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STUDIES IN LOGIC, GRAMMAR AND RHETORIC 68 (81) 2023

DOI: 10.2478/slgr-2023-0033

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THE (LEGAL) STATUS OF A WHISTLEBLOWER IN POLAND. SELECTED ISSUES

Abstract.

The Republic of Poland is one of the European Union countries that have not yet implemented Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting breaches of EU law (Journal of Laws EC L 305/17 of November 26, 2019). Even though signalling illegal acts is a more and more common occurrence and the social perception of such behaviours is also changing, the "whistleblowers" are not under any legal protection in Poland. In the Sejm of the 9th Term of office, legislative work is underway to pass the act on the protection of persons reporting violations of the law. This will be a legal act containing comprehensive legal protection of whistleblowers. In hereby publication the author focuses on presenting the role of whistleblowers in preventing law violations by employers in the current legal state. In the next part, the above-mentioned draft act is analyzed in terms of provisions ensuring the protection of persons who disclose irregularities. Numerous tragic incidents which could have been avoided if people that were aware of irregularities could safely reveal the information are evidence of how needed an act on whistleblower protection is. The author cites examples of the sinking of the MF Herald of Free Enterprise ferry and the Deepwater Horizon platform as well as the methane explosion in the Halemba mine in Ruda Śląska.

Keywords: whistleblower, whistleblower protection, bill, labor code, criminal sanctions.

Introduction

Signalling violations (*whistleblowing*) is not popular in our country and culture. Since our school days we learn that the well-being of a group is more important than obeying rules and especially more important than reporting the cases of rules being broken. Such attitude has deep historical roots, dating back to the times of serfdom, when "reporting to the Lord" often

brough terrible consequences to the defendant (you could not really count on impartial trial) and it was strengthened during the partitions of Poland and the Second World War. What we can also notice here is lack of trust towards the authorities and a strong fear of social ostracism, which translates into the risk of losing employment and therefore losing livelihood[1]. The public perception of whistleblowers, e.g. in the United Kingdom, is completely different. A study commissioned by PCAW from Cardiff University covering the period January 1997 to December 2009 found that 54% of the national newspaper stories represented whistle-blowers in a positive light, while only 5% of stories were negative. The remainder (41%) were neutral[2].

The English term of "*whistleblowing*" stands literally for "blowing a whistle", which corresponds to the act of calling for help (in the past used in this form by policemen), alarming, signaling danger, was proposed in the 70s in the last century by a very popular and respected American lawyer and social activist Ralph Nader to define the activity of a prosocially motivated unit informing the environment that its organization violates the public interest[3]. The term of *whistleblowing* itself first appeared in the 20th century, but the system of protection of the people reporting violations developed during the American Civil War, more precisely in the Union army from the northern states. In order to protect "legal informers", revealing fraud committed against the army of the North during the Civil War, in 1863 the first legal act called *The False Claims Act* was introduced[4]. Under it, such informants were guaranteed protection against "unfair dismissal". *The False Claims Act* now provides measures to combat fraud against the federal government, but its original purpose was the world's first whistleblower protection.

In Polish there is no real term for a person that reports violations or issues and such people are usually called "*signalists*", which corresponds to the English term of a *whistleblower*. In this study, the terms "*people who report violations*" and "*whistleblowers*" will be used interchangeably.

The purpose of this publication is to assess the legal protection of people reporting violations in Poland in the context of the draft of April 6, 2022, the act on the protection of people who report violations of the law.

The term and position of a "whistleblower" in current legal state

While considering the legal protection of whistleblowers, the concept itself should be first defined. Not every person reporting violations of applicable law can obtain such status. A whistleblower is a person who reveals

confidential information related to the activity of an employer for the purpose of revealing violations in their acts[5]. In literature we may find various definitions of who a whistleblower is. According to G. Makowski, whistleblowers are people (employees, speaking broadly), who for the sake of their workplace and (or) the public good, report (first to their superiors, then – if it does not bring any result – to other institutions, law enforcement agencies or the media) information about irregularities related to the functioning of their organization[6]. A. Kobylińska defines the term differently and according to her it might be any person who possesses internal knowledge about an organization and decides to reveal its internal violations. That concerns both full-time employees, but also coworkers, interns, consultants and former employees[7].

In world literature, the concept of whistleblowing is defined very similarly. According to J.P. Near and M.P. Micelli, whistleblowing has been defined as "the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action". Terms such as wrongful activity and questionable practice refer to omissions as well as commissions, for example, when an organization fails to warn employees of workplace hazards[8]. The non-governmental organization Transparency International provides a more restrictive definition, which describes whistle-blowing as the disclosure of information related to corrupt, illegal, fraudulent or dangerous activities carried out in or by organizations in the public or private sector that threaten the public interest, which involves disclosure to those individuals or entities believed to have the power to act against such unwanted practices. According to this definition, disclosure to those capable of action is a necessary condition for being able to speak on whistle-blowing[9].

Disclosure required by law under penalty of sanctions is not considered to be the whistleblower's action. This is due to the fact that where there is a legal and sanctioned obligation to disclose irregularities, the disclosure's motivation is built solely or also by the willingness to avoid sanctions for failure to comply with the obligation to disclose irregularities. However within the typical whistleblowing act, the motivation is purely about taking care of a public or third party's interest and therefore it is of legal, but only of altruistic and ethical character[10]. An employee who reports violations only in order to achieve individual benefits (e.g. getting rid of a supervisor he does not like, obtaining an undue promotion, bonus, etc.) cannot be considered a whistleblower. In the opinion of the author of this study, even if the reported irregularities or violations of the law by the employer or other persons

employed in the workplace are real, and their disclosure may bring benefits to other employees, if the applicant is guided only by his private, individual interests, they might not be protected as a "whistleblower". That is not a sparse opinion. M. Waszak, on the basis of polls conducted among union members, concluded that respondents used the term of "pseudowhistleblowers" to describe people instrumentally using information on irregularities, being fully aware of their manipulations in private interest. They usually seek material compensation and report cases of violations only when they see a chance to gain something personally[11].

The paradox of perception of whistleblowers is that – in theory – while defending the interests of society, at the same time in their closest environment they are treated as isolated people, violating the internally established order. That happens when a whistleblower disturbs the specifically understood solidarity between employees and between employees and the employer, agreeing to evade the applicable standards where they consider them non-functional[12]. The whistleblowers' activity is often badly received by their employers or supervising personnel. Employees reporting irregularities are sometimes dismissed from work pursuant to Art. 52 § 1 of the Labor Code, i.e. for a serious breach of basic employee duties. The possibility to expose an employer to harm by revealing certain information is given as a reason for terminating a work contract. Such legal basis for terminating the employment relationship with an employee immediately is in direct contradiction to the idea of reporting violations of the law in workplaces, and the consequences can be catastrophic. Already in the 1990s, attention was drawn to the fact that since the Karen Silkwood case and the Challenger disaster to more recent incidents, such as the savings and loan scandals and the alleged misrepresentation of the safety of General Motors trucks by the National Broadcasting Corporation, organizational wrongdoing has become a part of everyday life[13]. Despite this, even in the United States, reporting irregularities has not become common enough to prevent further dramatic events.

The disaster that took place on the Deepwater Horizon mining platform on April 20, 2010 might be mentioned here. It was the greatest environmental disaster in the history of the United States. It cost a dozen or so people's lives. It also caused enormous financial losses of tens of billions of dollars and image losses which are hard to evaluate. Additionally, it has caused significant damage and long-term negative effects on local business (including fishing, tourism)[14]. If the British Petroleum oil company, i.e. BP, had implemented a whistleblowing policy, probably the catastrophe could be avoided and even if not, it could have much milder consequences. The

lack of an active policy of reporting violations resulted in reluctance on the part of employees to disclose them, for fear of repercussions on the part of the employer.

In Poland similar incident happed in the Halemba mine in Ruda Slaska, where violations had been taking place for years (falsifying documentation, firedamp detectors were set incorrectly, etc.) and they had been hidden by the surpervisors and mine authorities. In consequence, it lead to a catastrophe on 21.10.2006, when 23 miners died, out of which 15 were not even members of this mine's staff, but outsorced people hired for decommissioning works[15].

A person reporting such serious breaches of the applicable provisions that may have the consequences described above should be under special protection of law. However, it is not so. This also applies to those countries where whistleblowers and people revealing violations of the law are positively received in the public opinion. In Anglo-Saxon countries, in particular those based on case law, many changes for the better were introduced on the basis of cases brought after the whistleblower discovered irregularities. Nevertheless, even in the USA, a country proud of its longest functioning law protecting whistleblowers, still there are people that are harmed while applying for a job simply because they reported cases of violations. None of the applicable laws (*False Claims Act*, *Sarbanes – Oxley Act* or *Dodd – Frank Act*) adequately protect American whistleblower in workplaces. Many whistleblowers experience retaliation twice: in their workplace after they disclose undesirable actions and secondly in the labor market when they try to take up any subsequent employment. That negative trace follows whistleblowers, depicting them as disloyal, suspicious, in the end not ideal employees, which makes them unable to find a job[16]. On the other hand, in 2009 Pieter Omtzigt from the Committee on Legal Affairs and Human Rights of Council of Europe, in 2009 conducted a fundamental study on the issue ('Protection of whistleblowers'), where he noticed, that in many European countries, because of the lack of a reporting culture with positive connotations, the whistle-blower is all too often seen as a traitor or likened to a police informer. The lack of reporting culture is massive even in Europe. According to the European Commission's Special Eurobarometer Corruption Report 2014, 74% of respondents said that they did not report corruption that they experienced or witnessed to anyone. This statistic is a red light: if three-fourths of EU citizens do not report corruption (citizens of countries that have vibrant democracies in place with accountable governments), then it is possible to imagine what the situation is in developing countries[17].

Current legal protection of whistleblowers in Poland compared to other countries

Unfortunately, potential whistleblowers often do not prefer to raise their concerns or suspicions of misconduct since they can encounter retaliation in various forms, such as harassment, firing, or threats. The EU Directive highlights that potential whistleblowers are reluctant to disclose their concerns or suspicions of wrongdoings because of the fear of retaliation. Employees may become vulnerable to mistreatment by their employers in terms of termination of employment, negative impact on promotions or salary, unjustified negative performance assessment, transfer and change of workplace, harassment, or discrimination[18]. They may even be alienated by their co-workers, bullied, and labelled as "traitors" by their colleagues[19]. The above applies both to whistleblowers dealing with irregularities in workplaces, as well as to those who detect them in cyberspace. Cybersecurity whistleblowers are no different; like all whistleblowers, they also experience retaliation for their disclosures[20]. It is therefore necessary for whistleblowers to be subject to special protection. This protection varies depending on the country.

The United Kingdom of Great Britain and Northern Ireland is rightly regarded as the European leader in whistleblower protection. The British whistleblower protection act is assessed as the most far-reaching and the most comprehensive regulation on that issue in Europe[21]. What lead to the initiation of this act was a series of tragic accidents in Great Britain in the end of 1980s, among others due to allowing for carelessness and abuse of staff. One of such cases was, for example, the sinking of the British ferry *MF Herald of Free Enterprise* near the coast of Belgium on March the 6th, 1987. The problem was seen and made public in the report of a charity organization Social Audit in 1990, by calling for signaling policies to be included in the internal regulations of enterprises[22].

In a way, at the opposite extreme, there was Hungary, which – similarly to Poland – until recently was included in the group of countries passive to the protection of whistleblower rights (referred to in Hungary by the term *közérdekű bejelentő*), in which the problem of whistleblowing was mainly solved by an adequate code of conduct obliging to inform about manifestations of corruption[23]. It ought to be added here that since 2004, due to changes in the Hungarian Penal Code, formally there has been a regulation penalizing acts against people revealing information in the name of a public good[24].

Slovenia and Luxembourg have passed meaningful whistleblower protection provisions in accordance with international standards. In 2011, Luxem-

bourg public and private sector employees who report corruption, influence peddling and abuse of office benefit from protection against retaliation from their employers. The burden of proof is on the employer, and employees may appeal to a labour court, which is similar to the UK's law. In 2010, Slovenia opted for an anti-corruption law that covers public and private sector whistleblower protection. The rules follow many international standards that concern confidentiality, internal and external disclosure channels, a broad range of remedies, the burden of proof for employers, pecuniary sanctions for retaliators and special assistance for whistleblowers[25].

D. Schultz, K. Harutyunyan examined also one of the Eurasian Economic Union (EEU) member-states, in order to reveal the possibility of drawing parallels with western experiences. Armenia is the subject here. It was chosen because of it being typically a good example of EEU member. It enjoys a relatively good position under the Corruption Perception Index 2014 of Transparency International, among other member states of the Eurasian Economic Union. Armenia occupies 94 rank among 175 countries, while Russia and Kyrgyzstan share the 136th position, Belarus 119th, and Kazakhstan 126th[26].

The protection of whistleblowers in Armenia is not comprehensive and, the law is complicated and not well developed. The legislation divides the protection into two legal regimes: the first one regulates reporting persons who are public servants, and the second one regulates ordinary citizens[27].

In Poland, according to the legal status as of October 15, 2023, the situation of people reporting violations of the law looks even worse. According to the Transparency International report of 2013, whistleblowers in Poland were covered by partial normative and procedural protection, as in 16 other EU countries. A much more advanced form of protection was used in 4 other countries of the Union: Great Britain, Luxembourg, Slovenia and Romania. In countries such as Finland, Greece, Lithuania, Slovakia, Bulgaria[28], Portugal and Spain whistleblowers are protected very poorly or have no protection at all[29]. The European Union wishes to unify legal systems within that scope. The newest normative act focused on the need to protect whistleblowers is the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of people reporting breaches of Union law[30]. The directive requires employers to set up effective and efficient reporting channels (this generally applies to entrepreneurs with more than 50 employees). The same obligation is imposed on public administration in communes with at least 10,000 inhabitants. This directive has not yet been implemented in the Polish legal system. Currently therefore

there is no clear regulation giving an employee a guarantee of confidentiality and the secrets of a company are protected even as a thing of higher value. Revealing the facts about, for example, an employer achieving higher profits, winning favorable tenders, etc., because it repeatedly violates health and safety regulations, it is treated as a violation of Art. 100 § 2, point 4 of the Labor Code In such a situation, it discourages employees from reporting violations of the law.

Some positive changes have to be, however, pointed out. Before a legal protection of people reporting violations will be introduced, in many workplaces codes of ethics are introduced, in which significant pressure is put on caring about the workplace by all the employed people. The term of "all employed people" stands for all people in any way related to the workplace, starting with ordinary employees, through medium and higher level supervisors and going as far as board members. Every employee has the right to report any violations or obstructions of law. He can do it, often also bypassing the service dependency path, i.e. having a suspicion that his immediate superior is involved in the violation of the law, the whistleblower may disclose it to senior management or even the board. However, the lack of explicit legal protection of whistleblowers means that the codes of ethics introduced in workplaces do not fulfill their role fully. Employees still have some doubts as for the retaliaton from the employer and/or coworkers for revealing any irregularities in the workplace. It is therefore important to immediately start legislative actions leading to the creating of a legal act that guarantees whistleblowers' protection[31].

Legal protection of a whistleblower – legislative work

The necessity to implement the above-mentioned Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019, resulted in the development of the first draft of the act on the protection of people reporting breaches of the law[32]. The project assumed that the act must contain 63 articles divided into 8 chapters. The most significant regulations concerning whistleblower protection were included in the second chapter. Eventually another project of an act on the protection of whistleblowers of April the 6th 2022 is being proceeded. In comparison to the first project, the act was reduced to 60 articles, divided into 8 chapters, the *vacatio legis* period was lenghtened from 14 days to 2 months and special regulations on whistleblower protection were included in chapter 2, articles 11–22 instead of 10–26.

In the justification to both projects, it can be read that currently in the Polish legal system there is no comprehensive regulation on the protection of the so-called whistleblowers, as it is commonly understood (as there is no statutory definition of this term or its equivalent), i.e. persons who, acting in good faith and in the public interest, report or disclose information about infringements of the law. It should be noted that the above, common understanding is very roomy and therefore a person reporting or revealing information about law violations, depending on the circumstance, will possess varied powers or a procedural role in relation to any legal entity, law enforcement, courts or other public authorities and in any proceedings before these authorities[33]. We must of course agree with the above, as lack of effective whistleblower protection was already solved in article 4. There is no clear term of a "whistleblower" there, while the people to whom the provisions of the draft act apply were defined. According to the proposal contained in Art. 4 of the draft, in sec. 1 it is said that the act applies to a natural person who reports or publicly discloses information about a breach of law obtained in a work-related context, including: 1) an employee, 2) a temporary employee, 3) a person providing work on a basis other than an employment relationship, including a civil law contract, 4) an entrepreneur, 5) a shareholder or a partner, 6) a member of a body of a legal person, 7) a person performing work under the supervision and management of a contractor, subcontractor or supplier, including on the basis of a civil law contract, 8) an intern, 9) a volunteer, 10) an apprentice, 11) an officer within the meaning of Art. 1 clause 1 of the Act of February 18, 1994 on pensions for officers of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Marshal's Guard, the State Protection Service, the State Fire Service, and the Customs Service – Treasury and Prison Service and their families (Journal of Laws of 2020, items 723 and 2320 and of 2021, items 2333, 2448 and 2490), 12) professional soldier – hereinafter referred to as the "reporting". In turn, in paragraph 2 it is indicated that the cct also applies to the natural person referred to in paragraph 1, in the case of reporting or public disclosure of information about a breach of law obtained in a work-related context, prior to entering into an employment relationship or other legal relationship constituting the basis for the performance of work or services or the performance of a function or supply of goods, or when such a relationship has already ceased. In the justification, the project initiator emphasizes that the term "notifier" (Directive: "reporting person"), understood as a natural person which reports or reveals publicly information on

law obstruction obtained in the context of work is equal to the commonly used term of a "whistlebower" for people reporting law violations. The definition reflects an open directory of notifiers that meets the requirements of Art. 4 sec. 1 of the Directive. In addition, according to the content of motive 38, the catalog includes a temporary worker within the meaning of the Act of 9 July 2003 on the employment of temporary workers (Journal of Laws of 2019, item 1563). Due to remarks and doubts appearing during the process of working on the project, whether the reporting person can be a service officer and a professional soldier, and recognizing the legitimacy of including the possibility of reporting also by these categories of entities, the project designer decided to include officers, within the meaning of Art. 1 clause 1 of the Act of February 18, 1994 on pensions for officers of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Marshal's Guard, the State Protection Service, the State Fire Service, and the Customs and Tax Service and the Prison Service and their families and professional soldiers (Journal of Laws of 2020, item 723, as amended)[34]. It ought to be noted that admittedly the project does not contain the definition o a "whistleblower", but it is explained in the justification. That means, that the term of a "whistleblower" might be used interchangeably with "a reporting person".

As mentioned before, the most significant provisions protecting whistleblowers are contained in Art. 11–22. First of all, the project designer prohibits any retaliation against the person reporting the violation of the law (Art. 11). That means that revealing illegal acts of an employer will not be treated as a violation of the duty to keep in secret information that might cause harm to the employer. It will be especially forbidden to terminate an employment contract (Article 12, section 1, point 2.). The proposed provision of art. 11 sets out the overriding prohibition against taking any retaliatory actions against the notifier, understood in accordance with the proposed art. 2 point 2 as direct or indirect acts or negligence in the context related to work, which is caused by public reporting or revealing and which harms or may harm the rights of the reporting person or causes or may cause unjustified harm to the reporting person, including instituting burdensome proceedings against the notifier (compare Art. 5 point 11 and Art. 19 of the Directive). The concept of retaliation also includes the initiation of the so-called arduous proceedings within the meaning of Art. 23 sec. 1 lit. c of the Directive against persons reporting or disclosing information on infringements of the law. Taking retaliatory actions will be subject to sanctions in accordance with Art. 23 of the Directive. According to the

regulations of Article 19 of the Directive also efforts or threats to use such actions are included[35]. The proposed act also provides for the possibility for a person who has suffered a loss due to reporting or public disclosure of false information by the reporting party to obtain compensation in the amount of at least the average salary in the enterprise sector, applicable on the date of filing the notification or public disclosure.

When discussing the bill protecting whistleblowers, it should be mentioned that Chapter 6 contains criminal sanctions to which persons obstructing the possibility of reporting a breach of law are subject to. It means that an employee opposing a whistleblower, no matter what position he or she is employed at and what is their work dependence between them, will be punishable. The catalog of offenses and penalties is contained in Articles 51 to 55 of the proposed act. Penalty is imposed on anyone who hinders or attempts to make the reporting difficult (fine or restriction of liberty), and if violence, threats or tricks are used, he or she is subject to a fine, and if he or she uses violence, threats or deception, they shall be subject to a fine, the penalty of restriction of liberty or the penalty of detention for up to 2 years, who, contrary to the provision of art. 11 takes retaliatory measures against the person who made the reporting or public disclosure, or the persons referred to in art. 21, shall be subject to a fine or the penalty of restriction of liberty or the penalty of detention for up to 2 years, in the event of using more than 2 retaliatory actions in total – penalty of deprivation of liberty for up to 3 years, who breaches the obligation to maintain the confidentiality of the identity of the person who made the notification, or in art. 21, shall be subject to a fine, the penalty of restriction of liberty or the penalty of detention for up to one year. The whistleblower might also be subject to penalties, when he or she consciously publicly reported or revealed false information or helped to report false information. In such case the reporting person is subject to a fine, the penalty of restriction of liberty or imprisonment for up to 3 years. Eventually also people responsible for implementing internal procedures will be subject to criminal sanctions. In a situation when, despite the obligation, against the regulation of Article 24 of the act a person who did not set an internal procedure or an internal procedure violates art. 25 sec. 1, is punishable by a fine.

The provisions of the draft act discussed here go in the right direction to provide legal protection to people reporting irregularities. There is therefore hope that the Sejm of the 9th term will pass the much-needed act, which is also the adaptation of Polish law to the requirements of the European Union. The principle of discontinuation, applied in the practice of Polish

parliamentarism, will mean that if the legislative work is not completed during the current term of the Sejm, the new parliament elected in 2023 will have to start work from the beginning. The lack of legal protection of whistleblowers might lead to incidents similar to previously described Deepwater Horizon or the Halemba mine.

Summary

Is legal protection of whistleblowers necessary in the Polish legal system? It is. There is no doubt that reporting irregularities allows for detecion and elimination of pathology in social life. Revealing noticed violations by employees does not stand in counter to caring about the well-being of a work place in the sense that it allows to avoid negative consequences, such as losing reputation in the market, legal issues and in extreme cases, liquidation of the workplace. Reporting negligence or deliberate actions may also protect other employees from loss of health or life. In the legal system the employee – whistleblower protection must be made in order to encourage and not discourage such acts *pro publico bono*. The bill discussed here meets these expectations. First of all, clearly defined regulations on who and in what situations is subject to legal protection as a whistleblower, displaces dishonest employers from the argument about breach of the obligation to keep trade secrets, which is the basis to terminate an employment cotract immediately. Moreover, the catalog of penalties including the imprisonment of up to 3 years against persons who hinder the actions of whistleblowers, may encourage employees to disclose violations of the law. Unfortunately Polish Parliament did not manage to finish the legislative works on whistleblowers' protection law. As mentioned earlier, this means that in the new term of office of the Sejm, work on this act must start from the beginning. The new parliamentary majority may, but does not have to, use the project discussed in this article in its work. All that remains is to appeal for work on the much-needed legal regulation to be started as soon as possible.

NOTES

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