Taking The Air Out Of The Whistle In Whistleblower Litigation

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The Prominent Role of the "Whistleblower" in Contemporary Law and Culture

- Daniel Ellsberg
- Karen Silkwood
- Erin Brockovich
- Edward Snowden

The Two Words Least Likely to Appear Together in 21st-Century American Journalism:

*"**Alleged**"* and *"**Whistleblower**"*

The Proof is in the Headlines:

The Washington Post
Energy Department investigated for retaliating against whistleblowers

Bloomberg
Highway Guardrails Are Deadly Spears on Impact, Says Whistleblower

Whistleblower Petitions for Expanded First-Responder Protection
The New York Times

THE WALL STREET JOURNAL.
Whistleblower Files Another Complaint Against Infosys
Ex-employee Who Initiated Visa Practices Investigation Alleges Company Retaliated Against Him

Chicago Tribune
Whistleblower files federal lawsuit against Morgan Stanley, FINRA

Forbes
Whistleblower Fingers Tax Tricks At Private Equity Firms

L.A. union trusts' attorney accused of conspiring to fire whistle-blower
Los Angeles Times

USA TODAY
Investigator: VA downplayed whistle-blower findings

Whistleblower Protection Statutes on the March

Environmental:	Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act") 33 U.S.C. § 1367
Nuclear Energy:	Energy Reorganization Act of 1974 ("ERA") 42 U.S.C. § 5851 (provision added in 1978)
Commercial Aviation:	Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21") 49 U.S.C. § 42121 (enacted in 2000)
Public Companies:	Sarbanes-Oxley Act ("SOX") 18 U.S.C. § 1514A (enacted in 2002)
Finance:	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 2 U.S.C. § 78u-6

Whistleblower Protection Statutes on the March
- A New Development -

Government Contractors: National Defense Authorization Act of 2013 ("NDAA"), 41 U.S.C. § 4712

Grants whistleblower protection against "reprisals" directed at employees of government contractors.

- NDAA is restricted to:
  - contracts awarded after July 2, 2013;
  - task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; or
  - pre-existing contracts modified to include a contract clause providing for the applicability of such amendments.

"Whistleblower Protection" Laws Stack the Deck Against the Employer

- Expansive definitions of "protected activity."
- "Materiality" of alleged adverse impacts seldom required.
- Low standards of causation: "a contributing factor."
- One-way cost and attorneys' fees recovery provisions.
- Administrative adjudication as a crap shoot.

The Gift that Keeps on Giving: The "Frequent Filer"

- The tactic: Keep reapplying for every job opening posted by the erstwhile employer, then bring multiple follow-on claims for "retaliation" in hiring.
- The acknowledged master: Sayed Hasan
  - His saga underscores inability of the ARB and the courts to rein in abusive filings.
- Now a standard tactic enshrined in every whistleblower support group's playbook.

How to Take the Air Out of the Whistle?

An Ounce of Prevention . . .

Implement a Robust Compliance Program

When a Claim Arises:

- Hire an experienced, skillful trial attorney *IMMEDIATELY.*
- Turn him or her loose to work the evidence energetically.
  - *"There's gold in them thar hills . . ."*

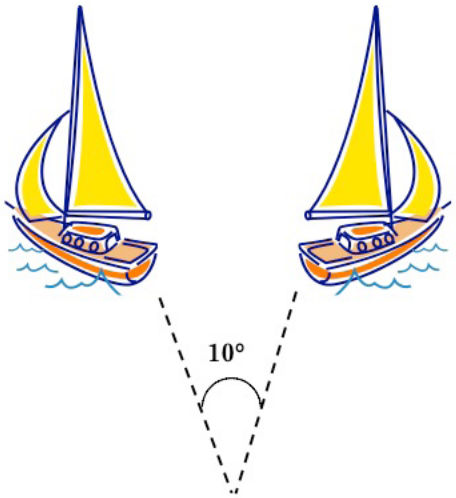
News Flash: Many Whistleblower Cases are a Load of . . . Nonsense

- Often brought by disgruntled employees harboring longstanding grievances unrelated to whistleblowing.
- Frequently after-the-fact constructs reframing bad workplace performance or misbehavior.
- But . . . they take on a life of their own . . .
  - Self-identified whistleblowers in prominent industries will be egged on by support groups, the media, and politicians.

The Game Plan:

- Carpe Diem
  - Many claimants' lawyers will neglect up-front preparation.
  - Depositions can make or break your case.
- Re-frame the issue: Whose motivation?
  - Frame the narrative.
- Focus on the legal elements of the claim (often subject to changing case law definitions).
- Lock-in the case terminology early.

The Rule of 10 Degrees



Gather, Review, and Analyze the Claimant's Documents as Early as Possible

- Personal electronic files (private email, iPhone, social media)
  - Candid communications with friends/family often reveal true motives.
- Company email accounts and other electronic files.
  - Refutation of "whistleblower"-type concerns
  - Proof of real reasons for employment actions
  - Evidence of motives.
- IMMEDIATELY START PREPARATION OF A WITNESS/ DEPOSITION FILE.
  - The trial lawyer should play an active role in this process.

Gather and Review Key Company Witnesses' Documents at the Outset

- The integrity of the document collection/review process.
  - Many cases ultimately subject to federal discovery rules.
- Find out if there is a real problem.
  - Find "bad documents" and put them into context.
- Defend the employment action taken.
  - Gather documents that show lack of animus toward the claimant, inclusion in decision-making, etc.

Interview Key Company Managers and Other Witnesses as Soon as Practicable

- Get this done early − well before the claimant's deposition.
- Identify good evidence as well as weaknesses in the company's case.
- Develop a psychological profile of the claimant: what makes him or her tick?
- KEY: IDENTIFY THE BEST COMPANY WITNESSES
  - . . . AND THOSE WHO SHOULD STAY AWAY FROM THE COURTHOUSE!

Deposing the Alleged Whistleblower

- **Always** videotape the claimant's deposition.
- ***The trial lawyer must take this deposition*** – INSIST ON IT.
  - "Discovery" is a misnomer:
    - Video deposition = Trial (cross-examination) testimony.
    - Use for "any purpose" at trial (opening/closing, high impact impeachment, crossing other witnesses, stand-alone testimony, etc.).
- Use the deposition to tell the defense story through the claimant:
  - Use the claimant's own documents aggressively.
  - Home in on the claimant's true motive.
  - Question the claimant closely regarding satisfaction of the elements of the claim – amazingly, many whistleblower claimants will not be prepared on those elements.

Deposing the Alleged Whistleblower *(continued)*

- Incorporate precise shades of meaning into deposition questions:
  - A leg up in establishing case terminology in depositions = a leg up at summary judgment and trial.
- Ask the ultimate questions – lightning need strike only once.
- Allow the self-important claimant to talk and explain to his/her heart's content – plenty of rope . . .
  - Set the traps, but don't spring them all . . .

Seize the Terminology: "No actual safety violation"

Deposition Testimony of Plaintiff in Whistleblower Litigation

Q: Was there ever an instance where an aircraft took off while out of compliance with the Federal Aviation Regulations?

A: Not that I'm aware of.

Q: So is it fair to say you were never aware of any actual safety violations by the airline?

A: That's fair to say.

Q: So you're not claiming that Mr. Smith or any of his superiors ever did anything to compromise safety, are you?

A: Oh, no.

Defending Company Witness Depositions

- **DANGER:** One bad answer − on videotape – is locked in for all time.
- Budget substantial time and money to ensure adequate preparation.
  - Go through all pertinent documents/potential trial exhibits, and anticipated questions regarding them.
  - Adoption/incorporation of case themes and nomenclature.
  - Conduct mock video deposition questioning.
    - Credibility, Credibility, Credibility.
    - Television is a cool medium.
- A special challenge: the CEO deposition

Media Strategy

- Multi-disciplinary.
  - Should involve in-house and outside counsel, media relations staff, government relations staff (if applicable), and key executives.
- Should complement − but not necessarily be dictated by − litigation strategy.
- Don't swing for the fences − the media will likely be against the company no matter what.
- The perils of "no comment."
- Beware video interviews subject to "editorial control."
  - Or "We should have thought twice before agreeing to appear on *60 Minutes* . . ."

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Whistleblower Statutes

National Defense Authorization Act of 2013 ("NDAA"), 41 U.S.C. § 4712, effective July 2, 2013

Under the NDAA, employees of contractors, subcontractors and grantees are granted whistleblower protections for any "reprisals" that occur because an employee of a government contractor disclosed, among other things, "a substantial and specific danger to public health or safety." 41 U.S.C. § 4712(a).

The NDAA is a whistleblower pilot program with a four year sunset clause. 41 U.S.C. § 4712(i).

The NDAA is restricted to (1) contracts awarded after July 2, 2013; (2) task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; (3) all contracts awarded before such date that are modified to include a contract clause providing for the applicability of such amendments. *See* Pub. L. 112-239, 126 Stat. 1840 (Jan. 2, 2013). At the time of "any major modification to a contract," agencies are ordered to insert the applicable provision into all old contracts. *Id.*

The statute of limitations for filing a complaint under the NDAA is three years after the alleged reprisal. 41 U.S.C. § 4712(b)(4).

Section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), 12 U.S.C. § 78u-6, effective July 21, 2010

Section 922(a) of the Dodd-Frank Act prohibits retaliation against whistleblowers who (1) provide information to the SEC; (2) initiate, testify or assist in any SEC investigation or legal action related to information provided by the whistleblower; or (3) make disclosures that are required or protected under SOX or the Securities Exchange Act of 1934. 12 U.S.C. § 78u-6(h)(1)(A).

In contrast to SOX, section 922(a) of the Dodd-Frank Act allows an employee alleging retaliation to bring an action directly in federal district court, allowing the employee to bypass the OSHA process that must be exhausted by SOX whistleblower claimants. 12 U.S.C. § 78u-6(h)(1)(B)(i).

The statute of limitations for filing a complaint under section 922(a) of the Dodd-Frank Act is six years after the date of the violation or three years "after the date when facts material to the right of action are known or reasonably should have been known by the employee," but no more than 10 years after the date of the violation. 12 U.S.C. § 78u-6(h)(1)(B)(iii).

In addition to section 922(a), the Dodd-Frank Act includes other whistleblower protections. Sections 922(b) and (c) and 929A amend the SOX whistleblower provision, 18 U.S.C. 1514A. Section 1057 provides a new cause of action for whistleblowers who provide information about certain consumer protection violations. Section 1079B expands the scope of protected whistleblowing activity under the False Claims Act.

Sampling of OSHA Whistleblower Statutes

Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A, whistleblower provision included when statute enacted in 2002

SOX prohibits publicly traded companies from discharging, demoting, suspending, threatening, harassing or in any other manner discriminating against an employee because such employee provided information, caused information to be provided, otherwise assisted in an investigation or filed, testified, or participated in a proceeding regarding any conduct that the employee reasonably believes is a violation of SOX, any SEC rule or regulation, or any federal statute relating to fraud of shareholders. 18 U.S.C. § 1514A(a).

A claim under SOX must be filed with the Department of Labor within 180 days after the date on which the violation occurs or 180 days after the date on which the employee became aware of the violation. 18 U.S.C. § 1514A(b)(2)(D).

If the Secretary of Labor fails to issue a final decision within 180 days, an employee may seek *de novo* review in the appropriate federal district court. 18 U.S.C. § 1514A(b)(1)(B).

Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851, whistleblower provision added in 1978

> The ERA prohibits an employer from discharging or otherwise discriminating against any employee who (1) notifies his employer of an alleged violation of the ERA or the Atomic Energy Act; (2) refuses to engage in any practice made unlawful by the ERA or Atomic Energy Act if the employee has identified the alleged illegality to the employer; (3) testified before Congress or at any federal or state proceeding regarding the ERA or the Atomic Energy Act; (4) commenced, caused to be commenced or is about to commence or cause to be commenced a proceeding under the ERA or Atomic Energy Act; (5) testified or is about to testify in any such proceeding; or (6) assisted or participated in such a proceeding or any other action to carry out the purposes of the ERA or the Atomic Energy Act. 42 U.S.C. § 5851(a).
>
> A claim under the ERA must be filed with the Department of Labor within 180 days after a violation occurs. 42 U.S.C. § 5851(b)(1).
>
> Similar to SOX, the ERA also provides for a "kickout" provision to federal district court if the Secretary of Labor fails to issue a final decision. Unlike SOX, the ERA provides for a much longer time period of one year before the claimant can seek *de novo* review in the appropriate federal district court. 42 U.S.C. § 5851(b)(4).

Other OSHA Whistleblower Statutes

Asbestos Hazard Emergency Response Act ("AHERA"), 15 U.S.C. § 2651

Clean Air Act ("CAA"), 42 U.S.C. § 7622

Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9610

Consumer Financial Protection Act of 2010 ("CFPA"), Section 1057 of the Dodd-Frank Act, 12 U.S.C. § 5567

Consumer Product Safety Improvement Act ("CPSIA"), 15 U.S.C. § 2087

Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109

Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1367

International Safe Container Act ("ISCA"), 46 U.S.C. § 80507

Moving Ahead for Progress in the 21st Century Act ("MAP-21"), 49 U.S.C. § 30171

National Transit Systems Security Act ("NTSSA"), 6 U.S.C. § 1142

Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 660(c), Section 11(c)

Pipeline Safety Improvement Act ("PSIA"), 49 U.S.C. § 60129

Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9(i)

Seaman's Protection Act ("SPA"), 46 U.S.C. § 2114, as amended by Section 611 of the Coast Guard Authorization Act of 2010

Section 402 of the FDA Food Safety Modernization Act ("FSMA"), 21 U.S.C. § 399d

Section 1558 of the Affordable Care Act ("ACA"), 29 U.S.C. § 218C

Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971

Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105

Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121

Federal Whistleblower Statutes*

There are many additional federal whistleblower statutes that are not encompassed by the whistleblower statutes referenced above. Federal statutes providing whistleblower protections often fall into one of the following categories:

Corporate/Financial/Manufacturing Whistleblower Protections

Environmental Whistleblowers Protections

Nuclear Whistleblower Protections

Workplace Health and Safety Whistleblower Protections

Criminal Prohibition against Retaliation

Federal Contractor Fraud

Federal Employee Whistleblower Protections

Labor Rights

IRS Whistleblower Informant Awards

*In addition to federal law, state law may provide whistleblower protection for employees.

What Constitutes an Adverse Action?

Retaliation statutes protect whistleblowers from an "adverse action" as a result of their protected activities. Termination, demotion and loss of pay have traditionally served as the mainstay adverse actions. However, the scope of what constitutes an adverse action in federal whistleblower statutes has varied widely over the past two decades, due in large part to the political goals of whichever administration happens to have appointed the Secretary of Labor. Broad interpretations of adverse actions in the 1990s were gradually supplanted by narrower views in the 2000s, which are now being replaced in turn with an increasingly expanding definition that accepts a much wider swatch of qualifying employment actions. Companies in industries regulated by whistleblower retaliation statutes should be aware of this shifting environment and cognizant of the types of adverse actions—both those actionable on their own as discrete adverse actions and those actionable as part of a hostile work environment—when taking even the most mundane actions involving their employees.

I. Discrete Adverse Actions

a. Pre-*Williams* - Materially Adverse Standard

In the 1990s, the Department of Labor deemed a wide array of employment actions to be adverse, finding that "[g]enerally speaking, any employment action by an employer that is unfavorable to the employee's compensation, terms, conditions, or privileges of employment may be considered an adverse action." *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002 & 09-003, ALJ No. 2007-SOX-5 at 19 (ARB Sep. 13, 2011). Federal courts were similarly broad in their interpretation. *See, e.g.*, *Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996) (finding adverse action where complaining employee "was excluded from meetings, seminars and positions that would have made her eligible for salary increases, was denied secretarial support, and was given a more burdensome work schedule"). During the 2000s, the broader Department of Labor jurisprudence was gradually replaced by adverse action standards imported from Title VII cases, including "tangible job consequences," "significantly diminished material responsibilities" and "ultimate employment decisions." *Id.* at 20. These varied, and often conflicting, standards created splits in the federal circuits and in Department of Labor jurisprudence, but generally narrowed the interpretation of "adverse action."

The Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, addressed this adverse action circuit split, specifically speaking to Title VII's anti-retaliation provision. 548 U.S. 53 (2006). The Court recognized the need to separate truly adverse actions from trivial actions like petty slights, minor annoyances, personality conflicts, or snubbing by supervisors and coworkers because Title VII did not "set forth a general civility code for the American workplace." *Id*. (quotation omitted). Thus, the Court held that Title VII "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee . . . . mean[ing] that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* at 57.

For four years after *Burlington Northern*, the "materially adverse" standard was applied more or less ubiquitously and uniformly by the Department of Labor and federal courts to a wide variety of retaliation statutes, such as Title VII, Sarbanes-Oxley and the Energy Reorganization Act. As an illustrative example, under this standard, warning letters were generally found to not be adverse actions. *See, e.g.*, *Melton v. U.S. Dep't of Labor*, 373 Fed. Appx. 572 (6th Cir. 2010) (finding that a warning letter without tangible employment consequences was not a materially

adverse action under the Surface Transportation Assistance Act); *Simpson v. United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008) ("ARB precedents have held that warning letters do not meet the adverse action requirement of the whistleblower statutes because they do not have tangible job consequences."); *LoVecchio v. US Airways*, ALJ No. 2010-AIR-19 (ALJ Dec. 23, 2010) (finding that a warning letter was not an adverse action since it was not known to co-workers and was not accompanied by discipline or a loss of pay).

***b. Williams* & *Menendez* – Department of Labor Broadens Its Interpretation**

In 2010, the Administrative Review Board ("ARB") for the Department of Labor announced that *Burlington Northern*'s "materially adverse" standard from the Title VII context, while persuasive, is not controlling in actions brought under the Aviation Investment and Reform Act for the 21st Century ("AIR 21"). *See Williams v. American Airlines, Inc.* ("*Williams*"), ARB No. 09-018, ALJ No. 2007-AIR-4, at 9-16 (ARB Dec. 29, 2010). *Williams* involved an employer that held a counseling session with an employee to address poor performance and added an entry about the discussion into the employee's permanent counseling record. *Id.* at 4. The facts showed that the counseling record entry, while not itself disciplinary, was often used as the first step in the disciplinary process and expressly referenced future corrective action up to and including termination should the employee's job performance not improve. *Id.* at 5. The ALJ applied *Burlington Northern*'s materially adverse standard to find that, in the totality of the circumstances, the counseling record entry was an adverse action inasmuch as a reasonable employee would be dissuaded from engaging in protected activity. *Id.* at 9.

The ARB affirmed the finding of an adverse action, but on different grounds. The ARB first noted that unlike Title VII, the Department of Labor's broad implementing regulations interpreting AIR 21's prohibition against discrimination expressly included efforts "to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee" where the employee has engaged in protected activity. *See id.* at 9-16; 29 C.F.R. § 1979.102(b). Accordingly, the ARB held that while actions considered materially adverse under Title VII precedent are similarly adverse actions under AIR 21, the broader AIR 21 regulations have no "expressed limitation to those actions that might dissuade the reasonable employee" from filing or supporting a claim and expressly include adverse actions that are not necessarily tangible or ultimate employment actions. *See Williams*, ARB No. 09-018 at 11 n.51 & 15 (specifically highlighting "intimidating" or "threatening"). Applying this broader standard, the ARB found that "a written warning or counseling session is presumptively adverse where (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline." *Id*. at 11. Further, the ARB found that even under the *Burlington Northern* standard the counseling session constituted a materially adverse action because "[e] mployer warnings about performance issues are manifestly more serious employment actions than the trivial actions the Court listed in *Burlington Northern*" and are "usually the first concrete step in most progressive discipline employment policies, regardless of how the employer might characterize them." *Id* at 14.

The following year, the ARB extended *Williams* to claims brought under Sarbanes-Oxley, a statute with language similar to the AIR 21 regulation, which states that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." *Menendez*, ARB No. 09-002. The ARB found that "[b]y explicitly proscribing non-tangible activity, this language bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse action . . . ." *Id.* at 15. It reasoned that prior ARB holdings that an adverse action is that which would deter a reasonable employee from engaging in protected activity is not significantly limited by the phrase "terms and conditions of employment," meaning that the harm is not limited to economic or ultimate employment-related actions such as loss of pay or termination. *Id.* at 18.

c. Current Application of *Williams* & *Menendez*

Neither *Williams* nor *Menendez* have been reviewed by a federal appellate court (*Menendez* is currently pending before the Fifth Circuit). However, the ARB has fully accepted the cases' holdings and has applied them widely to statutes with similar implementing regulations. The cases have only been mentioned by two federal courts, most notably in a decision denying a defendant's summary judgment motion on the adverse action issue, stating that *Williams* and *Menendez* have "materially undermined" the reasoning of prior federal Sarbanes-Oxley decisions that rely on the *Burlington Northern* standard. *See Guitron v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 93883, at *51-53 (N.D. Cal. July 6, 2012); *see also Wiest v. Lynch*, 2014

U.S. Dist. LEXIS 52472, at *39-43 (E.D. Pa. Apr. 16, 2014) (applying *Menendez*, but noting that its standard "certainly leaves much to be desired").

Recent Department of Labor cases addressing warning letters or other similar employment actions have held to *Williams*' reasoning, finding adverse actions where the employer's acts are the first step in disciplinary actions or have an inherent reference to potential discipline. *Compare Occhione v. PSA Airlines, Inc.*, ALJ No. 2011-AIR-12, at 23 (ALJ May 9, 2013) (finding that a complainant's failure of an impartially applied test "cannot constitute adverse actions within the meaning of the act, as there was no inherent 'reference to potential discipline'"), *with Vernance v. Port Authority Trans-Hudson Corp.*, ALJ No. 2010-FRS-18, at 26 (ALJ Sep. 23, 2011) (finding an adverse action where a warning letter explicitly referenced the potential for discipline and was the first step in the company's disciplinary process). The vast majority of warning letter cases decided by the Department of Labor post-*Williams* have found the letters to be adverse actions.

With a little time, and perhaps another Democratic president, *Williams* and *Menendez* could potentially lead to a broader interpretation of adverse actions in general. It is conceivable that the broader standard applied in *Williams* and *Menendez* could be used to argue that workplace reorganizations, staffing changes, or lack of secretarial support are intimidating, disciplining, or in some other way retaliating against the employee.

II. Hostile Work Environment

Employers who skirt the expansive interpretation of an adverse action under *Williams* and *Menendez* must still beware of allegations regarding acts that would not generally qualify as discrete adverse actions, such as isolation, running an understaffed department, or being excluded from meetings. These disparate acts can be united into a hostile work environment claim that serves as a substitute for a discrete adverse action.
In order to establish liability on such a claim, the employee must demonstrate that:

(1) she engaged in protected activity;
(2) she suffered intentional harassment related to that activity;
(3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and
(4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant.

See, e.g., *Jenkins v. EPA*, 2003 DOL Ad. Rev. Bd. LEXIS 131, at *110-11 (ARB Feb. 28, 2003) (collecting cases). This is a relatively high legal standard to meet that is regularly rejected by the Department of Labor and federal courts, even where the behavior complained of is highly outrageous. *See, e.g.*, *Mahoney v. Donovan*, 2011 U.S. Dist. LEXIS 130946 (D.D.C. Nov. 14, 2011) (collecting cases rejecting hostile work environment claims where co-workers touched their private parts in front of complainant, discussed plaintiff's private parts, and referred to plaintiff by racial slurs).

The primary roadblock to successful hostile work environment claims is that they do not allow for general grievances, changes in working conditions, or even antagonistic behavior unless these conditions are severe and pervasive. *See Gorokhovsky v. City of New York*, 2011 U.S. Dist. LEXIS 54941, at *31 (S.D.N.Y. May 18, 2011) (holding that "vague allegations of isolated acts of hostility are insufficient as a matter of law to state a claim for hostile work environment"). For instance, "allegations of a hostile work environment based on 'stonewalling' and 'friction,' are insufficient to raise adverse action if the evidence does not show that such circumstances were pervasive, humiliating or interfered with a complainants' work performance." *Menendez v. Halliburton, Inc.*, 2008 DOLSOX LEXIS 69, at *25 (ALJ Sept. 18, 2008), *aff'd in part, rev'd on other grounds*, 2011 DOL Ad. Rev. Bd. LEXIS 83 (ARB Sept. 13, 2011). Moreover, "[w]here employee communication, although critical of colleagues, remains within the normal tenor for that workplace, Respondent has no obligation, nor even a right, to quell such expression." *Dierkes v. West Linn-Wilsonville Sch. Dist.*, 2003 DOL Ad. Rev. Bd. LEXIS 51, at *100 (ARB June 30, 2003).

Nonetheless, hostile work environment claims routinely survive summary judgment where it is determined that objectionable, but not independently actionable, behavior was pervasive and severe. *See, e.g.*, *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) (holding that regularly imposed verbal abuse can accumulate into a hostile work environment); *see also Gowski v. Peake*, 682 F.3d 1299 (11th Cir. 2012) (upholding jury determination that employer created "a workplace filled with intimidation and ridicule that was sufficiently severe and pervasive to alter [plaintiffs] working conditions," including spreading rumors about them, limiting their privileges, solicited complaints about them, prohibiting

them from doing their work, reassigning them to other work, and giving low proficiency ratings). Moreover, while it does not appear that the Department of Labor's broadening of what constitutes an "adverse action" has impacted the hostile work environment analysis to date, it is possible that the broader interpretation could allow employees to argue for a wider view of hostile work environment as well.

Recent Whistleblower Developments

I. The Expanding Definition of "Employee" in Retaliation Cases

Sarbanes Oxley - Lawson v. FMR LLC, 134 S. Ct. 1158 (2014)

In March 2014, the Supreme Court of the United States issued a decision in *Lawson v. FMR LLC* that greatly expanded the scope of employees that may bring claims for whistleblower retaliation under the Sarbanes-Oxley Act. Section 806 of SOX provides that no publicly traded company, nor any officer, employee, contractor, subcontractor, or agent of such company may retaliate against "an employee." *See* 18 U.S.C. § 1514A (titled "Whistleblower Protection for Employees of Publicly Traded Companies"). The Court's decision held that this section protected not only employees of public companies, but also employees of private contractors or subcontractors that render services to those public companies. The majority, authored by Justice Ginsburg, noted that this interpretation was supported by the understanding that "outside professionals bear significant responsibility for reporting fraud by the public companies with whom they contract" and that to exclude these individuals because they did not work directly for a public company would defeat the statute's purpose.

The dissent, authored by Justice Sotomayor and joined by Justices Kennedy and Alito, argued that this interpretation gave SOX a "stunning reach" that would sweep in millions of people that are not logically within the reach of the statute, leading to such absurdities as a babysitter bringing a federal case against his employer, "a parent who happens to work at the local Walmart (a public company)," if the babysitter is fired after expressing concern that the parent's son participated in an internet purchase fraud. The dissent would have more narrowly interpreted the provision to find that it protected only those individuals who were employees of a public company, while the remainder of the provision merely restricted the public company from engaging representatives (officers, employees, contractors, subcontractors, and agents) to carry out retaliation by proxy.

The full impact of *Lawson* is unclear, but at least one case has pushed toward the expansive consequences warned of by Justice Sotomayor. In *Wiest v. Lynch*, the Eastern District of Pennsylvania argued that "[t]here is no reason to think that the Supreme Court's holding in *Lawson* does not also apply, beyond contractors of public companies, to agents of public companies and those agents' employees." __ F. Supp. 2d __, Civ. No. 10-3288, 2014 LEXIS 52472 (E.D. Pa. Apr. 15, 2014). Accordingly, *Wiest* held that an employee of a non-public subsidiary of a publicly held company was covered by SOX. No matter how far this expansion may ultimately reach, it is clear that private employers that have relationships with public companies regulated by SOX, either by providing them services or serving as a subsidiary, should immediately implement compliance programs to forestall the wave of whistleblower claims they may face.

The Department of Labor's Administrative Review Board ("ARB") – Robinson v. Triconex Corp.

Recently, the ARB has been the central proponent and instigator of the trend toward broadly interpreting whistleblower statutes, especially with regard to who has a cause of action and whom they may sue. For example, *Lawson* explicitly relied on the ARB's interpretation of SOX as affording whistleblower protection to employees of privately held contractors. *See Spinner v. David Landau & Assocs., LLC*, ARB Case Nos. 10-111 & -115, ALJ Case No. 2010-SOX-029, at n.79 (ARB May 31, 2012). The Eastern District of Pennsylvania's decision in *Wiest* also cited *Spinner*, along with a handful of other recent ARB cases that have broadened the application of SOX. Now that federal courts have adopted the ARB's expanding interpretation of "employee" in the context of SOX, companies should be aware of the ARB's other decisions which may permit lawsuits that are not plainly obvious from a whistleblower statute's text.

Most notably, *Robinson v. Triconex Corp.*, presents plaintiffs with another potentially stunning argument to exponentially expand the understanding of who is an employee. ARB Case No. 10-013, ALJ Case No. 2006-ERA-031 (ARB Mar. 28, 2012). While the Supreme Court has held that a statute's undefined use of "employee" incorporates the common-law interpretation of the master-servant relationship, *Nationwide Mutual*

Ins. Co. v. Darden, 503 U.S. 318 (1992), some plaintiffs have argued that *Robinson* supports a nearly unlimited understanding of "employee" that protects any individual in the regulated field from retaliation by any employer in the field regardless of whether there is any traditional employee-employer relationship between the two.

Robinson was a nuclear engineer and President of R&R Consolidated. Triconex supplied products, systems and services for the Nebraska Public Power District ("NPPD") as a subcontractor. Robinson, as an employee of R&R Consolidated, provided services to Triconex at the NPPD nuclear power plant pursuant to a master service agreement that Robinson entered into with TAC Worldwide, a job agency that coordinated independent contractors for Triconex. After more than a year of work, Triconex notified Robinson that his services would no longer be needed and the next month TAC Worldwide terminated its contract with R&R. Robinson filed a civil suit against Triconex in California Superior Court alleging wrongful discharge and a Department of Labor administrative action alleging violation of the whistleblower provisions of the Energy Reorganization Act ("ERA"). The state court granted summary judgment to Triconex, dismissing Robinson's complaint and relying on the traditional common law definition of "employee" to find that he was not an employee of Triconex. An ALJ dismissed the administrative complaint both on collateral estoppel grounds and because Robinson could not establish that he was an employee of Triconex.

On appeal, the ARB stated that prior interpretations of "employee" had been overly narrow and turned to a 1989 decision from then Secretary of Labor Elizabeth Dole, which held that "any on-site worker or any nuclear quality assurance worker is covered" by the ERA irrespective of which entity is accused of retaliation. *Robinson*, ARB Case No. 10-013, at 15 (discussing *Hill & Ottney v. TVA*, Nos. 1987-ERA-023, -024 (Sec'y May 24, 1989)). Indeed, the ARB reiterated *Hill & Ottney*'s finding that the ERA "is not limited in terms to discharges or discrimination against any specific employer's employees, nor to 'his' or 'its' employees." *Id.* This odd interpretation arose in *Hill & Ottney* when complainants were employees of a company, Quality Technology Company ("QTC"), that had been hired by the Tennessee Valley Authority ("TVA") to identify concerns about quality and safety issues at nuclear power plants. After the QTC employees investigated and disclosed safety problems in TVA's nuclear power program, TVA restricted the scope of its contract with QTC and refused to renegotiate, causing QTC to terminate the complainants for lack of work.

Robinson was remanded for further findings, but the parties settled, so no judicial review occurred. However, *Robinson* has been cited exactly once since, by the Supreme Court. *See Lawson*, 134 S. Ct. at 1175 n.20 (noting that the ARB has interpreted the ERA as protecting employees of contractors). This citation by *Lawson* may embolden complainants in the ERA and other whistleblower statutes such as SOX or Dodd Frank to argue that an "employee" does not necessarily have to be your employee. However, an expansive interpretation of *Robinson* may be its own undoing. If *Robinson* stood for such a sweeping proposition that a worker could sue any employer in the field, any different approach to the "employee" issue would be meaningless and *Robinson* would occupy the field. This has not yet occurred, as the common-law understanding of "employee" has continued to be used in the ERA context by at least some ALJs. *See, e.g.*, *Nelson v. Energy Northwest*, 2012-ERA-00002, at 13-21 (ALJ June 24, 2013) (applying, more than a year after *Robinson*, the common law definition of employee applied to the ERA in *Demski v. U.S. Dep't of Labor*, 419 F.3d 488, 491-92 (6th Cir. 2005)).

II. The Rise in Whistleblower Awards

With Dodd-Frank's regulations and whistleblower awards now in full swing, the SEC expressing commitment to encouraging more whistleblower complaints, record-breaking awards, and proposals for new whistleblower awards, whistleblowing bounties are on the rise.

In 2010, Dodd-Frank authorized whistleblowers to receive between 10% and 30% of the monetary sanctions that the SEC are able to collect as a result of the whistleblowing activity. It took a full two years for the first whistleblower award, initially $50,000 and later supplemented to $200,000, to be paid in August 2012. The second award was not issued until June 2013 and amounted to a projected $125,000 split between three whistleblowers. However the awards took a stratospheric leap in October 2013 when the SEC issued its third award for $14 million. This exponential rise could be seen as a sea change, and indeed, SEC Chair May Jo White stated in the press release announcing the massive award that "[w]e hope an award like this encourages more individuals with information to come forward." Particularly interesting was the SEC's acknowledgement that the whistleblower's

assistance allowed an expedited enforcement action in six months rather than the usual several years, which may simultaneously signal an effort to issue awards more quickly and foreshadow that awards from investigations started in 2010 and 2011 may soon start flooding out of the SEC. While the SEC's fourth, and most recent, award in June 2014 pulled back into the six figures, splitting $875,000 between two whistleblowers, the press release continued to heap praise on whistleblowers who "perform a great service to investors and help us combat fraud."

Importantly, the SEC is not alone in the trend of ramping up awards to whistleblowers. In November 2013, a $167.7 million award was divided among whistleblowers in three states for their assistance in qui tam actions under the False Claims Act. *See* Press Release, U.S. Dep't of Justice, Johnson & Johnson To Pay More Than $2.2 Billion To Resolve Criminal And Civil Investigations (Nov. 4, 2013). The IRS has paid out over $175 million dollars over the past two years for those whistleblowers that bring tax evasion to light. *See, e.g.*, IRS, Fiscal Year 2013 Report to the Congress on the Use of Section 7623 (2014). Even those statutes that do not rely on bounties have been the source of significant awards in the past year, with the Department of Labor issuing a number of multi-million dollar compensatory awards for statutes ranging from SOX to the Surface Transportation Assistance Act. *See, e.g.*, Press Release, U.S. Dep't of Labor, US Labor Department's OSHA Orders Clean Diesel Technologies Inc. To Pay Over $1.9 Million To Former CFO Fired For Reporting Conflict of Interest (Sept. 30, 2013).

Adding to this rise in bounties from current statutes is new legislation that seeks to add even more incentives to become a whistleblower. The New York legislature currently has legislation pending before the Senate Finance Committee that would track Dodd-Frank whistleblower bounties, providing awards for those whistleblowers who provide information to the New York Department of Financial Services as to the violation of state finance laws. *See* S4362, 200th Leg. (N.Y. 2013). The Criminal Antitrust Anti-Retaliation Act, a bill that passed the Senate in November 2013 and awaits a vote in the House, prohibits retaliation against whistleblowers that come forward with knowledge of antitrust violations, but does not contain a bounty provision. However, such a provision was heavily debated, as detailed in a July 2011 Government Accountability Office report. *See* U.S. Government Accountability Office, GAO 11-619, Criminal Cartel Enforcement—Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection 16 (July 2011). After interviewing twenty-one key stakeholders (a mix of plaintiffs' attorneys, defense attorneys, professors, and SEC and OSHA officials), the GAO concluded that there was "no consensus" on adding a whistleblower award although nine of the stakeholders indicated that such awards would make the statute more effective. *See id.* at 36-45. Notably, the detractors stated that bounties were particularly problematic in a criminal context where a whistleblower may not be considered a credible witness where they had received a significant monetary reward. *See id.* at 38-40. Accordingly, while Senator Patrick Leahy decided against a bounty provision when introducing the Criminal Antitrust Anti-Retaliation Act, future legislation that imposes civil fines and penalties through the SEC or Department of Labor may find bounties more enticing.

III. Dodd-Frank's First Anti-Retaliation Enforcement

In June 2014 the SEC brought its first ever enforcement action for violation of the Securities and Exchange Act's anti-retaliation provision that was added in 2011 by Dodd-Frank. The charges against Paradigm Capital Management, which were announced alongside news of a $2.2 million settlement of those charges, alleged that Paradigm had removed its head trader from the trading desk and stripped him of his duties in retaliation for his submission of information to the SEC about improperly conflicted trades. The SEC found that improper trades had been made in violation of Section 206 and 207 of the Investment Advisers Act of 1940 and that Paradigm had no legitimate reason for removing its head trader after he revealed those violations to the SEC. Paradigm's settlement involved a disgorgement of $1.7 million in administrative fees paid by clients in connection with the improper transactions, prejudgment interest of $181,771, a civil penalty of $300,000, and the hiring of an independent compliance consultant.

Notably, although a significant portion of the SEC's charges and press release highlight the anti-retaliation aspect of the case, the settlement's terms are focused almost exclusively on curing the conflicted trades and preventing future conflicts at Paradigm. Indeed, none of the monetary or supervisory penalties imposed on Paradigm were linked to the finding of retaliation. While Paradigm's former head trader could receive as much as $650,000 as a bounty award and bring a civil suit to seek reinstatement and double back pay, it is significant

that the SEC chose to allow Paradigm to fashion a settlement which does not address the explicit finding of retaliation. Given the SEC's full-throated support of whistleblowers, this appears at first blush to be a somewhat odd result, especially compared with the wide scope of terms in deferred and non-prosecution agreements in recent years. However, having explicitly found a violation of the anti-retaliation provision, the SEC may simply be leaving it to the former head trader to collect on that finding by bringing a civil claim on his own behalf.

Whistleblowers As Heroes

In 2011, on the fortieth anniversary of the publication of the Pentagon Papers, the New York Times ran an op-ed by the executive director of the National Whistleblowers Center that detailed the origin of the US's very first whistleblower statute. Enacted in 1778, the statute was passed to protect a group of sailors who had been jailed after they informed the Continental Congress that their superior in the Continental Navy was torturing prisoners. As the jailed sailors pleaded to Congress, they had been "arrested for doing what they then believed and still believe was nothing but their duty." The resulting statute instituted a duty to provide the proper authorities with information of misconduct in the armed services and specifically authorized the payment of the jailed sailors' legal fees to fight the criminal libel charges they faced. The op-ed bemoaned that in comparison, modern national security whistleblowers like Bradley Manning were being punished for doing their duty to their country. Instead of being treated as heroes like they would have been in 1778, concluded the op-ed, these honest citizens are now being ignored, silenced, and intimidated.

Here, in a microcosm, is the framing of whistleblowers in the public consciousness. America loves an underdog, the tale of one person standing up for what is right against a faceless powerful entity, and the press is all too happy to portray aspiring whistleblowers in this light. This is why two words you will almost never see together are "alleged" and "whistleblower." Once a person comes forward with a grievance, they are a full-fledged whistleblower with all the spectacle that title affords, irrespective of their own wrongdoing or whether their claim will prove to hold any merit. A look at the more high-profile modern whistleblowers, and the Oscar winners who have portrayed them, highlights the uphill battle faced by any company who finds itself squaring off against an employee who adopts the whistleblower nomenclature:

- Daniel Ellsberg – The Pentagon Papers (James Spader)
- Frank Serpico – Serpico (Al Pacino)
- Mark Felt aka "Deep Throat" – All the President's Men (Hal Holbrook)
- Karen Silkwood – Silkwood (Meryl Streep)
- Jeffrey Wigand - The Insider (Russell Crowe)
- Erin Brockovich – Erin Brockovich (Julia Roberts)

Indeed, being a whistleblower has a unique draw for employees who might otherwise toil in obscurity, offering a chance to be hailed as brave and important, the possibility of becoming a celebrity, and even significant financial rewards:

- Mark Whitacre, an executive at Archer Daniels Midland, served as an informant for the FBI in a price fixing case from 1992 to 1995. In the course of the investigation, it was revealed that Whitacre had embezzled $9 million from ADM in unrelated activities, which resulted in a loss of his immunity and a ten and a half years federal prison sentence. Despite Whitacre's guilty plea, many alleged ADM had exposed Whitacre's wrongdoing in retaliation for his whistleblowing. In fact, Whitacre's handlers at the FBI have spoken out about his conviction, arguing that he is a "national hero" and should have been pardoned in light of the case he helped build.
- In 2002, in what TIME called the Year of the Whistle-Blower, Sherron Watkins and Cynthia Cooper were named as Persons of the Year for their internal complaints at Enron and WorldCom, respectively, regarding improper accounting methods. Watkins and Cooper shared this honor with Coleen Rowley, an FBI staff attorney who brought to light allegations that the FBI had brushed off pleas from her Minneapolis field office that Zacarias Moussaoui, a now convicted 9/11 co-conspirator, was a man who must be investigated. Both Watkins and Cooper have published books and given numerous lectures about their whistleblowing experiences.
- Bradley Birkenfeld received a $104 million

award from the IRS Whistleblower Office for his cooperation with federal authorities in a 2008 fraud investigation against his employer UBS. Birkenfeld collected his award after he was released from his 40-month sentence for abetting tax evasion by personally stuffing one of his customer's undeclared diamonds into a toothpaste tube to move them across borders. Among his non-monetary accolades was the distinction of being named "2009 Tax Person of the Year" for being the "Benedict Arnold of the private banking industry."

- Greg Smith, an executive director at Goldman Sachs, publicly resigned in a March 14, 2012, New York Times op-ed that accused his former colleagues of "callously" ripping their clients off. Two weeks later, Smith had signed a $1.5 million advance on a tell-all book and was profiled on various newsmagazine programs, such as 60 Minutes.
- Edward Snowden was hailed as initiating the most important leak in American history by Daniel Ellsberg, the man who had leaked the Pentagon Papers, in an article he wrote for the newspaper that had broken Snowden's story in June 2013. Although considered by some as a traitor and currently living under temporary asylum in Russia, an equally vocal group has lauded Snowden as a true American hero. Either way, Snowden has become internationally famous/infamous and, as is the tradition, will be portrayed in a movie to be filmed by the producers of the James Bond franchise now that Sony purchased the movie rights to his story in May 2014.

The Whistle-Blowers of 1777
By STEPHEN M. KOHN
The New York Times

FORTY years ago today, The New York Times began publishing the Pentagon Papers, a seminal moment not only for freedom of the press but also for the role of whistle-blowers — like Daniel Ellsberg, who leaked the papers to expose the mishandling of the war in Vietnam — in defending our democracy.

Today, the Obama administration is aggressively pursuing leakers. Bradley E. Manning, an Army private, has been imprisoned since May 2010 on suspicion of having passed classified data to the antisecrecy group WikiLeaks. Thomas A. Drake, a former official at the National Security Agency, pleaded guilty Friday to a misdemeanor of misusing the agency's computer system by providing information to a newspaper reporter.

The tension between protecting true national security secrets and ensuring the public's "right to know" about abuses of authority is not new. Indeed, the nation's founders faced this very issue.

In the winter of 1777, months after the signing of the Declaration of Independence, the American warship Warren was anchored outside of Providence, R.I. On board, 10 revolutionary sailors and marines met in secret — not to plot against the king's armies, but to discuss their concerns about the commander of the Continental Navy, Commodore Esek Hopkins. They knew the risks: Hopkins came from a powerful family; his brother was a former governor of Rhode Island and a signer of the declaration.

Hopkins had participated in the torture of captured British sailors; he "treated prisoners in the most inhuman and barbarous manner," his subordinates wrote in a petition.

One whistle-blower, a Marine captain named John Grannis, was selected to present the petition to the Continental Congress, which voted on March 26, 1777, to suspend Hopkins from his post.

The case did not end there. Hopkins, infuriated, immediately retaliated. He filed a criminal libel suit in Rhode Island against the whistle-blowers. Two of them who happened to be in Rhode Island — Samuel Shaw, a midshipman, and Richard Marven, a third lieutenant — were jailed. In a petition read to Congress on July 23, 1778, they pleaded that they had been "arrested for doing what they then believed and still believe was nothing but their duty."

Later that month, without any recorded dissent, Congress enacted America's first whistle-blower-protection law: "That it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states,

which may come to their knowledge."

Congress did not stop there. It wanted to ensure that the whistle-blowers would have excellent legal counsel to fight against the libel charges, and despite the financial hardships of the new republic, it authorized payment for the legal fees of Marven and Shaw.

Congress did not hide behind government secrecy edicts, even though the nation was at war. Instead, it authorized the full release of all records related to the removal of Hopkins. No "state secret" privilege was invoked. The whistle-blowers did not need to use a Freedom of Information Act to obtain documents to vindicate themselves. There was no attempt to hide the fact that whistle-blowers had accused a Navy commander of mistreating prisoners.

Armed with Congress's support, the whistle-blowers put on a strong defense, and won their case in court. And true to its word, Congress on May 22, 1779, provided $1,418 to cover costs associated with the whistle-blowers' defense. One "Sam. Adams" was directed to ensure that their Rhode Island lawyer, William Channing, was paid.

Nearly two centuries later, the Supreme Court justice William O. Douglas, praising the founders' commitment to freedom of speech, wrote: "The dominant purpose of the First Amendment was to prohibit the widespread practice of government suppression of embarrassing information."

A 1989 law was supposed to protect federal employees who expose fraud and misconduct from retaliation. But over the years, these protections have been completely undermined. One loophole gives the government the absolute right to strip employees of their security clearances and fire them, without judicial review. Another bars employees of the National Security Agency and the Central Intelligence Agency from any coverage under the law. And Congress has barred national security whistle-blowers who are fired for exposing wrongdoing from obtaining protection in federal court.

It is no surprise that honest citizens who witness waste, fraud and abuse in national security programs but lack legal protections are silenced or forced to turn to unauthorized methods to expose malfeasance, incompetence or negligence.

Instead of ignoring and intimidating whistle-blowers, Congress and the executive branch would do well to follow the example of the Continental Congress, by supporting and shielding them.

The UBS whistleblower - Bradley's winnings

The big money to be made in finance now is from turning in your own firm
The Economist

BRADLEY BIRKENFELD was conspicuously absent from a press conference on September 11th to announce his award of $104m from the Internal Revenue Service (IRS) for exposing schemes used by UBS, his former employer, to help Americans avoid taxes. That's because Mr Birkenfeld's road to riches has been anything but smooth. He is under house arrest until November, having been released from prison only recently for his role in helping a property developer dodge the taxman.

Mr Birkenfeld came forward in 2007 with information on how UBS helped clients hide taxable income. Some revelations were routine, others anything but: Mr Birkenfeld himself stuffed a customer's undeclared diamonds into a toothpaste tube to move them across borders. Related charges were settled by UBS in 2009; the bank paid a fine of $780m, from which Mr Birkenfeld will get his award.

His actions have had big consequences. Switzerland's commitment to bank secrecy is showing cracks. Along with money, UBS provided the American tax authorities with the names of 4,500 customers. Other Swiss banks are now under investigation, and not just in America.

Americans living abroad have also been affected by the fall-out from the case. In 2010 Congress enacted the Foreign Account Tax Compliance Act, requiring foreign financial institutions to identify American account-holders and disclose their balances and withdrawals, or face a 30% withholding tax on income from any financial assets they hold in America. An IRS amnesty programme allowing the repatriation of undeclared offshore accounts has resulted in 33,000 filings and more than $5 billion in back-taxes and penalties. Foreign banks have become increasingly pernickety about opening accounts for Americans abroad.

Mr Birkenfeld's huge payday will also have a galvanising effect on would-be whistleblowers. His lawyer, Dean Zerbe—who wrote the relevant legislation on

informants in 2006 while serving as tax counsel to the Senate Finance Committee, and with other lawyers will share in an estimated 10-33% of the reward—says he has two dozen other cases pending, two of them bigger than Mr Birkenfeld's. His phone has rung incessantly since the settlement.

Other agencies are now wooing informants, too. The Securities and Exchange Commission began its own whistleblower programme in 2011. In the first year it received 2,766 tips.

Encouraging whistleblowing is a good thing. But the size of Mr Birkenfeld's award may have perverse results. Employees now have a big incentive to report crimes to the government rather than to their employers. That may not be the best way to stop wrongdoing.

Why I Am Leaving Goldman Sachs
By GREG SMITH
The New York Times

TODAY is my last day at Goldman Sachs. After almost 12 years at the firm — first as a summer intern while at Stanford, then in New York for 10 years, and now in London — I believe I have worked here long enough to understand the trajectory of its culture, its people and its identity. And I can honestly say that the environment now is as toxic and destructive as I have ever seen it.

To put the problem in the simplest terms, the interests of the client continue to be sidelined in the way the firm operates and thinks about making money. Goldman Sachs is one of the world's largest and most important investment banks and it is too integral to global finance to continue to act this way. The firm has veered so far from the place I joined right out of college that I can no longer in good conscience say that I identify with what it stands for.

It might sound surprising to a skeptical public, but culture was always a vital part of Goldman Sachs's success. It revolved around teamwork, integrity, a spirit of humility, and always doing right by our clients. The culture was the secret sauce that made this place great and allowed us to earn our clients' trust for 143 years. It wasn't just about making money; this alone will not sustain a firm for so long. It had something to do with pride and belief in the organization. I am sad to say that I look around today and see virtually no trace of the culture that made me love working for this firm for many years. I no longer have the pride, or the belief.

But this was not always the case. For more than a decade I recruited and mentored candidates through our grueling interview process. I was selected as one of 10 people (out of a firm of more than 30,000) to appear on our recruiting video, which is played on every college campus we visit around the world. In 2006 I managed the summer intern program in sales and trading in New York for the 80 college students who made the cut, out of the thousands who applied.

I knew it was time to leave when I realized I could no longer look students in the eye and tell them what a great place this was to work.

When the history books are written about Goldman Sachs, they may reflect that the current chief executive officer, Lloyd C. Blankfein, and the president, Gary D. Cohn, lost hold of the firm's culture on their watch. I truly believe that this decline in the firm's moral fiber represents the single most serious threat to its long-run survival.

Over the course of my career I have had the privilege of advising two of the largest hedge funds on the planet, five of the largest asset managers in the United States, and three of the most prominent sovereign wealth funds in the Middle East and Asia. My clients have a total asset base of more than a trillion dollars. I have always taken a lot of pride in advising my clients to do what I believe is right for them, even if it means less money for the firm. This view is becoming increasingly unpopular at Goldman Sachs. Another sign that it was time to leave.

How did we get here? The firm changed the way it thought about leadership. Leadership used to be about ideas, setting an example and doing the right thing. Today, if you make enough money for the firm (and are not currently an ax murderer) you will be promoted into a position of influence.

What are three quick ways to become a leader? a) Execute on the firm's "axes," which is Goldman-speak for persuading your clients to invest in the stocks or other products that we are trying to get rid of because they are not seen as having a lot of potential profit. b) "Hunt Elephants." In English: get your clients — some of whom are sophisticated, and some of whom aren't — to trade whatever will bring the biggest profit to Goldman. Call me old-fashioned, but I don't like selling my clients a product that is wrong for them. c) Find

yourself sitting in a seat where your job is to trade any illiquid, opaque product with a three-letter acronym.

Today, many of these leaders display a Goldman Sachs culture quotient of exactly zero percent. I attend derivatives sales meetings where not one single minute is spent asking questions about how we can help clients. It's purely about how we can make the most possible money off of them. If you were an alien from Mars and sat in on one of these meetings, you would believe that a client's success or progress was not part of the thought process at all.

It makes me ill how callously people talk about ripping their clients off. Over the last 12 months I have seen five different managing directors refer to their own clients as "muppets," sometimes over internal e-mail. Even after the S.E.C., Fabulous Fab, Abacus, God's work, Carl Levin, Vampire Squids? No humility? I mean, come on. Integrity? It is eroding. I don't know of any illegal behavior, but will people push the envelope and pitch lucrative and complicated products to clients even if they are not the simplest investments or the ones most directly aligned with the client's goals? Absolutely. Every day, in fact.

It astounds me how little senior management gets a basic truth: If clients don't trust you they will eventually stop doing business with you. It doesn't matter how smart you are.

These days, the most common question I get from junior analysts about derivatives is, "How much money did we make off the client?" It bothers me every time I hear it, because it is a clear reflection of what they are observing from their leaders about the way they should behave. Now project 10 years into the future: You don't have to be a rocket scientist to figure out that the junior analyst sitting quietly in the corner of the room hearing about "muppets," "ripping eyeballs out" and "getting paid" doesn't exactly turn into a model citizen.

When I was a first-year analyst I didn't know where the bathroom was, or how to tie my shoelaces. I was taught to be concerned with learning the ropes, finding out what a derivative was, understanding finance, getting to know our clients and what motivated them, learning how they defined success and what we could do to help them get there.

My proudest moments in life — getting a full scholarship to go from South Africa to Stanford University, being selected as a Rhodes Scholar national finalist, winning a bronze medal for table tennis at the Maccabiah Games in Israel, known as the Jewish Olympics — have all come through hard work, with no shortcuts. Goldman Sachs today has become too much about shortcuts and not enough about achievement. It just doesn't feel right to me anymore.

I hope this can be a wake-up call to the board of directors. Make the client the focal point of your business again. Without clients you will not make money. In fact, you will not exist. Weed out the morally bankrupt people, no matter how much money they make for the firm. And get the culture right again, so people want to work here for the right reasons. People who care only about making money will not sustain this firm — or the trust of its clients — for very much longer.

Edward Snowden: saving us from the United Stasi of America -- Snowden's whistleblowing gives us a chance to roll back what is tantamount to an 'executive coup' against the US constitution
by Daniel Ellsberg
theguardian.com

In my estimation, there has not been in American history a more important leak than Edward Snowden's release of NSA material – and that definitely includes the Pentagon Papers 40 years ago. Snowden's whistleblowing gives us the possibility to roll back a key part of what has amounted to an "executive coup" against the US constitution.

Since 9/11, there has been, at first secretly but increasingly openly, a revocation of the bill of rights for which this country fought over 200 years ago. In particular, the fourth and fifth amendments of the US constitution, which safeguard citizens from unwarranted intrusion by the government into their private lives, have been virtually suspended.

The government claims it has a court warrant under Fisa – but that unconstitutionally sweeping warrant is from a secret court, shielded from effective oversight, almost totally deferential to executive requests. As Russell Tice, a former National Security Agency analyst, put it: "It is a kangaroo court with a rubber stamp."

For the president then to say that there is judicial oversight is nonsense – as is the alleged oversight function of the intelligence committees in Congress. Not for the first time – as with issues of torture, kidnapping,

detention, assassination by drones and death squads –they have shown themselves to be thoroughly co-opted by the agencies they supposedly monitor. They are also black holes for information that the public needs to know.

The fact that congressional leaders were "briefed" on this and went along with it, without any open debate, hearings, staff analysis, or any real chance for effective dissent, only shows how broken the system of checks and balances is in this country.

Obviously, the United States is not now a police state. But given the extent of this invasion of people's privacy, we do have the full electronic and legislative infrastructure of such a state. If, for instance, there was now a war that led to a large-scale anti-war movement – like the one we had against the war in Vietnam – or, more likely, if we suffered one more attack on the scale of 9/11, I fear for our democracy. These powers are extremely dangerous.

There are legitimate reasons for secrecy, and specifically for secrecy about communications intelligence. That's why Bradley Mannning and I – both of whom had access to such intelligence with clearances higher than top-secret – chose not to disclose any information with that classification. And it is why Edward Snowden has committed himself to withhold publication of most of what he might have revealed.

But what is not legitimate is to use a secrecy system to hide programs that are blatantly unconstitutional in their breadth and potential abuse. Neither the president nor Congress as a whole may by themselves revoke the fourth amendment – and that's why what Snowden has revealed so far was secret from the American people.

In 1975, Senator Frank Church spoke of the National Security Agency in these terms:

> "I know the capacity that is there to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss. That is the abyss from which there is no return."

The dangerous prospect of which he warned was that America's intelligence gathering capability – which is today beyond any comparison with what existed in his pre-digital era – "at any time could be turned around on the American people and no American would have any privacy left."

That has now happened. That is what Snowden has exposed, with official, secret documents. The NSA, FBI and CIA have, with the new digital technology, surveillance powers over our own citizens that the Stasi – the secret police in the former "democratic republic" of East Germany – could scarcely have dreamed of. Snowden reveals that the so-called intelligence community has become the United Stasi of America.

So we have fallen into Senator Church's abyss. The questions now are whether he was right or wrong that there is no return from it, and whether that means that effective democracy will become impossible. A week ago, I would have found it hard to argue with pessimistic answers to those conclusions.

But with Edward Snowden having put his life on the line to get this information out, quite possibly inspiring others with similar knowledge, conscience and patriotism to show comparable civil courage – in the public, in Congress, in the executive branch itself – I see the unexpected possibility of a way up and out of the abyss.

Pressure by an informed public on Congress to form a select committee to investigate the revelations by Snowden and, I hope, others to come might lead us to bring NSA and the rest of the intelligence community under real supervision and restraint and restore the protections of the bill of rights.

Snowden did what he did because he recognised the NSA's surveillance programs for what they are: dangerous, unconstitutional activity. This wholesale invasion of Americans' and foreign citizens' privacy does not contribute to our security; it puts in danger the very liberties we're trying to protect.

"Frequent Filer" Sayed Hasan: A Case Study

The long saga of the cases brought by "frequent filer" Sayed Hasan provides a good illustration of how even the least meritorious cases can be prolonged. Mr. Hasan has filed at least 28 separate retaliation cases with OSHA between 1986 and 2012 (almost all *pro se*). He has not ultimately prevailed in any of his claims; however, each respondent has had to deal with multiple claims, many appeals, and (in many cases) lengthy

evidentiary hearings before obtaining final relief.

The factual background recited in the reported decisions in Hasan's cases demonstrates a similar pattern. In his earlier cases, Hasan held temporary assignments; he made safety complaints to applicable regulatory agencies just as the assignments were winding down and filed retaliation claims when his assignments ended. Hasan thereafter submitted applications for re-employment to those employers and repeatedly filed failure to hire claims when he was not re-hired. *See, e.g.*, *Hasan v. Exelon Generation Co., LLC*, 31 Fed. Appx. 328, 329-30 (7th Cir. 2002). Hasan later moved on to rapid-fire applications with other employers in the industry that had no prior relationship with him or his alleged "whistleblowing"; his applications included cover letters referring to his prior "whistleblowing" (including his mounting collection of whistleblower claims) and requesting that the employers "[p]lease do not discriminate and retaliate against me." *See, e.g.*, *Hasan v. Dep't. of Labor*, 545 F.3d 248, 249 (3rd Cir. 2008).

No reported decision reflects any ultimate finding in support of Hasan's claims; indeed, most find them to be utterly without merit. For example, in *Hasan v. Nuclear Power Servs., Inc.* 86-ERA-24 (Sec'y June 26, 1991), the Secretary (predecessor to the Administrative Review Board ("ARB")) upheld summary dismissal based on the ALJ's determination that the failure to hire was "not based 'even in part'" on claimant's prior safety complaints, but was instead due to claimant's "abrasive, overbearing and superior manner harmful to good working relationships with other engineers and supervisors."

After many similar results in multiple tribunals, Hasan was finally sanctioned in *Hasan v. Dept. of Labor*, 301 Fed. Appx. 566 (7th Cir. 2008) (Easterbrook, J.). His claims were dismissed after the court determined that the decision by respondent Sargent and Lundy never to hire Hasan was not retaliatory, because—in addition to his lack of qualifications—it was based upon Hasan's "temperament," his "obstinate, inflexible" nature that made him "difficult to work with," and his having "consistently maligned the firm and its work," rendering him unable to adequately represent the firm to its clients. 301 Fed. Appx. at 567. However, it must be noted that this result occurred only after the case had been pending for five years, through eight days of evidentiary hearings and multiple appeals. The Seventh Circuit sanctioned Hasan for his "repeated frivolous litigation" which "drains judicial resources," noting the "flood of complaints" Hasan had filed against "various engineering firms and other companies that have rejected his employment applications," and adjudication of his claims as meritless by four separate Circuit Courts of Appeal. *Id.* at 566, 568. However, it appears to be the only tribunal to have done so.

More recently, however, the ARB reversed a summary decision on the causation element in another failure to hire case brought by Hasan, stating that "[t]he issue of causation is generally a difficult issue to resolve by summary disposition because it often involves factual questions of motivation and intent." *Hasan v. Enercon Servs., Inc.* ARB No. 10-061, ALJ Nos. 2004-ERA-022, 2004-ERA-27 at 2 (ARB July 28, 2011). The ARB held that a hearing was required to determine the legitimacy of the reasons proffered by the employer for not hiring Hasan. Summary decision had been granted 3 separate times in this case—twice by the ALJ and previously by the ARB (which had been reversed by the Third Circuit on the ground that the "rejection" element of a failure to hire claim is met any time a claimant is not hired). *Hasan v. Dep't of Labor*, 545 F.3d 248 (3rd Cir. 2008). On remand, and after an extensive evidentiary hearing, the ALJ again dismissed Hasan's claims and the ARB affirmed. *Hasan v. Enercon Servs., Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-022, 27 (ALJ July 30, 2012), *aff'd* ARB No. 12-096 (Mar. 14, 2013). Based upon his past behavior, it seems likely that this will not be the last claim from Hasan.

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Mr. Baumgardner is one of the founding partners of Corr Cronin. Mr. Baumgardner was formerly the Chair of Bogle & Gates's Product Liability/Personal Injury Practice Group, and was a member of that firm's Executive Committee. He has been named a "Super Lawyer" by Washington Law & Politics magazine numerous times, has been designated one of Seattle's "Top Lawyers" by Seattle Magazine and has been recognized as a Seattle "Litigation Star" by Benchmark, America's Leading Litigation Firms and Attorneys. Mr. Baumgardner is also included in the 2009 edition of The Best Lawyers in America and in the 2nd edition Guide to the World's Leading Product Liability Lawyers.

Mr. Baumgardner has tried cases in the state and federal courts of Washington and Alaska, and has appeared before an international sports law tribunal in Lausanne, Switzerland. He has also handled labor arbitrations, administrative trials, and civil case arbitrations. Mr. Baumgardner has represented dozens of Fortune 500 companies in complex litigation. Among the many individuals he has represented are a Nobel Prize winner and an Olympic medalist, both in matters concerning their professional standing. His broad-ranging litigation practice focuses on product liability, labor and employment, commercial, toxic tort and personal injury cases, as well as international sports law and the defense of alleged whistleblower litigation.

Representative Cases

- n re: Asbestos Litigation – Partner in charge for diverse group of defendants in Washington State asbestos cases. Obtained numerous summary judgments and negotiated favorable settlements.
- In re: Le Samurai – Defense of an Olympic medalist athlete against disciplinary charges; hearing before Federation Equestre Internationale tribunal in Lausanne, Switzerland.
- Palmer G. Lewis, et al. v. ARCO Chemical Company – Defense of implied indemnity claim regarding flammability characteristics of polystyrene beads used in rigid foam insulation, arising from school fire in Barrow, Alaska. Claims in excess of $3 million; plaintiff agreed to dismiss claim and take nothing after fact and expert deposition discovery by ARCO Chemical team headed by Mr. Baumgardner.
- KAL Litigation – Defense of major airline operator against multifarious claims brought in connection with DC-10 crash at Anchorage International Airport. Claims in excess of $20 million; multi-week jury trial (on cargo claims) resulting in defense verdict.
- Airline Industry "Whistleblower" cases – Mr. Baumgardner has successfully defended multiple claims brought by ex-airline employees under federal and state whistleblower provisions. In Smith v. Alaska, a case brought in King County (Washington) Superior Court, Mr. Baumgardner obtained summary judgment in favor of the airline in March, 2004.

Education / Background

- J.D., Columbia University School of Law, 1984; Harlan Fiske Stone Scholar
- B.A., with high honors, English, Michigan State University, 1981; Elected to Phi Beta Kappa
- Joined Bogle & Gates P.L.L.C. in 1984, became a Member in 1992
- Founding partner of Corr Cronin Michelson Baumgardner & Preece in 1999
- Admitted to the Washington State Bar in 1984. Admitted to practice before the U.S. District Court for the Western District of Washington and the Ninth Circuit Court of Appeals.
- Current president of the United States Eventing Association, the national organization of the Olympic equestrian sport of Three-Day Eventing