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## Running for Cover under Sarbanes-Oxley

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## COMMENT

### RUNNING FOR COVER UNDER SARBANES-OXLEY

*Though it be honest, it is never good to bring bad news: give to a gracious message.  
An host of tongues; but let ill tidings tell themselves when they be felt.*

William Shakespeare<sup>1</sup>

#### I. INTRODUCTION

If fraudulent accounting in business is a rather old sin,<sup>2</sup> shooting the messenger may prove older still. Unlike white-collar crime, which is proscribed by law but not frequently or severely penalized,<sup>3</sup> whistleblowing<sup>4</sup> “is likely to be penalized with impunity.”<sup>5</sup> Case studies of whistleblowing suggest that “the characteristic trajectory of whistleblowers’ careers . . . is, with few exceptions, a downward spiral.”<sup>6</sup>

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1. William Shakespeare, *Antony and Cleopatra*, Act III, Scene V, <http://www-tech.mit.edu/Shakespeare/cleopatra/full.html> (accessed Nov. 4, 2005).

2. See e.g. Evan T. Jones, *Illicit Business: Accounting for Smuggling in Mid-Sixteenth-Century Bristol*, 54 *Econ. History Rev.* 17 (2001); Sean McCartney & A.J. (Tony) Arnold, ‘A Vast Aggregate of Avaricious and Flagitious Jobbing?’ *George Hudson and the Evolution of Early Notions of Directorial Responsibility*, 11 *Acctg., Bus. & Fin. History* 117 (2001).

3. Nick Perry, *Indecent Exposures: Theorizing Whistleblowing*, 19 *Org. Stud.* 235, 239 (1998). The United States Sentencing Commission’s latest published statistics reveal that predominantly white collar crimes such as fraud and embezzlement represent less than twelve percent of the total number of offenders sentenced. White collar criminals predominantly receive probation and, if imprisoned, prison sentences well below the average. U.S. Senten. Commn., *2003 Sourcebook of Federal Sentencing Statistics* tbls. 3, 12, 13, <http://www.ussc.gov/ANNRPT/2003/SBTOC03.htm> (accessed Oct. 28, 2005).

4. A “whistleblower” is “[a]n employee who reports employer illegality to a governmental or law-enforcement agency.” *Black’s Law Dictionary* 1590 (Bryan A. Garner ed., 7th ed., West 1999). The term also describes an employee who reports allegedly improper or illegal conduct to management. See e.g. N.Y. Lab. L. § 740(2) (McKinney 2002) (A “whistleblower” includes an employee who discloses alleged wrongdoing to a supervisor.). Additionally, the term also loosely describes an employee who does not actually report the alleged wrongdoing but rather refuses to participate in it. See *id.*; *infra* pt. II.

5. Perry, *supra* n. 3, at 239.

6. *Id.* at 240. Some commentators have cast whistleblowing as equivalent to “occupational suicide” or “accidental career death.” *Id.* at 240–41. Perry also notes “whistleblowers are . . . cautioned against going public by the same authors who commend the integrity of those who do.” *Id.* at 237; see also Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 *Wash. L. Rev.* 1029, 1051–55 (2004).

Corporate cultures,<sup>7</sup> as a general rule, do not tolerate dissent well,<sup>8</sup> in part because of the premium placed on loyalty not only to the organization, but also to those who lead and manage it.<sup>9</sup> Executive-level managers, in particular, stress the importance of getting “on board”<sup>10</sup> and being a “team player”<sup>11</sup>—euphemistic language in many cases for others to see things top management’s way.<sup>12</sup> This social construction of reality,<sup>13</sup> coupled with the underlying subjective nature of accounting,<sup>14</sup> places a whistleblower’s idea of the truth at odds with most everyone else’s in the organization<sup>15</sup> and, perhaps more importantly, with that of top management.<sup>16</sup> All of this makes the whistleblower’s position a precarious one inside the organization. As one lawmaker put it, corporate

7. A “corporate culture” is defined by the “set of beliefs, norms and practices that is *shared* by the individuals in a group.” Susan Key, *Organizational Ethical Culture: Real or Imagined?* 20 J. Bus. Ethics 217, 218 (1999) (emphasis in original). As such, it “can influence how ethical decisions are made, and the pressure to adapt [one’s] behavior to organizational culture may lead to unethical behavior.” *Id.*

8. For example, a whistleblowing employee “runs the real risk of being branded as a ‘snitch,’ an ‘informer,’ or even a ‘traitor,’” because whistleblowing is in “tension [with] accepted concepts of employee loyalty.” Frank J. Cavico, *Private Sector Whistleblowing and the Employment-at-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. Tex. L. Rev. 543, 548 (2004) (citing in part *Dahl v. Combined Ins. Co.*, 621 N.W.2d 163, 167 n. 4 (S.D. 2001)); see also Ira Chaleff, *The Courageous Follower: Standing up to & for Our Leaders* 156 (2d ed., Berrett-Koehler 2003) (“[T]errific pressure may exist in an organization to make a key measurement of organizational performance look good by using short-sighted, questionable, or deceptive means. This pressure is symptomatic of deeper organizational dynamics.”); Robert Jackall, *Moral Mazes: The World of Corporate Managers* 109–10 (Oxford U. Press 1988) (citing as one of the “fundamental rules” of organizational life, “tell[ing] your boss what he wants to hear, even when your boss claims he wants dissenting views”); Bethany McLean & Peter Elkind, *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* 28 (Portfolio 2003). Jeff Skilling, an executive at Enron, “summarily dismissed [dissenters] as just not bright enough to ‘get it.’” *Id.* “Skillling, in particular, was infamous for dividing the world into those who ‘got it’ and those who didn’t. Internally, it was part of the company’s code.” *Id.* at 233. While Skillling is perhaps an extreme case, top executives in other organizations may differ from him only in degree—not kind. See generally Jackall, *supra*, at 75–100.

9. 148 Cong. Rec. S7420 (July 26, 2002) (noting that some companies have a “corporate culture that punishes whistleblowers for being disloyal” (statement of Senator Patrick Leahy) (internal quotation marks omitted)); Jackall, *supra* n. 8, at 26, 77 (concluding “[f]ealty is the mortar of the corporate hierarchy” and “managers’ essential problem is how to make things turn out . . . as defined or expected by their bosses”); see generally Chaleff, *supra* n. 8.

10. Jackall, *supra* n. 8, at 118.

11. *Id.* at 52–55.

12. *Id.* at 134 (noting “[m]anagers’ public language is, more than anything else, euphemistic”). Other commentators have pointed out that words used by managers such as “[be] realistic” [are] therefore an injunction to compute personal costs, rather than an invitation to attend to the content of truth.” Perry, *supra* n. 3, at 252.

13. See e.g. Jackall, *supra* n. 8, at 112–19.

14. Michael J. Barrett, *Enron and Anderson—What Went Wrong and Why Similar Audit Failures Could Happen Again*, in *Enron: Corporate Fiascos and Their Implications* 155, 158–59 (Nancy B. Rapoport & Bala G. Dharan eds., Found. Press 2004) (“[F]inancial accounting requires various estimates [and] generally accepted accounting principles often allow alternative treatments for the same transaction.”); Jeffrey D. Bauman, Elliott J. Weiss & Alan R. Palmiter, *Corporations Law and Policy: Materials and Problems* 201 (5th ed., West 2003) (noting “while the numbers in financial statements appear precise [they involve] many subjective judgments”).

15. See Jackall, *supra* n. 8, at 110–11. In recounting why a whistleblower had been fired, managers reported that “irregular payments, doctored invoices, shuffling numbers in accounts [are] commonplaces of corporate life” and the whistleblower had refused to recognize that truth is “socially defined, not absolute.” *Id.*; see also Cherry, *supra* n. 6, at 1051, 1054 (noting that both the law and co-workers have been “generally unsympathetic” to whistleblowers and supervisors, and co-workers view the whistleblower as somehow disloyal to organizational goals).

16. See Jackall, *supra* n. 8, at 75–100.

managers “with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law.”<sup>17</sup>

The Sarbanes-Oxley Act<sup>18</sup> attempts to improve the whistleblower’s situation. Yet, it remains unclear whether the Act’s whistleblower provision<sup>19</sup> tempers these cultural forces any more than existing state-level protection. A potential whistleblowing employee is likely to consider available legal protection before blowing the whistle or deciding how hard to push the issue with management.<sup>20</sup> This comment will analyze and demonstrate that while the decision to blow the whistle may depend on the legal protection afforded, the whistleblower’s experience ultimately depends on the corporate culture in which the employee resides. Stated another way, the fact that an employee considers or seeks refuge in the type of protection offered by the Act suggests such protection has little, if any, effect on corporate culture. Whistleblowers are still likely to be penalized with impunity.

#### A. *The Fastest Growing Category of Complaints*

Prior to the passage of the Act in 2002,<sup>21</sup> whistleblowers within publicly traded companies had to rely on common law exceptions to the doctrine of employment-at-will<sup>22</sup> for protection against wrongful discharge,<sup>23</sup> or find protection in various area-specific federal<sup>24</sup> and state statutes.<sup>25</sup> Taken as a whole, these exceptions and statutes created at best a “crazy-quilt” of varying levels of protection.<sup>26</sup> At their worst, they provided no protection at all.<sup>27</sup>

The Act addressed this state of affairs by federalizing whistleblowing protection in corporate settings.<sup>28</sup> Some lawmakers, for example, viewed the Act as a place to turn for

17. 148 Cong. Rec. S7420 (statement of Senator Patrick Leahy) (internal quotation marks omitted).

18. *Pub. Co. Acctg. Reform & Investor Act*, Pub. L. 107-204, 116 Stat. 745 (2002). The Act is codified in § 15 and § 18 U.S.C. (Supp. 2004); see *U.S.C.A. Popular Name Table for Acts of Congress, Sarbanes-Oxley Act of 2002, Pub. L. 107-204* (available on Westlaw, “USCA-TABLES” database).

19. 18 U.S.C. § 1514A (Supp. 2004). For a discussion of Sarbanes-Oxley’s whistleblower provision, see *infra* pt. III.

20. Cavico, *supra* n. 8, at 550.

21. See 116 Stat. 745.

22. The employment-at-will doctrine holds in part that an employee may be discharged “for good cause, for no cause or even for cause morally wrong.” *Crain v. Natl. Am. Ins. Co.*, 52 P.3d 1035, 1038 (Okla. Civ. App. 2002).

23. Wrongful discharge is also referred to as retaliatory discharge. See *Black’s Law Dictionary*, *supra* n. 4, at 476.

24. For a partial listing of federal statutes that relate to whistleblowing, see Cherry, *supra* n. 6, at 1121–23.

25. For a summary of state statutes that relate to whistleblowing, see Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 Am. Bus. L.J. 99 (2000); Cherry, *supra* n. 6, at 1087–1120; Richard A. Leiter, *50 State Surveys Employment Whistleblower Statutes* (West 2005) (available at Westlaw, “SURVEYS” database).

26. See *Graham County Soil & Water Conservation Dist. v. U.S.*, 545 U.S. 409, 427 (2005) (Breyer & Ginsberg, JJ., dissenting) (noting a “crazy-quilt of limitations periods stitched together from the [retaliatory discharge] laws of 51 jurisdictions”); see also 148 Cong. Rec. S7420 (“Corporate employees who report fraud are subject to the patchwork and vagaries of current state laws.” (statement of Senator Patrick Leahy) (internal quotation marks omitted)); Cherry, *supra* n. 6, at 1042–51.

27. See Cherry, *supra* n. 6, at 1042–51.

28. Marc I. Steinberg & Seth A. Kaufman, *Minimizing Corporate Liability Exposure When the Whistle Blows in the Post Sarbanes-Oxley Era*, 30 Iowa J. Corp. L. 445, 446–47 (2005); see also Robert G. Vaughn, *America’s First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 Admin. L. Rev. 1 (2005).

employees who knew of fraudulent practices but found themselves “trapped in a corporate culture which squash[es] dissent.”<sup>29</sup> While debate continues on the import and effect of the Act on corporate governance in general,<sup>30</sup> complaints filed under its whistleblower provision<sup>31</sup> represent the fastest growing category of complaints filed with the United States Department of Labor.<sup>32</sup> Within two years of the Act’s passage, over three hundred complaints by whistleblowers had been filed.<sup>33</sup> The more than one hundred whistleblower decisions issued by administrative law judges in 2005<sup>34</sup> represent a two hundred percent increase from the thirty-two decisions issued in 2003.<sup>35</sup>

Commentators, however, have paid relatively little attention to the Act’s whistleblower provision.<sup>36</sup> Those who have addressed the whistleblower provision have focused their discussions on categorizing the type of whistleblowing conduct protected, defining who is considered an employee, identifying what action triggers an adverse employment action under the Act, and finally, defining the elements of and legal burdens associated with a whistleblower’s claim.<sup>37</sup> Other commentators have focused on various corporate policies or practices that potentially could work to minimize liability exposure.<sup>38</sup> Few commentators have considered the sociological dimensions of whistleblowing under the Act.<sup>39</sup>

29. 148 Cong. Rec. S6301 (June 28, 2002) (statement of Senator Debbie Stabenow) (internal quotation marks omitted).

30. See e.g. J. Robert Brown, Jr., *The Irrelevance of State Corporate Law in the Governance of Public Companies*, 38 U. Rich. L. Rev. 317, 358–80 (2004); Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 Del. J. Corp. L. 79, 80 (2005); Joseph F. Morrissey, *Catching the Culprits: Is Sarbanes-Oxley Enough?* 2003 Colum. Bus. L. Rev. 801 (2003).

31. 18 U.S.C. § 1514A.

32. *Whistleblower Complaints Growing*, 39 Info. Mgt. J. 8 (May/June 2005).

33. Deborah Solomon, *Risk Management: For Financial Whistle-Blowers, New Shield is an Imperfect One*, Wall St. J. A1 (Oct. 4, 2004). Of the 317 complaints filed as of October 2004, 253 have been addressed and sixty-four are pending. *Id.* Of those addressed, roughly seven out of ten have been dismissed and only one out of six has favored the complainant. *Id.*

34. The number of decisions is based on case numbers assigned and reported by USDOL/OALJ Reporter, *Whistleblower Decisions Sarbanes-Oxley Act, § 806 2005-SOX*, <http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/CASELISTS/SOX2LIST.HTM> (accessed Nov. 4, 2005). After a complaint is filed with the Occupational Safety and Health Administration (“OSHA”), an investigation is conducted. OSHA, *Whistleblowers and Corporate Fraud*, [http://www.osha.gov/OshDoc/data\\_WhistleblowerFacts/whistleblowers\\_corporatefraud-factsheet.pdf](http://www.osha.gov/OshDoc/data_WhistleblowerFacts/whistleblowers_corporatefraud-factsheet.pdf) (accessed Nov. 8, 2005). Either party may appeal the investigative findings and order issued by requesting a hearing before an administrative law judge of the Department of Labor. *Id.* Therefore, the number of complaints filed and investigated is greater than the number of hearings held or decisions issued.

35. USDOL/OALJ Reporter, *Whistleblower Decisions Sarbanes-Oxley Act, § 806 2003 and 2004-SOX*, <http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/CASELISTS/SOX1LIST.HTM> (accessed Nov. 4, 2005).

36. Vaughn, *supra* n. 28, at 3.

37. See generally Terry F. Moritz, David E. Morrison & Katharine E. Burdic, *Recent Developments in the Interpretation of the Sarbanes-Oxley Act Whistleblower Provisions*, PLI Corp. L. & Prac. Course Handbook Series No. 6236 (2005).

38. See Steinberg & Kaufman, *supra* n. 28.

39. Cherry, *supra* n. 6, at 1049.

### B. *A Sociological Perspective*

When viewed from a sociological perspective, the availability of the Act's protection may have less of an effect on an employee's decision to blow the whistle than do the pressures brought to bear by the employee's workplace culture,<sup>40</sup> personal hardships imagined or experienced as a result,<sup>41</sup> and sporadic or uncertain enforcement.<sup>42</sup> Whether the Act tempers these factors and provides a greater incentive on the part of employees to report corporate fraud remains an open question. The increasing number of complaints being filed under the Act could signal little more than a shift in choice of venue. The increase could also be an indication that the Act does provide an incentive for the employee but has not altered the employer's reaction to whistleblowing. In that case, the repercussions faced by whistleblowers have remained fundamentally unchanged.

To gain some insight into whether the Act made whistleblowing less sociologically burdensome on the whistleblower, comparing the results of a case adjudicated under the Act to what the result might have been under existing common law and statutory protection may prove instructive. There may be no better case to use for this comparison than *Welch v. Cardinal Bankshares Corp.*<sup>43</sup> David Welch, the former CFO of Bank of Floyd (Virginia), was the first whistleblower to win employment protection under the Act.<sup>44</sup> Yet Welch remains unemployed by Bank of Floyd some three years after making his allegations of insider trading and financial irregularities.<sup>45</sup>

Would Welch have fared any better under Virginia's common law cause of action for wrongful discharge? Would he have fared any better had he lived in some other state? Whether a whistleblower like Welch is better served sociologically by the Act, by state common law, or statutory protection may depend on the state and ultimately the corporate culture in which the whistleblower resides.

### C. *Organization of this Comment*

Part II of this comment provides a brief history of state whistleblower protection and includes an overview of statutory and common law protection currently offered by states to whistleblowers in publicly traded companies. Statutory whistleblower provisions, for example, vary with respect to such elements as the specific type of whistleblowing conduct protected, causation requirements, standards and burdens of proof, and available remedies. Common law protections are not uniform, ranging from

40. *Id.* at 1052–54.

41. *Id.* at 1053; Perry, *supra* n. 3, at 240–41; *see also* Cherry, *supra* n. 6, at 1035–42 (recounting the story of Enron whistleblower Sherron Watkins and MCI whistleblower Cynthia Cooper); Sherron S. Watkins, *Ethical Conflicts at Enron: Moral Responsibility in Corporate Capitalism*, 45 Cal. Mgt. Rev. 6 (Summer 2003) (addressing the cultural dimensions and personal hardships associated with Watkins's whistleblowing experience at Enron).

42. Cherry, *supra* n. 6, at 1051.

43. *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 (Dept. Lab., Off. Admin. L. JJ. Jan. 28, 2004).

44. Telephone interview with D. Bruce Shine, Counsel for Mr. Welch, Shine & Mason Law Office, Kingsport, Tenn. (Nov. 15, 2005); *see also* Karen Krebsbach, *The Long Lonely Battle of David E. Welch*, 115 U.S. Banker 30, 32 (Aug. 2005); Mark A. Stein, *Whistle-Blower Wins*, 154 N.Y. Times C2 (Feb. 27, 2005).

45. Telephone interview with D. Bruce Shine, *supra* n. 44; *see also* Steve Cocheo, *SOX Whistleblower Law Embroils Virginia Bank*, 2005 ABA Banking J. 22, 28 (Sept. 2005).

no protection whatsoever in certain states to, in some cases, greater protection than comparable statutory provisions. Taken as a whole, state-level whistleblower protection represents, at best, an uneven playing field and, at worst, an uncertain one from a whistleblower's perspective.

Part III provides an overview of the Act's key whistleblowing provisions. This overview provides an understanding of how the Act's protection differs from state protection. Part IV reviews *Welch*, paying special attention to the application of the Act to the facts of that case.

Part V applies Virginia common law to the facts of *Welch*. Part VI then analyzes various states' whistleblowing laws—Louisiana, Delaware, Arkansas, and California—to the facts of *Welch*. Virginia was chosen for the comparison because it is the state in which the alleged corporate wrongdoing in *Welch* took place. California and Louisiana were chosen because each state lies at opposite ends of the statutory protection continuum. California has one of the latest, broadest, and, arguably, the toughest<sup>46</sup> whistleblowing statutes in the country, making it more sympathetic to whistleblowers. Louisiana, in contrast, has a very narrowly tailored statute<sup>47</sup> and, unlike California, offers no other exceptions to the doctrine of employment-at-will.<sup>48</sup> Delaware and Arkansas were chosen because both states lie at (almost) opposite ends of the common law protection continuum. Delaware, which is generally regarded as a business or corporate friendly state,<sup>49</sup> provides a rather narrow exception to the doctrine of employment-at-will<sup>50</sup> and its recently passed statutory protection<sup>51</sup> arguably poses a stricter standard for alleged employer wrongdoing than does the Act. Arkansas's common law protection is far broader than Delaware's in that it encompasses alleged violations of federal law.<sup>52</sup> The ultimate goal of this multi-state comparison is to determine whether a different outcome would result in *Welch* under the various states' laws versus the Act.

Part VII concludes this comment and discusses an element of corporate culture found in *Welch*, which is common to many corporate settings. From the perspective of a whistleblower, the Act might have leveled the playing field by filling in certain valleys left untouched by state protection, but this leveling might also have failed to lower

46. See Joshua L. Baker, *Chapter 484: The Strongest Whistleblower Protection Law in the Nation—Did We Need It, and Can We Really Afford It?* 35 McGeorge L. Rev. 569 (2004).

47. La. Stat. Ann. § 23:967 (1998) (limiting protection to employees who disclose or threaten to disclose a violation of state law, participate in an investigation held by a public body, or refuse to participate in a violation of state law).

48. *Quebedeaux v. Dow Chem. Co.*, 820 So. 2d 542, 546 (La. 2002) (noting that “[a]side from federal and state statutory exceptions, there are no broad policy considerations creating exceptions to employment at will” (internal quotation marks omitted)).

49. Bauman, Weiss & Palmiter, *supra* n. 14, at 61–63.

50. *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 441–42 (Del. Super. 1996) (noting the public policy exception for breach of covenant of good faith and fair dealing must entail an “explicit and recognizable public policy” but does not include discharge of an employee for disclosing questionable, but not illegal, financial and business practices).

51. *Del. Whistleblowers' Protec. Act*, Del. Code. Ann. tit. 19, §§ 1701–1708 (2005).

52. *Northport Health Services, Inc. v. Owens*, 158 S.W.3d 164, 174 (Ark. 2004) (holding a claim of wrongful discharge available where discharge is in violation of a well-established public policy intended to protect public interests and includes reporting a violation of state and federal law) (citing *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385–86 (Ark. 1988)).

organizational cultural barriers. In the context of corporate culture, neither the Act nor various state approaches may have done much, if anything, to make whistleblowing less sociologically burdensome.

## II. STATE WHISTLEBLOWER PROTECTION

The past thirty years have brought about a significant change in the protection that states have afforded to whistleblowers in the private sector.<sup>53</sup> Until the late 1970s and early 1980s, the doctrine of employment-at-will governed the employee-employer relationship in all the states with few exceptions.<sup>54</sup> The at-will doctrine, which held in part that an employee could be discharged “for good cause, for no cause or even for cause morally wrong,”<sup>55</sup> favored employers who discharged a whistleblower for no cause other than whistleblowing. The only exceptions to this general rule occurred, for example, in those cases in which the whistleblower was not an at-will employee<sup>56</sup> or where the activity was protected by a federal statute that contained an anti-retaliation provision.<sup>57</sup> Federal statutes, however, tended to be both narrow and area-specific<sup>58</sup> and often precluded coverage of private sector employees who had reported corporate wrongdoing unless federal funds were somehow involved.<sup>59</sup>

Many states have recognized the inherent unfairness of the at-will doctrine.<sup>60</sup> That recognition, coupled with the state’s interest in exposing governmental and corporate wrongdoing,<sup>61</sup> led to protections for whistleblowers in the private sector. Those protections took two forms: judicially created exceptions based on public policy<sup>62</sup>

53. See Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. Cin. L. Rev. 517, 519–22 (2004); Callahan & Dworkin, *supra* n. 25, at 99, 105–08. Whether this change has been accompanied by a shift in general societal norms toward whistleblowing is unclear. See Terance D. Miethe, *Whistleblowing at Work: Tough Choices in Exposing Fraud, Waste, and Abuse on the Job* 21–37 (Westview Press 1999).

54. Some commentators cite a 1959 California Court of Appeals decision, *Peterman v. Intl. Bd. of Teamsters*, 314 P.2d 25 (Cal. Ct. App. 1959), as the first state case to adopt the tort theory of firing in violation of a public policy. E.g. Callahan & Dworkin, *supra* n. 25, at 105–06. Twenty years then passed “before a significant number of state courts were willing to erode employer autonomy” by adopting a public policy exception for whistleblowers. *Id.* at 106.

55. *Crain*, 52 P.3d at 1038.

56. See e.g. *Rothrock v. Rothrock Motor Sales, Inc.*, 883 A.2d 511, 512 n. 1 (Pa. 2005) (noting that historically an employment contract provided an exception to the at-will employment doctrine).

57. See *Cherry*, *supra* n. 6, at 1049–50.

58. See *id.* at 1121–23 (classifying federal whistleblower laws under categories that include environmental/public health and welfare, fraud/false claims, health care, and safety and transportation).

59. See e.g. 31 U.S.C. §§ 3729, 3730(h) (2000) (fraud against the U.S. government).

60. See e.g. James A. Henderson, Jr., Richard N. Pearson & John A. Siliciano, *The Torts Process* 841 (6th ed., Aspen 2003) (citing *Sides v. Duke Hosp.*, 328 S.E.2d 818, 826 (N.C. App. 1985)). The court in *Sides*, citing public policy concerns, stated that “‘at-will’ can never mean ‘without limit or qualification’” and held that “no employer has the right to discharge an [at-will] employee . . . without civil liability because he refuses to testify untruthfully or incompletely in a court case.” *Sides*, 328 S.E.2d at 826; see Henderson, Jr., Pearson & Siliciano, *supra*, at 841–42 (quoting *Sides*, 328 S.E.2d at 826); see also *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 592 (Minn. App. 1986) (discussing employee and societal interests in allowing for an exception to the at-will doctrine) (citing *Palmateer v. Intl. Harvester Co.*, 421 N.E.2d 876 (Ill. 1981)).

61. See e.g. *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 104–07 (Colo. 1992) (protecting employee conduct which exposes employer wrongdoing is an important public policy).

62. For a review of state common law protection for both public and private sector whistleblowers, see Callahan & Dworkin, *supra* n. 25, at 105–07; Cavico, *supra* n. 8, at 589–609; *Cherry*, *supra* n. 6, at 1087–1120.



and legislation that granted specific protections to private sector whistleblowers.<sup>63</sup> Today, only three states—Alabama, Georgia, and New York—provide no common law or statutory protection to whistleblowers who report alleged corporate financial wrongdoing.<sup>64</sup> Four other states—Florida, Louisiana, Maine, and Rhode Island—also provide no common law protection,<sup>65</sup> but do provide some form of statutory protection.<sup>66</sup> Another thirteen states,<sup>67</sup> including California, Hawaii, and Michigan, provide both common law<sup>68</sup> and statutory protection,<sup>69</sup> with statutory protection in

63. See e.g. Michigan's *Whistle-blowers' Protec. Act*, Mich. Comp. L. Ann. §§ 15-361–15-369 (West 2004). Michigan was the first state to extend whistleblower protection to private employees. Frederick Elliston, John Keenan, Paula Lockhart & Jane van Schaick, *Whistleblowing: Managing Dissent in the Workplace* 9 (Praeger 1985). A review of state statutory protection for both public and private sector whistleblowers is found in Callahan & Dworkin, *supra* n. 25, at 107–22; Cavico, *supra* n. 8, at 552–89; Cherry, *supra* n. 6, at 1087–1120; see also Leiter, *supra* n. 25.

64. See generally e.g. *Hoffman-LA Roche, Inc. v. Campbell*, 512 So. 2d 725, 728 (Ala. 1987) (holding at-will employee “may be terminated . . . with or without cause or justification”); *Eckhardt v. Yerkes Regl. Primate Ctr.* 561 S.E.2d 164 (Ga. App. 2002) (declining to create a public policy exception for whistleblowers); *Lobosco v. N.Y. Tel. Co./Nynex*, 751 N.E.2d 462, 464 (N.Y. 2001) (stating New York does not recognize wrongful discharge and there are no public policy exceptions, including “discharge for exposing an employer’s illegal activities”). All states, including Alabama, Georgia, and New York, provide narrow, area-specific statutory protection to private-sector employees in many of the areas also addressed by federal protection. See Cherry, *supra* n. 6, at 1087–1120. New York provides statutory protection for participation in an investigation held by public body, or disclosure to supervisor or public body of violation of law, rule, or regulation, the violation of which “creates and presents a substantial and specific danger to public health and safety” or refusal to participate in any such violation. N.Y. Lab. L. § 740(2). It is unlikely that corporate financial wrongdoing presents such a danger.

65. See generally e.g. *Lurton v. Muldon Motor Co.*, 523 So. 2d 706, 708 (Fla. 1st Dist. App. 1988) (stating that an action for wrongful discharge is not available for an at-will employee); *Quebedeaux*, 820 So. 2d at 546 (noting that “[a]side from federal and state statutory exceptions, there are no ‘broad policy considerations creating exceptions to employment at will’”); *Bard v. Bath Iron Works Corp.*, 590 A.2d 152, 156 (Me. 1991) (declining to recognize the tort of wrongful discharge); *Pacheo v. Raytheon Co.*, 623 A.2d 464, 465 (R.I. 1993) (emphasizing that there is no common law cause of action for wrongful discharge).

66. See generally e.g. Fla. Stat. Ann. § 448.102 (West 2002) (participation in an investigation held by a public body or, after giving notice to the employer and providing a reasonable opportunity to correct, disclosure of, or refusal to participate in, a violation of a law, rule, or regulation); La. Stat. Ann. § 23:967 (1998) (participation in investigation held by a public body or disclosure of, or refusal to participate in, a violation of state law); 26 Me. Rev. Stat. Ann. §§ 831–840 (1988) (participation in an investigation conducted by a public body and disclosure of violation of a federal or state law or rule to an employer or public body); R.I. Gen. L. §§ 28-50-1–28-50-3 (2003) (participation in an investigation held by a public body or disclosure to employer or public body of a violation of federal, state, or local law, rule, or regulation “which the employee knows or reasonably believes has occurred or is about to occur,” or refusal to assist in violating a law, rule, or regulation).

67. California, Colorado, Connecticut, Delaware, Hawaii, Indiana, Michigan, Minnesota, New Hampshire, New Jersey, North Dakota, Ohio, and Pennsylvania.

68. See generally e.g. *Sinatra v. Chico Unified Sch. Dist.*, 14 Cal. Rptr. 3d 661, 664 (Cal. App. 3d Dist. 2004) (holding discharge must violate a public policy that is “‘fundamental’ and ‘substantial’ in that it is tethered to constitutional or statutory law [including] refusal to violate a statute, performing a statutory obligation, exercising a statutory or constitutional right or privilege, or reporting an alleged violation of a statute of public significance” (numbering omitted)); *Krauss v. Catholic Health Initiatives Mt. Region*, 66 P.3d 195, 203 (Colo. App. 2003) (holding discharge must “[contravene] a clear mandate of public policy” and occurs where an employee is discharged for exercising a statutory right or privilege) (citing *Lorenz*, 823 P.2d at 100); *Tomei v. Sharp*, 902 A.2d 757, 769 (Del. Super. 2006) (holding covenant of good faith and fair dealing is “an implied part of every employment contract”); *Fa v. Brigham Young U.-Haw.*, 98 P.3d 246 (Haw. 2004) (unpublished disposition) (holding discharge violates a clear mandate of public policy as evidenced by statutory or regulatory provisions); *McGarrity v. Berlin Metals, Inc.*, 774 N.E.2d 71, 76 (Ind. App. 2002) (stating wrongful discharge available to at-will employee “discharged solely for exercising a statutorily conferred right” or “allegedly fired for refusing to commit an unlawful act for which he would be personally liable”); *Baker v. Oakwood Hosp. Corp.*, 608 N.W.2d 823, 832 n. 3 (Mich. App. 2000) (noting a common law cause of action is available when an employee has been discharged for failing or refusing to perform an illegal

Colorado and Indiana limited to situations involving private employers under public contract.<sup>70</sup> Two states, Alaska and Delaware, allow a whistleblower to bring a cause of action under breach of the implied covenant of good faith and fair dealing,<sup>71</sup> with Alaska also providing a tort cause of action.<sup>72</sup> The remaining twenty-nine states and the District of Columbia provide various forms of common law protection absent any state statutory protection relating to the disclosure of corporate financial wrongdoing.<sup>73</sup>

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act and when there is no applicable statutory prohibition against such a discharge); *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569, 571 (Minn. 1987) (holding that an employee who is discharged “for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation”); see also *Abraham v. County of Hennepin*, 639 N.W.2d 342, 351–52 (Minn. 2002) (noting the decision in *Phipps*, 408 N.W.2d 569, was prior to the enactment of the state’s Whistleblower Act); *Porter v. City of Manchester*, 849 A.2d 103, 114 (N.H. 2004) (holding elements of wrongful discharge claim includes a showing that the discharge resulted from the employee “perform[ing] an act that public policy would encourage, or refus[ing] to do something that public policy would condemn” (quoting *Cloutier v. Great A. & P. Tea Co., Inc.*, 436 A.2d 1140 (N.H. 1981)) (internal quotation marks omitted)); *Maw v. Adv. Clinical Commun., Inc.*, 846 A.2d 604, 607 (N.J. 2004) (holding discharge violates a “clear mandate of public policy” found in a constitutional provision, statute, rule, or regulation such that “there should be a high degree of public certitude in respect of acceptable versus unacceptable conduct”); *Vandall v. Trinity Hosp.*, 676 N.W.2d 88, 91 (N.D. 2004) (holding discharge “contravene[s] a clear statement of public policy in a constitutional or a statutory provision”); *Daniels v. Fraternal Or. of Eagles Aerie of Tecumseh #979*, 833 N.E.2d 1253, 1258 (Ohio App. 2d Dist. 2005) (holding an element of public policy tort includes showing that discharge of similarly situated employees would jeopardize public policy) (citing *Collins v. Rizkana*, 652 N.E.2d 653 (Ohio 1995)).

69. See generally Cal. Lab. Code Ann. § 1102.5 (West Supp. 2005) (disclosure of violation or refusal to participate in a violation of a federal or state statute, rule, or regulation); *id.* at § 1106 (protection extends to employees of public corporations); Conn. Gen. Stat. Ann. § 31-51m (West 2003) (disclosure to a public body of a violation of a federal or state law or regulation or participation in investigation held by public body); *id.* at § 33-1336 (protection mirrors that found in the Act’s whistleblower provision, 18 U.S.C. 1514A); Del. Code Ann. tit. 19, § 1703 (2005) (disclosure to public body or employer of actual or suspected violation of federal or state law, rule, or regulation or participation in investigation held by public body); Haw. Rev. Stat. § 378-62 (Supp. 2005) (disclosure to a public body of violation or suspected violation of a state or federal law, rule, ordinance, or regulation or participation in investigation held by a public body); Mich. Comp. L. Ann. §§ 15-361–15-369 (disclosure to a public body of a suspected violation of state or federal law, regulation, or rule); Minn. Stat. Ann. § 181.932 (West 2004) (participating in an investigation held by a public body; good faith disclosure of a violation or suspected violation of state or federal law or rule; or refusal based on an objective belief, to participate in a violation); N.H. Rev. Stat. Ann. § 275-E:2 (1999) (good faith disclosure of violation or suspected violation of federal or state law or rule, or participation in investigation held by a public body); *Conscientious Employee Protec. Act*, N.J. Stat. Ann. §§ 34:19-1–34:19-8 (2000) (participation in an investigation held by a public body, disclosure to a supervisor or public body of an activity that the employee reasonably believes is in violation of a law, rule, or regulation, or refusal to participate in activity that is fraudulent or criminal or “incompatible with clear mandate of public policy”); N.D. Cent. Code § 34-01-20 (2004) (participation in an investigation held by a public body, good faith disclosure of a violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule, or refusal to participate in an activity that employee objectively believes violates the law); Ohio Rev. Code Ann. § 4113.52 (West Supp. 2005) (disclosure of a felony in violation of a federal or state statute, rule, or regulation); *Whistleblower Law*, 43 Pa. Consol. Stat. Ann. §§ 1421–1428 (West 1991) (good faith disclosure of a violation of a federal or state statute or regulation).

70. Colo. Rev. Stat. Ann. § 24-114-102 (West 2004) (limited to employees of companies under contract with a state agency who discloses information to a public body which, if not disclosed, could endanger public health, safety, or welfare or adversely affect state interests); Ind. Code Ann. § 22-5-3-3 (LEXIS 2005) (limited to employees of private employers that are under public contract and who disclose a violation of federal or state law, regulation, rule, or ordinance).

71. E.g. *Norcon, Inc. v. Kotowski*, 971 P.2d 158, 167 (Alaska 1999) (holding whistleblowers can bring action for breach of the implied covenant of good faith and fair dealing); *Pressman*, 679 A.2d at 441 (recognizing breach of covenant of good faith and fair dealing as the exception to the at-will doctrine).

72. See e.g. *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 438 (Alaska 2004) (holding that a tort remedy for wrongful discharge is appropriate in cases in which there is a violation of an explicit public policy).

73. See *Cherry*, *supra* n. 6, at 1087–1120; *infra* pt. II.A.

A. *Little in Common, Common Law Protection*

Common law protection for private whistleblowers varies according to a number of factors. One significant factor is whether the whistleblowing is external or internal.<sup>74</sup> Other factors include the reasonableness of the whistleblower's belief, whistleblower complicity in the wrongdoing, standards and burdens of proof, and statutes of limitations.<sup>75</sup> However, for the purposes here, the most important factors are the type of whistleblowing conduct protected and the remedies available to the whistleblower.<sup>76</sup> Protection depends upon whether some public policy<sup>77</sup> of the state incorporates the subject matter about which the whistleblower complains.<sup>78</sup> As a general rule, a whistleblower has a cause of action for wrongful discharge if the discharge or other adverse employment action<sup>79</sup> contravenes, jeopardizes, or violates some public policy of the state.<sup>80</sup>

The public policy exceptions of some states are likely to protect the very type of whistleblowing covered by the Act.<sup>81</sup> For example, some jurisdictions have defined the act of whistleblowing itself as a public policy deserving of protection.<sup>82</sup> For others, federal statutes and regulations provide the source of public policy deserving of

74. Internal whistleblowing involves disclosure to a supervisor or employer. External whistleblowing involves disclosure to a public body. Cavico, *supra* n. 8, at 599–601.

75. *See id.* at 589–609.

76. Several reviews of the various factors of state common law protection are available. *See e.g.* Callahan & Dworkin, *supra* n. 25; Cavico, *supra* n. 8; Cherry, *supra* n. 6. Cavico's treatment of the common law protection served as the basis for this section of the article.

77. One source defines "public policy" as "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society." *Black's Law Dictionary, supra* n. 4, at 1267.

78. *Barker v. St. Ins. Fund*, 40 P.3d 463, 469 (Okla. 2001) ("In whistle-blower cases, the answer to [the policy question] determines the subjects about which a whistle-blower may or may not legitimately complain.").

79. Adverse employment actions include reassignment and constructive discharge. *See Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 88 P.3d 966, 976–77 (Wash. App. Div. 3d 2004).

80. Idaho, Virginia, and Washington are examples. *See generally e.g. Anderson v. ITT Industries Corp.*, 92 F. Supp. 2d 516, 522 (E.D. Va. 2000) (noting that a claim for wrongful discharge must involve either "(i) a statutorily-created right which the termination interferes with or violates, or (ii) a statutorily-imposed duty which the employee is terminated for refusing to violate"); *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733, 737–38 (Idaho 2003) (stating the only general exception to employment-at-will is where the motivation for the discharge contravenes public policy as found in the state's statutes and constitution, and includes protection for employees "who refuse to commit unlawful acts, who perform important public obligations, or who exercise certain legal rights or privileges"); *Alaiyan v. Insightful Corp.*, 2005 WL 1406003 at \*3 (Wash. App. Div. 1st June 13, 2005) (unpublished opinion) (listing as one of the elements of a wrongful discharge claim a showing that discouraging the conduct in which the employee engaged in would jeopardize a "clearly articulated" public policy and noting this includes discharge for refusing to perform an illegal act, performing a legal duty, exercising a legal right, or reporting employer misconduct).

81. The Act does not protect whistleblowing on all types of fraudulent conduct. Cavico, *supra* n. 8, at 556–57. Rather, the fraudulent conduct must involve a violation of federal securities laws, a federal law relating to shareholder fraud, or a Securities and Exchange Commission rule or regulation. *Id.*; *see* 18 U.S.C. 1514(A)(1).

82. Illinois and South Carolina are examples. *See generally e.g. Geary v. Telular Corp.*, 793 N.E.2d 128, 133–34 (Ill. App. 1st Dist. 2003) (noting the exception for discharge in violation of a "clearly mandated public policy" is a narrow one, limited to situations "where the discharge stems from asserting a worker's compensation claim . . . or for activities referred to as 'whistle-blowing'" (citations omitted)); *Dahl*, 621 N.W.2d at 167 ("[O]nly whistleblowing which promotes the public good is protected by the public policy exception.").

protection,<sup>83</sup> and the Act certainly qualifies as such. In other states, the whistleblowing must relate to acts subject to criminal penalties,<sup>84</sup> and the Act provides for such penalties.<sup>85</sup>

In a number of other states, however, it is less clear that the public policy exception would protect those whistleblowers. For example, certain states limit the source of public policy to state laws and regulations,<sup>86</sup> and there may be no state-level law or regulation equivalent to the Act. The absence of an equivalent law might leave a whistleblower completely unprotected, especially in those states which refuse to recognize the act of whistleblowing as a public policy deserving of protection.<sup>87</sup> Protection in other jurisdictions depends on whether the whistleblowing somehow furthered the public interest<sup>88</sup> or whether the public policy itself was aimed specifically at providing protection to the employee.<sup>89</sup> Still other states define the policy exception narrowly in terms of the employer's allegedly wrongful conduct that gave rise to the whistleblowing.<sup>90</sup> In other jurisdictions, protection turns on whether the whistleblower

83. The District of Columbia and Maryland are examples. *Pope v. Romac Intern*, 829 A.2d 945, 947 n. 3 (D.C. 2003) (holding discharge must be based on some "identifiable policy that has been 'officially declared' in a statute . . . or the Constitution"); *King v. Marriott Intl., Inc.*, 866 A.2d 895, 901–02, 902 n. 8 (Md. Spec. App. 2005) (holding discharge must violate a clear mandate of public policy and is limited to situations "where an employee has been fired for refusing to violate [a federal or state] law or the legal rights of a third party, and where an employee has been terminated for exercising a legal right or duty").

84. Mississippi and South Carolina are examples. *E.g. Hammons v. Fleetwood Homes of Miss., Inc.*, 907 So. 2d 357, 360 (Miss. App. 2004) (noting that the act complained of must warrant criminal penalties and not merely civil penalties); *Antley v. Shepherd*, 532 S.E.2d 294, 297–98 (S.C. App. 2000) (holding discharge violates a "clear mandate" of public policy and includes situations where the employee has refused to violate a criminal law).

85. 18 U.S.C. § 1350(b), (c) (Supp. 2004) (imposing criminal penalties for corporate officers who certify periodic financial reports "knowing" the information contained therein does not "fairly present, in all material respects, the financial conditions and results").

86. Kentucky and Pennsylvania are examples. *See generally e.g. Wetherhold v. Radioshack Corp.*, 339 F. Supp. 2d 670, 674 (E.D. Pa. 2004) (holding discharge must violate "a clear mandate of public policy . . . embodied in a [state] constitutionally or legislatively established prohibition, requirement, or privilege" rather than a possible violation of a federal statute (quoting *Smith v. Calgon Carbon Corp.*, 917 F.2d 1338, 1344 (3d Cir. 1990)); *Shrout v. The TFE Group*, 161 S.W.3d 351, 354 (Ky. App. 2005) (clarifying exceptions to the at-will doctrine as including the discharge of an employee for refusing to violate a law or when discharge is contrary to a "fundamental and well-defined public policy" including exercising a right defined by a state statute and directed at providing protection to the employee).

87. Virginia is an example. *See e.g. Dray v. New Mkt. Poultry Prods.*, 518 S.E.2d 312, 313 (Va. 1999) (refusing to recognize whistleblowing as an exception to the at-will doctrine).

88. Arkansas is an example. *See generally e.g. Owens*, 158 S.W.3d at 174 (holding a claim of wrongful discharge available where discharge is in violation of a well-established public policy intended to protect public interests and includes reporting a violation of state and federal law).

89. Kentucky and Massachusetts are examples. *See generally e.g. Shrout*, 161 S.W.3d at 354–55 (clarifying exceptions to the at-will doctrine as including discharge of an employee for exercising a right defined by a state statute and directed at providing protection to the employee); *Fernandes v. The Talbots, Inc.*, 2005 WL 1009749 at \*2 n. 1 (Mass. Super. Mar. 18, 2005) (mem.) (noting three public policy exceptions to the at-will doctrine—discharge for "asserting a legally guaranteed right . . . , for doing what the law requires . . . or for refusing to do what the law forbids" (quoting *GTE Prods. Corp. v. Stewart*, 421 Mass. 22, 26 (Mass. 1995)) (internal quotation marks omitted)).

90. Nevada is an example. *See e.g. Allum v. Valley Bank of Nev.*, 970 P.2d 1062, 1066 (Nev. 1998) (noting wrongful discharge actions are limited to those "rare and exceptional cases" in which "the employer's conduct violates strong and compelling public policy" (quoting *Sands Regent v. Valgardson*, 777 P.2d 898, 900 (Nev. 1989)) (internal quotation marks omitted)).

disclosed or refused to participate in the alleged wrongdoing,<sup>91</sup> whereas others limit it only to refusal—a constructive rather than actual act of disclosure.<sup>92</sup>

Perhaps the greatest source of uncertainty as to whether a specific type of whistleblowing is protected involves the standard by which the public policy itself is judged.<sup>93</sup> The standard used by the court in deciding the scope of the public policy determines “where and how to draw the line between claims . . . that are actionable and ordinary disputes between employee and employer that are not.”<sup>94</sup> Standards vary from state-to-state and include strong or compelling,<sup>95</sup> well-established or “not subject to any substantial doubt,”<sup>96</sup> clear or well-defined,<sup>97</sup> and sufficient or important.<sup>98</sup> Courts in many cases debate the definition of those standards,<sup>99</sup> leading some to cast a rather broad net and consider such factors as “community common sense.”<sup>100</sup> Other courts find the

91. Mississippi and Missouri are examples. See generally e.g. *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993) (holding refusal to participate in, or reporting of, an illegal act as public policy exceptions to employment-at-will); *Dunn v. Enter. Rent-A-Car Co.*, 170 S.W.3d 1, 6 (Mo. App. 2005) (holding an employee has a cause of action for wrongful discharge if discharge resulted from “refusing to perform an illegal act or . . . reporting wrongdoing or violations of law or public policy” (quoting *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 935–36 (Mo. App. 1998)) (internal quotation marks omitted)).

92. For example, Texas limits the at-will exception to refusal to perform an illegal act. See generally e.g. *Laredo Med. Group Corp. v. Mireles*, 155 S.W.3d 417, 420 (Tex. App. San Antonio Dist. 2004) (holding a “narrow exception [to the at-will doctrine] covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act” (quoting *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1995)) (internal quotation marks omitted)).

93. See *Barker*, 40 P.3d at 469.

94. *Id.*

95. California, Nevada, and Utah are examples. See generally e.g. *Sinatra*, 14 Cal. Rptr. 3d at 664; *Allum*, 970 P.2d at 1068; *Hansen v. Am. Online, Inc.*, 96 P.3d 950, 952 (Utah 2004) (holding discharge must implicate a “clear and substantial” public policy and is limited to “(i) refusing to commit an illegal or wrongful act . . . ; (ii) performing a public obligation . . . ; (iii) exercising a legal right or privilege . . . ; or (iv) reporting to a public authority criminal activity of the employer” (citing *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 408 (Utah 1998)) (citations omitted)).

96. Kansas and Oklahoma are examples. *Palmer v. Brown*, 752 P.2d 685, 687–88 (Kan. 1988) (holding public policy exception available where the policy is “so thoroughly established . . . that its existence is not subject to any substantial doubt” (quoting *Noel v. Menninger Found.*, 267 P.2d. 934, 941 (Kan. 1954)) (internal quotation marks omitted)); *Crain*, 52 P.3d at 1039 (holding discharge must violate an established and well-defined public policy “grounded in a statute or employee actions, such as reporting fraudulent activity or criminal misuse of funds”).

97. New Mexico and Wisconsin are examples. See generally e.g. *Silva v. Am. Fedn. of St., Co. & Mun. Employees*, 37 P.3d 81, 83 (N.M. 2001) (holding the at-will doctrine is limited to those cases in which the discharge “results from the employer’s violation of a clear public policy” (citing *Vigil v. Arzola*, 699 P.2d 613, 619 (N.M. App. 1983)); *Goggins v. Rogers Meml. Hosp., Inc.*, 683 N.W.2d 510, 514 (Wis. App. 2004) (holding discharge must involve a “fundamental and well-defined public policy . . . evidenced by a constitutional or statutory provision” (citations omitted)).

98. Arizona and Oregon are examples. See generally e.g. *Murcott v. Best Western Intl., Inc.*, 9 P.3d 1088, 1096 (Ariz. App. Div. 1st 2000) (noting as one element of a whistleblowing claim “some important public policy interest . . . furthered by the whistleblowing activity” (internal quotation marks and citation omitted)); *Yeager v. Providence Health Sys.*, 96 P.3d 862, 865–66 (Or. App. 2004) (holding discharge for “exercising of a job-related right that reflects an important public policy” defined by constitutional and statutory provisions and case law (citations omitted)).

99. See Cavico, *supra* n. 8, at 590–91.

100. Arizona, Vermont, and West Virginia are examples. *Murcott*, 9 P.3d at 1096 (The “matter must strike at the heart of the citizen’s social rights, duties, and responsibilities.” (citation omitted)); *Adams v. Green Mt. R.R.*, 862 A.2d 233, 235 (Vt. 2004) (holding discharge must be against a “clear and compelling” public policy as defined by “community common sense and common conscience” such as employer conduct that “is cruel or shocking to the average [person’s] conception of justice” (quoting *Payne v. Rozendaal*, 520 A.2d 586, 588–89 (Vt. 1979)) (internal quotation marks omitted, bracket in original)); *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 718 (W. Va. 2001) (holding discharge must contravene a “substantial” public policy, grounded in state statutes,

standard only in explicit statutory language.<sup>101</sup>

For those whistleblowers who find their respective state does protect the subject matter involved under its public policy exceptions, several legal hurdles still remain. Because there is no “rumor spreader exception” to the doctrine of employment-at-will,<sup>102</sup> the whistleblower must often show, at a minimum, personal knowledge of wrongdoing and a “good faith concern” regarding the wrongful conduct.<sup>103</sup> In addition to good faith, some states require the whistleblower to hold a reasonable belief the employer’s conduct violates a law or public policy.<sup>104</sup> Some states go so far as to require the whistleblower to cite the specific law allegedly violated.<sup>105</sup> While a showing of good faith is particularly important in those situations involving an erroneous whistleblower,<sup>106</sup> in other states a good faith or reasonable belief may not save the whistleblower’s claim—there must be an actual violation of the policy or law.<sup>107</sup>

Remedies also vary, with some states holding that a wrongful discharge claim sounds in contract, thereby limiting the remedy to lost wages and benefits.<sup>108</sup> Under the contract theory, the employee has a duty to mitigate his or her losses.<sup>109</sup> Other states hold the cause of action sounds in tort, thereby making available to the discharged employee compensatory damages as well as punitive damages.<sup>110</sup> The equitable remedy of reinstatement of employment may be available, but “as a practical matter [it] is frequently very difficult to secure.”<sup>111</sup>

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regulations, or cases, and “widely regarded as to be evident to employers and employees alike”).

101. Connecticut and Tennessee are examples. See e.g. *Thibodeau v. Design Group One Architects, L.L.C.*, 802 A.2d 731, 736–37 (Conn. 2002) (holding discharge must be “predicated upon an employer’s violation of an important and clearly articulated public policy,” where the discharge has “violated any explicit statutory or constitutional provision”); *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 535 (Tenn. 2002) (holding discharge contravenes a “well-defined and established public policy” as evidenced by “an unambiguous constitutional, statutory or regulatory provision [including] refusing to remain silent about [an employer’s] illegal activities” (citations omitted)).

102. *Barker*, 40 P.3d at 471.

103. *Goodman v. Wesley Med. Ctr., L.L.C.*, 78 P.3d 817, 821 (Kan. 2003). Minnesota provides another example of this. See e.g. *Phipps*, 408 N.W.2d at 571 (holding that an employee may bring a wrongful discharge action “for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation”).

104. *Goodman*, 78 P.3d at 821 (citing as an element of a retaliatory discharge claim a showing by clear and convincing evidence that a “reasonably prudent person would have concluded the . . . employer was engaged [in wrongdoing]”); see also e.g. *Allum*, 970 P.2d at 1068 (holding a claim for wrongful discharge “available to an employee who was terminated for refusing to engage in conduct that he . . . reasonably believed to be illegal”). South Carolina applies a different standard. *Antley*, 532 S.E.2d at 298 (holding protection does not extend to those cases in which the employee “refus[es] to comply with a directive which she simply believes would require her to violate the law” (emphasis in original)).

105. See e.g. *Dunn*, 170 S.W.3d at 11 (stating public policy is served by employees reporting suspected wrongdoing but a claim deserving of protection requires citing the specific law allegedly violated).

106. See Cavico, *supra* n. 8, at 597.

107. For example, in the state of Washington, “[i]n situations not involving imminent harm, the plaintiff may be required to prove an actual violation of the policy.” *Korshund*, 88 P.3d at 978. Arizona takes a different approach. *Murcott*, 9 P.3d at 1096 (holding an actual violation of a law or regulation need not be proven).

108. See Cavico, *supra* n. 8, at 605–07.

109. See *id.* at 606 n. 319, 607.

110. *Id.* at 607–08.

111. *Id.* at 607.

*B. Less Than Uniform Statutory Protection*

The National Conference of Commissioners on Uniform State Laws drafted the Model Employment Termination Act, which provided for protection against wrongful discharge, in an attempt to remedy state-to-state variations and other problems associated with the growing number of common law exceptions to the employment-at-will doctrine. However, to date, no state has adopted this model statute in whole or in part.<sup>112</sup> Similarly, the National Whistleblower Center has proposed a model statute,<sup>113</sup> but it is not current law.<sup>114</sup>

While a uniform whistleblower law has not been adopted, a number of states have adopted whistleblower statutes that protect subject matter beyond area-specific statutes relating to public health, safety, and the environment.<sup>115</sup> However, the variation in state statutory protection mirrors to a certain extent that found in state common law protection.<sup>116</sup> As with differences in common law protection, the most important difference in statutory protection for the purposes here is the type of whistleblowing conduct protected and remedies available to the whistleblower.

In general, state statutory protection of private-sector whistleblowers typically addresses one or more types of whistleblowing: (1) disclosing or threatening to disclose employer wrongdoing; (2) assisting or participating in an investigation conducted by a public body; and (3) objecting or refusing to participate in the employer's wrongdoing.<sup>117</sup> Some states, for example, limit protection to the first two,<sup>118</sup> while other states extend protection to the third in either broad<sup>119</sup> or narrow terms.<sup>120</sup>

States which extend protection to this third type of whistleblowing conduct go further than the Act, which limits protection to disclosure and assistance.<sup>121</sup> In addition, because whistleblowing statutes are directed toward violations of federal and state statutes, regulations, and rules,<sup>122</sup> they arguably encompass subject matter far beyond that encompassed by the Act.<sup>123</sup>

112. Bird, *supra* n. 53, at 524.

113. Natl. Whistleblower Ctr., *The National Whistleblower Protection Act*, [http://www.whistleblowers.org/html/model\\_whistleblower\\_law.htm](http://www.whistleblowers.org/html/model_whistleblower_law.htm) (accessed Nov. 5, 2005).

114. For a comparison of this model statute with that of state statutory protection, see Cavico, *supra* n. 8, at 552–89.

115. *Id.* at 552–609; Cherry, *supra* n. 6, at 1087–1120.

116. See generally Cavico, *supra* n. 8.

117. *Id.* at 549. The discussion in this section makes use of Cavico's classification and treatment of state whistleblower statutes. See *id.* at 552–89.

118. Hawaii and Michigan are examples. Haw. Rev. Stat. § 378-62; Mich. Comp. L. Ann. § 15.362.

119. California, New Jersey, and Rhode Island are examples. Cal. Lab. Code Ann. § 1102.5(c) (extending protection for refusal to participate in any activity that would result in a violation of federal or state law, rule, or regulation); N.J. Stat. Ann. § 34:19-3(c) (extending protection to refusal to participate in fraudulent and criminal conduct); R.I. Gen. L. § 28-50-3(3) (refusal to violate or assist in violating a federal, state, or local law, rule, or regulation).

120. Minnesota, New Hampshire, and North Dakota are examples. Minn. Stat. § 181.932(c) (protection for refusal extends only to an employee who has "an objective basis in fact to believe" the action violates a law, rule, or regulation and informs the employer as to the reason for refusal); N.H. Rev. Stat. Ann. § 275-E:3 (refusal relates to "a directive which in fact violates an law or rule"); N.D. Cent. Code § 34-01-20(1)(c).

121. See 18 U.S.C. § 1514(A)(a)(1). Michigan, while not extending statutory protection to refusal conduct, does provide common law protection for it. *Baker*, 608 N.W.2d at 832 n. 3.

122. California, Connecticut, Delaware, Florida, Indiana, Michigan, Minnesota, New Hampshire, New Jersey, North Dakota, Ohio, Pennsylvania, and Rhode Island are examples. See *supra* n. 69 and

Exceptions do exist. Connecticut, for example, has a statute that mirrors the Act<sup>124</sup> and, therefore, does not extend beyond the wrongdoing required by the federal statute.<sup>125</sup> In addition, its statutory protection precludes any common law cause of action.<sup>126</sup> Louisiana's statute, in contrast, requires a violation of state law,<sup>127</sup> making it potentially far narrower than the Act. Absent an equivalent state law, a potential whistleblower of corporate financial wrongdoing in Louisiana is entirely dependent upon the Act for protection.<sup>128</sup>

Even in those states that provide broader coverage relative to the Act, that coverage is tempered in many cases by restrictions placed on the manner in which the employee blows the whistle.<sup>129</sup> While statutes typically require good faith on the part of the whistleblower,<sup>130</sup> some states specifically require that the whistleblower make a reasonable effort to ascertain the accuracy of the information reported.<sup>131</sup> Other states require that prior notice be given to the employer.<sup>132</sup> Still, other states do not have the notice requirement<sup>133</sup> or provide an exception to it.<sup>134</sup> In addition to notice, some states require the employer be provided an opportunity to correct the alleged violation before any protection is provided to the whistleblower.<sup>135</sup> Others go further, requiring the whistleblowing itself be done in writing.<sup>136</sup>

accompanying text.

123. See *supra* n. 80 and accompanying text.

124. *Chenarides v. Bestfoods Baking*, 2005 WL 1088983 at \*\*3, 4 n. 6 (Conn. Super. Mar. 30, 2005) (unpublished opinion) (noting the protection afforded by Conn. Gen. Stat. § 33-1336 mirrors the federal statutory rule found in Sarbanes-Oxley); see Conn. Gen. Stat. § 33-1336. Connecticut does, however, have another statute that covers other subject matter and protects external whistleblowing. *Chenarides*, 2005 WL 1088983 at \*\*3, 4 n. 6 (noting that statutory protection afforded by Conn. Gen. Stat. § 31-51m protects external whistleblowing); see Conn. Gen. Stat. § 31-51m.

125. See *infra* pt. III.

126. *Campbell v. Town of Plymouth*, 811 A.2d 243, 250 (Conn. App. 2002) (emphasizing that where a statutory cause of action for a whistleblower is provided, the public policy exception does not apply); but see N.H. Rev. Stat. Ann. § 275-E:5 (whistleblower statute has no effect on any common law rights).

127. La. Stat. Ann. § 23:967(A); *Hale v. Touro Infirmary*, 886 So. 2d 1210, 1216 (La. App. 4th Cir. 2004), *cert. denied*, 896 So. 2d 1036 (La. 2005) (holding whistleblower statute is limited to violations of state law).

128. See *infra* pt. VI.A.

129. See Cavico, *supra* n. 8, at 570–76.

130. Minnesota, North Dakota, and Pennsylvania are examples. Minn. Stat. Ann. § 181.932(1); N.D. Cent. Code § 34-01-20(1)(a); 43 Pa. Consol. Stat. Ann. § 1422 (defining good faith report as one “made without malice or consideration of personal benefit” and based on a reasonable belief).

131. Indiana and Ohio are examples. Ind. Code Ann. § 22-5-3-3(c) (“employee must make a reasonable attempt to ascertain the correctness of any information to be furnished”); Ohio Rev. Code Ann. § 4113.52(C) (“employee shall make a reasonable and good faith effort to determine the accuracy of any information reported”).

132. Colorado and Louisiana are examples. Colo. Rev. Stat. Ann. § 24-114-102(2) (requiring a “good faith effort” on the part of a whistleblowing employee to make a prior disclosure to a supervisor); La. Stat. Ann. § 23:967(A) (protecting employee “who in good faith and after advising the employer of the violation of law”).

133. California, Hawaii, and Michigan are examples.

134. Indiana and Maine are examples. Ind. Code Ann. § 22-5-3-3(a) (“unless the private employer is the person whom the employee believes is committing the violation”); 26 Me. Rev. Stat. Ann. § 833(2) (prior notice to the employer is not required “if the employee has specific reason to believe that reports to the employer will not result in promptly correcting the violation”).

135. Maine and New Jersey are examples. 26 Me. Rev. Stat. Ann. § 833(2) (employee must afford the employer a “reasonable opportunity to correct that violation, condition, or practice”); N.J. Stat. Ann. § 34:19-4 (requirement of notice and opportunity to correct).

136. Florida and Maine are examples. Fla. Stat. Ann. § 448.102(1) (protection does not extend to employee who has not, “in writing, brought the activity . . . or practice to the attention of a supervisor or the employer”);



State statutes also differ as to whether an actual, suspected, or prospective violation is required.<sup>137</sup> One state, for example, extends protection to those situations in which a violation of law “has occurred or is about to occur.”<sup>138</sup> Other states have an “in violation” requirement,<sup>139</sup> suggesting that something more than a reasonable belief of wrongdoing is required.<sup>140</sup> In yet other states, a suspected violation suffices.<sup>141</sup> Regardless of whether wrongdoing has occurred, states differ as to how egregious any alleged employer wrongdoing must be. For example, one state requires the wrongdoing be something more than “merely technical or minimal [in] nature.”<sup>142</sup> Another state requires that the wrongdoing rise to the level of a felony.<sup>143</sup>

State statutes also differ as to available remedies. Many states provide for equitable relief in the form of an injunction<sup>144</sup> or reinstatement of employment.<sup>145</sup> Other states limit legal remedies to those available under common law remedies in tort actions.<sup>146</sup> Still other states allow “any and all damages recoverable at law,” including lost wages and benefits, costs and attorney fees, and punitive damages.<sup>147</sup>

### III. THE ACT’S WHISTLEBLOWER PROVISION

Over fifty federal laws relate to whistleblowers, covering such areas as banking, employment, environment and public health, federal government employment, fraud, health care, immigration, military, and transportation safety.<sup>148</sup> However, it was not until passage of the Act in 2002 that employees of publicly traded companies had federal-level whistleblower protection<sup>149</sup> for exposing corporate financial wrongdoing absent a federal contract.<sup>150</sup>

26 Me. Rev. Stat. Ann. § 833(2) (employee must first bring the alleged violation to the attention of a person with supervisory authority).

137. See Cavico, *supra* n. 8, at 567–69.

138. Rhode Island is an example. R.I. Gen. L. § 28-50-3(1). California also includes a prospective violation with respect to refusal. Cal. Lab. Code Ann. § 1102.5(c) (refusal to engage in “an activity that would result in a violation”).

139. Florida, Louisiana, and New Jersey are examples. Fla. Stat. Ann. § 448.102; La. Stat. Ann. § 23:967(A); N.J. Stat. Ann. § 34:19-3.

140. See *e.g.* Abraham, 639 N.W.2d at 354–55 (holding the Whistleblower Act does not require the employee to specifically identify the law allegedly violated “so long as the alleged facts, if proven, would constitute a violation of the law”).

141. Hawaii, Minnesota, and North Dakota are examples. Haw. Rev. Stat. § 378-62(1); Minn. Stat. Ann. § 181.932(a); N.D. Cent. Code § 34-01-20(1)(a).

142. 25 Pa. Consol. Stat. Ann. § 1422.

143. Ohio Rev. Code Ann. § 4113.52(A)(1)(a).

144. Florida, Hawaii, Minnesota, New Jersey, North Dakota, Ohio, and Rhode Island are examples. Cavico, *supra* n. 8, at 580 n. 193.

145. Connecticut, Florida, Hawaii, New Jersey, North Dakota, and Ohio are examples. *Id.* at 580 n. 191.

146. New Jersey is an example. *Id.* at 579 n. 180.

147. Minnesota is an example. *Id.*

148. See Cherry, *supra* n. 6, at 1121–23. The count of federal laws that provide a legal or administrative remedy to whistleblowers is based on a listing of federal laws found at WhistleblowerLaws.com, <http://whistleblowerlaws.com/statutes.htm> (accessed Nov. 5, 2005).

149. Cherry, *supra* n. 6, at 1064.

150. 18 U.S.C.A. § 1514A(a). Under the Act, a publicly traded company is one which has “a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)).” *Id.* A detailed review of the Act’s whistleblower provision is found in Vaughn, *supra* n. 28.

Under the Act, an adverse employment action encompasses any management action, such as discharge, demotion, suspension, and harassment, which works to discriminate against a whistleblowing employee in the terms and conditions of employment.<sup>151</sup> Protected whistleblowing conduct includes disclosure of “any conduct which the employee reasonably believes constitutes a violation of” Security and Exchange Commission rules and regulations or other federal law designed to protect shareholders from fraudulent conduct.<sup>152</sup> Disclosure can be made to a federal regulatory or law enforcement agency, any member of Congress or congressional committee, or a person with supervisory authority.<sup>153</sup> A corporation’s audit committee is to establish procedures for receiving and handling employee “concerns regarding questionable accounting or auditing matters.”<sup>154</sup> Submissions by employees are to be kept anonymous and confidential.<sup>155</sup>

Protection also extends to an employee who assists in an investigation,<sup>156</sup> files a complaint alleging a violation,<sup>157</sup> or participates in a proceeding relating to an alleged violation.<sup>158</sup> Where a complaint relating to an alleged violation is about to be filed, protection applies during that period of time if the employer has “any knowledge” of the pending complaint.<sup>159</sup> In this sense, the Act seeks to provide a safe harbor for a whistleblower still employed at the company.

For an employee, establishing a prima facie case under the Act is analogous to establishing a case under Title VII of the Civil Rights Act of 1964.<sup>160</sup> The employee establishes a prima facie case by showing that:

- (1) he engaged in protected activity as defined by the Act; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action, such as a discharge; and (4) circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action.<sup>161</sup>

The nexus element, item (4), is satisfied by “proximity in time . . . sufficient to raise an inference of causation.”<sup>162</sup> A “contributing factor” means “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.”<sup>163</sup> This test makes it easier for a whistleblower to make a prima facie case than did earlier federal case law. Earlier case law required whistleblowers to prove the

151. 18 U.S.C. § 1514A(a).

152. *Id.* at § 1514A(a)(1).

153. *Id.* at § 1514A(a)(1)(A)–(C).

154. 15 U.S.C. § 78j-1(m)(4) (Supp. 2004).

155. *Id.*

156. 18 U.S.C. § 1514A(a)(1).

157. *Id.* at § 1514A(a)(2).

158. *Id.*

159. *Id.*

160. In deciding whether an employer has discriminated under Title VII, the plaintiff must first establish a prima facie case of discrimination by showing that: (1) he has protected status; (2) he suffered an adverse employment action; and (3) the defendant demonstrated discriminatory animus in taking that employment action. 42 U.S.C. § 2000e-2 (2000).

161. *Welch*, 2003-SOX-15 at 52. The standard of proof is a preponderance of the evidence. *Id.*

162. *Id.*

163. *Id.* (citing *Marano v. Dept. of Just.*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)).

protected conduct was “a ‘significant’, ‘motivating’, ‘substantial’, or ‘predominant’ factor” in the adverse employment action.<sup>164</sup>

If the employee makes the prima facie case, then the employer may have the opportunity to avoid liability by producing “sufficient evidence to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse employment action.”<sup>165</sup> An employee who prevails in a wrongful discharge claim under the Act “shall be entitled to all relief necessary to make the employee whole.”<sup>166</sup> Relief, therefore, includes reinstatement, back pay, and compensation for special damages including costs and reasonable attorney fees.<sup>167</sup>

#### IV. ONE WHISTLEBLOWER’S TRAVEL THROUGH THE ACT

David Welch’s case against Cardinal Bankshares (“Cardinal”) represents one of the first whistleblower cases brought under the Act and the first case in which a whistleblower won employment protection.<sup>168</sup> Welch joined Bank of Floyd as its CFO in February 1999,<sup>169</sup> well before the corporate scandals that led to the passage of the Act. Around that same time, he became CFO and Transfer Agent of Cardinal, a bank holding company that had purchased all of Bank of Floyd’s stock.<sup>170</sup> As CFO, Welch’s responsibilities included monitoring and reviewing journal entries and financial statements for Bank of Floyd and Cardinal.<sup>171</sup> As Transfer Agent, he had responsibility for reviewing stock trades, canceling old stock certificates, and issuing new ones,<sup>172</sup> as well as keeping records of who owned Cardinal’s stock, how those stocks were held, and how many shares each investor owned.<sup>173</sup> Two allegedly improper journal entries, loose financial controls, and questionable insider stock trades caused Welch to run for cover under the Act.

##### A. *A Difference of Opinion*

In October 2001, Welch wrote a memorandum to R. Leon Moore suggesting that certain stock trades made by Moore “closely fit” the Securities and Exchange Commission’s definition of insider trading.<sup>174</sup> Moore, who was Cardinal’s<sup>175</sup> President, CEO, and Chairman of the Board of Directors, had allegedly made stock trades at or near

164. *Id.* (citing *Marano*, 2 F.3d at 1140).

165. *Welch*, 2003-SOX-15 at 53. This is analogous to the burden-shifting test used in a Title VII action. Once the employee establishes a prima facie case, the “burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” *Jordan v. Clay’s Rest Home, Inc.*, 483 S.E.2d 203, 206 (Va. 1997) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)) (internal quotation marks omitted).

166. 18 U.S.C.A. § 1514A(c).

167. *Id.*

168. *See e.g.* Krebsbach, *supra* n. 44; Solomon, *supra* n. 33.

169. *Welch*, 2003-SOX-15 at 3.

170. *Id.* at 3, 6.

171. *Id.* at 3.

172. *Id.* at 5, 6 n. 5.

173. *See generally* U.S. Securities & Exch. Commn., *Transfer Agents*, <http://www.sec.gov/answers/transferagent.htm> (last updated Apr. 19, 2005).

174. *Welch*, 2003-SOX-15 at 4–5.

175. Cardinal, a bank holding company, had purchased all of Bank of Floyd’s stock.

the end of financial reporting quarters and, on one occasion, had made trades with knowledge of a not yet publicly announced stock split.<sup>176</sup> One end-of-quarter trade by Moore that Welch found particularly troublesome was a trade made one day following the end of a quarter in which earnings had been overstated by nearly fourteen percent.<sup>177</sup> Moore responded by telling Welch that he had cleared the trade with an attorney and accountant.<sup>178</sup> Based on his understanding of Securities and Exchange Commission rules and cases on insider trading,<sup>179</sup> Welch questioned the quality of advice Moore had been given and suggested that he “might consider a second source of opinion.”<sup>180</sup> Nonetheless, Welch never reported his concerns to any member of the board of directors or Audit Committee other than Moore.<sup>181</sup>

While Moore’s trades continued to be of concern to Welch, two journal entries totaling \$195,000<sup>182</sup> caused Welch even more concern. In January 2002, Welch wrote a memorandum to Moore, stating that Moore was “improperly overriding . . . internal controls.”<sup>183</sup> Welch had come to learn that Moore had instructed Wanda Gardner, Cardinal’s Vice President and Internal Auditor, to make the two improper journal entries.<sup>184</sup> Gardner had “[no] appropriate knowledge relating to generally accepted accounting principles,”<sup>185</sup> as well as a potential conflict of interest: she was “responsible for possibly auditing those same numbers.”<sup>186</sup> Welch also questioned certain sundry credit entries made by Moore’s personal secretary<sup>187</sup> that would then be reversed the following year and have the effect of overstating income in the current year.<sup>188</sup>

In Welch’s view, the journal and sundry credit entries undermined the dual control system,<sup>189</sup> did not follow generally accepted accounting principles,<sup>190</sup> and had “the appearance of manipulating income [by] pumping up earnings.”<sup>191</sup> Although an external auditor later corrected the two journal entries made by Gardner, those

176. See Rule 10b-5 of the Securities and Exchange Act of 1934 (insider trading provision of 15 U.S.C. § 78j(b) (2000); 17 C.F.R. § 240.10b-5 (2004)). In order to violate Rule 10b-5, the alleged trading must occur “on the basis of material nonpublic information.” 17 C.F.R. § 240.10b5-1 (2004).

177. *Welch*, 2003-SOX-15 at 3.

178. Moore testified that his decision to trade pre-dated any discussions regarding a stock split and that Cardinal’s standard operating procedure for approving trades made close to the end of the quarter involved consulting legal counsel and accountants. *Id.* at 40–41.

179. *Id.* at 4–5, 5 n. 3.

180. *Id.* at 5.

181. *Id.* at 8.

182. *Welch*, 2003-SOX-15 at 12.

183. *Id.* at 4.

184. *Id.* at 12.

185. *Id.* at 11.

186. *Id.* at 12.

187. *Welch*, 2003-SOX-15 at 15 n. 19.

188. *Id.* at 15–16, 59–60.

189. Welch noted in his written comments on the third-quarter certification that “too many non-accounting people [were] making [journal entries] w[ithout] Finance review or approval.” *Id.* at 14–15 (second bracket in original). He also stated that he had not been given a chance to review such entries and that the requirement of two signatures or “[d]ual control [by itself] does not make an entry meet [generally accepted accounting principles].” *Id.* at 15.

190. Welch noted that these practices were inconsistent with the principle of matching, “that income and expenses be matched against the period in which they are incurred.” *Id.* at 15–16.

191. *Welch*, 2003-SOX-15 at 16.

corrections only went to restating income for the year end, leaving the third quarter overstatement in place.<sup>192</sup> Welch, however, had recommended that the financials be restated so that investors were not misled when making quarter-to-quarter comparisons.<sup>193</sup> As proof that those entries were material to investors, Welch pointed to a twenty-one percent increase in the stock price between September and October.<sup>194</sup>

Despite his concerns, Welch signed the consolidated financial statements and reports of condition (or call reports) which were filed with the Federal Reserve.<sup>195</sup> In addition, he did not report any problems to the Securities and Exchange Commission because “[a]t [his] age it’s difficult to change careers and [he] believed [that] before Sarbanes-Oxley came along [he] would have been terminated.”<sup>196</sup>

### B. *The “Failure to Understand”*

In July 2002, the Act did come along and, with it, came Welch’s persistence that the third quarter financials be restated and internal controls followed.<sup>197</sup> His interpretation of the Act led him to conclude that Cardinal’s conduct was fraudulent<sup>198</sup> because it involved “mishandling even small amounts of money [with an] intent to deceive.”<sup>199</sup>

The Act requires publicly traded companies to file two certification forms, an initial certification and a recurring quarterly certification,<sup>200</sup> with their financial statements or Form 10-QSB.<sup>201</sup> Both certification forms must be signed by the CEO and CFO.<sup>202</sup> By signing, the CEO and CFO certify that, based on their knowledge and belief, the financial reports accompanying the forms “fully compl[y] with the requirements” of § 13(a) or § 15(d) of the Securities and Exchange Act of 1934 and the information contained therein “fairly presents, in all material respects” the financial condition and results of the company.<sup>203</sup> The signatures also certify that the signatories are responsible for establishing and maintaining disclosure controls and procedures and have made use of those controls and procedures.<sup>204</sup> The initial certification is required only for the first Form 10-QSB submitted after passage of the Act.<sup>205</sup> Therefore, Cardinal’s initial certification had to be filed with its June 30, 2002 Form 10-QSB.<sup>206</sup>

192. *Id.* at 13, 32, 54.

193. *Id.* at 13.

194. *Id.* at 12.

195. *Id.* at 16.

196. *Welch*, 2003-SOX-15 at 16. Welch was in his early fifties at the time of his whistleblowing. See Krebsbach, *supra* n. 44, at 32 (“[T]he 55-year old Welch remains unemployed.”).

197. See *Welch*, 2003-SOX-15 at 14.

198. *Id.* at 15.

199. *Id.* (internal quotation marks omitted). Some of the sundry credit entries that concerned Welch totaled \$4,500. *Id.* at 15 n. 19.

200. *Id.* at 9; see also 17 C.F.R. §§ 240.13a-13, 240.13a-14, 15(d)-13, 15(d)-14 (2005).

201. Form 10-QSB is a quarterly report filed by small business issuers within forty-five days after the end of the first three fiscal quarters of each fiscal year. 17 C.F.R. § 249.308(b) (2005).

202. 18 U.S.C.A. § 1350(a) (West Supp. 2004); 17 C.F.R. §§ 240.13a-14 (2004), 15d-14 (2005).

203. 18 U.S.C.A. § 1350(b).

204. 17 C.F.R. §§ 240.13a-15, 15d-15 (2005); *Welch*, 2003-SOX-15 at 13.

205. *Welch*, 2003-SOX-15 at 9.

206. *Id.*

Moore signed the initial certification.<sup>207</sup> Welch, on the other hand, refused to sign the initial certification and the third quarter certification,<sup>208</sup> despite receiving assurances from Cardinal's external auditor that there were "no violations or potential violations of laws or regulations, or irregularities involving management and employees."<sup>209</sup>

In a September 13, 2002 memorandum to Moore, Welch explained his reasons for refusing to sign, citing once again the allegedly improper journal entries and lack of internal controls.<sup>210</sup> He also provided to Moore an annotated copy of the initial and third quarter certification,<sup>211</sup> and cited the penalties under the Act that a person is subject to who "willfully certifies" a Form 10-QSB "knowing" that it "does not comport with all the requirements."<sup>212</sup> Welch again pointed to the "material items" that should be restated in the 2001 third quarter figures,<sup>213</sup> and emphasized this needed to be completed for the Income Statement, Balance Sheet, and Cash Flow Statement to accurately reflect the results and financial performance of that quarter.<sup>214</sup> Welch also stated that he had not "participated nor been consulted in" the design of the control procedures, nor had he evaluated their effectiveness as is required under the Act.<sup>215</sup> He also complained of his lack of access to the Audit Committee,<sup>216</sup> noting that Moore was "the conduit for information" to the Committee and the board.<sup>217</sup>

Moore responded to Welch by writing a memorandum which stated, in part, that Welch needed to provide more detail concerning the alleged problems as well as suggestions on each.<sup>218</sup> Moore also emphasized that Welch "must understand that these reports will be certified."<sup>219</sup>

### C. *Blame Time*<sup>220</sup>

Four days after Welch and Moore exchanged memoranda, Cardinal's board of directors met to address Welch's allegations.<sup>221</sup> Moore informed the board that "no fraud was involved" in the accounting and reporting associated with the third quarter Form 10-QSB.<sup>222</sup> He also cited his concerns with Welch's performance, including

207. *Id.* at 10.

208. *See generally id.* at 6–16.

209. *Id.* at 7; *see also Welch*, 2003-SOX-15 at 44.

210. *Id.* at 10–16.

211. *Id.* at 10.

212. *Id.*

213. *Id.*

214. *Welch*, 2003-SOX-15 at 12.

215. *Id.* at 13–14.

216. *Id.* at 14, 25.

217. *Id.* at 16. Moore testified that it would have been "easy for Welch" to communicate with the Audit Committee, and denied ever telling Welch not to communicate with the Committee. *Id.* at 42.

218. *Welch*, 2003-SOX-15 at 16.

219. *Id.*

220. This term is borrowed from Jackall, *supra* n. 8, at 86. Jackall notes that executive-level managers often blame others "to cover up their own mistakes, or to extricate themselves from [a] potentially embarrassing or politically untenable [situation]." *Id.* He then adds, "someone, somewhere is going to become a scapegoat when things go wrong." *Id.*

221. *Welch*, 2003-SOX-15 at 17–18.

222. *Id.* at 18.

errors made by him in past call reports, his failure to train other employees as his backup and to implement new software, and his “excessive reliance” on internal and external auditors for help in accomplishing his work.<sup>223</sup> Cardinal’s counsel, Douglas Densmore,<sup>224</sup> advised the board as to its options in dealing with Welch’s allegations and the “potential ramifications of terminating Welch at [this] time.”<sup>225</sup> Densmore suggested the Audit Committee meet with Welch and “take corrective action to the extent [that] Welch’s concerns are substantiated.”<sup>226</sup>

Several days after the board met, Welch called a meeting for the purpose of deciding upon the corrective action needed to avoid liability under the Act.<sup>227</sup> Upon learning that the meeting would be tape-recorded by Welch, and on advice of Cardinal’s counsel, Moore and Gardner immediately left, as did the secretary to the board.<sup>228</sup> Welch proceeded with those still in attendance, reviewing the Act and recounting his allegations of financial wrongdoing at Cardinal.<sup>229</sup>

Subsequent to this meeting, Densmore requested a meeting with Welch and Moore.<sup>230</sup> Rather than Moore being in attendance, Densmore was joined by Michael Larrowe, Cardinal’s external auditor and Welch’s former employer.<sup>231</sup> Larrowe, along with Densmore, had been instructed by Cardinal’s Vice Chairman and Chair of the Audit Committee, Vernon Bolt, “to meet with Welch, investigate his concerns, and provide a written report to the [audit] committee.”<sup>232</sup> Welch, however, refused to participate in the meeting on the grounds that his attorney was not present and that meeting with Larrowe “would not be in his best interests because [Larrowe] was part of the problem.”<sup>233</sup>

Later that same day, a joint meeting of Cardinal’s and the Bank’s Audit Committee was held. Larrowe addressed and dismissed each of Welch’s allegations,<sup>234</sup> noting that the handling of the journal entries was correct and, regardless of how they were handled, they had no “real effect” on Cardinal’s results.<sup>235</sup> Moore repeated many of his concerns related to Welch’s performance and cited additional concerns including Welch’s “inability to control his temper” and failure to properly document certain loan participation agreements between Cardinal and the Bank of Floyd.<sup>236</sup> He failed, however, to provide any documentation relating to Welch’s performance.<sup>237</sup> Densmore concluded that Welch “had surfaced issues, but not in the proper way or in a timely

223. *Id.* Welch testified that Moore’s performance allegations were inaccurate. *Id.* at 19.

224. *Id.* at 17.

225. *Welch*, 2003-SOX-15 at 18.

226. *Id.*

227. *Id.* at 19.

228. *Id.* at 20.

229. *Id.* at 19–22.

230. *Welch*, 2003-SOX-15 at 22.

231. *Id.* at 23. Welch was employed by Larrowe prior to joining Cardinal. *Id.* at 2.

232. *Id.* at 19; *see also id.* at 24, 43, 44.

233. *Welch*, 2003-SOX-15 at 23 (internal quotation marks omitted).

234. For a summary of Larrowe’s counter-arguments to Welch’s allegations, *see id.* at 43–50.

235. *Id.* at 25. Larrowe concluded that Welch’s concerns, even those which were technically correct, “were not relevant because they were not material to the financial statements.” *Id.* at 44. For an account of Larrowe’s report, *see id.* at 44–48.

236. *Welch*, 2003-SOX-15 at 26–27.

237. *Id.* at 36.

fashion.”<sup>238</sup> He recommended that Welch be suspended indefinitely pending further action by the board.<sup>239</sup>

The joint audit committees unanimously approved Welch’s suspension.<sup>240</sup> Welch subsequently received a letter signed by Bolt that informed him that he (Welch) had been suspended “for refusing to meet with Cardinal’s legal counsel and external auditor.”<sup>241</sup>

#### D. *Seeking Shelter from the Storm*

Welch filed a complaint with the Occupational Safety and Health Commission, seeking protection under the Act.<sup>242</sup> He alleged that he engaged in protected activity by submitting various memoranda to, and holding meetings with, Moore and others regarding the journal entries.<sup>243</sup> He also pointed to his restricted access to outside auditors and the Audit Committee and his exclusion from designing and evaluating financial controls.<sup>244</sup> His complaint, however, was denied in February 2003, and he filed an appeal.<sup>245</sup>

On appeal, the administrative law judge, Stephen Purcell, ruled in favor of Welch.<sup>246</sup> Judge Purcell found that Welch had engaged in a protected activity because several of Welch’s allegations “were based on a reasonable belief that violations were being committed.”<sup>247</sup> Judge Purcell found that Moore had never labeled as unreasonable Welch’s concerns regarding the two journal entries and that Welch had “convincingly explained” why he had previously signed financial statements and call reports without objecting to those entries.<sup>248</sup> The outside auditor, Larowe, “went directly to Moore” and not to Welch in regards to financial matters,<sup>249</sup> and both Larowe and Cardinal’s counsel, Densmore, “relied heavily on Moore’s representations without questioning their accuracy.”<sup>250</sup> In addition, they created “an arbitrary barrier” to Welch’s participation in

238. *Id.* at 25. Densmore stated that “Welch should have been in ‘immediate contact’ with the Audit Committee.” *Id.* at 27.

239. *Id.*

240. *Welch*, 2003-SOX-15 at 35. Moore testified that he “never had a plan to fire Welch and . . . he played no role in the decision to suspend or terminate him.” *Id.* at 41.

241. *Id.* at 24. Bolt testified that after reading Larowe’s and Densmore’s report, “he was satisfied that Welch’s concerns had been adequately addressed.” *Id.* at 34.

242. *Id.* at 2. The Department of Labor, and specifically OSHA, administers the whistleblowing provision of Sarbanes-Oxley. 18 U.S.C. § 1514A(b); 29 C.F.R. § 1980.103(c) (2004). OSHA provides on its website access to the Act, along with summary descriptions, information on how to file a complaint and on investigative procedures, and opinions of the Office of Administrative Law Judges and Administrative Review Board. See OSHA, Off. of Investigative Assistance, *The Whistleblower Program*, <http://www.osha.gov/dep/oia/whistleblower/index.html> (accessed Nov. 5, 2005).

243. *Welch*, 2003-SOX-15 at 53.

244. *Id.*

245. *Id.* at 2. Denial of a complaint is not unusual. Solomon, *supra* n. 33. OSHA investigators are trained in health and safety issues and often lack expertise in finance and accounting. In addition, investigators lack both subpoena power and adequate time to investigate and in some cases do not interview the complainant. *Id.*

246. *Welch*, 2003-SOX-15 at 70.

247. *Id.* at 53. Under the Act, a whistleblower does not have to prove actual wrongdoing. A mistaken or erroneous whistleblower receives protection so long as the belief of wrongdoing was a reasonable one. Steinberg & Kaufman, *supra* n. 28, at 452; Vaughn, *supra* n. 28, at 15–22.

248. *Welch*, 2003-SOX-15 at 57.

249. *Id.*

250. *Id.* at 58.



the investigation.<sup>251</sup> Judge Purcell found it reasonable for Welch to believe that internal controls were lacking because the design of those controls and review of entries was part of his job description<sup>252</sup> and bank auditors consider it problematic whenever too many employees make journal entries.<sup>253</sup>

Judge Purcell also found that Cardinal's top management was "clearly aware of Welch's protected activities" and that Welch had suffered an adverse employment action.<sup>254</sup> The proximity in time between Welch's protected activities and the adverse employment action was "itself sufficient to create an inference of unlawful discrimination."<sup>255</sup> Cardinal, in its attempt to rebut Welch's prima facie case, was unable to show by clear and convincing evidence that it would have taken the employment action, irrespective of Welch having engaged in a protected activity.<sup>256</sup> Cardinal's assertion that Welch was suspended and later discharged for his failure to meet with Larrowe and Densmore without his personal attorney present did not, in the judge's view, "ring true."<sup>257</sup>

Pursuant to the Act's goal of making the whistleblower whole,<sup>258</sup> Cardinal was ordered to reinstate Welch, purge his file of any references to his whistleblowing activities, pay back pay and interest, and pay all costs and expenses including attorney fees.<sup>259</sup> Additionally, Cardinal was forbidden to mention Welch's whistleblowing when providing references to prospective employers.<sup>260</sup> Almost two years have passed and Welch has yet to be reinstated.<sup>261</sup>

#### V. THERE'S NO PLACE LIKE HOME? WELCH UNDER VIRGINIA LAW

Under Virginia common law, the facts in *Welch* lead to a very different legal outcome. Virginia provides a cause of action for wrongful discharge<sup>262</sup> but its

251. *Id.*

252. *Id.* at 60 n. 100.

253. *Welch*, 2003-SOX-15 at 60.

254. *Id.* at 61.

255. *Id.* at 62.

256. *Id.* at 65-70.

257. *Id.* at 62.

258. 18 U.S.C. § 1514A(c)(1) (employee "shall be entitled to all relief necessary to make the employee whole").

259. *Welch*, 2003-SOX-15 at 71-72. This order was a preliminary order. *Id.* Cardinal then made an unsuccessful interlocutory appeal to the Administrative Review Board. *Welch v. Cardinal Bankshares*, ARB No. 04-054, ALJ No. 2003-SOX-15 (Dept. Lab., Admin. Rev. Bd. May 13, 2004). It then appealed unsuccessfully in June 2004 to the Fourth Circuit. *Cardinal Bankshares v. U.S. Dept. of Lab.*, No. 04-1791 (4th Cir. Oct. 26, 2004). Judge Purcell then issued a supplemental recommended order in February 2005 that once again ordered Welch's reinstatement. Supp. Recommended Dec. Or. Awarding Damages, Fees, and Costs, No. 2003-SOX-15 (Dept. Lab., Off. Admin. L. JJ. Feb. 15, 2005). In November 2005, Welch found himself in federal court seeking an injunction compelling Cardinal to implement the reinstatement order. *Welch v. Cardinal Bankshares Corp.*, No. 7:05 CV 00546 (W.D. Va. Nov. 14, 2005). For a general overview of the administrative and judicial procedures related to the Act's whistleblowing provision, see Vaughn, *supra* n. 28, at 73-99.

260. *Welch*, 2003-SOX-15 at 71-72.

261. Or. Denying Motion for Or. to Show Cause, No. 2003-SOX-15 (Dept. Lab., Off. Admin. L. JJ. Aug. 9, 2005); Telephone interview with D. Bruce Shine, *supra* n. 44.

262. In Virginia, a claim of wrongful discharge is known as a *Bowman* claim. *King v. Donnkenny, Inc.*, 84 F. Supp. 2d 736, 739 (W.D. Va. 2000). In *Bowman*, two bank employees who held stock in the bank were discharged after informing the bank's board that the proxies they had cast in favor of a proposed merger had

exceptions to the doctrine of employment-at-will<sup>263</sup> are narrowly defined and strictly construed.<sup>264</sup> Only three exceptions exist. The first exception is “where the termination results solely from [the] free exercise of a statutory right.”<sup>265</sup> The second is “where a plaintiff belongs to a class of individuals protected by the public policy of a statute, and the termination, in and of itself, violates the policy or statute.”<sup>266</sup> The third is where the discharge was based on the employee’s “refusal to engage in a criminal act.”<sup>267</sup> None of these three exceptions protected Welch because no Virginia statute provided a public policy that encompassed his whistleblowing conduct.

*A. Not Any Statute Will Do: The Statutory Right and Policy Exceptions*

Virginia courts have held that the source of law or policy must be a state statute<sup>268</sup> and the discharged employee must identify the specific statute that establishes the public policy.<sup>269</sup> A federal statute like the Act, therefore, does not suffice,<sup>270</sup> and Virginia does not have a law equivalent to the Act.<sup>271</sup> “[W]hile all Virginia statutes reflect public policy to some degree, ‘termination of an employee in violation of the policy underlying any one of them does not automatically give rise to a . . . cause of action for wrongful discharge.’”<sup>272</sup> The State has also refused to recognize a general whistleblower exception to the at-will doctrine<sup>273</sup> in situations where the employer has violated

been obtained under threat of employment termination. *Bowman v. St. Bank of Keysville*, 331 S.E.2d 797, 799 (Va. 1985).

263. Virginia’s formulation of the at-will doctrine is “[a]n employee is ordinarily at liberty to leave his employment for any reason or for no reason, upon giving reasonable notice . . . . Notions of fundamental fairness underlie the concept of mutuality which extends to a corresponding freedom to the employer.” *Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806, 808 (Va. 1996) (quoting *Lockhart v. Cmmw. Educ. Sys.*, 439 S.E.2d 328, 330 (Va. 1994)) (internal quotation marks omitted).

264. *King*, 84 F. Supp. 2d at 739.

265. *Id.* at 740.

266. *Id.*

267. *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709, 711 (Va. 2002).

268. *Leverton v. AlliedSignal, Inc.*, 991 F. Supp. 486, 490 (E.D. Va. 1998) (noting a claim for wrongful discharge “cannot succeed unless the plaintiff identifies a Virginia statute”).

269. *Warner v. Buck Creek Nursery, Inc.*, 149 F. Supp. 2d 246, 261–64 (W.D. Va. 2001) (reviewing Virginia case law on exceptions to the at-will doctrine); *Lawrence Chrysler Plymouth*, 465 S.E.2d at 809 (holding discharged employee did not have a cause of action for wrongful discharge “because he is unable to identify any Virginia statute establishing a public policy”) (quoted, in part, in *Warner*, 149 F. Supp. 2d at 261). One commentator has noted that “Virginia courts are becoming increasingly sympathetic toward plaintiffs who are fired for bringing an employer’s criminal transgressions to light.” Cavico, *supra* n. 8, at 592 (citing *King*, 84 F. Supp. 2d at 740). However, the underlying public policy interest must be found in a state statute. *King*, 84 F. Supp. 2d. at 740; *Lawrence Chrysler Plymouth*, 465 S.E.2d at 809.

270. See *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 450 (E.D. Va. 2002) (“It is worth emphasizing that a claim [for wrongful discharge] must find root in a state statute; it cannot have its genesis in an act of Congress” (internal quotation marks, bracket and citation omitted, emphasis in original)); see also *Bowman*, 331 S.E.2d at 799–800. The successful whistleblowing plaintiffs in *Bowman* had alleged a violation of federal securities law and state corporation laws. The court based its holding in the case solely on the violation of state law. *Id.* at 801.

271. Virginia has passed the equivalent of the federal False Claims Act. *Virginia Fraud Against Taxpayers Act*, Va. Code Ann. §§ 8.01-216.1–8.01-216.19 (Supp. 2005) (fraudulent claims against state government). The statute prohibits discrimination against an employee who discloses the employer’s fraudulent conduct or assists in an investigation of it. *Id.* at § 8.01-216.8.

272. *Anderson*, 92 F. Supp. 2d at 520 (quoting *City of Va. Beach v. Harris*, 523 S.E.2d 239, 245 (Va. 2000)).

273. *King*, 84 F. Supp. 2d at 740; *Dray*, 518 S.E.2d at 313. Virginia does provide whistleblower protection, for example, to employees who have been discharged for filing a labor-related health or safety complaint.

“generalized regulatory mechanisms for business and industry” and the employee reports it.<sup>274</sup> Furthermore, the discharged employee’s rights, duties, or “zone of interests . . . must fall within the protective reach of the statute [or regulation],”<sup>275</sup> and the discharge itself must violate the public policy.<sup>276</sup> Stated another way, a discharge that violates only the employee’s private interests is not actionable under Virginia law.<sup>277</sup>

All this left Welch with no state cause of action for wrongful discharge under the first two exceptions—statutory right and public policy. This result is typical of many plaintiffs who claim wrongful discharge in Virginia.<sup>278</sup> The two exceptions, however, merit further discussion because even if Welch had fallen under one or both<sup>279</sup> he probably would not have been successful in his action for wrongful discharge.

### B. *A Much Tougher Row to Hoe*

Finding an appropriate state statute on which to base his claim is only one of many difficulties Welch would have faced in Virginia. Significant legal differences exist between the Act’s treatment of wrongful discharge and Virginia’s treatment of it because Virginia courts narrowly construe at-will exceptions.<sup>280</sup> For example, constructive discharge<sup>281</sup> provides a cause of action under the Act<sup>282</sup> but may not provide one under Virginia law.<sup>283</sup> More important to the facts of *Welch*, Virginia raises the evidentiary burden on the discharged employee by lowering the standard of proof required on the part of the employer<sup>284</sup> and imposing a potentially stricter causation requirement on

Va. Code. Ann. § 40.1-51.2:1 (2002). The State also provides protection to employees who are discharged because of having filed or intending to file a workers compensation claim. Va. Code. Ann. § 65.2-308(A).

274. *King*, 84 F. Supp. 2d at 740 (citing *Dray*, 518 S.E.2d at 313). In *Dray*, a quality control inspector was discharged for reporting unsanitary conditions directly to government inspectors rather than to plant management. 518 S.E.2d at 313. The employee alleged she had a right under Virginia’s Meat and Poultry Product’s Inspection Act to disregard management’s directive that she report violations to them. *Id.* at 314. The court held the law’s purpose was to provide for “inspection programs” and did not confer any rights or duties on inspectors. *Id.*

275. *Francis v. Computer Learning Centers, Inc.*, 199 F.3d 1327 (4th Cir. 1999) (unpublished disposition). For example, in *Bowman*, the discharged bank employees were also shareholders who were denied “the right to vote . . . free of duress and intimidation.” 331 S.E.2d at 801. Therefore, the discharged employees fell within the class of persons that the state’s corporation laws were designed to protect. *Leverton*, 991 F. Supp. at 493.

276. *Leverton*, 991 F. Supp. at 492 (citing and quoting *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 918 (Va. 1987)).

277. *Id.*

278. See *Storey*, 207 F. Supp. 2d at 451 (discussing the restrictions on wrongful discharge claims and noting “not even all Virginia statutes may serve as the predicate”); *Leverton*, 991 F. Supp. at 492 (discussing the public policy exception to the at-will doctrine).

279. The availability of a federal remedy would not necessarily preclude recovery for wrongful discharge under a state statute or the common law. See *Lockhart*, 439 S.E.2d at 332 (finding no merit in defendant’s argument that the availability of a federal remedy precludes a state-based claim for wrongful discharge).

280. *King*, 84 F. Supp. 2d at 739.

281. “Constructive discharge” is defined as “[a] termination of employment brought about by making the employee’s working conditions so intolerable that the employee feels compelled to leave.” *Black’s Law Dictionary*, *supra* n. 4, at 475.

282. 18 U.S.C. § 1514(A)(a) (“demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment”).

283. *Barron v. Netversant-Northern Va., Inc.*, 2005 WL 2242741 at \*4 n. 4 (Va. Cir. July 14, 2005) (noting the Virginia circuit courts are split as to whether constructive discharge is actionable).

284. *Shaw v. Titan Corp.*, 498 S.E.2d 696, 698 (Va. 1998) (“[i]f you find by a preponderance of

the employee.<sup>285</sup>

In Virginia, an employer is held to a lower burden of proof than required by the Act in countering a discharged employee's claim. The Act requires the discharged employee to establish, *inter alia*, that the employee had engaged in a protected activity and the protected activity was likely a contributing factor in the discharge.<sup>286</sup> If the employee establishes the prima facie case, the burden shifts to the employer to clearly and convincingly show a legitimate business reason for the discharge.<sup>287</sup> In contrast, Virginia does not make use of a burden-shifting test in wrongful discharge suits,<sup>288</sup> and the evidentiary burden placed on the employer is a preponderance standard.<sup>289</sup> Although Cardinal did not meet the standard of proof required by the Act,<sup>290</sup> it might have presented enough evidence<sup>291</sup> to prevail under a preponderance standard.

Virginia magnifies the lower standard of proof applied to the employer by placing a potentially stricter causation requirement on the discharged employee. As a general rule, Virginia applies the proximate causation standard of negligence law to wrongful discharge.<sup>292</sup> The State, therefore, requires a plaintiff to establish a "sufficient" prima facie case as to proximate causation in order to reach the jury.<sup>293</sup> What qualifies as sufficient, however, depends on the wording of the Virginia statute involved.<sup>294</sup> In some cases, the wording of the statute is such that the prima facie case must establish that the protected conduct was the "sole [proximate] cause" of the employee's discharge.<sup>295</sup> Under a "sole cause" standard, mere proximity in time between the employee engaging in the protected conduct and the discharge, "without more," is not enough to satisfy the sole cause element.<sup>296</sup>

A less restrictive causation requirement applies when the statute is silent on causation. Rather than sole causation, it suffices to show the discharge occurred "because of factors that violate . . . public policy."<sup>297</sup> The "because of" causation standard is more favorable to the employee than either a sole cause<sup>298</sup> or mixed-motive

the evidence").

285. *Id.* at 700 (noting the causation standard "solely" is applied in those cases where the applicable statute requires that standard).

286. *See supra* pt. III.

287. *Id.*

288. *Jordan*, 483 S.E.2d at 207 (refusing to extend the Title VII burden shifting test as formulated in *McDonnell Douglas*, 411 U.S. 792, to wrongful discharge suits).

289. *Shaw*, 498 S.E.2d at 698.

290. *Welch*, 2003-SOX-15 at 70.

291. *See id.* at 65-70.

292. *See Kerns v. Shirley Well Drilling*, 1986 WL 401732 at \*3 (Va. Cir. Feb. 13 1986). A proximate cause "produces the result, . . . a cause without which the accident, injury, or damage would not have occurred." *Id.* (quoting Virginia Model Jury Instructions, Instruction No. 5.000).

293. *Jordan*, 483 S.E.2d at 207 (stating Virginia law in civil actions and wrongful discharge suits).

294. *Shaw*, 498 S.E.2d at 700.

295. *Id.* (finding circumstantial evidence was insufficient to establish a prima facie case "that [the plaintiff] was fired 'solely' because she intended to file a workers' compensation claim" (citing *Jordan*, 483 S.E.2d at 207)).

296. *Jordan*, 483 S.E.2d at 207 (stating the "timing of these events and the employer's knowledge . . . without more, does not raise an inference that the plaintiff was fired solely because she intended to file a workers' compensation claim").

297. *Shaw*, 498 S.E.2d at 700.

298. *Id.* (distinguishing the "because of" test from a requirement the plaintiff prove the "employer's

standard,<sup>299</sup> but arguably less favorable than the Act's contributing factor test.<sup>300</sup> Under the contributing factor test, proximity in time is sufficient to raise an inference of wrongful discharge.<sup>301</sup> More might be required under the "because of" test, which lies closer to a test not adopted by the Act, the motivating or substantial factor test.<sup>302</sup> The "because of" test considers what motivated the discharge.<sup>303</sup> If the employer's motivation for discharging the employee involved a legitimate business reason and the jury finds it was more likely than not the employee was discharged because of this business reason, the employer prevails.<sup>304</sup>

Where might all this have left Welch if Virginia had a state version of the Act or some other applicable statute? If the statute made use of the sole cause language of other Virginia whistleblower statutes,<sup>305</sup> Cardinal might have been able to rebut Welch's claim that the discharge stemmed solely from his whistleblowing.<sup>306</sup> Cardinal, for example, had argued that Welch's discharge resulted "*solely* [from his refusal] to meet with Larowe [and] Densmore without a personal attorney."<sup>307</sup> It also pointed to Welch's performance, arguing that if Welch had not been discharged when he in fact was, "he most certainly would have been fired by us later in October."<sup>308</sup> While both of Cardinal's arguments failed under the Act's contributing factor test and its clear and convincing burden of proof,<sup>309</sup> those arguments could be enough when adjudicated under a sole factor test coupled with a preponderance standard.<sup>310</sup> Cardinal's argument might also prove successful under the more lenient "because of" test. A reasonable jury could find that Cardinal discharged Welch either because of his performance or his failure to meet with Larowe and Densmore.

### C. *Grasping at the Final Straw: The Criminal Act Exception*

The third exception—criminal act—merits discussion because it protects whistleblowing conduct left unprotected by the Act.<sup>311</sup> Virginia provides the criminal

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improper motive [as] the sole cause of the wrongful termination").

299. Under a mixed-motive standard, if the employee shows a discriminatory reason for the discharge, the employer can still prevail if it can show the reasons for the discharge "included a legitimate [business] reason" and the discharge would have occurred regardless of any discriminatory reason. *Id.* at 698 (holding trial court did not err in rejecting defendant's mixed motive jury instruction). Virginia has not adopted the mixed motive standard. *Id.* at 700.

300. *See supra* pt. III.

301. *See Welch*, 2003-SOX-15 at 62.

302. *See supra* pt. III.

303. *See Shaw*, 498 S.E.2d at 698 (noting "[t]he question before [the jury] is what motivated the termination").

304. *Id.*

305. *See id.* at 700.

306. The employer can prevail in a wrongful discharge suit if it shows by a preponderance of the evidence that the employee was discharged for legitimate reasons. *Id.* at 699.

307. *Welch*, 2003-SOX-15 at 62 (emphasis added).

308. Supp. Recommended Dec. Or. Awarding Damages, Fees, and Costs, *supra* n. 259.

309. *See Welch*, 2003-SOX-15 at 53 ("Respondent may avoid liability . . . by producing sufficient evidence to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action.").

310. *See Shaw*, 498 S.E.2d at 700.

311. Under the Act, refusal to participate in alleged wrongdoing, absent a disclosure to a public body or "person with supervisory authority," would have left Welch unprotected. *See* 18 U.S.C. §§ 1514(A)(a)(1), 1514(A)(a)(2); *see also* Cherry, *supra* n. 6, at 1064; Steinberg & Kaufman, *supra* n. 28, at 451.

act exception because “the employment-at-will doctrine [should not] serve as a shield for employers who seek to force their employees, under the threat of discharge, to engage in criminal activity.”<sup>312</sup> Welch believed the two journal and sundry account entries were “misleading to the financial statement reader”<sup>313</sup> and constituted fraud.<sup>314</sup> He also believed “failure to correct known problems could be construed as fraud.”<sup>315</sup> However, he never alleged that Cardinal engaged in fraudulent accounting practices.<sup>316</sup> Rather, he alleged that his discharge resulted from his engaging in a protected activity as defined by the Act.<sup>317</sup> Therefore, all he was required to show was that he reasonably believed Cardinal’s conduct to be prohibited under the Act.<sup>318</sup> A far more difficult legal burden would have awaited him in a Virginia state court.

To fall under Virginia’s third exception, Welch would have had to allege both that Cardinal’s officers engaged in fraudulent conduct<sup>319</sup> and that he was discharged for refusing to “consent to commission” of fraudulent accounting entries.<sup>320</sup> Discharge relating to disclosure would not suffice.<sup>321</sup> In addition, the allegation of fraudulent conduct would have to be rooted in a state statute “designed to protect the property rights, personal freedoms, health, safety, or welfare” of the general public.<sup>322</sup> Finally, the statute itself would have to be one that created or imposed a legal duty on the part of Welch.<sup>323</sup>

Virginia has two statutes that apply to fraudulent conduct on the part of officers of a bank.<sup>324</sup> The first statute, Virginia Code § 6.1-122, proscribes “false entry in any

312. *Rowan*, 559 S.E.2d at 711 (quoting *Mitchem v. Counts*, 523 S.E.2d 246, 252 (Va. 2000)) (internal quotation marks omitted).

313. *Welch*, 2003-SOX-15 at 15.

314. *Id.* at 15 (testifying “even small amounts of money would violate Sarbanes-Oxley as long as there was the intent to deceive [and] the aforementioned journal entries and insider trading constituted fraud” (internal quotation marks omitted)); see also *id.* at 20 (believing Moore and others at Cardinal were “parties to fraudulent acts”).

315. *Id.* at 19.

316. Telephone interview with D. Bruce Shine, *supra* n. 44; see *Welch*, 2003-SOX-15 at 50.

317. *Id.*

318. *Id.*

319. Telephone interview with D. Bruce Shine, *supra* n. 44; see also *Mitchem*, 523 S.E.2d at 252 (holding trial court did not err in dismissing wrongful discharge claim because plaintiff did not allege her employer discharged her for refusal to engage in a criminal act).

320. See *Mitchem*, 523 S.E.2d at 252–53 (Plaintiff “did not allege that her employer discharged her for refusing to commit [simple assault]. Instead, she alleged that she was fired for refusing to consent to the commission of a battery.” (internal quotation marks omitted)).

321. *Storey*, 207 F. Supp. 2d at 453 (noting discharged employee’s allegation reflected the discharge was in response to employee’s disclosure of illegal acts).

322. *Id.* at 451 (quoting *Levertton*, 991 F. Supp. at 493).

323. See generally *Storey*, 207 F. Supp. 2d at 453; *Anderson*, 92 F. Supp. 2d at 522; *Warner*, 149 F. Supp. 2d at 262–63. The criminal act exception is analogous to the statutory right exception. Under the criminal act or statutory duty exception, the employee is terminated for refusal to violate a legal duty. Under the statutory right exception, the employer’s discharge of the employee interferes with or violates the employee’s exercise of that right. See *Anderson*, 92 F. Supp. 2d at 522; *Rowan*, 559 S.E.2d at 711–12 (describing an employee who had discovered embezzlement and was discharged in connection with her testifying at employer’s criminal trial) (holding Virginia’s obstruction of justice statute did not create any statutory right or corresponding public policy exception that would extend protection to employee).

324. Va. Code Ann. §§ 6.1-122 (1999), 18.2-113 (2004); see Roger D. Groot, *Embezzlement and Related Crimes E7* §§ 12–14, in Va. Prac. Series Crim. Offenses & Defenses (West 2005) (available at Westlaw, “VA PRAC CROFDEF E7” database).

book, report or statement of such bank . . . with intent” to defraud the corporation or deceive a corporate officer.<sup>325</sup> Conviction for false entry carries with it a payment of a fine and imprisonment of from one to ten years.<sup>326</sup> The second statute, Virginia Code § 18.2-113, proscribes “fraudulent entries . . . in accounts by officers or clerks of financial institutions.”<sup>327</sup> A fraudulent entry is an entry made<sup>328</sup> “with [the] intent, in so doing, to conceal the true state of such account.”<sup>329</sup> A person convicted for fraudulent entry is guilty of a Class 4 felony<sup>330</sup> and subject to imprisonment of two to ten years.<sup>331</sup> Personal or third party financial gain resulting from the false or fraudulent entry is not a required element of either crime.<sup>332</sup>

As a threshold matter, it is very likely that Welch could have shown that either statute served as the basis for a wrongful discharge claim. Because the statutes address fraudulent conduct,<sup>333</sup> they are designed to protect the property rights of the general public.<sup>334</sup> The statutes also impose a legal duty on Welch as a bank officer. Therefore, he falls within the class of individuals the statutes are designed to benefit or protect.<sup>335</sup>

From this point forward, however, Welch would have faced difficult legal challenges. For example, to show a false entry, as is required by § 6.1-122, Welch would have to show more than a reasonable belief the entries were false.<sup>336</sup> Rather, he would have to show the entries were in fact false.<sup>337</sup> This might have proved a very difficult

325. Va. Code Ann. § 6.1-122.

326. *Id.*

327. *Id.* at § 18.2-113. At the time of the alleged wrongdoing in *Welch*, this statute was limited to banks and joint stock companies. The statute was revised in 2003 and now encompasses corporations. *Id.*; Va. Bill Status, Va. Gen. Assembly H. 2109, 2003 Reg. Sess. (Jan. 8, 2003).

328. Includes “makes, alters or omits to make.” Va. Code Ann. § 18.2-113.

329. *Id.*

330. *Id.*

331. *Virginia Crime Codes* § LAR-2336-F4 (2005).

332. Va. Code Ann. § 6.1-122; *see id.* at § 18.2-122 (“with the intent of concealing the true state of the account or to defraud the entity or to enable or assist any person to obtain money to which the person is entitled” (emphasis added)); Groot, *supra* n. 324, at § 12 (“conviction [under § 6.1-122] does not depend upon proof that money was actually obtained”); *see also id.* at § 14.

333. The crime defined by § 6.1-122 is similar to that of § 18.2-113, with the notable exception that an entry under § 18.2-113 need not be a false one. Groot, *supra* n. 324, at § 14 (“entries need not be false”); *see Mitchell v. Commonwealth*, 127 S.E. 368, 373 (Va. 1925) (noting the statute “is not directed against false entries; but against any entry made with intent to conceal” (emphasis in original)). An entry is not false if it truthfully records a fraudulent transaction. *Id.* at 372. While a person charged with both crimes can demand separate trials, a person who intends to conceal under § 18.2-113 “probably also has the intent to deceive one of the officials” included in § 6.1-122. Groot, *supra* n. 324, at nn. 75, 77.

334. *See Anderson*, 92 F. Supp. 2d at 521 (concluding that a statute prohibiting the use of forged documents protects the property rights of the general public).

335. *Id.* (noting “a statute’s protective reach may extend to those who have a legal duty under [the] statute”).

336. *See Cohn v. Knowledge Connections, Inc.*, 585 S.E.2d 578, 582 (Va. 2003) (stating it is “well settled that a misrepresentation, the falsity of which will afford ground for an action for damages, must be of an existing fact, and not the mere expression of an opinion” (quoting *Mortarino v. Consultant Engr. Services, Inc.*, 467 S.E.2d 778, 781 (Va. 1996)) (internal quotation marks omitted)); *Lawrence Chrysler Plymouth*, 465 S.E.2d at 808 (refusing to extend at-will exception to employee who was discharged for his refusal to repair a car because he “believed that this method of repair was unsafe”).

337. *See Cohn*, 585 S.E.2d at 582; *Lawrence Chrysler Plymouth*, 465 S.E.2d at 808. Little Virginia case law directly deals with § 6.1-122 or § 18.2-113. The *Mitchell* case, 127 S.E. 368, addressed § 18.2-113’s predecessor statute. A search of Westlaw’s “VA-CS-ALL” database on November 5, 2005, using the terms “6.1-122” or “18.2-113” revealed no state or federal appellate cases which directly dealt with either statute.

thing for Welch to do given the subjective nature of accounting<sup>338</sup> and the difference of opinion that existed between the two certified public accountants involved, Welch and Larrowe, as to the entries' proper accounting treatment.<sup>339</sup> In addition, Welch was not specifically asked by Moore to "make, alter or omit to make" those entries,<sup>340</sup> making it questionable as to whether Welch's refusal to certify receives protection under the statute. He might have been found complicit in the alleged crime by his earlier signing of the call reports,<sup>341</sup> thereby undermining his claim of refusal.<sup>342</sup>

Putting aside the falsity of the entries at Cardinal or any alleged complicity on Welch's part, Welch would have had to produce "sufficient facts,"<sup>343</sup> to satisfy the intent element contained in both statutes.<sup>344</sup> A reasonable belief that Moore or others intended to misrepresent the facts is not enough.<sup>345</sup> Welch lacked direct evidence of intent to deceive or conceal, and some of the circumstantial evidence he did have might show the opposite: Cardinal had corrected the entries that Welch questioned,<sup>346</sup> and a number of Welch's concerns had more to do with the potential for error, namely inadequate controls.<sup>347</sup> Cardinal's corrections were not to Welch's satisfaction, but the discharged employee's satisfaction is not the test in Virginia for establishing intent.<sup>348</sup> Inadequate financial controls that lead to erroneous entries in accounts might satisfy a negligence standard but fall short of the statutes' required *mens rea*. Instead, evidence must be presented that establishes the employer "intentionally and knowingly" engaged in the allegedly fraudulent conduct.<sup>349</sup>

In summary, without the Act, Welch had no viable cause of action for wrongful discharge in Virginia. He correctly believed the Act provided the only legal protection available to him.<sup>350</sup>

## VI. IN SEARCH OF GREENER PASTURES: WELCH UNDER OTHER STATES' LAWS

Would Welch have fared any better in another state? While a detailed treatment of this question lies beyond the scope of this article, a cursory review of the law in four other states—Louisiana, Delaware, Arkansas, and California—proves instructive.<sup>351</sup>

338. See *supra* n. 14.

339. See *Welch*, 2003-SOX-15 at 11 nn. 13, 25, 42–50.

340. See Va. Code Ann. § 18.2-113.

341. See *supra* pt. IV.A.

342. See *Mitchem*, 523 S.E.2d at 253 (suggesting that if a discharged employee had consented to her employer touching her, the crime of battery disappears and she could not then allege she was discharged for refusing to consent to a battery).

343. *Bowman*, 331 S.E.2d at 802 (concluding discharged employees must supply sufficient factual allegations to support their claim of tortious interference with employment contract).

344. Va. Code Ann. § 6.1-122 ("with intent" to injure, defraud, or deceive); *id.* at § 18.2-113 ("with intent . . . to conceal").

345. *Cohn*, 585 S.E.2d at 578 (applicant sued prospective employer for actual and constructive fraud; listing "intentionally and knowingly" and "intent to mislead" among the elements of fraud); see Va. Code Ann. § 6.1-122; *id.* at § 18.2-113.

346. *Welch*, 2003-SOX-15 at 25 (noting the journal entries had been "reclassified").

347. *E.g. id.* at 15.

348. See *Cohn*, 585 S.E.2d at 582.

349. *Id.*

350. See *supra* pt. IV.A.

351. The choice of these four states is discussed above in Part I.B.



A. *Legally Back in Ole Virginy*.<sup>352</sup> *Welch in Louisiana and Delaware*

In Louisiana and Delaware, Welch would probably fare no better than in Virginia. Unlike Virginia, Louisiana provides no public policy exception to the at-will doctrine<sup>353</sup> but does provide statutory protection to private sector whistleblowers.<sup>354</sup> Louisiana's whistleblower statute protects an

employee who in good faith, and after advising the employer of the violation of law:

- (1) [d]iscloses or threatens to disclose [the violation;]
- (2) [p]rovides information to or testifies before any public body [or;]
- (3) [o]bjects to or refuses to participate in [a] violation of law.<sup>355</sup>

With respect to disclosure and refusal, the alleged violation must involve a state law<sup>356</sup> or environmental law.<sup>357</sup>

Louisiana has no state law equivalent of the Act, but does have a statute similar to that of Virginia with respect to fraudulent conduct on the part of bank officers.<sup>358</sup> However, to prevail in a wrongful discharge claim, the court requires more than a good faith belief on the part of the discharged employee that there was a violation of state law.<sup>359</sup> The discharged employee must establish that a state law was in fact violated.<sup>360</sup> This requirement places Welch in the same position he would find himself in Virginia, having to allege and prove fraudulent conduct on the part of Cardinal's officers.<sup>361</sup> Therefore, in Louisiana, Welch would have had only the Act for protection against wrongful discharge.<sup>362</sup>

A similar result is obtained in Delaware. The State, at the time of the acts alleged in *Welch*, provided no statutory protection but did recognize breach of the covenant of good faith and fair dealing as an exception to the at-will doctrine.<sup>363</sup> However, the covenant exception is narrowly applied, partly out of a concern that the exception could "swallow the [rule] and effectively end at-will employment."<sup>364</sup> Therefore, Delaware courts show deference to the at-will doctrine,<sup>365</sup> giving employers "wide latitude" in termination decisions of at-will employees.<sup>366</sup> This wide latitude extends, for example,

352. Based on the song, Louis Armstrong, *Carry Me Back To Ole Virginy*, in *Vocal Duets with Ella and Louis* (Goldies 2000) (CD).

353. *Quebedeaux*, 820 So. 2d at 546.

354. La. Stat. Ann. § 23:967.

355. *Id.*

356. *Hale*, 886 So. 2d at 1215–16.

357. La. Stat. Ann. § 30:2027 (2000).

358. *Id.* at § 6:420 (2005) (prohibiting false entries).

359. *Hale*, 886 So. 2d at 1214.

360. *Id.* at 1215 (holding the discharged employee must establish the employer's practices were in actual violation of a state law in order for employee to prevail under Whistleblower Statute).

361. *See id.*

362. Louisiana does not recognize a public policy exception to the at-will doctrine. *Quebedeaux*, 820 So. 2d at 546.

363. *Pressman*, 679 A.2d at 441–42 (discussing exceptions to the at-will doctrine).

364. *Id.* at 442. The case goes on to discuss the narrow application of the covenant exception. *Id.* at 442–44.

365. *See id.* at 440 (noting the at-will doctrine remains a "heavy presumption").

366. *Id.* at 441 (noting "an employer has wide latitude" (quoting *Merrill v. Crothall-American, Inc.*,

to preclude an employee who is discharged absent good cause<sup>367</sup> or because of the employer's hatred of, or ill will toward, the employee.<sup>368</sup>

To prevail in a wrongful discharge suit under the covenant exception, the employee's discharge must involve bad faith on the part of the employer<sup>369</sup>—"an aspect of fraud, deceit or misrepresentation" with respect to the terms and conditions of employment<sup>370</sup> or a violation of a clear mandate of public policy.<sup>371</sup> The bad faith category extends to allow promissory estoppel as the basis for a wrongful discharge claim.<sup>372</sup> Estoppel arises where the employer promised employment protection to the employee as consideration for the employee disclosing alleged wrongdoing that the employee was not under a duty to disclose and then discharged the employee following the disclosure.<sup>373</sup> Welch does not fall under the bad faith exception. Cardinal did not manufacture a fictitious basis for Welch's discharge,<sup>374</sup> and Welch initiated the disclosure at Cardinal.<sup>375</sup>

Welch does not fall under the public policy category either. He would fail to satisfy the first prong of the two-part test required by Delaware courts: "(i) the employee must assert a public interest recognized by some legislative, administrative or judicial authority and (ii) the employee must occupy a position with responsibility for advancing or sustaining that particular interest."<sup>376</sup> Welch fails under the first prong because the public policy category does not include disclosing questionable, but not illegal, financial and business practices.<sup>377</sup> Welch in Delaware, therefore, would find himself in the same position as in Virginia and Louisiana—having to allege and prove an illegal practice.<sup>378</sup>

Welch might not fare any better under Delaware's newly enacted Whistleblowers' Protection Act.<sup>379</sup> The Delaware Act provides protection to private sector employees who "[refuse] to commit or assist in the commission of a violation, as defined in this chapter"<sup>380</sup> or "[report] verbally or in writing to the employer . . . a violation, which the employee knows or reasonably believes has occurred or is about to occur."<sup>381</sup>

606 A.2d 96, 101 (Del. Supr. 1992))).

367. *Pressman*, 679 A.2d at 441 (approving of idea that a breach of the covenant "cannot be predicated simply upon the absence of good cause for a discharge" (quoting *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 788 (Conn. 1984))).

368. *Id.* at 441.

369. *Id.* at 442-44 (discussing good and bad faith).

370. *Id.* at 440. For example, misrepresentation of some important fact the employee relies upon in making an employment decision or where the employer uses its superior bargaining power to deprive the employee of fair compensation. *Id.* at 440, 442. It also includes situations where the employer created false grounds and manufactured records to support a fictitious basis for discharge. *Pressman*, 679 A.2d at 444.

371. *Id.* at 441-42.

372. *Lord v. Souder*, 748 A.2d 393, 393-94 (Del. 2000) (holding promissory estoppel may provide the basis for a wrongful discharge claim).

373. *Id.* at 399 (listing elements of promissory estoppel in context of wrongful discharge).

374. See *Pressman*, 679 A.2d at 444.

375. See *supra* pt. IV.A-B.

376. *Lord*, 748 A.2d at 401 (citing *Pressman*, 679 A.2d at 441-42).

377. *Pressman*, 679 A.2d at 442.

378. See e.g. *Lord*, 748 A.2d at 402.

379. Del. Code Ann. tit. 19, §§ 1701-1708.

380. *Id.* at § 1703(3).

381. *Id.* at § 1703(4).

A violation includes “an act or omission by an employer” that is “materially inconsistent with, and a serious deviation from, financial management or accounting standards implemented pursuant to a [federal] law, rule, or regulation.”<sup>382</sup> Case law interpreting the Delaware Act is limited to a single case,<sup>383</sup> and the courts have not addressed the materially inconsistent and serious deviation standard. Whether Cardinal’s journal and sundry account entries rise to the level of a serious deviation is arguable given Sarbanes-Oxley’s “fairly presents” standard,<sup>384</sup> as is the objective reasonableness of Welch’s belief that a serious deviation had occurred. Accounting contains subjective elements, and the two certified public accountants involved, Welch and Larowe, differed as to the entries’ proper accounting treatment.<sup>385</sup>

*B. Seeing Daylight: Welch in Arkansas*

Welch probably fares better in Arkansas than in Virginia. Arkansas recognizes three exceptions to the at-will doctrine: “(1) where an employee relies upon a personal manual that contains an express provision against termination except for cause; (2) where the employment agreement contains a provision that the employee will not be discharged except for cause,”<sup>386</sup> or (3) if the employee “is fired in violation of a well-established public policy of the state.”<sup>387</sup> Additionally, the exceptions encompass both actual and constructive discharge.<sup>388</sup>

The public policy exception extends to discharge that results from reporting a violation of state or federal law.<sup>389</sup> The Act certainly qualifies as a federal law, and Welch did report suspected violations of that law to Moore and others with supervisory authority at Cardinal.<sup>390</sup> Similar to the Act, Arkansas’s protection extends to discharge stemming from the whistleblowing conduct itself.<sup>391</sup> In other words, Welch would not have to establish that the practices he reported to Cardinal management were in actual

382. *Id.* at § 1702(6)(b).

383. *Tome*, 902 A.2d. 757 (describing state employee who sought protection under the Delaware Act alleging that she was discharged by the State for whistleblowing activity that took place during her prior federal employment).

384. *See* 18 U.S.C.A. § 1350(b).

385. *See supra* nn. 14, 339 and accompanying text.

386. *Crawford County v. Jones*, 91 Ark. App. 161 (Ark. App. Div. I 2005).

387. *Sterling Drug*, 743 S.W.2d at 385.

388. *See id.* at 386 (defining elements of constructive discharge).

389. *Id.* (discharged employee had reported his employer’s alleged violation of the False Claims Act, 31 U.S.C. §§ 3729–3731 (1983)); *see also Crawford County*, 91 Ark. App. 161 (noting that the discharged employee had “submitted evidence of several possible violations of state law”).

390. Arkansas law suggests that internal whistleblowing would qualify for protection under the public policy exception. *See e.g. Arkansas Whistle-Blower Act*, Ark. Code. Ann. §§ 21-1-601–21-1-609 (2004) (providing protection to public sector employees).

391. *Sterling Drug*, 743 S.W.2d at 386 (discussing the public policy exception and concluding that “to further the public good, citizens . . . should be encouraged to report illegal activity”).

violation of the law.<sup>392</sup> Rather, a “good faith” belief that the practices were in violation of the law would suffice.<sup>393</sup>

To prevail on a wrongful discharge claim, Welch would have to present “substantial evidence”<sup>394</sup> that his reporting of those violations was a factor in his discharge.<sup>395</sup> This evidentiary burden could be satisfied by showing that Moore held an “antagonistic attitude” toward Welch<sup>396</sup> and that a “close temporal proximity existed” between Welch’s report and his discharge.<sup>397</sup>

However, prevailing in Arkansas might prove more difficult for Welch than prevailing under the Act because Arkansas applies a preponderance standard to the employer<sup>398</sup> as opposed to the Act’s clear and convincing standard.<sup>399</sup> Cardinal might have presented enough evidence to satisfy this lower standard.<sup>400</sup> Even if Welch could prevail, reinstatement would not be an available remedy. Arkansas courts have held that the public policy wrongful discharge claim is grounded in contract.<sup>401</sup> Therefore, Welch’s damages would be limited to lost wages and any other tangible benefit that resulted from the discharge.<sup>402</sup> Additionally, he would have a duty to mitigate his losses.<sup>403</sup>

### C. One Tough Act? Welch in California

Welch might fare as well in California as he did under the Act. California provides both common law<sup>404</sup> and statutory<sup>405</sup> protection for private sector whistleblowers. Its statutory protection is of interest here because it might provide greater protection than the Act.<sup>406</sup> For example, the statute requires employers to “conspicuously display the rights and responsibilities afforded to employees.”<sup>407</sup> A “whistleblower hotline” must

392. Analogous Arkansas law supports this point. For example, the Whistleblower Act applies a good faith standard, prohibiting retaliation by a public employer against any employee who has a “reasonable basis” for reporting a violation or refusing an order that the employee “reasonably believes” violates a law. Ark. Code Ann. § 21-1-603.

393. Arkansas does have a law proscribing false entries in business records. Ark. Code Ann. § 5-37-202. However, Welch believed the accounting entries to be misleading and not necessarily false. See *supra* pt. IV.A–B.

394. *Gen. Elec. Co. v. Gilbert*, 65 S.W.3d 892, 897 (Ark. App. Div. II, III, IV 2002).

395. *Id.* at 901 (Bird, J., dissenting).

396. See *id.* at 898.

397. *Id.* at 901 (Bird, J., dissenting).

398. *Id.* at 897 (discussing the burden shifting test as applied to wrongful discharge).

399. See *supra* pt. III.

400. See *supra* pt. V.B.

401. *Sterling Drug*, 743 S.W.2d at 385 (adopting the “exclusive” contract approach). A discharged employee can also recover under tort if the employer’s conduct is “sufficiently egregious or extreme.” *Id.*

402. *Gilbert*, 65 S.W.3d at 900.

403. *Id.*

404. A wrongful discharge claim in California is called a *Tameny* claim. *Green v. Ralee Engr. Co.*, 960 P.2d 1046, 1048 (Cal. 1998). *Tameny* claims “fall into one of four categories: the employee (1) refused to violate a statute; (2) performed a statutory obligation; (3) exercised a constitutional or statutory right or privilege; or (4) reported a statutory violation for the public’s benefit.” *Erskine v. Boeing Co.*, 2002 WL 31475219 at \*7 (M.D. Fla. July 9 2002) (citing *Green*, 960 P.2d at 1051).

405. See Cal. Lab. Code §§ 1102.5–1102.8, 1106.

406. See Baker, *supra* n. 46, at 574–75.

407. Cal. Lab. Code § 1102.8(a) (“employer shall prominently display”); Baker, *supra* n. 46, at 573.

also be maintained by the Attorney General.<sup>408</sup> The caller's identity and any disclosure made to the hotline is held in confidence<sup>409</sup> to "help foster the early detection of financial misdoings" and provide a "safer haven of protection" to whistleblowers.<sup>410</sup> Last, the statute encompasses a far greater number of laws than does the Act<sup>411</sup> and includes refusal as protected whistleblowing conduct.<sup>412</sup>

California's Whistleblower Protection Statute<sup>413</sup> provides protection to an employee who (1) discloses to an employer or government or law enforcement agency an alleged violation of a federal or state law, regulation, or rule or (2) refuses to participate in "an activity that would result in a violation of" a law, regulation, or rule.<sup>414</sup> Similar to the Act, the statute requires only a "reasonable cause to believe" on the part of the employee that a violation of law has or is about to occur.<sup>415</sup> In addition, a preponderance standard is applied to the employee's prima facie case, which must show that the protected activity was a "contributing factor" in the discharge.<sup>416</sup> The California statute places a "clear and convincing" burden of proof upon the employer in rebutting the prima facie case.<sup>417</sup>

Given the similarities between the California statute and the Act, it is likely that Welch would prevail in a wrongful discharge claim in California. Welch could recover damages suffered as a result of the discharge,<sup>418</sup> with reinstatement to his former position being a potential remedy.<sup>419</sup>

## VII. CONCLUSION

"Whistle blowers are usually right but they also usually get the bad end of the deal."<sup>420</sup> The Act might have given Welch the courage to blow the whistle, but he was wrong when he believed "that before Sarbanes-Oxley came along, [he] would have been terminated."<sup>421</sup> The Act did come along and Welch was terminated from his employment at Cardinal.

408. Cal. Lab. Code § 1102.7 ("[t]he office of the Attorney General shall maintain a whistleblower hotline"); Baker, *supra* n. 46, at 573.

409. Cal. Lab. Code § 1102.7(c) ("shall hold in confidence information disclosed . . . including the identity of the caller").

410. Baker, *supra* n. 46, at 576, 576 n. 67 (citing Sen. Jud. Comm., Comm. *Analysis of SB 777*, at 10 (Apr. 8, 2003)).

411. See *supra* n. 69 and accompanying text.

412. Cal. Lab. Code § 1102.5(c) ("refusing to participate in an activity that would result in a violation").

413. The statute is commonly referred to as the "Whistleblower Protection Statute." Baker, *supra* n. 46, at 570.

414. Cal. Lab. Code § 1102.5. In 2003, the California legislature made several changes to the Whistleblower Protection Statute. Baker, *supra* n. 46, at 572-73. The legislature expanded the statute's protective reach to include, *inter alia*, state and federal rules and refusal to participate in a violation. *Id.*

415. Cal. Lab. Code § 1102.5(a)-(c).

416. *Id.* at § 1102.6. The same test is used by the Act. See *supra* pt. III.

417. *Id.* at § 1102.6.

418. *Id.* at § 1105.

419. *Green v. State*, 2005 WL 2562887 at \*3 (Cal. App. 1st Dist. Oct. 12, 2005) (noting reinstatement is a potential remedy for wrongful discharge).

420. *Sterling Drug*, 743 S.W.2d at 388 (Purtle, J., dissenting).

421. Krebsbach, *supra* n. 44, at 32; see *Welch*, 2003-SOX-15 at 16.

Welch perhaps underestimated the power of the Act to curb a rather predictable response on the part of management when confronted with dissent or criticism, namely, to shoot the messenger.<sup>422</sup> Legal protection might dampen this response in some cases, but human nature combined with a managerial ethos<sup>423</sup> suggests it will not in most cases. While the Act and other state laws encourage proper conduct on the part of managers in dealing with a whistleblowing employee, that encouragement may be no match for the immediate and long-ranging sting and sense of betrayal felt by those managers.<sup>424</sup> By challenging a whistleblower at every organizational and legal turn, management sends a message to those employees who remain working in the organization.<sup>425</sup> Ultimately, employees decide whether to raise concerns with management by taking clues from the organizational culture.<sup>426</sup>

Welch continues to push for his reinstatement,<sup>427</sup> finding himself blacklisted by the banking industry<sup>428</sup> and unable to find equivalent employment in the rural, sparsely populated Virginia community that is home to the Bank of Floyd.<sup>429</sup> Less lucrative employment and the legal battle that has raged over the past several years have drained his and his wife's retirement accounts and left the couple saddled with debt.<sup>430</sup> For its part, Cardinal continues to fight Judge Purcell's damages and reinstatement order.<sup>431</sup> Cardinal argues, *inter alia*, that reinstating Welch would prove inequitable to Welch's replacement, who would then "have to leave Floyd . . . since available positions in the Floyd community for someone with his skills are rare."<sup>432</sup> Additionally, Cardinal argues that Welch lacks something that it, as well as the Act, requires of a CFO—integrity.<sup>433</sup> Last, Cardinal argues the district court lacks subject matter jurisdiction to enforce the

422. See generally Jackall, *supra* n. 8; Wendy R. Boswell & Julie B. Olson-Buchanan, *Experiencing Mistreatment at Work: The Role of Grievance Filing, Nature of Mistreatment, and Employee Withdrawal*, 47 Acad. Mgt. J. 129 (2004); Frances J. Milliken, Elizabeth W. Morrison & Patricia F. Hewlin, *An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why*, 40 J. Mgt. Stud. 1453, 1455 (2003).

423. See generally Jackall, *supra* n. 8.

424. In addition, directors and senior-level managers might "know that there will be little or no consequence for violations [of the Act] until detection, and even then there will be opportunity to cure." Brown, *supra* n. 30, at 372.

425. See Kenneth D. Butterfield et al., *Organizational Punishment from the Manager's Perspective: An Exploratory Study*, 17 J. Managerial Issues 363, 377 (2005) (finding that "when managers want others to learn from a punishment incident, they are more likely to punish in public").

426. See generally Milliken, Morrison & Hewlin, *supra* n. 422, at 1456–57.

427. *Welch v. Cardinal Bankshares Corp.*, No. 7:06 CV 00407, Pet. to Enforce Or. of Reinstatement of the U.S. Dept. Lab. (W.D. Va. July 6, 2006); *Welch v. Cardinal Bankshares Corp.*, No. 7:05 CV 00546, Pl.'s Pet. and/or Compl. to Enforce Or. of A.L.J., U.S. Dept. Lab. (W.D. Va. Aug. 30, 2005).

428. Telephone interview with D. Bruce Shine, *supra* n. 44.

429. Floyd, Virginia, is located forty miles southwest of Roanoke, Virginia. Floyd Virginia Online, *Visitor's Guide to Floyd*, <http://www.floydvirginia.com/visitors.html> (accessed Nov. 24, 2005). Floyd's population in the 2000 Census was 432. U.S. Census Bureau, *Fact Sheet: Floyd Town, Virginia* (available at [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en)).

430. Solomon, *supra* n. 33.

431. See *Welch v. Cardinal Bankshares Corp.*, No. 7:05 CV 00546, Defs. Reply Memo. in Support of Defs. Mot. to Dismiss and Memo. in Opposition to Pl.'s Mot. for Prelim. Inj. (W.D. Va. Nov. 8, 2005).

432. *Id.* at 23.

433. *Id.* at 19–23.

reinstatement order because it is a “preliminary order,” an argument the district court found persuasive in dismissing Welch’s petition for enforcement.<sup>434</sup>

Irony never seems in short supply in cases involving whistleblowing. If the Act had not come along, Welch would probably have remained silent, thereby keeping his reputation and career prospects intact. Alternatively, he might have spoken up regardless of any legal protection and still have been discharged, in which case he would have moved on with his life after learning he had no legal recourse in Virginia. Instead, he finds himself in circumstances familiar to a great many whistleblowers—protected by law but still penalized with impunity.

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434. *Welch v. Cardinal Bankshares Corp.*, No. 7:05 CV 00407 (Oct. 5, 2006) (mem.).

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