

Ending Business as Usual: The Need for Worldwide Whistleblower Protections

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A biochemist and vice president of a major tobacco company who was tasked with developing a less harmful cigarette became aware that the company was adding hazardous chemicals to its products to increase the effects of nicotine and keep smokers addicted. In the face of powerful forces, he risked everything he had ever worked for and went public, becoming one of the most famous whistleblowers.

This was Jeffrey Wigand, and his decision to come forward and become a whistleblower has saved millions of lives. He did not do it alone. He collaborated with attorneys who were able to protect him.

Prior to Wigand coming forward, whistleblowers were denigrated and scorned. Wigand demonstrated the need for whistleblowers to come forward and that one could succeed, even against one of the most powerful and well-funded industries in the world. No longer should whistleblowers be marginalized or relegated to live in the shadows. In the face of powerful forces, whistleblowers are essential, especially in a free and open society. Over the past 40 years, whistleblower laws in the United States have succeeded in bringing to light fraud and corruption in all sectors of society while protecting whistleblowers from retaliation.

Reporting institutional fraud and other major misconduct – to law enforcement, ombudsman-like structures, whistleblower authorities, or the media – is seen as a huge threat by people in power. They will often do anything to prevent losing face and position. The higher up the ladder violations take place and the more accepted and structural the behaviour is, the higher the risk of retaliation.

There is a need worldwide to protect whistleblowers, who come forward and report problems, such as corporate or government fraud and corruption, product defects, money laundering, and human rights violations, just to name a few. Retaliation against those who bring to light fraud and corruption is universal, as it is universal that violators do not like to be exposed. These violators are typically organizations and individuals who use their power and position to threaten whistleblowers, or worse.

Power and exclusion

When dealing with rule-breaking that needs and requires reporting, what strikes us most is the dramatic imbalance of violators, whether they are individuals or corporate entities, who hold positions of power that enable them to act as they please and get away with it.

Whether it is a multinational company bribing foreign regimes for an oil contract or to look the other way when rainforests are destroyed, or a local government official bending the rules in order to get a building permit for a befriended entrepreneur, or a hospital manager trying to get rid of patient files in order to cover up medical errors – the mentality of these violators is of entitlement: “they” are entitled to do so “because they can.”

There is a culture of concealment in place that shelters wrongdoings and violators. In some instances, certain illegal and harmful conducts are so ingrained that they have become part of “business as usual.”

Employees, at times, are not even aware of what is truly occurring – at a glance, there seems nothing wrong with the permit for the local entrepreneur, and the patient files that have been misplaced. This is where whistleblowers step in: their position in the workplace gives them knowledge of true motivations, covert deals and paper trails.

When voicing concern, they are retaliated against through a pattern of conduct known as gaslighting that can take many forms. Usually, whistleblowers face tremendous obstacles to fight injustices, wrongdoings, and violations because they often lack a truly autonomous and independent regulatory authority, robust legal protection, or the financial means to endure the consequences of their reporting.

The emergence of a new specialization of law

To date, whistleblower cases have been dealt with as labor disputes. When employees report a violation, employers are faced with a choice; investigate the claims while protecting the whistleblower from retaliation or retaliate against the whistleblower by taking adverse action as a pretext for the whistleblower engaging in protected conduct. Unfortunately, many employers chose the latter by alienating the whistleblower and carefully creating a record that provides justification for the adverse action.

Whistleblowers frequently fail to maintain a separate copy of his or her whistleblower complaints and are caught off-guard and terminated without any opportunity to retrieve evidence of their protected conduct. When this occurs, whistleblowers are at a major disadvantage and courts do not always see through the diversions and smokescreens put in place by corporate and organizational power. This is the reason why the success rate in wrongful termination actions for whistleblowing retaliation claims is low in all jurisdictions throughout the world.

Establishing whistleblower laws and protection is an increasing movement worldwide. Brazilian law provides an anonymity safeguard as a protection and incentive to those willing to report fraud and corruption. It also grants certain immunities and financial rewards for successful claims, establishes reporting channels, and stipulates that some cases of retaliation can lead to double damages. Many US laws also provide protection and monetary rewards for whistleblowers for placing their careers and livelihoods at risk for coming forward.

With these protections in place, whistleblowers have greater incentive to come forward. This is a big leap forward in the emergence of a specialized field of law. However, other related questions remain to be addressed, such as: when is a problem big enough to report, what standards do employers and employees need to meet, and how do reporters get compensated or rewarded for blowing the whistle? What authority do we give government agencies dealing with investigation, supervision, and protection?

The role of investigators

Investigators are crucial in ensuring whistleblower disclosures have the maximum impact. In far too many instances, however, there are very little guarantees that an investigation of a reported problem is done in a proper manner. Some of these investigators have solid

backgrounds, but many of them have no official credentials. This is partly the case, because the professional education sector is also run by the free market.

Some diplomas, certificates and registers offer courses by qualified teachers, but many of these offer courses by people that only followed a 3-hour webinar from another *non-valeur*. These organizations can easily obtain accreditation to give courses because the certifying companies or professional associations only check if some features are in place, such as ISO 9001 (quality management procedures). They do not have qualified lawyers, criminologists, psychologists, or other acknowledged expertise to check if the ‘teacher’ has sufficient knowledge.

In the Netherlands, the private investigator branch has a monopoly on person-oriented investigations, such as fraud, corruption and #metoo. One need only pass an exam on the lowest possible level to receive a licence. Most people obtain a licence after a 5-day training or some self-study. No experience or relevant education is required. Recently, some court cases ruled against employers because they noticed serious flaws in the investigative reports.

International and national legislators should take action and not only make sure that investigations are performed in a truly independent but also a professional manner.

The role of lawyers and advocates

Lawyers across the globe have been granted an important duty and delegation to represent those who attempt to expose corruption and profits over people. Fraud and corruption within society only lead to the suppression of individual and collective rights. Whistleblowing should be recognized as a fundamental human right. However, this process requires action and mobilization amongst us as lawyers.

Lawyers can assist from the start by counselling whistleblowing clients on what is needed to prove misconduct, how and where to report misconduct, and how to document the reporting of the misconduct. Where retaliation occurs, lawyers can assist in recovering damages for the unlawful adverse action taken.

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