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"Snitching" for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing

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"SNITCHING" FOR THE COMMON GOOD: IN SEARCH OF A RESPONSE TO THE LEGAL PROBLEMS POSED BY ENVIRONMENTAL WHISTLEBLOWING

by

STEFAN RUETZEL

A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment of the Requirements for the Degree

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"SNITCHING" FOR THE COMMON GOOD: IN SEARCH OF A RESPONSE TO THE
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Approved:

[Handwritten signatures and dates]

Graduate Dean

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CHAPTER 1. INTRODUCTION

Since the early 1970's, the problems posed by diminishing natural resources, mounting waste, and increased pollution of air and water have gained public attention. Federal, state and local legislators have responded to the growing public awareness toward environmental problems by enacting a comprehensive net of protective environmental regulations. In many instances, the United States today has the most stringent environmental laws of all industrialized nations and certainly has the reputation for the most draconian enforcement of these laws.¹

However, widespread non-compliance by private polluters and non-enforcement by government authorities exists.² To a large extent, this lack of compliance and enforcement is an information problem. After the consciousness-raising decades of the 1970's and 1980's,³ most companies are nowadays aware of the requirements environmental law imposes on how they have to conduct their respective businesses. Despite this knowledge of the legal standards, however, management, as well as the responsible government authorities, often do not know when conduct violating these standards occurs.

² For example, in 1988, although the majority of cases are settled, the EPA initiated 225 administrative actions and 9 criminal prosecution actions against violators, see 19 ENVTL. RPT. 1762 (BNA) (Current Developments) (1988)
³ See Borland, supra note 1, at 22-27.
reporting of violations by employees has, as examples from other areas show, the potential to dramatically increase compliance with and enforcement of environmental law.

Within the last 25 years, courts and legislators have developed a variety of approaches to deal with the legal problems posed by employees who report alleged or true wrongdoing of their employers. In balancing the interests of the employer in the loyalty and obedience of its workforce and the conflicting interest of the employee-citizen in law enforcement and compliance, a body of "whistleblowing" law has gradually evolved, which forms, in the eyes of many employment lawyers, the "hottest niche of their practice today."

This article argues that in order to further environmental protection, a uniform state statute encouraging employees to report perceived violations of environmental law externally to government authorities should be adopted and outlines the content of such a statute.

Chapter 1, after defining the scope of the article, examines the extent of the existing legal protection of such "environmental" whistleblowing, as well as legal disincentives to blow the whistle. Chapter 2 shows that, by balancing the interests involved, encouraging external whistleblowing should be the goal of whistleblower regulation. It then examines

6) The term "whistleblower" stems either from an analogy to an official in sports, such as a football referee, who can blow a whistle to stop action, see MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 15 (1992); ALAN F. WESTIN, WHISTLEBLOWING! LOYALTY AND DISSENT IN THE CORPORATION 1 (Alan F. Westin ed., 1981), or from the act of an English bobby who blows his whistle to alert other law enforcement officers of the commission of a crime, see Vanessa F. Kuhlmann-Macro, Blowing The Whistle On The Employment At-will Doctrine, 41 DRAKE L.REV. 339 N7 (1992); Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 727 (Texas 1990).
the possible ways to encourage such reporting through law, the receptiveness of whistleblowing to legal regulation, and outlines the parameters of a model whistleblower statute.
CHAPTER 2. ENVIRONMENTAL WHISTLEBLOWING: THE SCOPE OF THE THESIS

I. WHISTLEBLOWING DEFINED

Although disagreement in detail exists, whistleblowing is generally defined as the "(1) disclosure (2) of wrongdoing (3) under the control of the organization (4) by a former or current member of that organization (5) to a person or organization that may be able to effect action." 8

Generally, not only disclosure by actively volunteering information (active whistleblowing), 9 but also the response to a lawful request for information from government authorities (passive whistleblowing), is covered. 10 Moreover, usually the refusal to obey orders to commit wrongdoing is considered passive whistleblowing. 11

The refusal may be viewed as a complaint to the person giving the order that the employee perceives the ordered behavior as wrongdoing.

9) Westman, supra note 5, at 19-20; Miceli & Near, supra note 6, at 16; Dworkin & Near, supra note 8, at 244 ("good faith reporting"); Elliston, supra note 8, at 5-6.
10) Westman, supra note 5, at 19-20 also includes "embryonic whistleblowing," i.e. preventative retaliation against a whistleblower before he has opportunity to disclose.
Whether an activity or omission constitutes "wrongdoing" is not judged by an objective standard but is determined by the perception of the individual whistleblower. Generally, the whistleblower must perceive the act either as illegal or as "illegitimate", "immoral", "unethical" or just "beyond the purview of what an organization legitimately can expect an employee to do." The distinctions between the latter characterizations appear to be more semantic than substantive. As to illegal behavior, there seems to be consensus that it covers "any act punishable by the state, regardless whether it is punished by administrative or civil law or criminal law."

The requirement of wrongdoing "under the control of the organization" covers any wrongdoing occurring in the organization, be it on behalf of the organization or on behalf of the wrongdoer. Authorization or knowledge of supervisors or top management is not necessary.

Finally, only former or current members of the organization can be whistleblowers, including members whose job ostensibly requires them to report wrongdoing and excluding, e.g., independent contractors. However, considerable controversy exists about who may be the recipient of the disclosure. There is consensus that reports to

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12) Both activities and omissions can constitute wrongdoing, see Miceli & Near, supra note 6, at 18. The term "act" in the following also encompasses omissions.
13) Id. at 18-19; Dworkin & Near, supra note 8, at 244; see Hausermann, Whistle-Blowing: Individual Morality in a Corporate Society, 29 BUS. HORIZONS 1,4 (1986); Westman, supra note 5, at 19
14) Dworkin & Near, supra note 8, at 244; Miceli & Near, supra note 6, at 17-18; Rongione, supra note 5, at 284; Westin, supra note 6, at 9; Elliston, supra note 8, at 13.
15) See, e.g., Miceli & Near, supra note 6, at 17 (defining illegitimate as "beyond the realm of the organization's authority").
17) Miceli & Near, supra note 6, at 19-20; Dworkin & Near, supra note 8, at 243.
18) Miceli & Near, supra note 6, at 19-20; Dworkin & Near, supra note 8, at 243.
19) Miceli & Near, supra note 6, at 16-17 ("general agreement among theorists"); Dworkin & Near, supra note 8, at 243 ("generally agreed"); Elliston, supra note 8, at 14.
20) Miceli & Near, supra note 6, at 21.
parties outside the organization constitute whistleblowing. However, opinions are split as to whether reports to internal recipients are covered.\textsuperscript{22} Empirically, whistleblowers who use internal channels do not significantly differ from external whistleblowers. Therefore, and because of the fact that internal complaints are very often lodged prior to external whistleblowing,\textsuperscript{23} the majority rightly includes both categories under the definition.\textsuperscript{24} As whistleblowers characteristically "lack authority and power to make the changes being sought (and) therefore must appeal to someone of greater power or authority,"\textsuperscript{25} there is no need to restrict it to outside parties.

II. ENVIRONMENTAL WHISTLEBLOWING

For the purpose of this article, a restriction to private sector "environmental whistleblowing," i.e. the active disclosure of violations of environmental laws, either internally or externally to government authorities, seems appropriate.

Active whistleblowing is the form of reporting the least influenced by legal regulation outside existing whistleblower law. Therefore, it seems to be best suited to show the basic problems of environmental whistleblowing. Other than active whistleblowing, passive whistleblowing is subject to various legal incentives to report. As it is the reaction to either an information request by government or an order by the employer to perform an unlawful act, reporting is not the product of a free decision but is forced to a large degree by legal rules. Information requests by government, for example a subpoena, are governed by discovery and administrative law and may impose a duty to testify.\textsuperscript{26} The

\textsuperscript{22} See cit. at Elliston, supra note 8, at 4, 9-10; Miceli & Near, supra note 6, at 25.
\textsuperscript{23} See Miceli & Near, supra note 6, at 26-27.
\textsuperscript{24} Dworkin & Near, supra note 8, at 243; Westman, supra note 5, at 19-20; Miceli & Near, supra note 6, at 25-27.
\textsuperscript{25} Miceli & Near, supra note 6, at 15; compare Westin, supra note 5, at 1-2.
\textsuperscript{26} See FED.R.CIV.P. 45; FED.R.CRIM.P. 17.
decision whether to refuse to perform an unlawful act may be heavily influenced by concerns of personal criminal or civil liability when following the order.\textsuperscript{27}

The restriction to violations of environmental law, rather than immoral or unethical behavior, reflects the prerogative of the legislative to define what constitutes legally recognized wrongdoing in our society.

As internal and external whistleblowing usually go hand in hand and pose similar problems, both are covered. The limitation of external complaints to government authorities reflects government's primary responsibility to enforce compliance with environmental law.\textsuperscript{28}

Finally, the analysis is limited to private sector employees. Private industry has by far the highest share in the number of activities potentially dangerous for the environment, has to make profits in order to survive in the market, which may further unlawful behavior, and lacks control mechanisms available in public sector enterprises.

\textsuperscript{27} Compare Daniel Riesel, \textit{Criminal Prosecution and the Regulation of the Environment}, in \textit{ENVIRONMENTAL LAW 1993}, at 519, 546-548 (ALI-ABA Course of Study 1993).

\textsuperscript{28} Environmental laws are also "enforced" by civil actions of individuals, such as neighbors or injured parties. However, although there may be some overlap, the goal of these actions are not the protection of the environment, but individual damages.
CHAPTER 3. A SURVEY OF ENVIRONMENTAL WHISTLEBLOWING LAW

American employment law provides for a specific body of whistleblower protection law. In addition, environmental whistleblowing is governed by the general principles of law.

I. ENVIRONMENTAL WHISTLEBLOWER PROTECTION LAW

A. THE EMPLOYMENT AT-WILL DOCTRINE

In the United States, the employment relationship of roughly three quarters of the private sector workforce is based on the employment at-will doctrine. Developed in the middle of last century, this doctrine permits an employer to terminate an employee "for good cause, for no cause, or even for cause morally wrong without being thereby guilty of legal wrong." Although substantially modified and eroded in the last twenty years, the free severability of the employment relationship by both the employer and the employee is still the basic underlying assumption in American employment law.

29) See U.S. Bureau of the Census, Dep't of Commerce, Statistical Abstract of the United States 1982-83, tables 500, 683, 624; Kevin D. Hill, Whistleblower: A Study of Alternative Remedies, 4 TEMP. ENVTL. L. & TECH. J. 50n3 1985; the remainder are employed either under personal contracts or covered by a collective bargaining agreement, id.
30) For the history of the doctrine see Hill, supra note 29, at 51-52; Atkins, supra note 4, at 540-541.
33) Most states apply a presumption for at-will employment, which is in some states statutory, see, e.g., CAL. LAB. CODE Sec. 2922; GA. CODE ANN. Sec. 34-71; N.D. CENT. CODE Sec. 34-03-01; Siniscalo, supra note 11, at 7.
B. LEGAL PROTECTION OF ENVIRONMENTAL WHISTLEBLOWING

In light of the in principle unrestricted right to discharge an employee, the whistleblowing discussion focuses mainly on legal protection against retaliation by the employer. Such protection is available both on the federal and the state level.

On the federal level, a large number of statutes protect public or private whistleblowers today. The protection of private sector whistleblowers in several "environmental" statutes overlaps substantially with other federal statutes protecting the public or workplace safety and health.

On the state level, the courts reacted to the problem of whistleblowing by creating common law remedies against retaliation on a step-by-step basis. Although frequently courts rely on contract theories or construe a covenant of good faith and fair dealing to protect whistleblowers, the by far most important remedy is a tort action based on public policy considerations. As common law remedies evolved slowly and incoherently, several states enacted - in addition to a few scattered and limited existing provisions - general whistleblower statutes protecting private sector employees.

34) See compilation at Westman, supra note 5, Appendix C.; Lofgren, supra note 21, at 321 n.41.
37) See, e.g., the development in California at Westman, supra note 5, Appendix D.
39) See, e.g., Terry Morehead Dworkin & Elletta Sangrey Callahan, Employee Disclosures To the Media: When Is A "Source" A "Sourcerer"?, 15 HASTINGS COMM. & ENT.L.J. 357, 373 n.103 ("neither of these theories has been utilized to any degree in whistleblowing cases").
40) Compare Westman, supra note 5, at 1-20.
42) See infra notes 161-234 and accompanying text.
Montana's Wrongful Discharge From Employment Act covers private sector whistleblowing as well.43

Rather than to depict the details of all existing sources of private whistleblower protection law, this chapter will show the variety of the different approaches in the three main sources of law shielding environmental whistleblowers: Federal environmental statutes providing for administrative proceedings, state common law tort actions, and state whistleblower statutes.

1. Federal Statutes: Protection By An Administrative Agency

Among the federal statutes containing whistleblower provisions, eight are traditionally regarded as "environmental" in nature.44 However, comprehensive federal whistleblower legislation in the area of environmental law does not exist. Many important environmental statutes do not contain such provisions, and the ones which do form an incoherent picture.

43) MONT.CODE ANN. Sec. 39-2-901.
44) See 42 U.S.C. Sec. 7401, Sec. 7622 (Clean Air Act, CAA); 42 U.S.C. Sec. 9601, Sec. 9610 (Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); 42 U.S.C. Sec. 5801, Sec. 5851 (Energy Reorganization Act, ERA); 33 U.S.C. Sec. 1251, Sec. 1367 (Fed. Water Pollution Control Act, FWPCA); 42 U.S.C. Sec. 300f, Sec. 300j-9 (Safe Drinking Water Act, SDWA); 42 U.S.C. Sec. 6901, Sec. 6971 (Solid Waste Disposal Act, SWDA); 30 U.S.C. Sec. 1201, Sec. 1293 (Surface Mining Control and Reclamation Act, SFMCRRA); 15 U.S.C. Sec. 2601, Sec. 2622 (Toxic Substances Control Act, TSCA); although environmental protection shows often considerable overlap with workplace or public safety and health, whistleblower provisions in these fields are out of the scope of this article. See to whistleblowing regarding workplace safety and health 29 U.S.C. Sec. 651, Sec. 660 (Occupational Safety & Health Act); 30 U.S.C. Sec. 801, Sec. 815 (Fed. Mine Safety & Health Act); 29 U.S.C. Sec. 158 (National Labor Relations Act); 29 U.S.C. Sec. 1801, Sec. 1855 (Migrant Seasonal and Agricultural Worker Protection Act); Westman, supra note 6, at 72-75; James H. Swain, Protecting Individual Employees: Is It Safe To Complain About Safety?, 9 BRIDGEPORT L.REV. 59 (1988); STEPHEN M. KOHN & MICHAEL D. KOHN, THE LABOR LAWYER'S GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF EMPLOYEE WHISTLEBLOWERS 23-27 (1988); to whistleblower protection provisions in statutes relating to the transport industry compare 45 U.S.C. Sec. 421, Sec. 441 (Fed. Railroad Safety Authorization Act); 46 U.S.C. Sec. 1501, Sec. 1506 (International Safe Containers Act); 49 U.S.C. Sec. 2301, Sec. 2305 (Surface Transportation Assistance Act); Kohn & Kohn, id. at 22-23, 30.
Some of them address certain industries only. Others cut across all industries, while again others are focused on certain sources of danger for the environment.

However, despite all the differences, the environmental whistleblower provisions have certain common features. The most important is that they all protect whistleblowers by providing for an administrative proceeding rather than giving each employee a right to sue individually in court. Furthermore, although the procedural provisions differ, the scope of substantive protection of all of them is quite similar. The language of the Energy Reorganization Act (ERA), Safe Drinking Water Act (SDWA), Toxic Substances Control Act (TSCA) and Surface Mining Control and Reclamation Act (SMCRA) trace basically that of the Clean Air Act (CAA). The same is true for the Solid Waste Disposal Act (SWDA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) with regard to the Federal Water Pollution Control Act (FWPCA). The legislative history of most of the statutes indicates that Congress oriented itself on the existing whistleblower provisions of the Federal Mine Safety and Health Act (FMSHA) and the National Labor Relation Act (NLRA). And finally, seven of the

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45) 42 U.S.C. Sec. 5801, Sec. 5851 (ERA) and 30 U.S.C. Sec. 1201, Sec. 1293 (SMCRA).
46) 42 U.S.C. Sec. 7401, Sec. 7622 (CAA), 33 U.S.C. Sec. 1251, Sec. 1367 (FWPCA), 42 U.S.C. Sec. 300f, Sec. 300j-9 (SDWA), 42 U.S.C. Sec. 6901, Sec. 6971 (SWDA), 42 U.S.C. Sec. 9601, Sec. 9610 (CERCLA) or 15 U.S.C. Sec. 2601, Sec. 2622 (TSCA).
47) 42 U.S.C. Sec. 5801, Sec. 5851 (ERA) (nuclear facilities) and 15 U.S.C. Sec. 2601, Sec. 2622 (TSCA).
50) 29 U.S.C. Sec. 158; see Kohn, supra note 48, at 15-16; Passaic Valley Sewerage Comm'n v. U.S. Dept. of Labor, 992 F.2d 474, 479 (3d Cir. 1993); Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1510 (10th Cir. 1985).
eight statutes are under the adjudicatory jurisdiction of the Department of Labor, with six of them following the same administrative rules.51

Thus, for the purpose of showing the "model" of federal environmental whistleblowing, this article will, besides depicting the common scope of substantive protection, focus on the procedural rules under which the vast majority of these statutes are administered.52

a. Substantive Protection

Relying on the legislative history of the environmental whistleblower statutes, the courts have generally interpreted the scope of substantive protection under these provisions broadly.53 Congress wanted to encourage employees to assist in the enforcement of environmental law as a means of achieving a higher standard of environmental quality54 and generally to prevent employers from silencing environmental

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51) See 29 C.F.R Sec. 24.1 (a); the SMCRA is subject to the adjudicatory jurisdiction of the Department of the Interior, see 30 U.S.C. 1293; 43 C.F.R. Part 4; 30 C.F.R. Part 865; see Kohn, supra note 48, at 185; Kohn & Kohn, supra note 44, at 27.
52) Besides the relatively small number of reported cases arising under the SMCRA and CERCLA, see Eugene R. Fidell, Federal Protection Of Private Sector Health and Safety Whistleblowers, 2 ADMIN L.J. 1, 11 (1988), these proceedings are the model for the proposed Fed. Uniform Health and Safety Whistleblower Act, see Westman, supra note 5, at 77; 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 CINCNATI L.REV. 513 (1990).
53) See, e.g., Passaic Valley Sewerage Comm'ts v. U.S. Dept. of Labor, 992 F.2d at 479; DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983) ("need for broad construction of the statutory purpose"); Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1163 (9th Cir. 1984); Kohn, supra note 48, at 23; but see Brown & Root, Inc. v. Donovan, 747 F.2d 1029, 1036 (5th Cir. 1984); the same is true for similar whistleblower protection provisions in other statutes, see cit. at Kohn, supra note 48, at 23 n.23.
54) See legislative history of the FWPCA, cit. in Conference Report of Clean Air Act, 1977 U.S. Code Cong. & Admin. News 1077, 1404 "The best source of information about what a company is actually doing or not doing is often its own employees, and this amendment would insure that an employee could provide such information without losing his job or otherwise suffering economically from retribution from the polluter"; see S.Conf. Rep. No. 414, 92d Cong., 2d Sess. 82-83 at 83; 1972 U.S.Code Cong. & Admin. News 3668, 3748 (to FWPCA) "Under this section employees and officials could help assure that employers do not contribute to the degradation of our environment".
concerns by threat of economic retaliation.\textsuperscript{55} These underlying purposes, the derivation of most of the environmental whistleblower statutes from the FMSHA and the NLRA, and the substantially similar language of all of the statutes have led the courts to use decisions under either the FMSHA, the NLRA or other environmental whistleblower statutes as precedent.\textsuperscript{56}

\textbf{aa. Covered Relationship}

The clear language of the statutes covers all private sector employers\textsuperscript{57} as well as any of their current employees, including temporary or probationary employees and regardless of the respective function in the firm.\textsuperscript{58} In view of the requirement of broad interpretation of the statutes, the statutory protection has been extended to employees blowing the whistle after the employment relationship was terminated.\textsuperscript{59}

\textbf{bb. Protected Activity}

Under the federal statutes following the language of the Clean Air Act,\textsuperscript{60} an employee is protected who "commenced, caused to commence, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding of the administration or

\textsuperscript{55} See, e.g., Statement of Representative William D. Ford "...we are only seeking to protect workers and communities from those very few in industry who refuse to face up to the fact that they are polluting our waterways, and who hope that by pressuring their employees and frightening communities with economic threats, they will gain relief from the requirement of any effluent limitation or abatement order"; see Kohn, supra note 48, at 13-15; Lofgren, supra note 21, at 328.

\textsuperscript{56} See, e.g., Passaic Valley Sewerage Comm'rs v. U.S. Dept. of Labor, 992 F.2d 474, 479 (3d Cir. 1993); Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1510 (10th Cir. 1985) (ERA, using CAA, FWPCA, FMSHA, NLMA); Consolidated Edison of New York Co. v. Donovan, 673 F.2d 61, 62 (2d Cir. 1982) (using NLRA for ERA); Kohn, supra note 48, at 22-23.

\textsuperscript{57} Kohn, supra note 48, at 18; Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 567 (8th Cir. 1980).

\textsuperscript{58} See Kohn, supra note 48, at 18-19.

\textsuperscript{59} See Flanagan v. Bechtel Power, 81-ERA-7, slip. op. of ALJ at 7-10 (Nov. 19, 1981); Kohn, supra note 48, at 19; Dunlop v. Carriage Carpet Co., 548 F.2d 139, 142-144 (6th Cir. 1977).

\textsuperscript{60} See supra notes 49-52 and accompanying text.
enforcement of any requirement imposed under this chapter." The Solid Waste Disposal Act and its progeny shields an employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this chapter." Thus, only whistleblowing with regard to violations of the respective act is protected. Although the statutes do not explicitly specify the recipient to whom complaints may be made, the language indicates that complaints may only be made to such persons having the power to carry through "proceedings" under the acts.

aaa. External Whistleblowing

With regard to external whistleblowing, blowing the whistle directly to the federal environmental agencies charged with the enforcement of the respective statutes is therefore clearly protected. As many of the environmental statutes contain criminal provisions, reports to the appropriate federal law enforcement officials are covered as well. However, the courts have not yet decided whether reports to other governmental agencies are covered. In distinguishing between "proceedings under this chapter" and "proceedings of the administration or enforcement of any requirement imposed under this chapter," the Clean Air Act and its progeny can be read to cover whistleblowing to other government authorities, at least as long as their power includes enforcing one of the requirements of the act, even when on a different legal basis and for a different purpose. The legislative history of the Clean Air Act makes specific reference to "employee's exercise of rights under federal, state, or local Clean Air Act legislation or

61) 42 U.S.C. 7622 (a) (1).
64) See, e.g., 42 U.S.C. Sec. 7413 (c) (CAA); 42 U.S.C. Sec. 6928 (d) (SDWA); Riesel, supra note 27, at 521.
65) E.g. an enforcement action under OSHA regarding overly high concentrations of hazardous air pollutants at the workplace.
regulations,"66 thus indicating that the protection is not restricted to reports to the Federal agencies charged with the administration of the Clean Air Act. Although otherwise substantially identical with the Federal Water Pollution Control Act, CERCLA explicitly states that providing "information to a State or to the Federal Government"67 is protected, thus showing a broader application. Considering the congressional purpose, the Secretary of Labor and the Administrative Law Judges have consistently interpreted the statutes to cover reporting to state and local government bodies as well.68 In view of the generally broad interpretation of the statutes and considering the dictum in Passaic Sewerage v. United States Dept. of Labor that the protection intended by Congress would be "largely hollow if it were restricted to...filing a formal complaint with the appropriate external law enforcement agency,"69 it seems predictable that the courts will hold reports to other government agencies covered.

bbb. Internal Whistleblowing

Internal whistleblowing is literally not covered under the language of most of the statutes, as "proceedings" connotes a formal legal or administrative action.70 However, courts have overwhelmingly held that intracorporate whistleblowing is protected activity.71 Internal whistleblowing fosters the congressional purpose of corporate

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67) 42 U.S.C. Sec. 9610 (a).
68) See Kohn, supra note 48, at n24.
compliance with environmental law by either facilitating voluntary remediation and compliance or affording management the opportunity to justify and clarify its environmental policies to its employees. The 5th Circuit's objections to such broad application of the Energy Reorganization Act's whistleblower provisions, based on the formal language argument as well as on the concern that otherwise the Department of Labor's supervisory power would expand into the area of mediating employee-employer relations and thus in an area viewed by the court as the discretionary domain of corporate management, has been unanimously rejected by the other Courts of Appeals.

Moreover, Congress in 1992 amended the Energy Reorganization Act to protect an employee who "notified his employer of alleged violations...." As it can be assumed that Congress was aware that a conflict as to whether internal whistleblowing is protected or not existed only regarding the Energy Reorganization Act, the amendment shows general congressional intent to protect intracorporate complaints as well.

Closely connected with the issue of internal whistleblowing is the question whether an employee is protected who threatens or states the intention to report externally. Under the statutes following the language of the Clean Air Act, this activity is protected under the phrasing "about to commence." Although the other statutes do not contain similar language, the arguments made for protecting internal whistleblowing support an extension in this case as well. Threats of external whistleblowing will be often used to effectuate internal reports, and the effect of such threats or statements is the same as the one of internal reports.

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72) See Passaic Sewerage, 992 F.2d at 478-479.
74) Brown & Roots, 747 F.2d at 1031-32.
75) See Jones, 948 F.2d at 264; Mackowiak, 735 F.2d at 1163; Kansas Gas, 780 F.2d at 1510-12; Consolidated Edison, 673 F.2d at 61.
76) See 42 U.S.C. Sec. 5851 (a) (1) (A).
ccc. Good Faith Allegations

The congressional intent to allow employees to voice their environmental concerns makes clear that not the specific validity of information, but the ability to communicate perceived environmental wrongdoing, is protected.\(^79\) Therefore, the courts have held that not only true, but also false, allegations are covered as long as they are made in good faith.\(^80\) Otherwise not only would the Department of Labor have to determine the truth of allegations possibly concerning complicated technical matters\(^81\) but denial of protection for allegations which - possibly after exhaustive investigation by experts - are proven unfounded would have a chilling effect on employee initiative in bringing to light perceived wrongdoing.\(^82\)

cc. Discriminatory Conduct And Motive

The statutes following the language of the Clean Air Act prohibit an employer to discharge or "otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment."\(^83\) Without explicitly restricting prohibited retaliatory measures to those directly affecting the employment relationship, the language of the statutes following the Federal Water Pollution Control Act covers employers who discharge or "in any other way discriminate against" the whistleblower.\(^84\) However, although courts generally construe whistleblower protection broadly,\(^85\) it seems none has so far included retaliatory employer behavior

80) See Passaic Sewerage v. Dept. of Labor, 992 F.2d 474, 478 (3d Cir. 1993) (FWPCA); Brown & Roots, Inc. v. Donovan, 747 F.2d 1029, 1034 (5th Cir. 1984); Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569 (Minn. 1987) ("good faith refusal" sufficient); compare cit. at Kohn, supra note 48, at 28 (Title VII-cases).
81) See Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1508-10 (10th Cir. 1985); Kohn, supra note 48, at 29.
82) Passaic Sewerage, 992 F.2d at 479.
83) 42 U.S.C. Sec. 7622 (a) (CAA).
84) 33 U.S.C. Sec. 1367 (a) (WPCA).
85) See supra note 54 and accompanying text.
under this language which does not affect the employment relationship itself.

Discriminatory conduct has been found in practically every retaliatory action related to the employment relationship, such as intimidation and harassment, restraints, transfers, blacklisting and the like, but not, for example, in independent tort claims, such as defamation actions.

The discriminatory conduct must have been motivated by the protected whistleblowing activity of the employee. As the nature of employer motive as a subjective factor makes it hard for the employee to prove, the ultimate outcome of a case very often depends on who carries the burden of proof. In whistleblower cases under federal law, the courts follow the standard the Supreme Court has developed in *Mount Healthy City School District Board of Education v. Doyle*.

Under the *Mount Healthy* standard, the whistleblower has to state a prima facie case by providing direct or circumstantial evidence that creates a reasonable inference of

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86) Kohn, *supra* note 48, at 19; *compare Passaic Sewerage*, 992 F.2d at 480 ("adverse action"); Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989); Lockert v. U.S. Dept. of Labor, 867 F.2d 511, 519 (9th Cir. 1989); DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983), Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980).
87) *Compare Pogue v. United States Dept. of Labor*, 940 F.2d 1287, 1288 (9th Cir. 1991); Dunham v. Brock, 794 F.2d 1037, 1038 (5th Cir. 1986).
90) *See* 29 C.F.R. Sec. 24.2 (b); to decisions to "unlawful discrimination" under the NLRA see Kohn, *supra* note 48, at 21 and John P. Ludington, *Employer Discrimination Against Employees for Filing Charges of Giving Testimony under NLRA*, 35 ALR FED. 132, Sec.48-77.
91) *See* Lockert v. U.S. Dept. of Labor, 867 F.2d 513 (9th Cir. 1989); *DeFord*, 700 F.2d at 286; Mackowiak, 735 F.2d 1159, 1162 (9th Cir. 1984) (ERA); Passaic Sewerage v. Dept. of Labor, 992 F.2d 474, 480 (3d Cir. 1993) (FWPCA); Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986); Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989); Kohn, *supra* note 48, at 30.
92) 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed2d 471.
discriminatory motive. Inter alia, the employee may show that he was a valued employee by presenting satisfactory work performance ratings, pay raises shortly before the whistleblowing, or that there were no complaints about him and his performance. He may then demonstrate that after his complaint, management changed its attitude, or that he was transferred or treated differently compared to other employees in a similar situation without a proven cause like lower performance or violation of his duties.

Furthermore, not only the fact that the alleged reason for discrimination is out of proportion to the conduct, but also the way management behaves after the whistleblowing may show discriminatory motive. The manner in which the employee was informed, the absence of a warning, deviation from established procedures or inadequate investigation of charges may create circumstantial evidence for discriminatory motive. Finally, management's general low regard of corporate environmental officers and remarks disqualifying the employee's protected activity as "disloyal" and the like may create evidence.

After the whistleblower, by preponderance of evidence, raises a reasonable inference of discriminatory motive, the employer may rebut it by providing evidence that legitimate business reasons caused his conduct. The employee can then prove that the alleged business reasons were "pretextual," i.e. that they either not exist or that the employer in

93) Id.; Lockert, 867 F.2d at 513; DeFord, 700 F.2d at 286; Passaic Sewerage, 992 F.2d at 480; Couty, 886 F.2d at 148.
94) See the general categories in Am. Jurisprudence, Proof of Facts (2nd), "Proof of Retaliatory Termination," Sec. 7-1; Kohn & Kohn, supra note 48, at 77-80.
95) See, e.g., Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980); Pogue v. United States Dept. of Labor, 940 F.2d 1287, 1290 (9th Cir. 1991).
96) See Ellis Fischel State Cancer Hosp., 629 F.2d at 565; Lockert, 867 F.2d at 516; Couty, 886 F.2d at 147.
97) See, e.g., Consolidated Edison Co. v. Donovan, 673 F.2d 61 (2d Cir. 1982).
98) See, e.g., Ellis Fischel State Cancer Hospita, 629 F.2d at 566; DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983).
99) Compare Kohn, supra note 48, at 31-34.
100) Passaic Sewerage v. Dept. of Labor, 992 F.2d 474, 480 (3d Cir. 1993); Lockert, 867 F.2d at 520.
fact did not rely on them. 101 The ultimate burden of proof for pretext remains with the employee. 102 In many cases, however, the evidence will support both a discriminatory motive and a legitimate business reason for the employer's conduct. In such "dual motive" cases, 103 the employee has only to prove that the discriminatory motive "played some part" in the employer's conduct. 104 The employer carries the burden of proof that the conduct in question would have occurred even if the employee had not engaged in the protected activity. 105 Thus, the employer bears the risk that the influence of legal and illegal motives on his conduct cannot be separated. 106

b. Procedure And Remedies

Except for the Surface Mining Control Act and CERCLA, all of the federal environmental statutes containing whistleblower provisions are administered by the Department of Labor. 107 Proceedings are instituted by a written complaint with the

101) See DeFord, 700 F.2d at 286; Kohn, supra note 48, at 35; Kohn & Kohn, supra note 44, at 80-81.
102) See Texas Dept. of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981); Kohn & Kohn, supra note 44, at 81.
103) Compare Lockert, 867 F.2d at 519; Pogue v. United States Dept. of Labor, 940 F.2d 1287, 1289 (9th Cir. 1991).
104) See Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 286, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 ("substantial or motivating factor in decision"); Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1163-64 (9th Cir. 1984); Consolidated Edison Co. v. Donovan, 673 F.2d 61, 62-63 (2d Cir. 1982); Dunham v. Brock, 794 F.2d 1037, 1040 (5th Cir. 1986).
105) "But for"-test, see Mackowiak, 735 F.2d at 1163-64; Passaic Sewerage v. Dept. of Labor, 992 F.2d 474, 480 (3d Cir. 1993); Consolidated Edison, 673 F.2d at 62-63; Mt. Healthy, 429 U.S. at 287; Dunham, 794 F.2d at 1040.
106) See Pogue, 940 F.2d at 1290; Mackowiak, 735 F.2d at 1163-64; Kohn, supra note 44, at 37; Kohn & Kohn, supra note 44, at 81; the underlying reasons for that allocation is that "the employer is a wrongdoer; he has acted out of a motive that is declared illegal by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated because...the risk was created by his own wrongdoing," NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1986).
107) These proceedings are governed by two set of administrative rules. 29 C.F.R. Part 24 specifies the procedure for claims under the employee protection statutes, while 29 C.F.R. Part 18 contains all the general litigation rules before the Office of ALJ. In case of conflict between the rules, 29 C.F.R. Part 18 controls. The Fed.R.Civ.P. and the Admin.P.A. are used as default rules, see 29 C.f.R. Sec. 18.1, 18.29 (7) and (8); Kohn, supra note 48, at 87.
Administrator of the Department of Labor's Wage and Hour Division or any of its local
offices within 30 days after the alleged discrimination occurred. After investigating, the
Administrator has to render a decision stating the reasons for his finding of whether the
complaint is meritorious or not. If he finds that the alleged discrimination occurred, his
notice to the parties includes an appropriate order to abate the violation. The decision
becomes the final and binding order of the Secretary of Labor unless a request for a
hearing is filed within five days. The Administrative Law Judge assigned to the case must
schedule a hearing date within 7 days after the receipt of the request. The parties may file
pre-hearing briefs and may use the standard discovery rules. The Administrative Law
Judge issues a recommended decision within 20 days after the hearing is terminated and
forwards it to the Secretary of Labor. Within 90 days after the original complaint was
filed, the Secretary has to render his final order. Although he is not bound by any legal
conclusions of the Administrative Law Judge, the Secretary can only reject a factual
determination if there are substantial grounds on the record for such a departure.\textsuperscript{108}

If he finds a violation of the whistleblower law, the Administrative Law Judge typically
orders reinstatement in the same or an equivalent position, backpay and, depending on the
circumstances, other "make whole" remedies.\textsuperscript{109} Compensatory damages,\textsuperscript{110} including
compensation for emotional distress, pain and suffering, mental anguish, and lost future
earnings\textsuperscript{111} are available under all of the environmental whistleblower statutes. Under
both the Safe Drinking Water Act and the Toxic Substances Control Act, the Secretary
has discretionary power to award punitive damages.\textsuperscript{112} However, the statutory silence of

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108) See Kohn, \textit{supra} note 44, at 71; \textit{compare} Penasquitos Village, Inc. v. NLRB, 565
F.2d 1074 (9th Cir. 1977) (close scrutiny by courts).
109) See Kohn, \textit{supra} note 44, at 61 (e.g. reimbursement for lost overtime, good
recommendation, front pay etc.).
110) See 29 C.F.R. Sec. 24.6; DeFord v. Secretary of Labor, 700 F.2d 281, 288 (6th
Cir. 1983); Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992).
111) Kohn, \textit{supra} note 48, at 62; \textit{compare} Smith v. Atlas Off-Shore Boat Serv., Inc.,
653 F.2d 1057, 1064 (5th Cir. 1981)
112) 15 U.S.C. Sec. 2622 (b) (TSCA); 42 U.S.C. Sec. 300j-9 (i) (SDWA).
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the other statutes has been interpreted to mean that punitive damages are not available. Finally, the complainant may recover reasonable litigation expenses, including attorney's fees under all of the statutes.

When the employer does not comply with the final order of the Secretary, it may be enforced by the Federal district court. Upon filing a petition for review within 60 days after the Secretary's final order was issued, judicial review by the Federal Court of Appeals under the standard whether the order is "unsupported by "substantial evidence" or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" is available.

2. State Common Law: The Public Policy Whistleblower Tort

Although most American private sector employment is at-will, the traditional rule of free severability at any time has been eroded substantially within the last 30 years. Most states now recognize one or more significant exceptions to the at-will doctrine.

Inter alia, courts have developed a body of protective law on the basis of public policy considerations. The underlying idea for that exception to at-will is that employees should not be discharged for asserting certain rights that society has an interest in protecting. Over the years, four groups of protected activities have evolved. With varying scope, most courts protect employees from discharges in retaliation for fulfilling a public

113) See Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569 (Minn. 1987); Kohn, supra note 48, at 64.
114) But not the respondent, see Kohn, supra note 48, at 65
115) Kohn, supra note 48, at 65; Westman, supra note 5, at 78; 29 C.F.R. Sec. 24.6. (3).
116) Westman, supra note 5, at 78-79; Kohn, supra note 48, at 83, 85.
117) See Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1162-63 (9th Cir. 1984); Pogue v. U.S. Dept. of Labor, 940 F.2d 1287, 1288 (9th Cir. 1991); Lockert v. U.S. Dept. of Labor, 867 F.2d 513, 516-17 (9th Cir. 1989); see Fed.Admin.P.A., 5 U.S.C. Sec. 701; Kohn, supra note 48, at 71-81.
119) See Rongione, supra note 5, at 294.
obligation, exercising a statutory right, refusing to participate in illegal or unethical acts and, to some lesser extent, for whistleblowing. Although more than 20 jurisdictions now protect whistleblowing on a theory of public policy, several courts have explicitly refused to acknowledge a whistleblower exception to at-will,\textsuperscript{120} while other jurisdictions have not taken a clear position yet.

However, the scope of protection differs immensely within the jurisdictions recognizing a public policy exception. As one author noted,\textsuperscript{121} the exception's "only consistency is its inconsistency." Therefore, the following description shows the different answers to particular questions among courts, as well as the majority trend.\textsuperscript{122}

a. Substantive Protection

Whistleblowing concerning the violation of environmental law has only in a few cases given rise to a decision of a court.\textsuperscript{123} However, courts have had ample opportunity to decide on retaliatory measures by employers against employees reporting alleged violations of law either to government authorities or internally. Despite some inconsistencies, several general lines of reasoning have evolved.

aa. Protected Activity

Environmental whistleblowing by definition means reporting violations of environmental laws.\textsuperscript{124} However, the majority of courts does not take any violation of


\textsuperscript{121) Atkins, \textit{supra} note 4, at 546.}

\textsuperscript{122) For a state by state survey see Kohn & Kohn, \textit{supra} note 44, at 39-72; Westman, \textit{supra} note 5, Appendices A-D.}


\textsuperscript{124) See \textit{infra} pp. 5-6.}
law as a basis for a public policy but acknowledges only constitutional or statutory provisions, not judge-made law, as possible sources of public policy. Moreover, the majority of courts agree that the retaliatory measure must be in contrast to a "clear mandate of public policy" expressed in the violated statute. However, the judiciary has been unable to define exactly and consistently what is in the interest of the public, as opposed to private party interest, and sometimes has even reached contrary results regarding the same statute.

With regard to environmental law, a clear mandate of public policy of both the states and the federal government to protect reports of violations can be seen in the ever increasing number of both state and federal laws aimed at protecting the environment. Accordingly, whistleblowing regarding violations of environmental laws has been mostly protected by the courts. Moreover, the violation of many environmental laws is a crime. Some courts have stated that the enforcement of criminal provisions is one of the most important public policies of a state. Although other courts have not protected employees reporting crimes, the refusal to protect whistleblowing in these cases was

125) See, e.g., Gantt v. Sentry Ins., 1 Cal.4th 1083, 824 P.2d 680, 4 Cal.Rptr.2d 874 (1992); Westman, supra note 5, at 108 n.96
126) Bishop v. Federal Intermediate Credit Bank, 908 F.2d 658, 662 (10th Cir. 1990); Gantt, 1 Cal.4th at 1083, 824; Pierce v. Ortho Pharmaceutical Corp, 84 N.J. 58, 417 A.2d 505, 512 (1980).
129) See Kohn, supra note 48, at 161.
130) Atkins, supra note 4, at 545 n.77.
131) Compare Riesel, supra note 27, at 521.
basically due to the fact that the discharging employer was the only victim of the
crime. On the contrary, environmental crimes victimize not only a single person, but
society as a whole. However, despite this theoretical justification for criminal provisions
creating a public policy, courts seem generally not to rely on the nature of the violation as
civil or criminal. Instead, the recipient of the whistleblowing and the effect of the
violations on third persons or the public seems to be determinative.

aaa. External Whistleblowing

External whistleblowing to all kinds of public authorities has been generally held
protected by the courts, regardless of whether the violation of law was criminal or
civil in nature.

bbb. Internal Whistleblowing

Although not entirely consistent, courts follow basically two lines of reasoning
regarding the reporting of violations of law to internal recipients.

The majority of courts deny a public policy claim when either the employer is the only
victim of the reported crime or when he is the only one (potentially) damaged by the
violation of the law. The rationale behind this approach seems to be that internal

133) See infra notes 138-139 and accompanying text.
134) Westman, supra note 5, at 107.
135) See Palmateer, 85 Ill.2d 124, 421 N.E.2d at 879 (criminal conduct by co-workers
reported to local law enforcement authorities); Potter v. Village Bank of N.J., 225 N.J.
(bank executives reporting suspected money laundering); Wagner v. City of Globe, 150
Ariz. 82, 722 P.2d 250 (1986) (police officer reporting illegal arrest and detention to a
magistrate); Dworkin & Callahan, supra note 39, at 375-76; Westman, supra note 5, at
104-105.
reporting violations of administrative safety procedures to OSHA and FDA); Prince v.
Recorp Realty, 940 F.2d 1104 (7th Cir. 1991) (reporting violations of Illinois State Fire
Marshall Act to village officials); Siniscalo, supra note 11, at 14.
137) Foley v. Interactive Data Corp, 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373
alleged travel and expense account improprieties which constituted theft and fraud by co-
disclosure in those and similar cases is considered "merely...private or proprietary," \(^ {139}\) and that the courts should not interfere in such internal employee-employer relations \(^ {140}\).

However, when third persons \(^ {141}\) or the public \(^ {142}\) are affected, most courts acknowledge an action for wrongful discharge. Then, the effects of the wrongdoing leave the internal circle, and the courts obviously see the need for corrective action. Furthermore, it appears that the courts want to give employees who seek the resolution of such problems within their organization at least not less protection than when they choose the more disruptive way of reporting to law enforcement authorities. \(^ {143}\) As environmental crimes affect the


\[^{142}\] see Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980) (reporting violations of state food and drug law); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) (Cal. law), cert. denied, 471 U.S. 1099 (1985) (reporting violation of state food law); Johnson v. World Color Press, Inc., 147 Ill.App.3d 746, 498 N.E.2d 575 (5th Dist. 1986), app. denied, 505 N.E.2d 353 (Ill. 1987) (complaint that certain financial statements do not conform with federal securities laws); but see Smith v. Calgon Carbon Corp., 917 F.2d 1338 (3d Cir. 1990) (complaint about toxic chemical leaks not protected when employee's job did not include protecting against or investigating such leaks).

\[^{143}\] See Westman, supra note 5, at 114.
public, blowing the whistle internally is protected under this line of reasoning. Accordingly, courts have protected embryonic whistleblowing\textsuperscript{144} as well as threats to go externally\textsuperscript{145} as well.

However, a second, and minority, line of reasoning denies protection for internal whistleblowing based on social utility considerations.\textsuperscript{146} When learning of illegal conduct through internal whistleblowing, the employer can prevent wrongdoing in the future. However, the only way to have the wrongdoer punished for criminal or other acts subject to government disciplinary action is to report them to government authorities. Reporting to government authorities is something the employee could have done himself without involving the employer, and he would have been protected by doing it. Thus, internal whistleblowing serves no purpose with regard to the societal interest in the punishment of crimes. Moreover, although internal whistleblowing may lead to legal compliance in the future, the decision to take action is, in the case of internal whistleblowing, entirely at the discretion of the employer. Thus, law enforcement is not obstructed when an internal whistleblower is discharged, as the employee's behavior failed to make sure law enforcement occurred.\textsuperscript{147} In essence, this approach views the mere chance that internal whistleblowing may lead to future legal compliance by the employer as not worth protecting. Only whistleblowing which makes sure law is enforced, such as external whistleblowing to government authorities, is protected.

\textsuperscript{144} Johnston v. DelMar Distrib. Co., 776 S.W.2d 768 (Texas 1989) (employee contacting government agency to ask whether mislabeling of firearms is illegal); see Westman, supra note 5, at 114.
\textsuperscript{145} McQuary, 69 Or.App. at 107.
\textsuperscript{146} See Dworkin & Callahan, supra note 39, at 376.
ccc. Good Faith Allegations

Regarding both internal and external whistleblowing, courts unanimously protect only reporting in good faith. Thus, the employee has to believe that the wrongdoing occurred and violates a statute.\(^{148}\) Investigations by the employee to ascertain his belief have been looked disfavorly at by the courts, as they disrupt the internal climate of an organization.\(^{149}\) Good faith requires furthermore that the whistleblowing is primarily motivated to correct the alleged wrongdoing. Reporting primarily as a means to pursue other interests is not protected.\(^{150}\)

bb. Discriminatory Conduct And Motive

Most jurisdictions limit protection of whistleblowers to discharge,\(^{151}\) with only a few shielding whistleblowers from other forms of adverse employer conduct.\(^{152}\) With regard to proving discriminatory motive, most courts follow the *Mount Healthy*\(^ {153}\) standard.

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b. Procedure And Remedies

Actions based on the public policy exception against retaliatory discharge are brought by the individual employee in civil court. With the exception of one jurisdiction, courts locate the source of the employer's duty not to discharge not in the employment contract, but in public policy, and therefore allow the full range of tort damages, including punitive damages.

3. State Whistleblower Statutes

After the first whistleblower statutes were enacted in response to nation-wide scandals in the late seventies and early eighties, many states have, with increasing speed, followed in the hope that removing barriers to employee efforts to report violations of law will lead to more stringent compliance. Currently, of the approximately 35 states having "general" statutes not restricted to employees blowing the whistle on wrongdoing in a certain industry or on violations of a single statute, at least 15 protect private sector employees. Furthermore, the Montana Wrongful Discharge From Employment Act codifies the common law public policy exception to at-will including whistleblowing.

156) See for Michigan Dworkin & Near, supra note 8, at 253.
157) See Lofgren, supra note 21, at 332.
159) See compilations at Lofgren, supra note 21, at 351 n.48; Westman, supra note 5, Appendix A; Miceli & Near, supra note 6, table 6-2.
160) See CAL. LAB. CODE Sec. 1102.5; CONN. GEN. STAT. ANN. Sec. 31-51m; FLA. STAT. Sec. 112.3187 (1)-(10); HAW. REV. STAT. Sec. 378-61; IND. CODE ANN. Sec. 22-5-3-3; LA. CIV. CODE ANN. art. 30:2027; ME. REV. STAT. ANN. tit. 26, Sec. 831; MICH. COMP. LAWS Sec. 15.361; MINN. STAT. ANN. Sec. 181.932; N.H. REV. STAT. Sec. 275-E:1; N.J. STAT. ANN. Sec. 34:19-1; N.Y. LAB. LAW Sec. 740; OHIO REV. CODE ANN. Sec. 4113.51; OR. REV. STAT. Sec. 659.550; R.I. GEN. LAWS Sec. 36-15-1; TENN. CODE ANN. Sec. 50-1-304.
Despite the common feature that virtually all statutes give the individual employee a civil cause of action, the statutes vary greatly in detail. However, depicting the scope and procedural way of protection\(^{161}\) will show the different legislative attempts to deal with a certain aspect.

a. Substantive Protection

aa. Covered Relationships

Of the 15 statutes covering private sector employees, most define "employer" simply by having a certain number of employees,\(^{162}\) while four only apply to employers which are state contractors.\(^{163}\) The protection of employees\(^{164}\) is in some statutes extended to a "person acting on behalf of the employee."\(^{165}\)

bb. Protected Activity

With variations in detail, all statutes protect disclosure of illegal behavior to government authorities. However, some deny protection for internal whistleblowing, while others require prior internal reporting or exhausting administrative procedures.

\(^{161}\) For descriptions of related groups of statutes see Dworkin & Near, \textit{supra} note 8, at 244-253; Westman, \textit{supra} note 5, at 61-71.

\(^{162}\) See, e.g., HAW. REV. STAT. Sec. 378-61; ME. REV. STAT. ANN. tit. 26, Sec. 832 (b); MICH. COMP. LAWS Sec. 15.361 (b); MINN. STAT. ANN. Sec. 181.931; N.H. REV. STAT. Sec. 275-E:1; N.Y. LAB. LAW Sec. 740 (1) (b); MONT.CODE ANN. Sec. 39-2-903 (3) ("one or more"); CONN. GEN. STAT. ANN. Sec. 31-51m ("who has employees," i.e. at least two); FLA. STAT. Sec. 112.3187 (1)-(10) (ten or more).

\(^{163}\) See IND. CODE Sec. 22-5-3-3 (a); FLA.STAT. Sec. 112.3187 (1)-(10); OR. REV. STAT. Sec. 659.510; R.I. GEN.LAWS Sec. 36-15-1 (employer receiving more than USD 200,000,- in public funds in preceding 12 months), Sec. 36-15-9 (a) (employer subject to provisions of ti. 23 ch. 19.1 (violations of toxic disposal law).

\(^{164}\) "Employee" is in all statutes essentially defined as a person performing services for remuneration, see e.g. CONN. GEN. STAT. ANN. Sec. 31-51m (1); to the "economic reality" test to determine whether an individual is an employee see Chilingirian \textit{v. City of Fraser}, 194 Mich. App. 65, 486 N.W.2d 347 (1992).

\(^{165}\) See CONN. GEN. STAT. ANN. Sec. 31-51m (b); ME. REV. STAT. ANN. tit. 26, Sec. 833 (1) A.; MINN. STAT. ANN. Sec. 181.932 (a); R.I.GEN. LAWS Sec. 36-15-3.
before blowing the whistle externally. Two states explicitly require an employee to show "clear and convincing evidence" that he was blowing the whistle on illegal behavior. 166

aaa. External Whistleblowing

The act of communicating, the recipients of external whistleblowing and the wrongdoing are mostly defined broadly. Most statutes cover either "reporting" 167 or "disclosing information," 168 while others expressly include embryonic whistleblowing, 169 indirect whistleblowing 170 or threats to disclose. 171

Recipients to whom whistleblowing is protected encompass in all statutes practically all government authorities on all levels of government. 172

With regard to the reported wrongdoing, the majority of statutes include any violation of federal, state or local law. 173 Despite the broad language, however, two courts have

166) MICH. COMP. LAWS Sec. 15.362 (4); R.I. GEN. LAWS Sec. 36-15-4 (d).
167) See, e.g., CONN. GEN. STAT. ANN. Sec. 31-51m (b); HAW. REV. STAT. Sec. 378-62; ME. REV. STAT. ANN. tit. 26, Sec. 833 (1) A.,B.; MICH. COMP. LAWS Sec. 15.362; MINN. STAT. ANN. Sec. 181.932; MONT. CODE ANN. Sec. 39-2-904 (1).
168) CAL. LAB. CODE Sec. 1102.5 (b); LA. CIV. CODE ANN. art. 30:2027 (1); N.J. STAT. ANN. Sec. 34:19-3; N.Y. LAB. LAW Sec. 740 (2) (a); the term "refusing to be silent" in TENN. CODE ANN. Sec. 50-1-304 (a) is probably just a semantic variation, not a requirement of a prior order of the employer; to New Jersey see Smith v. Travelers Mortg. Serv., 699 F.Supp. 1080 (D.N.J. 1988) (holding individual claim to Equal Employment Opportunity Commission not as "disclosure"); contra Sandom v. Travelers Mortgage Serv., Inc., 752 F. Supp. 1240 (D.N.J. 1990) (sex discrimination claim to same commission).
169) MICH. COMP. LAWS Sec. 15.362; HAW. REV. STAT. Sec. 378-62; R.I. GEN. LAWS Sec. 36-15-3 ("about to report").
170) See, e.g., N.H. REV. STAT. Sec. 275-E:2 (a); R.I. GEN. LAWS Sec. 36-15-3 ("causes to report").
171) LA. CIV. CODE ANN. art. 30:2027 (1); N.J. STAT. ANN. Sec. 34:19-3; N.Y. LAB. LAW Sec. 740 (2) (a) ("threatens to disclose").
172) See CAL. LAB. CODE Sec. 1102.5 (b) (government and law enforcement agency); CONN. GEN. STAT. ANN. Sec. 31-51m (b); HAW. REV. STAT. Sec. 378-62 (1); LA. CIV. CODE ANN. art. 30:2027 A. (1); ME. REV. STAT. ANN. tit. 26, Sec. 833 (1);
MICH. COMP. LAWS Sec. 15.362; N.J. STAT. ANN. Sec. 34:19-3; N.Y. LAB. LAW Sec. 740 (2) (a); R.I. GEN. LAWS Sec. 36-15-1 ("public body" defined in the broadest sense); MINN. STAT. ANN. Sec. 181.932 ("any government body or law enforcement officer"); IND. CODE ANN. Sec. 22-5-3-3 ("any person, agency or organization").
173) See CAL. LAB. CODE Sec. 1102.5 (b); CONN. GEN. STAT. ANN. Sec. 31-51m (b); FLA. STAT. Sec. 112.3187 (1)-(10); HAW. REV. STAT. Sec. 378-62 (1); ME. REV. STAT. ANN. tit. 26, Sec. 833 (1) A. (covering in addition "condition or practice that would put at risk the safety and health of...any individual"); MICH. COMP. LAWS Sec.
interpreted their respective statutes not to include violations of law which did not affect the public, but only caused damages to the employer.\textsuperscript{174} Several of the other statutes contain various limitations. The Indiana statute, which is only applicable to public contractors, restricts the protection to violations of law "concerning the execution of the public contract."\textsuperscript{175} New York requires that the violation "creates and presents a substantial and specific danger to the public health and safety."\textsuperscript{176} The New York courts interpret this provision narrowly.\textsuperscript{177} Louisiana covers only violations of environmental laws, rules or regulations.\textsuperscript{178} Tennessee protects reporting of violations of its civil or criminal code, federal law and "any regulation intended to protect the public health, safety or welfare,"\textsuperscript{179} thus, however, including all environmental regulations. Ohio only covers criminal offenses, either when they are likely to cause an imminent risk of physical harm to a person, creating a hazard to public health and safety, being a felony or resulting from violations of certain environmental laws.\textsuperscript{180} Finally, the Oregon statute covers reporting criminal activity or causing others to report it.\textsuperscript{181} The Montana statute covers violations

\begin{itemize}
\item \textsuperscript{175} IND. CODE ANN. Sec. 22-5-3-3 (a).
\item \textsuperscript{176} N.Y. LAB. LAW Sec. 740 (2) (a).
\item \textsuperscript{177} See Kern v. DePaul Mental Health Serv., Inc., 544 N.Y.S.2d 252, 152 A.D.2d 957 (1989) (only dangers to public at large, danger for individual patient is not sufficient); Lamagna v. New York State Ass'n for Help of Retarded Children, Inc., 551 N.Y.S.2d 556, 158 A.D.2d 588 (no fiscal improprieties covered); Remba v. Federation Employment and Guidance Serv., 76 N.Y.2d 801, 559 N.Y.S.2d 961, 559 N.E.2d 655 (fraudulent billing not covered).
\item \textsuperscript{178} LA. CIV. CODE ANN. art. 30:2027 A. (1); see Cheramie v. J.Wayne Plaisance, Inc., 595 So.2d 619 (Sup. 1992) (protection applies not only to violation of Louisiana environmental act, but also to violations of federal and local laws).
\item \textsuperscript{179} TENN. CODE ANN. Sec. 50-1-304 (a) (b).
\item \textsuperscript{180} OHIO REV. CODE ANN. Sec. 4113.51.
\item \textsuperscript{181} Sec. 659.550 (1) and (3).
\end{itemize}
of public policy, public policy defined as a policy concerning the public health, safety and welfare as established by statute.\textsuperscript{182}

The Minnesota statute contains the unique feature that no external recipient is allowed to disclose the identity of the whistleblower unless he consents to it or the disclosure is necessary for the prosecution of the wrongdoing.\textsuperscript{183}

\textbf{bbb. Internal Whistleblowing}

Internal whistleblowing is not only protected under several statutes,\textsuperscript{184} but seven of them mandate prior intracorporate complaints when protection for subsequent external whistleblowing is sought.

New York, New Jersey, New Hampshire and Maine require the employee to give\textsuperscript{185} notice to a supervisor and to give the employer reasonable opportunity to correct the wrongdoing.\textsuperscript{186} However, in Maine and New Hampshire, such notice is not necessary if the employee has specific reasons to believe that it will not result in prompt correcting of the wrongdoing.\textsuperscript{187} If the wrongdoing leads to an emergency and the employee is either reasonably certain that the wrongdoing is known to a supervisor or where he reasonably fears physical harm as a result of the notice, he may report directly externally under the New Jersey statute.

Under the Indiana statute,\textsuperscript{188} the employee has to report to the employer first unless the employer is the person who the employee believes is committing the violation. Even then, the employee may report either to the employer, or to an agency entitled to a report

\begin{footnotes}
\item[182] MONT. CODE ANN. Sec. 39-2-904 (1); Sec. 39-2-903 (7).
\item[183] MINN. STAT. ANN. Sec. 181.932.
\item[184] LA. CIV. CODE ANN. art. 30:2027 A. (1); N.J. STAT. ANN. Sec. 34:19-3; N.Y. LAB. LAW Sec. 740 (2) (a) (to supervisor); ME. REV. STAT. ANN. tit. 26, Sec. 833 (1) A., B.; MINN. STAT. ANN. Sec. 181.932 subd. (1) (a) (to employer).
\item[185] New Jersey requires writing.
\item[186] ME. REV. STAT. ANN. tit. 26, Sec. 831; N.H. REV. STAT. Sec. 275-E:1; N.J. STAT. ANN. Sec. 34:19-1; N.Y. LAB. LAW Sec. 740
\item[187] ME. REV. STAT. ANN. tit. 26, Sec. 831, see Bard v. Bath Iron Works Corp., 590 A.2d 152 (Me 1991); N.H. REV. STAT. Sec. 275-E:1.
\item[188] IND. CODE ANN. Sec. 22-5-3-3.
\end{footnotes}
from the state ethics commission. Only when no good faith effort to correct the wrongdoing is made within a reasonable time by the recipient, the employee may report to any outsider. In Ohio, the employee is allowed to go externally when the employer does not make a reasonable attempt to correct the wrongdoing within 24 hours after the notice. 189

On the other hand, under the clear language of several other statutes, only external whistleblowing is protected. 190 Two others are silent on possible recipients. 191

ccc. Good Faith Allegations And Reasonable Belief

Under all statutes, the whistleblowing must be carried out in good faith. 192 When whistleblowing is used for an improper purpose, even the reporting of true wrongdoing cannot shield an employee from retaliation. Thus, in Wolcott v. Champion International Corp., 193 an employee who was discharged after threatening management to expose the violation of air pollution control laws unless he received an assurance regarding future job security was held not protected. With regard to the content of the whistleblowing, most statutes require a reasonable belief that the reported activities constitute violations of law, 194 and some explicitly deny protection when the employee knows that his

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189) OHIO REV. CODE ANN. Sec. 4113.51; compare Phung v. Wastes Managementt, Inc., 40 Or.App.3d 130, 532 N.E.2d 195.
190) CAL. LAB. CODE Sec. 1102.5; CONN. GEN. STAT. ANN. Sec. 31-51m; HAW. REV. STAT. Sec. 378-61; MICH. COMP. LAWS Sec. 15.361; R.I. GEN. LAWS Sec. 36-15-1; see Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (no protection of internal whistleblowing); Westman, supra note 5, at 70-71; Lofgren, supra note 21, at 331-32.
191) OR. REV. STAT. Sec. 659.550; TENN. CODE ANN. Sec. 50-1-304.
193) 691 F.Supp. 1052, 1059 (W.D. Mich 1987) (extortion clearly not the conduct statute wanted to encourage); see Lofgren, supra note 21, at 334.
194) CAL. LAB. CODE Sec. 1102.5 (b); LA. CIV. CODE ANN. art. 30:2027 A. (1); ME. REV. STAT. ANN. tit. 26, Sec. 831 (1); N.H. REV. STAT. Sec. 275-E:1; N.J. STAT. ANN. Sec. 34:19-3 (a); R.I. GEN. LAWS Sec. 36-15-3; see Melchi, 597 F.Supp. at 575 (in view of pervasive regulation of nuclear power industry reasonable to believe that
allegations are false. Some statutes even apply a negligence standard, requiring either "reckless disregard" or "reason to know" of the falsity of the allegations.

Under the Ohio and Indiana statutes, the employee is obliged to make a reasonable attempt to determine the accuracy of any information he reports.

c. Discriminatory Conduct And Motive

As Tennessee and Montana only cover discharges, the language of most of the other statutes covers in addition any discrimination "regarding compensation, terms, conditions, location, or privileges of employment" in response to the whistleblowing.

With regard to the discriminatory motive, some courts allocate the burden of proof in cases under the state whistleblower statutes differently from cases under the federal environmental whistleblower laws. Although the requirements for stating a prima facie case, showing valid business reasons and "pretext" are essentially the same, these
destruction and falsification of reports and records violaton of law); Bard v. Bath Iron Works Corp., 590 A.2d 152 (Me 1991).
195) CONN. GEN. STAT. ANN. Sec. 31-51m (b); HAW. REV. STAT. Sec. 378-62 (1); IND. CODE ANN. Sec. 22-5-3-3 (c); MICH. COMP. LAWS Sec. 15.362; MINN. STAT. ANN. Sec. 181.932 Subd. (2).
196) MINN. STAT. ANN. Sec. 181.932 Subd. (2).
197) R.I. GEN. LAWS Sec. 36-15-3.
198) IND. CODE ANN. Sec. 22-5-3-3 (c); OHIO REV. CODE ANN. Sec. 4113.51.
199) TENN. CODE ANN. Sec. 50-1-304; MONT. CODE ANN. Sec. 39-2-904 (1); MONT. CODE ANN. Sec. 39-2-903 (1), (2).
200) See FLA. STAT. Sec. 112.3187 (1)-(10); HAW. REV. STAT. Sec. 378-61; IND. CODE ANN. Sec. 22-5-3-3 (b); ME. REV. STAT. ANN. tit. 26, Sec. 833 (1); MICH. COMP. LAWS Sec. 15.362; MINN. STAT. ANN. Sec. 181.932 Subd. (1); N.H. REV. STAT. Sec. 275-E:2; N.J. STAT. ANN. Sec. 34:19-3; N.Y. LAB. LAW Sec. 740 (2); OHIO REV. CODE ANN. Sec. 4113.51; OR. REV. STAT. Sec. 659.550 (1); R.I. GEN. LAWS Sec. 36-15-3; the language of the California, Connecticut and Louisiana statutes is broader, see CAL. LAB. CODE Sec. 1102.5 (b) ("retaliate"); CONN. GEN. STAT. ANN. Sec. 31-51m (b) ("penalize"); LA. CIV. CODE ANN. art. 30:2027 B. ("any action").
has to pursue administrative proceedings if the government agency he is reporting to provides for such. 210

In Maine, the employee has first to bring a complaint before the Maine Human Rights Commission, which, after investigating and attempting to settle the dispute, may file a civil action in court. However, if neither a settlement agreement is reached nor suit is brought by the Commission within 180 days after the complaint, the employee may, after obtaining a right-to-sue-letter from the commission, sue himself. 211 Similarly, the Oregon statute provides for a complaint with the commissioner of labor, who may assess a civil fine and who must try to settle the dispute within one year. Thereafter, the employee can bring a civil action on his own. 212 Under the Montana Wrongful Discharge Act, an employee is required to exhaust internal procedures maintained by the employer and laid down in writing before bringing a claim in court, unless the proceedings are not completed within 90 days or the employer did not notify the employee of the existence of these proceedings within 7 days after the discharge. 213 Furthermore, each party can make an offer to arbitrate within 60 days after service of the complaint. If the other part rejects this offer and the offeror prevails in court, the other part is liable to reasonable attorney's fees for the litigation. If the employee's offer is accepted, the employer has to pay all costs of arbitration in case the employee prevails. 214

210) Dworkin & Near, supra note 8, at 247-248
211) ME. REV. STAT. ANN. tit. 26, Sec. 834-A, tit.5 Sec. 4612.
212) OR. REV. STAT. Sec. 659.550.
213) MONT. CODE ANN. Sec. 39-2-911 (2).
bb. Remedies

With regard to the available remedies, there is considerable variety among the different statutes. Some are limited to equitable remedies, while others allow only actual damages. Only three state statutes provide explicitly for punitive damages, including Montana, which requires clear and convincing evidence that the discharge was actually fraudulent or actually malicious. Under some statutes, civil fines or other penalties may be assessed. Finally, most statutes provide for recovery of litigation costs, including attorney's fees.

Equitable remedies may include injunctive relief, reinstatement, back pay, fringe benefits and seniority rights. Actual damages may include damages for non-economic losses, such as emotional distress or career difficulties resulting from being known as a "troublemaker." However, Montana restricts damages to lost wages and fringe benefits for at the most 4 years and denies explicitly damages for emotional distress and

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215) CONN. GEN. STAT. ANN. Sec. 31-51m (c); N.Y. LAB. LAW Sec. 740, see Scaduto v. Restaurant Assocs Industries, Inc, 180 A.D.2d 458, 579 N.Y.S.2d 381 (1992); N.H. REV. STAT. Sec. 275-E:4 (through commissioner only).
216) TENN. CODE ANN. Sec. 50-1-304.
217) MICH. COMP. LAWS Sec. 15.364; HAW. REV. STAT. Sec. 378-63; Sec. 378-64; R.I. GEN. LAWS Sec. 36-15-5; MINN. STAT. ANN. Sec. 181.935; N.J. STAT. ANN. Sec. 34:19-5; LA. CIV. CODE ANN. art. 30:2027 B. (29 (b).
218) LA. CIV. CODE ANN. art. 30:2027 B. (1), (2) (triple the actual damages), see Cheramie v. J.Wayne Plaisance, Inc., 595 So.2d 619 (Sup.1992); N.J. STAT. ANN. Sec. 34:19-5 (f); the Indiana, California and Tennessee statute allow civil actions without mentioning the kind of damages, see IND. CODE ANN. Sec. 22-5-3-3 (c); CAL. LAB. CODE Sec. 1102.5; TENN. CODE ANN. Sec. 50-1-304.
219) MONT. CODE ANN. Sec. 39-2-905 (2).
220) E.g. HAW. REV. STAT. Sec. 378-65; MICH. COMP. LAWS Sec. 15.365; N.J. STAT. ANN. Sec. 34:19-5 (g); MINN. STAT. ANN. Sec. 181.936.
221) See CONN. GEN. STAT. ANN. Sec. 31-51m (c); FLA. STAT. Sec. 112.3187 (1)- (10); HAW. REV. STAT. Sec. 378-64; LA. CIV. CODE ANN. art. 30:2027 B.(1); MICH. COMP. LAWS Sec. 15.364; MINN. STAT. ANN. Sec. 181.936, see Pickarski v. Home Owners Sav. Bank F.S.B., 752 F.Supp. 1451, on subsequent appeal, 956 F.2d 1484, cert. denied 113 S.Ct. 206, 121 L.Ed.2d 147 (D.Minn. 1990) (award within discretion of court); N.J. STAT. ANN. Sec. 34:19-5 (e); N.Y. LAB. LAW Sec. 740 (5) (e); OHIO REV. CODE ANN. Sec. 4113.51; R.I. GEN. LAWS Sec. 36-15-5; but see MONT. CODE ANN. Sec. 39-2-914 (following American rule if not arbitration offer).
222) See to recoverable back and front pay Piekar, 752 F.Supp. at 1451.
223) Barnett, supra note 41, at 447.
pain and suffering. In order to discourage unfounded whistleblowing protection claims, the New York, New Jersey and Tennessee statutes allow the court to impose the employer's reasonable litigation expenses on the whistleblower.

c. Notification

Some states require the employer to post a notice or otherwise notify his employees about their rights and obligations under the statute. Violations of the notice requirements are punishable by civil fines.

d. Civil Fines

Under several of the statutes, violations are subject to civil fines. Hawai and Michigan provide for a fine of $500,- for each violation, while in New Jersey the first violation will be fined $1,000,-, and each subsequent violation $5,000,-. In Maine, the employer has to pay $10,- for each day of wilful violation, in Minnesota $25,- per day up to a total of $750,-

4. Protection By Criminal Law

There is no law directly aimed at making harassment or intimidation of whistleblowing a crime. Although conspiracies to intimidate government informants are criminally

224) MONT. CODE ANN. Sec. 39-2-905.
225) N.J. STAT. ANN. Sec. 34:19-6; N.Y. LAB. LAW Sec. 740 (6) ("without basis in law or fact"); TENN. CODE ANN. Sec. 50-1-304 (e) (2) (when suit for improper purposes, "such as to harass or to cause needless increase in cost to the employer").
226) See ME. REV. STAT. ANN. tit. 26, Sec. 839; HAW. REV. STAT. Sec. 378-68.
227) See ME. REV. STAT. ANN. tit. 26, Sec. 836 ($10,- for each day of wilful violation); HAW. REV. STAT. Sec. 378-68 (up to $500,-).
228) IND. CODE ANN. Sec. 22-5-3-3 (c) (class A infraction).
229) HAW. REV. STAT. Sec. 378-65.
230) MICH. COMP. LAWS Sec. 15.365.
231) N.J. STAT. ANN. Sec. 34:19-5 (g).
232) ME. REV. STAT. ANN. tit. 26, Sec. 836.
233) MINN. STAT. ANN. Sec. 181.936.
punishable under federal law, it seems that this provision has so far not been utilized to protect employee whistleblowers against retaliation, and it seems fair to say that "it is unrealistic to expect the U.S. Department of Justice to prosecute anything but the most outrageous criminal harassment of a whistleblower." Therefore, criminal law has no potential to protect whistleblowers.

II. DISINCENTIVES TO ENVIRONMENTAL WHISTLEBLOWING

Environmental law is not only subject to employment law, but, as any human behavior, to the general rules the legal system imposes on everybody.

A. MANDATORY WHISTLEBLOWING?

The employment contract or work instructions may oblige an employee to report wrongdoing internally. However, as the information is requested by the employer, it will be very unlikely that he will react adversely when the employee provides it. Furthermore, there is no law requiring an employee to report violations of environmental law. The only exception are the code of conduct for physicians and attorneys, which impose a duty to report misconduct of fellow professionals to the appropriate internal or external authorities. However, although not observing the duty may result in revocation of the

234) 18 U.S.C. Sec. 241; see U.S. v. Smith, 623 F.2d 627, 629 (9th Cir. 1980); Kohn & Kohn, supra note 44, at 31.
235) Kohn & Kohn, supra note 44, at 31.
236) Neither the crimes of misprision of felony nor of compounding crimes punish the mere failure to report, see Note (Merek Evan Lipson), Compounding Crimes: Time for Enforcement?, 27 HASTINGS L.J. 175, 203 (1975); WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., SUBSTANTIVE CRIMINAL LAW (vol. 2) 175 (1986); see MODEL PENAL CODE Sec. 208.32A, Comment at 203 (Tent. Draft No. 9, 1959); compare the famous quotation in Marbury v. Brooks, 20 U.S. 556, 5 L.Ed. 522 (1822) ("it may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; ... the law which would punish him in every case for not performing this duty is too harsh for man").
237) For lawyers, see MODEL RULES OF PROFESSIONAL CONDUCT Rules 8.3 (a), 8.4; for physicians see PRINCIPLES OF MEDICAL ETHICS AND CURRENT OPINIONS OF THE COUNCIL OF ETHICAL AND JUDICIAL AFFAIRS, Rule 9.04 (American Medical Association 1989).
license to practice, the restriction to fellow professionals minimizes the practical importance of this duty.

B. DISINCENTIVES TO WHISTLEBLOWING

The employment contract as well as general tort law create disincentives for environmental whistleblowing.

1. Contractual Liability

Implied in every employment contract are the duties of an employee to obey all reasonable orders, to act solely for the benefit of the employer with regard to his employment, and not to use or to communicate generally unknown information acquired during the employment to the injury of the principal. These duties of obedience, loyalty and confidentiality may be supplemented by an explicit confidentiality agreement. Violations of these duties make an employee liable for damages.


240) RESTATEMENT (SECOND) OF AGENCY Sec. 385 (1958-84); Specter & Finkin, supra note, at 539.

241) See RESTATEMENT (SECOND) OF AGENCY Sec. 387 (1958-84); Specter & Finkin, supra note 239, at 543.

242) See RESTATEMENT (SECOND) OF AGENCY Sec. 395 (1958-84).

243) See Reuschlein & Gregory, supra note 239, at 130.
As internal whistleblowing is neither disloyal nor a breach of confidentiality,\textsuperscript{244} external whistleblowing may violate both the implied duties and an explicit confidentiality provision when the allegations are false.

True allegations do not constitute a breach of the implied duties. The Restatement (Second) of Agency lists "business and professional ethics" as a factor to determine the reasonableness of an order,\textsuperscript{245} and excludes illegal or unethical acts from the duty of obedience. Although the right not to perform illegal acts does not imply a right to disclose such acts or not to comply with an order of the employer not to disclose,\textsuperscript{246} the reference to ethical standards as well as the privileges from all of the implied duties when acting in the protection of superior interests of others, such as revealing a planned crime,\textsuperscript{247} show

\textsuperscript{244)} Compare Greene v. Hawaiian Dredging Co., 26 Cal.2d 245, 157 P.2d 367, 370 (right to protest regarding working conditions); Specter & Finkin, supra note 239, at 542-43; On the contrary, reporting internally is to a limited extent required under the duty of loyalty. Although courts have not directly taken a position whether an employee has a duty to disclose violations of law, decisions in other agent-principal relationships seem to support a limited duty when the information is related to the specific activity the agent carries out for the principal, and the agent is either the only one in possession of the information or has specific expertise to evaluate information the principal has not. Applied to the employment context, the duty of loyalty would then only require the reporting of illegal conduct relating to the respective job duties of which the employer is not aware. Thus, a low-level employee would be only responsible for reporting illegal conduct in his individual workspace, whereas a supervisor's and manager's duty to report would encompass their respective field of responsibility, see Monty v. Peterson, 85 Wash.2d 956, 540 P.2d 1377, 1381 (1975); Lindland v. United Business Invs, 298 Or. 318, 693 P.2d 20, 23 (1984); Rodriguez v. Cardona Travel Bureau, 216 N.J.Super. 226, 523 A.2d 281 (1986). This result seems to be in accord with the view of some of the courts denying protection against retaliatory discharge, see Smith v. Calgon Carbon Co., 917 F.2d 1338 (3d Cir. 1990) (internal complaint about toxic chemicals leak not protected when employee's job did not include protecting against or investigation of such leaks).

\textsuperscript{245} See RESTATEMENT (SECOND) OF AGENCY Sec. 385, Comment a (1958-84).

\textsuperscript{246} See Blumberg, supra note 239, at 284; Westman, supra note 5, at 23.

\textsuperscript{247} RESTATEMENT (SECOND) OF AGENCY Sec. 385 (2); Sec. 387, Comment b; the comment states that an employee is not "necessarily prevented from acting in good faith outside his employment in a manner which injuriously affects his principal's business". As an illustration, the Comment allows an employee of a life insurance to advocate legislation which would require a change in the policies issued by his employer. However, with regard to specific information acquired during his employment, the employee is not allowed to disclose, see Blumberg, supra note 239, at 285; Comment f. to Sec. 395 asserts that an employee may reveal confidential information "in the protection of "a superior interest of himself or of a third person. Thus, if the confidential information is to the effect that the principal is committing or about to commit a crime, the
that the authors of the Restatement obviously did not want to construe the implied duties to protect or further illegal behavior. Pursuant with this finding, courts and other authority allow disclosures in the public interest with regard to several other principal-agent relationships.

Confidentiality agreements are phrased in general terms and will never explicitly cover illegal conduct. They are interpreted in the light of the purpose both parties assented to. Restrictive provisions in standardized agreements are generally construed against the drafter, and the public interest is taken into account when choosing between different possible interpretations. The purpose of an employer's including a confidentiality clause in an employment contract or another agreement is not, at least not from the viewpoint of the employee, to cover up possible illegal behavior. An employee legitimately can - and will - expect that illegal behavior will not occur in the firm. Thus, he legitimately understands a confidentiality clause not to include illegal acts. As this interpretation limits the restrictive confidentiality provision to the detriment of the drafter,

agent is under no duty not to reveal it"; compare Dworkin & Callahan, supra note 39, at 387 n.197 (obviously assuming that crime and illegal act are identical).

248) See Blumberg, supra note 239, at 288 (questioning usefulness of Restatement's economic approach to the problem of the relationship between employee's obligations as a citizen and his role as employee).
249) See Initial Servs., Ltd. v. Putterill, 3 W.L.R. 1032, 84 L.Q.Rev. 8 (1968) (England) (disclosure of at least unlawful acts to government authorities no breach of confidentiality); Dworkin & Callahan, supra note 39, at 388; Westman, supra note 5, at 24 obviously assumes that disclosure of all illegal acts does not constitute a breach ("privilege to disclose criminal activities does not necessarily extend to disclosures of unethical behavior"); see also Blumberg, supra note 239, at 297 (pointing out that tort law introduces consideration of societal interest).

250) Problems of breach of confidentiality mainly occur in the public employee-employer, the attorney-client, physician-patient and bank-customer relationships, see Note (Alan B. Vickery), Breach of Confidence: An Emerging Tort, 82 COLUM. L.REV. 1426 (1982).

251) See to the principles of contract interpretation ALLAN F. FARNSWORTH, CONTRACTS, Sec. 7 (1990).
253) See Farnsworth, supra note 251, at 310, 315; North Gate Corp. v. Nat'l Food Stores, 30 Wis.2d 317, 140 N.W.2d 744 (1966) ("where various meanings can be given a term, the term is to be strictly construed against the draftsman of the contract").
254) COMPARE Farnsworth, supra note 251, at 519; Atlanta Ctr. Ltd. v. Hilton Hotels Corp., 848 F.2d 146 (11th Cir. 1988).
and furthermore serves the public interest, courts are likely to interpret confidentiality clauses in a way not to include environmental whistleblowing when the allegations are true.

Therefore, false allegations to government authorities may subject the employee to liability for the resulting damages. Although these damages can be substantial, cases in which an employer sued under this cause of action are not reported. For the jurisdictions recognizing either statutory or common law whistleblower protection, this may be explained by the fact that imposing contractual liability would be incongruent with the protection against discharge and harassment for good faith reporting. However, such contract claims may be successful in jurisdictions not providing for whistleblower protection. Thus, the potential liability serves as a disincentive for environmental whistleblowing.

2. Tort Liability

Among the theories the employer, or a co-employee named responsible for the perceived illegal conduct, may try to utilize to recover damages from the whistleblower,255 a tort action for defamation has the most potential.

Defamation256 provides a remedy for statements impairing the reputation of both individuals and business associations.257 Elements for an action are (1) a false and defamatory statement of fact258 concerning another person, which is (2) without a

255) Depending on the facts, actions for intentional infliction of emotional distress, false imprisonment, tortious interference with economic advantage and for malicious prosecution are possible.
256) An action for libel concerns basically written, for slander oral communications. Slander requires proof of special damages, i.e. loss of something which has economic or pecuniary value and results from the harm to the reputation, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 793 (5th ed. 1984)
257) RESTATEMENT (SECOND) OF TORTS 561, 562 (1977); Prosser & Keeton, supra note 256, at 778-779.
258) Stating an opinion is not actionable; however, if and to the extent the opinion implies the assertion of facts, it might be, see Milkovich v. Lorain Journal Co., 110 S.Ct. 2695, 111 L.Ed.1 (1990); to defamatory opinions compare Prosser & Keeton, supra note 256, Sec. 113A.
privilege (3) intentionally or negligently published to a third party (4) and results in damages. 259

Internal whistleblowing may directly or indirectly accuse a co-employee with violating the law, or at least with violating his job duties. This, as well as reporting perceived illegal conduct externally to government authorities, tends to lower the respective recipient's estimation of the person or organization responsible, and thus constitutes a defamatory statement. 260 As whistleblowing, by definition, seeks either management or government authority to take notice of and correct the alleged wrongdoing, the statement is communicated intentionally to them. 261 However, the allegations have to be false 262 to constitute an action for defamation. Reporting true violations of environmental law does not subject a whistleblower to liability for defamation. But even when the allegations are false, the majority view grants a qualified privilege for environmental whistleblowing. 263

With regard to internal whistleblowing, statements made to protect the recipient's or a third party's interest are privileged if the publisher has a legal or moral duty to protect these interests, or when the reporting reflects "generally accepted standards of decent

259) RESTATEMENT (SECOND) OF TORTS Sec. 558 (1977).
260) See RESTATEMENT (SECOND) OF TORTS Sec. 559 (1977); communication to one third person is sufficient, SEE Prosser & Keeton, supra note 256, at 798-799.
261) Intent in torts means desire to cause a consequence, or belief that this consequence is substantially certain to occur, see RESTATEMENT (SECOND) OF TORTS Sec. 8A (1977).
262) See Prosser & Keeton, supra note 256, at Sec. 116; RESTATEMENT (SECOND) OF TORTS Sec. 581A Comment a (1977).
263) A minority of courts grants an absolute privilege for participants in judicial and "quasi-judicial" proceedings, even before the proceedings have commenced, covering actively volunteered statements to law enforcement or other public officials, especially when the statements are intended to initiate judicial proceedings, see, e.g. General Elec. Co. v. Sargent & Lundy, 916 F.2d 1119, 1125-27 (6th Cir. 1990) (Kentucky law); Cutts v. American United Life Ins. Co., 505 So.2d 1211, 1215 (Ala. 1987); Ducosin v. Mott, 292 Or. 764, 642 P.2d 1168, 1169-70 (1982); Williams v. Taylor, 129 Cal.App.3d 745, 181 Cal.Rptr. 423 (1982); Prosser & Keeton, supra note 256, at 819-20; Bieluch v. Smith, 1993 WL 190841 (letter complaining about state trooper to commissioner for Public Safety); Ganim v. Bridgeport Hydraulics Co., 1993 WL 541005 (complaint about petrol discharge to Conn. Dept. of Env. Protection); Vantassell-Matin v. Nelson, 741 F.Supp 698 (N.D.Ill. 1990).
conduct. Courts have recognized that the employment relationship justifies statements to the employer about a fellow employee, especially when the purpose of the statement is to warn the employer of misconduct. Closely related are privileged statements which are made to protect a common interest of the publisher and the recipient, and where the publisher reasonably believes that the recipient is entitled to such information. Such a common interest is acknowledged for communications between employees among themselves, e.g. between employee and supervisor, as well as for statements between employee and employer. The future existence of the firm constitutes such a common interest, and violations of environmental law may endanger it because of the substantial financial losses or revocation of necessary licenses it may incur.

270) It could be further argued that individual exposed to environmental pollution or hazards form a group with a common interest, including the employer and the employee, compare Prosser & Keeton, supra note 256, at 830 (also "members of a group with a common interest of non-pecuniary character").
External environmental whistleblowing is protected under the qualified privilege for statements aimed at safeguarding the public interest. A statement is privileged as long as there are reasonable grounds on the part of the publisher to believe that his statement contains information affecting an important public interest, and the recipient is a public officer "authorized ... to take action if the defamatory action is true." Thus, not only statements regarding criminal activity are covered. Communications made in service of the public interest in effective law enforcement, at least when made to law enforcement officials, are generally privileged.

However, abuse can override the qualified privilege. The most important basis to deny the privilege is when the whistleblower does not believe in the truth of the statement. Although courts differ regarding the standard of fault necessary to defeat the privilege, most follow the Restatement (Second) of Torts and apply the

271) See Baine & Milton, supra note 265, at 10; Prosser & Keeton, supra note 256, at 830-31.
272) RESTATEMENT (SECOND) OF TORTS Sec. 598 (1977); Baine & Milton, supra note 265, at 10.
276) See RESTATEMENT (SECOND) OF TORTS Sec. 593, Sec. 258; Baine Milton, supra note 265, at 7; Prosser & Keeton, supra note 256, at 8
277) See Russell v. Geis, 251 Cal.App.2d 560, 50 Cal.Rptr. 569 (1967); Caldwell v. Personal Fin. Co. of St. Petersburg, 46 So.2d 726 (Fla.1950); Prosser & Keeton, supra note 256, at 834.
278) Some courts require common law malice, i.e. ill will, spite, absence of good faith or desire to harm the person defamed to defeat the privilege, see Clark v. America's First Credit Union, 585 So.2d 1367 (Ala. 1991); John Hancock Mut. Life Ins. Co. v. Zalay, 581 So.2d 178 (Fla.App.), rev. denied, 591 So.2d 185 (Fla 1991); Stuempges v. Park Davis & Co., 297 N.W.2d 252 (Minn. 1980); Brebny v. Nordstrom, Inc. 812 P.2d 49 (Utah 1991); Haeter v. Publ. Co., 811 P.2d 231 (Wash.App.1991), while others apply a negligence standard, see e.g. Rouly v. Enscher Corp., 835 F.2d 1127 (5th Cir. 1988) (Louisiana); Cooper v. Portland Gen'l Elec. Corp., 824 P.2d 1152 (Or. Ct. App. 1992); Tibke v. McDougal, 479 N.W.2d 848 (S.D. 1992) contra Prosser & Keeton, supra note 256, at 835, while still others develop their own standard outside these
"actual malice" standard developed by the Supreme Court in *New York Times v. Sullivan* and its progeny. Under this standard, a private plaintiffs such as the employer or a fellow employee must show "actual malice" to recover presumed or punitive damages when the statement, such as environmental whistleblowing, addressed a matter of public concern. "Actual Malice" means that the defendant either knew that his statement was false and that it defames plaintiff, or that he acted in reckless disregard of this matter. Therefore, a whistleblower who does not positively know that his statement is false and who does not have serious doubts about its truth is shielded by the qualified privilege.

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282) The court distinguishes whether the plaintiff is a "public figure", i.e. somebody who does not hold a public office, but is "nevertheless intimately involved in the resolution of important public questions or, by reason of (his) fame, shape(s) events in areas of concern to society at large", see Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (Warren, J. concurring in the result); Anderson, *supra* note 281, at 500. The Court requires a showing of "actual malice" to recover presumed damages. Although some large employers might be characterized as "public figures", the vast majority as well as the whistleblower's fellow employees are not.


III. INTERRELATIONSHIP BETWEEN THE SOURCES OF WHISTLEBLOWER LAW

The relationship between the three sources of whistleblower protection law, federal statute, state statute and common law, as well as their relationship to employer or co-employee claims under state tort or contract law is largely unclear.

A. FEDERAL PREEMPTION OF STATE LAW?

State law is preempted by federal law when Congress either explicitly provided for it, indicated an intent to occupy an entire field of regulation, or the state law actually conflicts with federal law. Such a conflict exists when compliance with both laws is impossible, or when the state law stands as an obstacle to the purpose and objective congress wanted to achieve by enacting the federal law. However, especially in fields like environmental protection and labor relations which are traditionally dominated by the states, "the exercise of federal supremacy is not lightly to be presumed." Under this standard, state whistleblower protection law is not preempted even when a federal remedy is available.

290) see Kohn & Kohn, supra note 44, at 105-07; in Willy v. Coastal Corp., 855 F.2d 1160 (5th Cir. 1988), the court implied that there is at least no general preemption for the CAA, WCPA, SDWA, SWDA; see also Phipps v. Clark Oil & Refining Corp., 396 N.W.2d 588 (Minn.Ct. App. 1986), affd, 408 N.W.2d 569 (Minn. 1987) (no preemption by CAA); but see Braun v. Kelsey-Hayes Co., 635 F.Supp. 75 (E.D.Pa 1986) (preemption for TSCA, but before ERA amendment); the Montana whistleblower statute explicitly does not apply to discharges for which a federal statute provides a procedure such as filing complaints with an administrative body, MONT. CODE Sec. 39-2-912 (1).
None of the federal environmental statutes explicitly preempts state law. On the contrary, the use of the term "may...file a complaint" implies that Congress wanted to permit federal protection, but not mandate it.291

In 1993, Congress showed its clear intent not to occupy the entire field of environmental whistleblowing292 by amending the Energy Reorganization Act. Responding to a split of opinion among courts,293 Congress explicitly expressed its intent not to preempt state whistleblower law in the field of the most extensive federal legislation, and thus allows the conclusion that the other federal environmental whistleblower provisions do not preempt state remedies as well.294 There are no hints to the contrary in the legislative history of the statutes,295 and at the time of the enactment of the federal statutes, a broad body of whistleblower common law already existed.

Finally, state and federal law are not in conflict, and the congressional purpose of preventing employers from silencing environmental concerns296 is best served by giving employees both a federal and a state track of protection.297

However, it is not clear whether state tort or contract law claims by the employer or a co-employee against the whistleblower are preempted as well. Such claims are not covered by the federal statutes,298 and there are no indications in the language or legislative history that Congress wanted to bar them.

291) See Norris v. Lumbermen's Mut. Casualty Co., 881 F.2d 1144 (1st Cir. 1989); all of the federal statutes except the ERA contain a general clause allowing more stringent state action in the regulated field, see Kohn & Kohn, supra note 44, at 117 n.26.
295) See Kohn & Kohn, supra note 44, at 106.
296) See supra note 56 and accompanying text.
297) See Kohn & Kohn, supra note 44, at 167.
298) See supra note 84-91 and accompanying text.
Regarding a tort action for defamation, the privilege includes behavior which is not protected under the federal statutes. Therefore, the two laws do not conflict directly, and liability for defamation does not stand as an obstacle to the purpose of enabling an employee to voice his environmental concerns in good faith, as the "actual malice" standard for defamation is stricter than the good faith standard for protection under the statutes.

However, although false allegations made in good faith are protected under the federal scheme, contract law imposes liability in this case. It could be argued that this liability stands as an obstacle to the purpose of federal environmental whistleblower law. However, courts have not decided that question yet.

B. INTERRELATIONSHIP BETWEEN STATE STATUTES AND OTHER STATE LAW

1. Preclusion Of Common Law Whistleblower Claims By State Statutes?

As some jurisdictions acknowledged a tort action for whistleblowing prior to enacting a whistleblower statute, the question whether the statute precludes tort claims arises. Some statutes address that problem by stating explicitly that they are non-exclusive. The Montana statute is explicitly exclusive. Others give the employee in effect the choice by ordering that an action under the statutes constitutes a waiver of any other possible remedy. However, many others do not address the problem.

299) See supra note 80-83, 272-286 and accompanying text.
300) Although Title VII is designed by Congress to apply as broadly as possible, see Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 13 L.Ed.2d 258, 85 S.Ct. 348 (1964), courts allow tort actions in response to a complaint, see Kolosky v. Ancho Hocking Corp., 35 FEP Cases 1830 (W.D. Pa. 1984).
301) See HAW. REV. STAT. Sec. 378-69; LA. CIV. CODE ANN. art. 30:2027 B. (1); OR. REV. STAT. Sec. 659.550 (4); N.H. REV. STAT. Sec. 275-E:5.
302) MONT. CODE Sec. 39-2-913.
303) N.J. STAT. ANN. Sec. 34:19-8; N.Y. LAB. LAW Sec. 740 (7); compare Gonzalez v. John T. Mather Memorial Hosp., 147 Misc.2d 1082, 559 N.Y.S.2d 467 (1990) (preclusion of any other action under any theory of liability) with Flaherty v. The
Generally, under the "negative implication" rule of statutory interpretation, there is a presumption that the legislature impliedly intended a statutory remedy to be exclusive when enacting a statute creating a comprehensive remedial scheme containing both a liability and a remedy to enforce the liability.\textsuperscript{304} Many of the existing statutes contain such a comprehensive scheme, and with regard to the ones ordering prior internal procedures, it is not likely that the respective legislature wanted them to be bypassed easily by allowing a tort action.\textsuperscript{305} Following the "negative implication" argument, the Michigan\textsuperscript{306} and Maine\textsuperscript{307} courts have held their respective statutes exclusive.

However, the acknowledgement and scope of a public policy tort for whistleblowing in many of the states was not certain at the time their respective statutes were enacted,\textsuperscript{308} and it can be argued that the statutes were intended to provide a minimum standard only. As no general trend appears,\textsuperscript{309} one has to look closely at the legislative history,\textsuperscript{310} the extent of protection and the state of the acknowledgement of the public policy tort in the respective jurisdiction at the time of the enactment of the statute to determine the likelihood of preemption.


\textsuperscript{305} Compare Dworkin & Near, supra note 8, at 251-52.


\textsuperscript{307} See Bard v. Bath Iron Works Corp., 590 A.2d 152 (Me. 1991); but see Larrabee v. Penobscot Frozen Foods, 486 A.2d 97, 100 (Me. 1984); Wyman v. Osteopathic Hosp., 493 A.2d 330 (Me. 1985); Lofgren, supra note 21, at 332.

\textsuperscript{308} See compilation at Westman, supra note 5, Appendix D.

\textsuperscript{309} Compare Westman, supra note 5, at 148 ("the majority approach appears to avoid creating...common-law remedies if a pre-existing statutory remedy is already in place") with Miceli & Near, supra note 6, at 246 ("seems to be a trend not to deny ...the full range of remedies by allowing them to sue for wrongful firing, especially if their only remedy is reinstatement and lost wages and benefits").

\textsuperscript{310} Note (M.E.Knack), supra note 304, at 543.
2. State Statutes And Employer Claims

State whistleblower protection statutes do not preclude employer or co-employee contract or tort claims against the whistleblower. As most whistleblower statutes protect only against discriminatory conduct by the employer with regard to the employment, such claims are not covered. Pursuant to that, the Michigan, Minnesota and Hawai statutes assert that the statutory whistleblower protection shall not impair the right of confidentiality of communications protected by other statutes or common law.\(^{311}\) As false allegations may violate an employee's duty of confidentiality,\(^{312}\) these statutes seem not only to deny protection against retaliatory discharge or harassment\(^{313}\) but also to allow for employer contract claims for breach of confidentiality.

IV. SUMMARY: THE EXISTING ENVIRONMENTAL WHISTLEBLOWER LAW

Whistleblowing is, for all practical purposes, not mandated by law, but protected. As criminal law plays no practical role in protecting whistleblowers, administrative or civil proceedings are available. Despite some similarities, the content of the existing whistleblower protection law varies widely. Substantive protection is generally granted for internal as well as external reporting of violations of environmental law. However, only violations of the respective statute are covered on the federal level, whereas the common law tort encompasses clear public policies based on any statute, and the state statutes mostly limit protection to certain violations of law. As all sources require good faith reporting, some state statutes demand in addition a reasonable belief that a violation occurred. Only discriminatory conduct affecting the employment relationship is covered, and state law common protection is furthermore restricted to dismissals. Punitive damages are in general only available under common law. Finally, the civil actions under

\(^{311}\) HAW. REV. STAT. Sec. 378-66 (1); MICH. COMP. LAWS Sec. 15.366; MINN. STAT. ANN. Sec. 181.932 Subd. 5.
\(^{312}\) See supra note 240-55 and accompanying text.
\(^{313}\) Compare HAW. REV. STAT. Sec. 378-62 (1); MICH. COMP. LAWS Sec. 15.362; MINN. STAT. ANN. Sec. 181.932 Subd. 1.
state law are subject to a statute of limitations between 1 and 4 years, whereas the federal protection through administrative proceedings is barred after 30 days.

In case his allegations are false, the whistleblower is subject to contract actions for breach of the implied duties of obedience, loyalty and confidentiality, or of an explicit confidentiality agreement. Employers and co-employees may also bring a defamation action when the whistleblower acted with actual malice.

Although federal law does not preempt actions under state whistleblower protection law, it is unclear whether employer tort or contract claims for damages are possible when the whistleblowing is covered by federal protection law. Although state whistleblower statutes in general preclude common law protection actions, they do not preclude employer claims for damages.

Although the number of whistleblower cases has increased dramatically within the last 10 years, the existing whistleblower law is far from optimal. Despite contrary expectations by the legislators, the statutes have not substantially encouraged employees to seek protection under them. The main reason why employees prefer common law actions is the availability of punitive damages. The scope of wrongdoing which may be reported is rather restricted under most state statutes, and most statutes with a broader scope are restricted to equitable remedies. Furthermore, the extremely short statute of limitations bars many actions under the federal statutes. However, common law protection is only acknowledged in about half of the jurisdictions, is limited to dismissals only, and carries a certain amount of uncertainty whether the court in the concrete case will assume a violation of public policy or will hold the common law action precluded.

314) see Dworkin & Near, supra note 8, at 253-260; Miceli & Near, supra note 6, at 243-44.
315) Miceli & Near, supra note 6, at 243-44; Barnett, supra note 41, at 446.
316) In general, moreover, it is narrowly interpreted by the courts, compare Dworkin & Near, supra note 8, at 263.
317) See Westman, supra note 5, at 65-66.
CHAPTER 4. IN SEARCH OF AN OPTIMAL WHISTLEBLOWER LAW

The shortcomings of the existing whistleblower law lead to the question of what an optimal response to the problem of reporting environmental violations should look like. After determining what result is desirable by balancing the interests, the most efficient way to implement this finding has to be explored.

I. BALANCING THE INTERESTS: IS ENVIRONMENTAL WHISTLEBLOWING DESIRABLE?

The underlying assumption for the existing whistleblower law is the general desirability of having employees reporting on perceived wrongdoing of their employers. However, the question when and what kind of whistleblowing is desirable in a given situation must balance the legitimate interests of at least the organization (employer), the whistleblower, and of society at large. The outcome of balancing the interests is substantially influenced by two major distinctions: Between true and false allegations and external and internal whistleblowing.

A. TRUE ALLEGATIONS

1. The Interests Of The Organization: Internal Whistleblowing

The legitimate interests of the organization support internal whistleblowing as the most desirable employee response to violations of environmental law.

From the viewpoint of the firm, moreover, there are several arguments against environmental whistleblowing at all, even when the allegations are true. However, some of these interests are not legitimate in the sense that the legal system should take them into account. These include the interest in externalizing costs by disregarding environmental law, of saving the costs of correction, including the expenses for an internal investigation, of preserving management's "peace of mind" by not informing it about wrongdoing and thus keeping the possible defenses of lack of knowledge and no fault against liability, or of keeping the image and goodwill of an "environmentally correct" enterprise.

But a legitimate interest of the firm is maintaining its effectiveness. The effectiveness of an organization depends at least in part on a functioning authority structure. At least when whistleblowing circumvent the existing structure of internal responsibility and supervision, whistleblowing implicitly criticizes the effectiveness of the existing system of internal control, weakens the chain of command, and constitutes unpredictable behavior. Moreover, whistleblowing may violate group norms and thereby threaten the cohesiveness and positive working climate within the organization.

The benefits of internal whistleblowing for the organization clearly offset these interests. As the system of internal control obviously has failed when illegal behavior occurs within the firm, internal whistleblowing may provide management with the information the formal internal control system is supposed to provide, but did not. Information about wrongdoing through internal whistleblowing may benefit the organization by enabling it to take early action. Whistleblowing may prevent

319) This might even be true when caught, e.g. when the penalties are lower than the profit; see e.g. the example at Atkins, supra note 4, at 551 n.146-148; Miceli & Near, supra note 6, at 10.
320) This effect may be avoided when whistleblowing is specifically encouraged by the organization and channels are designated, see Miceli & Near, supra note 6, at 9-10.
321) Id. at 10-11.
322) Id. at 81-84 (work group); this is equally true for substantiated and unfounded allegations, id. at 12.
323) See Boyle, supra note 127, at 828-830; Miceli & Near, supra note 6, at 242.
continued wrongdoing or escalation, and the possibly higher costs resulting from it. \textsuperscript{324}

Internal whistleblowing (and correction) may reduce mismanagement\textsuperscript{325} and may avoid lawsuits and legal regulation.\textsuperscript{326} It may save costs in addition to the costs of correcting the wrongdoing, such as fines or counselling costs arising from government intervention. Internal whistleblowing may help to maintain goodwill and reputation.\textsuperscript{327} At least, it enables management to steer the information to the outside, thus possibly avoiding (personal) liability or negative publicity.\textsuperscript{328} Finally, although internal whistleblowing may disturb the working climate, it may also benefit it by having a pacifying effect on the workforce, may increase a feeling of security and that the employer cares,\textsuperscript{329} and by encouraging ethical behavior.\textsuperscript{330}

From the point of view of the firm, internal whistleblowing is not only preferable to no whistleblowing at all, but also to external whistleblowing. Compared to internal whistleblowing, external reporting has major disadvantages for the firm. External whistleblowing may lead to additional costs besides the ones arising for investigating and correcting the wrongdoing internally. Government may impose costly measures to prevent further hazards, may revoke or limit licenses, fine the organization, and hold it liable for damages. The organization may lose efficient managers, either through imprisonment or through loss of legal prerequisites necessary to remain in their function,\textsuperscript{331} or as a result of public or shareholder pressure to discharge managers perceived responsible for the wrongdoing. Violations of environmental law may lead to a severe loss of goodwill and reputation.\textsuperscript{332} When violations are only corrected after

\textsuperscript{324) Miceli & Near, supra note 6, at 6; Atkins, supra note 4, at 544.}
\textsuperscript{325) Miceli & Near, supra note 6, at 12.}
\textsuperscript{326) Id. at 13.}
\textsuperscript{327) Id.}
\textsuperscript{328) See Atkins, supra note 6, at 544; see the examples at Westman, supra note 5, at 30.}
\textsuperscript{329) Miceli & Near, supra note 6, at 11.}
\textsuperscript{330) Id. at 11-12.}
\textsuperscript{331) E.g. disbarment of an in-house counsel.}
\textsuperscript{332) see Dworkin & Near, supra note 8, at 251.}
government intervention, the responsible agency may lose its trust in the firm. Straining existing good working relationships with regulatory agencies is generally not desirable due to the great amount of agency discretion. Moreover, agency involvement bears an increased risk that the public will learn of the violations. Due to widespread awareness concerning environmental issues, market shares and the availability of supplies or bank credit may be affected, and difficulties in hiring or holding much-needed employees may arise.

2. The Interests Of Society: External Whistleblowing

Society as a whole has a clear interest in environmental whistleblowing. Compliance with environmental law helps to preserve or improve existing living conditions, and protects the public health and safety.333 Whistleblowing leads to increased compliance, either voluntary or enforced, without demanding additional public funds for supervision,334 detection and evidence gathering.335

From the viewpoint of society at large, basically four arguments make external whistleblowing preferable to internal reporting.

Firstly, society has a strong interest in controlling and monitoring cleanup efforts by the organization. Although wrongdoing may be corrected faster and more cost-efficiently by a receptive management, the response to internal whistleblowing is entirely at the discretion of the employer.

Considering the immense costs of environmental clean-ups, the danger exists that without government supervision, not all necessary steps will be taken. A private sector firm has to act economically in minimizing costs. Generally, the ideal way of compliance from its point of view is the least expensive one. Therefore, an organization will tend to

333) Miceli & Near, supra note 6, at 8, 14; Atkins, supra note 4, at 537-538.
334) Miceli & Near, supra note 6, at 14.
335) Atkins, supra note 6, at 537, 544; contra James W. Hubbell, Retaliatory Discharge and the Economics of Deterrence, 60 U.Colo.L.Rev. 91, 105 (1989) (false claims penalize innocent corporate behavior and thus reduce statutory enforcement).
correct wrongdoing with minimum efforts and generally will be reluctant to investigate other damages to the environment or third parties possibly caused by its conduct.

Furthermore, internal whistleblowing gives the employer the chance to silence legitimate environmental concerns. An employee-whistleblower often will not be able to verify whether the employer really took all necessary steps to correct the wrongdoing. In case the employer only pretends to do so or just covers up the misconduct, objectively inadequate employer action may appease the employee’s concerns and prevent further complaints. Moreover, the organization may also threaten the employee into or buy his silence.

Secondly, internal whistleblowing exempts the firm from large parts of its responsibility and allows it to keep parts of the profits of its wrongdoing. Even when the organization complies in the future and cleans up existing environmental damages, not all violations of environmental law lead to damages which can be measured and corrected. Society as a whole or third persons eventually bear the costs of such past violations in the form of living in a more polluted environment. Civil fines and penalties have at least partially the function to provide government with the financial means to respond to future damages resulting from such conduct and to take away financial advantages resulting from it. In a case of internal whistleblowing, the firm is not subjected to such fines. It may not only keep the costs saved by externalizing the disposal

336) Contra Miceli & Near, supra note 6, at 242 (possibility of EXTERNAL whistleblowing sufficient).
337) See Barnett, supra note 41, at 443.
338) See Boyle, supra note 127, at 828.
339) In many reported whistleblower cases, the employee complained externally after internal reports did not have a satisfying outcome.
341) E.g. air pollution.
342) See, e.g., Sec. 120 CAA (noncompliance penalties).
of sewage or gases, but also the potentially higher profits made due to the competitive advantage resulting from non-compliance.

Thirdly, government involvement shows the citizen that it takes its protective role seriously, and that environmental laws have to be obeyed. Penalties and criminal prosecution of wrongdoers serve not only material justice and equality before the law, but deter the wrongdoer and others with similar propensities from future violations. Thus, punishment secures and fosters overall compliance through individual and general deterrence.343

Finally, external whistleblowing helps to update environmental data and to make government aware about problems in compliance, thus leading to more efficient future regulation and a better determination of the crucial points control should focus on.

3. Conflicting Interests Of The Whistleblower

An employee has conflicting interests with regard to environmental whistleblowing. In his role as a member of society, which interests are his as well, external whistleblowing is the action to take. However, in his role as a member of the firm, the viability of the firm constitutes a legitimate interest of the employee as a prerequisite for the future existence of the workplace, and acting in the best interest of the firm generally will lead him to internal reporting. Finally, the employee has a personal interest apart from the ones his different roles prescribe. His personal interests in maintaining his job and a friendly work environment in which he is not being harassed, socially rejected or sued for damages asks for either refraining from whistleblowing at all, or for internal whistleblowing as the way most likely not to evoke such reactions. As his personal interests are presumably then best served, employees will generally tend to internal whistleblowing.

343) Compare Miceli & Near, supra note 6, at 14; Dworkin & Callahan, supra note 318, at 285; Fidell, supra note 52, at 29 n.164 ("belief that - despite whistleblowing - no action is taken discourages whistleblowing").
B. FALSE ALLEGATIONS

In general, false allegations are neither in the interest of the organization nor of society. False allegations incur investigation costs for both the employer\(^{344}\) and the government, and public resources are wasted by binding funds and manpower in unnecessary investigations or court proceedings.\(^{345}\) Authority structure and working climate within the organization are unnecessarily disturbed, and despite the fact that the allegations are false, the danger of loss of goodwill exists when the public learns of them. Information about allegations of wrongdoing or ongoing government investigations leaking out to the public may result in irreparable damages to the firm. Especially when potentially high liability is involved, stock may plunge, and creditors and business partners may withdraw. Reputation and image are fragile commodities, and the public not always acts rationally in condemning activities. Although administrative procedures are designed to protect the rights of a wrongfully accused and to keep information confidential,\(^ {346}\) these safeguards do not always work.

However, the negative effects of false allegations in general are partly offset by the potential benefits for both the organization and society of reporting suspicions, even when they turn out to be false. Given the complexity of environmental regulation and the underlying technical processes, an employee often can only suspect that a specific conduct violates environmental law. However, actual violations are often detected when reporting a suspicion triggered an investigation. Therefore, the risk of a claim turning out to be false is inherent in many of the whistleblowing acts. Considering the strong interests of the organization and society in learning of violations, investigation costs, disruption of working climate and threats to an organization's goodwill may be offset by the potential benefits of reporting suspicions.

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345) *Id.* at 8, 13; see Atkins, *supra* note 4, at 541; Westman, *supra* note 5, at 29.
Moreover, investigations proving that no violations occured provide this information to the employer and government. Government investigations of suspicions show the public and industry its willingness to enforce environmental law, thus serving the purposes of general deterrence and protecting the public safety and health. An employer learning of suspicions may clarify the legality of his conduct to his employees to pacify concerns within the firm 347 and thus to prevent outside reporting with its potentially negative effect on the goodwill. Finally, internal reporting of suspicions enables the employer to react adequately when government or the public learns of it and raises the issue.

C. BALANCING THE INTERESTS: IN FAVOR OF EXTERNAL WHISTLEBLOWING

In order to reach a fair result, whistleblower regulation has to evaluate and balance the interests involved, both with regard to true and to false allegations. By balancing the conflicting interests, external whistleblowing seems to be the desirable goal of whistleblower legislation.

1. Balancing The Interests Of The Organization And Of Society

By weighing the burdens of government involvement for the firm with the strong societal interests in controlled investigation and clean-ups, in holding the wrongdoer responsible for past misconduct, and the individual and general deterrence effect of government involvement, these burdens seem bearable.

Both forms of reporting have the potential to correct mismanagement. Although external whistleblowing may challenge the authority structure and may disturb the working climate more intensely, these effects only gradually differ from internal reporting.

347) See Dworkin & Near, supra note 6, at 263-64.
Costs in addition to its own investigation and correction expenses arise for the firm from government involvement only when the allegations are true, as the firm only has to carry the costs of government involvement, fines and liability when it is responsible for wrongdoing. From the viewpoint of government, the lost expenses for its investigations in cases of false allegations are outweighed by far by the potential financial gains for the public from civil fines and liability in case of increased true external whistleblowing. Besides these additional costs and the costs for supervision, government involvement does not necessarily incur higher costs for the clean-up itself. As management usually knows the situation best, government may let the company propose a clean-up plan and may approve it when reasonable. Thus, interference with management's discretion can be minimized, and the reaction to the wrongdoing may be as cost-effective and efficient as in cases of internal whistleblowing.

Finally, the employer's interest in preserving his goodwill is only legitimate when the alleged violations did not occur. To mitigate the severe effects on the reputation and goodwill of the firm even false allegations may have, full and fast cooperation with government provides opportunity for the employer to show that the allegations are unfounded and thus to reduce the reputational damage. The negative outcome of a government investigation affirms the correctness of the firm's conduct toward the environment and may be even used to build up goodwill. As the safeguards of administrative procedure prevent at least in part that information leaks out, however, the number of false complaints has to be kept as low as possible.

2. Protecting The Interests Of The Whistleblower

As balancing of the respective interests of the organization and society points in favor of external whistleblowing, the interests of the whistleblower, leading him to prefer internal reporting, can be mitigated by whistleblower regulation. As fines, liability and

348) See Malin, supra note 346, at 306.
other effects of whistleblowing on the viability of the firm depend on the nature of the violations, whistleblower law cannot influence this factor. However, regulation can raise public consciousness regarding the desirability of environmental whistleblowing and thus help to prevent social rejection. More important, it can take away the major reason for an employee not to report at all or only internally by protecting him effectively against dismissal and harassment.

II. THE DESIRABLE WAY: ENCOURAGING EXTERNAL WHISTLEBLOWING THROUGH REGULATION

A. THEORETICAL WAYS TO ENCOURAGE WHISTLEBLOWING

Environmental whistleblowing may be furthered in two ways. Firstly, the law can set incentives for blowing the whistle, either by mandating reports and imposing criminal sanctions for not reporting, or by giving a positive incentive in rewarding reports. With regard to environmental whistleblowing, neither of these has been utilized yet. Secondly, the law can impose direct disincentives, such as fines, imprisonment or forfeitures, to prevent employer conduct discouraging reporting. It can also try to remove disincentives for the employee, such as the fear of retaliation, by protecting him against such adverse behavior. As shown supra, the existing whistleblower law nearly exclusively focuses on protection against retaliation.

B. RECEPTIVENESS OF WHISTLEBLOWING TO LEGAL REGULATION

To be efficient, environmental whistleblower law has to take into account the sociological factors influencing whistleblowing. In a recent study based on a comprehensive evaluation of the existing sociological literature, Miceli and Near have

349) Fidell, supra note 52, at 5.
350) Id.
351) Miceli & Near, supra note 6, at 49-92.
developed a model of whistleblowing. This model will be used to show which factors shape the whistleblowing process and how employment regulation can influence external whistleblowing.

Miceli and Near's model divides the whistleblowing process into 5 steps: (1) The (perceived) wrongdoing, (2) the decision making process whether to blow the whistle or not, (3) the actual act of whistleblowing, (4) the reactions of others to it, and finally (5) the assessment of these reactions by the whistleblower.352 Steps (2), (4) and (5) are the ones most likely to be influenced by legal regulation.

1. The Decision-Making Process

The decision making process can be divided into at least 4 sub-steps.353 All steps are strongly shaped by personal features of the potential whistleblower, such as his intellectual ability to detect wrongdoing,354 his self-esteem and self-confidence,355 his educational level,356 and the development of a general sense of responsibility357 for society or the organization,358 of moral judgement359 and of an individual conscience.360

The recognition phase, in which the potential whistleblower applies his personal standard of what constitutes wrongdoing to his perception of what has actually taken place, is not responsive to whistleblower law.

352) Id. at 48-92.
353) Id. at 58-72.
354) Id. at 103-105.
355) Id. at 109-110.
356) Id. at 119-120 (only slightly); 127-128 (knowledge of legal standards).
357) Id. at 112-114.
358) Id. at 124-127 (as reflected by higher status, such as supervisor).
359) Id. at 105-109.
360) Formed e.g. by religious and quasi-religious beliefs (environment) or by peer pressure (membership in environmental organizations); see Westman, supra note 6, at 28; Myron Peretz Glazer & Penina Migdal Glazer, The Whistleblowers. Exposing Corruption in Government & Industry 97-132 (1989) (exploring the power of belief systems); see the accounts of whistleblowers in Westin, supra note 6, at 17-130 and in Peretz & Peretz, Id.
However, the assessment phase, in which the whistleblower decides if the triggering event deserves action, as well as the two subsequent decision phases are. The outcome of the decisions of whether it is his responsibility to take action at all, and if yes, whether whistleblowing is the choice, may be shaped by law. All of these three phases are influenced by the number of incidents perceivedly constituting wrongdoing, their perceived seriousness, and whether clear and direct evidence exists.

The crucial decision whether to choose whistleblowing may be divided into three, inextricably intertwined, steps.

Firstly, perceiving whistleblowing per se as an appropriate alternative to other choices of action is more likely when support from friends and family is expected, when the individual perceives whistleblowing per se as desirable, or when the societal culture generally is supportive to whistleblowing.

Secondly, empirical research suggests that the evaluation of the costs and benefits of whistleblowing for the individual employee, although largely subjective and depending on the personality of the whistleblower, is heavily influenced by concerns about personal disadvantages. Empirically, whistleblowing is less likely when the individual believes that continuing the wrongdoing is critical for the survival of the organization, or if the wrongdoer has a high status in it. Internal whistleblowing occurs more often when the organization is less bureaucratic, stresses participation and is perceived as responsive to whistleblowing. This data seems to suggest that the personal interest in

361) Miceli & Near, supra note 6, at 141-142.
362) Id. at 138-142.
363) Id. at 137-138.
364) Id. at 59-72.
365) Id. at 148.
366) Id. at 114.
367) Id. at 164.
368) Id. at 162-163.
369) Id. at 147-148.
370) Id. at 156-158.
371) Id. at 157, 158-160.
372) Id. at 148-150.
survival of the workplace, the wrongdoer's ability to retaliate as well as the general likelihood of adverse employer reactions plays an important role. However, empirical research is not entirely clear how the threat of retaliation influences the decision to blow the whistle. Probably, the perceived threat of retaliation, the individual whistleblower's personality and the perceived seriousness of the wrongdoing as well as existing alternatives to whistleblowing all influence the decision.

Finally, an employee who has decided to blow the whistle faces at least three questions on how to do it: Alone or together with others, internally or externally, and openly or anonymously.

In practice, the percentage of whistleblowers reporting alone or going with others is roughly equal, and empirical data show no convincing influence for either one of the alternatives.

Empirically, nearly all whistleblowers who used external channels also reported internally. Internal as opposed to external whistleblowing is more likely when the organization is perceived to be responsive to whistleblowing, when the whistleblower has a high status within the organization, or is a supervisor. Perceived responsiveness reduces the confrontational effect of allegations of wrongdoing and the likeliness of extreme adverse reactions of the employer or fellow employees to the allegations. On the contrary, internal reporting may even lead the employer to regard the whistleblower as a responsible and caring member of the organization. However, harsh reactions are possible as well, and it may be sometimes more difficult for the employee to

373) Id. at 153-156; this finding is consistent with the (self-) description of whistleblowers in Westin, supra note 6, at 17-130 and Glazer & Glazer, supra note 360
374) Miceli & Near, supra note 6, at 61.
375) Id. at 61.
376) Id. at 26-27.
377) Id. at 148-150.
378) Id. at 123-127.
379) Id. at 125.
380) See Malin, supra note 346, at 313; compare Miceli & Near, supra note 6. at 242.
face the wrongdoer directly than to report to outside recipients.381 Status as a supervisor or a generally high status within the firm reflect a special responsibility for the firm and in the latter case presumably diminishes the vulnerability for retaliation.

Finally, most whistleblowers do not choose to report anonymously but identify themselves.382 This might be explained by the fact that remaining anonymous leads to a loss of effectiveness of the complaint.383 Lodging it anonymously may be perceived by the recipient as unwillingness to face the target of the accusation. This and the inability to assess the report diminishes the credibility of the complaint. Furthermore, there is no chance to contact the whistleblower when the amount of information and evidence given is not sufficient. Although the latter consequence can be circumvened by disclosing the whistleblower’s identity only to the recipient, the whistleblower makes then himself dependent on the recipient.384

2. Reactions To Whistleblowing

Environmental whistleblowing may induce the reactions at least of the complaint recipients (government agency or management), of other members of the organization, and of outsiders such as family, friends, trade unions and the media. However, government reaction is largely compelled by environmental and administrative law, and the influence of outsiders in the whistleblowing process depends on the facts of the case and is outside the scope of this article.

With regard to the reaction of the organization and its members, empirical research suggests a tendency of the organization to resist the change sought by the whistleblower rather than to correct its behavior.385 The reactions of management and other

381) See Barnett, supra note 41, at 444; Westman, supra note 5, at 69.
382) Westman, supra note 5, at 61.
383) Id. at 76-77.
384) Id. at 76-77.
385) Id. at 85; for public relations strategies compare id. at 87.
organization members regarding the act of whistleblowing itself may cover the whole range from support and encouragement to hostility and retaliation. However, with the exception of the wrongdoer who is likely to threaten or carry out retaliation, empirical research suggests that usually neither of these extremes occurs.

Whether supportive or hostile reactions of management occur may depend on the power relationships between whistleblower and management. The power of the whistleblower within the organization, the need for his future services, and the nature of the complaint itself are important factors.

The reaction of co-workers depends on whether they perceive whistleblowing as a violation of group norms. When it violates such norms they perceive as right even after the whistleblowing occurred, they will encourage the withdrawal of the complaint and will finally socially reject the whistleblower if he does not comply. Especially when the whistleblower "presents a good case," the group may on the other hand alter its standard to the standard the whistleblower has set.

3. Assessment Of The Reactions And Decision How To Respond

The final stage in the whistleblowing process is the assessment of these reactions and the decision of how to respond to it. The main influencing factor in this stage is whether the whistleblower is satisfied with the outcome of the whistleblowing, that is if he believes that a change in organizational behavior correcting the wrongdoing has occurred. If yes, the whistleblowing process usually ends. Otherwise, several options of future behavior exist. The whistleblower can repeat his report or take other courses of actions, such as complaining to external recipients after an internal report did not lead to a

386) Miceli & Near, supra note 6, at 79.
387) Id. at 80.
388) Id. at 84-85.
389) Resistance strategy; see id. at 81-84.
390) Id. at 83.
391) Accommodation strategy, see id. at 83.
392) Id. at 88.
change. If he perceives further action as generally desirable, but not feasible, he may end
the whistleblowing process as well. Influential factors in this decision are the
whistleblower’s perception of the likely success of further action and the perceived risk
involved. The threat or experience of retaliation may serve as a deterrent to further
action or may influence the whistleblower to leave the organization voluntarily without
further complaint. However, it also may lead him to complain not only about the
wrongdoing but to seek protection against the retaliatory behavior.

4. Shaping Whistleblower Behavior Through Employment Law

Reviewing the main sociological factors shaping a whistleblower’s decision to act
reveals that some of them are not responsive to employment regulation. Personal features
and the perception of how serious the wrongdoing and how clear the evidence is cannot
be altered by legal regulation.

However, the power relationship between employer and employee, resulting in the
fear of personal disadvantages, the societal climate towards whistleblowing, the
prevailing group norms among employees within the firm, and the responsiveness of the
organization can be influenced.

In general, any legal regulation encouraging whistleblowing shows that it is a desirable
goal. Such a demonstration, possibly increased by notification requirements, may change
the attitude of society, employers and employees toward whistleblowing, and thus may
lead to more widespread acceptance of and therefore increased reporting.

Incentives, such as criminal sanctions for not reporting or rewards for doing so, may
outweigh the fear of retaliation and of social rejection. Likewise, imposing direct
disincentives in the form of criminal or civil sanctions for hindering whistleblowing on
the employer alters the power relationship between employer and whistleblower

393) Id. at 89.
394) Id. at 88-89.
dramatically and would force the firm to be responsive. Effective protection against adverse employer behavior would lead to the same result. All of these ways can be structured to encourage external whistleblowing.

C. INCENTIVES FOR BLOWING THE WHISTLE?

1. Mandating Whistleblowing?

The most forceful way to encourage whistleblowing would be to mandate it by threat of criminal or civil fines. However, the First Amendment right of free expression and to petition government for redress of grievances protects a citizen against state action compelling him to provide information. The Supreme Court applies in cases of compelled speech a balancing test, weighing the competing government interest in gathering information against the individual's right not to speak. As there may be perfectly legitimate reasons to maintain silence about illegal acts of somebody else, and considering the importance of free speech in our society, it has been suggested that "the mere fact that a person wishes not to speak about a matter should create an initial presumption against compelled utterances on that subject." At least, a general duty to inform government about any, even minor, violation of law seems constitutionally problematic.

Against this background, there is no environmental or criminal law compelling an employee to report violations of law. Misprision of felony, the crime closest to instituting a general duty to report, requires in addition to the failure to report a criminal offense

395) U.S. CONST. amend. I.
398) Haiman, supra note 396, at 351.
either an active act of concealment,\textsuperscript{399} an "evil motive to prevent or delay justice,"\textsuperscript{400} or covers only felonies involving violence.\textsuperscript{401} Even with this restriction, courts look disfavorably not only on misprision,\textsuperscript{402} but on the idea of criminally enforcable duties to report in general.\textsuperscript{403} This reluctance may have its roots partly in the negative experiences with mandatory or encouraged informing of government in totalitarian countries or the United States during the McCarthy area.\textsuperscript{404}

Furthermore, although a citizen should be encouraged to support clear and vital public interests embodied in legislative acts, such as environmental protection law, generating a general "informant mentality" is not a preferable goal for a society. Therefore, and as the individual has to bear the potentially severe personal and social consequences of an act of whistleblowing, the law should leave the individual the choice of whether he wants to report or not. Leaving him the choice respects his individual conscience and his evaluation of the concrete situation. Therefore, encouraging a citizen to voluntarily inform law enforcement authorities, but not mandating it, seems the most desirable way to proceed.\textsuperscript{405}

\textsuperscript{399} See, e.g., 18 U.S.C. Sec. 4 (1970); N.J. REV. STAT. Sec. 2A:97-2.
\textsuperscript{400} Commonwealth v. Lopes, 318 Mass. 453, 459, 61 N.E.2d 849, 852 (1945); see Westman, supra note 5, at 26.
\textsuperscript{401} WASH. REV. CODE ANN. Sec. 9.69.100; see Note (Merek Lipson), supra note 236, at 183.
\textsuperscript{402} See Note (Merek Lipson), supra note 236, at 175; Callahan & Dworkin, supra note 341, at 331.
\textsuperscript{403} Compare the famous quotation in Marbury v. Brooks, 20 U.S. 556, 5 L.Ed. 522 (1822) ("it may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge;...the law which would punish him in every case for not performing this duty is too harsh for man").
\textsuperscript{404} See Malin, supra note 346, at 303.
\textsuperscript{405} See Westman, supra note 5, at 105 (pointing to statutes rewarding whistleblowing); Fidell, supra note 52, at 5.
2. Rewarding Whistleblowing?

Sociological-psychological research strongly supports that a properly administered system of financial rewards can effectively encourage whistleblowing. Although there is no law granting any "extrinsic" rewards for environmental whistleblowing, positive incentives in the form of financial rewards exist in other areas. On the state level, only a few statutes provide for very modest rewards for blowing the whistle. In general, the states seem to dislike the idea, and some even deny protection from retaliation when the employee personally gains from his reporting. However, Congress has enacted several statutes which provide for the possibility of monetary rewards for whistleblowing. Generally, granting an award and its amount is at the discretion of the administering federal agency, and most of these statutes have not had much impact on encouraging whistleblowing. However, the False Claims Act guarantees a minimum recovery to the informant. After establishing the mandatory minimum recovery,

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407) Extrinsic rewards, i.e. money or promotions, are benefits depending upon external factors, see id. at 285.
408) Recently, private rewards for whistleblowers have been created, see Jeff Goldberg, Truth & Consequences, OMNI, Nov. 1990, at 73, 113; James Strodes, Corporations Discover That It's Good To Be Good, BUS. & SOC'Y REV., Summer 1990, at 57-58.
409) See, e.g., S.C. CODE ANN. Sec. 8-27-20 (25 % of public savings resulting from the reporting in the first year up to $2,000,-); WISC. STAT. ANN. Sec. 230.83 (2) (rewards possible).
410) See Callahan & Dworkin, supra note 340, at 278-79.
411) See, e.g., 43 PA. CONS. STAT. ANN. 1422, 1423; W.VA. CODE Sec. 6C-1-2(d),-1-3; WISC. STAT. ANN. Sec. 230.83 (2).
412) See, e.g., 12 U.S.C. Sec. 1831k (Financial Institutions Reform, Recovery and Enforcement Act of 1989, FIRREA) (maximum reward of $100,000,- for information which leads to recovery of $50,000,- or more of GOVERNMENT money spent to "bail out" banks or savings and loans); 15 U.S.C. Sec. 78u-l (e) (Insider Trade and Securities Fraud Enforcement Act of 1988) (up to 10 % of penalties for information leading to civil insider-trading penalties); 26 U.S.C. Sec. 7623 (tax informer statute); 19 U.S.C. Sec. 1619 (customs informer statute).
413) See, e.g., 12 U.S.C. Sec. 1831k (a), (d) (FIRREA); 17 C.F.R. Sec. 201.61 (Securities Exchange Act).
actions under the Act have skyrocketed from an annual average of 6 to 280 in 1990, with growing tendency. 416

Despite its suitability for encouraging whistleblowing, and despite the fact that self-interest as a motive for reporting is not inherently wrong, 417 financial rewards for environmental whistleblowing seem not to be appropriate.

First of all, whistleblowing driven by greed for possibly large amounts of money increases the danger of frivolous complaints. The existing whistleblower protection law lowers the potential cost of reporting for the employee substantially by taking largely away the fear of successful employer retaliation. As his only gain is a better environment, his decision to report is mainly based on the perceived seriousness of the violations and how clear the evidence is. 418 Thus, the employee evaluates the situation and bases his decision mainly on the perceived need for correction. Introducing financial rewards alters that decision process substantially. Not the need for correction, but the possible personal profit may be determinative. Carried into the extreme, the employee will report even the slightest suspicion in the hope that something may come out of it. Therefore, the danger that false allegations will be reported increases dramatically.

Secondly, financial rewards for whistleblowers may offset the savings for supervision and regulation increased whistleblowing is supposed to provide. 419 Violations of environmental law not always result in civil fines 420 or in recovery of damages exceeding the amount necessary for clean-up. 421 There may be either no sanction, or only imprisonment. Environmental law may only provide for actual, not for punitive damages. Granting awards only when government makes a profit would leave large parts of environmental law out, reducing the effectiveness of a reward system. As empirical

417) Id. at 319-323.
418) See supra note 362-364 and accompanying text.
419) See supra note 335-36 and accompanying text.
420) See, e.g., 42 U.S.C. Sec. 9609 (a) (1) (CERCLA) (no civil fines for all violations).
421) See, e.g., 42 U.S.C. Sec. 960 (a) (4) (CERCLA) (damages restricted to cost of clean-up and assessment).
research shows that rewards have to be substantial to work, paying rewards out of government funds even when no gain is made will possibly burden government with additional expenses which might, under an overall evaluation, not be offset by the gains made in other cases in which civil fines and punitive damages are recovered.

Thirdly, as an employee either may be protected against employer retaliation or such retaliation may not occur, it is not necessary to reward a whistleblower for the risk he takes by providing a financial reward for reporting. It seems more appropriate to protect him against concrete adverse employer conduct.

D. IMPOSING AND REMOVING DISINCENTIVES TO WHISTLEBLOWING

1. Imposing Direct Disincentives On The Employer

Although no criminal sanctions for intimidating whistleblowers exist, several of the state whistleblower statutes provide for civil fines when an employer retaliates against a protected whistleblower. However, the fines are in general low and do not pose much of a threat. Despite their potential discouraging effect on employer behavior, direct disincentives in the form of criminal or civil sanctions seem not to be the most desirable way to encourage whistleblowing.

Criminal sanctions should be restricted to behavior which is of crucial importance to the well-being of society. As reflected by the absence of criminal sanctions in the current whistleblower law, retaliation against environmental whistleblowers, although undesirable from the viewpoint of society, is below this threshold. The existing criminal law provides for sanctions for extreme adverse employer actions such as assault or

422) See Callahan & Dworkin, supra note 340, at 298, 301.
423) But see id. at 330-331.
424) See supra note 229-234 and accompanying text.
425) See Miceli & Near, supra note 6, at 243.
coercion. Considering the general trend to decriminalization as promulgated by the Model Penal Code, criminal sanctions for "ordinary" retaliation such as discharge or transfers seem not to be appropriate. When providing the whistleblower with a cause of action against retaliation, direct government involvement in the employee-employer relationship by assessing a civil fine seems not to be desirable as well.

Government would have to investigate and prove the reasons for the retaliation. The effectiveness of the threat of civil fines would depend largely on how keen government prosecutes retaliatory behavior. This would involve considerable expenses and staff. However, the amount of a civil fine has to reflect the seriousness of the wrongdoing. The relatively low maximum in the statutes containing a civil fine provision indicates that retaliatory behavior in general cannot justify high fines. Therefore, the collected fines will possibly be lower than the expenses for the government involvement, thus burdening the budget. Even giving the employee a private cause of action in addition to the possibility of government imposing a fine does not solve this problem. Although government could use the evidence provided in this action for assessing a fine and thus lower its costs, there are many legitimate reasons why an employee may not want to sue his employer for retaliation. One of the likely reasons not to sue is when it is difficult to prove retaliatory motive. However, equality before the law requires government to investigate these cases as well.

Moreover, government involvement seems not to be necessary. As the civil fines have to be relatively modest, they do not pose much of a threat. Allowing the employee to recover for emotional distress and punitive damages leads potentially to substantial awards discouraging employers from retaliation. Furthermore, as the employee and not government bears the retaliation, the employee should be able to gain something. And finally, the employee, as the only victim of retaliation and who has to cope with the

426) See MODEL PENAL CODE Sec. 212.5.
further situation, should be able to make the choice whether he challenges his employer or whether he keeps quiet and takes it. 427

2. Removing Disincentives: Protecting The Employee Against Adverse Employer Actions

The existing environmental whistleblower law focuses entirely on removing disincentives to reporting violations by protecting the employee against retaliatory discharge and harassment. Although removing disincentives seems, as shown infra, the most appropriate way to encourage whistleblowing, the current whistleblower law has several flaws and shortcomings. In part E., the parameters of an optimal whistleblower law will be discussed.

E. REMOVING DISINCENTIVES: AN OUTLINE OF AN OPTIMAL WHISTLEBLOWER PROTECTION LAW

1. Statutory Versus Common Law Protection

Whistleblowing should be regulated by state statute, not by common law. As one author puts it, statutes "can take a bird's eye view on the total problem, instead of that of an owl on a segment. They can encompass wide generalizations from experience that a judge is precluded from making in his decision on a particular case...They avoid the wasteful cost in time and money of piecemeal litigation that all too frequently culminates in a crazy quilt of rules defying intelligent restatement or coherent application." 428 A carefully drafted statute, taking into account all aspects the public or the experts focus on,

427) One may, especially in smaller communities, fear being blackballed or being socially rejected.
seems to be the best response to whistleblowing.\textsuperscript{429} Such a statute, especially one containing the requirement that the employer has to notify his employees of its existence and content, documents the general viability of environmental whistleblowing.\textsuperscript{430} As the federal legislature has only limited powers in the areas of environmental and labor law and existing federal legislation does not preempt state whistleblower statutes,\textsuperscript{431} the state level seems appropriate for such legislation. Given the mobility of the workforce today, uniformity between the state statutes should be achieved by following a model whistleblower statute.

2. Parameters Of An Optimal Environmental Whistleblower Statute

a. Substantive Protection

aa. Covered Relationships

The statute should cover broadly all private employment relationships. Restrictions concerning the number of employees\textsuperscript{432} should be abandoned. Although in a smaller firm the personal relationship between employer and whistleblower is closer and reporting is more likely to be perceived as "disloyal" by the employer, the underlying interests do not differ from larger firms. Protection should be given also when another person acts on behalf of the employee,\textsuperscript{433} as an employee may be too timid to contact a government agency himself, or may intellectually not be able to communicate his concerns clearly.

\textsuperscript{430} Id. at 589 (assurance that a legislative solution does not run counter to the public will).
\textsuperscript{431} See supra note 287-301 and accompanying text.
\textsuperscript{432} See supra note 58-60, 163-166 and accompanying text.
\textsuperscript{433} See supra note 166 and accompanying text.
bb. Protected Activity

For the reasons which favor encouraging external rather than internal whistleblowing, internal reporting should not be protected. True internal reporting serves environmental protection better than no reporting at all. However, employees tend in general more to internal reporting, especially when the employer shows his receptiveness for whistleblowing by setting up internal complaint mechanisms. Given a sufficient degree of protection of external whistleblowing and none to internal, an employee will more likely opt for reporting externally when he is in doubt about the receptiveness of his employer. Thus, employers who want to prevent widespread external and to further their interest in internal reporting have to set up clear internal whistleblower mechanisms and have to demonstrate that they deal effectively with the complaints and do not retaliate. Therefore, the threat of external whistleblowing drives employers to make internal whistleblowing attractive, and overall reporting is more likely to increase. However, despite such possible countermoves of an employer, a whistleblower statute making external whistleblowing the most secure way for the employee will encourage its occurrence substantially.

In order to encourage external whistleblowing, the act of communication, the possible government recipients, and the scope of the wrongdoing which may be reported should be defined broadly. Any disclosures to any government authority, regardless of the level of government and whether charged with environmental protection or not, should be covered. Given the complicated allocation of jurisdiction between agencies, whistleblower protection should not depend on whether the employee was able to figure out what agency has jurisdiction, but should be made as easy as possible. Finally, wrongdoing should be defined broadly as any conduct which might violate any federal, state or local law which has an environmental impact in the broadest sense. A “de

435) See supra note 377-82 and accompanying text.
436) See supra note 320-31 and accompanying text.
minimus"-exception should not be applied, as small violations of environmental law may have enormous results, and the employee very often will lack the sophistication to decide whether this is the case.

As anonymous reporting leads to a loss of effectiveness of the complaint, it should not be possible. However, the government agency should be required to keep the identity of the whistleblower confidential, unless he consents to disclosing it or the disclosure is absolutely necessary for the prosecution of the wrongdoing. When an employee's reporting is protected by the statute, there is no point in telling the employer who has reported and thus to enable him to illegal retaliation, or induce social rejection within the firm. However, knowing that there is an anonymous "snitch" within the organization may disturb the internal working climate considerably. Therefore, the confidentiality duty should be limited to the broad whistleblowing covered by the statute and should not extend to complaints in bad faith or without reasonable belief. If there is doubt about that, the confidentiality duty should apply.

cc. Good Faith Allegations And Reasonable Belief

To prevent frivolous complaints, a statute should protect only whistleblowing in good faith and should in addition require the reasonable belief that the reported conduct constitutes a violation of environmental law. The good faith requirement prevents employees from utilizing whistleblowing for improper purposes, such as harassment of their employers. The standard for reasonable belief should make sure that no totally

437) E.g. an oil spill.
438) See supra note 383-85 and accompanying text.
439) But see Feerick, supra note 340, at 592 (one of the best ways to encourage whistleblowing is to ensure the anonymity”).
440) See supra note 184 and accompanying text.
441) The standard of reasonable belief has been applied by the courts for the reverse case when an employer discharged an employee protected by a just-cause provision for alleged illegal conduct, see Lewis v. Magna Am. Corp., 472 F.2d 560 (6th Cir. 1972); Food Fair Stores, Inc. v. Commonwealth, Unemployment Compensation Bd. of Review, 314 A.2d 528 (1974).
pointless allegations are made but should not raise the threshold for protection too high. Therefore, the reasonableness of the belief should not be judged by the objective standard of what an average employee in the situation would have considered reasonable. Then, sophisticated employees who could know better would be protected, and the totally ignorant not. It seems more appropriate to take the personal features of the concrete whistleblower into account by asking whether for a person with his information, education and intellectual capacities, the conduct reasonably appeared to be a violation of law.442

The whistleblower should not be required to verify or investigate his allegations.443

The lack of technical or legal knowledge or of access to information will in many cases prevent useful findings. Moreover, employees investigating their suspicions within the firm are likely to create considerable disruptions, and a requirement to investigate will serve as a substantial deterrent to blow the whistle.

dd. Discriminatory Conduct And Motive

The statute should not only prohibit discharge, but also other adverse actions by the employer. The broad interpretation the courts have given discriminatory conduct with regard to the employment should be adopted.444 For allocating the burden of proof, the Mount Healthy standard should be applied.445

There should also be a cause of action against the employer when the whistleblower is harassed by his fellow employees on the workplace as a result of his whistleblowing, even when the employer did not instigate this harassment. This provision would make sure that an employer does not try to circumvent the whistleblower protection by using his employees and would secure at least a tolerable working environment for the

442) See Malin, supra note 346, at 306.
443) But see id. at 306.
444) See supra note 86-91, 152-54, 200-04 and accompanying text.
445) See supra note 93-107 and accompanying text.
whistleblower whose fellow employees are hostile. However, to mitigate this burden on the employer, the ultimate burden of proof that the harassment occurred and resulted from the whistleblowing should rest on the employee.

b. Procedure And Remedies

aa. The Adequate Dispute Resolution Mechanism

In theory, there are three ways to resolve whistleblower claims: Through litigation, through administrative proceedings, or through alternative dispute resolution mechanisms such as mediation or arbitration. As all of these models have their advantages and drawbacks, litigation seems to be most appropriate for environmental whistleblowing.

Administrative proceedings seem to be the least desirable way. It is neither effective to let each agency to which the report was made also handle the whistleblower protection claim nor to grant this task to the environmental agencies which have jurisdiction. Besides the fact that the whistleblower cases then would be scattered, with none of the agencies developing expertise in handling them, many environmental agencies may be sympathetic to their respective industry, or may not be impartial, as whistleblowing implies that the agency is not effective. Creating one state agency for all whistleblower claims creates not only an additional layer of bureaucracy, but the potential problem that expertise from other agencies, possibly federal or local ones, may be needed to resolve the claim. Despite efforts, the goal of developing efficient interagency information channels has not even been achieved on the federal level. Finally, the existing time limits in the procedural rules do not help to speed up the procedure, as they are usually

447) See Fidell, supra note 52, at 20-21; Boyle, supra note 127, at 828 (for federal level).
448) Hill, supra note 29, at 10.
449) See Fidell, supra note 52, at 20-21.
not met, and the possibility of judicial review of agency decisions further delays a final resolution. 450

The generally quick, informal and inexpensive dispute resolution mechanisms of mediation and arbitration 451 are not well suited for environmental whistleblowing cases as well. Forced negotiations by mediation implies compromise, and in case of dismissal, there is no room for it. Either the discharge was legal, or it was retaliatory and the employee gains reinstatement or damages. 452 Arbitration is usually quick and inexpensive because it does not require extensive discovery or careful handling of evidence, nor does it involve too much concern for precedent and policy considerations. 453 However, exactly these advantages make arbitration not well suited for the resolution of environmental whistleblower protection suits with its underlying public policy implications. 454

Therefore, despite the drawbacks of high expenses and overburdened courts which delay suits, 455 litigation provides for a fair and thorough resolution of whistleblower claims. The high expenses mainly deter the employee from going to court. However, they may be mitigated by the possibility of recovery of litigation expenses including attorney's fees, and of punitive damages, which enable the employee to work with an attorney on a contingency basis. 456

450) See Grodin, supra note 446, at 151.
451) See Grodin, supra note 446, at 151.
452) Hill, supra note 29, at 11.
453) Id.
454) Id.; compare Grodin, supra note 446, at 151-157 (raising constitutional objections for California).
455) See Hill, supra note 29, at 8; Grodin, supra note 446, at 150 ("anyway").
456) See Grodin, supra note 446, at 150.
bb. Exhaustion Of Administrative Proceedings Or Of Intracorporate Complaint Procedures

Neither the requirement of prior exhausting administrative procedures nor of intracorporate procedures contained in some statutes should be adopted. Both restrain the employee's access to the public adjudicatory process and may delay the prompt disposition of employee protection complaints. Although such prior proceedings may reduce the need of court involvement in some cases, the possibility of judicial review may lead to a substantial lengthening of the whole process. Moreover, administrative resolution of environmental whistleblower claims is not the most efficient way. Mandatory exhaustion of intracorporate complaint mechanisms may provide the employer arguably with an unfair opportunity for early discovery, possibly before the employee has legal representation. Finally, pursuing intracorporate complaint procedure, which might be dominated by the employer's representatives, may pose a substantial psychological burden on the employee.

cc. Remedies

Recovery in whistleblower claims should not be restricted to equitable remedies, but should also allow for compensatory and punitive damages and litigation expenses. Reinstatement with back pay after a possibly nasty and emotional litigation generally does not appear as desirable to an employee. In the comparable situation of reinstated

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457) See supra note 210-15 and accompanying text.
458) Fidell, supra note 52, at 21-22 (arguing in this direction).
459) Id. at 22.
460) See supra pp. 84-85.
461) Fidell, supra note 52, at 22.
462) Compare Feerick, supra note 340, at 595 ("one of the most important changes necessary to promote effective whistleblowing laws is the elimination of the notice provision"); Fidell, supra note 52, at 22.
463) See supra note 216-226 and accompanying text.
464) See Grodin, supra note 446, at 160 (views public policy violations such as whistleblowing as deserving punitive damages).
465) Dworkin & Near, supra note 8, at 248, 262; Miceli & Near, supra note 6, at 244.
employees fired for attempts to bring a union into their firm, empirical research has shown that most of them quit "voluntarily" after a while. Without the help of a union supporting the employee and discouraging the employer from harassment, many employees cannot stand the pressures of returning to the workplace. Reinstatement thus has the ironic effect that despite lost litigation, the employer eventually gets his way without too much cost. 466

Compensatory damages as well as punitive damages may lead to high awards, thus serving as a substantial incentive for the employee. 467 Compensatory damages refund the employee for the emotional and physical stress of being unemployed and pursuing a lawsuit. 468 Punitive damages provide a threat which does not fit into a cost-benefit analysis on part of the employer, as the size of the award depends on how outrageous the jury perceives the conduct. 469 Moreover, punitive damages allow an employee to minimize the cost risk by working with a capable attorney on a contingency basis. The possibility of recovering "reasonable" attorney's fees may especially in complicated cases not be sufficient.

On the other hand, an employer should be able to recover his litigation expenses when the whistleblower protection claim was clearly frivolous. 470 Although such a provision might potentially deter employees from bringing a valid claim, 471 the employee's attorney may counsel him appropriately.

c. Notification Requirement

The employer should be required to post the text of the statute and possibly a simple explanation of its content on a place where all employees have access to it. This

466) Compare Malin, supra note 346, at 316-17; Grodin, supra note 446, at 158-59.
467) See Barnett, supra note 41, at 446; Hill, supra note 29, at 8.
468) Miceli & Near, supra note 6, at 244.
469) See Hill, supra note 29, at 8.
471) See Freerick, supra note 340, at 596.
requirement would not only inform the individual employee about his rights but would
also serve as a means to make employees and employers conscious of society's interest in
protecting environmental whistleblowing, and thus help to shape group norms as well as
societal attitude toward reporting. 472

d. Statute Of Limitations

As discharges and other adverse personnel measures happen every day, and
considering the possibly high damages in a whistleblower action, the statute of limitations
should recognize the need of the employer for certainty by allowing him to close the book
after a certain time, but should allow for enough time for the employee to get legal advice
and prepare a claim. As due to the notification requirement, the employee is aware of the
possibility of bringing a claim for discrimination, and legal counsel is readily available in
the United States, the statute of limitations should be short. Ideally, it should be
somewhere between 3 months 473 to 1 year after the alleged discriminatory conduct
occurred.

e. Relationship To Other Laws

The statute should explicitly state that it is available besides possibly existing federal
remedies. The outlined statute is not preempted, as it is more generous than the federal
statutes and thus not in conflict with the purpose of federal environmental whistleblower
law. Its broader scope, especially with regard to covered wrongdoing, damages, and
statute of limitations, will lead employees to seek recovery under the statute rather than
under federal law.

To foster uniformity and thus certainty as to what law is applicable, the statute should
preclude common law remedies for whistleblowing. As it allows for punitive damages as

472) See supra note 366-68, 390-92 and accompanying text.
473) Compare Fidell, supra note 52, at 18 (not less than 180 days).
well, the main advantage of a whistleblower tort action has disappeared. On the contrary, allowing tort actions would circumvent the requirement of reasonable belief as well as the shorter statute of limitations.

Finally, preclusion of tort claims for defamation by the employer or co-employees need not to be covered.\textsuperscript{474} Liability for defamation requires false allegations and "actual malice" on part of the whistleblower.\textsuperscript{475} This standard allows only recovery in cases where the whistleblower either knows or has recklessly disregarded doubts about the truth of his statement. This kind of whistleblowing would not be protected under the good faith and reasonable belief standard either. Therefore, and as such liability helps deter cases of frivolous complaints in which neither the organization nor society at large has an interest, the question of liability for defamation need not to be addressed.

However, false allegations can constitute a breach of the implied duties of obedience, loyalty and confidentiality, or of an explicit confidentiality clause.\textsuperscript{476} The statute should make clear that whistleblowing within the scope of the statute does not constitute such a breach.

\textsuperscript{474) See supra note 302-11 and accompanying text.}  
\textsuperscript{475) See supra note 282-86 and accompanying text.}  
\textsuperscript{476) See supra note 245-55 and accompanying text.}
CHAPTER 5. CONCLUSION

The shortcomings of the existing environmental whistleblower law call for rethinking the way the legal system addresses the problem. Balancing the interests of the organization, society and the whistleblower shows that whistleblowing regulation should encourage external reporting to government authorities. Although both incentive and disincentive models have the potential to alter whistleblower behavior, an evaluation of the possible ways to reach increased external whistleblowing favors the removal of disincentives for employee reporting. As the existing whistleblower law focuses on that way, the approaches best suited to encourage external whistleblowing can be taken from the existing variety of whistleblower protection and can be combined in a model state statute. Enacting this statute will not only have the effect of increasing external whistleblowing but will most likely increase the number of internal reports as well. Thus, by remodeling existing state statutes and by adopting new ones, a large step toward a better environment can be achieved.