

BURDENS OF PROOF

European Union Draft Directive on Whistleblower Protection

Burdens of proof are the rules for how much evidence parties must prove to win. As a result, they have unsurpassed impact on whether the law offers a fair chance for whistleblowers to defend themselves. Rapporteur Virginie Rozière recommends modifying Recital 70 to tighten legal standards for the employee's burden, which are only partially specified. The Recital requires the employee to provide reasonable grounds to believe retaliation occurred. The Rapporteur recommended a prima facie case if the whistleblower proves protected speech, followed by discriminatory action. Consistent with international best practices, both the Directive's Recital and the Rapporteur then place the burden on employers to prove retaliation was not part of the reason.

As summarized below, the Rapporteur's recommendation is well-taken for the prima facie case. **The Commission's and Rapporteur's consensus recommendation for a subsequent reverse burden of proof are also well-taken and should be adopted without modification.**

1. **Employers have a tremendous advantage over whistleblowers in access to proof.** As a rule, unemployed whistleblowers asserting their rights have been cut off from income, access to institutional records about their job, and access to witnesses. Employers, by contrast, typically have an unlimited budget, access to all relevant records on the dispute, and complete access to a labor force of witnesses who likely are afraid of retaliation themselves or trying to earn institutional favor through their testimony. Unless the burdens of proof compensate, the conflict is a hopelessly unfair fight.
2. **The Recital does not provide objective, realistic standards for the employee's burden.** The Recital states that the employee must prove reasonable grounds to believe the employer took an action due to whistleblower retaliation. But this essentially requires the employee to prove the ultimate conclusion of the case, rather than a realistic preliminary test. Further, it requires the whistleblower to prove the employer's subjective motive to retaliate. In the absence of a dramatic confession or smoking gun evidence, it is unrealistic to prove the employer's state of mind.
3. **The Rapporteur's recommendation provides an objective, realistic test for the employee's burden.** The employee passes the prima facie test by proving protected speech, followed by discriminatory action. In some best practice laws, this has been qualified temporally, such as requiring the action to occur within a reasonable time lag such as within two years of whistleblowing. An alternative, in the World Bank, many IGO policies, and modern U.S. laws, is merely to require proof that whistleblowing was relevant, or a contributing factor, to the employer's action.
4. **The Recital and Rapporteur's consensus then to reverse the burden of proof are well-taken.** This widely-accepted burden shift reflects two fundamental reasons: a) there already is a prima facie case of illegal retaliation, so the employer should be held accountable through a higher standard; and b) the employer has such far superior access to documents and witnesses that a higher burden is necessary to sustain an even playing field.
5. **The Rapporteur's recommendations are consistent with the international best practice standards** for burdens of proof, including the United Nations, World Bank and all other development banks with whistleblower policies, as well as all U.S. federal whistleblower laws since 1989. The principles are discussed in a law journal article published by the International Whistleblowers Research Network.¹

¹ See http://gala.gre.ac.uk/14461/4/14461_VANDEKERCKHOVE_Developments_in_Whistleblowing_Research_2015.pdf.