2017

Protecting the Whistleblower: An Evolving Understanding of the Role of the Whistleblower

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A Thesis Submitted to Fulfill the Requirements of the Honors Program at Assumption College

December 2016

Introduction

Imagine that you have just signed a contract to work as the Assistant Controller at AeroTechAZ Corp., a multinational technology corporation that has experienced tremendous growth in the last couple of years, outpacing all of their industry competitors by a margin of 2:1 in terms of gross profit. The company has just published its financial statements and the company's performance has shattered investment analyst expectations for the eighth year in a row, raising the stock price on the New York Stock Exchange from $670 to an all-time high of $680. According to the contract you signed your total compensation includes a starting base salary of $182,000, full company covered health insurance of your choice, stock options, retirement benefits, and the potential for bonus compensation should short-term target goals be met, as set out by the company's chief executive officer. After every year of service, you will receive an average of 42,628 of time-vested stock that will be available for purchase after two more subsequent years of service. If you received all 42,628 shares and the company's share price remained the same for the next two years, the total value of those shares would be $28,987,040. Thrilled about this opportunity, you begin your job at the company feeling a constant rush of euphoria as you enter your glass office space on the top floor of your company's New York City headquarters.

A month passes since you have started your new position at the company when you hear some talk among some employees in the accounting department about questionable journal entries being entered into the system. While utilizing the company's accounting system, you discover that there is a large quantity of questionable journal entries that you cannot explain. After further investigation, which you carry out in secret for the next month, you find that there are many other accounts that have altered numbers. Doing a quick estimate, you realize that the questionable journal entries are material in nature and would greatly impact your company's financial statements and it would have to restate them. In fact, instead of exceptional growth for the past couple of years, your company has been experiencing turbulent times and actually experienced a loss in the past two fiscal years.

To prepare for your next meeting with the company's Chief Financial Officer (CFO) you compile your report as usual, but you also gather the evidence you have discovered about the questionable journal entries that, to you, appear to have a material impact on the company's financial statements. During your meeting with the CFO you inquire about the supposed rumors pertaining to dubious accounting entries being made, being careful not to reveal that you have full knowledge about the various material misstatements. The CFO responds nonchalantly and jokes that you should not rely on the ramblings of the "common workers." Despite the CFO's attitude toward the rest of the employees, you bring forward the evidence of the accounting anomalies at the company, emphasizing that there are also deficiencies in some of the internal controls if these entries could be entered. After several minutes, the CFO looks up and states that the concern will be brought up with the external auditors as well as the company's legal counsel. The CFO also states that as soon as any findings come from either the external auditors or the legal counsel you will be informed.

A week goes by and you receive an email from the CFO asking to see you as soon as possible. You hurriedly grab the evidence you had gathered and go to meet the CFO. After exchanging pleasantries, the CFO begins to explain that, while your report may state "inefficiencies in internal controls and accounting anomalies that are of a material nature," the external auditors and company legal counsel have determined that the accounting methods used followed Generally Accepted Accounting Principles (GAAP) and that this was "just how the company did its accounting." The CFO also mentions that the matter should be dropped and that you should not look into the matter any further, hinting that to do so would be a waste of company resources. After you leave this meeting you decide to look over your findings and the more you analyze the financial statements and accounts, the more certain you are that there is some type of fraud occurring at the company. Torn between your responsibilities to report fraud and your loyalty to your company you decide to use the company's employee fraud hotline to report the fraud as well as file a report with the Securities and Exchange Commission (SEC). As you finish the calls you wonder, did you feel you made the right decision?

Another month goes by and you have not heard anything about an investigation into the accounting anomalies. You enter your office on the final Friday of your fourth month at the company and you notice that many of your co-workers are avoiding you and talking in hushed whispers as you pass them on your way to your office. You check your email and notice that you have received an email from the company's human resources and legal department. Hoping that this is the email stating that the fraud had been investigated, you open it only to find that you have been terminated "effective immediately." Stunned, you sit in your office chair staring at your computer screen when the CFO and two security officers of the company walk into your office. The CFO notifies you that you have 30 minutes to leave the premises. You quickly gather your belongings, stow them in your vehicle, and drive home.

Your surprise quickly turns into anger and you start to wonder why you were fired, especially with such short notice. You speculate that you were fired due to reporting fraud at the company using the hotline or that the company was alerted by the SEC about allegations of the possible fraud and the CFO realized that the whistleblower was you. You know that your termination from the company for providing information as a whistleblower is against the law. In hopes that you will receive some type of compensation, as well as help with your future job prospects, you decide to sue the company for violation of the anti-retaliation policies under the Sarbanes-Oxley Act of 2002, Section 806. However, after months of legal battles your case is dismissed by the Department of Labor Occupational Safety and Health Administration. Your former employer has finally won.

This narrative is an example of what some employees in the workforce may experience during their lifetimes, regardless of their occupation or background, in a publicly traded company. Activities involving whistleblowing can range from These illegal activities can range from discrimination against job candidates based on criteria such as race or sexual orientation to instances of fraud which could include acts such financial statement fraud. There are also two types of whistleblowers, those who report internally within their respective organization and those who report externally to an outside organization.

This thesis will provide a background for whistleblower protection policies and explore the evolution of whistleblower protection policies in the United States in relation to publicly traded companies. Also, this thesis will analyze how, while initially these policies themselves did not help many whistleblowers, over time many whistleblowers have won legal battles, creating a precedent for greater recognition and greater protection of the whistleblowers.

Background

Over the past few decades, government regulators have attempted to protect those individuals who have blown the whistle on their organizations to help promote ethical behaviors. These whistleblower protection policies affect both employees of federal, state, and local governments as well as those in publicly traded companies. This thesis will review five pieces of government regulation that affects the sale of securities of public companies, both at the time of an initial public offering and after the fact, as well as laws that regulate public companies. These laws include the following: The Securities Act of 1933, The Securities Act of 1934, the Private Securities Legislation Reform Act, enacted in 1995, the Sarbanes-Oxley Act of 2002, hereafter referred to as the Sox Act of 2002, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, hereafter referred to the as the Dodd-Frank Act. While the Securities Act of 1933 and Securities Act of 1934 established the guidelines for securities trading for the initial public offering of a public company's securities as well as the regulations following the initial public offering, the Private Securities Legislation Reform Act sought to limit the amount of frivolous lawsuits brought against companies.

However, in response to the accounting scandals that occurred in the early and late 2000s, Congress enacted the SOX Act of 2002 and the Dodd-Frank Act, in an effort to curb unethical accounting standards and elevated levels of risky behavior by companies. While, on the whole, all the aforementioned Acts sought to provide the public with a greater sense of security, the SOX Act of 2002 and the Dodd-Frank Act both provide specific provisions to whistleblowers. However, as noted in the aforementioned narrative, the whistleblower does not always win.

Next, there will be an examination of published academic literature that explains why whistleblowers are afraid to blow the whistle. Sherron Watkins, the former Vice President of Enron, and Cynthia Cooper, former Vice President of Internal Audit at WorldCom, will be used as examples of how a whistleblower is viewed during and after their act of whistleblowing. This thesis will also cover the evolution of the legal system's understanding of the types of protections that are afforded to whistleblowers at publicly traded companies. To illustrate the evolution of the courts' understanding of whistleblower protection policies, four legal cases, as well as their ultimate outcomes, will be analyzed.

The first case, *Menendez v. Halliburton Inc*., involved Anthony Menendez, the former Director of Technical Accounting Research and Training at Halliburton Inc. bringing up a whistleblower retaliation case against his employer, Halliburton Inc., a multinational corporation that "…is one of the world's largest providers of products and services to the energy industry" (Halliburton, n.d.). The second case, *Lawson et al. v FMR LLC et at.* involves Jacqueline Lawson, a former "…employee of Fidelity Brokerage Services, a subsidiary of FMR" (Mooney & Bull, n.d.) and Jonathan Zang, a former employee of "Fidelity Management & Research Co. and later for a subsidiary called FMR Co., Inc. (collectively, the "Fidelity Management companies")" (Mooney & Bull, n.d.) who filed lawsuits citing that they had been retaliated against for raising concerns over the company's accounting methods (Mooney & Bull, n.d.).

The third case, *Julio Perez v. Progenics Pharmaceuticals, Inc.* involves Julio Perez, the former Senior Manager of Pharmaceutical Chemistry at Progenics Pharmaceuticals, Inc., who was terminated from his position due to his accusation that upper management was falsifying clinical testing results on a developing drug. The final case involves Monsanto Company and its unnamed whistleblower who, after bringing forward information to the SEC about "…alleged accounting violations related to the company's trademark weedkiller…" (Rubenfeld, 2016), was awarded the second biggest whistleblower retaliation claim payout in American history, totaling $22.5 million. Finally, there will be a discussion of how the courts power over statutory law can have an impact on whistleblowers.

Government Regulation

Ethics, corporate governance, compliance, risk assessment, and litigation are all words that do not just have an integral part in the legal system, but also in the world of accounting. Any business or organization should maintain and encourage an environment based on ethical decision making. This ethical behavior involves, not only a culture that punishes fraudulent acts, but also extends to subjects such as sexual harassment, onboarding practices, anti-retaliation policies for employees. The most difficult part about curbing unethical business practices and promoting ethical behaviors is developing effective internal controls within an organization while also ensuring top management sets an ethical tone-at-the-top. In the United States, the government hasl several statues that also seek to promote ethical behavior by providing protection to employees both employed by the government and publicly traded companies.

According to *Fraud Magazine*, “whistle-blowing, as it relates to fraud, is the act of reporting fraud, waste, and abuse. Reporting any act of wrongdoing is considered whistle-blowing, regardless if it’s reported by a public or private employee or to persons inside or outside of the victim organization” (Patrick, 2010). As mentioned previously, whistleblowers can report these types of illegal acts both internally or externally and the United States government, over the years, has attempted to provide greater protections to whistleblower, in part, by encouraging ethical behavior. The government and organizations have encouraged whistleblowing activities by providing anti-retaliation legislation as well as by providing other monetary incentives to those whistleblowers whose cases are proven valid. However, scholars point out that government regulations, in some cases, benefit the companies who are retaliating against the whistleblowers rather than protecting them. Furthermore, it can also be said that the legal system has, in some cases, sought to limit the rights of whistleblowers.

Even though the United States government and professional organizations both try to encourage ethical behavior at organizations, the real world remains a far cry from an ethical paradise. As the accounting scandals of the early 2000s and the market collapse that started in 2007 show, there was and still is much work to be done in the way of ethical behavior in corporate America. Two of the reoccurring motives for disregarding ethical behavior in favor of behaviors that disregard ethical decision making are either top management's own personal gain from a company's improved performance, or meeting Wall Street analyst expectations. While there have been whistleblowers who have attempted to report the wrongdoing at a company and have succeeded, there are far more of those within the past decade since the SOX Act of 2002 and the Dodd-Frank Act who have not been validated. These whistleblowers face, not only the possibility of retaliation from their place of employment, but also industry-wide backlash that can result in long-term economic ruin.

The Securities Act of 1933 & the Securities Exchange Act of 1934

One of the original acts to protect investors from unscrupulous companies was the Securities Act of 1933. This Act came as a response to two major historical events, the stock market crash of 1929 and the fraud perpetrated by Ivar Kreugar. As pointed out in Paul Clikeman's *Called to Account: Financial Frauds that Shaped the Accounting Profession*, Kreugar, a Swedish born businessman, who created a business empire centered on the production of matches during the mid-1910s to the early 1930s that eventually grew to where he was able "…to obtain absolute monopolies in 15 countries and dominate the match market in 19 others" (2013, p. 25). Ultimately, investors, both in Europe and in the United States, lost millions of dollars due to the fraud with investors in the United States having "…. held more than $250 million of securities issued by Kreuger's companies" (p. 35).

Until the Securities Act of 1933, the sale of securities was not regulated at a federal level, rather, the sale of securities was regulated on a state-by-state basis in the United States (Investopedia, n.d.). According to Clikeman, "the 1933 Act…was modeled loosely on the British Companies Act" (p. 36) and requires any company that sells securities to provide investors with reliable financial information that is free of intentional misrepresentations or other instances of fraud. Even with the objections from those in the audit profession, Congress saw the implementation of this Act to further prevent fraud and provide greater assurance to the public. However, the law still gave public accounting firms and their auditors the ultimate power to audit a company's financial statements.

While the Securities Act of 1933 sought to help provide greater assurance to investors for the initial public offering of a company's securities, the Securities Exchange Act of 1934 was primarily focused on after the initial public offering of a company. The Securities Exchange Act of 1934 established the Securities and Exchange Commission (SEC), which was, and still is, a federal agency that enforces government regulation regarding the sales of a company's securities. According to Investopedia, the SEC:

> has the power and responsibility to lead investigations into potential violations of the SEA such as insider trading, selling unregistered stocks, stealing customers' funds, manipulating market prices, disclosing false financial information or breaching broker-customer integrity. Also, the SEC enforces corporate reporting by all companies with more than $10 million in assets and whose shares are held by more than 500 owners. The SEC can choose to file a case in federal court or settle the matter outside of trial (n.d.).

The Securities Exchange Act of 1934 also required companies to register their securities on a listed stock exchange, properly disclose their securities on their financial statements, and meet financial reporting framework requirements (Investopedia, n.d.). This Act also protected investors from insider trading to help further guarantee that no one has an unfair advantage in the market place. However, as is the case with government statues, future pieces of legislation as well as the interpretation by the court system would dictate the impact these laws would ultimately have.

Private Securities Litigation Reform Act

During the late 1980s and into the beginning of the 1990s, the accounting industry faced a crisis from mounting lawsuits from all sides. In fact, in April of 1992, "…U.S. accounting firms faced 6,000 liability suits seeking more than $15 billion in damages" (Clikeman, p. 176). In response to the volume of securities lawsuits that threatened the accounting industry, Congress enacted the Private Securities Litigation Reform Act. The law focused on reducing the number of frivolous lawsuits, specifically class action lawsuits, by establishing, "…immunity from liability for financial projections and other forward-looking statements, and eliminate[ing] joint and several liability under certain circumstances" (Coppolo, 2002). Also, those seeking reparations must now prove that the company being sued knew about the misrepresentation of the information, either by intentional manipulation or omission, it gave to investors.

The law also lays out specific provisions that affect the public accounting industry. To improve the provisions that the Securities Exchange Act of 1934 placed into law, section 301 of the Private Securities Litigation Reform Act of 1995 set forward additional considerations for the audits conducted by public accountants. Per section 301 public accountants are required to design their audits to provide reasonable assurance that a company's financial statements are presented fairly, to discover related party transactions that have a material effect on the company's financial statements, and to determine if the company has a problem as a going concern (1995, p. 26). Also, public accountants were also tasked with informing a client's top management of any instances of material fraud and, if no action was taken by the company's management considering the fraud, then the public accountants had a responsibility to report the fraud to the SEC (p. 27).

The law also had two, possibly unintended, consequences. The first consequence is that plaintiffs now had a higher burden of proof when it comes to successfully bringing forward a lawsuit. According to the Act:

> …relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class" (p. 9).

This meant that the plaintiff must prove that there was adequate base for the lawsuit without the aid of the discovery process during normal legal proceedings. As a byproduct of the first consequence, whistleblowers and their activities were also possibly adversely affected. Thus, the second consequence was a limitation on the ability of whistleblowers to bring forward possible lawsuits against their employers, should they be retaliated against due to the restraint on the discovery process.

Sarbanes-Oxley Act 2002 Section 406, and 806

Two of the largest and most well-known accounting scandals of the early 2000s involved both Enron and WorldCom. In the case of Enron, the accounting scandal cost investors about $74 billion and, in the case of WorldCom, investors lost a total of $180 billion (Accounting Degree Review, n.d.). In response to these accounting scandals, Congress passed the SOX Act of 2002, which is named after Senator Paul Sarbanes (D-MD) and Representative Michael G. Oxley (R-OH) who spearheaded the legislation in their respective parts of Congress. Per the law, the purpose of the SOX Act of 2002 is "…to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes" (Sarbanes-Oxley Act of 2002, 2002, p.1). The SOX Act accomplished this goal, at least in part, by establishing the Public Company Accounting Oversight Board (PCAOB), requiring greater auditor independence, holding the company to a higher standard of corporate responsibility, enhancing financial disclosures, defining certain occasions of a conflict of interest, increasing corporate and criminal fraud accountability, and requiring the chief executive officer of a public corporation to sign off on the company's tax return (2002). Two of the SOX Act's most important sections, regarding ethics and whistleblowers, are section 406 and section 806.

Section 406 of the SOX Act, now requires companies to have a code of ethics or disclose the reasons why they do not have a code of ethics for both their senior financial officers as well as a general employee code of ethics. This code of ethics would be "…applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions" (p. 45-46). This meant that corporate executives, in theory, would be specifically tasked with setting an ethical tone at the top, one in which the company would value ethical behavior more than mere financial gain. While section 406 focused on top financial management at a company, section 806 empowered the everyday employee.

Under Section 806 of the SOX Act, employees of publicly traded companies are protected against retaliation from their employers if they provide evidence of the perpetration of fraud (p. 59). However, if an employee, who works at a publicly traded company, is terminated from their position after providing evidence "…a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders…" (p. 59), then he or she can bring their complaint to the Secretary of Labor or an appropriate court which has jurisdiction over the matter.

Furthermore, the claim must be brought forward within 90 days of the incident and, should the claimant's assertion found to be true, then the claimant can receive compensation. The compensation available to whistleblowers who were retaliated against included the following:

> … "(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; ''(B) the amount of back pay, with interest; and ''(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees (. 60).

However, as mentioned before, legislation is only part of the battle against unethical behavior. Even with the SOX Act, it would only take half a decade until the United States faced another fiscal crisis and would institute yet another piece of legislation aimed at financial reform.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

By late 2007 a housing bubble, a moment where speculation on the housing market exceeded the actual demand of the market (Investopedia, n.d.), totaling about $8 trillion, burst and launched the United States economy into a downward spiral, resulting in a nationwide economic slowdown (Economic Policy Institute, n.d.). The great Recession, as it would be named, lasted a total of 18 months, ending in June of 2009 (National Bureau of Economic Research, 2010). In response to the market collapse, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, more commonly referred to as the Dodd-Frank Act, was signed into law on July 21, 2010. The Dodd-Frank Act's (2010) purpose was "to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ''too big to fail'', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes" (p. 1).

While mainly focused on financial reforms on Wall Street and protecting the everyday consumer, the bill also expanded upon the whistleblower protection policies in the SOX Act. In section 748 of the Dodd-Frank Act (2010), the Commodity Exchange Act was updated and defined a whistleblower as "…any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of this Act to the Commission, in a manner established by rule or regulation by the Commission" (p. 1). Furthermore, the Dodd-Frank Act of 2010 continued to expand upon the protections set forth under the SOX Act by listing out specific actions that constituted as retaliation by an employer. The Dodd-Frank Act specifically states:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower (p. 369)

Also, those seeking legal action against their employers for wrongful termination due to blowing the whistle on the company may bring their cases directly to a United States District Court. The U.S. District Court would most likely be the one in which the incident occurred. However, the rights of a whistleblower to bring a case forward are not indefinite. The Dodd-Frank Act also limits the amount of time between an incident where an employee is retaliated against for performing a whistleblowing activity and when they file a claim. The Dodd-Frank Act (2010) specifically states that "an action under this subsection may not be brought more than 2 years after the date on which the violation reported in subparagraph (A) is committed." (p. 369)

The Dodd-Frank Act further expanded the compensation that a whistleblower could receive under the SOX Act of 2002, possibly in recognition of the outcomes of previous whistleblower cases. A whistleblower, who is successful in their claim, may now receive "(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions" (p. 467). However, as will be shown below, even with federal regulations protecting whistleblowers, employer retaliation still occurs and many employees remain silent.

To blow or not to blow the whistle, that is the question

Every day, billions of people make decisions based on the objective and subjective consequences of the options they have at hand. Examples of everyday decisions that have consequences can be as simple as deciding what to eat for dinner or whether to stay up late to watch a television show they enjoy. Likewise, ethical decisions are made on an everyday basis as well. Deciding to blow or not to blow the whistle is just one ethical dilemma that an employee can encounter. However, just as there are times when a person might take the higher more ethical road, there are possibly an equal amount of opportunities for fraud to be perpetrated.

In fact, the potential of fraud is a reality that every corporation or organization must face, regardless if it wants to or not. In fact, as noted by Colin Parcher, CFE, former director and president of the Vancouver Canada Association of Certified Fraud Examiners (ACFE) Chapter, "a simple Google search of Work Place Fraud gets 98 million hits in 0.37 seconds likewise a Google search of Employee Theft nets 26 million hits in 0.19 seconds…" (2012, p. 2), which potentially displays how often employees and companies are looking to prevent fraud within their organization. Furthermore, according to the ACFE's *Report to the Nations on Occupational Fraud and Abuse 2014 Global Fraud Study*, "the median loss caused by the frauds in our study was $145,000. Additionally, 22% of the cases involved losses of at least $1 million" (Association of Certified Fraud Examiners, 2014, p. 4). Even more disheartening is the fact that, according to the same report, “the median duration - the amount of time from when the fraud commenced until it was detected - for the fraud cases reported to us was 18 months” (2014 p. 4).

However, the report did offer some good news to business professionals. “Tips are consistently and by far the most common detection method…[and] over 40% of all cases were detected by a tip — more than twice the rate of any other detection method. Employees accounted for nearly half of all tips that led to the discovery of fraud” (p. 4). This shows that, tip lines are not only an effective way to combat fraud, but that employees are taking actions to help protect the ethical integrity of the organization. The report also notes that companies can take preventative measures by setting up other internal controls, besides tip lines, to prevent and detect fraud as well as improve other areas of corporate governance throughout the organization (p. 4-5).

One simple question remains though, why would a person want to blow the whistle? Dungan, Waytz, and Young in their article *The Psychology of the Whistleblower* set out to answer this question. The authors state that “…the decision to blow the whistle rests on the tradeoff that people make between fairness and loyalty” (2015, p. 1) and that those who endorsed fairness more often than loyalty were more willing to blow the whistle, while conversely those who endorsed loyalty were more likely not to blow the whistle (p. 1). Other factors that determined the likelihood of not blowing the whistle included the time they were employed at their current company, their total levels of compensation, the level of their education, and their gender as well as whether a person was introverted or extroverted, or those who feel they have a greater locus of control (2015, p. 2). However, the authors also state that organizational culture and parameters of the situation affect the likelihood of whistleblowing (2015, p. 3).

However, unlike the conclusions of Dungan, Waytz, and Young, some researchers have found contradictory results. For example, Near, "a professor at the Kelley School of Business at Indiana University who has studied whistleblowing since 1980" (Melnick, 2014) found that the determining factor in whether an employee reports a violation or not is the severity of the situation at hand rather than a personal morality or psychology (Melnick, 2014). This means that even if a person is more psychologically groomed to not interfere with a certain situation, if the situation is dire, then one might expect that the individual might intervene in some way, such as through blowing the whistle.

Others still have found a middle ground between those of Dungan, Waytz, Young, and Near, including both personal and situational factors. Michael McMillan, CFA, director of Ethics and Professional Standards at CFA Institute, agrees with Dungan, Waytz, and Young in the sense that one's personal morality and sense of right or wrong plays an integral part in the decision to blow the whistle or not. However, unlike Dungan, Waytz, and Young, McMillan sees the act of whistleblowing as "…the ultimate manifestation of employee loyalty to the organization [because] loyalty in this context, does not mean allegiance to top management; instead whistle-blowers are acting in the best ethical interests of their organization, the public, clients, or capital markets" (2012). Like Near, McMillan also states that individuals do consider the situational factors, such as the severity of the wrongdoing, however, he also notes that one's own personal life circumstances, such as emotional and financial stability, also do factor into the ultimate decision (2012).

A major environmental factor that also affects an individual's decision includes the organization's tone at the top. "An organization's leadership creates the tone at the top – an ethical (or unethical) atmosphere in the workplace. Management's tone has a trickle-down effect on employees" (Mahadeo, 2006, p. 44). The corporate culture that a person on the outside of a company might observe could be entirely different than the inner culture. For example, as many have noted, Enron's top executives perpetuated a culture focused on a high-school mentality of dangerous behavior and risk-taking, defining this term as "guys with spikes" (Gibney, 2005). As mentioned previously, when employees fear retaliation from either their supervisors or co-workers they are less likely to report fraud (Ethics & Compliance, 2013). Another key component to tone at the top is rewarding whistleblowers and punishing those who are found responsible. Without these two main components, many employees will be not be as inclined to actually report fraud.

Why are whistleblowers afraid to blow the whistle?

Still, another question arises when discussing whistleblowing. Why are employees afraid to blow the whistle, especially since there are laws that protect them? To answer this question, one could turn to the fates of former Vice President of Enron, Sherron Watkins, or former Vice President of Internal Audit at WorldCom, Cynthia Cooper for further explanation.

Sherron Watkins, Enron's Whistleblower

The names of Enron executives and its auditor, Arthur Andersen, are often associated with terms such as unethical behavior, corporate greed, and a corrupt tone at the top. The main perpetrators of the Enron fraud near the time of Enron's collapse involved Kenneth (Ken) Lay, Enron's chairman of the board, Jeffrey Skilling, Enron's chief executive officer, and Andrew (Andy) Fastow, Enron's chief financial officer. These top Enron executives created a culture focused on giving off the appearance to the public that Enron was an unstoppable force and would only keep turning a profit while engaging in reckless behavior that ignored ethical guidelines.

However, the blame does not fall only on the failings of these few Enron executives. Enron's auditor, Arthur Andersen, and, in part, Enron's legal counsel, Vinson and Elkins, are both to blame for, at certain times, colluding with Enron's top management to promote an unethical business culture and to commit fraud, such as in the case of Sherron Watkins, a Vice President at Enron prior to its collapse. While Watkins' actions may not appear to be that of a normal whistleblower, her letter to Ken lay and her testimony before Congress has earned her the title of a whistleblower from both Congress and the public.

Sherron Watkins began her career in public accounting after receiving her bachelors in business administration from the University of Texas at Austin in 1982 (Federal News Services, 2002). Her first position as a public accountant was at Arthur Andersen, where she worked in both the Houston and New York offices until 1990 when she transitioned into a career as a portfolio manager for MG Trade Finance's commodity-backed finance assets group (Federal News Services, 2002). During this time Watkins, earned her certified public accountants license as well as received her masters in professional accounting from the University of Texas at Austin (Federal News Services, 2002). Watkins worked for MG Trade Finance until October of 1993 when she was directly hired by Andrew Fastow, "…to manage Enron's newly-formed partnership with CALPERS, the California Public Employee Retirement System. The partnership was the Joint Energy Development Investments Limited Partnership, or JEDI… [and she] held the JEDI management portfolio position until the end of 1996" (Federal News Services, 2002).

During her time at Enron, Watkins held a variety of positions, all the while moving up the chain of command to become a vice president at Enron. After her position as part of the JEDI management portfolio unit, Watkins moved to Enron International with a focus on acquiring new energy assets globally, then to Enron's broadband unit, and, finally, to assisting in corporate development projects directly under the direction of Andrew Fastow until her eventual resignation. As mentioned in her testimony before the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee, Watkins explained that during a review of the market and book values of sales assets she discovered that Enron had engaged in business with Raptor, an entity owned by a company called LJM, which was, in turn, owned by Andrew Fastow, her direct boss.

After further investigation, Watkins determined that "the Raptor hedges were locking in supposedly sales value that Enron had on equity investments that it had made" (Federal News Services, 2002). This meant that Enron was recording agreed-upon value for certain assets that were bought from Raptor, even though they should have been recorded on Enron's books at current market values. Eventually Watkins realized that Enron would ultimately take an economic loss from the investment due to Raptor's inability to pay off the pre-determined price.

Like other whistleblowers before her, and since then, Watkins feared for her continued employment at the company saying. "I was not comfortable confronting…Mr. Fastow with my concerns. To do so, I believe, would have been a job- terminating move." (Federal News Services, 2002). When questioned as to why she had not gone to Jeff Skilling about the Raptor accounting, Watkins stated that "…Mr. Skilling was fully aware of them [the improper accounting methods]. He is a very hands-on manager. I had also heard rumors that people… had complained to him and he had done nothing. So I really felt it was fruitless to go to Mr. Skilling"

In August of 2001, Watkins sent an anonymous letter, "…in response to a request for questions for an upcoming all-employee meeting to be held August 16th, to address Mr. Skilling's departure." A few days after sending the letter, and after talking to Cindy Olson, Enron's Vice President of Human Resources (Federal News Services, 2002), Watkins decided to try to meet with Ken Lay to discuss her findings. During her meeting with Lay, Watkins explained that the economic loss from the Raptor investment would total $700 million and that she also wanted to transfer to a different department. Watkins found Fastow's relationship to Raptor in violation with accounting policies and Lay reassured Watkins that he would investigate the matter (Federal News Services, 2002).

Eventually, Fastow would discover that Watkins had both written a letter and met with Ken Lay about her concerns. Fastow retaliated by attempting to seize Watkins computer as well as try to fire her. With the help of Olson, Watkins uploaded her findings onto a new computer, delete the files from her old computer, and comply with Fastow's wishes without losing any of her information. Furthermore, the subcommittee found that Vinson and Elkins and Arthur Andersen both limited the scope of their investigations into Watkins' claims, which explains why their investigation showed that Enron would not experience a loss from the Raptor deal (Federal News Service, 2002).

One of the most interesting points of Watkins' testimony was not necessarily her attempts at blowing the whistle, but was her defense of Ken Lay. As stated previously in this thesis, tone at the top is established by all top management, especially that of the board of directors and chief executive officer. The pressure to continuously meet analyst expectations, management's actions, and executive management's compensation are linked together by their nature. Watkins recalled that Enron was "… a very arrogant place with a feeling of invincibility. And I'm not certain people felt like it was that imminent. They just felt like Mr. Fastow, along with the accountants, would come up with some magic in the future" (Federal News Services, 2002). Her words, providing a slight insight to outside observers about what actually happened within the walls of Enron. However, Watkins seemed to have believed throughout her time working at

Enron that Lay was innocent. In fact, in a letter to Ken Lay dated October 30, 2001 she wrote, “the culprits are Skilling, Fastow, Glisson, Causey, as well as Arthur Andersen and Vinson & Elkins" (Federal News Services, 2002).

Throughout her testimony and thereafter, Watkins was heralded as a whistleblower. In his closing remarks, Representative Billy Tauzin (R-LA), chairman of the Energy and Commerce Committee at the time, while not using the term itself, described Watkins as a whistleblower, immortalizing her as such to both the corporate world and the public eye. Tauzin stated:

> Ms. Watkins, your testimony stands for itself…And that is that your testimony, your activities in regard to Enron actually call upon, I think, all of us to examine the notion of corporate loyalty. There is some, I assume, who believe corporate loyalty is protecting the corporation against all harm, even when it's doing something wrong. You demonstrated for us a different definition of corporate loyalty, a different definition of fiduciary responsibility to a corporation. That includes responsibility to its shareholders and investors, and I want to compliment you for that…the notion that corporate loyalty means owning up to mistakes for the sake of the proper relationship to investors and consumers, and confronting them directly and reporting them and dealing with them forthrightly. (Federal News Services, 2002).

Even today, Watkins is still remembered as the whistleblower who helped bring down Enron and rise to immediate fame. In the January/February 2007 issue of *Fraud Magazine*, Dick Carozza wrote, “Watkins was soon lauded as an “internal whistle-blower," brought before Congressional and Senate hearings to testify against her former bosses, and heralded by TIME magazine as a "Person of the Year," with WorldCom's Cynthia Cooper and the FBI's Coleen Rowley” (Carozza 2007).

However, while some continue to praise Watkins for her actions, she has also had her fair share of criticism. One criticism labels Watkins as an opportunist who used the situation to dodge the blame and lay it on others, noting "…that she sold Enron stock options worth $17,000 shortly after talking to Ken Lay" (Curwen, 2003). Others have questioned her title as a whistleblower since, as one *Forbes* article points out, there is not much public information as to what Watkins did in the meantime directly following her meeting with Ken Lay other than wait for an answer (Ackmen, 2002). In the same year Watkins was named a *TIME*'s Person of the Year, but before Enron had permanently shut its doors, Frank Pellegrini, stated that Watkins was not truly a whistleblower. "In the news media, it is "Enron whistle-blower" Sherron Watkins, even though Watkins never really blew a whistle. A whistle-blower would have written that letter to the Houston Chronicle, and long before August" instead of just reporting internally" (Pellegrini, 2002).

Strangely enough, if one were to search on Google, "who was the whistleblower of Enron," the result comes up as, "Sherron Watkins, the plainspoken former vice president whom Congress anointed as a whistleblower after the company's collapse, repeated much of what she said then: Enron needed to come clean about potentially disastrous accounting tricks or face implosion" (Associated Press, 2006) with a link to an article from NBC News. This statement implies that Watkins is only labeled as a whistleblower because of Congress's view of her, not necessarily because of her actions. In the end, whether she was a "true whistleblower" or not, she still received just as fierce of a backlash from the business world as other whistleblowers have in the past.

There is a reason why many people are afraid to blow the whistle. While the immediate retaliation from an employer is daunting in and of itself, the long-term impact on a person's life can be just as devastating to the whistleblower. In a 2004 interview with Deborah Solomon of the New York Times, Sherron Watkins shared a grim outlook for her own future in corporate America. While noting that she was doing a lecturing circuit and wrote a book, when asked if she would ever work at another company Watkins responded, “about the only corporation I can see hiring me is one that is in a meltdown situation and trying to revamp its reputation…When it comes down to the final decision, there's probably one or two people who say: "Are y'all crazy? She's a whistle-blower” (Solomon, 2004).

Watkins’s comment, not only speaks to the tone at the top at some companies and how they view those who have blown the whistle on a former employer, but also to some of the beliefs of those who work within corporate America. In the time immediately following Watkins’s testimony on Capitol Hill, she found that, while there were those who hailed her as a hero, those in her hometown of Houston did not necessarily share the same view. In an interview with Pamela Colloff of *Texas Monthly*, Watkins stated “I’m seen as a troublemaker by that elite group in Houston that’s being critiqued by everyone now…they blame me for spoiling all the fun” (Colloff, 2003).

In another interview with Dr. Nance Lucas and Dr. V. Scott Koerwer for the *Journal of Leadership and Organizational Studies,* Watkins stated “whistle-blower is a word that generates a lot of negative feelings. There are people who view that term negatively and then there are those who view it heroically” (2004, p. 39). Years later in an interview with *Fraud Magazine*, when asked how people respond to her now, Watkins stated “people respond very favorably to me. I think most folks see themselves taking the same actions I did at Enron, if they found themselves in my shoes. And just in case they ever do need to follow in my footsteps, they sure like hearing the story directly from me and hearing what I might have done differently, etc" (Carozza, 2007).

Watkins would also appear in the documentary *Enron: The Smartest Guys in the Room* and co-author the book *Power Failure the Inside Story of the Collapse of Enron.* Today, Watkins has moved onto a career in consulting, advising companies on matters of corporate governance issues, but she never returned to corporate America as an accounting executive (Associated Press, 2006). In fact, Watkins words about being a hero to some while a villain to others are later echoed by Dr. Bruce Shine who, in 2007, stated that Sherron Watkins "…while engaging in the occasional academic lecture, is without work in corporate America" (p. 230).

In regards to her work after Enron, Watkins stated that her future did not involve reentering corporate America into the same type of position as when she had left. In fact, Watkins stated, "starting a leadership development program, collaborating with other leadership experts and executive coaching firms [in a] multi-month program, involving peer interaction along industry lines. The goal is to equip these leaders with a peer network and an experience that prepares them for anything, even the perfect storm that was Enron." (Carozza, 2007).

Cynthia Cooper, the WorldCom Whistleblower

Enron was not the only major fraud that occurred during the early 2000s. According to the Connecticut General Assembly, which compiled "…a list of the major corporate accounting scandals occurring between 2000 and 2005" (Sullivan, 2006), there were 26 different major accounting scandals. Of these 26 accounting scandals, WorldCom, Inc., which was one of the largest telecommunications companies operating within the United States during the early 2000s, crumbled quickly after the discovery of fraud within the company. After the fraud at WorldCom was uncovered, the Board of Directors of WorldCom, Inc., established a Special Investigative

Committee to investigate the fraud in its entirety. The Committee submitted a report to the SEC, dated March 31, 2003, that noted that the fraud itself "…was accomplished in a relatively mundane way: more than $9 billion in false or unsupported accounting entries were made in WorldCom's financial systems in order to achieve desired reported financial results" (Special Investigative Committee of the Board of Directors of WorldCom, Inc., 2003).

In fact, as noted by a TIME's Daniel Kadlec, the WorldCom fraud cost investors over $175 billion, "…nearly three times what was lost in the implosion of Enron" (Kadlec, 2002). Much like Enron, one of WorldCom Inc.'s top management was involved in the main whistleblowing act. However, unlike Enron's Sherron Watkins, who was directly in charge of reviewing the Raptor accounts, this fraud was uncovered due to the hundreds of hours of work on the part of WorldCom's internal audit department, specifically, the efforts of Cynthia Cooper, WorldCom's Vice President of Internal Audit, and Gene Morse and Glyn Smith, two of Cooper's most trusted internal auditors in her department.

Cynthia Cooper completed her undergraduate work in accounting at the Mississippi State University, her Master's work at the University of Alabama in Tuscaloosa, and would began her professional public accounting career at Price Waterhouse before moving on to Deloitte, Haskins, and Sells (Cooper, 2008, p. 41-49). Eventually, Cooper would move onto WorldCom Inc. who, at the time, was the second largest telecommunications company in America. Although, as is often with long-term frauds, nothing was as rosy as it might have appeared on the surface. During the end of May of 2002 and into June of 2002, WorldCom's internal audit department started to investigate an account that increased computer equipment by $500 million, using the description of "PREPAID CAPACITY" (p. 226-227)

As Cooper lays out in her book, *Extraordinary Circumstances*, the convoluted system of accounting that led the $500 million to be put in that account:

> It looks like the amount was moved from an asset account called "intercompany asset transfer clearing." But the trail gets fuzzier from there. Gene thinks the amount in "intercompany" is coming from an account called "transmission equipment," which represents amounts spent to build out WorldCom's telecom network. But the amount in "transmission equipment" traces back to three separate line-cost expense accounts- payments to other telecom carriers to originate and terminate phone calls or lease fiber. (p. 227).

To say that the roundabout accounting that the internal audit team had stumbled upon was confusing would be a gross understatement. However, the reasoning for the convoluted accounting soon became apparent. As Cooper soon found out, by "…moving [funds] from the income statement to the balance sheet… [it would] increase the company's profit" (p. 227), which would then in turn increase financial analyst opinions of WorldCom. Eventually, Cooper, Morse, Smith, and the rest of the internal audit department would find more entries booked as "PREPAID CAPACITY." Around mid-June of 2002, Cooper's audit team found "…49 prepaid capacity accounting entries, totaling $3.8 billion, recorded over all four quarters in 2001 and the first quarter of 2002…some described as prepaid capacity, others labeled, simply, "SS entry."" (259).

After days of being stonewalled by top management, Cooper and Smith interviewed David Myers, the Controller of WorldCom as part of their investigation. Myers admitted that the company had been improperly capitalizing the line costs of the company's leased fiber lines to allow the company's total revenue to overtake the losses on the fiber lines since they were being utilized in a limited way by customers. Soon after, WorldCom would face some serious consequences for its actions. On June 26, 2002, the SEC would file a civil fraud lawsuit against WorldCom in response to the company being forced to restate its previous year's financial statements. No clearer representation of how the public responded to the news of the WorldCom fraud can be seen than through an analysis of the company's stock price which was "…hitting a low of $0.09 before the [trading] halt" (p. 267). In the end, WorldCom was forced to pay $750 million as a fine to the SEC, the largest accounting scandal fine at the time (BBC News, 2003).

Like Sherron Watkins, Cynthia Cooper was not a whistleblower in the sense that she took the company's problems to the public. Cooper sought to find an answer to her questions as thoroughly as she could while staying within the organization. However, one of the major differences between the two is that, after meeting with Ken Lay about the Raptor accounts, Watkins seemingly stopped trying to do anything more than she had already done. Cooper, on the other hand, worked tirelessly with her team to discover the extent of the potential fraud. In the end, after the public was informed of the fraud at WorldCom, Cooper quickly rose to public fame, being named one of *Time* Magazine's 2002 persons of the year for her efforts. However, she did not survive the ordeal unscathed. Six years later, she would publish her book *Extraordinary Circumstances*.

While Cooper's tale of courage and ethics may seem indeed extraordinary, the result of her career in corporate America should not come as a surprise. While not totally severing ties from corporate America, today "Ms. Cooper is CEO of The CooperGroup, LLC, a management consulting firm that provides services in the areas of internal audit, ethics and compliance, fraud prevention and detection, board consultation and education and enterprise risk management" (Cooper Group LLC, n.d.). Also, Cooper provides services as a guest speaker at high schools and universities as well as serving "…on advisory boards for Louisiana State University, Lehigh University and Mississippi State University" (Cooper Group LLC, n.d.). Other notable positions Cooper held include: being "…a member of the Standing Advisory Group of the Public Company Accounting Oversight Board… [and], the 2011 Chairman of Board of Regents for the Association of Certified Fraud Examiners…" ("Biography," n.d.).

However, after becoming a whistleblower, Cooper found life difficult at times. "I was an ordinary citizen who, like most people, preferred a private life, but I had stepped over some "invisible line" and become a whistleblower. Though I didn't know it at the time, whistleblowers often experience negative repercussions. I would quickly learn first-hand what that meant" (p. X). In fact, "…Cooper says she never felt like a hero. Just the opposite: in the aftermath of the disclosure of the fraud, with the press and lawyers and congressional investigators constantly on her trail, Cooper [was] seized by depression and anxiety" (Farrell, 2008). However, when asked in a 2008 question and answer interview with TIME, if she would still blow the whistle, even knowing all the struggles she went through, Cooper affirmed her stance, "yes, I would. I really found myself at a crossroads where there was only one right path to take" (Ripley, 2008).

The fates of Watkins and Cooper provide a glimpse into the future of an employee thinking of blowing the whistle. On one hand, one could make a successful consulting career after it as well as feel good knowing he or she "did the right thing." However, the initial economic and personal consequences could be quite detrimental to the average person. To blow the whistle on an organization is not just to defy the corporate culture of the company, but it is also an act of defiance against the corporate culture of the industry. For Sherron Watkins, it meant being called a hero and a villain at the same time. For Cynthia Cooper, like Watkins, it meant dealing with giving up a lifetime in the corporate world.

While Watkins's and Cooper's acts as whistleblowers were highly publicized and might provide hope for those thinking of blowing the whistle, some scholars have found that many still do not report wrongdoing in their organization and, if they did report the incident, they experienced retaliation from their employer. According to one study, "…65% of those who witness wrongdoing reported it; 22% of those who reported wrongdoing said they experienced retaliation (an increase of 46% from 2009): and 46% of those who observed wrongdoing but chose not to report it, cited fear of retaliation as the reason" (McMillan, 2012). Also, in a 2013 study by the Ethics & Compliance Initiative, the rate of retaliation was 21 percent "… [and when] asked why they kept quiet about misconduct, more than one-third (34 percent) of those who declined to report said they feared payback from senior leadership. Thirty percent worried about retaliation from a supervisor, and 24 percent said their co-workers might react against them" (Ethics & Compliance Initiative, 2013). Thus, even when employees report unethical or fraudulent activities, many still fear being retaliated against either by their company or their co-workers.

Anthony Menendez v. Halliburton Inc.

The legal system's interpretation of statutory law has been a double-edged sword for whistleblowers, sometimes originally denying claimants before being ultimately overruled. This was the case for Anthony Menendez, Jonathan Zang, and Jacqueline Lawson. In regards to Anthony Menendez, Menendez became the Director of Technical Accounting Research and Training at Halliburton Inc. in 2005 and, after discovering accounting anomalies in the company's revenue recognition practices, Menendez filed a report with the SEC and emailed the audit committee of Halliburton Inc. about his report to the SEC (Eisinger, 2015). Unbeknownst to Menendez, his email to the audit committee was forwarded to Halliburton Inc.'s General Counsel and, after being notified that the SEC would be investigating due to a tip;

> …the General Counsel, having seen Menendez's internal complaint, surmised that Menendez must have been the source of the SEC complaint as well. The General Counsel sent an email to Menendez's boss and others, instructing them to preserve documents relevant to the SEC's investigation, as directed, because "the SEC has opened an inquiry into the allegations of Mr. Menendez (ArentFox, 2014).

This email would start a cascade of events that would ultimately lead to Menendez having some of his official duties taken away, being socially ostracized by colleagues, and he was excluded from meetings he had previously attended (Eisinger, 2015). Eventually Menendez would resign from his position, but not before filing a claim with the DOL's OSHA stating that he had been retaliated against as described under the Sarbanes-Oxley Act of 2002 section 806. (Eisinger, 2015). That same year, an Administrative Law Judge for the OSHA denied Menendez's claim stating "…that Menendez failed to demonstrate that Halliburton subjected him to adverse action when it breached his confidentiality" (Administrative Review Board, 2011).

After six more years trying to appeal the Administrative Law Judge's opinion, the Department of Labor's Administrative Review Board, in *Anthony Menendez v. Halliburton, Inc.*, reversed the Administrative Law Judge's opinion stating that there was sufficient evidence to support Menendez's claim that he had been unfairly retaliated against under SOX section 806 due to a breach in confidentiality (Administrative Review Board, 2011). Halliburton, would try to appeal the Administrative Review Board's decision and the case would be brought up one final time in the Fifth Circuit Court of Appeals. In 2014 the Fifth Circuit Court of Appeals would side in favor of Menendez and stating that he should receive $30,000 as compensation for his troubles (Fifth Circuit Court of Appeals, 2014) and all his legal fees were to be paid by Halliburton Inc. (Eisinger, 2015).

While Menendez did eventually find a job as the "… controller for General Motors in Detroit," (Wakelee-Lynch, 2015), it took him nearly a decade to win his whistleblower case. Even worse, those who were directly involved in retaliating against Menendez for his actions never faced any type of punishment. In fact, as noted by Eisinger;

> Many of the Halliburton and KPMG officials involved in the accounting issue or the retaliation have continued to prosper in the corporate ranks. One is now Halliburton's chief accounting officer. McCollum [the chief accounting officer during Menendez's tenure at Halliburton] is now the company's executive vice president overseeing the integration of a major merger. The KPMG executive who disagreed with Menendez is now a partner at the accounting firm (2015)

Menendez may have won the legal battle, but one may wonder if Halliburton Inc. still could be claimed as the true victor, monetary fine aside.

Lawson et al. v FMR LLC et al.

The second case, *Lawson et al. v FMR LLC.*, like the Menendez case, involved retaliation by the employer against the employees. In 2005, Jonathan M. Zang worked for Fidelity Investments and was terminated due to raising concerns over Fidelity fund statements that "…he believed violated federal securities laws" (Mooney & Bull, n.d.). Zang brought an anti-retaliation case to the Department of Labor's Occupational Health & Safety Administration (OSHA) and then to an Administrative Law Judge, both of which denied his request, first for not being a protected action under the law and second because Zang was not an employee of a publicly traded company and was instead a contractor for a private company (Mooney & Bull, n.d.). In 2007, Jackie Lawson, a former employee of Fidelity Brokering Services LLC, filed a claim with the Department of Labor's OSHA and the United States District Court of Massachusetts, citing that she had been constructively discharged after "…raising concerns about cost-accounting methods" (Mooney & Bull, n.d.).

Like in the case of Zang, the court found that Lawson was not covered as a protected employee under the current understanding of the law since she too was a contracted employee for a private company. On March 4, 2014, the Supreme Court of the United States, in a six to three vote, decided that "…§1514A's (SOX) whistleblower protection includes employees of a public company's private contractors and subcontractors" (Supreme Court, 2013, p. 1-2). The legal understanding of what constituted as protected activities and what employees were protected under the SOX law were expanded with the *Lawson et al. v. FMR LLC et al.* case.

Julio Perez v. Progenics Pharmaceuticals, Inc.

In *Julio Perez v. Progenics Pharmaceuticals, Inc.*, which was filed in the United States District Court Southern District of New York, Julio Perez filed a whistleblower retaliation claim against Progenics Pharmaceuticals Inc. under the SOX Act of 2002. Perez was an employee of Progenics Pharmaceutical, Inc., where he acted as the Senior Manager of Pharmaceutical Chemistry. Before starting Pereze had to sign an agreement which:

> …required [the] Plaintiff [Perez] to preserve in confidence, and not to use, to publish, or to otherwise disclose…, either during or subsequent to [Perez's] employment, without the written permission of Progenics, all confidential proprietary rights or any knowledge, . . . or any other confidential information of Progenics, its customers, or others from whom

Progenics has received information under obligations of confidence.'" (Julio Perez v. Progenics Pharmaceuticals, Inc., 2015).

During Perez's time as Senior Manager of Pharmaceutical Chemistry, he worked on the development of Relistor, a drug developed to help individuals with "constipation from opioid use in adults with chronic non-cancer pain and advanced illness" (Progenics, n.d.). As described in court documents, Perez was never directly involved in the clinical trials for Relistor and was not involved in "…any sales, marketing, or public relations positions…" (Julio Perez v. Progenics Pharmaceuticals, Inc., 2015, p. 1) for the product Relistor. Progenics and Wyeth Pharmaceuticals Division partnered together "…to co-develop and jointly commercialize Relistor…[and] established a Joint Steering Committee ("JSC"), a Joint Development Committee ("JDC"), and a Joint Commercialization Committee ("JCC")" to assist with the Relistor project (Julio Perez v. Progenics Pharmaceuticals, Inc., 2015, p. 3). According to Perez, Target Product Profiles, which, according to a Joint Development Plan, was another creation of both Progenics and Wyeth, had an ideal description of the specific concepts of Relistor (Julio Perez v. Progenics Pharmaceuticals, Inc., 2015, p. 4). Furthermore, Perez asserted that, while knowing that the second phase of testing for Relistor had yielded negative results, Wyeth and Progenics released statements to the contrary, saying that the clinical trials had shown positive results (p. 5-6).

Per an update from Wyeth, referred to as the "Wyeth Update," there was a recommendation that Relistor not continue forward to phase 3 of clinical testing, but per Wyeth, after talks with Progenics, Phase 3 of testing was allowed. This update was sent to certain Progenics employees, including senior management and Mark Baker, Progenics' general counsel, and was not intended for Perez, but he somehow attained the update. Perez sent a memorandum on August 4, 2008, to Mark Baker and Thomas Boyd, Progenics' Senior Vice-

President of Product Development, stating that Progenics was committing an act of fraud since by approving Relistor even though the clinical trial results were negative.

According to Progenics, Perez's work computer was taken away for two reasons. The first reason, was that the he was not one of the original intended recipients of the Wyeth Update and thus there was suspicion surround how Perez had received the Wyeth Update. The second reason, was that Perez was not in his office at the time Mark Baker came to talk to Perez and thus, as a precaution, Perez's computer was secured (p. 8). Unlike Progenics account of the events, Perez stated that "…Baker told him "in hostile words" that his computer had been removed and did not make any comment on the Wyeth Update" (p. 8). When questioned by "…Robert McKinney, then Progenics Chief Financial Officer…" (p. 9) as to how Perez had acquired the Wyeth Update, Perez requested to speak to his attorney first. McKinney agreed to this and Perez was told to contact Baker with his answer. However, the next day Perez met with both McKinney and Baker and received two letters, the first stating that Perez's assertions were groundless and the second stating that Perez must have gotten the Wyeth Update through some type of illegal activity and he would therefore be fired effective immediately.

This was not the first-time Perez had dealt with retaliation from Progenics. "On October 2, 2007, [Perez] filed a complaint with the U.S. Department of Labor/Occupational Safety and Health Administration…alleging that Progenics failed to promote him in retaliation for raising concerns in October 2005 and October 2006 about a different drug Prostate-Specific Membrane Antigen Antibody-Drug Conjugate ("PSMA-ADC")" (p. 10). Following his conversation with Baker and McKinney, Perez filed another complaint with the U.S. Department of Labor's OSHA about his termination from Progenics. Like the *Menendez v. Halliburton Inc.* case, both of Perez's original claims were rejected. Perez, like Menendez, persevered regardless and appealed his complaint about his termination from Progenics on December 23, 2008. Over the next year and 11 months, Perez would file a lawsuit against Progenics and filed an Amended Complaint on November 29, 2010. Progenics "…filed the instant Motion for Summary Judgment on February 8, 2013… [and] the Court held oral argument on June 26, 2013…" (11:

> Defendant makes three main arguments: (1) Plaintiff did not engage in protected activity, because he did not "reasonably believe" that the May 2008 Press Release was fraudulent; (2) even if Plaintiff engaged in protected activity, Plaintiff cannot show that the protected activity was a "contributing factor" to his termination; and (3) Plaintiff's employment would have been terminated even in the absence of the protected activity (15).

Ultimately, the Court sided with Perez on all three of the above arguments. According to the Government Accountability Project, an organization "…created in 1977 at the Institute for Policy Studies (IPS) in response to several whistleblowers…" (Government Accountability Project, n.d.), Perez was awarded $1,662,951 as compensation for his unlawful termination in 2015. The Court also, instead of ordering Progenics to reinstate Perez, required Progenics to pay Perez $2.7 million in "front pay." This course of action was determined to be the most favorable because "the Court… found Perez had no reasonable prospect of obtaining comparable alternative employment. The amount of the award was based on a conservative estimate of expected earnings based on Perez' age at the time of the verdict until a reasonable retirement age" (Stinson Leonard Street LLP, 2016). To put this in further perspective, according to Yahoo Finance, Progenics gross profit on its 2015 income statement only reached about $8,676,000, meaning that over half of Progenics gross profit for 2015 went to compensate Perez (Yahoo Finance Progenics Pharmaceuticals, Inc., 2016).

The Monsanto Whistleblower

In contrast to the years immediately following the Sarbanes-Oxley Act of 2002 and even those following the implementation of the Dodd-Frank Act of 2010, whistleblower complaints are starting to be heard more often and, not only heard, but whistleblowers are also starting to win with higher payouts in the end. This increase in, not only payout, but overall publicity on part of the American news media as well as the SEC itself can be seen in the recent penalty of Monsanto Company for its inappropriate accounting methods and misstatements to the public in its 2009, 2010, and 2011 annual reports.

The Monsanto case was, not only successful in bringing a whistleblower claim forward, but resulted in millions of dollars in reparations being awarded to the whistleblower. Unlike other whistleblower cases however, the whistleblower's claim originally started as an internal claim, but then eventually made its way to the SEC's doorstep (Cohn, 2016). Also, unlike other whistleblower cases where the identity of the whistleblower either was well known from the beginning or eventually came to light, the chances of that occurring are almost nonexistent, even though the SEC's initial public announcement about fining Monsanto was announced in February 2016. However, according to the Wall Street Journal, the Monsanto whistleblower was "a former financial executive…" (Rubenfeld, 2016), but just as was the case of other articles, the whistleblower's exact identity was not revealed. This secrecy covering the Monsanto whistleblower's identity because, "by law, the SEC protects the confidentiality of whistleblowers and does not disclose information that might directly or indirectly reveal a whistleblower's identity" (SEC, 2016).

The whistleblower responsible for bringing forward information to the SEC received "… an award of more than $22 million…one of the largest awards so far since the SEC instituted the current whistleblower program inaugurated under the Dodd-Frank Act of 2010" (Cohn, 2016).

To put this in perspective, Monsanto was ordered to pay $80 million to the SEC. This meant that the whistleblower received roughly 27.5% of the total Monsanto fine. Officially, the SEC investigation looked into the actions of four parties; Monsanto Company, as an entity itself, Sara M. Brunnquell, CPA, the former External Reporting Lead at Monsanto and current Global Commercial Operations Climate Lead, Jonathan W. Nienas, the former U.S. Strategic Account Lead for the Roundup division of Monsanto, and Anthony P. Hartke, the former U.S. Business Analyst for Monsanto's Roundup division and current Regional FP&A Analysis Lead at Monsanto (In the Matter of Monsanto Company, Sara M. Brunnquell, CPA, Anthony P. Hartke, CPA, and Jonathan W. Nienas, 2016).

According to the SEC investigation, in regards to Monsanto's herbicide product, Roundup (2016):

> During fiscal years 2009, 2010, and 2011, Monsanto improperly accounted for millions of dollars of rebates offered to Roundup distributors and retailers in the U.S. and Canada to incent them to purchase Roundup. Monsanto also improperly accounted for rebate payments to Roundup customers in Canada, France, and Germany as selling, general, and administrative expenses ("SG&A") rather than rebates, which boosted Roundup gross profit in those countries. Monsanto did not have sufficient internal accounting controls to identify and properly account for rebate payments promised to customers (p. 2).

In short, Monsanto not only had improper accounting methods to keep track of its product, Roundup, but also suffered from a deficiency in internal controls in regards to the product, which are used to prevent and detect errors or misstatements, whether intentional or unintentional.

The report goes on to detail how, starting after the year 2000, Monsanto's Roundup product was not earning its expected annual expectations and Monsanto lost most the market share to products manufactured by other companies. During Monsanto's fourth quarter of 2009, Monsanto created a U.S. Loyalty Bonus program to incentivize retailers to purchase more Roundup. This loyalty program was, in part, created with the help of Hartke and approved by Brunnquell, which is why the investigation extended to both.

The first major departure from Generally Accepted Accounting Principles (GAAP), revolved around the recognition of revenue from the loyalty program. The revenue should have been recorded in the 2009 fiscal year, but Monsanto instead recorded it in the 2010 fiscal year (p. 2). Again, this approval of accounting treatment was given by both Hartke and Brunnquell as well as the auditors, Deloitte & Touche LLP. The second major accounting departure was that, per an agreement between Nienas and a customer, referred to as "Customer A" in the official SEC report, Customer A could record payment of a rebate under the 2010 Rebate program even though the Customer had not met target goals for the 2009 loyalty program. This action of paying a customer even without the customer meeting the predetermined sales goals was repeated with what the SEC referred to as "Customer B." "Monsanto relied upon the failures of Customers A and B to meet their minimum LTA [Long-Term Agreements] volume targets as the basis for reversing LTA accruals in the fourth quarter of fiscal year 2009. Hartke participated in recording the reversal of these accruals" (p. 7). This process was repeated for Monsanto's 2010 and 2011 fiscal years, thus, affirming the SEC's allegations that for the years 2009, 2010, and 2011 Monsanto had improperly accounted for its sales. Also, Monsanto's internal controls were unable to prevent side agreements between Monsanto and the customer that were established after the original loyalty program agreement (p. 8).

In regards to Monsanto's Canadian operation, due to the Monsanto U.S. price-drop of Roundup, Monsanto was faced with a dilemma. It had established, prior to the price drop, the

Price Risk Protection Program, which would have obligated Monsanto to accrue payment obligations after the price drop. However, in exchange for the willing consent to relinquish their rights to the PRPP, customers were told that "…it would pay them amounts equivalent to the amounts payable under the PRPP through a sales incentive program like the U.S. LBP (hereinafter "the LBP Canada")" (p. 9). Brunnquell purposefully misled auditors, telling them that many of the, at that point, cancelled accounts were still active. This led to Monsanto Canada having "…improperly recorded approximately $43 million in rebates…" (p. 9) for fiscal year 2010. Furthermore, in 2010, the rebate program was converted to account for rebates into the selling, general, and administrative expenses and the Monsanto employees valued these expenses and services to reflect $18 million even though this estimate was not accurately represented of the fair value of the services.

Monsanto France and Germany both faced the same issues. In 2009, Monsanto France and Germany had too much left in inventory of their Roundup products. Much like in Monsanto Canada during the same period, Monsanto tried to transfer the extra costs into selling, general, and administrative accounts because customers were supposed to receive $5 worth of compensation for every liter of Roundup that was sold. This plan was carried out from fiscal years 2009 to 2011, but the SEC found no evidence that such sales of Roundup on the customer's behalf ever occurred (p. 9-11). Finally, the last charge brought forward is that Monsanto, while utilizing irregular accounting methods, also continued its sale of securities, intentionally misleading the public (p. 11).

Discussion & Conclusion

Shortly after the passage of the SOX Act of 2002, even knowing that protections exist, many whistleblowers remain silent, fearing that their claims would not be heard. The two great whistleblowers of the early 2000s, Sherron Watkins and Cynthia Cooper, both faced retaliation from both their superiors and corporate America, though, neither one pursued legal action against their former employers. Their stories present a double-edged sword to whistleblowers. On one hand, by blowing the whistle on a company for some type of illegal activity, they would be acting in an ethical manner and would be compensated for their actions. On the other hand, should they potentially be retaliated against by their employer and their claim not be held up in court, then both the immediate and long-term economic consequences could be devastating. Also, even if they were to win the industry they practice in might retaliate in some way against the whistleblower, as can be seen in the case of Watkins and Cooper.

Even if the whistleblower wins, it could take years for their claims to be upheld, as can be seen in the case of Menendez, Lawson, Zang, and Perez. While ultimately these four whistleblowers all received compensation for the retaliation they experienced, they also experienced a lengthy period between when they were first retaliated against and when they received their compensation. This time for each of them, in some way, resulted in some economic loss, at least in terms loss of income from their occupation that they left or lost. Also, the emotional toll that it this long-waiting period could take on a whistleblower should not be overlooked, as it affects a person’s whole life. Thus, while government regulation, in theory, does ultimately protect a whistleblower, the complexity of the legal system can present a roadblock in the whistleblower’s journey.

Another interesting note is that government regulation does not provide any provisions for reprimanding a company and requiring it to take extra actions to change its tone at the top or corporate culture after a whistleblower’s claim is upheld. Each of those responsible for the instances of employer retaliation mentioned prior, except for Enron and WorldCom executives, never faced criminal charges. While Halliburton, Inc., FMR LLC, Progenics Inc., and Monsanto all faced fines from the whistleblower cases, as stated above, none were forced to necessarily put in preventative measures to prevent further instances of whistleblower retaliation. In fact, as mentioned in the case of Menendez vs. Halliburton, Inc., some of those who had been directly involved in retaliating against Menendez did not face any negative consequences. They remained untouched and, in some cases, had been promoted to a higher position.

One possible solution to further prevent retaliation against whistleblowers in a corporation would be some type of punishment. This punishment would need to be two-fold, one involving a punishment from the court, such as a fine to those who had retaliated against the whistleblower, and some type of punishment on the part of the company. While the combined consequences may seem harsh on the surface, this could potentially help to further create a more ethical tone at the top while also providing a further deterrent for unethical behavior. This type of legislation might also encourage more employees to not be afraid about blowing the whistle.

In conclusion, whistleblowers come from all types of situations and backgrounds. From a staff accountant to the vice president of a company, from reporting a concern internally to alerting an outside organization, anyone can be a whistleblower. More importantly, everyone in any organization should be willing to be a whistleblower if the need arises. Any employee should be empowered by the company itself to blow-the-whistle if they notice something wrong happening, even acknowledging that they may potentially face retaliation from fellow employees or upper management. The legal battle these whistleblowers face to prove their innocence can be just as daunting as the actual act of whistleblowing itself, due to the amount of time it takes for some whistleblowers’ claims to be upheld by an upper level court. In the end, while there is federal legislation to protect whistleblowers and whistleblowers' claims have been validated more and more in recent years, many more employees remain afraid to blow the whistle.

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