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Editor's Corner

The Annual Meeting of the MidAtlantic Academy of Legal Studies in Business was held on March 2007, at the St. Michaels, Maryland. The Annual Meeting was attended by approximately twenty faculty and students. Normally, the academic program includes papers on teaching, employment, constitutional, curriculum development, civil procedures, tort, intellectual property, environmental, accountant liability, bankruptcy law and corporate law.

We give special thanks to Program Chair, Brian Halsey, Peirce College, Philadelphia, Pennsylvania, for planning the academic program. We also give a special thanks to Peirce College for its generous support of the 2007 MAALSB Annual Meeting.

The next Annual Meeting will be held in March or April, 2008. Please join us. We encourage all ALSB members, other professors and professionals to participate. We will have paper presentations and a great luncheon. We look forward to seeing you.

The *ALJ* is a refereed journal. The *ALJ* is listed in *CABELL'S* DIRECTORY OF PUBLISHING OPPORTUNITIES IN MANAGEMENT AND MARKETING. We encourage all readers to prepare and submit manuscripts for publication in the *Atlantic Law Journal*.

James E. Holloway
Editor-in-Chief

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ARTICLES

Still Crazy After All These Years: The Employment At-Will Doctrine and Public Policy Exceptions

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I. Introduction

The predicted demise of the employment at-will doctrine (doctrine) in the United States has been premature, but the present uncertainty surrounding public policy exceptions may pose employment law risks regarding employment stability, employee portability and business expansion and will likely eventually require federal legislative intervention. Over the years, various exceptions to the doctrine have been established by courts and legislatures. However, these exceptions vary greatly from state to state, and even in disputes and conflicts that appear to be appropriate for establishment of public policy exceptions, many courts remain reluctant to take the initiative and instead look to their State's legislatures for action. Federal courts are mandated to apply established state law so the dilemma is perpetuated by federal choice of law principles. These public policy exceptions have defined, but have not been the demise of the doctrine, and every court unanimously announces that the doctrine is firmly in place. These courts *however,* cannot agree on the kinds and nature of public policy exceptions to the doctrine. Thus federal intervention may be necessary to remove uncertainty surrounding conflicting public policy exceptions that may eventually impact employee mobility and business expansion in interstate commerce.

The article consists of five parts. Part I is the introduction and sets forth the legal issue and its impact on employment relations. Part II gives a brief historical perspective and examines the current state of the employment at-will doctrine and its public policy exceptions. Part III examines the seminal public policy exceptions and their development and standing in federal and state courts. Part IV examines federal and state cases applying the doctrine in wrongful discharge actions where the plaintiffs raise public policy exceptions to termination under the doctrine. Part V is the conclusion and finds that Congress should create standard public policy exceptions or abolish the employment at-will doctrine. If the latter is the federal choice, Congress should also mandate that courts apply the covenant of good faith and fair dealing to resolve wrongful discharge claims alleging a violation of public policy.

II. Development of the Doctrine and Exceptions

The common law is traditionally described, in part, as judge made law when there is an absence of statutory or other authority. The origin of the at-will employment doctrine is somewhat unusual in American common law. In 1877, Horace C. Wood published a legal treatise[1] asserting the doctrine as law. One court would later state that:

> The crystallization of an "American Rule" is attributed to Horace Wood whose 1877 treatise on employment relations stated, "With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring . . . and is determinable at the will of either party... .[2]

Wood's authority for espousing the rule in fact did not actually exist and had not been previously decided by the courts. In Munoz *v. Expedited Freight Systems, Inc.,*[3] the court stated that:

> As explained by Larson, the American rule was "invented" by Horace Woods who authored A Treatise on the Law of Master and Servant (1877)...Wood's treatise was so often cited that even the courts which acknowledged that Wood's original proposition was insupportable, found there for the American rule.[4]

Obviously, the doctrine's beginning may be flawed and its application in the contemporary workplace may not reflect modern workforce

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[1]. HORACE C. WOOD, LAW OF MASTER AND SERVANT, § 134.

[2]. Sheets v. F.E. Knight, 308 Or. 220, 779 P. 2d 1000 (1989)(citing HORACE C. WOOD, LAW OF MASTER AND SERVANT 283 § 136 (2d ed. 1886). *See also* Carter Coal Co. v. Human Rights Comm., 261 Ill.App.3d 1, 633 N.E. 2d 202 (1994)).

[3]. 775 F.Supp. 1181 (N.D. Ill., 1991)(citing LEX K. LARSON, UNJUST DISMISSAL (1991)).

[4]. *Id.* at 1186. *See also* Magnan v. Anaconda Industries, Inc., 479 A.2d 781 (Conn. 1984)(holding that: Scholars and jurists unanimously agree that Wood's pronouncement in his treatise, MASTER AND SERVANT § 134 (1877), was responsible for nationwide acceptance of the rule. They also agree that the rule was not supported by the authority upon which he relied, and that he did not accurately depict the law as it then existed.).

needs for employment mobility and economic needs for economic expansion.

A. Origin of the Doctrine

The doctrine is simply stated and has been interpreted fairly consistently by the courts. Essentially, employers may discharge or retain employees at will, for good or bad cause or even, in some cases, for a morally wrong cause, without being guilty of legal wrong.[5] Prior to Woods' treatise, American states maintained a common law presumption that an indefinite hiring was considered to be for a term of one year. This was termed the English rule.[6] *Martin v. New York Life Insurance Co.,*[7] a New York case, was one of the first cases to abandon the common law English rule in favor of Woods' American rule or at-will doctrine.[8]

States consider an employee to be at-will when they are hired for an indefinite period of time.[9] Even when the terms of employment are explicitly or implicitly deemed to be for permanent employment,

[5]. Payne v. Western & Atlantic Railroad Co., 81 Tenn. 507 (1884); *See also* Henry v. Pittsburg and Lake Erie Railroad Company, 139 Pa.Super. 120, 660 A.2d 1374 (1995)(holding that '[t]he at-will employment doctrine has historically provided that absent an employment contract, an employer is free to terminate an employee at any time, for any reason."); Phung v. Waste Mgt., Inc. 23 Ohio St.3d 100, 491 N.E.2d 1114 (1986)(holding that "[t]raditionally, an employer could terminate the employment of an at-will employee for any cause, at any time whatsoever, even if the termination was done in gross or reckless disregard of the employees rights."); Broadhead v. Bd. Of Trustees for State Colleges and Universities, 588 So.2d 748 (La.App. 1 Cir.1991)(holding that "[g]enerally under [Louisiana Civil Code] an employer is free to dismiss an employee at any time for any reason without incurring liability for the discharge."); Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730 (Ky. 1992)(holding that "[o]rdinarily an employer may discharge an at-will employee for good cause, for no cause, or for a cause than some might view as morally indefensible.").

[6]. Coman v. Thomas Manufacturing Co., Inc., 325 N.C. 172, 381 S.E. 2d 445 (1989); *See also Sheets*, 779 P. 2d at 1000; *Munoz*, 775 F.Supp. at 1181; *Carter Coal Co.*, 633 N.E. 2d at 202.

[7]. Martin v. New York Life Insurance Co., 148 N.Y. 117, 42 N.E. 416 (1885).

[8]. *Martin*, 42 N.E. at 416.

[9]. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395 (Utah 1998)(holding that "Utah's employment law presumes that all employment relationships entered into for an indefinite period of time are at will."); Brannan v. Wyeth Laboratories, Inc., 526 So.2d 1101 (La. 1988)(holding that "[w]hen the employment contract is for an indefinite term, the contract is terminable at the will of either party."); Luethans v. Washington Univ., 894 S.W.2d 169 (Mo. Banc 1995)(holding that "[g]enerally, an employee who does not have a contract which contains a statement of duration is an employee at-will and may be discharged at any time, with or without cause, and the employer will not be liable for wrongful discharge.").

states have considered the employment relationship to be at-will.[10] However, unionized employees are generally not at-will employees. Unionized employees are generally working subject to a collective bargaining agreement that incorporates specific language defining those just cause reasons for termination or demotion. This contractual relationship precludes unionized employees from being at-will employees.

Under federal statutory laws, most federal government employees can only be downgraded or dismissed for cause[11] and are therefore not treated as at-will employees. States have adopted similar policies protecting state governmental employees.[12] For example, Oklahoma law defines governmental employees as classified and unclassified. Classified employees are provided clearly defined grievance resolution procedures and specific protections from discharge or demotion in the absence of just cause, however, unclassified employees lack similar protections. As a result of the differing rights and protections, classified employees are not deemed to be at-will while unclassified employees are at-will employees.[13]

B. Public Policy Exceptions in General

Many employees terminated by employers under the doctrine sue their employers for a wrongful discharge, and courts have created public policy and other exceptions to the doctrine. Public policy exceptions to the at-will doctrine can be created by statute, by state constitutional mandate or by judicially created common law.[14] The

[10]. Prescott v. Farmers Tel. Coop., Inc., 335 S.C. 330, 516 S.E.2d 923 (1999)(holding that "[t]his doctrine [employment at-will] provides that a contract for permanent employment is terminable at the pleasure of either party when unsupported by any consideration other than the employer's duty to provide compensation in exchange for the employee's duty to perform a service or obligation. *See also*: Pitcher v. United Oil & Gas Syndicate, 174 La. 66, 139 So. 760 (1932); Romaguera v. Prudential Ins. Co. of America, 95-3006, 1995 WL 747464 (E.D.La. 1995); Simmons v. Westinghouse Electric Corp., 311 So.2d 28 (La.App. 2d Cir.1975); Nelson v. Charleston County Parks & Recreation Commission, 362 S.C. 1, 605 S.E.2d 744 (2004)").

[11]. 15 U.S.C. § 7513 (a).

[12]. Andrus v. State Department of Transportation, 128 Wash. App. 895, 117 P.3d 1152 (2005)(stating in part that, "The public policy exception is a narrow one and is limited to firings based on an employee's performance of a public duty or obligation..." *Id.* at 899.).

[13]. Phillips v. Wiseman, 1993 OK 100, 857 P.2d 50; McGrady v. Oklahoma Department of Public Safety, 2005 OK 67, 122 P.3d 473.

[14]. Greeley v. Miami Valley Maintenance Contrs., Inc., 49 Ohio St. 3d 228 (1990); Painter v. Graley 70 Ohio St. 3d 377 (1994).

Court of Appeals of Maryland, in *Porterfield v. Mascari II, Inc.*,[15] cited the Court of Appeals of Ohio that stated:

> [C]lear public policy sufficient to justify an exception to the employment at-will doctrine is not limited to public policy expressed by the General Assembly in the form of statutory enactments, but may also be discerned as a matter of law based on other sources, such as the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law.[16]

There must, however, be a clear statute or policy for the court to find a public policy exception. In *Grimley v. Icon International*,[17] Grimley, a single woman, was terminated after she adopted a child. Claiming protection under the Connecticut Fair Employment Practices Act, the court found that she was only able to allege "violations of generalized principles governing child and family welfare."[18] They further opined that she had not proven that the defendant had violated a well established public policy in Connecticut.[19]

States may also look to the particular circumstances giving rise to the at-will employee's dismissal. These circumstances amount to a narrow public policy exception,[20] and include only discharges or terminations for performance or refusal to perform involving public obligations, illegal acts, legal right or privilege or disclosure of employer misconduct.[21] A few states have provided avenues for

[15]. Porterfield v. Mascari II, Inc., 374 Md. 402, 823 A.2d 590 (2003).

[16]. Simonelli v. Anderson Concrete Co., 99 Ohio App.3d 254, 650 N.E.2d 488 (1994). *See also* Barker v. State Ins. Fund, 2001 OK 94, 40 P.3d 463 ("To prevail on a claim of wrongful discharge in violation of Oklahoma's public policy, a plaintiff must first identify an Oklahoma public policy that is well established, clear and compelling and articulated in existing constitutional, statutory or jurisprudential law."); Hunger v. Grand Central Sanitation, 447 Pa.Super. 575, 670 A.2d 173 (1996)("[T]o state a public policy exception to the at-will employment doctrine, the employee must point to a clear public policy articulated in the constitution, in legislation, an administrative regulation, or a judicial decision."); Boyle v. Vista Eyewear, Inc., 700 S.W. 2d 859 (Mo.App. W.D. 1985)(holding that "[p]ublic policy finds its sources in the letter and purpose of a constitutional, statutory or regulatory provision or scheme."); *See also* Yetter v. Ward Trucking Corp., 401 Pa. Super. 467, 585 A.2d 1022 (1991).

[17]. 2004 WL 870675 (Conn. Super.)(This is an unreported opinion that may be subject to change.).

[18]. *Id.* at 2.

[19]. *Id.*

[20]. *See* Clinton v. State of Oklahoma, ex. Rel. Logan County Election Board, 2001 OK 52, 29 P.3d 543; Marshall v. OK Rental & Leasing, Inc., 1997 OK 34, 939 P.2d 1116; List v. Anchor Paint Mfg. Co., 1996 OK 1, 910 P.2d 1011; Hayes Eateries, Inc., 1995 OK 108, 905 P.2d 778.

[21]. *See* Reninger v. Dept. of Corrections, 134 Wash.2d 437, 951 P.2d 782 (1998); Gardner v. Loomis Armored Inc., 128 Wash.2d 931, 913 P.2d 377 (1996).

subjective analysis. Pennsylvania permits an at-will employee to maintain a wrongful discharge action against the employer, not only when the discharge violates a clear mandate of the law, *but also when the discharge is motivated by a specific intent to harm the employee.* (emphasis added in original)[22] Two leading California cases initially looked to statutory law as a basis for the creation of public policy exceptions but indicated that *good morals which benefit society in general* (emphasis added in original) may too be the cause for finding proper public policy causes of action.[23]

Since the general rule is that "[a]n employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible"[24] a quandary often arises when determining when a "morally indefensible" cause has become a public policy violation. Generally states look for a clearly defined, fundamentally sound, ~~and~~ well established and clear-cut public policy.[25]

When such cases arise, even when the party claiming injury acted in an apparently righteous manner, where a specific procedure is specified in the statute, failure to follow the procedure, even when the procedure appears to have failed, does not allow protection for the fired employee. Such was the dispute in *Mitchell v. Mid-Ohio Emergency Services, L.L.C.,*[26] where a physician under contract to the defendant complained about the level of care being afforded emergency room patients and what he considered to be the premature transfer of patients to regular hospital beds from the emergency room. The Ohio statute in question protected the doctor from retaliatory discharge when he formally complained to the hospitals quality assurance committee,[27] but when the doctor perceived that the hospital was not going to remedy the overcrowding and premature transfer situations, he registered complaints outside of the quality assurance chain and was subsequently fired for doing so.[28] Denying Dr. Mitchell protection, the court said:

[22]. Geary v. United States Steel, 456 Pa. 171, 319 A.2d 174 (1994); Darlington v. General Electric, 350 Pa. Super. 183, 504 A.2d 306 (1986).

[23]. Petermann v. International Bhd. Of Teamsters Local 396, 344 P.2d 25 (Cal. 1959); Glenn v. Clearman's Golden Cock Inn, Inc., 13 Cal. Rptr. 769 (Cal. Dist. Ct. App. 1961).

[24]. Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1984); Bishop v. Shelter Mutual Insurance Co., 129 S.W.3d 500 (2004); Emerick v. Mut. Ben. Ins. Co., 756 S.W.2d 513 (Mo. Banc 1988); *See supra* note 5 and accompanying text.

[25]. Brockmeyer v. Dun and Bradstreet, 113 Wis.2d 561, 335 N.W.2d 834 (1983).

[26]. 2004 WL 2803419 (Ohio App. 10 Dist., 2004)(unreported decision).

[27]. *Id.* at 6.

[28]. *Id.*

> To the extent Mitchell suggests an even broader public policy by arguing that anyone who complains about patient care to anyone is protected from discharge, we cannot extend the exception this far. While the cases cited by Mitchell note the importance of patient care, they *do not* clearly define a public policy that would be applicable to this case. If Mitchell's argument were accepted, any physician or health care worker who complained to anyone about patient care issues at any time during their employment who is later discharged could file an action for wrongful termination in violation of public policy. Ohio law does not support such a sweeping interpretation of the public policy exception to employment at-will. If we were to hold otherwise, Ohio's long-standing and predominate rule that employees are terminable at will would disappear.[29]

Only when a given public policy is so obviously for or against the public health, safety, morals, or welfare that there is a virtual unanimity of opinion regarding the creation or rejection of a public policy exception so that a court may freely constitute itself the voice of the community in so declaring. There must be a positive, we-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and in the interests of the public weal.[30]

Questions involving the creation of public policy exceptions under statutory law arose, when relief in the form of a common law claim for wrongful discharge was frequently denied, especially where a clear violation of statute existed and the statute itself provided remedies and a defined structure for pursuing a claim.[31] In *Hale v. MCI, Inc.*,[32] the United States District Court for the Western District of Oklahoma stated that:

[29]. *Id.*

[30]. Weaver v. Harpster 885 A.2d 1073 (2005)(citing Mamlin v. Genoe, 340 Pa. 120, 17 A.2d 407 (1941)).

[31]. Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985); Benningfield v. Pettit Environmental, Inc., 2005 WL 2240967 (Ky. App. 2005)(an federal workplace health and safety related claim); King v. Marriott International, Incorporated, 160 Md.App. 689, 866 A.2d 895 (2005)(a federal employee benefit related claim); Litton v. Maverick Paper Co., et al., 354 F.Supp2d 1209 (D. Kan.2005)(a federal employment and Kansas Acts Against Discrimination claims); Parent v. Mount Clemons General Hospital, Inc., 2003 WL 21871745 (Mich.App.)(a public health code issue); Grimley v. Icon International, 2004 WL 870675 (Conn. Super.)(unreported opinion).

[32]. 2006 WL 223829 (W.D.Okla., 2006)(unreported decision).

> In *Burk v. K-Mart Corp.*,[33] the Oklahoma Supreme Court recognized an exception to the employment-at-will doctrine when it held that "[a]n employer's termination of an at-will employee in contravention of a clear mandate of public policy is a tortious (sic) breach of contractual obligation." The *Burk* exception "applies to only a narrow class and [is] tightly circumscribed."[34] The exception will not apply if a federal or state statutory remedy "adequately accomplishes the goal of protecting Oklahoma public policy.[35]
>
> The Seventh Circuit and district courts in Indiana have repeatedly predicted that Indiana courts would not recognize a common law claim for wrongful termination contrary to public policy where the underlying statute establishes its own remedies and procedures for discrimination and retaliatory discharge.[36]

One can conclude that when statutory law is involved, courts may normally reject relief in the form of a wrongful discharge claim. Perhaps, the rationale of these courts is that the statutory claim and remedy further public policy norms.

At least one court has refused to accept this total reliance on existing statutory protection and would create a public policy exception under statutory law providing both a claim and relief. In *Miller v. Med Central Health System*,[37] Miller, a food service employee, of the defendant hospital reported a series of healthcare and workplace safety violations and was terminated.[38] Although the state's whistleblower statute provided statutory remedies, the court followed or relied on *Collins v. Rizkana*[39] stating that:

> [T]he Ohio Supreme Court held: "In cases of *multiple*-source public policy, the statute containing the right and remedy will not foreclose recognition of the tort on the basis of some other source of public policy, unless it was the legislature's intent in enacting the statute to preempt common-law remedies."[40]

Consequently, federal and state courts have yet to agree on whether a statute that contains rights and remedies will create public policy exceptions to wrongful discharge claims. In seeking not to undermine the purpose of doctrine, the majority of courts normally require that public policy be clearly set forth in the statute or moral principle in order to create a public policy exception to the doctrine.

III. Public Policy Exceptions and Established Statutes

Worker's compensation and whistleblower statutes are two legislative acts that have led to a number of disputes regarding the existent of public policy exceptions to wrongful discharge claims under the doctrine. However, interpretations of these acts have been mixed among federal and state courts.

A. Interpretations of Whistleblower Statutes

Whistleblower statutes receive differing treatment from state to state. As stated above, Ohio recognizes the right of an employee terminated for whistle blowing to various kinds of protection. One Ohio lower court stated that:

> [T]he Ohio Supreme Court held [the whistleblower statute] does not preempt a common law cause of action against an employer who discharges or disciplines an employee in violation of that statute and an at-will employee who is discharged or disciplined in violation of [the whistleblower statute] may maintain a statutory cause of action for the violation, a common-law cause of action at tort, or both.[41]

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[33]. 770 P. 2d 24 (Okla. 1989).

[34]. *Clinton*, 29 P.3d at 543.

[35]. *Id.* at 546.

[36]. Davenport v. Indiana Masonic Home Foundation Incorporated, 2004 WL 2278754 (Ohio App. 10 Dist., 2004)(unreported decision). Citing: Groce v. Eli Lily & Co., 193 F.3d 496 (7th Cir.1999); Combs v. Indiana Gaming Co. , 2000 U.S. Dist. Lexis 16658, 2000 WL 1716452 (S.D.Ind., 2000)(unreported decision); Reeder-Baker, 644 F.Supp. 984.

[37]. 2006 WL 44290 (Ohio App. 5 Dist.), 23 IER Cases 1873, 2006-Ohio-63.

[38]. *Id.* at 1.

[39]. 73 Ohio St.3d 65, 652 N.E.2d 653 (1995).

[40]. *See also* Bennett v. Hardy, 113 Wash.2d 912, (1990); Froyd v. Cook, 681 F.Supp. 669 (E.D.Cal.1988); Drinkwater v. Shipton Supply Co., Inc., 225 Mont. 380, 732 P.2d 1335 (1987).

[41]. Miller v. MedCentral Health System, at note 36. Citing: Kulch v. Structural Fibers, Inc., 78 Ohio St. 3d 134, 677 N.E.2d 308 (1997).

Subsequently, in *Clements v. Sears Roebuck & Co.*[42] the United States District Court, recognizing the established whistleblower protections in Ohio, cited *Jermer v. Siemens Energy & Automation, Inc.*[43] stating that:

> [E]mployers must receive notice that they are no longer dealing with an at-will employee, but with someone who is vindicating a governmental policy. Employers receive clear notice of this fact when actual government regulators arrive to audit or inspect. They should receive some similar notice when an employee functions in a comparable role. Even though an employee need not cite any specific statute or law, [the employee's] statements must indicate to a reasonable employer that he is invoking governmental policy in support of, or as a basis for, his complaints.[44]

Other states however follow more limited applications, but there remains considerable conflict among state courts on the creation of public policy exceptions to the doctrine for wrongful discharge claims by whistleblowers.

Some states follow the concept that statutory remedies provided under the statute will preclude the need to establish public policy exceptions[45] while other states require that whistleblowing must be based on violations of definite rules, regulations or laws and cannot be based on personal opinion of wrongdoing.[46] For example, the United States Court of Appeals for the Eleventh Circuit applied Mississippi law and found that Mississippi recognized a public policy exception for whistleblowing when the reported act constitutes a violation of criminal law.[47] The court of appeals did not find a public policy exception for whistleblowing when the reported act was

[42]. 2005 WL 263895 (N.D.Ohio, 2005)(unreported decision).

[43]. 2005 WL 147079 (6th Cir.2005)(unreported decision).

[44]. *Id* at 4.

[45]. Akers v. Kindred Nursing Centers Limited Partnership, 2004 WL 1629733 (S.D.Ind.); Iosa v. Gentiva Health Services, Inc., 299 F.Supp.2d 29 (2004).

[46]. Goodman v. Wesley Medical Center, L.L.C., 276 Kan. 586, 78 P.3d 817 (2003); *See also* Connelly v. Kansas Highway Patrol, 271 Kan. 944, 26 P.3d 1246 (2001).

[47]. Wheeler v. BL Development Corporation, 415 F.3d 399 (C.A. 5, Miss., 2005)(citing McArn v. Allied Bruce-Terminex Co., Inc., 626 So.2d 603 (Miss.1993)).

unprofessional or immoral,[48] nor would it find an exception when the reported act was merely illegal but not criminal.[49]

The courts in Indiana and Virginia have specifically disallowed whistleblower protection. In *Akers v. Kindred Nursing Centers Limited Partnership,*[50] the United States District Court for the Southern District of Indiana stated that:

> The Indiana courts have been unwilling to expand the public policy exception to cases where employees who are terminated for whistleblowing. [McGarrity v. Berlin Metals, 774 N.E.2d 71 at 78]. . . . In whistle-blower cases, "the employees' reports of their employers' illegal activities, while certainly advantageous if substantiated, were not mandatory under the law, unlike compliance with a state's penal code."[51]

Moreover, in *Devnew v. Brown & Brown, Inc.*,[52] the district court applied Virginia law and concluded that:

> Statutes that prohibit conduct are distinct from statutes that impose an affirmative duty on an individual. [McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390 (Ind.1988) at 393 n. 1.] . . . To hold otherwise would essentially create a generalized whistleblower protection for retaliatory discharges within the class of "narrow" exceptions to the at-will employment doctrine, which the Virginia Supreme Court has already rejected.[53]

In *Devnew*, the plaintiff, Devnew, was an insurance agent who refused to participate in an "administrative reimbursement" arrangement that violated state law. When he complained of the illegality, he was fired.

[48]. *Id.* at 404 (citing Drake v. Advance Construction Service, Inc., 117 F.3d 203 (5th Cir.1997). In Drake, the plaintiff, a quality control manager for Advance, was ordered by his superiors to not include certain deficiencies regarding the placement of rock, thus falsifying a formal report to the Army Corps of Engineers. Drake never the less filed an accurate report, included the deficiencies, and was fired.).

[49]. *Id.* (citing Howell v. Operations Mgmt. Int'l, Inc., 77 Fed.Appx. 248 (5th Cir.2003)(unpublished opinion) In Howell, the plaintiff reported violations of OSHA violations. The court opined that the plaintiff had not shown that even if the alleged OSHA complaints had been found meritorious, that they would have constituted criminal violations.).

[50]. 2004 WL 1629733 (S.D.Ind., 2004)(unreported decision).

[51]. *Id.* (citing McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390, 393n.1 (Ind. 1988))

[52]. 396 F.Supp.2d 665 (E.D.Va. 2005).

[53]. *Devnew v. Brown & Brown, Inc.,* 2004 WL 1629733 (S.D.Ind., 2004)(unreported decision).

Although he claimed that his actions were for the benefit and protection of his customers, the court found that the statute, designed to protect the public, was not designed to protect insurance agents.[54] Since insurance is only available through licensed agents, and agents enjoy a fiduciary relationship with their client/customers, one would expect that an agent would be obligated to act in the best interests of the client/customer. The *Devnew* court then muddled the waters further when it stated that the plaintiff is afforded protection when a statute is "designed to protect property rights, personal freedoms, health, safety or welfare of the people in general"[55] or when the statute "is a statute stating explicitly that it expresses a public policy of the Commonwealth."[56]

One could find it particularly difficult to understand how the enactment of a valid statute by a duly authorized and elected legislature cannot be deemed *per se* public policy by default. Wrongful discharge disputes involving the creation of public policy exception under whistleblower statutes make the entry into sensitive employment relationships, such as financial, accounting and safety, in interstate commerce somewhat riskier.

B. Retaliation for Filing a Workers' Compensation Claim

Conflicting state interpretations occurs in the application of public policy exceptions regarding retaliation against employees for filing a workers' compensation claim. On one hand, a number of states specifically have established the right to file for workers' compensation as a protected activity, negating the employer's right to fire the employee under an at-will theory. These states include Indiana,[57] Illinois,[58] Kansas,[59] Missouri,[60] Idaho,[61] Louisiana,[62] Oregon,[63] and

[54]. *Id.* at 674. In *Denvew*, the court state that "[o]n its face, [the statute] is clearly protecting insurance consumers and payors of insurance premiums or finance charges, not insurance agents who would have received the money... The statute does not protect insurance agents at all." *Denvew*, 396 F.Supp.2d. at 674.

[55]. *Id.* (citing City of Virginia Beach v. Harris, 259 Va. 220, 523 S.E.2d 239, 245 (2000)).

[56]. *Id.* (citing Anderson v. ITT Indus. Corp., 92 F.Supp.2d 516, 520-521 (E.D.Va., 2000)).

[57]. Frampton v. Central Indiana Independent Gas Co., 297 N.E.2d 425 (Ind. 1998) at 428. The Indiana Supreme Court stated that "when an employee is solely discharged for exercising a statutorily conferred right an exception to the general rule must be recognized." *See also* Akers v. Kindred Nursing Centers Limited Partnership, 2004 WL 1629733(S.D.Ind., 2004)(unreported opinion); Davenport v. Indiana Masonic Home Foundation Incorporated, 2004 WL 2278754 (S.D.Ind., 2004)(unreported opinion).

[58]. Carter Coal Co. v. Human Rights Comm., 261 Ill.3d 1, 633 N.E.2d 202 (1994)(citing Kelsay v. Motorola, Inc. 384 N.E.2d 353, 357 (1978). The Court stated that "[t]he Workman's Compensation Act ... in light of its beneficial purpose, is a humane

Massachusetts.[64] On the other hand, other states, while not identifying workers' compensation specifically, have expressed protection for statutorily created rights[65] and protection for clear expressions of public policy by state legislatures.[66] While some might consider workers' compensation laws to be the type of public policy that a court should find an exception for, caution must be exercised until a specific decision is rendered in the states not yet solidly proclaiming the exception.

The state of Connecticut recognizes workers' compensation as a legitimate and important employee right and an extension of valid state public policy. Connecticut courts have refused to specifically create an exception based on the availability of remedies under the

law of a remedial nature. . . . It provides for efficient remedies for and protection of employees and, as such, promotes the general welfare of this State. Consequently, its enactment by the legislature was in furtherance of sound public policy. . . . We are convinced that to uphold and implement this public policy a cause of action should exist for retaliatory discharge."

[59]. Litton v. Maverick Paper Co., 354 F.Supp.2d 1209, 1216 (D. Kan., 2005). "Kansas narrowly recognizes two public policy exceptions to the rule of employment at will: (1) when an employer discharges an employee for exercising rights under the workers' compensation laws and (2) . . . ." (citing: Riddle v. Wal-Mart Stores, Inc. 27 Kan.App.2d 79, 85, 998 P.2d 114, 119 (Kan. 2000)).

[60]. Shuler v. Premium Standard Farms, Inc., 148 S.W.3d 1, 6 (Mo.Ct.App.2004). "In Missouri, it is unlawful for an employer to discharge an at-will employee such as the plaintiff, for . . . (4) filing a workers' compensation claim."

[61]. Paolini v. Albertson's Inc., 418 F.3d 1023 (C.A.9, Idaho, 2004) (citing Sorenson v. Comm. Tek, Inc., 118 Idaho 664, 669, 799 P.2d 70, 75 (Idaho 1990)).

[62]. Quebedeau v. Dow Chemical Co., 820 So.2d. 542, 545-546 **(La., 2002).**

[63]. Brown v. Transcon Lines, 284 Or. 597, 588 P.2d. 1087 (Or. 1978). The court found that a worker discharged for filing a workers' compensation claim may institute a tort action because the statutes that forbid discrimination against employees who file workers' compensation claims are considered legislative legitimacy of an important public policy and such a discharge frustrates the substantial public interest.

[64] Terespolsky v. Law Offices of Stephanie K. Meilman, P.C., 17 Mass.L.Rptr. 317 (2004), 2004 WL 333606. "Whether a clearly defined public policy exists is a question of law for the court. . . . We have found public policy exceptions making redress available to employees at-will who have been terminated for a variety of instances . . . for asserting a legal right. . . . [The plaintiff] has not shown how she could prove that the conduct giving rise to her discharge was statutorily protected, such as filing a workers' compensation claim, . . ." (citing Flynn v. Boston, 59 Mass.App.Ct. 490, 403 (2003)).

[65]. Rowan v. Tractor Supply Co., 263 Va. 209, 213, 559 S.E.2d 709, 711 (2002); Lucker v. Cole Vision Corporation, 2005 WL 2788882 (W.D.Va., 2005)(unreported decision). (citing Silver v. CPC-Sherwood Manor, Inc., 84 P.3d 728, 729 (Okla., 2004)).

[66]. *Rowan*, 342 F.3d at 711; Himmel v. Ford Motor Company, 342 F.3d 593, 598 (C.A.6, Ohio 2004) (citing Collins v. Rizkana, 73 Ohio St.3d 65, 652 N.E.2d 653, 657-658 (Ohio, 1995)(quoting Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where does Employer Self Interest Lie?*, 58 U. CIN. L.REV. 397, 398-99 (1989)).

statute.[67] Likewise, Mississippi courts have explicitly stated that the courts will not recognize a public policy exception for a retaliatory dismissal following the filing of a workers' compensation claim. In *Pipkin v. Piper Impact, Inc.*,[68] the United States Court of Appeals for the Eleventh Circuit stated that:

> When this court decided Green [v. Amerada-Hess Corp., 612 F.2d 212 (5th Cir. 1980)] in 1980, Mississippi law did not "explicitly provide for a civil action for a retaliatory discharge [, and] Mississippi courts [had] not specifically decided the question whether an employer may be liable in damages for discharging an employee for pursuing his workman's compensation rights." [*Id.* at 214-215.] . . . This court held that [w]hile the harshness of the terminable at will rule is subject to exception in light of express legislative action, the absence of explicit statutory provision of a civil remedy in the Mississippi workman's compensation statute argues against recognizing a cause of action for retaliatory discharge.[69]

Rejecting the plaintiff's request to create an exception in *Pipkin*, the court pointed out that the plaintiff in *Green* was denied a similar request because "it was inappropriate for a federal court to fashion social policy for a state."[70] The *Pipkin* court further opined that when *Green* had been decided, the Mississippi Supreme Court had yet to decide the particular issue, but the legislature had subsequently refused

[67]. Iosa v. Gentiva Health Services, Inc., 299 F.Supp.2d 29 (**D. Conn., 2004**) (rejecting the plaintiffs plea for a public policy retaliation exception regarding dismissal for filing a worker's compensation claim, *Id.* (citing Atkins v. Bridgeport Hydraulic Co., 5 Conn. App. 643, 648, 501 A.2d 1223, 1226 (Conn., 1985). In *Atkins*, the court stated that:

> A finding that certain conduct contravenes public policy in (sic) not enough by itself to warrant the creation of a contract remedy for wrongful dismissal by an employer. The cases which have established a tort or contract remedy for employees discharged for reasons violative of public policy have relied upon the fact that in the context of their case the employee was otherwise without remedy and that permitting the discharge to go unredressed would leave a valuable social policy to go unvindicated.

Atkins, 501 A.2d at 643.

[68]. 70 Fed.Appx. 760 (unreported decision).

[69]. *Pipkin v. Piper Impact, Inc.*, 70 Fed.Appx. 760 (unreported decision).

[70]. *Id.* (citing Green v. Amerada-Hess Corp., 612 F.2d 212, 214-215 (5th Cir. 1980)).

to enact a cause of action for retaliatory discharge when finally afforded the opportunity.[71]

Twenty days after *Pipkin* was decided by the court of appeals, the Supreme Court of Mississippi affirmed the lack of a Mississippi public policy exception to retaliatory discharge claims following terminations for filing a worker's compensation claim by finding no applicable public policy exception existed under Mississippi law.[72] Relying on a 22-year precedent, namely *Kelly v. Mississippi Valley Gas Co., Inc.*,[73] the court again refused to find a public policy exception and chose to wait for a legislative enactment.[74]

IV. Recent State And Federal Court Decisions

Much has been written advocating the reexamination and amendment of strict at-will employment applications. These authors have primarily advocated the creation of a new abusive discharge tort[75] and expanded employee privacy rights.[76] Professor Deborah A. Ballam has further opined that the doctrine of at-will employment is soon to be extinct. Professor Ballam strongly suggested that "[t]he future of employment at-will, then, is that it has no future. One of the most important developments in employment law in the first decade of the new millennium will be the express acknowledgement of the death of this doctrine."[77] Since 2003, several state and federal court cases have permitted and rejected public policy exceptions. If the demise is near, the courts have yet to settle on a date or time.

[71]. Kelly v. Mississippi Valley Gas Co., 397 So.2d 874 (Miss.1981).

[72]. Buchanan v. Ameristar Casino Vicksburg, Inc., 852 So.2d 25 (Miss., 2003).

[73]. 397 So.2d 874 (Miss., 1981).

[74]. *Buchanan*, 852 So.2d at 28.

[75]. Lawrence E. Blades, *Employment At-Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Daniel A. Mathews, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975); *Lucker*, 2005 WL 2788882, at 3 (citing *Rowan*, 559 S.E.2d at 711.)

[76]. Terry Morehead Dworkin, It's My Life – Leave Me Alone: Off the Job Employee Associational Privacy Rights, 35 Am. Bus. L.J. 47 (1997); Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671 (1996).

[77]. Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653 (2000).

A. Cases Rejecting a Public Policy Exception

State and federal courts have rejected public policy exceptions under numerous circumstances and various reasons. Again, these courts illustrate the uncertainty and risk surrounding the public policy exception to the doctrine in interstate commerce. *In Swain v. Adventa Hospice, Inc.,* [78] Swain was a hospice nurse employed by Adventa. She was asked to visit a patient who was under the care of another nurse (Williams) who had deemed the patient's death as imminent.[79] After an examination, Swain determined that Williams had overmedicated the patient. Swain immediately reduced the patient's medications and treated the patient for the over medication. As a result, the patient's health improved dramatically.[80] A few days later Swain was confronted by her supervisor and Williams and Swain was told that, "her actions embarrassed Adventa and that she should not have adjusted the medication."[81] Her reward for correcting a potentially fatal error and prolonging the patient's life was being fired the following day. Relying on *Bowman v. State Bank of Keysville*[82] the court found that the Supreme Court of Virginia had recognized a narrowly proscribed public policy exception to Virginia's employment at-will doctrine. The court further determined that the State of Virginia recognized three factual scenarios giving rise to a discharged employee's right to claim a wrongful discharge:

> (1) when "an employer violated a policy enabling the exercise of an employee's statutorily created right"; (2) "when the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy"; and, (3) when "the discharge was based on the employee's refusal to engage in a criminal act."[83]

The court concluded that Swain was not exercising a right, was not protected under a statutory policy and had not been fired for refusing an unlawful order, Swain's termination was upheld.

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[78]. 2003 WL 22996906 (W.D.Va.).
[79]. *Id.* at 1.
[80]. *Id.*
[81]. *Id.*
[82]. 229 Va. 534, 331 S.E.2d 797 (Va.1985).
[83]. Swain v. Adventa Hospice, Inc., 2003 WL 22996906, at 1 (W.D.Va. 2003)(citing Rowan v. Tractor Supply Co., 263 Va. 209, 559 S.E.2d 709 (Va. 2002)).

A similar outcome was reach in a North Carolina dispute under a different public policy. In *Imes v. City of Asheville, CCL,*[84] Imes was injured when he was shot by his wife. Subsequent to his incarceration, he was informed by his supervisor that he was being terminated because he had been a victim of domestic violence.[85] Imes brought suit claiming that, "termination of any employment based on the employee's status as a victim of domestic violence tends to be injurious to the public and against the public good."[86] After stating that the employee has the burden of pleading that his dismissal occurred for reason that violates public policy,[87] the court found that although domestic violence is indeed a serious social problem,[88] the plaintiff had failed to identify any specific North Carolina public policy that was violated by the defendant when the plaintiff's employment was terminated.[89]

In *McGrady v. Oklahoma Department of Public Safety,* [90] McGrady was a first Lieutenant with the Oklahoma Highway Patrol and was a permanent classified employee.[91] After his dismissal, he brought suit claiming to be an at-will employee and that his firing violated tenets of Oklahoma public policy. The court determined that his classified employment afforded him particular rights that precluded him being considered at-will.[92] Therefore, his suit alleging wrongful discharge was invalid and his recourse was solely in prescribed administrative remedies. The court was not persuaded by the plaintiff's allegations that the remedies afforded him were inadequate remedies at law.[93]

While declining to determine whether a public policy exception had been properly alleged by McGrady, the court did consider how public policy exceptions should generally be viewed, citing *Clinton v. State of Oklahoma, ex. Rel. Logan County Election Board,*[94] and found:

> [t]hat the public policy exception to the at-will doctrine rests on the notion that in a civilized society

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[84]. 163 N.C.App. 668, 594 S.E.2d 397 (2004).
[85]. *Id.* at 669.
[86]. *Id.* at 398, 668.
[87]. *Id.* at 398, 668.
[88]. *Id.* at 399, 672.
[89]. Imes v. City of Asheville, CCL, 163 N.C. App. 668, 672, 594 S.E.2d 397, 400 (2004).
[90]. 122 P.3d 473 (Okla. 2005).
[91]. *Id.* at 473.
[92]. *Id.* at 475.
[93]. *Id.* at 476.
[94]. 2001 OK 52, 29 P.3d 543 (2001)(certifying a question from the United States District Court for the Western District of Oklahoma).

> the rights of employers to discharge at-will employees must necessarily be balanced against the rights of the public at large as expressed in the existing law. Its purpose, therefore, is to protect the state's public policy in the context of at-will employment by ensuring that there is a strong disincentive to an employer who might wish to discharge an at-will employee for a reason which violates our clear and compelling public policy.[95]

Other courts have attempted to set forth the existing exceptions in their states in denying the public policy exceptions. In *Dufner v. American College of Physicians,*[96] Dufner was a full time employee for the defendant (ACP) and was discharged approximately one year after she filed various complaints against certain co-workers and her supervisor.[97] ACP countered alleging that the termination was due to falsification of time sheets.[98] Although the plaintiff alleged that she had a contract for employment with ACP, she did not produce a document or otherwise explain the absence of a contractual document.[99] The court stated that "an employee bringing an action for wrongful termination bears the burden of overcoming the "firmly entrenched presumption" that she is an at-will employee who can be discharged for any reason or for no reason at all."[100]

Having determined that Dufner was an at-will employee,[101] the court then looked to determine whether her termination violated Pennsylvania public policy. The court relied on *Darlington v. General Electric*,[102] that listed a a number of public policy exceptions that have been established in Pennsylvania, which include protection from termination due to, (a) serving on jury duty; (b) refusing to submit to polygraph tests; (c) reporting motor vehicle accidents; (d) refusing to violate anti-trust laws and (e) refusal to participate in lobbying efforts.[103] In *Dufner*, the court decided that even though the plaintiff had alleged that she was subject to a hostile work environment, she had failed to provide evidence indicating that she was subject to unlawful

[95]. McGrady v. Oklahoma Department of Public Safety, 122 P.3d 473, 475 (Okla. 2005).

[96]. 73 Pa. D & C4th 382, 2005 WL 3635105 (Pa.Com.Pl. 2004), *reversed & remanded*, 903 A.2d 56, 2006 Pa. Super. LEXIS 1991 (Pa. Super. Ct. 2006).

[97]. *Id.* at 384.

[98]. *Id.* at 384.

[99]. *Id.*

[100]. *Id.* at 385 (citing Rapagnani v. Judas Company, 736 A.2d 666 (Pa. Super. 1999)).

[101]. *Id.* at 388.

[102]. 350 Pa. Super. 183, 504 A.2d 306 (1986).

[103]. *Id.*

discrimination or that the hostility was a violation of constitutional, statutory, or regulated acts.[104] "Further, it is not sufficient that the employer's action toward the employee is unfair."[105] The court stated that:

> Although the duty of good faith and fair dealing exists in an at-will employment contract, there is no bad faith when an employer discharges an at-will employee for good reason, bad reason, or for no reason at all, as long as no statute or public policy is implicated.[106]

Notwithstanding the list of well established public policy exceptions, the court concluded that plaintiff did not establish a public policy exception under employment discrimination law. However, the higher court did not agree and reversed and remanded without an opinion.[107]

Some state law wrongful discharge claims may involve employee benefit plans and could be preempted by the Employee Retirement Income Security Act of 1974 (ERISA).[108] In *King v. Marriott International, Inc.,*[109] King was employed by Marriott for approximately 10 years in their employee benefits department.[110] When the corporate accounting department proposed the transfer of assets from a reserve account to a general corporate account, King voice objections citing potential illegalities.[111] The transfer was abandoned but sometime later was proposed for a second time.[112] After King once again voiced her concerns, both verbally and in writing, she was dismissed.[113] King filed a lawsuit asserting a wrongful termination and sought relief based on public policy exceptions to at-will employment based on employment termination for failure to act in an illegal manner at the direction of her employer; knowingly participating in a violation of ERISA.[114] The federal court refused to remand the

[104]. Dufner v. American College of Physicians, 73 Pa. D & C4th 382, 391, 2005 WL 3635105 (Pa. Com. Pl. 2004), *reversed & remanded*, 903 A.2d 56, 2006 Pa. Super. LEXIS 1991 (Pa. Super. Ct. 2006).

[105]. *Id.* at 389 (citing Davenport v. Reed, 785 A.2d 1058, 1063 (Pa. Commw. 2001)).

[106]. *Id.* at 392 (citing Donahue v. Federal Express Corp., 753 A.2d 238 (Pa. Super. 2000)).

[107]. Dufner v. American College of Physicians, 903 A.2d 56, 2006 Pa. Super. LEXIS 1991 (Pa. Super. Ct. 2006).

[108]. 29 U.S.C. §§ 1001 *et seq.* (2007).

[109]. 160 Md. App. 689, 866 A.2d 985 (2005).

[110]. *Id.* at 694.

[111]. *Id.* at 695.

[112]. *Id.*

[113]. *Id.* at 696.

[114]. King v. Marriott International, Inc., 160 Md. App. 689, 696, 866 A.2d 985 (2005).

action to the Maryland State court and dismissed the action. The refusal and subsequent dismissal was based on the courts determination that the cause of action was ERISA based and that state law claims were completely preempted under ERISA provisions.[115]

The present case is an appeal of the wrongful dismissal issue and examined the applicability of state public policy exceptions to the at-will doctrine.[116] The court noted that Maryland courts have found a violation of a clear mandate of public policy only under very limited circumstances: where an employee has been fired for refusing to violate the law or legal rights of a third party,[117] and where an employee has been terminated for exercising a specific legal right or duty.[118] In order to assert a claim, the moving party (King) must plead with particularity the source of the public policy allegedly violated by [the] termination.[119] In her complaint, appellant states, without citation to any case, statute, or regulation, Maryland has recognized a clear mandate of public policy encouraging the administrators and fiduciaries of employees benefit plans to refuse to participate in and to object to transactions which are proposed by the plan sponsor for its benefit and

[115]. *Id.*

[116]. *Id.* at 698.

[117]. *Id.* at 702 (citing Kessler v. Equity Management, Inc., 82 Md.App. 577, 572 A.2d 1144 (1990)(holding that: an employee could not be fired for refusing to commit the tort of invasion of privacy)).

[118]. *Id.* (citing Insignia Residential Corp. v Ashton, 359 Md. 560, 755 A.2d 1080 (2000)(holding that there was a finding of a cause of action for an employee terminated for failing to acquiesce to "quid pro quo" sexual harassment); Molesworth v. Brandon, 341 Md. 621, 672 A.2d 608 (1996)(holding that the court could apply public policy defined by statute even though the statute did not apply to plaintiff's employer who had less than 15 employees); Watson v. Peoples Sec. Life Ins. Co., 332 Md. 467, 588 A.2d 760 (1991)(holding that an employee could not be fired for seeking legal redress from co-worker for sexual harassment.); Ewing, 312 Md. 45, 537 A.2d 1173 (1988)(holding that an employee could not be fired for filing a worker's compensation claim); De Bleecker v. Montgomery County, 292 Md. 498, 438 A.2d 1348 (1982)(holding that a wrongful discharge action will lie for terminating an employee for exercising his First Amendment rights); Bleich v. Florence Critterton Servs. of Baltimore, Inc., 98 Md.App. 123, 632 A.2d 463 (1993)(holding that permitting a wrongful discharge claim for employee fired for fulfilling a statutory duty to report child abuse or neglect is appropriate); Moniodis v. Cook, 64 Md.App. 1, 494 A.2d 212 (1985), *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985)(holding that a cause of action for an employee fired for refusing to take a lie detector test is allowed); Porterfield v. Mascari II, Inc., 374 Md. 402, 823 A.2d 590 (2003)(holding that the right to seek counsel for employment relayed matters was not a sufficiently established public policy to support a wrongful discharge claim); Wholey v. Sears, Roebuck and Co., 370 Md. 38, 803 A.2d 482 (2002)(holding that declining to find a sufficiently compelling public interest where the employee filed internal reports of corporate wrongdoing instead of reporting the illegal activities to the proper authorities is appropriate).

[119]. *King*, 160 Md. App. at 703, 866 A.2d at 985 (citing Porterfield v. Mascari II, Inc., 374 Md. 402, 823 A.2d 590 (2003)).

not in the interests of the plan participants.[120] Plaintiff has therefore failed to meet the threshold requirement for stating a cause of action for wrongful discharge that she identify the source of the public policy with particularity.[121] Strangely, even if King had stated her case with the requisite particularity, the court opined that she would still have been unsuccessful[122] because ERISA provided remedies only for employees fired for reporting corporate wrongdoing to proper authorities but not for those fired for intra-employment conduct.[123] The failure of the statute to specify a public policy concerning King's conduct precludes the court from finding such actionable public policy.[124] "Maryland limits judicial forays into the wilderness of discerning 'public policy' without clear direction from a legislature or regulatory source."[125] "Such unguided forays are to be avoided by the judiciary, as they are more properly the province of the legislative branch."[126]

Court must also confront the ambiguity raised by the purpose of the statute and thus may not want to grant an exception not within the purpose and objectives of the statute. In *Psaila v. Shiloh Industries, Inc.*,[127] Psaila was a sales representative working for the defendant and brokered a transaction that resulted in his earning a sizable commission.[128] The commission was not paid and after months of expressing concern, Psaila was discharged from the job.[129] There was no dispute that the plaintiff was an at-will employee[130] however; plaintiff contended that the termination was wrongful pursuant to a Michigan statute. The statute in question[131] required that sales commission be paid to terminated sales representatives within 45 days of termination and prescribed various penalties for violation. The court determined that the statute did not preclude the termination of an employee but only addressed the requirement to pay sales commissions in a timely manner subsequent to the end of the employment

[120]. *Id.*

[121]. *Id.*

[122]. *Id.*

[123]. *Id.* at 705; *See also* 29 U.S.C. § 1140 (2006).

[124]. *Id.* at 707.

[125]. *King*, 160 Md. App. at 702, 866 A.2d at 985 (citing Milton v. IIT Research Inst., 138 F.3d 519 (4th Cir., 1998)).

[126]. *Id.* at 702-703 (citing Adler v. American Standard Corp., 830 F.2d 1303 (4th Cir.1987).

[127]. 258 Mich.App. 388, 671 N.W.2d 563 (2003)).

[128]. *Id.* at 390.

[129]. *Id.* at 390.

[130]. *Id.* at 390.

[131]. M.C.L. § 600.2961.

relationship.[132] The court therefore, declined to find a public policy exception appropriate to this case. The court concluded that:

> In defining "public policy," it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective sources what public policy is, not simply assert what such policy ought to be on the basis of the subjective views of individual judges. This is grounded in Chief Justice Marshall's famous injunction to the bench in *Marbury v. Madison*[133] that the duty of the judiciary is to assert what the law "is", not what it "ought" to be.[134]

Moreover, this court further sustained and deferred to Justice Marshall's declaration that stated that:

> In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.[135]

Still, the court concluded that a public policy exception did not exist, and thus this type of wrongful discharge claim was allowed to stand.

Public policy objectives are not always strong or clear enough to support a public policy exception to the doctrine. In *Porterfield v. Mascari II, Inc.*,[136] Porterfield was discharged from her job when she indicated her intent to speak with an attorney before responding to an unfavorable work evaluation.[137] Following her firing, she filed a complaint alleging wrongful discharge. She alleged that the public policy of Maryland "mandated that all persons be permitted freely to consult with an attorney of their choice concerning matters of importance in their lives, including matters related to their employment."[138] Petitioner also placed great emphasis on cases from Iowa[139] and Ohio[140] that recognized "the act of firing an employee for

[132]. *Psaila*, 258 Mich.App. at 393, 671 N.W.2d at 563.
[133]. 5 U.S. (1 Cranch) 137, 177, 2 L Ed 60 (1803).
[134]. *Psaila*, 258 Mich.App. at 392, 671 N.W.2d at 563.
[135]. *Id.* at 393.
[136]. 374 Md. 402, 823 A.2d 590 (2003).
[137]. *Id.* at 407.
[138]. *Id.* at 410-411.
[139]. Thompto v. Coborn's Inc., 871 F.Supp. 1097 (N.D.Iowa 1994).
[140]. Simonelli v. Anderson Concrete Co., 99 Ohio App.3d 254, 650 N.E.2d 488 (1994). It is interesting to note that in Popp v. Integrated Electrical Services, Inc., Slip Copy 2005 WL 2488050 (Ohio App. 12 Dist.), the Popp court cited Simonelli (Ohio App. 10 Dist.) and Chapman v. Adia Services, Inc., 116 Ohio App.3d 534 (1997) (Ohio App. 1 Dist.), both of which found a public policy interest when consulting an attorney, yet without major explanation found to the contrary.

consulting an attorney could serve as a basis for a public policy exception to the common-law employment-at-will doctrine."[141]

The decision of the Court of Special Appeals, from which appeal is taken, stated that:

> [F]or the tort of wrongful discharge to lie, the public policy in question must be a preexisting, unambiguous, particularized announcement, by constitution, enactment, or prior judicial decision, directing, prohibiting, or protecting the conduct in question so as to make the public policy on the relevant topic not a matter of conjecture or interpretation.[142]

This court ultimately reasoned that although there is a general right to counsel in Maryland,[143] this general right was not sufficient to create the public policy exception prayed for by the petitioner. The court concluded that:

> Absent a clear and articulable (sic) statement of public policy, we are mindful of our recognition in *Wholey*[144] that the establishment of "otherwise undeclared public policy" is ordinarily the "function of the legislative branch."[145]

Other courts have required more than clear public policy objective. One state required a connection between the discharge and this objective, thus requiring some type of nexus.

In *Goggins v. Rogers Memorial Hospital Incorporated*,[146] Goggins was a registered nurse employed by Rogers. Concerns arose amongst the hospital staff concerning the treatment of a particular patient and suspected improper conduct of a doctor with regard to this patient.[147] When Goggins expressed her concerns to the offending doctor, he responded, "Why should I stop now."[148] The plaintiff then

[141]. Porterfield v. Mascari II, Inc., 374 Md. 402, 412, 823 A.2d 590 (2003).
[142]. *Id.* (citing Porterfield v. Mascari, 142 Md.App. 134, 140, 788 A.2d 242, 245 (2002)).
[143]. *Id.* at 431.
[144]. Wholey v. Sears, Roebuck and Co., 370 Md. 38, 803 A.2d 482 (2002)(holding that there is a strong presumption against the judicial creation of public policy.).
[145]. *Porterfield*, 374 Md. at, 431, 823 A.2d at 590.
[146]. 274 Wis.2d 754, 683 N.W.2d 510 (2004).
[147]. *Id.* at 758.
[148]. *Id.*

complained to the president/CEO of the hospital.[149] The doctor was confronted and denied the allegations.[150] Subsequently, after the patient was discharged from the hospital's care, there were rumors that the doctor was living with the patient. (It is interesting to note that this same doctor had been asked to step down from a management position with the defendant hospital after the doctor had married a patient.)[151] Goggins again approached the president/CEO to renew her concerns.

Frustrated with the hospitals inaction, the plaintiff requested and was granted a leave of absence to assess her options.[152] At its expiration, she requested and was granted an extension to her leave. Her job was held for her and at the end of the extension the president/CEO urged her to return. She indicated that she could not work with the offending doctor and requested a further extension.[153] The president/CEO refused, but offered her an alternate position which she declined. She was then fired. Goggins then filed a wrongful termination action based on her claim that she was essentially forced to resign due to the intolerable situation, creating a constructive termination.[154] Relying heavily on *Strozinsky v. Sch. Dist. Of Brown Deer*,[155] the court opined that Goggins must "identify a fundamental and well defined public policy and then prove that the discharge, whether constructive or express, violated that policy."[156] They further indicated that, "[t]he law requires a connection between the discharge and the public policy."[157]

Ultimately the court concluded that the petitioner failed to demonstrate a connection between her termination of employment and the public policy goal of protecting hospital patients from abuse and neglect.[158] During her leave of absence, she had filed the appropriate complaint with the State Department of Regulation and Licensing (on May 7th) and the defendant had held her job for 48 days until her termination (on June 24th).[159] She had therefore not been restricted from, nor punished for, filing the complaint. The court reasoned that

[149]. *Id.* at 759.
[150]. *Id.*
[151]. Goggins v. Rogers Memorial Hospital Inc., 274 Wis.2d 754, 758; 683 N.W.2d 510 (2004).
[152]. *Id.* at 761.
[153]. *Id.*
[154]. *Id.*
[155]. 237 Wis.2d 19, 614 N.W.2d 443 (2000).
[156]. *Goggins*, 274 Wis.2d at 768.
[157]. Wandry v. Bull's Eye Credit Union, 129 Wis.2d 37, 47, 384 N.W.2d 325 (1986).
[158]. *Goggins*, 274 Wis.2d at 768.
[159]. *Id.*

"Goggins does not take issue with what Rogers did to her; she takes issue with what Rogers did not do to [the doctor]."[160]

> We conclude that Goggins' claim for wrongful discharge under the public policy exception to the employment at-will doctrine fails to state an actionable claim. Goggins cannot demonstrate that she was discharged in connection with a recognized public policy exception to the doctrine. Although she had an affirmative duty to report patient abuse and neglect, she was not faced with the choice to "report and be terminated, or fail to report and be prosecuted."[161]

Ultimately, the plaintiff must establish a connection between her termination of employment and the public policy objectives to justify a public policy exception.

Claims of a breach of ethics may not create a public policy exception. *In LoPresti, M.D. v. Rutland Regional Health Services, Inc.,*[162], LoPresti was a physician working under a "Physicians Employment Agreement" with Physician Group.[163] Physician Group was not a hospital but instead was a business arrangement between a group of doctors in which a base salary and benefits were paid to the doctors with Physician Group, a Vermont non-profit corporation collecting fees paid to the doctors by the patients.[164] To increase profitability, the doctors regularly referred patients to other doctors within the group. Dr. LoPresti began to develop concerns regarding the treatment provided by three of the specialist in the group and refused to continue referring his patients to these three specialists.[165] The three doctors complained and the director of Physician Group spoke with Dr. LoPresti who voiced his concerns which included; the performance of unnecessary procedures and the unnecessary hospitalization of certain patients.[166]

Soon after the meeting, Dr. LoPresti was terminated with no explanation.[167] Claiming that he was bound by his professional code of ethics, Dr. LoPresti brought a wrongful discharge action claiming that he was discharged for refusing toviolate state law and the code by

[160]. *Id.*
[161]. *Id.* at 770 (citing Hausman v. St. Croix Care Center, 214 Wis.2d 655, 571 N.W.2d 393 (1997)).
[162]. 177 Vt. 316, 865 A.2d 1102 (2004).
[163]. *Id.* at 318.
[164]. *Id.*
[165]. *Id.* at 319.
[166]. *Id.*
[167]. *Id.* at 319-320.

referring patients to doctors he believed to be providing improper care, potentially jeopardizing the physical well-being of the patients."[168] The court rejected his argument saying that a professional code gives rise to public policy only when it is "clear and compelling."[169]

> Specifically, the employee must show that the ethical provisions relied on are "sufficiently concrete to notify employers and employees of the behavior [they require]," and the code provision being applied must be primarily for the benefit of the public as opposed to the interests of the profession alone.[170]
>
> The employee must show that he had an objective, good faith belief that the conduct requested by the employer would violate an ethical rule that satisfies [Mariani]. To succeed, an employee cannot rely on his or her personal moral beliefs, or an overly cautious reading of the mandates in a particular code.[171]
>
> An employee should not have the right to prevent his or her employer from pursuing its business because the employee perceives that a particular business decision violates the employee's personal morals, as distinguished from the recognized code of ethics of the employee's profession.[172]

These courts would lead commentators and scholars to draw the conclusion that the employment at-will doctrine is not approaching extinction and that its application shifts contractual risk to employees of at-will employment relationships. However, such a conclusion may be premature.

B. Cases Permitting a Public Policy Exception

State and federal court cases permit public policy exception under some circumstances. *In Himmel v. Ford Motor Company,*[173] Himmel was terminated as the Supervisor of Labor Relations, Hourly Personnel and Safety at a plant in Sharonville, Ohio after he

[168]. *Id.* at 326.
[169]. *Id.* at 327 (citing Payne v. Rozendaal, 147 Vt. 488, 520 A.2d 586 (1986)).
[170]. *Id.* (citing Rockey Mtn. Hosp. & Med. Serv. V. Mariani, 916 P.2d 519 (Colo.1996)).
[171]. *Id.* at 327-328.
[172]. *Id.* at 328 (citing Peirce v. Ortho Pharm. Corp., 84 N.J. 58, 417 A.2d 505 (1980)).
[173]. 342 F.3d 593 (2004).

complained about labor practices that he alleged violated the Labor Management Relations Act.[174] Specifically he contended that Ford was improperly exhibiting favoritism toward United Auto Worker officials.[175] He opposed a number of hiring dictated by Ford and at one point promoted three qualified employees rather than less qualified UAW members nominated by Ford.[176] After his firing he filed suit for wrongful discharge claiming that his failure to participate in Ford's alleged violation of the LMRA as the cause for his termination.[177]

The court relied or followed *Greeley v. Miami Valley Maintenance Contrs., Inc.,*[178] *in* recognizing that an employee disciplined or terminated for a reason prohibited by statute is entitled to an exception to the employment at-will doctrine[179] and then cited *Collins v. Rizkana*[180] which articulated four elements that a plaintiff is required to evidence in order to establish a legitimate public policy claim. These elements are as follows:

> 1. That a clear public policy existed and was manifested in a state or federal constitution, statute, or administrative process, or in the common law (the *clarity* element).
> 2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element).
> 3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element).
> 4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).[181]

Ford conceded that provisions of the LMRA provide a clear public policy establishing the clarity element.[182] The court determined that Himmel had further established a genuine issue of material fact regarding the causation and overriding justification elements.[183] The

[174]. 1947 § 302, 29 U.S.C. § 186.
[175]. Himmel v. Ford Motor Company, 342 F.3d 593, 596 (___ Cir. 2004).
[176]. *Id.* at 596.
[177]. *Id.* at 597.
[178]. 49 Ohio St. 3d 228, 551 N.E.2d 981, (1990).
[179]. *Id.* at 986.
[180]. 73 Ohio St.3d 65, 652 N.E.2d 653 (1995) (quoting Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L.REV. 397, 398-99 (1989)).
[181]. *Collins*, at 657-658.
[182]. *Himmel*, 342 F.3d at 599.
[183]. *Id.* (citing *Collins*, 652 N.E.2d at-658 (recognizing that, under Ohio law, these two elements are questions for the jury)).

jeopardy element was the focus of the court's discussion, and the court determined that the LMRA intended to regulate various labor practices and public policy would indeed be jeopardized if employees of Ford were intimidated by fear of their job were they to question federal labor law violations.[184]

Some courts have created public policy exceptions, though state employment policy appears hostile to these exceptions. In *Rothrock v. Rothrock Motor Sales,*[185] Theodore Rothrock (Ted) was Motor Sales' body shop manager.[186] His son Doug, who he supervised, was injured on the job and finally reported the injury to the appropriate personnel coordinator two months after the accident.[187] Subsequently, Bruce, the company's sole owner, instructed Ted to have Doug sign a form releasing Motor Sales and waiver of Doug's Worker's Compensation rights.[188] Ted was told that if the release and waiver were not signed, both he and his son would be fired.[189] The documents were not signed and subsequently both were fired. The court recognized that a violation of a clear mandate of public policy resulting in a discharge of an at-will employee may lead to a right of action for wrongful discharge.[190] Maintaining the traditional view in Pennsylvania that, "exceptions to at-will termination should be carefully structured so as not to erode an employer's inherent right to operate its business as it chooses"[191], the court did find that coercion of an employee to waive compensation for established rights to be violative of public policy.[192] The court went on to mention the "very limited circumstances"[193] in which Pennsylvania have recognized public policy exceptions to exist. These included terminations for refusal to take a polygraph test[194] and filing an unemployment claim.[195]

In *Dunn v. Enterprise Rent-A-Car Company,*[196] Dunn was an accountant employed by Enterprise as their comptroller.[197] While

[184]. *Id.* at 601.
[185]. 883 A.2d 511 (2004).
[186]. *Id.* at 512.
[187]. *Id.*
[188]. *Id.* at 513.
[189]. *Id.*
[190]. Rothrock v. Rothrock Motor Sales, 883 A.2d 511, 515 (2004); *See also* Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).
[191]. *Rothrock*, 883 A.2d at 516.
[192]. *See also* Shick v. Shirley, 552 Pa. 590, 716 A.2d 1231 (1998).
[193]. *Id.* at 515.
[194]. Kroen v. Bedway Security Agency, 430 Pa. Super. 83, 663 A.2d 628 (1993).
[195]. Highhouse v. Avery Transportation, 443 Pa. Super. 120, 660 A.2d 1375 (1995); Raykovitz v. K Mart Corp., 445 Pa. Super. 378, 665 A.2d 883 (1995).
[196]. 170 S.W.3d 1 (2005).
[197]. *Id.* at 4.

preparing for an IPO, Dunn examined the company's financial records and recognized that the defendant had been practicing certain questionable accounting practices which he brought to the attention of management.[198] Dunn also indicated to management that he believed that the Securities and Exchange Commission would require Enterprise to report certain aspects of their business in a manner contrary to current company policy.[199] Dunn was warned and placed on probation. After completing the probationary period he was told that he could stay, "as long as [he] behaved."[200] Dunn continued to urge Enterprise to alter its accounting methods which he interpreted to be contrary to GAPP and was subsequently fired.[201] Enterprise eventually withdrew the planned IPO and the lower court determined that no public policy exception could exist when the illegal act was not attempted.[202] In reversing a lower court decision, the appellate court determined that, "Dunn should not be denied protection under the public policy exception to the employment at-will doctrine for refusing to perform an illegal act or act contrary to a clear mandate of public policy simply because Enterprise decided to postpone the IPO and not complete its alleged unlawful act.[203] This court stated that:

> Dunn should not be denied protection under the public policy exception to the employment at-will doctrine for refusing to perform an illegal act contrary to a clear mandate of public policy simply because Enterprise decided to postpone the IPO and not complete its alleged unlawful act. Viewing the evidence in the light most favorable to Dunn, we find Dunn presented sufficient evidence at trial that the conduct he was asked to engage in with respect to Enterprise's financial statements in preparation for the IPO would have been in violation of federal securities regulations and a clear mandate of public policy as enumerated in those regulations. Dunn also presented sufficient evidence at trial that linked his termination from Enterprise with his failure to perform this illegal conduct.[204]

A second course of action included allegations of wrongful dismissal due to Dunn's whistle blowing. The court found no Missouri cases on

[198]. *Id.*
[199]. *Id.* at 5.
[200]. *Id.*
[201]. *Id.* at 6.
[202]. *Id.* at 8.
[203]. *Id.* at 9.
[204]. *Id.*

point.[205] They then created a common law public policy exception as long as the whistle blowing was related to the violation of an existing law; in this case the violation of federal securities regulations.[206]

In this instance, worker's compensation rights were grounds for public policy exception. In *Bickers v. Western Southern Life Insurance Co., Inc.,*[207] Bickers suffered a work related injury and was on leave receiving temporarily total disability (TTD) benefits when her employment was terminated.[208] The lower court determined that her cause of action was moot because she had adequate remedies at law under existing worker's compensation statutes.[209] The Ohio Supreme Court had previously held that:

> [A]n at-will employee could maintain a wrongful discharge claim even when the public policy derives from a statute that already provides a remedy, as long as the remedy provided is not exclusive or sufficiently comprehensive.[210]

The court relied on a second Ohio Supreme Court decision in *Coolidge v. Riverdale Local School District.*[211] In *Coolidge*, the plaintiff was discharged while on disability leave. Acknowledging that it had, "never decided whether discharges for absenteeism caused by allowed worker's compensation injuries [we]re violative of public policy in the absence of retaliatory motive."[212] The Ohio Supreme Court ultimately decided that "Coolidge's absence and inability to work were due entirely to a work-related injury for which she was receiving ongoing TTD compensation, her discharge constitute[d] a violation of public policy and, therefore, [wa]s without good and just cause under [Ohio Law]."[213] This court further agreed with decisions in *Livingston v. Hillside Rehab. Hosp.*[214] and *Balyint v. Arkansas Best Freight System, Inc.*[215] holding that an at-will employee could pursue a public policy claim under [certain Ohio statutes] because the statutes only afforded plaintiff with equitable relief. The court held that the trial court erred

[205]. *Id.* at 10.
[206]. *Id.* at 10-11.
[207]. 2006 WL 305442 (Ohio App. 1 Dist. 2006).
[208]. *Id.* at 1.
[209]. *Id.* at 3.
[210]. Kulch v. Structural Fibers, 78 Ohio St.3d 134, 677 N.E.2d 308 (Ohio 20030..
[211]. 100 Ohio St.3d 141, 797 N.E.2d 61.
[212]. *Id.* at 25.
[213]. Bickers v. Western Southern Life Insurance Co., Inc., 2006 WL 305442 (Ohio App. 1 Dist. 2006)(citing Coolidge v. Riverdale Local School District Coolidge, 100 Ohio St.3d 141, 797 N.E.2d 61, (2003).
[214]. 79 Ohio St.3d 249, 680 N.E.2d 1220 (1997).
[215]. 18 Ohio St.3d 126, 480 N.E.2d 417 (1985).

in finding that Bickers had to comply with the procedural requirements of [Ohio worker's compensation statutes] to assert an actionable claim. . . ."[216]

One court has been willing to find a public policy exception for wrongful discharge based on sexual harassment. In *Weaver v. Harpster,*[217] Weaver was resigned from her job following the filing of a complaint with the Pennsylvania Human Relations Commission (PHRC) alleging sexual harassment.[218] The lower court dismissed her sexual harassment claims after her PHRC complaint was rejected.[219] The rejection was based solely on the fact that her employer had only four employees and the issue of determining the validity of her claim was not addressed. The lower court relied on the decision in *Clay v. Advanced Computer Applications,*[220] which precluded a wrongful discharge claim for sexual harassment because the plaintiff had not exhausted all of her PHRC remedies. The court, subsequent to *Clay* continued the rule that the exhaustion of administrative remedies was a necessary prerequisite before an employee could attempt to prove a clear mandate of public policy in order to bring a cause of action for sexual harassment.[221]

The plaintiff pleaded that the rejection of her claim precludes her from seeking relief and such a prohibition violates clearly established public policy that is designed to protect citizens from abuse.[222] Rejecting the appellee's argument that the law clearly indicated an intent to only prohibit sexual harassment in companies of more than four employees, the court refused to consider that the legislature intended a tacit endorsement of sexual harassment against employees of less than four employees.[223] Ultimately recognizing that sexual discrimination is addressed and prohibited in the Pennsylvania Constitution,[224] the court opined that, "No more clear statement of public policy exists than of a constitutional amendment."[225] The court stated that:

[216]. *Id.* at 4.
[217]. 885 A.2d 1073 (2005).
[218]. *Id.* at 1074.
[219]. *Id.* at 1074-1075.
[220]. 522 Pa. 86, 559 A.2d 917 (1989)
[221]. Weaver v. Harpster, at 1075; (Citing: Carlson v. Community Ambulance Service, Inc., 824 A2d 1228, (Pa. Super. 2003); Shick v. Shirley, 552 Pa. 590, 716 A.2d 1231 (1998)).
[222]. *Id.* at 1075.
[223]. *Id.* at 1077.
[224]. PA. CONST., Art. I, § 28.
[225]. *Weaver*, 885 A.2d at 1077; (citing Clay v. Advanced Computer Applications, 522 Pa. 86, 559 A.2d 917 (1989)(Zappala, J., concurring).

> It is difficult to believe that the Legislature would first define certain acts as illegal via both the Constitution and statute, thus establishing a public policy unequivocally condemning such conduct, and then remove all judicial recourse for the victims of that conduct. We therefore agree with Appellant's contention that a public policy exception is appropriate for her situation.[226]

Public policy set forth in the State's Constitution and legislation is clearly articulate and will survive judicial scrutiny.

Public safety has recognized as a source of public policy. *In Silver v. CPC-Sherwood Manor, Inc.*,[227] Silver was a cook at a nursing home maintained by the defendant. A few moments after arriving at work one morning, he suddenly fell ill, developing diarrhea and soon after vomiting.[228] When he informed an administrator that he needed to go to the emergency room he was told, "You're not going no damn where. If you leave from here I'm going to dismiss you."[229] Never-the-less, Silver punched out and was treated for dehydration and an intestinal infection at the emergency room.[230] The following Monday, Silver went to work with copies of the emergency room papers but was told, "I don't want them. I told you if you left that damn job what I was going to do. You don't work here any more."[231]

Relying on *Burk v. K-Mart Corp.*,[232] the court found a public policy exception and a proper cause of action for wrongful termination stating that the *Burk* public policy exception to the employment at will doctrine "rests on the notion that in a civilized society, the [right] of employers to discharge at-will employees is necessarily balanced against the rights of the public at large as found in existing law."[233] Finding that the Oklahoma Department of Health had promulgated rules that were well-defined and compelling in that they firmly established state public policy[234] prohibiting the holding, preparing and

[226]. *Id.* at 1077.
[227]. 84 P.3d 728 (2004).
[228]. *Id.* at 729.
[229]. *Id.*
[230]. *Id.*
[231]. *Id.*.

[232]. *Burk* at 29.
[233]. *Clinton* at 545.
[234]. See: Barker v. State Ins. Fund, 40 P.3d 463 (Okla., 2001). Citing: *Clinton* at 546 stating, " To prevail on a claim of wrongful discharge in violation of Oklahoma's public policy, a plaintiff must first identify an Oklahoma public policy goal that is well established, clear and compelling and articulated in existing constitutional, statutory or jurisprudential law."

delivering of food under conditions whereby it may have been rendered diseased, unwholesome, or injurious to health, the court found for Silver.[235] Amazingly, three justices dissented saying that, "Diarrhea can be caused by many different conditions. . . . Vomiting can be caused by many different medical problems."[236] They then concluded that absent a doctor's diagnosis of a communicable disease, a determination that "unwholesome" or "unsanitary" conditions prevailed was entirely subjective and invited vagueness rather than the clear and convincing standard necessary.[237]

These courts would lead commentators and scholars to draw the conclusion that the employment at-will doctrine is approaching extinction and that its application does not shift risk to employees in employment relationships. However, such conclusions appear to be invalid. Nevertheless, the state court would be wise to narrowly define the public policy exceptions to the at-will employment doctrine.[238] While the demise of the doctrine has been anticipated and predicted,[239] the doctrine remains alive, resilient and absolutely viable. Some minor erosion has taken place, but the doctrine remains primarily unbreached. State or common law courts appear reluctant to change or create public policy and have generally relied legislatures to act.

[235]. *Silver* at 730.
[236]. *Id.* at 730.
[237]. *Id.* at 731.
[238]. Imes v. City of Sahville, CCL, 163 N.C.App. 668, 594 S.E.2d 397 (2004) (Holding that: "The narrow exceptions to [the employment at-will doctrine] have been grounded in considerations of public policy designed to protect..."); McGrady v. Oklahoma Department of Public Safety, 122 P.3d 473 (2005) (Holding that: It [public policy exceptions] applies only to a narrow class of cases and must be tightly circumscribed.); Dufner v. American College of Physicians, 73 Pa. D & C4th 382, 2005 WL 3635105 (Pa.Com.Pl. 2004) (Holding that: If the language is ambiguous or there is no definite contractual agreement, the purported agreement will be strictly reviewed because of the persuasive presumption that employment is at-will. Citing: Nix v. Temple University, 408 Pa. Super. 369, 596 A.2d 1132 (1991)); King v. Marriott International, Incorporated, 160 Md. App. 689, 866 A.2d 985 (2005) (Holding that: Maryland Courts have found a violation of a clear mandate of public policy only under very limited circumstances...); Goggins v. Rogers Memorial Hospital Incorporated, 274 Wis.2d 754, 683 N.W.2d 510 (2004) (Holding that: The public policy exception to employment at-will is a closely guarded common law concept, and more often than not, courts have "emphasized the limited scope of the exception." Citing: Bammert v. Don's Super Valu, Inc., 2002 WI 85, 254 Wis.2d 347, 646 N.W.2d 367.)
[239]. Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653 (2000).

V. Conclusion

Employment at-will policy remains a serious concern and should be monitored as the global economy continues to evolve. With states taking totally divergent view of the doctrine's application with regard to exceptions to public policy, one should expect that employee rights, from state to state, may conflict in such a manner that employees of the same corporation, but at different sites, may have entirely different rights and protections. Moreover, an employee contemplating transfer is well advised to recognize the potential change in their employee rights under exceptions to the doctrine as they move from state to state. Similarly, companies base location decision for organizational expansion opportunities on state employment law and policy. Therefore, a state's application of the employment at-will doctrine and its public policy and other exceptions, whether they be narrowly or liberally applied, is certainly not a matter that should be overlooked in making a location decision.

Future research on the impact of the doctrine and its impact on employee mobility and employer location and other decisions is necessary. Researchers should scrutinize and monitor court decisions and analyze legislative actions to determine the at-will employment doctrine's future and continued viability. Appreciating the history of a state's right to regulate its citizens, we must recognize that purely intrastate commerce and purely intrastate employment scenarios are becoming increasingly infrequent. With the mobility of the modern workforce, and the likelihood that a citizen may work in one state yet live in another, it is time for the creation and application of a consistent and just definition of wrongful termination nationwide.[240]

Therefore, Congress must eventually act. Federal legislation should preempt the cacophony of state laws and resultant interpretations addressing the employment at-will doctrine and make the doctrine and its exception more uniform and entirely replace Wood's American rule by creating a doctrine of implied good faith and fair dealing. One state court sums up the uncertainty and risk by noting both the criticism to and clarity of the doctrine. The court states that "we conclude that the interests of at-will employers and employees are presently accommodated in a manner which, though criticized, is well

[240]. For example; if a citizen of Pennsylvania works in New York, Ohio, Delaware or New Jersey and is terminated, it will be Pennsylvania that bears the burden of unemployment insurance or other potential public assistance costs. This makes the taxpayers of one state responsible for the foibles and idiosyncrasies of another state's employment laws.

understood."[241] However, assuming a logical and manageable impact on national, state and local economies, a doctrine or body of laws that works for all, that provides justice and fairness for all and that provides reasonable predictability for all, is certainly preferable to one that is "criticized, [but] is well understood."

[241]. Sheets v. F.E. Knight, 308 Or. 220, 779 P.2d 1000 (1989).

Tax Consequences of Foreclosure

David H. Cullis*

I. Introduction

In an economic environment in which home prices are stagnant, or in some cases, falling, loan defaults and real estate foreclosures are increasing at an alarming rate. In July, 2007, the number of foreclosure filings, bank repossessions, default notices and auction sale notices increased by 9% from the prior month and 93% in the previous year. Nationwide, there is one foreclosure for every 693 households, and in some areas, the rate is much higher. In the state of Michigan, there was one foreclosure for every 320 households and in Detroit, the figure was one in every 97 households.[1]

This may be due to losses of higher paid manufacturing jobs, increased monthly mortgage payments required under the terms of an adjustable rate mortgage, an illness or disability visited upon the homeowner or a member of his family, or any of a variety of other events generally considered to be outside the homeowner's control.

Financially strapped homeowners often face the choice of letting their homes go to foreclosure or contacting their creditor to renegotiate their mortgage loans. Frequently, homeowners are advised by financial advisors, and others, to renegotiate, rather than default on their loans, and in Ohio, Governor Ted Strickland has proposed a nonbinding agreement of lenders that includes, among other things, a provision for modification of loan terms, in appropriate cases. On April 7, 2008 Governor Strickland announced that nine mortgage servicers agreed to sign a "Compact to Help Ohioans Preserve Homeownership.[2]

What is a homeowner in jeopardy of mortgage default to do? A foreclosure action will usually result in the loss of a home, a deficiency judgment and a bad credit history, all of which will probably be avoided by a successful renegotiation of the mortgage loan. A successful renegotiation of a mortgage loan may result in an

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1. RealtyTrac ™, *US Foreclosure Market Report* (Jul. 2007).

2. Governor Strickland proposed a *Compact to Help Ohioans Preserve Homeownership*. He has asked the state's major subprime mortgage lenders to participate in the compact. (The text of the Compact can be viewed at www.safeguardproperties.com/pub/pdf/compact_to_preserve_homeownership.pdfx).

unexpected tax bill, however, late in 2007, Congress enacted the Mortgage Forgiveness Debt Relief Act of 2007,[3] which was signed into law by President Bush on December 20, 2007. The Act provides tax relief to qualifying mortgagors who renegotiate their loans or suffer foreclosure and would otherwise face taxable income as a result of a discharge of indebtedness. In addition to all of the practical considerations to be taken into account, defaulting homeowners should be informed of the tax consequences before making a decision as to any proposed course of action.

It is timely to review the principles of income from discharge of indebtedness, both because debtors should be advised of the income tax consequences of renegotiation and foreclosure, and because Congress has taken action to remedy what many consider to be an unfair tax result.[4]

II. Discharge of Indebtedness as Income

Internal Revenue Code Section 61(a)(12) provides that "Income from discharge of indebtedness" is taxable income. Before the new Act, if a foreclosure or renegotiation of a mortgage loan resulted in discharge of indebtedness, either in whole or in part, the amount of the indebtedness discharged was treated as ordinary income to the debtor. The Act creates a three year window during which the discharge of certain residential mortgage debt will be treated as an exception to the rule of Section 61(a)(12).

Initially, it is worthwhile to review the law when the exception is inapplicable. When an individual borrows money, the amount borrowed is not treated as income because the individual undertakes a corresponding obligation to repay a sum equal to the amount borrowed. The individual's net worth has not increased as a result of the transaction. Presumably, the debtor repays the loan with after tax dollars, and as he does so, his net worth is increased. The key is that the debtor repays the loan principal with *after tax* dollars. If the debtor were permitted to repay the loan with untaxed dollars, or if the repayments were wholly tax deductible, the debtor could convert

[3]. H.R. 3648, The Mortgage Forgiveness Debt Relief Act of 2007, Public Law 110-142, 110th Congress, 1st Session (2007).

[4]. S. 1394, the Mortgage Cancellation Relief Act of 2007, 110th Cong., 1st Sess. (2007). The Act was introduced in the United States Senate on May 15, 2007. Identical legislation has been introduced in the United States House of Representatives on April 17, 2007. H.R. 1876, 110th Cong., 1st Sess. (2007).

taxable income to nontaxable income simply by borrowing the purchase price and repaying the creditor.

A foreclosure by the lender might result in cancellation of debt income to the debtor depending on a number of factors. If the debt is recourse debt and the debtor is personally liable for any deficiency, and the deficiency is forgiven, then the debtor will have cancellation of debt income, unless, for some other reason, such as insolvency, the cancellation of debt income is exempt from taxation.

A renegotiation of the loan, if accompanied by a reduction in the principal balance or interest rate, can be a partial discharge of indebtedness and result in taxable income under section 61(a)(12).

Notwithstanding Section 61(a)(12), Congress has provided that discharge of indebtedness is an exclusion from income if the discharge occurs in the taxpayer's bankruptcy or if the taxpayer is otherwise insolvent or if the indebtedness is "qualified farm indebtedness" or, in the case of a taxpayer who is not a C corporation, "qualified real property business indebtedness".[5]

With respect to financially strapped homeowners, Section 108(a)(1)(B) is most helpful as it provides relief if the taxpayer is insolvent at the time of the discharge. This is useful if the taxpayer has, or is in a position to file for bankruptcy relief under Chapter 7, however it provides no relief if the taxpayer simply wants to renegotiate the loan without taking advantage of the protection that bankruptcy affords. In effect, the tax code provides relief to the debtor who seeks discharge of all of his debt, but taxes the taxpayer who resolves the debt by making arrangements with the creditor to pay a satisfactory, but less than face amount.

III. History of Discharge of Indebtedness as Income

Section 61(a)(12) was not originally in the Internal Revenue Code and cancellation of debt was not considered income. In 1926, the Supreme Court addressed the question in *Bowers v. Kerbaugh-Empire Co.*[6], In 1911, H.S. Kerbaugh, Incorporated, a subsidiary of Kerbaugh-Empire Co., entered into a financing arrangement with Deutsche Bank of Germany in which Deutsche Bank agreed to transfer German marks, equivalent in dollars, to the requirements of Kerbaugh. Kerbaugh then executed promissory notes for principal and interest payable to Deutsche Bank in marks or their equivalent in U. S. gold coin. A series of loans was made pursuant to this arrangement.

[5]. 26 U.S.C. § 108 (a)(1).

[6]. 271 U.S. 170 (1926).

Business apparently was not good and despite the financing arrangement, Kerbaugh sustained and deducted operating losses in 1913, 1914, 1916, 1917 and 1918.

The United States then entered World War I and the Deutsche Bank became an "alien enemy". At the same time, the value of German marks declined precipitously against the dollar. In 1921, Kerbaugh paid $113, 688.23 to the Alien Property Custodian in full settlement of its debt to Deutsche Bank. The result was that Kerbaugh borrowed $798,144.41, repaid $113,688.23 and called it even.[7]

The Commissioner of Internal Revenue determined that the difference between the amount owed and the amount paid, $684,456.18 represented taxable income to Kerbaugh. Kerbaugh contended that since the amount borrowed had been lost in construction operations no income resulted from the transactions and reported a loss of $581,254.77 for the year.[8] The United States Supreme Court agreed with Kerbaugh, reasoning that the transaction "did not result in gain from capital and labor or from either of them", and observed that the entire transaction was a loss.

The government got a second bite at the apple five years later and the Supreme Court came to a different conclusion in *United States v. Kirby Lumber Co.*[9] The Kirby Lumber Company issued bonds in 1923 and received par value for them at the time of issuance. Later that year, the value of the bonds had declined and Kirby was able to repurchase some of them for $137,521.30 less than the original issue price.[10]

Although the Supreme Court agreed with the government's position that Kirby had income in the amount of the difference between the selling price and the repurchase price, it specifically declined to overrule *Kerbaugh*. It acknowledged that Kerbaugh's repayment in cheaper marks was a gain to Kerbaugh, however the Court focused on the fact that the "transaction as a whole was a loss", therefore, Kerbaugh's gain was not taxable income.[11] Kirby, on the other hand, made money on the transaction. The Supreme Court observed that "the taxpayer made a clear gain. As a result of its dealings it made available $137,521.30 assets previously offset by the obligation of bonds now extinct".[12]

[7]. Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 173 (1926).
[8] Bowers, 271 U.S. at 173.
[9] 284 U.S. 1 (1931).
[10]. *United States v. Kirby Lumber Co.*, 284 U.S. 1, 3 (1931).
[11] *Kerbaugh*, 271 U.S. 170 at 175.
[12]. Kirby, 284 U.S. 1 at 3.

The *Kirby Lumber Co.* doctrine was codified in the Internal Revenue Code of 1954 as Section 61(a)(12)[13] which specifically provides that income from the discharge of indebtedness is taxable income. In addition, Congress, tipping its hat to *Kerbaugh*, also enacted, as part of the 1954 Code, Section 108[14] and Section 1017[15] which, to some extent, ameliorate the harsh effects of Section 61(a)(12). Section 108(a) creates exceptions to the inclusion where the discharge is due, among other things, to a Chapter 11 bankruptcy or the insolvency of the taxpayer. Section 1017 governs various adjustments to tax attributes that are required when Section 108(a) applies to exempt discharge of debt income from taxation.

IV. Tax Consequences of Foreclosure

Initially, it is important to recognize that a foreclosure, a transfer in satisfaction of debt or an abandonment of the property, will be treated as a sale or exchange of the property.[16] The mortgagor then realizes a gain or loss on the disposition of the property in the amount of the difference between his adjusted basis and the amount realized on the foreclosure. Generally, the amount realized is the fair market value of the property sold at foreclosure, together with the fair market value of any other property received and the amount of any debt discharged. An exception arises if, as in most cases, the mortgagor is also personally liable to the lender for any deficiency. In such a case, the amount realized is limited to the fair market value of the property and any discharge of indebtedness is separate ordinary income to the debtor.

Thus, if a foreclosure sale results in proceeds insufficient to pay the debt in full, the Debtor's tax treatment depends on whether the debtor is liable to the creditor for the deficiency.

Most residential lending is done on a recourse basis. First, the borrower gives the lender a mortgage interest in the property. The grant of a mortgage is a conveyance of an interest in land that allows the lender to take possession of the land and sell it, should the debtor fail to repay, or otherwise default on the loan. The mortgage provides

[13]. 26 U.S.C. § 31(a)(12).
[14]. 26 U.S.C. § 108.
[15]. 26 U.S.C. §1017.
[16]. Helvering v. Hammel, 311 U.S. 504 (1941); 2925 Briarpark, LTD. v. Commissioner, No. 97-60850 (5th Cir., 1999), Yarbrough v. Commissioner, 737 F.2d 479 (5th Cir.. 1984)

security to the lender that the loan will be repaid, at least to the extent that the property can be sold.

If, at the time of the loan, the debtor also executed a promissory note evidencing his agreement to repay the loan according to the agreed terms, the debtor remains liable to the creditor for the deficiency. The promissory note is a contract, enforceable at law, and it outlines terms of the loan agreement in detail, including the interest rate, due dates and amounts of payments and where payments are to be made. If the debtor fails to make the required payments, the lender can sue on the promissory note, and if successful, will obtain a judgment against the debtor for the unpaid balance due on the loan. The promissory note makes the debt recourse debt.

The combination of the promissory note and the mortgage give the lender two imperfect remedies should the debtor default on his obligation to repay. The promissory note is imperfect because, at best, it will only result in a judgment against the debtor. If the debtor declines or is unable to pay the judgment, the creditor then has the right to try to collect, using whatever legal process is provided by state law. The mortgage is imperfect because, unless the creditor is willing to wait until the property is sold, the creditor must initiate a foreclosure action in court to take possession of the property. The creditor then must sell the property to generate funds with which to repay the loan. The foreclosure action is expensive and time consuming, and the funds generated by the sale may be insufficient to pay the balance of the loan. If so, the creditor can only obtain a deficiency judgment against the debtor if the debtor has executed a legally enforceable promissory note.

The result in a foreclosure action, where a deficiency judgment is obtained against the debtor, is that the debtor has no cancellation of debt and no resulting taxable income. This is because the deficiency judgment continues the obligation of the debtor to the extent that the original debt was not discharged by the sale of the mortgaged real estate. Similarly, if there is no promissory note or obligation of the borrower to pay the deficiency, the borrower has no cancellation of debt income because there is no legally enforceable debt to be cancelled.

V. Tax Consequences of Renegotiation or Creditor's Waiver

The result is very different if the debtor and creditor renegotiate the loan, reducing the debtor's obligation, or if the debtor conveys the property to the creditor and the creditor waives any deficiency. In either case, the debtor has the advantage of avoiding a

lawsuit and mitigating damage to his credit history. The debtor will be able to maintain his status as a homeowner and will have resolved the debt on a basis satisfactory to the creditor.

Not surprisingly, there is a price to be paid for a successful renegotiation of a loan (mortgage or otherwise) if the lender is willing to reduce the balance due under the loan. The price is the income tax on income deemed to arise from the discharge of the indebtedness or cancellation of debt.

Income resulting from the discharge of indebtedness (cancellation of debt income) is not an intuitive concept, and, as a result, can be a trap for the unwary. Often, it is first brought to the attention of the recipient in the form of a creditor issued Form 1099-C, shortly after January 31 of the following year.[17] At that point, there is little that can be done except to advise the debtor that if the amount of the discharge is correctly computed, and the debtor was not insolvent at the time, it must be included as income and he will be liable for the tax on it.

VI. The Mortgage Forgiveness Debt Relief Act of 2007

Many, including some in Congress, considered it a wrongheaded approach to the problem in that the tax code penalized people who, acting responsibly, contacted their creditors and negotiate a mutually satisfactory repayment plan. It then rewarded "irresponsible" people who avoid their obligations by taking refuge in the bankruptcy courts.

The increasing number of foreclosures created impetus for legislative action and several bills were introduced in the House of Representatives and in the Senate to ameliorate the taxation of cancellation of indebtedness in residential mortgages.[18]

Eventually, the Mortgage Forgiveness Debt Relief Act of 2007 (hereinafter Act) was passed and signed by President Bush.[19] The Act addresses the problem by amending Section 108(a)[20] to include a new exception to discharge of indebtedness income for individuals in the

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[17]. Banks and other financial institutions are required to issue a Form 1099-C to debtors for cancellation of debt if the amount discharged exceeds $600.00. (26 USC § 6050P).

[18]. *See* The Mortgage Cancellation Relief Act of 2007, H. R. 1876, 110th Cong., 1st Sess. (April 17, 2007); *See* The Mortgage Cancellation Relief Act of 2007, S. 1394, 110th Cong., 1st Sess. (May 15, 2007).

[19]. .Pub. L. 110- 142, 121 Stat. 1803 (2007), codified in scattered sections of the 13 U.S.C. and other title. (Please verify)

[20]. 26 U.S.C. § 108(a).

case of discharge of "qualified residential indebtedness" discharged after January 1, 2007 and before January 1, 2010. [21] Generally, "qualified residential indebtedness" is debt incurred to purchase, renovate or repair residential property and can be the original loan or a refinance loan. The Act also provides that the amount excluded will be applied to reduce (not below zero) the basis of the principal residence of the taxpayer.[22]

The Act limits the amount of the exclusion to acquisition indebtedness not exceeding $2,000,000 in the case of married taxpayers filing jointly and $1,000,000 in the case of a married individual filing a separate return. Moreover, the relief does not extend to discharges that are in exchange for services performed for the lender or for any factor not directly related to the decline in the fair market value of the property or the financial condition of the taxpayer.[23]

The Act also provides that if the taxpayer is in bankruptcy and the discharge could be excluded pursuant to Section 368(a)(1)(B)[24] (the bankruptcy exclusion) or Section 368(a)(1)(E)[25] (the qualified principal residence debt exclusion), the taxpayer may elect the bankruptcy exclusion. If the taxpayer fails to make the election, the qualified personal residence exclusion will apply.[26]

For example, if the outstanding principal debt on the property is $200.000 and there is an additional $50,000 home equity loan having a $40,000 outstanding balance, the total debt secured by the property is $240,000. The debtor, unable to afford the payments, renegotiates the debt with the creditor, who cancels $30,000 of the home equity loan, leaving the debtor with title to the property, subject to a mortgage debt of $210,000.

If the debtor were not insolvent, section 61(a)(12)[27] would require the debtor to recognize and pay tax on income in the amount of $30,000. Presumably, to the extent that the home equity loan was used to improve the property the newly enacted legislation would exempt the forgiven $30,000 from taxation, subject to the exclusion limitation. The exclusion limitation is the outstanding principal of indebtedness $240,000 reduced by the sum of the net proceeds of the sale, $0.00 and the outstanding principal of other indebtedness secured by the property. Since there is no other indebtedness secured by the property, the $30,000 exclusion is within the $240,000 limitation, and the debtor

[21]. 26 U.S.C. § 108(a)(1)(E), H.R. 3648, Sec. 2(a)
[22]. 26 U.S.C. § 108(h)(1), H.R. 3648, Sec. 2(b).
[23]. 26 U.S.C. § 108(h)(1), H.R. 3648, Sec. 2(b).
[24]. 26 U.S.C. § 368(a)(1)(B), H.R. 3648, Sec. 2(b).
[25]. 26 U.S.C. § 368(a)(1)(E), H.R. 3648, Sec. 2(b).
[26]. 26 U.S.C. § 368(a)(2)(C), H.R. 3648, Sec. 2(c).
[27]. 26 U.S.C. § 61(a)(12).

could properly exclude the entire amount of debt forgiveness from income.[28]

In the above example, if the debtor had used $20,000 of the home equity loan to purchase a car and $10,000 for home improvements, only $10,000 of the debt cancellation income should be excluded because the $20,000 used to purchase the car would not be "qualified residential indebtedness."[29]

This may create an enforcement or recordkeeping problem, because the purpose of the Act is to exempt "qualified residential indebtedness" from taxation, but not other indebtedness that happens to be secured by a mortgage against residential property. It is likely to be the burden of the taxpayer to prove that the cancelled debt is "qualified residential indebtedness."[30]

VII. Conclusion

While the legislature has provided tax relief to taxpayers in mortgage foreclosures and renegotiations, it is a problem that many people use home equity loans, with second mortgages, for many different purchases, some relating to home improvement and some for payment of consumer debt. While there may be general agreement that residential debt, if cancelled, should not result in taxable income, the same might not be true if the debt was incurred to purchase consumer goods, or to pay for vacations, for example. Congress has distinguished the two types of debt in an effort to treat their discharges differently. It is likely that the burden will be on the taxpayer to prove the original purpose of mortgage loans should the IRS question the applicability of the exclusion to the discharge or any part of it.

Given the current economic environment some homeowners who are experiencing financial difficulties have a three year opportunity to renegotiate their loans without realizing taxable income. Others who are unable to repay their loans on mortgaged property and are facing foreclosure should be advised that negotiating a deed in lieu of foreclosure before January 1, 2010 has a tax saving advantage.

In addition, it would be advisable for homeowners, particularly those with additional debt beyond the purchase price of the home, to maintain records adequate to show what portion of a home equity loan was used to purchase and improve the home.

[28] 13 U.S.C. §108(a)(1)(E), H.R. 3648, Sec. 2(a).
[29]. 13 U.S.C. § 163(h)(3)(B).
[30]. 13 U.S.C. § 108(h)(2), H.R. 3648, Sec. 2(b).

EMPLOYERS BEWARE: THE TORT OF ABUSIVE DISCHARGE AND SARBANES-OXLEY, SECTION 1107

John A. Gray*

I. Introduction

> The government has a substantial interest in receiving the cooperation and testimony of any employee who has knowledge of criminal activity, regardless of the status of the government's investigation. Subjecting an employee to possible termination for his cooperation with an ongoing investigation could serve as a significant barrier to the government's acquisition of relevant information, because the employee will be less likely to cooperate if he knows that it could result in his termination. . . .[1]

Legal developments in whistleblower protection continue to emerge at the federal and state level. Recent developments at the federal level include express provisions of the Sarbanes-Oxley Act of 2002[2] and a United States Supreme Court decision recognizing an implied private "whistleblower protection" cause of action under Title IX of the Civil Rights Act.[3] An example at the state level is a recent decision by the Court of Appeals of Maryland recognizing the availability of the tort of abusive discharge to protect employees fired for reporting to a public enforcement official what they reasonably believe in good faith to be violations of the law by their employers.[4]

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[1] Miller v. U.S. Foodservice, 405 F. Supp. 2d 607, 613 (D.Md. 2005).

[2] The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 18 U.S.C.A. 1514 A (West Supp. 2003)(hereinafter "Sarbanes-Oxley). *See infra notes* 27 and accompanying text.

[3]. Jackson v. Birmingham Board of Education, 125 S.Ct. 1497 (2005)(holding that Congress created an implied private cause of action in Title IX in favor of internal whistleblowers who suffered retaliation for reporting gender discrimination violative of the Act). For a detailed analysis, *see* John A. Gray, "*Is There Whistleblowing Protection under Title IX?: the Hermeneutical Divide and the Role of the Courts,*" 12 J. Women & L 671 (2006).

[4]. Wholey v. Sears Roebuck, 370 Md. 38, 803 A.2d 482 (Md.2000)(holding tort of abusive discharge is available to remedy terminations in retaliation for reporting crime to public authorities) (hereinafter *Wholey*). For a detailed analysis of the majority

The purpose of this article is twofold. It first describes the development of Maryland's common law of the tort of abusive discharge in the *Miller* case by the U.S. District Court for the District of Maryland on the question of whether the public whistleblower tort created in *Wholey* applies to those responding to public enforcement officials in the course of a government investigation. Secondly, it explores the potential usefulness of this decision and its reasoning in conjunction with Sarbanes-Oxley, Section 1107 which makes it a federal crime to retaliate against "public whistleblowers."[5] It concludes that an employer who fires an employee "public whistleblower" about company conduct violative of federal law risks not only being charged with a federal crime, namely, the federal crime of retaliation against an employee-public whistleblower, but also the risk, if the employee termination occurred in Maryland,[6] of being found liable to the employee for the tort of abusive discharge. In short, federal law criminalizes employer retaliation, and state common law provides a compensatory remedy for its victim(s).

II. Maryland Public Whistleblowers Tort

The tort of abusive discharge occurs when an employer's motivation for a discharge contravenes a clear mandate of public policy.[7] Typically, the termination is in response to an employee's refusal to act in a way required by the employer that contravenes a clear mandate of public policy; for example, for refusing at the employer's instructions to commit a civil or criminal wrong, or to forego an employment related statutory right, or to forego the doing of an important civic duty.[8] To support a claim of wrongful discharge, the

and dissenting opinions, *see* John A. Gray, "*Scope of Whistelblower Protection in the State of Maryland: A Comprehensive Statute is Needed*," 33 U. BALT. L. REV. 225, 225-56 (2004).

[5]. 15 U.S.C. § 1107 (2006).

[6]. This also occurs in states with a comparable "public whistleblower tort."

[7] Adler v. American Standard Corporation, 291 Md. 31, 432 A.2d 464 (Md. 1981). *Adler* first recognized this tort in Maryland. This tort is also referred to as Abusive Discharge or Retaliatory Discharge.

[8] Brendon v. Molesworth, 341 Md. 621 (1996)(holding that Maryland's public policy against discrimination in employment applies to all employers regardless of size and that the tort of abusive discharge is available to employees of employers with fourteen or fewer employees to remedy a discriminatory discharge). *See* John A. Gray, *Workforce Size and Remedies for Discrimination in Employment: Wrongful Discharge and Future Possibilities*, 15 MIDWEST L. REV. 79, 79-107, (1997); John A. Gray, *Statutory Workforce Size Requirement and the Tort of Abusive Discharge: Small Employers Beware*, Lab. L. J., Jan. 1996, at 13, 13-24.

clear mandate of public policy must "be a preexisting, unambiguous, and particularized pronouncement, by constitution, enactment or prior judicial decision, directing, prohibiting, or protecting the conduct in question so as to make the Maryland public policy on the topic not a matter of conjecture or even interpretation."[9] "To establish wrongful discharge, the employee must be discharged, the basis for the employee's discharge must violate some clear mandate of public policy, and there must be a nexus between the employee's conduct and the employer's decision to fire the employee."[10]

A. Maryland Tort of Abusive Discharge

In *Wholey v. Sears*,[11] the Maryland Court of Appeals, Maryland's highest court, first recognized the availability of the tort of abusive discharge to provide a remedy to employees fired in retaliation for reporting to public enforcement officials employer conduct which they reasonably believed in good faith to violate the law. The court of appeals found the clear mandate of public policy in a state statute that make it a crime to injure the person or property of a witness to or victim of a crime for reporting it to an appropriate public enforcement official.[12] Section 9-303(a) ("Retaliation for testimony") states:

> (a) Prohibited -- A person may not intentionally harm another or damage or destroy property with the intent of retaliating against a victim or witness for: (1) giving testimony in an official proceeding; or (2) reporting a crime or deliberate act.[13]

Setion 9-301(d) ("Definitions") provides the definition of "witness" used in § 9-303(a):

> (d) Witness -- Witness means a person who: (1) has knowledge of the existence of facts relating to a crime or delinquent act; (2) makes a declaration under oath that is received in evidence for any purpose; (3) has reported a crime or delinquent act to a law enforcement officer, prosecutor, intake officer, correctional officer, or judicial officer; or (4) has been served with a subpoena under the authority of a court of this State, any other state, or the United States.

[9] King v. Mariott Int'l, Inc., 160 Md. App. 689 (2005).

[10] *Wholey*,803 A.2d at 489.

[11], *Id.*

[12]. The current version of the statutes discussed in *Wholey* is found in Md. Code Ann., Crim. Law §§ 9-303(a) and 9-301(d) (2002).

[13]. Md. Code Ann., Crim. Law § 9-303(a).

The *Wholey* majority concluded that Maryland's public policy clearly mandates protecting those who in good faith report violations of the law to public enforcement authorities. While the state statute provides a criminal penalty for those who are convicted of injuring the person or property of a witness or victim, it provides no remedy to the party so injured. The availability of the tort of abusive discharge at common law exists to fill this statutory gap.[14]

At the same time, the *Wholey* court rejected the availability of the tort to "private whistleblowers;" that is, those who, like the plaintiff in that case, had been fired for reporting the violations of the law by a company manger only to higher authorities in the company. Their reason for not extending the availability of the tort to private whistleblowers is that the statutory public policy covers only "public whistleblowers"; i.e., those who reported the conduct to a public enforcement officer.[15] If Mr. Wholey had reported the manager's crime, viz. theft of company property, to the police and then been fired in retaliation for doing so, the tort of wrongful discharge would have been available to him.

B. *Miller v. U.S. Foodservice (Miller I)*

In *Miller v. U.S. Foodservice*,[16] Mr. Miller's situation differed from that of Mr. Wholey. After USF dismissed James Miller as the Chair of its Board, its CEO, and President, James Miller sued USF for failing to provide him with post-termination benefits.[17] USF counterclaimed, asserting that Miller had breached his duties of care,

[14]. A creative use of this tort is Insignia Residential Corporation v. Ashton, Maryland, 359 Md. 560; 755 A.2d 1080 (2000), in which a female employee sued her employer for abusive discharge based on Maryland's public policy against the solicitation of prostitution rather than for quid pro quo harassment under Title VII of the Civil Rights Act of 1964. The statute criminalizing the solicitation of prostitution provides no civil remedy to the victim of solicitation. The tort of abusive discharge theoretically provides more generous remedies than does the statutory cause of action. *See* Gray, John A., *Sexual Harassment, Prostitution, and the Tort of Abusive Discharge: An Analysis and Evaluation of Recent Legal Developments*, 9 WOMEN'S L. J. 175 (2001).

[15]. Under this reasoning, the tort is not available to those who blow the whistle externally to a public news source without reporting it also to a public enforcement official.

[16]. 361 F. Supp. 2d 470 (D.Md. 2005).

[17]. Miller v. U.S. Foodservice, 361 F. Supp. 2d 470 (D.Md. 2005)(hereinafter *Miller I*). "Miller's complaint contains claims for breach of contract, including anticipatory breach of contract, fraudulent inducement, negligent misrepresentation, and promissory estoppel. He is seeking a declaratory judgment as to whether and to what extent he is entitled to benefits, as well as compensatory damages in the amount of at least $10 million, and a temporary restraining order and preliminary injunction ordering the companies to pay his benefits pending the outcome of this litigation." *Id.*

good faith, and loyalty as a USF director and officer and also his employment contract and "therefore they [were] not obligated to provide him with the benefits conferred by the contract." [18] In the early stage of the litigation, the U.S. District Court denied Miller's motion to dismiss USF's claims for breach of fiduciary duties of care, good faith, and loyalty, and breach of contract, and granted his motion to dismiss USF's claims of unjust enrichment, mutual mistake, and corporate waste. At this stage of the litigation, USF has moved,. *Inter alia*, to dismiss Miller's abusive discharge claim.

Mr. Miller contended that U.S. Foodservice (USF) had fired him from his CEO position because he had cooperated with an Assistant U.S. Attorney, the FBI, and the SEC in their investigation of accounting irregularities at USF.[19] Miller agued that he had reported to these public officials in response to their questions during their investigation of company conduct that he reasonably believed in good faith to be in violation of the law and that USF fired him in retaliation.[20]

USF argued that the tort was available only to those who were "whistleblowers" in the sense that their report caused the initiation of an investigation and not to those who reported what they knew in response to an investigation already underway.

> Because Miller did not initiate the government's criminal investigation into USF and Royal Ahold -- he merely responded to inquiries from the

[18]. *Id. at* 472. "The companies also are suing under the theory of corporate waste, and are bringing contract claims for mutual mistake and unjust enrichment. They are seeking forfeiture, disgorgement, and restitution to Royal Ahold and USF of compensation, incentive-based bonuses, and other benefits, as well as rescission of the employment agreement if its enforcement would result in ill-gotten gains." *Id.*

[19]. Miller v. U.S. Foodservice, 405 F. Supp. 2d 607 (2005)(hereinafter *Miller II*).

[20]. *Miller II,* 405 F.Supp. 2d at 609. (Id. 10). According to Miller, he was terminated for "reporting a suspected crime to the appropriate law enforcement or judicial officer," *i.e.*, he discussed the accounting irregularities at USF and Royal Ahold with AUSA Jonas, the SEC, and the FBI. *Id.* Miller asserts that he is a *witness* pursuant to both § 9-301(d)(1) and (3) -- he "has knowledge of the existence of facts relating to a crime or delinquent act" and "has reported a crime or delinquent act to a law enforcement officer, prosecutor, intake officer, correctional officer, or judicial officer." *Id.* According to Miller, he "is thus a *witness* under Maryland law both because he has knowledge of the accounting irregularities of USF and Royal Ahold (*i.e.*, knowledge of the facts of an alleged crime) as well as because he reported those irregularities (*i.e.*, a crime or delinquent act) to the SEC and the FBI (*i.e.*, law enforcement officers) and AUSA Jonas (*i.e.*, a prosecutor)." . . . . *Id.* Accordingly, Miller claims that he is subject to the protection of § 9-303(a)(2), and his termination from USF constitutes unlawful discharge in violation of the holding in *Wholey. Id.*

> government in response to an investigation that was already underway -- Miller is not a "whistle blower," and therefore is not eligible for the protection extended by *Wholey*. USF, in short, would limit *Wholey* to those situations where an employee who reports a suspected crime initiates the investigation.[21]

USF also argued that Section 9-303, the statute that made it a crime to threaten or injury the person or property of a witness to or victim of a crime, and therefore the reach of its underling public policy, should be interpreted *in pari material* with Section 9-501, which made it a crime to make a false statement to the police resulting in the initiation of an investigation.[22]

C. *Public Whistleblower Tort Available to Those Fired in Retaliation*

USF did not convince the District Court, which dismissed its motion and held that Maryland's "public whistleblower" tort is available to those fired in retaliation for their cooperation with public enforcement authorities in the course of an investigation. Because Wholey was a relatively recent case, there is no Maryland case law interpreting what it means to "*report a suspected crime* to the appropriate law enforcement officer," the primary issue in dispute between the parties.

The District Court reasoned, first, that "there is no support for the assertion that one who 'responds' to questions posed by authorities is not 'reporting' a crime."[23] "In other words, to 'report' suspected crime means to tell law enforcement what one knows about the crime alleged. USF does not present any explanation for why the court should interpret the word 'report' more restrictively than its common

[21]. Miller II, 405 F. Supp. 2d at 611-12. (Id.11.)

[22]. Md. Code Ann., Crim. Law § 9-501. *In pari materia* is a canon of statutory interpretation. It requires that statutory provisions that deal with the same or similar subject matter should be similarly interpreted. Since the "false statement to the police" provision refers only with those made to the police to instigate an investigation or other official action, likewise "reporting a crime to public enforcement authorities" should be interpreted to refer only to those made to initiate an investigation.

[23]. *Miller* II, 405 F. Supp. 2d at 612. (Id. 11). "The primary meaning of the verb report, as defined by *The American Heritage Dictionary, New Collegiate Edition,* is '[t]o make or present an account of (something), often officially, formally or regularly; to relate or tell about; to present; to report one's findings.' This definition would encompass Miller's conversation with AUSA Jonas, the SEC, and the FBI, wherein he 'fully and truthfully disclosed his knowledge of the accounting irregularities at USF.'" *Miller II*, 405 F. Supp. 2d at 612. (*Id.)*

meaning."[24] Second, the Court concluded that "there is little support for USF's contention that Section 9-303 should be read *in pari material* with Section 9-501. Section 9-303 concerns obstruction of justice by threatening or injuring witnesses or victims, whereas *Section* 9-501 concerns only false statements to law enforcement officers made with the intent to deceive them and to cause an investigation or other action to be taken as a result of the false statement.

> "... the limitation in the false statement statute exists because the legislature put it there. The express terms of §9-303 by contrast do not include a causative or temporal limitation. Instead, §9-303 by its express terms applies to any person who reports a crime."[25]

Third, the District Court concluded that Miller has the stronger argument as a matter of public policy. It cited *Adler v. American Standard Corporation*[26] and stated that "... there is a clear public policy [in Maryland] favoring investigation and prosecution of criminal offenses."[27]

> USF does not have a compelling argument for its assertion that only those witnesses who first report a suspected crime, or those who are the initiators of their conversations with law enforcement officials, are subject to protection under *Wholey*. USF asserts that individuals such as Miller, who merely respond to inquiries from law enforcement, are not worthy of the same protection as a "whistleblower" because the former does not reveal evidence of a previously unknown crime. But this criticism is misguided. The government has a substantial interest in receiving the cooperation and testimony of *any* employee who has knowledge of criminal activity, regardless of the status of the government's investigation. Subjecting an employee to possible termination for his cooperation with an ongoing investigation could serve as a significant barrier to the government's acquisition of relevant information, because the employee will be less likely to cooperate if he knows that it could result in his termination. Thus, it is in the

[24]. *Id.*

[25]. *Id.*

[26]. 432 A.2d 464, 4649 (1981).

[27] *Miller II*, 405 F. Supp. 2d at 612.

> public interest to interpret *Wholey* to apply to any person who reports a crime.[28]

USF also argued that if the Court adopted Miller's Miller's interpretation of "report" as used in *Wholey*, then employees who have committed a crime could protect themselves from termination by disclosing the crime upon questioning from the authorities. The District Court responded:

> This argument confuses the issues. Under the doctrine of wrongful discharge, the employer would not be able to terminate the employee for reporting the crime to the authorities. The employer would, however, still be able to terminate the employee for the underlying crime. Moreover, USF does not explain how the "whistle blower" exception would not culminate in the same result. Under USF's interpretation of *Wholey*, an employee who has committed a crime could report his own illegal act to the authorities in order to use the wrongful discharge tort as a shield against termination.[29]

Miller illustrates a federal court providing a state common law compensatory remedy to an employee fired for reporting in good faith violations of federal law to federal law enforcement authorities in the course of an investigation. The outcome on USF's motion to dismiss the abusive discharge claim turned on the construction of the term "report" to include not only acts of whistleblowing that call to the authorities attention potential violations of the law, but also any information concerning a potential violation provided by an employee during the course of an investigation by public enforcement authorities. Other terms in §9-303, the state statute that is the basis for the tort, namely "official proceeding" and "crime or deliberate act" include, at least in the perspective of this federal district court, although not in issue, not only "state" but also "federal" laws, investigations, and enforcement authorities.

Clearly, the *Miller* decision has significantly expanded the availability of Maryland's "public whistleblower" tort to employees in the state of Maryland. The number of employees interviewed in local, state, and federal enforcement investigations in Maryland reasonably must be many times the number of those who whistleblow in the usual sense of taking the initiative to report wrongdoing. Finally, and obviously, *Miller* is an interpretation of Maryland common law by a federal district court and so is subject at some point of time in the

[28] *Id.* at 613.
[29] *Id.* at 613n.3.

future to either confirmation or reversal by Maryland's highest court, the Court of Appeals. The question will be whether it accepts either USF's "standard" understanding of "public whistleblowing" or Miller's broader concept.

III. The Federal Crime of Retaliation Against Informants under Sarbanes-Oxley Act

Further, if the information provided by the employee concerns a federal offense, a retaliating employer also runs the risk under Sarbanes-Oxley, Section 1107, of being charged with a new federal crime in addition to federal offense reported by the fired employee. Congress enacted Sarbanes-Oxley in 2002 in response to the Enron scandal. As a generalization, Congress identified and addressed the principal "conditions precedent" in the areas of accounting practices and corporate governance that allowed the possibility of the scandal. One concern was to assure the protection of employee whistleblowers of illegally questionable conduct against retaliation by those "higher-up" in the company. To deal with this concern, Congress included three provisions in the Sarbanes-Oxley, namely Section 301, 806, and 107.

A. Section 301. Audit Committee

Section 301, Audit Committee, *inter alia*, requires the audit committees of boards of publicly traded companies to have adequate procedures to receive, review, and act on reports, including anonymous reports, regarding suspicions about legally questionable accounting and finance practices of the company. Section 806, Protection of Employees of Publicly Traded Companies Who provide Evidence of Fraud, provides a civil damages action to public company employees who provide information about actions they reasonably believe to be violations of securities law, SEC rules, or other federal laws relating to fraud against shareholders. The report may be made to a federal regulatory or law enforcement agency, Member of Congress or congressional committee, or a person with supervisory authority over the employee or other person working for the employer who has the authority to investigate, discover or terminate the misconduct. creating a civil remedy for those who blow the whistle on securities related matters. Section 1107, Retaliation Against Informants, creates the new "retaliation" crime.

B. *Sarbanes-Oxley, § 1107*

Sarbanes-Oxley, Section 1107, Retaliation Against Informants, states:

> (a) In General. Section 1513 of Title 18, United States Code, is amended by adding at the end the following: "(e) Whoever knowingly, with the intent to retaliate, takes an action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of an Federal offense, shall be fined or imprisoned not more than 10 years, or both.[30]

The elements of this new crime to be proven beyond a reasonable doubt are: (1) A harmful action, including interference with the lawful employment or livelihood. This goes beyond the existing federal statute which **Section** 1107 amends referred to death, bodily injury or damage to property.[31] (2) Done knowingly, with the intent to retaliate, (3) to a person providing information (a) to a law enforcement officer. (b) that is truthful and (c) that concerns the commission or possible commission of a federal offense. *Done knowingly to retaliate* is the *scienter* requirement of a specific intent crime. Next, law enforcement officer includes any local, state or federal law enforcement officer. Finally, the term "federal offense" may include any violation, civil or criminal, of any federal statute or agency rule or regulation.

Theoretically, for example, any employer and individuals involved in the decision who retaliate against an employee for reporting to an enforcement authority a reasonably believed violation of federal employment discrimination law or occupational and safety related law or environmental law could be could be charged under Section 1107 as well as be civilly liable under the relevant statute's anti-retaliation provision and also for the violation that is the subject matter of the report.

In brief, Section 1107 makes criminal any adverse employment related action, including termination, taken by an employer against an employee for reporting to appropriate law enforcement authority what the employee in good faith reasonably believes to be a violation of *any* federal law, and not just securities fraud. It applies to all companies, including nonprofits, and not just to public companies, and to all individuals involved in retaliatory

[30] 18 U.S.C. § 1513.

[31] 18 U.S.C. § 1513, Retaliating Against A Witness, Victim, or an Informant.

termination decisions related to any federal offense. Unlike the tort of abusive discharge which is a matter of private enforcement, charging someone or some company with this new crime of "retaliation against informants" is a matter of the prosecutorial discretion of U.S. Attorneys.

C. *Section 1107 Combined With Tort Of Abusive Discharge*

Professor Miriam A. Cherry has analyzed the three whistleblower related provisions[32] of the Sarbanes-Oxley Act of 2002 in terms of their impact on employment law.[33] She concluded that the combination of the a Section 806 retaliatory discharge lawsuit by an employee together with the possibility of a Section 1107 criminal charge by a U.S. attorney means that "Sarbanes-Oxley is an advance for conscientious employees" of publicly traded companies who have suffered retaliation for reporting securities related fraudulent activities."[34] However, she also concluded that Sarbanes-Oxley is significantly flawed in three ways on its handling of whistleblowing and should be amended accordingly.[35] The first has to do with the failure of Section 806 to specify what types of procedures are adequate to meet the responsibility of the audit committee.

> Employers must take action to deal with employee complaints of the type that both Cooper and Watkins made, and yet the precise mode of dealing with such complaints is not specified in the Act. Information can seemingly be sent into a void, and yet an employer will still comply with the letter of the law. Further, whistleblowing complaints under Sarbanes-Oxley can be sent to arbitration, a forum that provides inadequate remedies for employees. Some retaliatory actions are now considered criminal - even though the underlying employment action could be sent to mandatory arbitration. In short, the Sarbanes-Oxley Act provides a strange combination

[32] Section 301, *inter alia*, requires the audit committees of boards of publicly traded companies to have procedures to receive, review, and act on reports, including anonymous reports, regarding suspicions about legally questionable accounting and finance practices of the company. Section 806 creates a civil remedy for those who blow the whistle on securities related matters. Section 1107 creates the new *retaliation* crime.

[33] Miriam A. Cherry, *Whistling in the Dark: Corp0rate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029 (2004).

[34]. *Cherry, supra, at 1085.*

[35]. *Id.*.

of tort, criminal, employment, and alternative dispute resolution issues in its reform of federal securities laws.

If Sarbanes-Oxley had been in force at the time of the scandals, what would have been the fate of the two whistleblowers, Watkins and Cooper? Those at the top of the Enron hierarchy could still have asked outside counsel about the company's ability to fire Sherron Watkins, but after Sarbanes-Oxley, the answer would be that Enron could not fire Watkins for reporting her concerns. That answer would be definitive and would no longer depend on the vagaries of the Texas public policy exception. If Watkins had been fired or another adverse employment action taken against her for making such a report, Enron could have faced a lawsuit for retaliatory discharge under [Section] 806. The suit would likely have resulted in Enron providing Watkins with "make whole" relief. Further, after her testimony, any participants in her firing could have faced criminal charges under [Section] 1107.[36]

For purposes of this article, the third flaw Professor Cherry identified is the most important.

> However, [Section] 806 is an area-specific whistleblowing statute; it applies only to fraud. n388 There are still many other areas where employees may feel compelled to report violations of a state or federal rule or regulation, and such reports would be in the public interest, yet employees could be dismissed from their positions, harassed, or otherwise retaliated against ... in many jurisdictions without broad whistleblower protection statutes, or where judicial decisions have given such statutes narrow application, it is relatively easy for an employee's whistleblowing claim to fall through the cracks.
>
> Law reform, then, should include uniform federal protection for whistleblowers who report any violation of federal law or regulation to law enforcement. This is with the caveat that there should be an "escape clause" for such things as reporting that someone in the company was involved in an essentially technical violation. This protection could cover workplaces over a certain size - perhaps fifteen, as is the case with Title VII - and would not depend on either the vagaries of the type of wrongdoing that is being reported or the jurisdiction in which the whistleblower happens to live. Such protection would have a positive impact not only on the individual whistleblowers who receive direct protection under the law, but also on the enforcement of federal statutes. A uniform statement of state law, standardizing the types of dismissal that are against public policy, would also be a positive development.[37]

I agree with Professor Cherry's analysis and recommended amendment. However, until and if such an amendment takes place, employees in the state of Maryland enjoy precisely the protection that her recommended amendment of Sarbanes-Oxley advocates; and, perhaps, even broader protection.

Maryland's "public whistleblower" tort covers whistleblowing with regard to *any* law and not only securities related fraud laws. It also includes not only those who go first to the authorities to create *Wholey* claims, but also those who are questioned by the authorities in the course of their investigations creating *Miller* claims. This far reaching, common law cause of action may be more effective in deterring employer retaliatory employer conduct that the possibility of being charged with the new federal crime, which does depend on federal prosecutorial discretion. And arguably the reasoning of the *Miller* court including participants in enforcement investigations may also be adopted in Section 806 civil lawsuits.

IV. Conclusion

Employers should not fire an employee in retaliation for reporting to a law enforcement authority company conduct that the employee in good faith reasonably believes to be in violation of a federal law. Doing so is a criminal violation of Sarbanes-Oxley in all states and is a commission of the tort of abusive discharge in those states with a "public whistleblower" version of that tort similar to that in Maryland.

[36]. *Id.*

[37]. *Id. at 1086.*

Contract Law for the Executive MBA Program

Henry E. Mallue, Jr.*

I. Introduction

It can scarcely be imagined that a law-based course in an Executive Master in Business Administration (ExMBA) program would not include a substantial treatment of the law of contracts. The mid-level managers for whom such programs are designed are routinely involved in the buying and selling of goods and services for their current employers, and as they move up the corporate ladders their influence in contract formation and performance should be expected to increase. Many of these students have employment contracts with their employers that contain covenants not to compete. These covenants attempt to restrict, in some way, the activity of the employee upon termination of her or his employment contract. Such a common thread provides an opportunity to introduce the law of contracts to these students with material with a built-in importance and relevance to them.

II. An Introductory Example of Restrictive Covenants

So that ExMBA students do not jump to an attempt to apply every contract case about which they are going to read to their own fact situations, perhaps it is best to begin the discussion of contracts with a case involving a restrictive covenant not relating to the employment situation. Such an example is *Mattis v. Lally*,[1] a case involving the sale of a barbershop in Rockville, Connecticut. The Connecticut supreme court summarized the facts of the case. "The defendant owned and operated in Rockville a business known as Lally's Barber Shop. In September, 1948, he sold the shop 'together will all good will' to the plaintiff for $1500. The bill of sale contained the following restrictive clause: 'The seller agrees in and for the consideration above named, that he will not engage in the barbering business for a period of five years from this date in the City of Rockville * * * or within a radius of one mile from Market Street in said City * * * either directly or

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[1] . 82 A.2d 155 (Conn. 1951).

indirectly on his own account or as partner, stockholder, employee or otherwise.' The one-mile alternative was included because the limits of the town of Ellington were within a quarter mile of the location of the defendant's business. At the time of the sale, the defendant's condition of health was not good. He and his wife owned the four-family tenement house where they lived. The property was heavily incumbered (sic) with mortgages and the taxes were in arrears. The defendant was fifty-eight years old, had been a barber for forty years and was unfamiliar with any other kind of work.

He was not an invalid, however, and was capable of doing some manual and physical labor. He opened a restaurant which proved unsuccessful. He gave it up and went to work for the plaintiff as a barber in his old shop. After working there for about nine months he left in April, 1950, and set up a one-chair barber shop in his own home, which was not 300 yards from the shop he had sold to the plaintiff. There he has the patronage of old personal customers and the work is easier for him. His income is about what he received when he was working for the plaintiff. His wife has carried on a small millinery business from their home to increase the family income. He recently purchased a new Plymouth car. After the defendant left the plaintiff's employ, the business of the plaintiff did not justify the hiring of another assistant except in Saturdays. He had to work harder and his net receipts were less."[2]

The plaintiff, Edward J. Mattis, sought an injunction to restrain the defendant, William F. Lally, from engaging in the barbering business in violation of his covenant in the bill of sale. The trial court concluded that Mattis' business needed the protection of the restrictive clause, that the clause worked no hardship on the defendant, and that the contract and the restrictive clause were valid and enforceable.[3]

The Connecticut Supreme Court, to which Lally appealed, began its opinion with a blunt statement, "This is a contract in restraint of trade."[4] At this point references to Section 1 of the Sherman Act and corresponding state antitrust legislation is appropriate, noting that generally such contracts are condemned. That such statutory schemes do not prevail over certain restraints upheld under common law principles should be noted, naming contacts involving the sale of the goodwill of a business, the employer-employee relationship, and efforts to protect the middleperson in sales contracts.[5]

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[2]. *Id.* at 155-56.
[3] .*Id.* at 156.
[4] .*Id.*
[5]. *See generally* M. Handler, R. Pitofsky, H. Goldschmid & D. Wood, CASES AND MATERIALS ON TRADE REGULATION, Ch. 1, § 2, at 26-53 (4th ed. 1997).

It cannot be said, however, that every contract in restraint of trade falling into one of the above categories is valid, however. The *Mattis* court continued, articulating the traditional three-fold test for validity of such contracts, "The test of its validity is the reasonableness of the restraint it imposes. (Citations omitted.) To meet this test successfully, the restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interests of the party in whose favor it is to operate, without unduly interfering with the public interest. (Citations omitted.)"[6]

The court joined the first two considerations when applying the legal standard articulated to the facts of *Mattis*. "The plaintiff bought all the equipment in the defendant's shop 'together with all good will.' Good will in the sense here used means an established business at a given place with the patronage that attaches to the name and the location. It is the probability that old customers will resort to the old place. (Citations omitted.) Having paid for 'good will,' the plaintiff was entitled to have reasonable limitations placed upon the activities of the defendant to protect his purchase. If the plaintiff could hold the patronage of the defendant's old customers and secure that of others who might be looking for the services of a barber at the established location, he would be reasonably assured of carrying on the business profitably. If, however, the defendant should open up another shop in the immediate vicinity, it was to be expected that his old personal customers and others would seek his services. There is no finding that the barber shop before the sale to the plaintiff attracted customers from the entire area covered by the restriction except as that fact is implicit in the court's finding that the plaintiff's business required the protection accorded to it. If the fact were otherwise, the burden was upon the defendant to establish it.[7] The court correctly concluded that the limitations as to area and time were fairly and justly calculated to protect the business sold and that they were not unreasonable.(Citations omitted.)"[8]

Thus, in the language of the standard articulated, the supreme court found the required limitation with respect to time and place in the Mattis-Lally contract, and that the restraint, as so limited, provided no more than a fair and just protection to the party (Mattis) benefited by the restraint. It is appropriate to discuss parenthetically at this point the shifting burden of proof suggested by the court. If the area covered by the restraint clause provided more than needed protection to the buyer-plaintiff, the burden of proof of such overextension was on the

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[6]. 82 A.2d at 156.
[7]. Milaneseo v. Calvanese, 92 Conn. 641, 642, 103 A. 841.
[8]. *Id.*

defendant when the plaintiff sought enforcement of the restraint. It apparently was not incumbent upon the plaintiff to justify the contract restraint's, but, rather, it was incumbent upon the defendant to prove the restraint overbroad if he were able to do so.[9]

The *Mattis* court then turned to the potential interference with the public interest, the third prong of its three-fold test. "The defendant argues that this contract works an undue hardship upon him and therefore should not be enforced in equity. The court has found that the circumstances of the defendant's health and finances and the possibility that both might deteriorate in the future were known to him when he made the contract. The court found further that there was no possibility that the defendant and his wife would become public charges and that the defendant was not an invalid, although his health would be under less strain and the family finances improved if he could carry on his vocation as a barber in his home. The plaintiff, however, had purchased the business for a substantial consideration and in good faith, relying upon the restrictive clause for protection. Equity under some circumstances will hold invalid contracts which are so broad in their application that they prevent a party from carrying on his usual vocation and earning a livelihood, thus working undue hardship. (Citations omitted.) Those circumstances are not present in this case. The defendant may practice his vocation anywhere except in the limited area of one town and part of another. The rest of the state and the world is open to him. To excuse him from the performance of his agreement would amount to returning to him a large part of what he has sold and would work a real hardship on the plaintiff. Nor was there any unwarranted interference with the public interest. The public is not being deprived of the defendant's services as a barber except in the area where the plaintiff is offering the same kind of service. (Citation omitted.) The court correctly held that the restriction worked no undue hardship upon the defendant and was not an unreasonable interference with the public interest."[10]

Indeed, the *Mattis* court considered the issue of the public interest from both sides, the side of the defendant with the possibility of the restraint driving him to the welfare rolls, and the side of the public, which may have deprived of convenient or essential services. On both counts the restraint in *Mattis* was found not to offend. The defendant had a wide area in which to practice his barbering outside of the area identified in the restraint, and the public had opportunity to use the plaintiff's services at the location of the defendant's former shop if it chose to do so. The restraint clause thus passed the third prong of the

[9]. *Id.*
[10]. *Id.* at 156-57.

test of reasonableness. With the contract's restraint satisfying each of the three criteria for potentially valid restraints, the Connecticut supreme court in *Mattis* concluded, "There is no error."[11] The trial court was correct in enjoining the defendant's violation of the restraint clause.

III. An Employment Contract Restrictive Covenant

Mattis provides an example of the enforcement of a restrictive covenant in a contract for the sale of a business, including its good will. An introductory case in which is found an employment contract restrictive covenant should now be introduced. Although not long on reasoning, *Hunter v. North American Biologicals, Inc.*,[12] provides an example of a restraint on an employee's conduct and a court's willingness to enforce the restraint under circumstances generally to be avoided.

North American Biologicals, Inc., was "a Florida corporation dealing in blood plasma with offices in Orange County, Florida. On February 11, 1970, appellant, while employed by appellee, executed a non-competition agreement which provides in part: 'During the time I am an employee of NABI, and for a period of one (1) year thereafter, I will not engage in any activity, on my own behalf or on behalf of any competitor of NABI, which is the same as or similar to work engaged in by me as an employee of NABI, unless I have the written consent of NABI.' Appellant left the employ of appellee in November, 1972, and obtained employment with another Orlando firm engaged in business similar to that of appellee, although appellant's position with his new employer (as manager) differed from his former position with appellee."[13]

Unlike *Mattis*, the *Hunter* court necessarily applied a controlling statute. "This interlocutory appeal involves the application of F.S. Section 542.12, F.S.A. 1971, which pertinent provisions provide: '(1) Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by subsections (2) and (3) hereof, is to that extent void. (2) . . . one who is employed as an agent or employee may agree with his employer, to refrain from carrying on or engaging in a similar business . . . within a reasonably limited time and area . . . so long as such employer continues to carry on a like business therein. Said

[11]. *Id.* at 157.
[12]. 287 So.2d 726 (4th DCA Fla. 1974).
[13]. *Id.* at 727.

agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction.'"[14]

In attacking the injunction granted, appellant Hunter asserted that the trial court made three errors. He first asserted that the blood plasma business is a profession, and, thus not regulated by the statute quoted by the court of appeals, and, third, that he had accepted a different position with his new employer than the one he held with North American Biological, Inc. The Fourth District Court of Appeal rejected both of these arguments. It is the second argument that is perhaps most instructive of the court's willingness to enforce the intent of the legislation, however. The court noted, "Second, appellant argues that since the agreement fails to specify any geographical area to which it is applicable, the agreement is so vague and broad as to be void and unenforceable."[15] Without elaboration or explanation, the court said simply, "We disagree."[16] The court apparently did not see compliance with the statutory language calling for a "limited time and area" to be a predicate for the validity of such a restraint, and enforced the restraint despite the omission of a named geographic area, required by common law in *Mattis* and by statute in Florida.[17] Perhaps enforcement of the restraint without the geographic limitation was deemed to be within the "discretion" granted to the court by the statute.

IV. An Employment Restrictive Covenant Rejected

Finally, Executive MBA students should be exposed to a restrictive covenant which does not meet the common law or statutory requirements of the jurisdiction in which its enforcement was sought. In other words, students should be exposed to such a covenant that was not enforced by the courts, so that they do not get the impression that the employer always wins. An example is provided by *Stringer v. Herron*.[18]

On July 1, 1985, Walter Herron, a doctor or veterinary medicine licensed to practice in South Carolina, entered into an employment contract with Fred Stringer, also a South Carolina-licenses veterinarian, whereby Herron was to work for Stringer for the five-year period beginning July 1, 1986, and ending July 1, 1991. The employment contract contained the following restrictive covenant.

[14]. *Id.* at 727-28.
[15]. *Id.* at 728.
[16]. *Id.* The court cited one Florida supreme court case and two appellate decisions in support of its position.
[17]. The appellate court held, "The trial court properly entered the appealed order, and the same is hereby affirmed." 287 So.2d at 728.
[18]. 424 S.E.2d 547 (S.C.App. 1992)

"During a period of three years from the termination of the employee's employment . . . the employee will not associate himself or engage in, directly or indirectly, any business or practice which exists for the practice of veterinary medicine within fifteen miles of any veterinary practice operated by the employer . . . at the time of termination of the employment."[19] Also provided in the contract were liquidated damages in the amount of $30,000.[20]

On or about July 15, 1989, Herron voluntarily left Stinger's employ and began a mobile veterinary practice in and around Anderson County, South Carolina, where, at the time, Stringer operated three animal hospitals. Advertising in the yellow pages and in local newspapers, Herron apparently met with some success, as records filed with the South Carolina Department of Health and Environmental Control indicated he vaccinated at least 249 animals formerly on Stringer's active customer lists.

When Stringer brought suit to enjoin Herron from practicing veterinary medicine within the proscribed area and time, the Circuit Court for Anderson County granted Stringer an injunction and awarded him $30,000 in liquidated damages. Upon Herron's appeal, the Court of Appeals of South Carolina, on November 16, 1992, reversed, holding "the territorial restriction to be overbroad: therefore, it is unreasonable and unenforceable."[21]

The court first articulated the general public policy of South Carolina regarding covenants not to compete, citing *Rental Uniform Service of Florence, Inc. v. Dudley*,[22] "Covenants not to compete contained in an employment contract are generally disfavored and will be strictly construed against the employer."[23] Continuing to cite *Dudley*, the *Stringer* court then listed the essential elements of valid restrictive covenants:

"A covenant not to compete will be upheld if it is:

(1) necessary for the protection of the legitimate interest of the employer;
(2) reasonably limited in its operation with respect to time and place;
(3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;

[19]. *Id.*
[20]. *Id.*
[21]. *Id.* at 548.
[22]. 301 S.E.2d 142 (1983).
[23]. 424 S.E.2d at 548.

(4) reasonable from the standpoint of sound public policy; and
(5) supported by a valuable consideration."[24]

Referring to the second of the above criteria, and citing *Standard Register Co. v. Kerrigan*,[25] court observed, "To be considered reasonable, a territorial restriction must not cover an area any broader than is necessary to protect the employer's legitimate interest."[26] *Dudley*, citing *Standard Register*, had articulated a more specific standard which the court could have employed in *Springer*, "A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers."[27] Indeed, the specific geographic restraint upheld in *Dudley* had covered the territory "in which (Dudley) worked or to which he was assigned at any time during his employment with the Company."[28]

The *Stringer* court, in rejecting the territorial restraint before it, took pains to analyze the geographical extent of the restraint necessary to protect Stringer. "As we mentioned, Stringer maintained a 'veterinary practice' at three locations within Anderson County. The practice locations were so situated within the county that the 15-mile radius around each one overlapped with the others and together they created a proscribed area that embraced nearly all of Anderson County, parts of Abbeville, Greenville, Pickens, and Oconee Counties, and, indeed, a small part of Georgia. Although 96 per cent of Stinger's 14,326 clients lived within 15 miles of at least one of the three practice locations, 55 per cent or about 7,897 of them lived within 5 miles and 84 per cent or about 12,034 of them lived within 10 miles of at least one of these locations."[29]

The court apparently felt that Stringer's territorial restraint on Herron's activities could have been more narrowly drawn, with no adverse impact upon the usefulness of the restraint to Stringer. "Considering that the territorial restriction surrounding the three practice locations reached into adjoining counties and another state and considering that the overwhelming majority of Stringer's clients lived much closer than 15 miles from at least one of the practice locations,

[24]. *Id.*
[25]. 119 S.E.2d 533 (S.C. 1961).
[26]. 424 S.E.2d at 548.
[27]. 301 S.E.2d at 143.
[28]. *Id.*
[29]. 424 So.2d at 548.

we hold the territorial restriction to be overbroad; therefore, it is unreasonable and unenforceable."[30]

V. Important Elements of Contract Law

With the facts, issues, decisions, and reasoning of *Mattis*, *Hunter*, and *Stringer* in mind, Executive MBA class attention and discussion may be directed to the elements of contract law with which these students should become familiar. Types of contracts, including the dichotomies of bilateral versus unilateral, express versus implied, void and voidable (and valid), and executed versus executory contracts, can be explored using these three cases as examples. Valid contracts' essential elements, including (1) a manifestation of mutual assent, usually discussed in the context of offer and acceptance, (2) consideration, (3) capacity of the parties, and (4) legality of object, with emphasis on the last, as it was the prominent issue in each of the three employment contract restrictive covenant cases, can be articulated and explained. Potential taints to the reality of consent in the employment contracts, including fraud, concealment, duress, undue influence, mistake, and unconscionability, can be suggested, although in *Mattis*, *Hunter*, and *Stringer*, the facts would have to be changed to give examples of these six taints, but students' suggestions of examples would demonstrate whether they understand the concepts involved. The form of the contract, including the issue of whether the contract must be in writing to be enforceable under the Statute of Frauds, would open up for discussion the topic of the role of Statute of Frauds in modern contract law. The rights and responsibilities of third parties can be introduced, including the rights and responsibilities of Stringer and Herron should Herron sell his three-location practice to Montgomery (for example) during the period of Stringer's employment or within three years thereafter. Finally, these cases are amenable to discussions of all major contract remedies, including damages, accounting, cancellation, decrees of specific performance, injunction, reformation, and rescission.

Mattis gives an example of a contract dispute resolved by common law principles untainted by statutory application. *Hunter* introduces a court's concern for a controlling statutory provision, with the court seeming either to ignore requirements language in the statute or to seize upon the discretion it was given by the statute. *Stringer* provides the counsel that if Executive MBA students employ

[30]. *Id.*

employment contract restrictive covenants in contracts with their key employees, they must avoid the temptation to get greedy. Taken together, these three cases provide take-off points for a meaningful discussion of contract law and its application for Executive MBA students.