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Private Sector Whistleblowers: Are There Sufficient Protections?

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PRIVATE SECTOR WHISTLEBLOWERS: ARE THERE SUFFICIENT LEGAL PROTECTIONS?

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON

EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

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PRIVATE SECTOR WHISTLEBLOWERS: ARE THERE SUFFICIENT LEGAL PROTECTIONS?

Tuesday, May 15, 2007
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and Labor
Washington, DC

The subcommittee met, pursuant to call, at 2 p.m., in Room 2175, Rayburn House Office Building, Hon. Lynn Woolsey [chairwoman of the subcommittee] Presiding.

Present: Representatives Woolsey, Payne, Bishop of New York, Shea-Porter, Wilson, Price, and Kline.

Staff Present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Lynn Dondis, Senior Labor Policy Advisor for Subcommittee on Workforce Protections; Michael Gaffin, Staff Assistant, Labor; Peter Galvin, Senior Labor Policy Advisor; Jeffrey Hancuff, Staff Assistant, Labor; Thomas Kiley, Communications Director; Joe Novotny, Chief Clerk; Robert Borden, Minority General Counsel; Steve Forde, Minority Communications Director; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Legislative Assistant; Richard Hoar, Minority Professional Staff Member; Victor Klatt, Minority Staff Director; Jim Paretti, Minority Workforce Policy Counsel; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel; and Loren Sweatt, Minority Professional Staff Member.

Chairwoman WOOLSEY. A quorum is present. The hearing of the Workforce Protection Subcommittee on Private Sector Whistleblowers: Are There Sufficient Legal Protections, will now come to order. Pursuant to committee rule 12(a), any Member may submit an opening statement in writing, which will be made part of the permanent record.

I now recognize myself, followed by Ranking Member Joe Wilson, for an opening statement.

I want to thank all the witnesses for coming today, to testify on whether current legal protections are sufficient to protect whistleblowers, especially those laws that are administered by the Department of Labor. And I want to especially thank both Dr. Wigand and Mr. Simon for appearing here today. You are going to tell your stories. Being a whistleblower is very difficult, and I know that your lives have changed in ways you can never have imagined when you first made your decision to come forward.

Today you are among friends. This week is Whistleblowers Week. We want to celebrate your actions and praise the substantial public service that you have provided, all at a considerable sacrifice to yourselves and your families.

We also want to learn from you because you know far better than we do what additional protections are needed so that people like yourselves will be encouraged to report illegalities, safety and health violations, and fraud and abuse when the situation makes it necessary.

The idea for this hearing was generated by a full committee hearing held on the Sago mine disaster on March 28th, 2007, just a couple of months ago. At that hearing we heard testimony about the blacklisting faced by miners who speak up about safety and health risks in the mines. This is true even though they should be protected by MSHA, and they find that their very jobs are threatened if they come forward.

But as our witnesses today will illustrate, miners are not alone in having to deal with such problems. Over the years Congress has indicated its clear intent to protect whistleblowers by passing over 30 statutes prohibiting retaliation against employees who report a myriad of problems, from environmental spills to health and safety violations, to corporate fraud.

However, while the laws may have made some things better, they have not eliminated intimidation, harassment, blacklisting and other forms of retaliation. Often the laws themselves are inconsistent and certainly not always user friendly.

Let me give you one example. Mr. Fairfax's office at OSHA administers 14 whistleblower provisions. Under these laws complainants have either 30, 60, 90 or 180 days to file their claim, depending on the statute that they are filing under. These statutes of limitation are very short, sometimes creating insurmountable hurdles, especially for someone who has just been demoted or fired from a job not for performance, but because he or she may have complained about an unsafe condition at work.

It is as though in legislating we have created protections or the expectation of protection without ensuring that these protections are accessible.

Today we will explore the issues and at least begin to answer some important questions: Do we need to expand the laws to cover employees currently not covered. Are there procedural and other hurdles in the law that we need to change so complainants can successfully bring their claims forward? Do we need to look more closely at how these laws are being administered, including OSHA's Department of Enforcement? And what is the need for resources in order to process whistleblower claims in a timely manner?

I am looking forward to all of your testimony, and with that I defer to Ranking member Joe Wilson for his opening statement.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn C. Woolsey, Chairwoman, Subcommittee on Workforce Protections

I want to thank all our witnesses for coming today to testify on whether current legal protections are sufficient to protect whistleblowers, especially those laws that are administered by the Department of Labor.

And I want to especially thank both Dr. Wigand and Mr. Simon for appearing here today to tell their stories. Being a whistleblower is very difficult, and I know your lives have changed in ways you could never have imagined when you first made your decision to come forward.

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At that hearing, we heard testimony about the blacklisting faced by miners who speak up about safety or health risks in the mines. This is true even though they should be protected by MSHA (the Mine Safety and Health Act) if they came forward.

But as our witnesses today will illustrate, miners are not alone in having to deal with such problems.

Over the years, Congress has indicated its clear intent to protect whistleblowers by passing over 30 statutes prohibiting retaliation against employees who report on a myriad of problems, from environmental spills to health and safety violations to corporate fraud.

However, while the laws may have made some things better, they have not eliminated intimidation, harassment, blacklisting and other forms of retaliation.

And often, the laws themselves are inconsistent and certainly not always user friendly.

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Today, we will explore the issues and at least begin to answer some important questions.

Do we need to expand the laws to cover employees currently not covered?

Are there procedural and other hurdles in the law that we need to change so complainants can successfully bring their claims forward?

And do we need to look more closely at how these laws are being administered, including OSHA's Department of Enforcement need for more resources in order to process whistleblower claims in a timely manner?

I am looking forward to everyone's testimony.

With that, I defer to Ranking Member Joe Wilson for his opening statement.

Mr. WILSON. Good afternoon. I would like to thank Chairman Woolsey for convening this hearing and welcome our witnesses to the subcommittee. At the outset I would also like to thank Chairman Woolsey for restoring a sense of fairness to these hearings with the witness ratio.

I believe this hearing to explore the Occupational Safety and Health Administration's work will be very informative for our panel, and I thank you, the witnesses, for being here today. I look forward to your testimony on the whistleblower programs for which OSHA is responsible.

OSHA administers 14 statutes in the whistleblower program. The range of issues covered under the programs stem from the Occupational Safety and Health Act, OSHA's core competency, if you will, to the newly passed AIR 21 legislation. In addition, several environmental laws are covered under this program.

With the addition of the relatively new and far-reaching Sarbanes-Oxley Act, I am sure that some have questioned the wisdom of housing all of these programs at OSHA. That said, I am encouraged by the statistics demonstrating OSHA's performance in investigating whistleblower-related claims. On average OSHA is dispensing 2,000 whistleblower claims annually, mainly in the OSHA and Sarbanes-Oxley arena. At the heart of these programs is the issue of whether or not an employer retaliated against a whistleblower.

For example, if an employee correctly brought to light a concern about safety, environmental hazards, or financial irregularities and then was fired, received a demotion, or had his or her pay cut, this is a clear example of retaliation that the law seeks to protect against.

However, it is not always crystal clear. I know this firsthand from my National Guard service of 31 years as a staff judge advocate to assist Guard members in reemployment rights and reducing discrimination and retaliation against Guard member service.

In the work of the investigators at OSHA to determine if action taken by management is retribution or if the employee simply is disgruntled, for example, there are two sides to every story, and each side has a right to be heard. The testimony we will hear today will highlight how these actions are reviewed and how a determination is made about the true motivation between the actions of employers and employees alike.

I look forward to hearing from our witnesses about this very important program.

Chairwoman WOOLSEY. Thank you, Congressman.

[The statement of Mr. Wilson follows:]

Prepared Statement of Hon. Joe Wilson, Ranking Minority Member, Subcommittee on Workforce Protections

Good afternoon. I'd like to thank Chairwoman Woolsey for convening this hearing and welcome our witnesses to the subcommittee. At the outset, I would also like to thank Chairwoman Woolsey for restoring some sense of fairness to these hearings with the witness ratio. I believe this hearing to explore the Occupational Safety and Health Administration's work will be very informative for our panel, and I look forward to your testimony on the whistleblower programs for which OSHA is responsible.

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we'll hear today will highlight how these actions are reviewed and how a determination is made about the true motivation behind the actions of employers and employees alike.

I look forward to hearing from our witnesses about this important program.

Chairwoman WOOLSEY. Without objection, all Members will have 14 days to submit additional materials or questions for the hearing record.

I would now like to introduce our very distinguished panel of witnesses that are here with us this afternoon. I will introduce you all in the order that you are seated and in the order that you will speak.

Jeffrey Wigand has a distinguished background, and his honors and activities are too numerous to name. Dr. Wigand may be best known for his courageous activities in exposing Big Tobacco. But in 1998, he founded Smoke-Free Kids, Inc., and has spent the better part of a decade speaking out on the dangers of tobacco consumption, especially for children.

Dr. Wigand received his B.A., master's and Ph.D. From the State University of New York at Buffalo and also received a master's in teaching from the University of Louisville. He also received honorary degrees from Worcester Polytech, the Medical Society of Nova Scotia, and Connecticut College.

John Simon is from Lake Villa, Illinois, and a former trucker. He also acted courageously in exposing his former employer's illegal transportation practices. Mr. Simon is a graduate of Gray Lakes High School in Illinois.

Richard Fairfax is the Director of Enforcement Programs at OSHA at the Department of Labor. He is a certified industrial hygienist and has been at OSHA for 30 years. Mr. Fairfax received his B.A. From California Polytech University and his masters from Humboldt State University.

Lloyd Chinn is a partner at Proskauer Rose in New York practicing in the areas of labor and employment law. Mr. Chinn received his B.S. From Georgetown University and his law degree from New York University.

Richard Moberly is an assistant professor and the Cline Research Chair at the University of Nebraska College of Law where he teaches employment law and evidence. Professor Moberly is the author of a study on OSHA's handling of whistleblowers' claims under the Sarbanes-Oxley Act. He received his B.A. from Emory University and his law degree from Harvard Law School.

Tom Devine is the legislative director of the Government Accountability Project, a leading organization representing the rights of whistleblowers. Mr. Devine has written extensively about whistleblower laws and has worked with whistleblowers for over two decades. Mr. Devine received a B.A. From Georgetown University, and his law degree from Antioch School of Law.

Now, many of you don't know how we do this, so just before you get started, I want to talk to you about the lights and how this all works. We have a lighting system. They are in front of you right there. We have a 5-minute rule, and everyone, including the Members up here, are limited to 5 minutes of presentation and questioning.

The green light is illuminated when you begin to speak. When you see the yellow light, it means you have 1 minute remaining. When you see the red light, it means your time has expired and you need to conclude your testimony. We will not cut you off in midsentence, midthought, but we may cut you off in the middle of a long paragraph.

Please be certain as you testify to turn on the speaker on the microphone and speak into it, because it is right in front of you, and we will be acting weird up here if you haven't. So we want to hear you.

Now we will hear from our first witness Dr. Wigand.

[...]

Chairwoman WOOLSEY. Professor Moberly.

STATEMENT OF RICHARD MOBERLY, ASSISTANT PROFESSOR, UNIVERSITY OF NEBRASKA COLLEGE OF LAW

Mr. MOBERLY. Good afternoon. My name is Richard Moberly. I am assistant professor of law in the Cline Williams Research Chair at the University of Nebraska. I teach and write about whistleblower protection.

In response to the question this hearing presents, my research indicates that whistleblowers have some legal protection, but the protection is likely insufficient. Over 30 Federal statutes protect whistleblowers and relate to a variety of topics, including workplace safety, the environment, public health, and corporate fraud. However, these statutes provide only a relatively limited amount of

protection because of their ad hoc and narrow approaches. Rather than protect any employee who reports any illegal activity, Federal statutes only protect whistleblowing related to a specific topic or statute, and then only if the whistleblower works for an employer covered by the statute.

Even if the right type of illegal activity is reported, the whistleblower may or may not be protected, depending on how the employee blew the whistle. Some statutes only protect employees who formally participate in enforcement proceedings, while others protect employees who affirmatively report illegal activity or who refuse to engage in misconduct. Some statutes require reports to be made externally to the government, while others protect whistleblowers who report misconduct to their supervisors.

The procedural requirements for a whistleblower to file a claim are varied as well. Some laws permit whistleblowers to file claims directly in Federal court, while others require whistleblowers to file claims with an administrative agency like OSHA. Some of these statutes permit only the agency to prosecute claims on an employee's behalf, while others permit employees to pursue their own claims.

As Chairwoman Woolsey suggested, the statute of limitation for these laws vary from 30 to 300 days, which only compounds the confusion created by these multiple protections and procedures. Suffice it to say, one would never create this system from scratch.

Whether a whistleblower is protected depends on the employer for which the employee works, the industry in which the employee works, the type of misconduct reported, the way in which an employee blew the whistle, and, under some statutes, the willingness of an administrative agency to enforce the law.

Because of these nuances it is simply too easy for good-faith whistleblowers to fall through the gaps created by these varied requirements, a situation that fails to encourage employees to blow the whistle and fails to protect them when they do.

The problems with the current system are illustrated by the Sarbanes-Oxley Act of 2002, which applies to employees of publicly traded companies who report fraud. At the time it was passed, many expected that Sarbanes-Oxley would provide the broadest most comprehensive coverage of any whistleblower provision in the world. These expectations have not been realized. Employees rarely win Sarbanes-Oxley cases.

In the act's first 3 years, only 3.6 percent of Sarbanes-Oxley whistleblowers won relief after an OSHA investigation. Only 6.5 percent of whistleblowers won appeals in front of an administrative law judge. Subsequent statistics from OSHA indicate that not a single Sarbanes-Oxley whistleblower won a claim before OSHA in fiscal year 2006 out of 159 decisions made by the Agency during that year.

My empirical study of Sarbanes-Oxley outcomes highlights more general problems. First, the legal and procedural nuances I detailed earlier don't have real bite. Employees who don't fall squarely within the law's narrow legal boundaries do not get protected. Under Sarbanes-Oxley, for example, ALJ determined that 95 percent of whistleblower cases failed to satisfy these boundary issues as a matter of law and dismissed those cases. Judges almost never

hear the factual merits of whether retaliation occurred because an employee blew the whistle.

Second, ALJs dismissed one-third of Sarbanes-Oxley cases because whistleblowers failed to satisfy the act's 90-day statute of limitations, demonstrating that such short statute of limitation periods can have drastic consequences.

Third, retaliation cases are highly fact-intensive cases that require resources, time and expertise. Requiring an administrative investigation may not efficiently utilize government resources and may unduly delay justice under that act. As an example I detailed some of the problems with OSHA's enforcement of Sarbanes-Oxley in my written statement.

As a result of these problems, rank-and-file employees likely cannot determine the protection available to them before blowing the whistle, which means that Federal law is not doing its job of encouraging employees to come forward with information about misconduct.

Society cannot gain the enormous public benefits from whistleblowers who disclose health and safety issues and other corporate misconduct. To address these issues Congress should comprehensively examine the manner in which Federal law protects whistleblowers, and I have detailed specific recommendations in my written testimony. Thank you.

Chairwoman WOOLSEY. Thank you.

[The statement of Mr. Moberly follows:]

Prepared Statement of Richard E. Moberly, Assistant Professor of Law, Cline Williams Research Chair, University of Nebraska College of Law

Madam Chair and Members of the Subcommittee: Thank you for the invitation to appear before you to talk about whether there are sufficient legal protections for private-sector whistleblowers. I teach and write about whistleblower protection and I am honored to talk with you about this topic.

The short answer to the question this hearing presents is that there are many protections for whistleblowers, but it is doubtful whether there are sufficient protections. In this testimony, I hope to explain the ways in which current protections fall short by focusing on four primary areas:

1. The importance of encouraging and protecting whistleblowers in the private sector;
2. A general description of private-sector whistleblower protection, particularly under federal law;
3. Examples of whistleblower protection issues under the Sarbanes-Oxley Act of 2002, to illustrate problems with the federal protection of whistleblowers; and
4. Areas in which federal whistleblower protection should be more closely examined.

1. Whistleblowers Provide a Public Benefit

A rationale often provided for protecting whistleblowers is one of "fairness," whistleblowers take a great risk by disclosing information about corporate misconduct, and it is unfair that they should be retaliated against because of their actions. While this justification has resonance, I want to focus on another rationale: whistleblowers provide a substantial public benefit.

Private sector whistleblowers enhance corporate monitoring and improve corporate law enforcement. We need whistleblowers to report corporate misconduct in order to supplement the traditional methods of monitoring corporations. Employees know more than others who might discover corporate wrongdoing (such as the government or even an independent board of directors) because they are on-the-ground inside the corporation and, collectively, know everything about its inner workings.[1] In fact, even with few corporate or legal incentives provided to whistleblowing employees, roughly one-third of fraud and other economic crimes against businesses are reported by whistleblowers.[2]

Furthermore, almost all the benefits of a whistleblower's disclosure go to people other than the whistleblower: society as a whole benefits from increased safety, better health, and more efficient law enforcement. However, most of the costs fall on the whistleblower. There is an enormous public gain if whistleblowers can be encouraged to come forward by reducing the costs they must endure. An obvious, but important, part of reducing whistleblowers' costs involves protecting them from retaliation after they disclose misconduct.

2. Federal Whistleblower Protection for the Private Sector

Despite the importance of protecting whistleblowers from retaliation, no uniform whistleblower law exists. Rather, protections for private sector whistleblowers consist of a combination of federal and state statutory protections, as well as state common law protections under the tort of wrongful discharge in violation of public policy. These uneven protections are often rightly labeled a "patchwork," because of the wide variance in the scope of protections each provides.

a. Narrow Substantive Protections for a Broad Range of Industries

Federal protections for whistleblowers take an ad-hoc, "rifle-shot" approach. Rather than protect any employee who reports any illegal activity, federal statutes only protect whistleblowing related to a specific topic or statute, and then only if the whistleblower works for an employer covered by the statute.

For example, the Surface Transportation Assistance Act of 1982 only protects whistleblowing related to the safety of commercial motor vehicles.[3] The only employees who are protected are drivers of commercial motor vehicles, mechanics, or freight handlers who directly affect commercial motor vehicle safety in the course of their employment.[4]

Even if the whistleblower reports the right type of illegal activity, statutes vary on whether the whistleblower will be protected depending upon how the employee blew the whistle. Some statutes appear to only protect employees who participate in proceedings related to violations of particular statutes,[5] while others also protect employees who affirmatively report illegal conduct[6] or who refuse to engage in illegal activity.[7] Moreover, some statutes require reports to be made externally to the government,[8] while others will protect whistleblowers who report misconduct to their supervisors.[9]

These types of nuanced protections exist for a broad range of industries. More than 30 separate federal statutes provide anti-retaliation protection for private-sector employees who engage in protected activities in a variety of areas, including workplace safety, the environment, and public health. Statutes protect employees who disclose specific violations in certain safety-sensitive industries, such as the mining,[10] nuclear energy,[11] and airline industries.[12] Private sector employees may be protected if they disclose corporate fraud on the government[13] or on shareholders.[14] The list of protected employees ranges from the expected—employees who make claims under anti-discrimination statutes such as Title VII[15]—to the surprising—employees who participate in a proceeding regarding drinking water or who report an unsafe international shipping container.[16]

b. A Wide Variety of Procedural Requirements

The procedural requirements for whistleblowers to file a claim are as varied as the activities protected by the statute. Some statutes permit whistleblowers to file claims directly in federal court.[17] Others require whistleblowers to file claims with administrative agencies, such as the Department of Labor. In fact, 14 statutes require whistleblowers to file with the Occupational Safety and Health Administration within the Department of Labor. Even among these OSHA statutes, the procedures vary depending on the type of claim. Some statutes, like the Occupational Safety and Health Act, permit only the agency to investigate and prosecute claims of retaliation on an employee's behalf. Others permit employees to pursue their own claims by requesting an administrative investigation, from which appeals can be made to an administrative law judge, then an administrative review board, and ultimately to a federal court of appeals. The Sarbanes-Oxley Act of 2002 has the additional procedural nuance of requiring whistleblowers to first file a claim with OSHA, but then permitting whistleblowers to withdraw their claim and file in federal district court if the agency does not complete its review within 180 days.

Depending on the statute invoked by the whistleblower, the statute of limitations for claims can be 30 days,[18] 60 days,[19] 90 days,[20] or 180 days.[21] The statute of limitations for retaliation under employee discrimination statutes can reach 300 days.[22]

The burdens of proof differ as well. Some retaliation cases require proof that the adverse employment action taken against the employee would not have occurred "but for" the employee's protected conduct. Others require only that the protected activity play a "motivating," or even less onerously, a "contributing" factor in the

adverse employment action. Statutes vary on the level of proof required for employers to rebut a prima facie case of retaliation, from preponderance of the evidence to clear and convincing evidence that the employer would have made the same decision absent any protected activity.

c. Many, but not Sufficient, Protections

Suffice it to say, one would never create this system from scratch. Instead, this network of protections has evolved on an ad hoc basis in order to support specific statutory schemes. Whether a whistleblower is protected depends upon the employer for whom the employee works, the industry in which the employee works, the type of misconduct reported, the way in which the employee blew the whistle, and, under some statutes, the willingness of administrative agencies to enforce the law.

Indeed, given this grab bag of statutes, rank-and-file employees likely cannot determine the protection available to them without consulting an attorney before blowing the whistle. Not surprisingly, surveys demonstrate that most employees are unaware of the protections they may (or may not) receive should they report wrongdoing.[23] If employees are not aware of or do not understand their protections, then these anti-retaliation provisions are not doing their job of encouraging employees to come forward with information about misconduct. Society cannot gain the enormous public benefits from whistleblowing. Thus, while there may be many legal protections for whistleblowers, it is doubtful whether there are sufficient protections.

3. The Sarbanes-Oxley Example

One statute that might have fixed some of these problems was the Sarbanes-Oxley Act of 2002, which Congress passed in response to corporate scandals involving Enron, WorldCom, and others. Under Sarbanes-Oxley, employees of publicly-traded companies who report fraudulent activity may bring claims against any person who retaliates against them as a result of their disclosure. By protecting employees at publicly-traded companies, the hope was to provide protections to a much broader range of employees than had previously been protected by statutes focusing primarily on particular industries. At the time it was passed, many whistleblower advocates and legal commentators expected that Sarbanes-Oxley would provide the broadest, most comprehensive coverage of any whistleblower provision in the world.

a. Whistleblowers Rarely Win

These expectations have not been realized: employees rarely win Sarbanes-Oxley cases. I recently completed an empirical study of all Department of Labor Sarbanes-Oxley determinations during the first three years of the statute, consisting of over 700 separate decisions from administrative investigations and hearings.[24] Only 3.6% of Sarbanes-Oxley whistleblowers won relief through the initial administrative process at OSHA that adjudicates such claims, and only 6.5% of whistleblowers won appeals in front of a Department of Labor Administrative Law Judge. That's 13 whistleblowers at the OSHA level, and 6 at the ALJ level. Moreover, more recent statistics from OSHA indicate that not a single Sarbanes-Oxley whistleblower won a claim before OSHA in Fiscal Year 2006—out of 159 decisions made by the agency during that year.

This low win rate for whistleblowers has two primary causes. First, administrative decision-makers focus an extraordinary amount of attention on whether the whistleblower is the "right" type of whistleblower. Did the whistleblower disclose the "right" type of misconduct, to the "right" type of person? Did the whistleblower work for the "right" type of company? Did the whistleblower provide a complaint precisely within the 90-day statute of limitations? ALJs determined that over 95% of Sarbanes-Oxley whistleblower cases failed to satisfy one or more of these questions as a matter of law. Thus, very few whistleblowers were actually provided the opportunity to demonstrate that they were the subject of retaliation.

Second, at the initial OSHA investigative level, when OSHA found that an employee's claim actually satisfied all of Sarbanes-Oxley's legal requirements, OSHA still found for the employee only 10% of the time. This low win rate seems surprising, because Sarbanes-Oxley purposefully presents a very low burden of proof for employees once their prima facie case is met.

By themselves, these statistics should give us pause, given the high expectations regarding the potential of Sarbanes-Oxley to provide relief to whistleblowers whose employers retaliate against them. But, as important, Sarbanes-Oxley's implementation illustrates broader problems with the federal ad hoc approach to whistleblower protection.

b. Problems with Whistleblower Protection

Boundary Problems. First, by only protecting certain types of disclosures and certain types of employees, federal law puts enormous pressure on whether the whistle-

blower's disclosure was the "right" kind of disclosure or the employee is the "right" type of employee. Not only is this difficult for employees to predict ahead of time, but it also requires line-drawing by decision-makers that can narrow the scope of the protections more restrictively than intended by Congress.

Sarbanes-Oxley demonstrates this problem. The Act protects disclosures related to certain federal criminal fraud provisions as well as rules and regulations related to securities requirements. Also, the Act only protects employees of publicly-traded companies. My study revealed that administrative decision-makers frequently focused on these two legal requirements to dismiss cases, and often by reading the statute's boundaries very narrowly. For example, Sarbanes-Oxley protects any disclosure related to mail or wire fraud, without qualification. However, the DOL's Administrative Review Board has ruled that the disclosure of mail or wire fraud in general is not sufficient; the fraud disclosed by a whistleblower must be "of a type that would be adverse to investors' interests."[25] Similarly, ALJs have ruled that Sarbanes-Oxley does not protect employees of privately-held subsidiaries of publicly-traded companies unless the employee can pierce the corporate veil between the companies or demonstrate that the publicly-traded company actively participated in the retaliation.[26] In this and other instances, such narrow interpretations leave good faith whistleblowers without protection if they report the wrong type of fraud or work for the wrong type of company.

Procedural Hurdles. Procedural hurdles loom large for whistleblowers. For example, ALJs dismissed one-third of Sarbanes-Oxley cases because the whistleblower failed to satisfy Sarbanes-Oxley's relatively short 90-day statute of limitations. As I noted earlier, the limitations period of other federal whistleblower protection statutes ranges from 30 to 300 days. Short filing periods can have drastic consequences. Because most employees who file whistleblower claims allege that they lost their jobs,[27] additional time to file claims would provide whistleblowers the ability to first take care of pressing responsibilities, such as finding another job and dealing with the upheaval of losing a primary source of income, before ultimately locating a competent attorney to file a claim.

Investigating Claims. Third, retaliation cases are highly fact-intensive cases that require resources, time, and expertise. Requiring an administrative investigation prior to an adjudicatory hearing may not efficiently utilize government resources. For example, when Sarbanes-Oxley was added to OSHA's responsibilities, OSHA did not receive any additional funding for cases that now consist of approximately 13% of OSHA's caseload. This lack of resources has led to lengthy delays to resolve cases: although the Act's regulations mandate that OSHA complete its investigation within 60 days, the average length of a Sarbanes-Oxley investigation in Fiscal Year 2005 was 127 days. Also, OSHA had primarily dealt with environmental and health and safety statutes prior to Sarbanes-Oxley. Asking the agency to discern the nuances of securities fraud seems well beyond its traditional scope. Moreover, OSHA investigators who must examine cases involving 14 different laws may not adequately differentiate among provisions that often provide for different burdens of proof and substantive protections. Add to that internal OSHA procedures that did not give the whistleblower a full and fair opportunity to rebut an employer's allegations, and it should not be surprising that few Sarbanes-Oxley whistleblowers have been successful at the OSHA investigative stage of their claim. In short, the Sarbanes-Oxley results call into question OSHA's utility as an investigative body for whistleblower claims.

4. Areas to Examine

There are two main types of questions to consider going forward. First, if you are satisfied with the current "rifle-shot" approach to whistleblower protection, are there ways in which it can be improved? Second, if the current model is not satisfactory, what would a different model look like?

a. Improving the Current System

Clarifying Broad Protections. In areas such as Sarbanes-Oxley, in which it can be demonstrated that administrative decision-makers or courts have narrowly read the protections that Congress already has granted, Congress could clarify the statute's broad reach. Passing legislation that clearly repudiates decisions narrowing an act's scope could alleviate the tendency of decision-makers to draw restrictive legal boundaries in whistleblower cases. Congress has repeatedly taken such an approach for federal employee whistleblowers when administrative and judicial rulings undermined the broad protections of the Civil Service Reform Act and, more recently, the Whistleblower Protection Act.[28] Congress should similarly examine federal statutory protections for private sector whistleblowers.

Lengthening the Statute of Limitations. The short statutes of limitations that currently exist are unrelated to the goals of whistleblower statutes and serve no real purpose other than to trip up unsuspecting whistleblowers after they have already taken the serious risk of coming forward with information about misconduct. Increasing statutes of limitations to at least 180 days would be an easy, but nonetheless extremely helpful, solution.

Improving Transparency. The adjudication of whistleblower claims should be more transparent. For example, OSHA does not publish any of its statistics or decision-letters. I received them by asking OSHA directly and by submitting a Freedom of Information Act (FOIA) request. No information about monetary awards or settlements are publicly available and OSHA denied my FOIA request for this information. The Office of Administrative Law Judges puts its decisions on the internet, but does not compile any statistics about its results. Statutory requirements that employers post notices about the available whistleblower protections are inconsistent: some statutes have them, others do not. The lack of meaningful, public information about whistleblower provisions and cases interpreting them fails to provide employees sufficient guidance regarding whether they will be protected if they blow the whistle, and also undermines the public discourse about whether these protections are effective. The decisions, and the decision-making process, of administrative agencies need more public oversight.

b. Implementing New Protections

The Importance of Defining Legal Boundaries. The problems with the current system can inform decisions on the areas on which one should focus when implementing new protections. Given the problems with the current narrow boundaries of many whistleblower provisions, a new whistleblower law should protect whistleblowers for disclosing a broad range of illegal activities. But, as with everything, the devil is in the details. Should whistleblowers who report any illegal activity be protected? Or only activity that is illegal under federal law or some subset of federal laws? Should we require whistleblowers to be correct that the activity they report is, in fact, illegal, or should we protect whistleblowers who reasonably disclose misconduct in good faith, even if the misconduct is not actually illegal? Should we require whistleblowers to report illegal activity externally to a law enforcement officer, or should we protect whistleblowers who report misconduct internally to their supervisor?

I am quite confident you understand that legal definitions and boundaries matter—it is what you debate everyday. My point is that for whistleblower protections in particular, the evidence demonstrates that the boundaries you draw will have real bite, for two reasons. The first relates to the nature of whistleblowing: whistleblowers take real risks, and the current topic-by-topic, ad hoc approach to protecting whistleblowers does not provide employees sufficient certainty regarding their protections as they decide whether to blow the whistle. Second, statutory boundaries particularly matter for whistleblower protections because of the manner in which whistleblower laws currently are administered: narrow protections only encourage, or in some instances, require administrative and judicial decision-makers to define whistleblowers out of protected categories. Agencies and courts currently spend too much time debating whether this is the "right" type of employee, the "right" type of report, or the "right" type of illegal activity, and not enough effort determining whether retaliation occurred. Broadly defining the legal boundaries of any new protection may enable decision-makers to focus on the important factual question of causation: was this employee retaliated against for reporting something illegal?

Providing Structural Disclosure Channels. Finally, I urge you to examine other types of encouragement for whistleblowers. For example, in the Sarbanes-Oxley Act of 2002, Congress required publicly-traded companies to implement a whistleblower disclosure channel directly to the company's board of directors. This internal reporting mechanism can supplement anti-retaliation protections because it encourages reporting directly to individuals with the authority and responsibility to respond to information about wrongdoing. Procedural and structural modifications that encourage effective employee whistleblowing should be considered along with any reform of anti-retaliation protections.[29]

5. Conclusion

From one perspective, whistleblowers demonstrate that employees can be effective as corporate monitors. At great risk to their careers, a few employee whistleblowers bravely attempt to expose wrongdoing at corporations involved in misconduct, such as Enron, WorldCom, Global Crossing, and others.

Viewed differently, however, such isolated scandals also illustrate the difficulty of relying upon employees to function as effective corporate monitors. The financial

misconduct at Enron and other companies lasted for years before being revealed publicly. Countless lower-level employees necessarily knew about, were exposed to, or were involved in the wrongdoing and its concealment—but few disclosed it, either to company officials or to the public. Thus, while whistleblowers who reveal corporate misconduct demonstrate employees' potential to monitor corporations, the fact that so few have come forward also confirm that this potential often is not fully realized.

The challenge for policy-makers is to provide sufficient encouragement and protection for employees so that they can fulfill their essential role of corporate monitoring. Without employees willing to blow the whistle on corporate misconduct, we lose one key aspect of society's ability to monitor corporations effectively. Thorough and comprehensive statutory whistleblower protections will encourage private-sector whistleblowers and should be an integral part of our corporate law enforcement effort.

ENDNOTES

[1] For a more complete discussion of the importance of employees as corporate monitors, see Richard E. Moberly, Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers, 2006 BYU L. REV. 1107, 1116-25.

[2] See Kathleen F. Brickey, From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley, 81 Wash. U. L.Q. 357, 365 n.37 (2003) (citing study reported in Jonathan D. Glater, Survey Finds Fraud's Reach in Big Business, N.Y. Times, July 8, 2003, at C3).

[3] See Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(a).

[4] See id.

[5] See, e.g., Clean Air Act of 1977, 42 U.S.C. § 7622(a); Solid Waste Disposal Act of 1976, 42 U.S.C. § 6971(a).

[6] See International Safe Container Act, 46 U.S.C. § 1506(a).

[7] See, e.g., Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(a); Energy Reorganization Act, 42 U.S.C. § 5851(a)(1)(B).

[8] See Records and Reports on Monetary Instruments Transactions, 31 U.S.C. § 5328.

[9] See Federal Mine Safety and Health Act, 30 U.S.C. § 815(c).

[10] See Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c).

[11] See Energy Reorganization Act, 42 U.S.C. § 5851.

[12] See Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121.

[13] See False Claims Act, 31 U.S.C. § 3730(h).

[14] See Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A.

[15] See Equal Employment Opportunity Act (Title VII), 42 U.S.C. § 2000e-3(a).

[16] See Safe Drinking Water Act, 42 U.S.C. § 300j-9; International Safe Container Act, 46 U.S.C. § 1506.

[17] See, e.g., Federal Deposit Insurance Act, 12 U.S.C. § 1831j.

[18] See, e.g., Solid Waste Disposal Act, 42 U.S.C. § 6971.

[19] See, e.g., International Safe Container Act, 46 U.S.C. § 1506.

[20] See, e.g., Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A.

[21] See, e.g., Energy Reorganization Act of 1974, 42 U.S.C. § 5851.

[22] See, e.g., Age Discrimination in Employment Act, 29 U.S.C. § 626.

[23] TERANCE D. MIETHE, WHISTLEBLOWING AT WORK: TOUGH CHOICES IN EXPOSING FRAUD, WASTE, AND ABUSE ON THE JOB 54 (1999).

[24] See Richard E. Moberly, Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win, 49 Wm. & Mary L. Rev. _____ (forthcoming 2007), available at *http://ssrn.com/abstract=977802.*

[25] See Platone v. FLYi, Inc., No. 04-154, at 15 (ARB Sept. 29, 2006).

[26] See Bothwell v. Am. Income Life, No. 2005-SOX-57, at 8 (Dep't of Labor Sept. 19, 2005); Hughart v. Raymond James & Assoc., Inc., 2004-SOX-9, at 44 (Dep't of Labor Dec. 17, 2004).

[27] The study found that 81.8% (378/462) of Sarbanes-Oxley Complainants whose allegation regarding retaliation was discernable alleged that they were fired from their jobs as retaliation.

[28] See Whistleblower Protection Enhancement Act of 2007, H.R. 985, 110th Cong. (2007).

[29] See Moberly, supra note 1, at 1141-78 (discussing the importance of implementing effective whistleblower disclosure channels).

[Internet address to "Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win," by Richard E. Moberly, 49 William and Mary Law Review (abstract), follows:]

http://ssrn.com/abstract=977802
