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PROTECTING THE WHISTLEBLOWER FROM RETALIATORY DISCHARGE

Martin H. Malin*

“Whistleblowing,” the disclosure by an employee of his employer’s improper activities, has received widespread attention in recent years. Whistleblowers have been branded everything from moral heroes¹ to gadflies,² though recent case studies suggest that whistleblowers tend merely to be ordinary employees who are so troubled by their employers’ conduct that they feel compelled to take action.³ Frequently, their employers respond to such action by terminating their employment.⁴ Employees fired for whistleblowing often have no recourse against their employer for this retaliatory discharge.

Much of the judicial and scholarly debate in this area has focused on the whistleblower’s utility to society. Case law and commentators attempt to balance society’s interest in using the whistleblowing employee to expose wrongdoing which might otherwise go undiscovered against the employer’s interest in maintaining employee loyalty. The standards

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1. See *Engineers as Moral Heroes*, 2 PERSPS. ON PROFS., Mar.-June 1982, at 3.

2. See, e.g., Shabecoff, *Persistent Whistle-Blower at E.P.A.*, N.Y. Times, April 14, 1982, at A20, col. 4.

3. Having examined these and other cases, I am convinced that the employees involved are neither neurotics nor misfits nor malcontents. Indeed, most are middle Americans, with no intrinsic animus toward capitalism or records of political radicalism. They are people who found themselves troubled over some things their employers were doing. One put the matter very simply: “I reached a point where I could no longer live with myself.” We have always claimed we are creatures of conscience. Here are individuals who acted on that principle.

Hacker, *Loyalty — and the Whistle Blower*, in *INDIVIDUAL RIGHTS IN THE CORPORATION* 85, 89 (A. Westin & S. Salisbury eds. 1980). See generally A. WESTIN, *WHISTLEBLOWING! LOYALTY AND DISSENT IN THE CORPORATION* (1981).

4. Some whistleblowers have experienced more retaliation than simply loss of their jobs. For example, when a Census Bureau employee reported that her boss, a politically well-connected manager of a regional office, was using his position to coerce sexual favors from female employees, making the office a vehicle for his political organizing, and neglecting the basic duties of the Census office, the boss not only fired her but used his influence with a local judge to obtain an *ex parte* order relieving her of custody of her children. Eventually the boss was indicted for conspiracy to defraud the government, false statements, illegal patronage hiring, and obstructing a criminal investigation. He pleaded guilty and was sentenced to a year in prison and three years probation. *Census Worker Fought for Right, But Didn’t Count on Such a War*, Chicago Tribune, June 3, 1982, § 3, at 1, col. 1.

that have evolved for protecting whistleblowers reflect this characterization of the relevant interests.

This approach to the problem of whistleblowing, however, is misguided; the appropriate balance is between the employee's interest in acting in accordance with his individual conscience and his duty of loyalty to his employer. This Article argues that although the law should protect individual acts of whistleblowing once they have occurred, it should not affirmatively encourage whistleblowing. Part I discusses the protection currently available to whistleblowers under the common law, collective bargaining agreements, and the antiretaliation provisions of several important statutes. Part II proposes a general standard of whistleblower protection that is designed to protect individual whistleblowers in appropriate circumstances, but which will not actively promote such conduct. Part III develops remedies for retaliatory discharge which, like the standard advocated in part II, will protect past whistleblowers without encouraging future whistleblowing. The Article concludes that, unless there is a violation of a collective bargaining agreement, a discharged whistleblower should be given a remedy that includes future damages, rather than the traditional labor law remedy of reinstatement.⁵

I. CURRENT SOURCES OF WHISTLEBLOWER PROTECTION

A. Common Law

Historically, an employment contract of indefinite duration was terminable at the will of either party.⁶ Although most jurisdictions retain

5. Public sector employees are outside the scope of this Article. Such employees may, in appropriate cases, find protection in civil service statutes or in the Constitution. See, e.g., Comment, *Government Employee Disclosures of Agency Wrongdoing: Protecting the Right to Blow the Whistle*, 42 U. CHI. L. REV. 530 (1975). The federal government and a few state governments have also enacted specific whistleblower protection laws which protect their employees. See, e.g., 5 U.S.C. §§ 2302(b)(8)-(9) (Supp. II 1978); *Frazier v. Merit Systems Protection Bd.*, 672 F.2d 150 (D.C. Cir. 1982) (discussing legislative history and application of 5 U.S.C. §§ 2302(b)(8)-(9)); IND. CODE §§ 4-15-2-34 to -35 (1981), amended by Acts 1982, P.L. 23, sec. 30; LA. REV. STAT. ANN. tit. 42, § 1169 (West 1981); N.Y. CIV. SERV. LAW § 736 (McKinney 1978); OR. REV. STAT. § 240.316(5)(a-d) as amended by ch. 155, L. 1981.

6. Commentators have discussed and criticized at length the development of the employment at will doctrine. In addition to the Articles and Student Notes in *Individual Rights in the Workplace: The At-Will Issue*, 16 U. MICH. J.L. REF. 199 (1983), see Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467 (1980); Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Olsen, *Wrongful Discharge Claims Raised by At Will Employees: a New Legal Concern for Employers*, 32 LAB. L.J. 265 (1981); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Comment, *Employment At Will and the Law of Contracts*, 23 BUFFALO L. REV. 211 (1974); Comment, *Job Security for the At Will Employee: Contractual Right of*

this common law rule,⁷ courts in a number of states have formulated exceptions to the employment-at-will doctrine when the discharge has

Discharge for Cause, 57 CHI. KENT L. REV. 697 (1981); Note, *A Remedy for Malicious Discharge of the At-Will Employee: Monge v. Beebe Rubber Co.*, 7 CONN. L. REV. 758 (1975); Note, *Contracts — Employment At Will — New Hampshire Supreme Court Recognizes Cause of Action for Malicious Discharge — Monge v. Beebe Rubber Co.*, 8 CREIGHTON L. REV. 700 (1975); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) [hereinafter cited as *Harvard Note*]. Note, *Implied Contract Rights to Job Security* 26 STAN. L. REV. 335 (1974).

7. See generally Annot., 12 A.L.R. 4th 544 (1982). Courts in the following 16 jurisdictions have refused to deviate from the employment-at-will doctrine: *Smith v. American Cast Iron Pipe Co.*, 370 So. 2d 283 (Ala. 1979); *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253 (Fla. 1980); *Georgia Power Co. v. Busbin*, 242 Ga. 612, 250 S.E.2d 442 (1978); *Stephens v. Justiss-Mears Oil Co.*, 300 So. 2d 510 (La. Ct. App. 1974); *Terrio v. Millinocket Community Hosp.*, 379 A.2d 135 (Me. 1977); *Kelley v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *Tolliver v. Standard Oil Co.*, 431 S.W.2d 159 (Mo. 1968); *Gonzales v. United Southwest Nat'l Bank of Santa Fe*, 93 N.M. 522, 602 P.2d 619 (1979); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978); *Sand v. Queen Packing Co.*, 108 N.W.2d 448 (N.D. 1961); *Henkel v. Educational Research Council of America*, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976); *School Comm. v. Board of Regents for Educ.*, 112 R.I. 288, 308 A.2d 788 (1973); *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 259 S.E.2d 812 (1979); *Maus v. National Living Centers, Inc.*, 633 S.W.2d 674 (Tex. Ct. App. 1982); *Bohlmaier v. Carson*, 603 P.2d 790 (Utah 1979); *Blevins v. General Elec. Co.*, 491 F. Supp. 521, 525 (W.D. Va. 1980). But see *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 289 S.E.2d 118 (1982) (*Dockery* superceded by statute protecting employees fired for filing workers' compensation claims).

Courts in eight other jurisdictions, although suggesting in dicta that in appropriate circumstances they might afford a cause of action to a discharged at-will employee, have refused to find such a cause of action on the facts before them. See, e.g., *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (Ariz. Ct. App. 1977); *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980); *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. Ct. App. 1977); *Keneally v. Orgain*, 606 P.2d 127 (Mont. 1980); *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979); *Ward v. Frito-Lay, Inc.*, 95 Wis. 2d 372, 290 N.W.2d 536 (Wis. Ct. App. 1980). The issue has been specifically left open in Iowa and Nebraska. See, e.g., *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978); *Mau v. Omaha Nat'l Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980). But cf. THE EMPLOYMENT-AT-WILL ISSUE, 111 LAB. REL. REP. (BNA) No. 23, at 33-65 (analyzing state court decisions and finding that 21 states adhere to at-will and 29 recognize exceptions).

Although a few jurisdictions stop short of creating an exception to the at-will doctrine, they have nonetheless read limitations on the employer's power to discharge into the employment contract. Even in these jurisdictions, however, common law contractual remedies are not likely to provide much relief to the employee who is discharged for whistleblowing. For example, the Michigan Supreme Court has held that an employment contract created by express oral or written agreement or through the employer's personnel policies, such as those contained in a personnel manual, may contain an enforceable promise to discharge only for just cause. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980). Accord *Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982); see also *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). The court did not, however, totally abrogate the employment-at-will doctrine. Employers may require employees to acknowledge that they may be terminated at will. The use of disclaimers of discharge for cause, if widespread, could easily strip employees of the protection provided by *Toussaint*. See Comment, *Job Security for the At Will Employee: Contractual Right of Discharge for Cause*, 57 CHI. KENT L. REV. 697, 730-33 (1981).

The other jurisdictions affording contractual protection to discharged employees have done

been contrary to public policy.⁸ The law is in utter disarray, however, over whether and when an employee discharged for whistleblowing has a cause of action against his employer.

In jurisdictions strictly adhering to the employment-at-will doctrine, the discharged whistleblower has no remedy.⁹ *Maus v. National Liv-*

so by requiring that the employer exercise its power to discharge in good faith. See, e.g., *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 New Hampshire Supreme Court, however, has since restricted *Monge* to situations where the discharged employee "performed an act that public policy would encourage, or refused to do that which public policy would condemn." *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980). Most recently, in *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981), the court interpreted *Monge* and *Howard* to require both a showing of employer bad faith and a violation of public policy. In *Fortune*, the Massachusetts Supreme Court did not imply a good faith requirement into every employment contract. Rather, it limited its holding to implying a good faith requirement for the termination of an employee otherwise entitled to commissions for work already performed. 373 Mass. at 103-05, 364 N.E.2d at 1256-57. The court has twice reiterated the narrowness of its holding. See *Gram v. Liberty Mut. Ins. Co.*, 1981 Mass. Adv. Sh. 2287, & n.5, 429 N.E.2d 21, 26 (1981), *Richey v. American Auto. Ass'n*, 1980 Mass Adv. Sh. 1425, 406 N.E.2d 675, 678 (1980).

A further issue is whether the required good faith is to be evaluated against a subjective or objective standard. Massachusetts appears to require subjective good faith, see *Gram*, 429 N.E.2d at 24, (equating bad faith termination with malice), while New Hampshire appears to analyze the employer's good faith objectively, see *Cloutier*, 121 N.H. at 921-22, 436 A.2d at 1143-44. Although some commentators have equated the requirement of good faith with just cause, See, e.g., Blackburn, *supra* note 6, at 490; *Harvard Note supra* note 6, at 1839-41, the only court to consider the issue thus far has rejected the equation. *Gram*, 429 N.E.2d at 26. The discharge of a whistleblower has frequently been justified as necessary to enforce employee loyalty, to avoid disruptions of employee morale, to preserve internal company security and audit procedures, and to avoid public embarrassment of the employer. Such reasons would clearly establish subjective good faith on the part of the employer. Cf. *Ward v. Frito-Lay, Inc.*, 95 Wis. 2d 372, 377, 290 N.W.2d 536, 538 (Wis. Ct. App. 1980) (even if court were to adopt *Monge*, employer who discharged employee for living out of wedlock with coemployee acted in good faith). Yet, even if the good faith requirement is interpreted objectively to require just cause, these reasons may be sufficient to establish just cause. See *infra* notes 56-67 and accompanying text.

8. A tort of abusive discharge has been recognized and applied in at least eleven jurisdictions: See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) *rev'g* 85 Ill. App. 3d 50, 406 N.E.2d 595 (1980); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Murphy v. City of Topeka-Shawnee County Dept. of Labor Serv.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); *Teays v. Supreme Concrete Block, Inc.*, 51 Md. App. 166, 441 A.2d 1109 (1982); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978); also *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

9. See, e.g., *Perdue v. J.C. Penney Co.*, 470 F. Supp. 1234 (S.D.N.Y. 1979); *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, 251 S.E.2d 51 (1978); *Maus v. National Living Centers, Inc.*, 633 S.W.2d 674 (Tex. Ct. App. 1982). A wrongfully discharged employee may attempt to recover under other tort theories but will encounter many obstacles. For example, an employee who sues for defamation must deal with the employer's qualified privilege. See *Walsh v. Consolidated Freightways, Inc.*, 278 Or. 347, 355-58, 563 P.2d 1205, 1210-11 (1977). An action for intentional infliction of emotional distress requires the employee to establish that the employer's conduct was outrageous, a showing that is difficult to make if the employer has a legal right

*ing Centers, Inc.*¹⁰ illustrates the harsh result of this rule. Plaintiff, a nurse's aid employed at defendant's nursing home, was terminated because she frequently complained to her superiors that patients were being neglected. One such complaint concerned the refusal of defendant's director of nursing to call a doctor for a patient who had suffered a stroke. Although the plaintiff had administered CPR and kept the patient alive for several days, the patient eventually died. The Texas Court of Appeals acknowledged the trend in other jurisdictions toward limiting the employer's right to terminate at will and noted that a Texas statute made it a misdemeanor to fail to report the abuse or neglect of nursing home patients to the state licensing agency or local law enforcement authorities. Nevertheless, the court viewed itself bound by the long standing terminable-at-will doctrine. Focusing upon the dearth of Texas Supreme Court precedent recognizing the tort of abusive discharge and the legislature's failure to protect employees reporting patient abuse from employer retaliation, the *Maus* court held that plaintiff was not entitled to protection.

Jurisdictions recognizing the tort of abusive discharge have taken divergent positions on whether and under what circumstances the discharge of a whistleblower violates public policy. The least protective of these jurisdictions requires specific and clearly applicable legislative declarations of policy before affording a cause of action.¹¹ Under this view a discharge is actionable only where it stems from the employee's exercise of a statutory right, such as the filing of a workers' compensation claim,¹² or from the employee's refusal to undertake an action prohibited by statute.¹³ Nevertheless, because employees

to fire at will. *Compare* *Palmateer v. International Harvester Co.*, 85 Ill. App. 3d 50, 53, 406 N.E.2d 595, 598 (1980), *rev'd on other grounds*, 85 Ill. 2d 124, 421 N.E.2d 876 (1980) with *Milton v. Illinois Bell Tel. Co.*, 101 Ill. App. 3d 75, 80-81, 427 N.E.2d 829, 833-34 (1981). Moreover, it is unclear whether a cause of action under these traditional tort theories will be barred by the immunity conferred on employers by workers' compensation statutes. *See generally* 2A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 68.33-68.34 (1982).

10. 633 S.W.2d 674 (Tex. Civ. App. 1982).

11. *See* *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978) (rejecting public policy exception where plaintiff relied on general policy rather than specific statutory declaration).

12. *See, e.g.,* *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978); *see also* *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3rd Cir. 1979) (employee discharged for refusal to take lie detector test has a cause of action in light of statute making it a misdemeanor to require such a test as a condition of employment).

13. *See, e.g.,* *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979) (refusal to participate in illegal price fixing scheme); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusal to participate in illegal price fixing scheme); *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (refusal to commit perjury); *Trombetta v. Detroit, Toledo & Ironton R.R. Co.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978) (refusal to falsify pollution control reports); *O'Sullivan v. Mallon*, 160

generally have no statutory right or obligation to report their superiors' improper or illegal conduct,¹⁴ the whistleblower usually is left without any remedy for his discharge.¹⁵ In these courts' view, the discharge "involves only a corporate management dispute and lacks . . . a clearly mandated public policy";¹⁶ thus, it does not give rise to an action for abusive discharge.

Other jurisdictions have adopted a slightly more protective approach. Although they too insist that a legislative declaration of public policy is a necessary element of the tort of abusive discharge, they find certain statutes to embody such a declaration.¹⁷ For example, in *Harless v. First National Bank*,¹⁸ the court afforded plaintiff a cause of action where he was discharged in retaliation for his efforts to correct his employer's violations of the West Virginia Consumer Credit and Protection Act. The court recognized that the legislature had intended to create a clear public policy that consumers of credit subject to the Act were to receive protection, and insisted that [s]uch manifest public policy should not be frustrated by a holding that an employee of a lending institution covered by the Act, who seeks to ensure . . . com-

N.J. Super. 416, 390 A.2d 149 (1978) (refusal to perform illegally a catheterization for which employee was not trained); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978) (refusal to avoid jury service by committing perjury).

14. Failure to report a felony generally does not constitute a misprison of felony unless it is accompanied by an affirmative act of concealment. *United States v. Hodges*, 566 F.2d 674 (9th Cir. 1977); *United States v. Johnson*, 546 F.2d 1225 (5th Cir. 1977); *United States v. Daddans*, 432 F.2d 1119 (7th Cir. 1970), *cert. denied*, 402 U.S. 905 (1971).

15. *See, e.g.*, *Campbell v. Eli Lilly Co.*, 413 N.E.2d 1054 (Ind. App. 1980) (employee discharged for advising employer's counsel of violations by his superiors of the federal Food, Drug and Cosmetics Act); *Martin v. Platt*, 386 N.E.2d 1026 (Ind. App. 1979) (employees discharged for reporting to company officials solicitation by their immediate superiors of kickbacks from company suppliers); *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982) (employee discharged for complaining about internal accounting practice which could have impeded the Public Service Commission's ability to regulate); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (employee discharged for advising corporate officer that product was unsafe).

16. *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 696, 316 N.W.2d 710, 712 (1982). In *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974), the court, in denying the plaintiff a cause of action even though he was fired after his complaints to a company vice-president that a new product was unsafe led to the withdrawal of the product from the market, reasoned:

There is nothing here from which we could infer that the company fired Geary for the specific purpose of causing him harm, or coercing him to break any law or otherwise to compromise himself. According to his own averments, Geary had already won his own battle within the company. The most natural inference from the chain of events . . . is that Geary had made a nuisance of himself, and the company discharged him to preserve administrative order in its own house.

Id. at 180, 319 A.2d at 178 (footnotes omitted).

17. *See* *Sheets v. Teddy's Frosted Foods, Inc.*, 178 Conn. 471, 427 A.2d 385 (1980); *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728 (1982); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

18. 246 S.E.2d 270 (W. Va. 1978).

pliance . . . can be discharged without being furnished a cause of action for such discharge.¹⁹

Even in these more protective jurisdictions, though, the whistleblower carries the heavy burden of pleading and proving the statutory violations. *Adler v. American Standard Corp.*²⁰ illustrates this burden. Plaintiff was discharged for reporting to the employer's headquarters improper activities of his superiors including attempts to treat capital expenditures as expenses, payment of commercial bribes, falsification of sales and income information, misuse of corporate funds for personal benefit, manipulation of inventory information, and alteration of forecasts in connection with intra-corporate financial reporting. In denying the plaintiff protection, the Maryland Court of Appeals conceded that he had exposed serious misconduct, but emphasized his failure to recite with sufficient specificity how the employer had violated specific statutes. Plaintiff pointed to a Maryland statute making it a misdemeanor to fraudulently misrepresent the affairs, assets or liabilities of a corporation, "with a view either to enhance or depress the market value of the shares therein, or the value of its corporate obligations, or in any other manner to accomplish any fraud thereby"²¹ The court rejected this statute as a basis for plaintiff's cause of action because plaintiff had not alleged that defendant's activities were intended to manipulate the value of the corporation's stock or obligations.²²

The most protective view of unjust discharge allows the judiciary to go beyond the legislature and apply its own notion of public policy. The Illinois Supreme Court took this approach in *Palmateer v. International Harvester Co.*²³ The plaintiff was discharged for reporting a fellow employee's criminal activity to local law enforcement authorities and for agreeing to assist in the subsequent investigation and trial. Although the court could have relied on the Criminal Code for a legislative declaration of public policy, it went further and defined public policy as "what is right and just and what affects the citizens of the State collectively."²⁴ It recognized judicial decisions as a source of public policy and declared that such policy favors citizen crime fighters.²⁵ Accordingly, it afforded Palmateer a cause of action.

To reconcile these divergent approaches to the tort of abusive discharge, it is necessary to examine the origins of the tort. The cause

19. *Id.* at 276.

20. 291 Md. 31, 432 A.2d 464 (1981).

21. *Id.* at 44, 432 A.2d at 471 (quoting MD. ANN. CODE art. 27, § 174 (1976)).

22. *Id.* The court also rejected the plaintiff's suggestion that the commercial bribes and false reports violated state and federal antitrust laws on similar grounds of insufficient specificity. *Id.* at 46, 432 A.2d at 472-73.

23. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

24. *Id.* at 130, 421 N.E.2d at 878.

25. *Id.* at 132-33, 421 N.E.2d at 880.

of action in tort for abusive discharge was initially advocated by Professor Lawrence Blades.²⁶ In Blades's view, the purpose of the tort was to protect employee freedom of action from the employer's absolute power over the employee's job security where the exercise of that power was not legitimately related to the employee's job.²⁷ As proposed by Professor Blades, the tort was not limited to discharges that violated clear mandates of public policy, but included any attempt to intimidate or coerce an employee in a manner bearing no reasonable relationship to the job.²⁸ Although Blades is frequently cited in abusive discharge cases, his article provides neither the rationale nor the theoretical foundation for the tort that has been developed by the courts.

Instead, the tort of abusive discharge recognized by the courts is predicated on arguments predating those contained in the Blades article. In *Petermann v. International Brotherhood of Teamsters*,²⁹ the plaintiff had been discharged because of his refusal to perjure himself before a state legislative committee. Without citing supportive authority, the California Court of Appeals asserted that the contractual right to discharge an employee could be limited by considerations of public policy.³⁰ It noted that the solicitation of perjury was a crime, and that the threat of criminal prosecution usually would deter such conduct; however, it also sought to harmonize the civil law of employment at will with the policy against perjury expressed in the criminal law. It therefore curtailed the employer's otherwise absolute right to discharge at will where the reason for the discharge was the employee's refusal to commit perjury.³¹

Similarly, in *Frampton v. Central Indiana Gas Co.*,³² the next case recognizing the tort of abusive discharge, the Indiana Supreme Court held that an employer's right to discharge at will must be limited where the discharge was in retaliation for filing a workers' compensation claim. To hold otherwise, the court reasoned, would completely emasculate the statutory workers' compensation scheme.³³

The actual basis for the tort of abusive discharge as developed by the courts is therefore not the employee's right to freedom of action, as Blades advocated, but rather a perceived need to restrain otherwise unlimited employer power, where the exercise of such power poses a

26. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

27. *Id.* at 1405-06.

28. *Id.* at 1413.

29. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

30. *Id.* at 188, 344 P.2d at 27. Notably, the court did cite authority for the proposition that the right to discharge could be limited by statute. *Id.*

31. *Id.*

32. 260 Ind. 249, 297 N.E.2d 425 (1973).

33. *Id.* at 251-52, 297 N.E.2d at 427.

substantial threat to the public welfare. Decisions recognizing the tort but refusing to apply it to protect discharged whistleblowers reason that a discharge has not violated public policy if the whistleblower neither exercised a statutory right nor refused to breach a statutory duty. When viewed in light of the origins of the tort, such decisions clearly are incorrect. The societal harm resulting from the discharge of an employee who works internally to correct statutory violations or who reports such violations to appropriate authorities is as substantial as the harm resulting from the discharge of an employee who refuses to commit the violation.³⁴ The absence of a statutory duty to report the violation, then, does not justify the refusal to protect the whistleblower.³⁵

Although not insisting that the employee be under a statutory duty to report employer violations, the more protective jurisdictions do require that the conduct challenged by the employee actually violate a statute.³⁶ Thus, an employee who reports activities such as the marketing of defective products or the receipt of bribes and kickbacks which are

34. For example, in Michigan when the Michigan Chemical Company accidentally shipped PBB instead of feed supplement to Michigan Farm Bureau Services, which accidentally mixed it with animal feed, employees aware of the error were warned by their supervisors not to report it if they wished to keep their jobs. Consequently, PBB worked its way into the state's food supply and ultimately contaminated most persons in the state. The PBB incident was a major reason for the enactment of Michigan's Whistleblower Protection Act. Westin, *Michigan's Law to Protect the Whistle Blowers*, Wall St. J., Apr. 13, 1981, at 18, col. 3.

35. The anomaly of the contrary position can be clearly seen in Michigan where an employee fired for refusing to make misrepresentations to a government agency is protected, but one fired for trying to prevent misrepresentations by others is not protected. *Compare* Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982) with *Trombetta v. Detroit, Toledo & Ironton R.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978).

These jurisdictions probably refuse to expand the tort to protect whistleblowers because they fear that such expansion could lead to runaway litigation that would eventually eliminate management's right to hire and fire. As one jurist cautioned:

By departing from the general rule that an at-will employment is terminable at the discretion of the employer, the courts are attempting to give recognition to the desire and expectation of an employee in continued employment. In doing so, however, the courts should not concentrate solely on promoting the employee's expectations. The courts must recognize that the allowance of a tort action for retaliatory discharge is a departure from, and an exception to, the general rule. The legitimate interest of the employer in guiding the policies and destiny of his operation cannot be ignored. The new tort for retaliatory discharge is in its infancy. In nurturing and shaping this remedy, courts must balance the interests of employee and employer with the hope of fashioning a remedy that will accommodate the legitimate expectations of both. In the process of emerging from the harshness of the former rule, we must guard against swinging the pendulum to the opposite extreme.

Palmateer v. International Harvester Co., 85 Ill. 2d 124, 142-43, 421 N.E.2d 876, 884 (1981) (Ryan, J., dissenting).

The ultimate fear is that "an employer may justly discharge an employee only at the risk of being compelled to *defend* a suit for retaliatory discharge." *Rozier v. St. Mary's Hosp.*, 88 Ill. App. 3d 994, 998-99, 411 N.E.2d 50, 54 (1980) (emphasis in original).

36. See *supra* notes 20-22 and accompanying text.

generally considered to be improper, but which may not violate a specific statute, may find himself unprotected. Most employees know only that what their employers are doing is wrong. They are not sufficiently familiar with the intricacies of statutory and administrative law to assess what violations, if any, have occurred. Even the most sophisticated employee will frequently be unable to predict with certainty a statute's ultimate interpretation.³⁷

Thus, even in the more protective jurisdictions protection is inadequate. A whistleblower can only be sure that a court *might* protect him against discharge. He cannot predict in a given case whether such protection is likely. The whistleblower must expect employer retaliation and weigh the consequences in deciding whether to act;³⁸ one of the factors he must consider is whether the legal system will provide protection from retaliation. Thus, any standard of whistleblower protection must offer the employee a considerable measure of predictability.

Unfortunately, the only alternative judicial formulation of when a discharge violates public policy is *Palmateer's* characterization of public policy as "what is right and just and what affects the citizens of the State collectively."³⁹ This definition is so broad as to afford little predictability. Indeed it is probably less capable of guiding conduct than

37. The problem is well illustrated by comparing two cases. In *Adler v. American Standard Co.*, 291 Md. 31, 432 A.2d 464 (1981), the plaintiff was discharged for reporting to the employer's headquarters that his supervisors were falsifying numerous corporate reports and paying commercial bribes. The court, however, stressed that to be protected, the whistleblowing must concern activity that clearly violated a public policy expressed by statute. The employee could not prove a specific statutory violation; therefore, no cause for action for abusive discharge would lie. On the other hand, in *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728 (1982), plaintiff, a pharmacist, was fired after insisting that defendant keep the pharmacy section of its grocery store open and under the supervision of a licensed pharmacist whenever the store was open. Although the New Jersey statute governing the practice of pharmacy did not specifically require that the pharmacy section be open whenever the rest of the store was open, the court concluded that the pharmacist had acted to prevent what he *thought* was a statutory violation, and held that his discharge contravened public policy.

38. The classic response to the whistleblowing employee — the ad hominem defense — is to divert attention from the disclosure to the discloser by attacking her motivation. This tactic transforms the problem into a mere "personality conflict," which is comparatively easier for management to deal with. In fact, after a study of a large number of government whistleblowers, one congressional report concluded that regardless of the nature or validity of the issue involved in the original allegation, the major response of the bureaucracy is directed to the employee who came forward and not to the problem. Raven-Hansen, *Dos and Don'ts for Whistleblowers: Planning for Trouble*, TECH. REV., May 1980, at 34, 41.

39. 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981). The *Palmateer* court appears to have borrowed this definition of public policy from Justice Barry's dissent in the decision below. See *Palmateer v. International Harvester Co.*, 85 Ill. App. 3d 50, 54, 406 N.E.2d 595, 599 (1980) (Barry, J., dissenting). Significantly, though, neither party had advocated so amorphous a standard. Appellate *Palmateer* had urged only that the court "establish guidelines . . . in order that a balance might be maintained between the unfettered exercise of business judgment and the protection of valid public interest . . ." Reply Brief of Appellant at 11, *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

the standard which limits protection to the reporting of statutory violations. Employers are left not knowing when they can legally discharge an employee, while employees are left not knowing when their whistleblowing will be protected and when they will be acting at their peril.

Besides lacking predictability, the common law standards that have developed have also lacked sufficient flexibility to accommodate whistleblowers occupying different positions with different responsibilities to their employers. Commentators have suggested that professional employees, in particular, are entitled to protection from discharge where their actions conform to professional ethical standards.⁴⁰ Courts, however, are divided over whether a code of professional ethics is a sufficient expression of public policy to support an action for abusive discharge.⁴¹

Divergent judicial views also exist concerning the relevance of the whistleblower's position with the employer. One court, in protecting a whistleblower, emphasized the employee's authority and responsibility over the type of actions on which he blew the whistle,⁴² yet another court, in denying a whistleblower protection, noted that the employee lacked such authority or responsibility.⁴³ A third court has maintained that employers must have wide latitude in dealing with upper level managers⁴⁴ — a decision which suggests that employers may impose greater requirements of loyalty on such individuals than on line employees.

As the preceding discussion indicates, courts have failed to develop a common standard for evaluating whistleblower conduct that is both flexible and predictable. Flexibility has generally characterized arbitration decisions interpreting collective bargaining agreements and some commentators have called for statutory reform of the common law modeled on the just cause and arbitration provisions of collective bargaining agreements.⁴⁵ The following section, however, demonstrates that ar-

40. See, e.g., Feliu, *Discharge of Professional Employees: Protecting Against Dismissal For Acts Within A Professional Code Of Ethics*, 11 COLUM. HUM. RTS. L. REV. 149 (1980); Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805 (1980). Cf. Edsall, *Scientific Freedom and Responsibility*, 188 SCI. 687, 688 (1975) ("Scientists possess no rights beyond those of other citizens except those necessary to fulfill the responsibilities arising from their special knowledge, and from the insight arising from that knowledge.").

41. Compare *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980) and *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 156-57, 443 A.2d 728, 730-31 (1982) (both recognizing in dictum that in appropriate circumstances a code of professional ethics can be a source of public policy) with *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692 696, 316 N.W.2d 710, 712 (1982) (rejecting this proposition).

42. *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385, 388 (1980).

43. *Geary v. United States Steel Corp.*, 456 Pa. 171, 181, 319 A.2d 174, 178-79 (1974).

44. *Percival v. General Motors Corp.*, 539 F.2d 1126, 1129-30 (8th Cir. 1976).

45. See, e.g., Steiber, *Protection Against Unfair Dismissal*, INDUS. REL. NEWSLETTER, Fall 1978, at 4; Summers, *supra* note 6, at 519-31.

bitrators also have failed to develop adequate standards for dealing with whistleblowers.

B. Collective Bargaining Agreements and Arbitration

Most collective bargaining agreements require that the employer have just cause to discharge covered employees.⁴⁶ Where such a provision is not explicit, arbitrators often imply it.⁴⁷ Commentators have assumed that such provisions include substantial protection for whistleblowers;⁴⁸ review of the relevant arbitration decisions, however, suggests that such an assumption is faulty.

An employer who discharges a whistleblower invariably will defend the discharge on grounds of employee disloyalty. The concept of employee loyalty implicates the voluntary acceptance of a relationship involving an "identity of interests and a support of common effort and continued effectiveness."⁴⁹ Loyalty requires that an employee promote the welfare of the business and act in the best interests of the employer. For example, an employee is disloyal when he places himself in a position that may have an adverse economic impact on the employer. Thus, an employee who moonlights for a competitor⁵⁰ or has an interest in a competitor⁵¹ is considered disloyal. Disloyalty also exists where an employee's actions can reasonably be expected to have an adverse impact on customer confidence in the employer,⁵² or the employer's public image or reputation.⁵³ Arbitrators recognize, however, that the duty of loyalty must be tempered by a rule of reason. An employee's obligations to his employer must be balanced with his rights as a private citizen.⁵⁴

*Appalachian Power Co.*⁵⁵ illustrates the difficulties encountered in striking this balance. While collecting information to complete a report

46. A Bureau of National Affairs Survey reveals that 80% of collective bargaining agreements contain provisions regarding discharge for "just cause." 2 COLLECTIVE BARGAINING: NEGOTIATIONS & CONTRACTS (BNA) 40:1 (1978).

47. See, e.g., *Cameron Iron Works, Inc.*, 25 Lab. Arb. (BNA) 295, 300-01 (1955) (Boles, Arb.).

48. See, e.g., Walters, *Your Employees' Right to Blow the Whistle*, 53 HARV. BUS. REV. July-Aug. 1975, at 34. Summers appears to make a similar assumption, as he cites a whistleblower case, *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974), as an example of why statutory just cause protection from discharge is needed. Summers, *supra* note 6, at 481-82.

49. *Los Angeles Herald-Examiner*, 49 Lab. Arb. (BNA) 453, 464 (1967) (Jones, Arb.).

50. *Pipe Coupling Mfrs.*, 1966-2 Lab. Arb. Awards (CCH) ¶ 8598 (McCoy, Arb.).

51. *Moore Business Forms, Inc.*, 57 Lab. Arb. (BNA) 1258 (1971) (Larson, Arb.); see also *Mechanical Handling Systems, Inc.*, 26 Lab. Arb. (BNA) 401 (1956) (Keller, Arb.).

52. *Anthony Co.*, 1969-2 Lab. Arb. Awards (CCH) ¶ 8699 (Cohen, Arb.).

53. *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953); *Thiokol Chem. Corp.*, 1969-2 Lab. Arb. Awards (CCH) ¶ 8705 (Williams, Arb.).

54. See, e.g., *Appalachian Power Co.*, 1973-2 Lab. Arb. Awards (CCH) ¶ 8496 at 4841 (McDermott, Arb.).

55. *Id.*

on accidental damage to one of the company's poles, a company serviceman spoke to city officials about the company's rate increase request. The employee advised city officials that he believed the company was wasting money on unnecessary promotional activity and encouraged the city to oppose the rate petition pending before the Public Service Commission. In upholding the company's suspension of the employee, the arbitrator relied on the employee's clear identification as a company employee at the time he spoke with city officials, the inaccuracy of the information, and the confidential nature of the information to tip the balance in favor of the employer.⁵⁶

Many arbitrators have agreed with employers that whistleblowing constitutes disloyalty and is therefore just cause for discharge or other discipline. They view the whistleblower's actions as harmful to the employer's reputation and disruptive of employee morale. Arbitrators have upheld discharges in part because they perceive the employee who deliberately blows the whistle as impliedly assuming the risk of discharge.⁵⁷ These arbitrators have followed two approaches in sustaining whistleblower discharges.

Some arbitrators appear to view whistleblowing as disloyalty per se. They take a hard line approach that you cannot "bite the hand that feeds you, and insist on staying for future banquets."⁵⁸ *Herald-Examiner*⁵⁹ exemplifies the harsh consequences of this per se approach. The employee, an editor of the Sunday magazine, objected when his superiors ordered that color reproductions of master paintings of Madonna and Child be airbrushed so they would not show genitalia. When his efforts to have the decision overruled failed, the editor, viewing the airbrushing as unethical, resigned, giving two weeks notice. He then sought employment with the *Los Angeles Free Press* and upon being asked, advised the *Free Press* of the reasons for his resignation. The *Free Press* used the information to satirize the *Herald-Examiner*. As a result, the editor was immediately fired, prior to the effective date of his resignation.

The arbitrator upheld the discharge, finding that the editor's revelations to the *Free Press* embarrassed his employer. Although the editor was merely explaining his reasons for seeking employment, not deliberately challenging his employer's conduct, the arbitrator concluded that the editor should have foreseen that the *Free Press* might use the information as it did. *A fortiori* this arbitrator would have viewed intentional whistleblowing as disloyalty per se.

56. *Id.*

57. R.P. Richards, Inc., 63 Lab. Arb. (BNA) 412, 418 (1974) (Gentile, Arb.) ("When one appears before a public forum . . . then one must assume the responsibility for the words used . . ."); Los Angeles Herald-Examiner, 49 Lab. Arb. (BNA) 453, 465 (1967) (Jones, Arb.).

58. Forest City Publishing Co., 58 Lab. Arb. (BNA) 773, 783 (1972) (McCoy, Arb.).

59. 49 Lab. Arb. (BNA) 453, 465 (1967) (Jones, Arb.).

Other arbitrators, though not ruling that whistleblowing is disloyal per se, have sustained discharges on the basis of such factors as the employee's bad faith or malicious motive,⁶⁰ his failure to resort first to internal channels,⁶¹ the tone and visibility of the employee's statements,⁶² and the statements' falsity.⁶³ These decisions place a heavy burden on the employee to consider the impact of his actions on the employer, the truth of his beliefs, and the methods by which he chooses to blow the whistle *before* he acts.

*Davenport Good Samaritan Center*⁶⁴ and *R.P. Richards, Inc.*⁶⁵ illustrate this latter approach. In *Davenport*, a dietary aide was suspended because she reported her nursing home employer to state health authorities. The employee filed the report after she showed her supervisor a loaf of bread which had been partially eaten by a rodent. The supervisor told her to cut off the bad part and use the rest. A state inspection precipitated by the complaint found that the home had a rodent problem but was taking adequate measures to control it. The arbitrator upheld the suspension, finding that the complaint damaged the home's reputation and caused needless concern among the residents and employees. He chastised the whistleblower for not taking her concerns to the home's administrator before going public.

In *Richards*, the employer, a plumbing contractor, had petitioned a public agency for permission to substitute plastic pipe for cast iron pipe in a construction project. The employee appeared at a public hearing, identified himself as a private citizen, and opposed the variance, testifying, "the . . . District is a victim of a fraud if you approve this" When the employee was discharged, the local press linked his discharge to his testimony. Even though the variance was ultimately granted, the arbitrator sustained the discharge, emphasizing the public visibility of the issue, the employer's vulnerability, the tone of the employee's statement, and the fact that the employee was linked publically to the employer even though he identified himself as a private citizen.⁶⁶

60. See *Kroger Co.*, 74 Lab. Arb. (BNA) 785 (1980) (Doering, Arb.); *Thiokol Chem. Corp.*, 1969-2 Lab. Arb. Awards (CCH) ¶ 8705 (Williams, Arb.).

61. See *Davenport Good Samaritan Center*, 1978-2 Lab. Arb. Awards (CCH) ¶ 8441 (Ross, Arb.); *Factory Services, Inc.*, 70 Lab. Arb. (BNA) 1088 (1978) (Fitch, Arb.).

62. *R.P. Richards, Inc.*, 63 Lab. Arb. (BNA) 412, 417-18 (1974) (Gentile, Arb.).

63. *Davenport Good Samaritan Center*, 1978-2 Lab. Arb. Awards (CCH) ¶ 8441 (Ross, Arb.).

64. *Id.*

65. 63 Lab. Arb. (BNA) 412 (1974) (Gentile, Arb.).

66. Arbitrators have often reinstated whistleblowers where their activities were directly related to their positions as union officials. See, e.g., *City of Williamsport*, 61 Lab. Arb. (BNA) 279 (1973) (Loewenberg, Arb.); see also *Sun Furniture Co.*, 1979-2 Lab. Arb. Awards (CCH) ¶ 8447 (Ruben, Arb.) (employee reinstated despite disparaging employer to customer where real motive for discharge was employee's union activities). Cf. *Hopwood Foods, Inc.*, 74 Lab. Arb. (BNA) 349 (1979) (Mullin, Arb.) (employee reinstated because his allegations of management incompetence

Recent cases reflect some moderation of the relatively hard line that arbitrators have taken toward whistleblowers. In *Olympic Memorial Hospital*,⁶⁷ three nurses were discharged for registering concerns over the competence of the Director of Nursing with her superiors. The employer contended that the charges proved to be false and that the complaints disrupted employee morale and interfered with the hospital's orderly operation. The arbitrator ordered the nurses reinstated. Finding the alleged falsity of the complaints irrelevant, he emphasized the nurses' good faith and suggested that had the nurses remained silent, they would have compromised their responsibilities to their patients.

Similarly, in *Town of Plainville*,⁶⁸ an arbitrator ordered a city employee reinstated following his discharge for writing an anonymous letter to a town councilman suggesting that a foreman had misappropriated town property. The charge turned out to be false but was made in good faith. The arbitrator set forth six factors to guide his decision: the significance of the activity exposed, the whistleblower's motives, the whistleblower's state of mind, the method used to blow the whistle, the harm to the employer, and the employee's right of free expression.⁶⁹

Although both *Olympic Memorial Hospital* and *Town of Plainville* take a more tolerant view of whistleblowing, both cases protected employees who did not go public. Of perhaps greater significance is a recent decision in the Seventh Circuit Court of Appeals upholding an employee's right to go public. In *Jones Dairy Farm*,⁷⁰ the arbitrator upheld a meat processor's rule prohibiting employees from reporting contamination problems to U.S.D.A. inspectors and requiring that the problems be reported to supervisors. He viewed the rule as a reasonable method of insuring that unsanitary conditions are brought to the attention of management for correction. A federal district court, in an opinion affirmed by the Seventh Circuit, enjoined enforcement of this decision, holding that it contravened public policy because it prohibited employees from reporting violations to inspectors even if a serious problem remained uncorrected after being reported to management.⁷¹

The arbitrators' decisions in *Olympic Memorial Hospital* and *Town of Plainville* and the court's decision in *Jones Dairy Farm*, however,

were made in his capacity as shareholder rather than employee). Arbitrators have also relied on whistleblower good faith and the absence of damage to the employer to reduce, *Zellerbach Paper Co.*, 75 Lab. Arb. (BNA) 868 (1980) (Gentile, Arb.), or overturn, *Northern Indiana Public Serv. Co.*, 69 Lab. Arb. (BNA) 201 (1977) (Sembower, Arb.), the discharge.

67. 1981-1 Lab. Arb. Awards (CCH) ¶ 8059 (1980) (Sinclitico, Arb.).

68. 77 Lab. Arb. Awards (BNA) 161 (1981) (Sacks, Arb.).

69. 77 Lab. Arb. (BNA) 167-71.

70. 1979-1 Lab. Arb. Awards (CCH) ¶ 8310 (Maslanka, Arb.).

71. *Amalgamated Meat Cutters Local P-1236 v. Jones Dairy Farm*, 519 F. Supp. 1362 (W.D. Wis. 1981), *aff'd*, 680 F.2d 1142 (7th Cir. 1982).

are relatively unique among published arbitration decisions. The divergent approaches taken by arbitrators in evaluating whistleblower discharges further underscores the need for a general standard of whistleblower protection.

C. Statutory Protection

In some circumstances, a whistleblower may be protected by the antiretaliation provision of one of a variety of statutes. Such provisions are primarily found in federal statutes regulating employment, and prohibit retaliation against individuals exercising rights conferred by the statutes.⁷²

1. *Federal civil rights legislation*— The virtually identical antiretaliation provisions of Title VII of the Civil Rights Act of 1964 ("Title VII")⁷³

72. Antiretaliation provisions are also found in the following non-employment statutes: Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (1976); Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1976); Toxic Substances Control Act, 15 U.S.C. § 2622 (1976); Solid Waste Disposal Act, 42 U.S.C. § 6971 (1976); Clean Air Act, 42 U.S.C. § 7622 (Supp. I 1977); and Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1976). They first appeared in 1972 in amendments to the Federal Water Pollution Control Act so that "employees and union officials could help assure that employers do not contribute to the degradation of our environment." S. REP. NO. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADM. NEWS 3668, 3748. By 1976 antiretaliation provisions in federal environmental legislation were considered "standard employee protection." H.R. REP. NO. 1491, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & ADM. NEWS 6238, 6245. Employees who believe they are the victims of retaliation must file complaints with the Wage and Hour Division of the Department of Labor. The complaints are investigated and if found meritorious are set for hearing before an administrative law judge; complaints found lacking in merit are dismissed unless the complainant requests a hearing. 29 C.F.R. § 24.4(2)(i) (1982). Following the hearing, the administrative law judge issues a recommendation, with the final order coming from the Secretary of Labor. 29 C.F.R. § 24.7(a) (1982). The Secretary's decision is reviewable in the circuit courts of appeals subject to the substantial evidence standard. *See Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied sub nom.*, *Ellis Fischel State Cancer Hosp. v. Donovan*, 450 U.S. 1040 (1981).

The availability of this statutory protection is tempered by an unusually short period of limitations. All complaints must be filed within 30 days following the alleged act of retaliation. The danger that a victim of employer retaliation will lose his remedy because of late filing is further enhanced by the requirement that the filing be made with the Labor Department rather than the agency enforcing the environmental statute of whose violation the employee initially complained. *See School Dist. v. Marshall*, 657 F.2d, 16, 18-19 (3d Cir. 1981); *see also Greenwald v. City of North Miami Beach*, 587 F.2d 779, 781 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979).

73. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. VI 1980). Section 704(a) provides: It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-4 (1976).

and the Age Discrimination in Employment Act ("ADEA")⁷⁴ provide the broadest protection for the whistleblower. Prohibited retaliation is not limited to discharge, but encompasses all actions inconsistent with the employer's usual procedures⁷⁵ as well as reprisals outside the scope of the employment relationship such as the filing of a retaliatory lawsuit.⁷⁶ Under these statutes, protection continues after the employment relationship has ended. Thus, a former employer may not retaliate by withholding reference letters or supplying negative references,⁷⁷ and a subsequent employer may not consider an employee's assertion of Title VII or ADEA rights against a prior employer in deciding whether to hire the employee.⁷⁸

Two types of conduct are explicitly protected by these statutes: participation in a statutory enforcement proceeding and opposition to employer practices violating the statutes. Participation has been broadly construed to protect the filing of employment discrimination charges with state agencies,⁷⁹ assisting others in filing charges,⁸⁰ and refusing to testify in favor of a party.⁸¹ Efforts to gather evidence are also protected. For example, in *United States v. City of Milwaukee*,⁸² the court enjoined enforcement of a city police department rule forbidding officers from discussing department business with persons outside the department to the extent that the rule was used to prohibit employees from cooperating with federal civil rights investigators.

74. 29 U.S.C. §§ 621-34 (1976 & Supp. IV 1980) (antiretaliation provision at 29 U.S.C. § 623(d) (1976)).

75. Illegal retaliation has taken several forms, including suspension, see *Hearth v. Metropolitan Transit Comm'n*, 436 F. Supp. 685 (D. Minn. 1977); demotion, see *Smith v. Columbus Metropolitan Housing Auth.*, 443 F. Supp. 61 (S.D. Ohio 1977); denial of positions to which employee was entitled by virtue of seniority, see *Berio v. EEOC*, 18 Empl. Prac. Dec. (CCH) ¶ 8847 (D.D.C. 1979); *Hackley v. Cleland*, 13 Empl. Prac. Dec. (CCH) ¶ 11,585 (D.D.C. 1977); refusal to provide work instructions, see *Robinson v. Midenhorf*, 13 Empl. Prac. Dec. (CCH) ¶ 11,415 (D.D.C. 1976); extension of probationary period, see *Sherkow v. Department of Public Instruc.*, 17 Empl. Prac. Dec. (CCH) ¶ 8553 (W.D. Wis. 1978), *aff'd in part, rev'd in part as to remedy*, 630 F.2d 498 (7th Cir. 1980); transfer to an undesirable position, see *Hatton v. Ford Motor Co.*, 26 Empl. Prac. Dec. (CCH) ¶ 32,038 (E.D. Mich. 1981); and refusal to provide a customary commendation, see EEOC Recommendation No. 74-15 (Aug. 7, 1973).

76. See *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775 (W.D. Va. 1980), 652 F.2d 380 (4th Cir. 1981).

77. See *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978).

78. In *Barela v. United Nuclear Corp.*, 462 F.2d 149 (10th Cir. 1972), an employer refused to hire an applicant who had filed Title VII charges against his former employer. The prospective employer claimed that the applicant was seeking reinstatement with his former employer, might return to work for his former employer in the near future, and therefore was unacceptable for the position that was available. The court held the refusal to hire was illegal retaliation.

79. See, e.g., *Kralowec v. Prince George's County*, 503 F. Supp. 985 (D. Md. 1980), *aff'd mem.*, 679 F.2d 883 (4th Cir. 1982); *Hayden v. Chrysler Corp.*, 486 F. Supp. 557 (E.D. Mich. 1980); *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F. Supp. 66 (S.D.N.Y. 1975), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

80. See *Eichman v. Indiana State Univ. Bd. of Trustees*, 597 F.2d 1104 (7th Cir. 1979).

81. See *Smith v. Columbus Metropolitan Housing Auth.*, 443 F. Supp. 61 (S.D. Ohio 1977).

82. 390 F. Supp. 1126 (E.D. Wis. 1975).

An employee who files discrimination charges is protected against retaliation even if the charges are false and intentionally malicious. In *Pettway v. American Cast Iron Pipe Co.*,⁸³ the court reasoned that because the filing of charges by employees was essential to the enforcement process, the need for protection against retaliation outweighed the employer's interest in using the power to discharge as a means of protecting itself from maliciously libelous employee statements.⁸⁴ Similar concerns have prompted other courts to bar employer tort actions for damages resulting from maliciously false charges.⁸⁵

Protection is also afforded if an employee opposes employer practices that the employee believes are discriminatory. Protected opposition includes refusing to carry out illegal instructions,⁸⁶ alerting a government agency with whom the employer deals to the employer's illegal practices,⁸⁷ and working within the employer's internal structure to eliminate the employer's illegal practices.⁸⁸ The employer's practices need not actually violate the civil rights laws; so long as the employee acts on a good faith belief that illegal conduct exists he is protected from retaliation.⁸⁹

Not all employee action in opposition to discrimination, however, is covered by these antiretaliation provisions. Opposition must be aimed at the employer's activities rather than at the discriminatory conduct of fellow employees.⁹⁰ The opposition must be lawful and reasonable. For example, employers may discipline or discharge an employee who copies the employer's confidential documents even though the copies are to be used in opposing the employer's discriminatory practices.⁹¹ Employees' statutory rights to oppose discrimination are not to be construed as a general license to be insubordinate.⁹²

The nature of an employee's job may influence the scope of his right to oppose discriminatory employment practices. For example, in certain circumstances the method of opposition may hinder the employee's

83. 411 F.2d 998 (5th Cir.), *reh'g denied*, 415 F.2d 1376 (5th Cir. 1969).

84. This broad interpretation of antiretaliation provisions is not available under other federal statutes. See *infra* notes 133-36 and accompanying text (discussing National Labor Relations Act).

85. See *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775 (W.D. Va. 1980); *Cooper v. Pic-Walsh Freight Co.*, 19 Empl. Prac. Dec. (CCH) ¶ 8994 (E.D. Mo. 1976).

86. See *Tidwell v. American Oil Co.*, 332 F. Supp. 424 (D. Utah 1971).

87. See *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978); *Hicks v. ABT Associates*, 572 F.2d 960 (3d Cir. 1978).

88. See *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980).

89. See *id.*; see also *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978).

90. See *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978) (holding employer may fire employee who forced a co-worker to apologize to a black for a racial slur).

91. See *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980); see also *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972) (illegal "stall-in"), *vacated on other grounds*, 411 U.S. 792 (1973); *King v. Illinois Bell Tel. Co.*, 476 F. Supp. 495 (N.D. Ill. 1978) (strike in breach of no-strike clause in collective bargaining agreement).

92. See *Monteiro v. Poole Silver Co.*, 615 F.2d 4 (1st Cir. 1980).

ability to carry out responsibilities peculiar to his position.⁹³ Thus, an equal employment opportunity manager may be fired for filing complaints or soliciting others to file complaints with civil rights enforcement agencies, because such activities compromise the manager's duty to represent fully the employer's interests in its dealings with those agencies.⁹⁴

2. *Federal labor laws*— Other federal statutes furnish a different measure of protection from retaliation.

a. *The National Labor Relations Act*— The National Labor Relations Act ("NLRA") shields from retaliation any "employee" who "has filed charges or given testimony" in proceedings under the NLRA.⁹⁵ In contrast with Title VII and the ADEA, though, it does not accord general protection to employees opposing illegal employer practices; rather, it covers only participation in NLRA proceedings.⁹⁶ Moreover, the NLRA's protections only expressly apply to "employees," which the statute defines to exclude supervisors;⁹⁷ National Labor Relations Board ("NLRB") decisions have further limited the term to exclude managerial employees⁹⁸ and students employed by their educational institutions.⁹⁹ The degree of protection, if any, afforded such employees who participate in NLRA proceedings is the subject of considerable controversy. Although most of the litigation has involved retaliation against supervisors, the same issues arise whether the employee is a supervisor or some other individual excluded from the statutory definition of "employee."

Courts generally agree that an employer may not retaliate against

93. *Rosser v. Laborers' Int'l Union of North America, Local 438*, 616 F.2d 221 (5th Cir. 1980) (legal for union to fire its dues posting clerk for political disloyalty after she unsuccessfully ran against her direct supervisor as a means of opposing discriminatory practices), *cert. denied*, 449 U.S. 886 (1980); *Novotny v. Great Am. Sav. & Loan Ass'n*, 539 F. Supp. 437 (W.D. Pa. 1982) (legal to fire corporation secretary where he sided with employees in their dispute with corporation president by confronting the president in the presence of the employees); *Doe v. AFL-CIO*, 405 F. Supp. 389 (N.D. Ga. 1975) (legal for union to fire organizer who tells black workers that some unions are insensitive to blacks' needs and that certain union leaders lack social awareness), *aff'd mem.*, 537 F.2d 1141 (5th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977).

94. *See Smith v. Singer Co.*, 650 F.2d 214 (9th Cir. 1981); *see also Pendleton v. Rumsfeld*, 628 F.2d 102 (D.C. Cir. 1980).

95. 29 U.S.C. §§ 151-69 (1976) (antiretaliation provision at 29 U.S.C. § 158(a)(4) (1976)).

96. *Id.* In certain instances, however, protection may be available under sections 8(a)(1) and 8(a)(3) of the NLRA, 29 U.S.C. §§ 158(a)(1)(a)(3) (1976). *See Morris, The Developing Labor Law* 134, 1971 A.B.A. SEC. LAB. REL. LAW (BNA).

97. 29 U.S.C. § 152(3) (1976). Also excluded are agricultural laborers, domestics, individuals employed by their parents or spouses, independent contractors, or persons employed by employers not subject to the Act.

98. *See, e.g., NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

99. *See San Francisco Art Inst.*, 226 N.L.R.B. 1251 (1976); *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251 (1976). *See generally Malin, Student Employees and Collective Bargaining*, 69 Ky. L.J. 1 (1980).

a supervisor who testifies¹⁰⁰ or gives a sworn statement¹⁰¹ in an NLRA proceeding involving employees covered by the Act. Three reasons have been advanced in favor of this result. First, prohibiting retaliation against supervisor testimony protects the NLRB's sources of information and thereby assures effective administration of the NLRA.¹⁰² Second, the right to have witnesses testify at NLRB proceedings is embodied within the NLRA's guaranty to covered employees of the right to engage in concerted activities for mutual aid and protection.¹⁰³ Thus, although the supervisor may lack an independent right to testify, his testimony must be protected to protect the rights of nonsupervisory employees.¹⁰⁴ Third, in certain circumstances nonsupervisory employees may interpret retaliation against a supervisor as part of a general antiunion campaign, and consequently may forego exercising their NLRA rights.¹⁰⁵ Accordingly, courts have held that retaliation against such supervisor testimony violates section 8(a)(4)'s prohibition against retaliation¹⁰⁶ or section 8(a)(1)'s general prohibition against employer interference, restraint, or coercion of employees exercising their statutory rights.¹⁰⁷

The NLRB has extended supervisor protection beyond the limited degree accepted by the courts. In *General Nutrition Center*¹⁰⁸ the employer discharged a supervisor who led a group of employees to the NLRB's regional office and assisted them in filing an unfair labor practice charge. Relying on cases protecting supervisor testimony, the Board held that the discharge violated sections 8(a)(4) and 8(a)(1).¹⁰⁹ In *General Services, Inc.*,¹¹⁰ the Board went a step further and barred retaliation against a supervisor who filed an unsuccessful unfair labor practice charge on his own behalf, rather than on the behalf of the

100. See *Oil City Brass Works v. NLRB*, 357 F.2d 466 (5th Cir. 1966); *King Radio Corp. v. NLRB*, 398 F.2d 14 (10th Cir. 1968); *NLRB v. Dal-Tex Optical Co.*, 310 F.2d 58 (5th Cir. 1962); *NLRB v. Better Monkey Grip Co.*, 243 F.2d 836 (5th Cir.), *enforcing* 115 N.L.R.B. 1170, *cert. denied*, 355 U.S. 864 (1957).

101. See *NLRB v. Electro Motive Mfg. Co.*, 389 F.2d 61 (4th Cir. 1968); *NLRB v. Southland Paint Co.*, 394 F.2d 717 (5th Cir. 1968).

102. See *NLRB v. Electro Motive Mfg. Co.*, 389 F.2d 61, 62 (4th Cir. 1968); *Oil City Brass Works v. NLRB*, 357 F.2d 466, 471 (5th Cir. 1966).

103. 29 U.S.C. § 157 (1976).

104. See *King Radio Corp. v. NLRB*, 398 F.2d 14, 22 (10th Cir. 1968); *NLRB v. Southland Paint Co.*, 394 F.2d 717, 721 (5th Cir. 1968); *Oil City Brass Works v. NLRB*, 357 F.2d 466, 471 (5th Cir. 1966).

105. See *King Radio Corp. v. NLRB*, 398 F.2d 14, 22 (10th Cir. 1968).

106. 29 U.S.C. § 158(a)(4) (1976). See *Oil City Brass Works v. NLRB*, 357 F.2d 466 (5th Cir. 1966).

107. 29 U.S.C. § 158(a)(1) (1976). See *King Radio Corp. v. NLRB*, 398 F.2d 14 (10th Cir. 1968); *NLRB v. Dal-Tex Optical Co.*, 310 F.2d 58 (5th Cir. 1962).

108. 221 N.L.R.B. 850 (1975).

109. *Id.* at 858. If this view is ultimately accepted by the courts of appeals, the result may be somewhat greater protection under the NLRA than under Title VII and the ADEA. See *supra* notes 95-97 and accompanying text.

110. 229 N.L.R.B. 940 (1977), *enforcement denied*, 575 F.2d 298 (5th Cir. 1978).

nonsupervisory employees. In its prior cases, the supervisor was protected in order to safeguard the rights of employees covered under the NLRA. In this case, however, no such employees were involved.¹¹¹ The Board, reasoning that enforcement of the NLRA depended upon all individuals having free and uncoerced access to it, concluded that absent specific contrary congressional directives, the term "employee" as used in section 8(a)(4) should be interpreted to include supervisors who file unfair labor practice charges.¹¹² In the Board's view, the legislative history of the Taft-Hartley Act's exclusion of supervisors from the general definition of employee revealed nothing suggesting a congressional intent to limit section 8(a)(4)'s coverage to nonsupervisory employees.¹¹³ The Board reiterated this broad interpretation of section 8(a)(4) in *Hi-Craft Clothing Co.*¹¹⁴

The Court of Appeals refused, however, to enforce the Board's orders in both *General Services*¹¹⁵ and *Hi-Craft*¹¹⁶. The court in *Hi-Craft* grounded its denial of enforcement on the plain and unambiguous exclusion of supervisors from the NLRA's definition of employee and on the lack of any effect of the retaliation on the interests of nonsupervisory employees.¹¹⁷

The courts' exclusion of supervisors from the protections of Section 8(a)(4) except where the supervisor testifies in proceedings involving the rights of nonsupervisory employees may well comport with the overall statutory scheme of the NLRA.¹¹⁸ This exclusion underscores the need for an independent source of whistleblower protection. For

111. *Id.*

112. *Id.* at 942.

113. *Id.*

114. 251 N.L.R.B. 1310 (1980), *enforcement denied*, 660 F.2d 910 (3d Cir. 1981). Recently, the Board has retreated in protecting supervisors. See Parker-Robb Chevrolet, 262 NLRB No. 58, 1982 NLRB Dec. (CCH) ¶ 19,087 (1982). Whether this retreat will affect section 8(a)(4) remains to be seen.

115. 575 F.2d 298 (5th Cir. 1978).

116. 660 F.2d 910 (3d Cir. 1981).

117. *Id.* at 918.

118. Excluding supervisors from the protection of section 8(a)(4) in such cases, however, has two adverse effects. First, it forces the employee whose supervisory status is in doubt to assume the risk that he will be held to be a supervisor and left unprotected. Such forced assumption of the risk, however, already occurs under section 8(a)(3) when the individual engages in union activity. If he is found to be a supervisor he may be lawfully discharged, but if he is found to be an employee, his union activity is protected. Second, retaliation against the supervisor may instill fear in employees covered by the NLRA that they too may be subjected to retaliation. Congress chose to ignore the potential chilling effects of such fears on rank and file employees when it decided to exclude supervisors from coverage of the NLRA. See *Hi-Craft Clothing Co.*, 251 N.L.R.B. 1310, 1312-13 (1980) (Truesdale, Member, dissenting), *enforcement denied*, 660 F.2d 910 (3d Cir. 1981). An interesting issue, beyond the scope of this Article, is whether a state law providing general whistleblower protection would be preempted by the NLRA when applied to supervisors. Cf. *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974) (holding that the NLRA preempts state law creating remedy for supervisors discharged on account of labor union membership).

example, suppose that an employee whose supervisory status is in doubt is discharged for belonging to a labor organization. If the employee is found to be a supervisor, the discharge is lawful, but if the employee is found to be nonsupervisory and thus protected by the NLRA, the discharge violates Section 8(a)(3)'s prohibition of discrimination against employees who engage in protected concerted activity.¹¹⁹ Suppose further that another employee who is clearly supervisory is aware of information related to the first employee's charge, and offers such information to an NLRB investigator or testifies at an unfair labor practice proceeding and is then discharged in retaliation. If the first employee is held to be nonsupervisory, the supervisor will be protected because the discharge interferes with the first employee's exercise of statutory rights. If, however, the first employee is held also to be a supervisor, the second supervisor's discharge will be legal because it is related to protected activity of covered employees. Thus, whether the supervisor is protected turns entirely on the status ultimately accorded the first employee. In these circumstances the supervisor is in a position comparable to that of the whistleblower in a jurisdiction that limits common law protection to the reporting of statutory violations.¹²⁰ The supervisor cannot predict with reasonable certainty whether he will be protected from discharge nor effectively weigh the personal consequences of cooperating with the NLRB.

In cases where section 8(a)(4) applies, it is interpreted broadly. Not only discharge, but all other forms of retaliation are prohibited.¹²¹ Moreover, applicants for employment,¹²² former employees,¹²³ and em-

119. Section 8(a)(3) provides:

It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. § 158(a)(3) (1976).

120. See *supra* notes 37-38 and accompanying text. The issue of whether particular employees are supervisors has generated considerable litigation. See generally, Finkin, *The Supervisory Status of Professional Employees*, 45 *FORDHAM L. REV.* 805 (1977); Comment, *The Status of Supervisors Under the National Labor Relations Act*, 35 *LA. L. REV.* 800 (1975).

121. See, e.g., *Montefiore Hosp. & Medical Center v. NLRB*, 621 F.2d 510 (2d Cir. 1980) (denying part-time physician employees full-time status); *Road Sprinkler Fitters Local Union 669 v. NLRB*, 600 F.2d 918 (D.C. Cir. 1979) (refusing to hire "employees" who had been promised jobs on worksite); *Wilson v. Whitehall Packing Co.*, 108 L.R.R.M. 2165 (BNA) (W.D. Wis. 1980) (filing lawsuit against employee); *Riley-Beaird, Inc.*, 259 N.L.R.B. 1339 (1982) (suspending employees); *Welfare, Pension and Vacation Funds*, 256 N.L.R.B. 1145 (1981) (promulgating more stringent workplace rules); *Art Steel of Cal., Inc.*, 256 N.L.R.B. 816 (1981) (issuing warnings to employees); *Continental Dist. Co.*, 256 N.L.R.B. 654 (1981) (prohibiting employees from speaking to co-workers); *Pan-Abode, Inc.*, 222 N.L.R.B. 313 (1976) (refusing to increase wages); *Florida Drum Co., Inc.*, 213 N.L.R.B. 604 (1974) (failing to reinstate unlawfully discharged employee); *Telecom, Inc.*, 157 N.L.R.B. 104 (1966) (refusing to rehire lawfully terminated employees).

123. *Fulton Bag & Cotton Mills*, 79 NLRB 939 (1948), *enforced*, 180 F.2d 68 (10th Cir. 1950).

ployees of other employers,¹²⁴ as well as current employees, have been held entitled to protection. An employee is protected even though his employer does not gross a sufficient dollar volume of business to be generally subject to the NLRB's jurisdiction.¹²⁵ Although the statute only literally embraces employees who file charges or testify, it has been interpreted to cover employees on whose behalf a union has filed charges,¹²⁶ employees present at representation proceedings,¹²⁷ employees who threaten to file charges,¹²⁸ and employees whom the employer erroneously believes to have filed charges.¹²⁹ Similarly protected are employees who, although they do not actually testify in formal proceedings, provide sworn statements to NLRB investigators,¹³⁰ and those who refuse to give false or misleading testimony.¹³¹

The broad privilege given to charges filed under Title VII and the ADEA¹³² has not, however, been extended under Section 8(a)(4). Although the employer may not retaliate against an employee merely because the employee's charge is not upheld,¹³³ deliberately false and malicious charges are not protected from retaliation¹³⁴ or subsequent lawsuit.¹³⁵ Moreover, the employer may use information obtained in an NLRB proceeding as a basis for disciplinary action.¹³⁶

b. The Fair Labor Standards Act— A second major piece of federal employment legislation containing an antiretaliation provision is the

124. Joseph Nemeth, 222 N.L.R.B. 664 (1976); Lamar Cremery Co., 115 N.L.R.B. 1113 (1956), *enforced*, 246 F.2d 8 (5th Cir. 1957).

125. See Pedersen v. NLRB, 234 F.2d 417 (2d Cir. 1956); Pickle Bill's, Inc., 224 N.L.R.B. 413 (1976).

126. See Lenox Hill Hosp., 225 N.L.R.B. 1237 (1976); Briggs Mfg. Co., 75 N.L.R.B. 569 (1947).

127. See Friendly Ice Cream Corp., 254 N.L.R.B. No. 172, 1981 NLRB Dec. (CCH) ¶ 17,919 (1981), *enforcement denied*, 677 F.2d 170 (1st Cir. 1982); E.H. Ltd., 227 N.L.R.B. 1107 (1977), *enforcement denied sub nom.* Service Employees Int'l Union v. NLRB, 600 F.2d 930 (9th Cir. 1979).

128. See Glenside Hosp., 234 N.L.R.B. 62 (1978) (finding that the employer unlawfully discharged the employee for filing an unfair labor practice charge); see also NLRB v. Retail Store Employees Union Local 876, 570 F.2d 586, 591 n.5 (6th Cir. 1978) (noting that a discharge of an employee who threatens to file charges with the NLRB violates § 8(a)(4)), *cert. denied*, 439 U.S. 819 (1978).

129. See Maple City Stamping Co., 200 N.L.R.B. 743 (1972).

130. NLRB v. Scrivener, 405 U.S. 117, *reh'g denied*, 405 U.S. 1033 (1972).

131. NLRB v. Retail Store Employees Union Local 876, 570 F.2d 586 (6th Cir.), *cert. denied*, 439 U.S. 819 (1978).

132. See *supra* notes 73-76 and accompanying text.

133. See NLRB v. Whitfield Pickle Co., 374 F.2d 576 (5th Cir. 1967); Acme Paper Box Co., 201 N.L.R.B. 240 (1973).

134. See NLRB v. Brake Parts Co., 447 F.2d 503 (7th Cir. 1971); Iowa Beef Packers, Inc. v. NLRB, 331 F.2d 176 (8th Cir. 1964).

135. See Power Systems, Inc. v. NLRB, 601 F.2d 936 (7th Cir. 1979).

136. See Oakland Press Co., 260 N.L.R.B. No. 126, 1982 NLRB Dec. (CCH) ¶ 18,886 (1982) (employee who filed charge while on sick leave was discharged for dishonesty and abusing sick leave); Fairmont Creamery Co., 73 N.L.R.B. 1380, 1410-12 (1947), *enforced*, 169 F.2d 169 (10th Cir. 1948) (employee discharged after testifying that he advised co-employee that employer was testing co-employee for dishonesty).

Fair Labor Standards Act ("FLSA").¹³⁷ The FLSA protects all persons, not just employees, from retaliation.¹³⁸ As with the NLRA, its antiretaliation provision is applicable whether or not the employer is otherwise subject to FLSA jurisdiction.¹³⁹ The FLSA protects complaints to the employer about alleged violations,¹⁴⁰ refusals to waive FLSA rights,¹⁴¹ filings of private suits to enforce the FLSA,¹⁴² threats to file suit or initiate an administrative complaint,¹⁴³ testimony,¹⁴⁴ and refusals to give false testimony.¹⁴⁵ The employee does not assume the risk that the complaint ultimately will be found lacking in merit; indeed, he is protected from reprisal as long as he entertains an objectively reasonable, good faith belief that the employer is violating the Act.¹⁴⁶ Thus, the FLSA protection is somewhat broader than NLRA protection, at least with respect to supervisors acting in good faith.¹⁴⁷ As with other statutes, however, the employee's actions must be reasonable and legal. Actions such as misappropriating employer records are not protected, even though the records are to be used in an enforcement proceeding.¹⁴⁸

3. *The Occupational Safety and Health Act*— The most recent federal employment legislation to incorporate an antiretaliation provision is the Occupational Safety and Health Act ("OSHA").¹⁴⁹ It too

137. 29 U.S.C. §§ 201-19 (1976). Section 15(a)(3) makes it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding" *Id.* at 215(a)(3).

138. See *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977); *Marshall v. Seminole Distributors Inc.*, 23 Wage & Hour Cas. (BNA) 174 (N.D. Fla. 1977).

139. See *Wirtz v. Ross Packaging Co.*, 367 F.2d 549 (5th Cir. 1966); *Mitchell v. Equitable Co.*, 13 Wage & Hour Cas. (BNA) 564 (D.N.J. 1958).

140. See *Goldberg v. Zenger*, 15 Wage & Hour Cas. (BNA) 237 (D. Utah 1961).

141. See *Dunlop v. South Glens Falls Lumber Co.*, 22 Wage & Hour Cas. (BNA) 864 (N.D.N.Y. 1976); *Hodgson v. Yinger*, 20 Wage & Hour Cas. (BNA) 78 (S.D. Fla. 1971). *But see* *Wirtz v. C.H. Valentine Lumber Co.*, 236 F. Supp. 616 (E.D.S.C. 1964) (denying FLSA protection to a complaint filed by an employee where the employer had sufficient disciplinary cause to discharge the employee).

142. See *Marshall v. Mardels, Inc.*, 23 Wage & Hour Cas. (BNA) 980 (E.D.N.Y. 1978).

143. See *Marshall v. Great Lakes Recreation Co.*, 25 Wage & Hour Cas. (BNA) 506 (W.D. Mich. 1981).

144. See *Wirtz v. Home News Publishing Co.*, 341 F.2d 20 (5th Cir.), *cert. denied*, 382 U.S. 823 (1965).

145. See *Hodgson v. Hodges*, 20 Wage & Hour Cas. (BNA) 155 (E.D. Cal. 1971).

146. See *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975).

147. See *supra* notes 95-105 and accompanying text.

148. See *Hodgson v. Texaco, Inc.*, 440 F.2d 662 (5th Cir. 1971); *Walling v. Barnesville Farmers Elevator Co.*, 58 F. Supp. 821 (D. Minn. 1945).

149. 29 U.S.C. §§ 651-78 (1976). Section 11(c)(1) provides:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any

has been broadly construed to encompass not only the filing of complaints with the Occupational Safety and Health Administration, but also complaints to the employer,¹⁵⁰ complaints to other agencies regulating work place safety,¹⁵¹ and retention of counsel to rectify unsafe working conditions.¹⁵² Of course, the employee must act reasonably and lawfully.

In other respects, however, OSHA's antiretaliation provision has been read narrowly.¹⁵³ One court has refused to prohibit retaliation by persons other than the employee's employer,¹⁵⁴ though such an interpretation is inconsistent with decisions under Title VII, the ADEA, NLRA, and FLSA, and appears to ignore OSHA's broad language prohibiting "any person" from retaliating. Courts have also refused to protect employee safety complaints where such complaints have been found not to involve rights expressly embodied within OSHA.¹⁵⁵

II. TOWARD GENERAL PROTECTION FOR WHISTLEBLOWERS

A. *The Inadequacies of a "Piecemeal" Statutory Approach*

Whistleblowers discharged by their employers may have recourse in both the aforementioned and other antiretaliation statutory provisions. Such provisions, though are not necessarily a paradigm to be followed in providing for general whistleblower protection. Antiretaliation provisions in employment statutes are part of an overall statutory scheme to guarantee specific statutory rights to employees. These provisions are interpreted in light of that statutory scheme,¹⁵⁶ which embodies a legislative decision to rely on employees in the enforcement of the

such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

Id. at § 660(c)(1).

150. See *Power City Electric, Inc.*, 1979 O.S.H. Dec. (CCH) ¶ 23,947 (E.D. Wash. 1979); *Marshall v. Springville Poultry Farm, Inc.*, 445 F. Supp. 2 (M.D. Pa. 1977).

151. See *American Atomics, Inc.*, 1980 O.S.H. Dec. (CCH) ¶ 24,254 (D. Ariz. 1980).

152. See *Dunlop v. Hanover Shoe Farms Inc.*, 441 F. Supp. 385 (M.D. Pa. 1976).

153. See *Marshall v. Klug & Smith Co.*, 7 O.S.H. Cas. (BNA) 1162 (D.N.D. 1979).

154. See *Lummus Co.*, 1980 O.S.H. Dec. (CCH) ¶ 24,465 (N.D. Ohio 1980).

155. See *Marshall v. Certified Welding Corp.*, 73 O.S.H. Cas. (BNA) 1069 (10th Cir. 1978); *Express Container Services, Inc.*, 1980 O.S.H. Dec. (CCH) ¶ 24,765 (E.D. Va. 1980).

156. [A]bundant support can be found under [The NLRA and FLSA] for the conclusion here that protection must be afforded to those who seek the benefit of statutes designed by Congress to equalize employer and employee in matters of employment The balance is . . . struck in favor of the employee in order to afford him the enunciated protection from invidious discrimination, by protecting his right to file charges.

Pettway v. American Cast Iron Pipe Co., 441 F.2d 998, 1006-07 (5th Cir.), *reh'g denied*, 415 F.2d 1376 (5th Cir. 1969) (footnote omitted).

statute.¹⁵⁷ They are thus interpreted with a view toward encouraging employees to report violations.

Any *general* standard for dealing with the discharged whistleblower, on the other hand, should protect him but should not affirmatively encourage others to whistleblow. Relying on employee vigilantes is not necessarily sound general law enforcement policy,¹⁵⁸ for encouraging rather than simply protecting whistleblowing may have serious negative consequences. Many who urge that the law should encourage whistleblowing argue that in matters involving public health and safety the employee's duty of loyalty to his employer is overridden by a duty of loyalty to society.¹⁵⁹ This view fails to recognize that the nature of the suggested duty to whistleblow in the interests of protecting society may shift with changes in the opinions and perceptions of the majority of the population. Individuals who manipulate public opinions and perceptions may also manipulate the suggested duty to whistleblow.

157. The Supreme Court has emphasized this on several occasions. In interpreting the FLSA, the Court has stated:

For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This end the prohibition of § 15(a)(3) against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.

Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960). Similarly, the Court has explained the rationale behind the NLRA's antiretaliation provision:

Implementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing an unfair labor-practice charge. Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board. This is shown by its adoption of § 8(a)(4) which makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges.

Nash v. Florida Industrial Comm'n, 389 U.S. 235, 238 (1967) (footnote omitted); *accord*, NLRB v. Scrivener, 405 U.S. 117, 121-22 (1972). The decision to rely on employee assistance in enforcement has also accompanied antiretaliation provisions in statutes outside the employment context. See *supra* note 72.

158. Compare C. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 213-16 (1975) (suggesting that encouraging whistleblowing will assist in controlling illegal corporate behavior) with Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1146-47 (1977) (arguing that reliance on whistleblowers may be unrealistic and counterproductive). In Michigan, some evidence indicates that since the enactment of the Whistleblower Protection Act employees have felt freer to report the illegal dumping of toxic substances to appropriate authorities, thereby facilitating enforcement of environmental laws. *The Laws Are Working*, Lansing State J., July 21, 1981, a A-6, col. 1.

159. See, e.g., C. STONE, *supra*, note 158 at 213; R. NADER, P. PETKAS & K. BLACKWELL, WHISTLE BLOWING (1972); Chalk, *The Miners' Canary*, 38 BULL. ATOMIC SCI., Feb. 1982 at 16; Edsall, *Scientific Freedom and Responsibility*, 188 SCI. 687 (1975). See also James, *In Defense of Whistleblowing*, in W.M. HOFFMAN & J.M. MOORE, eds., BUSINESS ETHICS: READINGS AND CASES IN CORPORATE MORALITY (forthcoming 1984).

Many of the arguments currently being advanced for encouraging whistleblowing to promote public health and safety were also advanced in the late 1940's and early 1950's to justify exposing Truman administration officials and private employers alleged to be "soft on communism."¹⁶⁰ Any general standard of whistleblower protection should be structured to avoid encouraging an informant mentality which can result in abusive invasions of privacy or suppression of unpopular views and lifestyles.¹⁶¹

Whether the utility of broad statutory antiretaliation provisions need to be re-examined is beyond the scope of this Article. It is clear, however, that because statutory antiretaliation provisions rely upon employees to help enforce the statute, caution must be exercised in analogizing many of the broad interpretations of those provisions to standards for general whistleblower protection. Certainly Title VII's protection of maliciously filed false charges should not be generally extended to the bad faith whistleblower in the absence of an explicit legislative determination that the need for employee participation in enforcement outweighs the employer's interest in being free from malicious defamation. Nor should other aspects of specific statutory antiretaliation provisions — protection regardless of whether the employee resorts to available internal channels before reporting the employer to government authorities and reinstatement as a typical remedy for illegal discharge — automatically be incorporated into more general standards of protection.

Paradoxically, although statutory antiretaliation provisions are in most respects too broad to serve as a model for whistleblower protection, they are also too narrow. Statutory language has been interpreted to deny protection to employees in situations where they reported in good faith what they believed to be violations of the statute. Both the NLRA¹⁶² and OSHA¹⁶³ have been so limited, as have some state antiretaliation statutes. For example, in *Bryant v. Dayton Casket Co.*,¹⁶⁴ plaintiff alleged that he was fired because he told his employer he intended to file a workers' compensation claim. His compensation claim was actually filed after his discharge. Relying on what it viewed as plain statutory language, the court held that the plaintiff was not protected by the Ohio workers' compensation statute's prohibition of retaliation against an employee who has "filed a claim or instituted,

160. See A. WESTIN, *WHISTLEBLOWING: LOYALTY AND DISSENT IN THE CORPORATION* 135 (1981).

161. See Bok, *Whistleblowing and Professional Responsibility*, 11 N.Y.U., ED.Q., 2, 9 (1980) ("In many societies, citizens are asked to report deviations, fellow workers to spy on one another, and students to expose the subversive views of their teachers. No society can afford to ignore these precedents in its enthusiasm for eradicating corruption.").

162. See *supra* notes 100-05 and accompanying text.

163. See *supra* notes 153-55 and accompanying text.

164. 69 Ohio St. 2d 367, 433 N.E.2d 142 (1982).

pursued or testified in any case proceeding under the workers' compensation act." Thus, it appears that in Ohio employees filing workers' compensation claims are protected from retaliation only if they can file faster than their employers can fire. Clearly, the piecemeal approach of including antiretaliation provisions in statutes primarily designed to accomplish other objectives is no substitute for general whistleblower protection.

B. The Michigan Whistleblowers' Protection Act

On January 17, 1981, Michigan became the first jurisdiction to provide general statutory whistleblower protection.¹⁶⁵ The Michigan Whistleblowers' Protection Act ("MWPA")¹⁶⁶ prohibits employers from retaliating against an employee because the employee "reports or is about to report . . . a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false"¹⁶⁷ Public bodies are employees and bodies of the three branches of state government, local governing bodies and their employees, and law enforcement agencies and their employees.¹⁶⁸ Violators are subject to private civil actions for reinstatement, back pay, restoration of fringe benefits and seniority rights, actual damages, costs, and attorney fees.¹⁶⁹ Plaintiffs alleging that retaliation occurred because they were about to report a violation are required to prove their case by clear and convincing evidence.¹⁷⁰ A recent amendment denies protection to employees who disclose information entitled to confidentiality conferred by statute or common law.¹⁷¹

The Michigan statute was intended to encourage employees to assist in enforcing federal, state, and local statutes and regulations; consequently, it actively promotes whistleblowing. In a speech on the floor of the Michigan House of Representatives, Representative James Barcia, the legislation's principal sponsor, urged its adoption to encourage employees to fulfill their societal duty to participate in law enforce-

165. 1980 Mich. Pub. Acts 469 (codified at MICH. COMP. LAWS ANN. §§ 15.361-.369). A similar statute providing for general whistleblower protection has since been enacted in Connecticut. 1982 Conn. Pub. Acts 289, effective October 1, 1982, prohibits the discharge of an employee "because the employee . . . reports, verbally or in writing, a violation or suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body."

166. 1980 MICH. PUB. ACTS 469.

167. *Id.* sec. 2.

168. *Id.* sec. 1(d).

169. *Id.* §§ 3, 4. Violators are also subject to civil fines up to \$500. *Id.* § 5(1).

170. *Id.* § 3(4).

171. 1982 MICH. PUB. ACTS 146.

ment, particularly when dealing with large and impersonal governmental institutions or businesses.¹⁷² A Michigan House Legislative Analysis reiterates this purpose.¹⁷³ Because the Act encourages whistleblowing as a means of law enforcement, it contains many of the deficiencies of statutory antiretaliation provisions.

The MWPA imposes no requirement that in appropriate circumstances employees utilize internal channels before publicly blowing the whistle. This omission appears to have been deliberate, as amendments imposing such a requirement were proposed to Representative Barcia prior to the Act's passage.¹⁷⁴ The omission not only fails to give employers the initial opportunity to correct their own violations, but may actually encourage employees to bypass their employers' internal procedures. Nowhere does the Act explicitly protect employees pursuing internal avenues from retaliation. Courts interpreting the Act have available to them analogies to FLSA and OSHA cases which extend antiretaliation protections to complaints made directly to the employer. The MWPA, however, differs from the FLSA and OSHA in two respects. First, it treats employees *about* to report violations differently from those who have *actually* reported violations by requiring that the former prove their cases by clear and convincing evidence. Second, it is rather explicit in protecting reports to public bodies and in defining public bodies as state and local government and law enforcement agencies. Thus, a strong argument can be made that the statute intentionally reduces employee protection the further removed the employee is from complaining to governmental authorities. Thus, employees discharged while pursuing internal avenues may have difficulty convincing the courts that the statute applies to them at all. Alternately, such employees may be required to prove by clear and convincing evidence that they were about to report the violation to a public body — a requirement that they will usually be unable to meet because using internal channels usually enables the employee to defer the decision of whether to go public. Even if the Michigan courts ultimately accept the FLSA and OSHA analogies, until the ambiguity is clarified, employees wishing to maximize their chances for statutory protection would be well advised to bypass internal channels.

In addition to its apparent failure to protect employees using internal channels, the MWPA on its face does not protect employees who report violations to the federal government even though this will usually

172. Rep. Barcia's speech is reprinted in a set of materials on the Act available from his office in Lansing, Michigan (on file with the *Journal of Law Reform*) [hereinafter cited as Barcia Speech].

173. MICH. HOUSE LEGISLATIVE ANALYSIS, H.B. s.5088 & 5089, First Analysis (Apr. 17, 1980).

174. Letter from Alan F. Westin to Rep. James A. Barcia, (November 22, 1980) (copy on file with the *Journal of Law Reform*).

be the most appropriate course of action for violations of federal law. It also fails to extend protection in the few circumstances under which it may be appropriate to report violations to parties other than public bodies.

The MWPA is ambiguous concerning the degree to which employees must point to specific statutes or regulations that employers allegedly have violated. Arguably, employees are protected whenever they allege in good faith that their employers acted illegally even though in reality no statute or regulation was violated. Although a preliminary draft of the NWPA deprived employees of protection if reports they filed were false, upon recommendation of the Michigan Department of Labor this provision was limited to employees who knowingly file false reports. The purpose of the change was to protect employees "if they, in good faith, report a violation which later proves groundless."¹⁷⁵

An equally strong argument can be made, however, that the final version of the MWPA only covers employees who are mistaken as to facts rather than law. The term false usually refers to factual representations rather than legal conclusions. An employee may know that his employer acted wrongfully, but be unable to point to specific statutes or regulations that have been violated. Such an employee may be acting at his peril if the employer's activity is subsequently found to be legal.

The degree of protection provided for employees who file false reports is further clouded by the Act's failure to indicate whether the employee's knowledge of the falsity is to be measured by an objective or subjective standard. An objective standard could result in an implied duty to make a reasonable investigation prior to blowing the whistle. The Act's legislative history, however, indicates that a subjective standard was intended. Representative Barcia, in responding to criticisms that employees generally lack sufficient knowledge to distinguish and report violations, did not aver any employee duty to investigate. Instead, he appears to have assumed that employee complaints would be based on incomplete and perhaps inaccurate information, and argued that no real harm would come to the employer because the ultimate issue of guilt or innocence would be initially decided by the public body, then by the enforcement agency, and finally by the courts, thereby affording the employer ample opportunity to clear itself.¹⁷⁶ Such a subjective standard is not desirable. A false report made in ignorance is protected, while the employee who investigates before filing charges risks being found to have had knowledge of the falsity. Thus, a subjective standard may actually discourage employees from investigating and verifying their suspicions before reporting their employers.

175. MICH. DEPT. OF LABOR, ANALYSIS OF H.B. 5089, at 2 (Feb. 7, 1980).

176. Barcia Speech, *supra* note 172.

Finally, the MWPA treats the whistleblower's motive, be it based on high principle or retaliatory spite, as irrelevant. Beyond the requirement that the employee not know that the charge is false, it imposes no requirement of good faith. This is consistent with the MWPA's purpose to use employees as a resource in law enforcement. To fulfill this purpose, the Michigan statute is concerned with the accuracy of the employee's information rather than his motive in coming forward.

These deficiencies stem from the Act's goal of encouraging employees to blow the whistle on illegal employer activity. This goal entails an assumption that whistleblowing presents a conflict between a duty of loyalty to employer and a higher duty of loyalty to society. The existence of such a conflict — and how the conflict should be resolved — is usually asserted without any meaningful analysis of either duty. Such analysis, though, must be the initial inquiry in any effort to establish a standard of whistleblower protection.

C. A Proposed Standard for Whistleblower Protection

Some philosophers have argued that the concept of loyalty to a corporation is a red herring because loyalty requires a mutual bond tying people to each other — reciprocity which a corporation is incapable of giving.¹⁷⁷ Nevertheless, the concept of loyalty to employer is deeply rooted in American industrial relations.¹⁷⁸ The leading judicial discussion of employee loyalty is *NLRB v. Local 1229, International Brotherhood of Electrical Workers*.¹⁷⁹ During the course of a labor dispute, technicians employed by a television station publically distributed handbills attacking the quality of the station's programming, and were discharged. The Court affirmed the NLRB's finding that the employees' actions were disloyal and thus not entitled to protection under the NLRA. The Court observed that the employees' handbill was not related to the labor dispute, made no reference to wages or working conditions, was not related to matters within the scope of the employees' responsibility, and did not appeal for public support. Accordingly, the Court characterized the employees' actions as "a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to conserve and develop"¹⁸⁰ and concluded that "[n]othing would contribute less to the Act's declared purpose of promoting industrial peace and stability."¹⁸¹

177. See, e.g., Ladd, *Collective and Individual Moral Responsibility in Engineering; Some Questions*, (paper presented to Second National Conference on Ethics in Engineering (Chicago) (March 5, 1982)) 7 (copy on file with the *Journal of Law Reform*).

178. See *supra* notes 49-56 and accompanying text.

179. 346 U.S. 464 (1953).

180. *Id.* at 476.

181. *Id.*

The principle of *Local 1229* raises the critical question whether reasonable and responsible whistleblowing amounts to disloyalty. For purposes of analysis, whistleblowing may be divided into two types: internal, that is within the employer's structure, and external, that is to government authorities or other third parties.

Internal whistleblowing does not carry with it such dangers implicit in external whistleblowing as unjustified harm to the employer's reputation or the unjustified expense of defending against incorrect allegations. Internal whistleblowing ultimately may save the corporation from damage to its reputation and defense costs by enabling it to correct its wrongdoing before its actions become a matter of public knowledge.¹⁸² In some of the most notorious corporate scandals in history upper level managers were unaware of corporate misconduct. For example, no senior level manager was involved in the price fixing conspiracies in the electrical industry in the 1950's.¹⁸³ In the corporate bribery scandals of the 1970's lower level management was responsible for the conduct in most of the cases,¹⁸⁴ and in those instances where the bribery was directed by senior management, members of the board of directors were unaware of the illegal activity.¹⁸⁵

The isolation of directors and senior managers from lower level managers has been attributed to the tendency of managers on a lower level to act to maximize the interests and autonomy of their units rather than the interests of the corporation.¹⁸⁶ The effects of this "subgoal pursuit" are aggravated by an "authority leakage" whereby general policies set by upper level management lose their authority as they are reinterpreted, distorted, and qualified in the process of being relayed to successive lower levels.¹⁸⁷ The isolation of upper level management is completed by the tendency to restrict the flow to upper level management of information which is adverse to the interests of the subunit.¹⁸⁸

Thus, accusations that the employee who blows the whistle internally on employer misconduct is disloyal come from the perspective of the subgoal pursuits of a lower level manager. Where the employee reports activity which furthers the interests of a subunit but conflicts with the

182. For examples where internal whistleblowing could have saved corporate reputations and finances, see Ewing, *The Employees Right to Speak Out*, 5 CIV. LIB. REV. 10 (Sept.-Oct. 1978).

183. Coffee, *supra* note 158, at 1132.

184. *Id.* at 1104-05 n.11 and accompanying text.

185. *Id.* at 1127-29.

186. *Id.* at 1135.

187. *Id.* at 1136-37.

188. *Id.* at 1137-38. Consequently, a *Harvard Business Review* survey's finding that even though 80% of the responding executives believed in the abstract that "business people should try to live up to an absolute moral standard rather than to the moral standard of their peer group," 50% believed their superiors do not want to know how results are obtained as long as they achieve the desired outcome is not surprising. Brenner & Molander, *Is the Ethics of Business Changing?*, 55 HARV. BUS. REV., Jan-Feb, 1977, at 57, 62.

general interests of the firm the only disloyalty exhibited by the employee is to the subunit. The employee's actions exhibit loyalty of a high degree to the firm as a whole.¹⁸⁹

Most managers appear to recognize that employees owe loyalty to the firm rather than to the subunit. In a *Harvard Business Review* survey, readers were presented with the following hypothetical. A sales executive, concerned that a new product was unsafe, first complained to his field sales manager, then voiced his fears to the district manager and finally to the regional head. Unsuccessful at each level, the salesman eventually went to the vice president of marketing, who fired him for being insubordinate to the sales managers and for being a nuisance. Of the almost 2000 business persons responding to the survey, 96% stated that they would not have taken the same action had they been vice president, and 87% stated that had they been chief executive of the company, they would have opposed the vice president's action.¹⁹⁰ The business community, then, appears to support overwhelmingly the internal whistleblower.

The loyalty of the external whistleblower has engendered the most debate. This debate has focused first on a perceived conflict between the employee's duty of loyalty to society and his duty of loyalty to the employer and second on how to balance properly these conflicting duties. With respect to both concerns, the debate is misguided.

Although an employee may have a moral obligation to prevent harm by publicly reporting his employer's wrongdoing,¹⁹¹ it does not follow that he has a comparable legal duty. Generally, even with respect to felonies, the only legal duty an individual has is not to aid affirmatively in concealment. There is no independent duty to report an offense.¹⁹² Moreover, the typical whistleblower does not perceive himself as a moralist protecting societal interests. Most decisions to discuss employer misconduct are deeply personal ones stemming from the employee's individual conscience.¹⁹³ Thus, the interests that weigh in favor of providing legal protection for the external whistleblower are not those embodied in an employee's obligation to society, but rather those embodied in his interest as an individual to act in accordance with the dictates of his conscience.¹⁹⁴

189. Cf. *C. & P. Tel. Co.*, 51 Lab. Arb. (BNA) 457 (1968) (Serber, Arb.).

190. Ewing, *What Business Thinks About Employee Rights*, 55 HARV. BUS. REV., Sept-Oct, 1977, at 81, 88.

191. See James, *supra* note 159, at 9-10.

192. See *supra* note 14.

193. See *supra* note 3 and accompanying text.

194. The general mischaracterization of the interests which weigh in favor of protecting the whistleblower is analogous to the courts' mischaracterization of the tort of abusive discharge. As Part I showed, courts have developed the tort to protect societal interests rather than to ensure employee rights. See *supra* notes 26-33 and accompanying text.

Balanced against this basic individual interest is the employee's duty of loyalty to the employer. The employer's claim to his employee's silence presupposes that an incorrect or inappropriate public disclosure can harm the firm. Thus, the duty of loyalty requires a potential whistleblower to take every measure that a reasonable employee would take to insure the accuracy and appropriateness of the disclosures. For example, disclosure usually will be inappropriate where resort to available internal channels could correct the problem.

Once this obligation to insure the accuracy and appropriateness of disclosure is fulfilled, insistence on employee silence amounts to insistence on blind obedience. Philosophers and managers tend to agree that loyalty does not include blind obedience. From a philosophical perspective, loyalty demands that which is morally due the object of loyalty. Blind obedience has no moral value because it is not something which is morally due.¹⁹⁵

Although some managers insist on blind obedience,¹⁹⁶ most do not. In the *Harvard Business Review* survey noted above, 61% agreed that if the whistleblower "believes sincerely he is acting in the best interests of customers, stockholders or the community, he should be respected and not penalized,"¹⁹⁷ and almost 90% disagree with the boss who fires a bus driver for speaking out on a safety violation.¹⁹⁸ In contrast, only a third agree that a whistleblower who does not like the company should leave it¹⁹⁹ and fewer than a tenth believe that the whistleblower should be penalized if his disclosures hurt sales or customer relations.²⁰⁰

Neither philosophical theory nor contemporary business mores favor blind obedience to the employer. Thus, when an employee has taken the precaution required by the duty of loyalty to ensure appropriateness and accuracy of the disclosure, only the employer's illegitimate insistence on blind obedience weighs against the employee's interest in acting in accordance with conscience. In such circumstances the law should protect the whistleblower from retaliatory discharge.

195. See LASS, *Loyalty*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 97-98 (1972).

196. A frequently quoted proponent of blind obedience is former General Motors chairman James Roche:

Some critics are now busy eroding support of free enterprise — the loyalty of a management team, with its unifying values of cooperative work. Some of the enemies of business now encourage an employee to be disloyal to the enterprise. They want to create suspicion and disharmony, and pry into the proprietary interests of the business. However this is labeled — industrial espionage, whistleblowing, or professional responsibility — it is another tactic for spreading disunity and creating conflict.

Roche, *The Competitive System, to Work, to Preserve, and to Protect*, in VITAL SPEECHES OF THE DAY, 445 (1971).

197. Ewing, *supra* note 190, at 91.

198. *Id.* at 93.

199. *Id.* at 91.

200. *Id.*

The above formulation of the competing interests of employer and employee suggests two independent standards that a whistleblower must meet to be entitled to protection: subjective good faith and objective reasonableness. These standards should be used by arbitrators in determining whether the discharge of a whistleblower is for just cause, by courts in developing the tort of abusive discharge, and by legislatures in enacting whistleblower protection legislation.

1. *Subjective good faith*— A requirement of subjective good faith assures that the law will protect the employee's interest in acting in accordance with his conscience without encouraging the employee having ulterior motives for whistleblowing: a subjective good faith limitation protects the employer from employee harassment. Evidence that the right to file safety complaints under OSHA has been abused to further ulterior motives²⁰¹ supports a subjective good faith requirement. Moreover, the employee who acts in bad faith is not asserting a legitimate personal right and should not be entitled to legal protection. Concerns similar to these prompted the Louisiana legislature to include a good faith requirement in its recently enacted statute protecting from retaliation employees who report violations of environmental laws.²⁰² Although the Michigan legislature rejected employer requests for a similar limitation in the MWPA,²⁰³ that statute is more concerned with actively promoting whistleblowing as a means of law enforcement than with merely protecting individual rights.²⁰⁴

2. *Objective reasonableness*— A requirement of objective reasonableness guarantees that the employee fulfills his obligations of loyalty to the employer. The employee should be required to act as a similarly situated reasonable employee would act under the circumstances. Objective reasonableness is a standard with which the courts are quite familiar. It embodies the common understanding of when and how to act. The standard places a burden on the employee which, by definition, the employee is capable of meeting. It leaves the employee to act at his peril only to the limited extent that his individual peculiarities deviate from acceptable average conduct.²⁰⁵ Although oc-

201. See H. NORTHRUP, R. ROWAN & C. PERRY, *THE IMPACT OF OSHA* 134-41 (1978).

202. 1981 La. Acts 280, sec. 1(A). See *Minutes of Meeting, La. House Committee on Natural Resources* 4 (May 21, 1981). The official minutes reflect only that the bill was amended in committee to add the good faith requirement. A tape recording of the Committee meeting, available from the Committee, reflects that the amendment responded to fears raised by State Representative Ullo that "there are so many small areas that can be considered a violation, if you have an employee that's a real habitual agitator, he could really use this to an advantage where he can make it really unbearable for the employer."

203. See, e.g., Letter from William J. Stuart to Rep. James A. Barcia (Oct. 31, 1980); Letter from Keith J. McLeod, to Rep. James A. Barcia (Oct. 28, 1980) (copies on file with the *Journal of Law Reform*). See also *supra* note 172.

204. See *supra* notes 172-73 and accompanying text.

205. See generally O.W. HOLMES, *THE COMMON LAW* 86-87 (1963 ed.).

asionally well-intentioned but overly suspicious whistleblowers may find themselves unprotected, protection should not be extended to them at the employer's expense.

Moreover, objective reasonableness is a standard that is sufficiently flexible to accommodate various fact situations and to account for such factors as the nature of the employer's alleged wrongdoing and the whistleblower's position within the firm. The issue is not whether a reasonable employee necessarily would have acted in the same manner, but is rather whether a reasonable employee in a similar position would consider the employee's actions in question to be reasonable. Although the standard must be developed on a case by case basis, several factors are likely to figure prominently in almost all cases.

a. Employer conduct— Current common law and statutory protection encompasses, if anyone, employees who disclose their employer's violations of statutes or administrative regulations. Such a standard is far too narrow, though, as some activity generally regarded as improper does not violate any statute or regulation. For example, responsible officials of the Ford Motor Company were aware in 1971 that the gas tanks on its Pintos were vulnerable to rupture in twenty miles per hour rear-end collisions and that the defect could be cured by a modification costing only ten dollars per car. The tank was not modified until the 1977 model year, when federal safety standards for gas tanks were issued. Thus, from 1971 through 1976 Ford marketed a car which it knew was unnecessarily dangerous but which did not violate any federal statute or regulation.²⁰⁶ Protected disclosure should not be limited to statutory violations but should include disclosures of conduct that a reasonable person would regard as wrongful.²⁰⁷

Disclosure of wrongful activity, however, may not always be appropriate. For example, it would not be appropriate for an employee of a bus company to reveal that five years ago the company used defective buses if all such buses have been removed from service.²⁰⁸

Protected disclosures should be limited to conduct generally regarded as wrongful. It should not extend to employee-employer differences of opinion or judgment. In such instances, even though the employee in good conscience dissents from the employer's views, the employee's right to act in accordance with his conscience should not be transformed into a license to impose his personal values on the employer. Instead,

206. See generally DeGeorge, *Ethical Responsibilities of Engineers in Large Organizations: The Pinto Case* (unpublished manuscript presented to the National Conference on Engineering Ethics, June 20-22, 1980) (copy on file with the *Journal of Law Reform*).

207. DeGeorge appears to sanction this standard when he suggests that employees be permitted to go public with information about the safety of a product only if the harm that will be done by the product to the public is serious and considerable. *Id.*

208. The example is suggested in Bok, *supra* note 161, at 2.

his duty of loyalty requires that he refrain from publicly opposing the employer's judgment.²⁰⁹

b. The employee's position with the employer— The standard of objective reasonableness will also adapt to the individual whistleblower's position and job responsibilities. For example, the degree of expertise possessed by the employee will affect what constitutes a reasonable belief in the accuracy of the disclosure. The employee's position in the firm may also influence his access to and consequently his duty to exhaust available internal channels.

c. Exhaustion of available internal channels— Where internal channels for complaining of employer misconduct exist, the employee's duty of loyalty generally mandates that such channels be used. The duty of loyalty implies a correlative duty to avoid harming the employer through inaccurate or inappropriate disclosure. Resorting to internal channels may furnish the employee with additional information and forestall an inaccurate disclosure, or may result in the problem's correction and prevent a needless disclosure. There may, however, be some instances in which failure to exhaust internal channels is justified. Therefore, the failure to exhaust available internal channels should give rise to a rebuttable presumption that the employee has acted unreasonably.²¹⁰

A rule that presumptively requires exhaustion of internal channels produces two benefits. First, the rule encourages employers to provide internal channels through which employees can voice dissent. Many such systems are already in effect; two that have been cited frequently as being particularly effective are the systems utilized by IBM and the Allied Corporation.²¹¹ Ideally, if all employers made such systems available, external whistleblowing would be unnecessary. This should be a goal of any set of legal rules to protect whistleblowers.

Second, channeling whistleblowing into internal procedures helps focus attention on the object of the complaint rather than on the personality of the whistleblower. Whistleblowers who bypass internal channels engender suspicion that their primary objective is personal publicity rather than correction of the problem. Their credibility is damaged and the situation frequently develops into an adversarial confronta-

209. See *Pierce v. Ortho Pharmaceutical Co.*, 84 N.J. 58, 417 A.2d 505 (1980).

210. The presumption may be overcome by showing that exhaustion would be futile or, perhaps, by a showing analogous to the OSHA rule allowing employees to refuse to work under conditions reasonably believed to pose an imminent risk of death or serious injury where there is insufficient time or opportunity to seek redress from their employer or apprise OSHA of the danger. *Whirlpool Corp. v. Marshall*, 593 F.2d 715 (6th Cir. 1979), *aff'd*, 445 U.S. 1 (1980).

211. See Cook, *Whistleblowers: Friend or Foe?*, INDUS. WEEKLY, Oct. 5, 1981, at 50, 53-54; see also Office of Management and Program Analysis, U.S. Nuclear Regulatory Commission, *A Survey of Policies and Procedures Applicable to the Expression of Differing Professional Opinions*.

tion in which the reason for the initial complaint is lost.²¹²

Internal channels are only effective, though, if employees know they are available. Moreover, the system must be structured to discourage employees from bypassing it. Employees will only utilize an internal complaint procedure to the extent that it is credible — and its credibility, in turn, depends on strong guarantees against reprisals for using the system.²¹³ Such guarantees should be legally enforceable through a cause of action for their breach; moreover, if such guarantees are not made the employee should not be obligated to exhaust internal channels.²¹⁴

d. Accuracy of the disclosure— Employees' duty of loyalty requires that they have an objectively reasonable belief in the accuracy of their disclosures. This will usually involve reasonable investigation and verification, much of which can be accomplished through internal channels. Factors to be considered include the complexity of the information they are revealing, the employee's access to corroborating information, and the employee's expertise in the area.

e. To whom may the whistle be blown?— The duty of loyalty requires that even if internal channels have failed, information damaging to the employer must be revealed only to appropriate parties. In cases involving statutory violations, the appropriate party will usually be the government enforcement authority. It may also include customers and other parties but only if the violation poses an immediate danger to those parties, or if the impropriety does not involve a statutory violation. In some cases, it may remain inappropriate to blow the whistle publicly even though internal channels have failed. For example, an attorney should not reveal information protected by the attorney-client privilege.

III. REMEDIES FOR UNJUST DISCHARGE

At common law, courts of equity refused to order specific performance of employment agreements.²¹⁵ Today, grievance procedures in collective bargaining agreements and statutory protections have made reinstatement a common remedy for wrongfully discharged employees. It may seem reasonable then, that the protection provided to at-will employees should include reinstatement as a remedy.²¹⁶ In the case of the discharged whistleblower, however, except where the discharge con-

212. See Chalk, *supra* note 159; Chalk & von Hippel, *Due Process for Dissenting "Whistle-Blowers"*, TECH. REV. June-July 1979, at 48, 55.

213. Conference Board, *Non Union Complaint Systems: A Corporate Appraisal* 8-9 (1980).

214. Cf. *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 208-09, 94 N.W.2d 711, 720-21 (1959).

215. E. FARNSWORTH, CONTRACTS § 12.6 (1982).

216. See generally COMM. ON LABOR & EMPLOYMENT LAW, *At-Will Employment and the Problem of Unjust Dismissal*, 36 REC. A.B. CITY N.Y. 170, 196 (1981); Summers, *supra* note 6, at 531.

travenes a collective bargaining agreement, reinstatement may be unworkable and inappropriate.

A. *Collective Bargaining Agreements*

In most collective bargaining agreements, the employer contractually agrees both to just cause limitations on its right of discharge and to an arbitration procedure. Together these provisions give an employee a contractual right to employment so long as he does not engage in conduct constituting just cause for discharge. Given the nature of this contractual right, reinstatement usually is an essential part of the remedy where the right has been infringed,²¹⁷ although the parties remain free to limit the remedy by contractual agreement.²¹⁸

The whistleblower discharged in breach of a collective bargaining agreement need not be treated differently than any other employee discharged without just cause. Any reinstatement order would be based on a contractual right for which the employee has bargained and to which his employer has voluntarily agreed. The collective bargaining agreement embodying that right is an essential part of an ongoing relationship between the employer and the union; reinstatement is a well-established and mutually acceptable aspect of that agreement.

Reinstatement of the whistleblower discharged in violation of a collective bargaining agreement is not only appropriate from an historical perspective; it is also an eminently workable remedy. An empirical study of reinstatement ordered by arbitrators in discharge cases between 1950 and 1955²¹⁹ showed that almost all of the employees offered reinstatement pursuant to an arbitration order actually returned to their jobs. Only 12 out of 123 did not.²²⁰ The study further shows that employers generally accept the reinstated employee and do not seek to retaliate against him: 65% responded that since reinstatement the employee performed satisfactorily,²²¹ 64% said that he made normal occupational progress,²²² 70% said he presented no subsequent disciplinary problems,²²³ and 71% reported that supervisors' attitudes were favorable or neutral toward the reinstated employee.²²⁴ The employer's responses are particularly impressive because in 61% of the cases, including many

217. See generally O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 281 (1973); M. HILL & A. SINICORPI, REMEDIES IN ARBITRATION 42 (1981).

218. See, e.g., *Consumers Oil Co.*, 77 Lab. Arb. (BNA) 141 (1981) (Hill, Arb.).

219. Ross, *The Arbitration of Discharge Cases: What Happens After Reinstatement*, in CRITICAL ISSUES IN LABOR ARBITRATION 21 (1957).

220. *Id.* at 33.

221. *Id.* at 34.

222. *Id.*

223. *Id.* at 35.

224. *Id.*

where the post-reinstatement experience with the employee was favorable, the employer remained convinced that the arbitrator's award had been wrong.²²⁵ These findings have also been confirmed in a more recent study.²²⁶ Thus, it appears that though employers often disagree with the arbitrators' decisions, they accept these decisions and do not work to undermine them.

B. Absence of Collective Bargaining

Outside the collective bargaining context, reinstatement is not a remedy to which the employer contractually agrees; instead, it must be imposed on the employer by statute or judicial fiat. Unlike the employee reinstated by the arbitrator, the employee discharged in violation of a statute usually does not have a union to support him once reinstated and to discourage the employer who is tempted to retaliate. Moreover, reinstatement is not institutionalized as it is in an ongoing union-employer collective bargaining relationship.

The available empirical evidence indicates that under these circumstances, reinstatement is not a workable or desirable remedy. A study of employees ordered reinstated after being discharged for attempting to organize a union in violation of the NLRA showed that over half declined to be reinstated.²²⁷ Almost a third of these did so even though he or she had no alternative job at the time.²²⁸ The study also revealed that if the union had been successful in its organizing drive, the employee was far more likely to accept reinstatement than where the union drive had failed.²²⁹ This finding demonstrates the importance of the union to a workable reinstatement remedy. Of the 87 employees who refused reinstatement, 78 gave reasons for their refusals: 39 expressed fear of company retaliation as a reason while 10 stated that financial need caused them to accept settlement offers of back pay without reinstatement.²³⁰ Moreover, their fears of company retaliation were evidently justified. Of 85 employees who returned to their jobs, 60 subsequently left the company, 40 of them due to employer

225. *Id.* at 36.

226. Malinowski, *An Empirical Analysis of Discharge Cases and The Work History of Employees Reinstated by Labor Arbitrators*, 36 ARB. J. 31 (1981). Another study also confirmed the Ross findings except for the finding that employers disagreed with the arbitrator's decision. McDermott & Newhams, *Discharge — Reinstatement: What Happens Thereafter*, 24 INDUS. & LAB. REL. REV. 526 (1971).

227. L. Aspen, *A Study of Reinstatement Under the National Labor Relations Act 15* (1966) (unpublished Ph.D. Dissertation, Mass. Institute of Technology).

228. *Id.* at 22.

229. *Id.* at 25-26. Among the employees who accepted reinstatement, however, the success of the union drive was irrelevant to whether reinstatement was ultimately successful. *Id.* at 47-48.

230. *Id.* at 38-39.

retaliation. Of 23 employees placed on preferential hiring lists, none were ever recalled by the employer.²³¹ On the basis of the experiences of employees who remained with the employer, the study concluded that reinstatement was an effective remedy at best in only 30% of the cases and possibly in only 10% of the cases.²³² Subsequent studies have confirmed these findings.²³³

It thus appears that often times the reinstatement order has the ironic effect of transforming an unlawful discharge into a "voluntary" resignation. From the discharged employee's perspective, a more complete damages remedy may be preferable to reinstatement. In western Europe, most countries protect employees from discharge without just cause, but the remedy of reinstatement is rare.²³⁴ Why, then, does reinstatement remain such a well-entrenched statutory remedy?

The equitable remedy of reinstatement is part of the overall statutory scheme of most protective employment legislation. Reinstatement has frequently been characterized as necessary to signal to other employees that they need not be afraid to exercise their statutory rights.²³⁵ Thus, the reinstatement remedy, like most statutory antiretaliation provisions, is intended to encourage employees to exercise their statutory rights. Even under these statutes, however, reinstatement has been denied where tension and hostility between the discharged employee and the employer rendered it extremely impractical to return the employee to a job requiring a close working relationship with his superiors,²³⁶ and where the employee was guilty of misconduct.²³⁷ In such instances future damages "front pay" have often been awarded.²³⁸

A complete damage remedy that includes front pay will usually better protect the interests of the whistleblower than reinstatement, and will not as a general matter encourage whistleblowing. Given this Article's premise that the law should protect the whistleblower once he has acted, yet avoid encouraging him in the first instance, damages rather than reinstatement is the best remedy for the unjust discharge of employees who are not entitled by virtue of a collective bargaining agreement to equitable reinstatement relief.

231. *Id.* at 37.

232. *Id.* at 63.

233. Chaney, *The Reinstatement Remedy Revisited*, 32 LAB. L.J. 357, 359 (1981).

234. Sherman, *Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries*, 29 AM. J. COMP. L. 467 (1981).

235. See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

236. See, e.g., *Vant Hul v. City of Dell Rapids*, 462 F. Supp. 828 (S.D.S.D. 1978); *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919 (S.D.N.Y. 1976) *aff'd mem.*, 559 F.2d 1203 (2d Cir. 1977), *cert. denied*, 434 U.S. 920 (1977); *Hyland v. Kenner Products Co.*, 13 Fair Empl. Prac. Cas. (BNA) 1309 (S.D. Ohio 1976).

237. *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152 (5th Cir. 1962).

238. *Id.* See also *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd mem.* 559 F.2d 1203 (2d Cir. 1977), *cert. denied*, 434 U.S. 920 (1977); *Mitchell v. Dyes*, 14 Wages & Hour Cas. (BNA) 484 (S.D. Ala. 1960).

CONCLUSION

Most participants in the debate over whistleblowing perceive the problem as a conflict between duty to society and duty to employer. This view is mistaken; the real issue is what balance should be struck between the individual's interest in acting according to his conscience and the employer's interests in his employee's silence. Although the individual's interest may be outweighed by his duty of loyalty, it is *always* superior to his employer's claim to blind obedience. The law should respect this individual interest but should eschew treating the whistleblower as a resource to be cultivated in law enforcement.

Due to their rigid conception of public policy and their failure to embrace an individual rights theory of the tort of abusive discharge, courts have thus far furnished little protection for whistleblowers. Arbitrators, because of an overbroad characterization of the duty of loyalty, have similarly afforded inadequate protection to these employees. Statutory antiretaliation provisions, though protecting whistleblowers in certain instances, are an inappropriate model for general whistleblower protection because they view the whistleblower as a law enforcement resource.

Both the standard of protection and the damages remedy advocated in this Article better accommodate the crucial interests implicated by any act of whistleblowing than currently available sources of protection. Courts and legislatures should keep this standard and remedy in mind when fashioning common law tort and statutory causes of action for retaliatory discharges of employee whistleblowers.