

Whistleblower Protection – the law and the reality

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Overview

- State Law Protections of Whistleblowers
- Federal Whistleblower Protections
- False Claims Act
- Retaliation
- Reality





Whistleblowing

- Disclosure by a person, typically an employee, of mismanagement, corruption, illegal acts to an entity or individual with authority to address the situation
- Must be reported in good faith – reasonably believe what reported
- Process and requirements for reporting can vary by law or policy





Defamation and Confidentiality

- Defamation – If Whistleblower fails to use reasonable care to establish truth – including reckless disregard for truth – and report is false resulting in harm, can face defamation claim
- Publication – False statement had to have been communicated to others and tend to injure the reputation of accused





State Law Protections

- The overwhelming majority of states have state laws protection Whistleblowers
- Some cover all employees and employers, some only cover public employers and some only cover private employers
- The remedies provided can also vary
 - Reinstatement
 - Back Pay
 - Attorneys fees
 - Fines
- <http://www.ncsl.org/research/labor-and-employment/state-whistleblower-laws.aspx>





Federal Law Protections

- Public Health Service Act
- Whistleblower Protection Enhancement Act of 2012
- Many Federal laws contain whistleblower protection provisions : ACA, ADA, AWAR, Dodd-Frank, FMLA, OSHA, SOX, etc.

<http://www.taterenner.com/fedchart.php>

<https://www.fas.org/sgp/crs/misc/R42727.pdf>





Common Mistakes

- Allegations not made in good faith
- Acts underlying allegations not within coverage of law (policy violation verses violation of law)
- Report not made to appropriate person
- Report not made timely
- Employee engaged in misconduct





Defend Trade Secrets Act (May 2016)

- An individual cannot be held criminally or civilly liable for disclosure of a trade secret made in confidence to a federal, state or local government official, or to an attorney for the sole purpose of reporting or investigating a suspected legal violation.
- An individual cannot be held liable for disclosure of a trade secret in a complaint or other lawsuit related document if the filing is made under seal.
- An employer is required to provide notice of the immunity relating to lawful disclosures in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.
- An employer must provide the notice of whistleblowing immunity to maintain eligibility for exemplary damages or attorneys' fees in litigation for unprotected disclosures.





False Claims Act Violations

- Presenting false or fraudulent claim for payment to the government
- Causing the false claim to be paid
- Conspiring to do the foregoing
- Using false records or statements to avoid paying money or giving property to government





Qui Tam

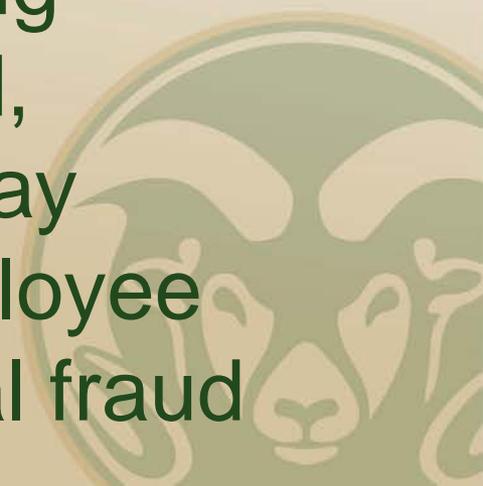
- If government chooses not to pursue case, the individual (relator) may pursue claim as a “private attorney general”
- Treble damages
- Relator can receive 15% to 30% of that recovery along with attorneys fees





FCA and Whistleblowers

- Cases are under seal during the government investigation and names released only if they decide not to pursue
- Act protects employees from being discharged, demoted, suspended, threatened, harassed or in any way discriminated against due to employee investigating or reporting potential fraud





Retaliation





Elements of Retaliation

- Engaged in a protected activity
- Employer took adverse action against them
- Because they engaged in the protected activity





The Numbers

- The EEOC reports that for fiscal year 2015, 44.5% of all of their charges filed with them were retaliation claims

HIGH RETALIATION RATE: A Cause for Concern



More than 1 in 5 U.S. workers

[21%] who reported misconduct said they experienced **6.2 million** retaliation. That is about **Americans.**"

<http://www.ethics.org/research/eci-research/nbes/nbes-reports/nbes-2013>



Types of Whistleblower Retaliation

Ignored or treated differently by supervisor	69%
Ignored or treated differently by different employees	59%
Excluded from decisions and work activity	54%
Verbally abused by supervisor or other manager	49%
Not given promotions or raises	47%
Verbally abused by other workers	43%
Almost lost job	38%
Cut in hours or pay	29%
Relocated or reassigned	28%
Demoted	21%
Harassed at home	18%
Experienced physical harm to person or property	16%
Experienced online harassment	15%





Retaliation continued

- Employer/supervisor must have knowledge that the employee engaged in the protected activity – if they don't, their actions are likely not retaliatory
- Adverse action generally must happen within a reasonable period of time after the employee engages in the protected activity
- Adverse actions that were in motion prior to protected activity are probably okay





The Sad Reality

Innocent people will have their careers
damaged even if they have done
nothing wrong.





The Vulnerable

- Graduate student informally reports to you that they think their PI is cherry picking data but they are close to finishing their degree and just want to finish and get a job. They would like to make a formal report but don't think they can as a practical matter.
- What can you do?





The Innocent

- Graduate student is working with a PI who is later determined to have spiked samples to achieve certain results. The graduate student had no reason to know her work was being compromised. Articles they are co-authors on are retracted.
- More than half of her publications : GONE.





The Scapegoat

- A PI's published research cannot be reproduced and an investigation is launched. The PI is confronted and claims ignorance – suggesting that a junior research scientist in their lab must have done something wrong. That person says they only did what the PI told them to do.
- I wonder who ends up in trouble?





The Research Community

- Articles supporting a certain finding end up being retracted for research misconduct. Other PIs are doing similar or related research and publishing results that could support the falsified findings as valid.
- Are their publications now called into Question?

