



Avoiding Liability Based on Allegations of Employee Wrongdoing

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Two Issues to Consider

- Investigating an Employee Accused of Wrongdoing
- Protecting an Employee Complaining of Wrongdoing
 - *Financial Institutions Reform, Recovery & Enforcement Act of 1989*
 - *Sarbanes-Oxley*
 - *State Whistleblower Laws*



Financial Institutions Reform, Recovery & Enforcement Act of 1989

- Applies to, among other entities, banks and savings association the deposits of which are insured by the Corporation
- Prohibits, among other things, retaliation against employees who provide information to the Corporation, the Board of Governors of the Federal Reserve System, the Federal Housing Finance Board, the Comptroller of the Currency, the Director of the Office of Thrift Supervision and the Attorney General



Protected Activity

- The information must concern possible violations of laws or regulations, gross mismanagement, waste of funds, abuse of authority or a substantial and specific danger to public health or safety by the institution or any director, officer or employee
- Does not apply to any employee who--
 - *(1) deliberately causes or participates in the alleged violation of law or regulation; or*
 - *(2) knowingly or recklessly provides substantially false information to such an agency or the Attorney General*



Remedies

- Reinstatement;
- Compensatory damages; and
- Federal court in NY has held that punitive damages may be awarded



Sarbanes-Oxley

- **PURPOSE:** To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws
- **REACTION TO ENRON, GLOBAL CROSSING, TYCO, WORLDCOM**



Who Must Comply

- **Domestic public companies and privately held companies, required to file reports under § 15(d) of the Securities Exchange Act of 1934, and whose debt securities are publicly traded**

And

- **Foreign companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934**



What is Protected Activity

- (1) Providing information or assisting in an investigation; or**
- (2) Filing or participating in a proceeding**





Protected Activity: Providing Information

- **Information must be provided to, or the investigation conducted by:**
 - ***A federal regulatory or law enforcement agency;***
 - ***A Member or Committee of Congress; or***
 - ***A person with:***
 - **Supervisory authority over the employee; or**
 - **A person working for the same employer who has authority to investigate, discover, or terminate misconduct**



Protected Activity ***Filing or Participating in a Proceeding***

Filing or causing to be filed, testifying, participating in, or otherwise assisting in a proceeding filed or about to be filed (about which the employer knows) relating to:

- ***Wire fraud***
- ***Bank fraud***
- ***Securities fraud***
- ***Any SEC rule or regulation***
- ***A violation of any provision of Federal law relating to fraud against shareholders***



Protected Activity Can Be

- **Oral or written**
- **Formal or informal**
- **Internal or external complaints**



“Reasonable Belief”

- **Employee does not have to be “right”**
- **Reasonable person standard**
- **An employee’s “non-frivolous” complaint is sufficient to entitle the employee to protection**
- **A stricter standard would chill employee initiatives in bringing to light perceived discrepancies**



Enforcement

- **Adversely affected employees may:**
 - ***File a complaint with the U.S. Department of Labor within 90 days of the alleged violation;***

And
 - ***IF the DOL fails to issue a final decision within 180 days, the employee may file suit in Federal district court***



Remedies

- All relief “to make the employee whole”
- Reinstatement
- Back pay, with interest
- Special damages: attorney fees, expert witness fees, litigation costs
- No punitive damages



Criminal Penalties

Any person who “knowingly, with the intent to retaliate” takes an action “harmful” to any person (including interference with lawful employment or livelihood)

- **For providing to a law enforcement officer any truthful information relating to the commission or possible commission of “any Federal offense”**
- **Shall be fined or imprisoned**
 - ***Fines up to \$500,000***
 - ***Up to 10 years imprisonment***



NEW JERSEY CONSCIENTIOUS EMPLOYEE
PROTECTION ACT
(CEPA)

Prohibits an employer from retaliating against an employee if the employee “blows the whistle” on his employer’s unlawful conduct



Four types of protected activity:

- *employee reports employer's violation of law to a supervisor or to a regulatory authority*
- *employee testifies truthfully at a public proceeding*
- *employee objects to any practice that the employee "reasonably believes" is a violation of the law, or is fraudulent or incompatible with a clear mandate of public policy concerning public health, safety or welfare*
- *employee refuses to participate in activity that he "reasonably believes" is a violation of law, fraudulent, or incompatible with a clear mandate of public policy*



Remedies

- **Reinstatement**
- **Back pay**
- **Attorney's fees**
- **Punitive damages**



JURY BIASES

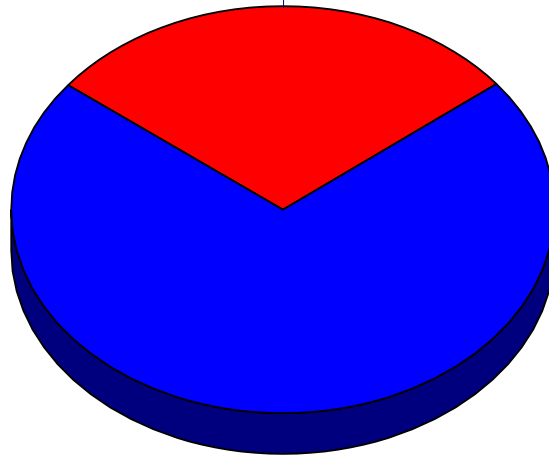
Source: Dan Gallipeau, Ph.D, DDI Database



Which of the following statements best describes your feelings?

It is more important to follow the "letter of the law" than the "spirit of the law":

29%

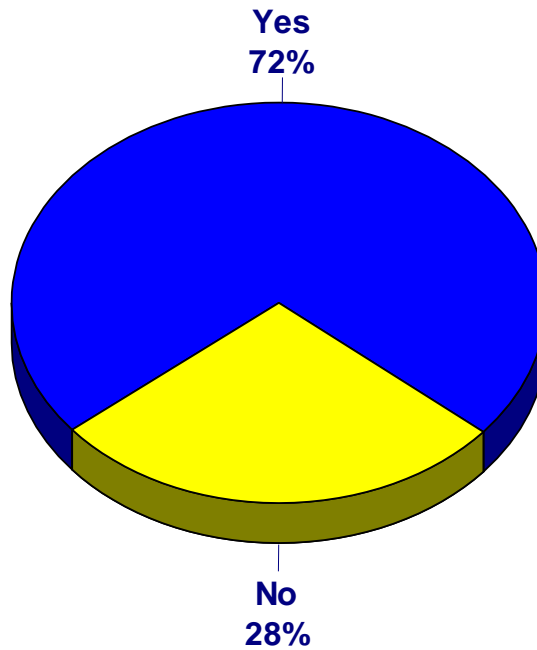


71%

It is more important to see that "justice is done" than to follow the "letter of the law":

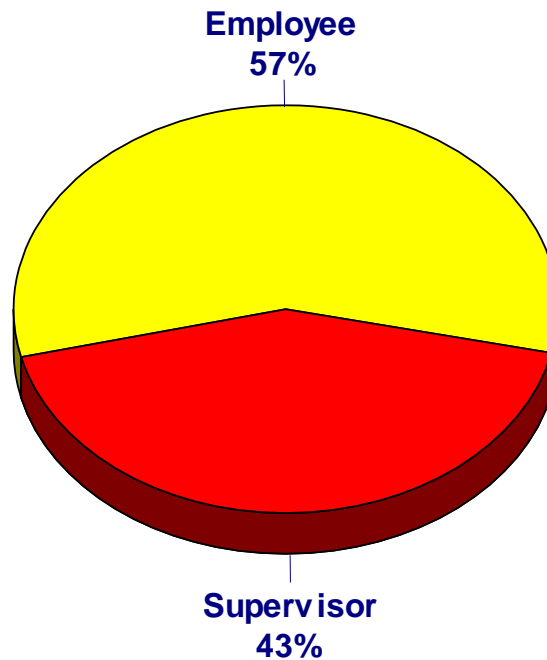


An important function of juries in America is to send messages to organizations to improve their behavior.



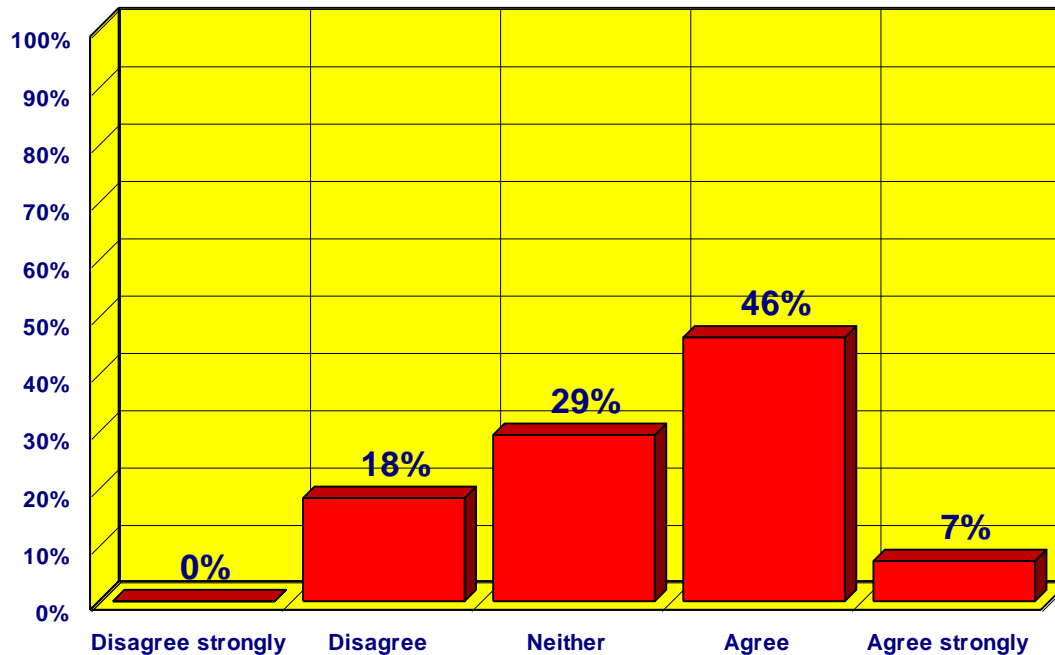


**In a dispute between an employee and his/hers supervisor,
who would you tend to believe?**



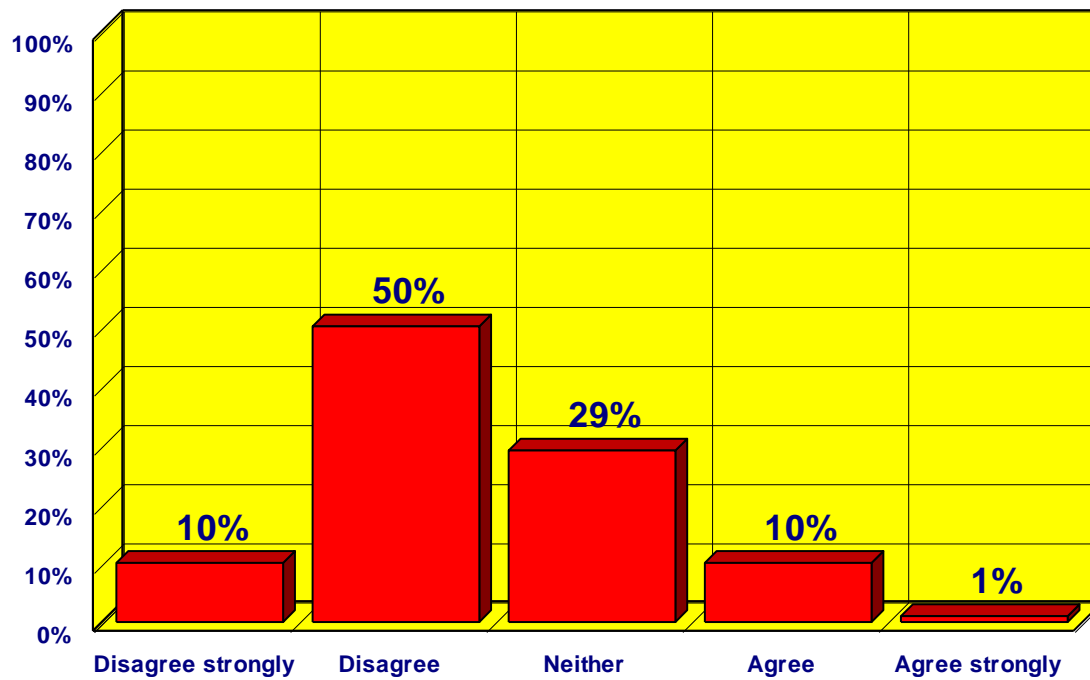


It is common for a supervisor to retaliate against an employee who participates in an investigation of claims of unlawful conduct.





I am against punitive damages.





What to Do to Reduce Risk

- Reporting procedure for alleged wrongdoing
- Open door policy
- Confidential hotline
- Delineate prohibited/required conduct
- Prohibit retaliation
- Complaint procedure
- Train Managers
- Remediate Retaliation



Employee Handbook Should Include:

- Reporting Procedure
- Open Door Policy
- Policy Prohibiting Retaliation
- Complaint Procedure



Complaint Procedure

- Allow Complaints to Any Member of Management
- Investigate All Complaints
- Handle Complaints As Quickly as Possible
- Promise That Investigations Will Be Discreet, Not Confidential



The Investigation

- Maintain the “Status Quo”
- Interview Witnesses
 - *Prepare Written Summaries*
 - *Have Witnesses Adopt Summaries*
- Review Documents
- Determine Whether An Outside Expert is Required
- Determine Whether You Need to Report Bank’s Conduct to Regulatory Authorities
- Implement a Remedy



The Remedy

- Take appropriate corrective action
- Report the wrongdoing
- Stop and remedy the wrongdoing
- Protect the complainant from retaliation



Types of Retaliation

- Discharge
- Demotion
- Loss of Opportunities
- Compensation
- Suspension
- Threats
- Harassment