

Uldaho Law

## Digital Commons @ Uldaho Law

---

Articles

Faculty Works

---

2002

### Exploring Paths to Recovery for OSHA Whistleblowers: Section 11(C) of the OSHAct and the Public Policy Tort

Monique C. Lillard

*University of Idaho College of Law, [lillard@uidaho.edu](mailto:lillard@uidaho.edu)*

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/faculty\\_scholarship](https://digitalcommons.law.uidaho.edu/faculty_scholarship)



Part of the [Labor and Employment Law Commons](#)

---

#### Recommended Citation

6 Emp. Rts. & Emp. Pol'y J. 329 (2002)

This Article is brought to you for free and open access by the Faculty Works at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Articles by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

EXPLORING PATHS TO RECOVERY FOR OSHA  
WHISTLEBLOWERS: SECTION 11(C) OF THE OSHAct AND  
THE PUBLIC POLICY TORT

BY  
MONIQUE C. LILLARD\*

I. INTRODUCTION .....	330
A. <i>Whistleblowers</i> .....	330
II. TWO AVENUES OF RECOVERY .....	336
A. <i>OSHAct – Section 11(c)</i> .....	336
1. Practice and Procedure.....	336
2. No Private Right of Action – <i>Taylor</i> .....	347
B. <i>State Tort Cause of Action</i> .....	350
III. THE EFFECT OF SECTION 11(C) ON THE VIABILITY OF THE PUBLIC POLICY TORT .....	357
A. <i>No Private Right of Action – Taylor Concerns</i> .....	358
B. <i>Statutory Exclusivity</i> .....	360
1. Remedial Adequacy – <i>Walsh</i> Concerns .....	360
2. Legislative Intent to Exclude Common Law Rights and Remedies .....	364
C. <i>Federal Preemption</i> .....	366
1. Is the Field Preempted? Section 18(a).....	369
2. Is There a Conflict Between the State Tort and Section 11(c)? .....	371
3. Is the State Tort a "State Plan" Which Must Be Submitted to and Approved by the Secretary of Labor Pursuant to Section 18(b)? .....	375
4. Lower Court Decisions on Preemption.....	378
D. <i>Confusion and Clarity in the Courts</i> .....	381

\* Professor of Law, University of Idaho College of Law. The author wishes to thank Dean John A. Miller of the University of Idaho College of Law for summer research stipend support. She also wishes to thank Professor Doug Scherer, Sharla Robinson, Jann Farris, Shea Mehan, Brett Johnson, David Hensley, Susan Troyano, and, for his steadiness, her husband, Duncan Palmatier.

E. Other Policy Concerns..... 384  
 IV. CONCLUSION ..... 386

I. INTRODUCTION

This article analyzes protections offered to employees who have been discharged because they complained about violations of the federal Occupational Safety and Health Act ("OSHAct").<sup>1</sup> These employees seek restoration to the positions they would have occupied but for their terminations. They have several available avenues of recourse. This article focuses on two of these avenues and navigates the intersection between them. After a general discussion of whistleblowers, the article addresses how an employee can use section 11(c) of the OSHAct.<sup>2</sup> Then it describes the state common law tort of retaliatory discharge, or discharge in violation of public policy.

Part III describes the intersection of these two causes of action. The article assesses several road blocks to common law tort recovery. These include the desire to avoid the appearance of creating a private cause of action under the OSHAct, reluctance to utilize common law rights and remedies when a related statutory provision exists, and federal preemption. The article concludes that none of these concepts need prevent state courts from affording their citizens the protection of the common law tort. Rather than going on forays into these labyrinthine areas, courts would do better to address the fundamental policy questions inherent in a decision to allow or disallow the public policy tort.

A. Whistleblowers

*"Dissenters and whistleblowers rarely win popularity contests or Dale Carnegie awards. They are frequently irritating and unsettling. These qualities, however, do not necessarily make their views wrong or unhelpful . . . ."*<sup>3</sup>

Various definitions of "whistleblower" have been put forward.<sup>4</sup> One state supreme court justice observed:

1. Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651-78 (2000)). All references to the OSHAct refer to the federal statute. State Occupational Safety and Health Acts ("State OSHActs") will be referred to specifically by state.

2. 29 U.S.C. § 660(c) (2000).

3. *Greenberg v. Kmetko*, 840 F.2d 467, 477 (7th Cir. 1988) (Cudahy, J., dissenting).

4. For a thorough discussion of various whistleblowing scenarios see Terry Morehead Dworkin & Janet P. Near, *Whistleblowing Statutes: Are they Working?*, 25 AM. BUS. L.J. 241, 243-44 (1987).

The term is derived from the act of an English bobby blowing his whistle upon becoming aware of the commission of a crime to alert other law enforcement officers and the public within the zone of danger. Like this corner law enforcement official, the whistleblower sounds the alarm when wrongdoing occurs on his or her 'beat,' which is usually within a large organization.

While many contemporary definitions of the term have been advanced, no one definition captures the essence of a 'whistleblower' – the public need and benefit, the conflict of loyalties to the employer and to the public good, and the corresponding personal anguish involved.<sup>5</sup>

For the purposes of this article, a whistleblower is a worker who finds evidence of a serious violation of law on the part of the employer or its agents, and who takes specific, active, steps to bring that violation to the attention of authorities. Those authorities may be company officials, in which case the worker is an "internal" whistleblower. Or the worker may notify public authorities, often by speaking to the relevant regulatory agencies. The worker is then an "external" whistleblower. Some courts make significant distinctions between internal and external whistleblowers.<sup>6</sup>

The usefulness of whistleblowers is well-documented,<sup>7</sup> as is their plight.<sup>8</sup> Many employees are afraid of reprisal for whistleblowing,

5. *Winters v. Houston Chronicle Publ'g Co.*, 795 S.W. 2d 723, 727 (Tx. 1990) (Doggett, J., concurring) (citation omitted). Justice Doggett continued:

Employees who protest corporate wrongdoing are . . . not invoking the whistle of authority but the whistle of desperation. Their action resembles that of a person who blows a whistle to bring help when threatened with assault on the city streets. The hope is that the law will arrive and protect not only the person's rights but the peace and good order of the community. In a society where the law operates well, the hope is also that just wearing the whistle on a street, or threatening to use it in the corporate setting, may serve to ward off misconduct.

*Id.* at 727-28 (quoting Alan Westin, *Introduction in WHISTLE BLOWING! LOYALTY AND DISSENT IN THE CORPORATION* 1, 2 (Alan Westin ed., 1981).

6. See *infra* text accompanying notes 161-64.

7. See Chad A. Atkins, Note *The Whistleblower Exception to the At-Will Employment Doctrine: An Economic Analysis of Environmental Policy Enforcement*, 70 DENV. U. L. REV. 537, 538 n.10 (1993). One member of Congress has asserted that 75 to 80% of information that agency inspector generals act upon comes from whistleblowers. 135 Cong. Rec. H752 (daily ed. Mar. 21, 1989) (statement of Rep. Horton). For one of the few scholarly articles less sympathetic to the whistleblower, see Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277 (1983).

8. See David Culp, *Whistleblowers: Corporate Anarchists or Heros? Towards a Judicial Perspective*, 13 HOFSTRA LAB. & EMP. L.J. 109, 112-13 (1995) ("Reviled by management and shunned by co-workers, whistleblowers face a lonely existence.") Whistleblowers also face a myriad of personal problems: legal expenses, loss of earnings; lost homes; lost marriages. See *id.* For an eye-opening list of tactics used to undercut the whistleblower's effectiveness see Thomas M. Devine & Donald G. Aplin, *Whistleblower Protection – The Gap between the Law and Reality*, 31 HOW. L.J. 223, 224-27 (1988). For a suggested plan of action for the person considering whistleblowing, see *id.* at 236-38.

and their fears lead to silence.<sup>9</sup> One court described whistleblowers as professional, upper and middle level employees with lengthy tenure but no contractual job security, who are at an age where, if terminated, they will find it difficult to replace fringe benefits like insurance and retirement plans.<sup>10</sup> The court's generalizations concerning age and status may not hold true as often in the occupational safety and health context, because rank and file workers of any age are at least as likely as managers to observe and report violations.<sup>11</sup> Hands-on workers are motivated by self interest as well as by altruism, because they fear for their own safety on the job. Whistleblowers of any station fear consequences, ranging from unlikely but terrifying physical reprisals<sup>12</sup> to retaliatory job action.<sup>13</sup> The latter is a realistic concern, as evidenced by the number of cases on point in the legal reports across the United States.

9. "In 1980, 19 percent who witnessed significant misconduct cited fear of reprisal as the reason for remaining silent. By 1983 the figure was 37%." Devine & Aplin, *supra* note 8, at 230 (citing OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, MERIT SYSTEMS PROTECTION BOARD, BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF 1980 AND 1983 SURVEY FINDINGS 31, 34 (1984); OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, MERIT SYSTEMS PROTECTION BOARD, WHISTLEBLOWING AND THE FEDERAL EMPLOYEE 27, 29 (1981)); *see also* Culp, *supra* note 8, at 121 n.113 (quoting Senator Levin for the report that 70% of federal workers with knowledge of waste and inefficiency do not report it because of fear of retaliation); *but see* William D. Kimball, *New Developments in the Whistleblower Protection Act: Some Relief for Federal Managers*, THE ARMY LAWYER, Dec. 1996, at 10 (reporting an increased aggressiveness by the U.S. Office of Special Counsel in prosecuting whistleblower protection cases in light of the Whistleblower Protection Act of 1989 and its 1994 amendments).

10. *Boyle v. Vista Eyewear, Inc.*, 700 S.W. 2d 859, 877-78 (Mo. Ct. App. 1985). *See id.* at 878 n.12 (listing retaliatory discharge cases, along with each plaintiff's job title and number of years with the company and showing that all were upper level managers or supervisors with long years of service).

11. One commentator finds it "a basic axiom that employee participation in monitoring and improving workplace safety and health is indispensable." James S. Swain, *Protecting Individual Employees, Is it Safe to Complain about Safety?*, 9 U. BRIDGEPORT L. REV. 59, 139 (1988). Although Swain cited no support for this assertion, the court in *Reich v. Hoy Shoe Co., Inc.*, 32 F. 3d 361 (8th Cir., 1994) observed:

Congress recognized employees to be a valuable and knowledgeable source of information regarding work place safety and health hazards. Congress was aware of the shortage of federal and state occupational safety inspectors, and placed great reliance on employee assistance in enforcing the Act . . . [I]t is clear that without employee cooperation, even an army of inspectors could not keep America's work places safe."

*Id.* at 368 (internal quotations and citations omitted).

12. *See infra* note 130 and accompany text.

13. The law makes some attempt to handle heavy handed, provable, job reprisals, like termination. But the employee is also subject to social and psychological pressures that are far beyond the reach of the law. *See, e.g.*, CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 213-16, 230 (1975) ("Those who labor for [the American business corporation] are going to be concerned with providing for their wives and children, the approval of their peers, and 'moving up' in the organization."); Devine & Aplin, *supra* note 8, at 224-29.

Popular culture often adulates the whistleblower. He is portrayed as a knight in shining armor, or as a martyr; he is someone who sees something wrong going on and tells the world, despite the possibility of harm to himself.<sup>14</sup> It is in the public good that workplace hazards be revealed and corrected.<sup>15</sup> It is even in the corporate good.<sup>16</sup> When a statute is systematically violated in a meaningful way we hope to have the violations stopped, especially if the statute touches on health and safety. We want to encourage those who have the best knowledge to blow the whistle. "Often the very act of whistleblowing indicates that governmental regulation has been inadequate to protect the public; it represents a breakdown of systems whose very goal is to make sure that misconduct does not occur in the first place."<sup>17</sup> So we offer whistleblowers some monetary compensation for the adverse employment actions they may suffer.

A judge may speak of shielding citizens from retaliation,<sup>18</sup> but the wrongfully treated whistleblower does not consider himself shielded or protected by a lawsuit. At best he feels compensated, long after the fact, for some of the losses he incurred. Consider his plight. He suffered the fear and embarrassment of being fired and seeking new work under disadvantageous conditions. His income stream was abruptly shut off. To obtain any recompense from his employer, he navigated the cumbersome, unpleasant and labyrinthian process of American litigation — the administrative forms, the grilling by opposing counsel, the delay, and the uncertainty of victory. This

14. The Time Magazine Persons of the Year for 2002 were "The Whistleblowers," Cynthia Cooper of Worldcom, Coleen Rowley of the FBI and Sherron Watkins of Enron. See TIME, Dec. 30, 2002, cover photo & 30. Examples of popular movies providing sympathetic portrayals of whistleblowers include *Silkwood* (20th Century Fox, ABC Films, 1983), which grossed \$35.6 million in the United States and resulted in numerous nominations and awards, and *The China Syndrome* (IPC Films, 1979), which grossed \$25.342 million on theatrical rentals in the USA, and garnered many nominations and awards. See Business Data for *Silkwood*, at <<http://us.imdb.com/Business?0086312>> (last visited Jan 11, 2003); Awards for *Silkwood*, at <<http://us.imdb.com/Tawards?0086312>> (last visited Jan. 11, 2003); Business Data for *China Syndrome*, at <<http://us.imdb.com/Business?0078966>> (last visited Jan. 11, 2003); Awards for *China Syndrome*, at <<http://us.imdb.com/Tawards?0078966>> (last visited Jan 11, 2003).

15. See *Winters v. Houston Chronicle Publ'g Co.*, 795 S.W.2d 723, 729 (Tx. 1990) (Doggett, K., concurring) (listing examples of cases where employee whistleblowers could have prevented injurious activities). This assertion is in contrast to the cases that say that private employee health is not a matter of public policy. See *infra* notes 154-55 and accompanying text.

16. "The modern corporation must encourage the honest and concerned employee to blow the whistle on illegalities and actual malpractices. It must give the whistle blower access to the people who can change things . . . to those high enough up in the corporation to solve it." *Winters*, 795 S.W.2d at 728-29 (Doggett, J., concurring) (citation omitted).

17. *Id.* at 728 (internal quotation marks and citation omitted).

18. *Id.* at 730.

worker who blew the whistle on a violation of law and also sued for improper retaliation embarked on two crusades: one to correct the violation, the other to vindicate the right of workers to speak out.

The employer has an entirely different perspective. The employer feels a diminishment of power from even the possibility of legal action by the employee. The employer's attorneys' fees are even less likely to be covered than the plaintiff whistleblower's. The employer fears significant negative publicity. The employer's agents responsible for the reprisal worry that they themselves will suffer negative job consequences if the employer is sued. Thus, the supervisor's perception of the whistleblower's legal remedies may be sufficient to deter improper action. The result is that the very existence of statutes or common law rules may protect many whistleblowers from future retaliation.

There are various avenues leading to compensation for the wrongfully fired whistleblower:<sup>19</sup> the federal OSHA Act;<sup>20</sup> state OSHA Acts,<sup>21</sup> state and federal whistleblower statutes,<sup>22</sup> other federal statutes,<sup>23</sup> and common law torts.<sup>24</sup> These avenues lead to similar if not identical ends: the whistleblower is returned, more or less, to his rightful position, via back pay, reinstatement (or front pay), expungement of records, and compensatory monetary awards.

The urge to provide wide protection for the whistleblower is reined in by a countervailing concern that the protections will be abused or will backfire.<sup>25</sup> If a sub-par employee, sensing that he is

19. For an overview of legal protections for whistleblowers, see Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?*, 38 S.D. L. REV. 316, 320-30 (1993).

20. 29 USC § 660(c) (2000).

21. See, e.g., ALASKA STAT. § 18.60.089 (2002); ARIZ. REV. STAT. § 23-425 (1999); IND. CODE ANN. § 22-8-1.38.1 (West 1991); KY. REV. STAT. ANN. § 338.121(3) (Michie 2001); MD. CODE ANN. LAB. & EMPL. § 5-604(b) (1999).

22. See generally INDIVIDUAL EMPLOY. RTS. MAN. (BNA) 505:28 (2002).

23. For an overview of the available means of recovery see Swain, *supra* note 11, at 59; see also *infra* note 142.

24. Although a tort cause of action for discharge in violation of public policy is available in most states, there are some notable exceptions. See *Guillory v. St. Landry Parish Police Jury*, 802 F.2d 822 (5th Cir. 1986); *Borden v. Johnson*, 395 S.E.2d 628 (Ga. Ct. App. 1990); *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86 (N.Y. 1983).

25. As one judge observed:

An investigation by an outsider will generally be disruptive and expensive to the employer. Substantial damage is likely to result regardless of whether the allegation is true or false. Even if the allegation is true, the disruption and expense may be unjustifiable if the alleged wrong is not a substantial one.

The employee does not have a right to disregard these concerns. Indeed, the common law recognizes that an employee has a duty of an undivided and unselfish

about to be fired, could find some violation of law to reveal or to threaten to reveal to make a supervisor hesitate before taking deserved negative job action, whistleblower protection would become a shield for slackers rather than a goad to truth-tellers. Another worry is that the picky, perennial whiner, the naysaying trouble-maker,<sup>26</sup> will be given too much power and will slow the progress of people of good will.<sup>27</sup> Unions may use OSHA complaints, or the threat thereof, to pressure collective bargaining. Meddlesome whistleblowers, and the government agencies they call in, may interfere with autonomous management of the company.<sup>28</sup> When viewed in the short run, the external whistleblower's choice is between company loyalty and the public good.<sup>29</sup> Any protection of the external whistleblower rewards what might be termed "disloyalty." When viewed at some distance, however, what is good for the public may become to a large extent congruent with what is good for the company. Safe, healthy employees work better. Inefficiencies result if workers are chronically worried about getting hurt or incessantly outraged by clearly illegal conduct.<sup>30</sup>

The legal protections available to whistleblowers attempt to balance all these concerns. Part II examines two leading sources of recovery, section 11(c) of the OSHAct and the common law public policy tort.

loyalty to the employer.

*Gutierrez v. Sundancer Indian Jewelry*, 868 P.2d 1266, 1283 (N.M. App. 1993)(Hartz, J., dissenting) (internal quotation marks and citation omitted).

26. See *Winters v. Houston Chronicle Publ'g Co.*, 795 S.W.2d 723, 733 n.22 (Tx. 1990) (Doggett, J., concurring).

27. "This is not to say that all whistleblowers should be viewed as heroes or knights in shining armor. Some may be ill-informed, meddlesome troublemakers or ill-motivated and vindictive." Culp, *supra* note 8, at 115.

28. For insight into the federal statutory whistleblowing protection from a government manager's perspective, see *Kimball*, *supra* note 9. It has been suggested that effective, firm use of summary judgment will protect employers' legitimate, broad discretion to run their workplaces as they see fit. *Winters*, 795 S.W.2d at 732 (Doggett, J., concurring).

29. The tension in the whistleblower's choice is well caught in the title, *WHISTLEBLOWING: SUBVERSION OR CORPORATE CITIZENSHIP?* (Ed Gerald Vinten, ed., 1994). The book compiles essays, case studies and articles on English and American law pertaining to whistleblowers.

30. One commentator has noted:

[The whistleblower] did not believe in the "loyalty-to-his-company-at-all-costs" approach to his work. His loyalty was to what he believed was a higher morality. In seemingly being disloyal to his company, he sought to protect the rights and safety of the public. Oddly enough, in so doing, he may have been more loyal to the long-range viability of the company than all those corporate employees who turn their heads when wrongdoing occurs.

Culp, *supra* note 8, at 115.



## II. TWO AVENUES OF RECOVERY

### A. OSHA Act – Section 11(c)

The first enumerated purpose of the OSHA Act is to "encourag[e] employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment."<sup>31</sup> In furtherance of this purpose, section 11(c) provides:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.<sup>32</sup>

#### 1. Practice and Procedure<sup>33</sup>

An employee who believes he has been "in any manner discriminate[d] against" may file a complaint with the OSHA Area Director,<sup>34</sup> within thirty days of the wrongful treatment.<sup>35</sup> No particular form of complaint is required,<sup>36</sup> and the complaint may be

31. 29 U.S.C. § 651(b)(1) (2000); *see also* *Donovan v. R.D. Anderson Constr. Co.*, 552 F. Supp. 249, 251 (D. Kan. 1982) ("The primary purpose of the [OSHA Act] is to assure safe and healthful working conditions for workers.").

32. 29 U.S.C. § 660(c)(1) (2000). *See* 29 C.F.R. pt. 1977 (2001). For an overview of section 11(c), *see* Glenn A. Guarino, Annotation, *Prohibition of Discrimination Against, or Discharge of, Employee Because of Exercise of Right Afforded by Occupational Safety and Health Act, Under § 11(c)(1) of the Act (29 USCS § 660(c)(1))*, 66 A.L.R. FED. 650 (1984 & Supp. 2002).

33. *See generally* OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, WHISTLEBLOWERS INVESTIGATIONS MANUAL, (Dep't Of Labor Instruction Directive No. DIS0-0.8, 2002), *available at* <[http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?P\\_table=DIR ECTIVES&p\\_id=2771&p\\_text\\_version=FALSE](http://www.osha.gov/pls/oshaweb/owadisp.show_document?P_table=DIR ECTIVES&p_id=2771&p_text_version=FALSE)> (last visited Jan. 14, 2003) [hereinafter OSHA WHISTLEBLOWERS INVESTIGATIONS MANUAL].

34. 29 C.F.R. § 1977.15(c) (2001). Failure to file may be considered a failure to exhaust administrative remedies, and lead to summary judgment for the employer. *McCarthy v. The Bark Peking*, 676 F.2d 42, 46-47 (2d Cir. 1982), *vacated on other grounds*, 459 U.S. 1166 (1983).

35. The thirty-day statute of limitations is subject to waiver, estoppel and equitable tolling. 29 C.F.R. §1977.15(d) (2001); *Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421, 1423-28 (10th Cir. 1984). *See also* *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417, 1423 (E.D. N.Y. 1984) (calling "petty" an objection to a complaint that was filed orally 4 days after the discrimination and in writing "only nine days beyond the thirty-day period," and observing, "It is not clear that the time limitation in question creates a right in the favor of the employer. It may well be that the time limitation is designed solely for the benefit of the Secretary [of Labor], to protect the Secretary from the necessity of having to investigate claims which he regards as stale."); *Donovan v. Peter Zimmer Am., Inc.*, 557 F. Supp. 642 (D.S.C. 1982) (holding that complaints made to State Department of Labor within thirty days tolled the running of the federal limitations period).

36. 29 C.F.R. §1977.15(b) (2001).

filed via the internet.<sup>37</sup>

OSHA has ninety days to investigate the complaint and notify the complainant of the result of the investigation.<sup>38</sup> OSHA will usually try to negotiate a settlement.<sup>39</sup> OSHA attempts to satisfy the complainant in the settlement process, but ultimately the agency has final say over settlement.<sup>40</sup> If no settlement can be reached, but OSHA determines that a case has merit, the Secretary of Labor may file suit in federal district court.<sup>41</sup> The individual employee has no right to file his or her own private lawsuit under the OSHAct.<sup>42</sup>

37. OSHA WHISTLEBLOWERS INVESTIGATION MANUAL, *supra* note 33, § IV(A), Complaint Filing. The overseer of whistleblower investigations under OSHA's jurisdiction reports no great surge in complaints regarding whistleblowing since internet complaints have been allowed. Conversation with Tom Buckley, Director, OSHA Office of Investigative Assistance, June 15, 2000.

38. 29 U.S.C. § 660(c)(2)(3) (2002); 29 C.F.R. § 1977.16 (2001).

39. "It is OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation." OSHA WHISTLEBLOWERS INVESTIGATIONS MANUAL, *supra* note 33, ch. 6, II.

40. "If the settlement does not contain a make whole remedy, . . . the complainant's concurrence must be noted in the file . . ." *Id.* ch. 6, IV A 4 (a).

Under the OSHA 11(c), when the complainant does not agree to become a party to a settlement which, in the Regional Administrator's opinion, is a fair and equitable settlement of all matters at issue and would effectuate the policies of the Act, settlement agreements may be effected between OSHA and respondents without the consent of the complainant. All unilateral settlement agreements must be personally reviewed and approved in writing by the Regional Administrator.

*Id.*, ch. 6, IV, B, 3.

41. 29 C.F.R. §1977.3 (2001). However, the OSHAct contains no express limitations period for the Secretary of Labor's lawsuit under section 11(c), and courts have refused to borrow state statutes of limitations. *Donovan v. Square D. Co.*, 709 F.2d 335, 337 (5th Cir. 1983); *Marshall v. Intermountain Elec. Co., Inc.*, 614 F.2d 260, 261-63 (10th Cir. 1980). The Secretary's action, however, is subject to the equitable defense of laches. *See Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417, 1423 (E.D. N.Y. 1984) (finding no laches because of notice, despite argument of detrimental reliance by the employer because a replacement employee was hired).

42. *Taylor v. Brighton Corp.*, 616 F.2d 256, 258-64 (6th Cir. 1980). *See infra* text accompanying notes 116-45. The Hazard Reporting Protection Act, H.R. 1851, 106th Cong., 1st Sess (1999), would have increased the time for workers to file retaliation complaints from 30 to 180 days; set firm deadlines for the Department of Labor ("DOL") to complete investigation of retaliation complaints; allow the DOL to provide for reinstatement, back pay and damages without requiring the employee to go to court; protect refusals to work; and allow workers to bring their own cases to an administrative law judge if the DOL decides not to pursue the case. The bill was referred on June 4, 1997 to the House Committee on Education and the Workforce, Subcommittee on Workforce Protections, but does not appear to have progressed further. Then Secretary of Labor Alexis Herman observed that expanding OSHA whistleblowers had bipartisan support, including from former Secretaries of Labor Ann McLaughlin, Elizabeth Dole and Robert B. Reich. Labor Secretary Honors Atlanta Rescue Heroes; Announces New Whistleblower Legislation, OSHA National News Release, USDL 99-120 (April 28, 1999), available at <[http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=918&p\\_text\\_version=FALSE](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=918&p_text_version=FALSE)> (last visited Nov. 22, 2002). However, the OSHA website indicates that the news release does not represent current OSHA policy. *Id.* Referred, June 4, 1999, to House Committee on Education and the Workforce, Subcommittee on Workplace Protections.

An employee fired for exercising OSHAct rights may bring other actions concurrent

The statute prohibits discrimination because an employee "fil[ed] any complaint."<sup>43</sup> The reference to "filing" a complaint is an obvious reference to *external* whistleblowing. "Any complaint" includes not only an official complaint to an OSHA office, but also any request for inspection under section 8(f).<sup>44</sup> "[T]he range of complaints 'related to' the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application."<sup>45</sup> This includes complaints registered with other federal or state agencies "which have the authority to regulate or investigate occupational safety and health conditions."<sup>46</sup>

The statute also prohibits discrimination because the employee has "instituted or caused to be instituted any proceeding under or related to [the] Act."<sup>47</sup> This includes employee initiation or invocation of various statutory mechanisms.<sup>48</sup> Complaints to unions,<sup>49</sup> to

with the section 11(c) case brought by the Secretary. OSHA regulations expressly allow the employee to pursue remedies under collective bargaining agreements, and before the National Labor Relations Board, 29 C.F. R. § 1977.18(a) (2001), and to seek help from state agencies, *id.* § 1977.23. This can lead to jurisdictional conflicts. *See, e.g.* Appeal of Osrarn Sylvania, Inc., 706 A.2d 172, 174 (N.H. 1998) (finding the State Department of Labor had jurisdiction to enforce the state whistleblowers' protection act, despite parallel § 11(c) proceeding). The outcome of an arbitration proceeding does not preclude a lawsuit by the Secretary under section 11(c). *Marshall v. N.S. Indus., Inc.*, 618 F.2d 1220, 1222 (7th Cir. 1980); *Reich v. Sysco Corp.*, 870 F. Supp. 777 (S.D. Ohio 1994). *See Swain, supra* note 11, at 91-94.

43. 29 U.S.C. 660(c)(1) (2000); 29 C.F.R. §1977.3 (2001). Actual filing of a complaint, with OSHA or any other relevant agency, is not required, as long as the employer believes or suspects that the employee has filed the complaint. *See, e.g., Hoy Shoe Co.*, 32 F.3d at 364. The complaint may be oral or in writing. *Power City Elec., Inc.*, 1979 O.S.H. Dec. (CCH) ¶ 23,947 (E.D. Wash.1979). In a proceeding under the Minnesota OSHAct, which contains language similar to the OSHAct, the court found that the "complaint" may include an employee's demonstration of a dangerous practice. *Bohn v. Cedarbrok Eng'g Co.*, 422 N.W.2d 534, 537 (Minn. Ct. App. 1988) (finding protected an employee fired for demonstrating smoke problems to a state inspector, who took smoke samples).

44. 29 C.F.R. §1977.9(a) (2001).

45. *Id.*

46. *Id.* §1977.9(b); *Donovan v. Peter Zimmer Am., Inc.*, 557 F. Supp. 642, 644 (D.S.C. 1982) (complaint to state OSHA); *American Atomics, Inc.*, 1980 O.S.H. Dec. (CCH) ¶24,254 (D. Ariz. 1980); *Marshall v. Commonwealth Aquarium* 469 F. Supp. 690, 692 (D. Mass.) (complaint to local health authorities), *aff'd*, 611 F.2d 1 (1st Cir. 1979); *but see Usery v. Certified Welding*, 1978 O.S.H. Dec. (CCH) ¶ 22,605 (D. Wyo.) (finding complaint to state agency not protected), *aff'd sub nom. Marshall v. Certified Welding Corp.*, 1979 O.S.H. Dec. (CCH) ¶ 23,257 (10th Cir.1978). *See Swain, supra* note 11, at 84 n.119.

47. 29 U.S.C. 11(c) (2000).

48. 29 C.F.R. §1977.10 (2001) provides:

Discharge of, or discrimination against, any employee because the employee has "instituted or caused to be instituted any proceeding under or related to this Act" is also prohibited by section 11(c). Examples of proceedings which could arise specifically under the Act would be inspections of work sites under section 8 of the Act, employee contest of abatement date under section 10(c) of the Act, employee initiation of proceedings for promulgation of an occupational safety and health standard under section 6(b) of the Act and part 1911 of this chapter, employee application for modification of revocation of a variance under section 6(d) of the

lawyers,<sup>50</sup> or even to the local paper<sup>51</sup> are protected. Also protected is testimony in OSHA proceedings.<sup>52</sup>

Administrative regulations and case law also prohibit adverse treatment because of internal complaints to the employer. "[T]he salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer."<sup>53</sup>

The introductory section of the OSHA Act describes its purpose "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."<sup>54</sup> Courts effectuate this purpose by viewing protected activity under section 11(c) broadly.<sup>55</sup> For example, one court upheld section 11(c) protection for an employee merely "because he was a special friend of [a complaining employee]."<sup>56</sup> In another case, a court found a violation where three employees were fired because the employer was unable "to pinpoint the one employee who actually filed the OSHA complaint. [The employer] accordingly fired all three suspected 'culprits,' notwithstanding his mistake as to [the two who had not filed]. Such an approach brings the 'innocent' parties under the umbrella of protected activity."<sup>57</sup>

Act and part 1905 of this chapter, employee judicial challenge to a standard under section 6(f) of the Act and employee appeal of an Occupational Safety and Health Review Commission order under section 11(a) of the Act. In determining whether a "proceeding" is "related to" the Act, the considerations discussed in Sec. 1977.9 would also be applicable.

(b) An employee need not himself directly institute the proceedings. It is sufficient if he sets into motion activities of others which result in proceedings under or related to the Act.

*Id.*

49. *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417, 1419 (E.D. N.Y. 1984).

50. *Dunlop v. Hanover Shoe Farms, Inc.*, 441 F. Supp. 385, 388 (M.D. Pa. 1976).

51. *Donovan v. R.D. Andersen Constr. Co.*, 552 F. Supp. 249, 250 (D. Kan. 1982).

52. 29 C.F.R. §1977.11 (2001).

53. *Id.* §1977.9(c); see *Marshall v. Springville Poultry Farm, Inc.*, 445, F. Supp. 2, 3 (M.D. Pa. 1977) (upholding the regulation).

54. 29 U.S.C. § 651(b) (2000).

55. See *R.D. Andersen Constr. Co.*, 552 F. Supp. at 253 ("The very language of the statute [section 11(c)] suggests that a broad construction is appropriate. Further, the broad remedial purpose of the Act mandates that an employee's communications with a newspaper reporter regarding conditions of the workplace are protected.").

56. *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1188 (1st Cir. 1994).

57. *Donovan v. Peter Zimmer Am., Inc.*, 557 F. Supp. 642, 652 (D.S.C. 1982).

The complaint or proceeding need not lead to a finding of a safety violation to qualify for the protection of section 11(c). One court wrote:

The presence or absence of safety violations is not before the Court in an action under §660(c)(1) of the Act. The crux of §660(c)(1) litigation is whether the employer's actions against the employee were predicated upon the employee's filing of a complaint or engagement in other protected activity. Had [employer] been as pure as the driven snow in its maintenance of the work-place, and had it nevertheless fired complainants for urging OSHA to investigate, the instant action would still lie, so long as the complainants had acted (as they palpably did in this case) in good faith.<sup>58</sup>

Section 11(c) prohibits intentional discrimination. The section should be read broadly, "otherwise the Act would be gutted by employer intimidation."<sup>59</sup> The prohibition of the section goes to all forms of detrimental discrimination, not only to termination.<sup>60</sup>

The gravamen of the cause of action turns on a finding of improper motivation leading to an adverse employment action. Although motive is difficult to prove, the burden of proof is eased through use by courts of the *McDonnell Douglas* method of proof developed under Title VII of the Civil Rights Act of 1964.<sup>61</sup> The Secretary establishes a prima facie case under section 11(c) by proving the employee's participation in protected activity, a subsequent adverse employment action and evidence of a causal connection between the two. The employer then must articulate a non-discriminatory reason for the adverse action, after which the Secretary has the burden to prove that the articulated reason was pretextual.<sup>62</sup>

Mixed motive cases have arisen under section 11(c). The Act is violated if the protected activity was a substantial reason for the discharge, or if the discharge would not have taken place "but for"

58. *Donovan v. Freeway Const. Co.*, 551 F. Supp. 869, 877 (D.R.I. 1982).

59. *Reich v. Hoy Shoe Co.*, 32 F. 3d 361, 368 (8th Cir. 1993) (quoting *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 722 (6th Cir. 1979), *aff'd*, 445 U.S. 1, 23 (1980)). For a discussion of the need for a broad interpretation of the OSHAct to "achieve accident prevention," see MARK. A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 125 (4th ed. 1998).

60. "An employer 'discriminates' against an employee within the meaning of [11(c)] only when he treats that employee less favorably than he treats others similarly situated." *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 19 (1980). See *infra* text accompanying notes 64-72.

61. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

62. *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 365 (8th Cir. 1994). The determination of pretext often turns on witness credibility. See *generally* *Reich v. Skyline Terrace, Inc.* 977 F. Supp. 1141, 1147 (N.D. Okla. 1997).

the protected activity.<sup>63</sup>

The pivotal proof required in the section 11(c) lawsuit goes to whether the employer treated the whistleblowing employee *worse* than other employees *because of* the whistleblowing. Relevant factual inquiries include: (1) the employer's past record of handling safety complaints;<sup>64</sup> (2) the employer's knowledge<sup>65</sup> or suspicion<sup>66</sup> of the safety complaints; (3) the employer's knowledge that the employee made the complaints;<sup>67</sup> (4) timing of adverse employment action closely following the protected activity;<sup>68</sup> (5) the existence of other reasons for the employment action;<sup>69</sup> (6) treatment of other

63. 29 CFR § 1977.6(b) (2001) ("[T]o establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place 'but for' engagement in protected activity, section 11(c) has been violated."); *Marshall v. Commonwealth Aquarium*, 469 F. Supp. 690, 692-93 (D. Mass.1979) ("once the plaintiff establishes that his activity was protected and that the protected activity was a substantial factor in the employer's decision, the burden then shifts to the employer to establish by a preponderance of the evidence that it would have reached the same decision in the absence of the protected conduct. . . ."); *see also* *Uery v. Granite Groves*, 1977-78 O.S.H. Dec. (CCH) ¶ 22,126 (D.D.C. 1977) (finding no liability because retaliatory motive only a "minor" rather than "substantial" reason for discharge.) For discussion and criticism of the allocation of proof in mixed motive cases, *see* ROTHSTEIN, *supra* note 59, at § 206.

64. *Compare* *Marshall v. Dexter Corp.*, 487 F. Supp. 78, 80 (N.D. Ill. 1980) (noting that the employer had encouraged employees to bring safety complaints to management's attention, and the employee "came forward with no credible evidence of any employee having been criticized or disciplined for making safety complaints") *with* *Donovan v. Freeway Constr. Co.*, 551 F. Supp. 869, 876 (D.R.I. 1982) (workers aiding OSHA inspectors referred to as "trouble making clique" by employer). *See also* *Reich v. Cambridgeport Air Sys.*, 26 F.3d 1187, 1188 (1st Cir. 1994) (punitive damages were justified by "brash" behavior, including an attempt to bribe Labor Department inspector with a case of wine).

65. *Dexter*, 487 F. Supp. at 80 (no credible evidence that any managers, and most importantly no managers who made the discharge decision, were aware of her OSHA complaints before her discharge).

66. *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 363-64 (8th Cir. 1994). *See* text accompanying note 57, *supra*.

67. *Reich v. Skyline Terrace, Inc.*, 977 F. Supp. 1141, 1147 (N.D. Okla. 1997) (nurse reported shortage of latex gloves to OSHA, OSHA issued a complaint, and four days later the nurse was fired. The court inferred a "causal connection" between the OSHA report and the firing from the brief time period between the inspection and the termination, "coupled with the allegations in the complaint from which [plaintiff] could have been identified. . . ."); *Powell v. Globe Indus., Inc.*, 431 F. Supp. 1096, 1101 (N.D. Ohio 1977) (employer did not know that plaintiff had filed OSHA complaint, so plaintiff could not establish retaliatory discharge in violation of collective bargaining agreement).

68. *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992); *Donovan v. Commercial Sewing, Inc.*, 562 F. Supp. 548, 553 (D. Conn. 1982) (employee undependable for months, but fired the day after she complained about health implications of a glue). Timing isn't everything, though. In one case, an employee was discharged after pointing out OSHA violations, but the company did not know that he was the complainant. *Powell v. Globe Indus., Inc.*, 431 F. Supp. 1096 (N.D. Ohio 1977).

69. *See* *Sec'y of Labor v. Keystone Foods Corp.*, 1990 O.S.H. Dec. (CCH) ¶ 29,065 (N. D. Ohio 1990) (finding that the employee would have been suspended for insubordination

employees similar to the complaining employee<sup>70</sup> and (7) employer statements.<sup>71</sup> Often these factors are interdependent. Direct proof of improper motive is not required; circumstantial evidence will suffice.<sup>72</sup>

Section 11(c)(2) provides for a court to award "all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."<sup>73</sup> The back pay remedy is treated as discretionary equitable relief, which means that the employer has no right to a jury trial.<sup>74</sup> The monetary relief awarded to a wrongfully discharged employee has included: back pay, bonus payments, exemplary damages, prejudgment interest and post-judgment interest. Notably absent is recovery for emotional harm.<sup>75</sup>

irrespective of OSHA activity); *Marshall v. Dexter Corp.*, 487 F. Supp. 78, 80 (N.D. Ill. 1980) (finding that employee was unwilling to work cooperatively with management and that she had lied about and undermined one particular supervisor); *Usery v. Granite Groves*, 1977-78 O.S.H. Dec. (CCH) ¶ 22,126 (D.D.C. 1977) (finding that predominant motive for discharge was substandard job performance); *but see Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1188-89 (1st Cir. 1994) (noting that despite employee's problems at work, and despite the employee's credibility problems on the stand, the district court had found that he was fired for being friends with a person who brought an OSHA complaint).

70. In *Reich v. Hoy Shoe Co.*, 32 F.3d 361 (8th Cir. 1994), the employer claimed that the employee had been disciplined pursuant to an attendance policy, but the employee was "the first person so disciplined, even though other employees had comparable or worse attendance records." *Id.* at 367. The court stated, "The only other employee ever disciplined under the policy had a record significantly worse than [the complaining employee] and was not disciplined until a point in time after [employer] had received notice of [the] retaliation complaint." *Id. See also Donovan v. George Lai Contracting, Ltd.*, 629 F. Supp. 121 (W.D. Mo. 1985); *Donovan v. Peter Zimmer Am., Inc.*, 557 F. Supp. 642 (D. S.C. 1982); *Schult Homes Corp.*, 1980 O.S.H. Dec. (CCH) ¶ 24,152 (W.D. Ky. 1979).

71. *See Reich v. Cambridgeport Air Systems*, 1993 O.S.H. Dec. (CCH) ¶ 30,242 (D. Mass 1993) (noting that the "employee testified that his foreman asked him if he had called OSHA and when he stated that he had, the foreman responded, [y]ou're fired."), *aff'd*, 26 F.3d 1187, 1188 (1st Cir. 1994); *Martin v. Anslinger, Inc.*, 794 F. Supp. 640, 644 (S.D. Tex. 1992) (finding employer liable who told employee that he was fired because he "had talked 'too much' to the OSHA inspector."); *Donovan v. George Lai Contr., Ltd.*, 629 F. Supp. 121, 122 (W.D. Mo. 1985) ("[The employee] informed [his foreman] that he had called OSHA that morning. [The foreman] responded, 'That will probably cost you your job.'" The employee was fired that afternoon).

72. *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993); *Donovan v. Freeway Constr. Co.*, 551 F. Supp. 869, 872-76 (D.R.I. 1982).

73. 29 U.S.C. § 660(c)(2) (2000).

74. *Martin v. Sharpline Converting, Inc.*, 790 F. Supp. 252, 253 (D. Kan. 1992) (noting that the OSHAct makes no reference to a right to a jury trial, and that the Seventh Amendment preserves the right to trial by jury only where legal rights are at stake); *see also Dunlop v. Hanover Shoe Farms, Inc.*, 441 F. Supp. 385-86 (M.D. Pa. 1976). For a general discussion, see Robert Roy, *Right to Jury Trial in Action for Retaliatory Discharge from Employment*, 52 ALR 4th 1141 (1987 & Supp. 2002).

75. For a good general summary of section 11(c) remedies, see Robert F. Koets, Annotation, *What Constitutes Appropriate Relief for Retaliatory Discharge under §11(c) of Occupational Safety and Health Act (OSHA)* (29 USCS § 660(c); 134 A.L.R. FED. 629, 635 (1996); *but see Swain, supra* note 11, at 132 ("The limited remedies available under most of the federal statutes [including OSHAct] may not be as effective as tort remedies at common law in deterring this unsavory conduct on the part of employers.").

Uncertainties regarding the amount of back pay should be resolved against the discriminating employer, since its unlawful conduct created the necessity for the award.<sup>76</sup> Many OSHA complaints arise at construction sites, where the work is cyclical and seasonal, so the back pay amount is often uncertain. One court wrote: "Resolving this uncertainty in light of the evidence, the court finds that the highest number of hours worked by any welder during the relevant periods is an appropriate measure of the number of hours which [the discharged employee] would have worked . . . ."<sup>77</sup> One court calculated the percent of time the respective plaintiffs had been previously absent from work, and reduced the award by that percent.<sup>78</sup>

In *Reich v. Cambridgeport Air Systems, Inc.*,<sup>79</sup> the parties stipulated what the back pay period would be, but they did not agree that the fired employees would have retained their jobs for the entire period.<sup>80</sup> The employer argued that the work was cyclical, and that the poor work history of one of the employees would have resulted in his lay off.<sup>81</sup> The district court awarded base pay for the entire period. The First Circuit upheld the district court's findings, which were based partly on the lack of credibility of the employer's witnesses.<sup>82</sup>

The duration of the back pay period normally runs from the date

76. *Martin v. Anslinger, Inc.*, 794 F. Supp. 640, 647 (S.D. Tex. 1992); see *Dole v. H.M.S. Direct Mail Serv., Inc.*, 752 F. Supp. 573, 581-82 (S.D. N.Y. 1990) (awarding only \$1.00 in back pay because the employee had no pay stubs and no income tax returns to prove his earnings before discharge), *rev'd*, 936 F.2d 108 (2d Cir. 1991) (allowing back pay because the employee could prove the amount of his unemployment benefits, which were exactly half of the earnings the employee would have received from the employer during that time).

77. *Anslinger*, 794 F. Supp. at 648. In that case the questions were whether the employee would have been working at all, and what he would have been paid. *Id.* The employer presented no evidence "suggesting what criteria (*i.e.* seniority) were used by the company to determine which welders would be retained during a layoff and which would not." *Id.* See also *Donovan v. George Lai Contracting, Ltd.*, 629 F. Supp. 121, 123 (W.D. Mo. 1985).

78. *Marshall v. Wallace Bros. Mfg. Co.*, 1978 WL 186390 at \*405 (M.D. Pa. Dec. 22, 1978).

79. 26 F.3d 1187 (1st Cir. 1994).

80. See *id.* at 1189.

81. *Id.*

82. *Id.* A court within the Fifth Circuit has articulated a clear and convincing standard by which the employer must rebut the employee's proof. See *Martin v. Anslinger, Inc.*, 794 F. Supp. 640, 647 (S.D. Tex. 1992) ("a court's finding of discrimination presumptively entitles [the discharged employee] to back pay unless the defendants can prove by clear and convincing evidence that [the employee] would not have stayed in his job absent the discrimination."). This stems from the Fifth Circuit's employment discrimination opinion in *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437, 444-45 (5th Cir. 1974). *Baxter* has been followed by other circuits in discrimination cases, even though it has been called into question in its own circuit. Compare *O'Day v. McDonnell Douglas Helicopter Co.* 79 F.3d 756 (9th Cir., 1996)(Fletcher, J., dissenting) with *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207 (5th Cir. 1995).



of discharge to the date of reemployment, or other relevant date.<sup>83</sup> The employee, however, has an obligation to avoid the consequences of the wrongful firing.<sup>84</sup> The burden is on the employer to prove that the employee failed to mitigate damages by finding interim employment.<sup>85</sup> The employer must prove that a "similar employment opportunity was available in the specific line of work in which the employee was engaged."<sup>86</sup> "Ordinarily, an employee's unreasonable rejection of a bona fide offer of reinstatement will stop an employer's back pay liability from continuing to accrue."<sup>87</sup> Any amounts actually earned during the back pay period are deducted from the back pay award.<sup>88</sup> Back pay awards, however, are not reduced for state unemployment monies collected by the employees,<sup>89</sup> because they are collateral benefits.<sup>90</sup>

The employee is also entitled to promised bonus payments.<sup>91</sup> The Secretary has the burden to prove that bonus payments were agreed to by the employer.<sup>92</sup>

83. See *Marshall v. Commonwealth Aquarium*, 469 F. Supp. 690, 693 (D. Mass. 1979) (period of unemployment), *Donovan v. Freeway Const. Co.*, 551 F. Supp. 869, 880 (D.R.I. 1982) (from date of termination until date job ended); *Donovan v. Peter Zimmer Am., Inc.*, 557 F. Supp. 642, 648-49, 653-54 (D.S.C. 1982) (from date of termination until date of new permanent employment). See also MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 5.54 (2001 ed.) (date of termination to date of verdict). It is instructive to view the Sample Backpay Calculation Sheet, following OSHA WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 33.

84. *Donovan v. Commercial Sewing, Inc.*, 562 F. Supp. 548, 556 (D. Conn. 1982).

85. *Donovan v. Peter Zimmer Am., Inc.*, 557 F. Supp. 642, 653 (D.S.C. 1982).

86. *Id.* at 653-54.

87. *Commercial Sewing, Inc.*, 562 F. Supp. at 554. In the same year *Commercial Sewing* was decided, the Supreme Court decided *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982), which held that an employer could toll the continuing accrual of backpay liability under § 706(g) of Title VII by unconditionally offering the claimant the job previously denied. The employer was not required to offer seniority retroactive to the date of the alleged discrimination. Thus, held the Court, absent special circumstances the rejection of an employer's unconditional job offer ends the accrual of potential back pay liability. *Id.* at 238-39. The employee in *Commercial Sewing* was offered a full time position when she had previously worked part time. The court held that this was not a good faith offer and did not toll the running of back pay. 562 F. Supp. at 555-56.

88. *Martin v. Anslinger, Inc.*, 794 F. Supp. 640, 648 (S.D. Tex. 1992).

89. *Donovan v. Peter Zimmer Am.*, 557 F. Supp. 642, 653. (D.S.C. 1982).

90. *Anslinger*, 794 F. Supp. at 649, n.14; *Donovan v. George Lai Contracting, Ltd.*, 629 F. Supp. 121, 123 (W.D. Mo. 1985); *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417, 1425 (E.D. N.Y. 1984) ("We see no reason why defendants should profit at the expense of the State of New York or the union's annuity fund; rather, the Court should direct that a portion of the damages otherwise payable to [employee] should be paid to the State and the union annuity fund.").

91. See *Donovan v. Freeway Constr. Co.*, 551 F. Supp. 869, 880 (D. R.I. 1982).

92. *Id.* (finding that the Secretary had not met its burden to prove the "claimed parole contract").

An award of prejudgment interest on the back pay amount is standard,<sup>93</sup> although at the discretion of the trial court.<sup>94</sup> "Prejudgment interest is intended to compensate a party for the time value of money lost due to the wrongful dismissal."<sup>95</sup>

In *Reich v. Cambridgeport Air Systems, Inc.*<sup>96</sup> the First Circuit held that the statutory language authorizing a court to "order all appropriate relief" included the power to award exemplary damages.<sup>97</sup> The court analogized to environmental statutes, to tort law in general and to the common law tort of retaliatory discharge in particular.<sup>98</sup> The court observed that an early Senate version of the OSHAct fueled the employer's "strongest argument for . . . deciding that punitive damages are not available" under section 11(c).<sup>99</sup> That early version provided for the Secretary to order "such affirmative action" as necessary to abate the violation.<sup>100</sup> Such language was comparable to that used in Title VII and the National Labor Relations Act, both of which had been interpreted not to contemplate punitive damage awards.<sup>101</sup> Nevertheless, as the *Cambridgeport* court pointed out, the language contemplated early on by the Senate was not adopted, and the language that was chosen could reasonably be interpreted to include exemplary damages.<sup>102</sup>

In *Cambridgeport* the district court, for unclear reasons, had doubled the back pay award. The doubling was not labeled as a penalty, but as compensation "for the effects of loss of pay upon the victim[s]."<sup>103</sup> In particular the district court had stated that "a portion of the award covered prejudgment interest."<sup>104</sup> But, the district court had also "concluded that the defendant's conduct, 'both in and out of court, [was] consistently brash,' suggesting a belief that exemplary

93. "Prejudgement interest ordinarily is awarded whenever it is necessary to fully compensate the wrongfully injured party." *Donovan v. George Lai Contracting, Ltd.*, 629 F. Supp. 121, 123 (W.D. Mo. 1985).

94. *Donovan v. Freeway Constr. Co.*, 551 F. Supp. 869, 880-81 (D.R.I. 1982).

95. *Id.* at 881. Federal common law provides for prejudgment interest when the amount is reasonably ascertainable.

96. 26 F.3d 1187 (1st Cir. 1994).

97. *Id.* at 1191.

98. *Id.* at 1191-92.

99. *Id.* at 1192.

100. *Id.*

101. *Id.* at 1192-93.

102. *Cambridgeport Air Sys.*, 26 F.3d at 1193.

103. *Id.* at 1190 (emphasis in original).

104. *Id.* at 1195.

damages were in order."<sup>105</sup> Thus, the doubled back pay award could have been deemed compensatory or punitive, but was, in any event, upheld.<sup>106</sup> A more recent case criticized the vague language of *Cambridgeport* concerning the basis for doubling the damages, but agreed with the holding that "punitive damages are available under appropriate circumstances."<sup>107</sup>

Apart from monetary relief, courts may issue orders of reinstatement,<sup>108</sup> expungement of record(s),<sup>109</sup> and orders to refrain from hindering the discharged employee from obtaining a new job.<sup>110</sup> Reinstatement may be ordered even if the employer has already hired a substitute employee, and even if reinstatement will require payment of two employees for the same job or dismissal of the substitute.<sup>111</sup> In addition to back pay, the reinstatement order may include accumulated seniority and expungement of employee records.<sup>112</sup>

More general injunctive relief has included enjoining an employer from future violations of the OSHA Act and posting notices informing employees of the case at bar and of their rights under the

105. *Id.* The Labor Department investigator testified that an agent of the employer had offered him a case of wine, "possibly in an attempt to influence the investigation." At trial, the employer "revealed itself as a 'tough outfit' that 'more than passively observed; it supervised its witnesses.'" *Id.*

106. *Id.*

107. *Reich v. Skyline Terrace, Inc.*, 977 F. Supp. 1141, 1147 (N.D. Olka. 1997).

108. 29 U.S.C. § 660(c)(2) (2000). *See Donovan v. Peter Zimmer of Am., Inc.*, 557 F. Supp. 642, 654 (D.S.C. 1982) ("Since none of the affected employees wishes to be reinstated, no order in that respect is required to make them whole.").

109. *Donovan v. Commercial Sewing, Inc.*, 562 F. Supp. 548, 556 (D.Conn. 1982).

110. *See, e.g., Martin v. Anslinger, Inc.*, 794 F. Supp. 640, 649 (S.D. Tex. 1992) ("In this case, the court concludes that it is appropriate to enjoin defendant Urban Anslinger from providing negative references upon inquiries about Selso Rodrigues by prospective employers."); *Donovan v. Commercial Sewing, Inc.*, 562 F. Supp. 548, 556 (D.Conn. 1982) ("The defendant and its agents, Samuel and Michael Mazzarelli, are also enjoined from making any attempts to hinder Nancy Perez from finding another job.").

111. *Cf. Donovan v. Diplomat Envelope Corp.*, 587 F.Supp. 1417, 1423 (E.D.N.Y. 1984) (rejecting employer's laches argument even though the employer had hired a substitute to replace the discharged employee and if the employee was reinstated the employer would have "to pay two employees for the same job or fire the substitute employee").

112. *See Marshall v. Wallace Bros. Mfr. Co.*, 1979 O.S.H. Dec. (CCH) ¶23,251 at 28,126 (M.D. Pa. 1978). One writer is critical of OSHA reinstatement provisions, which are not expedited as is reinstatement under the Mine Safety and Health Act (MSHA), 30 U.S.C. § 815(c)(2) (2000). He writes:

Due to the political compromises that are necessary to enact sweeping whistleblower protections, such as OSHA and the state statutes, it appears that broad substantive protections have been achieved only by sacrificing strong remedies. The example of MSHA, however, suggests that both liberal protections and strong remedies can be combined in whistleblower protection statutes that are narrowly framed to address the specific problems of particular industries.

Act.<sup>113</sup> Courts can draft their own notices to be posted.<sup>114</sup> Injunctive relief can issue even if the employer is no longer in business.<sup>115</sup>

## 2. No Private Right of Action – *Taylor*

In *Taylor v. Brighton Corp.*,<sup>116</sup> three employees complained to the Secretary of Labor that they had been discharged in violation of section 11(c). The Secretary notified two of the employees that he would not file suit based on their complaints.<sup>117</sup> All three employees then filed suit themselves against their employer, alleging that their discharges violated section 11(c).<sup>118</sup>

The *Taylor* court looked to the Supreme Court's decision in *Cort v. Ash*<sup>119</sup> for the factors relevant to determining whether a private remedy is implicit in a statute not expressly providing one. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted?"<sup>120</sup> Second, is there any indication of legislative intent, explicit or implicit, in favor of or against a private remedy?<sup>121</sup> Third, "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?"<sup>122</sup> Fourth, "is the cause of action traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"<sup>123</sup> These factors are "signposts that guide the court's larger inquiry: Did Congress intend to create a private right of action in this situation?"<sup>124</sup>

The *Taylor* court quickly answered the first question, finding that the plaintiff employees were members of the class of persons

113. See *Donovan v. Freeway Constr. Co.*, 551 F. Supp. 869, 879 (D.R.I. 1982).

114. See, e.g., *id.* at 881-82.

115. Generally, successor corporations are liable for section 11(c) violations. See *Dole v. H.M.S. Direct Mail Serv., Inc.*, 752 F. Supp. 573, 580-81 (W.D.N.Y. 1990), *rev'd on other grounds*, 936 F.2d 108 (2d Cir. 1991).

116. 616 F.2d 256 (6th Cir. 1980); see also *King v. Fox Grocery Co.*, 642 F. Supp. 288, 290-91 (S.D. Pa. 1986).

117. *Taylor*, 616 F.2d at 257. The Secretary eventually filed suit on behalf of the third employee on the ground that his dismissal violated section 11(c). *Id.*

118. The employees also made allegations of racial discrimination in violation of Title VII and 42 U.S.C. § 1985(3). *Id.* at 258 n.4. The Title VII action was allowed to proceed. *Id.* at 264-65. The § 1985(3) causes of action were dismissed for failure to show "that the alleged discrimination was based on their membership in a definable class." *Id.* at 266.

119. 422 U.S. 66 (1975). See text accompanying note 145, *infra*.

120. *Taylor*, 616 F.2d at 258 (internal quotation marks and citation omitted).

121. *Id.* (citation omitted).

122. *Id.* (citations omitted).

123. *Id.* (citations omitted).

124. *Id.* at 259.

intended to benefit from section 11(c).<sup>125</sup> The court then gave an answer to the final question that was largely accurate in 1980, when *Taylor* was decided, but which is inaccurate today. The court wrote, "Nor is there any argument that retaliatory discharge actions have traditionally been relegated to state law; the cause of action, if one exists, is solely federal."<sup>126</sup> In only a few years that would change, as wrongful discharge causes of actions proliferated in state courts in the early 1980s.

The *Taylor* court then set about answering questions two and three to determine the intent of Congress.<sup>127</sup> The panel began with the language of the statute itself, and noted the failure to mention private suits to enforce section 11(c) and the explicit detailed procedure set forth by Congress for the Secretary to redress section 11(c) violations.<sup>128</sup> The court looked at the legislative history, in particular various Senate and House versions of the prohibitions on retaliation.<sup>129</sup> The court noted that both the Senate and the House originally feared that physical violence would be used to oppose enforcement of the Act.<sup>130</sup> The *Taylor* court detailed the lengthy drafting process,<sup>131</sup> opined that Congress intended for the Secretary to screen out frivolous retaliation complaints,<sup>132</sup> and concluded:

[It is] unlikely that Congress, having deliberately interposed the Secretary's investigation as a screening mechanism between complaining employees and the district courts, intended to permit

125. *Id.* at 258.

126. *Id.*

127. *Taylor*, 616 F.2d at 259-64.

128. *Id.* at 259.

129. *Id.* at 260-62.

130. *Id.* The original bill contained the following grim provision:

Any person who forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of inspections or investigative duties under this Act shall be fined not more than \$5000 or imprisoned not more than three years, or both. Whoever, in the commission of any such acts, uses a deadly or dangerous weapon, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both. Whoever kills any person while engaged in or on account of the performance of inspecting or investigating duties under this Act shall be punished by imprisonment for any term of years or for life.

*Id.* at 259-60, (quoting S. 2193, 91st Cong., 2d Sess § 9(e) (introduced in the Senate May 16, 1970), reprinted in Subcommittee on Labor, the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (Comm. Print 1971)). Thus, the drafters contemplated setting maximum fines and prison terms for assault, battery, murder and other crimes normally in the province of the states.

131. *Id.* at 260-62. The rights of employees to a public hearing on retaliation diminished as the legislative process wore on.

132. See *id.* at 261-62. The court explained, "A more plausible explanation for the change, we think, is that the Senate wanted the Secretary to screen out frivolous complaints so as to not overburden the hearing body." *Id.* at 261.

those employees whose claims are screened out to file individual actions in those same courts. A private cause of action is simply inconsistent with the enforcement plan provided by Congress.<sup>133</sup>

In *Taylor*, the Secretary of Labor filed an amicus brief urging the court to find an implied private right of action.<sup>134</sup> "The Secretary says he has neither the resources nor the personnel to handle all § 11(c) complaints adequately."<sup>135</sup> The Secretary argued that "individual suits offer the only realistic hope of protecting employees from retaliatory discrimination."<sup>136</sup> The court replied that "[t]he Secretary should address his arguments to Congress, not the courts."<sup>137</sup>

Five years later *Taylor* was relied upon by another circuit court in *George v. Aztec Rental Center, Inc.*<sup>138</sup> In that procedurally irregular case,<sup>139</sup> the Fifth Circuit noted *Taylor's* "thorough" consideration of the matter, and squarely held that no private right of action exists under section 11(c).<sup>140</sup> The Fifth Circuit opined that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."<sup>141</sup>

The lack of a private right of action significantly impacts the protection of section 11(c) whistleblowers. OSHA currently has jurisdiction to protect whistleblowers under eleven health and safety statutes, along with enforcing all the other provisions of these laws as well.<sup>142</sup> The workload is tremendous. For example, in 1998 OSHA

133. *Id.* at 262-63.

134. *Id.* at 263.

135. *Id.*

136. *Id.* at 262-3.

137. *Id.* at 263.

138. 763 F.2d 184 (5th Cir. 1985).

139. The pro se employee plaintiff had failed to respond in normal time and in normal fashion to the employer/defendant's motion for summary judgment. *Id.* at 185-86.

140. *Id.* at 186. *George* also lists other cases which noted in passing that no private right of action exists, *Donovan v. Occupational Safety & Health Review Comm'n*, 713 F.2d 918, 926 (2d Cir. 1983); *Donovan v. Oil, Chem. and Atomic Workers Int'l Union*, 718 F.2d 1341, 1348 n.27 (5th Cir. 1983); *Donovan v. Square D. Co.*, 709 F.2d 335, 338-39 (5th Cir. 1983). *See also Shaw v. Western Sugar Co.*, 497 N.W.2d 686, 688-89 (Neb. Ct. App. 1992) (upholding dismissal of what was apparently a suit under section 11(c); the claim was dismissed upon a motion for a directed verdict at the close of plaintiff's presentation of the case to a jury.)

141. 763 F.2d at 187 (quoting *Transamerica Mortgage Advisors, Inc., v. Lewis*, 444 U.S. 11 (1979)). Because no federal private right of action is available under section 11(c), a state common law claim of retaliatory discharge or breach of contract is not removable to federal court, even if it pertains to an OSHA violation. There is no federal private cause of action in this area. *Pitchford v. Aladdin Steel, Inc.*, 828 F. Supp. 610, 613-14 (S.D. Ill. 1993).

142. Section 31105 of the Surface Transportation Assistance Act, 49 U.S.C. § 2305 (2000); section 211 of the Asbestos Hazard Emergency Response Act, 15 U.S.C. § 265 (2000); section 7 of the International Safe Container Act, 42 U.S.C. § 1506 (2000); section 211 of the Energy

received 2,465 whistleblower complaints under OSHA section 11(c) alone. Of these, only 348 were settled with the employee receiving some remedy.<sup>143</sup> Perhaps, in the bureaucratic shuffle, some meritorious claims were overlooked. Perhaps, fewer would have been overlooked by a private lawyer with more time, more interest in the individual whistleblower, and more self-interest in pursuing the claim. Almost certainly more retaliatory discharge lawsuits would be filed if a private right of action were allowed. But *Cort v. Ash*,<sup>144</sup> on which *Taylor* rests, has been largely discarded in favor of an approach that is even more restrictive, whereby courts will create private rights of action only if there is affirmative evidence of congressional intent to create one.<sup>145</sup> Such a change only solidifies the *Taylor* court's conclusion that no private right of action arises under section 11(c).

### *B. State Tort Cause of Action*

Until the 1980s it could be said accurately that, in the eyes of the law, the default employment relationship was "at the will" of either party, meaning that absent a contractual term to the contrary, either the employer or the employee could terminate the relationship at any time for any reason.<sup>146</sup> In the 1980s, many states developed a cause of

Reorganization Act, 42 U.S.C. § 5851 (2000); section 322 of the Clean Air Act, 42 U.S.C. § 7622 (2000); section 110 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610 (2000); section 507 of the Federal Water Pollution Control Act, 33 U.S.C. § 1367 (2000); section 1450 of the Safe Drinking Water Act, 42 U.S.C. § 300-19 (2000); section 7001 of the Solid Waste Disposal Act, 29 U.S.C. § 6971 (2000); section 23 of the Toxic Substances Control Act, 15 U.S.C. § 2622(a) (2000); section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), Pub. L. No 106-81, 114 Stat. 61, 145 (2000), codified at 49 U.S.C.A. § 42121 (Supp. 2002).

143. Of the 2,465 section 11(c) complaints received, 865 were dismissed as lacking merit; 377 were not accepted because the employee failed to file a complaint within 30 days or was not engaged in an activity protected under the law; 39 were referred to other more appropriate agencies such as the Mine Safety and Health Administration or the National Labor Relations Board; 197 were withdrawn by the complainant without resolution following a closing conference; and 42 were referred to the Solicitor of Labor for recommended litigation in court. See Labor Secretary Honors Atlanta Rescue Heroes; Announces New Whistleblower Legislation, OSHA National News Release, USDL 99-120 (April 28, 1999), available at <[http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=918&p\\_text\\_version=FALSE](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=918&p_text_version=FALSE)> (last visited Nov. 22, 2002). However, the OSHA website indicates that the news release does not represent current OSHA policy. *Id.*

144. 422 U.S. 66 (1975).

145. See *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (Scalia, J. concurring); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

146. New Jersey courts have written colorfully that an at will employee may be fired "for no specific reason or simply [for] bothering the boss." *Beck v. Tribert*, 711 A.2d 951 (N.J. Super. App. Div. 1998) (quoting *Velantzas v. Colgate-Palmolive Co., Inc.*, 356 A.2d 237 (N.J. 1988)).

action to protect employees terminated in violation of public policy.<sup>147</sup> This cause of action sounds in tort in nearly all jurisdictions.<sup>148</sup> Nonetheless, even now, nearly all courts still assert the viability of the at will doctrine.<sup>149</sup>

The cause of action varies somewhat by jurisdiction, but it always involves a termination of employment, and a causal-motivational link between a violation of public policy and the discharge. The New Mexico Court of Appeals recently summarized the elements of the prima facie case:

- 1) that the employee was discharged because he performed an act that public policy has authorized or encouraged, or that the employee has refused to do something that public policy condemns;
- 2) that the employer knew or suspected that the employee's action involved a protected activity;
- 3) that there was a causal connection between the employee's protected actions and the employer's act of discharging him;
- and 4) that the employee suffered damages thereby.<sup>150</sup>

147. "The purpose of the public policy exception in these instances is to ensure that in order to keep his or her job, an employee is not required to forsake an important public duty (such as whistle-blowing) or to forgo a job-related right or privilege." *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 667 (Colo. 1999). A corollary impetus for the exception stems from a desire to enforce the law, usually statutory law. Attorney James Hubble points out that this makes the retaliatory discharge claim different from other limitations on the at will rule. "Unlike legislative restrictions on the at will rule and the implied contract theories now recognized by most courts, the retaliatory discharge exception is not based on policies specific to employment relationships." James W. Hubble, *Retaliatory Discharge and the Economics of Deterrence*, 60 COLO. L.REV. 91, 96 (1989).

148. In a few jurisdictions this cause of action sounds in contract. *See, e.g., Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wisc. 1983). Some scholars have argued that contract is more suitable than tort for such claims. *See, e.g., Clark W. Sabey, Scalpels and Meat Cleavers: Carving a Public Policy Limitation to the At-Will Employment Doctrine*, 1993 UTAH L.REV. 597.

149. *See, e.g., Shawcross v. Pyro Prods., Inc.*, 916 S.W.2d 342, 343 (Mo. Ct. App. 1995) ("[T]his court, while recognizing that employers may terminate employees at-will 'for no reason, or for an arbitrary or irrational reason,' has specifically determined that there is no right to discharge an employee for an unlawful reason or purpose which goes against public policy, and has recognized the public policy exception to employment at-will."); *Winters v. Houston Chronicle Publ'g Co.*, 795 S.W. 2d 723, 733 (Tex. 1990) (Doggett, J. concurring) ("Employers remain free under present Texas law to terminate employment relationships for no reason, or for cause, but not for a very limited class of unconscionable reasons, as determined by judicial decision and statute.").

150. *Weilder v. Big J. Enters., Inc.*, 953 P.2d 1089, 1096-97 (N.M. Ct. App. 1997). Similarly, the Colorado Supreme Court has described the prima facie case as follows:

An at-will employee, therefore, will establish a prima facie case for wrongful discharge under the public-policy exception if the employee presents evidence on the following elements: that the employer directed the employee to perform an illegal act as part of the employee's work related duties or prohibited the employee from performing a public duty or exercising an important job-related right or privilege; that the action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's basic responsibility as a citizen or the employee's right or privilege as a



The first element is the hardest to pin down. What does public policy encourage? What does it condemn? Courts have varied in their formulations of what constitutes public policy. Some seem comfortable with highly amorphous standards for the tort,<sup>151</sup> while others seek to impose some limits by requiring that the firing be in violation of an important public policy evidenced by a legislative writing.<sup>152</sup> States differ on whether the writing must be from their own legislatures, or whether federal statutes may also be a source of the public policy.<sup>153</sup>

Because the policy allegedly violated by the discharge must be public, matters involving only the employee's workplace, the employer's company, the employee's health, or even a group of employees' health may be merely private and not deserving of tort protection.<sup>154</sup> Many cases require some sort of third party effects, or

worker; and that the employee was terminated as the result of refusing to perform the act directed by the employer. To these elements we add the additional requirement that the employee present evidence showing that the employer was aware, or reasonably should have been aware, that the employee's refusal to comply with the employer's order or directive was based on the employee's reasonable belief that the action ordered by the employer was illegal, contrary to clearly expressed statutory policy relating to the employee's duty as a citizen, or violative of the employee's legal right or privilege as a worker.

*Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992). In whistleblowing cases, Kansas requires proof that the whistleblowing was done out of a good faith concern over the wrongful activity rather than from a corrupt motive such as malice, spite, jealousy or personal gain. *Palmer v. Brown*, 752 P.2d 685, 690 (Kan 1988).

151. See *Petermann v. Int'l Bhd. of Teamsters, Local 396*, 344 P.2d 25 (Cal. App. 1959) ("whatever contravenes good morals or any established interests of society is against public policy"); *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981) ("what is right and just and what affects the citizens of the State collectively"); *Payne v. Rozendaal*, 520 A.2d 586, 589 (Vt. 1986) ("society's concern for providing equity and justice"). See also *Jackson v. Minidoka Irrigation. Dist.*, 563 P.2d 54 (Idaho 1977); *Jones v. Keogh*, 409 A.2d 581 (Vt. 1979).

152. See, e.g., *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 381 (Ark. 1988) ("It is generally recognized that the public policy of a state is found in its constitution and statutes."); *Carl v. Children's Hosp.*, 702 A.2d 159, 163 (D.C. App. 2000) (Terry, J., concurring) (opining that "courts should generally abstain from making declarations of public policy" and should base the tort on a statute, regulation or constitutional provision). See also *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 839-41 (Wis. 1983) and cases cited therein.

153. Compare *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308, 322 (Ohio 1997) (rejecting any distinction between state and federal sources of policy) with *Griffin v. Mullinix*, 947 P.2d 177, 179-80 (Okla. 1997) and *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283 (Pa. 2000) (each refusing to allow federal OSHA to serve as a source of state public policy for the purposes of the tort).

154. In *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 289 n.11 (Pa. 2000), the court found that the presence of a toxic chemical in air at work was not a public concern. In that internal whistleblower case, the court did not address the likelihood that customers could have inhaled the toxic air. The court stressed that people outside the workplace need to be at risk of harm for the tort to apply. See also *Crawford Rehab. Serv., Inc. v. Weissman*, 938 P.2d 540, 551-53 (Colo. 1997) (finding no claim for wrongful discharge allegedly in retaliation for employee's asserting a right to rest breaks and for employee's inquiry to state Division of Labor concerning entitlement to rest breaks because of insufficient import to the public). For a

threat to the general public.<sup>155</sup>

Judicially drafted definitions notwithstanding, some have suggested that the better way to predict outcomes in public policy tort cases is to look at the typology of the cases, or at least to come to recognize what facts are likely to give rise to the cause of action.<sup>156</sup> These recognizable fact patterns have their origins in some of the early cases creating the tort, arising from, for instance, a firing for refusal to step down from jury duty<sup>157</sup> or a firing for reporting concerns about bad carrots being sold to the public.<sup>158</sup>

Occupational safety and health complaints are grounded in federal statute and often in parallel state statutes. A finding of a statutory violation on the part of the employer may not be necessary, if the employee has a good faith belief that a statutory violation is at issue.<sup>159</sup> But the public policy allegation must be that a specific OSHA standard or state law was violated, not merely general laxity regarding occupational safety.<sup>160</sup>

States are deeply split on whether internal as well as external whistleblowers should be protected. Some states limit their public policy tort to the external whistleblower.<sup>161</sup> A number are willing to

thoughtful justification of the public/private distinction on legal, practical, and moral grounds, see Hubble, *supra* note 147, at 97.

155. See, e.g. *Palmateer*, 421 N.E.2d at 878-79 ("a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed."); see generally Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943 (1996).

156. See, e.g. *Shawcross v. Pyro Prods., Inc.*, 916 S.W.2d 342, 343 (Mo. Ct. App. 1995) ("The courts of this state have recognized four categories of cases under the public policy exception: (1) discharge of an employee because of his or her refusal to perform an illegal act; (2) discharge because an employee reported violations of law or public policy to superiors or public authorities; (3) discharge because an employee participated in acts that public policy would encourage, such as jury duty, seeking public office, asserting a right to collective bargaining, or joining a union; and (4) discharge because an employee filed a workers's compensation claim."); STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 128 (2d ed. 1998); Schwab, *supra* note 155, at 1954. This is also recognized by the courts.

157. *Nees v. Hocks*, 536 P.2d 512 (Or. 1975).

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

159. See *Motarie v. N. Mont. Jt. Refuse Disposal Dist.*, 907 P.2d 154, 156-57 (Mont. 1995) (decided under the Montana Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-904(1)). See also *Allum v. Valley Bank of Nev.*, 970 P.2d 1062, 1067 (Nev. 1998) (loan underwriting requirements); *McQuary v. Bel Air Convalescent Home, Inc.*, 684 P.2d 21, 23-24 (Ore. App. 1984) (nursing home abuse); *Ellis v. City of Seattle*, 13 P.3d 1065, 1071 (Wash. 2000) (fire precautions at sports arena); Schwab, *supra* note 155, at 1965.

160. *Corbin v. Sinclair Mktg., Inc.*, 684 P.2d 265 (Colo. Ct. App. 1984).

161. See, e.g., *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283 (Pa. 2000). At least one jurisdiction provides statutory protection to internal and external whistleblowers, but allows only external whistleblowers to pursue a common law remedy for the public policy tort. *Beck v. Tribert*, 711 A.2d 951, 957-58 (N.J. Super. Ct. App. Div. 1998). It is ironic that the external whistleblower is often quicker to get protection, for he is the more disloyal employee.

expand coverage to the internal reporter as well.<sup>162</sup> A related distinction is between the actual whistleblower and the would-be whistleblower. The would-be whistleblower is someone who threatens to blow the whistle, or implies that he is going to blow the whistle.<sup>163</sup> Internal whistleblowers are often in this last category, because they warn people inside the company that they are considering contacting outside authorities. Strong arguments exist for the protection of those who stop short of notifying external agencies. They are more loyal than external whistleblowers, and may be more concerned with correcting the violations of law than with getting the employer in trouble.<sup>164</sup>

*McLaughlin v. Gastrointestinal Specialists, Inc.*<sup>165</sup> reveals many reasons why a court may hesitate to protect a whistleblower. Plaintiff believed that her employer's storage and use of a chemical, in violation of OSHA's ventilation requirements, was causing her headaches, nausea, fatigue, shortness of breath and dizziness.<sup>166</sup> Although she had gone to a laboratory to determine that the air was in fact contaminated, and despite the closeness in timing between her firing and her expressions of concern to the employer, the state court refused to find a violation of public policy based on a violation of

For arguments that external whistleblowers ought to have a higher burden to meet, and ought to have to prove that they worked through internal channels first, see Culp, *supra* note 8, at 133. For a contrary view, see Susan Sauter, *The Employee Health and Safety Whistleblower Protection Act and the Conscientious Employee: The Potential for Federal Statutory Enforcement of the Public Policy Exception to Employment at Will*, 59 U. CIN. L. REV. 513, 540-41 (1990); see also Terry Morehead Dworkin & Janet P. Near, *Whistleblowing Statutes: Are they Working?*, 25 AM. BUS. L.J. 241, 243 (1987).

162. See, e.g., Lanning v. Morris Mobile Melas, Inc., 720 N.E.2d 1128, 1130 (Ill. App. Ct. 1999) ("Reports to internal personnel do not transform public issues into private disputes. . . . In many instances, complaints to internal personnel and supervisors may be the first step in an investigation."); Porter v. Reardon Mach. Co., 962 S.W.2d 932, 937-38 (Mo. App. 1998); see also Holmes v. Gen. Dynamics, 22 Cal. Rptr. 2d 172, 181 (Cal. Ct. App. 1993) (holding an internal complaint of alleged over-billing protected under the common law tort).

163. See Sherman v. Kraft Gen. Foods, Inc., 651 N.E.2d 708, 711 (Ill. App. 1995) ("[I]t would be an absurd result to deny a plaintiff's cause of action for retaliatory discharge where the employer discovers the employee's intent to report an occupational hazard and terminates him before he does so."). Accord McQuary v. Bel Air Convalescent Home, Inc., 684 P.2d 21 (Or. Ct. App. 1984) (holding actionable discharge for threatening to report patient abuse to state authorities).

164. Some observers have suggested that a common law duty of loyalty requires that an employee not blow the whistle, and not be allowed a cause of action for retaliatory discharge, unless he has made "reasonable efforts to correct the problem through efforts within the company." Gutierrez v. Sundancer Indian Jewelry, 868 P.2d 1266, 1282 (N.M. Ct. App. 1993) (Hartz, J., dissenting) (citing Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J. L. REF. 277, 307-14 (1983)). If so, it would be perverse not to protect the potential whistleblower as he was loyally attempting to correct from within.

165. 750 A.2d 283 (Pa. 2000).

166. *Id.* at 284.

federal law. The court came to this conclusion not because it disbelieved plaintiff, but because it did not want to weaken the state's at will presumption, did not see sufficient third party effects, mistrusted internal whistleblowers, and, apparently, feared that every arcane rule in the C.F.R. would become fodder for employee suits.<sup>167</sup>

The second element of the public policy tort involves proof that the employer knew or suspected that the employee was engaged in whistleblowing activities. Very little time in the cases is devoted to this element, as long as the employer was actually aware of, or suspected, the whistleblowing activity.<sup>168</sup>

The third element is the causal link between the knowledge of the employee's complaint and the firing. Judicial analysis of the facts is similar to that in the section 11(c) cases. The most damning evidence against the employer is timing. When the employer learned of the whistleblowing activity and fired an otherwise adequate employee within a few hours or days, the firing is suspect. This is especially true when coupled with a confrontation between the employer and the employee, wherein the employer indicated his knowledge of (and disgust with) the employee's whistleblowing.<sup>169</sup>

167. The *McLaughlin* court wrote:

[T]his Court has steadfastly resisted any attempt to weaken the presumption of at-will employment in this Commonwealth. If it becomes the law that an employee may bring a wrongful discharge claim pursuant to the "public policy" exception to the at-will employment doctrine merely by restating a private cause of action for the violation of some federal regulation, the exception would soon swallow the rule. While, of course, this Commonwealth cannot enact laws that contravene federal law, we are not required to override our longstanding policy regarding common law at-will employment and thus provide a common law remedy for wrongful discharge simply because Congress provides a federal statutory remedy to be brought in a federal forum. Rather, we hold that a bald reference to a violation of a federal regulation, without any more articulation of how the public policy of this Commonwealth is implicated, is insufficient to overcome the strong presumption in favor of the at-will employment relation.

*Id.* at 290. *But see* *Brandon v. Anesthesia & Pain Mgmt. Assoc., Ltd.*, 277 F.3d 936, 942 (7th Cir. 2002) (giving examples of Illinois cases allowing reports of violations of federal law to give rise to retaliatory discharge claims).

168. *See* *Weidler v. Big J Enters., Inc.*, 953 P.2d 1089, 1097 (N.M. Ct. App. 1997) ("We agree that there must be some evidence that the employer was aware, either by suspicion or actual knowledge, or the protected activity. A discharge based on a belief or suspicion of protected activity is just as reprehensible as a discharge based on actual knowledge of protected activity.").

169. *See, e.g.*, *Sherman v. Kraft Gen. Foods, Inc.*, 651 N.E.2d 708, 709-10 (Ill. Ct. App. 1995) (Employer learned of intention to give insulation sample to employer or to OSHA on May 11; sample confiscated and plaintiff fired on May 12); *Cerracchio v. Alden Leeds, Inc.*, 538 A.2d 1292, 1295 (N.J. Super. App. Div. 1988) (Employee filed a workers' compensation claim on August 13 and complained to OSHA on August 15; on August 24 he went to work, his supervisor asked about his OSHA complaint, "shook his head," and informed the plaintiff that he had been terminated as of August 13. That supervisor provided perfect proof of but for cause by adding "if you weren't such a troublemaker you would still have a job here."); *Weidler v. Big*

Correspondingly, plaintiff employees have a hard time convincing a court of their employers' retaliatory motivation when a long time passed between the employer's knowledge of the lodging of their complaint and the termination.<sup>170</sup>

The tort action provides a remedy for wrongful termination, but seldom for other adverse employment actions, such as harassment or demotion.<sup>171</sup> Damages for wrongful termination include back pay and front pay,<sup>172</sup> including benefits,<sup>173</sup> lost perquisites,<sup>174</sup> bonuses,<sup>175</sup> and

J. Enters., Inc., 953 P.2d 1089, 1098-99 (N.M. Ct. App. 1997) (Plaintiff presented evidence of threats, confrontations, and poor assignments; co-workers "testified that the phrase 'you talk, you walk' applied at Big J." Apparently, the word throughout the company was, "Don't make waves." There was testimony about an incident where a worker brought up a safety concern at a safety meeting after which management was heard to say, "He's out of here." That worker was laid off after shutdown.).

170. See, e.g., Sanders v. Culinary Workers Union Loc. No. 226, 804 F. Supp. 86, 100-01 (D. Nev. 1992) (dismissing claim on summary judgment because the OSHA complaint was filed five months before the termination, and there was ample evidence supporting a conclusion that the employee was discharged for "purposefully disobeying company procedures which resulted in substantial damage to an aircraft"); Altman v. Luther Coll., 14 I.E.R. Cas. (BNA) 1270 (Iowa Ct. App. 1998); Walker v. Westinghouse Elec. Corp. 335 S.E.2d 79, 86 (N.C. Ct. App. 1985) (finding no claim where no evidence in record as to by how long safety concerns predated discharge but could have been as much as three years); Beck v. Tribert, 711 A.2d 951, 958 (N.J. Super. App. Div. 1998) (mentioning the long span of time between the employee's written and oral complaints and his termination, but holding that internal whistleblowers are not protected.). However, in one case the knowledge was of OSHA complaints filed years before at different places of work. But the employer could nonetheless be liable for retaliatory discharge if that knowledge motivated the dismissal. Skillsky v. Lucky Stores, 893 F.2d 1088, 1094 (9th Cir. 1990).

171. The public policy tort has generally not been extended to retaliatory demotions or discrimination, Zimmerman v. Buchheit of Sparta, Inc., 645 N.E.2d 877, 879 (Ill. 1994), or constructive discharge, Grey v. First Nat'l Bank of Chicago, 523 N.E. 2d 1138 (Ill. Ct. App. 1988). See generally Michael D. Moberly & Carolann E. Doran, *The Nose of the Camel: Extending the Public Policy Exception Beyond the Wrongful Discharge Context*, 13 LAB. LAW. 371 (1997). But cases exist to the contrary. See, e.g., Brigham v. Dillon, 935 P.2d 1339 (Kan. 1997) (recognizing retaliatory demotion); Beye v. Bureau of Nat'l Affairs, Inc., 477 A.2d 1197, 1202-03 (Md. Ct. Spec. App. 1993) (allowing action for abusive discharge to be founded upon constructive discharge).

172. Back pay is income lost from the time of the discharge until the time of reinstatement, finding new employment, or the date of judgment. Front pay is lost prospective, future earnings, that is, the difference between what the employee would have made at the first job less what he will make at his next job or jobs. See *Besupre v. Smith Assoc.*, 738 N.E.2d 753, 767 n.25 (Mass. App. 2000); see generally STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW 332-33 (2001); PAUL A. TOBIAS, LITIGATING WRONGFUL DISCHARGE CLAIMS § 8:05 (1999). The employee's life expectancy, years expected until retirement, promotions expected, and other relevant factors must be taken into account to determine the amount, which is then discounted to present value. See, e.g., *Rasmussen v. Quaker Chem. Corp.*, 993 F.Supp. 677 (N.D. Iowa 1998); *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682 (Iowa 1990).

173. The import of paying to restore benefits becomes more crucial when one considers that many whistleblowers are older, and will have a difficult time replacing health and life insurance policies. See *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 877-88 (Mo. Ct. App. 1985).

174. One whistleblower was allowed to recover the replacement value of his company car and insurance benefits. *Potter v. Village Bank of N.J.*, 543 A.2d 80 (N.J. Super. 1988).

175. *Id.* at 88 (bonuses and vacation pay).

projected promotions.<sup>176</sup> Plaintiff is subject to the avoidable consequences rule, and money earned elsewhere will serve as an offset.<sup>177</sup> Plaintiffs may recover for emotional distress,<sup>178</sup> other foreseeable compensatory damages,<sup>179</sup> and punitive damages.<sup>180</sup> This tort action is normally tried before a jury.<sup>181</sup>

### III. THE EFFECT OF SECTION 11(C) ON THE VIABILITY OF THE PUBLIC POLICY TORT

*"The courts should not use statutes designed to shield employees from retaliation as a sword to eliminate such rights."*<sup>182</sup>

The existence of section 11(c) should not preclude state courts

176. *Nelson v. United Technologies*, 88 Cal. Rptr. 2d 239, 251-52 (Cal. App. 1999).

177. *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 387 (Ark. 1988). One state court, finding that a discharge was "malicious," alleviated "the duty of mitigating by seeking new employment, even if comparable employment was available." *Seymore v. Pendleton Community Care*, 549 S.E.2d 662, 667 (W.Va., 2001). For an example of deduction of mitigating income from a backpay award, see *Wilkins v. St. Louis Housing Auth.*, 197 F. Supp. 2d 1080, 1090 (E.D. Mo. 2001) (relief founded upon False Claims Act and state common law tort of unjust termination).

178. A separate cause of action may be brought for intentional infliction of emotional distress, but emotional distress damages should also be available as a consequence of the wrongful discharge. *See, e.g., Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982); *Nibb v. Parr Mfg., Inc.*, 445 N.W.2d 351 (Iowa 1989). Remnants of some of the traditional limits on emotional distress still may be found, like requirements of physical manifestations or extremely outrageous treatment. For a case discussing emotional distress in a whistleblowing context, see *Hentzel v. Singer Co.*, 188 Cal. Rptr. 159 (Cal. Ct. App. 1982). For an award of emotional distress damages in the OSHA context, see *Weidler v. Big J Enter., Inc.*, 953 P.2d 1089, 1099-1100 (N.M. Ct. App. 1997).

179. Such damages may include lost reputation, costs of seeking alternative employment, or even foreseeable loss of property due to lost stream of income from paychecks. *See, e.g., Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986); *Montgomery Coca-Cola Bottling Co. v. Golson*, 725 So.2d 996, 1000 (Ala. Ct. App. 1998).

180. *See, e.g., Rhein v. ADT Auto. Inc.*, 930 P.2d 783, 791 (N.M. 1996) (error to refuse instruction on punitive damages). State punitive damage award have been recently constricted on constitutional grounds by the Supreme Court. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Punitive damages are often limited in state "tort reform" statutes. Punitive damages awarded by a jury were upheld, in an 8 to 1 ratio with actual damages, in *Weidler v. Big J Enters., Inc.*, 953 P.2d 1089, 1102 (N.M. Ct. App. 1997). That case provides a window into how the proof and jury instructions may unfold when a statutory action dovetails with the common law wrongful termination case.

181. *Holien v. Sears, Roebuck & Co.*, 689 P.2d 1292, 1303 n.8 (Ore. 1984) (sex discrimination case addressing possibility of jury trial in common law action but not for statutory claim). *See generally*, Robert Roy, Annotation, *Right to Jury Trial in Action for Retaliatory Discharge from Employment*, 52 A.L.R. 4th 1141 (1987 & Supp. 2002).

182. STEPHEN M. KOHN & MICHAEL D. KOHN, *THE LABOR LAWYER'S GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF EMPLOYEE WHISTLEBLOWERS* 113 (1989). The Kohns write of the lack of consistency in state and federal approaches to preemption and preclusion issues. "The most troubling paradox has developed in labor law: Unfair and discriminatory labor practices, which were so outrageous or troubling as to spark specific legislative actions, are now, in some jurisdictions, subject to less protection than unfair or discriminatory labor practices which are not as threatening to the public welfare." *Id.* (Emphasis in original).

from allowing the public policy tort to be brought in the OSHA whistleblower context. But some state courts, or federal courts applying state law, have used the existence of OSHAct section 11(c) as a reason to preclude tort recovery. The clearer course for those courts would be to address their concerns about the foundations or consequences of the tort, rather than shrouding those concerns in confusing terms and muddled doctrines.

Courts have concluded that the OSHAct prevents state tort recovery for the following reasons: 1) *Taylor*<sup>183</sup> concerns, that a public policy tort is merely a backdoor means to a private action under section 11(c); 2) statutory exclusion analysis, including (a) focusing on adequacy of remedy, and (b) other legislative intent inquiries; and 3) federal preemption. When these concerns meet up with any remaining judicial hostility to inroads on the at will doctrine, judges may seize on them to refuse to allow the public policy tort.<sup>184</sup>

#### A. *No Private Right of Action – Taylor Concerns*

The *Taylor* case, refusing to allow a private cause of action under OSHAct section 11(c), is often summarily cited by state courts denying common law claims for wrongful discharge or related torts.<sup>185</sup> Some states spell out that they will not allow what is in effect a private action under section 11(c), or under an analogous state OSHAct, to come in through the back door of a common law cause of action.<sup>186</sup> The Court of Special Appeals of Maryland, faced with a complaint for abusive discharge,<sup>187</sup> summed up the position:

[T]he exclusive remedy for that violation lies under MOSHA [the Maryland OSHAct]. As this case in particular demonstrates, any other view would seriously undermine the coherent administration

183. *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980), discussed *supra* at text accompanying notes 116-45.

184. See, e.g., *Corbin v. Sinclair Mktg., Inc.* 684 P.2d 265, 267 (Colo. Ct. App. 1984) (disallowing public policy tort).

185. *King v. Fox Grocery Co.*, 642 F. Supp. 288, 290 (W.D. Pa. 1986) (granting summary judgment against plaintiff employee because statutory remedies were available and because there was no private right of action under OSHA, citing *Taylor*); *Hendrix v. Wainwright Indus.*, 755 S.W.2d 411, 413 (Mo. Ct. App. 1988) (dismissing cause of action for "conspir[acy] to terminate [employee] . . . because of his involvement and filing of an [OSHA] complaint . . . 'in direct violation of 29 U.S.C. section 660(c).'" The court concluded, "[a]ny remedy for a retaliatory discharge must come from within the agency. There is no private cause of action for a violation of the Occupational Safety and Health Act. [citing *Taylor*]").

186. *Silkworth v. Ryder Truck Rental*, 520 A.2d 1124, 1127-28 (Md. Ct. Spec. App. 1987).

187. *Id.* The employee's dismissal arose from his refusal to work rather than retaliation because of whistleblowing. Refusal to work cases are more complicated than whistleblowing cases because they involve what would otherwise be insubordination.

of MOSHA. The Commissioner investigated the very charge made by appellant in this case and found no violation. His fact-finding, under the statute, is conclusive; his legal conclusions can be tested by judicial review under the laws and rules governing administrative appeals. What appellant wants is for a court, in an original tort action, to review his factual and legal contentions *de novo* and to reach conclusions contrary to those of the Commissioner. That would emasculate the authority of the Commissioner, however, and would run directly contrary to the clear intent of the Legislature. It would also create the anomalous situation of an employee whose claim is found by the Commissioner to have merit being restricted to the statutory remedy of reinstatement and back pay, but an employee whose claim is found to have no merit being able to seek compensatory and punitive damages from a jury.<sup>188</sup>

While there is some appeal to this argument, it need not lead to the disavowal of all state public policy tort causes of action, because the purposes of the state common law action may be different from those of Congress in enacting the OSHAct. Torts seek to prevent and remedy breaches of the social contract, goals that may be farther-reaching than the enforcement of a specific statute. States are concerned with the employment and unemployment of their citizens, and the concomitant effect on the state coffers. The calculi of compensation, deterrence, retribution and administrative costs may be different at the state tort level than at a federal administrative agency. This difference in perspective is acknowledged and approved by the OSHAct itself, which makes clear that the states are free to provide more protection to their citizens than Congress chose to impose on the entire country.<sup>189</sup>

In *Holmes v. Schneider Power Corp.*,<sup>190</sup> a federal district court applying Pennsylvania law correctly separated two arguments. "One issue is whether this court should find an implied right of action under the OSHA statute as a matter of federal law. It is an entirely separate issue for this court to decide whether Pennsylvania courts would find a common law cause of action in this case, *i.e.* wrongful discharge in violation of a public policy."<sup>191</sup>

The court answered the first question in the negative by citing *Taylor*. The court reasoned, "The plaintiff has had the benefit of the administrative remedy provided. The Secretary's decision not to bring

188. *Id.* at 1128.

189. *See infra* text accompanying notes 255-58.

190. 628 F. Supp. 937 (W.D. Pa. 1986).

191. *Id.* at 939.



suit does not deprive plaintiff of his statutory remedy."<sup>192</sup>

The court then discussed what the Pennsylvania state courts would do if presented with the common law complaint. The court indicated its reluctance "to glibly expand state law."<sup>193</sup> The court refused to find a state law cause of action, because of lack of Pennsylvania precedent and a sense that the facts did not support the claim.<sup>194</sup>

This is an appropriate decision. The question is not whether *Taylor* prevents the bringing of the state tort, but rather whether the lawmakers of the state – legislative or judicial – have chosen to allow the state tort. As a federal judge, the *Holmes* judge was understandably reluctant to hold that a state cause of action would lie. His hesitation may well have been prophetic, in view of the Pennsylvania Supreme Court's decision in *McLaughlin*.<sup>195</sup>

### *B. Statutory Exclusivity*

The existence of section 11(c) raises the question whether legislative action in the area should preclude judicial, common law activity. One judicial approach looks at statutory remedies and procedures, asking whether the legislative provisions are adequate. *Walsh v. Consolidated Freightways, Inc.*<sup>196</sup> is a leading case that employs this analysis. This leads to a comparison of plaintiffs' rights and remedies under section 11(c) and the public tort. Statutory exclusivity may also be analyzed from another perspective, one that attempts to ascertain the intent of the legislators, scrutinizing not only the remedies and procedures, but also the timing of the legislation and other indicia of legislative intent vis-a-vis the common law.

#### 1. Remedial Adequacy – *Walsh* Concerns

Should state common law create a tort remedy if a statutory remedy exists? This question is similar to but distinct from the *Taylor* question of whether section 11(c) allows a private right of action.<sup>197</sup>

192. *Id.*

193. *Id.* at 940.

194. *Id.*

195. *McLaughlin v. Gastrointestinal Specialists, Inc* 750 A.2d. 283 (Pa. 2000). Indeed, the *McLaughlin* court found in *Holmes* support for its proposition that enforcement of federal law is not a state policy in Pennsylvania. *Id.* at 289-90.

196. 563 P.2d 1205 (Or. 1977).

197. In *Cerracchio v. Alden Leeds, Inc.*, 538 A.2d 1292 (N.J. Super. Ct., App. Div. 1988), the court recognized this question:

The Oregon Supreme Court addressed this question in *Walsh v. Consolidated Freightways, Inc.*<sup>198</sup>

The Oregon court had been a leader in creating the public policy tort, holding in 1975 that an employer could not legally discharge an employee "solely for refusing to ask to be excused from jury duty."<sup>199</sup> Two years later, in *Walsh*, the court confronted a jury verdict for a plaintiff who was discharged apparently because he "complained rather adamantly" to his foreman and his union representative about the potential health hazard presented by blue clouds of noxious-smelling smoke emanating from a forklift.<sup>200</sup> The court wrote:

Although the situation in this case is similar [to the discharged potential juror], there is one decisive difference. It is true, of course, that the community has a strong interest in maintaining safe working conditions. That interest has been expressed in both state and federal statutes. Correspondingly, we would agree that employers should not be allowed to discharge employees solely for complaining about safety problems. However, unlike the [potential juror], an employee who is discharged because he complained for a safety violation *is* provided a remedy under existing law for his wrongful discharge.<sup>201</sup>

After describing section 11(c) procedures, the *Walsh* court pointed out, "[I]t is apparent that plaintiff was aware of this remedy, for the record indicates that he, in fact, did file a complaint pursuant to [section 11(c)]."<sup>202</sup> The court noted the adequacy of both the section 11(c) remedies and similar remedies under state statute,<sup>203</sup> and concluded, "Therefore, we find it unnecessary to extend an additional

[I]t is clear that this statute does not 'create' a private right of action for an employee who is discharged for reporting a safety violation. [citing *Taylor*] The question, however, is whether it prohibits such an action. On its face, no such prohibition exists in the statute, and it seems to us that the statute does not preclude an employee from instituting an action in New Jersey, under a recognized tort or contract theory.

*Id.* at 1298 (citing *Kennard v. Louis Zimmer*, 632 F. Supp. 635 (E.D. Pa. 1986)), but recognizing that contrary authority existed). Similarly, the *Holmes* court remarked in passing, "It is noteworthy that Pennsylvania courts have found a common law action based on the public policy exception *only* in cases where no statutory remedy is available." 628 F. Supp. at 939 (emphasis in original).

198. 563 P.2d 1205 (Or. 1977).

199. *Id.* at 1205 (citing *Nees v. Hocks*, 536 P.2d 512 (Or. 1975)).

200. *Id.* at 1207-78. A clear undercurrent in the case was that the discharge may have been partially motivated by the employer's displeasure that plaintiff was attempting to organize the casual employees who were not covered by the union contract. *Id.* at 1207, 1209-10.

201. *Id.* at 1208 (citations omitted).

202. *Id.*

203. The state provisions were not in effect at the time of the conduct. *Id.* at 1208 & n.1. The highest court of a state, however, charged with making precedent as well as adjudicating the matter at hand, was obligated to consider how similar scenarios would play in future workplace disputes.

tort remedy to cover this kind of situation."<sup>204</sup> The Oregon court later created a typology of public policy tort cases, using *Walsh* as the lead example of a category "where an adequate existing remedy protects the interest of society so that an additional remedy of wrongful discharge will not be accorded."<sup>205</sup>

Several states have followed *Walsh*. For example, the Kentucky Supreme Court, in *Grzyb v. Evans*,<sup>206</sup> generally allowed the bringing of a public policy claim at common law, but not as described in a subsequent federal district court opinion, "when the statute creating the public policy exception provides the structure for pursuing a claim."<sup>207</sup> In the latter cases, "[t]he statute not only creates the public policy but preempts the field of its application."<sup>208</sup> The only statutes that can be the basis for the public policy tort are penal statutes, or statutes that do not prescribe any remedy.

*Grzyb* arose in the sex discrimination context, but a federal district court in Kentucky used it as precedent to disallow a whistleblower to sue under the Kentucky public policy tort, where the source of the policy was alleged as the federal and state OSHA acts.<sup>209</sup> In a brief paragraph, the court rejected the public policy tort under Kentucky law, because the federal OSHA act section 11(c) and the Kentucky OSHA act statute<sup>210</sup> already create what is basically a public policy exception to the at will rule, and "provide a structure for employees to pursue when alleging violations."<sup>211</sup>

Other courts have rejected *Walsh*, finding that the OSHA act

204. *Id.* at 1208-09.

205. *Dalaney v. Taco Time Int'l, Inc.*, 681 P.2d 114, 118 (Or. 1984).

206. 700 S.W.2d 399 (Ky. 1985).

207. *Hines v. ELF Atochem N. Am., Inc.*, 813 F. Supp. 550, 552 (W.D. Ky. 1993). *See Grzyb*, 700 S.W.2d at 401 ("Where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute."). *Grzyb* disallowed a public policy cause of action which rested on the state sex discrimination statute as the source of the policy because the statute provided its own remedial structure.

208. *Id.* The court's use of the term "preemption" is technically accurate, but can cause confusion because it brings to mind "federal preemption." *See infra* text accompanying notes 326-38.

209. *Hines v. Elf Atochem N. Am., Inc.*, 813 F. Supp. 550 (W.D. Ky. 1993). The *Hines* court wrote that the federal and state OSHA acts "preempt" the state policy tort. *Id.* at 552. This usage is even more confusing than the "preemption" language in *Grzyb*, because of the federal/state tension present in *Hines*.

210. KY. REV. STAT. ANN. § 338.121(3)(b) (2001).

211. *Hines*, 813 F. Supp. at 552. This was not a whistleblower case. The employee alleged that she was harassed and retaliated against, and suffered stress because she refused to comply with order that she not make OSHA incident reports, falsify OSHA records and provide confidential employee informational records. *Id.* at 551.

provides insufficient structure or remedies to justify dismissal of the public policy tort claim. The Missouri Court of Appeals has reasoned, "A statutory remedy shall not be deemed to supersede and displace remedies otherwise available at common law in the absence of language to that effect unless the statutory remedy fully comprehends and envelops the remedies provided by common law."<sup>212</sup> The court allowed the state tort, finding the OSHA remedy incomplete.<sup>213</sup> The court noted that because of the lack of a private right of action under OSHA, the employee has no control over the decision to bring suit and what relief to seek.<sup>214</sup> Also, the court found, the short, 30-day statute of limitations further restricts the employee's right to relief.<sup>215</sup>

Similarly, in *Kilpatrick v. Delaware County Society for Prevention of Cruelty to Animals*,<sup>216</sup> a federal court in Pennsylvania rejected a "state based preemption argument,"<sup>217</sup> and allowed the tort under state law. The court's conclusion was based partially on the facts of the case – plaintiff had complained to Pennsylvania agencies about violations of Pennsylvania law, so she did not have an OSHA claim.<sup>218</sup> The court further found it unlikely that the Pennsylvania courts would entrust enforcement of state law to the federal Secretary of Labor, especially since the vigor of federal officials enforcing OSHA "waxes and wanes depending upon the prevailing political winds blowing toward Washington."<sup>219</sup> The court concluded that the public policy tort should be allowed.<sup>220</sup>

212. *Shawcross v. Pyro Prods., Inc.*, 916 S.W.2d 342, 345 (Mo. Ct. App. 1995) (citations omitted).

213. *Id.*

214. The court distinguished the Fair Labor Standards Act, which enumerates more relief for the wrongfully discharged employee than does the OSHA. *Id.*

215. *Id.*

216. 632 F. Supp. 542 (E.D. Pa. 1986).

217. *Id.* at 548-50. The use of the word "preemption" here creates confusion between the *Walsh* concerns about separation of powers and the federalism concerns in the federal preemption cases, discussed *infra* notes 299-325 and accompanying text.

218. *Id.* at 948-49. This conclusion is not in line with the broad language of 29 C.F.R. § 1977.9(b) (2001): "Complaints registered with other Federal agencies which have the authority to regulate or investigate occupational safety and health conditions are complaints 'related to' this Act. Likewise, complaints made to State or Local agencies regarding occupational safety and health conditions would be 'related to' the Act." *Kilpatrick* may seem to be dissonant with *Holmes*, see *supra* notes 190-94 and accompanying text. The Supreme Court of Pennsylvania reconciled the two by pointing out that the *Kilpatrick* plaintiff had complained to the Commonwealth whereas the *Holmes* plaintiff had complained to OSHA. *McLaughlin*, 750 A.2d at 289 n.14.

219. *Kilpatrick*, 632 F. Supp. at 550.

220. The *McLaughlin* court, 14 years later, again noted the lack of congruence and trust between the federal OSHA and the state, but this time to the employee's disadvantage. See notes 165-67 and accompanying text.

This leads to the central question of how plaintiff's rights and remedies compare as between section 11(c) and the public policy tort. Various inadequacies in the section 11(c) protections emerge when it is compared to the public policy tort: reduced compensation to the plaintiff whistleblower,<sup>221</sup> commensurate reduced punishment of the offending employer,<sup>222</sup> and less control over the lawsuit on the part of the whistleblower. Examination of the federal statutory procedures and remedies may lead to the conclusion that the *Walsh* court was cavalier in relegating its state's citizens to the federal arena. Rather than summarily citing *Walsh*, state courts should examine the OSHA remedies and procedures alongside the potential tort remedies and procedures. A state court may well conclude that its own tort processes and recoveries provide more protection to the citizens of its state.<sup>223</sup>

## 2. Legislative Intent to Exclude Common Law Rights and Remedies

Legislatures have the power to protect and compensate the citizens of their states by creating remedial schemes that exclude common law rights of action. When legislatures fail expressly to exclude common law remedies, an argument remains that a desire for exclusivity should be implied. Although these arguments usually arise with regard to state legislation, they are so closely related to, and so often mixed in with, analyses of the federal OSHA that they will be briefly introduced here.

The analysis of an implicit statutory preclusion of common law remedies often emphasizes timing. As the California Court of Appeal observed, "When a new right, not existing at common law, is created by statute, that statutory remedy is exclusive. For rights which already existed at common law before creation of the statutory right, however, the statutory remedy is usually regarded as merely cumulative, permitting the plaintiff to pursue the common law remedy as well."<sup>224</sup>

221. For example, the author found no 11(c) cases awarding emotional distress damages, but emotional distress recovery is granted in state tort cases. See *supra* note 178.

222. Compare, *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187 1190 (1st Cir. 1994) (under § 11(c) punitive award two times the amount of back pay) with *Weilder v. Big J. Enters., Inc.*, 953 P.2d 1089, 1100 (N.M. Ct. App. 1995) (under state retaliatory discharge claim, punitive award in a ratio of 8:1 with compensatory damages, which included lost wages and emotional distress).

223. See, e.g., *supra* text accompanying notes 213-15.

224. *Cabesuela v. Browning-Ferris Indus. of Cal., Inc.*, 80 Cal. Rptr. 2d 60, 64 (Cal. Ct. App. 1998).

Application of this doctrine in the context of OSHA and the common law raises interesting issues of timing. The basic OSHAct was passed in 1970. Most states began recognizing the common law public policy tort in the 1980s. It could be argued that the remedial scheme of the federal OSHAct predated and hence excluded the common law tort remedy. On the other hand, most state whistleblower statutes were enacted in the late 1980s and early 1990s, after the public policy tort was recognized in many jurisdictions.

Exclusivity claims, based on either the OSHAct or state whistleblower statutes, are usually unsuccessful, largely because the courts do not simply apply a "time line" approach. Rather they also look to legislative intent and remedial sufficiency.<sup>225</sup> For example, defendants in *Gutierrez v. Sundance Indian Jewelry, Inc.*<sup>226</sup> argued that the New Mexico OSHAct provided exclusive remedies. The court did not agree, pointing out that a common law duty to provide employees with safe workplaces predated the state OSHAct. The statute merely codified the pre-existing duty. The public policy tort "supports, and is often necessary to reinforce" the statute.<sup>227</sup> Nothing in the statutory language indicated an intent that the statutory remedies be exclusive;<sup>228</sup> on the contrary, the broadly worded preamble disavowed an attempt to diminish common law rights.<sup>229</sup>

Similarly, a sharply divided Ohio Supreme Court, in *Kulch v. Structural Fibers, Inc.*,<sup>230</sup> allowed a public policy tort to rest on the state whistleblower protection act, but not before pausing to consider various exclusivity concerns. The *Kulch* analysis demonstrates how close these concerns are to each other, and how they overlap. The *Kulch* court studied state statutory whistleblower remedies and decided they were not adequate standing alone. Rather, tort remedies would complement the statute. Although *Kulch* did not cite *Walsh* or its progeny, it rejected the rule that the existence of statutory

225. For a detailed example of the process used to determine legislative intent in this regard, in the sexual harassment context, see *Hobien v. Sears, Roebuck & Co.*, 689 P.2d 1292, 1300-1304 (Or. 1984).

226. 868 P.2d 1266 (N.M. Ct. App. 1993).

227. *Id.* at 1273.

228. *Id.* at 1274. *Accord* *Reed v. Municipality of Anchorage*, 782 P.2d 1155, 1158-59 (Alaska 1989)

229. *Gutierrez*, 868 P.2d at 1274-75. The preamble also declines to "enlarge" common law rights, which ironically lead the dissent to find no statutory hook for the public policy tort. *Id.* at 1281 (Hartz, J., dissenting).

230. 677 N.E. 2d 308, 329 (Ohio 1997). For criticism of *Kulch*, see Margaret M. Koesel et al., *Will the Real Legislature Please Stand Up? A Response to Kulch v. Structural Fibers, Inc.: Clarifying the Public Policy Exception*, 46 CLEV. ST. L. REV. 19 (1998).

remedies would preclude the tort.<sup>231</sup>

The *Kulch* majority then addressed the timing issue,<sup>232</sup> concluding that the statute was "never intended to preclude the future development of the common law of this state in the area of 'whistleblowing.'"<sup>233</sup> The majority wrote, "[I]f the General Assembly had truly intended to make [the statute] the sole and exclusive remedy for whistleblowers, it certainly knew how to do so."<sup>234</sup> Finally, the court addressed separation of powers concerns, concluding, "The employment-at-will doctrine was judicially created, and it may be judicially abolished."<sup>235</sup> Thus the majority put the burden on the legislature to make clear its intention to abrogate the court's dominion over the common law.

In the context of the OSHA Act, Congress not only expressly declined to exert exclusive control over workers' rights or over health and safety in the workplace,<sup>236</sup> but also expressly stated that the federal legislation provided a minimum, not a maximum, of worker protection.<sup>237</sup> Thus, the better path for courts to follow is to address directly the reasons for and effects of allowing or disallowing the tort, rather than relying on the statutory exclusivity doctrine.

### C. Federal Preemption

The preemption doctrine, as enunciated, is fairly straightforward, but its application is difficult to predict.<sup>238</sup> The source of preemption doctrine is the supremacy clause of the United States Constitution which declares that "the Laws of the United States . . . shall be the supreme Law of the Land. . ." <sup>239</sup> The "ultimate touchstone"<sup>240</sup> of the inquiry is congressional intent. This intent should be manifested fairly

231. 677 N.E.2d at 325.

232. *Id.* at 325-27. The Ohio whistleblower protections had a convoluted history.

233. *Id.* at 326. This holding invalidated a string of Ohio appellate and federal district court cases. *See id.* at 327.

234. *Id.* at 326.

235. *Id.* at 328.

236. 29 U.S.C. § 667(a) (2000).

237. *Id.* § 667(c)(2).

238. "It is difficult in this area – even more so than in others – to apply the rationale underlying a decision in one field to the problem in another context." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 348 (6th ed. 2000); *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 377 (2d ed. 2002).

239. U.S. CONST., art. VI, § 3, cl.2. *See Gade v. Nat'l Solid Waste Mgmt. Ass'n.*, 505 U.S. 88, 108 (1992); *but see Nash v. Fla. Indus. Comm'n.*, 389 U.S. 235, 239-40 (1967) (citing the Supremacy Clause and cases going back to *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819)).

240. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

clearly by Congress. "Exercise of federal supremacy is not to be lightly presumed."<sup>241</sup> This is especially true in areas traditionally occupied by the states, involving the states' historic police powers.<sup>242</sup> But, Professor Chemerinsky explains:

The problem, of course, is that Congress's intent, especially as to the scope of preemption, is rarely expressed or clear. Therefore, although the Court purports to be finding congressional intent, it often is left to make guesses about purpose based on fragments of statutory language, random statements in the legislative history, and the degree of detail of the federal regulation.<sup>243</sup>

To determine congressional intent, courts look first for express preemption. The words of the statute are analyzed to determine any preemptive intent and, if so, to assess the scope of the preemptive effect. When express preemption is lacking, courts look for implied preemption. Implied preemption can be divided into two parts: 1) field preemption, where the federal scheme is so pervasive that it can be said that Congress left no room for state action, and 2) conflict preemption.<sup>244</sup> Conflict preemption can be further divided into (a) true conflict preemption, where compliance with both the federal and the state law is physically impossible, so the federal law takes precedence, and (b) impediment, or purpose, preemption, where the state law is an obstacle to accomplishment and execution of the full purposes and objectives of Congress.<sup>245</sup> If field preemption is found, then the states cannot act in the area,<sup>246</sup> because there is no room for them to act. If conflict preemption is found, bits and pieces of the state rules may be invalidated, but others may survive; the state law is preempted only "to the extent that it actually conflicts with federal

241. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).

242. *Gade*, 505 U.S. at 96. "Another reason for the presumption against preemption is that although Congress can always amend its legislation if the courts interpret preemption too narrowly, states are powerless to act, except by lobbying Congress, if the courts interpret preemption too broadly." Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535, 541 n.40 (1987).

243. CHEMERINSKY, *supra* note 238, at 285.

244. Implied preemption can be divided several ways. Many courts discuss field preemption and conflict preemption, dividing conflict preemption into two parts. See, e.g. *Gade*, 505 U.S. at 109 (Kennedy, J., concurring in part and concurring in the judgment). Justice O'Connor noted that the categories can be recharacterized even to the point of understanding field pre-emption "as a species of conflict pre-emption." *Id.* at 104.

245. This last category can also be called "purpose-conflict pre-emption." *Id.* at 115 (Souter, J., dissenting). But that term is confusing, given the use of differing state and federal legislative purposes to save a state law in a field preemption context. See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Devel. Comm'n*, 461 U.S. 190 (1983). The Supreme Court includes impediment (or obstacle) preemption as one of two types of conflict preemption. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Gade*, 505 U.S. at 98.

246. See, e.g., *English v. General Elec. Co.*, 496 U.S. 72, 82 (1990).



law.<sup>247</sup> All of these categories overlap, and how they are divided may well have an effect on preemption jurisprudence.<sup>248</sup> For ease of discussion, this article will adhere to fairly rigid categorization of the preemption theories, keeping in mind that the touchstone of the inquiry is congressional intent.<sup>249</sup>

Since the late 1970s, the number of preemption cases has risen, partially because of a huge rise in the number of federal laws concerning matters previously reserved to the states,<sup>250</sup> and partially because of the increased prominence of battles over so-called "states rights."<sup>251</sup> Strange bedfellows can be found in preemption cases. In the 1960s, federal law was often considered to be more protective of individual rights than state law. Civil libertarians argued more often for preemption and against states' rights. Then, by the late 1980s, lawyers seeking to recover money on behalf of wronged employees began to turn to state law for protection, as common law remedies expanded. Champions of individual employees found themselves arguing against rather than for federal preemption, and trumpeting the rights of the states to assess damages.<sup>252</sup>

The best analysis is that the OSHAct does not preempt the state public policy tort. Although the Supreme Court has yet to rule on the issue, most other courts have arrived at this conclusion by studying recent Supreme Court cases and the OSHAct itself.<sup>253</sup> Because the

247. Field preemption blots out all state law touching on the preempted subject; conflict preemption, on the other hand, merely chips away at it. See *Pacific Gas*, 461 U.S. at 203-0. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 278-7 (1984) (Powell, J., dissenting).

248. *Gade*, 505 U.S. at 109-11 (Kennedy, J., concurring).

249. The intent of the state actors must also be considered. If the state purpose is significantly different from the federal purpose, the state law may not even be in the preempted field. See, e.g., *Pacific Gas*, 461 U.S. at 213-17; *English*, 496 U.S. at 83-85.

250. NOWAK & ROTUNDA, *supra* note 238, at 347 ("In recent years Congress had enacted legislation touching more and more areas that traditionally have been subject to state regulation.").

251. See generally Shea C. Meehan & D. Benjamin Beard, *What Hath Congress Wrought: E-Sign, the UTEA and the Question of Preemption*, 37 IDAHO L. REV. 389 (2001).

252. See, e.g., *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473 (8th Cir. 1990).

253. See *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473, 474-76 (8th Cir. 1990); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 864 (9th Cir. 1987); *McElroy v. SOS Int'l, Inc.*, 730 F. Supp. 803, 808-09 (N.D. Ill. 1989); *Kilpatrick v. Del. County Soc. for Prevention of Cruelty to Animals*, 632 F. Supp. 542 (E.D. Pa. 1986); *Lepore v. Nat'l Tool and Mfg. Co.*, 540 A.2d 1296, 1305-07 (N.J. Super. Ct. App. Div. 1988), *aff'd*, 557 A.2d 1371 (N.J. 1989).

One of the most cogent, succinct analyses of the non-preemptive effect of the OSHAct on a public policy tort for discharge because of whistleblowing can be found in *Lepore*. The analysis is pre-*Gade*, but still apt:

OSHA does not reflect express congressional intent to preempt the field of occupational safety and health. To the contrary, as previously indicated, OSHA specifically permits individual states to adopt a scheme of health and safety regulations along with enforcement procedures so long as such standards are at least as vigorous as

proper place to begin any inquiry into preemption is to look at the words of Congress, this discussion is organized according to sections of the OSHAct and proceeds along the following lines. First the threshold question of field preemption will be answered, in the negative, by section 18(a). Then the preemptive force of section 11(c) will be discussed. Then a secondary preemption issue, presented by section 18(b), will be addressed. Finally, the article takes a critical look at lower court opinions, attempts to bring some clarity to the competing analyses,<sup>254</sup> and concludes that section 11(c) does not preempt state public policy torts. Thus, if a court chooses to deny recovery to wrongfully discharged OSHA whistleblowers, the court needs to address the adequacy of remedies or consider other policy concerns, not base its decision on federal preemption rules.

### 1. Is the Field Preempted? Section 18(a)

Section 18(a) of the OSHAct provides, "Nothing in this chapter

those required by OSHA and have been approved by the Secretary of Labor. Beyond that, OSHA gives states express authority to regulate areas of health and safety not governed by an OSHA standard. Thus, preemption under OSHA arises only where a state law or regulation concerns an occupational safety and health matter governed by a specific federal standard and only where an approved state plan is not in effect.

.....

OSHA, thus, does prohibit retaliatory discharges and establishes enforcement procedures encompassing a remedy therefor. It does not, however, by its express terms prohibit a state from providing an aggrieved employee an alternative remedy. To the contrary, permitting an employee to pursue a state tort remedy is entirely consistent with the overall congressional intent of encouraging states to "assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws . . . ."

*Lepore*, 540 A.2d at 1306 (citations omitted).

254. In the area of workplace law there has been tension within the patchwork of state common law, state statutes and federal legislation that has been created since the passage of the National Labor Relations Act of 1935. A complex preemption analysis in traditional union-management labor cases occupied jurists and scholars for most of the 20th century. Occasionally, in the OSHA whistleblower context, arguments arise about the preemptive effect of the National Labor Relations Act, the Labor Management Relations Act, or some other traditional labor act. Those claims are best addressed under the body of preemption law that surrounds the traditional union-management statutes, and are not covered in this article. *See generally* JULIUS G. GETMAN & BERTRAND B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* 333-61 (1988).

Traditional labor preemption cases work from a doctrinal matrix overlaid upon standard preemption doctrine. That set of rules is beyond the scope of this article. However, OSHA whistleblowing can occur in the union setting, which necessitates a careful separation of the relevant causes of action, and hence of the relevant preemption rules. *See, e.g.*, *Platt v. Jack Cooper Trans. Co.*, 959 F.2d 91 (8th Cir. 1992) (refusing to recast unsuccessful attempts at grievance and NLRB relief as a state wrongful discharge cause of action); *Washington v. Union Carbide Corp.*, 870 F.2d 957 (4th Cir. 1989) (discussing the proper order of inquiry in preemption cases, deciding that it can be appropriate for a court to address state law claims on the merits before resolving preemption inquiry pursuant to section 301 of the Labor Management Relations Act); *Paige v. Henry J. Kaiser Co.*, 825 F.2d 857 (9th Cir. 1987).

shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under [section 6] of this title."<sup>255</sup>

Section 18(a) thus eschews any federal preemption of the field of occupational safety and health.<sup>256</sup> Indeed, various other sections of the OSHAct demonstrate that Congress intended to share the field with the states. For example, in section 2(b)(11), Congress states an intent and purpose of "encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws."<sup>257</sup> Also, section 4(b)4 creates a broad exception for worker injuries. It reads:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liability of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.<sup>258</sup>

A reader sympathetic to state causes of action might be tempted to read the language "common law . . . rights . . . with respect to injuries . . . of employees arising out of, or in the course of, employment" to include the economic and dignitary injury of being fired in contravention of public policy. If so, Congress would have expressly disavowed an intent to preempt the state tort. But the common sense of the section 4(b)4 language, taken in its entirety, relates to physical "injury, disease and death."<sup>259</sup> So, our analysis must continue.

255. 29 U.S.C. § 667(a) (2000).

256. The dissenters in *Gade* viewed section 18(a) as an express negation of field preemption. 505 U.S. 1116-21 (1992)(Souter, J., dissenting). Lower courts have also found that "Congress explicitly decided that OSHA would not preempt the entire field of occupational health and safety law." *Kilpatrick*, 632 F. Supp. at 548.

One case, on peculiar facts, indulges in some overbroad language to the effect that OSHA has preempted the entire field of "assuring worker safety." *Thornock v. State*, 745 P.2d 324, 328 (Mont. 1987). At issue was a specific federal regulation governing sawmill safety, which, because of section 18(b), preempted a Montana state inspection statute which had never been submitted to or approved by the Secretary pursuant to section 18(b) procedures. Plaintiff Thornock was seeking to use the state statute to create a tort duty of inspection upon the state. Plaintiff's reasoning was that if there was a duty, the duty had been breached because the sawmill was never inspected, leading to an unsafe situation, which in turn led to the "traumatic amputation" of his arm.

257. 29 U.S.C. § 651(b)(11) (2000).

258. *Id.* § 653(b)(4).

259. *Phillips v. Gen. Elec. Co.*, 881 F. Supp. 1553, 1556-58 (M.D. Ala. 1995).

## 2. Is There a Conflict Between the State Tort and Section 11(c)?

Section 11(c) of the OSHAct covers the same general topic as the public policy tort, namely, punishment of an employer who has disciplined an employee solely for whistleblowing, and remuneration of the wronged employee.<sup>260</sup> But the punishment and remedies provided by section 11(c) are considerably less onerous to the employer, and less restorative to the employee, than those provided by the public policy tort.<sup>261</sup> Also the procedures of section 11(c) result in more screening of claims before they reach federal court, and allow the wronged employee no control over the lawsuit. Do these differences amount to a conflict worthy of a finding of preemption?

Clearly the public policy tort does not render impossible prosecution of a section 11(c) action. Nor does the public policy tort "impede" achievement of federal objectives.<sup>262</sup> But does the state cause of action amount to a dual set of conflicting regulations?<sup>263</sup> Did Congress intend that OSHA retaliation be subject only to the penalties and procedures it set forth in section 11(c)? Is not this especially convincing in cases where plaintiff seeks the tort remedy after pursuing the federal administrative remedy?<sup>264</sup> What of the specter that state courts will become "inevitably entangle[d] . . . in interpreting the complex Federal regulations enacted pursuant to

260. 29 U.S.C. § 660(c) (2000).

261. Compare notes 172-80 *supra* and accompanying text with notes 73-107 *supra* and accompanying text.

262. This standard is articulated in *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 240 (1967). There, the Court found preemption of a state law that denied unemployment benefits to those who filed unfair labor practice charges with the National Labor Relations Board. The Court considered that a key purpose of the National Labor Relations Act was to encourage the filing of such charges. A state law that imposed a punishment for doing so was in conflict and deemed preempted.

263. For example, in *Gade*, 505 U.S. at 92-94, the court was presented with substantially different training requirements for workers who handle hazardous wastes. OSHA required, *inter alia*, 3 days of on-site training; the state required 500 days. Four of the justices found preemption, agreeing

that nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly pre-empted as in conflict with the full purposes and objectives of the OSHA Act. The design of the statute persuades us that Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and that the only way a state may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan that displaces the federal standards.

*Id.* at 98-99 (citations omitted).

The *Gade* plurality was discussing a training standard, in the context of section 18(b); a state common law tort is not a state "standard" for the purposes of section 18(b), *see infra* notes 284-98 and accompanying text. But related arguments have been made by defendants arguing the preemptive effect of section 11(c).

264. *See Fragassi v. Neiburger*, 646 N.E.2d 315, 317 (Ill. App. Ct. 1995).

OSHA . . . lead[ing] to inconsistent interpretations, frustrating the goal of a single, uniform set of requirements."<sup>265</sup> Does allowing state action undermine a possible congressional intent to have retaliatory discharge complaints administratively screened before proceeding to court?<sup>266</sup>

These arguments have some resonance, but they are somewhat overblown, and are given correspondingly short shrift by the courts. The emphases and results of the tort may differ from those of a section 11(c) procedure. But the better view is that any conflicts that do occur do not rise to levels required for federal preemption. This is true for a variety of reasons.

First, section 2(b)(11) "encourag[es] the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws,"<sup>267</sup> and section 18(c)(2) allows states to develop safety plans "at least as effective" as those imposed by the federal standards.<sup>268</sup> OSHA sets a floor, not a ceiling, for the protection of American workers. Tort consequences imposed by the state judiciary are in keeping with those directives.

Second, the employment relationship and the public policy tort have traditionally been in the realm of state law, and therefore a high standard must be met to prove federal preemption.<sup>269</sup> Third, the Supreme Court has rejected arguments for field preemption in ambiguous settings. In *Silkwood v. Kerr-McGee Corp.*<sup>270</sup> and *English v. General Electric Co.*,<sup>271</sup> the Court allowed states to impose tort and punitive damage liability beyond that authorized by federal nuclear safety law.

265. *Id.* at 317-18. The *Fragassi* court dismissed this argument with the terse statement, "Defendant's concern is overstated. . . . State courts are capable of construing Federal regulatory schemes." *Id.* at 318.

266. *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473, 475 (8th Cir. 1990). The panel found "no evidence that 'employees will forgo their [statutory] options and rely solely on state remedies for retaliation.'" *Id.* at 475 (citing *English*, 446 U.S. at 87). The court presented no evidence or reasoning for this conclusion, merely dismissed it as "too speculative a basis on which to rest a finding of pre-emption," *id.*, and found the case "indistinguishable from *English* in any material way." *Id.* at 476.

267. 29 U.S.C. § 651(b)(11) (2000).

268. *Id.* §667(c)(2) (2000). "Congress included a provision in [the OSHAct] whereby the federal government allowed individual states to regulate health and safety, provided the states adopted a scheme of regulation and enforcement at least as vigorous as that required by [the OSHAct]." *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 864 (9th Cir. 1987) (citing 29 U.S.C. §667). *See also* *Germann v. Vulcan Materials Co.*, 106 F. Supp. 2d 1010, 1016 (S.D. Cal. 2000).

269. *See* *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 253-56 (1984).

270. 464 U.S. 238 (1984).

271. 496 U.S. 72 (1990).

In *Silkwood* the Court determined that a jury could award punitive damages in a civil case,<sup>272</sup> sounding in strict liability and negligence, even though the case arose out of the escape of plutonium from a nuclear plant.<sup>273</sup> Nuclear power is strictly and solely regulated by the federal law. Nonetheless, the Supreme Court found that the preempted field did not extend as far as punitive damage awards.<sup>274</sup> The court acknowledged the "tension" between the federal regulation and the added and variable effect of punitive damages under state law, but deemed that tension something that Congress "accepted, tolerated and apparently authorized."<sup>275</sup> The test for preemption, according to *Silkwood*, is whether there is an "irreconcilable conflict" or "frustrat[ion] of objectives" between the state and federal rules.<sup>276</sup> *Silkwood* found no preemption, even though, as the *English* court later pointed out,

the tort claim in *Silkwood* attach[ed] additional consequences to safety violations themselves, rather than to employer conduct that merely arises from allegations of safety violations. [And even though] the prospect of compensatory and punitive damages for radiation-based injuries will undoubtedly affect nuclear employers' primary decisions about radiological safety in the construction and operation of nuclear power facilities. . . .<sup>277</sup>

The *English* case comes even closer to the issue of OSHA preemption. English was an employee at a nuclear facility. She engaged in a fairly dramatic, disobedient demonstration that plant clean-up was inadequate. She was fired. She filed a complaint with the Secretary of Labor charging General Electric ("GE") with violating the anti-retaliation provision of the Energy Reorganization Act of 1975. The complaint was dismissed as untimely. She then filed a

272. *Silkwood*, 464 U.S. at 255.

273. *Id.* at 256.

274. *Id.* at 249-56. This determination was arrived at after an examination of the legislative history to learn why Congress chose to preempt the field of nuclear safety, and evidence of congressional intentions vis-a-vis state tort recovery. *Id.* The holding was limited to recovery of damages based on state law for radiation injuries. "We do not suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law." *Id.* at 256. The rigorous dissenters invoked a presumption against the viability of state law, once the field has been determined to be preempted, and noted that the reason for the preemption of the field would have been the desire to entrust to an expert body the "full authority to issue comprehensive regulations and assess penalties." *Id.* at 280 (Powell, J., dissenting). This last argument carries less force in the OSHA context, as the drafters from the beginning contemplated coexistent state workplace law, and even coexistent state occupational health and safety law.

275. Georgene M. Vairo, *Survey of Recent Tort Preemption Cases*, C491 ALI-ABA 871, 877 (1990).

276. *Silkwood*, 464 U.S. at 256.

277. *English*, 496 U.S. at 86.

diversity action against GE in the United States District Court for wrongful discharge and intentional infliction of emotional distress, seeking compensatory and punitive damages. The wrongful discharge claim was not supported by state law and was not before the court. Defendant GE argued that the remaining state tort action, for intentional infliction of emotional distress, was preempted.

The Court allowed the state tort claim, even though the workplace was covered by a federal statute that had preempted the field. The court found "no 'clear and manifest' intent on the part of Congress . . . to pre-empt all state tort laws that *traditionally* have been available to those persons who, like petitioner, allege outrageous conduct at the hands of an employer."<sup>278</sup>

*Cipollone v. Liggett Group, Inc.*,<sup>279</sup> also supports the public policy tort against preemption by section 11(c) of the OSHA Act. In *Cipollone*, a plurality of the Court found that amendments to the Federal Cigarette Labeling and Advertising Act expressly preempt certain state tort failure-to-warn and fraudulent misrepresentation claims, because those claims might result in the state court "requir[ing] or prohibit[ing]" certain warning language on cigarette boxes.<sup>280</sup> But the plurality was cautious, in view of the presumption against preemption of state tort and contract causes of action, and highlighted that all common law claims were not preempted. Rather, each common law claim must be scrutinized to see if it entered into the zone that is expressly preempted.<sup>281</sup>

A seven-member majority of the *Cipollone* Court found no preemption of state claims for express warranties, fraudulent misrepresentation and conspiracy to misrepresent. Those causes of action derived from matters not based on smoking and health, but rather on more general obligations – the duties to refrain from breaching warranties, to refrain from material deception.<sup>282</sup>

This precedent supports a conclusion that the public policy tort goes to a matter sufficiently distinct from that addressed by section 11(c) that preemption ought not to arise. The tort acknowledges a general duty not to discharge an individual for improper reasons. Although this may affect OSHA enforcement, it does not set new

278. *Id.* at 83 (emphasis added).

279. 505 U.S. 504 (1992).

280. *Id.* at 520-21.

281. *Id.* at 523-24.

282. *Id.* at 529-31.

standards nor even create new duties regarding occupational safety and health. State procedures may differ from those set out in section 11(c), and state liabilities may exceed those imposed by federal law, but these differences do not amount to an impediment to the federal law. Thus, authority supports several reasons why the public policy tort is not in conflict with, or an impediment to, section 11(c).<sup>283</sup>

### 3. Is the State Tort a "State Plan" Which Must be Submitted to and Approved by the Secretary of Labor Pursuant to Section 18(b)?

The OSHAct is replete with cessions of power from Congress to the states. Besides those found at sections 18(a), 1(b)(11) and 4(b)4, another can be found in section 18(b), which provides:

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under [section 6] of this title shall submit a State plan for the development of such standards and their enforcement.<sup>284</sup>

These state standards must be "at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under [section 6]." <sup>285</sup>

At first blush it may appear that a state common law tort could be a state "plan" or a "standard," requiring approval from the Secretary because it "related to [an] occupational safety or health issue with respect to which a Federal standard has been promulgated." In *Gade v. National Solid Wastes Management Association*<sup>286</sup> five justices agreed that a "State standard" within the

283. The Texas Court of Appeals has offered another reason why section 11(c) does not preempt a state law tort action. In a case involving a claim for tortious interference with contractual relations, the court rejected the defendants' argument that section 11(c) preempted the claim. The court wrote:

[T]he language of the statute demonstrates that the whistleblower cause of action through OSHA is permissive rather than mandatory. Indeed, [section 11(c)] states in part that "[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may . . . file a complaint with the Secretary. . . ." . . . The intent here is clear. The language Congress chose for this portion of the statute is permissive. Thus, employees are not required to pursue their causes of action solely through OSHA, nor are they limited to OSHA remedies.

*Land v. Dow Chem. Co.*, 2000 WL 729401 at \*3 (Tex. App. June 8, 2000) (emphasis in original). The court further reasoned that because tort law was traditionally occupied by the state, congressional intent to preempt must be clear and manifest. *Id.*

284. 29 U.S.C. § 667(b) (2000).

285. *Id.* § 667(c)(2).

286. 505 U.S. 88 (1992). In *Gade*, the justices used three different analytical approaches. Justices O'Connor, Rehnquist, White, and Scalia, the plurality, found conflict/impediment



meaning of section 18 is "a state law requirement that directly, substantially, and specifically regulates occupational safety and health is an occupational safety and health standard within the meaning of the Act. That such a law may also have a nonoccupational impact does not render it any less of an occupational standard for purposes of pre-emption analysis."<sup>287</sup> Nonetheless, further analysis leads to the conclusion that section 18(b) does not apply to the public policy tort.

First, there is no "federal standard which has been promulgated under [section 6]" in the 11(c) context. The C.F.R. sections discussing section 11(c) are described as a compilation of "interpretations" to "guide the Secretary of Labor,"<sup>288</sup> rather than "standards," which "requir[e] conditions, or adoption or use of one or more practices, means, methods, operations or processes."<sup>289</sup> Second, the public policy tort is not a "State standard" of the type contemplated by the *Gade* Court<sup>290</sup> or the drafters of section 18(b). A "state plan or standard" is a positive enactment of a state legislature or administrative agency requiring specific practices or processes,<sup>291</sup> rather than a common law rule. Many courts have ended their federal preemption inquiry here, concluding that state common law duties governing the employment relationship are simply not health and safety standards.<sup>292</sup>

preemption. *Id.* at 99. Justice Kennedy, concurring, found express preemption by negative inference in the reading of section 18. *Id.* at 111 (Kennedy, J., concurring). Justices Souter, Blackmun, Stevens and Thomas, in dissent, would have required a far clearer expression of preemptive intent by Congress before overturning the presumption of validity accorded to state law. *Id.* at 115 (Souter, J., dissenting).

287. *Id.* at 107.

288. 29 C.F.R. § 1977.2 (2001).

289. 29 U.S.C. § 652(8) (2000).

290. In *Gade*, OSHA had promulgated regulations detailing training requirements for employees engaged in hazardous waste operations, mandating three days of field experience for certification. 505 U.S. at 92. After the OSHA interim regulations were in effect, the Illinois Legislature, without approval from the Secretary of Labor, enacted rules detailing additional requirements for the same personnel. Illinois required 500 days of experience (4,000 hours) for licensing. *Id.* at 93-94. The articulated purposes of the state legislative enactment were "both 'to promote job safety' and 'to protect life, limb and property.'" *Id.* at 91. Despite the dual purpose, a majority of the Court found the Illinois laws to be state occupational health and safety standards. *Id.*

291. 29 U.S.C. §652(8).

292. See, e.g., *McElroy v. SOS Int'l, Inc.*, 730 F. Supp 803, 807 (N.D. Ill. 1989); *Fragassi v. Neiburger*, 646 N.E.2d 315, 317 (Ill. App.Ct., 1995); see also *People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 902, 968-75 (Ill. 1989) (finding that OSHA does not preempt state personal injury tort or criminal law). The question whether criminal laws and prosecutions constitute "State standards" for the purposes of section 18(b) has attracted considerable attention. For example, one commentator observed:

Standards are thus ex ante, prophylactic measures prescribing or proscribing specific practices. In contrast, general state criminal laws covering homicide, manslaughter,

But there is another point of view. Given the force of judge-made law in the American system of jurisprudence, state courts do "create" tort duties, which do have considerable force of law. The high costs of breaching those duties are effective motivators for compliance with the duty. In *Cipollone v. Liggett Group, Inc.*,<sup>293</sup> a majority of the Court noted that tort duties do indeed impose "requirements or prohibitions,"<sup>294</sup> and that "state law" includes "common law as well as statutes and regulations."<sup>295</sup>

*Cipollone* notwithstanding, it is difficult to argue that the state public policy tort "directly, substantially, and specifically regulates occupational safety and health"<sup>296</sup> The state tort "directly" regulates the employment contract, and the reasons for its termination. The state tort limits the state-created at will rule. In deciding whether the tort should be allowed, and determining its breadth, courts consider the underlying public policy at issue. But they also take into account the effect of their decision on the business climate of the state, the employer's interest in running the business as he sees fit, the employee's interest in job security and the stability of the job market.<sup>297</sup>

battery, and reckless conduct are ex post, reactive measures, focusing on conduct after an injury has occurred. They do not prescribe specific "practices, means, methods, operations, or processes" as such, but rather focus after the fact on whether conduct causing an injury in particular circumstances was blameworthy, as measured by general societal norms.

Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535, 542-43 (1987). This commentary applies to state common law tort as well.

293. 505 U.S. 504 (1992). The *Cipollone* Court studied language in the Public Health Cigarette Smoke Act of 1969 which specified: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are [lawfully] labeled." *Id.* at 515 (emphasis added). Four members of the Court concluded:

The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

*Id.* at 521.

294. *Id.* The majority's analysis was largely affected by the fact that Congress had broadened its preemptive language between 1965 and 1969, thereby demonstrating a clearer intent to preempt. *Id.* at 520. While a "requirement or prohibition" is broader than a "State plan," the analysis is not dissimilar.

295. *Id.* at 522.

296. *Gade*, 505 U.S. at 107.

297. See *Tameny v. Atlantic Richfield Co.*, 601 P.2d 1330, 1333 n.7 (Cal. 1980) (citing academic commentary "exposing the arbitrariness" of the at-will doctrine); *Adler v. American*

Certainly section 11(c) was included in the OSHAct to encourage reporting of OSHAct violations and to discourage cover-ups; tort remedies with punch enhance achievement of the same goals. But the substantial influencing effect of the tort is on the employer's decision to fire, not on the employer's eradication of the occupational safety or health hazard. The public policy tort has an insufficiently direct or specific effect on safety and health compliance for section 18(b) to apply. Rather, the public policy tort lies in the realm of section 18(a), so state courts are free to exercise jurisdiction and provide remedies to discharged employees.<sup>298</sup>

#### 4. Lower Court Decisions on Preemption

In *Fragassi v. Neiburger*,<sup>299</sup> the Illinois Appellate Court reconciled *Gade* and *English* in the OSHA context and correctly concluded

Std. Corp, 432 A.2d 464, 470 (Md. Ct. App. 1981); *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 509, 511-12 (N.J. 1980); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983). These motivators are not "directly" related to occupational safety and health.

298. This conclusion is in line with *English*, 496 U.S. 72 (1990), which emphasized that "clear and manifest" congressional intent must be found to preempt state common law that "traditionally" has been available. *Id.* at 83. The *English* court, assessing how "directly related" a state tort was to a federally protected area, included the following instructive language:

[N]ot every state law that in some remote way may affect the nuclear safety decision made by those who build and run nuclear facilities can be said to fall within the pre-empted field. We have no doubt, for instance that the application of state minimum wage and child labor laws to employees at nuclear facilities would not be pre-empted, even though these laws could be said to affect tangentially some of the resource allocation decisions that might have a bearing on radiological safety. Instead, for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decision made by those who build or operate nuclear facilities concerning radiological safety levels. We recognize that the claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistle-blowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.

*Id.* at 85. While *English* was a field preemption case, it is appropriate to look to it for aid in resolving a conflict preemption question because "this kind of purpose-conflict pre-emption, which occurs when state law is held to 'undermine a congressional decision in favor of national uniformity of standards,' presents 'a situation similar in practical effect to that of federal occupation of a field.'" *Gade*, 505 U.S. at 115-16 (Souter, J., dissenting) (quoting LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 486 (2d ed 1988)).

The Energy Reorganization Act of 1974 clearly preempts the field. Thus, the question before the *English* court was whether the state tort was in the field. The OSHAct does *not* preempt the field of workplace regulation and does not even preempt the field of occupational safety and health, as is demonstrated by sections 18(a) and (b). Additionally, the state torts in *English* were *not* covered in the Energy Reorganization Act of 1974, whereas the problem of retaliatory discharge *is* directly covered by the OSHAct.

299. 646 N.E.2d 315 (Ill. App. Ct. 1995). *Fragassi* is cited with approval in *Sherman v. Kraft Gen. Foods*, 651 N.E.2d 708, 713 (Ill. App. Ct. 1995).

that the public policy tort is not preempted.<sup>300</sup> In *Fragassi*, the plaintiff employee was fired for suggesting to the employer that an OSHA representative should conduct an inspection.<sup>301</sup> She filed an action in state court for retaliatory discharge. The trial court dismissed her complaint relying on *Gade*.<sup>302</sup> The appellate court reversed.<sup>303</sup> The court stressed that not every state law that "tangentially" affects occupational safety and health is preempted.<sup>304</sup> It further stated, "State causes of action are normally not preempted merely because they impose liability over and above that authorized by Federal law."<sup>305</sup> It refused to allow *Gade* to cast a shadow over *English* or over previous lower court decisions finding no federal preemption of the state tort.<sup>306</sup> The court observed, "*Gade* did not overrule *English*, but rather cited it with approval in delineating the proper scope of Federal preemption."<sup>307</sup>

At least one lower court was expressly impatient with arguments for federal preemption, denigrating them as "absurd,"<sup>308</sup> and "run of the mill."<sup>309</sup> Lower courts believe that they are promoting federal policy by allowing the state tort. For example, a Missouri court found no preemption of the state tort because there was no actual conflict, and stated that it was promoting the "more just policy of allowing plaintiffs remedies in addition to the single narrow remedy provided by OSHA."<sup>310</sup>

A case with interesting twists is *Phillips v. General Electric Co.*<sup>311</sup> A terminated employee alleged that he was fired because he reported

300. *Fragassi*, 645 N.E.2d at 316-18.

301. *Id.* at 316.

302. *Id.*

303. *Id.* at 318.

304. *Id.* at 317.

305. *Id.*

306. The court cited *McElroy*, 730 F.Supp. 803 (N.D.Ill. 1989) and *People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962 (Ill. 1989) with approval, defending them against a charge that *Gade* had rendered them "unreliable precedent." "We are not convinced that *Gade* has wrought such a complete change in the scope of Federal preemption of State tort law. *Fragassi*, 646 N.E.2d at 318.

307. *Fragassi*, 646 N.E.2d at 318.

308. *Kilpatrick v. Del. County Soc. for Prevention of Cruelty to Animals*, 632 F. Supp. 542, 548 (E.D. Pa. 1986) (noting "it would be absurd for Congress to permit states to assert jurisdiction over occupational safety and health issues [section 18(a)] while prohibiting states from protecting employees who aid in the enforcement of state law by reporting suspected occupational hazards to state agencies.").

309. *Id.* at 547.

310. *Shawcross v. Pyro Prods., Inc.*, 916 S.W.2d 342, 344-45 (Mo. Ct. App. 1995).

311. 881 F. Supp. 1553 (M.D. Ala. 1995).

unsafe practices to management personnel.<sup>312</sup> He filed suit<sup>313</sup> pursuant to an Alabama code section prohibiting termination "solely because the employee has filed a written notice of violation of a safety rule . . . ."<sup>314</sup> The employer argued that section 11(c) of the OSHAct preempted the Alabama statute.<sup>315</sup> The court disagreed, citing section 4(b)4 of the OSHAct, which saves from preemption any "common law or statutory rights, duties or liability of employers and employees under any law with respect to injuries, disease, or death of employees arising out of, or in the course of, employment."<sup>316</sup> The court found that the Alabama code section was a workers' compensation provision, "pertain[ing] to employee injuries arising out of the employment context,"<sup>317</sup> and therefore fitting "neatly and comfortably"<sup>318</sup> into the section 4(b)4 savings clause. But, ironically, the saving of the Alabama code section proved to be the undoing of plaintiff's claim. To use section 4(b)4 to save the state code section from preemption, the court gave the state code section an extremely narrow reading.<sup>319</sup> Because plaintiff had not been physically injured, disabled or killed, he could not invoke the narrowly contoured state statute, and employer's summary judgment motion was granted.<sup>320</sup>

In a case arising in New Jersey,<sup>321</sup> an employer sought to use section 11(c) as a preemptive sword, invoking the "complete preemption doctrine,"<sup>322</sup> in an attempt to remove state OSHA

312. *Id.* at 1555. Also implicit were allegations of discrimination because he attempted to assist and train an African-American employee, which irritated superiors who favored whites. *Id.*

313. The action was filed in state court and was removed to federal court. *Id.* at 1556.

314. *Id.* at 1557 (quoting ALA. CODE § 25-5-11.1).

315. *Id.* at 1557-58.

316. *Id.* at 1558 (quoting 29 U.S.C. §653(b)(4)).

317. *Id.*

318. *Id.*

319. Indeed, the court's reading of the statute strains credulity. Section 25-5-11.1 of the Alabama code protects employees for termination "solely because the employee has filed a written notice of a violation of a safety rule pursuant to subdivision (c)(4) of section 25-5-11." Section 25-5-11(4) defines willful conduct as "willful and intentional violation of a specific written safety rule of the employer after written notice to the violating employee by another employee who, within six months after the date of receipt of the written notice, suffers injury . . . ." It does not at all follow that an employee giving the written notice was not protected by section 25-5-11.1 merely because he was never injured. In fact, if section 25-5-11(4) has the desired result, after written notice is served the problem will be corrected and no one will be hurt. It is oddly perverse, and not at all mandated by the language of section 25-5-11.1, to say that one is protected from retaliation only if one is physically hurt, not if one is acting in accord with statute.

320. *Id.* at 1558.

321. *Kozar v. AT&T*, 923 F. Supp. 67, 68-72 (D.N.J. 1996).

322. *Id.* at 69-70. *Kozar* defined the "complete preemption" doctrine as a corollary to the

statutory claims and common law retaliatory discharge claims to federal court. The federal district court declined jurisdiction because the federal cause of action was not comparable to the state causes of action.<sup>323</sup>

The New Mexico Court of Appeals was willing to make the blanket assertion that the OSHAct "was not designed to preempt any common-law remedies."<sup>324</sup> It found support in legislative history that "indicates that Congress only intended to provide a parallel remedy for breach of the common-law duty to provide employees a safe workplace."<sup>325</sup>

#### D. Confusion and Clarity in the Courts

Appellate courts have correctly determined that the OSHAct does not preempt the state public policy tort. But employer defendants, and some trial courts, continue to make the argument that federal preemption should apply. One reason may be the understandable optimism of litigants, especially in a fuzzy area of law. Also, confusion may result from the varying uses of the word "preemption." Some courts use the term "preemption" to cover a variety of arguments, including: 1) the *Taylor v. Brighton*<sup>326</sup> question of whether a private cause of action may lie; 2) statutory exclusion questions; 3) federal preemption; or 4) a mixture of the above.

The best example of how courts sling these related words and concepts around can be found in *Braun v. Kelsey-Hayes Co.*<sup>327</sup> There, a federal district court, applying Pennsylvania law, dismissed a common law wrongful discharge claim by an employee who was allegedly wrongfully discharged because he tried to correct safety

well-pleaded complaint rule. "This corollary . . . applies when 'the Court has concluded that the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Id.* at 70 (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)). *Kozar* explained the complete preemption doctrine quite well, and cited the other two cases in the OSHAct area which declined complete preemption. *Pitchford v. Aladdin Steel, Inc.*, 828 F. Supp. 610 (S.D. Ill. 1993); *Lengel v. Fisher-Price, Inc.*, 1991 WL 224417 (W.D.N.Y. Oct. 28, 1991).

323. *Kozar*, 923 F. Supp. at 68-72.

324. *Gutierrez v. Sundance Indian Jewelry, Inc.*, 868 P.2d 1266, 1274 (N.M. Ct. App. 1993).

325. *Id.* (quoting S. Rep. No. 91-1282 (1970) reprinted in 1970 U.S.C.C.A.N. 5177, 5186). This common law duty to provide a safe place to work has been recognized in New Mexico, *Koenig v. Perez*, 726 P.2d 341 (N.M. 1986), and is generally recognized in the United States. See PROSSER & KEETON ON THE LAW OF TORTS, § 80 (W. Page Keeton et al. eds., 5th ed. 1984).

326. 616 F.2d 256 (6th Cir. 1980). See *supra* notes 116-45 and accompanying text.

327. 635 F. Supp. 75 (E.D. Pa. 1986).

problems.<sup>328</sup> The plaintiff cited the OSHAct along with other statutes to manifest the public policies which he charged were violated by his discharge.<sup>329</sup> The court found that the OSHAct had "preempted" the common law right of action, because the OSHAct provides specific and exclusive remedies "for corporate retaliation against employees who participate in any action to carry out the purpose of the federal statutes," relying exclusively on *Taylor*.<sup>330</sup> The court also cited *Walsh* for the point that "[s]ince OSHA provides a remedy for employees that claim retaliatory termination, the plaintiff cannot maintain his wrongful discharge action against the defendant."<sup>331</sup> *Braun* was gently but correctly criticized by a federal district court in Illinois, which wrote:

With due respect, however, the court in *Braun* apparently based its holding of preemption in part on the finding that Pennsylvania law would not recognize that particular common law claim of retaliation discharge. Because this court believes that the questions of whether there is preemption and whether state law recognizes a particular claim are entirely separate, it is reluctant to follow *Braun*.<sup>332</sup>

Another example of judicial confusion in language emanates from a federal district court in Kentucky.<sup>333</sup> Refusing to find a cause of action under Kentucky law, it wrote:

Both the federal OSHA statute, 29 U.S.C. §660(c), and the Kentucky OSHA statute, K.R.S. § 338.121(3)(b), create a public policy exception by prohibiting termination or discrimination against employees who refuse to violate the statutes. Both statutes provide a structure for employees to pursue when alleging violations. *These statutes preempt wrongful discharge claims based on OSHA.* Under the teaching of *Grzyb* the wrongful discharge claims pertaining to OSHA will be dismissed.<sup>334</sup>

This finding of "preemption" was accomplished with none of the search for legislative intent that the Supreme Court worked so hard to wrest from various sources, and without resort to the Supremacy Clause. This was more nearly an appeal to the *Walsh* doctrine.

The court in *Kilpatrick v. Delaware County Society for*

328. *Id.* at 79.

329. *Id.*

330. *Id.* at 80.

331. *Id.*

332. *McElroy v. SOS Int'l, Inc.*, 730 F. Supp. 803, 809 n.7 (N.D.Ill. 1989).

333. *Hines v. Elf Atochem*, 813 F. Supp. 550 (W.D. Ky. 1993).

334. *Id.* at 552 (emphasis added).

*Prevention of Cruelty to Animals*<sup>335</sup> identified two types of preemption arguments made by the defendant. One the court called "run of the mill" field preemption.<sup>336</sup> The other was characterized as follows:

[D]efendant argues that the existence of a remedy for plaintiff in this case pursuant to OSHA would be viewed by the Pennsylvania Supreme Court as a sufficient reason not to recognize a common law cause of action for wrongful discharge. According to defendant, even if Congress did not intend to preempt Pennsylvania law, Pennsylvania courts would view the existence of a federal statutory remedy as a sufficient reason to preempt voluntarily Pennsylvania common law and the policies those laws are meant to further.<sup>337</sup>

The court's considered the defendant's argument that state law would not recognize the tort because of an available remedy under the OSHAct. In a subheading the court referred to this argument as a "state based preemption argument."<sup>338</sup> The court could have avoided confusion by reserving the term "preemption" for "federal preemption" and otherwise assessing the "exclusivity" of statutory remedies.

Happily, cases can be found that are models of clarity. For example, in *Lepore v. National Tool and Manufacturing Co.*<sup>339</sup> the New Jersey Superior Court Appellate Division distinguished the federal preemption question from the *Taylor* concern that section 11(c) cannot be enforced by private parties.<sup>340</sup> The court wrote:

Thus, only the Secretary of Labor is authorized to file a complaint alleging a violation of [section 11(c)(1)]. The complaint here, however, does not seek to remedy a violation of OSHA. Rather, as discussed previously, plaintiff seeks to remedy a retaliatory discharge in violation of state laws and public policy. It is entirely distinct from a [section 11(c)(1)] private cause of action.<sup>341</sup>

The *Lepore* court further distinguished the *Walsh* exclusivity argument that the common law complaint should be dismissed "because there existed an available state administrative remedy."<sup>342</sup> Ultimately the common law tort was allowed to run concurrently with the federal administrative remedies.

335. 632 F. Supp. 542 (E.D. Pa. 1986).

336. *Id.* at 547.

337. *Id.* (emphasis added).

338. *Id.* at 548.

339. 540 A.2d 1296 (N.J. Super. Ct. App. Div. 1988).

340. *Id.* at 1306-07.

341. *Id.* (citations omitted).

342. *Id.* at 1307.



*E. Other Policy Concerns*

When courts decide whether to allow the public policy tort, the real question they should address is how their states protect their citizens. Citizens of the state include employees, employers, consumers, users of the courts, taxpayers and everyone related to these people. Choosing to allow or to disallow the tort has ramifications that extend beyond the individual parties.

Courts should consider the following questions. Who will decide, the legislature or the courts? What will be prohibited in the arena of workplace actions? What will the enforcement mechanism be? If the goal is to deter, and compensate for, retaliatory job action, who should pay how much to whom? Who should control the proceeding? Most importantly, what will the consequences of any rule be?

Both the public policy tort and section 11(c) seek to prevent wrongful job action, that is, job action that is motivated by the desire to punish OSHA whistleblowing. The question of motive is factual. It is difficult to predict in advance what a fact finder will find. Given that indeterminacy, the more money and other remedies available to the employee, the more hesitant the employer will be to take negative job action. This hesitancy may increase inefficiencies at the workplace, affecting profits and other workers. The goods or services produced by the employer may cost more to consumers. If the individual employee, with his lawyer, controls the lawsuits, more cases may be filed and they may take longer to settle than if control rests with overworked, politically conscious government officials. If the cost of lawsuits increases more in a given state than in others, that state may lose business to other states, with concomitant ripple effects. Allowing too many lawsuits clogs the courts. True redundancy of procedure, standards of proof and remedy should be avoided.

On the other hand, if less money is accorded the employee, he must bear more losses himself. This affects his family and his potential as a consumer, and may burden private and public social services. If he has less control over the lawsuit, he may have less psychological satisfaction from the lawsuit, and he may be made less whole in other ways that matter to him. Allowance of the tort benefits not only the individual, but also the general public, in that it aids enforcement of the statute. Workers talk to and about each other, and they read the newspaper. If they perceive that whistleblowers wind up getting hung out to dry, fewer people will blow the whistle. Fuller remedies encourage the initial reporting of

the OSHA violation and discourage the violation of section 11(c). Employees and the general public benefit from a safer workplace.

The far reaching boundaries of these myriad concerns, and the political subtexts that accompany them, have led some courts to defer to the legislature before "creating" the tort duty.<sup>343</sup> However, courts in most states have been willing to reach this general policy decision on their own.

Courts should concentrate on the large policy issues, and should not get confused by, or hide behind, doctrines of federal preemption, statutory exclusivity, or the like. The public policy tort goes to larger employment matters than does section 11(c); the differing remedies and procedures are not duplicative, but rather they reveal the differing goals of the actions. Although the tort affects enforcement of the OSHAct, it is not preempted by either the letter or the policies of federal preemption doctrine. Congress has manifested no intent to preempt state wrongful discharge actions. Similarly, the public policy tort is not merely a private right of action for section 11(c).

A state court is free to decide that federal statutory remedies are sufficient for its citizen employees if they are wrongfully fired. But another state court is equally free to provide a procedure which will give its citizens more money or more control than the federal statute. The measure of the harm that has befallen a wrongfully fired worker is usually more than the back pay amount. Usually tort recovery will come closer than the section 11(c) recovery to restoring the worker to where he or she would have been but for the wrong. Given the importance of safe employment and the widespread public benefits that result from disclosure and prevention of OSHA violations, a state court that allows the public policy tort may well have made the better choice.

If a state court makes such a determination, it is within its traditional common law roles, roles that pre-date the OSHAct. A state court may properly use its police powers to protect the health and safety of state residents. Regulation of the employment relationship and creation of tort duties are among the established tasks of state courts. When state courts enhance the rights and remedies of OSHA whistleblowers, they are acting pursuant to the design of the OSHAct, which contemplated that the federal legislation would set a floor but not a ceiling for worker protection.

343. *Murphy Am. Home Prods. Corp.*, 448 N.E.2d 86 (N.Y. 1983).

#### IV. CONCLUSION

Most people, encountering an employee who was fired in true, intentional retaliation for reporting a serious OSHA violation, would seek to return him to his rightful position, to where he would have been but for the wrongful discharge. This article has mapped out two paths. One, section 11(c), may not get him quite to his rightful position. The other, the state public policy tort, may get him closer because of greater compensatory damages, more possibility of punitive damages, and greater employee control of the process. But that second path may have higher costs to the state. State courts are within their province if they choose to bar plaintiffs from this path. But if they do, they should state policy reasons for doing so, not stumble over the misplaced road blocks discussed in this article, namely, fear that allowing the public policy tort amounts to allowing a private right of action, that the statute is exclusive, or that federal preemption is present. If the public policy tort exists in the state for most whistleblowers, nothing in the OSHAct leads to a different conclusion in the case of the OSHA whistleblower.