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The Ethical Health Lawyer

Watch Out for Whistleblowers

Leslie Griffin

"There's a new whistleblower in Washington," according to CNN News.¹ He is Food and Drug Administration scientist David Graham, who claims that the FDA failed to warn the public about certain drugs' dangerous side effects and pressured him to change his research's conclusion that the arthritis drug Vioxx caused heart attacks.² Another Washington whistleblower, Dr. Jonathan Fishbein of the National Institutes of Health, alleged that he was fired because "he had raised concerns about sloppy practices that might endanger patient safety" in a study of the AIDS drug nevirapine.³

Graham and Fishbein thus joined the ranks of whistleblowers who have gained some prominence in recent years for their reporting of corporate or institutional misconduct. The best-known whistleblowers—the FBI's Coleen Rowley, Enron's Sherron Watkins, and WorldCom's Cynthia Cooper, who together received *Time* magazine's Whistleblower Person of the Year Award in 2002⁴—focused public attention on the reform of corporate accounting and legal practices. The Graham and Fishbein examples, however, provide a timely reminder to the ethical health lawyer to be prepared for whistleblowers. State and federal law's treatment of health care whistleblowers is comprehensive and complex. Wise health lawyers will anticipate the whistleblowers in their midst and establish appropriate programs and procedures to prevent both misconduct and retaliation long before the whistleblower's story appears on CNN.

Retaliation Against Whistleblowers

Whistleblowers are individuals who report misconduct; they frequently face retaliation for doing so. Important legal questions about retaliation arise whenever an employee who re-

ports misconduct is fired or demoted. Unfortunately, this law of wrongful or retaliatory discharge is a mess: "piecemeal," "patchwork," "hodgepodge."⁵ The general rule is at-will employment, namely that an employee may be fired at the employer's will without recourse for job termination or demotion. State courts and legislatures, however, have enacted numerous exceptions to this rule, offering remedies to, for example, government (but not private company) whistleblowers, whistleblowers whose reporting involves important questions of public policy or safety, or whistleblowers who refuse to perform an illegal activity.⁶ In federal law, the False Claims Act, which lets private parties who discover federal health care program fraud file *qui tam* suits on the government's behalf and receive a percentage of the government's proceeds, also protects against individuals being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" for participating in the fraud investigations.⁷ Some combination of damages such as reinstatement, back pay, costs and attorney's fees is available under these federal and state standards.

Thus step one for the ethical health lawyer is to understand the numerous laws that govern retaliation against whistleblowers in the jurisdiction. Several federal statutes are directed explicitly at medical whistleblowers.⁸ Moreover, even states whose courts disfavor private whistleblower lawsuits may have legislation that affords special protection to medical care facility employees.⁹

Once the universe of whistleblower law is identified, the scope

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of protection against retaliation remains contested. In Dr. Fishbein's NIH case, for example, the United States Merit Systems Protection Board ruled recently that the Whistleblower Protection Act did not protect the doctor because he was a probationary, "Title 42" employee to whom the provisions of the act did not apply.¹⁰ The United States Supreme Court is also examining the range of whistleblower protection this term. In a non-medical case, Roderick Jackson, the male coach of a girls' high school basketball team, allegedly lost his coaching job after reporting that the girls' team did not receive equal funding or access. Jackson filed suit for retaliation under Title IX, the federal legislation that prohibits sex discrimination in education, but the Eleventh Circuit dismissed his lawsuit on the grounds that Title IX does not provide a private right of action for whistleblowers who report gender discrimination but are not subjected to it personally.¹¹ The Jackson decision may clarify the protection afforded to whistleblowers under numerous federal statutes; it also raises anew the recurring issues of at-will employment and statutory protection against retaliation. Piecemeal, patchwork, hodgepodge, developing, uncertain – the specific law of retaliatory discharge requires careful study.

Reporting Misconduct by Whistleblowers

Journalistic and literary descriptions of whistleblowers often focus on the moral and personal factors that persuade them to risk their careers and report misconduct. Reporting also poses equal challenges for the health lawyer. Over the last three years, corporate lawyers have been forced to recognize that retaliation lawsuits are not their only worry about whistleblowers. After Enron and other corporate scandals, Congress passed the Sarbanes-Oxley Act, which, in addition to prohibiting retaliation against whistleblowers, requires publicly traded companies to set up internal mechanisms that allow employees to report misconduct and establishes criminal penal-

ties for employers if retaliation occurs.¹² Although Sarbanes-Oxley applies only to publicly traded companies, its treatment of whistleblowers provides a model of "best practices" for other industries, including private and non-profit health care organizations.¹³

In addition to the Act's protection of employees against retaliation, the two other whistleblower provisions

hundreds of doctors to prescribe Neurontin for non-approved uses."¹⁷ Accountants Jim Alderson and John Schilling detected fraudulent Medicare reimbursements at Columbia/HCA and cooperated with the government to uncover the fraud.¹⁸ Franklin received a \$26.6 million settlement from Pfizer, while Alderson and Schilling split \$100 million.¹⁹

State and federal law treatment of health care whistleblowers is comprehensive and complex. Wise health lawyers will anticipate the whistleblowers in their midst and establish appropriate programs and procedures to prevent both misconduct and retaliation long before the whistleblower's story appears on CNN.

named above are noteworthy. First, like corporate lawyers, health lawyers should establish procedures that give employees the occasion to report wrongdoing without fear of reprisal and employers the opportunity to cure misconduct. Because Sarbanes-Oxley did not specify those procedures, lawyers must consider carefully what reporting mechanisms – internal or external, anonymous or non-anonymous – will be most effective.¹⁴ Second, Sarbanes-Oxley's criminalization of retaliation against whistleblowers "represents a *momentous departure* from the state statutes, as well as the Model [Whistleblower] Act."¹⁵ Those criminal sanctions are not limited to publicly traded companies, but "seemingly encompass every employer."¹⁶ The securities legislation thus raises the question whether criminal sanctions for employers will grow in importance as a means to police institutional misconduct and punish retaliation in every industry.

There have been numerous whistleblowers in the health care industry. In addition to Graham and Fishbein, for example, David Franklin reported that Pfizer marketed the epilepsy drug Neurontin for non-FDA approved purposes and "gave financial incentives to

Not all whistleblowers are so successful. Sometimes they are mistaken, and even when they are correct they can be "quirky, anxious and irritable."²⁰ Indeed, a leading book on whistleblowers profiles them as "psychological narcissists"²¹; in simpler language, they can be just the kind of person everyone wants to avoid. Nonetheless, the ethical health lawyer must listen to the whistle and then ensure that the whistleblower's complaint is reported, recorded and rectified while the whistleblower's person never faces retaliation.

Avoiding settlements or litigation, and complying with Sarbanes-Oxley, however, are not the only reasons for ethical health lawyers to heed the whistleblower; in this field, the whistleblower may warn of serious dangers to life and health. In learning about such risks, the lawyer comes face to face with the whistleblower's dilemma, namely whether to report the harm or to decide that loyalty to clients requires that lawyers never blow the whistle.

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- 3 "Judge Limits Protections That the Law

- Allows Federal Whistle-Blowers," *N.Y. Times*, December 25, 2004, at A12.
4. R. Lacayo and A. Ripley, "Persons of the Year," *Time*, Dec. 30, 2002, at 30.
 5. See M. A. Cherry, "Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law," *Washington Law Review* 79 (2004): 1029-1123, at 1049 ("state whistleblower law is murky, piecemeal, disorganized, and varies from jurisdiction to jurisdiction"); *id.* at 1064 ("patchwork of federal statutes, state statutes, and common law exceptions to the at-will employment rule"); P. R. Marksteiner, "The Flying Whistleblower: It's Time for Federal Statutory Protection for Aviation Industry Workers," *Journal of Legislation* 25 (1999): 39-75, at 41-42 ("Dozens of federal and state statutes and a hodgepodge of common law doctrines provide whistleblower protection for workers in a number of different industries.")
 6. See generally E. S. Callahan and T. M. Dworkin, "The State of State Whistleblower Protection," *American Business Law Journal* 38 (2000): 99-132; Cherry, *supra* note 5.
 7. 31 U.S.C. § 3730(h) (2000).
 8. See, e.g., Public Health Act, 42 U.S.C. § 1395dd(i) (2000) (employer may not "take adverse action" against a physician who refuses to authorize transfer of unstabilized patient") and other statutes cited in Cherry, *supra* note 5, at 1122.
 9. See, e.g., Tex. Health & Safety Code § 142.0093 (2001); Tex. Health & Safety Code § 161.134 (2001); Tex. Health & Safety Code § 242.133 (2001); Tex. Occ. Code Ann. § 160.012 (2004).
 10. "Judge Limits Protections," *supra* note 3. A Title 42 employee is a research or medical expert who is hired as a special consultant and therefore receives a higher salary than civil servants.
 11. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002), *cert. granted*, 124 S.Ct. 2834 (2004).
 12. See generally Cherry, *supra* note 5, at 1063-1069 (citing 15 U.S.C. § 78j-1; 18 U.S.C. § 1514A; 18 U.S.C. § 1513).
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 15. F. J. Cavico, "Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis," *South Texas Law Review* 45 (2004): 543-645, at 581 (emphasis added).
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