A global compliance career

an interview with Sally March

Director, Drummond March & Company, London

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by Amy Block Joy, PhD

The high cost of whistleblower retaliation: Why institutions should prevent it

» Retaliation is a major threat to the ethical culture of an organization.

» Organizations must prevent retaliation before it becomes a second form of misconduct.

» Retaliation increases the likelihood of additional costs in litigation, reputational damage, and adverse publicity.

» Even the perception of retaliation will reduce employees' trust and openness and reduce productivity.

» Prevention training and educational efforts can provide tangible proof that the organization is committed to fostering a safe environment.

Over the last two years, whistleblower retaliation claims have become far more prevalent. According to the 2011 National Business Ethics Supplementary Report entitled *"Retaliation: When Whistleblowers Become Victims,"* more than 22% of those who reported misconduct in 2011 perceived retaliation for doing so.[1] This upward trend calculates to an additional 2.3 million *more* workers than reported retaliation in 2009.[2]

Block Joy

Because whistleblower retaliatory activities are broad, subjective, and complex, many institutions may be tempted to display their anti-retaliation policy but side-step efforts to safeguard the reporter or whistleblower. Past organizational failure to protect the whistleblower has been costly: As of September 2010 the government paid out over $2.877 billion in compensation to whistleblowers.[3]

In a Ethics Resource Center (ERC) report entitled: *Retaliation: The Cost to your Company and Its Employees*, the authors note: "In essence, employees' beliefs about retaliation—that it will happen or already has—drive both how much misconduct is taking place and whether it gets reported."[4] Human resource experts are urging managers to train the workforce in order to stave off potential retaliation claims. Clearly, preventing retaliation would be less costly and reduce the risks of lengthy litigation, possible institutional reputation damage, and adverse publicity.

Despite the fact that many organizations have anti-retaliation policies in place and most states have whistleblower protections under state common law,[3] retaliation claims continue to fester. So what should institutions do to put a stop to this costly burden?

Retaliation is not just about the whistleblower, it is about the perception on how to speak up about possible wrong-doing without reprisal.[5] To preserve an institutional climate with a strong ethical framework, organizations must support a safe work environment. An organization will also benefit from embracing a culture of trust, accountability, and integrity.[6] In other words, preventing retaliation is good public policy.

Retaliation: What is it?

The Ethics Research Center (ERC) defined retaliation in their 2011 report as "a negative

consequence experienced by an employee for reporting observed misconduct."[1] In 2012, the ERC Fellows discussed the disturbing trend revealed in the 2011 survey. "Retaliation—defined as retribution exacted by co-workers or managers against an employee who has reported workplace misconduct—can take many forms."[2]

In fact, the ERC report on the 2011 National Business Ethics Survey (NBES) found at least a dozen forms of retaliation. This survey collected 4,683 employee responses from the for-profit sector on a wide range of retaliatory activities. The percent of those who observed misconduct were asked whether or not they experienced retaliation. The survey responders reported the following: Supervisor or management excluded from decisions and work activity (64%); Other employees gave a cold shoulder (62%); Verbally abused by supervisor or someone else in management (62%); Verbally abused by other employees (51%); Not given promotions or raises (55%); Relocated or reassigned (44%); Demoted (32%); Hours or pay cut (46%); Almost lost job (56%); Harassment online (31%); Harassment at home (29%); Experienced physical harm to person or property (31%) and Other (14%).[1]

The survey also found that senior managers were more likely to experience retaliation that is traceable compared to middle management, first-line supervisor, or non-management groups. Traceable retaliation was defined as: "forms of retaliation … that leave proof of having happened: physical harm,

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online harassment, harassment at home, job shift, demotion, cuts to hours or pay."[1]

One chilling statistic stood out: There was an increase in the percent of those who experienced physical harm to person or property. In the 2011 NBES, 3 out of 10 respondents (31%) reported physical harm to either themselves or their property compared to only 4% in 2009.[1,2]

Academic research studies have also shown that whistle-blower retaliation is thriving. In a privotal 8-year national whistle-blower retaliation study by Drs. Rothschild and Miethe, results were troubling. The researchers interviewed 761 employees (149 non-observers of misconduct, 218 observers of misconduct who remained silent, and 394 whistleblowers) from a large segment of organizational categories across the country. Of the whistleblower respondents, 69% lost their jobs or were forced to retire even though they reported the wrong-doing to higher ups within their own organization. Additionally, 64% received negative performance evaluations, 68% were closely monitored by supervisors, 69% were avoided by coworkers, and 64% were blacklisted from getting another job in their field.[7]

Drs. Rothschild and Miethe wrote:

> One of our most important findings, neither gender, age, race, educational attainment, nor years in the job can save you from retaliation … The bottom line is that the larger and more systemic the abuse that is being exposed, the more intense will be the managerial effort to discredit and to punish the whistle-blower.[7]

C. Fred Alford, in his landmark study of whistleblowers in the Washington DC area, made a similar observation about whistleblower retaliation:

> In theory, anyone who speaks out in the name of the public good within the organization is a whistleblower… Imagine that an employee observes an unethical or illegal act by her boss and reports it. This is the situation that is most likely to get the employee into trouble. Rarely do employees get fired for reporting the misbehavior of subordinates … Her bosses' boss thanks her for the information and corrects the problem. She has performed an act of whistleblowing, but for all practical purposes she is not a whistleblower. She becomes a whistleblower when she experiences retaliation. If there is no retaliation, she is just a responsible employee doing her job to protect the company's interest …[8]

Retaliation = Fear

Retaliatory activities may be an indicator that an organization needs a stronger, more credible ethics program.[5,6] When speaking out becomes dangerous and people believe that retaliation will result, the organization loses credibility. Employee survey results have shown that fear of retaliation keeps employees quiet, allowing misconduct to go unchecked.[6]

In fact, a 2007 business ethics survey found that 25% of respondents had observed unethical behavior in their organization but only 66% believed it would be detected and punished.[9] Encouraging the workforce to actually report wrong-doing has a long way to go: 13% of those employees surveyed in 2007 who were "silent observers" feared reprisal.[6] Furthermore, the 2011 ERC study found that over the past five years retaliation rates were rising faster than the reporting rates; while reporting of wrong-doing increased 12%, retaliation rates increased by 83%.[1] When retaliation becomes part of the cultural norm of an organization, the "silent observers" may decide to look the other way, allowing the wrong-doing to continue.[5,10] When the workforce fears retaliation, the ethical backbone of the organization weakens. As the 2011 NBES report cautions, "Retribution against the reporter [whistleblower] can create an environment that is cancerous to the organization."[1]

Preventing retaliation

Organizations also need to consider other factors. Issues regarding confidentially, lengthy investigative timelines, and keeping a lid on negative publicity can reduce management's interest in safeguarding the whistleblower. Interestingly, a new ruling from the National Labor Relations Board (NLRB) has raised concern regarding employers' requirement for confidentiality. Writes Corporate Journalist Dawn Lomer:

> A ruling last year by… (NLRB)—that an employer's request, that employees not discuss a workplace investigation while it was on-going, violated the employees' rights to engage in protected concerted activity …[11]

The most economical and practical approach to improving an ethical culture would be to provide education and training to

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increase awareness in the workforce regarding laws and policies prohibiting retaliation. In addition, as part of the development of a strong ethical culture, employees need to feel comfortable raising issues. Employees also need to know how the organization will protect them from retaliation. And, finally, if retaliation should happen, institutions with swift and credible enforcement will go a long way in sending a message that the leadership will respond.

Conclusion

Like any other wrongdoing, the organization should take an active role in preventing retaliation from becoming an additional costly burden. Organizations that promote open communication will be more effective in creating an atmosphere of trust. The first line of defense against retaliation is a workforce that believes that their leadership is listening and that speaking up is encouraged. In addition, developing training materials that explain what retaliation is and what it looks like should be part of an organizational dialogue to protect the whistleblower.

However, when retaliation is alleged the organization should take these reports seriously by responding quickly and appropriately. If the alleged retaliation is substantiated, then it is imperative for the leadership to take decisive action that is visible to the workforce. Otherwise, employees might just believe that retaliation isn't taken seriously. The consequences of this belief can be very costly. ✳

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1. Ethics Resource Center: Retaliation: "When Whistleblowers Become Victims. A supplemental report of the 2011 National Business Ethics Survey" 2012. Available at http://www.ethics.org/nbes/files/RetaliationFinal.pdf
2. Ethics Resource Center: Summary of the July 2012 ERC Fellows Meeting: "Retaliation in the Workplace—Why it Matters and What Companies Can Do About It" 2012. Available at http://www.ethics.org/files/u5/FellowsRetaliationNotesOptimized.pdf
3. S.M. Kohn: *The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself.* Lyons Press, 2011
4. Ethics Resource Center: Supplemental Research Brief, 2009 National Business Ethics Survey: "Retaliation: The Cost to Your Company and Its Employees." 2010. Available at http://www.ethics.org/files/u5/Retaliation.pdf
5. A.B. Joy: *Retaliation.* (In press, 2013)
6. A.B. Joy: "Is Whistleblowing Effective for an Organization?" *Compliance & Ethics Professional*; 8(6):20, December 2011
7. J. Rothschild and T. Miethe: "Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information about Organization Corruption." *Work and Occupations*; 26(1):107, February 1999
8. C.F. Alford: *Whistleblower: Broken Lives and Organizational Power.* Cornell University Press, 2001
9. S.S. Lightle, J.F. Castellano, and B.T.Cutting: "Assessing the Control Environment." *Internal Auditing*; 64(6):51, December 2007
10. A.B. Joy: *Whistleblower.* Bay Tree Publishing, 2010
11. Dawn Lomer: "Confidential Internal Investigations: An Exception, Rather than the Rule." *Compliance & Ethics Professional*; 10(2):75, March 2013

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