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91

RECEIVED
APR 24 1989
JAN FAIKS
SENATE OFFICE

NEA-ALASKA

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April 24, 1989

To: Senator Jan Faiks, Chair
Members, Senate Judiciary Committee

Re: CS for House Bill No. 91; An Act relating to protection for certain public employees and certain other persons who report or participate in a proceeding connected with a matter of public concern."

NEA-Alaska supports CS for HB 91 and encourages your favorable consideration.

This legislation is good public policy in that it provides the opportunity for improvement of government at all levels by enabling employees to be more productive and confident in fulfilling their responsibilities as employees and citizens as well.

School district employees have been subjected to reprisals for speaking out on matters of public concern.

HB 91 will permit all public employees to be more secure in their work environment knowing that they have a responsibility to speak out on matters of public concern.

The other strength of this legislation is that it does require employees to be responsible in their actions.

Thank you for your consideration of our position.

Respectfully submitted,

Bob Manners
Executive Secretary

Judy Salo
President

HOUSE LABOR AND COMMERCE COMMITTEE
ALASKA STATE LEGISLATURE
P.O. BOX Y, JUNEAU 99811
(907) 465-3892

February 6, 1989

M E M O R A N D U M

To: Members, House Judiciary Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: HB 91 - "Whistleblower" protection

The House State Affairs CS for HB 91, relating to protection of public employees who disclose certain public information, is currently before the House Judiciary Committee.

Modeled after other states "whistleblower" laws, HB 91 was introduced by the House Labor and Commerce Committee to provide protection for public employees who disclose information of public concern before a public body. A similar measure has been before this Legislative body for each of the last six years. Unfortunately, none has yet passed into law.

The House State Affairs CS adopted three amendments (see attached) to the bill as filed that:

- Specifically include school districts and REAA's under the definition of "public employer"
- Broaden the definition of "public body"
- Provide that the protections under the act do not apply unless the employee has reasonable cause to believe the information reported is a matter of public concern and that they report the information in good faith.

HB 91 is a much needed bill that will assure that the Legislature and other public bodies receive critical public information. I urge your support.

Ombudsman

Position Paper
CSHB 91 (SA)
Whistle Blowers Protection

The Office of the Ombudsman strongly supports the passage of HB 91 as a positive effort to improve the administration of Alaska's government. This office worked with the House Judiciary Committee in the development of its committee substitute and concur with its provisions. This bill will provide better protections for Alaskans who seek to correct problems with state and local governments.

Whistle Blowers protection is not a new concept to Alaska Law. Last year, the Alaska Legislature again embraced the concept through the adoption of the act creating the Long Term Care Ombudsman (2ch 108 SLA 1988). This act covers not only state-operated long term care facilities but private facilities and landlords and contractors who may take retaliatory actions against someone making a complaint. State labor law (AS 23.10.135) provides for penalties to any employer who "discharges or in any other manner discriminates against an employee because the employee has filed a complaint . . ." relating to the Wage and Hour Act.

The Federal Civil Service Reform Act of 1979 originally created Whistle Blower protections for federal employees. This past month it was revised with new "teeth" and signed into law by President Bush. There had been concerns that not enough employees had been protected by the previous act. The revision allows the Office of Special Counsel (OSC) to stop or postpone detrimental personnel actions which may be retaliatory to federal employees. It also prevents disciplinary actions being taken during the course of an investigation. The Federal Merit System Protection Board reviews the actions of the OSC and provides time extensions for the protections.

The Ombudsman's Interest

The Ombudsman Act requires that the confidentiality of the names of complainants and witnesses involved in an investigation "except insofar as disclosures may be necessary . . . to support recommendations" be maintained. The act also provides a maximum penalty of $1000 for a person who "willfully hinders the lawful actions of the ombudsman". The Ombudsman Act does not provide protections to those citizens, including state employees, who may either complain in good faith or provide testimony regarding one of our investigations.

This is an important issue for the Office of the Ombudsman. Lack of such protections has caused many citizens to withdraw apparently justified complaints when it became necessary for the ombudsman to release their names in order to "prove" information. Citizens have claimed to have not been hired for state jobs because of complaints made to the ombudsman. Several have claimed to have lost housing and other benefits because they complained. I have heard stories of people who believe that if they complain to the ombudsman they will lose a state benefit.

Few, if any, of these citizens would dare testify before the legislature in support of this measure because of their perceived fear of retaliation.

Complaints to the Ombudsman Covered

It is not unusual for my office to receive calls from potential complainants who first ask "Do you offer Whistle Blower protection?" More often than not, even after we explain our confidentiality provisions, the citizen will either just hang up or refuse to let the issue be further pursued.

Lack of such protection generates anonymous letters with allegations describing various degrees of abuses of the public trust being sent to my office. Such letters cause a dilemma. Some letters are clearly "poison pen" letters intended as revengeful acts. Others are honest attempts to cause an investigation of an action the author perceives as improper. In these cases, the author is clearly afraid of retaliation either by an agency or a supervisor.

As a matter of policy, my office does not pursue anonymous complaints. On rare occasions, I do consider an ombudsman initiated complaint (as allowed by the Ombudsman Act) if solid evidence is offered and there is opportunity for third party verification of the allegation. I believe the passage of a measure offering adequate Whistle Blowers protection would reduce the number of anonymous complaints received by the Office of the Ombudsman.

I was involved with a situation when an employee was fired from a position with a public agency for complaining to the ombudsman about fraud and mismanagement. The agency, after becoming aware of the complaint, conducted an internal investigation and created a reason for dismissing our complainant. As a result, our complainant, who was a specialized professional and head of a household, was unemployed for a 2 1/2 year period. It appeared many potential employers wondered why the termination occurred and would not offer the person a position. The family was forced to seek help from Public Assistance. After filing a civil suit and suffering through prolonged negotiations, a settlement was reached.

I believe had HB 91 been enacted at that time, the public employer may not have terminated that employee. The Alaskan and family involved paid dearly for doing what a responsible citizen should do -- ake a legitimate complaint to this office about governmental fraud. This person is not able to present testimony to you about the situation. They believe their settlement prevents such action.

Managers of that public agency were later prosecuted for their management abuses.

Witness Protection

Over the past several months, my office has received a number of complaints alleging misconduct on the part of office supervisors. It has been necessary to depose several of the staff in those offices. As often as not, clerk's or other staff in lower pay ranges are deposed. They often have witnessed -- or have information on -- incidents of misconduct. I have had them report overhearing conversations where the supervisor being investigated believed the "clerk" was my complainant. The supervisors made comments they were going to "get" them for causing the "trouble".

In these complaints I issue subpoenas to provide witnesses a "legal excuse" for providing sworn testimony to my investigators. Despite the state's requirement for the witness to "tell the truth" there is little real protection for them when the witness returns to the work-place. There is an equity problem when a complaint may be found to be technically "unsupported" but later detrimental personnel actions are taken against employees who have provided what may have been embarrassing testimony involving their supervisor.

Protection from Specious Complaints

Few argue the soundness of setting a public policy which protects those with the courage to come forward to "Blow the Whistle" on government officials who are abusing their position. After all, it is those within the government who are often the first to become aware of such abuses. This kind of legislation does create concern on the part of managers however. It is the fear that "bad" employees, or those about to be justifiably terminated, will file false charges in order to become sheltered by the protections of a "Whistle Blowers Act."

The House Committee substitute handles that problem well. It provides that matters **accepted for investigation** by the Office of the Ombudsman be considered a "matter of public concern" and subject to the protections of the act. This essentially requires the ombudsman perform a preliminary screening of a complaint and make a positive decision to accept it for investigation before the protections would take effect. This, in effect, prevents abuse by the filing of a last minute specious complaint with the ombudsman.

Section 39.90.110 of the measure also sets out other limitations for protections under the act. It should be noted that persons are required to make the complaint in good faith and, if an employee, must submit a written report to the employer concerning the matter. Employees are not required to file written reports if they reasonably fear reprisals or if an emergency exists.

MOA Resolution in support of HB 91.

APPROVED
Date: 4-11-89

Submitted by: Mayor

Prepared by: Municipal Manager

For reading: April 11, 1989

ANCHORAGE, ALASKA
AR NO. 89-92(S)

A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY ENDORSING THE CONCEPT OF HOUSE BILL NO. 91 (HB 91) RELATING TO WHISTLE BLOWERS PROTECTION

WHEREAS, HB 91 has passed the House and is before the State Senate Affairs Committee; and

WHEREAS, the Act provides protection for certain public employees and certain other persons who report matters of public concern; and

WHEREAS, the Act includes protection for municipal employees who report on matters of municipal concern; and

WHEREAS, the Municipality of Anchorage wishes to encourage public employees to report violations of municipal law, regulation or ordinance; a danger to public health or safety; or gross mismanagement, a substantial waste of funds, or a clear abuse of authority; and

WHEREAS, the Municipality of Anchorage believes passage of this Act will improve the provision of municipal government to the benefit of the general public.

NOW, THEREFORE, the Anchorage Municipal Assembly resolves:

Section 1: That this body endorses the concept embodied in HB 91 and urges passage of such a concept by the Legislature. The final bill should contain a balance between the employers' need to manage the workforce and the public interest relative to the protection of individuals reporting matters of public concern. The final bill should also provide that local governments will establish their own whistle blowers protection ordinances.

admin. didn't want as broad as HB 91.

Section 2: That copies of this resolution be forwarded to the Governor and Legislature.

PASSED AND APPROVED by the Anchorage Assembly this 11th day of April, 1989.

Chairman

mayor concerned whistle blowers would get him in trouble! MOA decided not to take him on so accepted version

ATTEST:

Municipal Clerk

Joe Griffith 4-20-89

Deputy

LDC:mr
m2/ari

AM 357-89

On grounds usurps muni.'s power. Didn't give defendant chance to respond.

From ..... *Michael Mills*

4/5/89

Duncan —

This Resolution on the Whistleblowers Act was passed but later reconsidered by Wood and Campbell to allow the Administration to offer some changes to the resolution at next weeks meeting (4-11-89). I will keep you posted.

Michael

Municipality of Anchorage
Office of the Ombudsman
Michael Mills, Ombudsman

343-4431

Submitted by: Asssemblymen Wood and Kubitz
Prepared by: Office of the Ombudsman
For reading: April 4, 1989

ANCHORAGE, ALASKA
AR NO. 89-92

A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY SUPPORTING HOUSE BILL NO. 91 (HB 91) RELATING TO WHISTLE BLOWERS PROTECTION

WHEREAS, HB 91 has passed the House and is before the State Senate Affairs Committee; and

WHEREAS, the Act provides protection for certain public employees and certain other persons who report matters of public concern; and

WHEREAS, the Act includes protection for municipal employees who report on matters of municipal concern; and

WHEREAS, the Municipality of Anchorage wishes to encourage public employees to report violations of municipal law, regulation or ordinance; a danger to public health or safety; or gross mismanagement, a substantial waste of funds, or a clear abuse of authority; and

WHEREAS, the Municipality of Anchorage believes passage of this Act will improve the provision of municipal government to the benefit of the general public.

NOW, THEREFORE, the Anchorage Municipal Assembly resolves:

Section 1: That this body endorses HB 91 and urges its passage by the Legislature.

Section 2: That copies of this resolution be forwarded to the Governor and Legislature.

PASSED AND APPROVED by the Anchorage Assembly this _____ day of _____, 1989.

_____
Chairman

ATTEST:

_____
Municipal Clerk

MM:eg
DOCA/AR33

Date: April 19, 1989
To: State Affairs Committee, Alaska State Senate,(Pat Pourchot)
From: Jamie Bollenbach, Executive Director, AkCLU
Re: HB 91
Attn: Sandra Schubert

The Alaska Civil Liberties Union, a private membership organization acting to promote and protect the Bill of Rights, strongly supports House Bill 91. The ability of a public employee to report to a public body a matter of public concern without fear of retribution is a policy that promotes the responsibility of state agencies. HB 91 also extends the spirit of the First Amendment's protection of free speech to employees acting in the public interest.

Of particular concern to the AkCLU is the possibility under current law that an employee required to report to a public body may be terminated or reprimanded for compelled testimony. A public employee in this situation is forced to either comply with the law and face the loss of a job or other sanctions from employers, or to violate the law and withold relevant information from the courts, the legislature, or other public bodies. The protection of these employees is critical for fairness in the workplace and for the accuracy of testimony.

The AkCLU would oppose amendments to the bill that weaken the protections for employees, place undue restrictions on the availability of these protections, or add language confusing to employees or employers affected by the law.

At least nineteen states have some form of statutory protection in this area. As currently drafted, HB 91 would facilitate the honest and responsible operation of state government by encourging reports of questionable activity, and would contribute to fair dealing and free speech for public employees.

The AkCLU would like to thank the Labor and Commerce Committee for their consideration in this matter. We would be happy to answer questions or provide further information on this topic.

Sec. 18.60.089. Prohibition against retribution. (a) A person may not discharge or discriminate against an employee because the employee has filed a complaint or instituted or caused to be instituted a proceeding related to the enforcement of occupational safety and health standards, or has testified or is expected to testify in a proceeding relating to occupational safety and health or because an employee has exercised personally or on behalf of others a right afforded under AS 18.60.010 — 18.60.105.

(b) An employee who has been discharged or discriminated against by a person in violation of this section may, within 30 days after the violation occurs, file a complaint with the commissioner alleging the discrimination. Upon receipt of the complaint, the commissioner shall investigate the matter as the commissioner considers appropriate. If, upon investigation, the commissioner determines that this section has been violated, the commissioner shall request the attorney general to bring an action in the superior court against the violator. The superior court has jurisdiction to restrain violations of (a) of this section and to order all appropriate relief including rehiring or reinstatement of the employee to the employee's former position with back pay.

(c) Within 90 days of the receipt of a complaint filed under this section, the commissioner shall notify the complainant of the determination under (b) of this section. (§ 7 ch 72 SLA 1973)

Sec. 18.60.090. Penalty for violations. [Repealed, § 9 ch 72 SLA 1973.]

Sec. 18.60.091. Citations. (a) If, upon inspection or investigation, the department believes that an employer has violated a provision of AS 18.60.010 — 18.60.105 that is applicable to the employer, the department shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and must describe with particularity the nature of the violation, including reference to the provisions of the chapter or any order or regulation alleged to have been violated, and must fix a reasonable time for abatement of the violation. The department may prescribe procedures for the issuance of a notice instead of a citation with respect to minor violations that have no direct or immediate relationship to safety or health, or violations that are not serious and that the employer agrees to correct within a reasonable time. If an employer does not, within a reasonable time set out in the notice, correct a violation that is not serious, the department shall issue a citation to the employer.

(b) Upon receipt by the employer, each citation issued under this section, or a copy of the citation, shall be immediately and prominently posted, at or near each place the violation referred to in the citation occurred.

Sec. 44.21.234. Access to long term care facilities, older Alaskans, and records. (a) A person may not deny access to a long term care facility or to an older Alaskan by the ombudsman or an employee, volunteer, or other representative of the office.

(b) Notwithstanding the provisions of AS 44.21.232(c)(1), the ombudsman may obtain medical or other records of an older Alaskan who resides in a long term care facility in the state only with the consent of the older Alaskan or the older Alaskan's legal guardian or, if the older Alaskan is unable or incompetent to consent and does not have a legal guardian, only with a court order. (§ 2 ch 108 SLA 1988)

Sec. 44.21.235. Confidentiality. (a) Records obtained or maintained by the ombudsman are confidential, are not subject to inspection or copying under AS 09.25.110 — 09.25.120 and, except as provided in (b) of this section, may be disclosed only at the discretion of the ombudsman.

(b) The identity of a complainant or an older Alaskan on whose behalf a complaint is made may not be disclosed without the consent of the identified person or the person's legal guardian, unless required by court order. (§ 2 ch 108 SLA 1988)

Sec. 44.21.236. Immunity from liability. (a) A person who, in good faith, makes a complaint described in AS 44.21.232 is immune from civil or criminal liability that might otherwise exist for making the complaint.

(b) The ombudsman, or an employee, volunteer, or other representative of the office, is immune from civil or criminal liability for the good faith performance of official duties. (§ 2 ch 108 SLA 1988)

Sec. 44.21.237. Interference with the long term care ombudsman and retaliation prohibited. (a) A person may not intentionally interfere with the ombudsman, or an employee, volunteer, or representative of the office, in the performance of official duties under AS 44.21.232.

(b) If a person makes a good faith complaint described in AS 44.21.232, an employer or supervisor of the person, or a public or private agency or entity that provides benefits, services, or housing to the person, may not discharge, demote, transfer, reduce the pay or benefits or work privileges of, prepare a negative work performance evaluation of, deny or withhold benefits or services, evict, or take other detrimental action against the person because of the complaint. The person making the complaint may bring a civil action for compensatory and punitive damages against an employer, supervisor, agency, or entity that violates this subsection. In the civil action there is a rebuttable presumption that the detrimental action was retaliatory if it was taken within 90 days after the complaint was made.

(c) A person who violates this section is guilty of a class B misdeeanor. (§ 2 ch 108 SLA 1988)

Sec. 44.21.238. Legal counsel for the long term care ombudsan. The attorney general shall provide legal advice and representan in connection with any matter relating to the powers, duties, and eration of the office, and in any legal action brought against the nbudsman or an employee, volunteer, or other representative of the fice. If the attorney general cannot provide legal advice or representation because of a conflict of interest, the ombudsman may employ ivate legal counsel. (§ 2 ch 108 SLA 1988)

Sec. 44.21.239. Cooperative agreements. The commission shall ter into cooperative agreements concerning the operations of the ice, including protocols for investigations, with state and local encies that have jurisdiction over long term care facilities or over e abuse and neglect of older Alaskans. (§ 2 ch 108 SLA 1988)

Sec. 44.21.240. Definitions. In AS 44.21.200 — 44.21.240,
1) "commission" means the Older Alaskans Commission;
2) "long term care facility" means a foster home or other residenl facility for dependent adults that is required to be licensed under 47.35 and a nursing home as defined in AS 08.70.180;
3) "office" means the office of the long term care ombudsman;
4) "older Alaskan" means a resident who is 60 years of age or er;
5) "ombudsman" means the long term care ombudsman hired un- AS 44.21.231;
6) "senior citizen housing" has the meaning given in AS 47.620(e). (§ 2 ch 79 SLA 1981; am § 3 ch 108 SLA 1988)

ffect of amendments. — The 1983 ndment rewrote and restructured this on, which read "In AS 44.21.200 — 44.21.240, 'commission' means the Older Alaskans Commission."

Article 5. Alaska Council on Science and Technology.

ecs. 44.21.241 — 44.21.255. [Repealed, § 63 ch 21 SLA 1985.]

Article 6. Alaska Public Broadcasting Commission.

ion
Duties of the commission
Powers of the commission

NOTE

State Law Protection of At-Will Employees Who "Blow the Whistle"

I. INTRODUCTION

In recent years there has been a tremendous increase in litigation concerning the common-law "at-will employment" rule, which provides that, absent a contract for employment for a definite period of time, an employer has the right to discharge any employee at any time, for any reason. It is estimated that as many as seventy percent of all private sector workers are considered at-will employees, and thus, arguably not entitled to protection against unjust dismissal.[1] For most of this country's history, the at-will rule went unchallenged, or at least seldom successfully challenged. However, in a trend that developed slowly, but accelerated in the late 1970s, courts in many jurisdictions came to view the doctrine as manifestly unfair and, hence, created exceptions to it.[2]

These judicially created exceptions can be placed into three distinct categories: (1) actions for breach of an express or implied contract; (2) actions in tort for abusive or wrongful discharge under a theory of intentional infliction of emotional harm or interference with employment relations; and (3) actions, essentially in tort, arguing that a discharge has violated the public policy of the state in which it arose.[3] This Note will focus upon the last of these theo-

1. *See Committee on Labor and Employment Law, At-Will Employment and the Problem of Unjust Dismissal*, 36 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 170 (1981). *See also* 9A Indiv. Empl. Rts. Man. (BNA) § 505:2 (Jan. 1, 1987) (estimates of the actual number of workers range from 50 million to almost 76 million).

2. *See generally* Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201 (1985); Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329 (1982); Olsen, *Wrongful Discharge Claims Raised by At-Will Employees: A New Legal Concern for Employers*, 32 LAB. L.J. 265 (1982); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983); Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *Employment At Will—Limitations on Employers' Freedom to Terminate*, 35 LA. L. REV. 710 (1975); Annotation, *Modern Status of Rule that Employer May Discharge At-Will Employee For Any Reason*, 12 A.L.R.4th 544 (1982).

3. The three categories are "natural" ones. The first, the implied (or express) contract theory, relies upon proof that the employer made a promise of continued employment absent just cause for termination. Courts have held that such a promise may be established by oral representations, a course of dealing, employment

ries—the so-called "public policy exception" to the at-will rule. More specifically, this Note will address one particular type of claim that is recognized as a public policy exception: actions by an employee who reports or exposes illegal or unsafe conduct on the part of his employer and is subsequently discharged in retaliation—the "whistleblower" exception.[4] The scope of this article is further limited to a discussion of the protection of private sector, at-will employees; thus, it will not address the protection of public sector employees or those covered by collective bargaining agreements.[5]

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handbooks, or personnel manuals. *See* Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984); Pugh v. See Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980). Related to this basic theory is the situation in which a discharged employee attempts to show a breach by the employer of an "implied convenant of good faith and fair dealing," which exists in every contract, and which in this case would protect an employee from termination for bad cause. *See* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

The second category develops the tort theory of abusive discharge. The employee seeks to prove intentional infliction of emotional harm by the employer, or interference by the employer with the employment relation (for example, with the right to file for workers' compensation or to file a sex discrimination charge), causing damages to the employee. Successful litigation in this area is rare and narrowly construed. *See* Alcorn v. Anbro Eng'g Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); Howard Univ. v. Best, 484 A.2d 958 (D.C. 1984); Gates v. Life of Mont. Ins. Co., 668 P.2d 213 (Mont. 1983). *See also* Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

The third category, and the one that this Note addresses, is the public policy exception. Although essentially an action in tort, this exception leads the courts who have adopted it to concentrate on the harm incurred by an unjustly discharged employee and by the public. Proponents of this theory assert that an employee should not be discharged for asserting basic rights that society has an interest in protecting. *See* Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983); Peterman v. Local 396, International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Kelsay v. Motorola Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

4. *See generally* R. NADAR, P. PETKAS & K. BLACKWELL, WHISTLEBLOWING (1972); A. WESTIN, WHISTLEBLOWING! LOYALTY AND DISSENT IN THE CORPORATION (1981); Kohn & Kohn, *An Overview of Federal and State Whistleblower Protections*, 4 ANTIOCH L.J. 99 (1986); Malin, *Protecting the Whistleblower From Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277 (1985); Rogine, *Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing*, 23 AMER. BUS. L.J. 281 (1985); Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Comment, *Protecting the Private Sector At-Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777.

5. Both state and federal laws guarantee the public sector employee some protection against arbitrary or unjust dismissal. The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5 U.S.C. (1982)), protects federal employees. Among its several sections are provi-

Until very recently, principled or conscientious employees who were brave enough to call attention to their employer's wrongdoings did not fare particularly well in actions for wrongful or abusive discharge.[6] Even today, a successful challenge to dismissal from employment under this theory is no minor feat because the law in this area can be described as inconsistent or, at best, perhaps more aptly as in a severe state of disarray.[7] It is clear that no general rule is accepted as a framework for analyzing a whistleblower claim, as

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sions for whistleblower protection and disclosure investigation. 5 U.S.C. § 2302(b)(8) (1982). However, these sections have thus far proven to be ineffective. *See Special Focus: Whistleblower and the Public Interest*, 4 ANTIOCH L.J. 1 (1986) (Introduction by Patricia Schrieder: D-Colorado: Chairwoman of the Subcommittee on Civil Service: U.S. House of Representatives) (ineffective or unconcerned special counsel in charge of enforcing the whistleblower protection provisions have "crippled" the protection provided by that legislation). The specific employee protection provisions for whistleblowing that are written into individual federal laws are far more effective. Examples include the whistleblower provisions in the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 660(c) (1982); the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215 (1975); the Federal Mine Health and Safety Act (FMHSA), 30 U.S.C. § 815(c) (1979); and the various environmental protection laws, such as the Solid Waste Disposal Act, 42 U.S.C. § 6971 (1982).

Most states provide protection against arbitrary and unjust dismissal for their public sector employees as well, either through laws allowing collective bargaining between employee unions and the state or local municipalities, or through specific protective legislation. One author estimates that over 50% of all state and local government employees have bargained for some sort of "just cause" protection. Peck, *Unjust Discharge From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-9 (1979). Several states have passed legislation designed to protect public sector whistleblowers only. At this writing they are: DEL. CODE ANN. tit. 29, § 5115 (1983); IND. CODE ANN. § 4-15-10-4 (Burns 1987); KAN. STAT. ANN. § 75-2973 (1984); KY. REV. STAT. ANN. § 61.990 (Michie/Bobbs-Merrill 1986); MD. ANN. CODE art. 64A, § 12G (1983); OR. REV. STAT. § 240.740 (1985); TEX. REV. CIV. STAT. ANN. art. 6252-16a (Vernon 1987); UTAH CODE ANN. § 67-21-3 (1986); WASH. REV. CODE ANN. § 42.40.010 (1987); WIS. STAT. § 230.81-88 (1987). A few states have enacted legislation to protect private sector whistleblowers as well. *See infra* note 76 and accompanying text.

6. As noted, there was little litigation concerning the at-will rule until recently. Professor Summers comments:

> Ten years ago a symposium on the subject of employment at will would have been unthinkable. There would have been few commentators willing to write on the subject, and few others interested in reading about it. The misbegotten legal doctrine was mechanically, and at times brutally, applied by the courts but was seldom examined or questioned. It was one of our inherited legal curses which we mindlessly accepted.

Summers, *Introduction: Individual Rights in the Workplace*, 16 U. MICH. J.L. REF. 201 (1983). The early leading case in whistleblower litigation is Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974), discussed *infra* in text accompanying notes 19-30.

7. One author describes the recent judicial attempts to deal with the subject as "patchwork, ad hoc, and inconsistent." He calls for the enactment of uniform legislation as the only way to remedy a situation that at present is "neither rational or humane." Rongine, *Toward a Coherent Response to the Public Policy Dilemma Posed by Whistleblowing*, 23 AMER. BUS. L.J. 281, 297 (1985).

the traditional rule denying protection once was. This Note will provide an overview of the laws created by the few courts and legislatures that have examined and acted upon the issue. It will begin with an examination of decisions in those states that decline to accept the idea of a public policy exception to the traditional rule and then analyze the varying degrees to which other states provide protection for employees who presume to report the illicit activities of their employers.

II. The Public Policy Exception for Whistleblowers

A. *No Exception Recognized*

Several jurisdictions decline to deviate from the traditional at-will rule under any theory.[8] In a state that does not recognize any public policy exception, the outcome of the discharged whistleblower's action, though harsh, is easily determined: there can be no recovery for abusive or retaliatory discharge because there is no theory under which to recover.

The Texas Court of Appeals' decision in *Maus v. National Living Centers, Inc.*[9] demonstrates the harshness of such a rule. In *Maus* a nurse's aide was discharged for complaining to her supervisors about patient neglect. The court affirmed the trial court's grant of summary judgment for the employer and declined to "recognize a new cause of action for retaliatory discharge" absent a determination by either the state legislature or supreme court.[10] Although it recognized the importance of policing the operation of nursing homes, the court would admit only that it stood "at the crossroads

8. At this writing, at least nine state courts refuse to recognize a public policy exception to the traditional rule in the absence of legislation. *See* Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977); Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (1978); Hanev v. Laub, 312 A.2d 330 (Del. Super. Ct. 1973); DeMarco v. Public Supermarkets, Inc., 384 So. 2d 1253 (Fla. 1980); Goodroe v. Georgia Power Co., 148 Ga. App. 193, 251 S.E.2d 51 (1978); Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978); Gil v. Metal Serv. Corp., 412 So. 2d 706 (La. App. 1982), *cert. denied*, 414 So. 2d 379 (La. 1982); Green v. Amereda-Hess Corp., 612 F.2d 212 (5th Cir. 1980); Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

9. 633 S.W.2d 674 (Tex. Ct. App. 1982).

10. *Id.* at 677. In its analysis of plaintiff's public policy argument, the court recognized that "[t]here is a trend toward limiting the employer's right to discharge his employees." *Id.* at 676 n.1. However, the court held that such a trend, without specific guidance, was not reason enough to exceed its "proper authority within the legal framework." *Id.* at 676. The harshness of the rule in this case is further exemplified by the fact that, while the Texas court refused to recognize an exception for employees who report the wrongdoing of their employers, a state statute existed that required nursing home employees to report cases of neglect to the state licensing agency or to law enforcement officials. Failure to report is a misdemeanor. *Id.* at 675. *See* Tex. Rev. Civ. Stat. Ann. art. 4442C § 16 (Supp. 1982). Thus, the employee in *Maus* was caught between the threat of legal sanctions and discharge.

of *two* important public policies:"[11] the proper and safe functioning of the state's health care facilities, and the traditional doctrine of judicial restraint and deference to the legislative function of promulgating state laws and creating public policy. The court held that the latter policy was overriding.[12]

A more recent application of this reasoning is found in the Ohio Supreme Court's opinion in *Phung v. Waste Management, Inc.*[13] in which the court held that an employee discharged for reporting violations of certain environmental regulations to his supervisor did not state a cause of action.[14] The court reasoned that because the legislature had not yet created an exception for abusive discharge, one did not exist.[15]

Similarly, the Georgia Court of Appeals in *Goodroe v. Georgia Power Co.*[16] held that a security officer who claimed he was discharged because he was about to uncover evidence of criminal activities by a superintendent of his employer did not have a cause of action. The court in *Goodroe* likewise deferred to the legislature's failure to provide such an exception to the at-will rule.[17]

B. *Limited Exception Recognized*

Several states, however, do recognize a general public policy

11. *Id.* at 676 (emphasis added). The court posed its determinative question as "whether the time has come for the nursing home policy [requiring employees to report neglect] to override the employment at-will doctrine." *Id.* It found it could not answer affirmatively without more guidance.

12. *Id.*

13. 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

14. *Id.* at 103, 491 N.E.2d at 1117. The court of appeals, in finding that such a cause of action existed, stated that "[p]ublic policy requires that there be an exception to the absolute right of an employer to discharge an employee at will when such employee is discharged for reporting to his employer or proper authorities that the employer is conducting its business in violation of the law." *Id.* at 101, 491 N.E.2d at 1115-16 (quoting from the court of appeals' unpublished opinion).

15. The court stated simply that "an at-will employee who is discharged for reporting to his employer that it is conducting its business in violation of the law does not have a cause of action against the employer for wrongful discharge." *Id.* at 103, 491 N.E.2d at 1117.

16. 148 Ga. App. 193, 251 S.E.2d 51 (1978).

17. *Id.* at 194, 251 S.E.2d at 52. *See* Perdue v. J.C. Penney Co., 470 F. Supp. 1234 (S.D.N.Y. 1982). In *Perdue*, plaintiffs, who had conducted an internal audit of the employer, uncovered an illegal bribery or kickback scheme. They claimed that they were discharged to cover up their conclusion. The court applied Texas law and held that the wrongful purpose on the part of the employer was irrelevant. *See also* Martin v. Platt, 386 N.E.2d 1026 (Ind. App. 1979) (employees claimed that they were discharged for reporting a supervisor who was receiving kickbacks; the court held that what constitutes public policy is a decision better left to the legislature); Pavolini v. Bard Air Corp., 451 N.Y.S.2d 288, 88 A.2d 714 (1982) (after noting the merits of the case and the harshness of the rule, the court refused to recognize a cause of action by a discharged at-will employee on public policy grounds).

exception to the at-will rule. These exceptions are varied in scope, and not all are broad enough to include whistleblowing activity.[18] Some state courts create a public policy exception so narrow that it is often impossible for the whistleblower to enlist its protection. For example, in *Geary v. United States Steel Corp.*,[19] the seminal case in whistleblower litigation, the Pennsylvania Supreme Court considered the discharge of a salesman who had repeatedly voiced to his superiors his concerns over the safety of a particular product he was selling. When his protestations were ignored, he took the matter to a company vice-president.[20] The product was reevaluated and taken off the market, but Geary was discharged shortly thereafter, allegedly in retaliation for disrupting and ignoring procedure.[21] The court rejected Geary's public policy argument, but did not, as the courts in *Maus* and *Phung* did,[22] completely decline the invitation to create *any* exception.[23] It merely found that in this case it was not convinced that "a clear mandate of public policy" had been violated by the employer.[24] The court noted the "praiseworthiness" of Geary's intentions, but found that a new cause of action was not the most appropriate method for employees to express their views on the quality of their employer's products.[25] The court also noted that Geary was not an expert[26] on the subject of product safety and that he had gone outside of the usual chain of command established for voicing opinions and concerns.[27] It concluded that the case did

18. For a state-by-state analysis of those jurisdictions that recognize an exception, however limited, to the traditional rule, see 9A Indiv. Empl. Rts. Man. (BNA) § 540-90 (1987). The degree of protection provided by these courts varies from state to state.

19. Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

20. *Id.* at 173, 319 A.2d at 175.

21. *Id.* at 180, 319 A.2d at 178.

22. *See supra* text accompanying notes 9-15.

23. The court discussed Geary's claim that his actions were undertaken with good intent and were obviously of some merit given the subsequent change made in the product. Yet the court refused to credit the argument, concluding that:

> It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of those areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened. The notion that substantive due process elevated an employer's privilege of hiring and discharging his employees to an absolute constitutional right has long since been discredited.

Geary, 456 Pa. at 184, 319 A.2d at 180.

24. *Id.* at 184-85, 319 A.2d at 180. "We hold only that where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship and no clear mandate of public policy is violated thereby, an employee at will has no right of action against his employer for wrongful discharge." *Id.*

25. *Id.* at 183, 319 A.2d at 180.

26. *Id.* at 181, 319 A.2d at 178-79.

27. *Id.* at 180, 319 A.2d at 178.

not clearly involve any significant danger or wrongdoing on the part of the employer, and therefore expressly refused to fashion a privilege based upon an employee's right to express his views.[28] The decision in *Geary* is significant, though, because the court at least implied a willingness to entertain an exception when a "clear mandate" of public policy warrants.[29]

Critics of *Geary's* strict standard fault the opinion for its apparent requirement that there be a "pronouncement" of policy by the legislature before the court takes action.[30] They argue that, as a practical matter, the discharged employee would then be required to allege that the employer violated a specific legislative prohibition or that he was discharged for exercising a specific statutory right or fulfilling a specific statutory duty.[31] Some courts indicate that a public policy exception will be recognized only under these circumstances. In *Campbell v. Eli Lilly & Co.*[32] the Indiana Court of Appeals rejected a wrongful discharge claim by a researcher at a drug manufacturing company. The researcher was fired for reporting his su-

28. *Id.* at 183, 319 A.2d at 180. The Michigan Supreme Court made a similar ruling in Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982). The court rejected an employee's claim that he was discharged for his complaints concerning the company's internal auditing practices and that the discharge was in violation of public policy. The employee based his complaint on two sources, the Code of Ethics of the Institute of Internal Auditors and the Regulations of the Public Service Commission. *Id.* at 696, 316 N.W.2d at 712. The court stated that for it to support an action for retaliatory discharge, the employee must establish a violation of a "clearly mandated public policy." *Id.* A dispute over internal auditing procedures, it argued, was at best a "corporate management dispute." *Id.*

29. *Geary*, 456 Pa. at 185, 319 A.2d at 180. *See also* Rossi v. Pennsylvania State Univ., 340 Pa. Super. 39, 489 A.2d 828 (1985) (plaintiff's claim that he was fired for attempting to prevent a "waste of taxpayer's money" through frequent criticism or complaints to management was denied as not establishing a sufficient violation of a clear mandate of public policy); Rachford v. Evergreen Int'l Airlines, Inc., 596 F. Supp. 364 (N.D. Ill. 1984) (plaintiff, fired for reporting aircraft defects to the FAA, had no viable claim since he could not show that the discharge violated a clear mandate of public policy); Percival v. General Motors Corp., 400 F. Supp. 1322, 1324 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976) (plaintiff's claim that he was fired for trying to correct misinformation given by the company to the public and government was rejected since there existed no violation of a clear mandate of public policy in the absence of "contractual, statutory or public policy considerations").

30. *See, e.g.*, Note, *Protecting the Private Sector Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 Wis. L. Rev. 777, 802.

> 31. [The] use of such terms as "clear mandate" or "expressed" policy, if taken as those terms are conventionally used, refers to legislatively defined public policy. If this is how the *Geary* . . . [court] mean[s] to limit the exception, then [it has], by inference, rejected the application of the public policy exception to cases which present non-legislatively defined public policy issues.

Id. at 802.

32. *Campbell*, 413 N.E.2d 1054 (Ind. App. 1980).

pervisor's misconduct and questioning the safety of some of the drugs.[33] The court found that the plaintiff had not demonstrated a "statutory source for the alleged rights he claims to have exercised,"[34] nor a "statutory source for the duty he claims to have fulfilled."[35] The court, therefore, refused to "recognize the general public policy exception . . . to the venerable at will employment doctrine we reconfirm today."[36] Again, the case is significant because it implies a willingness to create *some* kind of exception so long as there is a statutory basis for the employee's actions.[37]

An even more restrictive interpretation of the statutory-based requirement is found in *Murphy v. American Home Products Corp.*[38] In *Murphy* the New York Court of Appeals considered the case of an at-will employee who reported the illegal manipulation of a company pension plan by high-ranking officers to his superiors.[39] Although the court found that the actions of the officers only amounted to unorthodox accounting procedures, it stated that in order to succeed Murphy needed to show that he was fired either for some "constitutionally impermissible purpose" or that a *statutory proscription* against firing for that particular reason existed.[40] Otherwise, the employer's right to fire him is unaffected.[41]

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33. *Id.* at 1057.

34. *Id.* at 1061.

35. *Id.* The court in *Campbell* relied on the decision in *Percival*, discussed *supra* at note 29, which used similar language to limit protection under the public policy exception to cases in which the discharge was "motivated by the fact that an employee did something that public policy encourages or refused to do something that public policy forbids or condemns." *Percival*, 539 F.2d at 1129-30.

36. *Cambell*, 413 N.E.2d at 1061.

37. The court indicated its reliance on its earlier decision in Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973), in which it established the "statutory right or statutory duty" test. It concluded only that under the facts before it, plaintiff had not satisfied the test, and refused to create the general exception urged by plaintiff. *Campbell*, 413 N.E.2d at 1061.

The court's decision in *Campbell* is reaffirmed by the recent decision of Romack v. Public Serv. Co. of Ind., 499 N.E.2d 768 (Ind. App. 1986), in which plaintiff alleged he was fired for reporting to his superiors several safety and security problems at the employer's nuclear power plant. The court of appeals dismissed his complaint and concluded that a "narrowly construed exception" to the at-will rule existed only "when the employee is discharged solely for exercising a statutorily conferred right." *Id.* at 773.

38. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

39. *Id.* at 297-98, 448 N.E.2d at 87-88, 461 N.Y.S.2d at 233-34.

40. *Id.* at 305, 448 N.E.2d at 91, 461 N.Y.S.2d at 237. "In sum, under New York law as it now stands, absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired."

41. *Id.* The New York court was particularly careful about infringing upon the territory of the legislature in making policy decisions, acknowledging that body's "infinitely greater resources and procedural means to discern the public will." *Id.*

In some cases it is impossible to establish the existence of the plaintiff's right or duty. For example, in *Pierce v. Ortho Pharmaceutical Corp.*[42] the New Jersey Supreme Court held that a physician did not have a cause of action when she resigned after Ortho removed her from a team working on the development of a drug that she claimed might be harmful.[43] The court argued that the physician's Hippocratic Oath was not comparable to a statute and thus was an insufficient basis upon which to claim a public policy exception.[44]

Some courts, while still requiring a legislative basis for a finding of public policy violations, allow the whistleblowing plaintiff to satisfy his burden by establishing something less than an explicit statutory right or duty. In some jurisdictions, the mere existence of a statute specifically prohibiting the reported activity, even if the action is not brought under it, will provide a basis upon which to argue the existence of a policy favoring a remedy for discharge. These courts reason that the existence of a legislative prohibition is persuasive evidence of a public policy against such activity. In *Harless v. First National Bank*[45] the court examined violations of state and federal consumer credit and protection laws by a West Virginia bank. A bank employee brought the violations to the attention of several of his superiors and a bank auditor[46] and was discharged for reporting the violations.[47] The court accepted the plaintiff's argument that his discharge violated the state's public policy, concluding that the legislature's adoption of the consumer protection and credit laws created a "clear and unequivocal public policy that consumers

at 302, 448 N.E.2d at 90, 461 N.Y.S.2d at 236. As such, it concluded: "If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants." *Id.* The court's position here is much like that of the courts in *Mau* and *Phung*. See *supra* text accompanying notes 9-14 for a discussion of these cases.

42. 84 N.J. 58, 417 A.2d 505 (1980).

43. *Id.* at 61, 76, 417 A.2d at 507, 514.

44. *Id.* at 76, 417 A.2d at 514. *Compare* Suchdolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982), discussed *supra* note 28. An even more difficult determination for the employee is found in Welch v. Brown's Nursing Home, 20 Ohio App. 3d 15, 484 N.E.2d 178 (1984). The *Welch* court found that since the statute, which provided that no nursing home or employee of a nursing home may retaliate against any person for reporting alleged violations to the Commission on Aging, was an *administrative*, not legislative, one, it did not create a cause of action for retaliatory discharge. *Id.* at 17, 484 N.E. 2d at 180. *See also* Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 897, 568 P.2d 764, 770 (1977) (no cause of action existed since plaintiff did not claim that he was discharged for "exercising a statutory right" or for "refus[ing] to engage in criminal activity").

45. 246 S.E.2d 270 (W. Va. 1978).

46. *Id.* at 272.

47. *Id.*

. . . [are] to be given protection."[48] Such "manifest public policy," it argued, should not be frustrated by allowing an employee to be fired for attempting to ensure consumer protection.[49]

Similarly, the Connecticut Supreme Court in *Sheets v. Teddy's Frosted Foods, Inc.*[50] held that an employee had stated a claim for wrongful discharge when he was dismissed after reporting to his employer several state law violations, including the mislabeling of food weight and the use of substandard raw materials.[51] The court noted that state law imposed a criminal penalty for such violations and concluded that an employee should not be forced to choose between the risk of criminal sanctions and the loss of employment.[52] More recently, the Illinois Supreme Court in *Wheeler v. Caterpiller Tractor Co.*[53] held that a cause of action existed for retaliatory discharge when a radiographer was fired for refusing to operate a unit that utilized live, radioactive cobalt in violation of Nuclear Regulatory Commission standards.

C. *Broad Exception Recognized*

Finally, some jurisdictions recognize a very broad public policy exception, affording substantial protection to the employee who reports an employer's wrongdoing, regardless of statutory authority. In carving out such an exception, courts generally determine that it is proper, if not often necessary, to look outside the legislative area for a definition of public policy. Particularly illustrative of this conclusion is *Wagner v. City of Globe*,[54] in which the Arizona Supreme Court endorsed plaintiff's argument that his discharge violated the state's public policy. Wagner, a newly-hired, probationary employee with the Globe police department, was fired after uncovering

48. *Id.* at 276.

49. *Id.*

50. 179 Conn. 471, 427 A.2d 385 (1980).

51. *Id.* at 473, 427 A.2d at 386.

52. The court found that the statute, which made the employer's actions criminal, was intended to "safeguard the public health and promote the public welfare by protecting the consuming public from injury by product use and the purchasing public from injury by merchandising deceit." *Id.* at 478, 427 A.2d at 388. The court concluded that because the statute was clearly relevant to plaintiff's claim, it could not "ignore the statement of public policy that it represents." *Id.* at 478, 427 A.2d at 389.

53. 108 Ill. 2d 502, 485 N.E.2d 372 (1982). *See also* Kalman v. Grand Union Co., 183 N.J. Super. 153, 443 A.2d 728 (1982). In *Kalman*, a pharmacist was fired for refusing to close his pharmacy within the employer's store. State statutes (as well as the pharmacy profession's code of ethics) required the pharmacy to keep the same hours of operation as the store. The New Jersey court found that these laws sufficiently expressed public policy, which would be violated if the employee had been fired for attempting to comply with them.

54. 150 Ariz. 82, 772 P.2d 250 (1986).

the illegal arrest and detention of a prisoner.[55] He brought the prisoner before a magistrate who, after some persuasion, reluctantly released the prisoner.[56] However, Wagner was terminated from his position shortly thereafter.[57]

Wagner argued that despite his at-will status, his discharge was wrongful. He advanced two theories in support of his contention: breach of contract by the employer for violation of the rules set out in its personnel manual (his "employment contract"),[58] and violation of the state's public policy in favor of reporting illegal and improper activities.[59] The trial court granted summary judgment in favor of the employer, and the court of appeals affirmed.[60] The supreme court, however, reversed.[61]

The supreme court was very receptive to plaintiff's public policy argument, stating at the outset that "employees should not have to choose between their jobs and the demands of important public policy interests; . . . thus courts have developed the public policy exception to the at-will doctrine."[62] The Arizona court, unlike other courts, was not inhibited by the lack of "explicit statutory expression" of such policy. Such explicit recognition, it argued, was "no longer required."[63]

The court initially examined several generally recognized policy exceptions to the rule, including that for the whistleblower. It concluded that whistleblowing employees had lately "gained a measure of judicial protection,"[64] that such activity serves a public purpose, and that it should enjoy equal status among the other perhaps better-established exceptions.[65] Protection for the at-will employee who blows the whistle on his employer would henceforth be granted, the court ruled, "[s]o long as employees' actions are not merely private or proprietary, but instead seek to further the public good. . . ."[66]

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55. *Id.* at 84, 772 P.2d at 252. The prisoner was given a ten-day sentence for vagrancy under a statute that had been amended or abolished over a year earlier. He was in jail for twenty-one days when Wagner discovered the "error." *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 85-86, 772 P.2d at 253-54.

59. *Id.* at 87-90, 722 P.2d at 255-58.

60. *Id.* at 82, 722 P.2d at 250.

61. *Id.*

62. *Id.* at 87-88, 722 P.2d at 255-56. "Whatever the nomenclature, our concern remains the same: employees should not be discharged because they performed an act that public policy would encourage, or refused to do that which public policy condemns." *Id.* at 88, 722 P.2d at 256.

63. *Id.* This language is particularly important because it shows that the court is aware that it is expanding the existing law to accommodate the new exception.

64. *Id.* at 88, 722 P.2d at 256.

65. *Id.* at 89, 722 P.2d at 257.

66. *Id.* Indeed, the court states that the decision on the part of an employee to

The *Wagner* court noted that the facts clearly established that the employer had violated the law, making it a particularly strong case in which to justify the creation of an exception to the at-will doctrine. Nevertheless, it explicitly acknowledged that its decision to afford protection to whistleblowing employees was not limited to such a case, but would extend to any instance in which "some 'important public policy interest in the law' has been furthered by the whistleblowing activity."[67] Thus, the court broadly held that "all employees who attempt to correct problems of public interest fall within the ambit of the public policy exception to the at-will doctrine."[68]

Wagner is not the only instance in which a court has provided maximum protection to an employee discharged for whistleblowing. The *Wagner* court, for example, relied heavily on the Illinois Supreme Court case of *Palmateer v. International Harvester Co.*[69] in which an employee was fired for supplying information to local law enforcement authorities regarding another employee and agreeing to assist in the investigation and trial.[70] The *Palmateer* court held that, while no particular constitutional or statutory provision "requires a citizen to take an active part in the ferreting out and prosecution of a crime," public policy must nonetheless protect the "citizen crime-fighters."[71]

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expose illegal or unsafe practices on the part of his employer should not only be protected, but *encouraged* as well. *Id.*

67. *Id.*

68. *Id.* at 90, 722 P.2d at 258. It is important to note the absence of any kind of "qualifying" language in the court's holding (for example, that the employee must report only to his superiors, or be correct).

69. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

70. *Id.* at 127, 421 N.E.2d at 877.

71. *Id.* at 132, 421 N.E.2d at 880. On remand the trial court granted summary judgment to the plaintiff. The employer appealed, and the court of appeals reversed, holding that an issue of fact existed regarding whether the plaintiff was in fact fired for his whistleblowing or for some other reason. The court did not contest the supreme court's ruling that a cause of action existed. Palmateer v. International Harvester Co., 140 Ill. App. 3d 857, 489 N.E.2d 474 (1986). The Illinois Supreme Court's ruling in *Palmateer* was recently affirmed in Johnson v. World Color Press, 147 Ill. App. 3d 746, 498 N.E.2d 575 (1986). In *Johnson* the plaintiff claimed that he was discharged for complaining to superiors about the use of certain accounting procedures, which he contended overstated income and net worth. The employer cited Petrik v. Monarch Printing Corp., 143 Ill. App. 3d 1, 493 N.E. 2d 616 (1986), in which the court had ruled that a discharge for similar activity did not create a cause of action, reasoning that the controversy concerned internal management disputes. *Compare* Suchdolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982), discussed *supra* note 28. The *Johnson* court distinguished *Petrik*, stating that it had involved a dispute over two acceptable practices while *Johnson* involved a procedure that was arguably fraudulent. In reaffirming *Palmateer*, the court stated: "We have found public policy favors, and certain statutes require, full disclosure, truthfulness, and accuracy in financial reports made by businesses to the government and to the public. Public policy favors employees

Another recent decision in which a court has recognized a broad, nonstatutory policy exception is *Boyle v. Vista Eyewear, Inc.*[72] The Missouri Court of Appeals in *Boyle* concluded that:

> where an employer has discharged an at-will employee . . . because the employee reported to his superiors or the public authorities serious misconduct that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for damages for wrongful discharge.[73]

Like the court in *Wagner*, the *Boyle* court noted that the public policies of the "state and nation" are found in the "constitutions, statutes, *judicial decisions, and administrative regulations*."[74]

D. Legislative Recognition

A handful of states have enacted legislation explicitly designed to protect the *private sector* at-will whistleblower. Such statutes, along with the liberal judicial interpretations (such as *Wagner*), are the "cutting edge" of developing at-will exceptions. Federal and state employees have long enjoyed such protection,[75] but at present only a few states afford this protection to private sector employees.[76]

Typical of such state legislation is the Michigan Whistleblower's

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attempting to ensure management's compliance with the requirements of the law and public policy." *Johnson*, 147 Ill. App. 3d at 752, 498 N.E.2d at 580. Illinois recently enacted a statute designed to protect both public- and private-sector employees. ILL. REV. STAT. ch. 127 ¶ 63b119c.1 (1981).

See also Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984). Plaintiff claimed he was fired for reporting to state health officials that his employer had forced him to deliver adulterated milk in violation of state laws specifically prohibiting such activity. The Ninth Circuit held that the action on the part of the employee to protect the health and safety of the citizens of California is exactly what that state's supreme court had in mind when it created its public policy exception to the at-will rule in Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

72. 700 S.W.2d 859 (Mo. App. 1985).

73. *Id.* at 871.

74. *Id.* at 877 (emphasis added).

75. *See supra* note 5 and accompanying text.

76. The number of states with statutes that protect private sector employees (or both public and private) is rapidly increasing. At this writing the list consists of: CAL. LAB. CODE § 1102.5 (West Supp. 1987) (public and private); CONN. GEN. STAT. ANN. § 31-51m(a) (private), § 4(b)-(d) (public) (West 1987); FLA. STAT. ANN. § 760.10 (West 1986) (public and private); ILL. ANN. STAT. ch. 63, ¶ 19 (Smith-Hurd 1979) (public and private); IOWA CODE ANN. § 19A.19 (private), § 20.10 (public) (West 1978); LA. REV. STAT. ANN. § 30:1074.1(A) (West Supp. 1987) (public and private); ME. REV. STAT. ANN. tit. 26, § 964 (1974) (public and private); MICH. STAT. ANN. § 17.428 (2) (Callaghan 1982) (public and private); N.J. REV. STAT. ANN. § 34:19 (West Supp. 1987) N.Y. CIV. SERV. LAW § 75-b(2)(a) (McKinney 1987) (public and private); R.I. GEN. LAWS § 36-15-3 (1987) (public and private).

"Whistle Blower

Protection Act of 1980,[77] which provides protection to both public and private employees. The Act, in rather broad language, purports to apply to any employee who "reports or is about to report" suspected violations of any law on the part of his employer, or who testifies in any enforcement proceedings.[78] If, however, the employee "knows" the report is false, he is not protected by the Act.[79] Generally, the employee must file suit within ninety days of the employer's action.[80] If found to be protected, the employee is entitled to injunctive relief and/or actual damages, which may include reinstatement, back pay, benefits, seniority, and attorney fees.[81]

Interestingly, there has not been a great deal of litigation under the Michigan Act. One major issue, the establishment of a prima facie case, has been addressed. In *Melchi v. Burns International Security Services, Inc.*,[82] a federal district court applied Michigan law in holding that a plaintiff must demonstrate that he was engaged in a protected activity, that he was subsequently discharged from employment, and that there was a causal connection between his activity and the discharge.[83] The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the discharge.[84] If the defendant sustains this burden, the plaintiff must demonstrate that the legitimate reason was a mere pretext for the retaliatory action.[85] The overall burden of persuasion remains with the plaintiff who must show that, but for his protected activity, he would not have been discharged.[86]

Several states have enacted laws to protect the private sector whistleblower that are similar to Michigan's Act. The statutes generally provide a cause of action for the employee who reports an actual or suspected legal violation and protect the employee who is asked to testify before an investigating agency.[87] Some statutes provide a great deal of protection. For example, Connecticut's statute protects an employee who reports any suspected violation of any federal, state, or municipal law, regulation, or ordinance.[88] Others

77. MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 1981).
78. MICH. COMP. LAWS ANN. § 15.362 (West 1981).
79. *Id.*
80. MICH. COMP. LAWS ANN. § 15.363(1) (West 1981).
81. MICH. COMP. LAWS ANN. § 15.364 (West 1981).
82. 597 F. Supp. 575 (E.D. Mich. 1984).
83. *Id.* at 582.
84. *Id.* (citing Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980)).
85. *Id.*
86. The order and allocation of the burden of going forward in *Melchi* parallels that first established for Title VII actions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which was later elaborated upon by the Court in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).
87. MICH. COMP. LAWS ANN. § 15.364 (West 1981); CONN. GEN. STAT. ANN. § 31-51m(d) (West 1987).
88. CONN. GEN. STAT. ANN. § 31-51m(a) (West 1987).

SENATE COMMITTEE REPORT

FURTHER

JUD
FIN

3/23/89

DATE TURNED INTO OFFICE 4-22-89

Mr. President:

STATE AFFAIRS Committee considered CSHB 91 (JUD)

protection for certain public employees and certain other persons who report or participate in a proceeding connected with a matter of public concern

and recommended

[X] replace with ___ CS HB 91 (St Aff)) [X] same title
[ ] or adopt _____ CS _____) [ ] new title
[ ] technical title change (HB only)

[ ] attached amendment(s) and

[ ] _____ letter of intent adopted

[ ] do pass

[ ] do not pass

[ ] no recommendation

[X] individual recommendations

[ ] further referral to _____

FISCAL NOTE(S) [X] zero [ ] fiscal impact [ ] appropriation no FN
[ ] new [ ] updated [ ] previous
[ ] same as previous fiscal note(s) published _____

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Jim Tate No Rec
Tim Kelly No Rec
Lee Cates No Rec

Chairman signature and recommendation

[ ] Committee Backup attached

SCS for CS (a) (SA)

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: HB 91
Publish Date: 4/22/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: An Act relating to protection for certain public employees ...
Sponsor: Labor & Commerce
Requestor: Judiciary

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

The State Affairs CS has no fiscal effect. This fiscal note is appropriate
S Schubert
4-21-89

Prepared by: Jan Strandberg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 04/20/89

Approved by: Arthur H. Snowden, II, Administrative Director
Date: 04/20/89
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)

SCS to (b)

1989 LEGISLATIVE SESSION

Bill Version: CSHB 91 (SA
Publish Date: 4/22/89

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Department of Administration
Title: An Act relating to protection for public employees
BRU: Personnel
Sponsor: House Labor and Commerce Committee
Components: Centralized Administrative Services
Requestor: House Labor and Commerce Committee

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

This bill would not require an additional appropriation.

Changes made in the CS have no fiscal effect This fiscal note is appropriate
S Schubert
4-21-89

Prepared By: David K. F. Otto DKFO
Phone: 465-4450
Division: Personnel
Date: 1-31-89

Approved by Commissioner: John M. Andrews
Date: 1-31-89
Agency: Department of Administration

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

1/AK1/013007-9/1

(108)

STATE OF ALASKA
1989 LEGISLATIVE SESSION

No. 1

Bill Version: CSHB 91 (SA)
Publish Date: HOUSE 2/6/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: An Act relating to protection for public employees
Sponsor: House Labor and Commerce Committee
Requestor: House Labor and Commerce Committee

Agency Affected: Department of Administration
BRU: Personnel
Components: Centralized Administrative Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

This bill would not require an additional appropriation.

Prepared By: David K. F. Otto DKFO
Division: Personnel
Phone: 465-4450
Date: 1-31-89

Approved by Commissioner: John M. Andrews
Agency: Department of Administration
Date: 1-31-89

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

1/4K1/013007-9/1&2

Rev: 12/88