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Blowing the Whistle on Whistleblower Protection Laws

 “Don’t put your head up, because it will get blown off” (United States Merit Systems, 6). To most, this sounds as if it would be an order a general would give in a combat zone, however that is not the case. This was the advice a former Special Counsel official had given to the about whistleblowers. People are often discouraged from coming forward as a whistleblower for this reason: for fear of the repercussions from their action. Despite this fear, individuals have continued to come forward in order to report wrongdoings they are witnessing. The current protection laws in place for such whistleblowers are not effective in order to fully protect someone after he or she reports wrongdoing. This project will flow as followed: First, a definition of whistleblowers and retaliation will be given. Second, the current whistleblower protection laws will be explained. Third, an explanation about the weaknesses in these laws will be given. Fourth, the explanation will be given on what entails an effective whistleblower protection law. Finally, three case studies will be given. The first involves Assistant U.S. Attorney Richard Concertino and the Department of Justice. A second case study involves Sibel Edmonds and the FBI. The final case study involves the individuals in Abu Ghraib. Before understanding the weaknesses in protecting whistleblowers, it must be understood how a person becomes a whistleblower.

 For many individuals, the title “whistleblower” has many different connotations or slight variations in meaning. As defined by the Whistleblower Protection Act of 1989, a whistleblower is someone “disclosing information that an employee reasonably believes is evidence of illegality, gross waste, gross management, abuse of power, or substantial and specific danger to public health or safety” (Devine, 1). While the definition of a whistleblower may seem like an easy term based off this, the concept of a whistleblower is much more complex.

For some individuals, the definition of being a whistleblower has more to do with a commitment to the truth as opposed to the commitment to reporting an illegal action. Ernie Fitzgerald, the Pentagon whistleblower, once described whistleblowing as “committing the truth” due to the way the people the whistleblowers are speaking about react (Devine, 2). The offenders often react to whistleblowing as if the whistleblower is the individual committing a crime as opposed to just reporting an illegal action being committed by another. Because of the consequences that sometimes stem from the whistleblower’s actions, there is a negative connotation that accompanies whistleblowing. For some people, they would define a whistleblower as a tattle-tail, something similar to what children may describe someone who goes to the teacher on the playground when a fellow classmate or sibling breaks the rules of a game. Some people believe that being a whistleblower is wrong and is a violation against the group’s values, beliefs, and trust.

 No matter whether a whistleblower carries a positive or negative connotation, whistleblowers often aid the government or society as a whole significantly. According to Stephen Martin Kohn, one of the leading whistleblower attorneys in the country, whistleblowers are quite possibly one of the most effective tools for reporting criminal and corporate activities (Kohn, xii). Whistleblowers are more likely to find wrongdoings that many investigators and auditors would not be able to find on their own. Even the Association of Certified Fraud Examiners believes whistleblowers are an effective tool. “Tips were by far the most common detection method. In our study, catching nearly three times as many frauds as any other source of detection…Not surprisingly, employees were the most common source of fraud tips” (Kohn, xiii). One of the reasons a whistleblowers are more effective in delivering and showing wrongdoing is because they are more knowledgeable about the individual or group that is committing the wrongdoing since they associate with these individuals often.

 Whistleblowers may have different reasons for coming forward. One common reason someone may choose to report the wrongdoing may be for the financial benefits. If someone steps forward as a whistleblower in the private sector, the individual stands to receive “between 10 percent and 30 percent of a penalty if it’s more than $1 million” through the Dodd-Frank Act (Rubenfeld, 1). Through the False Claims Act, in exchange for the government collecting a monetary penalty from contractors who have committed some type of wrongdoing against them, the whistleblower receives between 15 and 30 percent of the money collected (Kohn, 7). In 2011, the Internal Revenue Service awarded eight million dollars to ninety-seven individuals for coming forward as whistleblowers. By 2012, the amount of money awarded almost tripled, giving twenty four million dollars to almost one hundred individuals (Sullivan, 1). On average, if a whistleblower does receive a financial award, it usually is estimated to be between $330,000 and $500,000 (Sullivan, 1). However, there are cases in which a whistleblower may receive an award that is worth millions of dollars. For example, in a case involving tax fraud with a Swiss bank, the whistleblower received $104 million from the United States Internal Revenue Service for his information as a whistleblower (Temple-West and Browning, 1). For some individuals, this financial incentive is enough reason to come forward.

 For other whistleblowers, however, the incentive to come forward is based on principle more so than financial gain. These individuals feel that it is the moral or the right thing to do. It becomes a decision based on values. A whistleblower for the Equal Employment Opportunity Commission once stated, “When you work your way up like I did, you have a pride in your work. You have to stand up, not just for yourself, but for a principle. At the time, I made a decision of conscience” (Devine, 8). These whistleblowers want to be able to feel that they did the right thing about coming forward, not necessarily for the praise or money they may receive.

 While people may become whistleblowers for different reasons, in the end their goal is the same: to end some type of wrongdoing that is taking place. However, when people do come forward with such information, sometimes that action haunts them for years, even after the investigation is complete. Sometimes, the ones who they reported take action against them, bring retaliation against the whistleblower.

 In a report delivered by the Senate in 1978, one Senator reported “Often, the whistle blower’s reward for dedication to the highest morale [sic] principle is harassment and abuse” (United States Merit Systems, 1). Retaliation is defined as the negative action that is brought against an individual due to his or her actions as a whistleblower. It can also be viewed as bringing revenge upon someone because they reported the wrongdoings that are taking place. The United States Merit Systems Protection Board (MSPB) has developed eight criteria that is needed in order for a whistleblower to determine that they are being retaliated against in the government’s eyes. In order to prove retaliation, an individual must:

1. Disclose conduct that meets a specific category of wrongdoing set forth in the law.
2. Make the disclosure to the ‘right’ type of party. Depending on the nature of the disclosure, the employee may be limited regarding to whom the report can be made.
3. Make a report that is either: (a) outside of the employee’s course of duties; or (b) communicated outside of normal channels.
4. Make the report to someone other than the wrongdoer.
5. Have a reasonable belief of wrongdoing. The employee does not have to be correct, but the belief must be reasonable to a disinterested observer.
6. Suffer a personnel action, the agency’s failure to take a personnel action, or the threat to take or not take a personnel action.
7. Demonstrate a connection between the disclosure and the personnel action, failure to take a personnel action, or the threat to take or not take a personnel action.
8. Seek redress through the proper channels. (United States Merit Systems, iii).

However, despite these eight standards, there is still ambiguity in whether an individual actually has been retaliated against. Meeting these eight standards can still not be enough to bring retaliation charges against an individual or company. Due to the law, if the company or agency can provide reasonable and convincing evidence that supports the actions that are allegedly retaliation, the retaliation charges can be dropped.

There are multiple reasons why someone may retaliate against a whistleblower. One of the main goals of retaliation is to serve as a form of intimidation or to instill fear into the whistleblowers. The retaliator is attempting to show that he or she or the organization is more powerful than the individual whistleblower in an attempt to instill fear or concern (Devine, 27). Another reason someone may retaliate against a whistleblower is in an attempt to silence the whistleblower to prevent them from going through with the report or to stop the investigation (Parmerlee et al, 19). Organizations may also use retaliation as an attempt to deter others from coming forward as whistleblowers as well, making the whistleblower an example of what could happen if others choose to follow his or her path (Parmerlee et al, 20). Despite the reasons for retaliating, the end result is the same: to cause the whistleblower harm.

One common way a retaliator may commit such actions is by focusing on the whistleblower as a person, not the issue that he or she reported. Typically, a retaliator will focus on the whistleblower’s motivation, professional ability, credibility, or any other aspect of the individual (Devine, 28). In doing so, the retaliator is making the whistleblowing a personal action as opposed to an action about business. Tom Devine of the Government Accountability Project described it as being similar to a modern-day witch-hunt being launched against the whistleblower (28). Some other aspect of retaliation is that, in some cases, the retaliator is willing to commit felonies in order to retaliate. This can go to the extreme of placing the whistleblower’s life at risk (Koch and Ellis, 215). In cases involving the government, sometimes the retaliation involves the highest levels of government (Koch and Ellis, 212).

One way many whistleblowers are often retaliated in the workplace. Patrick Burns, a spokesman for Taxpayers Against Fraud, believes that an individual’s employment after he or she becomes a whistleblower may be altered. “There is a 100 percent chance that you will be unemployed – the question is, Will you be forever unemployable?” (Sullivan, 2). There are a variety of techniques a company may use in order for these whistleblowers to lose their employment. One common example is when a company or agency decides suddenly to reorganize the organization, causing the whistleblower to lose their job or to be demoted to a less standing position (Devine, 37). One example of this type of retaliation involves Mike McQueary, who was the whistleblower in the Jerry Sandusky incident at Penn State University. After coming forward with evidence of Sandusky molesting young boys, McQueary faced difficulties at Penn State as an assistant football coach. McQueary is currently suing the university, claiming that his actions as a whistleblower are the reason why he was not hired back. He claims that he was the only assistant football coach who was not asked to interview for his job, believing this shows retaliation on the part of the University (Iaboni, 1). In other cases, the agency or company may go as far as to restrict the whistleblower’s access to research and data and add additional restrictions that make it impossible for the individual to complete the tasks that are necessary for completing their job (Devine, 34). When retaliation occurs in the workplace, whistleblowers often experience a decrease in support from supervisors or even termination.

Another way a whistleblower may be retaliated against is by having the retaliator using the whistleblower’s record against them, sometimes falsifying the incidents. In the past, government agencies or private companies have been known to alter the whistleblower’s record to hurt not only their current employment, but their chances of future employment opportunities as well. Often, employers will state in a whistleblower’s record that he or she was “a chronic problem employee who has refused to improve,” or something of a similar claims (Devine, 31). To support these claims, employers may include a memorandum about some incident, exaggerating details or that may not even be true. Once these changes or incidents are filed into his or her record, the whistleblower will most likely be sent to a “counseling” session, which is confrontational on purpose in order to incite the whistleblower into lashing out. It is similar to the idea of hitting a sore topic in order to arouse negative feelings in the individual. Since the whistleblower would not have few, if any, rights to defend himself or herself, the individual is written up yet again, eventually leading to their termination (Devine, 31). This is a process that has been commonly documented among whistleblowers.

These types of retaliations in the workplace happen more often than people may suspect. In a study conducted by the United States General Accounting Office, a survey among federal employees who had previously sought whistleblower protection from the Office of Special Counsel showed the public what a whistleblower actually experiences following them coming forward. The results showed that approximately 58 percent of participants believed that their performance appraisal was lowered due to their actions as a whistleblower, while approximately 51 percent reported being denied an expected promotion for the same reason. Approximately 82 percent believed their professional reputation was damaged due to their actions as a whistleblower (United States General Accounting, 26). As the Senate Committee on Governmental Affairs reported it, “Often, the whistleblower’s reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss” (Fisher, 5). Overall, most whistleblowers encounter some type of retaliation in their professional career due to coming forward about a wrongdoing.

In many cases, retaliation may affect the person’s private life in addition to their professional life. John Phillips, founder of Phillips & Cohen Law Firm and creator of the amendment in 1986 to the False Claims Act, believes that whistleblowers go through much more than just the retaliation in the workplace. “If you look at the field of whistleblowers, you see a high degree of bankruptcies. You may find yourself unemployable. Home foreclosures, divorce, suicide and depression all go with this territory” (Sullivan, 1). This belief is supported in the results from the U.S. General Accounting Office. Approximately 51 percent of whistleblowers reported feeling depression to a very great extent, while approximately 48 percent expressed a lowered sense of pride (United States General Accounting, 28).

In extreme cases, some whistleblowers face physical harm for their actions. Physical retaliations can vary in severity. Some cases can include bodily harm. One example involves a Metropolitan Transportation Authority employee in New York City. Juan de los Santos reported in 2009 that there were periods in which employees for the MTA just sat around for hours at a time, which is estimated to have cost the MTA approximately $10 million. After reporting the employee misconduct, de los Santos was reportedly pushed off a platform onto a railway. He suffered broken teeth, a broken nose, and a gash on his face that required eight stitches (Donohue, 1). It is believed by officials that this injury is connected to his actions as a whistleblower.

In other cases, there have been incidents where a whistleblower’s actions have led to their death. One such example is Karen Silkwood, a laboratory analyst at Kerr-McGee Cimarron Nuclear Facility in Crescent, Oklahoma. Silkwood came forward to express concerns about the safety of employees at the nuclear facility. Eventually, Silkwood reported to the Atomic Energy Commission with these concerns. However, soon after she came forward as a whistleblower, Silkwood found her own safety to be in jeopardy. Her apartment was contaminated with plutonium with everything inside destroyed. Later, as Silkwood was on her way to meet a journalist from the *New York Times* to discuss the issues when her car was mysteriously ran off the road, leading to her death. It has believed that she was transporting documentation to support her claims about Kerr McGee nuclear facility, but when her body and the car were discovered, there were no such documents present (Jenkins, 1). The retaliation against Silkwood eventually led to her own death.

Faced with such retaliation tactics, many whistleblowers, through their experiences, feel very dissatisfied with the protection of whistleblowers. Over 80 percent of whistleblowers reported that they felt that protection of whistleblowers against retaliation was very inadequate (United States General Accounting, 30). In order to help individuals to be more likely to become a whistleblower, there needs to be guaranteed protections for them to ensure the types of retaliation previously discussed will not fall upon them. Whistleblowers need to feel secure and protected for what they are doing.

Throughout the history of the United States, there has been many attempts to provide laws that help with the regulation and protection of whistleblowers. There has been some legislation that has only loosely covered whistleblowers to pieces of legislation that have their main purpose being to strengthen aid for whistleblowers. No matter what kind of legislation is used, each policy has its areas of effectiveness and areas in which it caused the whistleblower more harm than good.

The first piece of legislation in American history that dealt with whistleblowers is called the False Claims Act. First created in 1863, that President Lincoln called this piece of legislation “a bill to prevent and punish frauds upon the Government of the United States” (Kohn, 9). This policy is also referred to as the “qui tam” statute, which translated from its longer phrase in Latin, means “who brings action for the king as well as himself” (West, 1). The target of this piece of legislation were individuals who attempted to do the government harm.

The original purpose of the False Claims Act was to prevent deceitful suppliers to the Union military. During the Civil War, there were manufactures that the federal government had contracts with, but instead the companies would sell the government faulty equipment and supplies on purpose. For example, one government contractor sold the federal government saw dust and tried to pass it off as gunpowder (Kohn, 8). After further investigation, Congress soon discovered that there were employees in these companies that had prior knowledge of the misconducts taking place and were retaliated against when they attempted to come forward with the information. Congress passed the False Claims Act in 1863 in hopes of preventing such action from happening again. It was an attempt to encourage such people, soon to be called whistleblowers, to come forward with such information.

This law allowed for the first time individuals to sue on the government’s behalf if the individual was aware of misconduct being done upon the federal government. So, for example, in the case of Eli Lilly and Company, a drug company, when an employee of the company came forward about how the company was denying the government and doctors out of funds, the employee that came forward could file the suit (Kohn, 7). If the case is successful, the whistleblower is eligible to win up to thirty percent of the civil penalties the defendant is charged (West, 3). This law had the whistleblower taking a more active role throughout the process.

This law also brought forward information about retaliation against a whistleblower. The False Claims Act protected whistleblowers from all forms of discrimination. If a whistleblower faced any harm or discrimination, he or she could file a separate claim against their employer, which would be heard by the United States District Court (Devine, 10).With the law’s creation, there was no standard on who bared the burden of proof in such cases. This made it difficult to apply the law because different courts would apply different standards. For example, some courts would go as far to require a “clear and convincing” standard in such cases (West, 5). However, in 1986, almost one hundred and twenty three years after its creation, Congress passed an amendment to the law in order to provide clarity and consistency. In order to win their case, the burden of proof fell upon the whistleblower to prove that they were being retaliated against. According to this law, if a whistleblower wins his or her case of retaliation, the whistleblower acquires he or her job back, twice the amount of back pay plus interest, and additional compensation (Devine, 132). This was the first time an attempt to prevent retaliation upon whistleblowers was brought forward in a piece of legislation.

One of the main purposes of this bill, as identified as the bill’s author Senator Jacob Howard, was “‘based’ on the ‘old-fashioned idea of holding out a temptation’ for persons to step forward and turn in thieves” (Kohn, 8). By having the financial incentive tied into the reporting of wrongdoing by a whistleblower as well as the increased protections from retaliation, the hope was that more individuals would be willing to come forward as a whistleblower to help prevent the actions that were witnessed during the Civil War.

For many individuals, the False Claims Act was a piece of legislation that was viewed as being ahead of the times. Since it was before the industrialization of the United States, it was not used often until fifty years later once the United States once again found itself in a war-era of manufacturing. After being dormant for many decades, by 1943 there were approximately twenty eight cases pending in the courts that involved the “qui tam” statutes (Kohn, 9). Among these cases included some reports against the country’s biggest corporations, including Illinois Steel Corporation, Anaconda Wire & Cable Company, and Hague Machine. These cases began to show the federal government whether this piece of legislation was useful or if it needed some more work. The growth of the industrial industry in the United States during the first half of the 20th century gave the nation the chance to test the False Claims Act.

While the False Claims Act appeared to have the whistleblower’s best interest in mind, when practiced in the real world the law is not as effective as lawmakers had hoped it would be. For example, when the law was put into use between 1995 and 1996 as the defense of some cases, the whistleblowers did not win any of the five cases on file during that period. Also, in many instances the courts have prevented federal employees from using the False Claims Act to their benefit (Devine, 133). Other groups of people that are barred under this law includes of the military, of Congress, of the courts, or of executive branches (West, 9). Tax fraud cases also are not eligible for prosecution or investigation under this law (West, 9). This effectively prohibits use of this law to just the private market (Devine, 133). Thus, for example, if an individual who works for a federal agency wants to come forward with information concerning wrongdoing in their agency, they cannot file anything with the False Claims Act. This greatly limited the number of individuals who could file a case under the False Claims Act and left a major loophole in the legislation.

After over one hundred years under the False Claims Act, Congress was aware that the whistleblower laws needed to be updated to close these loopholes discovered throughout time. In order to provide more updated protections for whistleblowers, Congress passed the Civil Service Reform Act of 1978 was passed.

The passage of this policy provided many firsts for the arena of whistleblower protections. For the first time this piece of legislation provided a legal mandate for protecting whistleblowers within the civil service area (United States Merit Systems, 1). As Senator Jim Sasser described it while the bill was being debated, “patriotic employees who bring examples of official wrongdoing to the public’s attention have, in the past, enjoyed no meaningful protection against reprisals by their supervisors” (Fisher, 6). Now, government officials had more freedom and protections to come forward as a whistleblower. Another first with this piece of legislation was that it provided procedural protections for whistleblowers (Fisher, 5). Now there were newly created departments designed to work with whistleblowers. The False Claims Act had left the procedure of becoming a whistleblower very vague. Now, some of the vagueness was given more definition. The Civil Service Reform Act also provided an exception for areas within national security, which included people within the FBI, CIA, NSA, and any other intelligence gathering department as opposed to the broader classifications with the previous legislation. This exception was included because legislators did not want individuals who revealed classified or prohibited information to the public (Fisher, 7). Whistleblowers within the FBI were given an exception to this clause if the individual agreed to follow the procedural process and did not reveal the information in a public setting (Fisher, 7).

The Civil Service Reform Act also provided major reforms in the reporting and processing of whistleblowers. Replacing the Civil Service Commission, the government now created many new departments, including the Office of the Special Counsel, which falls under the newly created United States Merit Systems Protection Board (United States Merit Systems, 6). The Office of the Special Counsel’s main purpose was to investigate forbidden personnel practices, including those involving whistleblowers. As described within the law, one of the merits of the department was that “employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences (A) a violation of any law, rule, or regulation, or (B) mismanagement, a gross waste of funds….” (Fisher, 5). When the Office of the Special Counsel had enough support, it would present the evidence to the Merit Systems Protection Board in order for the Board to deliver corrective or punitive punishments (Koch and Ellis, 51). The Office of Personnel Management was also created, causing the Civil Service Reform Act to create a total of three departments within one piece of legislation (Fisher, 5). By having the increased presence with three new departments, legislators had hoped this would allow whistleblowers more avenues to come forward about information and to receive the help they need.

According to Alan Campbell, the Chairman of the Civil Service Commission, passing the Civil Service Reform Act of 1978 showed that the United States believed that federal personnel management “was at the top of the nation’s policy agenda” (Ingraham and David, 1). However, in the years that were to follow the passage of this piece of legislation, the lack of effectiveness of the legislation made whistleblowers and the American public feel that maybe whistleblowers were actually at the bottom of the nation’s policy agenda.

This news did not come as a shock to Congress, however. Even at the passage of this piece of legislation Congress was aware that the bill may not be successful. “[R]eform has consequences that you don’t like sometimes, but the best reforms aren’t going to work unless people make them work” described Representative Morris Udall at the signing ceremony (Fisher, 12). By the ten year anniversary of the passage of the Civil Service Reform Act of 1978, the Office of the Special Counsel had been proven to not be effective at doing their jobs. Since 1979, the Office of the Special Counsel had yet to bring a single correction action for a whistleblower before the United States Merit Systems Protection Board (United States Merit Systems, 6). Overall, approximately ninety nine percent of all whistleblower retaliation cases brought before the Office of the Special Counsel had been closed without any action (Durwood, 1). In one case, a possible whistleblower renamed the OSC himself: “The Office of Secrecy and Coverups” (Durwood, 1). Whistleblowers reported to the Governmental Affairs Committee that the Office of the Special Counsel had acted only in the office’s own interest, not those of the whistleblowers. The Committee submitted a recommendation to Congress that the Office of the Special Counsel be done away with altogether (United States Merit Systems, 6). By the ten year anniversary, Congress knew that overhauls needed to come. The previous ten years had shown Washington that whistleblowers were dissatisfied and scared of what was happening.

Prior to this ten year anniversary, in 1985, the government witnessed first-hand what happens when there are ill-effective whistleblower protection laws. During a House Hearing before the Committee on Post Office and Civil Service, many federal employees provided contradictory information concerning the level of whistleblower protection. In the end, Representative Pat Schroeder concluded that “there is no dispute – whistleblowers have no protection. We urge them to come forward, we hail them as the salvation of our budget trauma, and we promise them their place in heaven. But we let them be eaten alive” (Fisher, 14). For four years, legislators would work to find a new piece of legislation that met the needs of these unprotected whistleblowers, negotiating and compromising with the administration (Norman, 1).

During the 100th session of Congress, Senator Carl Levin of Michigan was determined to correct these wrongs brought up during the House hearing. In 1988, Levin proposed The Whistle-Blower Protection Act of 1988. Focusing on federal employees, the bill would attempt to reestablish the burden of proof and judicial review. Instead of maintaining the current “significant reason” standard in order to prove retaliations, whistleblowers would only need to prove it was a “factor” (Norman, 1). Changing this from “significant reason” standard to a “factor” standard, it meant that the burden of proof for whistleblowers was lower, making it easier for whistleblowers to prove retaliation. By lowering the standard, the hope was that whistleblowers would be more successful in their retaliation cases than they were prior to the creation of the bill. In addition, the Office of the Special Counsel would become a separate entity from the Merit Systems Protection Board (Associated Press “Congress,” 1). By separating the two entities, the Office of the Special Counsel would be able to focus mainly on protecting whistleblowers.

For the members of Congress, they felt that this bill was a success. In the House, the bill was passed overwhelmingly by a 418-0 vote. In the Senate, they were able to pass the bill with a simple unanimous voice vote (Associated Press “Reagan,” 1). Even the Office of Management and Budget, who many believed were acting as Reagan’s voice, agreed to the bill (Norman, 1). Leading up to the signing of the bill, journalists believed that the Reagan administration would sign the bill into law in some form.

However, in October 1988, the American public was shocked when President Reagan revealed in a two page memo stating that he was planning on letting the bill die as a pocket veto with the advice of his Attorney General Richard Thornburgh (Norman, 1). The Reagan administration cited many concerns, including that the bill would like people who are not actual whistleblowers “manipulate the process to delay or avoid proper discipline” (“Reagan,” 1). The executive branch also raised constitutional concerns about the legislation, believing that the fact that agencies would be able to bring cases against each other in the courts would overstep his constitutional ability to act as a mediator in disputes within the executive branch (Margasak, 2).

The pocket veto of The Whistle-Blower Protection Act of 1988 stirred much tension among both Congress and whistleblowers. Senator Charles Grassley of Iowa believed that the pocket veto of this bill showed the executive branch’s priority in regards to whistleblowers. “We worked with the administration far too closely for Thornburgh and company to now suggest there are unresolved constitutional questions. But then this administration hasn’t exactly a sterling record where whistleblowers are concerned” (Margasak, 2). The bill’s author Senator Levin felt that a trust between Congress and the executive branch had been violated. “It’s outrageous conduct and has created a bipartisan explosion, because it violates the basic understanding we need but now no longer have…that an administration’s word is good” (Associated Press “Reagan,” 2). Despite the pocket veto, Congress was determined to not let this bill fail going into the next session of Congress in a few months.

On January 3, 1989, at the beginning of the George H. W. Bush administration and the 101st session of Congress, Representative Patricia Schroeder introduced the Whistleblower Protection Act of 1989 to the House of Representatives. Almost three weeks later on January 25th Senator Levin presented his version before the Senate (*Congressional Record 1989,* 2). The versions that the House and Senate both submitted were identical to the bill that Reagan had pocket vetoed a few months prior. Now, under the Bush administration, legislators were hoping that this time the bill would get that signature they so desired.

This bill, just like the bill from 1988, had four main goals with a focus on federal employees with its passage. First, the Office of the Special Counsel would become a separate entity from the United States Merit Systems Protection Board. Second, legislators wanted to override the previous court decisions that made it difficult for whistleblowers to have their claims proven. Third, whistleblowers could now have a body, the United States Merit Systems Protection Board, to appeal their cases to if they were not pleased with the actions of the Office of the Special Counsel, which was not a concept in place before this legislation. Finally, this policy would ensure that the Office of the Special Counsel followed through with their mission to help whistleblowers (*Congressional Record* 1989, 3).

One of the key components that legislators wanted to change did not come with the new legislation, however. Instead of the “factor” standard legislatures wanted to see with the new whistleblower protections, Congress was forced to keep the “clear and convincing evidence” standard with the Whistleblower Protection Act of 1989 in order to ensure its passage this time (Fisher, 20). However, legislatures were able to make a slight change to this, finding a compromise that required a “contributing factor” test be applied to retaliation cases. This placed the burden of proof on the agency to provide “clear and convincing evidence” that the retaliation was not taking place (Fisher, 20). This means that all the whistleblower has to prove is that their actions were just a factor, not the sole reason, the retaliation took place.

Less than two months after it was proposed in the Senate, it was passed with a 97-0 vote. By the end of the next week, the House suspended rules and passed the legislation on a voice vote. The legislation was presented to President Bush on April 3, 1989. The Whistleblower Protection Act of 1989 did not receive the same fate as its predecessor to the joy of Congress. Bush signed this bill on April 10, 1989, making it law (*Congressional Record* 1989, 4). As President Bush described it at the signing ceremony, “A true whistleblower is a public servant of the highest order…[T]hese dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment” (Fisher, 20). With the passage of this bill, government officials felt that they were one step closer to ensuring this for whistleblowers across the country.

Within the first two years of the passage of the Whistleblower Protection Act of 1989, twenty percent of whistleblowers were winning decisions with the United States Merit Systems Protection Board, jumping up from the mere one percent prior to the passage (Fisher, 21). It appeared that this policy was finally helping whistleblowers win the protections they so desired. However, after these first two years, this hope began to decline yet again. Between 1991 and 1994, this number of winning decisions had dropped yet again, this time down to five percent (Fisher, 21). It appeared that the initial hope that accompanied the legislation was disappearing yet again.

 In the fall of 1993, the General Accounting Office conducted a study among whistleblowers about their satisfaction with the process to see if the legislation was working as they had hoped it would. The results were gruesome to legislators. Approximately eighty-five percent of whistleblowers rated the effectiveness of the Office of the Special Counsel as either low or very low (United States General Accounting, 6). Even more shocking was the whistleblowers’ lack of knowledge about the Whistleblower Protection Act of 1989. Forty-two percent of whistleblowers reported that they had little to no knowledge of the provisions in the act (United States General Accounting, 6). Even fewer whistleblowers were aware that there were provisions within the act to help in retaliation cases. Approximately eighty seven percent of whistleblowers reported that retaliation took place following their actions as a whistleblower (United States General Accounting, 19). This was very alarming because the purpose of the Office of the Special Counsel was to help show whistleblowers what their options were. If whistleblowers were unaware of the available protections after working with the OSC, it alarmed people about what the OSC was actually doing.

In the end, the General Accounting Office reported that “[i]t was troubling that so many complainants in the whistleblower reprisal complaint process believed that OSC did not adequately represent their interests” (United States General Accounting, 7). In the end, they recommended that the Office of the Special Counsel work with the Subcommittee on the Civil Service to determine what exactly about the process whistleblowers were dissatisfied about (United States General Accounting, 7). As described by the House’s Committee on Post Office and Civil Service, “while the Whistleblower Protection Act is the strongest free speech law that exists on paper, it has been a counterproductive disaster in practice. The WPA has created new reprisal victims at a far greater pace than it is protecting them” (Fisher, 21). After investigation, the Office of the Special Counsel determined that one way to help relieve this concern may be rooted in better education of federal employees of their rights if they were to become a whistleblower.

Reflecting this research and people’s concerns, in 1994 Congress reevaluated the Whistleblower Protection Act to see if any amendments or changes could be made to help provide further protection to whistleblowers and direction for the Office of the Special Counsel. One of the four amendments that came about involved the representation of the whistleblower. Now, whistleblowers would have their attorney’s fees covered if the MSPB or an administrative law judge felt that it was in the best interest of the whistleblowers to provide such protection (Fisher, 22). Another change provided by the amendments was that ten days prior to the closing of a whistleblower retaliation case, the Office of the Special Counsel was required to submit a written report stating why this was necessary action (Fisher, 22). By providing these two changes, legislators were attempting to make it harder for officials to close a retaliation case.

Despite this second attempt with the Whistleblower Protection Act of 1989, the policy still did not fare well with whistleblowers. Between 1999 and 2005, only two out of thirty whistleblowers who filed retaliation charges before the United States Merit Systems Protection board were successful in their cases (Fisher, 21). Legislators grew more aware of the need for better protections for whistleblowers and only new legislation could provide this needed support.

With the growing media attention of whistleblowers in such cases as Abu Ghraib and the Penn State scandal, whistleblowers were being seen by the American public. In 2011, nearing the end of President Barack Obama’s first term as President of the United States, Congress tried one more attempt in fixing the problems with whistleblower protections.

On April 6th, 2011, Senator Daniel K. Akaka of Hawaii introduced the Whistleblower Protection Enhancement Act into the Senate (*Congressional Record* 2011, 1). In November of the same year, Representatives Elijah Cummings and Chris Van Hollen of Maryland and Representative Todd Platts of Pennsylvania introduced the bill into the House of Representatives (“President Obama,” 1). Although these bills took the first half of 2012 to go through committees in their respective chambers, the goal of this piece of legislation was the same as its predecessors: to protect whistleblowers. As described by Samuel Rubenfeld, “It clarifies the scope of protected disclosures, tightens requirements for non-disclosure agreements, expands penalties for violating protections and adds to the staff of some federal agencies an ombudsman whose job will be to educate agency employees of their rights” (Rubenfeld, 1).

One of the major expansions that came with this piece of legislation was in regards to who would be protected as a whistleblower. Since the passing of the Whistleblower Protection Act of 1989, airport baggage screeners had moved into the realm of becoming federal employees. However, the prior legislation left some confusion as to whether these new federal employees were eligible for the whistleblower protection laws or if they fell into the national security exclusion clause. The Whistleblower Protection Enhancement Act of 2012 clarified that TSA workers indeed did qualify for whistleblower protections. This now meant that almost 40,000 more individuals qualified to be protected whistleblowers if they choose to do so (“President Obama,” 1).

Another result of this law was that there was clarity in the type of information whistleblowers could now reveal. Specifically, whistleblowers had more freedom to express concerns in regards to scientific and technological information. Now, whistleblowers could reveal information or evidence of censorship of this type of information just as a whistleblower may reveal information of other topics as well (“President Obama,” 1).

As seen through the past legislation, one commonality that was attempted in all these pieces of legislation was the standard in which proof of retaliation was set. With the new legislation, a standard of “significance motivating factor” was set in order to test for retaliation (United States Office, 1). This set a lower standard than what was previously used in hopes of making it easier for whistleblowers to win their retaliation cases. It means that there could be other reasons for the retaliation-like actions to take place, but the whistleblower’s actions must be the main factor in the actions of the suspected retaliator.

Throughout the history of whistleblower protection laws, there has been many changes in the standards used to prove retaliation. Below is a table to represent these change.

|  |  |  |
| --- | --- | --- |
| **Legislation** | **Standard Created** | **Meaning** |
| Civil Service Reform Act | “clear and convincing”  | “Evidence presented by a party during the trial is more highly probable to be true than not and the jury or judge has a firm belief or conviction in it” (Clear and*,* 1). |
| Whistleblower Protection Act of 1988 | “factor”  | Only has to prove that the action was taken into consideration by the retaliator. |
| Whistleblower Protection Act of 1989 | “clear and convincing” | “Evidence presented by a party during the trial is more highly probable to be true than not and the jury or judge has a firm belief or conviction in it” (Clear and*,* 1). |
| Whistleblower Protection Enhancement Act of 2012 | “significance motivating factor” | It is a factor, even if there are other factors in the decision as well. |

The Whistleblower Protection Enhancement Act also focuses on the actual retaliation case itself. One criticism of the United States Merit Systems Protection Board in the previous twenty plus years was that it would still dismiss cases before they had enough time to thoroughly evaluate the case or even collect all of the evidence. One example that was given was the fact that the D.C. Circuit Court had not yet ruled in favor of a whistleblower, helping the whistleblower win their case (News & Politics, 1). In order to attempt to correct these problems, a clause concerning a time period was added. Within a two year span following the case, a whistleblower has the option of having their case heard within a different court. This gives whistleblowers the option to work with other legal officials when they feel that they unfairly lost their case.

After passing through both the House and Senate in the second half of 2012, the legislation appeared before President Obama in November. On November 29, 2012, President Obama signed the Whistleblower Protection Enhancement Act of 2012 into law to go into effect immediately. The Whistleblower Protection Enhancement Act was created in order to tighten some of the loopholes that the previous whistleblower protection laws left behind. Based off the history of whistleblower protection laws, there are key elements that make the law either successful or harmful.

In order to properly protect whistleblowers, a description of effective tools within a piece of whistleblower protection legislation is essential. Throughout the history of this legislation, many trial-and-error methods have been used to see what actually will ensure the protection of whistleblowers. Also, sometimes what the government may view as being effective in protecting whistleblowers may not be effective in the eyes of the whistleblowers. An effective piece of whistleblower protection legislation must be able to look at all sides of the issue and all the components involved in the situation.

One of the main components in an effective piece of whistleblower protection legislation is ensuring the whistleblower’s protection both in the workplace and in their personal life as well. One of the most important aspects to help with this protection is maintaining a whistleblower’s confidentiality. When a whistleblower files a report concerning wrongdoing, many prefer that their identity be withheld from people in order to help ensure their safety. If they hold their confidentiality, it will become harder for individuals to be retaliated against. However, this has been a right that many have not been granted throughout the process. Many times information comes forward that reveals who is behind the information. The whistleblower then becomes the face of the problem. One example of this is the Penn State assistant football coach Mike McQueary. Throughout history, the only predominant case in which a whistleblower has been able to maintain his or her confidentiality was in the case of Watergate’s whistleblower Deep Throat. It was not until almost forty years after the scandal that Deep Throat’s identity was revealed to the public, and it was revealed by his own choosing. Most whistleblowers do not have this luxury however. In order to be an effective piece of whistleblower protection legislation, protections such as those granted to Deep Throat to contain his identity needs to be guaranteed to all whistleblowers. In the case of Deep Throat, one of the reasons why his identity was held a secret could be due to the fact he was working for the President. Even then, though, all whistleblowers should have that same level of protection no matter who they work for because they are all completing the same task: revealing wrongdoing.

In order to better ensure this desired protection, the risk of information being leaked needs to be lowered. One way to accomplish this is by containing the identity and other risky information to only certain people. When our military goes overseas and mails letters back home, it is common to see certain information blacked out that may give details on their location or other national security information. This same type of analysis needs to be applied to whistleblowers as well. Create a “need-to-know” standard for certain whistleblower cases. In doing so, it will decrease a whistleblower’s risk of having their identity revealed and facing retaliation. It is a proactive way of facing retaliation as opposed to a reactive way.

Another component to effective whistleblower protection laws needs to include what will happen if the identity of the whistleblower is revealed. Consequences and repercussions need to be in place in case an official decides to deny a whistleblower of their right to withhold their identity. Considering that such an action could cost a whistleblower their livelihood, their friends, and their way of life, these consequences need to be harsh in order to sway individuals away from breaking a whistleblower’s trust. One possible repercussion includes that the individual who is at fault in the leak will lose his or her job. By being responsible for the leak, this shows that the individual cannot be trusted with confidential information. If they cannot be trusted, this can make them a less valuable employee.

To go along with the last component in case a whistleblower’s identity is blown, guarantees need to be made for the whistleblower for life after taking on this identity. For many individuals, the reason they do not come forward as a whistleblower is for fear of losing his or her employment if it is discovered he or she was the one that came forward. In order to ease this concern for individuals, a piece that guarantees employment after the investigation would be highly effective. If a whistleblower loses his or her job due to the actions of becoming a whistleblower, the Office of the Special Counsel must assist the whistleblower in finding new employment within a year of termination.

Another component that creates incentives for whistleblowers to come forward is by offering a monetary reward for their actions. Many previous pieces of whistleblower legislation have already added this component. By adding a financial incentive, it will entice whistleblowers to come forward for multiple reasons. First, typically if money is offered as a benefit for an action individuals are more likely to do that action. Second, this financial incentive can help the whistleblower in case their identity is revealed and they are out of employment for the time being.

The final piece of an effective whistleblower protection legislation is a proactive step: education. For many Americans, even those working in federal agencies, they may not understand what a whistleblower is, let alone what kinds of protections they can receive if they become one. In order to help people feel more at ease with the option of becoming a whistleblower, individuals need to be educated on these rights. Within each organization as part of the orientation process for new employees, a component needs to be required that states that the agency or business must explain to individuals what a whistleblower is and what their rights are as a whistleblower.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | False Claims Act | Civil Service Reform Act of 1978 | Whistleblower Protection Act of 1989 | Whistleblower Protection Enhancement Act of 2012 |
| Education |  | X |  |  |
| Identity remain anonymous by the government for extended period of time |  |  |  |  |
| Guarantee employment afterwards |  |  |  |  |
| Financial Incentive | X |  |  |  |
| Consequences for revealing whistleblower |  |  |  |  |
| Contained risk of information leak |  |  |  |  |

As seen, not all of these components have been initiated in whistleblower protection laws. In order to properly protect a whistleblower, these aspects are needed in a piece of legislation in order to secure their safety. Many whistleblowers have experienced consequence of not having all of these components. In the past, there has been some demonstrated examples in which these components did not happen.

Throughout the years, there has been many cases involving whistleblowers. In some of the cases, the whistleblowers were able to go through the entire investigation without their identity being revealed, as was the case with Deep Throat in the Watergate scandal. However, in other cases, the whistleblower’s identity was known and their lives were drastically changed due to their actions. In order to analyze the effectiveness of previous whistleblower protection laws, three case studies have been chosen in order to give a real life view of the whistleblower process.

These cases were chosen based on different criteria. First, the timing of the case was taken into consideration. The preference was for cases that took place in the last ten years. By having more recent cases, it will be effective to see how whistleblower protection laws have come to interact with technology. A second criterion that was chosen was to focus on cases in the federal sector. By choosing such cases, it was important to see how the national security exclusion clause impacted these individuals. One example that fit these criteria was the case of former Assistant United States Attorney Richard Convertino.

In 2003, Convertino was prosecuting the first terrorism trial since the September 11th attacks. Four suspected terrorists were involved in a hotel raid in Detroit six days after attacks that produced fake IDs, airport security badges, and a planner that was believed to show planned attacks (Shepardson “Judge,” 1). While Convertino won the convictions, the Justice Department later had the convictions overturned for what they believed were misconducts on Convertino’s part. The Justice Department claimed that Convertino withheld evidence that the defense could have used to help show their client’s innocence. However, Convertino claims that he did not withhold this evidence. He claimed it was retaliation on part because he was acting as a whistleblower on behalf of the Senate (Sullivan, 4).

In September 2003, the Senate, being led by Senator Charles E. Grassley of Iowa, held a hearing on the Department of Homeland Security. The hearing’s focus was on identity fraud used by terrorists during their terrorist attacks. Convertino was subpoenaed and testified before the congressional committee which appeared to support an anti-Justice Department movement (Egan “Cleared,” 1). Convertino spoke out during the hearing, stating that he felt the Department was not properly handling the war on terrorism issue (“Prosecutor,” 1). It was not long after this hearing that Convertino began to face challenges from the Department. In December 2003, the Department of Justice’s Office of Professional Responsibility opened an investigation into the misconduct of Convertino during the investigation, later leaking some of the information to the media (Egan “Justice,” 2).

In 2004, Convertino filed a whistleblower retaliation lawsuit against the Department of Justice, particularly naming Attorney General John Ashcroft in the suit (Yost, 1). Some of the charges Convertino brought before the court included accusations of mismanaging the War on Terror and the violation of the Privacy Act (Yost, 1). Senator Grassley also came to Convertino’s aid, writing to the Department of Justice multiple times “to accuse department officials of taking ‘hostile actions’ and ‘reprisals’ against the trial prosecutors” (“Prosecutor,” 1).

Within days of Convertino filing a whistleblower retaliation suit against the Department of Justice, the Department embarked on a criminal investigation against Convertino. The Department asked the courts to hold Convertino’s suit until the investigation was complete because the suit “poses a substantial threat to the integrity of the criminal process” (Shepardson “Fed,” 1).

In October 2005, a federal judge dismissed half of Convertino’s suit because the court felt that the case should have been brought through the Office of the Special Counsel, but required the Department of Justice to provide an explanation on why the other charges should be held (Shepardson “Terror,” 1). Two years later, the Department of Justice asked the courts to drop the criminal charges against Convertino (Egan “Cleared,” 1).

While the charges were eventually dropped against Convertino, he still faced many difficulties. In 2005, he resigned from the Department of Justice as a prosecutor. In order to defend himself, he spent his entire life savings on the case (Sullivan, 4). In addition, by no longer working for the Department of Justice, he suffered an enormous life style change.

In Convertino’s case, it is demonstrated that some of the components that are needed for effective whistleblower protection laws were not present. For example, Convertino did not withhold his identity during the Congressional hearing. In the hearing, it was stated that anything Convertino stated was “not on public record, either in court documents or news reports” (“Whistleblower,” 1). However, the fact that this testimony was found in the Federal Document Clearing House and was easily accessible shows that his identity was not withheld. In addition, the component of repercussions for revealing the identity was not applied either. Convertino, however, was still able to find employment afterwards, although not the caliber of work that he had with the Department of Justice. Another aspect that was lacking was education. If Convertino was informed of the proper methods of filing a whistleblower suit, his first charge would not have been dropped because it would have been filed properly with the Office of the Special Counsel. Even someone with his level of education could not navigate the process.

Another example of an individual whistleblower within a federal agency was that of Sibel Edmonds with the Federal Bureau of Investigation. A week after the September 11th attacks, Sibel was hired by the FBI to be a Turkish and Fasi translator. As part of Edmonds’s employment, she had to listen in on phone conversations between Turkish, Pakinstani, Israeli, and American officials. At one point, Edmonds reported that a supervisor took translation that were meant for her, forged her signature, and declared the translation were not of any use (Sheehly, 5). After going through her supervisors expressing her concerns, she eventually contacted the Department of Justice and Senator Grassley and Senator Leahy. Grassley stated that his belief was that “the F.B.I. is ignoring a very major internal security breach and a potential espionage breach” (Sheehly, 3). Two weeks after doing so, however, Edmonds was fired from the FBI (Giraldi, 1). In addition, her home computer was taken and her family was threatened by police in Turkey.

Months after she was fired, she took her case before the Senate Judiciary Committee. However, when her representation tried to access documents to use in their client’s case, Attorney General Ashcroft issued an State Secrets Privilege order, barring them from accessing the paperwork. Later, a Justice Department’s inspector general ruled that her termination from the FBI was because of a contributing factor as a whistleblower (“FBI”, 1). However, it was later ruled that the full letter created by the inspector general was part of the State Secrets Privilege, thus not accessible to Edmonds counsel.

Edmonds’s case shows many of the deficiencies in the whistleblower protection laws. First, her identity was not concealed through the process. However, this problem could yet again be related to the problem of education. If Edmonds was educated on the process of reporting concerns and becoming a whistleblower, she would not have reported her concerns to as many supervisors. In addition, she would have known which individuals to go in the first place, closing in the number of people who were aware of the situation at hand. It is also unclear if Edmonds received any financial benefits or employment following her firing.

Edmonds case demonstrated the importance of containing the number of people aware of the situation. Since so many of her supervisors were aware, they were able to more easily retaliate against her, causing Edmonds her job and threatening her safety. While the Edmonds case was not wildly publicized, the actions that took place in Abu Ghraib were not as secretive.

Abu Ghraib was one of the most publicized cases of whistleblowing within the past ten years. While the United States was amidst the War on Iraq in 2004, Army Reservist Joe Darby was faced with a different image than most of American would have expected to see. While going through a fellow soldier’s camera, Darby came across photos of fellow soldiers inflicting unthinkable actions upon prisons. The photographs depict prisons of war being abused, being required to before sexually humiliating task, and being humiliated in general. In January of 2004, Darby decided to write an anonymous letter to officials concerning these photographs (Kelley, 1).

To Darby, it was important that his identity was withheld from the investigation. “I knew a lot of them wouldn’t understand and would view it as, you know, me being a stoolpigeon, a rat, however you want to put it” (Frazier, 2). Initially, Darby gave a copy of the CD containing the photographs to the Criminal Investigations Division, claiming that it was left anonymously on his desk. However, the investigator knew it was Darby behind the disc, but promised to keep Darby’s name a secret (Frazier, 3).

However, it was not kept a secret as expected. Eventually, the New Yorker ran a story about the incident, publishing Darby’s name. A few days later, Defense Secretary Donald Rumsfeld made the mistake of saying Darby’s name during a Senate hearing concerning the events as Darby’s unit sat together at dinner watching it take place. “[T]he guys at the table just stopped eating and looked at me. I got up and got the hell out of there” (Associated Press “Tipster,” 2). From that moment on, Darby’s life was changed.

What was hard for Darby was not only the reaction of his unit, but also the reaction of his small hometown that was considered a military town of Cumberland, Maryland. His hometown felt that he had betrayed the military by reporting the action (Cooper, 4). Darby was also unable to return to his home on the Army Reserve either because Army officials felt that it was unsafe. Darby had to have security guards accompany him for approximately six months after returning to the States (Cooper, 6). Eventually, Darby had to leave the Army, a decision that upset him.

With Darby in the Abu Ghraib situation, the anonymous aspect of an effective whistleblower protection was the most essential part of his case. If Rumsfeld and the New Yorker had not revealed his identity, Darby would not have faced the decreased quality of life that he did. In addition, there are no recorded consequences for the individuals who revealed Darby’s identity.

Whistleblowers are essential to help keep the government in check. They are used to report wrongdoing the government does and brings awareness to such actions. Without these whistleblowers, society would lose not only money from the neglect work but also, in some cases, the lives of people due to lapses in safety percussions. Legislation needs to be reviewed to make sure that people will feel confident that they will be protected if they step forward as a whistleblower. Legislation needs to ensure confidentiality, guaranteement of employment, financial incentives, consequences for if the whistleblower’s identity is revealed, contained risk of information leak, and education on the whistleblower process. With these components, whistleblowers will finally feel at ease coming forward and helping society. People will help correct the wrongs taking place in society.

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