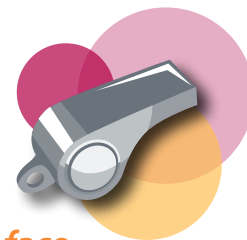


# Workplace Whistleblower

*Perspectives on whistleblower situations that employers frequently face*



## Hey, I'm a Whistleblower. You Can't Fire Me!... Or Can You?

**Hypothetical, based upon a real fact pattern:** Remember the old TV show "The Untouchables"? We often think that whistleblowers may be untouchables, meaning that once they report an issue they then become immune from future discipline even if they engage in actions that would normally result in discipline, even termination.

Imagine this scenario. Bill works for a toy manufacturer. Bill believes the toys are made with materials that are unsafe to children. Bill reports to the government that he believes his employer's alleged regulatory violations create an unsafe product. Bill is very open about his reports to the government. Bill then increasingly becomes hostile with his supervisors and anyone who questions the validity of his conclusions, and refuses to participate in an investigation into the alleged violations. Because Bill has engaged in protected activity, the employer cannot take action against him for his behavior, right?

### What should the Company do?

With great caution, the answer is "No". In *Caldwell v. EG&G Defense Materials, Inc.*,<sup>1</sup> the Department of Labor's Administrative Review Board ("ARB") found that an employer acted appropriately when it suspended and ultimately fired an employee for this type of behavior.

Gregory Caldwell was responsible for designing a system to transport hazardous chemicals in a chemical disposal facility. Several releases of toxic chemicals occurred and Caldwell was interviewed multiple times by the Company's internal investigation team. During these interviews, Caldwell was not forthcoming in explaining potential causes for the release of chemicals, denying that his system could have been the source and providing unsupported information regarding equipment compatibility. Another release of toxic chemicals followed shortly after Caldwell's interviews. After it was determined that his actions hindered the investigative team's ability to prevent further incidents, Caldwell was placed on leave, and he filed a whistleblower complaint with OSHA. The Company continued to investigate his performance, and Caldwell was terminated after his suspension was completed.

Although Caldwell was involved in the internal investigation of the hazardous waste incident, his actions only "constituted protected activity to the extent that they advanced the purpose of the [environmental whistleblower] acts" "to protect the public health and the environment." Thus, Caldwell's initial participation in the internal

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<sup>1</sup> ARB No. 05-101 (October 31, 2008). The ARB hears cases under Sarbanes-Oxley and other whistleblower laws.

investigations was protected, but his participation lost protected status when he “made ‘unwarranted assurances’” and “failed to fully disclose information critical to the investigation” because, the ARB explained, Caldwell’s participation “did not further the purpose of the acts.” Indeed, “[i]nstead of furthering the purpose of the environmental acts, his participation in the investigation actually endangered the public health and the environment.”

In upholding Caldwell’s suspension and ultimate termination, the ARB found that employees “under the guise of protected activity . . . [may not] interfere with internal investigations while also avoiding disciplinary action and successfully maintaining a claim against their employers if the employers take adverse action for their misconduct.”

Certainly employers should take special care before taking disciplinary action against a whistleblower, as such actions will almost assuredly result in a claim of retaliation. Indeed, *Caldwell* arguably presents an extreme example of employee misconduct, particularly because of his misleading activities related to the investigation. In the ordinary course, a whistleblower who simply becomes a thorn in the side of his supervisors is, in fact, the sort of employee for whom disciplinary steps must be very carefully assessed.

However, *Caldwell* illustrates that a whistleblower does not become a true “untouchable” after blowing the whistle.

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