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Whistleblowers

Tales from the back office

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It is becoming easier for employees to reveal their bosses' wrongdoings

SHERRON WATKINS, a star witness in the current trial of Kenneth Lay and Jeffrey Skilling, respectively Enron's former chairman and chief executive, is billed as a whistleblower. "Probably the closest thing to a hero to emerge from the Enron saga," said the *Wall Street Journal*. Ms Watkins fits the public's image of what a whistleblower should be—female, feisty and ultimately vindicated, a stereotype laid down by Oscar-nominated actresses such as Julia Roberts (in "Erin Brockovich") and Meryl Streep (in "Silkwood"), and reinforced when Ms Watkins was one of three female whistleblowers named as *Time* magazine's "Persons of the Year" in 2002.

In reality, the lives of most whistleblowers are far from glamorous. In "Whistleblowers: Broken Lives and Organisational Power", Fred Alford, a professor at the University of Maryland, writes, "the average whistleblower of my experience is a 55-year-old nuclear engineer working behind the counter at Radio Shack. Divorced and in debt to his lawyers, he lives in a two-room rented apartment."

Ms Watkins, at first sight a rare exception, is arguably not even a whistleblower. She made no systematic attempt to reveal wrongdoing to internal or external authorities, the defining action of

a whistleblower. Her qualms were instead laid out in an internal memo that she wrote to her boss, Mr Lay, expressing a fear that the company might “implode in a wave of accounting scandals”. The memo was uncovered by an investigative committee after the company had collapsed.

Other Enron employees fit the whistleblower description rather better. In “Confessions of an Enron Executive” by Lynn Brewer, published in 2004, the author says that many of her colleagues tried to alert authorities to what was going on, including Margaret Ceconi, who blew the whistle anonymously to the Securities and Exchange Commission (SEC) in July 2001 and then publicly to members of the board in August that year. In the Houston court this month, Mr Lay's lawyer described Ms Ceconi as “a nutcake”.

It is common for organisations to retaliate against whistleblowers by questioning their sanity. The strategy, known as “nuts and sluts”, is to cast doubt on the message by casting doubt on the messenger. National Fuel Gas Company, a utility based near Buffalo in New York state, sacked Curtis Lee, a highly paid company lawyer, after he alleged that the chief executive and president had ordered him to backdate their stock options on forms submitted to the SEC in a way that made the options worth considerably more. Not only did National Fuel then sue Mr Lee (successfully) for the return of the documents that might have provided proof, but it also persuaded a local court to ban him from ever repeating the accusations. In addition, the court ruled that he undergo psychiatric treatment, a ruling that was subsequently reversed on appeal on the grounds that it was illegal, but not before Mr Lee had been “treated”. An official investigation into the matter was frustrated by the untimely death of the chairman of the company's compensation committee.

In general, American companies do not have to give employees a reason for sacking them. Some whistleblowers believe that the greatest single protection they could gain would be for it to be mandatory for firms to say why they are getting rid of an employee. Short of that, legislation is rolled out regularly with the aim of providing whistleblowers with more protection. America has had a Whistleblower Protection Act in force since 1989, and after the Enron and WorldCom disasters the Sarbanes-Oxley act added further protections to corporate whistleblowers. In particular, it ruled that all companies quoted on an American stock exchange must set up a hotline enabling whistleblowers to report anonymously.

Earlier this month another bill was introduced into the Senate designed to “improve whistleblower protections” by giving federal employees the same rights to reinstatement and damages as private-sector employees received under Sarbanes-Oxley. In particular, a whistleblower who can prove that he was unjustly sacked will be reinstated and awarded damages.

In most of Europe the legal protection given to whistleblowers is weaker than in America. In June last year, the French Data Protection Authority refused to allow the setting up of anonymous whistleblower hotlines, saying that such lines were “disproportionate to the objectives sought with the risks of slanderous denunciations”. Companies, however, have discovered an ingenious compromise: they can set up their hotlines outside France. Meanwhile, a German court has ruled that the parts of an employee code of conduct that invited employees to report misconduct to a whistleblower hotline breached German labour laws.

After reviewing hundreds of laws protecting whistleblowers, Terance Miethe, a professor of criminal justice at the University of Nevada, concluded in 1999 that “most legal protection for whistleblowers is illusory; few whistleblowers are protected from retaliatory actions because of numerous loopholes and special conditions of these laws, and the major disadvantage that individual plaintiffs have against corporate defendants.” Little has happened since to change that view—one which should give all potential whistleblowers pause.

Yet just occasionally a whistleblower triumphs against the odds. Jonathan Fishbein, a doctor who

was fired by America's National Institutes of Health after reporting misconduct in federal research into viramune, an AIDS drug, was reinstated in December last year after concerted support from politicians, the media and fellow scientists. Charles Grassley, chairman of the Senate Finance Committee and a supporter of whistleblowers, said it was an example where "we can chalk one up for the good guys". More broadly, technology may be helping the whistleblower's cause. Blogs and e-mails make it easier to raise the suspicions of regulators and to steer their enquiries.

Finally, company structures are changing, becoming more open and, via the large number of alliances and joint ventures that corporations have with each other, more open-ended. Mr Alford says gloomily that "organisations are the enemy of individual morality". But the organisation of the future may have fewer dark corners in which to hide the wrongdoings that whistleblowers attempt to bring to light. With luck, that could result in fewer broken lives.

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