

# Comey Testimony Shows Value Of Whistleblower Protections

By Jason Zuckerman

For me, the most telling moment of former [FBI Director James Comey's June 8](#) testimony occurred early in the hearing, when Comey choked up as he recalled the White House's publicly stating that the president had fired him because the "FBI was in disarray."

This emotional display seemed out of character for Comey. While U.S. attorney for the Southern District of New York, he successfully prosecuted organized crime. As deputy attorney general during the George W. Bush administration, Comey refused to sign an extension of the warrantless domestic spying program and defied the White House counsel and chief of staff. Comey can fairly be described as a "tough guy." So how did he go from leading the most powerful law enforcement agency worldwide to being labeled a "leaking liar"?

To an experienced whistleblower advocate, Comey's predicament is not surprising. Comey's experience, unfortunately, is like those of many whistleblowers I have represented over more than a decade. President Donald Trump promised to bring a business approach to government — and his retaliation against Comey is straight out of the corporate defense playbook. Corporations typically take the following steps of escalating retaliation to silence whistleblowers.

## **Intimidate and Silence the Whistleblower**

In his June 8 testimony, Comey described in detail how the president had asked him to drop the investigation of former U.S. National Security Adviser Michael Flynn and had conditioned Comey's job on "loyalty" to him. Sen. Marco Rubio, R-Fla., expressed skepticism about Comey's feeling intimidated by the president and blamed Comey for not pushing back. But that type of Monday-morning quarterbacking ignored the power dynamics of the conversation. Comey wanted to keep his job and was understandably reluctant to accuse the president of obstructing an investigation.

Whistleblowers often confront this intimidation tactic in the workplace. A supervisor or senior company official tells the whistleblower to "let it go," "mind your own business," or learn to be a "team player." And in some cases, the whistleblower is told to shut up if he or she wants to remain employed. Threats of retaliation, whether express or implicit, are powerful tools to silence a whistleblower. When a company officer or senior manager orders a subordinate to do something unlawful or to cover up unlawful conduct, holding firm to one's ethical values is not an easy avenue to follow. As Comey learned, refusing to carry out an unlawful order may be career suicide, at least in the short term.

## **Retaliate Swiftly and Severely Against the Whistleblower**

Initially, the bizarre method of firing Comey seemed surprising for a president who perfected the art of firing on his reality show, "The Apprentice." Comey was not given an opportunity to resign; he was not even notified that he had been fired. But now that we know about the president's real motive for firing Comey, it's clear that his tack was deliberate.

Comey learned of his firing while addressing FBI agents at a Los Angeles field office when the announcement flashed across a television screen. [The White House](#) had announced Comey's firing without notifying Comey himself. Trump sent a loud and clear message to Comey and to every senior government official about the consequence of disloyalty.

In the corporate workplace, whistleblower-employees are similarly humiliated as a warning to their colleagues. A whistleblower may be escorted out of the office with security guards while other employees are present, pulled out of a meeting and fired on the spot in front of colleagues, or simply fired via text message. When a corporation fires a whistleblower in this humiliating fashion, it ensures that all other employees know the consequence of whistleblowing.

### **Badmouth the Whistleblower and Their Work History**

Firing Comey in a humiliating and offensive manner served only as phase one. Trump then defamed Comey and asserted that he fired him because of chaos within the FBI, as well as the alleged loss of confidence in Comey among FBI agents.

These statements stand in stark contrast to the president's repeated, public praise of Comey before Comey refused to comply with the president's "hope" that Comey drop the investigation of Flynn. Indeed, if Trump believed that Comey's leadership caused chaos within the FBI, then why did the president invite Comey to continue to serve as FBI director?

This patent distortion of Comey's performance record is an all-too-common experience of whistleblowers. Prior to blowing the whistle, they receive strong performance evaluations and bonuses; they are valued members of the team. But once they blow the whistle and refuse to drop their concerns, they are suddenly deemed incompetent and unqualified for their position. And when a company realizes that it lacks any existing basis to fire the whistleblower, it creates one by subjecting the whistleblower to heightened scrutiny and setting the whistleblower up to fail. For example, a company might place the whistleblower on a performance-improvement plan that contains impossible objectives, and then fire the whistleblower for not meeting those unattainable goals.

This tactic may backfire and enable a whistleblower to ultimately prevail at trial, but the damage to the whistleblower's reputation is permanent. Prospective employers are reluctant to hire someone who was previously fired for poor performance and are especially reluctant to hire a whistleblower. Many whistleblowers never find comparable employment and must accept lower-level positions, earning a fraction of what they did before their wrongful termination.

### **Attack the Whistleblower's Credibility**

Apparently, Trump has no evidence to rebut Comey's vivid account of the president's alleged attempts to obstruct justice. So Trump called him a "liar."

Desperate to defend themselves at all costs, corporations frequently employ this tactic — labeling the whistleblower a disgruntled former employee who will say anything to win his or

her case. So far, this is not working well for Trump, whose accusation merely serves to shine a spotlight on his own questionable credibility.

Attacking a whistleblower's credibility is an effective and pernicious tactic in many whistleblower cases. Once expelled from a company, a whistleblower is marginalized and alienated from former co-workers. The key witnesses continue to work at the company and, fearing retaliation, are reluctant to corroborate the whistleblower's testimony. Though whistleblowers may still prevail (for example, by using documentary evidence), the attack on a whistleblower's credibility is odious because the company fired the whistleblower precisely for having integrity.

### **Create a Post-Hoc Justification for Firing the Whistleblower**

Prior to firing Comey, Trump papered the file with a post-hoc justification for the firing. After the president decided to fire Comey, Deputy Attorney General Rod Rosenstein was tasked with drafting a memorandum to the attorney general outlining concerns about Comey's performance. Most of those concerns focus on Comey's statements about the investigation of former Secretary of State Hillary Clinton's use of a private email server. Surely Trump knew of those public statements when he repeatedly asked Comey to remain as FBI director (as long as he could pledge "loyalty" and drop the Flynn investigation).

In this case, the White House's initial reliance on the Rosenstein memo as the basis for the decision to fire Comey backfired because Trump told [NBC](#) anchor Lester Holt that he had decided to fire Comey regardless of the memo. In many whistleblower-retaliation cases, however, these types of pretextual memos may be persuasive. Some judges even rely on such memos, which mask the real reason for a firing or other adverse action, to grant the company summary judgment and deny the whistleblower a jury trial.

On the other hand, creating a post-hoc justification for a retaliatory adverse action sometimes misfires by providing strong evidence of pretext and spurring a jury to award punitive damages. For instance, a former in-house counsel at [Bio-Rad Laboratories](#) recently secured more than \$11 million in damages at trial in a Sarbanes-Oxley whistleblower-retaliation case. The jury awarded \$5 million in punitive damages because Bio-Rad had backdated a negative performance evaluation of the whistleblower that the company drafted after it fired him.

### **Focus on the Whistleblower's Alleged Misconduct**

To distract attention from what may be obstruction of justice, Trump and his attorney have focused on Comey's leak to the press and have alleged that the leak was unlawful. This accusation seems frivolous because Comey did not leak classified information, grand jury material or other sensitive information. Instead, he revealed that Trump had conditioned his continued service as FBI director on his agreeing to drop the investigation of Flynn. As a private citizen, Comey has a constitutional right to blow the whistle to the media about this matter of public concern. Comey did not reveal to the media information from FBI investigative files or classified information. Yet Trump and his allies compare Comey to leakers who illegally disclosed classified information. This is an appalling accusation against the former head of a law

enforcement agency.

But this is another standard corporate defense tactic in whistleblower cases. To divert attention from the wrongdoing that the whistleblower exposed, the company uses its substantial resources to dig up dirt on the whistleblower. The company or its outside counsel examines the whistleblower's timesheets and expense reports with a fine-tooth comb to find any discrepancy, reviews every email to find some inappropriate communication, and places all of the whistleblower's work under a microscope to find any shortcoming.

### **Sue the Whistleblower and Initiate a Retaliatory Investigation**

Firing Comey, concocting a pretextual basis for the firing, and branding him a leaking liar apparently was not sufficient retaliation. So shortly after his testimony, Trump's personal attorney announced his intention to sue Comey and/or file a complaint with the [U.S. Department of Justice Office](#) of Inspector General (OIG). I am skeptical that a civil action against Comey or an OIG complaint poses any real legal threat to Comey. To the contrary, such a complaint would likely pose a greater risk for Trump, including potential counterclaims and the risk of being deposed or questioned under oath by the OIG.

The misuse of legal process against corporate whistleblowers, however, is an especially powerful form of retaliation in that it can dissuade a whistleblower from pursuing their claims. When I defend against this form of abuse of process, I am always struck at the seemingly endless resources that the company will spend to prosecute claims lacking any merit or value. Fortunately, these claims can go awry by spawning additional retaliation claims under the whistleblower protection laws. And a jury can punish the employer for subjecting the whistleblower to abuse of process.

### **Why Whistleblowers Deserve Strong Legal Protection**

In light of Comey's distinguished record, he will likely bounce back and rebuild his career. But most corporate whistleblowers never fully recover. Too often they find their careers and reputations destroyed. Even when whistleblowers obtain monetary relief at trial, they are usually blacklisted from comparable positions, especially if they work in a small industry.

Comey's experience as a whistleblower is a stark reminder of what can happen to any employee who is pressured by a powerful superior to engage in unlawful conduct or to cover up wrongdoing. When intimidation tactics succeed, the public suffers. The company could be covering up threats to public health or safety, environmental contamination, financial fraud, defective products, or any other conceivable harmful wrongdoing.

Courageous whistleblowers who put their jobs on the line deserve strong protection. As Congress embarks on a mission to gut "job-killing" agencies, let us hope it will spare the very limited resources that are spent enforcing whistleblower protection laws. Without such a large backlog of whistleblower cases, the [Occupational Safety and Health Administration](#) could have, for example, addressed the complaints of [Wells Fargo](#) whistleblowers years ago, potentially curbing or halting the bank's defrauding of its customers. And Congress should consider filling the gaps

in existing whistleblower laws. If Comey “lacked the presence of mind” to explicitly reject the president’s improper demand for him to drop the Flynn investigation, then surely most employees would also be reluctant to refuse an order to commit an unethical or unlawful act.

After Comey’s testimony, House Speaker Paul Ryan, R-Wis., pointed out that “[t]he president’s new at this. He’s new to government.” Comey’s testimony should be a lesson for the president about how to treat whistleblowers. To make America great again, the president should abandon the "Rambo" litigation tactics that apparently served him well in New York real estate disputes, and instead view whistleblowers as allies, not as enemies. As Tom Devine of the [Government Accountability Project](#) and I argue in an article in the Emory Corporate Governance and Accountability Review, "[Draining the Swamp Requires Robust Whistleblower Protections and Incentives.](#)"

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