

# Retaliation for Whistleblowing Is on the Rise

A report from the ERC shows that retaliation against whistleblowers is increasing. While provisions in the Dodd-Frank Act strengthen the protection of whistleblowers, companies can still do more to strengthen their ethical culture and encourage employees to report misconduct.

Many favorable outcomes have resulted from the courageous actions of whistleblowers. Examples include the disclosures revealing the efforts of tobacco companies to get smokers hooked on nicotine, UBS's massive efforts to help U.S. taxpayers evade federal income taxes, and drug giant Pfizer's illegal marketing efforts that resulted in \$2.3 billion of criminal and civil penalties. Unfortunately, those blowing the whistle on such events are likely to face the painful cost of retaliation.

The provisions of the Dodd-Frank Act that were enacted to encourage whistleblowers and protect them from retaliation are still being adjudicated in the court system. One recent case is *Kramer v. Trans-Lux Corp.*, Case No. 3:11-cv-01424-SRU (D. Conn. September 25, 2012). The result was encouraging for whistleblowers. The U.S. District Court for Connecticut held that a whistleblower may pursue claims under the Sarbanes-

Oxley Act (SOX) as well as Dodd-Frank. The court also ruled that a whistleblower doesn't have to report a tip to the SEC in the manner prescribed by the SEC in order to qualify as a whistleblower under Dodd-Frank. Instead, the individual only must allege that he or she had a reasonable belief that the information relates to a possible violation of securities laws.

Though the courts continue to address the Dodd-Frank provisions, a report issued September 4, 2012, by the Ethics Resource Center (ERC) highlights the need for greater protection for whistleblowers. Titled *Retaliation: When Whistleblowers Become Victims*, the report details the practices of reporting illegal and unethical conduct in U.S. companies.

*Retaliation* analyzes data obtained in the 2011 National Business Ethics Survey (NBES), conducted before the protections of Dodd-Frank became effective. The NBES survey interviewed U.S. employees at all levels working at least 20 hours per week in the for-profit sector. Data was weighted for gender, age, and education. (The NBES study was covered in the April 2012 column, "New Survey of Workplace Ethics Shows Surprising Results.")

According to ERC's *Retaliation* report, retaliation against workplace whistleblowers is now extending to previously safe groups such as senior managers and is involving more acts of physical violence. "Addressing workplace retaliation should be a high priority for business leaders," ERC President Patricia J. Harned said. "When an employee experiences retaliation for reporting misconduct, companies have two new problems. A second form of misconduct has been observed, and the reporter is now a victim. Additionally, retaliation can create an environment that is cancerous to the organization."

The rate of retaliation against whistleblowers is increasing far more quickly than the rate of people reporting misdoing. Since 2007, the rate of reporting misconduct, or whistleblowing, has increased from 58% of those who observe improper behavior to 65%. Of the reporting group, the rate of employees experiencing retaliation increased from 12% in 2007 to 22% in 2011. Among the unfavorable side effects of retaliation is the dampening of motivation for future whistleblowers and the increased risk that unreported wrongdoing will continue and



expand because management has no opportunity to take corrective action.

Perhaps the most surprising findings set forth in *Retaliation* involve the striking increases in specific types of retaliatory acts—particularly those related to managerial employees. In the past two years alone, traceable retaliation (those that leave proof of having happened, such as physical harm, online harassment, harassment at home, job shift, demotion, or cuts to hours or pay) increased from 4% of those who experienced retaliation to 31%, managerial demotions increased from 18% to 32%, and relocations or reassignments increased from 27% to 44%.

This is the first time in the history of the ERC's studies of ethics that supervisory and managerial employees are now more likely to experience retaliation after whistleblowing. In addition, retaliation among union employees (another group with higher job security) increased dramatically in the past two years. Retaliation rates for union members were 25 percentage points higher (42%) than the rate for nonunion employees (17%).

Employees who feel comfortable enough to first report misconduct to their supervisor experience far less retaliation (17%) than those who first report to higher management (27%) or to their organization's hotline (40%). Possible explanations for this disparity are that (1) more significant violations would be reported to higher executives directly so that they could take immediate corrective action or (2) the reporter's supervisor may have some involvement with the situation. The severity of the

wrongdoing also may be a factor here. Logically, more significant violations are more likely to result in retaliation. If the action being reported is serious enough that the reporting would be escalated above a supervisor or done through a hotline, it's also more likely that there would be retaliation for reporting that action. But in organizations with an open culture, speaking up to benefit the firm in the long run is more likely to be accepted.

The ERC report also shows a direct link between increased retaliation and job pressures or stress. Fifty-two percent of people who report wrongdoing and feel pressure to compromise standards also end up experiencing retaliation. But only 12% of those who didn't feel such pressures experience retaliation. This suggests that an open and ethically strong culture encourages whistleblowing, while an unethical culture is more likely to result in employees "going along to get along."

The ERC study measures critical aspects of ethical culture, including management's trustworthiness, whether managers at all levels talk about ethics and model appropriate behavior, and the extent to which employees value and support ethical conduct, accountability, and transparency. Openness and the willingness to report misbehavior for the good of the organization is a positive outcome.

The best news in *Retaliation* is that ethics and compliance programs, strong ethical cultures, high standards of accountability that are applied consistently, and positive management behaviors are all linked to a reduced likelihood of

retaliation. Though the rate of retaliation increased in stronger ethical cultures, that rate (15%) was still lower than the retaliation rate in ethically weak cultures, which increased to 27% from 24%. In addition, retaliation is lower in organizations with comprehensive ethics and compliance programs (2% of reporters) than it is in companies that lack all of the standard program elements (36%).

Using other measurements, retaliation is far less likely when employees agree that management is accountable. Managers also have the power to curb retaliation. When they are perceived as trustworthy and committed to ethics, retaliation is far less likely. Some of the measures of accountability include:

- ◆ Trust supervisor to keep promises and commitments,
- ◆ Trust top management to keep promises and commitments, and
- ◆ Trust coworkers to keep promises and commitments.

*Retaliation* includes additional recommendations from the ERC for organizations that want to reduce the likelihood of the damaging effects of retaliation for whistleblowers. They include:

- ◆ Assess the views of the organization regarding whistleblowing and the protection of those who come forward with concerns about actions they have observed.
- ◆ Target managers with anti-retaliation training so they can recognize reporting, address the issues if possible, and interact with reporters in ways that aren't perceived as retaliatory.
- ◆ Communicate the reporting process broadly among all employees so they can feel reas-

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sured that progress is being made and are aware of the protections for those that do the reporting.

- ◆ Move investigations along and provide information as to the status of the issue so that reporters will feel they are being heard and won't need to bring up the same issues multiple times.

- ◆ Take steps to ensure that retaliation doesn't happen—show that fairness and consistency are the norms in the organization.

- ◆ Implement systems and procedures that ensure confidentiality.

- ◆ When a claim of retaliation is substantiated, take action in a way that is both decisive and, if possible, visible to employees.

- ◆ Track progress and periodically check up on reporters.

In view of the motivations for whistleblowing contained in Dodd-Frank—and the Act's greater protection against retaliation—the subject of whistleblowing and its influence in helping to establish and maintain a strong ethical culture within an organization deserves immediate attention and is likely to remain important for many years to come. **SF**

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