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The whistleblower's unending story

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COLUMBUS, OHIO

The guest lecturer steps to the front of classroom 322 with a lesson plan, but it's not drawn from any textbook.

Instead, Dave Welch comes with a story to tell, edgy and very personal. The names have been changed, he says, "to protect the guilty."

He directs students in this class, focused on preventing white-collar crime, to look at corporate financial forms he's projected on to a screen. Years ago, working at a small-town bank in the Virginia mountains, Welch combed through these figures and saw things that made him suspicious. He was certain they pointed to problems that could not be ignored.

When he confronted the bank's president with his doubts, it cost him his job.

In another time, the story might have ended there. But this time -- the months after titanic scandals capsized Enron and WorldCom -- things would be different.

There ought to be a law, Congress decided, to protect workers who blow the whistle on what might be the next Enron. Who could've imagined the fight between the little bank and the fired accountant would become the new measure's most unlikely -- and most strenuous -- test?

That was more than five years ago, and more than 1,000 self-professed whistleblowers have come forward since.

The great majority have seen their cases rejected; about 160 settled before an initial ruling. Only six workers have won before a Labor Department judge -- and the review board that hears appeals has not ruled in favor of a single whistleblower.

Now, standing in the darkened classroom, Welch is ready to bring his story to a close. It's not easy, though, to conclude something that winds on without an ending.

"This is the message the courts are sending to whistleblowers," Welch says, the Tennessee in his voice taking on a chill. A new image beams on to the classroom screen -- a pack of hounds in pursuit of blood. Right in their midst is the prey, a very nervous fox, his head down low.

"When you're in deep trouble, keep your mouth shut and your eyes straight ahead."

Six years ago, Americans embraced whistleblowers as a new kind of hero.

If only Sherron Watkins' warning had been heeded, Enron might have survived, some said. Then an auditor, Cynthia Cooper, stepped forward and exposed massive bookkeeping fraud at WorldCom.

The "year of the whistleblower," one business magazine crowed. The two women, together with FBI whistleblower Coleen Rowley, were crowned by Time magazine as its people of the year.

Congress, too, took note.

In July of 2002, President Bush signed a new law, known as Sarbanes-Oxley, requiring top executives to stand behind their companies' financial statements and work to prevent fraud and abuse.

But the new law also spoke to corporate foot soldiers, offering them whistleblower protection -- albeit with loopholes.

The law "is a breakthrough that means we've reached the promised land!" said Tom Devine of the Government Accountability Project, a whistleblower advocacy group, in an interview at the time.

From the start, though, the scope of the law's protection came into question. Hours after Bush signed, a White House spokeswoman said the administration believed it applied only to whistleblowers who talked to a Congressional committee pursuing an investigation.

"I don't see any room for interpretation here," responded one of the measure's authors, Sen. Chuck Grassley, R-Iowa. "Our intent was plain, to protect corporate whistleblowers, period."

Months later, a world away from both Beltway politics and big-money scandals, tensions began to flare inside the three-story brick offices of Cardinal Bankshares Corp. Cardinal is a holding company for the local bank in the one-stoplight town of Floyd, Va., population 432. It had 53 people on its payroll.

Welch was the chief financial officer. In the fall of 2002, he refused to approve financial statements, saying they appeared to overstate profits. He told the bank's president he suspected him of insider trading in Cardinal stock. The president, Leon Moore, was furious when Welch compared his bank to Enron.

In late September, the bank's board suspended Welch, and days later it fired him.

Welch turned to the federal Occupational Safety and Health Administration, which enforces whistleblower protection. An OSHA investigator determined that the bank was not at fault.

But a federal administrative law judge saw it differently. The new law "was expressly enacted by Congress to foster the disclosure of corporate wrongdoing and to protect from retaliation those employees, officers and directors who make such disclosures," the judge wrote in early 2004, ruling the bank should reinstate Welch.

The decision made Welch the first worker to win protection under the new law. Now came the acid test: What was that protection worth?

There's not much call for accountants in the small towns of the Blue Ridge, much less for one battling his former employer.

But Welch, attached to life on a 22-acre farm he and his wife had bought from her grandparents, was determined

to stay. He spent six months sending out resumes and going to job interviews.

At least a few seemed to go well. But afterward, employers and their jobs seemed to vanish "into a black hole not to be heard from again," he says.

With state unemployment aid running out, Welch listened when a friend recommended a finance job at a hospital 3 1/2 hours away in the mining town of Grundy. He rented an apartment there, driving his Subaru with more than 200,000 miles on it back home on weekends.

The job was eliminated in cost-cutting a little more than a year later. But shortly before, the Labor Department's judge ruled in Welch's favor. The couple, who stumbled on the decision while checking e-mail during a vacation, hugged each other in the hotel lobby. Welch felt vindicated.

But the bank -- denying Welch's accusations and accusing him of insubordination and incompetence -- had no intention of giving in.

"We determined through a thorough and fair investigation that there was no merit to Mr. Welch's complaints," the board of directors wrote in an "open letter" published in the weekly Floyd Press, soon after the ruling. "We believe our decision was right then and we believe even more firmly now that our decision was correct."

The bank appealed, investing heavily in a case that it and other banks saw as setting a crucial precedent.

Before Cardinal fired Welch, the bank spent about \$100,000 a year on professional and legal expenses, according to its filings with the Securities and Exchange Commission. Since then, its bill has jumped to more than \$400,000 a year, substantial for a company with annual profits of about \$2.5 million.

"We just said, look, we're not going to set back on this," says Moore, the bank president. "We're going to fight it."

Moore's bank is local in more than just name. At the time, it had just 600 shareholders, nearly all of them living in and around Floyd. The board -- which includes a pair of dentists, a dairy farmer and a local school official -- sent a letter to all of them, explaining its actions.

Moore says people came up to him at the bank's annual meeting and urged the company not to give in. He took his viewpoint on the road, speaking about the case to banking industry groups.

Meanwhile, it was becoming clear to Welch that if he was going to find work, the couple would have to move. He became convinced of his status as an exile the afternoon he ran into a former co-worker from the bank, at the counter of the Floyd Pharmacy.

"She looked around to see if anybody was watching her," Welch recalls, "and she said, 'Excuse me, I can't talk to you,' and she walked away."

Congress sent a straightforward, and sweeping, message to would-be whistleblowers.

A worker didn't have to be right. As long as the worker "reasonably believes" the company had broken securities law or harmed investors, and could show they'd been retaliated against for speaking up, that was enough. The government could then step in to resolve the dispute by ordering the company to take the worker back, and pay damages, even if the company chose to appeal.

But when the Labor Department judge ruled for Welch 16 months after he was fired, the promise of resolution dissolved in a protracted tug-of-war.

The bank argued that the judge's ruling was not a "final" order. Taking Welch back would be impossible. He'd already been replaced and bringing him back would severely disrupt life inside a company where everyone knew their co-workers and he was clearly not wanted.

Nearly 2 1/2 years after Welch was fired, the judge again ordered reinstatement and back pay, and the company refused. The question of what to do next bounced back and forth between Labor officials, federal court and the Administrative Review Board that has the Labor Department's final word on such matters.

Federal lawyers backed Welch, arguing that the bank had to take him back, even if temporarily.

In spring 2006 -- more than three years after Welch was fired -- the ARB, too, ordered Cardinal to take Welch back on a temporary basis. The bank again refused.

In October 2006, a U.S. District Court judge in Roanoke, Va. declined to enforce the reinstatement order, while expressing concern.

Lawmakers expected the Labor Department to resolve whistleblower cases in "a matter of days," Judge Glen Conrad wrote. Four years after Welch's firing, the case was still not settled. "The delay in the administrative process has been inordinate."

By now, the accountant had long given up finding another job locally. Down to one paycheck, the Welches say they burned through \$115,000 in investments. In late 2004, they sold the farm where they'd hoped to retire. They moved close to Liberty University, the school founded by evangelist Jerry Falwell, where Welch had taught a class or two. He thought the school might hire him full-time.

Meanwhile, there was a growing debate over whether Congress' effort to protect whistleblowers was working.

Lawyers for companies say many corporate whistleblower cases have failed because they are frivolous, brought by angry workers looking to settle a score.

In the few cases like Welch's that moved forward, the government has investigated carefully, determining that much of what workers allege is beyond the scope of the law, said Michael Delikat, a New York attorney who represents employers in such cases.

But critics disagree.

Instead of protecting workers who suspect fraud, the Labor Department has been "defining more and more whistleblowers out of protection," said Richard Moberly, an assistant professor of law at the University of Nebraska who analyzed the outcomes of such cases.

Labor Department officials say they are administering the law as it was written.

"We're trying to apply things and understand them," said Nilgun Tolek, director of OSHA's office of whistleblower protection.

The law, she says, applies to workers who report suspected wire fraud, bank fraud and other specific misconduct: "While some people may see that as reading the statute too narrowly, that is what the statute says."

The Labor Department's success should be measured, at least partly, in the settlements it has helped broker between workers and employers, officials say.

But Moberly is skeptical because he has been unable to review details of those settlements. Critics say they are concerned to see the Labor Department issuing so few decisions favoring workers. Through February, the government has ruled in 1,091 Sarbanes-Oxley cases, coming down on the side of workers just 17 times in initial rulings.

"The carefully targeted legislation that you've described is legislation that has failed to protect people," Rep. Tim Bishop, D-N.Y., said at a House hearing last year.

The promise to protect whistleblowers after Enron is falling well short of expectations, Moberly says.

The prime example, he says, is the odyssey of Dave Welch.

When he couldn't find work, Welch went back to school.

A classmate -- an accounting professor also continuing his studies -- encouraged him to apply for a job at the Ohio campus where he worked.

By then, Welch had grown skeptical about job interviews. Employers seemed reluctant to gamble on him, and he figured their rejections were based on his whistleblowing past. When Franklin University in Columbus called about a job on its accounting faculty early last year, he said a prayer.

At the end of his interview at Franklin, Welch was shown in to the office of Paul Otte, the school's president at the time.

Otte is a blunt-spoken long-ago Marine who sits on two corporate boards. He'd heard about Welch. The case, Otte says, reminds him of an article he'd written, a few months before the interview, on the need to challenge corporate authority.

He invited Welch to take a seat across a coffee table in the desk-less office.

"Let me ask you," Otte said. "Did you refuse to certify (the bank's financial statements) or did you sign them and then blow the whistle?"

"I refused to sign," Welch said, unsure which was the right answer.

It was good enough for Otte, whose article preaches this message: "The greatest failures resulting from unchallenged authority have occurred when people reporting directly to the CEO lacked the courage to challenge their boss."

Welch got the job.

Last July -- nearly five years after Cardinal fired Welch -- the Labor Department's review board ruled in favor of the bank. As a trained accountant, Welch could not have "reasonably believed" that the financial reports he objected to were problematic, the board said.

The ruling came just weeks before Welch started his new job in Ohio, supervising introductory accounting

classes.

He makes the rounds of most of those classes, and others on accounting fraud and investigation, offering his own experience as a window into the real-world choices students will be expected to make.

Welch once promised that he would go back to his desk at the bank if God opened the door. But while he has moved on, he and the bank have continued battling.

Soon after the review board ruled, Welch appealed. The case is set to be heard by a federal appeals court in Richmond, Va. in mid-May.

Both the accountant and the bank say they deserve to win. Both say they expect that, whatever the court decides, the case is likely to go on.

Moore, the bank president, acknowledges that Cardinal has spent heavily to defend itself in the case, but says the bank never considered settling with Welch. The stakes are too high to compromise.

"If you don't stand up for what you think's right, then you don't really need to be in this business," Moore says.

At least on that, the two men can agree.

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