Whistleblowing: How do people actually feel?

History:

Fraud, in any instance, has negative impacts on society; when the claims that are being made involve the health care system- they seem somehow worse. To try and deal with this problem, and to try and recover some of the money that these acts of fraud lost, a federal program was put in place in 1863. It was an act that was supposed to help and fight defense contract fraud and it was put into action by the Department of Justice (DOJ). Unfortunately, in the beginning the people who this act was supposed to protect were very often the people who could not afford to use it. When the act was amended in 1943, it became even harder for a person to bring a lawsuit against the government. However, in 1986 the federal false claims act was again amended but this time it was to create “the whistle blowers” protection amendment. This amendment made the not only increased the award amount and allowed the claimant to file the suit even if the government had prior knowledge of the lawsuit, it also was supposed to protect the whistleblower. Being a pharmacist comes with a great responsibility to always act in an ethical manner that puts the patient at the forefront of all actions. This will be a look at what the false claims act is, some cases of whistle blowing that are related directly to pharmacy, a look into studies of ethical values of healthcare workers, and what this all means in relation to the practice of pharmacy.

The federal false claims act was originally enacted in 1863 to fight defense contract fraud but was applicable to all governmental programs. “The federal False Claims Act permits a person with knowledge of fraud against the United States Government, referred to as the "qui tam plaintiff," to file a lawsuit on behalf of the
Government against the person or business that committed the fraud (the defendant). If the action is successful the qui tam plaintiff is rewarded with a percentage of the recovery.”(lawlibrary.com)¹ However, it was not feasible for the average citizen to bring forth a suit until the act was amended in 1986 with the “whistleblower protection clause”. This clause not only protects the whistleblower from harassment, demotion, and wrongful termination; it also extends to anyone who investigates, testifies, initiates, or assists in a qui tam lawsuit.²(Vivian) Qui tam is “Latin for who as well, a lawsuit brought by a private citizen (popularly called a "whistle blower") against a person or company who is believed to have violated the law in the performance of a contract with the government or in violation of a government regulation, when there is a statute which provides for a penalty for such violations. Qui tam suits are brought for "the government as well as the plaintiff." In a qui tam action the plaintiff (the person bringing the suit) will be entitled to a percentage of the recovery of the penalty (which may include large amounts for breach of contract) as a reward for exposing the wrong-doing and recovering funds for the government. Sometimes the federal or state government will intervene and become a party to the suit in order to guarantee success and be part of any negotiations and conduct of the case. This type of action is generally based on significant violations which involve fraudulent or criminal acts, and not technical violations and/or errors.”³ (legal dictionary.com) These actions have brought the recovery of billions of dollars by the department of Justice (DOJ), with a large portion of the fraud being discovered in the health care industry.
**Cases:**

Several cases involving health care fraud have been used to recover the money mentioned. One of the largest to date that has settled was the Medco Pharmacy Benefits Manager (PBM) case. This case was brought about due to major issues with the way the company processed the prescriptions that were sent to it. Some of the issues were that the company issued false statements about the filling and dispensing of prescriptions to avoid penalties and late fees for failing to meet their contractual obligations, it also switched medications to less expensive ones without the consent or knowledge of the doctor or patient, and it filed claims with the government for services rendered without regard to the validity of such claims. On October 23, 2006, a statement regarding this settlement was released to the press. It began, “One Of The Most Actively Litigated And Longest-Running Actions In Federal False Claims Act History Settled Today, Demonstrating Unprecedented Coordination And Cooperation Among The Government And Private Counsel Two Veteran Pharmacists' *Qui Tam* Action Initiated The Case And Helped Government Recover $84 Million Of $137.5 Million In Today's Mediated Final Settlement Reached Among Whistleblowers, Federal Government And Medco Health Solutions, Formerly Merck-Medco Managed Care, L.L.C.”³ This case was noteworthy for several reasons:

1. Length
2. Complexity
3. Industry changing results.

“This matter had been scheduled for an at least two-month jury trial before the successful mediation rendered the trial moot. To ultimately reach an amicable resolution, the
novelty, complexity and magnitude of this multi-faceted litigation demanded a vast expenditure of both public and private resources in order to reach a settlement that, not only benefits the public, but will change, and to some degree has already changed, the course of how all Pharmacy Benefit Managers (PBMs) contract and deal with both the federal Government and state governments in the future.\textsuperscript{4} (Raspanti) This case changed the way that PBM’s were allowed to operate and deal with the federal government. The Pharmacists in this case, Walter W. Gauger and George Bradford Hunt, had over 30 years of experience between them and were the ones who originally brought this case to the attention of the public. Gauger and Hunt spent seven and a half years of their careers to ensure that the integrity of pharmacy as a profession, and their own personal ethical codes, were not compromised by the actions of a corporation.

Another case that relates to pharmacy directly was brought about by Jeffery Fundin, PHARM.D., B.S., DAAPM, is Clinical Pharmacy Specialist, Stratton Veterans Affairs Medical Center, Albany, NY; and Adjunct Associate Professor of Pharmacy Practice, Albany College of Pharmacy that alleged violations of patients rights during cancer therapy investigations in the Veterans Affairs Medical Center in Albany, NY. Fundin first tried to voice his concerns to the Chief of Staff at the SVAMC about patients being included in studies that did not meet the inclusion criteria and that patient s were being included in studies without their knowledge or after having been coerced into it. When his concerns were ignored, he began to climb up the chain of command in the attempt to get anyone to do anything about these violations. He stuck to his ethical code even when all of the officials that he went to higher up with his claims told him that he should back off or that he would be ruined. Even when one of the directors took his side
and tried to help him, the only consequence was for that director to end up unemployed too. It took a decade of his life, and a new story in the New York Times, to bring these violations to the attention of the public.\(^5\) (Fundin)

He offers some survival strategies to help a “whistleblower” to survive the ordeal and keep his/her career as intact as possible. He states “If you are going to court, get an attorney who knows the system and specializes in employment law, not health care law. Allow your friends and colleagues to help. If you work for a large institution, you have the advantage. If you did the right thing, medical doctors, nurses, pharmacists, and other health care professionals will help you achieve your ultimate goal—protecting the patient. It is similar to the American colonists fighting the redcoats—the settlers were more familiar with the inner workings of the U.S. territory, and they could easily ambush their adversaries. Without realizing it, I was considered a modern-day Paul Revere, a whistleblower. And so, the struggle began.”\(^5\) (Fundin)

Jeffery Fundin, Walter W. Gauger, and George Bradford Hunt are rare examples of success and perseverance in the face of the adversity that people who blow the whistle will face. All too often the final thoughts of a whistleblower are “why the heck didn’t I keep my mouth shut?” Society as a whole and people in general, do not have a good view on people who “tattle” and whistle blowing to most of them falls into this category. I have had personal experience with this view. In 1990, which would have been just a few years after the whistle blowing amendment was added to the false claims act, I was involved in a similar situation, albeit it on a smaller scale. I was working as an aide in a nursing home and was witness, along with several other aides, to an act of abuse by one of the other staff members. The abuse was reported to the charge nurse and we were all
asked to write up statement about it. We were assured that these statements would be confidential and that there would be no retaliatory acts from anyone involved for our writing them. I did as I was asked, prepared my statement and gave it to the director and all seemed well. At least until the next day. When I got to work that day two of the other aides had already quit from pressure that was being exerted on them to recant their statements. We were all told that not only were there no charges being brought against this particular person, we were all going to be investigated. Not only did they not believe us, and there were five of us all with the same story, they felt that we were coming forward because we were jealous of her and her position. I did work there for about three more months. They were some of the most unbearable that I have ever been through in a place that I worked at. Everyone knew who had written the statements and not only did the person who committed the act make our lives impossible, so did all of our other coworkers. Our coworkers felt that we should have just let it go.

**Statistics:**

The statistical results that include former whistle blowers don’t look good at all. According to the IJME, (Indian Journal of Medical Ethics) “in a survey of 87 American whistleblowers from the civil service and private industry, all but one experienced retaliation, with those employed longer experiencing worse reprisal. Harassment came from peers as well as superiors and most of those in private industry and half of those in the civil service lost their jobs. Of the total, 17% lost their homes, 8% filed for bankruptcy, 15% got divorced and 10% attempted suicide.” (IJME) These statistics do not favor the whistleblower at all. The thing that was most fascinating here was that the IJME actually printed a list of ethics for the whistle blower.
“A code of ethics for whistleblowers

Norman Bowie lists his requirements of justifiable acts of whistle blowing:

1. The whistle blowing stems from the moral motive of preventing unnecessary harm to others.
2. The whistleblower has used all the available internal procedures for rectifying the problem before making public disclosure. (This may be precluded under certain special circumstances.)
3. The whistle blower has ‘evidence that would persuade a reasonable person’.
4. The whistleblower perceives serious danger from the violation.
5. The whistleblower acts in accordance with responsibilities for ‘avoiding and/ or exposing moral Violations’.
6. The whistleblower’s action has reasonable chance of success.”¹⁰ (Bowie)

This “code of ethics” can be compared to the

Pharmacists Code of Ethics:

“I. A pharmacist respects the covenantal relationship between the patient and pharmacist.
II. A pharmacist promotes the good of every patient in a caring, compassionate, and confidential manner.
III. A pharmacist respects the autonomy and dignity of each patient.
IV. A pharmacist acts with honesty and integrity in professional relationships.
V. A pharmacist maintains professional competence.
VI. A pharmacist respects the values and abilities of colleagues and other health professionals.
VII. A pharmacist serves individual, community, and societal needs.
VIII. A pharmacist seeks justice in the distribution of health resources.”¹¹ (APhA)


This code of ethics is much more stringent than the one that Bowie proposes for whistle blowers, as it should be. As pharmacists we take an oath that is meant to be adhered to, even in the face of doubt and abuse by the public that we swear to serve. It means that even though we believe that it will cost us greatly personally, we are sworn to uphold our values and beliefs and most importantly to maintain the highest standard of care for all of the patients which we serve.

Results:

Unfortunately, the retaliation against health care providers is a very real issue. There have been cases of pharmacists being fired and not being able to work at any other job; they have lost their patient base, livelihood, possessions and even their families due the retaliation. Even with the whistle blowers act this scenario happens all too often. Physicians are not immune to this retaliation either. According to an article in medical economics, there are numerous cases of physicians being labeled as trouble makers simply for trying to ensure that the patient care issues that they had were dealt with.

1. “Sanford Klein had served as chief of anesthesiology; in 2001, Klein sent a memo to his supervisor stating that unless conditions improved, he would refuse to work in the department. The response: he was removed from clinical duties.

2. Emergency physician David Lemonick joined the ED at Pittsburgh's Western Pennsylvania Hospital in 2000, he repeatedly complained to his department
chairman about various patient safety problems. The chairman reacted with hostility… In October 2004, Lemonick wrote to the hospital's CEO to express his concerns about patient care, and his fear of retaliation for reporting them.

Lemonick claims the CEO thanked him, promised an investigation, and assured him there would be no such retaliation. One month later, however, when Lemonick reported for work, he was informed that he'd been terminated.

3. San Francisco internist John Ulrich Jr. protested at a staff meeting, claiming the layoffs would endanger patient care. He and a group of colleagues later sent a written protest to the city's health department. About two weeks later, the hospital's medical director informed him that a peer review committee had launched an investigation into his professional competence. Disgusted, Ulrich resigned. The hospital reported his resignation to the state board and the National Practitioner Data Bank, noting that it had followed "commencement of a formal investigation into his practice and professional conduct." Although the state board found no grounds for action, the hospital refused to void the NPDB report, which essentially made Ulrich unemployable as a practicing physician.14 (Rice)

While it is nice to believe that one can hold to their high standards and that it would be easy to come forward in the event of such fraud, when asked many of the people who have blown the whistle say that if they knew now what would happen they would have thought twice before bringing suit against the government; even with the settlement money life doesn’t get any easier.
The reason that life doesn’t get any easier goes back to basic human nature. Beginning in childhood, a person is taught that tattling is wrong. It always brought the accusers actions into scrutiny as well and while in these whistle blowing cases they may be an upstanding member of society, putting anyone under a microscope makes them look bad. Their colleagues may begin to look down on them and judge them as disloyal or unethical. It is also very easy to become paranoid and begin to doubt ones self. If you are the only one that sees a violation- did you really see it? A conviction must be very powerful to withstand a decade of scrutiny. Within the practice of pharmacy, it is necessary to think of the patients first. The pharmacists that have blown the whistle and stuck to their convictions are to be admired. Fundin, Gauger and Hunt stuck with the oaths that they had taken when they became pharmacists to ensure that their patient’s rights were protected. This is the standard to which all pharmacists should strive to hold themselves to.

**Surveys:**

There have also been a number of surveys that have tried to gauge the response of people to whistle blowing. The first of these surveys that I looked into was the Freehills whistle blowing Esurvey, which was conducted in 2003 in a setting unrelated to health care itself. This was an electronically delivered survey that was delivered to companies, local government (councils) and other businesses regarding their whistle blowing awareness and practices. Of the 819 surveys that were sent out, 729 were valid (sent to a valid email address) and of these there were 162 (21%) responses. This, according to the author of this study, was an above average return rate. The usual return rate being only about 15% for this type of survey. Upon analysis, it was found that “there is a big
difference in the levels of awareness between the private and the public (local
government) sectors.” Freehill Esurvey) The results of this survey confirmed that there
was a greater emphasis placed on whistle blowing in the public sector then in the private
sector.

A study of medical students and their perception of whistleblowers was
performed at the University of Glasgow Medical School on a cohort of students entering
Glasgow University’s new learner-centered, integrated medical curriculum in October
1996. The methods that were employed in this study were to qualitatively and
quantitatively measure the attitudes of the student’s pre-medical school, post- year 1,
post-year 3 and post- year 5. This was done by using their responses to the whistle
blowing vignette of the Ethics in Health Care Instrument (EHCI). This study very
succinctly defined its conclusions and key learning point in the following table:

1. “Students may arrive at medical school with negative attitudes towards whistle
   blowing. Students’ potential moral ambivalence towards whistle blowing requires
to be acknowledged.

2. As in other studies, there was little improvement in students’ performance as they
   progressed through the curriculum in terms of their potential whistle blowing
   behaviour.

3. Students should be encouraged to contemplate ethical dilemmas from all ethical
   perspectives and consider relevant legal implications.

4. The Ethics in Health Care Instrument has the potential to elicit students’ attitudes
   towards ethical issues at entry to medical school and to measure change as they
   progress through the curriculum.
5. Whistle blowing must be addressed as part of the wider domain of professionalism." (Goldie)

The reasons that they gave for or against whistle blowing are in the chart below:

<table>
<thead>
<tr>
<th>Reasons for not blowing the whistle</th>
<th>Pre-Year 1</th>
<th>Post-Year 1</th>
<th>Post-Year 3</th>
<th>Post-Year 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>The registrar knows best / not my place to criticize</td>
<td>10</td>
<td>3</td>
<td>5</td>
<td>4</td>
<td>22</td>
</tr>
<tr>
<td>Its what’s written that’s important</td>
<td>5</td>
<td>3</td>
<td>2</td>
<td>8</td>
<td>18</td>
</tr>
<tr>
<td>Resuscitation wouldn’t work / it’s for the best</td>
<td>5</td>
<td>3</td>
<td>1</td>
<td>5</td>
<td>14</td>
</tr>
<tr>
<td>Detrimental effect on career</td>
<td>2</td>
<td>4</td>
<td>5</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>What’s done is done</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>In case of legal repercussions</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>To avoid hurting the family</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Reasons given for whistle blowing (professional consensus based)</th>
<th>Pre-Year 1</th>
<th>Post-Year 1</th>
<th>Post-Year 3</th>
<th>Post-Year 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patient autonomy</td>
<td>9</td>
<td>9</td>
<td>6</td>
<td>10</td>
<td>34</td>
</tr>
<tr>
<td>Patient advocacy</td>
<td>6</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>14</td>
</tr>
<tr>
<td>Patient’s right to life</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>To prevent it happening again</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Duty to report colleagues’ bad conduct</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Registrar should respect colleagues’ contribution</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Reasons given for whistle blowing (others)</th>
<th>Pre-Year 1</th>
<th>Post-Year 1</th>
<th>Post-Year 3</th>
<th>Post-Year 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Let the chief decide / take responsibility</td>
<td>3</td>
<td>9</td>
<td>3</td>
<td>10</td>
<td>25</td>
</tr>
<tr>
<td>Duty to save patient</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Own conscience</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>In case of legal repercussions</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Personal opinions</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>12</td>
</tr>
</tbody>
</table>

This studies finding were consistent with others of the same type that had been performed. It was disturbing to note that the attitude of the students towards whistle
blowing did not change, only their justifications. This was evident in some of the
statements that the students wrote in the justification part of their answer. In the latter
part of their schooling, it was common to get answers like, “What can you do now? The
lady is dead. Saying anything would only cause trouble for a lot of people. But, if your
conscience can’t live with it then tell, but expect trouble.” 7 (Goldie)

Finally, a look into health care professionals that have already been practicing a
while. This study looked at the beliefs of both whistle blowing and non-whistle blowing
nurses. “The instrument listed statements from current ethical codes, statements
from traditional views on nursing and statements of beliefs related to the
participant’s whistle blowing experience. Respondents were asked to rate each item
on a five-point Likert format which ranged from strongly agree to strongly disagree.
Data were analysed using a Pearson’s correlation matrix and one-way ANOVA. To
further explore the data, a factor analysis was run with varimax rotation. Results
indicated that whistleblowers supported the beliefs inherent in patient advocacy, while
non-whistleblowers retained a belief in the traditional role of nursing. Participants who
reported misconduct (whistleblowers) supported the belief that nurses were primarily
responsible to the patient and should protect a patient from incompetent or unethical
people. Participants who did not report misconduct (non-whistleblowers) supported the
belief that nurses are obligated to follow a physician’s order at all times and that nurses
are equally responsible to the patient, the physician and the employer. These findings
indicate that nurses may respond to ethical dilemmas based on different belief systems.”8
(Journal of Advanced Nursing) This study looked at nurses and tried to find factual
evidence about why they would- or why they wouldn’t- blow the whistle when they had an ethical dilemma about a patient care issue.

**Fiduciary Duties:**

A pharmacist also holds a fiduciary duty to his/her patients. According to the definition in the legal encyclopedia “A fiduciary relationship encompasses the idea of faith and confidence and is generally established only when the confidence given by one person is actually accepted by the other person. Mere respect for another individual's judgment or general trust in his or her character is ordinarily insufficient for the creation of a fiduciary relationship. The duties of a fiduciary include loyalty and reasonable care of the assets within custody. All of the fiduciary's actions are performed for the advantage of the beneficiary.”\(^{12}\) (answer.com) This fiduciary duty applies to all aspects of pharmacists actions, he/she must uphold both the confidentiality of personal health information about their patients and also make his/her decision to act based on the best interests of their patients. In US Pharmacist, an article on the fiduciary duty of confidentiality that a pharmacy owes to its customers was actually tried in a New York Court. According to the article, “the plaintiff claimed that he had been a patient of the selling pharmacy for over 20 years and that he traded at the pharmacy based on his expectation of privacy. He assumed that the pharmacy would keep his personal medical and prescription records confidential and not disclose them without his prior consent. The plaintiff may have had reason to want his records kept private because he was diagnosed as HIV+ in 1986 and with AIDS in 1989. In any event, he alleged neither he nor any other customers were told of the impending records sale until the transfer was completed and the pharmacy was closed.”\(^{13}\) (Vivian) the court ruling went in the complainants
favor. It ruled that “The court concluded that because patients rely on pharmacists' expertise in using confidential information, a fiduciary duty is present.”¹³ (Vivian)

According to the article this case was not a landmark case because it was not an appeals court and the decision was not binding in any other court, but the implications of this decision is clear; As a pharmacist there is an expectation that, as a trusted health care professional, the patient’s interests will come first above all else.¹³

This fiduciary duty should make the choice to “blow the whistle” on a corporation or system that is abusing the rights of patients almost automatic. If a pharmacist is to uphold the standards to which he/she has bound himself/herself to when taking the

“Oath of a Pharmacist”

“At this time, I vow to devote my professional life to the service of all humankind through the profession of pharmacy.

I will consider the welfare of humanity and relief of human suffering my primary concerns.

I will apply my knowledge, experience, and skills to the best of my ability to assure optimal drug therapy outcomes for the patients I serve.

I will keep abreast of developments and maintain professional competency in my profession of pharmacy.

I will maintain the highest principles of moral, ethical and legal conduct.

I will embrace and advocate change in the profession of pharmacy that improves patient care.

I take these vows voluntarily with the full realization of the responsibility with which I am entrusted by the public.”¹¹

This oath means that, as a pharmacist, a person will hold themselves to a higher standard and ensure that their patients welfare above all else is cared for. As with the case of
Jeffery Fundin, who spent a decade of his life fighting to ensure that the patients involved in the studies at the Veterans Affairs Medical center, whether or not to blow the whistle on questionable practices may very well be a decision that a pharmacist has to make.

**Conclusion:**

Whistle blowing is a valid method of fixing problems within the system. It has been shown to recover billions of dollars in funds for the DOJ, with a large portion being recovered from the health care system itself. However, the attitude of most people towards whistle blowers is not a favorable one, they are seen as tattling. There is still retaliation towards them. In the health care system itself, pharmacists have lost their practices, possession’s and even families due to the pressure that was caused by the whistle blowing cases, doctor’s have lost hospital privileges and have been labeled as trouble makers, and even nurses have been pushed out of their jobs and labeled as hard to work with. The code of ethics that a pharmacist, doctor or nurse follows makes them different. It is necessary to hold the people that are entrusted with the health and welfare of the nation to a higher standard. It is the duty of a pharmacist to fix the violation by whatever means they can when he/she sees a violation of the covenantal relationship that they have with their patients. Pharmacists adopt an oath and code of ethics that makes them responsible for their patient’s health and well being. They also have a fiduciary responsibility to their patients. These facts make it imperative that they speak up when they see violations of this code.
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