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ANALYSIS OF SAMPLE CASES ON WHISTLEBLOWING: OUTCOMES FOR WHISTLEBLOWER AND ORGANIZATION

Abstract:

The understanding of loyalty concept between employer and employee has changed in recent years. While, priorly, mainstream idea was based on employer's loyalty to his/her employer unquestioningly, nowadays this idea changes to a new understanding emphasize employer's responsibility to public, too. This change comes with birth of a new organization behavior concept and its legitimacy arguments: "Whistleblowing".

Whistleblowing means disclosure of in organization wrong doings to concerned authorities. In managerial science, detailed studies have been conducted on whistleblowing. Most of them seek what whistleblowing is (or is not), how it is/should be processed. Beside these subjects, whistleblowing is concerned with legal issues. After whistleblowing action, whistleblowers can be exposed to mobbing, retaliation, quitting etc. treatments. Countries pass some laws to protect whistleblowers from that kind of treatments to maintain whistleblowing actions. While some whistleblowers gain big awards make them rich thanks to these laws, others can get nothing but cruel treatments, also even get fired by their organization.

In this paper, various whistleblowing cases – increased in past two decades – will be analyzed comparatively from the point of outcomes for whistleblowers and organizations as well as other whistleblowing related issues.

Keywords:

Whistleblowing, Whistleblower, Whistleblower Protector Laws, Whistleblowing Cases, Whistleblowing Outcomes, Whisteblowing Cases

JEL Classification: M10, M12

1. INTRODUCTION

Today, all organizations' ethical position matter very much for stakeholders. The people putting the money in bank for protection and appreciation, buying food to feed her child healthy, buying a car well equipped for safety or trust in international organizations for world peace are roughly examples to these stakeholders. To protect mentioned stakeholders, some duties fall to some internal environments –top management, board, general meeting, etc.– and external environments –government, judicial authorities, international organizations etc.– concern these organization's ethical frameworks. However, to maintain these controls about mentioned organizations sometimes specific information is needed. At this point, a moral behavior from employees within organization can be occurred: Disclosing misconducts to the concerned authority. In the aspect of increase in ethic level within organizations, this important behavior is conceptualized as "whistleblowing" in literature.

Unfortunately, it is inevitable that this ethical and not serving someone's purpose behavior have risks. Whistleblowers can face many difficulties at work life like dismissal, retaliation, transferring or blocking career. In order to eliminate such hazards, in some countries, whistleblowers are protected and awarded in the context of whistleblower protection laws. Thanks to these laws, these risk can be overcame even whistleblowers may be awarded with high money amounts. Of course, these outcomes may differ substantially between different cases. In this study these differences will be analyzed by different cases.

2. WHAT IS WHISTLEBLOWING?

The whistleblowing concept which was unused until even 1986 is defined in Oxford English Dictionary as "to blow the whistle on (a person or thing): to ring an activity to a sharp conclusion, as if by the blast of a whistle; now usually by informing on (a person) or exposing (an irregularity or crime)". In literature, Near and Miceli (1985) defined whistleblowing as "the disclosure by organization 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". Therefore, whistleblower defined as the person makes whistleblowing.

The term whistleblowing is derived from the act of a referee in a sport event where the referee blows the whistle to stop the action, usually on account of an illegal play (Miceli & Near, 1992). Coming into prominence of whistleblowing concept became after Enron and Worldcom scandals (Aktan, 2006). Bush government issued Sarbanes-Oxley act after these scandals and tried to protect whistleblowers (Sayğan, 2011).

3. TYPES OF WHISTLEBLOWING

In the first phase, whistleblowing is divided into two dimensions according to where to apply and whether identity is anonymous. Then these dimensions divided into two dimensions again.

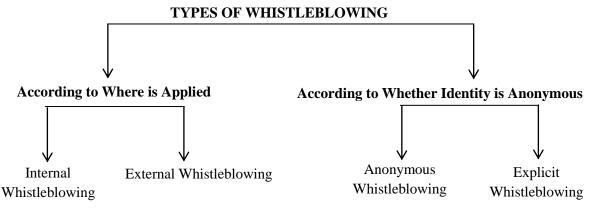


Figure 1: Whistleblowing Types

3.1. Whistleblowing Types According to Where is Applied

One of the most important decisions the whistleblower must give is whether the whistleblowing will be made internal or external (O'Sullivan & Ngau, 2012).

3.1.1. Internal Whistleblowing

That whistleblower makes whistleblowing to authorities which inside of organization is "internal whistleblowing". Employees' reporting ethical and legal distortions which they witnessed to senior management is an example of internal whistleblowing. Encouraging internal whistle-blowing can increase the safety and wellbeing of the organization, show support for codes of ethics, reduce waste and mismanagement, improve morale, maintain good will, and avoid damage claims and legal regulation (Miceli & Near, 1994). Increased safety, well-being of organization, declaration of supported code of ethics, reduced waste and mismanagement, improved morale, maintained good will, avoided damaging claims and legal regulations are rewards of encouraging internal whistleblowing (Miceli & Near, 1994; Paul & Townsend, 1996).

3.1.2. External Whistleblowing

That whistleblower makes whistleblowing to authorities which are outside of organization – like media, judicial bodies, etc. – is "external whistleblowing" (Sayğan, 2011). It is essential that external whistleblowing shouldn't be applied before applying to internal whistleblowing in aspect of ethical attitudes according to common view in the literature.

3.2. Whistleblowing Types According to Whether Identity is Anonymous

Another division in whistleblowing types is about whether the whistleblower's identity is anonymous or not in whistleblowing process. Whistleblowing divides two as anonymous and explicit whistleblowing.

3.2.1. Anonymous Whistleblowing

Anonymous Whistleblowing occurs when whistleblower's identity is hidden in whistleblowing process. This situation can occur in two ways.

- Whistleblower hides his/her name by himself/herself in whistleblowing process (anonymity).
- Whistleblower doesn't hide his/her name but the authority which is applied decide to hide the whistleblower's name (confidentiality) (Aktan, 2006).

3.2.2. Explicit Whistleblowing

Explicit Whistleblowing occurs when whistleblower doesn't intent to hide his/her identity in whistleblowing process.

4. COMPARATIVE ANALYSIS OF SEVERAL WHISTLEBLOWING CASES

In the past two decades many scandals revealed thanks to whistleblowers. An estimated one-third of fraud cases worldwide are exposed by whistleblowers and tipsitters-more than auditors. security staff and the police combined (https://www.indiegogo.com/projects/be-a-voice-for-change, 2013). These positive returns of whistleblowing actions encourage governments to introduce laws to promote whistleblowing, protect and reward whistleblowers. In whistleblowing issues, the country have most regulations and laws is U.S.A. Especially, after Enron, Worldcom and FBI scandals exposed by whistleblowers the country accelerated to introduce new regulations about whistleblowing and whistleblowers. The most important three regulations in U.S.A. are False Claims Act, Sarbanes Oxley Act and Dodd-Frank Act. However, the many other countries have whistleblowing regulations, too. The approaches of different countries to whistleblowing can be analyzed by cases. Six cases from four countries will be analyzed in this study.

Case 1: Robert Rester v. McWane Pipe

Whistleblowers may face very difficult situations like mobbing, retaliation, firing etc. Despite protector regulations, outcomes of whistleblowing for whistleblower can be very devastating even after litigation process. At this case Robert Rester made proper thing but his life ruined after that.

"Before he became a whistleblower, Robert Rester was an old hand at making McWane pipe. He began his career with McWane in 1978 when he took a job as a millwright at the M&H Valve foundry, a McWane subsidiary. Rester rose through the ranks, receiving assignments to various plants in the United States and Canada.In 1999, Rester was promoted to plant manager at McWane's flagship foundry in Birmingham, Ala., a position that paid as much as \$125,000 a year, depending on how successful he was in keeping costs down. But keeping costs down, Rester said, meant skirting environmental and worker-safety rules: dumping toxins into local creeks and covering up employee injuries.

Rester admitted that he went along with the scheme. "You got polluted water, wait for a good rain and put it in the creek. Someone gets hurt, put someone else on the line. Keep the pipe moving, that's all that counts," he told FRONTLINE in 2002. When Rester was contacted by The New York Times and FRONTLINE in 2002, he was on medical leave for a heart condition and dealing with the recent death of his wife. He said he was having a change of heart about McWane, and he decided to blow the whistle.

Following the New York Times series and the FRONTLINE broadcast, Rester was contacted by federal investigators looking into McWane. Rester consulted an attorney and decided to speak to the FBI and the Environmental Protection Agency (EPA), who in turn agreed not to prosecute him if he implicated himself in related crimes.Rester became a key witness for the government and testified at trial. He also filed a whistleblower suit against McWane, claiming he was wrongfully terminated. Rester lost his civil suit and without steady employment was forced to file for bankruptcy.

'I lost it all,' Rester later told FRONTLINE. 'Horses, guns, the house and land where I used to live. I don't regret. I mean, of course sometimes I look at what I've lost and what I could have now, but I still feel like I did the right thing.'

Today, Rester makes a living driving a garbage truck in Anniston, Ala., which is home to two McWane plants. (http://www.pbs.org/wgbh/pages/frontline/mcwane/updates/, 2008)"

Case 2: Paul Blakeslee v. Shaw Environment & Infrastructure Inc. of Baton Rouge

Whistleblowers' fate are not always so dark as much as Robert Rester's. There are many examples which whistleblowers awarded with high compensations. One of them is Paul Blakeslee who whistleblow on his project manager suspect of a fraud in

"In 2008, Paul Blakeslee worked for Shaw Environment and Infrastructure, a full-service contractor for environmental and infrastructure projects worldwide. Blakeslee was managing over 40 employees working on a \$100+ million contract to maintain facilities at Fort Richardson and Fort Wainwright in Alaska. When Blakeslee learned that Shaw's Alaska project manager owned one-third of another private company that was leasing about \$2 million in equipment to Shaw, often without competitive bidding, he decided to write a letter to Shaw's CEO reporting what he believed to be fraud.

According to the lawsuit, Blakeslee said the project manager found out about the planned letter Blakeslee was writing to the company's CEO and threatened to lay him off. That exchange happened on a Friday and the following Monday, the company terminated him, telling him they were eliminating his position to save money.

A week or so after the project manager threatened to terminate, Blakeslee sent the planned letter to the CEO. According to the letter, Blakeslee decided to write the letter after he received a company email "encouraging any employee to report any illegal or adverse practices existing in the organization." Here is an excerpt from an affidavit Blakeslee filed in the subsequent lawsuit providing further background on why he wrote the letter:

"I wrote my letter dated September 19, 2008 because when I learned that Mr. Lantz owned American Leasing, I immediately believed that his ownership was illegal and a conflict of interest. I formed this opinion in August 2008 after the purchasing agent Ron Babbs told me that Lantz owned the company. I started working on my letter in August and I sent it on September 19 after editing and revising the letter over several weeks."

Blakeslee's letter was stamped "Received" in the CEO's office on September 23, 2008. A copy of the letter is attached here.

On the morning of October 6, 2008, Blakeslee was told his position had been eliminated and he was asked to pack his personal items and leave that day.

Shaw investigated the concerns raised in Blakeslee's letter and ultimately terminated the project manager was terminated. Despite this seeming validation of Blakeslee's concerns, however, Shaw refused to reinstate Blakeslee. Blakeslee sued in October 2009 alleging age discrimination, retaliation and wrongful termination. Click here to read a copy of the Shaw Complaint

Shaw retained counsel and defended aggressively for 4+ years. The case finally went to trial in March 2013. After a 12-day trial, the federal jury in Alaska found in favor of Blakeslee concluding that Shaw's firing of Blakeslee was illegal retaliation for his reporting of the wrongdoing. The jury awarded Blakeslee \$445,574 in lost wages and \$486,458 in non-economic damages for his emotional distress. After listening to oral arguments from the attorneys on both sides, the jury also awarded Blakeslee \$2.5 million in punitive damages. (Schaefer, 2013)"

Case 3: Heinisch v. Germany

Importance of this case would be more comprehensible with following case which occurred in United Kingdom where approach to whistleblowing is more different in the aspect of laws. In this case, a nurse's legal struggle from Germany courts to to European Human Rights Court is told.

Brigitte Heinisch was a geriatric nurse working for Vivantes, a rest home which majority of its shares own by the Berlin State. Heinisch was uneasy about the rest home management's recklessness on human resources. According to Heinisch employee number was inadequate and workload was too high. Because of this, she was getting ill continually and proved this by health reports. Also management didn't make its responsibilities to people and make these look like done on paper. Heinisch reported its concern to management and board by her lawyer and she applied to prosecution. However, prosecution denied the case and management terminated the employment contract citing her absences via health reports as reason by allowing the time required by law. After that, held protest and dealt proclaims with its colleagues and members of syndicate she was union of. She sent a copy of the proclaim to the rest home management. The management, this time, terminated the employment contract instantly based on violation of duty of loyalty and labor peace (Alp, 2013).

Labour Court of Berlin decided the termination of employment contract is illegal. Dealing of proclaims were under protect with regards to freedom of expression. Hereupon, the rest home management appealed a higher court (State Labour Court of Berlin). This court decided that claims of Heinisch were groundless, excessive and against to duty of loyalty. Thereupon, she appealed to Federal Labour Court of Germany and Federal Constitutional Court of Germany didn't accept her appeal. Therefore, domestic remedies exhausted and Heinisch appealed to European Human Rights Court (EHRC) (Alp, 2013).

Heinisch, at her appeal, indicated her right to freedom of expression and a fair trial mentioned in article 10 and article 6/I of European Convention on Human Rights. EHRC decided Heinrisch's right to freedom of expression was violated and sentenced Germany pay \$10.000 compensation to Heinisch. (Alp, 2013)

Case 4: ALM v. Bladon

Very familiar case to Heinisch v. Germany case was occurred in UK, 2002. The difference between legitimation processes in cases is striking. Even if, Court of Appeal decides the retrial of the case, it is understood that UK legal system and courts are more familiar with the whistleblowing concept. The case is exactly quoted from "Whistleblowing Case Summaries" from www.pcaw.org.uk

"ALM ran a number of nursing homes. Two months after employing Bladon as a charge nurse in one home, he was asked to act-up as matron. While doing so, he wrote to the Managing Director (MD) with several concerns about care standards and personnel issues. Ten days later and before there had been any formal response from ALM, Bladon disclosed his developing concerns to the Social Services Inspectorate (SSI) as he thought conditions at the home were worsening. [NB The SSI is not a PIDA prescribed regulator]. The SSI's investigation found some substance in 4 of the 6 concerns Bladon had raised. At the same time, the MD disciplined Bladon for his own poor care standards, issued him a written warning and denied him an appeal against it. A week later the MD dismissed Bladon. The ET (Employment Tribunal), having heard evidence from the MD but not from ALM's three other witnesses, held that Bladon's whistleblowing to the SSI was protected as a wider disclosure under PIDA and had caused the reprisals. The ET awarded £23,000 (£10,000 for detriment and £13,000 for unfair dismissal). ALM's appeal to the EAT (Employment Appeal Tribunal) was dismissed as it held that Bladon's whistleblowing to the SSI had been reasonable and that it had been of substantially the same information as he had risen with ALM. The EAT, however, declined to hear evidence questioning Bladon's good faith and rejected a belated attack on the impartiality of the chairman of the ET. ALM took its case to the Court of Appeal (CA) asserting that its other witnesses' evidence would have questioned whether Bladon had acted in good faith and whether his disclosure to the SSI was in fact reasonable. As an example, ALM referred to evidence that the day before his dismissal Bladon had been seeking evidence from staff in another home to have ALM closed down. The Court of Appeal ordered a rehearing, holding that the ET had erred in refusing to hear evidence from the other ALM witnesses. CA stressed that an ET must first decide whether there had been a protected disclosure and, if so, whether it had been the cause of the reprisal. CA recommended that tribunals hold directions hearings in advance of PIDA cases to identify the issues in dispute and to agree the evidence to be called."

Case 5: Douglas Durand v. TAP Pharmaceuticals

In early 1995, Douglas Durand left his job at Merck Pharmaceuticals to join TAP Pharmaceuticals as their Vice President for Sales. Within a few months of joining TAP, Durand became extremely concerned about certain practices at TAP – giving doctors a 2% administration fee for prescribing TAP's prostate cancer drug, Lupron; encouraging doctors to bill Medicaid for the cost of drugs that had been provided to them as free samples; and providing doctors with lavish discounts, gifts, and trips. After his futile efforts to stop these doubtful practices according to him, he started to gather evidences prove wrongdoings in organization. At the end of seven months evidence gathering process he had collected 500 boxes file. He guit TAP at February and three months later filed suits against TAP and Zeneca with his lawyer Elizabeth Ainslie. Feds started investigation against TAP and Durand helped them to government build its own case. After five years, in 2001, U.S. Boston Attorney intervened the case. TAP was accused by bribing doctors. It denied the charges but at last was obliged to concede in afraid of the reimbursement of Lupron - half billion dollar yield drug - wouldn't made by Medicare. TAP was convicted to \$885 million for settlement, Douglas Durand, - Elizabeth Ainslie (his lawyer) and Joseph Gerstein (another whistleblower works at TAP) took shares \$126 million, \$13 million and \$16 million respectively (Weinberg, 14.3.2005).

However, the truth emerged later. On the separate case that presented by TAP employees, all defendants exonerated. Claimed bribes to doctors either never happened or left in legal limits. One of Durand's claims, TAP fully accounted for only half of the free samples it handed out, wasn't verified, it was much more. It was revealed that claimed trips offered to doctors to prescribe Lupron were paid by doctors themselves (Weinberg, 14.3.2005).

It is understood that TAP management fed up with long court durations and feared to be lose reimbursements for Lupron, considering coming from government. At last it conceded involuntarily the charges against itself by making a pros and cons analysis and gave in to pay fine for settlement. According to Winberg, companies settle whether they are guilty or not generally in such situations. (Weinberg, 14.3.2005)

Case 6: Anonymous Whistleblower v. Renault

Whistleblowing's the other sharp side appeared clearly on another case about that Renault takes an internal anonymous whistle and events happened in a hoax and panic afterwards. According to Noam Noked (2011), the summary of the case as follows:

"In August 2010, Renault's management received an anonymous letter by mail accusing Michel Balthazard, the head of Renault's development projects, of having negotiated to receive a bribe. While acknowledging that that he or she "of course . . . ha[d] no proof," the letter's author wrote "if this is all wrong then I'm paranoid." In response, Renault had its internal security team conduct an internal investigation, which reportedly uncovered information that Balthazard and two other employees had hidden bribery proceeds in three offshore bank accounts. The three employees denied the allegations. According to published accounts, Renault concluded its internal investigation in January 2011 and fired the three employees. Around the same time Renault publicly announced that these individuals had committed industrial espionage—an announcement that generated headlines in the international press. It appears that Renault also reportedly informed French law enforcement authorities that its electric car technology had been leaked to rival Chinese automakers as part of the bribery scheme, filing a criminal complaint and prompting an official government inquiry. Two months later, however, French authorities announced that they had discredited the claims made in Renault's complaint, noting that the offshore accounts that allegedly had been used to store the bribery proceeds did not exist. Last week, in a turn of events that surprised the international press, French authorities took custody of an employee in the Renault security department that conducted the internal investigation into the bribery allegations. This employee was reportedly guestioned about a roughly \$350.000 payment by Renault's security department to Michel Luc, an Algeria-based private investigator allegedly involved in providing Renault with information about the nonexistent foreign bank accounts. It appears that French authorities are now investigating whether the bribery allegations in the anonymous letter were part of a scheme to defraud Renault. In the wake of these developments, this week Renault retracted its allegations against the three terminated employees and publicly apologized to them. Renault's Chief Executive Officer agreed to return his 2010 bonus and accepted the resignation of Renault's Chief Operating Officer, who (along with other executives involved in the matter) will also return their 2010 bonuses".

5. INFERENCES, ADVISES AND CONCLUSION

	Robert Rester v. McWane Pipe	Paul Blakeslee v. Shaw Environment	ALM v. Bladon	Heinisch v. Germany	Douglas Durand v. TAP	Anonymous Whistleblower v. Renault
Country	USA	USA	UK	Germany	USA	France
Sector	Pharmacology	Pipe Industry	Healthcare	Healthcare	Pharmacology	Automotive
Issue	Fraud	Damaging the Environment	Workplace Conditions	Workplace Conditions	Fraud	Fraud
Was Internal Whistleblowing applied?	Yes	Yes	Yes	Yes	No	Yes
Result for Whistleblower	Ruined his life	Awarded \$3.5 million	Awarded £ 23.000	Awarded £ 10.000	Awarded \$885 million	Didn't revealed
Result for Organization	Continued its operations	No information	Paid Compensation £ 23.000	No Information	Settled for \$885 million	Sacked employees unfairly
Court Result	R. Rester was considered unfair	Wasn't Reflected to Court	Found Bladon Right	EHRC found Heinisch right	Organization exonerated from all charges	Lawsuit process didn't occur

Table 1: Comparative Analysis of Sample Cases on Whistleblowing

In the Table-1 the outcomes of whistleblowing action for whistleblowers and organizations are summarized comparatively. While such examples can only provide limited insight to overall whistleblowing outcomes under different circumstances like country, sector, issue, etc., they can be helpful in capturing required introduction information with broad strokes for researchers.

It is seen in the majority of cases that applying internal whistleblowing has two advantages

- It can give a chance organization to fix its problems
- In case of event go legal process it provide advantage to whistleblower by reducing the organization's duty of loyalty violation.

Therefore, internal whistleblowing- if conditions are appropriate - must be applied.

Given effectiveness of whistleblowing in exposing frauds, the laws should be popularized around the world. However, the conditions make this issue harmful mustn't be ignored. That the laws are pro-whistleblower make them ignoring granular points about the issue. For example, these conditions of the laws incite whistleblowers to take action even if they are not sure about the situation or to go directly to external whistleblowing without applying internal whistleblowing. Sometimes, companies find no way out else paying compensation in afraid of further damages even they are innocent. (Douglas Durand Case)

Another inference can be made from these cases; whistleblower protections are not always linear with development level. While UK's legal system is rather familiar with whistleblowing concept, Germany high courts didn't care whistleblower protection in concerned cases (ALM v. Bladon and Heinisch v. Germany).

Whistleblowing is a risky action. Court conclusions can differ very much as between a ruined life and being very rich (Robert Rester- Douglas Durand difference).

Awards difference between USA and Europe very much, because of False Claims and Dodd-Frank Acts. While finding cases million dollars mentioned in USA is so easy, in Europe generally only thousand euros mentioned.

To protect the firm from misconduct so whistleblowing is intimately associated with internal audit and its quality. In case of there is a whistle, internal investigation's quality is crucial. In these processes, companies mustn't get into panic and decide in hoax. Otherwise, bad consequences may occur (Renault Case).

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