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Will the Real Legislature Please Stand Up - A Response to *Kulch v. Structural Fibers, Inc.*: Clarifying the Public Policy Exception

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WILL THE REAL LEGISLATURE PLEASE STAND UP?
A RESPONSE TO "KULCH v. STRUCTURAL FIBERS, Inc.: CLARIFYING
THE PUBLIC POLICY EXCEPTION."

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I. INTRODUCTION

In *Kulch v. Structural Fibers, Inc.*,⁴ the Supreme Court of Ohio decided a case that promises to have a significant impact on Ohio employment law. There, the court held that an employee who is discharged or disciplined for whistleblowing may bring a common-law cause of action for wrongful discharge based on either the public policy in the Ohio whistleblower statute⁵ or the policy set forth in the Occupational Safety and Health Act.⁶ The court overruled an earlier decision in which it had held that no common-law cause of action exists in Ohio for whistleblowing.⁷

This Article briefly traces the history of the employment-at-will doctrine from its origins in the English common law through the present.⁸ It also examines the exceptions to this doctrine that have arisen during the twentieth century and, in particular, the "public policy" exception.⁹ Next, the Article analyzes how Ohio courts have narrowed the at-will doctrine since 1990.¹⁰ The Article then examines the *Kulch* decision and responds to a recent article that favorably analyzes *Kulch*.¹¹ Finally, the Article concludes that this case is improperly decided because it usurps the right of the legislature to establish

⁴677 N.E.2d 308 (Ohio 1997), *cert. denied*, 118 S. Ct. 586 (1997).

⁵OHIO REV. CODE ANN. § 4113.52 (West 1998).

⁶29 U.S.C. § 651 (1994).

⁷*Phung v. Waste Mgmt., Inc.*, 491 N.E.2d 1114 (Ohio 1986), *overruled by Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308 (Ohio 1997).

⁸*See infra* notes 12-19 and accompanying text.

⁹*See infra* notes 26-67 and accompanying text.

¹⁰*See infra* notes 68-95 and accompanying text.

¹¹Sandra J. Rosenthal, *Kulch v. Structural Fibers, Inc.: Clarifying the Public Policy Exception*, 45 CLEV. ST. L. REV. 681 (1998) [hereinafter "*Clarifying the Public Policy*"].

public policy in statutes and because it will lead to further confusion and unpredictability in Ohio employment law.

A. History of the At-Will Employment Doctrine

The employment-at-will doctrine permits an employer to discharge an at-will employee for any reason, or no reason at all, without liability.¹² Essentially, this rule of contract construction creates a rebuttable presumption that, absent a term of duration, an employment relationship may be terminated by either party at will.¹³

In the past two decades, courts and legislatures have taken steps to limit application of the employment-at-will doctrine in the private employment relationship.¹⁴ Recent changes in the at-will employment arena have

¹²Mark A. Fahlson, *The Public Policy Exception to Employment At Will: When Should Courts Defer to the Legislature?*, 72 NEB. L. REV. 956, 956 (1993). While this doctrine is unique to the United States, its origins can be found in the English common law. Under English common law, an employment contract of indefinite duration, absent reasonable cause for discharge, was presumed to extend for one year. *Id.* at 959 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 425 (21st ed. 1847)). "[I]f the hiring be general, without any particular time limited, the law construes it to be hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not." *Id.*

The American doctrine of employment-at-will gained further recognition in Horace Gay Wood's treatise on the law of master and servant. See HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877). The treatise explained: "with us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants." *Id.* at 272. (footnote omitted)

However, even under the "traditional formulation" of the at-will employment doctrine, it only applies to "contracts of indefinite duration." BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW 114 (1997). In contrast, "[c]ontracts for a specified term . . . are not terminable 'at will' by either party prior to the expiration of the term." *Id.*

¹³J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 379 (1995) (citing *Forrer v. Sears, Roebuck & Co.*, 153 N.W.2d 587, 589-90 (Wis. 1967)); see also Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perception Of Legal Protection In An At-Will World*, 83 CORNELL L. REV. 105 (1997) (stating that while unions typically negotiate collective bargaining agreements that include "just-cause" termination provisions, most non-union, private sector employees are employed at-will).

¹⁴The erosion of this doctrine is arguably one of the most significant employment law developments in the last quarter of the twentieth century. Henry H. Perritt, Jr., *Beyond Collective Bargaining and Employment At Will: The Future Of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397 (1989) (advocating drafting of state wrongful dismissal statutes to codify and integrate the law of employee dismissals); Cheryl S. Massingale, *At-Will Employment: Going, Going. . .*, 24 U. RICH. L. REV. 187, 187 (1990) ("[T]he current system, which has evolved through judicially created exceptions, is expensive, time consuming and does not serve either party well.").

dramatically impacted the predictability and stability of this area of the law and resulted in unnecessary burden and expense for employers.¹⁵ These changes have been extensively critiqued.¹⁶

The employment-at-will relationship evolved during the late nineteenth century. In the context of the industrial revolution, the at-will relationship was "well suited to employer needs in America's developing industrial and commercial society."¹⁷ The underlying premise of the employment-at-will doctrine was the desire to preserve managerial discretion in the workplace and to maintain freedom of contract.¹⁸ Proponents of this doctrine argued that it provided incentives for workers to be productive; that is, employees worked harder in order to keep their jobs.¹⁹

B. Limiting the Employment-At-Will Doctrine

The employment-at-will doctrine remained intact well into the twentieth century²⁰ and reached its peak in 1915 following the United States Supreme

¹⁵See Dawn S. Perry, *Determining Egregious Violations of Public Policy: A Proposed Amendment To The Model Employment Termination Act*, 67 WASH. L. REV. 915, 915 (1992) (discussing erratic nature of wrongful termination litigation in light of public policy exception); Perritt, *supra* note 14; Massingale, *supra* note 14.

¹⁶See, e.g., Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Cornelius J. Peck, *Unjust Discharges From Employment: A Necessary Change In The Law*, 40 OHIO ST. L.J. 1 (1979); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 VA. L. REV. 481 (1976); Eugene N. Lindenbaum, *The Status of the Employment At-Will Doctrine in Ohio: Ohio Incorporates A Public Policy Exception*, 52 OHIO ST. L.J. 315 (1991) (examining why Ohio Supreme Court should use the whistleblower statute as a mandate for adopting a broad public policy exception); David G. Gibson, Note, *Expanding the Public Policy Exception to the Employment-At-Will Doctrine: Borse v. Piece Goods Shop, Inc.*, 38 VILL. L. REV. 1527 (1993) (examining impact of Third Circuit's recognition of public policy exception in the context of employer drug testing); Richard A. Epstein, *In Defense Of The Contract At Will*, 51 U. CHI. L. REV. 947 (1984) (arguing in favor of the doctrine of employment-at-will).

¹⁷Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding The Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 722 (1991) (examining the origin and development of the employment-at-will doctrine).

¹⁸*Darlington v. General Elec.*, 504 A.2d 306, 309 (Pa. Super. Ct. 1986). As one court explained,

men must be left, without interference, to buy and sell where they please, and to discharge or retain an employee at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.

Payne v. Western Atlantic R.R. Co., 81 Tenn. 507, 518-19 (1884), *overruled in part by Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915).

¹⁹Jones, *infra* note 62, at 1141 (explaining that the employment-at-will doctrine is based on the assumption that employers need complete freedom of contract to conduct business and promote industrial growth).

²⁰See, e.g., *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding that courts could not

Court's decision in *Coppage v. Kansas*.²¹ In *Coppage*, the Supreme Court invalidated a statute which prevented employers from discharging or refusing to hire employees because of union membership.²² The Court explained:

[S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.²³

In 1937, in *NLRB v. Jones & Laughlin Steel Corp.*,²⁴ the Supreme Court first limited the at-will employment rule by upholding the Wagner Act, which prohibited employers from discharging employees for union membership.²⁵ After *Jones & Laughlin*, courts and legislatures began to carve out exceptions to the at-will employment doctrine. These exceptions have three bases: contract law, tort law, and, most recently, legislative acts.

1. Contract Exceptions to the At-Will Doctrine

Under contract theory, an employee's work by itself, without additional consideration, only entitled him to a wage and supported no promise of job security.²⁶ Absent a promise by the employer to work for his employer for a fixed period of time, the employee could not infer a promise to retain his services for a fixed period.²⁷

Courts have "struggled to find a rationale that would permit them to uphold such promises or representations," such as those found in employee handbooks

interfere with the freedom of master and servant to contract with each other), *overruled in part by Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

²¹236 U.S. 1 (1915), *overruled in part by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

²²*Id.* at 26.

²³*Id.* at 17.

²⁴301 U.S. 1 (1937).

²⁵*Id.*

²⁶Lindenbaum, *supra* note 16, at 317 (quoting Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only In Good Faith*, 93 HARV. L. REV. 1816, 1825 (1980)). Contract theory necessarily entails the freedom of parties to bargain and exchange promises. This theory originated in laissez-faire economies where the marketplace operates free of government restrictions and interventions. These theories prevailed in American society when the prevailing view was that "what was good for private enterprise was good for all." See also Mayor G. Freed & Darrel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 558 (1990) (noting the employment at-will doctrine was "the natural offspring of a capitalist economic order").

²⁷*Id.*

or policy manuals, or oral representations, despite the at-will rule.²⁸ Some courts characterized such promises as "implied-in-fact contracts," other courts have characterized such representations as "implied-in-law covenants of good faith and fair dealing," and still others analyze such promises under estoppel theories.²⁹

Courts consider the implied-in-law covenant of good faith and fair dealing where an employee claims a right to receive the benefits of his employment agreement and, in some states, where an employee has asserted a "bad cause" discharge.³⁰ Under this theory, courts infer mutual promises between the employer and employee that neither party to the employment agreement will do anything that will impair the right of the other to receive the benefits of the agreement.³¹ Some courts and commentators have refused to apply this exception because of its vagueness.³²

The "implied-in-fact contract" exception allows an employee to establish an employment contract by proof of "an implied promise of continued employment established by oral representations, a course of dealing, personnel manuals, or memoranda," and the like.³³ Under this exception, an employee

²⁸Siegel & Stephen, *supra* note 12, at 116.

²⁹M. D. Moberly & Carolann E. Doran, *The Nose of the Camel: Extending the Public Policy Exception Beyond the Wrongful Discharge Context*, 13 THE LABOR LAWYER 371 n.1 (1997); Siegel & Stephen, *supra* note 12, at 116.

The distinctions between such theories are difficult to draw and difficult to comprehend and, indeed, the courts themselves frequently appear confused by some of the more arcane theorizing that accompanies this exercise. . . . Ultimately, however, each of these theories focuses on the reasonableness of the employee's expectation that the employer would indeed provide job security or certain benefits.

Id. (footnote omitted)

³⁰Moberly & Doran, *supra* note 29, at 371 n.1.

³¹Parker, *supra* note 13, at 361-62; *see also* Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251, 1255-56 (Mass. 1977) (finding implied covenant of good faith in contract where employee was at-will).

³²*See, e.g.,* Morriss v. Coleman Co., 738 P.2d 841, 851 (Kan. 1987) (explaining that the duty of good faith and fair dealing is too broad and should not be applicable to at-will contracts); Hinson v. Cameron, 742 P.2d 549, 554 (Okla. 1987) (refusing to impose upon employers a legal duty not to terminate at-will employees in bad faith); *see also* Robert S. Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 VA. L. REV. 195, 262-63 (1968) ("[good faith]" functions to rule out many different forms of bad faith . . . any general definition of good faith, if not vacuous, is sure to be unduly restrictive, especially if cast in statutory form"); Parker, *supra* note 13, at 359 (arguing that implied covenant analysis should be abandoned).

³³Moberly & Doran, *supra* note 29, at 371 n.1; *see also* Foley v. Interactive Data Corp., 765 P.2d 373, 384 (Cal. 1988) (ordinary rules of contract interpretation permit proof of implied terms; no basis for requiring special consideration); Coelho v. Posi-Seal Int'l, Inc., 544 A.2d 170, 176 (Conn. 1988) (promise of employment security becomes enforceable as soon as employee enters employment; no reliance beyond performance of regular services legally required as consideration); Watson v. Idaho Falls Consol. Hosps., Inc., 720 P.2d 632, 636 (Idaho 1986) (employee handbook creates binding

may allege breach of contract arising from an oral promise or course of conduct.³⁴

Courts have applied this theory where an employee alleges that a promise of employment for a particular period of time should be inferred from the parties' conduct or written materials.³⁵ For example, personnel materials can contain representations that may bind employers in job security or discharge procedures.³⁶ Courts have declined to employ this exception as it denigrates traditional contract theory by transforming an "at will contract into a just cause contract."³⁷

Some jurisdictions, including Ohio, analyze an employer's promises or representations under the doctrine of promissory estoppel.³⁸ As the Supreme Court of Ohio explained, holding that promissory estoppel is a separate and independent exception to the at-will rule:

[w]here appropriate, the doctrine of promissory estoppel is applicable and binding to oral employment-at-will agreements when a promise which the employer should reasonably expect to induce action or forbearance on the part of the employee does induce such action or forbearance, if injustice can be avoided only by enforcement of the promise.

The test in such cases is whether the employer should have reasonably expected its representation to be relied upon by its employee and, if so, whether the expected action or forbearance actually resulted and was detrimental to the employee.³⁹

There are conceptual differences between the implied-in-fact contract exception and promissory estoppel.⁴⁰ For example, unlike an implied-in-fact contract, promissory estoppel does not require that there be a "meeting of the minds" or an agreement, express or implied, between the parties; it is enough that there is "a promise which the employer should reasonably expect to induce

unilateral contract).

³⁴Perritt, *supra* note 14, at 398.

³⁵Lindenbaum, *supra* note 16, at 319.

³⁶See Fahlson, *supra* note 12, at 962.

³⁷Parker, *supra* note 13, at 355 (explaining that "[e]mployees cannot rely upon the implied covenant as an independent basis of protection in at-will contracts precisely because its invocation calls for a tremendous act of will on the part of a court"); see also Buehner Block Co. v. U.W.C. Assocs., 752 P.2d 892, 895 (Utah 1988) (explaining "a cardinal rule in construing such a contract is to give effect to the intentions of the parties").

³⁸Mers v. Dispatch Printing Co., 483 N.E.2d 150, 155 (Ohio 1985) (recognizing promissory estoppel exception to the at-will employment doctrine).

³⁹*Id.*

⁴⁰Siegel & Stephen, *supra* note 12, at 487.

action or forbearance. . . ."⁴¹ The "most important difference may be the nature of relief awarded."⁴² As one court explained in a case involving promises in a personnel manual:

Promissory estoppel does not necessarily operate as a substitute for consideration, nor does its application create a binding contract where none existed before. Rather, the doctrine is used to avoid injustice, and the remedy granted for breach may be limited as justice requires. Thus, the trial court need only enforce the manual's promises as justice requires.⁴³

2. Tort-Based Exceptions to the Employment-At-Will Doctrine

Courts also rely on tort-based theories in formulating exceptions to the employment-at-will doctrine. Tort theories generally offer more expansive remedies than do contract theories.⁴⁴

The most prevalent tort-based exception is the public policy exception.⁴⁵ The underlying theory supporting this exception is that "basic public policy overrides the freedom of contract embodied in the traditional at will rule."⁴⁶

One court explained that this tort seeks to achieve a "proper balance . . . among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out."⁴⁷ Most states have recognized this tort,⁴⁸ although its acceptance is not universal.⁴⁹

⁴¹*Id.* at 487-88.

⁴²*Id.* at 489.

⁴³*Jones v. East Ctr. for Community Health, Inc.*, 482 N.E.2d 969, 974 (Ohio Ct. App. 1984), *overruled by Stites v. Napoleon Spring Works, Inc.*, No. F-96-002, 1996 WL 660655, at *1 (Ohio Ct. App. Nov. 15, 1996); *see also Karnes v. Doctors Hosp.*, 555 N.E.2d 280 (Ohio 1990).

⁴⁴*See Kerry L. Macintosh, Gilmore Spoke Too Soon: Contract Rises from the Ashes of the Bad Faith Tort*, 27 LOY. L.A. L. REV. 483 (1994) (noting that traditionally, tort remedies are "more expansive" than contract remedies).

⁴⁵For a state-by-state survey of wrongful discharge law, *see Littler, Mendelson, THE 1997 NATIONAL EMPLOYER 149-213* (1997 ed.).

⁴⁶Fahlson, *supra* note 12, at 963.

⁴⁷*Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981) (finding employee stated cause of action where fired after supplying information to police concerning a co-worker's criminal violations).

⁴⁸*Gantt v. Sentry Ins.*, 824 P.2d 680, 687 (Cal. 1992), *overruled by Green v. Ralee Eng'g Co.*, 960 P.2d 1046 (Cal. 1998) "[T]he vast majority of states have recognized that an at-will employee possesses a tort action when he or she is discharged for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn." *Id.*; *see also Greeley v. Miami Valley Maintenance Contractors*, 551 N.E.2d 981, 986 n.3 (Ohio 1990) (acknowledging that at least thirty-nine states recognize some form of the public policy exception).

*Petermann v. International Brotherhood of Teamsters*⁵⁰ is the seminal case on the public policy exception to the employment-at-will doctrine. There, an employee alleged that his employer had encouraged him to commit perjury before a legislative committee and, when he testified truthfully, the employer discharged him. The California appellate court held that the employee had a right of damages for unlawful termination contrary to the state's public policy.⁵¹ In recognizing a new cause of action, the *Petermann* court found that the discharge, in effect, coerced an act prohibited by a criminal statute.⁵²

Courts may find public policies by "identifying a specific provision of a statute, constitution, or administrative regulation, synthesizing a policy from several different statutes or constitutional provisions, identifying a right or mode of conduct covered by traditional common-law cause of actions or identifying a trade practice or well recognized professional standard."⁵³ In the absence of the foregoing provisions, courts have decided "what public policy is from [their] own perception of community values and consideration of competing interests."⁵⁴

⁴⁹See, e.g., *Caletka v. State Farm Mut. Auto Ins. Co.*, 936 F. Supp. 380, 382 (W.D. La. 1996) (refusing to create public policy exception absent legislative mandate); *Reich v. Holiday Inn*, 454 So.2d 982 (Ala. 1984) (explaining Alabama adheres to the general rule that a contract of employment "at will" is at the "will of either party"); *Evans v. Bibb Co.*, 342 S.E.2d 484 (Ga. Ct. App. 1986) (refusing to adopt public policy tort where employee terminated for filing workers compensation claim); *Bard v. Bath Iron Works Corp.*, 590 A.2d 152, 156 (Me. 1991) (explaining that Maine has not yet recognized wrongful discharge action); *Murphy v. American Home Prod.*, 448 N.E.2d 86 (N.Y. 1983) (refusing to recognize the tort of abusive discharge); *Pacheco v. Raytheon Co.*, 623 A.2d 464, 465 (R.I. 1993) (declining to recognize public policy tort where whistleblower statute enacted).

⁵⁰344 P.2d 25 (Cal. Ct. App. 1959).

⁵¹In *Petermann*, the court explained:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.

Id. at 27.

⁵²*Id.* at 25.

⁵³Perritt, *supra* note 14, at § 5.10. One state supreme court recently stated:

The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as a result of a study of various factors and conditions. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community. . . .

Tiernan v. Charleston Area Med. Ctr., No. 24434, 1998 W. Va. LEXIS 33, at *5 (W. Va. May 21, 1998) (citing *Mamlin v. Genoe*, 17 A.2d 407, 409 (W. Va. 1941)).

⁵⁴See ARTHUR CORBIN, CORBIN ON CONTRACTS § 1375, at 1165 (1962) ("in determining what public policy requires, there is no limit whatever to the 'sources' to which the court

This exception may enable an employee to bring a cause of action premised upon statutory provisions delineating public policy, although the individual fails to meet the statutory prerequisites.⁵⁵ Essentially, courts have applied this theory where an employer adhered to the "letter of the law," but not the "spirit of the law."⁵⁶ Although the term "public policy" cannot be precisely defined, courts often consider that the term includes "what is right and just and what affects the citizens of the state collectively."⁵⁷

The public policy exception has several variants, including (1) refusal to commit an unlawful act, (2) fulfilling a public obligation, and (3) exercising a right or privilege.⁵⁸ Cases of the first type include, for example, an employee who alleges that her discharge resulted from her refusal to commit a crime.⁵⁹ Cases of the second type include those where an employee seeks to participate in jury duty.⁶⁰ Finally, an employee may attribute his discharge to an exercise of a right such as filing a workers' compensation claim.⁶¹

3. Legislative Exceptions to the Employment-At-Will Doctrine.

Advocates of legislative reform in the area of at-will employment argue that they seek to restore the "balance, predictability and efficiency" to relationships in the employment context.⁶² One commentator supporting a legislative solution has remarked that "the public policy tort can become an amorphous source of just cause litigation, unless standards exist for principled decision-making, especially at the summary judgment and pleadings stages."⁶³ Those who support "just cause" legislation also argue that legislation will level

is permitted to go; and there is no limit to the 'evidence' that the court may cause to be produced"); *Greeley v. Miami Valley Maint. Contr., Inc.*, 551 N.E.2d 981, 990 (Ohio 1990).

⁵⁵Jones, *infra* note 62, at 1147 (noting that "if an employer's conduct did not constitute a violation of statute because there was a restriction, definition, or exemption contained in the statute, the employee could still recover under a tort wrongful discharge theory"). *But see* *Contreras v. Ferro Corp.*, 652 N.E.2d 940 (Ohio 1995) (employee must comply with statute to bring public policy claim based on a policy in that statute).

⁵⁶Jones, *infra* note 62, at 1147.

⁵⁷Peck, *supra* note 16, at 249.

⁵⁸See *Parker*, *supra* note 13; *see also* *Perritt*, *supra* note 14.

⁵⁹See *Petermann*, 344 P.2d 25 (Cal. Ct. App. 1959) (employee refused to commit perjury at employer's request).

⁶⁰See, e.g., *Nees v. Hocks*, 536 P.2d 512 (Ore. 1975).

⁶¹See, e.g., *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973).

⁶²Marzetta Jones, Note, *The 1996 Arizona Employment Protection Act: A Return To The Employment-At-Will Doctrine*, 39 ARIZ. L. REV. 1139, 1140 (1997); *see also* Janice R. Bellace, *A Right of Fair Dismissal: Enforcing A Statutory Guarantee*, 16 U. MICH. J.L. REF. 207, 231-47 (1983) (proposing state legislation as method of protecting against unjust dismissals); Summers, *supra* note 16, at 481-501.

⁶³Perritt, *supra* note 14, at 407.

the playing field by establishing boundaries and guidelines for wrongful termination.⁶⁴

In response to the increased litigation in this area, some states have enacted legislation governing employee discharges.⁶⁵ In 1987, Montana became the first state to legislatively prohibit wrongful discharge.⁶⁶ Since then, at least one other state has enacted legislation that alters the traditional at-will employment rule.⁶⁷

II. THE PUBLIC POLICY EXCEPTION TO THE EMPLOYMENT-AT-WILL DOCTRINE IN OHIO

As recently as 1986, the Supreme Court held the rule in Ohio to be that, absent contractual or statutory restrictions,

the right of an employer to terminate employment at will for any cause, at any time whatever, is not absolute, but limited by principles which protect persons from gross or reckless disregard of their rights and interests, willful, wanton or malicious acts or acts done intentionally, with insult, or in bad faith.⁶⁸

Accordingly, Ohio employers could discharge employees at any time so long as the discharge was not "contrary to law."⁶⁹

A. *Greeley v. Miami Valley Maintenance Contractors, Inc.* - Ohio's Seminal Case

In 1990, in *Greeley v. Miami Valley Maintenance Contractors, Inc.*,⁷⁰ the Supreme Court of Ohio followed the majority of state courts and recognized the tort of wrongful discharge in violation of public policy as an exception to the employment-at-will doctrine. *Greeley* involved an employer who had discharged an employee when it learned that he was subject to a child support withholding order. The discharge violated an Ohio statute, Ohio Revised Code

⁶⁴Jones, *supra* note 62, at 1140.

⁶⁵The National Conference of Commissioners on Uniform State Laws formulated the Model Employment Termination Act in 1991. The Model Act's authors emphasized the need for uniformity and sought to address the situation where a employee is hired in one state, works in another, and is fired in a third. *See* Perry, *supra* note 15, at 916.

⁶⁶*See* MONT. CODE ANN. §§ 39-2-901 - 39-2-914 (1989).

⁶⁷*See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1501 (West 1996) (prohibiting terminated employee from claiming wrongful termination unless the employer breached a written contract, asked the employee to violate an Arizona statute, or fired the employee in retaliation for performing a protected act).

⁶⁸*Fawcett v. G.C. Murphy & Co.*, 348 N.E.2d 144, 147 (Ohio 1976); *Phung v. Waste Mgmt., Inc.*, 491 N.E.2d 1114 (Ohio 1986); *Dadas v. Prescott, Ball & Turben*, 529 F. Supp. 203, 206 (N.D. Ohio 1981); *see also* *Henkel v. Educational Res. Council of Am.*, 344 N.E.2d 118 (Ohio 1976) (explaining that under Ohio law employment is presumed to be at-will).

⁶⁹*Phung*, 491 N.E.2d at 1116; *Mers*, 483 N.E.2d 150.

⁷⁰551 N.E.2d 981 (Ohio 1990).

section 3113.213(D), which prohibits an employer from discharging or disciplining an employee based on a court order to withhold personal earnings.⁷¹ Greeley brought a claim charging that the employer wrongfully discharged him because of the wage assignment order. The court of appeals affirmed the trial court's dismissal.⁷²

The Supreme Court reversed. Although it acknowledged that section 3113.213(D) lacks any remedial provisions, it concluded that "[b]y enacting R.C. 3113.213(D), the General Assembly has set forth a policy which prohibits the use of a child support withholding order as a basis for discharging an employee."⁷³ Because "[i]t is our job to enforce, not frustrate, that policy," held the court, "public policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute."⁷⁴

The *Greeley* court emphasized, however, that "it is clear that the employment-at-will doctrine in Ohio is today alive and well in an employment relationship which is, without more, clearly at-will."⁷⁵ Further discussing the scope of its holding, the *Greeley* court stated:

[The at-will] relationship permits termination of employment for no cause or for "any cause" which is not unlawful, at any time and regardless of motive. Accepting this, henceforth, the right of employers to terminate employment at will for "any cause" no longer includes the discharge of an employee where the discharge is in violation of a statute and thereby contravenes public policy.⁷⁶

The court, however, left open the possibility of future exceptions:

Today, we only decide the question of a public policy exception to the employment-at-will doctrine based on violation of a specific statute. This is not to say that there may not be other public policy exceptions

⁷¹*Id.* at 983. OHIO REV. CODE ANN. § 3113.213(D) (Banks-Baldwin 1994) provides, in relevant part:

No . . . employer may use a requirement to withhold personal earnings . . . as a basis for a discharge of, or for any disciplinary action against, an employee, or as a basis for a refusal to employ a person. The court may fine an employer who so discharges or takes disciplinary action against an employee, or refuses to employ a person, not more than five hundred dollars.

⁷²*Greeley v. Miami Valley Maintenance Contractors*, 551 N.E.2d 981 (Ohio 1990).

⁷³*Id.* at 985.

⁷⁴*Id.* at 986. The *Greeley* court distinguished *Phung*, noting that in *Phung* there was an absence of a "sufficiently clear public policy warranting the creation of a cause of action." *Id.*

⁷⁵*Id.* at 986-87 (internal citations omitted).

⁷⁶*Id.* at 987 (internal citations omitted).

to the doctrine but, of course, such exceptions would be required to be of equally serious import as the violation of a statute.⁷⁷

B. Greeley's Progeny

Only two years later, in *Tulloh v. Goodyear Atomic Corp.*,⁷⁸ the Supreme Court of Ohio revisited the public policy tort. In that case, a materials handler claimed that he had been exposed to hazardous dust, chips, and fumes, that his employer failed to warn him about the health hazards associated with his work, and that it concealed critical information about the work environment. The employee brought a common-law tort claim for wrongful discharge, which the trial court dismissed.⁷⁹ The Supreme Court declined to extend the public policy exception to reach a "whistleblower" claim that pre-dated the effective date of Ohio Revised Code section 4113.52, Ohio's Whistleblower Protection Act. The *Tulloh* court held that "[a]bsent statutory authority, there is no common-law basis in tort for a wrongful discharge claim."⁸⁰ Thus, the court construed the public policy exception as limited to policies clearly articulated by legislation.

⁷⁷*Id.* (internal citations omitted). Chief Justice Moyer and Justices Holmes and Wright dissented. In addition to acknowledging that creating a public policy exception to the employment at will doctrine was "wholly inappropriate judicial discourse, . . ." Justice Wright stated:

This sort of approach has potentially enormous consequences for the stability of the business community and our state's economy as a whole. . . . [W]e have seemingly, almost by accident, broadened the common-law remedy pertaining to wrongful discharge. Some of this language may lead to unintended consequences and visit both the employer and employee with the worst of all possible worlds by way of groundless litigation. In the words of Professor Gould:

"* * * [E]mployers are subject to volatile and unpredictable juries that frequently act without regard to legal instructions. Moreover, the employees who benefit are few and far between, first, because of the difficulties involved in staying the course of a lengthy and expensive judicial process, and second, because of the limitations inherent in the legal doctrines adopted by the courts."

Id. at 989 (Wright, J., dissenting) (quoting Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMP. REL. L.J. 404, 413 (1987/1988)).

Justice Wright's concern regarding the actual benefits that an employee who successfully challenges a discharge enjoys is supported by a 1988 survey by the Rand Institute. The Institute found that litigation costs are nearly as high as the average total monetary award a successful wrongful termination litigant receives. Mark D. Wagoner, Jr., *Comment: The Public Policy Exception to the Employment-At-Will Doctrine in Ohio: A Need for a Legislative Approach*, 57 OHIO ST. L.J. 1799, 1826 n.104 (1996).

⁷⁸584 N.E.2d 729 (Ohio 1992), *overruled by* *Painter v. Graley*, 639 N.E.2d 51 (Ohio 1994).

⁷⁹*Id.* at 732.

⁸⁰*Id.* at 733. Justice Douglas dissented, stating, "[i]n my judgment, public policy clearly demands that a safe workplace be provided, that unsafe working conditions be corrected and that employees who voice concerns aimed at correcting unsafe working conditions are entitled to protection against retaliatory measures." *Id.* at 734.

In *Provens v. Stark County Board of Mental Retardation & Developmental Disabilities*,⁸¹ the Supreme Court of Ohio declined to create an exception to the at-will employment doctrine where an employee claimed her public employer violated her constitutional rights. The employee alleged that her employer had harassed, discriminated against, and disciplined her in violation of, among other things, the right to free speech granted in the Ohio Constitution.⁸²

Declining to extend *Greeley* by creating an exception based on an alleged constitutional violation, the Court reasoned that the public employee had other "reasonably satisfactory" statutory and administrative remedies available.⁸³ Citing the United States Supreme Court's decision in *Bush v. Lucas*,⁸⁴ the *Provens* court stated:

[I]t is not incumbent upon this court to engage in the type of comparative analysis of the relative merits of various remedies that is invited by appellant. Rather, the more appropriate course for this court is to defer to the legislative process of weighing conflicting policy considerations and creating certain administrative bodies and processes for providing remedies for public employees such as appellant.⁸⁵

Less than two years later, a fractured⁸⁶ court overruled *Tulloh*⁸⁷ and expanded the public policy exception. *Painter v. Graley*⁸⁸ involved a city's

⁸¹594 N.E.2d 959 (1992).

⁸²*Id.*

⁸³*Id.* at 965.

⁸⁴462 U.S. 367 (1983). The *Provens* court explained in *Bush*:

The question whether to augment a remedial scheme carefully constructed by Congress did not turn merely on a determination that existing remedies failed to provide complete relief. Instead, the court asserted that the decision to create a *Bivens*-style remedy in those circumstances turned on a careful evaluation of relevant policy considerations. The court gave special deference to Congress' ability to weigh the policy considerations relevant to a determination of whether to create a remedy for a harm suffered, and, in the end, deferred to Congress' superior expertise, "convinced that Congress [was] in a better position to decide whether or not the public interest would be served by creating" a *Bivens*-style remedy in the case.

Provens, 594 N.E.2d at 965 (quoting *Bush*, 462 U.S. at 390).

⁸⁵*Provens*, 594 N.E.2d at 965.

⁸⁶Justices A. William Sweeney and Resnick concurred in the majority opinion. Chief Justice Moyer concurred in paragraphs one and two of the syllabus and in the judgment. Justice Wright concurred in paragraph one of the syllabus and in the judgment. Justices Douglas and Pfeifer concurred in paragraphs one and three of the syllabus and dissented in part. Judge James A. Brogran of the Second Appellate District, who was sitting for Justice F.E. Sweeney, dissented. Accordingly, there were only four votes to support the paragraph of the syllabus that overruled *Tulloh*.

⁸⁷The *Painter* court stated that "[s]trict and literal adherence to the syllabus of *Tulloh*

discharge of an unclassified public employee who chose to seek partisan elected office while holding public employment. After carving out a broader exception to the employment-at-will doctrine, the *Painter* court upheld the discharge, stating:

In specifically designating chief deputy clerks to be unclassified, the legislature expressed the public policy that they serve at the pleasure of those who appointed them. That is, *Painter's* at-will status as a public employee was prescribed by statute, and is not the result of the common-law employment-at-will doctrine. In that *Painter's* dismissal did not violate her constitutional rights, the existence of this legislative directive precludes us from finding a "sufficiently clear public policy" against *Painter's* dismissal based upon her becoming a candidate for office.⁸⁹

Regarding the public policy exception, the *Painter* court held that it was not limited, as a matter of law, to "public policy expressed by the General Assembly in the form of statutory enactments, but may be also discerned, as a matter of law based on other sources, such as the Constitution of Ohio and the United States, administrative rules and regulations, and the common law."⁹⁰ The *Painter* court did not specify the elements of the public policy tort; rather it indicated:

Full development of the elements of the tort of wrongful discharge in violation of public policy in Ohio [will] result [from] litigation and resolution of future cases, as it is through this means that the common law develops.⁹¹

would lead to the illogical result that courts could not recognize claims of wrongful discharge in violation of public policies where those policies arise from the Constitution of Ohio, unless that public policy was also incorporated into a legislative enactment." *Painter v. Graley*, 639 N.E.2d 51, 56 (Ohio 1994). Adherence to *Tulloh*, however, does not seem "illogical" when one considers that "[a]s a general rule, constitutional restrictions limit actions by the government, as opposed to actions by private individuals." *Deiters v. Home Depot, U.S.A., Inc.*, 842 F. Supp. 1023, 1027 (M.D. Tenn. 1993); see also *Takach v. Am. Med. Tech., Inc.*, No. 72247, 1998 Ohio App. LEXIS 638 (Ohio Ct. App. Feb. 19, 1998) (dismissing a public policy tort claim for an employer's alleged violation of the Open Court provision of the Ohio Constitution after it discharged an employee for filing a products liability action against a third party), *appeal allowed*, 696 N.E.2d 1088 (Ohio 1998).

⁸⁸639 N.E.2d 51 (Ohio 1994).

⁸⁹*Id.* at 57. The court noted that its opinion should be limited to public employees. *Id.* at 57 n.9. It is noteworthy that the *Painter* court felt compelled to expand the scope of the tort of wrongful discharge in a case that did not implicate the common law doctrine of employment-at-will.

⁹⁰*Id.* at 52.

⁹¹*Id.* at 56. The *Painter* court suggested that Ohio courts may find useful the analysis of Professor Perritt in *The Future of Wrongful Discharge Dismissal Claims: Where Does the Employer Self-Interest Lie?*, 58 U. CIN. L. REV. 397, 398-99 (1989). *Painter*, 639 N.E.2d at 57

Despite expanding the tort beyond statutory enactments, the court stated that "[j]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy."⁹²

Although *Greeley* limited the public policy tort to claims based on policies set forth in statutes, Ohio courts have since broadened the tort to include public policies in the Ohio constitution, federal statutes, and other sources.⁹³ Ohio courts have recognized public policy claims based on such violations as retaliation for filing an OSHA complaint, for making an age discrimination claim, and for serving jury duty.⁹⁴ One restriction, however, on a claim based on a policy delineated in a statute is that an employee must strictly comply with the statute, or the public policy claim will fail.⁹⁵

n.8. Professor Perritt's analysis, discussed *supra*, has not been relied on in any reported decisions outside of Ohio.

⁹²*Id.* at 57 (quoting *State v. Smorgala*, 553 N.E.2d 672, 674 (Ohio 1990)).

⁹³*Painter v. Graley*, 639 N.E.2d 51 (Ohio 1994) (holding that the public policy exception could be based on the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law); *see also Devlin v. North Shore Door Co.*, No. 68063, 1995 Ohio App. LEXIS 1958, at *1 (Ohio Ct. App. May 11, 1995) (holding that discharge of an employee for engaging in actions protected against employer interference by section 7 of the National Labor Relations Act gives rise to a public policy tort action and rejecting the preemption argument); *Stephenson v. Litton Sys., Inc.*, 646 N.E.2d 259 (Ohio Ct. App. 1994) (finding that discharging a secretary for calling 1-800-GRABDUI on her boss violates public policy).

⁹⁴*Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308 (Ohio 1997) (reporting health and safety concerns to OSHA); *Shaffer v. Frontrunner, Inc.* 566 N.E.2d 193 (Ohio Ct. App. 1993) (employee alleged she was terminated for absenteeism resulting from jury duty); *Livingston v. Hillside Rehabilitation Hosp.*, 680 N.E.2d 1220 (Ohio 1997) (suggesting a public policy claim may be made based on age discrimination); *see also Collins v. Rizkana*, 652 N.E.2d 653, 661 (Ohio 1995) ("a cause of action may be brought for wrongful discharge in violation of public policy based on sexual harassment/discrimination" even where the defendant is not an "employer" as defined by the Ohio Civil Rights Act); *Cage v. Gateways to Better Living, Inc.*, No. 94 C.A. 44, 1995 Ohio App. LEXIS 2668, at *1 (Ohio Ct. App. June 26, 1995) (reversing dismissal of employee claim for discharge in violation of public policy for refusing an order that would have violated the Nurse Practice Act, OHIO REV. CODE ANN. § 4723 *et seq.* (Banks-Baldwin 1998)); *Simonelli v. Anderson Concrete Co.*, 650 N.E.2d 488 (Ohio Ct. App. 1994) (determining that "the act of firing an employee for consulting an attorney could serve as the basis for a public policy exception to the at-will employment doctrine"); *Smith v. Troy Moose Lodge No. 1044*, 645 N.E.2d 1352 (Ohio Ct. App. 1994) (endorsing public policy exception where employee fired in retaliation for filing for unemployment benefits); *Clipson v. Schlessman*, 624 N.E.2d 220 (Ohio Ct. App. 1993) (reversing summary judgment for employer in *Greeley* claim based on alleged handicap discrimination).

⁹⁵*Contreras v. Ferro Corp.*, 652 N.E.2d 940 (Ohio 1995).

C. Kulch v. Structural Fibers, Inc.

In April 1997, the Supreme Court decided *Kulch v. Structural Fibers, Inc.*⁹⁶ Kulch was a factory worker who believed his health problems resulted from exposure to toxic chemicals in the workplace. He orally complained to his employer and then, having received no response, filed a written report with the Occupational Safety and Health Administration ("OSHA"). OSHA inspected the facility and found serious violations that were unrelated to Kulch's allegations.⁹⁷ Kulch was discharged. After his discharge, Kulch filed suit, alleging that his employer retaliated against him because he had filed a complaint with OSHA. The complaint included claims under Ohio Revised Code section 4113.52, under the Ohio Whistleblower Protection Act, and for wrongful discharge in violation of public policy.⁹⁸

The trial court granted summary judgment on the whistleblower claim because Kulch had failed to give his employer written notice under the statute. The court also granted summary judgment on the public policy claim, holding that the statute preempted any public policy claim for whistleblowing.⁹⁹ The court of appeals affirmed.

On appeal, the Supreme Court of Ohio reversed, in part. Kulch's statutory whistleblower claim under section 4113.52(A)(1) failed as a matter of law because Kulch had not made the required written report prior to contacting the authorities. The court, however, found that section 4113.52(A)(2) does not require an employee to notify his employer of the alleged violation prior to making a report to the authorities. Accordingly, because there was evidence to support application of this subsection, the court reversed summary judgment as to this portion of the statutory claim.¹⁰⁰

Turning to the public policy claim, the court held that section 4113.52 does not preempt a common-law cause of action for whistleblowing.¹⁰¹ The court also held that full compliance with the whistleblower statute allows an employee to bring a common-law cause of action for whistleblowing.¹⁰² In reaching this conclusion, the court found it necessary to overrule its earlier holding in *Phung* that no such exception to the employment-at-will doctrine exists. The court further held, separate and apart from the whistleblower statute, that where an employer discharges or disciplines an employee for filing

⁹⁶677 N.E.2d 308 (Ohio 1997).

⁹⁷*Id.* at 310.

⁹⁸*Id.*

⁹⁹*Id.* at 311.

¹⁰⁰*Id.* at 312.

¹⁰¹*Kulch*, 677 N.E.2d at 312.

¹⁰²In *Contreras*, the court held that in order to bring a public policy claim based on the whistleblower statute, a plaintiff must strictly comply with the statute. 652 N.E.2d 940, 940-41 (Ohio 1995).

an OSHA complaint, the employee can state a claim for wrongful discharge in violation of public policy.¹⁰³

In analyzing the public policy claim, the court reiterated the analysis employed in earlier public policy decisions:

In reviewing future cases, Ohio courts may find useful the analysis of Villanova Law Professor H. Perritt, who, based on review of cases throughout the country, has described the elements of the tort as follows:

1. That [a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).
2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).
4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).¹⁰⁴

Applying Professor Perritt's analysis, the court concluded that because the clarity and jeopardy elements were met, summary judgment was improperly granted and that, on remand, Kulch would have the opportunity to prove his wrongful discharge claim based on section 4113.52 and OSHA.¹⁰⁵

Justice Pfeifer concurred in the syllabus and judgment only.¹⁰⁶ Although he agreed that a common law claim exists for whistleblowing, he also cautioned that the "corollary" to this claim is the recognition of "a wide range of reasonable defenses" for employers.¹⁰⁷

Justice Cook¹⁰⁸ authored a strong dissent that criticized the majority for "elevating itself above the General Assembly as architect of Ohio's public policy."¹⁰⁹ The dissenters reasoned that the decision frustrated Ohio public policy by circumventing the remedies in both the Ohio statute and OSHA. They further reasoned that it was illogical to permit a private litigant to bring a public

¹⁰³*Id.* The court also held that the statutory remedies under Ohio Revised Code section 4113.52 and the remedies for a public policy claim are cumulative, but that a plaintiff is not entitled to a double recovery. *Id.* (paragraphs four and five of the syllabus).

¹⁰⁴*Kulch*, 677 N.E.2d at 321 (quoting *Painter*, 639 N.E.2d at 57 n.8 (quoting Perritt, *supra* note 91, at 398-99)).

¹⁰⁵*Id.* at 329.

¹⁰⁶*Id.* at 329-30.

¹⁰⁷*Id.* at 330.

¹⁰⁸Chief Justice Moyer and Justice Lundberg Stratton joined in the dissent.

¹⁰⁹*Kulch*, 677 N.E.2d at 330.

policy claim based on a federal statute that itself expressly forbade a private right of action.¹¹⁰

The dissent also noted that in an earlier decision, *Collins v. Rizkana*,¹¹¹ the court had stated that where a statute's "coverage provisions form an essential part of its public policy," the court should not "extract a policy from the statute and use it to nullify the statute's own coverage provisions."¹¹² The dissenters explained that this was exactly the effect of *Kulch*; namely, that the public policy in favor of workplace safety was being used to defeat the policy considerations that also limited the available relief under the statute.¹¹³

The dissent also took issue with the holding that the whistleblower statute does not preempt a common law cause of action for wrongful discharge. According to Justice Cook, where rights and remedies are set forth in the same statute, there is a presumption that the remedies are intended to be exclusive.¹¹⁴ She reasoned, further, that the majority improperly "reverses the presumption of exclusivity" when it concludes that because the statute did not contain the words "sole and exclusive," it did not preempt a common law claim.¹¹⁵

Finally, the dissent disagreed with the majority's "eviscerat[ion]" of summary judgment in order to reach the public policy issue and expand the holding of *Greeley*.¹¹⁶ The dissent noted that in order to distinguish this case from *Contreras*, the majority had to conclude that plaintiff had preserved its argument for applicability of subsection (A)(2), notwithstanding the apparent abandonment of this argument in the lower courts.¹¹⁷

III. A RESPONSE TO *KULCH v. STRUCTURAL FIBERS, INC.*: CLARIFYING THE PUBLIC POLICY EXCEPTION

In a recently published law review article,¹¹⁸ author Sandra J. Rosenthal argues that *Kulch* is a positive development in Ohio tort law because it further erodes the employment-at-will doctrine. According to the author, *Kulch* "marks the culmination of a trend in Ohio to expand the public policy exception doctrine and provide much needed protection for the rights of employees."¹¹⁹

¹¹⁰*Id.* at 330-31.

¹¹¹652 N.E.2d 653, 658 (Ohio 1995).

¹¹²*Kulch*, 677 N.E.2d at 332 (quoting *Collins*, 652 N.E.2d at 661).

¹¹³*Id.*

¹¹⁴*Id.* at 332.

¹¹⁵*Id.* at 333.

¹¹⁶*Id.* at 334.

¹¹⁷*Kulch*, 677 N.E.2d at 334.

¹¹⁸Sandra J. Rosenthal, *Kulch v. Structural Fibers, Inc.: Clarifying the Public Policy Exception*, 45 CLEV. ST. L. REV. 681 (1998) (hereinafter "*Clarifying the Public Policy*").

¹¹⁹*Clarifying the Public Policy*, *supra* note 118, at 683.

She argues that employees will now be able to "obtain full and fair redress" for wrongful treatment by employers and, at the same time, that this decision will promote Ohio public policies.¹²⁰

In addition to analyzing *Kulch*, the author discusses *Kulch's* impact by focusing on two other Supreme Court public policy tort decisions. First, the author discusses *Provens*,¹²¹ a 1992 case in which the Supreme Court held that a public employee cannot bring a public policy claim for wrongful discharge based on the Ohio Constitution where other "reasonably satisfactory" remedies are available.¹²² The author suggests that this holding "does not make sense in light of *Kulch*" and will have to be reexamined.¹²³

The second case, decided three months after *Kulch*, is *Livingston v. Hillside Rehabilitation Hospital*.¹²⁴ There, the court of appeals had declined to recognize a public policy claim based on age discrimination because the applicable Ohio age discrimination statute already provided remedies that were as broad as those available under a *Greeley* claim.¹²⁵ In a one-sentence opinion joined by five justices, the Supreme Court reversed and remanded the case "on the authority of *Kulch*."¹²⁶ The author of *Clarifying the Public Policy* reads this decision to stand for the proposition that a plaintiff is entitled, not only to more expansive public remedies, but also to a jury trial.¹²⁷

Finally, the author suggests that after *Kulch*, two issues are likely to come to the forefront. First, she argues that the predominant issue in future litigation is likely to be whether remedies set forth in a statute are exclusive or, alternatively, whether *Greeley* remedies will be available for violations of that statute.¹²⁸ Second, as noted, the author argues that *Provens* will have to be reconsidered.¹²⁹

¹²⁰*Id.* at 698. Further, the author argues that *Kulch* (1) reaffirms the four-part test of Professor Perritt, enunciated in earlier court decisions; (2) reaffirms that a public policy claim can also be based on federal statutes, the state and federal constitutions, administrative rules and regulations, and the common law; and (3) recognizes that an employee can bring a public policy claim under OSHA even if he has failed to comply with the whistleblower statute. *Id.* at 693-94.

¹²¹*Provens v. Stark County Bd. of Mental Retardation & Developmental Disabilities*, 594 N.E.2d 959 (Ohio 1992).

¹²²*Id.* at syllabus.

¹²³*Clarifying the Public Policy*, *supra* note 118, at 698.

¹²⁴680 N.E.2d 1220 (Ohio 1997).

¹²⁵*Id.* at 1227 (Cook, J., dissenting).

¹²⁶*Id.*

¹²⁷The author identifies the right to a jury trial as the "best avenue to obtain such a remedy." *Clarifying the Public Policy*, *supra* note 118, at 697.

¹²⁸*Id.* at 698.

¹²⁹*Id.*

A. Kulch Has Usurped the Legislative Prerogative to Set Public Policy and Will Engender Further Confusion and Unpredictability

The unspoken premise behind *Clarifying the Public Policy* is that further erosion of the employment-at-will doctrine is a positive development, even if it is accomplished piecemeal and frustrates legislative intent. Whether the employment-at-will doctrine should be abolished, judicially, statutorily, or otherwise, is beyond the scope of this Article. *Clarifying the Public Policy's* wholesale endorsement of this premise, however, misses the mark with regard to two more fundamental questions, which it leaves unanswered.

First, should the Supreme Court of Ohio be creating public policy, and remedies to vindicate this policy, that are directly contrary to the remedies established by the General Assembly as part of a comprehensive statutory scheme? Second, even if the Court arguably is vested with the responsibility to shape new common-law remedies based on its vision of public policy, will this advance the twin goals of uniformity and predictability? We believe that the answer to both these questions is in the negative, and that this compels the conclusion that *Kulch* was decided incorrectly.

1. *Kulch* Has Usurped the Legislative Prerogative to Set Ohio Public Policy

Prior to enacting the whistleblower statute,¹³⁰ the General Assembly weighed, and debated, the respective interests of the public, employees, and employers.¹³¹ The result is a statute that protects the rights of whistleblowers and the interests of the public, but also safeguards the rights of employers by imposing certain conditions upon employees who seek the protections of the statute.¹³² The statute sets forth the procedural requirements that employees must meet to qualify as whistleblowers, as well as the remedies that the General Assembly deemed appropriate.¹³³

¹³⁰The General Assembly enacted the Whistleblower Protection Act, Ohio Rev. Code Ann. section 4113.51, *et seq.*, in response to the Ohio Supreme Court's decision in *Phung. Siegel & Stephen*, *supra* note 12, at 121. Compare *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (noting that amending legislation is an appropriate reaction by a legislature when it disagrees with a court's interpretation of legislation).

¹³¹See *Provens v. Stark County Bd. of Mental Retardation & Developmental Disabilities*, 594 N.E.2d at 965 (stating "the more appropriate course for this court is to defer to the legislative process of weighing conflicting policy considerations and creating certain administrative bodies and processes. . .").

¹³²Section 4113.52 of the Ohio Revised Code provides that to qualify as a whistleblower under the statute, before going to the authorities with an alleged violation of law, an employee generally must orally notify the employer of the alleged violation, and then follow up with the employer in writing. If the violation is not corrected, or if the employer does not make a good-faith effort to correct the violation, within twenty-four hours, the employee may go to the appropriate authorities. An employee making such a report, however, also has a duty to make a reasonable and good-faith effort to determine the accuracy of any information reported. *Id.*

¹³³The available remedies include reinstatement, back wages, and reinstatement of fringe benefits and seniority rights. The court also may award a prevailing employee

Although other bodies might, of course, weigh the competing interests differently and arrive at different remedies, the legislature—not the courts—has been vested with primary responsibility for passing laws and setting Ohio public policy.¹³⁴ As one court explained:

All questions of policy are for the determination of the legislature, and not for the courts. . . . Where courts intrude into their decrees their opinion on questions of public policy, they in effect constitute the judicial tribunals as lawmaking bodies in usurpation of the powers of the legislature.¹³⁵

Nothing in *Kulch* suggests that the court found the whistleblower statute to be defective.¹³⁶ Instead, the court simply conducted its own assessment of the remedies therein and reached the conclusion that these remedies "are not adequate to fully compensate an aggrieved employee. . . ."¹³⁷ In the court's view, the more expansive remedies available for a public policy tort claim merely "complement the limited remedies available under the Whistleblower Statute."¹³⁸

This reasoning is unpersuasive. As the *Kulch* dissenters observed, the majority improperly "elevat[ed] itself above the General Assembly as architect of Ohio's public policy."¹³⁹ Decisions about the adequacy of statutory remedies are for the legislature, not for the courts.¹⁴⁰ The Supreme Court of Ohio recently explained,

costs of the litigation, together with witness fees, attorney fees, and fees for any experts who testify at trial. Finally, if the court determines that the employer deliberately retaliated against an employee, it may award interest on the award of back pay.

¹³⁴*Phung v. Waste Mgmt., Inc.*, 491 N.E.2d 1114 (Ohio 1986) ("The Ohio constitution delegates to the legislature the primary responsibility for protecting the welfare of employees.").

¹³⁵*Watson v. Cleveland Chair Co.*, 789 S.W.2d 538, 540-41 (Tenn. 1989).

¹³⁶If a statute denies a plaintiff a "meaningful remedy," it violates Section 16, Article I of the Ohio Constitution, which guarantees citizens the right to open courts. *Sorrell v. Thevenier*, 633 N.E.2d 504, 513 (Ohio 1994) (holding OHIO REV. CODE ANN. § 2317.45 to be unconstitutional violation of this Constitutional provision). Compare *Takach v. American Med. Tech. Inc.*, No. 72247, 1998 Ohio App. LEXIS 638, at *1 (Ohio Ct. App. Feb. 19, 1998) (dismissing a public policy tort claim of an employer's alleged violation of the Open Court provision of the Ohio Constitution after it discharged an employee for filing a lawsuit against a third party).

¹³⁷677 N.E.2d at 324.

¹³⁸*Id.*

¹³⁹*Id.* at 330 (Cook, J., dissenting).

¹⁴⁰*Austin v. HealthTrust, Inc.*, 967 S.W.2d 400 (Tex. 1998). Discussing whether to recognize a common law cause of action for whistleblowers, the *Austin* court stated:

In enacting statutes that prohibit certain conduct in the employment area, the Legislature has carefully balanced competing interests and policies. This has resulted in statutes not only with diverse protec-

it is not a court's function to pass judgment on the wisdom of the legislation, for that is the task of the legislative body which enacted the legislation.¹⁴¹

The General Assembly could have included other remedies in the statute, but it did not. By including only the enumerated remedies, the legislature implicitly decided to exclude others.¹⁴² For a court to add remedies to those available under the statute on the basis that they are merely "complementary" is to rewrite the statute, which is beyond the scope of its authority.¹⁴³

Courts are ill-equipped to serve as policy-making bodies.¹⁴⁴ Legislatures, not reviewing courts, have the expertise, and the resources, to hold hearings, take evidence, conduct studies, receive input from constituents, debate alternatives, and, ultimately, to arrive at an appropriate balance of competing concerns. A reviewing court has none of these resources and, therefore, is not

tions, but also with widely divergent remedies and varying procedural requirements.

... We do not doubt that significant policy interests are advanced when employers are prohibited from discriminating against employees who report violations of the law. However, the Legislature has enacted specific statutes to redress wrongful termination. While we are not bound by the Legislature's policy decisions when we consider whether to create a common-law whistleblower action, "the boundaries the Legislature has drawn do inform our decision."

Id. at 403. Based on this reasoning, the Texas Supreme Court declined to recognize a common-law whistleblower claim. *Id.*

¹⁴¹*Arnold v. Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993); *see also Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187 (Ohio 1998) ("It is, however, the role of the court to interpret the law, not to legislate."); *State v. Knox*, 656 N.E.2d 1046, 1047-48 (Ohio Ct. App. 1995) ("It is a fundamental rule of statutory review that a court may not pass judgment on the wisdom of legislation or substitute its judgment for that of the legislative body.").

¹⁴²*United States v. Cardenas*, 864 F.2d 1528, 1534 (10th Cir. 1989), *cert. denied*, 491 U.S. 909 (1989) ("[W]e apply the long-honored rule of statutory construction, *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of others)").

¹⁴³*State ex rel. Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."); *Brunswick v. Brunswick Hills Twp. Bd. of Trustees*, 610 N.E.2d 1054, 1057 (Ohio Ct. App. 1992) ("Courts may not judicially rewrite legislation under the guise of 'statutory construction.'"); *Myers v. Chiaramonte*, 348 N.E.2d 323, 328 (Ohio 1976); *see also Burlington Ind., Inc. v. Ellereth*, 118 S. Ct. 2257 (1998).

¹⁴⁴*See, e.g., City of Crown Point v. Rutherford*, 640 N.E.2d 750, 752 (Ind. Ct. App. 1994) ("courts are ill-equipped to evaluate the various factors determinative of legislative and executive decisions"); *In re Guardianship of Matejski*, 419 N.W.2d 576, 581 (Iowa 1988) (Harris, J., dissenting) ("Courts are not equipped to pursue the paths for discovering wise policy."); *Nix v. Prefomed Line Prods. Co.*, 170 Cal. App. 3d 975, 987 (5th Dist. 1985) (Best, J., concurring) ("courts are ill-equipped to decide questions of public policy which are essentially political in nature").

well suited to "sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations. . . ."145

It is unclear what remains of statutory limits on whistleblower remedies after *Kulch*. Apparently, if an employee can identify a public policy in a statute, rule, regulation, or common law that supports public safety, or perhaps another policy such as public health or morals, compensatory and punitive damages are potentially recoverable without regard to the limits in section 4113.52. After *Kulch*, employees may argue that they can simply bypass the more limited remedies in section 4113.52 and seek unlimited compensatory and punitive damages, with the result being that the public policy exception will swallow the statutory rule.¹⁴⁶

2. *Kulch* Has Engendered Further Confusion and Unpredictability in Ohio Employment Law

In the last twelve years, the Ohio Supreme Court has vacillated on the scope of the public policy tort. In 1986, the Supreme Court decided *Phung*, in which it declined to recognize a cause of action for wrongful discharge based on whistleblowing.¹⁴⁷ Four years later, in *Greeley*, the court did an about-face and held that such a cause of action exists. Justice Douglas, whose majority opinion for the court of appeals in *Phung* was reversed in 1986, wrote for a 4-3 majority in the *Greeley* decision.¹⁴⁸

Just two years later, in *Tulloh*, the court held that a whistleblower claim based on common-law does not exist in Ohio.¹⁴⁹ Now, in *Kulch*, the court has come full circle by overruling *Phung* and *Tulloh* and recognizing that a common-law cause of action exists in Ohio for whistleblowing.

These decisions illustrate the confusion and uncertainty in this area and belie the suggestion in *Clarifying the Public Policy* that *Kulch* has "laid to rest once and

¹⁴⁵ *Alford v. Republic Steel Corp.*, 467 N.E.2d 567, 570-71 (Ohio Ct. App. 1983); *see also Pack v. Cleveland*, 438 N.E.2d 434, 443 (Ohio 1982) (Brown, J., dissenting) ("A judiciary should not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations.").

¹⁴⁶ *See, e.g., Daniel v. Carolina Sunrock Corp.*, 430 S.E.2d 306, 312 (N.C. Ct. App.) (Lewis, J., dissenting) (stating "eggshell sensitivity of . . . 'narrow exception' to the employment at will doctrine will virtually swallow the rule"), *rev'd*, 435 N.E.2d 835 (1993) (reversal based on the reasons stated in Judge Lewis's dissent); *Tatge v. Chambers & Owen, Inc.*, 565 N.W.2d 150, 152 (Wisc. Ct. App.) (explaining public policy exception for wrongful discharge "would become the rule and the at-will doctrine would be swallowed up where employers and employees sign restrictive covenants"), *review granted*, 569 N.W.2d 589 (1997).

¹⁴⁷ 491 N.E.2d 1114 (Ohio 1986).

¹⁴⁸ 551 N.E.2d 981 (Ohio 1990).

¹⁴⁹ 584 N.E.2d 729 (Ohio 1992).

for all" any doubts regarding whether public policy remedies may be available notwithstanding the existence of statutory remedies.¹⁵⁰

The reality is that a bare majority of the court supported the judgment and syllabus. The opinion authored by Justice Sweeney commanded only three votes, with Justice Pfeifer concurring in judgment and syllabus only.¹⁵¹ Therefore, the outcome of future cases is in doubt¹⁵² and may turn on changes in the composition of the court.

Although *Kulch* admittedly answers some questions,¹⁵³ these answers may prove ephemeral. Moreover, *Kulch* raises other, troublesome questions. For example, how far will the public policy tort be extended, or retrenched, in subsequent decisions? What other sources of public policy will be found to support a wrongful discharge claim for whistleblowing?¹⁵⁴ How explicit must a preemption clause in a statute be in order for the court to find preemption? If the legislature unambiguously preempts nonstatutory remedies, will the statute withstand a constitutional challenge? And, after *Kulch*, is *Provens* still good law as to a public employee's right to assert a public policy claim, or is the demise of this case imminent? Presumably, the Supreme Court intends to address these (and other) questions on a case-by-case basis.¹⁵⁵

One unfortunate result of the court's erratic decisionmaking is that employers and employees who seek to conform their conduct to the law are left in the dark as to what the law, is, and what it will be in the foreseeable

¹⁵⁰*Clarifying the Public Policy*, *supra* note 118, at 683.

¹⁵¹*Greeley, Tulloh, and Painter* were all decided by a 4-3 majority, at least as to the law of the syllabus.

¹⁵²Two recent cases in which the Supreme Court has granted discretionary appeals illustrate this uncertainty. In *Davidson v. BP Am., Inc.*, Nos. 70170/71812, 1997 Ohio App. LEXIS 4712, at *1 (Ohio Ct. App. Oct. 23, 1997), *appeal granted*, 690 N.E.2d 1289 (Ohio 1998), which involves a public policy whistleblower claim, four justices voted to hear the appeal. Chief Justice Moyer and Justices Cook and Lundberg Stratton dissented. In *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, Port. App., No 96-P-0280, 1997 Ohio App. LEXIS 5563, at *1 (Ohio Ct. App. Dec. 12, 1997), *appeal denied*, 694 N.E.2d 78 (Ohio 1998), another public policy discharge case, Justices Douglas, Resnick, and Sweeney dissented from the denial of the discretionary appeal.

¹⁵³For example, *Kulch* clarifies that Ohio public policy claims may be based on the Occupational Safety and Health Act. It also reaffirms the four-part test enunciated by Professor Perritt for assessing the viability of public policy tort. *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308, 322 (Ohio 1997).

¹⁵⁴In the *dicta* of *Kulch*, Justice Douglas suggested that the "public policy of this state demands a safe working environment" and that this "conclusion is supported by a host of statutes and constitutional provisions favoring safety in the workplace." *Id.*

¹⁵⁵"Full development of the elements of the tort of wrongful discharge in violation of public policy in Ohio will result through litigation and resolution of future cases, as it is through this means that the common law develops." *Painter v. Graley*, 639 N.E.2d 51, 57 (Ohio 1994).

future.¹⁵⁶ The court's unwillingness to be bound by *stare decisis*,¹⁵⁷ together with its case-by-case approach and the internecine struggles¹⁵⁸ within the court, only aggravate the problem.¹⁵⁹

B. Confusion and Unpredictability in Wrongful Discharge Litigation

Notwithstanding Ms. Rosenthal's position that clarity has been achieved through *Kulch*, the first post-*Kulch* decision illustrates that *Kulch* sowed new seeds of confusion. By remanding a public policy claim for age discrimination "on the authority of *Kulch*," in *Livingston*,¹⁶⁰ the court has given the impression that a public policy claim is available on this basis. Unfortunately, the court provided absolutely no guidance to lower courts regarding the elements of this "claim," including how it interplays with statutory age discrimination claims.¹⁶¹

¹⁵⁶A recent article explained some of the consequences of legal uncertainty. For example, some employers will be reluctant to terminate marginal employees, which may cause a reduced demand for new workers. Such uncertainty leads to a sort of "regressive tax" on potential employees. Wagoner, Jr., *supra* note 77, at 1825 n.101. In addition, an employer may retain marginal employees to avoid litigation, even where there is a labor surplus, which may result in less productivity, less efficient manufacturing, and increased employee morale problems. *Id.* at 1826 n.102.

¹⁵⁷*Id.* at 1826 n.109 ("The Supreme Court of Ohio has been rather cavalier when dealing with *stare decisis* in past public policy cases.").

¹⁵⁸*Takach v. American Med. Tech. Inc.*, 1998 Ohio App. LEXIS 638 (Ohio Ct. App. Feb. 19, 1998), *appeal allowed*, 696 N.E.2d 1088 (Ohio 1998), provides yet another example of the struggles within the court on the public policy issue. In *Takach*, the court of appeals rejected an employee's public policy claim based on the "open courts" amendment to the Ohio Constitution. There, the employee resigned when her employer placed restrictions on her job duties after she filed a products liability claim against one of the employer's suppliers. The appellate court affirmed the court's rejection of the employee's public policy discharge claim, noting that the supreme court had previously rejected a public policy claim based on the Ohio constitution. Apparently, the court intends to revisit this question because it has allowed a discretionary appeal of this case over the dissent of Chief Justice Moyer and Justices Cook and Lundberg Stratton.

¹⁵⁹There are other troubling aspects of this decision as well. The dissent notes that it is illogical to hold, as the majority does, that an Ohio public policy claim can be based on a federal statute (OSHA) that does not provide a private right of action. As it has done with the whistleblower statute, the court severs the federal policies of OSHA, which are premised on the legislative determination that the Secretary, and not private litigants, should enforce the statute, from the statutory remedies.

¹⁶⁰*Livingston v. Hillside Rehabilitation Hosp.*, 680 N.E.2d 1220, 1221 (Ohio 1997).

¹⁶¹Justice Cook, in dissent, criticized the majority for failing to provide any legal analysis to support its decision:

Given that *Kulch* was decided based on the perceived inadequacy of the statutorily prescribed remedy available to a discharged whistleblower, one would expect this case, where the age discrimination statute has no restriction on remedies, to be affirmed.

Id. at 1221.

Moreover, Ohio courts and federal courts construing Ohio law have struggled to understand the limits of the public policy tort as it presently exists. The recent decision of *Sutton v. Salkin*¹⁶² is, perhaps, illustrative. This case involved, not an employment dispute, but the enforceability of a preprinted arbitration clause that required a consumer to arbitrate disputes. The consumer sought to take her dispute to small claims court rather than arbitrate, as agreed upon in the contract. The municipal court ordered her to arbitrate.

The court of appeals reversed. After acknowledging that there is a "strong presumption" in favor of arbitration under these circumstances, the court nonetheless held that it would "circumvent the public policy favoring resolution of small claims" to enforce the arbitration clause.¹⁶³ Particularly troublesome is the court's candid acknowledgement that its decision was not informed "by any statutory or judicially created authority. . . ."¹⁶⁴ Unfortunately, this case signals that Ohio courts have moved a step closer to the position that judges can decide cases based on their personal views of what the law should be, in derogation of what the law is.

Two recent federal district court decisions also are illustrative of the uncertainty in this area. In *Dorricott v. Fairhill Center for Aging*,¹⁶⁵ the court dismissed a claim for wrongful discharge in violation of "the public policy against terminating employees who take leave."¹⁶⁶ Dorricott had taken a medical leave of absence for emotional distress associated with alleged sexual harassment. After she exhausted available medical leave, she requested an extension. The employer declined to extend the leave and warned the employee that she would be terminated if she did not return to work. When the employee failed to return to work, the employer discharged her.¹⁶⁷

According to Justice Cook, the only difference between the age discrimination statute and the age discrimination public policy tort approved by the *Livingston* court was the right to a jury trial. *Id.* Since the General Assembly had not provided for a jury trial in the age discrimination statute, Justice Cook criticized the *Livingston* majority for substituting its personal public policy choice for a contrary public policy statement by the Ohio legislature.

This is not the first time that the court has decided a case involving wrongful discharge in violation of public policy under the discrimination statutes. In *Collins v. Rizkana*, 652 N.E.2d 653 (Ohio 1995), the court held that "a cause of action may be brought for wrongful discharge in violation of public policy based on sexual harassment/discrimination." *Id.* at syllabus.

¹⁶²No. 721707, 1998 Ohio App. LEXIS 382, at *1 (Ohio Ct. App. Feb. 5, 1998).

¹⁶³*Id.* at *4.

¹⁶⁴*Id.*

¹⁶⁵2 F. Supp. 2d 982 (N.D. Ohio 1998).

¹⁶⁶*Id.* at 993.

¹⁶⁷*Id.* at 982 (internal citations omitted).

The employee brought claims for, among other things, retaliation for filing a sexual harassment charge and wrongful discharge in violation of public policy. After acknowledging *Kulch*, the *Dorriccott* court stated:

Congress has obviously spoken on the issue of . . . family medical leave in the workplace by enacting comprehensive statutes as legislative statements of public policy in this area. As the *Painter* court noted, "Judicial policy preferences may not be used to override valid legislative enactments, for the legislature should be the final arbiter of public policy. Because the legislature has enunciated public policy and provided remedial schemes to protect employees in this area, this Court will not override the scheme. . . ."¹⁶⁸

Accordingly, it appears that this court gave *Kulch* a restrictive reading.

*Wallace v. Trumbull Memorial Hospital*¹⁶⁹ illustrates a contrary interpretation of the scope of *Kulch*. In that case, an employee brought an action for wrongful discharge in violation of public policy and for age and disability discrimination. Although the employee failed to state a claim under the Americans with Disabilities Act, and the employee's age claim was time-barred, the *Wallace* court permitted the employee to pursue his public policy claim.¹⁷⁰ Relying on *Kulch*, the district court stated: "[T]he mere existence of statutory remedies does not[,] without more, operate to bar a claim for wrongful discharge unless the remedies available under the statute are sufficient to provide the complete relief that would otherwise be available in a common law cause of action for wrongful discharge."¹⁷¹

Dorriccott and *Wallace* provide further evidence that as a result of judicial expansion of the public policy tort, including *Kulch*, the decision to discharge an employee is fraught with uncertainty and presents greater risks than in the past.¹⁷²

IV. CONCLUSION

The *Kulch* decision reflects an attempt by the Supreme Court of Ohio to shape public policy, a role better left to the legislature. This decision will lead to

¹⁶⁸*Id.* at 993 (quoting *Gall v. Quaker City Castings*, 874 F. Supp. 161, 164 (N.D. Ohio 1995)).

¹⁶⁹970 F. Supp. 618 (N.D. Ohio 1997).

¹⁷⁰*Id.* at 621.

¹⁷¹*Id.*

¹⁷²Other examples include the following recent authorities: *Bell v. Cuyahoga Community College*, No. 73245, 1998 Ohio App. LEXIS 3741 (Ohio Ct. App. Aug. 13, 1998) (declining to recognize a cause of action for harassment in violation of public policy); *Powers v. Springfield Sch.*, No. 98-CA-10, 1998 Ohio App. LEXIS 2827 (Ohio Ct. App. June 26, 1998) (recognizing a public claims for *wrongful promotion* in violation of a statute requiring certain professionals to report child abuse where the employee failed to comply with the requirements of the Whistleblower Protection Act).

greater confusion and unpredictability in an already muddled area of the law. We believe that in *Kulch*, the better course would have been for the Supreme Court to defer to the legislature, which carefully delineated the appropriate procedures and remedies for Ohio whistleblowers in the statute. Employers and employees alike can only hope that in the coming years, Ohio courts will demonstrate a more cautious approach when analyzing public policy, thereby bringing some stability to Ohio employment law.

