

## **WHISTLEBLOWING IN ORGANIZATIONS: A LOGIT ANALYSIS OF LITIGATED CASES**

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### **ABSTRACT**

This study examines the issue of whistleblowing in organizations. As suggested by the literature, a variety of legal protections and issues were examined to predict case outcomes in future litigation by individuals who engage in the act of whistleblowing. We used chi square analyses and a logit model to predict when an individual plaintiff would prevail, and the results indicate that case characteristics including discrimination laws, safety behavior, sexual harassment, and refusal to participate in illegal activities are significant predictors. The odds of a finding in favor of the employee increase with the presence of these particular case characteristics. Our examination uses litigated cases as the source of data, which allows for a rich analysis of occurrences relating to whistleblowing in a large number of organizations. The results of this study suggest that individuals increase their chances for successful litigation when these specific issues of discrimination laws, safety behavior, sexual harassment, and refusal to participate in illegal activities are involved in the whistleblowing occurrence.

Since the early years of the first decade of the 21st century, there have been a number of whistleblowing cases that have generated a great deal of publicity and

have had a significant impact on business and society. Such cases have involved whistleblowing actions taken by Sharon Watkins at Enron, Cynthia Cooper at WorldCom, and Karen Silkwood at Kerr-McGee's plutonium processing plant. More recent cases include actions taken by Harry Markopolos in the Madoff Ponzi scheme, Kenneth Kendrick at the Peanut Corporation of America (PCA) with its contaminated food products, and David Graham at the Food and Drug Administration concerning the drug Vioxx at Merck (Dworkin, 2010; Ebersole, 2011; Katz, LaVan, & Lopez, 2012; Lukacs et al., 2012; Moberly, 2012). Those who have taken action in these well-publicized whistleblowing cases unfortunately constitute only a minute fraction of the employees and members of the public who may actually be in a position to blow the whistle on wrongdoing in their organizations.

Part of the concern that employees may have with whistleblowing involves the consequences that they may experience. If the well-publicized and theoretically well-protected whistleblowers described above still experienced personal consequences of whistleblowing, one can only envision the consequences that may be experienced by less prominent whistleblowers.

The publicity often associated with whistleblowing can create dilemmas for managers, which then spills over to pressures for their employees. Sometimes there is strong pressure to increase profits to the point of skirting the law, harming the environment, or being negligent about safety issues. When employees point out a problem of this sort, there may be an attempt to convince them not to report it. Managers may use their influence through rewards, persuasion by calling upon the employees' loyalty to the company, or threats of retaliation. Counter-tendencies weighing against these influences include increased legislation and litigation against companies that engage in retaliation against whistleblowers. Furthermore, considerable financial costs may often be associated with litigation for companies that either have to make unplanned modifications to their processes or have to defend themselves against charges of retaliation. This can extend as far as the possibility of bankrupting a company, as was the case with the Peanut Corporation of America.

## OVERVIEW AND PURPOSE OF STUDY

The existing literature on the topic of whistleblowing is quite extensive. Research in this area has identified whistleblowing as an important tool that helps to point out bad behavior of individuals or organizations. Because large organizations are so complex, employees are often the best source of information about wrongdoing (Miceli & Near, 2010; Miethe, 1999). Employees are therefore in a position to help protect themselves and other employees, protect the environment, safeguard the health and safety of citizens, and find irregularities in financial reporting (Katz et al., 2012).

Unfortunately, as mentioned above, employees may be subject to pressure from their companies not to report wrongdoing. In such instances, companies make themselves vulnerable to potential litigation or bad publicity, if an accident occurs or if external publicity for wrongdoing arises. Litigation can result when the company fails to act on the information provided by the whistleblower or when it retaliates against the reporting employee. Such individuals who have been punished by their managers or the organization by job demotion, harassment, or termination may find their only recourse is litigation. This study therefore contributes to the literature on whistleblowing by examining the extent of the protections provided to whistleblowers in the overall context of whistleblowing as evidenced in litigated cases. Furthermore, we identify the variables that will most likely affect the outcomes of litigation. Finally, individuals are presented with recommendations for increasing their chances for successful litigation.

### **WHISTLEBLOWING DEFINED**

Whistleblowing is frequently defined as “the disclosure by organizational members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action” (Near & Miceli, 1985: 4). Such practices can include “illegality, gross waste or fraud, mismanagement, abuse of power, general wrongdoing, or a substantial and specific danger to public health and safety” (Government Accountability Project, n.d.). Whistleblowers can use different channels for reporting misbehavior. These may include internal channels (i.e., within their organization, such as directly reporting misbehavior and incidents to their immediate supervisor, union representative, or human resources department). Reporting options may also include external means (i.e., going outside their organization to, for example, a third party ombudsman, an external hotline, or an applicable government regulatory agency related to the type of wrongdoing behavior (Katz et al., 2012; Near et al., 2004).

### **LEGAL PROTECTIONS**

Various protections have been legislated with the aim of offering safeguards for whistleblowers. These protections have been set up at both federal and state levels and include the Whistleblower Protection Act, state whistleblowing protection acts, discrimination laws, and the Sarbanes-Oxley Act. General descriptions of each of these protections for whistleblowers are provided below.

#### **Whistleblower Protection Act**

The Whistleblower Protection Act is enforced by the Occupational Safety and Health Administration (OSHA) to protect employees who report violations of

various workplace safety, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, and securities laws. Employees who report such violations receive protection from discrimination and retaliation by the employer who may take adverse action against the whistleblowing employee. Adverse actions against whistleblowers include a variety of unfavorable human resource actions such as demotion, denial of overtime or promotion, disciplining, denial of benefits, failure to hire or rehire, firing or laying off, intimidation, making threats, reassignment to a less desirable position or reassignment affecting prospects for promotion, reducing pay or hours, and/or suspension (United States Department of Labor, 2013).

### **State Whistleblowing Protection Acts**

Most states have laws protecting employees from retaliation for filing a claim or reporting a violation of the law through the act of whistleblowing. However, states vary widely in terms of the coverage offered to whistleblowers. For instance, some state statutes apply only to public employees, while some apply to both public and private employees. Some statutes cover a broad array of circumstances, such as prohibiting employers from dismissing workers for disclosing information about a violation of law, gross mismanagement, gross waste of funds, or specific danger to public safety and health. Other statutes, however, are much narrower in scope, for example, limiting the protection of public and private employees to protection from retaliation for reporting possible violations. The reader's attention is directed to National Conference of State Legislatures (2010) for a full explanation of state whistleblowing protection acts.

### **Discrimination Laws**

The relationship between whistleblowing and employment discrimination law is also less than straightforward. Discrimination laws include the Age Discrimination in Employment Act, the Americans with Disabilities Act, and Title VII of the 1964 Civil Rights Act. The reader's attention is directed to Equal Employment Opportunity Commission (n.d.) for a full explanation of discrimination laws. Technically, it would seem that individuals blowing the whistle under discrimination laws would have double protections: based on both applicable discrimination laws and whistleblowing protection laws. However, the availability of protection by such laws still might not be sufficient to allow an employee to feel safe enough to take action.

One process that often intersects with issues of discrimination involves differences in perception. With regard to the perception of employees, existing research indicates that individuals vary in their demographic characteristics with respect to the propensity to file a claim (Goldman et al., 2006). Therefore, there is concern that companies may hire based on the perception or on the criterion of low

propensity to file claims. Even after individuals perceive that they have been discriminated against, they may not necessarily be interested in pursuing their legal rights (D. Martin, 2011; M. Martin, 1992). Alternatively, they may be concerned that the costs associated with filing a claim are too high (Goodson, 2012) to warrant engaging in the act of whistleblowing.

### **Sarbanes-Oxley Act**

The Sarbanes-Oxley Act, enacted in 2002, includes expansive whistleblower provisions. The act covers mail, wire, and bank and securities fraud. It further serves as a model of reform to protect and encourage whistleblowers.

During the last decade, the federal government has introduced many new regulations that discourage retaliation for whistleblowing. The federal government has also broadened other whistleblower provisions to expand their applicability. Furthermore, 40 state governments have broadened or toughened their whistleblowing laws for public employees and have added protections for private employees as well (Moberly, 2012). Regulators have mandated that companies have codes of ethics to protect whistleblowers and that they set up whistleblower hotlines (Moberly, 2012). However, it should be noted that the law on whistleblowers does not apply to all employees. Rather, it primarily applies to those who are involved in the financial dealings of the organization.

## **LIMITATIONS OF PROTECTIONS**

The Ethics Resource Center (ERC) has reported that the percentage of employees who observe misconduct and report it has risen consistently (DiMauro, 2012; Moberly, 2012). Some research reporting that whistleblowing is on the increase indicates that this may be due to the increase and strengthening of regulations (Moberly, 2012).

However, other research does not support this finding (Dyck, Morse, & Zingales, 2008; Moberly, 2012). While there is a perception that whistleblowers are adequately protected, according to many researchers this perception is inaccurate. It has been reported that OSHA has a dismal record of protecting whistleblowers (Calvasina, Calvasina, & Calvasina, 2011). Lies and Newman (2010), Moberly (2007), and Schuman (2013) have all reported that OSHA has found merit in only about 3% of all complaints. Furthermore, OSHA has reported that 65% of its Whistleblower Protection Program managers believe that the program is stressed and 29% believe that the program is broken (Dworkin, 2010; Earle & Madek, 2007; Moberly, 2007). In addition, the Ethics Resource Center (ERC) reported in 2012 that 22% of workers reporting workplace misconduct have experienced some form of retaliation, compared to 12% in 2007 (DiMauro, 2012).

## ISSUES THAT SERVE AS THE BASIS FOR WHISTLEBLOWING

As indicated above, the topic of whistleblowing has been examined extensively in the literature. Researchers have identified various issues that are most often associated with whistleblowing. These issues include concerns with safety behavior, public harm, sexual harassment, inappropriate financial behavior, and refusal to participate in illegal activities. Descriptions of each of these issues are provided below.

### Safety Behavior

Safety behavior refers to the safety of individuals within the organization. A number of different concerns have arisen when the relationship between safety and whistleblowing has been examined (Gonzalez, 2010). Such concerns include patient safety, product safety, and health and safety. Whistleblowing dilemmas can occur when there is a conflict between the expectations of an individual and/or a profession regarding safety and the interests of the organization. For instance, with respect to patient safety, occurrences of whistleblowing arise as a result of the obligation of nurses to report coworkers and physicians who engage in acts that may pose threats to patient safety (Bolsin et al., 2011; Jeffs et al., 2012). As for product safety, this is often a concern for engineers. The expectation is that engineers should design products that ensure user safety, rather than relying on liability insurance to cover the failure of products (Bowden, 2010). One place in which an intersection between patient safety and product safety occurs is within pharmaceutical companies (Kesselheim, Studdert, & Mello, 2010). In fact, it is contended that whistleblowing policies are needed to supplement the failure of organizations' ethics policies (Lee & Fargher, 2013).

### Public Harm

Public harm is concerned with issues that affect external stakeholders. Whistleblowing regarding public harm can include concerns about pollution or other forms of environmental harm. Thus, whistleblowing surrounding this issue may be substantively different from whistleblowing with regard to other issues. For instance, whistleblowing with regard to public harm is different from other whistleblowing in that employees could be acting as private citizens when they blow the whistle, but under certain circumstances, they could experience retaliation from their employer. Additionally, the consequences of whistleblowing in such cases could be much more far-reaching than in other cases. Whistleblowing in these situations could be regarded as protecting the greater good, rather than as simply reporting deviant behavior (Lewis, 2011). An example of whistleblowing that protected the general public was initiated by Cheryl Eckard. She exposed serious contamination problems at GlaxoSmithKline's pharmaceutical manufacturing operations (Wearden, 2010).

However, blowing the whistle on this type of wrongdoing may be extremely difficult, because the consequences of whistleblowing can be substantial. For instance, reporting may result in plant closings, loss of jobs, and reduction in the tax base (Bjørkelo & Macko, 2012). In addition, backlogs may cause governmental regulators to ignore reported violations for long periods of time (Minkes, 2010), so that the whistleblower does not see any relief on the issue.

Members of various professions may view whistleblowing on public harm differently. For example, accountants may be more likely to blow the whistle on pollution when they judge that the company might in the end suffer severe financial harm if the pollution is not reported (Shawver, 2011). With increasing emphasis on the greening of production, attention is being drawn to polluters, so that not only will employees consider blowing the whistle, but members of the public and competitors may do so as well (Ji, Yang, & Liu, 2011).

### **Sexual Harassment**

Sexual harassment is a widespread phenomenon and has serious consequences for the employee (Knapp et al., 1997). Studies have revealed that sexual harassment negatively affects a victim's job satisfaction, self-confidence, motivation, commitment, and mental and physical stress, for example, resulting in post-traumatic stress disorder (Crull, 1982; Fitzgerald et al., 1997; Schneider, Swan, & Fitzgerald, 1997; Willness, Steel, & Lee, 2007).

Given the immensity of the negative consequences associated with sexual harassment, a great deal of attention has been given to the topic in the media and in academic research. Research on the prevalence of sexual harassment has estimated that 40%–75% of American women and 13%–31% of American men experience some form of sexual harassment in the workplace at some time during their working life (Aggarwal & Gupta, 2000; United States Merit Systems Protection Board [USMSPB], 1988; Willness et al., 2007). Yet, other research argues that it is difficult to quantify the experience of sexual harassment in the workplace because of barriers related to creating a universal definition of what constitutes sexual harassment, varying perceptions of what sexual harassment means, and reluctance to report experiences (Advocates for Human Rights, 2010). The barriers to reporting are often thought to include a fear of retaliation, concern for those involved, shame, fear of blame, or ineffective reporting mechanisms (Advocates for Human Rights, 2010).

While women appear more likely than men to self-label as targets of sexual harassment, both men and women report experiencing the same types of sexually harassing behaviors (Nielsen et al., 2010). Given the number impacted by sexual harassment and given the increase in awareness factors arising from training practices, discrimination laws, public awareness, and legal awareness, employees may be becoming more responsive to this issue and cognizant of their protection options. This awareness may result in a greater potential likelihood of employee willingness to blow the whistle on such activities.



### **Inappropriate Financial Behavior**

Inappropriate financial behavior has various components. Financial misbehavior includes bad financial reporting, ghost workers on the payroll, unpaid wages, incorrect time reporting, and corruption of a financial nature. For example, a purchasing officer might be influenced by the offer of a bribe to buy a product that does not provide the best value for the company. Sometimes the influence might include gifts, such as tickets to a ball game or a seat at the theater or bottles of liquor. A politician might accept a bribe that is given to secure his support for a rezoning change or a piece of legislation that the voting public might not view as in its best interest. A safety inspector might be influenced to state that a product meets safety standards when it does not.

Other forms of inappropriate financial behavior include cost overruns by government contractors, such as doctors, hospitals, defense manufacturers, or infrastructure construction companies. Accounting and auditing misdeeds in the financial sector include earnings mismanagement, improper disclosure, insider trading, price fixing in product markets, tax fraud, or violations of securities regulations (Bowen, Call, & Rajgopal, 2010).

### **Refusal to Participate**

Refusal to participate, sometimes referred to as passive whistleblowing, occurs when employees refuse to participate in an activity they believe violates a statute or regulation (Aron, 2010). Refusing to participate in illegal acts or criminal activities is a behavioral component covered by a variety of state and federal laws serving to protect whistleblowers. For instance, while employers are often covered by the Employment-at-Will doctrine, passive whistleblowing is often tied to the public policy exception. The Employment-at-Will doctrine allows employers the right to hire and fire at-will in employment-at-will states. The public policy exception, however, protects employees from being fired or wrongfully discharged when the termination is against an explicit, well-established public policy of the government (Muhl, 2001). An example of this might be that an employer cannot terminate an employee for refusing to break the law at the request of the employer.

Unfortunately, not all existing laws are effective in protecting whistleblowers from retaliation and wrongful discharge. In many states, employees in the private sector remain inadequately protected against employer retaliation for reporting fraudulent acts in the workplace (Aron, 2010).

## **HYPOTHESES**

In consideration of both the legal protections provided to whistleblowers and the variety of serious issues that often serve as the basis of whistleblowing, the hypotheses in this article are designed to elicit the underlying variables that are



most likely to affect the outcome of litigation in favor of the individual (the whistleblower) at the expense of the employer.

### **Hypotheses Based on Legal Protections**

Hypothesis 1a: There is a positive relationship between the legal protection offered by the Whistleblower Protection Act and case outcome in favor of the employee.

Hypothesis 1b: There is a positive relationship between the legal protection offered by state whistleblowing protection acts and case outcome in favor of the employee.

Hypothesis 1c: There is a positive relationship between the legal protection offered by discrimination laws and case outcome in favor of the employee.

Hypothesis 1d: There is a positive relationship between the legal protection offered by the Sarbanes-Oxley Act and case outcome in favor of the employee.

### **Hypotheses Based on Issues of Whistleblowing**

Hypothesis 2a: There is a positive relationship between the issue of safety behavior and case outcome in favor of the employee.

Hypothesis 2b: There is a positive relationship between the issue of public harm and case outcome in favor of the employee.

Hypothesis 2c: There is a positive relationship between the issue of sexual harassment and case outcome in favor of the employee.

Hypothesis 2d: There is a positive relationship between the issue of inappropriate financial behavior and case outcome in favor of the employee.

Hypothesis 2e: There is a positive relationship between the issue of refusal to participate in illegal activities and case outcome in favor of the employee.

## **METHODOLOGY**

The methodology used in this study is guided by grounded theory. Grounded theory involves the discovery of theory from data systematically obtained from social research (Glaser & Strauss, 1967). Grounded theory development is applicable to the present research, in that it has the following characteristics: simultaneous collection and analysis of data, creation of analytical codes in categories developed from the data, discovery of basic social processes in the data, construction of abstract categories, theoretical sampling, and the integration of categories into a theoretical framework (Birks & Mills, 2011; Charmaz & Belgrave, 2003). Grounded theory has been developed as an approach to theory development over the past 50 years, but it has hardly if ever been applied to management research.

The methodology used in this study also involved a policy-capturing approach. Court cases were analyzed by content analysis to discern legal protections and

issues on which the act of whistleblowing took place. In the process, the researchers discerned the policies in the companies that led to the whistleblowing. It should be noted that the data were constrained by the information that judges chose to include in their opinions. It also should be noted that there are many instances of cases that are settled out of court. These cases cannot be included in a study, because they are not usually available for scrutiny by researchers.

Hall and Wright (2008: 63) note the increased potential contribution of this type of methodology, indicating that “case material is a gold mine for scientific work. It has not been scientifically exploited.” Furthermore, “content analysis makes legal scholarship more consistent with the basic epistemological underpinnings of other social science research” (Hall & Wright, 2008: 64).

### **Sources of Data**

State and federal litigated cases were drawn from the Bureau of National Affairs (BNA), Inc., Labor and Employment Law Resource Center database. The current study is composed of a 20% random sample, drawn from 940 cases using the following search strategy: (Whistleblow\* OR (Whistle AND Blow)) and date (after January 1, 2003 and before December 31, 2010). A total of 188 cases were included in the analysis.

The dependent variable in the analysis was the case outcome. The case outcome was either in favor of the employer or in favor of the employee. Split decisions were included as if the employee had prevailed. The rationale for including split decisions with those in favor of the employee is that management did not clearly prevail in these decisions. Any aspect in the case in which the employee prevailed was an improvement over the employee’s initial state.

A finding in favor of the employer would entail that the employer acted appropriately with respect to investigating the activities involved in the whistleblowing. The outcome might also involve a finding indicating that the employer did not act in retaliation against the whistleblower. The coding of the cases involved identifying the presence or absence of whistleblowing and the case characteristics, such as court level, safety issues, financial rewards to the whistleblower, and laws under which the case was litigated.

### **USE OF LOGISTIC REGRESSION IN POLICY RESEARCH**

Logistic regression is a statistical technique frequently used in the management literature (Hoetker, 2007; Manning, Carroll, & Carp, 2004; Perry, Kulik, & Bourhis, 2004; Pohlmann & Leitner, 2003; Werner & Bolino, 1997). The dependent variable in this study is a binary outcome. Specifically, the two outcomes are whether the court ruled in favor of the employer or whether the court ruled in favor of the employee.

Given the dichotomous nature of the dependent variable, logistic regression is the appropriate statistical procedure (Peng, Lee, & Ingersoll, 2002). It is the statistical analysis of choice in those instances where the hypotheses involve a categorical outcome variable and either a categorical or a continuous predictor variable (Peng et al., 2002). One of the assumptions underlying logistic regression is that the predictor variables do not have to be normally distributed (Worster, Fan, & Ismaila, 2007).

## RESULTS

### Descriptive Statistics

The following text describes the characteristics of the cases that comprised the sample in our study. Of the cases in the sample, 81% were litigated in federal courts, 14% were from state courts, and 5% were from other forums, such as the Equal Employment Opportunity Commission [EEOC]. The laws that protected employees were the Whistleblower Protection Act (22%), employment discrimination laws (22%), constitutional amendments (14%), state whistleblowing protection acts (13%), the Sarbanes-Oxley Act (10%), and others (29%). Note that a given case could have multiple bases. The employers' alleged misbehaviors included discriminatory behavior (24%), financial misbehavior (23%), safety behavior (17%), public harm (8%), and sexual harassment (4%). The forms of retaliation included discharge (77% of cases), demotion (5%), forced retirement (4%), transfer (3%), and other job outcomes (12%). The employer prevailed 46% of the time, the decisions were split 34% of the time, and the employee prevailed 20% of the time.

### Multivariate Analysis: Logistic Regression

The purpose of this study was to discern which case characteristics were likely to be related to whistleblowing case outcomes for the employee. Chi square analyses were performed on variables suggested by the literature as affecting case outcomes. Chi square analyses were performed with case outcome as the dependent variable and the Whistleblower Protection Act, the state whistleblowing protection acts, the discrimination laws, the Sarbanes-Oxley Act, safety behavior, public harm, sexual harassment, inappropriate financial behavior, and refusal to participate as the independent variables. A logistic regression analysis was performed with only those variables that produced statistically significant chi square results. However, upon running the multivariate analysis to develop a model, we found that only the following four variables contributed significantly to the logistic regression: Hypothesis 1c, discrimination laws; Hypothesis 2a, safety behavior; Hypothesis 2c, sexual harassment; and Hypothesis 2e, refusal to participate. All other hypotheses were not supported, including Hypothesis 1a,

Whistleblower Protection Act; Hypothesis 1b, state whistleblowing protection acts; Hypothesis 1d, Sarbanes-Oxley Act; Hypothesis 2b, public harm; and Hypothesis 2d, inappropriate financial behavior. The reader's attention is directed to Table 1, where the relative weights of the variables in the various hypotheses are portrayed.

In total, 188 cases were analyzed and the full model significantly predicted case outcome (Omnibus Tests of Model Coefficients chi square = 21.871,  $df = 4$ ,  $p = .000$ ). The model accounted for between 11.3% and 15.1% of the variance, with 53.3% of the cases correctly classified. Table I gives coefficients for each predictor variable, the Wald statistic, associated degrees of freedom, and probability values for each of the predictor variables or case characteristics. The Exp(B) column gives an indication of the change in the predictor odds of the case outcome for each unit change in the predictor variable. Positive values indicate that an increase in the value of the case characteristics is associated with an increase in the odds of the case outcome being in favor of the employee.

Based on the coefficient for the discrimination laws predictor variable in the model, the positive coefficient for discrimination laws indicates that the odds of finding in favor of the employee increase with the presence of this particular case characteristic ( $B = .994$ ,  $p = .01$ ). Similarly, the predictor variables of safety behavior ( $B = 1.214$ ,  $p < .01$ ), sexual harassment ( $B = 1.867$ ,  $p = .09$ , moderately significant), and refusal to participate ( $B = 2.127$ ,  $p = .05$ ) indicate that the odds of finding in favor of the employee increase with the presence of these particular case characteristics. Therefore, the results indicate that individuals increase their chances for successful litigation when the act of whistleblowing involves situations that violate discrimination laws, when there is a concern for safety, when sexual harassment has taken place, and when the act is based on the issue of refusing to participate in illegal activities on behalf of the organization.

Table 1. Logistic Regression Analysis<sup>ab</sup>

Variables in Equation	B	S.E.	Wald	df	Sig.	Exp(B)
Discrimination laws	.994	.397	6.261	1	.012*	.370
Safety behavior	1.214	.412	8.685	1	.003**	.297
Sexual harassment	1.867	1.102	2.871	1	.090 <sup>+</sup>	.155
Refusal to participate	2.127	1.103	3.716	1	.054 <sup>+</sup>	.119
Constant	.453	.205	4.892	1	.027*	1.573

<sup>a</sup>The Events per Variable (EVP) in our sample are sufficient to discern Type I and Type II errors as being uncommon (Vittinghoff & McCulloch, 2007)

<sup>b</sup>Variable(s) entered in Step 1: Discrimination laws, Safety behavior, Sexual harassment, and Refusal to participate.

<sup>+</sup> $p < .10$

\* $p < .05$

\*\* $p < .01$ .

## DISCUSSION

According to King et al. (2011: 63), “Numerous scholarly sources suggest that employers have a much higher victory rate than plaintiffs in employment discrimination litigation. For example, Eisenberg and Farber (2003), Wingate et al. (2003), and Zink and Gutman (2005) all reported that plaintiffs had about a 25% victory rate in employment discrimination cases that made it to litigation. More recent research by Clermont and Schwab (2009) suggests that the plaintiff victory rate may be even smaller (between 10 and 19%).”

No studies address the issue of the plaintiff prevailing rate in whistleblowing cases. A major purpose of this research was to identify laws and issues that can suggest the likelihood of individuals being protected when they engage in whistleblowing related to misbehavior in their organizations. Analysis of the cases clearly indicates the presence of retaliation in the form of discharge, demotion, transfer, forced retirement, and other job outcomes when the employee engaged in whistleblowing. Our data suggest that employees were best protected, that is, the outcome was either in favor of the employee or split, when the following case characteristics existed: when various discrimination laws were applicable, various unsafe practices existed, sexual harassment was involved, or there was a refusal to participate in illegal activities perceived to violate statutory regulations.

Our findings further suggest that where individuals are seen as personally affected by the problematic behavior, they are more likely to receive favorable rulings in court. For example, in situations where the individual was discriminated against, experienced unsafe behaviors, experienced sexual harassment, or did not want to participate in the illegal activities, the individual received favorable rulings. This is in contrast to cases involving Sarbanes-Oxley or other whistleblowing protection acts dealing with financial misbehaviors where whistleblowers were not personally affected. Similarly, issues regarding public harm did not result in favorable outcomes for the individual, since she/he was probably not perceived as personally affected.

Whistleblowing in situations where there are violations of various discrimination laws could potentially be explained as follows. Individuals who have been discriminated against based on race, sex, or national origin are now more confident in blowing the whistle and, overall, less tolerant of this form of discrimination. Furthermore, there is a greater awareness of their legal protections related to these specific classes.

There are societal factors that will be facilitative in individuals' decisions to blow the whistle in the future with respect to discrimination. These include the election and reelection of a black president, which is indicative of more social acceptance of the need for antidiscrimination action. This is further supported by the visibility of high profile women, including Hillary Clinton, female Supreme Court appointees, and CEOs of prestigious companies, such as Marissa Mayer at Yahoo, Indra Nooyi at PepsiCo, and Virginia Rometty at IBM (Fortune 500,

2012). The overall increase in the number of Hispanics in the workforce also contributes to an increased expectancy of equal treatment. Thus, individuals who are discriminated against may feel sufficiently empowered and secure to blow the whistle.

With respect to safety behavior, safety practices affect all employees. While OSHA is responsible for ensuring safe working conditions, it often relies on employees to report violations. In addition, employees are often the people most likely to recognize safety hazards and they are in a prime position to report violations. There is still some concern, however, surrounding reluctance to report safety violations as well as near misses that could provide critical information related to hazards (Walter, 2011). Near misses take place in a variety of industries. A near miss is often defined as “a hazardous situation, event, or unsafe act where the sequence of events could have caused an accident if it had not been interrupted”(Jones, Kirchsteiger, & Bjerke, 1999: 60). Therefore, a near miss should be considered a learning experience by the company. However, the reasons for not reporting near misses often include concerns with regard to fear, embarrassment, difficult and confusing means for reporting, bureaucracy, peer pressure, loss of reputation, the idea that it is easier not to report, perceived lack of interest from the organization, and perceived pointlessness (Walter, 2011). If organizations take action to remove such barriers, then employees may be more inclined to report potential problems before they occur and not simply after the fact. “If we report near misses, and learn from them, we will eventually get to the point where near miss occurrence itself reduces” (Jones et al., 1999: 60).

Publicity surrounding the negative outcomes of sexual harassment on careers increases the likelihood of whistleblowing. We have seen many examples involving the military and politics. For instance, the military has found it necessary to create a specific position, sexual assault prevention coordinator, to facilitate whistleblowing on sexual harassment. In politics, we have seen numerous candidates' careers ruined by whistleblowers for this very reason. For instance, former presidential candidate Herman Cain and Assemblyman Vito Lopez (Brooklyn Democratic Party boss) present reminders of how whistleblowing relating to sexual harassment can leave a deleterious impression on the public and ruin a promising political career. While our study provides only moderate support for the issue of sexual harassment in affecting case outcome, there is anecdotal evidence suggesting that whistleblowing actions are increasingly related to this concern.

While some people may not be inclined to report observing illegal activity and inappropriate behavior, more individuals may be inclined to choose to refuse to participate in the inappropriate activity. This refusal may be explained by their own personal ethical standards. The fear of consequences associated with the activity, including arrest, financial loss, or physical injury, may also deter them from participating in the activity.

There are several possible reasons why the hypothesized variables of inappropriate financial reporting and public harm did not enter into our statistical model,

meaning that they were not significantly related to case outcomes. It is possible that the procedural complexity, interpretations that were given as strictly as possible against the whistleblower, a very short period before the statute of limitations came into play, and/or a lack of resources allocated to OSHA explain why the expected relationships were non-significant. In addition, complainants sometimes have to wait a long time, sometimes years, for compensation (Dworkin, 2010; Moberly, 2007). Finally, it may be that they are inconsistently treated in various courts or under various laws.

One of the most interesting findings suggests that whistleblowing laws are not very helpful to whistleblowers. The hypotheses were not supported for the Whistleblower Protection Act and the state whistleblowing acts, indicating that these acts were not significantly related to case outcomes. One possible explanation could be that potential whistleblowers are less familiar with whistleblowing protections than they are with protections surrounding discrimination and safety (Goodson, 2012; Moberly, 2007). Another possibility is that whistleblowing tends to reflect issues of broad significance to the company. Therefore, a company is likely to marshal more resources to defend itself in court than it would in discrimination cases. For example, in instances of whistleblowing, the scope of the case would be broader and would have greater economic consequences, as with pollution contaminating a water supply, which affects the whole community. Most discrimination cases involve only one or a small number of plaintiffs, and the settlements would be significantly smaller. Furthermore, the courts have tended to apply a very narrow definition of what qualifies for protection under the heading of whistleblowing. Additionally, there tend not to be remedies appropriate to an individual who blows the whistle on security issues.

### **RECOMMENDATIONS FOR WHISTLEBLOWING SUCCESS**

Given that whistleblowing can be time consuming and expensive if the employee loses, it is in the employees' and the employers' best interests to report safety violations internally (Walter, 2011). First, the individual should be encouraged to utilize internal channels of reporting, including the direct supervisor, the union representative if available, and the human resources department. If the internal resources are not effective in resolving the situation, then the individual should go to the appropriate external regulatory agencies. There may be a variety of external sources for resolution. These include various municipal, state, and federal organizations, such as OSHA. One of the notable aspects of human resource management is that sometimes state or municipal agencies are more effective than federal agencies in the resolution of human resource related issues.

Second, to encourage the act of whistleblowing, further state and federal whistleblowing laws should be enacted and/or more rigorously enforced (Aron, 2010). This includes proposed legislation that would require employees to report violations of health and safety (Cassebatis & Wortley, 2013; Fasterling & Lewis,



2014; Tsahuridu & Vandekerckhove, 2008; Vandekerckhove & Tsahuridu, 2010), in a manner similar to requiring teachers to report abuse of their students.

However, Vandekerckhove and Tsahuridu (2010) note that legislating whistleblowing as a positive duty to do good or to prevent harm may not be feasible considering that three necessary criteria are often not met, namely, the criteria that (1) who should know what needs to be specified; (2) actions need to be specified to minimize the risk to the whistleblower; and (3) protections need to be in place to adequately deal with mistaken concerns that might be raised.

Finally, in a manner similar to the practice of providing sexual harassment avoidance training, safety training, and general ethics on a regular basis, regular training needs to be provided on various issues such as financial irregularities and harm to society. It should be made clear that individuals have a duty to report. Just as members of professions are made aware that they have a duty to report violations and abuses as part of their professional obligations, others should be mandated to report and trained to recognize when they should do so. There can be large financial rewards for reporting (Wearden, 2010), and this should be made more widely known. It should also be made clear that retaliation is legally unacceptable and will be punished.

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