

Having served as the chief human resources officer for a number of large complex educational institutions, I am strongly in favor of the concept of whistleblower statutes or policies. Over the years I have dealt with numerous instances of faculty and staff misconduct ranging from abuse of authority to fraud and/or embezzlement. In many of these situations the behavior by the faculty or staff member(s) involved was so outrageous and so egregious that I was certain his/her colleagues, coworkers, subordinates and in some cases, supervisors, had to know that something was wrong. In these instances when questioned, these other individuals have sometimes indicated that they were aware of some irregularities but were afraid to come forward. If a strong whistleblower policy had been in place it is possible these concerns would have been alleviated and wrongdoing might have been identified and dealt with far more promptly avoiding further losses or additional institutional liability.

The advantages of an effective whistleblower policy are numerous.

- Such a policy can send a clear message that management has a commitment to avoiding malpractice and unethical as well as illegal behavior.
- The policy can facilitate early identification of problems thus avoiding crisis management as a necessary response.
- Providing visible commitment to accountability can enhance the institution's public image.
- Such a policy can help ensure compliance with the law.
- The policy may minimize public disclosure and afford the institution the opportunity to resolve problems internally.
- Such a policy is a low cost method of encouraging positive behavior by all employees.

My colleague in this presentation will address more directly the legal aspects of whistleblower policies while I will focus on the human resource issues and on factors which I believe institutional administrators must address in order to gain the advantages of an effective whistleblower policy.

I would like to divide my discussion of this issue into two parts. The first will deal with the development and implementation of an effective policy for the reporting of wrongdoing (whistleblowing) and the second will deal with handling claims of whistleblower retaliation.

I. Reporting/Disclosure of Wrongdoing

A variety of issues which raise management concern have developed in institutions which have in place policies which encourage the reporting/disclosure of wrongdoing and which afford protection to those who make such reports. Among the problems are:

- Individuals who wish to report wrongdoing do not know where to seek assistance with reporting or where to file reports.
- Reports are frequently made to individuals who fail to realize the significance of the report or for other reasons do not investigate the alleged wrongdoing.
- Reporters have an expectation of confidentiality which cannot be maintained if the allegations are investigated.
- Allegations are ambiguous or fail to provide sufficient information to facilitate investigation.
- The allegation is not appropriately investigated.
- There is no communication or closure with the individual filing the report.
- The reporting individual, because of lack of confidence in the procedure, decides to “go public” prior to resolution of the internal investigation.
- There is an attempt to minimize or cover up the wrongdoing by those involved in the investigation.

Most of these problems can be avoided with a well-designed and well-administered reporting/disclosure policy. The policy, at a minimum should include:

- definition of the scope of the policy;
- clear identification of where assistance with report filing may be obtained, and with whom reports may be filed;
- a confidentiality clause which describes the limits of confidentiality protection;
- a requirement that a detailed description of the alleged wrongdoing and the fact(s) which support the allegations be included in the report/disclosure;
- a statement of the consequences of filing a false report/disclosure;
- a general description of the complaint handling procedures including timelines for each phase of the process;
- a statement outlining communication and closure which the reporting individual may expect;
- a non-retaliation clause.

Definition of Scope of Policy

The scope of the policies statement must define three things:

1) Who may report/disclose wrongdoing?

Faculty, staff, students, members of the public, and those doing business with the institution are all individuals who may wish to disclose wrongdoing. However, generally those who may report wrongdoing is limited to faculty, staff and students.

2) Against whom may allegations be raised?

Due to the employment relationship with the institution it is reasonable that faculty and staff may be the focus of reports/disclosures. One other group which may be the subject of disclosure are contractors and sub-contractors doing work for the institutions as the institution may be liable for their actions and can exercise some control by virtue of the existing

contract. Because of specific issues with student's rights, a separate procedure generally exists for allegations of student wrongdoing.

3) What types of wrongdoing may be reported?

The policy may limit reportable acts to those specifically listed in a particular statutory authority or may broadly define the types of wrongdoing the institution is seeking to have identified. It is important to note that in defining scope the institution should consider other policies under which such wrongdoing may be reported or complained about. If for instance, wrongdoing by a staff member may be the subject of an existing grievance procedure or a union complaint procedure, the institution may wish to either exclude such wrongdoing from the whistleblower policy coverage or stipulate that the individual wishing to report/disclose such activity must choose which of the applicable policies he/she will use to raise the issue.

Careful design of the three elements defined in the scope section of this policy can avoid many pitfalls.

Generally speaking, at least in California, whistleblowing policies have been utilized far more frequently than institution administrators anticipated. When the policy at my system was first developed, careful consideration was not given to other existing procedures through which issues could be raised and thus the use of the whistleblower provision has become an additional avenue for those who have had complaints denied elsewhere. We are currently in the process of redefining scope to eliminate this redundancy of process.

Clear Identification of Where to Get Assistance and Where to Report/Disclose of Wrongdoing

It is generally helpful if there are individual(s) within the institution who will not be ultimately involved in handling the complaint but is knowledgeable about the

policy and its procedures. These persons can assist an individual who is aware or concerned about possible wrongdoing but is uncertain if this procedure is the appropriate venue in which to raise his/her concerns. An ombudsman is the ideal person to designate for this role if your institution has such a function. If an ombudsman is not available there may be a person within the employee assistance program, in human resources, business affairs or student affairs who could be designated to provide such information. It should be noted however, that employees or students may have concerns if the person providing advice is closely associated with any office which may have to handle any aspect of the investigation or subsequent disciplinary action.

The complaint of wrongdoing should normally be raised with an appropriate level of management. If a specific individual is not identified to receive reports/disclosures, employees are likely to approach their immediate supervisor or his or her superior. A student is likely to take a report/disclosure to a trusted faculty member or someone in the student affairs area.

Depending on the sensitivity and seriousness of the issue raised, the immediate supervisor, the faculty member or the student affairs staff member, who is approached may not know how to handle the issues raised. For this reason I strongly recommend the identification of one or more “designated individuals” (located in various divisions of the institution) who have received the appropriate training and who will receive such reports/disclosures. A list of these designated individuals should be distributed along with copies of the whistleblowing policy and procedures. First line supervisors and others within the academic community should also be provided with the names of these designated individuals so that they may make referrals if they are approached by a student, faculty or staff member wishing to make a report/disclosure.

Confidentiality Clause

Although it is desirable to attempt to conceal the identity of a whistleblower upon request, the procedures must clearly state that it may not be possible to provide such protection in all situations. Disclosing various facts, which may unfold in the course of the investigation, may make the identity of the reporting individual obvious. If the report/disclosure results in either legal action or discipline, the individual who initiated the report may have to testify as a witness. Finally, in certain cases there may be a legal right on the part of the accused to question the person making allegations.

For all of the above reasons, confidentiality should be guaranteed only so far as is legally and procedurally feasible.

Requirement of Detailed Description of Wrongdoing

In order to facilitate a proper investigation, it is critical that the policy require a detailed description of the alleged wrongdoing along with specific information (facts and/or documents), which supports the allegation.

Such a requirement can go a long way to prevent false claims from being filed.

In addition, the more information that is provided in the report, the easier it is for those handling the issue to identify individuals who need to be questioned in an investigation and the records or documents which must be examined.

Statement of Consequences of Filing a False Claim

There is some controversy about whether the policy should specifically address consequences of false claims. Because honestly held concerns may prove unfounded and because a threat of consequences can have a chilling effect, there

is a fear that such a statement may reduce the effectiveness of the policy. However, the consequences for the victim of a false claim can be serious. Additionally, the institution may waste valuable time and resources investigating such complaints. Therefore, many employers do include such a clause but limit consequences to instances where it is apparent that the facts provided as the basis of the report/disclosure prove to be falsifications or that malicious intent has otherwise been proven.

General description of the procedures to be followed

It is desirable to identify as specifically as possible both what steps will be taken in conducting an investigation and when they will occur. However, the facts of the specific case are very likely to dictate both what must be done and when it can be accomplished.

At the very least, the policy can set out how and when the investigator will be identified. It can also set forth a “normal” time limit for conducting the investigation. It should note however, that the availability of parties or witnesses as well as various scheduling factors such as semester breaks may cause the normal timeline to be adjusted. The procedure should identify to whom such conclusions regarding the investigation will be provided and how soon after completion of the investigation such information will be delivered. Finally it should identify how soon appropriate action should be taken after receipt of the determination of outcome, and should outline any appeal procedure.

In setting time limits with these procedures it is important that the administration be realistic about how quickly things can occur within the particular institution. If timelines are not realistic, the institutional administration can easily find itself constantly violating its own procedures. Furthermore, failure to meet time deadlines can lead to frustration on the part of both the individual who filed the

report/disclosure and the individual(s) accused. Such frustration is often the basis of loss of confidence in the process rendering the procedure totally ineffective.

Communication Plan

Closely linked to procedures is the need to outline points at which information regarding progress will be provided to the person who made the disclosure. In many cases this occurs only at the end of the investigative process.

I would recommend that at a minimum the communication plan should include:

- Sharing with the reporting/disclosing individual a copy of the complaint provided to the investigating party
- Providing a statement outlining the steps that are anticipated to be taken as follow up
 - have preliminary inquiries been initiated?
 - will a full investigation occur and if not, why not?
- Providing an estimate of a time to final response
- Providing a referral to support mechanisms such as an EAP which are available during the course of the investigation
- Providing a statement of final resolution

Providing a statement of final resolution can raise some issues of its own.

Certainly the complainant has a right to know if his/her allegations have been substantiated and if appropriate remedial action has been taken. The complainant will often press for details regarding the disciplinary action which has taken place.

In some whistleblowing cases there are criminal aspects and the outcome is entirely public. In others, no criminality is involved and there may be no visible negative outcome. In the later circumstances, the privacy rights of the accused

regarding personnel matters must be carefully balanced in determining how much information is given the complainant regarding disciplinary actions.

Non-Retaliation Clause

The entire intent of most whistleblower statutes or policies is to encourage reporting/disclosure of wrongdoing by assuring individuals that they will suffer no adverse consequences. Thus an unequivocal statement that the institution will not tolerate any harassment or retaliation and will take appropriate action to protect the reporting/disclosing individual is imperative. The policy should set forth where and to whom claims of retaliation should be raised.

Once the policy has been developed with these elements it is critical that appropriate training be offered.

In order to ensure that supervisors are familiar with the whistleblower process and with the importance of referring such complaints to the designated individuals for handling I would suggest that basic supervisory training incorporate information on handling of referrals of whistleblower complaints.

I would also suggest that extensive training be offered to individuals designated to receive reports/disclosure to investigators and to the person or persons designated to assist those who want advice on the whistleblowing process.

Each of the above-referenced training programs needs to be offered at least once every 18 months to allow for turnover and to provide opportunity to be retrained to those seeking to update or refresh their knowledge.

Another aspect of a successful reporting/disclosure program is a good monitoring system that will track each complaint. An online tracking system can be developed that will utilize timelines to develop checkpoints to monitor progress of complaints as they move

from one phase to another. Such a monitoring system helps ensure that complex cases do not get lost in the system.

An effective monitoring system will also include a review process designed to look for evidence of attempts to cover up or minimize the severity of the wrongdoing. Such a review process requires examination of documents and notes submitted by the investigation and through follow-up of any discrepancies or irregularities.

The majority of the concerns with the reporting/disclosure process which were outlined earlier can be eliminated or minimized with a well-developed policy and follow-up system.

II. Handling Retaliation Claims

I find dealing with claims of retaliation by whistleblowers to be the most challenging part of dealing with a whistleblower's policy. I indicated in the first part of this paper that many administrators underestimate the degree to which the whistleblowing policy will be used to report wrongdoing. What is even more surprising is the degree to which individuals claim that they have been subject to retaliation because they are whistleblowers.

In many instances, the individuals claiming harm due to retaliation have never filed a formal whistleblower report. What they have done is tell a person in an apparent position of authority that they believed someone within the institution is guilty of wrongdoing. They have subsequently experienced some adverse action which they then claimed is a direct result of their "whistleblowing" activity.

The problem is that many whistleblowing statutes do not specify a format for reporting wrongdoing and that many employers do not specify that whistleblowers must file a written report or must file a report with a specific individual.

Obviously if an institution's policy requires a written report and or specifies with whom the complaint must be filed, the institution can more easily ascertain if the individual claiming retaliation is a whistleblower. If the policy is silent on either of these points the institution has a greater challenge when faced with a claim of retaliation. Because whistleblower protection generally has statutory origin, the claim cannot be dismissed out of hand. Furthermore, to determine whether there has been retaliation, the institution is now faced with a very complex investigative process.

For many individuals, the whistleblower retaliation protection provides an opportunity to challenge adverse treatment which either cannot be challenged through another procedure or which has been unsuccessfully challenged elsewhere.

Furthermore, in the absence of a required written complaint, the person who disciplines, demotes or causes other adverse action becomes a potential target for an allegation that the action was retaliation for raising some earlier alleged misconduct.

The challenge for administration is that such retaliation claims can be time consuming and costly to process. This is especially true where there is no written record of the original whistleblowing complaint. We frequently have found ourselves spending significant time and money handling such claims of retaliation.

In such a case, the institution only has to respond to the adverse action that was taken, but also may for the first time have to deal with an allegation that one of their employees engaged in some inappropriate activity which was allegedly reported.

Even if we are able to limit retaliation claims to instances where complaints are written and properly submitted, the process for investigating retaliation claims will continue to be lengthy and costly.

It is important in order to minimize both time and cost that the institution have a specified procedure for investigating retaliation claims. As with the reporting/disclosure process itself, the retaliation investigation process should set out a timetable for prompt review and closure. The points made about timelines and communication relating to the reporting/disclosure investigation is also applicable to the retaliation investigation. It is also important to maintain careful documentation throughout the retaliation investigation.

Over time we have developed four questions which we ask investigators of retaliation claims to answer. These are:

1. Was there a qualifying disclosure of wrongdoing?
2. Did the “reporter” suffer harm from some adverse action which occurred after the disclosure?
3. Was the adverse action a direct result of the disclosure?
4. If the answers to 1-3 are yes, what is the appropriate remedy?

Our investigation should begin by determining whether there was a qualifying disclosure of wrongdoing. In making this determination we must first focus on the scope of the whistleblower policy and determine the following:

1. Is the person claiming retaliation an individual who may report wrongdoing under the policy?
2. Is the alleged wrongdoer an individual whose wrongdoing is subject to reporting under the policy?

3. Is the alleged wrongdoing the type of wrongdoing covered by the policy?

If the answer to all three of these questions is yes, we may then proceed to determine if there was a disclosure of the wrongdoing. If the policy specifies a form or format for reporting we must determine if that was followed. In the absence of a form or format requirement, we must determine how the information was allegedly communicated and confirm whether that communication actually occurred.

If the policy specifies a person or persons to receive such disclosures we must determine if that provision was followed. In the absence of such a requirement, we must determine to whom the information was disclosed and then determine if he or she had appropriate agency to receive and or act upon such a disclosure.

We must also determine the timing of the disclosure with as much specificity as possible. This is a critical determination which can be hard to pin down. Since we often deal with verbal communication there is often no written record of the claimed disclosure and we must rely on the memory of the parties regarding when the discussion took place. Checking work schedules and calendars can be helpful in pinning down a date and time. It is a tedious process but will be critical when trying to determine if the alleged retaliatory action occurred after disclosure.

If we find that all scope requirements were met and that the information was disclosed in an appropriate format to a person with authority to receive and act upon such disclosure, we must conclude that a qualifying disclosure of alleged wrongdoing has occurred. It is important to note that the validity of the allegation is not a critical factor in considering whether retaliation has occurred. Even a substantiated allegation can be the basis for retaliation. Unless the report/disclosure was fraudulent in nature, the protection from retaliation will still apply.

We then move to the question of whether actions which occurred after the disclosure resulted in harm.

There are two aspects to the inquiry. First we must determine whether there was actual harm which occurred. In some instances the action which is alleged may prove to be a change in circumstances but not a “harm.” One example of this is when job duties are changed adding or deleting tasks which did not substantially change the nature of the overall work. Another example is when the title of a position is changed but neither the work, the compensation or the classification level of the position is changed.

In other instances, the investigation may discover that the facts of the situation are not as perceived by the person claiming retaliation and that no harm occurred at all.

If it is found that a harm did occur, the second aspect of this determination deals with the timing of the actions which resulted in the harm. As previously mentioned, the timing of the disclosure should have been determined as specifically as possible. Once this timing of disclosure is determined, the timing of the actions causing the harm must be determined.

In some instances it will be determined that the harm actually occurred prior to the disclosure. In other instances, the harm may have occurred after disclosure but the actions causing the harm occurred prior to the disclosure. A good example of this is when the paperwork to process a demotion was initiated prior to disclosure but the actual demotion did not occur until after the disclosure. In either of these cases, the question of whether the causal action occurred after the disclosure must be answered “no.”

If in fact there are clear actions which occurred after disclosure and resulted in harm then we must move to consideration of whether there is a direct causal relationship between the disclosure and the harmful acts. This can be one of the most difficult parts of the retaliation investigation because it is unusual for the disclosure to be the only identifiable reason for the harmful acts. In most cases there is some independent action on the part of the person alleging retaliation which contributed to the decision to take action. Perhaps there is a history of poor performance preceding demotion or termination. Perhaps there is inappropriate behavior followed by disciplinary action. In either of these examples the specific reason for the action would be the disclosure, the action of the claimant or a combination of these actions.

When there is additional activity by the alleged victim of retaliation the investigator must attempt to determine whether the disclosure was a factor at all in the action taken and if it was a factor whether it was the determining factor leading to the harmful acts. This is usually very difficult to determine. Most investigations tend to focus on whether other factors were sufficient to justify the harmful acts in absence of the disclosure. If the investigator concludes that the harmful actions would have been justified absent disclosure he/she is not likely to determine that a causal relationship exists even if he/she cannot prove that the disclosure was not a factor in the decision to act.

Because there is often a substantial time interval between disclosure and the claim of retaliation, there are likely to be complex issues which will increase the difficulty in investigating the alleged retaliation. Many individuals who have information about events during the intervening period may no longer be a part of the academic community. Relevant documents may have become lost or may no longer exist. For all of these reasons, the investigation of retaliation claims are often both time consuming and costly to investigate.

In addition to the procedural challenges, claims of whistleblower retaliation are almost always emotionally charged. Individuals on both sides of the issue feel strongly that they have been wronged particularly when the alleged wrongdoing was not supported by the disclosure investigation. For this reason it is particularly important that the person investigating the retaliation claim be able to focus clearly on facts. He/she may have to listen to a significant amount of emotionally charged information but must be able to isolate on the facts relevant to answering the questions outlined above.

In my experience, retaliation is difficult to prove because there are so few cases where disclosure is the only explanation for the actions which have resulted in harm to the complainant.

It is important that the written response which closes the retaliation investigation clearly indicate why the specific conclusion was reached whether there is a finding of retaliation or not. If retaliation is determined to have occurred, an appropriate remedy should be outlined in the final communication.

Although focusing on these specific questions and having an outlined process provides a good framework for handling the retaliation claim, I cannot overemphasize the need to construct your own whistleblower process so that there is no question regarding who is a covered whistleblower. The proliferation of retaliation claims by individuals who were never clearly identified as whistleblowers remains a vexing problem.

Conclusion

I began by stating that I strongly favor the concept of a whistleblower policy. I want to end by that fact with the qualification that I believe such a policy only serves the desired purpose if it is carefully drafted. As with much of what we do in human resource management, the devil is in the detail of whistleblower policies.

I would urge you to carefully review the latitude you have in constructing such a policy with your organization and to make such changes as are needed to tighten definitions, requirements and procedures. If properly constructed and managed, the whistleblower policy can be an important tool for institutional management.