

## Case 10: The Board's Response to a Whistleblower

### I. CONTEXT

Although everyone applauds whistleblowers when they bring fraud and abuse to light, whistleblowers can be a mixed blessing. The board and management are charged with protecting the organization's assets and integrity. They should welcome efforts by employees and others to surface wrongdoing, particularly when a supervisor is attempting to cover up inappropriate activities. But not every whistleblower is correct in his characterization of events or activities. Sometimes supervisors will legitimately attempt to diffuse the whistleblower's efforts. Unfortunately, what may be a natural human response on the part of the supervisor may be viewed as retaliatory action by the whistleblower. This can lead to employment practices litigation.

As a consequence, boards and managements must walk a fine line. On the one hand, the board should adopt policies that encourage whistleblowers to bring potential problems to the board's and management's attention. On the other hand, the board must make sure that whistleblowers don't disrupt the organization by aggressively pursuing what are erroneous claims and concerns. One observer has said, "Whenever there is a whistleblower, somebody is going to be fired. That person will either be the wrongdoer, or the person who makes the accusations that turn out to be false." That may be a common perception, but the board must assure that there is no retaliation against whistleblowers who are acting in good faith.

### A. FALSE CLAIMS ACT

The Federal False Claims Act provides for the imposition of penalties on entities that make false claims to the Federal government. Section 3730(h) of Title 31 of the United States Code provides protection to employees who blow the whistle. Specifically, Section 3730(h) provides:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of his employer or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

### B. STATE ANALOGUES

State laws also provide protection to whistleblowers. These protections are often analogous to the ones under federal law, or they can take the form of more general protections under state fair labor laws. The following are two examples of state laws:

#### 1. ILLINOIS WHISTLEBLOWER ACT

Under Illinois law 740 (ILCS 174), an employer cannot make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency if the employee has reasonable cause to believe that the information discloses a violation of a state or federal law, rule, or regulation. Nor may an employer retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of

a state or federal law, rule, or regulation. The act provides the employee with the right to bring a lawsuit for damages in the event of a prohibited retaliation.

## 2. CALIFORNIA LABOR CODE

Section 1102.5 of California's Labor Code provides that no employer may make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Moreover, no employer may retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

## II. FACTS

Alpha Community Action (Alpha CAA) had a subsidiary that developed and managed affordable housing. An employee complained to another employee and a member of the subsidiary's board that the subsidiary's practices involved "collusion, conflicts of interest and fraud" in the "preparation of office reports, methods of awarding housing units, the tenancy selection process, the bidding process, accounting methods and procedures, [and] awarding contracts." The employee, who had a \$30,000 annual salary, was terminated. She filed suit claiming harassment, intimidation, and wrongful termination. The suit focused on the actions of the housing and community services director and the deputy executive director. Newspaper accounts are unclear whether these individuals worked for Alpha CAA or its subsidiary. The outcome of the suit is unknown.<sup>1</sup>

## III. DISCUSSION QUESTIONS

The following questions are offered for discussion:

- A. Is it sufficient for a board to adopt a whistleblower policy, or are there other steps that a board should take to protect whistleblowers?
- B. Is a whistleblower policy primarily for the benefit of employees?
- C. Should the board have one point person to handle all whistleblower complaints?

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<sup>1</sup> This incident is now over a decade old. That places practical limitations on obtaining additional details.

## IV. ONE SUGGESTED SOLUTION

Every nonprofit should adopt a whistleblower policy, even those operating in jurisdictions that provide whistleblowers with no or minimal protections. Although many view whistleblower policies as laudable employment practices, the organization and its board are the primary beneficiaries of these policies. They are another internal control. Those who are willing to report a problem to the board or individuals outside normal reporting channels are bringing important information to the board's attention, information that some might prefer remain hidden.

### A. WRITTEN POLICY

A written statement is only the first step in implementing a whistleblower policy. The board must foster an environment that encourages employees to report potential problems. The board can facilitate the process by incorporating the policy into the employee handbook and other employment practice guidelines. The board should also instruct management to address the policy as part of ethics and employment law training.

### B. BUILDING CHANNELS

The board should encourage management to develop communication channels. In the case of employment practices, the board might designate someone in the personnel department as the proper person to receive reports from employees. In the case of concerns involving financial fraud and abuse, the board might designate its own audit or finance committee as the appropriate recipient for reports.

### C. ANONYMITY

The board must address the question of anonymity and confidentiality. This means working with legal counsel. A blanket promise of anonymity can hamper an investigation into allegations. If the report results in formal legal proceedings, the employer may not be able to keep the identity of whistleblower confidential. However, it is a good idea to permit anonymous reporting because despite assurances that they will be protected, many people nevertheless continue to fear and expect retaliation. Ultimately, the primary purpose of the policy is to protect the organization from the consequences flowing from misdeeds, legal violations, and abusive or inappropriate behavior. That means that the organization should take the necessary steps to surface what it vital information. If management perceives that the vast majority of employees fear retaliation, the organization should assess why that may be so and identify appropriate changes in the organization's operations. In the meantime, the organization should consider one of the many hotline operators providing these services to employees.

### D. CONSULT AN EMPLOYMENT PRACTICES LAWYER

Reports by whistleblowers often turn into "he said, she said" disputes, making these reports potentially explosive. When dealing with a whistleblower, the organization should err on the side of seeking legal counsel from an employment lawyer. As an example, an organization might in good faith decide to reassign a whistleblower to protect her, but the whistleblower could mistakenly characterize the new assignment as retaliation, or could claim that the new assignment violates the Americans with Disabilities Act or other acts prohibiting different forms of discrimination.

## V. BACKGROUND MATERIAL

For additional commentary, review Section IV (Whistleblowers) of the Background Material accompanying the case studies.