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Remedies for Employees Discharged for Reporting an Employer's Violation of Federal Law

REMEDIES FOR EMPLOYEES DISCHARGED FOR REPORTING AN EMPLOYER'S VIOLATION OF FEDERAL LAW

Under common law tradition, employers had the prerogative to discharge non-contract employees at will.[1] The "employment at will" rule provided that employers could freely discharge employees without cause or notice because no contract term specified the length of employment.[2] Likewise, an employee was free to leave the job voluntarily at any time.[3] Recently, however, judicial decisions[4] and legislative enact-

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1. *See* Coppage v. Kansas, 236 U.S. 1, 13-14 (1915) (employer has constitutional right to terminate employees at will); Adair v. United States, 208 U.S. 161, 174-75 (1908) (employer has absolute right to discharge employee); Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439, 441 (7th Cir.) (employment agreement is terminable at will if agreement does not specify length or duration of employment), *cert. denied,* 379 U.S. 914 (1964); Odell v. Humble Oil & Refining Co., 201 F.2d 123, 128 (10th Cir.) (employment relationship not governed by contract is terminable at will), *cert. denied,* 345 U.S. 941 (1953).

2. *See* Conrad v. Delta Air Lines, Inc., 494 F.2d 914, 916 (7th Cir. 1974) (absent statute or agreement, employer may discharge employee without cause); Hablas v. Armour & Co., 270 F.2d 71, 78 (8th Cir. 1959) (contract of employment for indefinite term is terminable by either party without cause or notice). *See generally* S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017, at 129-30 (3d ed. 1967); A. CORBIN, 3A CORBIN ON CONTRACTS § 684, at 224 (1960). Absent exceptions for public policy or other reasons, the employment at will rule remains valid in every American jurisdiction. *See, e.g.,* Comerford v. International Harvester Co., 235 Ala. 376,____, 178 So. 894, 896 (1938); Segal v. Arrow Indus. Corp., 364 So.2d 89, 90 (Fla. Dist. Ct. App. 1978); Geary v. United States Steel Corp., 456 Pa. 171, 173, 319 A.2d 174, 176 (1974); *see also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 744-46 n.25 (2d ed. 1983) (list of state courts applying employment at will rule). The employment at will rule was established in the late nineteenth century because of policies encouraging freedom of contract and employers' freedom to manage business. *See* Payne v. Western & Atlantic R.R. Co., 81 Tenn. 507, 518-19 (1884) (employers are free to discharge employees at will just as employers are free to buy and sell in market at will). *See generally* P. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 130-37 (1969) (nineteenth century concepts of freedom of contract, freedom of enterprise, and laissez-faire account for development of employment at will rule).

3. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 743 (2d ed. 1983) (absent explicit language in employment contract either party can terminate employment relationship).

4. Courts have challenged the employment at will rule based on theories of contract and implied covenant of good faith. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 747-48 (2d ed. 1983) (listing state courts using contract theories to abrogate employment at will rule). Some state courts have implied a contract term governing grounds for an employee's discharge although no express contract existed. *Id.* For example, state courts have found that internal company memoranda, verbal representations made by the employer, employee handbooks, and an employee's detrimental reliance on an offer of employment may create an implied contract between the employee and employer concerning the grounds for the employee's discharge. *See, e.g.,* Rabago-Alvarez v. Dart Indus., 55 Cal. App.3d 91, 97, 127 Cal. Rptr. 222, 225 (1976) (finding that employer must have just cause to dismiss employee who was induced to leave former employment); McIntosh v. Murphy, 52 Hawaii 29,____, 469 P.2d 177, 181 (1970) (employee's move to Hawaii to accept job constituted implied contract of employment because employee detrimentally relied on job offer); Toussaint v. Blue Cross & Blue Shield,

ments[5] have limited severely an employer's absolute right to discharge non-union employees at will. For example, one recent change in the law has

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408 Mich. 579, 617, 292 N.W.2d 880, 885 (1980) (court found implied requirement of just cause for discharge in employer's representations and in employee's Blue Cross Manual); Yartzoff v. Democrat-Herald Publishing Co., 281 Or. 651,____, 576 P.2d 356, 360 (1978) (court infers just cause requirement for termination from language in employee handbook indicating that employees were entitled to probationary period). *But see* Neth v. General Elec. Co., 65 Wash.2d 652, ____, 399 P.2d 314, 318 (1965) (employer's oral representations during union campaign were opinions, not promises). Additionally, some state courts have presumed that an implied covenant of good faith exists between an employee and employer so that any discharge in bad faith constitutes a breach of the employment contract. *See* Cleary v. American Airlines, Inc., 111 Cal. App.3d 443, 455-56, 168 Cal. Rptr. 722, 729 (1980) (company's policy to hold hearing to determine whether to discharge employee is one element in finding implied covenant of good faith); Fortune v. National Cash Register Co., 373 Mass. 96, ____, 364 N.E.2d 1251, 1257-58 (1977) (termination of employment in order to avoid paying commission to employee constitutes breach of implied covenant of good faith); Monge v. Beebe Rubber Co., 114 N.H. 130, 131, 316 A.2d 549, 551 (1974) (bad faith or malicious termination of employee constitutes breach of implied employment contract).

Commentators have urged courts and legislatures to place limitations on an employer's broad power to terminate at will. *See, e.g.*, Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410 (1967) (criticism of employer abuse of right to discharge at will); Jenkins, *Federal Legislative Exceptions to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy*, ALB. L. REV. 466, 512-24 (1983) (description of proposed employee discharge protection statute); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484 (1976) (arguing for abrogation of harsh employment at will rule); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1836-37 (1980) (advocating limitation on employer's right to terminate at will based on contractual duty to act in good faith); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 362 (1974) (arguing for protection of employees' jobs through application of contract principles); Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WISC. L. REV. 777, 799-812 [hereinafter cited as *Protecting the Private Sector Employee*] (analyzing whistleblower exception to employment at will rule).

5. *See* 5 U.S.C. §§ 2301(b)(9), 2302(b)(8) (1982) (federal employees are protected against reprisal for disclosure of violation of any law, rule, or regulation); Consumer Credit Protection Act § 304(a), 15 U.S.C. § 1674(a) (1982) (employer may not discharge employee because court garnishes employee's wages); Jury System Improvement Act § 6(a)(1), 28 U.S.C. § 1875 (1982) (employer may not discharge employee because of employee's jury service); National Labor Relations Act of 1935, § 8(a), 29 U.S.C. § 158(a) (1982) (prevents employers from discharging employees to discourage union organization); Fair Labor Standards Act § 15(a)(3), 20 U.S.C. § 215(a)(3) (1982) (retaliatory discharge against employees who exercise right to report violations of Act is illegal); Occupational Health and Safety Act of 1970, § 11(c), 20 U.S.C. § 660(c) (1982) (prohibits employer discharge of employee for filing complaint disclosing health or safety violations of Act, instituting proceedings, or testifying in exercise of employee's rights under Act); Age Discrimination in Employment Act of 1967, § 4(a), 29 U.S.C. § 623(a) (1982) (unlawful for employer to discharge employee based on individual's age if employee is between ages of forty and seventy); 38 U.S.C. § 2021(a) (1982) (guarantees re-employment for military veterans); Title VII of the Civil Rights Act of 1964, § 702(a), 42 U.S.C. § 2000e-2 (1982) (prohibits employee discharge on basis of race, color, religion, sex, or national origin).

California's labor statutes are representative of the statutes many states have passed to limit employer's power to terminate employees at will. *See, e.g.*, CAL. GOV'T. CODE § 12940(a)

provided a limitation on the employment at will rule called the "whistleblower exception."[6] The whistleblower exception provides employees with a cause of action in wrongful discharge against an employer when the employee has been discharged for reporting the employer's violations of law.[7] Although state courts have recognized a cause of action for whistleblower employees who report violations of state law to appropriate state authorities, employees who report violations of federal law have not enjoyed the same protection against discharge in either federal or state forums.[8] Underlying the question of whether employees fired for reporting violations of federal law should have a cause of action are two related issues. First, courts have questioned whether states have an interest in upholding federal public policy.[9] Second,

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(West 1980) (prohibits discharge based on race, color, religion, sex, ancestry, physical handicaps, medical condition, and marital status); CAL. LAB. CODE § 6310 (West Supp. 1985) (prohibits employer from terminating employee for filing claim under California Occupational Safety and Health Act); CAL. LAB. CODE § 230 (West Supp. 1985) (prohibits discharge of employee for serving on jury); *see also infra* notes 39-44 and text accompanying notes 37-45 (state whistleblower statutes prevent discharge of employee for reporting employer's violations of law).

6. *See* C. BAKALY & J. GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS: FORMATION, OPERATION AND REMEDIES FOR BREACH § 9.1.3 at 120 (1984 Supp.) (courts attempt to protect whistleblower employees when discharge of whistleblower employee contravenes public policy).

7. *See* Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471,____, 427 A.2d 385, 389 (1980) (employee who was discharged for insisting that employer comply with Connecticut Uniform Food, Drug and Cosmetic Act was fired in contravention of mandate of public policy); Palmateer v. International Harvester Co., 85 Ill.2d 124, 135, 421 N.E.2d 876, 880 (1981) (employee stated cause of action for retaliatory discharge when employee was discharged for supplying information to local law enforcement authorities that company officials may have violated Illinois criminal code); Harless v. First Nat'l Bank, 162 W. Va. 116,____, 246 S.E.2d 270, 275-76 (W. Va. 1978) (employee stated cause of action for wrongful discharge when fired for preventing employer from violating West Virginia Consumer Credit and Protection Act). *But see* Hinrichs v. Tranquilaire Hosp., 352 So.2d 1130, 1131 (Ala. Sup. Ct. 1977) (court rejected public policy exception in case of employee discharged for refusing to falsify medical records); Andress v. Augusta Nursing Facilities, Inc., 156 Ga. App. 775, ____, 275 S.E.2d 368, 369 (1980) (nursing home employee discharged for refusing to falsify employer's report has no cause of action against employer for wrongful discharge); Martin v. Platt, 179 Ind. App. 688, ____, 386 N.E.2d 1026, 1028 (1979) (employee discharged for reporting that his supervisor received kickback payments stated no cause of action because no statute prohibited such discharge).

8. *See* Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468, 1475 (9th Cir. 1984) (termination of employee in retaliation for employee's safety complaints stated no cause of action in wrongful discharge because employee acted in behalf of no state law or policy); Buethe v. Britt Airlines, 118 L.R.R.M. 2031, 2035 (7th Cir. 1984) (unclear under Indiana law whether state's exception to employment at will rule applies when source of right or duty upon which employee relies derives from federal law); Rachford v. Evergreen Int'l Airlines, 117 L.R.R.M. 3195, 3196 (N.D. Ill. 1984) (termination of employee who reported employer's violations of federal aviation law stated no cause of action for retaliatory discharge); Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1061 (1980) (discharge of employee who reported employer's violations of federal food and drug laws stated no cause of action under exception to state employment at will rule).

9. *See* Buethe v. Britt Airlines, 116 L.R.R.M. 3155, 3157 (S.D. Ind. 1984) (no state

courts have examined whether a particular federal statute provides an implied private right of action for discharged employees.[10]

Commentators and courts have urged abrogation of the employment at will rule based on both contract[11] and tort[12] theories. The whistleblower exception to the employment at will rule is part of a larger public policy exception.[13] State courts specifically have challenged the common law employment at will rule for public policy reasons based on tort theories.[14] Several courts have recognized an erosion of the employment at will doctrine

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interest exists in implementing federal public policy); Rachford v. Evergreen Int'l Airlines, 117 L.R.R.M. 3195, 3196 (N.D. Ill. 1984) (state has no interest in enforcing federal aviation law).

10. *See* Pavolini v. Bard-Air Corp., 645 F.2d 144, 146-47 (2d Cir. 1981) (no implied cause of action exists under federal aviation laws in favor of pilot discharged for reporting employer's safety violations); Rachford v. Evergreen Int'l Airlines, 117 L.R.R.M. 3195, 3196 (N.D. Ill. 1984) (Federal Aviation Act does not prohibit discharge for reporting safety violations).

11. *See supra* note 4 (listing courts which have challenged employment at will rule based on theories of contract and implied covenant of good faith).

12. *See* Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 176-77, 610 P.2d 1330, 1335-36 (1980) (employee's discharge for refusal to participate in price-fixing scheme creates action in wrongful discharge); Nees v. Hocks, 272 Or. 210, ____, 536 P.2d 512, 516 (1975) (recognizing cause of action for employees who were fired for serving jury duty).

13. *See* C. BAKALY & J. GROSSMAN, *supra* note 6, § 9.1-9.1.3 at 116-22 (cause of action for discharge for whistleblowing is part of public policy exception to employment at will rule). Commentators have divided the public policy exception into three categories. *Id.; see Protecting the Private Sector Employee, supra* note 4, at 78-99. In the first category, courts have provided a cause of action to employees discharged in retaliation for refusing to commit an illegal act. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App.2d 184, 190, 344 P.2d 25, 27 (1959) (termination of employee who refused to commit perjury violates public policy); Trombetta v. Detroit, T. & I.R. Co., 81 Mich. App. 489,____, 265 N.W.2d 385, 388 (1978) (termination of employee for employee's refusal to alter records creates cause of action for wrongful discharge). In the second category, courts have provided a cause of action to employees discharged in retaliation for exercising a vested statutory right. 265 N.W.2d at 390; *see* Kelsay v. Motorola, Inc., 74 Ill.2d 172, 185, 384 N.E.2d 353, 357-58 (1978) (at will employee fired for filing workmen's compensation claim states cause of action for wrongful discharge against employer); Frampton v. Central Indiana Gas Co., 260 Ind. 249, ____, 297 N.E.2d 425, 428 (1973) (Indiana provides exception to employment at will rule in case of worker fired for filing workmen's compensation claim). *But see* Thurston v. Macke Co., 716 F.2d 255, 255 (4th Cir. 1983) (employee discharged for asserting workmen's compensation claim states no cause of action under Virginia Workmen's Compensation Act); Sloane v. Southern Bell Tel. & Tel. Co., 505 F. Supp. 1085, 1086 (S.D. Fla. 1981) (no cause of action exists for retaliatory discharge of employee who receives reduced employment benefits as result of filing workmen's compensation claim). In the third public policy exception, courts provide a cause of action to employees discharged for reporting an employer's violation of law. *See* Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471,____, 427 A.2d 385, 389 (1980) (termination of employee who insisted that employer comply with Connecticut Uniform Food Drug and Cosmetic Act contravened mandate of public policy); Palmateer v. International Harvester Co., 85 Ill.2d 124, 135, 421 N.E.2d 876, 880 (1981) (termination of employee who supplied information to local authorities that company officials may have violated Illinois criminal code violates public policy and creates action in wrongful discharge).

14. *See supra* note 12 and accompanying text (courts using tort theories to limit employment at will rule). *See* Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471,____, 427 A.2d 385, 389 (1980) (discharge of employee for insisting that employer comply with Connecticut Uniform Food, Drug and Cosmetic Act was fired in contravention of mandate of public policy); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275-76 (W. Va. 1978) (discharge of employee for

if termination of an employee undermines an important public policy.[15] For example, courts have recognized a cause of action based on wrongful discharge for employees who report an employer's violation of a state law.[16] The justification for protecting whistleblowing employees is the belief that whistleblowers advance the public interest by reporting violations of public health, safety, or environmental standards.[17] Courts also have acknowledged that whistleblowers who report violations of antitrust law serve an important public function since whistleblowers significantly enhance government enforcement of antitrust law.[18] Courts have viewed employees as possessing a unique position in which to discover and report employer wrongdoing.[19] Commentators and courts, however, have suggested that despite their important social function, whistleblowers are often placed in a difficult position.[21] On one hand, the employee faces possible criminal or civil penalties

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reporting employer's violation of West Virginia Consumer Credit and Protection Act states cause of action for wrongful discharge). *But see* Martin v. Platt, 179 Ind. App. 688,____, 386 N.E.2d 1026, 1027-28 (1979) (termination of employee for reporting that employee's supervisor received kickback payments stated no cause of action for wrongful discharge).

15. *See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471,____, 427 A.2d 385, 389 (1980) (employee who was discharged for insisting that employer comply with Connecticut Uniform Food, Drug and Cosmetic Act was fired in contravention of mandate of public policy); Palmateer v. International Harvester Co., 85 Ill.2d 124, 135, 421 N.E.2d 876, 879-80 (1981) (discharge of employee for supplying information to local authorities that company officials may have violated Illinois' criminal code violates public policy and creates action in wrongful discharge); Harless v. First Nat'l Bank, 161 W. Va. 116, ____, 246 S.E.2d 270, 275-76 (W. Va. 1978) (termination of employee for reporting employer's violation of West Virginia Consumer Credit and Protection Act states cause of action for wrongful discharge).

16. *See* Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471,____, 427 A.2d 385, 389 (1980) (discharge of employee for insisting that employer comply with Connecticut Uniform Food, Drug and Cosmetic Act was fired in contravention of mandate of public policy); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275-76 (W. Va. 1978) (discharge of employee for reporting employer's violation of West Virginia Consumer Credit and Protection Act states cause of action for wrongful discharge). *But see* Martin v. Platt, 179 Ind. App. 688, ____, 386 N.E.2d 1026, 1027-28 (1979) (termination of employee for reporting that employee's supervisor received kickback payments stated no cause of action for wrongful discharge).

17. *See Protecting the Private Sector Employee, supra* note 4, at 778-79 (responsible whistleblower employee works in public's best interest because whistleblower acts as form of social control over organization).

18. *See* Shaw v. Russell Trucking Line, Inc., 542 F. Supp. 776, 780 (W.D. Pa. 1982) (employee discharged for refusal to participate in antitrust conspiracy had standing under section 4 of Clayton Act to recover damages from employer for wrongful discharge); Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1388-89 (S.D. Ind. 1982) (discharge of employee for refusing to continue in anti-competitive conspiracy creates claim for wrongful discharge under public policy exception to employment at will rule).

19. *See* Solomon & Garcia, *Protecting the Corporate Whistle Blower Under Federal Anti-Retaliation Statutes,* 5 J. CORP. L. 275, 275-76 (1980) (employees play pivotal role in helping government locate and correct violations of environmental, health, and safety statutes).

20. *Id.* at 279.

21. *See* Pavolini v. Bard-Air Corp., 645 F.2d 144, 148 (2d Cir. 1981) (employee who reported employer's safety violations to Federal Aviation Administration (FAA) faced with conflict between loss of job on one hand and potential loss of lives on other hand); *Protecting*

if the employee participates in the employer's illegal activity.[22] On the other hand, the employee risks the possibility of discharge for reporting the employer's illegal activity.[23]

In general, the public policy exception to the employment at will rule seeks to provide redress to discharged employees when the discharge would undermine an important public policy.[24] In the leading case of *Petermann v. International Brotherhood of Teamsters,*[25] the District Court of Appeals for the Second District of California determined that an employee fired for refusing to violate state law had a cause of action for wrongful discharge.[26] In *Petermann,* the plaintiff employee was fired after refusing to commit perjury before a committee of the California Legislature.[27] The *Petermann* court first noted that an employer's right to discharge an employee may be limited by considerations of public policy.[28] The *Petermann* court reasoned that since perjury tends to interfere with the proper administration of justice, the law must deny the employer's right to freely discharge employees who refuse to commit perjury on the employer's behalf.[29]

Courts have expanded the public policy exception to the employment at

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the Private Sector Employee, supra note 4, at 779 (whistleblower employee must balance obligation to report illegal activity against likelihood of job termination).

22. *See Protecting the Private Sector Employee, supra* note 4, at 779 (employees risk criminal liability for participation in employer's illegal activity). The Federal Aviation Act (FAA) provides civil and criminal penalties for employees engaging in illegal activity. *See* 49 U.S.C. § 1471 (1982) (prescribing civil penalties not to exceed $1,000 for each violation of Federal Aviation Act); 49 U.S.C. § 1472(a) (1982) (prescribing criminal penalties for *any person* who knowingly or willfully violates any provision of Federal Aviation Act for which no penalty is otherwise provided) (*emphasis added*).

23. *See, e.g.,* Pavolini v. Bard-Air Corp., 645 F.2d 144, 146 (2d Cir. 1981) (employer discharged plaintiff for reporting violations of Federal Aviation Act); Palmateer v. International Harvester Co., 85 Ill.2d 124,____, 421 N.E.2d 876, 877 (1981) (employer discharged plaintiff allegedly for supplying information to local law enforcement officials concerning another employee's alleged criminal activity); Trombetta v. Detroit, T. &. I. R. Co., 81 Mich. App. 489, 496, 265 N.W.2d 385, 386 (1978) (plaintiff alleged that employer had discharged plaintiff for plaintiff's refusal to alter pollution control reports).

24. *See* Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1374 (9th Cir. 1984) (state's interest in providing cause of action for violation of public policy is enforcement of underlying policy, not regulation of employment relationship); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception,* 96 HARV. L. REV. 1931, 1936 (1983) (basis for public policy exception of employment at will rule is to enforce underlying public policy).

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

26. *Id.* at____, 344 P.2d at 27.

27. *Id.* at 26. The defendant in *Petermann v. International Bhd. of Teamsters* employed the plaintiff as a business agent. *Id.* The plaintiff was subpoenaed to testify before the Assembly Interim Committee on Governmental Efficiency and Economy of the California Legislature. *Id.* The plaintiff alleged that the defendant instructed the plaintiff to make false statements at the committee hearing. *Id.* The plaintiff gave truthful answers at the committee hearing and was subsequently fired. *Id.*

28. *Id.* at 27.

29. *Id.* The *Petermann* court stated that the public policy against perjury derives from the California Penal Code, which makes the commission of perjury unlawful. *Id.* The *Petermann* court notes that the threat of criminal prosecution for committing perjury is not in itself

will rule to include the discharge of employees who report an employer's violation of law.[30] In *Harless v. First National Bank in Fairmont,*[31] the West Virginia Supreme Court relied primary on state consumer credit protection statutes to find a cause of action for an employee discharged for reporting violations of the state laws to his superiors and to bank auditors.[32] The plaintiff in *Harless,* an at will employee, noticed that the defendant bank had intentionally overcharged customers on repayment of their installment loans in violation of the state and federal consumer credit and protection laws.[33] The bank fired the plaintiff after he reported the violations to a member of the Bank's Board of Directors and later assisted bank auditors in investigating the violations.[34] The West Virginia Supreme Court in *Harless* held that the state legislature intended to establish a clear and unequivocal public policy that protected consumers of credit under the state act.[35] The *Harless* court stated that denying a whistleblower employee a cause of action for wrongful discharge would frustrate such public policy because the employee had acted to protect the rights of consumers.[36]

In addition to state court decisions providing rights of action for employees discharged for reporting violations of state law, state legislatures have enacted statutes expressly forbidding discharge of whistleblower employees.[37] In general, three types of whistleblower statutes exist.[38] The first

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sufficient to discourage perjury. *Id.* Therefore, the *Petermann* court reasoned, to more fully effectuate the state's public policy against perjury, that the civil law must deny the employer the right to discharge an employee who refused to commit perjury. *Id.* To hold otherwise, the *Petermann* court reasoned, would be to encourage criminal conduct on the part of the employee and employer. *Id.*

30. *See* Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471,____, 427 A.2d 385, 389 (1980) (termination of employee for insisting that employer comply with Connecticut Uniform Food, Drug and Cosmetic Act contravened public policy); Palmateer v. International Harvester Co., 85 Ill.2d 124, 135, 421 N.E.2d 876, 880 (1981) (employee stated cause of action for retaliatory discharge when employer had discharged employee for supplying information to local law enforcement authorities that company officials may have violated Illinois criminal code).

31. 246 S.E.2d 270 (W. Va. 1978).

32. *Id.* at 275-76; *see* W. VA. CODE § 46A-1-101 (1977 Rep. Vol.) (West Virginia Consumer Credit and Protection Act).

33. 246 S.E.2d at 272. The plaintiff in *Harless v. First National Bank in Fairmont* first reported violations of state and federal consumer credit protection laws to his superior at the defendant bank. *Id.* One year later, Harless reported the illegal activities to a member of the defendant's Board of Directors. *Id.* Shortly thereafter, Harless assisted auditors of the bank by supplying them with records and files of consumer loans. *Id.* at 273. The bank subsequently fired Harless. *Id.*

34. *Id.* at 273.

35. *Id.* at 275-76.

36. *Id.*

37. *See infra* notes 39-44 and text accompanying notes 38-45 (categorizing state whistleblower statutes). Michigan was the first state to enact a general whistleblower protection statute. *See* MICH. COMP. LAWS ANN. § 15.362 (West 1981) (whistleblower statute became effective on March 31, 1981).

38. *See infra* notes 39-44 and text accompanying notes 39-45 (categorizing whistleblower statutes).

type prohibits discharge of a public employee who reports violations of any state or federal law, rule, or regulation to any person.[39] The second type of state whistleblower statute prohibits discharge of any employee who reports a violation of a state or federal law, rule, or regulation to a public body.[40] The statutes in the second category generally define public body as any political subdivision of the state.[41] Third, a state whistleblower statute may protect any employee who reports a violation of a state or federal law, rule or regulation to any authority.[42] Nearly every whistleblower statute provides some minimal protection to employees who report violations of federal law.[43] The extent of coverage of state whistleblower statutes varies from state to state within the three broad categories,[44] but the statutes indicate a general state interest in enhancing federal public policy.[45]

Courts applying state law have been slower than legislatures to provide a remedy to discharged employees who report violations of federal law,[46]

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39. *See* DEL. CODE ANN. tit. 29, § 5115 (1983 Rep. Vol.) (prohibits discharge of state employee who reports violation or suspected violation of federal or state law or regulation); KANS. STAT. ANN. § 75-2973(b) (1984) (provides that no supervisor or appointing authority of any state agency shall prohibit state civil service employee from reporting any violation of state or federal law, rules, or regulations to any person); MD. ANN. CODE art. 64A, § 12G (1983 Rep. Vol.) (state appointing authority may not discharge state employee as reprisal for disclosure of information evidencing violation of any law, rule, or regulation); OKLA. STAT. ANN. tit. 74, § 841.7 (1984 Supp.) (state employee who provides information to any member of legislature, legislative committee, administrative hearing, or court of law is protected against disciplinary actions); OR. REV. STAT. § 240.316(5) (1983) (no state employee is subject to disciplinary action for disclosure of violation of laws, rules, other improper actions, or inefficiency of superior officers or fellow employees); R.I. GEN. LAWS § 36-15-3 (1984) (state shall not discharge state employee because employee reports to public body violation of state or federal law); WASH. REV. CODE ANN. § 42.40.010 (1984 Supp.) (state government shall not discourage state employees from disclosing improper governmental actions); WISC. STAT. ANN. §§ 230.81, 230.83 (West Supp. 1984) (state employee with knowledge of information concerning violation of any law may disclose that information to any person without fear of discharge).

40. *See* CONN. GEN. STAT. ANN. § 4-61dd(b) (1985 Supp.) (employees protected from discharge for reporting violations of law to state attorney general); ME. REV. STAT. ANN. tit. 26, §§ 831-840 (Supp. 1984) (employer shall not discharge employee for reporting violations of law to public body); MICH. COMP. LAWS ANN. §§ 15.361-15.369 (1981) (same).

41. *See* ME. REV. STAT. ANN. tit. 26, § 832(4) (Supp. 1984) (public body means state officer or any subdivision of state or local government); MICH. COMP. LAWS ANN. § 15.361 (1981) (same).

42. *See* N.Y. LAB. LAW § 740 (McKinney 1984 Supp.) (employer shall not retaliate against employee if employee discloses any employer activity which has violated any law).

43. *See supra* notes 39-42 and accompanying text (whistleblower statutes protect employees who report violations of federal as well as state law).

44. *See* LA. REV. STAT. ANN. § 30:1074.1 (West 1985 Supp.) (protects only those employees who report violations of environmental laws or regulations).

45. *See supra* notes 39-42 and accompanying text (whistleblower statutes provide cause of action for employees discharged for reporting violations of federal law).

46. *See* Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468, 1475 (9th Cir. 1984) (discharged employee who reported employer's violation of Federal Mine Safety and Health Act cannot seek protection of state law because state has little interest in enforcing federal law); Buethe v. Britt Airlines, 116 L.R.R.M. 3155, 3158 (S.D. Ind. 1984) (discharged

though some state and federal courts have recognized a cause of action for employees discharged for reporting violations of federal law.[47] The majority of courts applying state law consistently have refused to provide a cause of action for an employee discharged for reporting violations of federal law because states have little interest in enforcing federal law through state public policy.[48] For example, in *Rachford v. Evergreen International Airlines,*[49] the United States District Court for the Northern District of Illinois held that the state of Illinois has no interest in enforcing federal aviation law.[50] In *Rachford,* the plaintiff employee was a flight engineer employed by Evergreen.[51] The plaintiff noticed excessive oil consumption of a particular aircraft in violation of Federal Aviation Administration (FAA) aircraft maintenance requirements and reported the violation to the FAA.[52] Evergreen subsequently fired the plaintiff, and the plaintiff sued Evergreen alleging wrongful discharge in violation of Illinois common law and the Federal Aviation Act.[53] The *Rachford* court held that a successful plaintiff in a suit for retaliatory discharge must allege that the termination of employment occurred in

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employee who reported employer's violations of federal aviation laws states no cause of action in wrongful discharge under state law); Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1061 (1980) (employee discharged for reporting employer practices that violated federal drug regulatory laws states no cause of action in wrongful discharge).

47. *See* Adler v. American Standard Corp., 538 F. Supp. 572, 578-79 (D. Md. 1982) (employee terminated for uncovering acts of bribery which violated federal statutes has cause of action in wrongful discharge); Thompson v. St. Regis Paper Co., 102 Wash.2d 219, ____, 685 P.2d 1081, 1090 (Wash. 1984) (state has interest in enhancing federal public policy as expressed in Foreign Corrupt Practices Act by providing employee discharged for reporting violations of Act with cause of action).

48. *See* Rachford v. Evergreen Int'l Airlines, 117 L.R.R.M. 3195, 3196 (N.D. Ill. 1984) (termination of employee for reporting violations of federal aviation law does not contravene state public policy); Buethe v. Britt Airlines, 116 L.R.R.M. 3155, 3157 (S.D. Ind. 1984) (state has little interest in enforcing federal aviation rules and regulations).

49. 117 L.R.R.M. 3195 (N.D. Ill. 1984).

50. *Id.* at 3196.

51. *Id.*

52. *Id.*

53. *Id.* The employee in *Rachford v. Evergreen Int'l Airlines* sought to invoke the Illinois common law exception to the employment at will rule. *Id.; cf.* Palmateer v. International Harvester Co., 85 Ill.2d 124, 135, 421 N.E.2d 876, 880 (1981) (at will employee who reported violations of Illinois criminal law stated cause of action for wrongful discharge against employer); Kelsay v. Motorola, Inc., 74 Ill.2d 172, 185, 384 N.E.2d 353, 357-58 (1978) (at will employee fired for filing workmen's compensation claim stated cause of action for wrongful discharge against employer).

The employee in *Rachford* also alleged wrongful discharge in violation of the Federal Aviation Act (FAA). 117 L.R.R.M. at 3196. *See* 49 U.S.C. § 1421 (1982) (describing powers and duties of Federal Aviation Administration to set minimum standards of safety); 49 U.S.C. § 1425 (1982) (describing duty of air carrier to maintain and repair equipment used in air transportation).

The employee in *Rachford* further alleged wrongful discharge in violation of the Railway Labor Act. 117 L.R.R.M. at 3196. *See* 45 U.S.C. § 152 (1982) (duty of common carriers and employees to settle disputes to prevent disruption of commerce). *Id.* § 181 (1982) (making § 152

contravention of a clear mandate of state public policy.[54] The *Rachford* court found that the plaintiff's claim arose as a violation of federal public policy instead of state public policy.[55] Thus, the *Rachford* court held that the plaintiff had no claim for wrongful discharge because the state has no interest in enforcing federal law even though Illinois incorporates federal aviation law into the state's general public policy favoring aviation safety.[56]

Although the *Rachford* court determined that the state had no interest in enforcing federal law, other courts applying state law have concluded that a clear expression of federal public policy provides discharged employees with a viable cause of action for wrongful discharge under state common law.[57] Several states have incorporated clear expressions of federal public policy[58] into general state public policy through legislative enactments and judicial decisions. For example, in *Adler v. American Standard Corp.*,[59] a federal district court incorporated federal public policy into the state common law.[60] In *Adler,* the plaintiff employee claimed the employer had discharged him in an effort to cover up the plaintiff's knowledge that the defendant's subsidiaries had been paying bribes to the defendant's customers.[61] The

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of FAA applicable to air carriers). The plaintiff in *Rachford* argued that his consultation with fellow employees and representation of the employees' safety concerns to management constituted protected activity within the Railway Labor Act. 117 L.R.R.M. at 3196. The *Rachford* court held that because the plaintiff did not belong to a union and the Railway Labor Act does not cover activities unrelated to union organizing, the plaintiff's claim must fail. *Id.*

54. 117 L.R.R.M. at 3196.

55. *Id.*

56. *Id.*

57. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 324 (Tex. 1984) (employee stated cause of action for wrongful discharge when employer discharged employee for refusing to violate federal law), *aff'd,* 687 S.W.2d 733 (1985); Thompson v. St. Regis Paper Co., 102 Wash.2d 219, ____, 685 P.2d 1081, 1090 (Wash. 1984) (employee terminated for uncovering acts of bribery which violated federal statutes has cause of action for wrongful discharge). *But see* Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1061 (1980) (employee who was discharged for reporting employer's violations of regulations promulgated by United States Food & Drug Administration states no cause of action for wrongful discharge).

The Washington Supreme Court has held that Washington has an interest in enforcing federal public policy as enunciated in the Foreign Corrupt Practices Act and the Securities Exchange Act of 1934. *See* Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1090 (Wash. 1984). In *Thompson,* the plaintiff alleged that the defendant employer fired him because the plaintiff instituted accurate accounting procedures in compliance with the Foreign Corrupt Practices Act. *Id.* The *Thompson* court first held that Washington had not adopted the implied covenant of good faith exception to the employment at will rule. *Id.* at 1086. The *Thompson* court further held that the state of Washington had adopted the public policy exception to the employment at will rule and that the state has an interest in enhancing the principles underlying the Foreign Corrupt Practices Act. *Id.* at 1089-90.

58. *See supra* note 57 and accompanying text (noting state courts which rely on federal public policy to provide a cause of action in wrongful discharge to employees); notes 39-41 and text accompanying notes 37-41 (state whistleblower statutes protect employees who report violations of federal law).

59. 538 F. Supp. 572 (D. Md. 1982).

60. *Id.* at 578.

61. *Id.*

complaint alleged that the employer's violation of federal tax and antitrust statutes also constituted a violation of the public policy of Maryland.[62] The United States District Court for the District of Maryland first noted that the state civil law remedy for abusive discharge does not seek to enforce federal law, but rather to promote the policy underlying federal law.[63] The *Adler* court further noted that a state's promotion of federal public policy does not offend principles of federal sovereignty and extraterritoriality because state courts regularly and competently decide questions of federal law.[64] The *Adler* court also considered whether a state's engrafting of federal public policy into state civil law offends the concept of state sovereignty.[65] The *Adler* court concluded that the state of Maryland, as a matter of public policy, would choose to discourage bribery.[66] Therefore, the *Adler* court concluded that an employee's discharge for refusal to participate in bribery would undermine the state's public policy.[67] Thus, the *Adler* court determined that the plaintiff had a cause of action under state law for wrongful discharge.[68]

In a similar case involving alleged federal antitrust violations, a state supreme court granted the plaintiff employee a cause of action in wrongful discharge because the state had an interest in promoting federal public policy by protecting employees who refuse to commit antitrust violations.[69] In *Parnar v. Americana Hotels, Inc.*,[70] the plaintiff alleged that the employer discharged her in order to prevent the plaintiff's testimony at any subsequent criminal trials concerning the employer's antitrust violations.[71] The plaintiff in *Parnar* had observed and participated in the employer's scheme to regulate

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62. *Id.* at 577. The plaintiff in *Adler v. American Standard Corp.* alleged that the defendant had violated Maryland antitrust laws and several federal statutes, including the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. *Id.* at 577-78.

63. *Id.* at 578. The *Adler* court rejected the contention that federal enforcement of federal law preempts state enforcement of federal law because the state was not seeking to enforce federal law, but rather to promote the principles underlying the federal law. *Id.*

64. *Id.; see* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981) (state courts have presumption of subject-matter jurisdiction over federal claims absent provision by Congress to the contrary); Maine v. Thiboutot, 448 U.S. 1, 10-11 (1980) (state court may hear and decide federal claim if Congress has not granted exclusive jurisdiction to federal courts).

65. 538 F. Supp. at 579.

66. *Id.*

67. *Id.*

68. *Id.*

69. Parnar v. Americana Hotels, Inc., 65 Hawaii 870, ____, 652 P.2d 625 (1982).

70. *Id.*

71. *Id.* at 627. The defendant in *Parnar v. Americana Hotels, Inc.* employed the plaintiff as a secretary to the controller of the hotel. *Id.* at 626. The plaintiff in *Parnar* collected information from various hotels concerning their rates and occupancy percentages. *Id.* The Justice Department subsequently investigated the defendant's practice of exchanging rates and occupancy percentages with other hotels, and obtained criminal indictments against the defendant for engaging in anti-competitive practices in violation of the Sherman Act. *Id.* The defendant then discharged the plaintiff. *Id.* at 627.

occupancy and rate schedules among similar hotels.[72] The Supreme Court of Hawaii stated that prior judicial decisions and constitutional, statutory, or regulatory provisions may establish state public policy for purposes of wrongful discharge.[73] The *Parnar* court derived public policy in this case from federal antitrust laws, reasoning that Congress intended federal antitrust laws to encourage individuals to challenge antitrust violations.[74] The *Parnar* court concluded that retaliatory discharge in furtherance of violations of federal antitrust laws contravenes state public policy because the state has an interest in protecting whistleblower employees.[75] The decision in *Parnar* implicitly supports the proposition that states have an interest in enforcing the policies underlying federal antitrust law.[76]

In addition to supporting the public interests underlying federal antitrust laws, states also may have an interest in enhancing the policies underlying other federal statutes. For example, in *Hauck v. Sabine Pilots, Inc.,*[77] the Texas Court of Appeals for the Ninth District held that an employee discharged for refusing to violate federal law had a viable cause of action against an employer under state law.[78] In *Hauck,* the employee alleged that the employer had discharged him for refusing to pump the bilges of a vessel at a place where federal law prohibited pumping.[79] Although the *Hauck* court never cited the particular federal law prohibiting pumping at certain sites, the court held that an employee discharged for refusing to commit an unlawful act stated a valid exception to the Texas employment at will rule.[80] By implication, the *Hauck* court concluded that Texas has an interest in promoting federal laws that enhance public safety.[81]

Despite the conclusion suggested by the cases allowing a state cause of action for employees who report violations of federal statutes, not all states will protect employees who disclose information under federal law.[82] States should protect employees who report violations of federal law, however, because contrary to the reasoning of some state courts, states do have an interest in promoting federal public policy and enforcement of federal law.[83]

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72. *Id.* at 626.

73. *Id.* at 631.

74. *Id.* (citing Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) (Congress enacted Clayton Act to extend remedy under section 4 of Sherman Act to any person injured by virtue of any antitrust violation)).

75. 652 P.2d at 631 (citing McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D. Pa. 1979) (Clayton Act construed to provide remedy for employee discharged for refusing to participate in price-fixing scheme)).

76. 652 P.2d at 631.

77. 672 S.W.2d 322 (Tex. Civ. App. 1984).

78. *Id.* at 324.

79. *Id.* at 323.

80. *Id.* at 324.

81. *Id.*

82. *See supra* notes 46 and 48-49 and accompanying text (citing state courts' reluctance to provide remedy to employees discharged for reporting violations of federal law).

83. *See* Note, *State Enforcement of Federally Created Rights,* 73 HARV. L. REV. 1551,

Under our system of federalism, states may regulate employment relations through their police powers.[84] However, the purpose behind the public policy exception to the employment at will rule is to enforce the underlying statute or law, and not to regulate the employment relationship.[85] States thus have a general interest in protecting whistleblower employees from discharge for reporting violations of law. A state's interest in protecting employees should extend to employees who are discharged for reporting violations of federal law for the same reason that states protect employees who report violations of state law. State courts have an interest in protecting employees who report violations of state laws because that protection generally promotes the enforcement of laws.[86]

Aside from the interest that states have in enforcing certain federal laws to ensure the health and safety of the state's citizens, the United States Supreme Court in *Mondou v. New York, N.H. & H.R. Co.*[87] has held that states must enforce federal law.[88] The *Mondou* court stated that when Congress adopts an act or a statute, the policy underlying the statute must be respected in the courts of a state as if the policy had emanated from the state's legislature.[89] The Court thus held that states must recognize rights arising under federal law.[90] One problem with state enforcement of the policy underlying many federal statutes is the congressional grant of exclusive federal jurisdiction of the statutes.[91] A congressional grant of exclusive jurisdiction does not, however, preclude indirect enforcement of the policy

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1554 (1960) (Supreme Court can require states to enforce federal statutes if statutes are non-penal and if state has enforced an analogous state-created right).

84. U.S. CONST. amend. X (police powers reserved to states).

85. *See* Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1374 (9th Cir. 1984) (state's interest in providing cause of action for violation of public policy in discharging employee is to enforce underlying policy not to regulate employment relationship). In *Garibaldi v. Lucky Food Stores,* the plaintiff alleged that the employer discharged him because the plaintiff reported a shipment of spoiled milk to local health officials after the employer had ordered him to deliver it. *Id.* at 1374. Since the plaintiff was a union member, the defendant alleged that the plaintiff's rights under the collective bargaining agreement preempted the plaintiff's wrongful discharge claim. *Id.* at 1369. The *Garibaldi* court concluded that the state's interest in protecting the public transcends the employment relationship, and thus the collective bargaining agreement does not preempt the plaintiff's wrongful discharge claim. *Id.* at 1375.

87. 223 U.S. 1 (1912).

88. *Id.* at 57. The United States Supreme Court in *Mondou v. New York, N.H. & H.R. Co.,* held that states must enforce the Federal Employer's Liability Act in state courts. *Id.*

89. *Id.; see* McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230, 234 (1934) (state may not discriminate against federal claims).

90. 223 U.S. at 57; *see* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 45 at 193 (4th ed. 1983) (absent congressional grant of federal jurisdiction, state courts have concurrent jurisdiction with federal courts).

91. *See* 49 U.S.C. § 1487(a) (1982) (United States district courts have jurisdiction over matters arising from violations of the FAA); *cf.* Ward v. State, 280 Md. 485,——, 374 A.2d 118, 1122 (1977) (federal aviation law preempts state aviation law except for state-imposed criminal penalties for violations of state aviation law), *cert. denied,* 434 U.S. 1011 (1978).

underlying the federal statute. For example, despite the congressional grant of exclusive federal jurisdiction over antitrust laws, courts applying state law have acted to protect individuals who report violations of federal antitrust law by using state wrongful discharge law.[92] One way in which states may enhance federal policy is to provide rights of action under state common law to employees who report violations of the federal law.

Currently, state courts are divided over whether whistleblower employees discharged for reporting violations of federal law have a remedy under state common law.[93] Discharged employees may have a federal remedy for reporting violations of a federal statute if that statute specifically provides a right of action for employees who are discharged for exercising rights under the statute.[94] Federal courts cannot protect whistleblowing employees unless Congress has expressed an affirmative intent to create a right of action for employees.[95] The Federal Aviation Act (FAA), for example, provides no express private right of action for employees discharged for reporting violations of the FAA or for refusing to commit violations of the FAA.[96] Several courts also have determined that Congress never intended to imply a private right of action under the FAA for employees discharged for reporting violations of the FAA.[97] To determine whether implied rights of action exist under the FAA for discharged employees, courts have used the four factors set forth by the United States Supreme Court in *Cort v. Ash*.[98] In *Cort v.*

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92. *See* Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1390 (S.D. Ind. 1982) (discharge of employee who refused to continue in alleged anti-competitive conspiracy creates claim for wrongful discharge under state public policy exception to employment at will rule); Parnar v. Americana Hotels, Inc., 65 Hawaii 850, ____, 652 P.2d 625, 626 (1982) (employee discharged to prevent employee's testimony regarding employer's antitrust activities states cause of action in wrongful discharge).

93. *See supra* note 46 and accompanying text (citing state courts which fail to recognize cause of action for employees discharged for reporting employer violations of law).

94. *See* Occupational Safety and Health Act of 1970 § 11(c), 29 U.S.C. § 550(c) (1982) (provides right of action for employee discharged for reporting violations of Act); *infra* note 128 (federal statutes providing express rights of action for discharged employees).

95. *See* Buethe v. Britt Airlines, 116 L.R.R.M. 3155, 3156 (S.D. Ind. 1984) (no implied right of action in FAA for employees discharged for reporting violations of FAA).

96. *See* Pavolini v. Bard-Air Corp., 645 F.2d 144, 146-47 (2d Cir. 1981) (no express right of action exists under the FAA for discharged employees); Rachford v. Evergreen Int'l Airlines, 117 L.R.R.M. 3195, 3196 (N.D. Ill. 1984) (Congress did not expressly provide right of action under FAA for discharged employees).

97. *See* Pavolini v. Bard-Air Corp., 645 F.2d 144, 147 (2d Cir. 1981) (no implied private right of action exists under the FAA for discharged employees); Buethe v. Britt Airlines, 116 L.R.R.M. 3155, 3157 (S.D. Ind. 1984) (Congress did not intend to create implied right of action for retaliatory discharge in FAA); Rachford v. Evergreen Int'l Airlines, 117 L.R.R.M. 3195, 3196 (N.D. Ill. 1984) (no implied right of action exists under FAA for retaliatory discharge).

98. 422 U.S. 66 (1975); *see* Buethe v. Britt Airlines, 115 L.R.R.M. 3155, 3156-57 (S.D. Ind. 1984) (court applied *Cort v. Ash* analysis in determining that no implied right of action existed under FAA for employees discharged for reporting violations of FAA); Rachford v. Evergreen Int'l Airlines, 117 L.R.R.M. 3159, 3196 (N.D. Ill. 1984) (no implied cause of action exists for discharged employees because no congressional intent existed to create cause of

Ash, the United States Supreme Court set out a four-part test for determining whether a court may imply a private remedy from a statute that does not expressly provide a remedy.[99] First, the *Ash* Court determined that the plaintiff must be a member of the class for whose benefit the statute was created.[100] Second, an indication of congressional intent to create a remedy must exist.[101] Third, the implied remedy must be consistent with the purpose of the legislative scheme.[102] Fourth, the cause of action must not be traditionally relegated to state law.[103]

Court decisions in which a plaintiff has attempted to invoke an implied right of action under the FAA focus on whether Congress intended to create a right of action.[104] For example, in *Buethe v. Britt Airlines,*[105] the United States District Court for the Southern District of Indiana found that Congress had not intended that the FAA protect airline employees.[106] In *Buethe,* the plaintiff alleged that the employer discharged the plaintiff for refusing to fly an aircraft that the plaintiff claimed was unsafe.[107] The plaintiff reported the safety problems to the FAA after his discharge.[108] The *Buethe* court relied on the Supreme Court's four-step analysis in *Cort v. Ash* in determining that the pilot had no implied cause of action under the FAA.[109] The

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action). *See generally* Crawford & Schneider, *The Implied Private Cause of Action and the Federal Aviation Act: A Practical Application of* Cort v. Ash, 23 VILL. L. REV. 657, 659-73 (1977-78) (describing FAA implied rights of action cases applying *Cort v. Ash* criteria).

99. 422 U.S. at 78.

100. *Id.* (citing Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916) (court will imply private right of action under federal statute if Congress enacted statute for especial benefit of party)).

101. *Id.* (citing National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (court must have indication of legislative intent in order to imply private right of action)).

102. *Id.* (citing National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (private implied right of action must be consistent with underlying purposes of legislative scheme)).

103. *Id.* (citing Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (federal court should imply rights of action only in areas not relegated by Congress to state law)).

104. *See* Rauch v. United Instruments, Inc., 548 F.2d 452, 455 (3d Cir. 1976) (finding no implied right of action under FAA in favor of aircraft owners because no congressional intent to create right of action existed); Snuggs v. Eastern Airlines, Inc., 13 Av. Cas. (CCH) 17,631, 17,632 (S.D. Fla. 1975) (Congress did not intend private action as means of enforcement of FAA provisions).

105. 116 L.R.R.M. 3155 (S.D. Ind. 1984).

106. *Id.* at 3156 (citing Cort v. Ash, 422 U.S. 66 (1974) (outlining four-step analysis for implying private rights of action)).

107. 116 L.R.R.M. at 3156. The plaintiff in *Buethe v. Britt Airlines,* a copilot, refused to fly regularly scheduled passenger flights on two separate occasions. *Id.* at 3155. On one occasion, the plaintiff refused to fly because the "autofeather system" was inoperative. *Id.* The *Buethe* plaintiff again refused to fly after observing alleged discrepancies in the maintenance log and malfunctions of the engine fire detection system. *Id.* The employer in *Buethe* discharged the plaintiff two months after the second refusal to fly. *Id.* at 3156.

108. *Id.*

109. *Id.* The *Buethe* court applied the first part of the *Cort v. Ash* test and noted that

Buethe court found that Congress intended to protect the safety of airline passengers, but had not intended to protect whistleblower employees from wrongful discharge.[110] The *Buethe* court concluded that since Congress left the regulation and enforcement of the FAA to the expertise of the Federal Aviation Administration, the plaintiff had no right of action in a federal court.[111]

At least one court has bypassed the traditional *Cort v. Ash* analysis and used a basic tort analysis in determining whether the discharged employee's injury resulted from the employer's violation of a federal statute.[112] In *Pavolini v. Bard-Air Corp.*,[113] the United States Court of Appeals for the Second Circuit rejected a former pilot's claim that the FAA provided an implied right of action for wrongful discharge.[114] The plaintiff in *Pavolini* reported the defendant's violation of the FAA's air safety regulations to the FAA and subsequently was discharged.[115] The plaintiff argued that an implied right of action existed under the FAA allowing a pilot discharged for reporting violations of FAA safety provisions to bring suit against the offending employer.[116] The *Pavolini* court bypassed a *Cort v. Ash* analysis in favor of a tort analysis and inquired whether the FAA created a duty in the air carrier, and whether the violation of that duty caused an injury.[117] The *Pavolini* court stated that because the FAA does not create a duty in an airline to continue to employ an employee, the FAA does not prohibit a carrier from discharging an employee for reporting safety violations to the

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copilots are not members of the class for whose especial benefit the FAA was created. *Id.* Under the second part of the *Cort v. Ash* analysis, the *Buethe* court found that Congress in enacting the FAA did not intend to protect employees from wrongful discharge. *Id.* The *Buethe* court also found in applying the third part of the *Cort v. Ash* analysis that the underlying purpose of the legislative scheme embodied in the FAA does not warrant finding an implied right of action for employees because Congress already had created an administrative agency to insure compliance with the FAA. *Id.*

110. *Id.* at 3157; *see* Rauch v. United Instruments, Inc., 548 F.2d 452, 455 (3d Cir. 1976) (finding no implied right of action under FAA in favor of aircraft owners because no congressional intent to create right of action existed). In *Rauch,* the plaintiffs were aircraft owners suing to recover the cost of a defective altimeter manufactured by the defendant. *Id.* at 454. The plaintiffs in *Rauch* asserted liability under the theory that a cause of action arose under the FAA because the defendant's alleged violation of the FAA injured the plaintiffs. *Id.* The *Rauch* court concluded that the FAA granted no right of action to persons injured by violations of the FAA. *Id.*

111. 116 L.R.R.M. at 3157. Although the court in *Buethe* held that the plaintiff had no implied cause of action under the FAA, the court expressed its reluctance to make a decision which might imply that airline employees should hesitate to point out violations of the FAA. *Id.*

112. *See infra* notes 100-107 and accompanying text (describing four part *Cort v. Ash* test).

113. 645 F.2d 144 (2d Cir. 1981).

114. *Id.* at 147.

115. *Id.* at 146.

116. *Id.* at 146-47.

117. *Id.* (citing Rauch v. United Instruments, Inc., 548 F.2d 452, 457 (3d Cir. 1976)

FAA.[118] The court concluded that the plaintiff's injury did not arise from the employer's violations of the FAA.[119] Thus, the plaintiff's discharge in *Pavolini* created no injury that a federal court can redress.[120]

Some courts have expressed an unwillingness to imply private rights of action under the FAA in favor of employees discharged for reporting violations of federal law.[121] The reluctance to grant relief to injured plaintiffs hampers public concern over such matters as aircraft safety, public health, and the environment.[122] Many employees, such as airline pilots, are in an advantageous position to observe safety violations.[123] Responsible whistleblowers deserve some protection from the courts to alleviate the burden on the limited resources of the Federal Aviation Administration and other federal investigatory agencies in investigating potential safety abuses.[124] Given

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(Congress did not intend FAA to protect employees who are discharged for reporting violations of the FAA)).

118. 645 F.2d at 147. The *Pavolini* court first inquired whether the plaintiff's injury resulted from the employer's disregard of the statute. *Id.* The court in *Pavolini* concluded that the plaintiff's injury did not flow from the defendant's failure to obey any statutory requirement or from a violation of any statutory prohibition. *Id.*

119. *Id.* Although the *Pavolini* court refused to provide a right of action for the discharged employee, the court stated that the defendant in fact had violated the FAA as discovered in a later inspection. *Id.*

120. *Id.* The *Pavolini* court concluded that a remedy for wrongful discharge lies in the state courts, which have traditionally regulated the employment relationship. *Id.* at 148.

121. *See supra* note 97 and accompanying text (citing courts which have refused to create implied rights of action in favor of employees discharged for disclosing information under FAA).

122. *See* Buethe v. Britt Airlines, 116 L.R.R.M. 3155, 3157 (S.D. Ind. 1984) (public policy favoring airline safety is enhanced if employees are not hesitant to point out violations of FAA to employer or to FAA). In many cases, courts have been willing to protect employees who report violations of federal antitrust laws. *See* Shaw v. Russell Trucking Line, 542 F. Supp. 776, 780-81 (W.D. Pa. 1982) (employee discharged for refusing to participate in antitrust conspiracy states cause of action because discharge flowed directly from employer's unlawful conduct). *But see* In Re Industrial Gas Antitrust Litigation, 681 F.2d 514, 517 (7th Cir. 1982) (complaint alleging retaliatory discharge for plaintiff's refusal to participate in anticompetitive practices was not cognizable because antitrust practices did not injure employee). Wrongful discharge suits under federal antitrust laws differ significantly, however, from wrongful discharge suits under other federal laws because antitrust statutes provide an express right of action for persons injured by the antitrust activity. *See* Clayton Act § 4, 15 U.S.C. § 15 (1982) (provides right of action for any person injured in his business or property by reason of any action prohibited by antitrust laws). Traditionally, antitrust plaintiffs must meet three requirements to recover under section 4 of the Clayton Act. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 473-84 (1982). First, the plaintiff must show that his injury is related to the anticompetitive effects of the antitrust conduct. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Second, the plaintiff's injury must be direct. Illinois Brick Co. v. Illinois, 431 U.S. 720, 745 (1977). Third, the plaintiff must show that recovery is not speculative or duplicative and thus would undermine enforcement of the antitrust laws. *Id.*

123. *See* Solomon & Garcia, *supra* note 19, at 276 (whistleblower is in advantageous position to gain access to information regarding violations of federal safety statutes).

124. *See id.* at 297 (current staff of Occcupational Safety and Health Administration is overburdened and enforcement of safety provisions suffers). *But see* Crawford & Schneider, *The Implied Private Cause of Action and the Federal Aviation Act: A Practical Application of*

the lack of remedies available in state or federal courts for federal whistleblowers, recourse to Congress is necessary.[125] Congress must either amend those federal statutes which do not protect whistleblower employees, or enact a general whistleblower statute.[126]

Congress may choose to amend federal statutes such as the FAA by inserting specific provisions prohibiting the retaliatory discharge of whistleblower employees.[127] Congress has inserted such provisions in other federal legislative schemes dealing with public health, safety, and the environment.[128] For example, the Occupational Safety and Health Act of 1970 (OSHA) contains a section prohibiting discharge of any employee who has brought a proceeding under or related to OSHA.[129] The purpose of OSHA is to protect workers from unsafe working conditions.[130] One serious problem with protecting an employee's rights under OSHA, however, is that only the Occupational Safety and Health Administration (OSHA) can bring suit on behalf of a discharged employee.[131] If OSHA refuses to proceed on behalf of the discharged employee, the employee cannot sue his employer on his own behalf.[132] Additionally, a discharged employee must have attempted to correct

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Cort v. Ash, 23 VILL. L. REV. 657, 671 (1977-78) (private remedy under FAA would interfere with legislative intent to centralize in single agency the authority to enforce air safety rules).

125. *See* Pavolini v. Bard-Air Corp., 645 F.2d 144, 148 (2d Cir. 1981) (Congress must affirmatively act to protect federal whistleblowers against retaliatory discharge); Buethe v. Britt Airlines, 115 L.R.R.M. 3155, 3157 (S.D. Ind. 1984) (congressional amendment of FAA is necessary in order to create right of action under FAA for discharged employees).

126. *See* Jenkins, *Federal Legislative Exceptions to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy*, 47 ALB. L. REV. 466, 513-24 (1983) (setting out proposed employee discharge protection act).

127. *See infra* note 128 (examples of wrongful discharge provisions in federal statutes).

128. *See* Toxic Substances Control Act § 23, 15 U.S.C. § 2621 (1982) (no employer may discharge employee because employee has testified to, commenced proceeding under, or assisted investigation of any violation of Act); Surface Mining Control and Reclamation Act § 703, 30 U.S.C. § 1293 (1982) (no person shall discharge employee by reason of fact that employee has provided information under Act); Clean Water Act § 507, 33 U.S.C. § 1367 (1982) (discrimination against persons filing, instituting, or testifying in proceedings under Act is prohibited); Safe Drinking Water Act § 1450, 42 U.S.C. § 300j-9(i) (1982) (no employer may discharge employee for providing information, testifying, or commencing proceedings under Act); Solid Waste Disposal Act § 7001, 42 U.S.C. § 6971 (1982) (protects employees who have commenced proceeding or testified concerning any violations of this Act); Clean Air Act § 322, 42 U.S.C. § 7622 (1982) (no employer may discharge employee because employee has commenced proceeding, testified, or assisted in investigation under Act).

129. Occupational Safety and Health Act § 11(c), 29 U.S.C. § 660(c) (1982).

130. *See* Taylor Diving & Salvage Com. v. U.S. Dept. of Labor, 599 F.2d 622, 626 (5th Cir. 1979) (purpose of OSHA is to protect health and safety of workers and to improve physical working conditions on employment premises); 29 U.S.C. § 651(b) (1982) (purpose of OSHA is to encourage employers and employees to reduce number of safety and health hazards at places of employment).

131. 29 U.S.C. § 660(c)(2) & (3) (1982).

132. *Id.* § 660(c)(2) (1982); *see* McGowan v. Marshall, 604 F.2d 885, 890 (5th Cir. 1979) (party in OSHA proceeding precluded from obtaining judicial review of final order of Commission if party failed to pursue administrative remedies).

the employer's OSHA violations before the whistleblower employer may recover under OSHA for wrongful discharge.[133]

Other federal environmental and safety statutes afford additional protection in varying degrees to workers discharged for reporting violations of the statutes.[134] For example, the Federal Mine Safety and Health Act (Mine Safety Act) protects employees who give testimony, file a charge, institute an enforcement proceeding, or report alleged safety and health violations under the Mine Safety Act.[135] Congress enacted the Mine Safety Act to impose strict mine regulations to prevent accidents.[136] The purpose of the anti-retaliation provisions in the Mine Safety Act is to encourage the disclosure of information concerning violations of the Act.[137] Like OSHA, the Mine Safety Act prohibits the discharge of a worker for exercising any right under the Mine Safety Act.[138] However, the discharged employee first must file a complaint with the Mining Enforcement and Safety Administration alleging discrimination under the Mine Safety Act.[139]

Given the limitations involved in the retaliatory discharge provisions of the Mine Safety Act and OSHA, and the impracticability of amending the numerous federal statutes that do not contain retaliatory discharge provisions, a more reasonable alternative is for Congress to enact a general whistleblower statute. Commentators have pointed out that specific proscriptions against employee discharge in other federal statutes are limited in the amount of protection afforded to whistleblower employees.[140] One commentator has suggested that Congress may avoid piecemeal statutory protection

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133. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 10-11 (1980) (in order for employee to obtain protection of OSHA antidiscrimination section, employee must have attempted to obtain correction of dangerous condition by employer).

134. *See* Jenkins, *supra* note 4, at 482 (some federal statutory proscriptions against discharge protect employees who participate only in proceedings resulting from administration and enforcement of relevant act's provisions).

135. Federal Coal Mine Safety and Health Act § 105(c), 30 U.S.C. § 820(b) (1982); *see* Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 779 (D.C. Cir. 1974) (notifying employer of alleged Mine Safety Act violation is protected employee activity).

136. *See* National Independent Coal Operators' Ass'n v. Kleppe, 423 U.S. 388, 391 (1976) (purpose of Mine Safety Act is to prevent death and injury in mines resulting from accidents and disaster); 30 U.S.C. § 801(g) (1982) (purpose of Mine Safety Act is to promulgate health and safety standards to protect safety of miners).

137. *See* Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974) (purpose of discriminatory discharge provision in Mine Safety Act is to encourage reportings of suspected violations of safety regulations by deterring retaliation from mine operators); S. REP. No. 181, 95th Cong., 2d Sess. 35, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3401, 3435 (Congress intended employees to have right under Mine Safety Act to refuse work in unsafe or unhealthful conditions).

138. 30 U.S.C. § 820(b) (1982).

139. *Id.* § 820(b)(2) (1982).

140. *See* Jenkins, *supra* note 4, at 483 (all statutes protecting employees from discharge contain limited time periods in which to file complaint that severely limit employees' remedies for wrongful discharge); Solomon & Garcia, *supra* note 19, at 282-85 (employee protection

of federal whistleblower employees by enacting a comprehensive whistleblower statute.[141] The advantages of such a statute include the avoidance of inconsistencies between states which protect federal whistleblower employees and states which do not protect whistleblower employees.[142] Moreover, a general whistleblower statute would avoid inconsistencies among those federal statutes with retaliatory discharge provisions and those without such provisions.[143] An additional advantage of a federal whistleblower statute would be that the whistleblower statute would protect all employees, thereby equally and uniformly enforcing employers' compliance with federal statutes.

As the law presently stands, employees who report violations of federal law remain unprotected against discharge.[144] State courts may refuse to provide federal whistleblower employees with a cause of action under state common law because states have no interest in promoting federal public policy.[145] However, states have a duty to enforce federal law and thus have an interest in enhancing federal public policy.[146] Federal courts have refused to provide a right of action for discharged employees if no implied private right of action exists under a specific federal statute.[147] Congress should enact a comprehensive federal whistleblower statute in order to promote employer compliance with federal statutes and to enhance federal public policy. A federal whistleblower statute will enable the federal government not only to protect employees who disclose information, but also to gain valuable information regarding violations of federal law.

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provision in OSHA limited because only OSHA can bring action, filing period is short, complaints are backlogged, and penalties are too weak).

141. *See* Jenkins, *supra* note 4, at 513-24.

142. *See supra* notes 46-48 and accompanying text (discussion of inconsistent state treatment of whistleblowing employees).

143. *See supra* notes 128-139 (discussion of federal statutes which protect employees who are discharged for reporting employer's violations of the statutes).

144. *See supra* note 8 and accompanying text (discussion of courts' reluctance to protect employees fired for reporting violations of federal law).

145. *See supra* note 46 & 48 and accompanying text (courts applying state law have little interest in enforcing federal public policy by providing federal whistleblowing employees with a cause of action).

146. *See supra* notes 84-86 and accompanying text (discussion of states' interest in enhancing federal public policy).

147. *See supra* note 97 (courts are unwilling to imply rights of action under FAA).