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Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law

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WHISTLING IN THE DARK? CORPORATE FRAUD, WHISTLEBLOWERS, AND THE IMPLICATIONS OF THE SARBANES–OXLEY ACT FOR EMPLOYMENT LAW

Miriam A. Cherry*

Abstract: Passed in 2002 in the wake of the accounting scandals that resulted in billions of dollars of lost value to shareholders, the Sarbanes–Oxley Act has as its major goal the prevention of corporate corruption. This Article analyzes the impact of section 806, the portion of the Sarbanes–Oxley Act that provides protections for employees who report securities fraud, and describes the effect that Sarbanes–Oxley has on existing employment law. In addition, this Article contributes to the debate over the general effectiveness of the Sarbanes–Oxley Act, a topic of contention among both academics and press commentators. This Article argues that the Act does not go far enough to protect whistleblowers because employers do not need to specify procedures for acting upon tips that allege financial fraud. Also, employers most likely can send whistleblowing claims to arbitration, a forum that weakens the remedies available to employees. Finally, this Article provides a comprehensive survey of state whistleblowing laws and suggests changes to federal and state law to fill the gaps that remain after Sarbanes–Oxley.

“Had it ever been a real company? Or had Enron been, from the very beginning, just a brilliant illusion?”¹

I. THE STATUS QUO: WHISTLEBLOWING LAW BEFORE SARBANES–OXLEY	1035
A. Two Whistleblowers in Action: The Cases of WorldCom and Enron	1035
1. Sherron Watkins Alerts Executives at Enron of Fraud.....	1035

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1. MIMI SWARTZ & SHERRON WATKINS, POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON 15 (2003).

2. Cynthia Cooper Uncovers WorldCom's Massive Accounting Fraud	1039
B. Legal Status Quo: The Vagaries of Whistleblowing Law.....	1042
1. State Public Policy Decisions and Whistleblower Statutes.....	1042
2. Federal Whistleblower Statutes.....	1049
3. Sociological Approaches to Whistleblowing	1051
II. SARBANES–OXLEY ACT CHANGES TO SECURITIES LAW AND EMPLOYMENT LAW.....	1055
A. General Provisions.....	1056
1. Research Analysts and Conflicts of Interest.....	1057
2. Increased Criminal Penalties for Securities Fraud	1058
3. Standardization of Accounting Practices.....	1059
4. Corporate Governance.....	1060
5. Securities Fraud Litigation	1062
B. Whistleblowing Provisions	1063
1. Section 806: Federalizing the Law of Whistleblowing.....	1064
2. Section 1107: Criminal Penalties for Shooting the Messenger.....	1067
3. Section 301: Handling Whistleblower Complaints	1069
III. THE EFFECTIVENESS OF SARBANES–OXLEY	1069
A. Sarbanes–Oxley Fails to Specify Procedures that Employers Must Follow when Addressing Employee Complaints	1070
B. Mandatory Arbitration and Whistleblowing Claims.....	1075
1. Arbitration and the U.S. Supreme Court: From Skeptic to Supporter	1076
2. Will Sarbanes–Oxley Whistleblowing Claims be Sent to Arbitration?.....	1079
C. Conclusions and Suggested Law Reform	1083
APPENDIX A	1087
APPENDIX B.....	1121

As the accounting scandals surrounding Enron and WorldCom dominated the headlines and business ethics became increasingly suspect, two whistleblowers became symbols of integrity to the American public. Indeed, Sherron Watkins and Cynthia Cooper were among “The Whistleblowers” named as *Time* magazine’s “Persons of the Year” for 2002.² At significant risk to their careers, financial well-being, and mental health, Cooper and Watkins alerted high-level executives at their respective companies to accounting fraud.³ Unfortunately, most whistleblowers take all these risks when they report illegal activities occurring within their organizations.⁴ The magnitude of these recent frauds is startling and, unfortunately, appears to be indicative of a widespread problem.⁵ One study by a prominent accounting firm estimated that companies lose twenty percent of every dollar earned due to some form of workplace fraud.⁶

In response to the corporate scandals of 2002, Congress enacted the Sarbanes–Oxley Act (the Act)⁷ to prevent future corporate corruption and securities fraud.⁸ The Act contains a provision, § 806,⁹ that aims to

2. Richard Lacayo & Amanda Ripley, *Persons of the Year*, *TIME*, Dec. 30, 2002, at 30. Sherron Watkins remarked that she had several similarities with the two other whistleblowers: all three are women, all three were working as primary wage-earners, and all three grew up in small towns. Interview with Sherron Watkins in Birmingham, Ala. (Feb. 18, 2004).

3. Lacayo & Ripley, *supra* note 2, at 30.

4. According to a study of eighty-four whistleblowers conducted in the early 1990s, “82% experienced harassment after blowing the whistle, 60% were fired, 17% lost their homes, and 10% admitted to attempted suicide.” David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 *HOFSTRA LAB. & EMP. L.J.* 109, 113 (1995). For a fuller description of the risks accompanying whistleblowing, see *infra* Part I.B.3.

5. See Ernst & Young, *American Workers: Employers Lose 20 Percent of Every Dollar to Workplace Fraud* (Aug. 4, 2002), at http://www.ey.com/global/Content.nsf/US/Media_-_Release_-_08-05-02DC (last visited Oct. 7, 2004).

6. See *id.* The study was based on a telephone survey of 617 workers. *Id.*; see also Stephanie Armour, *More Companies Urge Workers to Blow the Whistle*, *USA TODAY*, Dec. 16, 2002, at B1 (reporting a trend toward whistleblowing as a method of curtailing workplace fraud). Of course, “fraud in the workplace” can mean a type of theft that is as trivial as making a personal copy at work or taking five extra minutes on a break. The type of fraud that appears to be most damaging and devastating is that perpetrated by individuals at the top of the organizational hierarchy—the magnitude of these frauds is greater because of the institutional trust given to leaders of an organization. See generally GERARD M. ZACK, *FRAUD AND ABUSE IN NONPROFIT ORGANIZATIONS: A GUIDE TO PREVENTION AND DETECTION* 20 (2003) (describing frauds and fraud-prevention techniques in the context of non-profit organizations).

7. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.A. (West Supp. 2003)).

8. Paul Beckett, *Executives Face Harsh Sanctions in Corporate-Governance Law*, *WALL ST. J.*, July

protect whistleblowers such as Cooper and Watkins who report accounting fraud.¹⁰ Most of the current scholarship on Sarbanes–Oxley focuses on the § 307¹¹ ethics rules that have been proposed to address a lawyer’s behavior when he or she is presented with knowledge of a client’s falsification of financial results (the so-called “noisy withdrawal” or “lawyer-as-whistleblower” provisions).¹² This Article instead examines the provisions of Sarbanes–Oxley that cover all workers at publicly traded companies who “blow the whistle” on suspect accounting practices, whether that whistleblowing is done within the organization, to government agencies, or as part of a shareholder

31, 2002, at C7. Since the enactment of Sarbanes–Oxley, accounting fraud continues to dominate the headlines. Recent news stories have focused on HealthSouth, which overstated its earnings by approximately \$2.5 billion over a period of seven years. Greg Farrell, *House Joins Justice, SEC in HealthSouth Scrutiny*, USA TODAY, Apr. 23, 2003, at 2B. U.S. Representative James Greenwood, chair of the congressional subcommittee currently investigating HealthSouth, stated that in addition to the accounting fraud, “some of these financial dealings between board members raise serious questions . . . I can’t wait to hear what these guys say under oath. Whose interests were they looking after, their own or the shareholders’?” *Id.*; see also Carrick Mollenkamp & Chad Terhune, *Scrushy Indicted on Fraud Charges: HealthSouth’s Former Chief Faces 85 Criminal Counts Tied to \$2.7 Billion Scheme*, WALL ST. J., Nov. 5, 2003, at A3. It is difficult to tell precisely why so much corporate fraud is now coming to light, but one anecdotal explanation is that, in the aftermath of the internet bubble, the stock market decline, and the recession, fraud has simply become more difficult to hide. See Thomas Wardell, *The Current State of Play Under the Sarbanes–Oxley Act of 2002*, 28 N.C. J. INT’L L. & COM. REG. 935, 936 (2003) (positing that the crash was at least partially due to unorthodox methods of measuring the success and profitability of “new economy” companies).

9. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802–04 (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)).

10. *Id.*

11. *Id.* § 307 (codified at 15 U.S.C.A. § 7245 (West Supp. 2003)).

12. See generally John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003) (describing legal ethics issues for transactional lawyers under Sarbanes–Oxley); Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003) (describing fraud at Enron and analyzing lawyer-as-whistleblower rules); Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003) (describing legal ethics issues for transactional lawyers under Sarbanes–Oxley); Darlene M. Robertson & Anthony A. Tortora, *Reporting Requirements for Lawyers Under Sarbanes–Oxley: Has Congress Really Changed Anything?*, 16 GEO. J. LEGAL ETHICS 785 (2003) (same). In contrast, virtually nothing has been written about § 806. The practitioner-oriented pieces that have appeared focus on the elements of a whistleblowing claim. See Michael Delikat, *Whistleblowing, Retaliation and Sarbanes–Oxley*, in 2 32ND ANNUAL INSTITUTE ON EMPLOYMENT LAW 2003, at 905, 925 (PLI Litig. & Admin. Practice, Course Handbook Series No. H-697, 2003) (containing description of elements of claims for practitioners); William R. McLucas & Mark M. Oh, *Whistleblowing: Protection of Corporate Officials and Employees Who Provide Evidence of Fraud Under the Sarbanes–Oxley Act of 2002*, in CORPORATE GOVERNANCE 2004, at 61, 63 (PLI Corporate Law & Practice, Course Handbook Series No. B-1411, 2003) (describing procedures for bringing claim).

lawsuit. This Article discusses the few publicized cases that have been brought under § 806 to date.¹³ In discussing the whistleblower provisions, this Article uses an employment law perspective to examine the changes that Sarbanes–Oxley makes to existing state retaliatory discharge laws.

“Traditional” whistleblowing doctrine has long been the province of individual states, and as such, legal protection for whistleblowers has been largely decentralized and uneven.¹⁴ An initial examination of the whistleblowing provisions of the Act suggests that the new law ameliorates this traditional unevenness. However, a further and fuller analysis reveals that the lack of remedies provided in the Act results in a less effective scheme for encouraging whistleblowing than it would initially seem. Further, even after the enactment of Sarbanes–Oxley there are significant gaps in retaliatory discharge law. For example, while Sarbanes–Oxley does contain criminal provisions that cover retaliation against whistleblowers at all workplaces,¹⁵ plaintiffs have a private right of action under § 806 only if their employer is a publicly traded company.¹⁶ Therefore, it would appear that Sarbanes–Oxley incrementally changes both securities law and employment law, rather than radically overhauling either field. Accordingly, one might ask whether § 806 is substantive or merely “whistling in the dark.”¹⁷

13. Recently, an administrative law judge ruled in favor of a chief financial officer who claims that he had been fired for raising various concerns regarding the issuer’s financial statements, including the chief executive officer’s insider trading. *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 (Dep’t of Labor Jan. 28, 2004), available at <http://www.oalj.dol.gov/public/wblower/decsn/03sox15c.htm> (last visited Oct. 7, 2004). The interpretations that this particular case gives to provisions of the Act will be discussed throughout the Article. Another such whistleblowing case is being litigated in federal court in Texas. *Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 799 (N.D. Tex. 2003) (allowing suit to proceed despite defendant’s challenge to procedure and timing). The *Murray* case involves a high-level executive at an energy trading company who alleges that he was fired for raising internal concerns about earnings manipulation, lack of meaningful financial disclosures, and false and misleading statements by the company’s management. *Id.*; see Sudeep Reddy, *TXU Denies Ex-VP’s Allegations: Utility Submits First Detailed Response to Whistleblower’s Suit*, DALLAS MORNING NEWS, Sept. 17, 2003, at 2D. For discussion of a contrasting Sarbanes–Oxley whistleblower case that was sent to mandatory arbitration rather than to court, see this Article’s discussion of *Boss v. Salomon Smith Barney, Inc.*, 263 F. Supp. 2d 684 (S.D.N.Y. 2003). See *infra* notes 362–376 and accompanying text.

14. See *infra* Part I.B.1.

15. See Sarbanes–Oxley Act § 1107 (codified at 18 U.S.C.A. § 1513 (West Supp. 2003)).

16. See *id.* § 806 (codified at 18 U.S.C.A. § 1514A (West. Supp. 2003)).

17. The tension within the doctrine surrounding whistleblowing arises from the economic analysis that underlies so many areas of employment law—legal rules should encourage the socially optimal amount of whistleblowing activity, no more and no less. With too little whistleblowing activity, we

This Article examines whether, overall, Sarbanes–Oxley is a radical departure that will drastically change securities law and corporate governance, or whether it merely gives the appearance of change while leaving the status quo in place. As one commentator put it, Sarbanes–Oxley “is not major reform, but patches and codifications and further study. It is a restatement with the force of federal law.”¹⁸ Based on analysis of the whistleblowing provisions, this Article largely concurs and concludes that Sarbanes–Oxley is a compromise half-measure and not the true reform our securities laws need to respond to corporate fraud.

Part I of this Article examines whistleblower protections before the passage of Sarbanes–Oxley. It includes the stories of two recent whistleblowers on corporate fraud, Watkins and Cooper, and analyzes their legal situations prior to the passage of the Sarbanes–Oxley Act. This section also describes the status of state and federal protections for whistleblowers before the passage of the Act and the sociological implications of whistleblowing. The next section, Part II, describes and analyzes the various provisions of the Sarbanes–Oxley Act, including an in-depth analysis of the Act and regulations pertaining to whistleblowing. Part III considers the overall effectiveness of the Act. Ultimately, this Article concludes that Congress should have gone further to protect whistleblowers in the Sarbanes–Oxley Act and

are left with sycophants who will agree to go on midnight toxic-dumping sprees, tell the Jeff Skillings of the world what they want to hear about ever-more-fraudulent related-party transactions, and allow polluted water into healing baths. On the other hand, with too much whistleblowing, we are left with organizations hobbled by internal strife. The same sort of tension between over- and under-reporting exists in other areas as well, and these same debates have gone on for years in terms of the reporting of racial and sexual harassment. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

18. Lawrence A. Cunningham, *The Sarbanes–Oxley Yawn: Heavy Rhetoric, Light Reform (and it Just Might Work)*, 35 CONN. L. REV. 915, 987 (2003) (emphasis omitted). In this analysis, I largely concur with Cunningham’s article, which describes the Sarbanes–Oxley Act as containing “sweeping punts and stunts,” but also as an Act that contains “potentially profound” provisions. *Id.* at 918–19. Cunningham states that “[i]ncremental provisions of the Act are best seen as patchwork responses to precise transgressions present in the popularized scandals—legislative action akin to the frequently maligned military strategist fighting the last war rather than planning for the next.” *Id.* At the same time, however, I disagree with Cunningham’s brief assessment of whistleblowing under Sarbanes–Oxley, as he seems to provide an overly optimistic view of the strength of state whistleblowing laws. See *id.* at 965–66. Another commentator remarked that, while “no panacea,” the Sarbanes–Oxley Act should be applauded for its steps to minimize conflicts of interest and for the publicity it is giving to business ethics. Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417, 442–43 (2003). Both of these points are important, Prentice argues, as they may affect behavior—not just rational behavior under the law and economics school of thought, but also behavior limited by bounded rationality and other such constraints. *Id.* at 443–44.

legislators should amend various federal and state laws to fill in the gaps that make whistleblowers vulnerable to retaliation.

I. THE STATUS QUO: WHISTLEBLOWING LAW BEFORE SARBANES–OXLEY

A. *Two Whistleblowers in Action: The Cases of WorldCom and Enron*

Sherron Watkins and Cynthia Cooper played instrumental roles in exposing corporate fraud at their respective companies. While Watkins’s whistleblowing activity would not have been protected under Texas law prior to the passage of the Sarbanes–Oxley Act,¹⁹ Cooper’s whistleblowing would have been protected under Mississippi law.²⁰ There is, however, no principled distinction that can be drawn between their two situations. Given the extent of the frauds and the problems that such accounting scandals created, these two situations justify a uniform federal system, such as that embodied by Sarbanes–Oxley.

1. *Sherron Watkins Alerts Executives at Enron of Fraud*

Sherron Watkins, trained as an accountant, had worked for Andrew Fastow, Enron’s chief financial officer, for nearly a decade in various capacities.²¹ During 2001 and 2002, Watkins, then a vice president at Enron, was charged with examining Enron’s books to find assets that the company could sell in response to the stock market decline.²² As she was assessing sale values, Watkins began finding “mystery assets”²³ and “fuzzy off-the-books arrangements that seemed to be backed by nothing more than . . . deflated Enron stock.”²⁴ When she asked questions, no one cared or seemed to be able to explain the arrangements.²⁵ The more

19. See *Austin v. HealthTrust, Inc.*, 967 S.W.2d 400, 403 (Tex. 1998); *Winters v. Houston Chronicle Publ’g Co.*, 795 S.W.2d 723, 724 (Tex. 1990) (refusing to recognize “cause of action for private employees who are discharged for reporting illegal activities”); cf. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 734 (Tex. 1985) (creating “very narrow exception to the employment-at-will doctrine,” but requiring plaintiff “to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act”).

20. See *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993).

21. See SWARTZ & WATKINS, *supra* note 1, at 269.

22. See *id.*

23. Sherron Watkins, Address at Samford University (Feb. 19, 2004).

24. Jodie Morse & Amanda Bower, *The Party Crasher*, TIME, Dec. 30, 2002, at 55.

25. *Id.*

she learned, the more Watkins became “highly alarmed” because her “understanding as an accountant [was] that a company could never use its own stock to generate a gain or avoid a loss on its income statement.”²⁶ However, Watkins felt that bringing her concerns either to Fastow or to Jeffrey Skilling, Enron’s then-chief executive officer, “would have been a job terminating move.”²⁷

Concluding that “accounting should just not be that creative,” Watkins began looking for a job outside Enron.²⁸ As she was in the process of looking for a position with another company, Skilling abruptly resigned, and Kenneth Lay, the chairman of the board, asked employees to drop suggestions in a comment box.²⁹ Watkins composed a now-famous anonymous letter warning that the accounting for certain transactions had been too aggressive.³⁰ The letter voiced her concern about improprieties and violations of accounting standards.³¹ Soon after

26. *Financial Collapse of Enron Corp.: Hearing Before the House Subcomm. on Oversight and Investigations*, 107th Cong. 15 (2002) [hereinafter *Hearings*] (testimony of Sherron Watkins).

27. *Id.*

28. Sherron Watkins, Address at Samford University (Feb. 19, 2004).

29. Morse & Bower, *supra* note 24, at 55; Interview with Sherron Watkins in Birmingham, Ala. (Feb. 18, 2004).

30. SWARTZ & WATKINS, *supra* note 1, at 275.

31. The letter, which has been widely reprinted, reads as follows:

Dear Mr. Lay,

Has Enron become a risky place to work? For those of us who didn’t get rich over the last few years, can we afford to stay?

Skilling’s abrupt departure will raise suspicions of accounting improprieties and valuation issues. Enron has been very aggressive in its accounting—most notably the Raptor transactions and the Condor vehicle. We do have valuation issues with our international assets and possibly some of our EES MTM positions.

The spotlight will be on us, the market just can’t accept that Skilling is leaving his dream job. I think that the valuation issues can be fixed and reported with other goodwill write-downs to occur in 2002. How do we fix the Raptor and Condor deals? They unwind in 2002 and 2003, we will have to pony up Enron stock and that won’t go unnoticed.

To the layman on the street, it will look like we recognized fund flows of \$800 mm from merchant asset sales in 1999 by selling to a vehicle (Condor) that we capitalized with a promise of Enron stock in later years. Is that really funds flow or is it cash from equity issuance?

We have recognized over \$550 million of fair value gains on stocks via our swaps with Raptor, much of that stock has declined significantly—Avici by 98%, from \$178 mm to \$5 mm, The New Power Co by 70%, from \$20/share to \$6/share. The value in the swaps won’t be there for Raptor, so once again Enron will issue stock to offset these losses. Raptor is an LJM entity. It sure looks to the layman on the street that we are hiding losses in a related company and will compensate that company with Enron stock in the future.

I am incredibly nervous that we will implode in a wave of accounting scandals. My 8 years of Enron work history will be worth nothing on my resume, the business world will consider the past successes as nothing but an elaborate accounting hoax. Skilling is resigning now for “personal reasons” but I think he wasn’t having fun, looked down the road and knew this stuff was unfixable and would rather abandon ship now than resign in shame in 2 years.

writing the letter, Watkins arranged a meeting with Lay in which she expressed her concerns and was told that there would be an investigation into the points she raised.³²

Months later, the Enron bankruptcy and fraud became well publicized. Indeed, Fastow and other executives had arranged for Enron to “hedge” with private partnerships, with many of the transactions backed only by Enron stock.³³ Watkins was called to testify about this scheme before Congress.³⁴ In the process of preparing for her testimony, Watkins reviewed an e-mail message from Enron’s outside counsel, Vinson & Elkins, which discussed the state of Texas whistleblowing law.³⁵ This message read, in part, “[p]er your request . . . the following are some bullet thoughts on how to manage the case with the employee who made the sensitive report Texas law does not currently protect corporate whistle-blowers.”³⁶ Watkins realized that the e-mail was in reference to her, as it was dated only two days after she met with Lay.³⁷

The legal implication of this e-mail message is clear. Evidently, someone at a high level of the company wanted to fire Watkins because of her willingness to come forward and discuss the accounting improprieties. As Watkins put it, “I found out . . . that Ken Lay’s first action was not to look at my concerns [about fraudulent accounting] but

Is there a way our accounting guru’s [sic] can unwind these deals now? I have thought and thought about how to do this, but I keep bumping into one big problem—we booked the Condor and Raptor deals in 1999 and 2000, we enjoyed a wonderfully high stock price, many executives sold stock, we then try and reverse or fix the deals in 2001 and it’s a bit like robbing the bank in one year and trying to pay it back 2 years later. Nice try, but investors were hurt, they bought at \$70 and \$80/share looking for \$120/share and now they’re at \$38 or worse. We are under too much scrutiny and there are probably one or two disgruntled “redeployed” employees who know enough about the “funny” accounting to get us in trouble.

What do we do? I know this question cannot be addressed in the all employee meeting, but can you give some assurances that you and Causey will sit down and take a good hard objective look at what is going to happen to Condor and Raptor in 2002 and 2003?

Id. at 361–62.

32. *Id.* at 287.

33. Michael L. Fox, *To Tell or Not to Tell: Legal Ethics and Disclosure After Enron*, 2002 COLUM. BUS. L. REV. 867, 870–80. In this instance, it was not hedging alone that was the problem. A “hedge” is often used to control the amount of risk to which an investor or an entity is subjected based on a downturn in the market. This explains the nature of hedge funds, which are countercyclical to the business cycle. The problem with Enron’s hedging was that it used its own assets. Not only does this violate various accounting rules, but instead of minimizing risk, it actually increases the amount of risk. See SWARTZ & WATKINS, *supra* note 1, at 228–34 (describing creation of Raptor entities for hedging purposes).

34. SWARTZ & WATKINS, *supra* note 1, at 352–53.

35. Morse & Bower, *supra* note 24, at 53.

36. *Id.*; see SWARTZ & WATKINS, *supra* note 1, at 291.

37. SWARTZ & WATKINS, *supra* note 1, at 291.

to see if they could dump me on the street.”³⁸ In her view, Enron executives asked outside counsel to research the status of Texas whistleblower law so that Enron could fire her without employment law liability.³⁹

Indeed, the e-mail embodied an accurate legal opinion because Texas law at that time would have allowed Lay to fire Watkins with no liability or legal consequence for Enron. In *Austin v. HealthTrust, Inc.*,⁴⁰ the Supreme Court of Texas refused to recognize a retaliatory discharge cause of action based on an employee’s report of illegal activity at a private company (as opposed to a government employer).⁴¹ Before Enron was able to fire Watkins, however, the scandals about the fraudulent transactions came to light and Enron’s financial practices were subjected to scrutiny by its shareholders, Congress, and the American public.

The unraveling of the Enron saga continues.⁴² Currently, one Enron ex-treasurer, Ben Glisan, is in federal prison serving a five-year sentence that he received after pleading guilty to one count of conspiring to commit fraud.⁴³ Fastow, who originally maintained his innocence,⁴⁴ entered a guilty plea in exchange for a ten-year prison sentence and has now agreed to cooperate with law enforcement.⁴⁵ Prosecutors recently filed a forty-two-count indictment against Skilling, who pleaded not guilty and is currently free on a \$5 million bond.⁴⁶ Former Chief

38. Sherron Watkins, Address at Samford University (Feb. 19, 2004).

39. *Id.*

40. 967 S.W.2d 400 (Tex. 1998).

41. *Id.* at 403 (refusing to recognize action for whistleblowing where nurse was allegedly retaliated against for reporting a co-worker who was endangering patients through substance abuse and illegal distribution of prescription drugs); see also *Winters v. Houston Chronicle Publ’g Co.*, 795 S.W.2d 723, 724 (Tex. 1990) (refusing to recognize “cause of action for private employees who are discharged for reporting illegal activities”); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 734 (Tex. 1985) (creating “very narrow exception to the employment-at-will doctrine,” but requiring plaintiff “to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act”).

42. See Kathleen F. Brickey, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes–Oxley*, 81 WASH. U. L.Q. 357, 357 nn.2–3 (2003) (listing indictments and pending criminal actions against Enron officers and executives).

43. John R. Emshwiller, *Ex-Treasurer Is First Enron Officer to Go to Prison*, WALL ST. J., Sept. 11, 2003, at A3.

44. *Id.*

45. John R. Emshwiller, *Enron Probe Shifts Its Focus to Lay*, WALL ST. J., Feb. 2, 2004, at A3.

46. John R. Emshwiller & Alexei Barrionuevo, *U.S. Prosecutors File Indictment Against Skilling*, WALL ST. J., Feb. 20, 2004, at A1.

Accounting Officer Richard Causey is also awaiting trial.⁴⁷ Meanwhile, a federal grand jury indicted three Merrill Lynch executives on fraud charges arising from a sham transaction that allowed Enron to record \$12 million in earnings based on the ostensible purchase of Nigerian barges.⁴⁸ Last, but certainly not least, Lay himself has been indicted by a grand jury and faces civil charges from the Securities and Exchange Commission (SEC) that could force him to disgorge his earnings from the sale of Enron stock and return those gains to investors.⁴⁹

Enron, at one time the seventh largest publicly traded company on the New York Stock Exchange and a pioneer in new economy energy trading, now trades only as a penny stock.⁵⁰ Enron's stock certificates are currently sold for their historical and artistic value rather than for the worth of the company that the certificates represent.⁵¹ The multicolored sign "E" that stood outside Enron's office, symbol of a once-proud corporation, is now better known as the "crooked 'E,'" a symbol of corporate corruption.⁵²

2. *Cynthia Cooper Uncovers WorldCom's Massive Accounting Fraud*

In March of 2002, Cynthia Cooper, the head of internal auditing at WorldCom, heard a disturbing report about WorldCom's accounting from an executive in the wireless division, who maintained that WorldCom used certain reserves to boost its revenue.⁵³ When Cooper brought the matter to the attention of outside auditor Arthur Andersen, she was told that the accounting treatment was not a problem and could

47. *Id.*

48. John R. Emshwiller & Ann Davis, *Merrill Takes Enron Responsibility*, WALL ST. J., Sept. 18, 2003, at A3.

49. John R. Emshwiller et al., *Lay Is Indicted as Enron Inquiry Reaches the Top*, WALL ST. J., July 8, 2004, at A1; Mary Flood, *For Ken Lay, His "Worst Nightmare,"* HOUSTON CHRON., Oct. 20, 2004, at 1, available at 2004 WL 83673862 (reporting that Ken Lay, Jeffrey Skilling, and Richard Causey will be tried together).

50. Diya Gullapalli, *Estate Taxes Muddy Comparisons*, WALL ST. J., July 23, 2004, at C3; Jeff D. Opdyke, *More Blue Chips Hit the Pink Sheets*, WALL ST. J., Jan. 21, 2003, at D1 (describing how the penny stock exchange works and its reputation as "notorious for distressed companies and dubious penny stocks").

51. A visit to the website eBay, <http://www.ebay.com>, on Oct. 7, 2004, confirmed that Enron stock certificates are worth more as art or as a symbol of a once high-flying company than they are as securities qua securities.

52. *Digits: What About the 'E'?*, WALL ST. J., Sept. 12, 2002, at B8.

53. Susan Pulliam & Deborah Solomon, *Uncooking the Books: How Three Unlikely Sleuths Discovered Fraud at WorldCom*, WALL ST. J., Oct. 30, 2002, at A1.

be ignored.⁵⁴ When she raised the issue with WorldCom Chief Financial Officer Scott Sullivan, he became angry.⁵⁵ Still concerned about the incident as well as other potential accounting irregularities, Cooper and her team of auditors secretly logged into the company's computer system at night to check the accuracy of the accounts.⁵⁶

What Cooper and her employees found was shocking. In May of 2002, they discovered that WorldCom had treated operating costs as capital expenditures.⁵⁷ While operating costs (such as salaries) are to be subtracted from income during the quarter, capital costs are major purchases (such as equipment or property) that can be spread out over time.⁵⁸ By falsely reclassifying operating costs as capital expenditures in violation of accounting rules, WorldCom looked far more profitable in its financial reporting than it actually was.⁵⁹

That June, after her team turned up over \$2 billion of suspect accounting entries, Cooper informed the board's audit committee of her findings.⁶⁰ After giving Sullivan a weekend to explain the accounting treatment, which he could not do, the audit committee fired him.⁶¹ Soon thereafter, WorldCom was forced to admit that it had inflated its profits by \$3.9 billion.⁶² The truth was revealed in newspaper accounts, SEC filings, and congressional hearings: top management had directed several accountants to compensate for earnings short-falls at the end of each quarter when results were due by reclassifying operating costs as capital expenditures.⁶³

Two external investigations released in 2003 document the extent of

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*; see LYNNE W. JETER, DISCONNECTED: DECEIT AND BETRAYAL AT WORLDCOM 168–73 (2003).

58. See Susan Pulliam, *Over the Line: A Staffer Ordered to Commit Fraud Balked, Then Caved*, WALL ST. J., June 23, 2003, at A6.

59. *Id.*

60. Pulliam & Solomon, *supra* note 53, at A6.

61. *Id.*

62. Andrew Hill, *Whistleblowers' Early Warning on WorldCom*, FIN. TIMES, July 15, 2002, at 16.

63. Julian Borger & Richard Wray, *How Auditor Found \$4bn Black Hole: Corporate Fraud Uncovered by Second Female Whistleblower*, GUARDIAN, June 28, 2002, at 3; Pulliam, *supra* note 58, at A6; *Questioning the Books: An Internal Auditor Saddened by Finding*, WALL ST. J., June 28, 2002, at A9; Jared Sandberg & Deborah Solomon, *Key Officials at WorldCom Going to the Hill*, WALL ST. J., July 8, 2002, at A17.

the fraud.⁶⁴ These investigations reveal that WorldCom kept two sets of books and that there were numerous failures in the company's corporate governance structure.⁶⁵ In addition to the switches surrounding capital expenses and operating costs, the company also manipulated revenues, depreciation reserves, and even taxes.⁶⁶ Sullivan and four other WorldCom executives and employees face criminal charges for orchestrating the \$3.8 billion fraud.⁶⁷ The Oklahoma Attorney General has indicted former Chief Executive Officer Bernard Ebbers, who was in charge of the company when the massive fraud took place and knew about the exaggerated numbers at the end of each quarter.⁶⁸ Ebbers also may face federal charges.⁶⁹

According to *The Wall Street Journal*, “[o]ne of the reports said while dozens of people knew about the fraud, it remained hidden from public view because employees were afraid to speak out.”⁷⁰ Although Cooper has kept her position at WorldCom, reporting the fraud took a heavy personal toll.⁷¹ Even though Cooper did not perpetuate the fraud, many at the company blamed her for her discovery.⁷² The fraud led to massive layoffs and WorldCom's subsequent bankruptcy.⁷³

In contrast to Sherron Watkins, whose whistleblowing would have been unprotected in Texas,⁷⁴ Mississippi state law likely would have protected Cooper.⁷⁵ In a 1993 decision, *McArn v. Allied Bruce-Terminix Co.*,⁷⁶ the Mississippi State Supreme Court created a public policy

64. See Rebecca Blumenstein & Susan Pulliam, *WorldCom Fraud Was Widespread: Ebbers, Many Executives Conspired to Falsify Results in Late 1990s, Probes Find*, WALL ST. J., June 10, 2003, at A3.

65. *Id.*

66. *Id.*

67. See Pulliam & Solomon, *supra* note 53, at A1.

68. See Rebecca Blumenstein & Susan Pulliam, *WorldCom Report Finds Ebbers Played Role in Inflating Revenue*, WALL ST. J., June 6, 2003, at A1.

69. Brickey, *supra* note 42, at 358 n.4.

70. Blumenstein & Pulliam, *supra* note 64, at A3.

71. Lacayo & Ripley, *supra* note 2, at 30.

72. *Id.*

73. *Id.*

74. See *Austin v. HealthTrust, Inc.*, 967 S.W.2d 400, 403 (Tex. 1998).

75. I have assumed for purposes of this Article that if, hypothetically, adverse employment action had been taken against Cooper, she would have brought an action under Mississippi whistleblower laws. WorldCom's corporate headquarters were in Mississippi, and that is where Cooper worked during her entire tenure with WorldCom. See JETER, *supra* note 57, at 167–68.

76. 626 So. 2d 603 (Miss. 1993).

exception to the at-will employment rule for whistleblowers.⁷⁷ Cooper and Watkins each had to make a choice about whether to confront wrongdoing and report fraud. Yet Watkins, facing this dilemma in Texas, could have been fired without legal recourse, whereas Mississippi law protected Cooper from that fate.⁷⁸ These two instances highlight the inconsistencies in state law that existed prior to the passage of Sarbanes–Oxley.

B. *Legal Status Quo: The Vagaries of Whistleblowing Law*

This section summarizes state and federal whistleblowing laws prior to the Sarbanes–Oxley Act. Under traditional common law, most jurisdictions provided no legal redress for employees whose employers terminated them in retaliation for their whistleblowing.⁷⁹ Increasingly, jurisdictions are moving from this legal regime to one that protects individuals who report wrongdoing at work.⁸⁰ However, the law has developed somewhat haphazardly.⁸¹ As illustrated by the examples of Sherron Watkins and Cynthia Cooper, whether an employee can bring a successful case often depends on the state in which the employee blows the whistle.

1. *State Public Policy Decisions and Whistleblower Statutes*

Under the common law of various states, whistleblowing cases—sometimes classified as retaliatory discharge, discharge in contravention of public policy, or wrongful discharge—have received, and continue to receive, inconsistent treatment.⁸² An action for wrongful discharge is an exception to the traditional employment at-will doctrine.⁸³ Under the at-will doctrine, an employer can hire and fire employees for a good

77. *Id.* at 607.

78. *Compare Austin*, 967 S.W.2d at 403, with *McArn*, 626 So. 2d at 607.

79. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (Albany, N.Y., John D. Parsons, Jr. 1877).

80. *See Elletta Sangrey Callahan & Terry Morehead Dworkin, The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 107–08 (2000).

81. *See App. A, infra* pp. 1087–1120 for a compilation of whistleblower protections by state.

82. *Id.*

83. *See, e.g., Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988) (“[W]e hold that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state. This is a limited exception to the employment-at-will doctrine.”).

reason, any reason, or no reason at all; in parallel, employees can quit for a good reason, any reason, or no reason at all.⁸⁴ As the common law developed, however, courts deemed certain reasons to be against public policy, such as firing an employee for refusing to give perjured testimony to a state investigatory committee⁸⁵ or for serving as a juror.⁸⁶

From these initial limited public policy exceptions, courts in some jurisdictions began fashioning rudimentary protection for employees who reported illegal actions that occurred at work.⁸⁷ Courts in early decisions reasoned that an employee should not be fired for refusing to violate a law or government regulation or for revealing such a violation.⁸⁸ One detects in the cases a certain hesitancy by the courts to intrude into the “private” decision to discharge an employee.⁸⁹ At the

84. Development of the at-will doctrine is usually attributed to a 125-year-old treatise by Horace G. Wood. WOOD, *supra* note 79, at 272. For a useful discussion of the rule, as well as its benefits and drawbacks, see PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 56–63 (1990).

85. Indeed, the genesis of whistleblowing doctrine is often traced to a case about perjured testimony. In *Petermann v. Int’l Bhd. of Teamsters*, the court, after establishing that plaintiff had a cause of action for wrongful discharge when he was fired for refusing to commit perjury, stated:

To hold that one’s continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare.

344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959).

86. See *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975) (creating exception to the employment-at-will rule and allowing plaintiff to recover when she was dismissed for serving on a jury). The court also stated, “[i]f an employer were permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected. The will of the community would be thwarted.” *Id.*

87. See, e.g., *Johnson v. Kreiser’s Inc.*, 433 N.W.2d 225, 228 (S.D. 1988) (holding that employee engaged in protected activity in reporting corporate president’s conversion of company property to own use).

88. See, e.g., *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330, 1335–37 (Cal. 1980) (holding that employee fired after refusing to participate in employer’s illegal scheme stated cause of action for wrongful discharge); *Johnson*, 433 N.W.2d at 228 (holding that employee engaged in protected activity in reporting corporate president’s conversion of company property to own use).

89. See *Sheets v. Teddy’s Frosted Foods, Inc.*, 427 A.2d 385, 387–88 (Conn. 1980):

We are mindful that courts should not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation. We are, however, equally mindful that the myriad of employees without the bargaining power to command employment contracts for a definite term are entitled to a modicum of judicial protection when their conduct as good citizens is punished by their employers.

Id.; *Harless v. First Nat’l Bank*, 246 S.E.2d 270, 275 (W. Va. 1978):

[T]he rule giving the employer the absolute right to discharge an at-will employee must be tempered by the further principle that where the employer’s motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge.

same time, however, many courts overcame this hesitancy by focusing on the legal violations that took place. To allow employers to direct their employees to break the law, to fire employees if they refused to comply, and then to deny the discharged employee any kind of legal redress would be tantamount to encouraging employers to break the law.⁹⁰ Instead of relying on public policy, other courts fashioned remedies for aggrieved employees by implying a contractual duty of good faith and fair dealing into the at-will employment relationship.⁹¹ Not all state courts, however, have recognized a cause of action for such a retaliatory discharge.⁹² In many jurisdictions, such as Texas, where Sherron Watkins would likely have had her case heard if Enron had fired her, courts have refused to fashion such a public policy exception to the at-will rule.⁹³

Although academics have soundly criticized the employment at-will rule, and debate over the rule's wisdom continues, it is the default rule in all but one American jurisdiction.⁹⁴ Currently, only Montana has abrogated the rule and adopted a for-cause termination statute.⁹⁵ However, the trend among the other forty-nine states has been to temper the at-will rule somewhat.⁹⁶ State legislatures, state courts, and Congress have increasingly encroached upon the at-will rule by providing some employees a limited level of job security based on public policy

90. See, e.g., *Beasley v. Affiliated Hosp. Prods.*, 713 S.W.2d 557, 559 (Mo. Ct. App. 1986) (involving employee who refused to determine outcome of raffle, which would have violated state law).

91. See, e.g., *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (implying duty of good faith into contract of employment that was terminable at will).

92. See App. A, *infra* pp. 1087–1120.

93. See *Austin v. HealthTrust, Inc.*, 967 S.W.2d 400, 403 (Tex. 1998); App. A, *infra* pp. 1115–16.

94. As the published writings on the employment-at-will rule are far too voluminous to encapsulate in a solitary footnote, the following is only a sample of the types of scholarship available. See, e.g., Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 597–611 (discussing just cause standard and how that standard is composed); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955–77 (1984) (defending contract at will on efficiency grounds through law and economic theory); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65–66 (2000) (presenting comparative approach and pointing out differences between United States law and that of other countries).

95. Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (2003). For discussion of Montana's statute, see generally Marc Jarsulic, *Protecting Workers from Wrongful Discharge: Montana's Experience with Tort and Statutory Regimes*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 105 (1999).

96. See App. A, *infra* pp. 1087–1120.

reasons.⁹⁷

In response to the perceived harshness of the at-will rule and, in some instances, in response to judicial unwillingness to provide employees with a remedy when they refuse to engage in wrongdoing or report illegal practices, many state legislatures have passed some form of whistleblowing statute to create a statutory tort regime.⁹⁸ Currently, twenty states have enacted whistleblowing statutes with general application to private employers.⁹⁹ Of these twenty states, most also recognize a common law public policy exception to the common law at-will employment rule. Only Florida, Maine, New York, and Rhode Island do not.¹⁰⁰ In addition, the status of the public policy exception in Arizona since the passage of the Arizona Employee Protection Act is unclear.¹⁰¹

Of the thirty-one jurisdictions (thirty states plus the District of Columbia) which do not provide comprehensive statutory protection for whistleblowers, twenty-six states recognize some form of judicially created public policy exception.¹⁰² However, the extent of the protection afforded under the public policy exception is often limited and is

97. *Id.* Federal anti-discrimination laws, which contain a burden-shifting scheme that requires employers to articulate a legitimate, non-discriminatory reason for an adverse employment action, can be seen as an encroachment into the at-will regime, as can provisions specified in employee handbooks, which, when those provisions are held enforceable, may create additional rights for employees. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

98. *See App. A, infra* pp. 1087–1120.

99. *Id.* I consider the following states to have whistleblower protections of general application to public and private employees: Arizona, California, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maine, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Tennessee. *Id.* States could be added to or subtracted from this list, depending on how one defines a “general” whistleblower statute. For example, the New York statute only applies to private employees if an employee “discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety” N.Y. LAB. LAW § 740(2)(a) (McKinney 2002); *see also* Callahan & Dworkin, *supra* note 80, at 107–08 (containing earlier fifty-state survey).

100. *See App. A, infra* pp. 1087–1120.

101. *Id.*; *see Galati v. Am. W. Airlines, Inc.*, 69 P.3d 1011, 1015 (Ariz. Ct. App. 2003).

102. *See App. A, infra* pp. 1087–1120. Alaska and Delaware recognize a type of retaliatory discharge action, although they classify it as a breach of the implied covenant of good faith and fair dealing in the employment contract. *See Lincoln v. Interior Reg’l Hous. Auth.*, 30 P.3d 582, 586 (Alaska 2001); *Lord v. Souder*, 748 A.2d 393, 401 (Del. 2000). The five states that do not recognize any type of retaliatory discharge are Alabama, Georgia, Indiana, Louisiana, and Texas. *See App. A, infra* pp. 1087–1120.

certainly not uniform across these jurisdictions.¹⁰³ Some states require that the public policy underlying a retaliatory discharge claim be “well-established,”¹⁰⁴ “substantial and widely accepted,”¹⁰⁵ “well-recognized and clear,”¹⁰⁶ “fundamental and well-defined,”¹⁰⁷ or “strong and compelling.”¹⁰⁸ These additional requirements lead to differences among states.

The fundamental problem in all public policy cases lies in determining exactly what constitutes a specific, well-established, clear, and compelling public policy, and courts have taken various approaches to resolve this question.¹⁰⁹ Sources of “public policy” may include only state statutes,¹¹⁰ state statutes and the state constitution,¹¹¹ “legislative, administrative or judicial authority,”¹¹² or the “customs and conventions of the people” along with state statutes, the constitution, and judicial decisions.¹¹³ Some states broadly categorize the type of conduct protected by the public policy exception by defining it as reporting any illegal act.¹¹⁴

Just as the state public policy decisions are uneven, so are the state whistleblowing statutes. State whistleblowing statutes consist of a patchwork of provisions.¹¹⁵ While some provide fairly broad protection,¹¹⁶ others limit protection to a specific industry or area.¹¹⁷ The

103. See App. A, *infra* pp. 1087–1120.

104. *Island v. Buena Vista Resort*, 103 S.W.3d 671, 679 (Ark. 2003).

105. *Flores v. Am. Pharm. Servs., Inc.*, 994 P.2d 455, 458 (Colo. 1999).

106. *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 282 (Iowa 2000).

107. *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985).

108. *Allum v. Valley Bank of Nev.*, 970 P.2d 1062, 1066 (Nev. 1998).

109. See App. A, *infra* pp. 1087–1120.

110. See *Island v. Buena Vista Resort*, 103 S.W.3d 671, 679 (Ark. 2003).

111. See *Grzyb*, 700 S.W.2d at 401.

112. *Lord v. Souder*, 748 A.2d 393, 401 (Del. 2000).

113. *Payne v. Rozendaal*, 520 A.2d 586, 588 (Vt. 1986) (quoting *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Kinney*, 115 N.E. 505, 507 (Ohio 1916)).

114. See, e.g., *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 26–27 (Miss. 2003) (concerning refusal to perform an illegal act and reporting an illegal act).

115. See App. A, *infra* pp. 1087–1120.

116. See CONN. GEN. STAT. § 31-51m (2003) (covering an employee of “a person engaged in business who has employees” who discloses violations of law); OHIO REV. CODE ANN. §§ 4113.51–.53 (West 2001 & Supp. 2003) (covering an employee of any employer with one or more employees who reports violations of law when “the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony”).

117. See, e.g., ARIZ. REV. STAT. § 3-376 (2002) (covering pesticide control); MO. ANN. STAT.

state whistleblowing statutes also differ in the type of disclosure they protect,¹¹⁸ the manner of disclosure they require,¹¹⁹ and the remedies they provide.¹²⁰ Judicial interpretation has restricted the scope of some statutes.¹²¹ However, in other instances, it has broadened a statute's application.¹²²

Plaintiffs bringing actions for retaliatory discharge in various states must also meet varying burdens of proof. Depending on the language of the specific state statute, the whistleblower may have to prove that the reported wrongdoing actually occurred.¹²³ Other jurisdictions use a less strict "reasonable belief standard," requiring the whistleblower to prove that he or she had a good reason to believe the wrongdoing had occurred and thus made the report in good faith.¹²⁴ Several courts have said that "bad faith" reports should not receive protection.¹²⁵

§ 197.285 (West 2004) (covering hospital and ambulatory surgical center employees).

118. Compare MO. ANN. STAT. § 197.285 (West 2004) (including reports of facility mismanagement, fraudulent activity, violations of law relevant to patient care and patient and facility safety, and "[t]he ability of employees to successfully perform their assigned duties"), with N.D. CENT. CODE § 34-11.1-04 (1987 & Supp. 2003) (protecting public employees who report job related violations of law and misuse of public resources).

119. Compare ALA. CODE § 36-26A-3 (2001), and *Flood v. Ala. Dep't of Indust. Relations*, 948 F. Supp. 1535, 1551–53 (M.D. Ala. 1996) (requiring statements made under oath or in form of affidavit), with GA. CODE ANN. § 34-6A-5 (2004) (filing a charge, testifying, assisting, or participating "in any manner in an investigation, action, proceeding, or hearing under this chapter").

120. See ALASKA STAT. § 18.60.089 (Michie 2002) (filing complaint with commissioner); HAW. REV. STAT. § 388-10 (2004) (fining and/or imprisoning employer or agent); W. VA. CODE ANN. § 6C-1-4 (Michie 2003) (establishing civil action).

121. See, e.g., *McDonald v. Campbell*, 821 P.2d 139, 144–45 (Ariz. 1991) (holding that application of ARIZ. REV. STAT. §§ 38-531 to 38-534 to employees of the Arizona State Supreme Court is unconstitutional).

122. See, e.g., *Wiggins v. S. Mgmt. Corp.*, 629 So. 2d 1022, 1024 (Fla. Dist. Ct. App. 1993) (holding that a judicial proceeding under Florida's whistleblower statute also includes an unemployment compensation hearing).

123. See, e.g., N.Y. LAB. LAW § 740 (McKinney 2002) (protecting private employee who "discloses, or threatens to disclose to a supervisor or to a public body an activity, policy, or practice of the employer that is in violation of law, rule, or regulation which violation creates and presents a substantial and specific danger to the public health or safety . . ."); *Bordell v. Gen. Elec. Co.*, 667 N.E.2d 922, 923 (N.Y. 1996) (holding that under section 740, proof of an actual violation is required).

124. See, e.g., OHIO REV. CODE ANN. § 4113.52 (West 2001 & Supp. 2003) (protecting employee who reports a violation of law when "the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony . . .").

125. *Wolcott v. Champion Int'l Corp.*, 691 F. Supp. 1052, 1065–66 (W.D. Mich. 1987); *Johnson v. Benson*, No. 84-2531, 1986 Wis. App. LEXIS 3113, at *7 (Wis. Ct. App. Jan. 16, 1986). If the report was manufactured to implicate another employee or to cover up wrongdoing, then that

New York provides perhaps the best example of the shortcomings in whistleblowing law before the passage of Sarbanes–Oxley. New York’s whistleblower statute protects only workers who report a problem that would endanger the health or safety of the public.¹²⁶ Specifically, the statute prohibits retaliatory action against an employee who “discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety”¹²⁷

Even though financial fraud can result in massive layoffs if the company becomes bankrupt and can lead to individual penury or a complete loss of retirement savings, New York courts do not view fraud as a danger to the public welfare within the definition of the whistleblower statute. For example, in *Leibowitz v. Bank Leumi Trust Co. of New York*,¹²⁸ the court held that financial fraud was not a danger to health and safety.¹²⁹ Thus, the court did not afford the protection of the statute to the employee who had reported fraudulent loan practices.¹³⁰ Further, in *Murphy v. American Home Products Corp.*,¹³¹ the court declined to create a public policy exception where the plaintiff had reported “\$50 million in illegal account manipulations of secret pension reserves which improperly inflated the company’s growth in

activity—which I hesitate even to term whistleblowing—should not receive protection. (Perhaps this is best termed “wolf whistling,” after the story of the boy who falsely cried wolf). On the other hand, there may be instances in which the employee making the report has a “malicious” motive, such as implicating another employee out of spite, but the report is accurate. In that case, it would seem that the whistleblower’s motive should be irrelevant. There are also instances in which it seems that a whistleblower is mistaken, even though the whistleblower’s motives are pure. Courts are divided on whether the whistleblower’s state of mind should matter in determining whether that whistleblower states a valid claim. Compare *Wolcott*, 691 F. Supp. at 1065–66 (holding that the Michigan Whistleblowers Protection Act, MICH. COMP. LAWS ANN. §§ 15.361–.369 (West 1994), did not protect plaintiff who knowingly participated in employer’s illegal activity and “who reported his employer for violating laws in retribution for the employer’s failure to meet his demands”), with *Phinney v. Verbrugge*, 564 N.W.2d 532, 555 (Mich. Ct. App. 1997) (“[W]hether plaintiff sought personal gain in making her reports, rather than the public good, is legally irrelevant . . .”). Of course, the state of mind probably would matter in how that whistleblower came across to the jury—those whistleblowers who do have a malicious motive probably would have more difficulty in terms of amount of recovery.

126. N.Y. LAB. LAW § 740(2)(a) (McKinney 2002).

127. *Id.*

128. 548 N.Y.S.2d 513 (N.Y. App. Div. 1989).

129. *Id.* at 520.

130. *Id.* at 516–18.

131. 448 N.E.2d 86 (N.Y. 1983).

income and allowed high-ranking officers to reap unwarranted bonuses from a management incentive plan”¹³²

Although fraud is not a “danger” in the traditional sense of safety problems with a nuclear reactor or toxic chemicals discharged onto farmland, white collar crimes such as fraud may create serious economic damage. For example, many Enron employees who invested heavily in Enron stock have lost their savings for retirement.¹³³ Although it is perhaps not an immediate “danger,” employees who witness fraud should have some ability to stop the criminal activity without worrying about being fired.¹³⁴

As the forgoing section has shown, state whistleblower law is murky, piecemeal, disorganized, and varies from jurisdiction to jurisdiction. The stories of Watkins and Cooper demonstrate the differences between various state approaches and the vagaries and inconsistencies of those approaches.

2. *Federal Whistleblower Statutes*

The pre-Sarbanes–Oxley federal approach to whistleblower protection is similarly piecemeal. If a private-sector employee reports a violation of a federal statute, either internally or to a law enforcement agency, that employee *may* receive protection.¹³⁵ Whether the whistleblower receives any legal protection depends on whether the federal statute violated by the employer contains an anti-retaliation provision.¹³⁶ Conceptually, the whistleblower provisions that accompany each statute can be seen as a way of strengthening the enforcement of that statute.

One beneficial component of federal whistleblower protection is that government employees are generally covered by civil service

132. *Id.* at 87, 89.

133. See Ellen E. Schultz, *Enron Employees to Settle Retirement Suit for \$85 Million*, WALL ST. J., May 13, 2004, at A2 (describing settlement as ten cents for every dollar lost).

134. Although Sarbanes–Oxley now covers reports of fraud, the Act’s civil provisions only apply to publicly traded companies. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 806(a), 116 Stat. 745, 802–04 (codified at 18 U.S.C.A. § 1514A(b)(1)(B) (West Supp. 2003)). Therefore, an employee who reports fraud in New York may or may not have a civil claim, depending wholly on whether the employee works at a privately held company, a non-profit, or a publicly traded company. Although the public company requirement by necessity would probably encompass some of the state’s larger employers, the law still leaves a major gap.

135. See App. B, *infra* pp. 1121–23.

136. *Id.*

protections.¹³⁷ For example, in the recent scandal over the abuse of Iraqi prisoners at Abu Ghraib prison, it was a whistleblower, Joseph Darby, who brought the problems to light.¹³⁸ By slipping photographs of the abuse under a superior's door, Darby brought necessary attention to the problem.¹³⁹ His actions prompted an investigation, popular outcry, and ongoing court-martials of those involved.¹⁴⁰ As a member of the military reporting torture and sexual abuse, Darby would be protected by a federal statute that specifically addresses such matters.¹⁴¹ Indeed, his conduct has earned him the respect of senior military officials.¹⁴² However, Darby's family remains concerned about possible impacts on his career and personal life,¹⁴³ as well as reaction from the soldiers who have been accused of the abuses.¹⁴⁴ Despite these difficulties, government employees are generally much more well-protected than private employees.¹⁴⁵

Although Appendix B catalogues the federal statutes that include whistleblower protections,¹⁴⁶ many others contain no such protection for whistleblowers. For example, if a private sector employee, such as a private contractor at a nuclear power plant, reports a violation of nuclear safety regulations, that individual would be covered by federal law because the regulations include an anti-retaliation provision.¹⁴⁷ If, on the other hand, the statute is not one of those listed in Appendix B, it does not contain an anti-retaliation provision, and the job of a whistleblower

137. *Id.* (listing statutes applicable to federal government employment).

138. Elizabeth Williamson, *One Soldier's Unlikely Act: Family Fears for Man Who Reported Iraqi Prisoner Abuse*, WASH. POST, May 6, 2004, at A16.

139. *Id.*

140. See Gregg Zoroya, *Whistleblower Asked Mom's Advice: She Knew He Was Bothered Before Abuse Scandal Broke*, USA TODAY, May 12, 2004, at A4.

141. See 10 U.S.C. § 1034(b) (2000) (prohibiting retaliatory personnel actions against military personnel who report instances of sexual harassment).

142. See Zoroya, *supra* note 140, at A4 (describing Defense Secretary's comments that whistleblower was "honorable and responsible").

143. There have already been some ramifications for Darby's personal life. In response to the publicity, an alleged paramour has come forward to talk with the press. Matthew Sweeney, *Hero a Two-Timing Rat—Whistleblower's Double-Life Stuns Gal*, N.Y. POST, May 11, 2004, at 8.

144. Williamson, *supra* note 138, at A17.

145. Qui tam actions are brought on behalf of the government, and plaintiffs who report fraud actions that have occurred are given financial rewards for having brought the action. For a useful theoretical discussion of many private rights of action, including those for securities fraud and qui tam actions, see generally Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1 (2002).

146. See App. B, *infra* pp. 1121–23.

147. 42 U.S.C. § 5851(a) (2000).

reporting a violation of that statute to enforcement officials is not necessarily secure. For example, Title IX, which promotes equality in women's and men's educational opportunities, does not contain an anti-retaliation provision.¹⁴⁸ Recently, a basketball coach alleged that after he reported unequal treatment for female athletes, he was fired.¹⁴⁹ The United States Court of Appeals for the Eleventh Circuit rejected the claim, and the U.S. Supreme Court has granted certiorari.¹⁵⁰

In effect, the federal statutory scheme results in a haphazard enforcement structure. Whistleblower advocates continue to lobby Congress to pass a statute that provides a general federal cause of action for private-sector employees who are fired after blowing the whistle on a violation of federal law.¹⁵¹ Such a blanket anti-retaliation provision would make whistleblower protection the default rule for federal legislation.

3. *Sociological Approaches to Whistleblowing*

From this view of whistleblowing and employment law before the passage of the Sarbanes–Oxley, this Article briefly turns to a discussion of the sociology and psychology surrounding whistleblowers. It is important to understand that not only has the law been generally unsympathetic to whistleblowers, but so have co-workers and others outside the organization who do not support a decision to report wrongdoing.¹⁵² Watkins has said whistleblowing at Enron was “not an easy road to take” partly because the company planned to “just stick [her] in a corner and treat [her] like a pariah and sort of force [her] out. They just imploded too fast to have that plan work.”¹⁵³ In light of this

148. See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2000).

149. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1335 (11th Cir. 2002) (rejecting coach's claim), *cert. granted*, 124 S.Ct. 2834 (June 14, 2004) (No. 02-1672).

150. *Id.*

151. One such advocacy group, the National Whistleblower Center, suggests just such a broad federal protection for whistleblowers on its website, which includes the text of a model act. See The National Whistleblower Protection Act, at http://www.whistleblowers.org/html/model_whistleblower_law.html (last visited Oct. 7, 2004). It is worth noting that such a model act would also be beneficial on a state level, given that the same issues of piecemeal coverage arise on the state level as well.

152. For an example of colleagues who did not support a whistleblower, see the case of Grace Pierce, a doctor on a research team who raised concerns about the use of saccharine in drugs for children. *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 507 (N.J. 1980); see MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, *THE WHISTLEBLOWERS* 93–95 (1989).

153. Liz Fedor, *Enron's Watkins Relishes New Role*, MINNEAPOLIS STAR TRIB., Feb. 3, 2003, at D3.

extreme societal disapproval,¹⁵⁴ any law that hopes to be effective in promoting whistleblowing must be a strong one.

One paradigm regarding whistleblowers casts the reporting employee as a type of scoundrel and inevitably focuses on the employee's disloyalty to the organization. In this archetype, the whistleblower is a disgruntled employee with an axe to grind with his or her former employer. The whistleblower may well have been fired for incompetence, or let go in a layoff. In either event, the whistleblower feels the need to "get back" at his or her former employer, by implicating a co-worker or supervisor against whom he or she held a grudge.¹⁵⁵

On the other hand, whistleblowers are also portrayed as lone voices of reason, morality, and truth who speak out to protect the public from harm. This paradigm usually pits the conscience of one individual against the power and resources of a large organization. One need only watch the movies *Silkwood*¹⁵⁶ or *The Insider*¹⁵⁷ to see the myth of the heroic whistleblower writ large. In part, the myth of the heroic whistleblower represents American individualism. The individual worker, refusing to give up his or her morals and identity, instead stands up for what he or she believes is right in the face of overwhelming power and pressure to conform.¹⁵⁸

154. See Sherron Watkins, Address at Samford University (Feb. 19, 2004).

155. See *Jones v. Enterprise Rent A Car*, 187 F. Supp. 2d 670, 673 (S.D. Tex. 2002) (detailing plaintiff's allegations that she was forced to perform various types of consumer fraud in order to keep her job, but later became the target of company investigation). A high profile example of whistleblower-as-wrongdoer was the case of Mark Whitacre, an executive at Archer Daniels Midland Co. who blew the whistle on anti-trust violations at the company. See generally KURT EICHENWALD, *THE INFORMANT: A TRUE STORY* (2001). Whitacre was later found to have embezzled over \$9 million. *Id.*

156. The movie was based on the life of Karen Silkwood, a chemical technician at the Kerr-McGee Corp. nuclear power plant who reported problems with plant safety. *SILKWOOD* (MGM Home Entm't 1983). Silkwood had been exposed to plutonium and died in 1973 in a single car accident that some viewed with suspicion. *Id.*; see also *The Karen Silkwood Story*, LOS ALAMOS SCI., Vol. XXIII (Nov. 23, 1995), available at <http://www.pbs.org/wgbh/pages/frontline/shows/reaction/interact/silkwood.html> (last visited Oct. 7, 2004).

157. The movie deals with a former scientist at Brown & Williamson Tobacco Corp. who violated contractual agreements to expose the company's decision to include addictive ingredients in cigarettes. *THE INSIDER* (Touchstone Pictures 1999). For an in-depth discussion of the case that became the basis for the movie, see generally Brian Stryker Weinstein, *In Defense of Jeffrey Wigand: A First Amendment Challenge to the Enforcement of Employee Confidentiality Agreements Against Whistleblowers*, 49 S.C. L. Rev. 129 (1997).

158. C. FRED ALFORD, *WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER* 14-15 (2001).

The scholarship on whistleblowers reveals quite a different story from either the “hero” or “dark side” scenarios—one in which whistleblowers are isolated by co-workers, relegated to dead-end positions, and affected in their personal lives by “spillover” from workplace stress associated with whistleblowing.¹⁵⁹ According to a study of eighty-four whistleblowers conducted in the early 1990s, “82% experienced harassment after blowing the whistle, 60% were fired, 17% lost their homes, and 10% admitted to attempted suicide.”¹⁶⁰ Due to the extreme stress, many whistleblowers develop serious mental illness, such as depression, which can lead to other problems, such as alcohol or drug abuse.¹⁶¹ The harsh truth about whistleblowing and the high price that whistleblowers pay is depicted in literature as well, most notably in Henrik Ibsen’s perceptive drama, *An Enemy of the People*.¹⁶²

In *Bowen v. Parking Authority of the City of Camden*,¹⁶³ the whistleblowers confronted just such pressures.¹⁶⁴ The two plaintiffs reported alleged corruption within the department, including the use of city property for personal gain, the distribution of materials that could be sexually harassing, and the inappropriate award of contracts based on the bidder’s personal “connections” and willingness to participate in a kickback scheme.¹⁶⁵ While the two plaintiff-whistleblowers were in the process of cooperating with authorities and building a case, the stress mounted.¹⁶⁶ At one point, one of the whistleblowers wrote a letter to the Equal Employment Opportunity Commission (EEOC) stating:

Over the last two years I have made diligent efforts to report and resolve numerous flagrant acts of discrimination/sexual harassment at our facilities At the present time I am functioning under intense pressure and threatened with termination Besides living in fear of losing my job I am

159. Culp, *supra* note 4, at 113.

160. *Id.*

161. *Id.*

162. See generally HENRIK IBSEN, *An Enemy of the People*, in THREE PLAYS OF HENRIK IBSEN (Elenor Marx-Aveling & William Archer trans., Heritage Press 1965) (1882). In the drama, the protagonist is confronted with a terrible choice: blow the whistle on the polluted water in his town and be fired from his job, evicted from his lodgings, and socially shunned, or keep silent, knowing all the while as a medical doctor that the sick and invalid who come to use the bath ostensibly for a cure are being made ill. *Id.*

163. No. CIV.00-5765 (JBS), 2003 WL 22145814 (D.N.J. Sept. 18, 2003).

164. *Id.* at *6.

165. *Id.* at **1–6.

166. *Id.* at *6.

also concerned for my personal safety as well as the safety of my co-workers¹⁶⁷

The second whistleblower also suffered from stress, anxiety, and depression.¹⁶⁸ After being constructively discharged, the first whistleblower received a letter charging him with retaliation and harassment, apparently for making the reports.¹⁶⁹ Tragically, the parking authority's executive director, who had been deeply involved in the fraud and kickback schemes, shot and wounded the first whistleblower before turning the weapon on himself.¹⁷⁰

Despite negative reaction from supervisors and co-workers, it is often forgotten that the whistleblower is generally not being disloyal to the "true" goals of the organization. The organization's stated goals do not (indeed, under corporate law principles, they cannot) involve illegal activity or fraud.¹⁷¹ Thus, although perhaps disloyal to management or an immediate supervisor who is performing illegal acts, whistleblowers are true to the stated ideals of their organization. For example, many WorldCom employees blamed Cynthia Cooper for her discovery and reporting of the WorldCom fraud, but they failed to realize that Cooper actually prevented further harm to the company and its employees by doing her job correctly.¹⁷² If the books can be corrected and the wrongdoers ousted from the organization, then the company may avoid further criminal sanctions and has a better chance to recover from the fraud.

Ultimately, employees receive little encouragement to blow the whistle. State and federal laws are inconsistent in their coverage, application, and enforcement.¹⁷³ Additionally, the negative views of whistleblowing further discourage employees from reporting wrongdoing. With this sociological view in mind, this Article turns to an examination of the most salient provisions of Sarbanes–Oxley, which affect both securities law and employment law.

167. *Id.*

168. *Id.*

169. *Id.* at *8.

170. *Id.* at *14.

171. A corporation is empowered to act only to the extent that its business is lawful. Otherwise, the corporation is acting ultra vires. ROBERT CHARLES CLARK, CORPORATE LAW § 16.1, at 676 (1986) (citing MODEL BUS. CORP. ACT § 3.01 (1979)).

172. Lacayo & Ripley, *supra* note 2, at 33.

173. See App. A, *infra* pp. 1087–1120; App. B, *infra* pp. 1121–23.

II. SARBANES–OXLEY ACT CHANGES TO SECURITIES LAW AND EMPLOYMENT LAW

Depending on one's view, the Sarbanes–Oxley Act either completely revised the field of securities regulation or merely made superficial changes to the status quo.¹⁷⁴ Passing the Act in response to the corporate scandals that erupted at Enron,¹⁷⁵ WorldCom,¹⁷⁶ Global Crossing,¹⁷⁷ Adelphia,¹⁷⁸ and Tyco,¹⁷⁹ Congress aimed to reduce accounting fraud, police insider transactions, and ensure the integrity of analyst research.¹⁸⁰ In short, the purpose of the legislation is to increase transparency in financial markets, which allows investors to rely on the accuracy of financial information. As one commentator observed, “the primary policy of the federal securities laws involves the remediation of information asymmetries, that is, equalization of the information available to outside investors and insiders.”¹⁸¹ Fundamentally, securities law places a priority on disclosure because securities themselves do not have fixed or inherent value.¹⁸²

Whether Sarbanes–Oxley actually advances these central goals of securities regulation is a matter of some debate. Obviously, the law will

174. As Joseph Grundfest, an SEC commissioner from 1985 to 1990, observed in a symposium on the collapse of Enron:

We are still too close to the Enron and WorldCom frauds, I believe, to draw any firm conclusion regarding the wisdom of the Congressional response as reflected in . . . Sarbanes–Oxley . . . Some observers will complain that Sarbanes–Oxley has gone too far while others will protest that it has not gone far enough.

Joseph A. Grundfest, *Punctuated Equilibria in the Evolution of United States Securities Regulation*, 8 STAN. J.L. BUS. & FIN. 1, 2 (2002).

175. See *supra* Part I.A.1.

176. See *supra* Part I.A.2.

177. See Almar Latour & Dennis K. Berman, *Global Crossing, SEC Deal Expected*, WALL ST. J., Mar. 22, 2004, at A8 (describing accounting fraud at Global Crossing and subsequent settlement with shareholders and the SEC).

178. See Susan Pulliam & Robert Frank, *Inside Adelphia: A Long Battle over Disclosing Stock Options*, WALL ST. J., Jan. 26, 2004, at A1 (describing \$2 billion in loans made to the Rigas family, who controlled the cable company, and the inflation of financial statements in order to conceal those loans).

179. See *infra* notes 220–221 and accompanying text.

180. See *supra* note 8.

181. Joel Seligman, *No One Can Serve Two Masters: Corporate and Securities Law After Enron*, 80 WASH. U. L.Q. 449, 450 (2002). That is not to say that quantity of disclosure guarantees quality of disclosure. One commentator has cited Great Britain's “true and fair” principle as a way to prevent the “use of technicalities to evade proper disclosures.” Alan Kohler, *System of Governance Shown to Be Bordering on the Useless*, AUSTL. FIN. REV., June 29, 2002, at 72.

182. Seligman, *supra* note 181, at 450.

be perceived differently by corporate lawyers who prepare the periodic filings required by the SEC, plaintiff's securities litigators, and securities defense attorneys. In part, the success of the law will depend on the SEC's willingness and ability (through a proposed and much-needed increase in resources)¹⁸³ to enforce the new laws. The Act's success will also depend on the extent to which it is resisted and co-opted by industry and professional groups with major financial interests in the securities markets, such as auditors, corporate attorneys, investment bankers, and research analysts. Another possible barrier to the Act's success is that corporate boards themselves are composed of rather insular groups—members have similar sets of connections and are often prone to groupthink. Will these groups actually listen to the employees who are blowing the whistle?¹⁸⁴

A. General Provisions

One of the major purposes of Sarbanes–Oxley is to promote the flow of accurate information to investors so that they can make informed decisions about how to allocate their resources.¹⁸⁵ The whistleblowing provisions advance this purpose in that, if effective, they will reduce the amount of fraudulent financial information. The following section is a brief summary of the problems that gave rise to the Act's provisions. In addition, it describes the measures that the Act and the regulations under the Act take to correct these problems, and also describes events subsequent to the passage of the Act.¹⁸⁶

183. Yochi J. Dreazen & Deborah Solomon, *Shifting the Cost of Regulation: To Shore Up Budgets, Agencies May Tap Industry 'User Fees'*, WALL ST. J., Feb. 4, 2003, at A4.

184. In a way, the perspective of the whistleblower, who is guarding the underlying ideals of the organization, would be an ideal addition to a corporate board. How one would go about obtaining such a perspective, however, given the current system of corporate governance, is a difficult question.

185. H.R. Res. 3763, 107th Cong. (2002) (enacted) (stating that purpose of Sarbanes–Oxley Act of 2002 is “To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws . . .”).

186. Other summaries of Sarbanes–Oxley written for practitioners are readily available at many websites of law firms that assist corporate clients with securities compliance. See generally HAROLD S. BLOOMENTAL, *SARBANES–OXLEY ACT IN PERSPECTIVE* (2003) (describing provisions of Sarbanes–Oxley Act for practitioners); Neil H. Aronson, *Preventing Future Enrons: Implementing the Sarbanes–Oxley Act of 2002*, 8 STAN. J.L. BUS. & FIN. 127 (2002) (same).

1. *Research Analysts and Conflicts of Interest*

Section 501 of the Act attempts to lessen conflicts of interest among research analysts.¹⁸⁷ There has been considerable concern that research analysts working for investment banks were assigning positive “buy” ratings to the stock of corporations that used their employer’s investment banking services.¹⁸⁸ Sometimes research analysts were given bonuses based on the amount of business the investment banking divisions received.¹⁸⁹ As the analysts were ostensibly “independent,” this hidden conflict of interest tainted much of the research that had been released to the public.¹⁹⁰ An investor could receive biased information without any indication that the source had an ulterior motive—that is, touting stocks underwritten by an affiliated investment bank.¹⁹¹

The Act attempts to remedy these conflicts in two ways. First, the Act attempts to prevent investment banks from exercising control over research analysts.¹⁹² Section 501 prohibits investment banks from pre-approving research reports, supervising analysts, or compensating analysts in any way tied to their underwriting.¹⁹³ Further, the investment banks may not retaliate against analysts for producing a report that is

187. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 501, 116 Stat. 745, 791–93 (codified at 15 U.S.C.A. § 78o-6 (West Supp. 2003)).

188. Two notorious examples illustrate the extent of the problem. At the height of the internet bubble, analysts from Merrill Lynch publicly encouraged investors to buy specific Internet stocks; at the same time, the research analysts were sending internal e-mail messages to each other trashing the same stocks. Charles Gasparino, *Merrill Lynch Will Negotiate with Spitzer*, WALL ST. J., Apr. 15, 2002, at C1; Jerry Markon, *Merrill Plaintiffs Seek to Append Spitzer Charges*, WALL ST. J., Apr. 16, 2002, at C7. These e-mails made it obvious that the research analysts were highly skeptical of stocks in these Internet companies that had no sound model for generating revenue. However, because Merrill was the investment bank that had underwritten the stocks, and was therefore promoting them, the analysts doctored their research and reversed their conclusions for presentation to the public. See Gasparino, *supra*, at C1; see also Affidavit in Support of Application for an Order Pursuant to General Business Law Section 354, at 10–11, 13, *In re Spitzer*, No. 02-4015-22 (N.Y. Sup. Ct. Apr. 8, 2002) (containing excerpts from Merrill Lynch employee e-mails), available at <http://www.oag.state.ny.us/press/2002/apr/MerrillL.pdf> (last visited Oct. 7, 2004).

The second example is that of Jack Grubman, a prominent research analyst with Salomon Smith Barney, who allegedly granted favorable ratings to WorldCom in return for investment banking business for his firm (as well as his children’s admittance to certain elite pre-schools in New York City). Charles Gasparino, *Ghosts of E-Mails Continue to Haunt Wall Street: In Grubman Inquiry, Preschool Is Pressed on Twins’ Admission*, WALL ST. J., Nov. 18, 2002, at C1.

189. See *supra* note 188.

190. See *supra* note 188.

191. See *supra* note 188.

192. Sarbanes–Oxley Act § 501.

193. *Id.*

neutral or negative.¹⁹⁴

The second way the Act seeks to prevent conflicts is through a regime of disclosure.¹⁹⁵ Research reports must disclose whether that issuer is a client of the associated investment bank.¹⁹⁶ In addition, analysts must disclose their own personal holdings in the issuer.¹⁹⁷ Further, research reports must disclose the business the investment bank conducted with that company.¹⁹⁸ Sarbanes–Oxley also requires investment banks to provide standardized criteria for giving a company a buy, sell, or hold rating.¹⁹⁹ Finally, the Act prohibits a company from awarding bonuses to analysts based on the company's level of investment banking business.²⁰⁰

Since Congress passed the Act, there have been further developments to address conflicts of interest. On April 29, 2003, ten major investment banks announced that they would pay \$1.4 billion into a fund to settle lawsuits accusing them of intentionally biasing their research.²⁰¹ Of the total settlement, the parties agreed to place \$432.5 million into a fund that would distribute research to investors independent of any brokerage firm.²⁰² Additionally, many investors have brought securities arbitration actions on the basis of tainted research reports.²⁰³

2. *Increased Criminal Penalties for Securities Fraud*

The Act augments existing white collar criminal statutes by creating two new criminal offenses, amending existing criminal statutes, and increasing the penalties for existing federal crimes, either by directly amending the statute or by requiring rulemaking to change the

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Walter Hamilton & Thomas S. Mulligan, *Wall Street Will Pay \$1.4 Billion: Regulators Detail Final Terms of a Settlement with Brokerage Firms over Analyst Conflicts*, L.A. TIMES, Apr. 29, 2003, at A1.

202. *Id.*; see also SEC v. Bear, Stearns & Co., No. 03.CIV.2937 (WHP), 2003 WL 21517973, at *1 (S.D.N.Y. June 2, 2003) (describing settlement of cases and discussing continuing issues after the settlement).

203. See, e.g., Susanne Craig & Ruth Simon, *Morgan Stanley Is Ordered to Pay Client \$100,000*, WALL ST. J., June 13, 2003, at C7 (describing one such case).

sentencing guidelines for those federal offenses.²⁰⁴ Two commentators have recently suggested that this approach adds little to the current federal laws regarding securities fraud.²⁰⁵ Another commentator, however, is more optimistic about the new criminal protections, stating that “the Act’s criminal provisions make significant strides toward piercing the veil of corporate silence.”²⁰⁶

3. *Standardization of Accounting Practices*

Additionally, Sarbanes–Oxley attempts to standardize certain accounting practices. In part, this standardization is accomplished by the creation of the Public Company Accounting Oversight Board (PCAOB), an entity that regulates the private audit firms that currently monitor public company accounting.²⁰⁷ The PCAOB sets certain quality control, independence, and other ethics standards for outside auditors.²⁰⁸ Of course, as noted by one commentator,

[w]hether this body achieves anything useful will depend substantially on who is appointed. Judging by the work of comparable bodies attempting to oversee the accounting and auditing professions in past decades, this will not be an easy job to do well. Enormous lobbying pressure from those industries can be expected to dampen any major initiatives.²⁰⁹

Indeed, as predicted, the Board became mired in controversy when

204. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, §§ 901–904, 116 Stat. 745, 804–05 (codified at 18 U.S.C.A. §§ 1341, 1343, 1349 (West Supp. 2003); 29 U.S.C.A. § 1131 (West Supp. 2003)). There are further signs that penalties for white collar crime may increase, as an advisory group to the Federal Sentencing Commission has recommended that directors be held accountable for compliance programs at their companies. Gary Fields, *Strict Corporate-Crime Sentencing Sought*, WALL ST. J., Oct. 8, 2003, at C1.

205. Michael A. Perino, *Enron’s Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes–Oxley Act of 2002*, 76 ST. JOHN’S L. REV. 671, 698 (2002) (“[Congress] trumpeted [Sarbanes–Oxley’s] new crimes and new enhanced penalties as providing significant deterrence for securities fraud. In reality, these provisions are unlikely to have much real impact on deterrence. They criminalize little additional conduct and do little to enhance real penalties.”); Recent Legislation, *Corporate Law—Congress Passes Corporate and Accounting Fraud Legislation*, 116 HARV. L. REV. 728, 734 (2002) (arguing that only tangible effect will be number of charges a prosecutor can bring, perhaps inducing more guilty pleas).

206. Brickey, *supra* note 42, at 359.

207. See Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, §§ 101–109, 116 Stat. 745, 750–71 (codified at 15 U.S.C.A. §§ 7211–7219 (West Supp. 2003)).

208. *Id.*

209. Cunningham, *supra* note 18, at 944.

the SEC named William Webster as its chair.²¹⁰ Although Webster had held numerous government positions, including that of CIA director, Webster had no connection or particular expertise with accounting and, in fact, had been a director of U.S. Technologies, a failed Internet firm that had been sued by shareholders for securities fraud.²¹¹ Ultimately, Webster resigned from the PCAOB before it held its first meeting.²¹² Critics of the Bush administration pointed to Webster's lack of accounting expertise as evidence that the administration was far from serious about corporate governance reform.²¹³

4. *Corporate Governance*

In one of its more publicized provisions, the Sarbanes–Oxley Act mandates that chief executive officers and chief financial officers of publicly traded companies review, sign, and take responsibility for the periodic reports the companies file with the SEC.²¹⁴ However, this is not in any real sense a departure from previous law. Company executives were already supposed to ensure that the corporation made no material misstatements in the periodic filings,²¹⁵ and shareholders could sue executives for either nondisclosure or false disclosure of facts in the filings.²¹⁶ As one commentator put it, “investors believed that the certification requirement was a meaningless exercise for those intent on committing financial fraud.”²¹⁷ On the other hand, such a certification requirement would make it easier for prosecutors to prove the requisite state of mind needed to obtain a criminal conviction.

Sarbanes–Oxley has other implications for corporate governance. One

210. John R. Wilke, *Webster Says He Will Likely Quit as Head of New Accounting Board*, WALL ST. J., Nov. 12, 2002, at A1.

211. *Id.*

212. Michael Schroeder, *Webster Makes it Official and Quits Accounting Board*, WALL ST. J., Nov. 13, 2002, at A3.

213. *See* Wilke, *supra* note 210, at A1.

214. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 302, 116 Stat. 745, 777–78 (codified at 15 U.S.C.A. § 7241 (West Supp. 2003)).

215. *See* 17 C.F.R. § 240.10b-5 (2004).

216. *See id.*

217. Aronson, *supra* note 186, at 143. Another commentator succinctly summarized the ambivalence about these rules as follows: “These provisions look to prevent CEOs and CFOs from hiding behind the defense of ignorance The rules may be sensible, but few knowledgeable people really believed those senior executives, and none but the most sympathetic or gullible absolved them from responsibility.” Cunningham, *supra* note 18, at 955–56.

major change is that the Act forbids loans to insiders.²¹⁸ Before, insiders co-mingled personal funds with corporate funds, and many corporations gave insiders loans on extremely favorable terms.²¹⁹ Recent controversy about such co-mingling of funds has focused on L. Dennis Kozlowski, the former head of Tyco, Inc., who threw a lavish (indeed, decadent) party in Italy for his wife’s birthday, which prosecutors assert was charged to the company as part of a supposed board meeting that was also taking place in Italy.²²⁰ In addition, the allegation that Kozlowski used Tyco’s assets to pay for a \$6,000 shower curtain in a bathroom used only by the family’s maid has led Kozlowski to become not only the subject of many tasteless jokes, but also, more seriously, the subject of criminal prosecution.²²¹

The Act also contains items that have long been considered “best practices” for publicly-traded companies and are not novel in any way except that they are now mandatory. For example, issuers are required to disclose insider trades in a more timely fashion,²²² as well as to disclose other developments that could have an effect on the value of the company’s stock price.²²³ The Act also strongly suggests that a “financial expert” be a member of the issuer’s audit committee.²²⁴ Finally, the Act requires management to file a report with the SEC detailing its internal controls to ensure that fraud does not go unnoticed.²²⁵

The Act also seeks to remedy the problem of auditor conflicts by prohibiting auditors from providing other services to their audit clients.²²⁶ During the 1990s, one of the most lucrative sources of revenue

218. Sarbanes–Oxley Act § 402 (codified at 15 U.S.C.A. § 78m (West Supp. 2003)).

219. Another scandal about insider loans and payments that has recently come to light took place within Hollinger International. See Mark Heinzl, *Hollinger Report Says Black Hid Fees in Barbados*, WALL ST. J., Sept. 3, 2004, at A3; Mark Heinzl & Christopher J. Chipello, *Report Slams Hollinger’s Black for a ‘Corporate Kleptocracy,’* WALL ST. J., Sept. 1, 2004, at A1.

220. Mark Maremont, *Finally a CEO Faces a Jury: Kozlowski*, WALL ST. J., Sept. 25, 2003, at C1 (describing party for Linda Kozlowski’s birthday).

221. Colleen DeBaise & Mark Maremont, *Jurors Examine Costs of Décor Chez Kozlowski*, WALL ST. J., Dec. 16, 2003, at B1; Colleen DeBaise, *Newest ‘Tyco Gone Wild’ Video Is Out, and Jurors See \$6,000 Shower Curtain*, WALL ST. J., Nov. 26, 2003, at C1 (describing, in addition to shower curtain, the outrageous prices of other home furnishings, including a mirror valued at \$103,000 and a Persian rug valued at \$191,250, which were allegedly furnished at Tyco shareholders’ expense).

222. Sarbanes–Oxley Act § 403 (codified at 15 U.S.C.A. § 78p (West Supp. 2003)).

223. *Id.* § 409 (codified at 15 U.S.C.A. § 78m (West Supp. 2003)).

224. *Id.* § 407 (codified at 15 U.S.C.A. § 7265 (West. Supp. 2003)).

225. *Id.* § 404 (codified at 15 U.S.C.A. § 7262 (West Supp. 2003)).

226. *Id.* § 201 (codified at 15 U.S.C.A. § 78j (West Supp. 2003)).

for accounting firms was selling not only audit services, but also other consulting and legal services to their auditing clients.²²⁷ The cross-selling of services, however, led to the very real threat of entanglement and conflicts of interest because an accounting firm's auditing branch would be hesitant to criticize the consulting work that another branch of the same firm had performed.²²⁸ It was this type of interlock that led to the indictment and subsequent failure of accounting firm Arthur Andersen in connection with its role as consultant and auditor for Waste Management, Global Crossing, and Enron.²²⁹ Additionally, the Sarbanes–Oxley Act contains document destruction provisions, which make it a federal offense to destroy documents of the type that Arthur Andersen destroyed when it was under investigation.²³⁰

5. *Securities Fraud Litigation*

Only a few years before the accounting scandals, Congress took action to make it more difficult for plaintiffs to bring securities class action lawsuits.²³¹ The enforcement of our securities laws, like the enforcement of many regulatory schemes, is partly the responsibility of government agencies—in the case of securities regulation, the SEC—and is in part left to plaintiffs who take on the role of private attorneys general.²³² In 1995, Congress passed the Private Securities Litigation and Reform Act (PSLRA) with the express purpose of limiting actions for securities fraud.²³³ The PSLRA “threw numerous substantive and procedural roadblocks” in front of plaintiffs seeking to bring securities fraud actions.²³⁴ Among other numerous requirements, it raised the

227. See BARBARA LEY TOFFLER & JENNIFER REINGOLD, FINAL ACCOUNTING 49–51 (2003). One former Arthur Andersen partner has described the process of gaining additional revenue from consulting as “turning a blind eye to accounting standards in order to earn the goodwill and trust of the client, and squeezing the consultants into meetings as often as possible in hopes of getting more overall business.” *Id.* at 49.

228. See *id.* at 50–51.

229. See *State Officials Revoke Andersen's License*, HARTFORD COURANT, Sept. 21, 2002, at E2 (describing Arthur Andersen's conviction for obstructing justice in the Enron probe and subsequent revocation of license to practice in Connecticut).

230. Sarbanes–Oxley Act § 802 (codified at 18 U.S.C.A. § 1519 (West Supp. 2003)). In response to this change in the law, companies should implement a standard document retention policy. *Id.*

231. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101(b), 109 Stat. 737, 743–49 (codified at 15 U.S.C. § 78u-4 (2000)).

232. See Bucy, *supra* note 145, at 31–54.

233. Private Securities Litigation Reform Act § 101(b).

234. Michael G. Lange & Michael T. Matraia, *The Sarbanes–Oxley Act of 2002: Political Sound*

pleading standard: in order to survive a motion to dismiss, a complaint must allege facts giving rise to a strong inference that the defendants acted with scienter.²³⁵ Plaintiffs had to allege such facts without the benefit of discovery, which the PSLRA stayed until the complaint had survived a motion to dismiss.²³⁶

The Sarbanes–Oxley changes to securities fraud litigation only marginally ease the burden on plaintiffs or mitigate the effects of the PSLRA. For actions that were commenced after July 30, 2002, § 804 extends the statute of limitations from one to two years after discovery of the fraud and from three to five years after the fraud occurred.²³⁷ Further, § 803 makes it easier for plaintiffs' attorneys to collect restitution for securities fraud from the personal assets of corrupt executives.²³⁸ The Act does this by amending the bankruptcy code to prevent the discharge in bankruptcy of debts related to securities fraud.²³⁹ Finally, § 306 gives private litigants the right to bring a derivative lawsuit to recover profits that executives earn through insider trades made during pension fund blackout periods (i.e., if pension funds are frozen out and cannot trade in the stock, executives should not be allowed to trade in the stock at that time either).²⁴⁰

B. Whistleblowing Provisions

In addition to the changes described above, Sarbanes–Oxley attempts to respond directly to the plight of employees who blow the whistle on corporate fraud. The following section details the changes that Sarbanes–Oxley makes to securities law and employment law. In particular, Sarbanes–Oxley provides federal statutory protection to whistleblowers who report fraud at publicly traded companies,²⁴¹

Bites Posing as Reform, 12 A.B.A. SEC. NEWS 2, 2 (Winter 2003).

235. 15 U.S.C. § 78u-4(b)(2).

236. *Id.* § 78u-4(b)(3)(B). One consequence of the PSLRA is that pension funds and other institutional investors must take a leading role in prosecuting securities class action litigations. Arden Dale, *Pensions Join Class-Action Suits at Faster Pace, Lending Clout*, WALL ST. J., Jan. 14, 2004, available at 2004 WL-WSJ 56917066.

237. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 804, 116 Stat. 745, 801 (codified at 28 U.S.C.A. § 1658 (West Supp. 2003)).

238. *See id.* § 803 (codified at 11 U.S.C.A. § 523(a) (West Supp. 2003)).

239. *Id.*

240. *Id.* § 306 (codified at 15 U.S.C.A. § 7244 (West Supp. 2003)); 29 U.S.C.A. §§ 1021, 1132 (West Supp. 2003)).

241. *Id.* § 806(a) (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)).

provides criminal penalties for retaliation against whistleblowers,²⁴² and requires publicly traded companies to institute procedures for handling internal complaints.²⁴³

1. Section 806: Federalizing the Law of Whistleblowing

Under § 806 of Sarbanes–Oxley, whistleblowers who report instances of fraud internally or to governmental agencies are statutorily protected from retaliation if they work at publicly traded companies.²⁴⁴ Sarbanes–Oxley therefore changes the landscape of whistleblower law by federalizing a portion of the law that had been composed of a patchwork of federal statutes, state statutes, and common law exceptions to the at-will employment rule.²⁴⁵ Had it been in force before the scandals broke, § 806 would have been directly applicable to both Watkins’s and Cooper’s employment situations.

Section 806 expressly forbids a publicly traded company or “any officer, employee, contractor, subcontractor, or agent of such company” from discharging, demoting, suspending, threatening, harassing, or otherwise discriminating against an employee who engages in certain forms of protected whistleblowing activity.²⁴⁶ The Act defines protected activity in one of two ways. First, employees are protected when they “provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of . . . any provision of Federal law relating to fraud against shareholders”²⁴⁷ This type of activity is protected, however, only if the “information or assistance” is provided in an appropriate forum: to a “Federal regulatory or law enforcement agency,” to a “[m]ember of Congress or any committee of Congress,” or to “a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)”²⁴⁸ Alternatively, the Act protects employees when they:

file, cause to be filed, testify, participate in, or otherwise assist

242. *Id.* § 1107 (codified at 18 U.S.C.A. § 1513 (West Supp. 2003)).

243. *Id.* § 301 (codified at 15 U.S.C.A. § 78j-1 (West Supp. 2003)).

244. *Id.* § 806(a) (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)).

245. *See* App. A, *infra* pp. 1087–1120.

246. Sarbanes–Oxley Act § 806(a) (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)).

247. *Id.*

248. *Id.*

in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of . . . any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.²⁴⁹

In other words, the Act protects whistleblowers who make internal reports of violations, as long as those reports are made to a supervisor or another individual within the organization.²⁵⁰ Moreover, the supervisor must have enough institutional power to investigate the wrongdoing.²⁵¹ The Act, therefore, does not protect an employee who confers with a peer, or discusses an accounting impropriety with a subordinate internally.

Externally, the law covers reports to government agencies, such as the SEC.²⁵² It also protects employees who provide information that would assist a shareholder lawsuit for a securities fraud violation.²⁵³ Reporting a violation to the media, however, would not be protected. One would assume that, although a report to the media would effectively expose the relevant concern, such a report could result in an extreme amount of adverse publicity.²⁵⁴ One could view this as striking an economic balance between encouraging reports of wrongdoing and, at the same time, preventing mistaken, erroneous, or malicious reports from reaching the press, where substantial harm to a company's reputation—not to mention stock price—would result.²⁵⁵

The whistleblower's required state of mind is described by the statute, but this standard will likely be interpreted by courts. The issue is whether the whistleblower's motives must be pure or whether the whistleblower is still protected if he or she intended to implicate a co-worker or cover up his or her own wrongdoing. What if the complaints of fraud are completely false or without any basis in fact? Section 806 of the Sarbanes–Oxley Act establishes that, in order to obtain the protection

249. *Id.*

250. *See id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. For a discussion of the issues surrounding whistleblowing to the media, see generally Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151 (1994).

255. The media lacks any formal institutional power to address the problem, unlike Congress, a regulatory agency, or a supervisor within organization.

of the statute, a whistleblower must have a “reasonable belief” that there has been a violation of the federal securities laws.²⁵⁶ If the state cases are any indication, this statutory language will likely become a subject for litigation.²⁵⁷

If an employer violates § 806, the employee is entitled to “all relief necessary to make the employee whole.”²⁵⁸ This “make whole” relief includes “reinstatement with the same seniority status that the employee would have had, but for the discrimination,” “back pay, with interest,” and litigation costs, including attorney’s fees.²⁵⁹ There is, however, no provision for punitive damages.²⁶⁰

The procedure for commencing a whistleblowing action is only briefly described in the Act.²⁶¹ Instead, Sarbanes–Oxley adopts the procedures for whistleblowing actions set forth in another statute, the Wendell H. Ford Aviation Investment and Reform Act.²⁶² The Sarbanes–Oxley Act gives oversight of § 806 to the Department of Labor (DOL), which has since delegated authority to the Secretary of the Occupational Safety and Health Administration (OSHA).²⁶³ Newly promulgated regulations further elaborate the procedures.²⁶⁴

These regulations require the employee to send notification of the OSHA complaint to the employer.²⁶⁵ Within twenty days of the initial filing, the OSHA investigator must allow the alleged violator/employer the opportunity to respond.²⁶⁶ The investigation will occur only if the plaintiff establishes a prima facie case that the adverse employment action was the result of protected activity and not some other lawful personnel reason.²⁶⁷ Under a DOL decision, to make out a prima facie case the whistleblower must establish by a preponderance of the

256. Sarbanes–Oxley Act § 806(a) (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)).

257. See *supra* note 125 and accompanying text; see also *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 (Dep’t of Labor Jan. 28, 2004), available at <http://www.oalj.dol.gov/public/wblower/decsn/03sox15c.htm> (last visited Oct. 7, 2004) (adopting the reasonable belief standard as set out in the Act).

258. Sarbanes–Oxley Act § 806(a) (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)).

259. *Id.*

260. See *id.*

261. See *id.*

262. See *id.*; 49 U.S.C. § 42121(b) (2000).

263. See 29 C.F.R. § 1980.101 (2003).

264. See *id.* §§ 1980.100–1980.115.

265. *Id.* § 1980.104.

266. *Id.*

267. *Id.*

evidence that (1) the whistleblower engaged in protected activity as defined by Sarbanes–Oxley, i.e., making a report as described in § 806; (2) the employer was aware of the protected activity; (3) the whistleblower suffered an adverse employment action; and (4) the whistleblower raised an inference that the protected activity was a contributing factor to the adverse employment action.²⁶⁸ If the plaintiff successfully establishes a prima facie case, the secretary will investigate and issue a determination in the form of a letter.²⁶⁹ If the secretary finds there is reasonable cause to believe there has been retaliation, then the secretary must award “make whole” relief.²⁷⁰

Section 806 also contains a timeline for the administrative proceeding. If there has been no final decision within 180 days of the complaint, the plaintiff is entitled to de novo review in federal district court.²⁷¹ One commentator has noted that this timeline, while ambitious, is also unrealistic and the end result may be that defendants will need to defend the lawsuit in front of two tribunals—once when they begin proceedings in an administrative forum, and once de novo in district court, where they will find themselves simply because of the timeline.²⁷²

2. Section 1107: Criminal Penalties for Shooting the Messenger

Other portions of the Act also are concerned with the type of whistleblowing in which Watkins and Cooper engaged.²⁷³ Entitled

268. *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 (Dep’t of Labor Jan. 28, 2004), available at <http://www.oalj.dol.gov/public/wblower/decsn/03sox15c.htm> (last visited Oct. 7, 2004).

269. 29 C.F.R. § 1980.105.

270. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 806(a), 116 Stat. 745, 802–04 (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)). For an excellent general summary of the text of the DOL’s interim regulations, see Peter M. Panken, *SOX Whistleblower Procedures: The Interim DOL Regulations*, A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 496, 472 (2003), available at WL SJ012 A.L.I.-A.B.A. 469.

271. Sarbanes–Oxley Act § 806(a).

272. Allen B. Roberts, *Timelines for Sarbanes Oxley Whistleblower Enforcement: Does the Administrative Procedure Arithmetic Work?*, METROPOLITAN CORP. COUNS., Nov. 2003, available at WL 11/03 METCC 26, (col 1).

273. See Brickey, *supra* note 42, at 359–60 (describing impact of criminal provisions, including criminal whistleblowing provisions). Brickey concludes that:

Sarbanes–Oxley undoubtedly will not be the last word on corporate governance reform or punishing criminal fraud. There are no simple solutions to a culture of deceit fueled by greed, mismanagement, conflicts of interest, and failure of professional and regulatory oversight. But Sarbanes–Oxley is a constructive step in the right direction. It may fall short, but it sends an unmistakably clear signal that this should never happen again.

Id. at 381.

“Retaliation Against Informants,” § 1107 of the Act creates a new criminal offense of that same name.²⁷⁴ Section 1107 amends an existing federal statute that deals with violence against witnesses and makes it a crime to “knowingly, with the intent to retaliate [take] any 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 . . . of any Federal offense”²⁷⁵ Before this amendment, the statute applied only to retaliation that caused death, bodily injury, or damage to property.²⁷⁶

In addition to its application to whistleblowing about securities fraud and accounting violations, § 1107 also criminalizes retaliation against an employee who reports any federal offense to law enforcement.²⁷⁷ Further, the language of § 1107 is not limited to publicly traded companies.²⁷⁸ Indeed, its reach would seemingly encompass every employer. Section 1107 conceivably criminalizes many actions that have been wholly civil tort matters, such as retaliation against an employee who reports violations of Title VII to the EEOC.

One management-side labor and employment law attorney has referred to § 1107 as “[o]ne of the Act’s potentially most dangerous sections” because it imposes criminal penalties for run-of-the-mill whistleblowing cases.²⁷⁹ One feature that distinguishes § 1107 from the average whistleblower scenario is that criminal penalties attach only if there is an “intent to retaliate,” the information about the commission of the federal offense is “truthful information,” and it is provided to a “law enforcement officer.”²⁸⁰ Further, the effectiveness of this provision is wholly dependent on the discretion of the prosecutor, which is a separate

274. Sarbanes–Oxley Act § 1107, 116 Stat. 745, 810 (codified at 18 U.S.C.A. § 1513 (West Supp. 2003)). For discussion and analysis of all of the criminal provisions enacted under Sarbanes–Oxley, see generally Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937 (2003).

275. Sarbanes–Oxley Act § 1107 (codified at 18 U.S.C.A. § 1513 (West Supp. 2003)).

276. *Id.*; Victim and Witness Protection Act § 4(a), 18 U.S.C. § 1513 (2000). Perhaps the extension to employment can be rationalized by recognizing that employment relationship can on some level be considered a property right. For an example of a work that treats employment in this manner, see generally Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

277. Sarbanes–Oxley Act § 1107 (codified at 18 U.S.C.A. § 1513 (West Supp. 2003)).

278. *See id.*

279. Dean J. Schaner, *Employment Law Post-Enron*, 66 TEX. B.J. 26, 26 (2003).

280. Sarbanes–Oxley Act § 1107.

topic altogether.²⁸¹

3. Section 301: Handling Whistleblower Complaints

Section 301 of the Act, which deals with audit committees, also affects whistleblowers.²⁸² Section 301(4) requires each company’s audit committee to establish procedures for “the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters” and “the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.”²⁸³ This is not phrased in discretionary terms—every publicly traded company must have a system in place for receiving anonymous complaints.²⁸⁴

Of course, the “procedures” here are only briefly addressed within the Act, a flaw that will be discussed and analyzed in Part III of this Article. As with other sections of the Act, there is a question as to whether these briefly-mentioned “procedures” for anonymous complaints must be internal or external. The Act is silent on this point, and therefore many companies interpret this provision to mean that an internal system for reporting complaints would suffice.²⁸⁵

III. THE EFFECTIVENESS OF SARBANES–OXLEY

From the previous section it is clear that Sarbanes–Oxley certainly has, and will continue to have, an impact upon corporate governance and securities law. However, the magnitude of the impact is an open question, and one that the next section critically analyzes. How much of a change does the Act actually make, and just how much protection are whistleblowers afforded? Evaluating the changes to employment law

281. See, e.g., Teah R. Lupton, *Prosecutorial Discretion*, 90 GEO. L.J. 1279, 1279–82 (2002):

Courts recognize a prosecutor’s broad discretion to initiate and conduct criminal prosecutions, in part out of regard for the separation of powers doctrine and in part because ‘the decision to prosecute is particularly ill-suited to judicial review.’ So long as there is probable cause to believe that the accused has committed an offense, the decision to prosecute rests within the prosecutor’s discretion. A prosecutor has far-reaching authority to decide whether to investigate, grant immunity, or permit a plea bargain, and to determine whether to bring charges, what charges to bring, when to bring charges, and where to bring charges.

Id. (citations omitted).

282. See Sarbanes–Oxley Act § 301 (codified at 15 U.S.C.A. § 78j-1 (West Supp. 2003)).

283. *Id.*

284. *Id.*

285. See *infra* note 314 and accompanying text.

assists in determining the effectiveness of the Act. Both of these analytical and evaluative goals can be answered by an inquiry into the weaknesses of Sarbanes–Oxley.

After an examination of the Act’s weaknesses, this Article concludes that Sarbanes–Oxley should have provided more protection for whistleblowers. First, the Act lacks procedures for responding to a whistleblower’s report. Second, a whistleblowing case can apparently be sent to arbitration, a forum that this Article argues weakens the rights of employees. A detailed analysis of Sarbanes–Oxley supports the proposition that the Act, a product of political compromise, is far more limited than the rhetoric accompanying it would indicate.

Sarbanes–Oxley, in its provision of a civil scheme for recovery in § 806, is an area-specific statute dealing with fraud at publicly traded companies. Whistleblowing in other areas is still left with piecemeal state law coverage, and an employee is either protected or denied recovery based on the nature of the violation and the happenstance of the law in the relevant jurisdiction. Given the confusing status of state whistleblowing law,²⁸⁶ this Article concludes that a general federal whistleblower protection act would be better policy than the current patchwork of area-specific statutes.²⁸⁷ Under the reform proposed, an employee who reported any violation of state or federal law, rule, or regulation would receive federal civil protection from retaliation. Further, the law would make it clear that these disputes are not subject to mandatory pre-dispute arbitration. First, however, the following two sections of this Article examine the effectiveness of Sarbanes–Oxley’s whistleblower protections.

A. Sarbanes–Oxley Fails to Specify Procedures that Employers Must Follow when Addressing Employee Complaints

The Act fails to detail the procedures employers must follow when dealing with a whistleblower complaint. Part II.B.3 described § 301 of the Act, which requires that “[e]ach audit committee shall establish procedures” for “the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting

286. See App. A, *infra* pp. 1087–1120.

287. For the text of a proposed act by the National Whistleblower Center, a whistleblower’s advocacy group, see The National Whistleblower Protection Act, *supra* note 151. It is worth noting that such a model act would be also be beneficial on a state level to provide employees uniform protections.

controls, or auditing matters” and “the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.”²⁸⁸ However, § 301 fails to specify what types of procedures are adequate.

Although the law requires a channel for employees to send anonymous complaints, and the audit committee is supposed to create procedures for the “retention” and “treatment” of complaints, the Act does not describe what the “treatment” of such complaints entails.²⁸⁹ Thus, like the proverbial tree in the forest, whistleblowers can report problems under the Act, but there is no guarantee that anyone—on the audit committee or otherwise—will necessarily hear them. This provision creates a “black hole” of sorts, in which anonymous complaints flow in, but there is no description of what to do with the complaints once they arrive.

In *Faragher v. City of Boca Raton*,²⁹⁰ the U.S. Supreme Court provided guidance on how best to deal with complaints stemming from instances of sexual harassment.²⁹¹ The decision gives employers an affirmative defense to Title VII liability if they take prompt corrective action to stop harassment from occurring once it has been reported.²⁹² It also shields employers from liability if they have in place policies or procedures that should prevent such harassment from occurring in the first place.²⁹³ No such analogue currently exists for Sarbanes–Oxley whistleblowing, but one should.

Presumably, in requiring the “treatment” of the anonymous complaints, § 301 implies that the employer must take at least *some* sort of action once it receives a complaint.²⁹⁴ However, because the Act does not set out specific requirements,²⁹⁵ conceivably the complaints could be “treated” by marking them with a large red check mark, or moving

288. Sarbanes–Oxley Act § 301.

289. *Id.*

290. 524 U.S. 775 (1998).

291. *Id.* at 786–92.

292. *Id.* at 807. See Paul Buchanan & Courtney W. Wiswall, *The Evolving Understanding of Workplace Harassment and Employer Liability: Implications of Recent Supreme Court Decisions Under Title VII*, 34 WAKE FOREST L. REV. 55, 59 (1999); Louis P. DiLorenzo & Laura H. Harshbarger, *Employer Liability for Supervisor Harassment After Ellerth and Faragher*, 6 DUKE J. GENDER L. & POL’Y 3, 8 (1999).

293. *Faragher*, 524 U.S. at 807. Such measures might include training employees or providing human resources staff who know how to address such complaints.

294. See Sarbanes–Oxley Act § 301 (codified at 15 U.S.C.A. § 78j-1 (West Supp. 2003)).

295. See *id.*

electronic mail into a reviewed folder—the Act does not require the employer to respond to the complaint in any way. This is not because it is inherently impossible to respond. One can imagine instances where even if a complaint is sent anonymously, it is possible to let that employee know that the feedback has been received and is being responded to, perhaps by responding to the anonymous e-mail account or posting an announcement on an electronic bulletin board.

The investigation into mutual fund timing at Putnam Investments provides one example of the black hole: a whistleblower tried to report financial fraud but was utterly ignored even after Sarbanes–Oxley.²⁹⁶ The whistleblower, Peter Scannell, reported that institutional investors were engaging in market timing, which is defined as: “[buying] shares of international funds late in the day when the U.S. market is rallying, locking in the daily fund price set at 4 p.m. Because foreign markets regularly follow the U.S., foreign shares in the fund will usually rise the next day, producing a higher fund price, enabling the trader to reap a profit by quickly selling thereafter.”²⁹⁷ Although this procedure was technically legal at the time the scandal broke, it had the effect of harming long-term mutual fund shareholders and violated internal policies at Putnam.²⁹⁸ Acknowledging that such trading hurts returns for shareholders, many funds had falsely stated in their prospectus or other materials sent to shareholders that they did not engage in timing.²⁹⁹ Many of the calls for increased action in the regulation of mutual funds focus on these types of misstatements in fund disclosures to the public.³⁰⁰

Scannell, an employee at Putnam’s call center in the suburbs of Boston, remarked on the fact that members of Boilermakers Union, Local 5, had made thousands of trades in international funds in violation

296. See Karen Damato & Tom Lauricella, *Mutual Funds Vow to Fix Their Clocks: Earlier Deadlines Are Proposed for Investors to Place Orders; Will New Fees Frustrate Them?*, WALL ST. J., Oct. 31, 2003, at C1; John Hechinger, *How One Call Taker Spurred the Putnam Mutual Fund Case*, WALL ST. J., Oct. 28, 2003, at C1.

297. See Hechinger, *supra* note 296, at C13.

298. *Id.* Since the scandal broke, the SEC has begun considering options for new regulations that would make the practice of timing illegal. These proposed rules are already drawing controversy because they involve naming an employee of the mutual fund management company as a compliance officer. Karen Damato & Michael Schroeder, *Can Funds Police Themselves?*, WALL ST. J., Dec. 4, 2003, at C1.

299. See Hechinger, *supra* note 296, at C1.

300. See Damato & Lauricella, *supra* note 296, at C15.

of Putnam’s internal policies.³⁰¹ Upon bringing this to the attention of his two immediate supervisors, Scannell allegedly was told “[t]hat’s Putnam senior management’s concern.”³⁰² After being ignored internally and then attacked by a man wielding a brick (according to a police report, the assailant was wearing a Boilermakers T-shirt), Scannell eventually turned to the SEC (who initially ignored him) and then to Massachusetts regulators.³⁰³ Regulators have now brought a civil fraud claim against Putnam in state court.³⁰⁴

Perhaps the only tangible effect of § 301 is that it may well provide concrete, written evidence, either for government investigators or for plaintiff’s attorneys prosecuting shareholder derivative lawsuits, of who knew about a fraud and when they decided to ignore or tacitly assent to it. A common problem that arises when prosecuting shareholder lawsuits is that defendants “pass the buck” among themselves. One defendant will point his or her finger at another corporate defendant and argue that someone else accounted for revenues improperly or masterminded the fraud.³⁰⁵ Similar to this argument is the “rogue trader” defense, in which a high-ranking executive will argue that he or she was ignorant of a fraudulent practice because it was the fault of an out-of-control “rogue” subordinate.³⁰⁶ Of course, the typical response³⁰⁷ to this argument is that

301. Hechinger, *supra* note 296, at C13.

302. *Id.* Although in this instance the Boilermaker’s Union was responsible for the trades, Putnam apparently admitted that “six of its managers made \$700,000 in such trading.” See John Hechinger & David Armstrong, *Mutual Funds Vow to Fix Their Clocks: Putnam Says it Was Subpoenaed for Papers Tied to Fund Trading: CEO Subject of Internal Scrutiny*, WALL ST. J., Oct. 28, 2003, at C12.

303. Hechinger & Armstrong, *supra* note 302, at C12.

304. *Id.*

305. In *In re Symbol Technologies*, many of the defendants began implicating each other in the fraud. Memorandum of Law in Support of Defendant Tomo Razmilovic’s Motion to Dismiss the Consolidated Amended Class Action Complaint at 9, 10, *In re Symbol Technologies, Inc.* (E.D.N.Y. 2003) (No. 02-CIV-1383 (LDW)) (settled without opinion); Defendant Frank Borghese’s Motion to Dismiss at 4, 12, 13, *In re Symbol Technologies, Inc.* (E.D.N.Y. 2003) (No. 02-CIV-1383 (LDW)) (settled without opinion). The case eventually settled for \$139 million, and the former CEO became a fugitive after his indictment. Michael Weissenstein, *Indicted Executive Declared Fugitive*, ASSOCIATED PRESS NEWSWIRE, June 9, 2004, available at 2004 WL 82210148.

306. In *In re Reliant Securities*, the defendants argued that so-called “round trip” energy trades were the products of subordinates rather than management. Reliant Defendants’ Motion to Dismiss Plaintiffs’ Claims Under Sections 10(B) and 20(A) of the Securities Exchange Act of 1934, Section 12(A) of the Securities Act of 1933, and the Texas Securities Act, at 12, 20, *In re Reliant Securities* (S.D. Tex. 2003) (No. H-02-1810).

307. Securities fraud lawsuits seem to contain the same archetypal arguments. In response to a plaintiff’s complaint alleging fraud, defendants will almost always counter with an argument that

a “rogue” subordinate may only engage in such behavior under inadequate supervision and a lack of proper internal controls.³⁰⁸

It is difficult to discern public companies’ response to § 301. Before the passage of the Sarbanes–Oxley Act, some companies had, on their own, set up internal “ethics hotlines,” which make sense as a best practice from a purely economic perspective.³⁰⁹ At the time Enron was formulating and implementing its byzantine accounting structures, it had in place a phone hotline that employees could call to report fraud anonymously.³¹⁰ Clearly this hotline did not prevent the massive fraud. The problem, as Sherron Watkins frames it, is that managers were continuously pushing the edge between acceptable and non-acceptable accounting practices and that, because of the company culture, no one wanted to challenge the hierarchy.³¹¹ Watkins posits that no one called the hotline because the border between what was acceptable and what was illegal had been blurred, and the employees were afraid to speak up about the situation for fear that they would lose their jobs.³¹² Watkins herself initially turned to an anonymous suggestion box to air her concerns, but then went directly to Ken Lay to discuss them.³¹³

To comply with § 301, many publicly traded companies have hired companies that specialize in setting up either anonymous hotlines or electronic mail systems that employees can use to report fraud.³¹⁴

the defendants lacked scienter, the required state of mind for proving securities fraud under Rule 10b-5. *See* 17 C.F.R. § 240.10b-5 (2004). In response, in their opposition to the motion to dismiss, plaintiffs often point to specific pieces of evidence that show either that the individual defendant actively engaged in the fraud or intentionally remained in the dark. Other stock arguments raised by defendants include the “rogue” trader defense, mentioned in the text, and the frequently used argument that various statements which later turned out to be unfounded were “mere puffing statements,” to which the plaintiffs may reply by attempting to argue that the statements were actually highly material. These various arguments and counterarguments are akin to the canons of statutory construction. Every clichéd securities fraud argument has its own clichéd response.

308. As auditors must now apprise the audit committee of the details of the internal controls, or lack thereof, ignorance is no longer a defense. *See* Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 404, 116 Stat. 745, 789 (codified at 15 U.S.C.A. § 78m (West Supp. 2003)).

309. Stephanie Armour, *More Companies Urge Workers to Blow the Whistle*, USA TODAY, Dec. 16, 2002, at B1.

310. Interview with Sherron Watkins in Birmingham, Ala. (Feb. 18, 2004).

311. *Id.*

312. *Id.*

313. *Id.*

314. *See* Jeffrey Kosseff, *Profiting from Corporate Liability*, OREGONIAN, Apr. 10, 2003, at D1. (describing the business of Ethicspoint, a company that allows employees to report instances of “embezzlement, conflicts of interest and other corporate misdeeds to a system that sends complaints to an independent manager, a board member or outside auditor” and Pinkerton Compliance

Common sense, as well as the results of one worker survey, indicates that people perceive anonymous hotlines as more “trustworthy” when they are maintained and monitored by a third-party,” and therefore those hotlines receive more calls than internal hotlines.³¹⁵ Given the disapproval and reprisals that whistleblowers face,³¹⁶ it is not surprising that some workers are reluctant to give up their anonymity. Thus, while § 301 improves the pre-existing regime, which did not require any action whatsoever of the employers, it is still not likely to be effective and certainly is not a revolutionary change.

B. *Mandatory Arbitration and Whistleblowing Claims*

The effectiveness of any statute depends on the remedies available to successful plaintiffs. Therefore, it is necessary to analyze the remedies whistleblowers are entitled to in the event retaliation occurs. While § 806 of the Sarbanes–Oxley Act authorizes “make whole” relief to employees who have been fired because of protected whistleblowing activity,³¹⁷ many of these cases may never reach an administrative tribunal or a federal court. Rather, many Sarbanes–Oxley whistleblowing cases, like many employment discrimination cases, will probably be sent to mandatory arbitration.³¹⁸ My earlier work describes many of the problems associated with mandatory arbitration: perceived employer bias; fewer options available to the employee regarding where

Services, which runs a more traditional phone-based reporting system); Charles Lunan, *Law Prompts Business Boom: Accountants, Lawyers and Ethics Consultants Rush to Help Companies Comply with the Sarbanes–Oxley Reform Act*, CHARLOTTE OBSERVER, May 25, 2003, at 1E (reporting growth of Pinkerton Compliance Services, including an increase from 780 public-company clients to 900 in the last year); see also Whistleblower Hotline, at <http://www.shareholder.com/home/Solutions/Whistleblower.cfm> (last visited Oct. 7, 2004) (advertising secure hotline system free of “human intervention”).

315. Ernst & Young, *supra* note 5 (reporting results of survey that concluded that while only thirty percent of workers would report fraud to management by means of an anonymous telephone call, that percentage rose by an additional twenty-seven percent if there was a telephone hotline administered by a third-party).

316. See *supra* Part I.B.3.

317. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802–04 (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)).

318. Miriam A. Cherry, Note, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts that Discriminate*, 21 HARV. WOMEN’S L.J. 267, 229 n.12 (1998); *Voluntary Arbitration in Worker Disputes Endorsed by 2 Groups*, WALL ST. J., June 20, 1997, at B2 (estimating that “more than 3.5 million employees are covered by arbitration agreements with the American Arbitration Association alone”).

to bring suit; and limitations on discovery.³¹⁹ All of these factors decrease the settlement value of a plaintiff's case and, as a result, undermine the federal protections granted to employees.³²⁰ The Sarbanes–Oxley Act fails to address this issue, and that failure is yet another weakness of the Act.

1. *Arbitration and the U.S. Supreme Court: From Skeptic to Supporter*

Before the early 1990s, courts did not enforce pre-dispute mandatory arbitration contracts for statutory employment claims.³²¹ However, in recent years, there has been a complete doctrinal reversal, and courts now view mandatory arbitration contracts favorably.³²² The U.S. Supreme Court cases decided during the last twenty years are the most critical to understanding the current state of the law on mandatory arbitration contracts. In the 1974 decision *Alexander v. Gardner-Denver Co.*,³²³ the Court refused to send a Title VII claim to mandatory arbitration.³²⁴ However, the Court later endorsed mandatory arbitration of statutory claims in *Gilmer v. Interstate/Johnson Lane Corp.*³²⁵ and *Circuit City Stores, Inc. v. Adams*.³²⁶

In *Gardner-Denver*, the Supreme Court unanimously held that a plaintiff suing under Title VII for race discrimination retained an independent right to be heard in federal court, despite his or her participation in an arbitration scheme established under a collective bargaining agreement.³²⁷ The Court reasoned that restricting plaintiffs to arbitration would interfere with both the EEOC and the individual litigant's role as a private attorney general in enforcing Title VII.³²⁸ The pervasive line of reasoning in the opinion, however, is that the federal courts have plenary power over, and are the most competent to hear,

319. Cherry, *supra* note 318, at 276–86.

320. *Id.*

321. *See Alexander v. Gardner-Denver*, 415 U.S. 36, 48 (1974).

322. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 123 (2001).

323. 415 U.S. 36 (1974).

324. *Id.* at 59–60.

325. 500 U.S. 20 (1991).

326. 532 U.S. 105 (2001).

327. *Gardner-Denver*, 415 U.S. at 59–60.

328. *Id.* at 44–45 (“Congress gave private individuals a significant role in the enforcement process of Title VII [T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.”).

Title VII claims.³²⁹ The Court stated that “final responsibility for enforcement of Title VII is vested with federal courts.”³³⁰ The Court compared Title VII litigation and arbitration and ultimately held exclusive arbitration proceedings inappropriate for resolving Title VII claims.³³¹ The Court cited the limited discovery, the inapplicability of rules of evidence, and the overall informality of an arbitration proceeding as defects that prevented arbitration from being an exclusive remedy for a Title VII plaintiff.³³² In addition, the Court also pointed to the arbitrator’s lack of “general authority to invoke public laws that conflict with the bargain between the parties”³³³ and possibly limited expertise with employment discrimination lawsuits.³³⁴ Taken as a whole, the *Gardner-Denver* decision evinced a strong hostility to the exclusive arbitration of Title VII claims.

The *Gilmer* decision, in 1991, involved a claim under the Age Discrimination in Employment Act (ADEA).³³⁵ The plaintiff, a manager in the securities industry, had signed a pre-dispute mandatory arbitration clause as required by the New York Stock Exchange.³³⁶ The Court held that the arbitration clause was enforceable and could constitute an exclusive remedy.³³⁷ The Court, however, did not overrule *Gardner-Denver*, but chose instead to distinguish it by stressing that *Gardner-Denver* involved a collective bargaining agreement.³³⁸ According to the *Gilmer* Court, the operative distinction in *Gardner-Denver* was that the union had traded away the individual plaintiff’s rights under Title VII.³³⁹ In *Gilmer*, no such collective/individual tensions were present because it

329. *Id.* at 45.

330. *Id.* at 44.

331. *Id.* at 56–60.

332. *Id.* at 57–58.

333. *Id.* at 53.

334. *Id.* at 57 (“[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.”).

335. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991). For examples of pre-*Gilmer* decisions where lower courts generally assumed that Title VII claims, whether in the collective bargaining or contractual context, were non-arbitrable under *Gardner-Denver*, see *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 185 (1st Cir. 1989); *Swenson v. Mgmt. Recruiters Int’l, Inc.*, 858 F.2d 1304, 1305–07 (8th Cir. 1988).

336. *Gilmer*, 500 U.S. at 23.

337. *Id.*

338. *Id.* at 35.

339. *See id.*

involved merely a contract with an individual employee, not a union.³⁴⁰ This result seems somewhat paradoxical, as the plaintiff in *Gilmer* probably had less bargaining power due to the absence of a union.

Then in *Circuit City*, a six-to-three decision, the Supreme Court spoke definitively about the validity of mandatory arbitration in the employment context.³⁴¹ After analyzing the text of the Federal Arbitration Act (FAA),³⁴² the Court concluded that the exception contained within the FAA for certain contracts of employment applied only to transportation workers.³⁴³ In making this determination, the court stated that “arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law”³⁴⁴

This pro-arbitration decision was tempered by the Court’s opinion in *Equal Employment Opportunity Commission v. Waffle House, Inc.*³⁴⁵ There, the Court held that even though the plaintiff had signed a mandatory arbitration contract, the contract did not preclude the EEOC from pursuing an enforcement action for victim-specific relief.³⁴⁶ One major criticism of arbitration has been that it tracks employees raising civil rights violations into individualized arbitrations, as opposed to class actions.³⁴⁷ This sort of tracking apparently precluded any hope of correcting systemic civil rights violations in the workplace, and many commentators had previously criticized arbitration on that basis alone.³⁴⁸ In *Waffle House*, the Supreme Court apparently recognized the limitations of private contracts in the face of a statutory and regulatory scheme to end disability discrimination.

However, on the whole, the overwhelming impression that one derives from the *Circuit City* and *Waffle House* decisions is that courts have shifted from viewing mandatory pre-dispute arbitration contracts with suspicion to distinctly favoring them. In part this can be explained

340. *Id.* at 23.

341. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

342. 9 U.S.C. §§ 1–16 (2000).

343. *Circuit City*, 532 U.S. at 119.

344. *Id.* at 123.

345. 534 U.S. 279 (2002).

346. *Id.* at 297.

347. See generally Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

348. See, e.g., *id.*

by the fact that enforcing mandatory arbitration contracts frees the federal courts from having to deal with a considerable volume of employment litigation.³⁴⁹ Arbitration of consumer claims and employment claims, among others, has become more widespread in response to increased enforcement of mandatory arbitration contracts.³⁵⁰ In light of this doctrinal background, a statute must clearly preclude mandatory arbitration, or the court will assume that the statutory claim is one that can be sent to arbitration.

It is worth noting that *Circuit City* was decided over a strongly worded dissent joined by three justices. Their strongest argument was that in 1925, when the FAA was passed, Congress’s power under the Commerce Clause was limited, and that Congress never intended to sweep all of these disputes into arbitration.³⁵¹ Given how polarized the Court has been in recent years, and the complete doctrinal reversal detailed above, it is difficult to predict what direction the Supreme Court will take in the future.

2. *Will Sarbanes–Oxley Whistleblowing Claims Be Sent to Arbitration?*

To determine whether Sarbanes–Oxley whistleblowing claims will be sent to arbitration, it is necessary to ask whether the Sarbanes–Oxley Act evinces a Congressional intent to preclude pre-dispute mandatory arbitration contracts. The Supreme Court, in *Gilmer*, established a general presumption in favor of mandatory arbitration.³⁵² The decision, however, mentions the text, legislative history, and purposes of an act as ways to rebut that presumption.³⁵³ Essentially, the *Gilmer* and *Circuit City* line of decisions changed the default rule. Whereas it used to be

349. See John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991) (cataloging 2166% rise in employment discrimination filings between 1970 and 1989).

350. See Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89–90 (documenting rise of arbitration clauses in the consumer context and presenting arguments in favor of such clauses).

351. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 131–32 (2001) (Stevens, J., dissenting).

352. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

353. *Id.*; see also *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (indicating that a party may use text, legislative history, and underlying purposes of a statute to rebut the presumption that an arbitration “agreement” will be enforceable); *Rosenberg v. Merrill Lynch*, 995 F. Supp. 190, 204 (D. Mass. 1998) (“Instead of overruling *Gilmer* . . . Congress could merely follow [Gilmer’s] . . . suggestion . . . and make clear its intent to preclude enforcement of pre-dispute arbitration . . .”), *aff’d*, 170 F.3d 1 (1st Cir. 1999).

assumed that a plaintiff could avail himself or herself of all of the remedies in the statute to the fullest extent, now a presumption in favor of arbitration means that Congress must affirmatively insert language into every act where mandatory arbitration is not to be used.³⁵⁴

The analysis of whether a § 806 claim is subject to arbitration begins with the text of the Sarbanes–Oxley Act, which is silent on the subject of mandatory arbitration. Although one certainly could argue that Congress created its own scheme of enforcement through criminal penalties in § 1107 and civil private rights of action under § 806, neither of which explicitly includes mandatory arbitration, the Supreme Court foreclosed this argument in *Gilmer* and *Circuit City*.³⁵⁵ Under these decisions, when Congress does not explicitly speak to the question of mandatory arbitration, courts are supposed to apply a presumption in its favor.³⁵⁶

Without express guidance in the text, one must analyze the legislative history. Earlier drafts of the Act included a provision within the whistleblowing section that banned mandatory arbitration.³⁵⁷ However, those portions of the bill were excised in committee, with no clear rationale emerging for why they were cut.³⁵⁸ Nevertheless, the committee did eliminate the provision, which does not bode well for a plaintiff arguing for his or her day in court.

With no express textual support and negative legislative history, the best argument that the Act did not contemplate mandatory arbitration for Sarbanes–Oxley whistleblowing claims must therefore focus on legislative intent. Congress would have been cognizant of the important role of whistleblowers in preventing corporate fraud because Sherron Watkins testified before congressional committees prior to the passage

354. See *Gilmer*, 500 U.S. at 26. The burden is on the plaintiff to:

show that Congress intended to preclude a waiver of a judicial forum If such an intention exists, it will be discoverable in the text[,] . . . its legislative history, or an ‘inherent conflict’ between arbitration and the ADEA’s underlying purposes Throughout such an inquiry, it should be kept in mind that ‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.

Id. (internal citations omitted).

355. *Id.* at 23; *Circuit City*, 632 U.S. at 109.

356. *Gilmer*, 500 U.S. at 26; *Circuit City*, 532 U.S. at 109.

357. An earlier version of the bill contained a provision that stated: “No employee may be compelled to adjudicate his or her rights under this section pursuant to an arbitration agreement.” S. 2010, 107th Cong. § 7 (2002). A bill introduced in the House contained identical language, and would have prevented whistleblowing claims from being sent to arbitration. H.R. 4098, 107th Cong. § 8 (2002).

358. The final version of the bill did not mention arbitration. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802–04 (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)).

of the Act.³⁵⁹ Indeed, it was such an important issue to Congress that legislators made retaliation against whistleblowers a crime punishable by ten years imprisonment.³⁶⁰ Under *EEOC v. Waffle House*, a government agency can perform investigations and bring an action for violation of a statute, despite the presence of a mandatory arbitration contract or any other private agreement with an individual employee.³⁶¹ Therefore, even if courts enforce mandatory arbitration for § 806 claims, the government could still bring a criminal action under § 1107.

In *Boss v. Salomon Smith Barney, Inc.*,³⁶² the district court examined whether whistleblowing claims under § 806 of Sarbanes–Oxley could be arbitrated.³⁶³ The plaintiff, Kenneth Boss, worked as a research analyst at Smith Barney.³⁶⁴ Boss alleged that, in violation of the company’s internal rules and procedures, Smith Barney ordered him to give a draft research report to its investment bankers.³⁶⁵ The investment bankers allegedly urged Boss to change his research findings after receiving the report.³⁶⁶ Boss alleged that Salomon Smith Barney terminated his employment when he refused to change the report and complained to supervisors.³⁶⁷ These are serious allegations, because, as noted in Part II.A.1, the Sarbanes–Oxley Act prohibits investment bankers from interfering with the research reports written by analysts within their organizations.³⁶⁸

Boss wanted to have his Sarbanes–Oxley whistleblowing claim heard in federal court, but he had signed a mandatory arbitration contract.³⁶⁹ This contract was one of the routine forms Smith Barney required employees to sign upon joining the firm.³⁷⁰ Boss had also executed a U-4, the registration form required by the National Association of Securities Dealers (NASD), which requires that employees arbitrate their

359. See *Hearings*, *supra* note 26, at 14–67 (testimony of Sherron Watkins).

360. Sarbanes–Oxley Act § 1107 (codified at 18 U.S.C.A. § 1513 (West Supp. 2003)).

361. *EEOC v. Waffle House*, 534 U.S. 279, 297 (2002).

362. 263 F. Supp. 2d 684 (S.D.N.Y. 2003).

363. *Id.* at 684.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 501, 116 Stat. 745, 791–93 (codified at 15 U.S.C.A. § 78o-6 (West Supp. 2003)).

369. *Boss*, 263 F. Supp. 2d at 684.

370. *Id.*

disputes.³⁷¹ Indeed, this was the very form contract at issue in the *Gilmer* case.³⁷²

In a rather conclusory analysis of the issue, the district court granted Smith Barney's motion to compel arbitration, holding that "[t]here is nothing in the text of the statute or the legislative history of the Sarbanes–Oxley [A]ct evincing intent to preempt arbitration of claims under the act."³⁷³ Further, the court ruled that there was no "'inherent conflict' between arbitration and the [statute's] . . . purposes."³⁷⁴ Ultimately, the court refused to hear Boss's whistleblowing claim, and instead sent the case to arbitration with the NASD.³⁷⁵ The court's disposal of the issue in such a brief fashion flows from the Supreme Court jurisprudence on mandatory arbitration and the failure of Congress to mention arbitration specifically in Sarbanes–Oxley. The court apparently assumed that Congress would be aware of the legal landscape that currently favors arbitration and would also be aware of the fact that, if there was no mention of mandatory arbitration, courts would assume that arbitration was an adequate remedy.³⁷⁶

As I have argued elsewhere, arbitration of employment disputes should be taken with a healthy dose of skepticism, as arbitration in general tends to favor the employer.³⁷⁷ Many arguments, both for (efficiency) and against (fairness), have been raised regarding the use of mandatory arbitration contracts.³⁷⁸ Despite the Supreme Court's

371. *Id.* at 685.

372. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

373. *Boss*, 263 F. Supp. 2d at 685.

374. *Id.* (quoting *Oldroyd v. Elmira Sav. Bank*, 134 F.3d 72, 77–78 (2d Cir. 1998)) (alteration in original).

375. *Id.*

376. An article that appeared in *The Wall Street Journal* recounts a case with whistleblower issues in the context of a severance agreement. Michael Orey, *WorldCom-Inspired 'Whistle Blower' Law Has Weaknesses*, WALL ST. J., Oct. 1, 2002, at B1. According to the article, Kim Emigh, a former financial analyst for WorldCom, sued the company alleging that he was forced to keep false financial records. *Id.* Emigh admitted he signed a waiver with WorldCom when he got his severance pay, but argued that he revoked the waiver and never cashed WorldCom's check. *Id.* Nothing in § 806, however, prevents an employee from waiving his or her right to sue in exchange for a monetary settlement. See Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802–04 (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)).

377. See *Cherry*, *supra* note 318, at 276–86. One certainty exists: because arbitration results in a reduction of the procedural protections available to employees and does not guarantee a decisionmaker versed in federal employment law, it tends to reduce the settlement value of a plaintiff's case. *Id.*

378. For a summary of the various arguments, see *id.*; Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE

imprimatur of approval in *Circuit City*, there is still an argument that arbitration of Sarbanes–Oxley whistleblowing claims should not be foisted on employees at the time of hire, when economic realities dictate that it will be a one-sided negotiation. Indeed, as I have queried elsewhere, if the alternative dispute resolution (ADR) movement values fair process and a mutual meeting of the minds to bargain for a fair solution to underlying goals, then the values of the movement are not consonant with mandatory arbitration. That is because mandatory arbitration is not the result of parties determining that ADR is the best way to resolve a dispute; rather, it is a one-sided provision foisted upon employees through a contract of adhesion.³⁷⁹

An employee can argue the arbitration point in two ways. First, the *Boss* case may have been wrongly decided based on the purposes of the statute and the other protections Sarbanes–Oxley provided to whistleblowers.³⁸⁰ On the other hand, if the *Boss* case was correctly decided because the Supreme Court favors arbitration,³⁸¹ then Congress made a mistake in not providing whistleblowers with more protection. Either way, a realistic view is that these Sarbanes–Oxley whistleblower cases will be sent to arbitration, as was the case in *Boss*.³⁸² The fact that mandatory arbitration of these claims will be the likely result is a serious weakness in the Act.³⁸³

C. *Conclusions and Suggested Law Reform*

In light of the forgoing discussion, what effect has Sarbanes–Oxley had on corporate governance? What effect will Sarbanes–Oxley have on

L. REV. 195, 196–206 (1998); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 109–29 (1996).

379. See Miriam A. Cherry, Case Comment, *A Negotiation Analysis of Mandatory Arbitration Contracts*, 4 HARV. NEGOT. L. REV. 269, 277–80 (1999).

380. See *supra* Part II.B.

381. See *EEOC v. Waffle House*, 534 U.S. 279, 297 (2002).

382. *Boss v. Salomon Smith Barney, Inc.*, 263 F. Supp. 2d 684, 685 (S.D.N.Y. 2003).

383. The last apparent weakness in the Act's treatment of whistleblowers is the allocation of agency oversight of § 806 to OSHA, rather than to the SEC. See Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802–04 (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)). The SEC is uniformly viewed as the expert agency when it comes to issues of securities violations. In the face of this expertise, giving oversight to OSHA is puzzling. See Deborah Solomon, *For Financial Whistle-Blowers, New Shield Is an Imperfect One*, WALL ST. J., Oct. 4, 2004, at A1 (pointing out OSHA's lack of expertise in accounting matters as well as its limited authority to subpoena witnesses). However, because OSHA does have experience with workplace disputes and other whistleblowing statutes, the question of OSHA's effectiveness is an open one.

the Sherron Watkinses and Cynthia Coopers of the world? Unfortunately, the answer to both of these questions seems to be “not as much as it should.” The promise of Sarbanes–Oxley is its seeming federalization of state retaliatory discharge law regarding accounting fraud, but its weakness is in the remedies provided.

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 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.³⁸⁴ 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 § 806.³⁸⁵ The suit would likely have resulted in Enron providing Watkins with “make whole” relief.³⁸⁶ Further, after her testimony, any participants in her firing could have faced criminal charges under § 1107.³⁸⁷

In that respect, Sarbanes–Oxley is an advance for conscientious employees, and a further movement away from the at-will employment rule. However, § 806 is an area-specific whistleblowing statute; it applies only to fraud.³⁸⁸ There are still many other areas where

384. Sarbanes–Oxley Act § 806.

385. *Id.*

386. *Id.*

387. *Id.* § 1107 (codified at 18 U.S.C.A. § 1513 (West Supp. 2003)).

388. *Id.* § 806 (codified at 18 U.S.C.A. § 1514A (West Supp. 2003)).

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. The survey in Appendix A³⁸⁹ indicates that 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 VII³⁹⁰—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.

In conclusion, Sarbanes–Oxley will have an impact on employment law. The Act federalizes (and, indeed, potentially criminalizes) an entire swath of activity that (depending upon state statutes and common law) might not have even been actionable as a civil tort under the previous legal regime. On the other hand, the Act does not provide adequate remedies, which provokes the question whether the Act will result in the right mix of incentives and disincentives for the optimal amount of whistleblowing.³⁹¹

Part of the whistleblower’s decision depends on the incentives or disincentives the law provides. Worker behavior tends to be influenced by the applicable law. However, whistleblowing behavior is partially a matter of individual conscience. Would the passage of Sarbanes–Oxley have influenced Watkins’s decision to write her letter? She decided to make her report, knowing that she faced firing, demotion, or other forms

389. See App. A, *infra* pp. 1087–1120.

390. 42 U.S.C. § 2000e (2000).

391. This optimal amount would be defined as a level of whistleblowing that will result in an appropriate level of reporting to deter wrongdoing, but without unduly disrupting the internal functioning of businesses with erroneous or inaccurate reports.

of retaliation—knowing that there would likely be no recourse or remedy in law against Enron.³⁹² In a way, it seems that Watkins, like many whistleblowers, felt an obligation to make a report regardless of any protection that the legal system would afford her. At the same time, those who are on the margins, those employees who are trying to decide if reporting illegal activity is worth losing their jobs, may be influenced if they know that retaliatory discharges are against the law.

Ultimately, the law should support those who are willing to make personal sacrifices for the public good and increase support for those who blow the whistle. The law should protect whistleblowers so that the high social price they have to pay is eased, not compounded. Cynthia Cooper recently gave some advice to a graduating class from her alma mater, Mississippi State University. Her speech focused on an employee's sense of honor, and her comment to students was that they should "[do] what you know is right even if there may be a price to be paid."³⁹³ Employment law doctrine should provide full support for such ethics and integrity.

392. Interview with Sherron Watkins in Birmingham, Ala. (Feb. 18, 2004).

393. Scott Waller, *'Do what . . . is right': Whistleblower Tells Students to Have Personal Integrity*, CLARION-LEDGER (Jackson, Miss.), Nov. 18, 2003, at C1.

APPENDIX A

This Appendix summarizes, by state, the applicable causes of action for whistleblowing, listing and briefly describing every state whistleblowing statute that is potentially relevant to disclosure of information by employees. In addition, this Appendix briefly lists relevant caselaw from each jurisdiction and any pertinent secondary material particular to that state. This Appendix owes a debt to Callahan and Dworkin’s survey of fifty states, *supra* note 80, at 107–08.

ALABAMA: Alabama does not recognize a public policy exception for private employees. *See, e.g.*, *Salter v. Alfa Ins. Co.*, 561 So. 2d 1050, 1053 (Ala. 1990); *Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130, 1131 (Ala. 1977). However, state employees are protected if the employee reports “under oath or in the form of an affidavit, a violation of a law, a regulation, or a rule . . . to a public body” or reports a code of ethics violation. ALA. CODE § 36-26A-3 (2001); *id.* § 36-25-24 (providing protection to state employees who report code of ethics violation); *see* State Employees Protection Act, *id.* §§ 36-26A-1 to -7.

Area-specific whistleblower statutes: ALA. CODE § 25-1-28 (2000) (unlawful employment practice—age discrimination); *id.* § 25-5-11.1 (filing for worker’s compensation or reporting violation of safety rule in writing); *id.* § 25-8-57 (child labor).

Secondary source: Blaine C. Stevens, Note, *Employment at Will: The Time Has Come for Alabama to Embrace Public Policy as an Exception to the Rule of Employment at Will*, 19 CUMB. L. REV. 373 (1989).

ALASKA: Alaska recognizes a public policy exception for private and public employees, as well as an implied covenant of good faith and fair dealing. *See Reed v. Municipality of Anchorage*, 782 P.2d 1155, 1158 (Alaska 1989); *Knight v. Am. Guard & Alert, Inc.*, 714 P.2d 788, 792 (Alaska 1986). The Alaska Whistleblower Act protects a public employee who “reports to a public body or is about to report to a public body a matter of public concern” or “participates in a court action, an investigation, a hearing, or an inquiry held by a public body on a matter of public concern.” Alaska Whistleblower Act, ALASKA STAT. §§ 39.90.100–.150 (Michie 2002 & Supp. 2003); *see also* ALASKA STAT. § 23.40.110 (Michie 2002) (unfair labor practices—public

employment).

Area-specific whistleblower statutes: ALASKA STAT. § 18.60.089 (Michie 2002) (occupational safety and health); *id.* § 18.80.220 (unlawful employment practice—discrimination); ALASKA STAT. § 23.10.135 (Michie 2002) (Wage and Hour Act); ALASKA STAT. § 24.60.035 (Michie 2002) (reports to legislative ethics committee or other government entity); ALASKA STAT. § 39.28.070 (Michie Supp. 2003) (affirmative action or equal employment opportunity); ALASKA STAT. § 42.40.760 (Michie 2002) (unfair labor practices—Alaska Railroad Corporation); ALASKA STAT. § 47.24.120 (Michie 2002) (vulnerable adults); *id.* § 47.35.105 (social services for children, maternity homes); *id.* § 47.62.040 (long-term care).

ARIZONA: Prior to 1996, Arizona unequivocally recognized a public policy exception for wrongful termination. *See Wagner v. City of Globe*, 722 P.2d 250, 257 (Ariz. 1986); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1033 (Ariz. 1985). However, after the passage of the Arizona Employee Protection Act (AEPA) in 1996, “[w]hether a common law tort for wrongful termination still exists after the AEPA is an open and much debated question in Arizona law.” *Galati v. Am. W. Airlines, Inc.*, 69 P.3d 1011, 1015 (Ariz. Ct. App. 2003); Arizona Employee Protection Act, ARIZ. REV. STAT. §§ 23-1501 to 23-1502 (2003). The AEPA protects employees who report violations of “the Constitution of Arizona or the statutes of this state” ARIZ. REV. STAT. § 23-1501(3)(c)(ii) (2003). Public employees are further protected if they provide a public body with “information of a matter of public concern” involving violations of law, “[m]ismanagement, a gross waste of monies or an abuse of authority.” ARIZ. REV. STAT. § 38-532 (2003); *see also id.* §§ 38-531 to 38-534 (disclosure of information by public employees); *id.* § 23-1411 (testimony by public safety employees).

Area-specific whistleblower statutes: ARIZ. REV. STAT. § 3-376 (2003) (pesticide control); *id.* § 3-3120 (occupational safety and health—agricultural employment); ARIZ. REV. STAT. § 23-329 (2003) (minimum wages for minors); *id.* § 23-425 (occupational safety and health); *id.* § 23-1385 (unfair labor practices—agricultural employees); ARIZ. REV. STAT. § 36-2282 (2003) (health care facility employees—infant care); ARIZ. REV. STAT. § 41-1378 (2003) (ombudsman-citizens aide); *id.* § 41-1464 (discrimination in employment); *id.* § 41-1492.10 (public accommodation and services); ARIZ. REV. STAT. §§ 49-207, 49-

288 (2003) (water quality control).

Case law: McDonald v. Campbell, 821 P.2d 139 (Ariz. 1991).

Secondary source: Marzetta Jones, Note, *The 1996 Arizona Employment Protection Act: A Return to the Employment-at-Will Doctrine*, 39 ARIZ. L. REV. 1139 (1997).

ARKANSAS: Arkansas provides a public policy exception to the employment-at-will rule. *Island v. Buena Vista Resort*, 103 S.W.3d 671, 679 (Ark. 2003); *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988). The Arkansas Whistle-Blower Act protects public employees who make good-faith reports about waste and violations of law “to an appropriate authority.” ARK. CODE ANN. § 21-1-603 (Michie 1987); see Arkansas Whistle-Blower Act, *id.* §§ 21-1-601 to 21-1-609; see also ARK. CODE ANN. § 8-7-1010 (Public Employees’ Chemical Right to Know Act) (Michie 1987).

Area-specific whistleblower statutes: ARK. CODE ANN. § 5-55-113 (Michie 1987) (Medicaid fraud—provision for reward); ARK. CODE ANN. § 9-28-405(f)(1) (Michie 1987) (retaliation grounds for revocation/denial of child welfare agency license); ARK. CODE ANN. § 11-3-204 (Michie 1987) (references to prospective employers—retaliation causes loss of immunity for employers); *id.* § 11-4-206 (minimum wage law); *id.* § 11-4-608 (wage discrimination); *id.* § 11-10-106 (employment security); ARK. CODE ANN. § 16-123-108 (Michie 1987 & Supp. 2003) (Arkansas Civil Rights Act of 1993); *id.* § 16-123-208 (fair housing); ARK. CODE ANN. § 20-10-1007 (Michie 1987) (long-term care facilities and services).

CALIFORNIA: California recognizes a public policy exception for at-will employees, often referred to as a *Tameny* claim. See *Green v. Ralee Eng’g Co.*, 960 P.2d 1046, 1051 (Cal. 1998); *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330, 1335–37 (Cal. 1980). Private and public employees are protected if the employee reports violations of state or federal statutes and regulations to “a government or law enforcement agency.” CAL. LAB. CODE § 1102.5 (West 2003). State employees are also protected if reporting “an improper governmental activity or . . . any condition that may significantly threaten the health or safety of employees or the public . . .” CAL. GOV’T CODE § 8547.2 (West 1992 & Supp. 2004); see California Whistleblower Protection Act, *id.* §§ 8547–8547.12; see also CAL. GOV’T CODE § 19702 (West 1995 & Supp. 2004) (discrimination in public employment); CAL. GOV’T CODE

§ 53298 (West 1997) (local government employees).

Area-specific whistleblower statutes: CAL. BUS. & PROF. CODE § 2056 (West 2003) (physicians advocating for medically appropriate health care); CAL. BUS. & PROF. CODE § 7583.46 (West Supp. 2004) (private patrol operator); CAL. BUS. & PROF. CODE § 9998.6 (West 1995) (foreign workers); CAL. EDUC. CODE § 44040 (West 1993) (school district employees—appearance before certain boards or committees); CAL. EDUC. CODE § 44114 (West 1993 & Supp. 2004) (school employees—improper governmental activities); CAL. EDUC. CODE § 87039 (West 2002) (community college district employee—appearance before certain boards or committees); *id.* § 87164 (community college employees—improper governmental activities); CAL. FIN. CODE § 6530 (West 1999) (savings associations); CAL. GOV'T CODE §§ 9149.20–9149.23 (West Supp. 2004) (disclosure of improper governmental activities to legislative committee); CAL. GOV'T CODE § 12653 (West 1992) (false claims actions); *id.* § 12940 (unlawful employment practices—discrimination); *id.* § 12944 (retaliation by licensing board); *id.* § 12945.2 (family care leave); *id.* § 19251.5 (communication with Legislature); CAL. HEALTH & SAFETY CODE § 444.22 (West 1990 & Supp. 2004) (communication with consumer health hotlines); CAL. HEALTH & SAFETY CODE § 1278.5 (West 2000) (care, services, or conditions of health care facilities); *id.* § 1317.4 (report of violations—health facilities); CAL. HEALTH & SAFETY CODE § 1432 (West 2000 & Supp. 2004) (long-term health care facilities); CAL. HEALTH & SAFETY CODE § 1539 (West 2000) (inspection of community care facilities); *id.* § 1568.07 (inspection of residential care facilities for persons with chronic life-threatening illnesses); *id.* § 1569.37 (inspection of residential care facilities for the elderly); *id.* § 1581 (inspection of adult day health care centers); *id.* § 1596.881 (child day care facilities); CAL. HEALTH & SAFETY CODE § 17031.7 (West 1984) (employee community housing); CAL. INS. CODE § 1871.7 (West 1993 & Supp. 2004) (fraudulent insurance claims action); CAL. LAB. CODE § 98.6 (West 2003) (exercise of employee rights); *id.* § 132a (testimony in co-employee's workers' compensation case); CAL. LAB. CODE § 752 (West 2003 & Supp. 2004) (complaint regarding election—smelters and underground workings); CAL. LAB. CODE § 1153 (West. 2003) (unfair labor practices—agricultural employers); *id.* § 6310 (occupational safety and health); *id.* § 6399.7 (hazardous substances information and training); CAL. MIL. & VET. CODE § 73.7 (West Supp. 2004) (veterans programs); CAL. PENAL CODE § 6129 (West 2000 &

Supp. 2004) (state correctional system—improper government activities); CAL. UNEMP. INS. CODE § 1237 (West Supp. 2004) (unemployment compensation); CAL. WELF. & INST. CODE § 5550 (West 1998) (mental health care); *id.* § 9715 (long-term care).

Case law: *Hoefer v. Fluor Daniel, Inc.*, 92 F. Supp. 2d 1055 (C.D. Cal. 2000).

Secondary source: Jennifer Vanse, Comment, *California Wrongful Discharge Law Turns Toward the Plaintiff*, 27 PEPP. L. REV. 281 (2000).

COLORADO: Colorado recognizes a public policy exception to the at-will employment rule. *See Flores v. Am. Pharm. Servs., Inc.*, 994 P.2d 455, 458–59 (Colo. 1999). State employees are protected when disclosing information “regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency.” COLO. REV. STAT. ANN. § 24-50.5-102 (West 2003); *see id.* §§ 24-50.5-101 to 24-50.5-107 (state employee protection).

Area-specific whistleblower statutes: COLO. REV. STAT. ANN. § 8-2.5-101 (West 2003) (communication with general assembly or court of law); *id.* § 8-3-108 (unfair labor practices—Labor Peace Act); *id.* § 8-4-120 (wages); *id.* § 8-6-115 (minimum wage); COLO. REV. STAT. ANN. § 24-34-402 (West 2003) (discriminatory or unfair employment practices); *id.* § 24-114-102 (private enterprise employee protection); COLO. REV. STAT. ANN. § 26-3.1-102 (West 2003) (abuse of at-risk adult); *id.* § 26-3.1-204 (financial exploitation of at-risk adult); *id.* § 26-11.5-109 (long-term care); COLO. REV. STAT. ANN. § 28-3.1-604 (West 2003) (state military forces—complaints of wrongs).

Case law: *Lanes v. O’Brien*, 746 P.2d 1366 (Colo. Ct. App. 1987).

CONNECTICUT: Connecticut recognizes a public policy exception to the at-will employment rule. *See Sheets v. Teddy’s Frosted Foods, Inc.*, 427 A.2d 385, 388–89 (Conn. 1980). Public and private employees are protected if the employee reports violations of laws or regulations to a public body. CONN. GEN. STAT. § 31-51m (2003). State employees (and employees of large state contractors) are also protected if the employee provides information to the Auditor of Public Accounts or the state Attorney General. CONN. GEN. STAT. § 4-61dd (2003); *see also* CONN. GEN. STAT. § 5-272 (2003) (collective bargaining—state employees); CONN. GEN. STAT. § 7-470 (2003) (collective bargaining—municipal employees).

Area-specific whistleblower statutes: CONN. GEN. STAT. § 4-37j (2003) (whistleblower protection for foundation employees); CONN. GEN. STAT. § 10-153e (2003) (certified professional employees—education); CONN. GEN. STAT. § 16-8a (2003) (public service companies); CONN. GEN. STAT. § 17a-101e (2003) (child abuse or neglect); *id.* § 17b-410 (long-term care); CONN. GEN. STAT. § 19a-532 (2003) (nursing home facilities); CONN. GEN. STAT. § 31-40d (2003) (employers who use or produce carcinogens); *id.* § 31-40t (hazardous conditions); *id.* § 31-51pp (family and medical leave); *id.* § 31-69 (testimony before wage board); *id.* § 31-69b (wages; state contracts); *id.* § 31-76 (wage discrimination); *id.* § 31-105 (unfair labor practices—Labor Relations Act); *id.* § 31-226a (unemployment compensation); *id.* § 31-379 (occupational safety and health); CONN. GEN. STAT. § 46a-13e (2003) (Victim Advocate); *id.* § 46a-13n (Child Advocate); *id.* § 46a-60 (discriminatory employment practice); CONN. GEN. STAT. § 54-85b (2003) (testimony in any criminal proceeding); *id.* § 54-203 (victim appearing as witness in any criminal proceeding).

DELAWARE: In Delaware, termination in violation of public policy is actionable on the basis of a “limited implied covenant of good faith and fair dealing” *Lord v. Souder*, 748 A.2d 393, 400 (Del. 2000); *see also* *Schatzman v. Martin Newark Dealership, Inc.*, 158 F. Supp. 2d 392, 398 (D. Del. 2001); *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 440–41 (Del. 1996). Public employees are protected if the employee makes a report to an elected official of a violation of a law or regulation. DEL. CODE ANN. tit. 29, § 5115 (1997); *see also* DEL. CODE ANN. tit. 14, § 4007 (1999) (unfair labor practices—public schools); DEL. CODE ANN. tit. 19, § 1307 (1995) (unfair labor practices—Public Employment Relations Act).

Area-specific whistleblower statutes: DEL. CODE ANN. tit. 6, § 1208 (Supp. 2002) (false claims actions); DEL. CODE ANN. tit. 16, § 1117 (2003) (nursing facilities); *id.* § 1135 (nursing facilities—abuse, neglect, mistreatment, or financial exploitation); *id.* § 1154 (investigations—long-term care); *id.* § 2415 (hazardous chemicals); *id.* § 2907 (Clean Indoor Air Act); DEL. CODE ANN. tit. 19, § 509 (1995 & Supp. 2002) (child labor); *id.* tit. 19, § 704 (polygraph testing); DEL. CODE ANN. tit. 19, § 707 (1995) (meal breaks); DEL. CODE ANN. tit. 19, § 718 (1995 & Supp. 2002) (discrimination in employment); DEL. CODE ANN. tit. 19, § 726 (1995) (handicapped persons employment protections); DEL. CODE ANN. tit. 19, § 735 (1995 & Supp. 2002) (right to inspect

personnel files); DEL. CODE ANN. tit. 19, § 910 (1995) (minimum wage); *id.* § 1112 (wage payment and collection); *id.* § 1607 (unfair labor practices—police officers and firefighters); DEL. CODE ANN. tit. 19, § 2365 (1995 & Supp. 2002) (report of non-compliance/testimony—workers’ compensation); DEL. CODE ANN. tit. 29, § 6960 (2003) (public works contracting).

WASHINGTON, D.C.: Washington, D.C. recognizes a public policy exception to the at-will employment rule. *Carl v. Children’s Hosp.*, 702 A.2d 159, 160 (D.C. 1997). District government employees are protected if they disclose information, including a violation of law or gross mismanagement, to a supervisor or a public body. D.C. CODE ANN. §§ 1-615.51 to .59 (2001 & Supp. 2004); *see also* D.C. CODE ANN. §§ 2-223.01 to .07 (2001) (private contractor employees; government employees not covered by sections 1-615.51 to .59).

Area-specific whistleblower statutes: D.C. CODE ANN. § 1-617.04 (2001 & Supp. 2003) (unfair labor practices—labor-management relations); D.C. CODE ANN. § 2-302.08 (2001 & Supp. 2003) (complaint/disclosure of information to Inspector General); D.C. CODE ANN. § 2-308.16 (2001) (false claims actions); *id.* § 2-1402.61 (prohibited acts of discrimination); D.C. CODE ANN. § 7-702.07 (2001) (long-term care); *id.* § 7-1912 (adult protective services); D.C. CODE ANN. § 32-507 (2001) (family and medical leave); *id.* § 32-1010 (minimum wages); *id.* § 32-1117 (occupational safety and health); *id.* § 32-1542 (testimony—workers’ compensation).

FLORIDA: Florida courts have refused to recognize a public policy exception to the at-will employment rule. The courts view the creation of such protection as the proper province of the legislature. *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1329–30 (Fla. Dist. Ct. App. 1985). Legislative response includes a Florida whistleblower statute, which provides protection for all employees, public and private, who report violations of law. *See* FLA. STAT. ANN. § 112.3187 (West 2002 & Supp. 2004) (violations by public agency); FLA. STAT. ANN. §§ 448.101–105 (West 2002) (protection for employee reporting violation of law, rule, or regulation by private employer).

Area-specific whistleblower statutes: FLA. STAT. ANN. § 39.203 (West 2003) (child abuse—facilities serving children); FLA. STAT. ANN. § 68.088 (West 1997) (False Claims Act); FLA. STAT. ANN. § 92.57 (West 1999) (testimony in judicial proceeding); FLA. STAT. ANN.

§ 112.044 (West 2002) (age discrimination); FLA. STAT. ANN. § 395.1041 (West 2002) (emergency care); FLA. STAT. ANN. § 400.0083 (West 2002) (long-term care); FLA. STAT. ANN. § 440.1051 (West 2002) (workers' compensation fraud); FLA. STAT. ANN. § 447.501 (West 2002) (unfair labor practices—public employees); FLA. STAT. ANN. § 633.816 (West Supp. 2004) (firefighters); FLA. STAT. ANN. § 651.111 (West 1996 & Supp. 2004) (continuing care providers); FLA. STAT. ANN. § 760.10 (West 1997) (unlawful employment practices—civil rights); FLA. STAT. ANN. § 766.1016 (West Supp. 2004) (report of patient safety data).

Secondary sources: Catherine A. Kyres, *Florida Workers' Whistles Are Not Silenced*, 74 FLA. B.J. 45 (2000); John Sanchez, *2000 Survey of Florida Public Employment Law*, 25 NOVA L. REV. 207 (2000).

GEORGIA: Georgia does not recognize a public policy exception for private employees. *See* Eckhardt v. Yerkes Reg'l Primate Ctr., 561 S.E.2d 164, 165–66 (Ga. Ct. App. 2002) (holding that there is no public policy exception in Georgia and refusing to allow claim where plaintiffs were fired for reporting that monkeys were infected with deadly disease potentially communicable to humans). However, state employees are protected if they report fraud, waste, or abuse “unless the complaint was made . . . with the knowledge that it was false or with willful disregard for its truth or falsity.” GA. CODE ANN. § 45-1-4 (2002).

Area-specific whistleblower statutes: GA. CODE ANN. § 15-11-175 (2001) (child advocate); GA. CODE ANN. § 31-8-60 (2001) (long-term care facility); *id.* § 31-8-87 (abuse or exploitation of residents in long-term care facilities); GA. CODE ANN. § 34-5-3 (2004) (sex discrimination in employment); *id.* § 34-6a-5 (equal employment for persons with disabilities); GA. CODE ANN. § 37-2-40 (Supp. 2004) (mental disability services); GA. CODE ANN. §§ 45-19-44, 45-19-45 (2002) (fair employment); *id.* § 45-22-10 (hazardous chemical protection).

Secondary source: W. Melvin Haas, III et al., *Labor and Employment Law*, 54 MERCER L. REV. 369, 374–78 (2002).

HAWAII: Hawaii recognizes a public policy exception to the at-will employment rule. *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982). Public and private employees are protected if the employee reports to the employer or a public body violations of law or of contracts “executed by the State, a political subdivision of the State, or the United States” HAW. REV. STAT. § 378-62 (2003); *see* Whistleblowers’

Protection Act, *id.* §§ 378-61 to 378-69; *see also* HAW. REV. STAT. § 89-13 (2003) (prohibited practices—collective bargaining in public employment).

Area-specific whistleblower statutes: HAW. REV. STAT. § 128D-15 (2003) (Hawaii Environmental Response Law); HAW. REV. STAT. § 377-6 (2003) (unfair labor practices—Hawaii Employment Relations Act); HAW. REV. STAT. § 378-2 (2003) (prohibited discriminatory practices); *id.* § 378-26.5 (lie detector tests); *id.* § 378-32 (testimony—unlawful suspension or discharge); HAW. REV. STAT. § 387-12 (2003) (wage and hour law); HAW. REV. STAT. § 388-10 (2003) (payment of wages); HAW. REV. STAT. § 396-8 (2003) (occupational safety and health); HAW. REV. STAT. § 398-8 (2003) (family leave).

Case law: *Ross v. Stouffer Hotel Co.*, 879 P.2d 1037, 1046–47 (Haw. 1994) (limiting availability of *Parnar* claim).

IDAHO: Idaho recognizes a public policy exception to the at-will employment rule. *See Thomas v. Med. Ctr. Physicians, P.A.*, 61 P.3d 557, 565 (Idaho 2002). Public employees are protected if the employee reports, in good faith, a violation of law or “any waste of public funds, property or manpower . . .” IDAHO CODE § 6-2104 (Michie 2004); *see* Idaho Protection of Public Employees Act, *id.* §§ 6-2101 to 6-2109.

Area-specific whistleblower statutes: IDAHO CODE § 39-4420 (Michie 2002) (hazardous waste management); *id.* § 39-6214 (PCB waste disposal); IDAHO CODE § 44-1509 (Michie 2003) (minimum wage); *id.* § 44-1615 (farm labor contractors); *id.* § 44-1702 (wage discrimination based upon sex); *id.* § 44-1904 (sanitation facilities for farm workers); IDAHO CODE § 45-613 (Michie 2003) (claims for wages); IDAHO CODE § 67-5009 (Michie 2001) (long-term care); *id.* § 67-5911 (human rights).

Secondary source: Bobbi K. Dominick, *What Is the Definition of “Public Policy” Wrongful Discharge? Time for the Idaho Courts to Provide Guidance, Without Judicial Legislation, of Public Policy by Interpreting the Wrongful Discharge Cause of Action*, 35 IDAHO L. REV. 285 (1999).

ILLINOIS: Illinois recognizes a public policy exception to the at-will employment rule. *See Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876, 879–80 (Ill. 1981). Private employees are protected if the employee reports to a “government or law enforcement agency . . . a violation of a State or federal law, rule, or regulation.” 740 ILL. COMP. STAT. ANN.

174/15 (West Supp. 2004); *see* Whistleblower Act, *id.* 174/1–35 (West Supp. 2004). Private citizens may bring a *qui tam* action in the event of fraud against the government. 740 ILL. COMP. STAT. ANN. 175/1–8 (Whistleblower Reward and Protection Act) (West 1993 & Supp. 2004); *see also* 5 ILL. COMP. STAT. ANN. 315/10 (unfair labor practices—Illinois Public Labor Relations Act); 20 ILL. COMP. STAT. ANN. 415/19c.1 (West 2001) (Executive branch—disclosure of prohibited activity).

Area-specific whistleblower statutes: 20 ILL. COMP. STAT. ANN. 105/4.04 (West 2001) (long-term care facilities); 105 ILL. COMP. STAT. ANN. 5/34-2.4c (West 1998) (board of education employees); 115 ILL. COMP. STAT. ANN. 5/14 (West 1998) (unfair labor practices—educational employees); 210 ILL. COMP. STAT. ANN. 35/10 (West 2000) (Community Living Facilities); *id.* 45/3-318 (Nursing Home Care Act); *id.* 45/3-608 (nursing homes); 210 ILL. COMP. STAT. ANN. 85/10.8 (West Supp. 2004) (employment of physicians); *id.* 86/35 (hospital employees); 210 ILL. COMP. STAT. ANN. 105/13 (West 2000) (agricultural workers); *id.* 110/17 (migrant workers); 225 ILL. COMP. STAT. ANN. 10/7.2 (West 1998) (employees of licensees subject to Child Care Act of 1969); *id.* 705/13.13 (Coal Mining Act); 320 ILL. COMP. STAT. ANN. 20/4.1 (West 2001) (elder abuse and neglect); 325 ILL. COMP. STAT. ANN. 5/9.1 (West 2001) (child abuse and neglect); 415 ILL. COMP. STAT. ANN. 5/52 (West 1997) (Environmental Protection Act); 740 ILL. COMP. STAT. ANN. 92/40 (West 2002) (Insurance Claims Fraud Prevention Act); 740 ILL. COMP. STAT. ANN. 175/1–8 (West 2002 & Supp. 2004) (Whistleblower Reward and Protection Act); 775 ILL. COMP. STAT. ANN. 5/6-101 (West 2001) (civil rights violations); 820 ILL. COMP. STAT. ANN. 40/12 (West 1999) (Personnel Record Review Act); *id.* 55/15 (Privacy in the Workplace Act); 820 ILL. COMP. STAT. ANN. *id.* 105/11 (minimum wage); 820 ILL. COMP. STAT. ANN. 112/10, /35 (West Supp. 2004); 820 ILL. COMP. STAT. ANN. 115/14 (West 1999) (wage payment and collection); *id.* 125/15 (testimony before wage board); *id.* 130/11b (Prevailing Wage Act); 820 ILL. COMP. STAT. ANN. 180/20 (West Supp. 2004) (leave due to domestic or sexual violence); 820 ILL. COMP. STAT. ANN. 220/2 (West 1993) (Safety Inspection and Education Act); *id.* 255/14 (Toxic Substances Disclosure to Employees Act).

Case law: *Zielonka v. Topinka*, 28 F. Supp. 2d 1081, 1090–92 (N.D. Ill. 1998); *McGrath v. CCC Info. Servs., Inc.*, 731 N.E.2d 384, 391–92 (Ill. App. Ct. 2000); *Dana Tank Container, Inc. v. Human Rights*

Comm’n, 687 N.E.2d 102, 104 (Ill. App. Ct. 1997).

INDIANA: Indiana does not recognize a public policy exception for private employees. *See* Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1060–61 (Ind. Ct. App. 1980). State employees are protected if the employee reports a violation of law or “misuse of public resources.” IND. CODE ANN. § 4-15-10-4 (Michie 1996); *see also* IND. CODE ANN. § 36-1-8-8 (Michie 2000) (employees of political subdivision).

Area-specific whistleblower statutes: IND. CODE ANN. § 4-2-6-13 (Michie 2002) (state ethics commission); *id.* § 4-13-1.2-11 (department of correction ombudsman); IND. CODE ANN. § 5-11-1-9.5 (Michie 2001) (sworn statements to state examiner); IND. CODE ANN. § 12-10-3-11 (Michie 2001) (report of endangered adult); *id.* § 12-10-13-20 (long-term care); *id.* § 12-11-13-16 (state wide waiver ombudsman); IND. CODE ANN. § 16-28-9-3 (Michie 1998) (health care facilities); IND. CODE ANN. § 16-41-11-8 (Michie 1993) (training in health precautions for communicable diseases); IND. CODE ANN. § 20-7.5-1-7 (Michie 1997) (unfair practices—school employees); IND. CODE ANN. § 20-12-1-8 (Michie 2000) (state educational institution employees); IND. CODE ANN. § 22-5-3-3 (Michie 1997) (private employer under public contract); *id.* § 22-8-1.1-38.1 (Occupational Health & Safety); *id.* § 22-9-1-6 (information provided to Civil Rights Commission).

IOWA: Iowa recognizes a public policy exception to the at-will employment rule. *See* Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 281–85 (Iowa 2000). State employees are protected if an employee reports “a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” IOWA CODE ANN. § 70A.28 (West 1999 & Supp. 2004); *see also* IOWA CODE ANN. § 19A.19 (West 2001) (state personnel); IOWA CODE ANN. § 20.10 (West 2001) (Public Employment Relations); IOWA CODE ANN. § 70A.29 (West 1999) (employees of political subdivisions).

Area-specific whistleblower statutes: IOWA CODE ANN. § 68B.32A (West 1999) (information provided to Ethics & Campaign Disclosure Board); IOWA CODE ANN. § 88.9 (West 1996) (occupational safety and health); IOWA CODE ANN. § 89B.9 (West 1996) (hazardous chemical right to know); IOWA CODE ANN. § 91A.10 (West 1996) (wage payment collection); IOWA CODE ANN. § 135C.46 (West 1997) (health care facilities); IOWA CODE ANN. § 207.28 (West 2000) (coal mining); IOWA

CODE ANN. § 216.11 (West 2000) (civil rights); IOWA CODE ANN. § 235B.3 (West 2000 & Supp. 2004) (dependent adult abuse); IOWA CODE ANN. § 272C.8 (West 2003) (continuing education); IOWA CODE ANN. § 729.6 (West 2003) (genetic testing); IOWA CODE ANN. § 730.4 (West 2003) (polygraph examinations).

KANSAS: Kansas recognizes a public policy exception to the at-will employment rule. *See* *Palmer v. Brown*, 752 P.2d 685, 689–90 (Kan. 1988). State agency employees are protected if the employee reports a violation of a state or federal laws, rules, or regulations. KAN. STAT. ANN. § 75-2973 (1997 & Supp. 2003); *see also* KAN. STAT. ANN. § 75-4333 (1997) (public employer and employee relations).

Area-specific whistleblower statutes: KAN. STAT. ANN. § 38-1525 (2000) (child abuse); KAN. STAT. ANN. § 39-1403 (2000) (dependent adult abuse); *id.* § 39-1432 (dependent adult abuse); KAN. STAT. ANN. § 44-615 (2000) (information provided to secretary of human resources); *id.* § 44-636 (unsafe or hazardous working conditions); *id.* § 44-808 (employer and employee relations); *id.* § 44-828 (agricultural labor relations); *id.* § 44-1009 (discrimination); *id.* § 44-1113 (age discrimination); *id.* § 44-1210 (wages and hours); KAN. STAT. ANN. § 47-852 (2000) (impaired veterinarians); KAN. STAT. ANN. § 65-4928 (2002) (health care—incidents and impaired health care providers); KAN. STAT. ANN. § 72-5430 (2002) (retaliation by board of education against professional employee); *id.* § 72-89b04 (school employees reporting criminal acts); KAN. STAT. ANN. § 75-7313 (Supp. 2003) (long-term care).

Case law: *Connelly v. State Highway Patrol*, 26 P.3d 1246, 1255–56 (Kan. 2001).

KENTUCKY: Kentucky recognizes a public policy exception to the at-will employment rule. *See* *Grzyb v. Evans*, 700 S.W.2d 399, 401–02 (Ky. 1985). Public employees are protected if they report a violation of law or “mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety.” KY. REV. STAT. ANN. § 61.102 (Banks–Baldwin 2001).

Area-specific whistleblower statutes: KY. REV. STAT. ANN. § 6.915 (Banks–Baldwin 1997) (information provided to Legislative Program Review and Investigations Committee); KY. REV. STAT. ANN. § 205.8465 (Banks–Baldwin 2001) (public and medical assistance fraud and abuse); KY. REV. STAT. ANN. § 207.170 (Banks–Baldwin 2001)

(Equal Opportunity Act—disability); KY. REV. STAT. ANN. § 216.541 (Banks–Baldwin 1999 & Supp. 2003) (long-term care); KY. REV. STAT. ANN. § 216B.165 (Banks–Baldwin 1999) (health care facilities and services); KY. REV. STAT. ANN. § 337.423 (Banks–Baldwin 2003) (wage discrimination); KY. REV. STAT. ANN. § 337.990 (Banks–Baldwin 2001) (penalties); KY. REV. STAT. ANN. § 338.121 (Banks–Baldwin 2003) (occupational safety and health of employees); KY. REV. STAT. ANN. § 344.280 (Banks–Baldwin 2003) (conspiracy to retaliate—civil rights violations); KY. REV. STAT. ANN. § 345.050 (Banks–Baldwin 2003) (collective bargaining for firefighters); KY. REV. STAT. ANN. § 351.030 (Banks–Baldwin 1997 & Supp. 2004) (testimony—department of mines and minerals).

Case law: *Palmer v. Int’l Ass’n of Machinists*, 882 S.W.2d 117, 120–21 (Ky. 1994).

LOUISIANA: Louisiana does not recognize a public policy exception for private employees. *See Quebedeaux v. Dow Chem. Co.*, 820 So. 2d 542, 545–46 (La. 2002); *Gil v. Metal Serv. Corp.*, 412 So. 2d 706, 708 (La. Ct. App. 1982). Public employees and some private employees, as defined in section 23:302, are protected if the employee reports a violation of state law. LA. REV. STAT. ANN. § 23:967 (West 1998). Public employees are protected if they make a complaint concerning a violation of law, waste, or mismanagement. LA. REV. STAT. ANN. § 36:8 (West 1985 & Supp. 2004); *see also* LA. REV. STAT. ANN. § 42:1169 (West 1990 & Supp. 2004) (public employees).

Area-specific whistleblower statutes: LA. REV. STAT. ANN. § 22:13 (West 1995) (employees of insurer); LA. REV. STAT. ANN. § 23:312 (West 1998) (age discrimination); *id.* § 23:352 (sickle cell trait discrimination); *id.* § 23:964 (enforcement of labor laws); LA. REV. STAT. ANN. § 29:404 (West Supp. 2004) (discrimination against veterans); LA. REV. STAT. ANN. § 30:928 (West 1989) (surface coal mining); LA. REV. STAT. ANN. § 30:2027 (West 2000) (violation of environmental laws); *id.* § 30:2351.55 (lead hazards); LA. REV. STAT. ANN. § 40:2009.17 (West 2001) (health care providers); *id.* § 40:2010.4 (long-term care); LA. REV. STAT. ANN. § 46:439.1 (West 1999) (protection of *qui tam* plaintiff); *id.* § 46:440.3 (medical assistance fraud and abuse); LA. REV. STAT. ANN. § 51:2256 (West 2003) (conspiracy to retaliate—human rights).

Case law: *Jackson v. Xavier Univ.*, No. 01-1659, 2002 U.S. Dist. LEXIS 12890, at **17–18 (E.D. La. July 8, 2002).

MAINE: Maine does not recognize a public policy exception for private employees. *See* *Bard v. Bath Iron Works*, 590 A.2d 152, 156 (Me. 1991) (“[T]his court has yet to recognize a common law action for wrongful discharge.”); *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 100 (Me. 1984); *Lyons v. La. Pac. Corp.*, No. 02-29-B-K, 2002 U.S. Dist. LEXIS 6042, at *9 (D. Me. Apr. 5, 2002). Employees, both public and private, are protected if the employee reports a violation of a law or rule or a “condition or practice that would put at risk the health or safety of that employee or any other individual.” ME. REV. STAT. ANN. tit. 26, § 833 (West 1988 & Supp. 2003); *see* Whistleblowers’ Protection Act, *id.* §§ 831–840; *see also* ME. REV. STAT. ANN. tit. 26, § 964 (West 1988) (Municipal Public Employees Labor Relations Law); ME. REV. STAT. ANN. tit. 26, § 979-C (West 1988 & Supp. 2003) (State Employees Labor Relations Act); *id.* § 1027 (University of Maine System Labor Relations Act); ME. REV. STAT. ANN. tit. 26, § 1284 (West 1988) (Judicial Employees Labor Relations Act).

Area-specific whistleblower statutes: ME. REV. STAT. ANN. tit. 5, § 23 (West 2002) (testimony by state employees to legislative committees); *id.* § 4572 (fair employment); *id.* § 4633 (Human Rights Act); ME. REV. STAT. ANN. tit. 22, § 1544 (West Supp. 2003) (pursuing remedy to enforce smoking laws); ME. REV. STAT. ANN. tit. 22, § 1580-A (West 2003) (workplace smoking); *id.* § 4017 (child abuse or neglect); ME. REV. STAT. ANN. tit. 26, § 570 (West 1988) (occupational safety); *id.* § 602 (hours of employment); ME. REV. STAT. ANN. tit. 26, § 628 (West 1988 & Supp. 2003) (equal pay); ME. REV. STAT. ANN. tit. 26, § 671 (West 1988) (minimum wage); *id.* § 847 (family medical leave); ME. REV. STAT. ANN. tit. 26, § 931 (West 1988 & Supp. 2003) (information/testimony—State Board of Arbitration); ME. REV. STAT. ANN. tit. 26, § 1324 (West Supp. 2003) (Agricultural Employees Labor Relations Act); ME. REV. STAT. ANN. tit. 35-A, § 1316 (West 1988 & Supp. 2003) (employees of public utilities); ME. REV. STAT. ANN. tit. 39-A, § 353 (West 2001) (testimony—workers’ compensation).

MARYLAND: Maryland recognizes a public policy exception to the at-will employment rule. *See* *Wholey v. Sears Roebuck*, 803 A.2d 482, 494 (Md. 2002). Executive branch employees are protected if the employee reports a violation of law, “an abuse of authority, gross mismanagement, or gross waste of money [or] . . . a substantial and specific danger to public health or safety.” MD. CODE ANN., STATE

PERS. & PENS. § 5-305 (1999 & Supp. 2003); *see id.* §§ 5-301 to -313 (Executive Branch employees); *see also* MD. CODE ANN., STATE PERS. & PENS. § 2-305 (1997) (state employment).

Area-specific whistleblower statutes: Health Care Worker Whistleblower Protection Act, MD. CODE ANN., HEALTH OCC. §§ 1-501 to 1-506 (Supp. 2003) (health care workers); MD. CODE ANN., INS. § 8-318 (1997) (third-party administrators); MD. CODE ANN., LAB. & EMPL. § 3-308 (1999) (equal pay); MD. CODE ANN., LAB. & EMPL. § 5-604 (occupational safety and health) (1999); MD. CODE ANN., TAX–PROP. § 8-214 (2001 & Supp. 2003) (discrimination by country clubs and golf courses); MD. CODE ANN., TRANSP. I § 2-103.4 (2001) (Department of Transportation employees); MD. CODE ANN. art. 28, §§ 2-112.1, 5-114.1 (2003) (collective bargaining—Maryland-National Capital Park and Planning Commission); MD. CODE ANN. art. 29, § 11.5-110 (2003) (collective bargaining—Washington Suburban Sanitary District); MD. CODE ANN. art. 44A, § 2-106 (2003) (collective bargaining—Housing Opportunities Commission); MD. CODE ANN. art. 49B, § 16 (2003) (discrimination in employment); MD. CODE ANN. art. 70B, § 5 (2003) (long-term care).

MASSACHUSETTS: Massachusetts recognizes a public policy exception to the at-will employment rule. *See* *Shea v. Emmanuel Col.*, 682 N.E.2d 1348, 1349–50 (Mass. 1997). Public employees are protected if the employee reports a violation of law or “a risk to public health, safety or the environment.” MASS. ANN. LAWS ch. 149, § 185 (Law. Co-op. 1999); *see also id.* ch. 150E, § 10 (public employees—labor relations).

Area-specific whistleblower statutes: MASS. ANN. LAWS ch. 12, § 5J (Law. Co-op. 2000) (false claims actions); MASS. ANN. LAWS ch. 19A, § 33A (Law. Co-op. 1999) (long-term care); *id.* ch. 19C, § 11 (Disabled Persons Protection Commission); MASS. ANN. LAWS ch. 111, § 72g (Law. Co-op. 1995) (patient abuse, mistreatment, and neglect); MASS. ANN. LAWS ch. 111F, § 13 (Law. Co-op. 1991 & Supp. 2003) (hazardous substances disclosure); *id.* ch. 112, § 5F (employees of health care providers); MASS. ANN. LAWS ch. 119, §§ 51A–B (Law. Co-op. 2002) (child abuse and neglect); MASS. ANN. LAWS ch. 149, § 6D (Law. Co-op. 1999) (occupational safety and health—asbestos); *id.* § 24f (age discrimination); *id.* § 105B (wage discrimination); MASS. ANN. LAWS ch. 149, § 148A (Law. Co-op. 1999 & Supp. 2003) (weekly payment of wages); MASS. ANN. LAWS ch. 150A, § 3A (Law. Co-op. 1999)

(domestic service employees); *id.* ch. 150A, § 4 (unfair labor practice—labor relations); *id.* ch. 151, § 19 (minimum wage); MASS. ANN. LAWS ch. 151B, § 4 (Law. Co-op. 1999 & Supp. 2003) (unlawful discrimination); MASS. ANN. LAWS ch. 152, § 75B (Law. Co-op. 2000) (testimony/cooperation—workers' compensation).

Case law: *Brissette v. Franklin County Sheriff's Office*, 235 F. Supp. 2d 63, 92–93 (D. Mass. 2003).

Secondary source: Marybeth Walsh, *1996–97 Annual Survey of Labor & Employment Law*, 39 B.C. L. REV. 365, 490–515 (1998).

MICHIGAN: Although Michigan recognizes a public policy exception to the at-will employment rule, it applies only to a limited number of cases. *See* *Dudewicz v. Norris-Schmid, Inc.*, 503 N.W.2d 645, 649–50 (Mich. 1993). Michigan courts have recognized a public policy cause of action where the statute that forms the basis for the public policy at issue does not provide a remedy for retaliatory discharge. *Id.*; *see also* *Trombetta v. Detroit, Toledo & Ironton R.R. Co.*, 265 N.W.2d 385, 388 (Mich. Ct. App. 1978). Thus, a plaintiff reporting a violation of law cannot maintain a cause of action because the plaintiff has a remedy under the Whistleblowers' Protection Act (WPA). *See* *Dudewicz*, 503 N.W.2d at 650. However, in a case decided prior to the enactment of the WPA, the Michigan State Court of Appeals held that the plaintiff had stated a cause of action for retaliatory discharge based on his refusal to falsify reports, which would constitute a violation of law. *Trombetta*, 265 N.W.2d at 388. The Michigan whistleblower statute applies to both private and public employers, as the statute defines "employer" broadly. *See* Whistleblowers' Protection Act, MICH. COMP. LAWS ANN. §§ 15.361–.369 (West 1994).

Area-specific statutes: MICH. COMP. LAWS ANN. § 18.1486 (West 1994 & Supp. 2003) (internal auditors); MICH. COMP. LAWS ANN. § 37.1602 (West 2001) (Persons With Disabilities Civil Rights Act); *id.* § 37.2701 (civil rights); MICH. COMP. LAWS ANN. § 259.114 (West Supp. 2004) (audit committee and internal auditor—Airport Authorities); MICH. COMP. LAWS ANN. §§ 324.6316, 324.6532 (West 1999) (vehicle emissions testing); MICH. COMP. LAWS ANN. § 330.1755 (West 1999) (mental health services); MICH. COMP. LAWS ANN. § 333.16244 (West 2001) (health professional organization employees); *id.* § 333.20176a (medical malpractice); MICH. COMP. LAWS ANN. § 333.20180 (West 2001 & Supp. 2003) (employees/contractors of health facilities and agencies); MICH. COMP. LAWS ANN. § 333.21771

(West 2001) (nursing homes); MICH. COMP. LAWS ANN. § 400.586j (West 1997) (long-term care facilities); MICH. COMP. LAWS ANN. § 408.395 (West 1999) (minimum wage); *id.* § 408.483 (payment of wages and fringe benefits); *id.* §§ 408.1029, 408.1065 (occupational safety and health); MICH. COMP. LAWS ANN. § 423.16 (West 2001) (labor disputes—mediation); *id.* § 423.210 (labor disputes—strikes by public employees); MICH. COMP. LAWS ANN. § 750.145p (West Supp. 2003) (vulnerable adults).

Secondary source: Brian D. Young, *The Michigan Whistleblowers' Protection Act: A Look at the Statute and Proposed Modification*, 46 WAYNE L. REV. 1691 (2000).

MINNESOTA: Minnesota recognizes a public policy exception to the at-will employment rule. *See* Vonch v. Carlson Cos., 439 N.W.2d 406, 408 (Minn. Ct. App. 1989). Public and private employees are protected if they report a violation of state or federal law or rule. MINN. STAT. ANN. § 181.932 (West 1993 & Supp. 2004).

Area-specific whistleblower statutes: MINN. STAT. ANN. § 144.9509 (West 1998 & Supp. 2004) (lead poisoning); MINN. STAT. ANN. § 177.32 (West 1993) (minimum wage); MINN. STAT. ANN. § 179.12 (West 1993 & Supp. 2004) (unfair labor practices—Minnesota Labor Relations Act); MINN. STAT. ANN. § 179A.13 (West 1993) (unfair labor practices—Public Employment Labor Relations); MINN. STAT. ANN. § 181.67 (West 1993) (wage discrimination); MINN. STAT. ANN. § 182.654 (West 1993) (occupational safety and health); MINN. STAT. ANN. § 214.19 (West Supp. 2003) (infection control reporting); MINN. STAT. ANN. § 245.94 (West 1992) (ombudsman for mental health); MINN. STAT. ANN. § 256.9742 (West 2003) (ombudsman for older Minnesotans); MINN. STAT. ANN. § 326.244 (West 2004) (electrical work); *id.* § 326.81 (Asbestos Abatement Act); MINN. STAT. ANN. § 626.556 (West 2003) (child abuse and neglect); *id.* § 626.557 (maltreatment of vulnerable adults).

Secondary sources: Jonathan W.J. Armour, *Who's Afraid of the Big, Bad Whistle?: Minnesota's Recent Trend Toward Limiting Employer Liability Under the Whistleblower Statute*, 19 HAMLINE L. REV. 107 (1995); Neal T. Bueth, *Everybody Likes a Tattletale?: The Minnesota Supreme Court's Elimination of the "Public Policy" Requirement for Whistleblower Protection in Anderson-Johanningmier*, 29 WM. MITCHELL L. REV. 295 (2002).

MISSISSIPPI: The Supreme Court of Mississippi adopted a public policy exception to the at-will employment rule in 1993. *See* McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603, 607 (Miss. 1993).

Area-specific whistleblower statutes: MISS. CODE ANN. §§ 25-9-171 to 25-9-177 (2003) (public employees providing information to investigative body or agency); MISS. CODE ANN. § 43-47-37 (1999 & Supp. 2003) (abuse and exploitation of vulnerable adults).

Secondary source: Thomas L. Cluff, Jr., Comment, *In Defense of a Narrow Public Policy Exception of the Employment at Will Rule*, 16 MISS. C. L. REV. 437 (1996).

MISSOURI: The Missouri Court of Appeals has allowed a public policy exception to the at-will employment rule. *See* Luethans v. Wash. Univ., 894 S.W.2d 169, 171 n.2 (Mo. 1995); Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 870–77 (Mo. Ct. App. 1985). State employees are protected if they report a violation of law or “[m]ismanagement, a gross waste of funds or abuse of authority, or a substantial and specific danger to public health or safety” MO. ANN. STAT. § 105.055 (West 2003).

Area-specific whistleblower statutes: MO. ANN. STAT. § 105.467 (West 2003) (conflicts of interest—lobbying); MO. ANN. STAT. § 188.105 (West 2003) (complaint/testimony/assistance—regulation of abortions); MO. ANN. STAT. § 197.285 (West 2003) (hospital and ambulatory surgical center employees); MO. ANN. STAT. § 198.070 (West 2003) (abuse—nursing homes); *id.* § 198.090 (misappropriation of funds—nursing homes); MO. ANN. STAT. § 213.070 (West 2003) (human rights); MO. ANN. STAT. § 217.410 (West 2003) (inmate abuse); MO. ANN. STAT. § 290.525 (West 2003) (minimum wage); MO. ANN. STAT. § 630.167 (West 2003) (mental health facilities); *id.* § 630.635 (testimony/information—mental health placement); MO. ANN. STAT. § 633.135 (West 2003) (testimony/information—mental health placement or discharge); MO. ANN. STAT. § 660.300 (West 2003) (abuse and neglect—in-home services); *id.* § 660.305 (misappropriation of property—in-home services); *id.* § 660.608 (long-term care).

Case law: Bachtel v. Miller County Nursing Home Dist., 110 S.W.3d 799 (Mo. 2003).

Secondary sources: James W. Riner et al., *Wrongful Discharge of At-Will Employees in Missouri*, 59 J. MO. B. 34 (2003).

MONTANA: Montana is the only state to have abolished the at-will

rule. It has a wrongful-discharge statute that requires an employer to show “good cause” for termination. Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (2003).

Area-specific whistleblowing statutes: MONT. CODE ANN. § 2-18-1001 (2003) (Transportation Department personnel filing grievances); *id.* § 2-18-1011 (filing grievances—hearing on complaint); MONT. CODE ANN. § 39-31-401 (2003) (unfair labor practices—public employees); MONT. CODE ANN. § 49-2-301 (2003) (prohibited discriminatory practices); *id.* § 49-3-209(4) (governmental code of fair practices); MONT. CODE ANN. § 50-78-204 (2003) (hazardous chemical exposure—employee rights). However, these are seemingly irrelevant because of the good cause requirement.

Secondary source: Marc Jarsulic, *Protecting Workers from Wrongful Discharge: Montana’s Experience with Tort and Statutory Regimes*, 3 EMPLOYEE RTS. & EMP. POL’Y J. 105 (1999).

NEBRASKA: Nebraska recognizes a public policy exception to the at-will employment rule. *See* Schriener v. Meginnis Ford Co., 421 N.W.2d 755, 757–59 (Neb. 1988). The State Government Effectiveness Act protects public employees who report a violation of law, “gross mismanagement or gross waste of funds, or . . . a substantial and specific danger to public health or safety.” NEB. REV. STAT. § 81-2703 (1999); *see id.* § 81-2705; *see also id.* § 81-1386 (collective bargaining—state employees).

Area-specific whistleblower statutes: NEB. REV. STAT. § 20-136 (1999) (public accommodations); NEB. REV. STAT. § 48-443 (2002) (safety); NEB. REV. STAT. § 48-824 (1998) (prohibited practices—Industrial Relations Act); NEB. REV. STAT. § 48-1004 (2002) (age discrimination); NEB. REV. STAT. § 48-1114 (1998) (Fair Employment Practice Act); NEB. REV. STAT. § 48-1221 (2002) (wage discrimination); NEB. REV. STAT. § 71-445 (Supp. 2001) (health care facilities and services); *id.* § 71-448 (retaliation by licensed health care facility—grounds for disciplinary action).

NEVADA: Nevada recognizes a public policy exception to the at-will employment rule. *See* Allum v. Valley Bank, 970 P.2d 1062, 1063–64 (Nev. 1998). State and local government employees are protected if they disclose improper governmental action, which includes violation of state law or regulation, “abuse of authority[,] . . . substantial and specific danger to the public health or safety[,] or . . . gross waste of public

money.” NEV. REV. STAT. 281.611 (2003); *see id.* 281.611–.671 (disclosure of improper governmental action); *see also* NEV. REV. STAT. 288.270 (2003) (government–public employee relations).

Area-specific whistleblower statutes: NEV. REV. STAT. 218.5343 (2003) (testimony by state employee before legislature); NEV. REV. STAT. 289.110 (2003) (peace officers); NEV. REV. STAT. 357.240 (2003) (false claims); NEV. REV. STAT. 388.531 (2003) (prohibited treatment of students with disabilities by public school officials); NEV. REV. STAT. 391.632 (2003) (irregularities in testing administration or security); NEV. REV. STAT. 394.377 (2003) (prohibited treatment of students with disabilities by private school officials); NEV. REV. STAT. 427A.138 (2003) (facilities for long-term care); NEV. REV. STAT. 433.536 (2003) (mental health facilities); NEV. REV. STAT. 449.205 (2003) (medical facilities); *id.* 449.785 (prohibited treatment of patients with disabilities); NEV. REV. STAT. 613.340 (2000) (unlawful employment practices); NEV. REV. STAT. 613.480 (2003) (lie detector tests); NEV. REV. STAT. 618.445 (2003) (occupational safety and health); NEV. REV. STAT. 630.293 (2003) (employees of physicians); NEV. REV. STAT. 633.505 (2003) (employees of osteopathic physicians).

NEW HAMPSHIRE: New Hampshire recognizes a public policy exception to the at-will employment rule. *See Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 1142–43 (N.H. 1981). Under the Whistleblowers’ Protection Act, private and public employees are protected if they report a violation of law or rule. N.H. REV. STAT. ANN. §§ 275-E:1 to :7 (1999 & Supp. 2003).

Area-specific whistleblower statutes: N.H. REV. STAT. ANN. § 141-E:19 (Supp. 2003) (asbestos management and control); N.H. REV. STAT. ANN. § 147-A:12 (Supp. 2003) (hazardous waste management); N.H. REV. STAT. ANN. § 151:27 (1996) (patient abuse—residential care and health facilities); N.H. REV. STAT. ANN. § 161-F:15 (2002) (elderly and adult services); N.H. REV. STAT. ANN. §§ 170-E:12(X), 170-E:35(XII) (2001) (child day care and child-placing agencies—licensing); *id.* § 170-E:48 (child day care and child-placing agencies—retaliation prohibited); N.H. REV. STAT. ANN. § 273-A:5 (1999) (Unfair Labor Practices—Public Employee Labor Relations); *id.* § 273-C:6(d) (unfair labor practices—dog and horse racing employees); N.H. REV. STAT. ANN. § 275:40 (1999) (protective legislation—penalties); N.H. REV. STAT. ANN. § 277-A:7 (1999) (toxic substances); N.H. REV. STAT. ANN. § 354-A:19 (1995) (trade and commerce—human rights).

Case law: Appeal of Fred Fuller Oil Co., 744 A.2d 1141 (N.H. 2000).

NEW JERSEY: New Jersey recognizes a public policy exception to the at-will employment rule. *Ballinger v. Del. River Port Auth.*, 800 A.2d 97, 108 (N.J. 2002). The New Jersey statute protects both public and private employees who participate in an investigation or report a violation of law. *See* Conscientious Employee Protection Act, N.J. STAT. ANN. §§ 34:19-1 to -9 (West 2000).

Area-specific whistleblower statutes: N.J. STAT. ANN. § 9:6-8.13 (West 2002) (child abuse and neglect); N.J. STAT. ANN. § 10:5-12 (West 2002) (unlawful employment practice—discrimination); N.J. STAT. ANN. § 11A:2-24 (West 2002) (civil service employees); N.J. STAT. ANN. § 18A:17-47 (West 1999) (school employees); N.J. STAT. ANN. § 18A:37-16 (West Supp. 2003) (school employees—harassment, intimidation, bullying); N.J. STAT. ANN. § 34:4A-13 (West 2000) (ski lift and tramway operators); *id.* § 34:5A-17 (hazardous substances); *id.* § 34:5A-42 (complaint or cooperation with Commissioner—hazardous substances); *id.* § 34:6A-45 (worker health and safety); *id.* § 34:8A-10.1 (seasonal farm workers); *id.* § 34:11-56a24 (minimum wage); *id.* § 34:11-56.6 (wage discrimination—violations of act); *id.* § 34:11-56.39 (Prevailing Wage Act); *id.* § 34:11B-9 (Family Leave Act); *id.* § 34:13A-5.4(4) (unfair practices—Employer-Employee Relations Act); *id.* § 34:15-39.1 (testimony—workers’ compensation); N.J. STAT. ANN. § 52:27D-409 (West 2000) (vulnerable adult abuse); *id.* § 52:27G-14 (ombudsman for institutionalized elderly).

Case law: *DeLisa v. County of Bergen*, 755 A.2d 578, 582 (N.J. 2000); *Donofry v. Autotote Sys.*, 795 A.2d 260, 288–89 (N.J. Super. Ct. App. Div. 2001).

Secondary sources: A. Michael Barker, *Whiners Are Not Whistleblowers*, N.J. LAW., Apr. 2001, at 52; Christopher P. Lenzo, *The Changing Contours of New Jersey Whistleblower Law*, N.J. LAW., Apr. 1999, at 51.

NEW MEXICO: New Mexico recognizes a public policy exception to the at-will employment rule. *See* *Silva v. Am. Fed’n of State, County & Mun. Employees*, 37 P.3d 81, 83 (N.M. 2001).

Area-specific whistleblower statutes: N.M. STAT. ANN. § 10-7E-19(E) (Michie 2003) (Public Employee Bargaining Act); N.M. STAT. ANN. § 22-10A-33(B) (Michie 2003) (school employees—violence and vandalism); N.M. STAT. ANN. § 28-1-7 (Michie 2000 &

Supp. 2004) (unlawful discriminatory practice—human rights); N.M. STAT. ANN. § 28-17-19(B) (Michie 2000) (long-term care); N.M. STAT. ANN. § 30-47-9 (Michie 2004) (Long-term Care Ombudsman Act); N.M. STAT. ANN. § 50-9-25 (Michie 2000) (occupational health and safety); N.M. STAT. ANN. § 74-3-16 (Michie 2000) (radiation protection).

NEW YORK: New York does not recognize a public policy exception to the at-will employment rule. *Horn v. N.Y. Times*, 790 N.E.2d 753, 759 (N.Y. 2003). A private employee is protected if the employee “discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety” N.Y. LAB. LAW § 740 (McKinney 2002). To maintain an action under section 740, reasonable belief of a violation of law is insufficient; proof of an actual violation is required. *Bordell v. Gen. Elec. Co.*, 667 N.E.2d 922, 923 (N.Y. 1996). Public employees are protected if they report a “violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or . . . which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action.” N.Y. CIV. SERV. LAW § 75-b(2)(a) (McKinney 1999); *see also* N.Y. GEN. MUN. LAW § 683 (McKinney 1999) (public employees—grievances).

Area-specific whistleblower statutes: N.Y. EDUC. LAW § 3028-c (McKinney 2001) (school employees—acts of violence and weapons possession); N.Y. EXEC. LAW § 296 (McKinney 2001 & Supp. 2004) (unlawful discriminatory practices—human rights); N.Y. EXEC. LAW § 544-a(15)(c) (McKinney 1996 & Supp. 2004) (long-term care facilities); N.Y. LAB. LAW § 27-a (McKinney 2002) (safety and health standards); *id.* § 215(1) (labor law violations); *id.* § 662 (minimum wage); *id.* § 680 (minimum wage—farm workers); *id.* § 704(8) (unfair labor practices—labor relations); *id.* § 736 (stress evaluators); N.Y. LAB. LAW § 741 (McKinney 2002 & Supp. 2004) (health care employees); N.Y. LAB. LAW § 880(3) (McKinney 2002) (toxic substances); N.Y. PUB. HEALTH LAW § 2801-d (McKinney 2002) (complaint of health care facility resident); *id.* § 2803-c (health care facilities—patients’ statement of rights); *id.* § 2803-d (health care facilities—reporting abuse and neglect); N.Y. SOC. SERV. LAW § 460-d(2)(vi) (McKinney 2003 & Supp. 2004) (residential care facilities—adoption of regulations); N.Y.

SOC. SERV. LAW § 461-a(3)(b)(iii) (McKinney 2003) (residential care facilities); N.Y. WORKERS' COMP. LAW § 120 (McKinney 1994) (discrimination against employees who bring workers' compensation proceedings).

Case law: *Bal v. City of New York*, 698 N.Y.S.2d 852, 852 (N.Y. App. Div. 1999).

Secondary source: Joan Corbo, Kraus v. New Rochelle Hosp. Medical Ctr.: *Are Whistleblowers Finally Getting the Protection They Need?*, 12 HOFSTRA LAB. L.J. 141 (1994).

NORTH CAROLINA: North Carolina recognizes a public policy exception to the at-will employment rule. *See* *Amos v. Oakdale Knitting Co.*, 416 S.E.2d 166, 167 (N.C. 1992); *Lenzer v. Flaherty*, 418 S.E.2d 276, 287 (N.C. Ct. App. 1992). State employees are protected if they report a violation of law, fraud, misappropriation, a “[s]ubstantial and specific danger to the public health and safety,” or “[g]ross mismanagement, a gross waste of monies, or gross abuse of authority.” N.C. GEN. STAT. § 126-84 (2003); *see id.* §§ 126-84 to 126-88 (improper government activities); *see also id.* § 126-17 (equal opportunity violations—state personnel).

Area-specific whistleblower statutes: N.C. GEN. STAT. § 95-196 (2003) (toxic or hazardous substances); *id.* §§ 95-240 to 95-245 (retaliatory employment discrimination); N.C. GEN. STAT. § 108A-70.15 (2003) (Medical Assistance Provider False Claims Act); N.C. GEN. STAT. § 115C-335.5 (2003) (school board employees—sexual harassment); N.C. GEN. STAT. § 122C-18 (2003) (complaint/information—Consumer Advocate); N.C. GEN. STAT. § 143B-181.23 (2003) (long-term care facilities); N.C. GEN. STAT. § 168A-10 (2003) (Persons with Disabilities Protection Act).

Secondary source: Michael McGuinness, *North Carolina's Developing Public Policy Wrongful Discharge Doctrine in the New Millennium: Basic Principles, Causation & Proof of Improper Motive*, 23 CAMPBELL L. REV. 203 (2001).

NORTH DAKOTA: North Dakota recognizes a public policy exception to the at-will employment rule. *See* *Ressler v. Humane Soc'y*, 480 N.W.2d 429, 431–32 (N.D. 1992). Private employees are protected if they report a violation of law. N.D. CENT. CODE § 34-01-20(1)(a) (Supp. 2003). Public employees are protected if they report a job-related violation of law or misuse of public resources. N.D. CENT. CODE

§ 34-11.1-04 (1987 & Supp. 2003).

Area-specific whistleblower statutes: N.D. CENT. CODE § 14-02.4-18 (2004) (unlawful discrimination); N.D. CENT. CODE § 25-01.3-05 (2002) (abuse or neglect of person with a developmental disability or mental illness); N.D. CENT. CODE § 34-06-18 (1987) (minimum wages and hours); N.D. CENT. CODE §§ 34-06.1-03, -09 (1987 & Supp. 2003) (equal pay); N.D. CENT. CODE § 50-10.1-05 (1999) (long-term care facilities); *id.* § 50-25.1-09.1 (child abuse and neglect); *id.* § 50-25.2-11 (vulnerable adult abuse and neglect).

Case law: *Dahlberg v. Lutheran Soc. Servs.*, 625 N.W.2d 241, 250–56 (N.D. 2001).

OHIO: Ohio recognizes a public policy exception to the at-will employment rule. *See Pytlinski v. Borcar Prods., Inc.*, 760 N.E.2d 385, 387–88 (Ohio 2002). Public and private employees are protected if they report a violation of law when “the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony” OHIO REV. CODE ANN. § 4113.52 (West 2001 & Supp. 2003); *see id.* §§ 4113.51–.53. In addition, state employees are protected if they report a violation of law or misuse of public resources. OHIO REV. CODE ANN. § 124.341 (West 2002); *see also* OHIO REV. CODE ANN. § 4117.11 (West 2001) (unfair labor practice); OHIO REV. CODE ANN. § 4167.13 (West 2001) (public employment risk-reduction program).

Area-specific whistleblower statutes: OHIO REV. CODE ANN. § 173.24 (West 2002) (long-term care); OHIO REV. CODE ANN. § 1513.39 (West 1996 & Supp. 2003) (surface mining); OHIO REV. CODE ANN. § 2903.36 (West 1997) (patient abuse and neglect—health care facilities); OHIO REV. CODE ANN. § 3721.22 (West 1998) (abuse, neglect, and misappropriation of property—long-term and residential care facilities); *id.* § 3721.24 (abuse, neglect, and misappropriation of property—retaliatory actions prohibited); OHIO REV. CODE ANN. § 3724.11 (West 1998) (community alternative homes); OHIO REV. CODE ANN. §§ 4111.13, 4111.17 (West 2001) (minimum fair wage standards); OHIO REV. CODE ANN. § 4112.02 (West 2001 & Supp. 2003) (unlawful discriminatory practices—civil rights); OHIO REV. CODE ANN. § 4723.33 (West Supp. 2003) (nurses and technicians); OHIO REV. CODE ANN. § 4723.34 (West 1998 & Supp. 2003) (reports to board of nursing/testimony); OHIO REV. CODE ANN. § 4734.31 (West Supp.

2003) (retaliation against chiropractors); OHIO REV. CODE ANN. § 5101.61 (West 2001) (abuse, neglect, or exploitation of adult); OHIO REV. CODE ANN. § 5104.10 (West 2001) (child care facility employees); OHIO REV. CODE ANN. §§ 5123.604, 5123.61 (West 2001) (abuse and neglect of persons with mental retardation and developmental disabilities).

Case law: *Contreras v. Ferro Corp.*, 652 N.E.2d 940, 944 (Ohio 1995); *Collins v. Rizkana*, 652 N.E. 2d 653, 661 (Ohio 1995).

Secondary source: Mark D. Waggoner, Jr., Comment, *The Public Policy Exception to the Employment at Will Doctrine in Ohio: A Need for a Legislative Approach*, 57 OHIO ST. L.J. 1799 (1996).

OKLAHOMA: Oklahoma recognizes a public policy exception to the at-will employment rule. See *Barker v. State Ins. Fund*, 40 P.3d 463, 468–70 (Okla. 2001). State employees are protected if they report a violation of law, mismanagement, gross waste of public funds, abuse of authority, “or a substantial and specific danger to public health or safety” OKLA. STAT. ANN. tit. 74, § 840-2.5 (West 2002 & Supp. 2004).

Area-specific whistleblower statutes: OKLA. STAT. ANN. tit. 10, §§ 1430.8, 1430.31 (West 1998) (Group Homes for Persons with Developmental or Physical Disabilities Act); OKLA. STAT. ANN. tit. 10, § 7103 (West 1998 & Supp. 2004) (child abuse and neglect); OKLA. STAT. ANN. tit. 25, § 1601(1) (West 1987) (discriminatory practices); OKLA. STAT. ANN. tit. 40, § 199 (West 1999) (protection of labor); *id.* § 403 (occupational health and safety); OKLA. STAT. ANN. tit. 63, § 1-832 (West 2004) (Residential Care Act); *id.* § 1-1916 (Nursing Home Care Act); *id.* § 1-1939 (employees under Nursing Home Care Act); *id.* § 1-2215 (long-term care); OKLA. STAT. ANN. tit. 85, § 5 (West 1992 & Supp. 2004) (testimony—workers’ compensation).

Secondary source: M. Derek Zolner, Note, *Employment Law: Report a Crime, Lose Your Job: The Oklahoma Supreme Court Reins in the Public Policy Exception in Hayes v. Eateries, Inc.*, 50 OKLA. L. REV. 585 (1997).

OREGON: Oregon recognizes a public policy exception to the at-will employment rule. See *Dunwoody v. Handskill Corp.*, 60 P.3d 1135, 1142 (Or. Ct. App. 2003). It is an unlawful employment practice for an employer to retaliate against an employee for certain conduct, such as reporting “criminal activity by any person” OR. REV. STAT.

§ 659A.230 (2001). Public employees are protected if they report a violation of law, “[m]ismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from action of the state, agency or political subdivision,” or “that a person receiving services, benefits or assistance from the state or agency or subdivision, is subject to a felony or misdemeanor warrant for arrest” *Id.* § 659A.203; *see* Whistleblower Law, *id.* §§ 659A.200–.224; *see also* OR. REV. STAT. § 243.672 (1999) (unfair labor practices—public employee collective bargaining).

Area-specific whistleblower statutes: OR. REV. STAT. § 185.170 (1999) (testimony by members of Oregon Disabilities Commission); OR. REV. STAT. § 430.755 (1999) (adult abuse); OR. REV. STAT. § 441.057 (1999) (health care facilities); *id.* § 441.127 (long-term care facilities); *id.* § 441.655 (resident abuse—long-term care facilities); OR. REV. STAT. § 443.765 (1999) (adult foster homes); OR. REV. STAT. § 464.280(3) (1999) (violations of law—gambling operations); OR. REV. STAT. § 652.220 (1999) (wage discrimination); *id.* § 652.355; OR. REV. STAT. § 653.060 (1999) (minimum wage); OR. REV. STAT. § 654.062 (1999) (occupational safety and health); OR. REV. STAT. § 657.260 (1999) (testimony—unemployment compensation); OR. REV. STAT. § 658.452 (1999) (farm labor employees); *id.* § 658.760 (farmworker camps); OR. REV. STAT. § 659A.030 (2001) (unlawful employment practices—discrimination); *id.* § 659A.233 (reporting certain violations; testifying at unemployment compensation hearing); *id.* § 659A.236 (legislative testimony); *id.* § 659A.259 (employee housing); OR. REV. STAT. § 663.120 (1999) (unfair labor practices—labor relations).

PENNSYLVANIA: Common law protection does not extend to a whistleblower who is not under a legal duty to report. *Donahue v. Fed. Express Corp.*, 753 A.2d 238, 244 (Pa. Super. Ct. 2000). The Whistleblower Law protects private and public employees who report wrongdoing or waste. Whistleblower Law, PA. STAT. ANN. tit. 43, §§ 1421–1428 (West 1991).

Area-specific whistleblower statutes: PA. STAT. ANN. tit. 23, § 6311 (West 2001) (child abuse); PA. STAT. ANN. tit. 24, § 5004 (West 1992 & Supp. 2003) (unfair educational practices—Pennsylvania Fair Educational Opportunities Act); PA. STAT. ANN. tit. 27, § 4112 (West Supp. 2004) (environmental laboratory employees); PA. STAT. ANN. tit. 35, § 6020.1112 (West 2003) (Hazardous Sites Cleanup Act); *id.* § 7130.509 (low-level waste facilities); *id.* § 7313 (Worker and

Community Right to Know Act); *id.* § 10225.302 (Older Adult Protective Services Act); PA. STAT. ANN. tit. 40, § 1303.307 (West Supp. 2004) (protection of health care workers—patient safety plan requirement); *id.* § 1303.308 (health care workers—reporting of serious events and incidents); PA. STAT. ANN. tit. 43, § 211.6 (West 1992) (unfair labor practices—labor relations); *id.* § 333.112 (testimony—minimum wage); *id.* § 336.8 (wage discrimination); PA. STAT. ANN. tit. 43, § 955 (West 1991 & Supp. 2004) (unlawful discriminatory practices—human relations); PA. STAT. ANN. tit. 43, § 1101.1201 (West 1991) (unfair practices—public employee relations); *id.* § 1301.606 (seasonal farm workers); PA. STAT. ANN. tit. 43, § 1431 (West Supp. 2004) (commercial motor vehicle safety); PA. STAT. ANN. tit. 53, § 4000.1714 (West 1997) (Municipal Waste Planning, Recycling and Waste Reduction Act); PA. STAT. ANN. tit. 63, § 1015.1 (West Supp. 2004) (water and wastewater system employees); PA. STAT. ANN. tit. 65, § 1108 (West 2000) (ethics standards commission); PA. STAT. ANN. tit. 66, § 3316 (West 2000) (public utility employees); PA. STAT. ANN. tit. 71, § 733-1104 (West Supp. 2004) (employees of companies licensed by Department of Banking); PA. STAT. ANN. tit. 75, § 1619 (West 1996) (commercial motor vehicle safety).

Case law: *Jakomas v. McFalls*, 229 F. Supp. 2d 412, 421–26; 430–31 (W.D. Pa. 2002).

RHODE ISLAND: Rhode Island does not recognize a public policy exception. *Pacheo v. Raytheon Co.*, 623 A.2d 464, 465 (R.I. 1993) (*per curiam*). However, The Rhode Island Whistleblowers’ Protection Act protects private and public employees and independent contractors reporting violations of law. The Rhode Island Whistleblowers’ Protection Act, R.I. GEN. LAWS §§ 28-50-1 to -9 (2003).

Area-specific whistleblower statutes: R.I. GEN. LAWS § 5-29-15 (1999) (unprofessional conduct, incompetence, or negligence of a podiatrist); *id.* § 5-31.1-9 (unprofessional conduct or negligence of dentists and dental hygienists); *id.* § 5-37-1.5 (unprofessional conduct or negligence of physicians); R.I. GEN. LAWS § 23-1.1-14 (2001) (occupational health); *id.* §§ 23-17.8-4 to -5 (abuse in health care facilities); *id.* § 23-17.14-29 (Hospital Conversions Act); *id.* § 23-24.5-.11 (asbestos abatement); R.I. GEN. LAWS § 27-18-45 (2002) (retaliation by insurance companies against medical services providers); *id.* § 27-19-37 (retaliation by nonprofit hospital service corporations against medical services providers); *id.* § 27-20-32 (retaliation by nonprofit medical

service corporations against medical services providers); *id.* § 27-41-46 (retaliation by HMOs against medical services providers); *id.* § 27-54-7 (Insurance Fraud Prevention Act); *id.* § 27-63-1 (health care fraud); R.I. GEN. LAWS § 28-5-7 (2003) (unlawful employment practices—fair employment); *id.* § 28-6-21 (wage discrimination); *id.* § 28-7-13 (unfair labor practices—Labor Relations Act); *id.* § 28-12-16 (minimum wage); *id.* § 28-14-18 (payment of wages); *id.* § 28-20-21 (occupational safety); *id.* § 28-21-8 (testimony—Hazardous Substances Right-To-Know Act); R.I. GEN. LAWS § 40.1-27-6 (1997) (abuse of persons with developmental disabilities); R.I. GEN. LAWS § 42-66.7-8 (1998) (long-term care).

SOUTH CAROLINA: South Carolina recognizes a public policy exception to the at-will employment rule. *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213, 216 (S.C. 1985). Public employees are protected if they report wrongdoing or waste. S.C. CODE ANN. §§ 8-27-10 to -50 (Law. Co-op. Supp. 2003).

Area-specific whistleblower statutes: S.C. CODE ANN. § 1-13-80 (Law. Co-op. 1986 & Supp. 2003) (unlawful employment practices—state human affairs commission); S.C. CODE ANN. § 41-1-80 (Law. Co-op. Supp. 2003) (testimony—workers' compensation); S.C. CODE ANN. § 41-15-510 (Law. Co-op. 1986 & Supp. 2003) (occupational health and safety).

SOUTH DAKOTA: South Dakota recognizes a public policy exception to the at-will employment rule. *See Dahl v. Combined Ins. Co.*, 621 N.W.2d 163, 166–67 (S.D. 2001). Public employees who are subjected to retaliation for reporting a violation of state law may file a grievance. S.D. CODIFIED LAWS § 3-6A-52 (Michie 2004); *see also id.* § 3-18-3.1 (unfair practices—public employees' unions).

Area-specific whistleblower statutes: S.D. CODIFIED LAWS § 20-13-26 (Michie 1995) (human rights); S.D. CODIFIED LAWS § 27B-8-43 (Michie Supp. 2003) (abuse, neglect, or exploitation of a person with a developmental disability); S.D. CODIFIED LAWS § 28-1-45.7 (Michie 1999) (Older Americans ombudsman program); S.D. CODIFIED LAWS § 60-9A-12 (Michie 2004) (unfair practices—collective bargaining); S.D. CODIFIED LAWS § 60-11-17.1 (Michie 1993) (wage complaints and proceedings); *id.* § 60-12-21 (wage discrimination).

TENNESSEE: Tennessee recognizes a public policy exception to the

at-will employment rule. *See* *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534–35 (Tenn. 2002). Public and private employees are protected if they refuse to remain silent about an illegal activity. TENN. CODE ANN. § 50-1-304 (1999 & Supp. 2003). State employees enjoy protection if they report various activities, such as a violation of law, fraud, and misappropriation. TENN. CODE ANN. § 8-50-116 (2002).

Area-specific whistleblower statutes: TENN. CODE ANN. § 4-18-105 (Supp. 2003) (false claims actions); TENN. CODE ANN. § 4-21-301 (1998) (human rights); TENN. CODE ANN. § 8-50-603 (2002) (communication with an elected official by a public employee); TENN. CODE ANN. § 33-2-416 (2001) (mental health and developmental disabilities services and facilities); TENN. CODE ANN. § 37-1-410 (2001) (child abuse); TENN. CODE ANN. § 49-5-609 (2002) (collective bargaining—education employees); *id.* § 49-50-1409 (Education Truth in Reporting and Employee Protection Act of 1989); TENN. CODE ANN. §§ 50-2-202 to -206 (1999) (wage discrimination); *id.* §§ 50-3-106, -409 (occupational safety and health); *id.* § 50-3-2012 (Hazardous Chemical Right to Know Law); TENN. CODE ANN. §§ 68-11-804, -903 (2001 & Supp. 2003) (nursing homes); TENN. CODE ANN. § 71-5-183 (1995) (false or fraudulent Medicaid claims); *id.* § 71-6-105 (abuse of certain adults).

Case law: *Griggs v. Coca-Cola Employees' Credit Union*, 909 F. Supp. 1059, 1062–65 (E.D. Tenn. 1995).

TEXAS: Texas does not recognize a “common-law whistleblower cause of action.” *City of Midland v. O’Bryant*, 18 S.W.3d 209, 215 (Tex. 2000). Public employees are protected if they report a violation of law. TEX. GOV’T CODE ANN. §§ 554.001–.010 (Vernon 1994 & Supp. 2004).

Area-specific whistleblower statutes: TEX. AGRIC. CODE ANN. § 125.013 (Vernon 1995) (Agricultural Hazard Communication Act); TEX. FAM. CODE ANN. § 261.110 (Vernon 2002) (child abuse and neglect); TEX. HEALTH & SAFETY CODE ANN. § 142.0093 (Vernon 2001) (home health, hospice, and personal assistance services); *id.* § 161.134 (health care facilities); *id.* § 242.133 (nursing homes and related institutions); *id.* § 242.655 (cooperation with long-term care legislative oversight committee); *id.* § 247.068 (assisted living facilities); TEX. HEALTH & SAFETY CODE ANN. § 252.132 (Vernon 2001 & Supp. 2004) (intermediate care facilities); TEX. HEALTH & SAFETY CODE ANN. § 502.017 (Vernon 2003) (Hazard Communication Act); TEX. HUM.

RES. CODE ANN. § 36.115 (Vernon 2001) (Medicaid fraud prevention—private actions); *id.* § 101.064 (long-term care facilities); TEX. LAB. CODE ANN. § 21.055 (Vernon 1996) (employment discrimination); *id.* §§ 411.081–.083 (use of telephone hotline to report occupational safety or health violation); *id.* § 451.001 (testimony and claims—workers’ compensation); TEX. LOC. GOV’T CODE ANN. § 160.006 (Vernon 1999) (county employees—grievances); TEX. OCC. CODE ANN. § 160.012 (Vernon 2004) (reports concerning physicians); *id.* § 301.413 (reports concerning nurses; nurse reports of patient care issues); *id.* § 303.009 (nursing peer review); *id.* §§ 505.602–.603 (social workers—incidents harmful to clients).

Case law: *Gold v. City of College Station*, 40 S.W.3d 637 (Tex. App. 2001); *Austin v. HealthTrust, Inc.*, 967 S.W.2d 400, 403 (Tex. 1998); *Winters v. Houston Chronicle Publ’g Co.*, 795 S.W.2d 723, 724 (Tex. 1990); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 734 (Tex. 1985) (creating “very narrow exception to the employment-at-will doctrine,” but requiring plaintiff “to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act”).

UTAH: Utah recognizes a public policy exception to the at-will employment rule. *See Rackley v. Fairview Care Ctrs., Inc.*, 23 P.3d 1022, 1026–27 (Utah 2001). Public employees are protected if they report a violation of law or waste. Utah Protection of Public Employees Act, UTAH CODE ANN. §§ 67-21-1 to -9 (2000).

Area-specific whistleblower statutes: UTAH CODE ANN. § 34-20-8 (2001) (unfair labor practices—employment relations and collective bargaining); *id.* § 34-23-402 (employment of minors); UTAH CODE ANN. § 34-28-19 (2001 & Supp. 2004) (payment of wages); UTAH CODE ANN. § 34A-6-203 (2001) (occupational safety and health); UTAH CODE ANN. § 62A-3-207 (2000) (long-term care).

VERMONT: Vermont recognizes a public policy exception to the at-will employment rule. *See Payne v. Rozendaal*, 520 A.2d 586, 588 (Vt. 1986).

Area-specific whistleblower statutes: VT. STAT. ANN. tit. 3, § 961 (2003) (unfair labor practices—State Employees Labor Relations Act); *id.* § 1026 (unfair labor practices—Judiciary Employees Labor Relations Act); VT. STAT. ANN. tit. 18, § 1427 (2002) (smoking in the workplace); VT. STAT. ANN. tit. 21, §§ 231–232 (2003) (occupational safety and

health); *id.* § 473 (parental and family leave); *id.* § 491 (employment rights for reserve and national guard members); *id.* § 494d (Polygraph Protection Act); *id.* § 495 (unlawful employment practices—fair employment); *id.* § 1621 (State Labor Relations Act); VT. STAT. ANN. § 1726 (1987 & Supp. 2003) (unfair labor practices—Vermont Municipal Labor Relations Act); VT. STAT. ANN. tit. 33, § 4920 (2001) (child abuse); *id.* § 6909 (abuse of vulnerable adults); *id.* § 7508 (long-term care).

VIRGINIA: Virginia recognizes a public policy exception to the at-will employment rule, but the state’s courts have thus far rejected its application to a “generalized, common-law ‘whistleblower’ retaliatory discharge claim.” *Dray v. New Mkt. Poultry Prods., Inc.*, 518 S.E.2d 312, 313 (Va. 1999).

Area-specific whistleblower statutes: VA. CODE ANN. §§ 2.2-3000 to -3004 (Michie 2001) (state employees grievance procedure); VA. CODE ANN. § 8.01-581.17 (Michie Supp. 2003) (report of patient safety data to patient safety organization); VA. CODE ANN. § 15.2-1507 (Michie 2003) (local government employees—grievance procedure); VA. CODE ANN. § 32.1-125.4 (Michie 2001 & Supp. 2003) (hospitals); VA. CODE ANN. § 32.1-138.4 (Michie 2001) (nursing facilities); VA. CODE ANN. § 40.1-51.2 (Michie 2002) (participation in safety and health inspection); *id.* § 40.1-51.2:1 (occupational safety and health); VA. CODE ANN. § 51.5-39.10 (Michie 2002) (complaints and investigations concerning persons with disabilities); VA. CODE ANN. § 54.1-515 (Michie 2002) (asbestos, lead, and home inspection contractors and workers); VA. CODE ANN. § 63.2-1730 (Michie 2002) (assisted living and adult day care facilities; child welfare agencies); *id.* § 63.2-1731 (abuse and neglect at assisted living facilities, adult day-care centers, or child welfare agencies); VA. CODE ANN. § 65.2-308 (Michie 2002) (testimony and current or future claims—workers’ compensation).

WASHINGTON: Washington recognizes a public policy exception to the at-will employment rule. *See Dicomis v. State*, 113 Wash. 2d 612, 617, 782 P.2d 1002, 1006 (1989) (en banc). State employees are protected if the employee reports improper governmental action to the office of the state auditor. WASH. REV. CODE §§ 42.40.010–.910 (2004); *see also* WASH. REV. CODE § 41.80.110 (2004) (unfair labor practices—state collective bargaining); WASH. REV. CODE §§ 42.41.010–.902 (2004) (local government whistleblower protection).

Area-specific whistleblower statutes: WASH. REV. CODE § 18.20.185 (2004) (boarding homes); *id.* § 18.51.220 (nursing homes); *id.* § 18.88A.230 (nursing assistants, community based care settings, and in-home service agencies); WASH. REV. CODE § 19.30.190 (2004) (employees of farm labor contractors and agricultural employers); WASH. REV. CODE § 28B.52.073 (2004) (unfair labor practices—community colleges); WASH. REV. CODE § 41.56.140 (2004) (public employees filing unfair labor practice charge); *id.* § 41.59.140 (unfair labor practices—Educational Employment Relations Act); *id.* § 41.76.050 (unfair labor practices—higher education faculty); WASH. REV. CODE § 43.06A.085 (2004) (family and children’s ombudsman); *id.* § 43.70.075 (quality of care by health care provider); *id.* § 43.190.090 (long-term care facilities); WASH. REV. CODE § 47.64.130 (2004) (unfair labor practices—ferry system); WASH. REV. CODE § 49.12.130 (2004) (testimony—primarily concerning wages and working conditions); *id.* § 49.12.287 (sick leave; care of family members); *id.* § 49.17.160 (industrial safety and health); *id.* § 49.26.150 (asbestos); *id.* § 49.46.100 (minimum wage); *id.* § 49.60.210 (unfair practices—discrimination); *id.* § 49.78.130 (family leave); WASH. REV. CODE § 70.124.100 (2004) (nursing homes and state hospitals); WASH. REV. CODE § 73.16.032 (2004) (employment of veterans); WASH. REV. CODE § 74.34.180 (2004) (abuse of vulnerable adults); *id.* § 74.39A.060 (long-term care facilities).

WEST VIRGINIA: West Virginia recognizes a public policy exception to the at-will employment rule. *See Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 718 (W. Va. 2001). Public employees are protected if they report wrongdoing or waste. W. VA. CODE ANN. §§ 6C-1-1 to -8 (Michie 2003).

Area-specific whistleblower statutes: W. VA. CODE ANN. § 5-11-9 (Michie 2002) (unlawful discriminatory practices); W. VA. CODE ANN. § 9-6-12 (Michie 2003) (nursing homes); W. VA. CODE ANN. § 16-5C-8 (Michie 2001) (nursing homes); W. VA. CODE ANN. § 16-5D-8 (Michie 2001 & Supp. 2004) (assisted living residences); W. VA. CODE ANN. § 16-5L-18 (Michie 2001) (long-term care); *id.* § 16-5N-8 (residential care communities); *id.* § 16-32-14 (asbestos abatement); *id.* § 16-39-4 (health care workers); W. VA. CODE ANN. § 21-1A-4 (Michie 2002) (unfair labor practices—private sector labor relations); *id.* § 21-3A-13 (occupational safety and health); *id.* § 21-5B-3 (wage discrimination); *id.* § 21-5C-7 (wages and hours); *id.* § 21-5E-3 (wage discrimination—state employees); W. VA. CODE ANN. § 22-3-31 (Michie 2002) (Surface Coal

Mining and Reclamation Act); *id.* § 22A-1-22 (miners and authorized representatives).

Case law: *Wiggins v. E. Assoc. Coal Corp.*, 357 S.E.2d 745, 747–48 (W. Va. 1987).

WISCONSIN: Although Wisconsin recognizes a public policy exception to the at-will employment rule, there is no broad protection for whistleblowers. *See Hausman v. St. Croix Care Ctr.*, 571 N.W.2d 393, 397–98 (Wis. 1997). The case protects only whistleblowers terminated for refusing an employer’s command to violate public policy or for acting pursuant to an affirmative legal obligation. *Id.* State employees are protected if they report a violation of law, mismanagement, abuse of authority, substantial waste, or a danger to public health and safety. WIS. STAT. ANN. §§ 230.80–89 (West 2001 & Supp. 2003); *see also* WIS. STAT. ANN. § 895.65 (West 1997 & Supp. 2003) (government employee protection).

Area-specific whistleblower statutes: WIS. STAT. ANN. § 16.009 (West 2003) (board on aging and long-term care); WIS. STAT. ANN. § 21.80 (West 2003) (reemployment after national guard, state defense force, or public health emergency service); WIS. STAT. ANN. § 46.90 (West 2003 & Supp. 2003) (elder abuse and neglect); WIS. STAT. ANN. § 50.07 (West 2003 & Supp. 2003) (care and service residential facilities); WIS. STAT. ANN. § 50.54 (West 2003) (rural medical centers); WIS. STAT. ANN. § 51.61 (West 2003) (mental health patients’ rights); WIS. STAT. ANN. § 66.0903 (West 2003) (municipal prevailing wage and hour scales); WIS. STAT. ANN. § 101.055 (West 2004) (occupational safety and health); *id.* § 101.595 (toxic substances, infectious agents, or pesticides); WIS. STAT. ANN. § 103.13 (West 2002) (proceedings concerning open records); *id.* § 103.33 (street trades of minors and recovery of wages); *id.* § 103.49 (wage rate on state work); *id.* § 103.83 (regulation of employment of minors); WIS. STAT. ANN. § 104.10 (West 2002) (testimony—investigation or proceeding concerning minimum wages); WIS. STAT. ANN. § 109.03 (West 2002) (payment of wages—claims and collections); *id.* § 109.07 (layoffs and business closings); *id.* § 109.075 (cessation of health care benefits); WIS. STAT. ANN. § 111.06 (2002) (unfair labor practices—Employment Peace Act); *id.* § 111.322 (employment discrimination); *id.* § 111.36 (sex discrimination in employment); *id.* § 111.37 (lie detector tests); WIS. STAT. ANN. § 111.375 (West 2002 & Supp. 2003) (providing limited anonymity for complainant in employee discrimination cases); WIS. STAT. ANN.

§ 289.42 (West 2004) (solid and hazardous waste facilities).

WYOMING: Wyoming recognizes a narrow public policy exception to the at-will employment rule. *See McLean v. Hyland Enters.*, 34 P.3d 1262, 1268–69 (Wyo. 2001). State employees are protected if they report a violation of law, fraud, waste, gross mismanagement, or a danger to health or safety. WYO. STAT. ANN. § 9-11-103 (Michie 2003).

Area-specific whistleblower statutes: WYO. STAT. ANN. § 9-2-1308 (Michie 2003) (long-term care facilities); WYO. STAT. ANN. § 19-11-104 (Michie 2003) (discrimination in employment—uniformed services members); WYO. STAT. ANN. § 27-4-304 (Michie 2003) (equal pay); *id.* § 27-11-109 (occupational health and safety); WYO. STAT. ANN. § 35-2-910 (Michie 2003) (health care facilities).

APPENDIX B

This Appendix summarizes the federal laws—other than the Sarbanes–Oxley Act—that either directly address whistleblowing or relate to employee disclosure of information that furthers the public welfare. The statutes are broken down by categories, such as environmental protection, that best summarize the underlying policy the whistleblowing provision is thought to protect.

As suggested by this list of statutes, the current federal regulatory approach is piecemeal. If an employee blows the whistle on a specific type of violation, then that employee is protected from retaliation by federal law. If an employee blows the whistle on a violation of a statute that is not listed below, then that employee has no federal protection and, depending on the vagaries of state law, may have no remedy whatsoever. The National Whistleblower Center, a non-profit group that advocates on behalf of whistleblowers, has pointed out this weakness in the law and is lobbying to have a broad federal protection for whistleblowers enacted. The text of the Center’s model act can be found at http://www.whistleblowers.org/html/model_whistleblower_law.html (last visited Oct. 7, 2004). It is worth noting that such a model act would be also be beneficial on a state level to provide employees uniform protections.

Banks and Banking: 12 U.S.C.A. § 1441a(q) (West 2001) (employees of RTC, Thrift Depositor Protection Oversight Board, and RTC contractors); 12 U.S.C. § 1790b (2000) (federal credit unions); *id.* § 1831j (depository institution employees).

Employment: 29 U.S.C. § 158(a)(4) (2000) (unfair labor practices—National Labor Relations); *id.* § 215(a)(3) (fair labor standards); *id.* § 623(d) (age discrimination); *id.* § 660(c) (occupational safety and health); *id.* § 1140 (Employee Retirement Income Security and Welfare and Pension Plans Disclosure Acts); *id.* § 1855(a) (migrant and seasonal agricultural workers); *id.* § 2002 (lie detector tests); *id.* § 2615(b) (family and medical leave); 30 U.S.C. § 815(c) (2000) (mine safety and health); 33 U.S.C. § 948a (2000) (testimony—longshore and harbor workers’ compensation); 42 U.S.C. § 2000e-3(a) (2000) (civil rights—equal employment opportunities); *id.* § 12203(a) (equal opportunity for individuals with disabilities); 46 U.S.C. § 2114(a) (2000) (seamen).

Environmental/Public Health and Welfare: 15 U.S.C. § 2622(a) (2000) (toxic substances control); *id.* § 2651 (asbestos hazard emergency response); 20 U.S.C. § 3608 (2000) (asbestos in school buildings); *id.* § 4018 (asbestos in school buildings); 30 U.S.C. § 1293(a) (2000) (surface mining control and reclamation); 33 U.S.C. § 1367(a) (2000) (water pollution prevention and control); 42 U.S.C. § 289b(e) (2000) (funding of research); *id.* § 300j-9(i) (safety of public water systems); *id.* § 5851 (nuclear whistleblower protection); *id.* § 6971 (solid waste disposal); *id.* § 7622 (air pollution); *id.* § 9610 (hazardous substances).

Federal Government Employment: 2 U.S.C. § 1316 (2000) (employment of veterans); *id.* § 1317 (Congressional Accountability Act of 1995); 3 U.S.C. § 417 (2000) (covered employees—Presidential Offices); 5 U.S.C. §§ 1214, 1221–1222 (2000) (remedies—prohibited personnel practices); *id.* § 2302(b)(8)–(9) (prohibited personnel practices); *id.* § 2303 (prohibited personnel practices—FBI employees); *id.* § 7116(a)(4) (unfair labor practice—agency employees); 22 U.S.C. § 4115(a)(4) (2000) (unfair labor practices—Department of State); 50 U.S.C.A. § 2702 (West Supp. 2004) (Department of Energy).

Fraud/False Claims: 18 U.S.C. § 1031(h) (2000) (major fraud against the United States); 31 U.S.C. § 3730(h) (2000) (false claims actions).

Health Care: 42 U.S.C. § 1395dd(i) (2000) (hospital employees); *id.* § 1997d (Civil Rights of Institutionalized Persons Act); *id.* § 3058g(j) (state long-term care ombudsman program—eligibility for funding).

Immigration: 8 U.S.C. § 1182(n)(2)(C)(iv) (2000) (labor condition application—H-1B status for alien); *id.* § 1324b(a)(5) (unfair immigration-related employment practices).

Military: 10 U.S.C. § 1034(b) (2000) (retaliatory personnel actions against military personnel); *id.* § 2409 (military contractor employees); 38 U.S.C. § 4311(b) (2000) (members of the uniformed services).

Safety/Transportation: 46 U.S.C. app. § 1506(a) (2000) (shipping); 49 U.S.C. § 20109(a) (2000) (railroad carrier employees); *id.* § 31105(a) (commercial motor vehicle safety); *id.* § 42121(a) (airline employees);

Employee Whistleblowing After Sarbanes–Oxley

49 U.S.C.A. § 60129(a) (West Supp. 2004) (pipeline safety).

Miscellaneous: 22 U.S.C. § 3664 (2000) (Panama Canal Commission); 31 U.S.C. § 5328 (2000) (monetary transactions); 41 U.S.C. § 265(a) (2000) (contractor employees).

