As corporate power grows without limit, governments at all levels are abandoning their responsibility to enforce laws. Instead, they are relying on “voluntary compliance” by corporations. Under these circumstances, the role of whistle-blowers assumes increased importance; often they are the public’s only protection against dangerous violations of law. Whistle-blowers are “insiders” in private firms and government agencies who dare to speak out against waste, fraud, abuse and threats to public health, often at great personal risk.[1]

Here are a few recent examples of whistle-blowers:

** In August, 2000, 40 members of the Los Angeles Police Department sued in court alleging that their superiors enforced a “code of silence” among police officers by punishing whistle-blowers who reported police misconduct.[2]

** In October, 1994, a 20-year career federal safety inspector, Steve Jones, was fired for reporting more than 500 safety violations at a chemical weapons incinerator operated by a private contractor at Utah’s Tooele Army Depot. Taylor said the contractor (his employer) had ignored and covered up releases of toxic nerve gas that put workers in immediate danger.[3]

** In November, 1998, employees of private health care firms blew the whistle on a scheme by over 200 hospitals to bilk the federal Medicare program out of billions of dollars by filing false expense reports over a 14-year period.[4]

** In 1996, EPA (U.S. Environmental Protection Agency) biologist Dr. David Lewis was silenced by his EPA supervisors when he warned that sewage sludge approved by EPA for use on farm land is a threat to human health because it is contaminated with dangerous pathogens including E. coli, salmonella, and the hepatitis virus.[5]

These are only a few examples of whistle-blowers protecting the public interest.

This week we have whistle-blower William Sanjour a long-time employee of U.S. Environmental Protection Agency (see REHN #350, #392, #484, and #612) reviewing a new book written for whistle-blowers and their lawyers by Steven Kohn[6], founder of the National Whistleblower Center in Washington, D.C.[7]

--Peter Montague

A Textbook for Whistle-blowers

by William Sanjour [8]

Anyone who has blown the whistle on corporate or government waste fraud or abuse, or is contemplating blowing the whistle or any activist or union organization which encourages or advises whistle-blowers needs to know the laws governing the protection of whistle-blowers. And there are plenty of laws; good laws, strong laws, enforceable laws. But there are also plenty of flaws and pitfalls to undo the unprepared.

Steve Kohn is the nation’s outstanding whistle-blower lawyer and he’s written a “first-rate book” on the “right and federal whistle-blower protection laws. His book is written mainly for attorneys but it offers guidelines for laymen to avoid the flaws and pitfalls and take advantage of the protection afforded by the laws.

In my own experience there are several misconceptions of the law which prevent would-be environmental whistle-blowers from taking action, or from choosing the best action, or which prevent whistle-blowers from seeking legal protection from retaliation.

The first misconception is the fear that they would not be able to prove that an adverse action taken against them by their employer was indeed retaliation for blowing the whistle. Short of firing, retaliation against a whistle-blower usually takes the form of harassment such as transfer to a dead-end position or reassignment to a hostile work environment. Management usually gives a rational-sounding explanation for these actions (e.g., the worker’s performance has fallen below par or the needs of the organization require the whistleblower’s transfer), so whistle-blowers often think that the burden of proof is on them to show that the action is harassment in retaliation for the whistle-blowing activity. Often whistle-blowers are cowed by the enormity of the burden. In fact, under most circumstances, that burden hardly exists. Kohn cites, for example, a decision from the U.S. Court of Appeals for the Seventh Circuit (pg. 82):

"[T]he plaintiff, on the one hand, can make out a prima facie case of retaliation, and shift the burden of persuasion to the defendant, with circumstantial evidence that her disclosure was a contributing (not necessarily a substantial or motivating) factor in the adverse personnel action taken against her; and the defendant, once the burden has shifted, must prove not merely by a preponderance but by clear and convincing evidence that it would have taken the same action against the plaintiff even in the absence of her protected disclosure."

By keeping good records an employee can establish evidence of discriminatory motives on the part of the employer and thereby shift the burden. Kohn cites 32 examples (pgs. 268-270) of factors, which have been successfully used. A few of these are:

** high work performance rating prior to engaging in protected activity, and low rating or “problems” thereafter;
** discipline, transfer, or termination shortly after the employee engaged in protected activity;
** change in attitude of management before and after employee engaged in protected activity, and attitude of supervisors toward whistle-blowers;
** absence of previous complaints against employee;
** differences between the way the complainant and other employees were treated;

--absence of warning before termination or transfer;
** willingness to deviate from established procedure;
** contradictions in an employer’s explanation of the purported reasons for the adverse action.

This misconception about the burden of proof is often shared by the employer as well. Frequently employers arrogantly believe they can do anything they want to punish or silence a whistle-blower just by inventing reasonable-sounding excuses for doing so. This can work to the advantage of the whistle-blower if he or she understands the law.

The whistle-blower can even get the employer to incriminate himself if he knows the law and the employer does not. For example, when I was transferred to a meaningless position shortly after blowing the whistle on EPA’s decimation of the hazardous waste regulations, my boss called me into his office to explain his rationalization for my transfer. I recognized that the reasons he gave were contrary to EPA rules but I kept quiet and let him talk. After the meeting I sent him a memorandum politely summarizing his comments and he returned it with a few minor corrections. This document later became the basis of my successful challenge to the transfer. In all but 7 states it is also legal to tape record conversations with your boss without your boss knowing it.

The second misconception is the uncertainty of a whistle-blower or would be whistle-blower that the act that he is concerned about may
not actually be illegal. After all, environmental law is a very convoluted and tricky business, perhaps intentionally so. For example an employee may be witness to the fact that his company is dumping toxic waste into a municipal landfill. His efforts to get the company to stop the practice are futile. His management assures him that the waste is not "technically" a hazardous waste because of loopholes in the EPA regulations. He doesn't know if that's true, but regardless, he believes that the practice is dangerous. He would like to blow the whistle on the dumping but he doesn't know if he'd be legally protected against retaliation if the dumping is lawful or if the company can convince the authorities that the dumping is harmless. Kohn points out he needn't be concerned (pg. 264):

"Under most whistleblower protection laws, an employee is under no obligation to demonstrate the validity of his or her substantive allegations. Although the safety or legal concern that resulted in the initial whistleblower disclosure need only be based on a good faith belief that an actual violation occurred, this 'good faith' belief must be based on 'reasonably perceived violations' of the applicable law or regulations. Employees are under no duty to demonstrate the underlying veracity or accuracy of their safety allegations."

A third misconception, perhaps brought about by movies such as SILKWOOD, is that retaliation has to be overt and severe before the whistle-blower can hope for any protection under the law. In fact the courts have recognized many lesser forms of retaliatory action (pg. 243):

"Under the nuclear, trucking, and environmental whistleblower laws, the DOL [Department of Labor] has 'broadly construed' the definition of adverse action to 'prevent the intimidation of workers through retaliation.' Various employer practices have been held to be illegal discrimination, including the elimination of a position, causing embarrassment and humiliation, transfers, and demotions; 'constructive discharge' (or making working conditions so difficult as to force a resignation); blacklisting; issuance of a disciplinary letter; a reassignment to a less desirable position (even with no loss of salary or grade); negative comments in an evaluation; a retaliatory order to undergo a psychological 'fitness for duty' examination; .... denial of promotion; threats; .... transfer to a position where employee could not perform supervisory duties; circulation of 'bad paper' comments and other forms of 'bad mouthing'; moving an office and denying parking and access privileges;..." and many, many other negative actions by employers (see pgs. 241-247).

However, none of this should lead to complacency. There are many pitfalls. If the courts are generous to whistle-blowers in applying the rules of evidence, they are very fussy about procedures. The U.S. Supreme Court is not the only court where deadlines are more important than justice. Kohn explains (pg. 5):

"One major weakness in many statutory whistleblower protection laws is the short statute of limitations.... Failure to comply with the statute of limitations is a common defense [by employers] in whistleblower cases, and the statute is generally held to start running at the time that an employee learns that he or she will be retaliated against, not on the last day of employment."

In most cases the statute of limitations is only 30 days. In other words, if a whistle-blower feels an adverse action has been taken against him, he must file a complaint with the appropriate authority within 30 days. Very often if the adverse action is something as amorphous as an unjust criticism or a change in work pattern it may take a while for the whistle-blower to even recognize that it was an adverse action and an even longer time to seek counsel and file the correct papers with the appropriate authority.

Federal employees are protected by many laws, the strongest of which are seven environmental and nuclear laws. However another

My personal advice to any whistle-blower is to make sure his or her lawyer has a copy of Kohn's book and has read it.


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