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EMPLOYMENT LAW

Blowing the whistle

How does workplace snitching fit in with employment law?

By Howard Levitt

Whistleblowing has never been bigger. "Dieselgate" — the scandal over Volkswagen's faked emission tests — severely tarnished that company's once green image and tanked its sales worldwide.

Meanwhile, in a record year, the U.S. Securities & Exchange Commission has rewarded eight different whistleblowers with bounties totaling US$37 million.

The essence of whistleblowing is that a worker discloses the employer's wrongdoing to the authorities. But how does snitching fit in with employment law?

Employees owe a duty of loyalty to their employer. This legal duty is so fundamental to the relationship that it binds employees even if there is no policy or written contract.

Whistleblowing laws create an important exception to that duty. In Regina, the Iron-Workers Union fired its office manager, Linda Merk, after she blew the whistle on alleged financial abuses by union officials. Merk then started a private prosecution, charging the union with illegal retaliation under the Saskatchewan Labour Standards Act. In 2005, she finally won the union's conviction at the Supreme Court of Canada.

Although the duty of fidelity does not require employees to remain silent when faced with wrongdoing, the same duty requires them to "go up the ladder," reporting a problem internally before tipping off authorities or the media. The Supreme Court in Merk held that the balance between an employee's duty of loyalty and the public interest in suppressing unlawful activity is best achieved by encouraging employees to resolve concerns internally before running to the police. This ensures their employer's reputation is not damaged by unwarranted and potentially defamatory accusations.

However, impropriety sometimes makes it unreasonable to seek an internal remedy. Someone working at FIFA can't be expected to confront its president, Sepp Blatter, for example.

In Canada, governmental workers typically have greater protection against retaliation for whistleblowing than those in the private sector. Federal government employees are sheltered by the Public Service Disclosure Protection Act. Provincial legislation protects public sector whistleblowers in several jurisdictions, including Ontario, Alberta and Nova Scotia. On Dec. 2, Quebec's legislature gave first reading to a similar statute, Bill 87, which the opposition criticized for failing to protect private sector employees.

In most provinces, employees who report violations of certain statutes (such as Ontario's Occupational Health & Safety Act) are specifically protected from reprisals. However, very few provinces — notably New Brunswick and Saskatchewan — give general protection to private sector whistleblowers.

The one general source of protection for all whistleblowing employees, nationwide, is the Criminal Code. Since 2004, it has made it a crime, punishable by up to five years' imprisonment, for an employer to retaliate against a worker who informs authorities of any lawbreaking activity. This provision, however, has rarely been used because the criminal process is seen as an excessive and overly blunt instrument to deal with workplace exigencies.

Tattletales don't qualify as whistleblowers if the alleged wrongdoing is essentially directed towards that employee personally. There must be a significant public interest dimension. In 2009, the Ontario Court of Appeal held that Nico Van Duyvenbode wasn't acting as a whistleblower when he began a letter-writing campaign complaining that his employer, the Public Service of Canada, was treating him unfairly. Publicizing your own personal workplace issues, as opposed to institutional wrongdoing, just doesn't count.

Being recognized as a legitimate whistleblower can be very valuable to a protected worker. It recently helped get Ted Cooper reinstated with 28 months' back pay. In May 2013, Cooper, a unionized professional engineer employed by the City of Ottawa, was fired for insubordination after sending an email to his supervisor demanding information about a project and threatening to involve the auditor general.

His union grieved the dismissal, seeking reinstatement. In September 2015, the arbitrator, Deborah Leighton, found that "the email was unprofessional and showed bad judgment." Despite this, she concluded the appropriate discipline was merely a five-day suspension rather than termination.

Cooper's history as a whistleblower tipped the scales, saving him from being found insubordinate. For years, he had waged a one-man campaign to alert authorities about grave errors in calculations that risked dangerous flooding in new developments in Kanata, Ont. Cooper's efforts had been vindicated in 2008 when then-mayor Larry O'Brien publicly commended his persistence.

Perceived errors in later studies had sent Cooper back into battle. Mindful of that background, Leighton wrote: "I am convinced that the email was well-motivated in spite of its tone. …(F)or years, he has worked on his own time to ensure that project is safe for the public. Moreover, he believed that he had a duty as a professional engineer to raise concerns".

Looking ahead to 2016, the Ontario Securities Commission is planning to set up a version of the Security and Exchange Commission's whistleblower reward system. There is nothing like the smile of a newly minted millionaire, especially one brimming with self-righteousness.

To avoid being the source of those funds, employers should enact policies that clearly delineate an internal grievance process employees must follow if they suspect impropriety at any level of the organization, with effective recourse. This should be coupled with rigorous confidentiality obligations. That may not totally protect someone — but it will go a very long way.

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