions, discrimination, and forced retirement and negative performance evaluations. Of concern is whether the whistle blower, regardless of context, was protected.

Model of Litigated Case Characteristics for Litigated Whistleblowing Cases ¹



1* indicates aspects of model focused on in paper.

FINDINGS AND POLICY IMPLICATIONS

Table I illustrates several types of cases including Retaliation, Fraud, Harassment, and Discrimination. Of the fourteen cases included in this analysis, nine were in the public sector. Six of the employees were male. These cases may not reflect the population of cases. The employees whistle blew on a variety of issues leading the employer either dismissing or retaliation against the individuals. The whistle blower claimed protection under a variety of laws, which varied by the country. These are listed in Table I.

The bases of whistle blowing included improper financial procedures, witnessing of harassment, abuse of patients, sex discrimination and other types of victimization.

Outcomes Of the 14 cases, eight were in favor of the employer. This means that the employer was legally permitted to take the action it intended to take against the whistle blower in the majority of cases. In six of the cases, the employers' actions were overturned by the court.

Policy Implications

There are a number of policy implications from the cases in the analysis. Clarified was the concept that the employer can be held vicariously liable for bullying by other employees. In addition, there is a noticeable expansion of whistle blowing protection from traditionally public sector coverage to private sector employees. Furthermore, procedural abnormalities, such as delay in filing or filing in an inappropriate venue do not necessarily set aside an award. In addition, in cases where the employment tribunals

issued an award, that award was considered final and not subject to subsequent court action.

Another clarification was that of the role of the union. Several of the cases contained ruling relating to the fact that the union should have protected employee in the context where there was a union and a grievance procedure.

REFERENCES

- Appelbaum, S. H., Grewal, K., & Mousseau, H. (2006). Whistleblowing: International Implications and Critical Case Incidents. *Journal of American Academy of Business*, 10(1), 7-13.
- Berry, B. (2004). Organizational Culture: A Framework and Strategies for Facilitating Employee Whistleblowing. *Employee Responsibilities and Rights Journal*, 16(1), 1-11., 16(6), 1-11.
- Chiu, R. (2002). Ethical Judgment, Locus of Control, and Whistle blowing Intention: A Case Study of Mainland Chinese MBA Students. *Managerial Auditing Journal*, 17(9), 581-587.
- Domagalski, T. A. (2008). Employment Discrimination and the International Workplace: A Review of Recent US Court Rulings *Employee Responsibilities and Rights Journal* 20(3), 195-204.
- Drew, K. (2003). *Whistle Blowing and Corruption: An Initial and Comparative Review*, 2003 <http://www.u4.no/document/literature/drew2002whistleblowing-and-corruption.pdf>
- Dyck, A., Morse, A., Zingales, L., & National Bureau of Economic, R. (2007). *Who Blows the Whistle on Corporate Fraud? : National Bureau of Economic Research Cambridge, Mass., USA.*
- Gbadamosi, G. (2004). Academic Ethics: What Has Morality, Culture and Administration Got To Do With Its Measurement? *Management Decision*, 42(9), 1145-1161.
- Gray, T., & Martin, B. (2006). Defamation and the Art of Backfire. *Deakin Law Review*, 11(2), 115-136.
- Hwang, D., Staley, B., Chen, Y. T., & Lan, J. S. (2008). Confucian culture and whistleblowing by professional accountants: an exploratory study. *Managerial Auditing Journal*, 23(5), 504.
- Mesmer-Magnus, J. R., & Viswesvaran, C. (2005). Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation. *Journal of Business Ethics*, 62, 277-297.
- Ramirez, M. K. (2007). Blowing the Whistle on Whistleblower Protection: A Tale of Reform vs. Power. *University of Cincinnati Law Review*, 76, 183.
- Rosenthal, P., Lockwood, G., & Budjnaovcanin, A. (2008). An overview of the UK Employment Appeal Tribunal decisions in sexual harassment cases 1995-2005. *Equal Opportunities International*, 27(6), 485-504.
- Rothschild, J., & Miethe, T. D. (1999). Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information about Organization Corruption. *Work and Occupations*, 26(1), 107.
- Vanasco, R. (1998). Fraud Auditing. *Managerial Auditing Journal*, 13(1), 4-71.
- Vinten, G. (2004). Whistle blowing: The UK Experience, Part 2. *Management Decision*, 42(1), 139-151.
- Zhuang, J., Thomas, S., & Miller, D. L. (2005). Examining Culture's Effect on Whistle-Blowing and Peer Reporting. *Business and Society*, 44(4), 462-486.

Table I--Table of Relevant Illustrative Cases

Case name	Case Citation	What Actions Did Employee Encounter?	Basis of Whistleblowing	Action of employer	Adjudication venue	Country	Laws	Sector	Occupation	Demographic s of whistleblower	Outcome	Public Policy Implication
Ferreira vs. Richmond (City)	[2007] B.C.J. No. 373; 2007 BCCA 131; 2007 BC.C. LEXIS 415	Race and Sexual Orientation Discrimination	Financial—including double billing, improper use of overtime, sick leave, use of city credit cards, conversion of city property	Failure to provide hassassment free work environment	British Columbia Court of Appeal	Canada	Code, R.S.C 1985, c. L-2, s. 37, s. 57(1)Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 8;	Municipal	City Roads Employee and member of bargaining unit	Male	Employer	Should have been protected by union
Sweeny vs. National Film Board of Canada	[2008] O.J. No. 461; 2008 ON.C. LEXIS 576; 2008 ONCA 97	Retaliation	Vaguely expressed—improper handling of government project	Dismissal	British Columbia Supreme Court Vancouver, British Columbia	Canada	Public Service Staff Relations Act	Federal	Film Producer	Female	Employer	Did not make use of the (non-union) grievance procedure. There was no retaliation since she was not a whistleblower
Burmis v Governing Body of Aylesford School and others	[2008] All ER (D) 28 (Oct)	Retaliation	Race, sex harassment, victimization	Dismissal	Employment Rights Act, s 103A - Employment Tribunal	United Kingdom	Rights Act, s 103A - Employment Tribunal (Constitution and Rules of Procedure)	Minicipal School District	Teacher	Black female	Employer	The lack of timeliness of the decision, did not change the tribunal's original verdict.
Peter Merrifield, Plaintiff, and The Attorney General of Canada, Inspector James Jagoe, and Superintendent Marc Proulx, Defendants	[2008] O.J. No. 2730; 2008 ON.C. LEXIS 3058	Harassed, did not honor his medical leave	Limiting of political activities	Failure to promote and stress-induced illness	Ontario Superior Court of Justice	Canada	Royal Canadian Mounted Police Act	Public Police	Royal Mounted Police	Male	Individual	Can proceed to trail, even though there is a union grievance process
Carter and others v Chief Constable of Cumbria Constabulary Paul Pleau, Heather Pleau and Adrianna and Paul Phillip Pleau, by their litigation guardian, Heather Pleau, Plaintiffs, and The Attorney General of Canada, Donald	[2008] EWHC 1072 (QB), [2008] All ER (D) 188 (May)	Harassed	Misfeasance in public office	Not protecting employees from unfair discrimination	Queen's Bench Division	United Kingdom	Police (Conduct) Regulations 1999 SI 1999 No 730	Public Police	Police officers	Male	Employer	More documentation necessary to pursue complaint
Clark-Darby v Centaur Media plc	[2008] N.S.J. No. 143; 2008 NS.C. LEXIS 184; 2008 NSSC 118	Discipline for fraudulently blowing the whistle.	Criminal activity on part of employer	Terminated	Nova Scotia Supreme Court	Canada	Public Service Staff Relations Act	Public Sector	Administrativ e Employee	Male	Employer	Should have been protected by union
	UKEAT0354/07/ MAA-17 December 2007	Claim of poor performance	Profit-loss discrepancy of 1.3 million pounds	Terminated	Employment Appeal Tribunal	United Kingdom	Employment Rights Act 1996, S 47 & S 103 A	Private Sector	Senior Mgt in Publishing Industry	Female	Employer	Definition of what constitutes whistleblowing

Table I--Table of Relevant Illustrative Cases Continued

Case name	Case Citation	What Actions Did Employee Encounter?	Basis of Whistleblowing	Action of employer	Adjudication venue	Country	Laws	Sector	Occupation	Demographic s of whistleblower	Outcome	Public Policy Implication
Cumbria County Council v Carlisle-Morgan	[2007] IRLR 314	Harassment by co-worker	Co-worker abuse of patient	Failure to protect for whistleblowing	Employment Appeal Tribunal	United Kingdom	Public Interest Disclosure Act - Employment Rights 1996 (as amended) section: 47B	Public Sector	Caretaker	Female	Individual	Employer can be vicariously liable in decision or the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any
Credson v Industrial Relations Commission of New South Wales	4051406, 2007 NSWCA 178	False claims of mental illness	Co-worker abuse of patient	Medical leave	Supreme Court of New South Wales – Court of Appeal	Australia	Supreme Court Act 1970, s 179 of the Industrial Relations Act 1996,	Public Sector	Caretaker	Male	Employer	Expands the protection of the act to the Private Sector
Merk v. International Assn. of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union 771	O.B.G. No. 419/2006	Retaliation	Financial supervisors taking money and double billing expenses	Terminated	Queen's Bench Judicial Centre of Regina	Canada	s. 74 of The Labour Standards Act, R.S.S. 1978	Private Sector	Office Manager and Booker	Female	Individual	The provisions given to whistle-blowers under s.47B of the Employment Rights Act continues to apply after the contract of employment has terminated.
Woodward v Abey National plc	[2006] EWCA Civ 822, [2006] BSLR 677	Retaliation	Reckless and/or negligence in handling the funds of its institutional investors, and/or the breaches of fiduciary duty of directors	Failure to provide reference after job ended	The Court of Appeal	United Kingdom	s.47B of the Employment Rights Act	Private Sector	Head of Financial Institutions	Female	Individual	Individual harassing and individual doing the dismissal do not have to be the same person for there to be protected whistleblowing behavior
Redcar and Cleveland Borough Council v Scanlon EMPLOYMENT APPEAL TRIBUNAL	UKEAT/0088/08/2T[2008] N.S.J. No. 143; 2008 NS.C. LEXIS 184, 2008 NSSC 118	Termination	Sexual harassment	Terminated	Employment Tribunal	United Kingdom	s 4 of the Sex Discrimination Act 1975	Private Sector		Female	Individual	Firm hired to find the dishonest and fraudulent behavior that eventually caused the liquidation should be accountable to blow whistle.
Steele & Rolls Ltd (in liquidation) v Moore Stephens (a firm) and another	[2007] EWSC 1826 (Comm), 2006/1378, (Transcript)	Negligence-- contention is that individual should have blown whistle but did not.	Whether claim should be precluded by ex turpi causa non oritur actio rule - Whether rule applicable to corporations relating to fraud by owners and controllers	Not an employee of company, but of accounting firm	Queen's Bench Division (Commercial Court)	United Kingdom	Law Commission in Consultation Paper No 160 (May 2001) on the illegality Defence in Tort.	Private Sector	Accountant	Male	Individual	Court does not have jurisdiction, when employee is represented by union
Merrill v Richmond (City)	[2006] B.C.J. No. 3209; 2006 BCSC 1848; 2006 B.C.C. LEXIS 2923	Breach of contract and negligence arising out of harassment and discrimination	Harassment and discrimination	Failure to provide safe and harassment-free working	British Columbia Supreme Court Vancouver, British Columbia	Canada	Human Rights Code	Public	Firefighter	Female	Employer	