RETALIATION

In prior chapters we have shared many whistleblower success stories. Bradley Birkenfeld who received a $104 million check from the IRS. The $30 million check paid by the SEC to an anonymous whistleblower living overseas. The $96 million check to Cheryl Eckard under the False Claims Act, and, the biggest of them all, $597 million paid to pharmacist T. Mark Jones and several of his colleagues in a healthcare fraud case.

Obviously, not all whistleblower stories have such happy endings. Although most whistleblowers say they would do it all over again, no discussion of whistleblowing is complete without some discussion of the risks.

The good news is that courts take retaliation claims quite seriously, although relief can often take months or longer. Whistleblower protections are discussed in the following chapter.

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Retaliation, or the fear of retaliation, is the number one reason why more whistleblowers don't come forward. In our present economy, many people are thankful to simply have a job. Workers today worry that if they blow the whistle, they could lose their job, or worse. Unfortunately, these fears are well placed.

While this book sings the praises of whistleblowers, not everyone welcomes them. Those with the most to lose are usually the ones with the most daily control and influence in the life of a whistleblower. Some

whistleblowers learn that even if they leave their employers, the influence of those former employers can often be quite extensive.

Whistleblower retaliation is nothing new. It has been with us for decades and is likely to remain a real problem for the foreseeable future. While Congress and the United States Supreme Court have recently acted to reaffirm a commitment to protect whistleblowers, change is slow.

Retaliation can come from any level of an organization. Over 40 years ago, then- president Richard Nixon told aides to fire a whistleblower who uncovered problems in a procurement contract for military aircraft. Memorialized forever on the infamous Nixon audiotapes is the President telling top aide H.R. Haldeman to "Fire that son of a bitch" referring to the defense department whistleblower.

Whistleblower lawyers best remember Nixon for charging another aide with creation of the so-called "Malek Manual," a how-to guide for getting rid of whistleblowers and "troublemakers." Sadly, the tactics in that manual are still in use today.

Fred Malek was an aide to both Richard Nixon and George H.W. Bush. In 1973, he served as director of the White House Personnel Office. Nixon wanted to purge the civil service ranks of Democrats and replace them with his supporters. Because federal employees had civil service protection, care had to be taken to avoid retaliation claims. The result was an 80-page document called the Malek Manual (although Fred Malek claims the title is a misnomer).

Included in the manual are sections about "frontal assault techniques," "transfer technique," "layering technique" and the "shifting responsibilities and isolation technique." The manual even contemplated that "disloyalists" would catch on to the techniques, so there is a section on "bureaucratic countermeasures."

The Malek manual was written during the darkest days of the Nixon administration yet its techniques are still widely used today.

Lest you think retaliation isn't a problem, the federal Equal Employment Opportunity Commission (EEOC) says it received 33, 613 complaints of retaliation in 2009. This number doesn't include cases received by the 50 states and numerous other municipal and federal agencies that are empowered to hear such claims.

Smart, ethical businesses know that nothing encourages whistleblowing more than retaliating against concerned employees who first try to bring concerns to the attention of management. Alienate an employee and you run the real risk that they will take their concerns to the media or the government.

While the introduction to this chapter paints a bleak picture, whistleblower retaliation is a very real problem. This chapter looks at some of the risks faced by whistleblowers.

ISOLATION

Most larger employers are smart enough to not immediately fire whistleblowers. From a legal standpoint, state and federal law protects whistleblowers from retaliation. Courts can award both monetary damages and equitable relief such as reinstatement.

Businesses also like to keep whistleblowers within their employ for legal reasons. A current employee has a higher duty of loyalty to their employer than one who is discharged. In simple terms, once fired, a former employee can potentially do more damage.

If a business is worried about lawsuits from shareholders or third parties that may arise from knowledge possessed by the whistleblower, it is often more advantageous to keep him or her around.

Although there may be some legal advantage to keep a whistleblower employed, most businesses hate whistleblowers. They worry that others may be encouraged and empowered to blow the whistle. The dilemma then becomes what to do with the whistleblower. Terminating them is illegal and potentially very costly but keeping them around isn't very palatable either.

The solution? Isolation, or what we call "corporate exile."

Many larger companies simply send whistleblowers home with a paycheck. Other companies send them to an isolated office with no phone, no duties, and no ability to interact.

Isolation serves several purposes. First, the person remains employed, thus preventing the company from getting in more legal trouble. As long as they keep paying the person, there effectively is no retaliation claim.

By keeping the person on the payroll, the company also minimizes the risk of cooperation with outside parties. Businesses can't keep a whistleblower from cooperating with the government but they can control interaction with outside lawyers who may have claims against the company.

Another reason for isolation is the message it sends to other would-be whistleblowers. Other workers quickly see that by becoming a whistleblower, all the perks and prestige of one's position or duties can be taken away instantly.

Although whistleblowers living in exile continue to receive their paychecks, their position and career becomes a dead end.

Once in exile, most companies no longer will entertain promotion or transfer requests. Ditto for bonus pools and merit raises. Training and professional development opportunities also become nonexistent.

Isolation sends a strong signal to other workers that the whistleblower's career is at an end. They may stay with the company for life but they will never get ahead or have a successful career.

Many whistleblowers simply quit. By quitting, however, any potential retaliation claims are seriously weakened.

TERMINATION

If "corporate exile" is the preferred strategy for many businesses, termination is the reality for most others.

Termination comes in many different forms. Sometimes employers simply call security and escort the whistleblower out the door. We continue to see that behavior with smaller companies that don't have a human resources department and don't understand the anti-retaliation laws. Larger and sophisticated employers are subtler in how they terminate whistleblowers.

Case Study - The Sarah McCray Story

Sarah McCray was a state worker in Kentucky, working for the transportation department. She claimed she was fired by her boss in retaliation for her cooperation with an investigation by the state attorney general involving her boss and then-governor Ernie Fletcher. After losing her job, she filed a whistleblower retaliation claim.

McCray's story was closely filed in Kentucky. Based in part on her cooperation, a grand jury indicted 29 people, including the governor and McCray's former boss. In a dramatic political maneuver, Governor Fletcher pardoned everyone. Although that action cost the governor his job, Sarah McCray remained unemployed.

Fortunately, McCray filed suit and ultimately the state settled with her for $500,000 plus another state job in a different department.

For government workers, getting a transfer to a different position is a

possibility. Reinstatement is rarely successful for private sector workers, however.

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ELIMINATION OF POSITION

A favorite tactic of employers is to simply eliminate the whistleblower's position. Duties are rearranged and spread out over several other workers.

Companies that engage in this kind of behavior want the whistleblower gone. They want others in the company to get the message, yet hope to avoid civil liability for violating anti-retaliation laws.

It's important to make sure you have a good labor lawyer on hand and ready to step in. Many whistleblower law firms are great at getting awards for their client's information but are of little help when their client is fired or finds his position eliminated.

Case Study - Martin Schell's Story

Martin Schell had a promising career at Bluebird Media. Originally hired as Vice President of Business Development in 2010, he was soon promoted to Vice President of Operations and charged with the responsibility to build a fiber optics network across northern Missouri.

Bluebird obtained $45 million in federal funds from the National Telecommunications and Information Administration to help finance the rollout of broadband access in rural Missouri. In his new role at Bluebird, Schell became concerned that the company made false statements to the government in order to receive federal funding. After bringing his concerns to the company's CEO, he suddenly found his compensation reduced.

When he didn't resign, his position was "eliminated" nine months later. Schell filed a federal False Claims Act case seeking damages on behalf of the government and also filed a whistleblower retaliation claim.

Bluebird denied wrongdoing and said Schell's position was eliminated. The company denied any wrongdoing and asked the court to dismiss Schell's claims.

In June of 2013, a federal judge in Jefferson City, Missouri ruled against the company and refused to dismiss the complaint. In refusing to toss the retaliation claims, the court noted that the company apparently had decided to fire Schell at a board meeting. The company's own lawyer expressed reservations about firing Schnell so at a second board meeting, the company suddenly changed tactics and decided to eliminate his position.

Sadly, since the court's ruling in favor of Schell in 2013, the case has not gone well for him. Earlier this year after discovery was complete, the court dismissed his whistleblower and retaliation claims saying he did not have enough facts. That decision is now on appeal.

Case Study – The Edward Lane Story

This story is significant because it is recent (2014) and made it all the way to the U.S. Supreme Court.

Edward Lane ran a program for at-risk youth through the Central Alabama Community College. While employed at the school, Lane became concerned that a local politician was on the school's payroll yet apparently performed no work. He brought his concerns to the school's president and ultimately to the FBI.

Ultimately that politician was charged by the FBI for misuse of federal funds. Predictably, Lane was terminated.

In a highly suspect move, the school's president claimed the school was having financial difficulties. Twenty-nine employees, including Lane, were laid off. Just days later, however, 27 were hired back. Lane filed a lawsuit and claimed retaliation. A unanimous Supreme Court overturned a lower court decision and agreed that Lane should not have been singled out and punished.

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SET UP FOR FAILURE

A common tactic for businesses that want to get rid of "troublemakers" is setting them up for failure. How do companies do this? By making their jobs impossible.

Giving the targeted employee too much work or unrealistic deadlines are sure-fire ways to make the worker either quit or be set up for termination. Once again, these tactics have ripple effects throughout the organization. Co-workers soon learn that if you make waves, the company can make your life miserable.

Worse than setting up workers for failure, in some extreme cases companies try to set up targeted workers for lawsuits or criminal charges.

BLACKLISTING

If termination is bad, blacklisting is worse. Here the message is simple: not only are we going to get rid of you, we will make it impossible for you to ever work again.

Older readers may remember the 1950's, during the reign of Senator

Joe McCarthy. If Senator Joe thought you were a communist, kiss away any thoughts of a career. Times have changed, but blacklisting is still with us. It has simply become subtler.

There are thousands of unemployed whistleblowers who spend many months (or longer) looking for a job. These folks have an interview where everything seems great yet soon thereafter the prospective employer is no longer interested.

The first couple rejections leave the worker puzzled. Soon it becomes apparent, however, that something sinister is taking place behind the scenes.

The perception of blacklisting is usually far worse than the actual results. Depending on the industry and the position held by the whistleblower within the industry, however, blacklisting is a real concern.

The more tightly-knit an industry, the easier it is to blacklist someone. The same general rule can be made for one's position within an industry. Senior managers and professionals within an industry are more often the victim of blacklisting.

For example, a billing clerk at a physician's office likely can get another job even if her boss claims she has been blacklisted. If the whistleblower is a physician and also a department head at a major hospital, finding employment at another hospital could be more difficult.

Case Study - The Grant Timmons Story

Not all whistleblowers are famous or make millions of dollars for having the courage to step forward. The story of Grant Timmons is a prime example. Timmons was so broke after losing his job that he could not afford a lawyer. He successfully took on a major employer by himself, however, after suffering from blacklisting. That alone makes his story worthwhile.

Timmons was employed as a truck driver by CRST, one of the largest transportation companies in the United States. Worried about job safety, Timmons spoke to management about his concerns. The company wasn't pleased and fired him.

Timmons filed a whistleblower retaliation complaint and ultimately settled with the company. Part of the settlement was that both parties entered a non-disparagement agreement, meaning both agreed to not say bad things about the other.

Timmons then applied for a truck driving job at another company. In doing a background check, the new company sought references from CRST. Notwithstanding the non-disparagement agreement, a dispatcher at CRST told the new company that Timmons wasn't eligible for rehire and that he didn't meet standards.

Timmons filed a new retaliation claim that was heard by an administrative law judge in April of 2014. Timmons won, but the company appealed the decision. Without a lawyer, Timmons handled both the hearing and subsequent appeal on his own. On September 29, 2014, a three-judge panel unanimously upheld the retaliation finding.

The lesson here is how the company blacklisted Timmons. Knowing that they could not openly disparage him and say he was a bad worker, they used buzzwords such as "didn't meet standards."

We find that some companies use special phrases or buzzwords to signal other employers that a person is a whistleblower or has been blacklisted. Common examples include telling an employer that the candidate "isn't a team player" or "isn't eligible" for rehire.

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DEATH AND PHYSICAL INJURY

While these cases are extremely rare, they do happen. We know of one whistleblower who claims he was poisoned. Luckily, the poisoning attempt wasn't successful and the victim made a full recovery.

Case Study - The Karen Silkwood Story

Many readers may be familiar with the story of Karen Silkwood, one of the most famous whistleblowers of modern times. Portrayed by Meryl Streep in the movie bearing her name, Silkwood, her story and her death have been debated for years.

Karen Silkwood was a chemical technician at a plutonium plant operated by Kerr-McGee. She later became a union activist after becoming concerned about health issues of workers in the plant.

At just 28 years old, Silkwood became a whistleblower and testified about her concerns before the Atomic Energy Commission in the summer of 1974. Later that year, Silkwood was found to have been exposed to harmful radiation. Reports say that she was exposed to 400 times the legal limits for plutonium. There was also evidence of radiation in her home.

Some managers accused Silkwood of contaminating herself to make the company look bad. Others say she was deliberately exposed as a warning to her and other would-be whistleblowers.

The same month as the contamination was found, Silkwood decided to go public with her concerns. She never had that opportunity, however.

Silkwood's family and her union said she was on her way to meet David Burnham, a reporter with the New York Times. Union officials say that she was carrying a binder of materials when she left a café on her way to meet Burnham. Her car was found several hours later in a ditch. Silkwood was

dead and no binder was found.

Evidence at the accident scene suggested Silkwood's car was rammed from behind. Her family and friends said her car had no rear end damage before her death. No suspects were ever located, however, and police ruled her death an accident.

The coroner's ruling did not stop Silkwood's family from suing Kerr-McGee, her employer.

Hiring noted trial attorney Gerry Spence, Silkwood's family claimed that Kerr-McGee was responsible for Karen's plutonium contamination. After a 10-month trial, the longest in Oklahoma history, the jury ruled against the company. Silkwood's estate was awarded $505,000 in damages and $10,000,000 in punitive damages.

On appeal, a federal court reduced the damages to just $5000 and threw out the award of punitive damages. Ten years after her death, the U.S. Supreme Court restored the original verdict.