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Callahan v. Edgewater Care & (and) Rehabilitation Center: The Illinois Whistleblower Act Does Not Preempt the Common Law Tort or Retaliatory Discharge

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CALLAHAN V. EDGEWATER CARE & REHABILITATION CENTER: THE ILLINOIS WHISTLEBLOWER ACT DOES NOT PREEMPT THE COMMON LAW TORT OF RETALIATORY DISCHARGE

INTRODUCTION

Judith Shores, a nursing assistant at Senior Manor Nursing Center, observed a co-worker falling asleep during her shift, failing to supervise the administration of prescription drugs, and refusing to assist nursing home residents with their needs.[1] Believing that this conduct endangered the "health, welfare, and safety" of the nursing home residents, Shores reported the situation to an administrator.[2] Shortly thereafter, the home fired her.[3] Shores brought an action against the nursing home under the Illinois common law tort of retaliatory discharge.[4] The nursing home argued that Shores could not state a claim for retaliatory discharge, because she did not report the nurse's neglect to the Illinois Department of Public Health.[5] The Fifth District rejected this argument, holding that it made no difference under the common law whether nursing home employees reported neglect to their supervisors or to the Department of Public Health. The common law provided a remedy for both.[6]

With the enactment of the Illinois Whistleblower Act,[7] however, it appeared that employees like Shores could lose their protection against retaliatory discharge. The common law tort of retaliatory discharge encompasses both internal and external whistleblower claims.[8]

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1. *See* Shores v. Senior Manor Nursing Ctr., 518 N.E.2d 471, 472 (Ill. App. Ct. 1988).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 475.
6. *Id.*
7. 740 ILL. COMP. STAT. 174/1-35 (2004).
8. Illinois defines "whistleblowing" as "the reporting of illegal or improper conduct." Sutherland v. Norfolk S. Ry., 826 N.E.2d 1021, 1026 (Ill. App. Ct. 2005). Illinois courts have recognized a cause of action for retaliatory discharge "in only two situations: (1) where the discharge stems from exercising rights pursuant to the Worker's Compensation Act or (2) where the discharge is for 'whistleblowing' activities." *Id.* The whistleblowing category includes the "situation where a worker was fired for refusing to engage in conduct that violated public policy, as opposed to reporting an employer for violating the law." Stebbings v. Univ. of Chi., 726 N.E.2d 1136, 1141

Internal whistleblowers report information directly to someone within their organization.[9] External whistleblowers disclose information to a government or law enforcement agency,[10] the media,[11] or a regulatory authority.[12] Illinois courts found this broad protection necessary "to protect employees who urge enforcement of Illinois public policy."[13] This comprehensive protection was jeopardized when the Illinois Whistleblower Act took effect on January 1, 2004.[14] The Whistleblower Act only protects whistleblowers who disclose information to a "government or law enforcement agency" or "in a court, an administrative hearing, or before a legislative commission or committee."[15] In retaliatory discharge actions brought by internal whistleblowers, employer-defendants argued that the Whistleblower Act preempted the common law tort of retaliatory discharge and provided the exclusive remedy for all whistleblower claims.[16]

In *Callahan v. Edgewater Care & Rehabilitation Center*, the First District held that the Whistleblower Act did not repeal the common law cause of action for retaliatory discharge where individuals are fired "for reporting illegal or improper activity to someone other than a government or law enforcement official."[17] This Note argues that the Appellate Court correctly interpreted the law of preemption and that the decision is sound in terms of public policy.[18] Part II discusses the tort of retaliatory discharge, compares the tort to the Illinois Whistleblower Act, and examines prior case law addressing the pre-

(Ill. App. Ct. 2000) (citing Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372, 377 (Ill. 1985), discussed *infra* notes 42–44 and accompanying text). This Note focuses on the whistleblowing prong of the tort of retaliatory discharge.

9. Elletta Sangrey Callahan et al., *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. INT'L L. 879, 890 (2004); Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 151 (1994); Michael Delikat & Jill L. Rosenberg, *Understanding Developments in Whistleblower Law 2 Years After Sarbanes-Oxley, Defending Whistleblower Claims Under the Sarbanes Oxley Act*, 718 PRACTISING L. INST. 9, 28 (2005).

10. Callahan et al., *supra* note 9, at 890.

11. Callahan & Dworkin, *supra* note 9, at 151.

12. Delikat & Rosenberg, *supra* note 9, at 32.

13. Lanning v. Morris Mobile Meals, Inc., 720 N.E.2d 1128, 1130 (Ill. App. Ct. 1999).

14. 740 ILL. COMP. STAT. 174/1–35 (2004).

15. 740 ILL. COMP. STAT. 174/15 (2004).

16. *See, e.g.*, Thomas v. Guardsmark, L.L.C., 487 F.3d 531, 535 (7th Cir. 2007); Krum v. Chi. Nat'l League Ball Club, Inc., 851 N.E.2d 621, 624 (Ill. App. Ct. 2006).

17. Callahan v. Edgewater Care & Rehab. Ctr., No. 1-06-3178, 2007 WL 1932736, at *1–2 (Ill. App. Ct. July 3, 2007).

18. Originally, this Note urged the First District to decide that the Whistleblower Act does not preempt retaliatory discharge. Because *Callahan* was decided while this Note was being prepared for publication, it will explain why *Callahan* was well-reasoned and illustrate how this outcome will protect Illinois public policy.

emption issue.[19] Part III discusses the *Callahan* decision.[20] Part IV demonstrates that, based on the criteria for determining common law preemption questions, the *Callahan* court correctly held that the Whistleblower Act does not preempt retaliatory discharge claims brought by internal whistleblowers.[21] Part V illustrates that preserving a cause of action for whistleblowers who do not report to a government or law enforcement agency is vital to enforcing Illinois public policy.[22] Part VI concludes that *Callahan*'s holding was correct, because the legislature did not intend to deprive a large class of whistleblowers of their remedy.[23]

II. BACKGROUND

To determine the status of whistleblower protection in Illinois, one must first examine the development of the common law tort of retaliatory discharge.[24] Furthermore, an analysis of the similarities and differences between the tort and the Whistleblower Act demonstrates how both remedies may coexist.[25] This Part examines several illustrative Whistleblower Act cases decided prior to *Callahan*.[26]

A. The Common Law Tort of Retaliatory Discharge

In *Kelsay v. Motorola, Inc.*, the Illinois Supreme Court first recognized a cause of action for retaliatory discharge.[27] There, an employee was fired for exercising her rights under the Workers' Compensation Act.[28] The *Kelsay* court held that a remedy for retaliatory discharge must exist in order to implement the Workers' Compensation Act.[29]

Three years later, in *Palmateer v. International Harvester Co.*, the Illinois Supreme Court further defined the scope of the tort.[30] In *Palmateer*, an employee was fired for reporting a co-worker's illegal conduct to the police.[31] The court extended the tort of retaliatory discharge, reasoning that this extension was necessary to protect public

19. *See infra* notes 24–102 and accompanying text.
20. *See infra* notes 103–118 and accompanying text.
21. *See infra* notes 119–210 and accompanying text.
22. *See infra* notes 211–243 and accompanying text.
23. *See infra* notes 244–245 and accompanying text.
24. *See infra* notes 27–63 and accompanying text.
25. *See infra* notes 64–72 and accompanying text.
26. *See infra* notes 73–102 and accompanying text.
27. Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978).
28. *Id.* at 355.
29. *Id.* at 357.
30. Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 877 (Ill. 1981).
31. *Id.*

policy.[32] The court found that the tort of retaliatory discharge was an exception to the employment at-will doctrine.[33] It noted that this exception is based on the rule that a contract cannot incorporate "rights and obligations" that are contrary to public policy.[34] The court stated that "all that is required [to state a cause of action for retaliatory discharge] is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy."[35] Further, the court found that, where employees report criminal activity, public policy favors "citizen crime-fighters."[36]

After *Palmateer*, Illinois courts attempted to determine which retaliatory discharge actions were supported by public policy. In *Petrik v. Monarch Printing Corp.*, the First District first addressed whether the tort of retaliatory discharge protects internal whistleblowers.[37] In *Petrik*, Monarch Printing Company fired its vice president after he reported suspicions of illegal conduct within the company.[38] The trial court dismissed Petrik's retaliatory discharge claim, stating that, because Petrik disclosed his suspicions of illegal conduct to his employer rather than to public officials, he did not state a claim that affected a matter of public policy.[39] The First District disagreed with the trial

32. *Id.* at 878–81. "The foundation of the tort of retaliatory discharge lies in the protection of public policy." *Id.* at 880.

33. *Id.* at 878 (citing Pleasure Driveway & Park Dist. v. Jones, 367 N.E.2d 111, 117 (Ill. App. Ct. 1977)). The employment at-will doctrine is "the rule that an employment contract of unspecified duration is terminable at the will of either the employer or the employee. According to this rule, an employee could quit or be fired at any time, with or without cause, and no liability would arise for the termination." Petrik v. Monarch Printing Corp., 444 N.E.2d 588, 590 (Ill. App. Ct. 1982).

34. *Palmateer*, 421 N.E.2d at 878 (citing People ex rel. Peabody v. Chi. Gas Trust Co., 22 N.E. 798 (Ill. 1889)). The court in *Stebbings v. University of Chicago*, 726 N.E.2d 1136 (Ill. App. Ct. 2000), stated that the law of retaliatory discharge "aims to strike a proper balance among employers' interests in operating their businesses efficiently, employees' interests in earning a livelihood and society's interests in seeing its public policies carried out." *Id.* at 1140.

35. *Palmateer*, 421 N.E.2d at 881. The court stated that although "there is no precise definition of [public policy] . . . it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions." *Id.* at 878 (citing Smith v. Bd. of Educ., 89 N.E.2d 893, 896 (Ill. 1950)). Furthermore, the court explained that "there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal," but that the "matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort [of retaliatory discharge] will be allowed." *Id.* at 878–79.

36. *Id.* at 880. The *Palmateer* court made it clear that law enforcement could only be effective if citizens were free to report what they believed to be illegal activity without fear of being discharged. *Id.* (citing Joiner v. Benton Cmty. Bank, 411 N.E.2d 229, 231 (Ill. 1980)).

37. *Petrik*, 444 N.E.2d at 590.

38. *Id.* at 589.

39. *Id.* at 590.

court's assessment that the situation involved a "mere internal dispute," stating that "the public policy considerations that underlie *Palmateer* also support Petrik's conduct."[40] In short, the court found that Petrik stated a cause of action for retaliatory discharge.[41]

In *Wheeler v. Caterpillar Tractor Co.*, the Illinois Supreme Court found that an internal disclosure did not bar a retaliatory discharge claim.[42] Specifically, the court recognized a cause of action for an employee who was discharged for refusing to work in hazardous conditions that violated a "clearly mandated public policy."[43] The Supreme Court stated the following:

> We do not agree with the appellate court that the question whether the facts as alleged involved public policy, or a matter of private concern, depended upon whether a complaint was made to the regulatory authorities. The legislation and the regulations declared the public policy, and the existence of that public policy did not depend upon whether plaintiff had communicated a complaint to the Nuclear Regulatory Commission or whether its investigation preceded or followed that compliant.[44]

Similarly, in *Johnson v. World Color Press, Inc.*, the Fifth District extended the tort of retaliatory discharge to claims by internal whistleblowers.[45] Recognizing Johnson's cause of action for retaliatory discharge, the court stated that his failure to report the suspected violations to law enforcement officials was inconsequential.[46]

In *Zaniecki v. P.A. Bergner & Co. of Illinois*, the Third District took an opposing view by refusing to recognize a cause of action for retaliatory discharge where an employee made an internal disclosure.[47] In that case, a store supervisor reported what he perceived to be his manager's criminal activity to the store's chief security officer.[48] The employee claimed that he was fired in retaliation and sued for retaliatory discharge.[49] The court dismissed the claim, stating that "[n]o such public policy is immediately evident in the relationship between an employee and his superiors."[50] In other words, the court found that

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40. *Id.* at 592.
41. *Id.* at 593.
42. Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372, 376 (Ill. 1985).
43. *Id.* at 377.
44. *Id.* at 376.
45. Johnson v. World Color Press, Inc., 498 N.E.2d 575, 579–80 (Ill. App. Ct. 1986).
46. *Id.* at 578–79.
47. Zaniecki v. P.A. Bergner & Co., 493 N.E.2d 419, 421–22 (Ill. App. Ct. 1986).
48. *Id.* at 420.
49. *Id.*
50. *Id.* at 421. The *Zaniecki* court apparently reconciled its decision with *Wheeler* by stating, "[W]e find *Petrick* to be an unwarranted extension of *Palmateer* insofar as the critical element of public authority involvement is lacking and there is no state or federal statute, constitution, or

firing an employee for reporting illegal conduct to law enforcement officials violates a clear public policy.[51] In contrast, the court considered a disclosure to a person within the organization to be a private concern.[52]

In *Lanning v. Morris Mobile Meals, Inc.*, the Third District reconsidered whether failure to report a violation to a public official precludes a retaliatory discharge claim.[53] There, a food service employee reported to her supervisor that her co-workers were endangering customers' health by leaving food unrefrigerated for extended periods of time.[54] Lanning believed that these incidents constituted health code violations.[55] Lanning was fired, and she subsequently sued for retaliatory discharge.[56]

The *Lanning* court set forth the elements of a prima facie claim for retaliatory discharge, originally stated in *Palmateer*: "To succeed on a claim of retaliatory discharge, a plaintiff must show 'that she was (1) discharged; (2) in retaliation for her activities; and (3) that the discharge violates a clear mandate of public policy.'"[57] The court rejected the additional obligation imposed by *Zaniecki* requiring an employee to make a complaint to a public official.[58] The court noted that the result in *Zaniecki* was "in direct conflict with the [F]irst and [F]ifth [d]istricts."[59] Specifically, the court stated that *Palmateer* applied equally to cases involving internal whistleblowers, because, like complaints made to public officials, internal reports can ultimately correct behavior that violates public policy.[60] In some cases, the court

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case law which would arguably protect plaintiff's activities." *Id.* at 422. The First District later clarified what type of law to which a plaintiff must point to support a retaliatory discharge claim in *Stebbings*. 726 N.E.2d 1136, 1141 (Ill. App. Ct. 2000). There, the court stated that "[i]t is not necessary for a plaintiff attempting to state a claim for retaliatory discharge to cite to a statute making his or her firing illegal." *Id.* The plaintiff, however, must cite law, "be it a statute, constitutional provision or judicial decision," that "enunciate[s] a public policy that plainly covers the situation to which the plaintiff objects." *Id.*

51. *Zaniecki*, 493 N.E.2d at 421.

52. *Id.* at 421–22 (stating that although there may be good reasons to protect internal whistleblowers, *Palmateer* did not support extending retaliatory discharge to internal whistleblower situations).

53. Lanning v. Morris Mobile Meals, Inc., 720 N.E.2d 1128, 1129 (Ill. App. Ct. 1999).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* (quoting Hinthorn v. Roland's of Bloomington, 519 N.E.2d 909, 911 (Ill. 1988)).

58. *Id.*

59. *Lanning*, 720 N.E 2d at 1130 (citing Johnson v. World Color Press Inc., 498 N.E.2d 575 (Ill. App. Ct. 1986); Petrik v. Monarch Printing Corp., 444 N.E.2d 588 (Ill. App. Ct. 1982)).

60. *Id.* ("Since the thrust of *Palmateer* was to protect employees who urge enforcement of Illinois public policy . . . *Johnson* and *Petrik* reasoned that employees who expose violations deserve protection, regardless of whether they choose internal or external processes.").

noted, employers can handle wrongdoing more effectively than regulatory agencies. Thus, it makes sense to encourage employees to report possible misconduct to their employers.[61]

By allowing internal whistleblowers to state a retaliatory discharge claim, the *Lanning* court articulated the tort's central goal: "[e]mployees contemplating a complaint must not be intimidated by fear of retaliation . . . *whenever* the health, safety or welfare of the public is involved."[62] *Lanning* illustrates the preference of Illinois courts to include causes of action by internal whistleblowers in the tort of retaliatory discharge.[63]

B. The Illinois Whistleblower Act

On January 1, 2004, the Illinois Whistleblower Act went into effect.[64] Although each addresses wrongful termination, the Whistleblower Act is both broader and narrower than the tort of retaliatory discharge. Specifically, the Act is broader than the tort in four ways. First, the Act includes independent contractors in its definition of "employees."[65] Second, the Act prohibits employers from adopting rules that prevent employees from making disclosures protected by the Act.[66] Third, the Act provides that reinstatement, back pay with interest, and litigation costs and attorney's fees must be

61. *Id.* at 1131. ("Employers are undoubtedly in the best position to rectify problems with food preparation, handling and storage. Failure to protect an employee who raises health concerns, even to his immediate supervisor, may stifle the willingness of other employees to complain of similar problems. To protect the public, this result must be avoided.").

62. *Id.* at 1130–31 (emphasis added).

63. *See also* Belline v. K-Mart Corp., 940 F.2d 184, 187–88 (7th Cir. 1991) (stating that an internal complaint is sufficient to state a cause of action); Parr v. Triplett Corp., 727 F. Supp. 1163, 1166 (N.D. Ill. 1989) ("[A] clear mandate of public policy is violated when an employee is discharged for reporting criminal activity to his employer."); Hicks v. Clyde Fed. Sav. & Loan Ass'n., 722 F. Supp. 501, 504 (N.D. Ill. 1989) (holding that "well-intentioned employees" should not be penalized for attempting "to rectify wrongdoing internally prior to taking public action"); Stebbings v. Univ. of Chi., 726 N.E.2d 1136, 1145 (Ill. App. Ct. 2000) ("[R]eporting to superiors in a company as well as to outside authorities is protected."); Fragassi v. Neiburger, 646 N.E.2d 315 (Ill. App. Ct. 1995) (implicitly allowing an internal complaint); Shores v. Senior Manor Nursing Ctr., 518 N.E.2d 471, 476 (Ill. App. Ct. 1988) (stating that a nurse's complaint to a nursing home administrator was sufficient to state a retaliatory discharge claim).

64. 740 ILL. COMP. STAT. 174/1–35 (2004).

65. *Compare* 740 ILL. COMP. STAT. 174/5 (2004) ("'Employee' means any individual who is employed on a full-time, part-time, or contractual basis by an employer."), *with* New Horizons Elecs. Mktg., Inc. v. Clarion Corp., 561 N.E.2d 283, 285 (Ill. App. Ct. 1990) (holding that an independent contractor cannot bring a retaliatory discharge claim).

66. 740 ILL. COMP. STAT. 174/10 (2004) ("An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency if the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation.").

awarded to successful plaintiffs.[67] Finally, in addition to providing grounds for a civil claim, a violation of the Act constitutes a Class A misdemeanor.[68]

The Whistleblower Act is narrower than the tort of retaliatory discharge in two significant ways. First, the Act only protects disclosures made by employees who have "reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation."[69] This departs from the common law, which protects disclosures in all situations implicating public policy matters.[70] Second, the Act states that "[a]n employer may not retaliate against an employee for disclosing information to a government or law enforcement agency" or for disclosing information "in a court, an administrative hearing, or before a legislative commission or committee."[71] As illustrated above, common law courts explicitly rejected the requirement that an employee must disclose to a government or law enforcement agency.[72]

C. *Cases Addressing the Whistleblower Act*

The Illinois Whistleblower Act fails to address its effect on the tort of retaliatory discharge. This failure prompted employers to defend against internal whistleblower claims by arguing that the Act preempted the tort. In *Krum v. Chicago National League Ball Club, Inc.*, a trial court held that the Whistleblower Act preempted retaliatory discharge.[73] The First District, however, dismissed the case on a different ground.[74] Plaintiff, Sandy Krum, an assistant athletic trainer for the Chicago Cubs, had signed a one-year employment contract.[75] On August 16, 2004, Krum met with the Cubs's general manager.[76] At that meeting, Krum discussed other employees' misconduct, including that the Cubs's head athletic trainer lacked a license required under

67. 740 ILL. COMP. STAT. 174/30 (2004).

68. 740 ILL. COMP. STAT. 174/25 (2004).

69. 740 ILL. COMP. STAT. 174/15 (2004). Like the cause of action recognized in *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372 (Ill. 1985), the Whistleblower Act also prohibits an employer from retaliating against an employee "for refusing to participate in an activity that would result in a violation of a State or federal law, rule, or regulation." 740 ILL. COMP. STAT. 174/20 (2004).

70. *See* Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 881 (Ill. 1981).

71. 740 ILL. COMP. STAT. 174/15 (2004).

72. *See supra* notes 27–63.

73. Krum v. Chi. Nat'l League Ball Club, Inc., 851 N.E.2d 621, 624 (Ill. App. Ct. 2006).

74. *Id.*

75. *Id.* at 623.

76. *Id.*

Illinois law.[77] Krum was terminated shortly thereafter,[78] and he sued the Cubs for wrongful termination.[79] The First District dismissed the case, stating that "the failure to renew an employment contract for a fixed duration could not serve as a basis for a retaliatory discharge claim." The court did not reach the preemption issue.[80]

Similarly, the Seventh Circuit did not decide the preemption question in *Thomas v. Guardsmark, L.L.C.*, even though it was the only issue on appeal.[81] In that case, the plaintiff worked as a security guard for Guardsmark.[82] Guardsmark fired the plaintiff shortly after he appeared in a televised investigative report about the lack of regulation of security guards in Illinois.[83] In his interview, the plaintiff stated that a fellow security guard had bragged about having a felony criminal record.[84] The plaintiff was suspended and subsequently fired for his report.[85] The plaintiff sued for retaliatory discharge, and a jury found in his favor.[86]

On appeal, Guardsmark argued that the Whistleblower Act codified and preempted retaliatory discharge and that the plaintiff did not meet the elements of the Act, because he did not report his claim to a "government or law enforcement agency."[87] The plaintiff contended that the statutory requirements of the Whistleblower Act were irrelevant, because he brought suit under retaliatory discharge.[88] Because the plaintiff filed suit more than a year before the Whistleblower Act went into effect, the Seventh Circuit held that the statute did not apply retroactively and, thus, never reached the preemption issue.[89]

Similarly, *Sutherland v. Norfolk Southern Railway Co.* implicated but did not decide the preemption issue.[90] In that case, the plaintiff alleged that his former employer had fired him for reporting an injury

77. *Id.*
78. *Id.*
79. *Krum*, 851 N.E.2d at 623.
80. *Id.* at 624–25.
81. 487 F.3d 531, 535 (7th Cir. 2007).
82. *Id.* at 533.
83. *Id.*
84. *Id.* That case illustrates another major type of whistleblowing: disclosures made to the media. *See* Callahan & Dworkin, *supra* note 9, at 151. Callahan and Dworkin discuss the legal system's "general disinclination to extend recourse to media whistleblowers [, which is] reinforced by the perception that reporters are used by less 'worthy' whistleblowers: those with groundless claims, those who are vengeful, and those with other ignoble motives." *Id.*
85. *Guardsmark*, 487 F.3d at 533.
86. *Id.*
87. *Id.* at 536.
88. *Id.* at 533.
89. *Id.* at 536.
90. Sutherland v. Norfolk S. Ry., 826 N.E.2d 1021 (Ill. App. Ct. 2005).

that plaintiff had suffered on the job and to prevent him from filing a claim under the Federal Employers' Liability Act (FELA) and the Federal Boiler Inspection Act (FBIA).[91] The *Sutherland* court began its analysis of the retaliatory discharge claim by summarizing the history of the tort.[92] In a footnote, the court stated that "[t]he 'whistleblower' cause of action has since been codified in the Whistleblower Act."[93]

Employer-defendants in retaliatory discharge suits seized upon this language, arguing that it proved that the Whistleblower Act preempted the common law claim.[94] In *Jones v. Dew*, Jones complained to her supervisors about rat infestation at her workplace.[95] After Jones's supervisors ignored her complaints, the infestation worsened.[96] Consequently, Jones suffered "mental and physical health problems," which required a medical leave.[97] Before Jones's doctor approved her return to work, Habilitative Services, Inc. terminated her employment.[98] The trial court held that "the Act codifies, and therefore preempts, any common law retaliatory discharge claim based on whistle-blowing activities."[99] The court based its reasoning almost entirely on the *Sutherland* footnote, which stated that the Act "codified" the tort.[100] Because Jones complained to her supervisors rather than to a law enforcement or government agency, the court found that she did not fall within the protections of the Whistleblower Act and dismissed her claim.[101] Shortly after *Jones*, in *Riedlinger v. Hudson Respiratory Care, Inc.*, a trial court relied on the *Jones* analysis to hold that a worker could not state a claim under the Whistleblower Act, because he had complained of mold contamination in the employer's facility to the employer rather than to the Food and Drug Administration.[102]

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91. *Id.* at 1023.

92. *Id.* at 1025–27.

93. *Id.* at 1025 n.4. *Accord* Bajalo v. Nw. Univ., 860 N.E. 2d 556, 581 n.1 (Ill. App. Ct. 2006) ("The 'whistleblower' cause of action has been codified in the Illinois Whistleblower Act.").

94. *See, e.g.*, Defendant's Memorandum of Law in Support of its Motion to Dismiss at 4, Callahan v. Edgewater Care & Rehab. Ctr., No. 05-L-006795 (Cook County Ill. Cir. Ct. July 13, 2006).

95. No. 06-C-3577, 2006 WL 3718053, at *1 (N.D. Ill. Dec. 13, 2006).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at *3.

101. *Jones*, 2006 WL 3718053, at *3. *See infra* notes 203–209 and accompanying text for a discussion of the *Jones* analysis.

102. Riedlinger v. Hudson Respiratory Care, Inc., 478 F. Supp. 2d 1051, 1055 (N.D. Ill. 2007).

III. SUBJECT OPINION

In *Callahan*, the First District squarely addressed whether the Whistleblower Act preempted retaliatory discharge.[103] Melissa Callahan worked as an admissions clerk at a nursing home operated by Edgewater Care & Rehabilitation Center.[104] Callahan became aware that a patient at the facility was being held against her will, which Callahan believed violated the Nursing Home Care Act and the Illinois Administrative Code.[105] After reporting this suspicion to her supervisor and the nursing home administrator, Callahan was discharged.[106] Callahan sought relief under the common law, but the trial court dismissed her action.[107] The court ruled that the Whistleblower Act preempted the common law tort and found that Callahan had not stated a claim under the Act, because she did not report to government or law enforcement officials.[108] The First District reversed the trial court's judgment, holding that the Act did not preempt the common law cause of action.[109]

The *Callahan* court rejected the preemption argument for several reasons. First, the court pointed out that Edgewater Care relied heavily upon *Jones* and *Riedlinger*, which rested their holdings on the *Sutherland* footnote stating that "the 'whistleblower' cause of action has since been codified in the Whistleblower Act."[110] The court rejected the *Jones* and *Riedlinger* holdings, because neither court used the preemption doctrine to interpret the issue.[111] Second, the court noted that, because the Whistleblower Act does not expressly preempt any common law remedy, the only way the Act could repeal the tort was by implication.[112] The court stated that the rule on preemption by implication "has long been that a statute will not be construed as taking away a common-law right . . . unless the pre-existing right is so repugnant to the statute that the survival of the common-law right would in effect deprive the statute of its efficacy and render its provisions nugatory."[113]

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103. Callahan v. Edgewater Care & Rehab. Ctr., No. 1-06-3178, 2007 WL 1932736, at *1–2 (Ill. App. Ct. July 3, 2007).

104. *Id.* at *1.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Callahan*, 2007 WL 1932736, at *4.

110. *Id.* at *2.

111. *Id.* at *3.

112. *Id.*

113. *Id.*

Additionally, the court found that there was no conflict between the Whistleblower Act and the common law rights of individuals who report illegal or improper conduct to their supervisors.[114] The court reasoned that the statute's language and legislative history did not demonstrate intent to repeal the common law remedy for internal whistleblowers.[115] Furthermore, the court presumed that the legislature knew that the common law remedy existed and stated that the legislature could have easily repealed the common law remedy.[116] Finally, the court noted differences between the Whistleblower Act and the common law, but stated that these differences alone did not create "any irreconcilable conflicts with the persistence of a common-law remedy."[117] In short, the court held that the Whistleblower Act does not preempt the common law tort of retaliatory discharge for internal whistleblowers and allowed Callahan to proceed on her common law claim.[118]

IV. ANALYSIS

The First District reached the correct result in *Callahan*, because it based its holding on the preemption doctrine. This Part elaborates upon *Callahan*'s reasoning and explains why the court's analysis was sound. Section A shows that the Illinois legislature neither expressly nor impliedly replaced the common law cause of action with the Whistleblower Act.[119] Section B demonstrates that decisions prior to *Callahan* discussing whether the Whistleblower Act preempted retaliatory discharge failed to apply the law of preemption.[120]

A. Preemption Doctrine

While there are no set criteria for deciding whether a statute preempts or repeals the common law, case law shows that some indi-

114. *Id.* The court did not decide whether the common law cause of action remains intact for individuals who report to a government or law enforcement agency or for individuals who refuse to work in conditions that contravene public policy. *Id.* Because the Whistleblower Act affords these individuals "far greater relief than the common law," this Note does not address this issue. *Id.* The reasoning in *Callahan*, however, should apply to other types of whistleblowers, such as media whistleblowers, who are not protected under the Whistleblower Act, but have historically been afforded relief under the common law.

115. *Callahan*, 2007 WL 1932736, at *3.

116. *Id.*

117. *Id.* ("The fact that individuals discharged in retaliation for reporting illegal activities to their superiors have no right of action under the Whistleblower Act does not compel the conclusion that they have no right of action at all.").

118. *Id.* at *4.

119. *See infra* notes 121–197 and accompanying text.

120. *See infra* notes 198–210 and accompanying text.

cation of legislative intent is required.[121] The Illinois legislature did not explicitly repeal the common law tort of retaliatory discharge when it passed the Illinois Whistleblower Act.[122] Furthermore, the doctrine of implied preemption does not apply.[123] Finally, the legislative history of the Whistleblower Act shows that the legislature sought to protect whistleblowers and did not contemplate cutting back existing common law protection.[124]

1. The Legislature Did Not Expressly Repeal the Common Law Tort of Retaliatory Discharge

Illinois courts generally require an express statement of legislative intent before finding that a statute preempts a common law right or duty.[125] The Illinois Supreme Court has stated that "[i]t is a familiar rule of construction that a statute is not to be construed as changing the common law farther than its terms expressly declare."[126] As noted in *Callahan*, the Illinois Whistleblower Act is devoid of language indicating legislative intent to preempt the tort of retaliatory discharge. Thus, the First District correctly preserved the common law tort for internal whistleblowers.[127]

If the legislature had intended to preempt the tort of retaliatory discharge, it would have done so explicitly.[128] Many statutes include language indicating that they are meant to replace former common law actions.[129] As the court in *Skilling v. Skilling* stated, "[o]ccasionally, the legislature enacts statutes that are intended to replace actions that existed at common law or equity and to provide the

121. *See, e.g.*, Advincula v. United Blood Servs., 678 N.E.2d 1009, 1017 (Ill. 1996) (citing People v. Lowe, 606 N.E.2d 1167, 1170 (Ill. 1992)) ("The primary rule of statutory construction is to give effect to the true intent of the legislature.").

122. *See infra* notes 125–134 and accompanying text.

123. *See infra* notes 135–191 and accompanying text.

124. *See infra* notes 192–197 and accompanying text.

125. *See* Cadwallader v. Harris, 76 Ill. 370, 370 (1875) (stating the general rule that "statutes are not to be presumed to alter the common law farther than they expressly declare").

126. Canadian Bank of Commerce v. McCrea, 106 Ill. 281, 289 (1882) (citing *Cadwallader*, 76 Ill. at 370).

127. Callahan v. Edgewater Care & Rehab. Ctr., No. 1-06-3178, 2007 WL 1932736, at *3–4 (Ill. App. Ct. July 3, 2007).

128. *Id.*; *see also* Nickels v. Burnett, 798 N.E.2d 817, 823 (Ill. App. Ct. 2003) ("Where the legislature intends to preempt the subject matter at common law through a statutory enactment, it will clearly specify that intent.").

129. The *Nickels*'s court cited several statutes containing preemptive language, including the Workers' Compensation Act, 820 ILL. COMP. STAT. 305/5 (2004), and the Dramshop Act, 235 ILL. COMP. STAT. 5/6–21 (2004). *Nickels*, 798 N.E.2d at 823.

exclusive means for the future enforcement of existing rights."[130] The Workers' Compensation Act illustrates preemptive language:

> *No common law* or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, *other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act*, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.[131]

Another example of explicit legislative intent to preempt occurs in the Right of Publicity Act:

> The rights and remedies provided for in this Act are meant to *supplant those available under the common law* as of the effective date of this Act, but do not affect an individual's common law rights as they existed before the effective date of this Act. Except for the common law right of publicity, the rights and remedies provided under this Act are supplemental to any other rights and remedies provided by law including, but not limited to, the common law right of privacy.[132]

The legislature could have easily drafted a provision that explained the Whistleblower Act's effect on other laws.[133] Yet the Act does not mention the common law tort of retaliatory discharge.[134] Because the legislature did not expressly preempt the common law, the *Callahan* court was correct to preserve that remedy for internal whistleblowers.

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130. 432 N.E.2d 881, 887 (Ill. App. Ct. 1982) (noting that former section 72 of the Civil Practice Act "abolished all actions that existed in common law or equity for post-judgment relief and in their stead established an exclusive means for acquiring such relief").

131. 820 ILL. COMP. STAT. 305/5(a) (2004) (emphasis added).

132. 765 ILL. COMP. STAT. 1075/60 (2004) (emphasis added).

133. Callahan v. Edgewater Care & Rehab. Ctr., No. 1-06-3178, 2007 WL 1932736, at *3 (Ill. App. Ct. July 3, 2007); *see also* Reeves v. Eckles, 222 N.E.2d 530, 531 (Ill. App. Ct. 1966) ("The legislature is presumed to have known of the common law action and had they intended to repeal such action, it would have been a simple matter for them to have done so."). In *Callahan*, the defendant argued that the legislature just as easily could have drafted a provision in the statute explaining that it does not repeal the common law remedies. Defendant's Reply Brief in Further Support of its Motion to Dismiss at 4, Callahan v. Edgewater Care & Rehab. Ctr., No. 05-L-6795 (Cook County Ill. Cir. Ct. Aug. 24, 2006). The defendant cited *Nelson v. National Car Rental System, Inc.*, No. 05-00374-JMS/LEK, 2006 WL 1814341, at *4–5 (D. Haw. June 30, 2006), in which the court allowed the plaintiff to proceed on a retaliatory discharge theory since the Hawaii Whistleblower Protection Act expressly stated that it did not limit common law rights or remedies on the subject. *Id.* It is true that such a clear expression of intent would have ended the matter. Illinois law, however, does not require the legislature to express its intent to leave the common law unaffected. Conversely, Illinois courts presume that the statute adopts the common law, unless otherwise specified. *See supra* notes 125–126 and accompanying text.

134. *See* 740 ILL. COMP. STAT. 174/1-35 (2004).

2. *The Legislature Did Not Impliedly Repeal the Common Law Tort of Retaliatory Discharge*

Because the legislature did not expressly declare its intent to preempt retaliatory discharge, the *Callahan* court had to determine whether implied preemption applied.[135] The law does not favor implied preemption.[136] The doctrine generally arises only where the statute in question predated the common law claim,[137] where there is a conflict between the statute and the common law claim,[138] or where the statute is so extensive as to render the common law claim meritless.[139] None of these situations arises in the context of the Whistleblower Act. Thus, the legislature did not impliedly repeal the Act.

a. The Illinois Whistleblower Act Did Not Predate the Common Law Tort of Retaliatory Discharge

Debolt v. Mutual of Omaha illustrates an Act that predates the common law.[140] In *Debolt*, an insured brought a common law action against his insurance company to recover punitive damages for a breach of good faith and fair dealing.[141] The court recognized an expansion in the field of torts to situations involving contract claims, but ultimately declined to recognize the common law action, because the legislature had already provided a remedy for insureds who deal with insurance companies that are "unreasonable and vexatious."[142] The *Debolt* court refused to recognize a new common law claim where a statutory remedy already exists.[143] *Debolt* is inapposite to whether

135. Callahan v. Edgewater Care & Rehab. Ctr., No. 1-06-3178, 2007 WL 1932736, at *3 (Ill. App. Ct. July 3, 2007); *see also* Cadwallader v. Harris, 76 Ill. 370, 372 (1875) (indicating that courts may also construe a statute "liberally according to its fair intent").

136. *Callahan*, 2007 WL 1932736, at *3 (citing Shores v. Senior Manor Nursing Ctr., 518 N.E.2d 471 (Ill. App. Ct. 1988)); *see also Reeves*, 222 N.E.2d at 531 ("As a general rule, the repeal of the common law by implication is not favored."); Walter v. N. Ins. Co., 18 N.E.2d 906, 908 (Ill. 1939) ("It is a familiar rule of construction that statutes in derogation of the common law cannot be construed as changing the common law beyond what is expressed by the words of such statute or is necessarily implied from what is expressed.").

137. *See infra* notes 140–157 and accompanying text.

138. *See infra* notes 158–169 and accompanying text.

139. *See infra* notes 170–191 and accompanying text.

140. Debolt v. Mut. of Omaha, 371 N.E.2d 373 (Ill. App. Ct. 1978).

141. *Id.* at 374.

142. *Id.* at 377 ("Where the legislature has provided a remedy on a subject matter we are not only loath but in addition harbor serious doubts as to the desirability and wisdom of implementing or expanding the legislative remedy by judicial decree.").

143. Jackson v. Callan Publ'g, Inc., 826 N.E.2d 413, 424–25 (Ill. App. Ct. 2005) ("Defendants rely on a line of cases that does not deal specifically with preemption but, rather, addresses the

the Illinois Whistleblower Act preempts the common law, because the tort of retaliatory discharge existed long before the statutory remedy.

Where a statute does not predate the common law claim, express language indicating intent to preempt the common law is essential.[144] In *Jackson v. Callan Publishing, Inc.*, the defendants argued that the plaintiffs were precluded from bringing a common law claim for breach of fiduciary duty, because the wrongs asserted also violated the Illinois Solicitation for Charity Act.[145] Specifically, the court noted that the common law claim predated the Act "by centuries" and stated the following:

> [W]here the legislature enacts a statute establishing a means to enforce *existing rights*, there is no presumption that the statutory means is intended either as an exclusive remedy or to abolish other actions at common law or equity; the legislature usually must express or manifest the intent to give the statute such a preemptive effect.[146]

The court held that the Act did not preempt the common law claim.

Similarly, in *Kosicki v. S.A. Healy Co.*, the plaintiffs brought a negligence action against the defendant, a contractor for the sanitary district of Chicago.[147] The Sanitary District Act "furnished redress for property owners who claimed damages arising from the construction of a legally authorized drain, sewer or other improvement by the sanitary district."[148] The Act did not provide a remedy against independent contractors. The defendant argued that it was immune from suit, because "the remedy provided by the statute, being complete and adequate, was exclusive."[149] The Illinois Supreme Court held that the Act was "cumulative and additional" to the common law cause of action and not "exclusive," thus preserving the plaintiff's ability to bring a negligence claim against the contractor.[150] The court stated that:

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question of whether a novel common law tort action should be recognized to complement or expand a statutory remedy for the wrong complained of.").

144. *Id.*

145. *Id.* at 424.

146. *Id.* at 425 (emphasis in original) (citing Sawko v. Dominion Plaza One Condo. Ass'n No. 1-A, 578 N.E.2d 621, 624–25 (Ill. App. Ct. 1991) (finding that the General Not For Profit Corporations Act of 1986 did not provide the exclusive means by which the plaintiff could enjoin a condominium association's *ultra vires* acts)). *C.f.* Skilling v. Skilling, 432 N.E.2d 881, 887 (Ill. App. Ct. 1982) ("Nothing in section 505(a) or the entire [Illinois Marriage and Dissolution of Marriage Act] indicates that the legislature intended to abolish all actions in equity that existed for child support before the statute was enacted. Thus, [the] petition for an original order of child support was a recognizable action in equity.").

147. Kosicki v. S.A. Healy Co., 44 N.E.2d 27, 28 (Ill. 1942).

148. *Id.*

149. *Id.*

150. *Id.* at 29.

> Where a statute creates a new right or imposes a new duty or liability, unknown to the common law, and at the same time gives a remedy for its enforcement, the remedy so prescribed is exclusive. Conversely, if no remedy is prescribed the right or liability may be enforced by the appropriate remedy already provided. *Where, however, a new remedy is given by statute, and there are no negative words or other provisions rendering it exclusive, it will be deemed to be cumulative only and not to take away prior remedies.*"[151]

The defendant in *Kosicki* argued that the Sanitary District Act created a liability that did not exist at common law.[152] The court rejected this argument, because, although the cause of action against the sanitary district was new, the common law claim of negligence was not.[153] The court stated that "[h]ad it been the intention of the legislature to exempt from the results of their negligence contractors engaged in work for a municipality, by limiting the right of the property owner who has suffered damage, appropriate language to accomplish this end would undoubtedly have been employed."[154]

Likewise, the Illinois Whistleblower Act did not create a liability that was "unknown at common law."[155] The tort of retaliatory discharge predates the Whistleblower Act by twenty-five years.[156] In addition, the legislature included no indication that the Act provided the exclusive remedy for all whistleblower claims.[157] Therefore, *Callahan* was correct in holding that the Whistleblower Act did not supplant existing common law remedies for internal whistleblowers.

b. The Illinois Whistleblower Act and the Tort of Retaliatory Discharge Can Coexist

A statute can coexist with the common law; *Reeves v. Eckles* is illustrative.[158] In *Reeves*, the plaintiff sought relief under a common law

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151. *Id.* (emphasis added) (citing 2 LEWIS, SUTHERLAND ON STATUTORY CONSTRUCTION § 720 (2d ed.)).

152. *Id.*

153. *Kosicki*, 44 N.E.2d at 29. *See also* Johnson v. Univ. of Chi. Hosps., 982 F.2d 230, 232 (7th Cir. 1992) (per curiam) (holding that the Emergency Medical Services Act, which "provide[d] remedies for violations of its provisions," did not preclude a claim under common law tort theories because the Act did not "constitute creation of a 'new tort;' rather, it is merely an application of the ancient action of trespass"); Nickels v. Burnett, 798 N.E.2d 817, 823 (Ill. App. Ct. 2003) ("Generally, 'where a statute applies to an area formerly covered by the common law, [the court] interpret[s] the statute as adopting the common law unless the General Assembly clearly and specifically expressed an intention to change the common law.'").

154. *Kosicki*, 44 N.E.2d at 29.

155. *Johnson*, 982 F.2d at 232.

156. *See supra* note 27 and accompanying text.

157. *See* 740 ILL. COMP. STAT. 174/1–35 (2004).

158. Reeves v. Eckles, 222 N.E.2d 530, 531 (Ill. App. Ct. 1966).

tort action for dog bite injuries.[159] A statutory action also provided recovery for such injuries.[160] The statute differed from the common law action in that it did not require the dog owner to be aware of the dog's dangerous proclivities.[161] The plaintiffs wanted to proceed under the common law, but the trial court held that the statutory remedy abolished the common law claim and provided the exclusive remedy.[162] The Second District disagreed, holding that the statute provided "an alternative remedy" and that the plaintiff could proceed under either the common law or the statute.[163] Elaborating on this principle, the court stated that "[i]t is only where there is a fair repugnance between the common law and the statute, and both cannot be carried into effect, that the common law must be considered as repealed by implication."[164]

The Illinois Whistleblower Act is analogous to the dog bite statute in *Reeves*. The pertinent part of the Whistleblower Act states:

> Retaliation for certain disclosures prohibited. (a) An employer may not retaliate against an employee who discloses information in a court, an administrative hearing, or before a legislative commission or committee, or in any other proceeding, where the employee has reasonable cause to believe that the information discloses a violation of a state or federal law, rule, or regulation. (b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation.[165]

Because there was no "fair repugnance" between the dog bite statute and the common law in *Reeves*, the provisions of the Whistleblower Act and the common law tort of retaliatory discharge do not conflict.[166] The Act simply provides an alternative remedy for individuals who make a disclosure before a court, administrator, or legislator or to a government or law enforcement agency. Plaintiffs should be able to proceed under either remedy, depending on the facts of their

159. *Id.* at 530.

160. *Id.* at 531.

161. *Id.*

162. *Id.* at 530.

163. *Id.* at 532.

164. *Reeves*, 222 N.E.2d at 531. *Accord* Scott v. Dreis & Krump Mfg. Co., 326 N.E.2d 74, 82 (Ill. App. Ct. 1975) ("[W]e are guided by the rule of construction that statutes should be construed with reference to the principles of the common law, and it will not be presumed that an innovation thereon was intended farther than is specified or clearly to be implied." (citing Reid v. Chi. Rys., 231 Ill. App. 58 (1923))).

165. 740 ILL. COMP. STAT. 174/15 (2004).

166. *See Reeves*, 222 N.E.2d at 531.

case.[167] Although the Act creates a remedy similar to the common law claim, the manner in which the statute differs from the common law indicates that the purpose of the statute was to expand the remedies available for particular types of whistleblowing activities, not to codify that area of law.[168] Therefore, as the *Callahan* court reasoned, the two claims may coexist.[169]

c. The Illinois Whistleblower Act is Not Comprehensive

Morris v. Ameritech Illinois illustrates complete preemption of the common law by a comprehensive statute.[170] In *Morris*, the court held that section 14–2 of the Criminal Code of 1961, which governed civil liability for eavesdropping, preempted a common law agency claim premised on eavesdropping by an agent.[171] The court reasoned that

167. *Id.* ("Either action is available depending upon the facts of the case and it cannot be fairly said that one remedy is contradictory to the other."). *Brandon v. Anesthesia & Pain Management Associates, Ltd.*, 277 F.3d 936 (7th Cir. 2002), illustrates the situation where the tort of retaliatory discharge will be allowed to coexist with an alternative statutory remedy. *Id.* at 943. In *Brandon*, the plaintiff brought a diversity suit against his former employer alleging retaliatory discharge under Illinois law. *Id.* at 940. The district court held that Brandon's claim failed, because the anti-retaliation provision of the Federal Claims Act (FCA) provided an alternative remedy. *Id.* at 941. The Seventh Circuit disagreed, pointing out that Illinois courts had "hinted in dicta that the claim *may* still be rejected if an adequate alternative remedy exists to vindicate the retaliatory discharge." *Id.* at 943 (emphasis in original) (citing Stebbings v. Univ. of Chi., 726 N.E.2d 1136, 1141 (Ill. App. Ct. 2000)). However, in order to recover under the FCA, an individual must have filed an FCA enforcement action. *Id.* at 944. Because the plaintiff had chosen to raise his concerns within his company and had not yet filed an FCA action, he did not qualify for protection under the FCA. *Id.* The court noted that "[t]he tort of retaliatory discharge . . . does not require the employee to have reported the allegedly illegal conduct to the authorities" and allowed him to proceed under the common law. *Id.* Like the federal statute in *Brandon*, the Whistleblower Act requires whistleblowers to report their concerns publicly rather than privately. As illustrated by *Brandon*, however, this does not automatically bar retaliatory discharge claims, because the two remedies can exist simultaneously. *See also* Sherman v. Kraft Gen. Foods, Inc., 651 N.E.2d 708, 713 (Ill. App. Ct. 1995) (holding that the Occupational Safety and Health Act (OSHA) does not preempt the common law tort of retaliatory discharge, and that failure to make a report to OSHA was "not fatal to plaintiff's case"). These cases also illustrate courts' reluctance to preempt the common law claim even when there is another anti-retaliation statute that could provide protection, especially when the fired employee would not fit within the statutory scheme. In other words, public policy does not favor preemption of the tort of retaliatory discharge, especially when doing so would leave a whistleblower without any remedy.

168. *See supra* notes 64–71 and accompanying text. Specifically, the statute provides special protection for individuals who report "a violation of a State or federal law, rule, or regulation" to a "government or law enforcement agency." 740 ILL. COMP. STAT. 174/15 (2004). The additional protections afforded in these specific situations include the extension of a remedy to independent contractors, expanded remedies such as reasonable attorney's fees, and the imposition of civil and criminal penalties for violations of the Act. 740 ILL. COMP. STAT. 174/5, 174/25, and 174/30 (2004).

169. Callahan v. Edgewater Care & Rehab. Ctr., No. 1-06-3178, 2007 WL 1932736, at *3 (Ill. App. Ct. 2007).

170. Morris v. Ameritech Ill., 785 N.E.2d 62, 69 (Ill. App. Ct. 2003).

171. *Id.*

the Code provision, which established limits on the situations in which a principal could be held civilly liable for eavesdropping by its agent, entirely superseded the area formerly covered by the common law.[172]

The *Morris* court relied heavily upon *In re Visitation with C.B.L.* in reaching its decision.[173] In *C.B.L.*, petitioner sought visitation with the child of her ex-girlfriend, who had been artificially inseminated.[174] The petitioner, who had helped care for the child for over a year, argued that, under the common law, she had standing to seek visitation as a de facto parent.[175] The court rejected her argument, holding that the Illinois Marriage and Dissolution of Marriage Act (Marriage Act), which covers non-custodial visitation, preempted any former common law claims.[176] The court recognized the traditional rule that a statute will be interpreted as adopting the common law absent legislative intent to change the common law,[177] but ultimately found that the Marriage Act had "evolved from a simple, straightforward codification of the common law of parental visitation to a complex and ever-growing statutory provision."[178] Therefore, the statute "constitute[d] a detailed and comprehensive legislative enactment on the subject of visitation," rendering any common law claims meritless.[179]

The Illinois Whistleblower Act is distinguishable from the Marriage Act. Unlike the Marriage Act, the Whistleblower Act is new and has not undergone an evolution that would lead a court to believe that the general assembly had entirely abandoned the common law tort. Furthermore, the Whistleblower Act does not represent a comprehensive enactment of retaliatory discharge claims.[180] The Act does not address claims by individuals who make disclosures that implicate public policy but do not violate a "[s]tate or federal law, rule, or regulation."[181] Courts have long recognized these claims at common law.[182] Nor does the Act mention individuals who report improper activity directly to their employers, even though those individuals' claims have

172. *Id.*

173. *In re* Visitation with C.B.L., 723 N.E.2d 316 (Ill. App. Ct. 1999).

174. *Id.* at 317.

175. *Id.* at 318.

176. *Id.* at 320.

177. *Id.* at 318.

178. *Id.* at 319. "No longer is [the Marriage Act] simply a codification of prior common law. It has been altered far too many times by amendments far too complex and comprehensive for such a narrow conception of that statutory section to retain any further validity." *Id.* at 320.

179. *C.B.L.*, 723 N.E.2d at 320.

180. *See supra* note 168 and accompanying text.

181. 740 ILL. COMP. STAT. 174/15 (2004).

182. *See supra* note 35 and accompanying text.

been recognized at common law since 1982.[183] Given that the legislature chose not to address these broad areas traditionally protected by the common law, *Callahan* was correct not to assume that the legislature intended to silently dissolve these common law protections.

In sum, a court may find that a statute impliedly repealed a common law claim for several reasons. First, a court may prevent a common law remedy from developing where a statutory remedy already exists.[184] Second, a court may find that a statute implicitly repealed the common law where the statute is inimical to the common law claim.[185] Finally, *Morris* and *C.B.L.* stand for the proposition that, in the rare instance in which a statute completely covers an area formerly addressed by the common law, a court could decide that the legislature intended the statute to preempt the entire common law area.[186] None of these situations apply to the Whistleblower Act. The statute deals with an area of law that has existed at common law for decades. Furthermore, these statutory and common law claims can coexist.[187]

The Illinois Whistleblower Act is not comprehensive and does not cover the entire field of whistleblowing claims.[188] In each preemption case, legislative intent remains the paramount consideration.[189] There is no evidence that the Illinois Whistleblower Act represented a deliberate choice by the legislature to limit the reach of retaliatory discharge claims. The result in *Callahan* was correct, because a court considering whether a statute repeals a common law cause of action "should not substitute its judgment for the judgment of the legislature."[190] Without a clear indication that the legislature intended to "preempt the field,"[191] the *Callahan* court was wise not to infer the requisite intent.

183. *See* Petrik v. Monarch Printing Corp., 444 N.E.2d 588, 592–93 (Ill. App. Ct. 1982).

184. *See supra* notes 140–157 and accompanying text.

185. *See supra* notes 158–169 and accompanying text.

186. *See supra* notes 170–179 and accompanying text. *See also* Cunningham v. Brown, 174 N.E.2d 153 (Ill. 1961); Mazur v. Hunt, 592 N.E.2d 335 (Ill. App. Ct. 1992); Combs v. Insurance Co. of Ill., 497 N.E.2d 503 (Ill. App. Ct. 1986).

187. *See supra* notes 165–168 and accompanying text.

188. *See supra* notes 180–183 and accompanying text.

189. *See supra* note 121 and accompanying text.

190. Reeves v. Eckles, 222 N.E.2d 530, 532 (Ill. App. Ct. 1966).

191. Mazur v. Hunt, 592 N.E.2d 335, 338 (Ill. App. Ct. 1992).

3. *The Legislative History of the Whistleblower Act Indicates that the Legislature Did Not Intend to Preempt the Common Law Tort of Retaliatory Discharge*

The Illinois General Assembly's Whistleblower Act debates demonstrate that the legislature did not intend to preempt the common law tort of retaliatory discharge, but rather intended to ensure protection for whistleblowers who disclose violations of the law to the government.[192] The chief House sponsor of the bill, Representative John A. Fritchey, stated that "Senate Bill 1872 is a *further* enhancement of the whistleblower protections in the state."[193] Moreover, these debates indicate that Representative Fritchey mistakenly believed that the common law tort of retaliatory discharge did not protect external whistleblowers and that the reason for passing the bill was to provide additional protection:

> Fritchey: ". . . you do not have a specific remedy today for a retaliatory discharge stemming from going to the authorities to report a violation of law."
> Bost: "If a judge ruled that it was a clear case where they were fired for this type action . . . a judge couldn't just automatically say, you know, what you did was wrong?"

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192. *See* H.R. 93–63, Reg. Sess. (Ill. May 22, 2003) ("What this does is prohibit an employer from taking any actions to prevent an employee from disclosing information to the government, if the employee has reasonable cause to believe that there was a violation of law.") (statement of Rep. Fritchey); S. 93–27, Reg. Sess. (Ill. Mar. 27, 2003).

193. H.R. 93–63, Reg. Sess. (Ill. May 22, 2003) (emphasis added). Likewise, Senator Peter J. Roskam stated that "[t]here's nobody that wants to create . . . a situation where whistleblowers in good faith, who are coming forward, aren't protected." S. 93–27, Reg. Sess. (Ill. Mar. 27, 2003). In the wake of corporate scandals like Enron, President Bush signed the Sarbanes-Oxley Act into law on July 30, 2002. Delikat & Rosenberg, *supra* note 9, at 27. This Act, which deals with a variety of corporate accountability issues, also "makes it clear that Congress was intent upon closing loopholes in existing state and federal laws that provide protection for whistleblowers." *Id.* (citing 148 CONG. REC. S6439–40 (2002)). *See also* Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1109 (2006) (describing the "structural model" of the Sarbanes-Oxley Act of 2002, which "requires that corporations provide employees with a standardized channel to report organizational misconduct internally within the corporation"). Following this federal act, many states began to "[revisit] and [fortify] their whistleblower protections." Delikat & Rosenberg, *supra* note 9, at 27. Sarbanes-Oxley is commonly known as "SOX," and these state enactments are sometimes referred to as "mini-SOX." 50 STATE STATUTORY SURVEYS, FINANCIAL SERVICES BANK OPERATIONS, SARBANES-OXLEY REQUIREMENTS (2006), *available at* http://www.westlaw.com (follow "50 State Surveys" hyperlink; search for 740 ILL. COMP. STAT. 174/1 (text should be in small caps); follow "39. SOX" hyperlink). The timing of the Illinois Whistleblower Act's enactment and the legislative debates make it likely that Illinois was enacting its own "mini-SOX." *See id.* If this is the case, the legislature's goal was far from reigning in whistleblower protections. Rather, it appears that the legislature was following the national trend of increasing whistleblower protection. In fact, in the legislative history, Representative Fritchey cited the Enron scandal as an example of the type of situation involving a retaliatory action against an employee. H.R. 93–63, Reg. Sess. (Ill. May 22, 2003).

> Fritchey: ". . . The judge could say, I think what you did was wrong, but you didn't violate the law. Mike, you hit it on the head and that's exactly why we need this Bill because you and I . . . both think that somebody should have protection from doing that. And as we stand here today, they don't have that protection."
>
> Bost: "Under civil action, they don't have that?"
>
> Fritchey: ". . . in my sincere belief, and I'm pretty sure I'm right on this one, you do not have a cause of action for retaliatory discharge today stemming from going to the authorities to disclose a violation of law."
>
> Fritchey: "Common sense would tell you that you should have *that* protection and this law would codify *that*."[194]

This dialogue illustrates that the Whistleblower Act was based on the erroneous notion that external whistleblowers did not have a common law remedy and that the legislature wanted to provide this protection.

In *Jones v. Dew*, the Northern District of Illinois interpreted Representative Fritchey's comments as proof that he intended the Act to be a "codification of the common law tort of retaliatory discharge based on [whistleblowing] activities."[195] Representative Fritchey, however, only referred to codifying a cause of action for retaliatory discharge stemming from disclosures to government or law enforcement agencies, a cause of action he apparently did not know existed at common law. There is no evidence that the legislature wished to abrogate long-standing common law protections. Simply put, the legislature could not have intended to repeal a cause of action that it did not know existed. Illinois courts have consistently stated that "[a] statute will be construed as changing common law only to the extent that the terms thereof warrant, or as necessarily implied from what is expressed."[196]

In *Jones*, the court inferred too much from these legislative comments. Complete preemption of the common law was neither necessary nor prudent. The Act evolved from an erroneous understanding of the common law, at least in the mind of the chief House sponsor. As the debates illustrate, the legislature never considered internal whistleblowers, and the debates involved no discussion of the Act's effect on the tort of retaliatory discharge.[197]

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194. *Id.* (emphasis added).

195. Jones v. Dew, No. 06-C-3577, 2006 WL 3718053, at *3 (N.D. Ill. Dec. 13, 2006). *Accord* Riedlinger v. Hudson Respiratory Care, Inc., 478 F. Supp 2d 1051, 1055 (N.D. Ill. 2007) ("Representative Fritchey . . . explained that the intent of the statute was to codify the common law tort of retaliatory discharge.").

196. Hormel Foods Corp. v. Zehnder, 738 N.E.2d 145, 153 (Ill. App. Ct. 2000) (citing Hawkins v. Hawkins, 430 N.E.2d 652 (Ill. App. Ct. 1981)).

197. *See* H.R. 93-63, Reg. Sess. (Ill. May 22, 2003).

B. *Prior to* Callahan, *Courts Failed to Analyze the Preemption Issue*

Before *Callahan*, several cases failed to apply the proper legal analysis to whether the Whistleblower Act repealed the common law whistleblower remedy. As illustrated in Part II.C, employer-defendants in retaliatory discharge suits pointed to *Sutherland*'s comment that the Whistleblower Act codified the tort of retaliatory discharge.[198] *Sutherland*, however, did not address preemption or apply the criteria that Illinois courts have set forth to determine whether a statute preempted the common law. Furthermore, the court analyzed the plaintiff's whistleblower claim under the traditional whistleblower prong of the tort of retaliatory discharge.[199] If the court had believed that the Whistleblower Act provided the only means by which an employee could recover for whistleblowing activities, it would have analyzed the whistleblower claim under the Act.[200] In short, these dicta did nothing to resolve the preemption issue.

Similarly, in *Sprinkle v. Lowe's Home Centers, Inc.*, the Southern District of Illinois stated that the Illinois Whistleblower Act codifies the common law tort of retaliatory discharge.[201] In that case, the plaintiff contended that he was fired for his refusal to engage in what he believed was an illegal activity.[202] The court found that the Whistleblower Act codified the common law, reasoning that a plaintiff can state a cause of action for whistleblowing "when an employee is fired for refusing to engage in illegal activity."[203] Because, in this circumstance, it made no difference whether the plaintiff proceeded

198. *See supra* Part II.C.

199. Sutherland v. Norfolk S. Ry., 826 N.E.2d 1021, 1027–29 (Ill. App. Ct. 2005). The court held that the plaintiff was not a whistleblower because reporting his injury to his employer did not "affect the citizens of the State collectively." *Id.* at 1028.

200. Notably, the court failed to mention that the plaintiff did not report his injury to a government or law enforcement agency and that he did not report a violation of a state or federal law, rule, or regulation, both requirements of the Whistleblower Act. *Id.*; *see also* 740 ILL. COMP. STAT. 174/15 (2004). On the contrary, the court recognized that the tort of retaliatory discharge requires an employee to make a complaint "either to an outside law enforcement or regulatory authority *or to internal company management*." *Sutherland*, 826 N.E.2d at 1027 (emphasis added). Furthermore, the court analyzed the plaintiff's claim under the *Palmateer* rule requiring an employee to show that his discharge violated a "clear mandate of public policy," which does not apply under the Whistleblower Act. *Id.*; *see supra* notes 69–70 and accompanying text.

201. Sprinkle v. Lowe's Home Ctrs., Inc., No. 04-CV-4116-JPG, 2006 U.S. Dist. LEXIS 49203, at *14 (S.D. Ill. July 19, 2006) (citing Sutherland v. Norfolk S. Ry., 826 N.E.2d 1021 (Ill. App. Ct. 2005)).

202. *Id.* at *10.

203. *Id.* at *14–15 (citing Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 879 (Ill. 1981); Stebbings v. Univ. of Chi., 726 N.E.2d 1136, 1144 (Ill. App. Ct. 2000)). The Whistleblower Act states that "[a]n employer may not retaliate against an employee for refusing to participate in an

under the Act or the common law, the court did not analyze whether the Act entirely preempted common law whistleblower claims. Just as the *Sutherland* footnote added nothing to the determination of whether plaintiffs could state a whistleblower claim under the tort of retaliatory discharge, the *Sprinkle* court's bald assertion that the Act codified the common law did not resolve the issue.

Nevertheless, the *Jones* and *Riedlinger* courts based their holdings that the Act preempted the common law solely on the footnote in *Sutherland*, dicta in *Sprinkle*, and Representative Fritchey's comment that the Whistleblower Act codifies the common law tort of retaliatory discharge.[204] Because the plaintiffs in these cases did not make their complaints to a government or law enforcement agency, the trial court determined that they did not fall within the protection of the Whistleblower Act and dismissed their claims.[205]

The trial court's decision that the Act preempted retaliatory discharge was conclusory and ignored the criteria that Illinois courts have developed to resolve preemption questions.[206] Simply stating that the Act codifies the tort does not determine whether it preempts or repeals it.[207] None of the cases *Jones* or *Riedlinger* cited even ad-

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activity that would result in a violation of a State or federal law, rule, or regulation." 740 ILL. COMP. STAT. 174/20 (2004).

204. *See* Riedlinger v. Hudson Respiratory Care, Inc., 478 F. Supp. 2d 1051, 1055 (N.D. Ill. 2007); Jones v. Dew, No. 06 C 3577, 2006 WL 3718053, at *3 (N.D. Ill. Dec. 13, 2006) (treating the Whistleblower Act as "a codification of the common law tort of retaliatory discharge based on whistle-blowing activities").

205. *Riedlinger*, 478 F. Supp. 2d at 1055; *Jones*, 2006 WL 3718053 at *4 (N.D. Ill. Dec. 13, 2006) (citing Smith v. Madison Mut. Ins. Co., No. 05-CV-00142DRH, 2005 WL 1460301, at *1 (S.D. Ill. June 21, 2005)). In *Smith*, plaintiff sued under the Illinois Whistleblower Act claiming that she was fired for reporting alleged sexual harassment to Madison Mutual's lawyer. *Smith*, 2005 WL 1460301, at *1. The court granted the defendant's motion to dismiss, explaining that "[w]hile the Act prevents retaliation against an employee who disclosed information to a government or law enforcement agency, it does not protect an employee who disclosed information to her own company." *Id.* The issue of whether the Act preempts the common law tort, however, was not squarely before the court. In that case, the court merely set forth an element necessary to make out a claim under the Whistleblower Act. The court did not mention the tort of retaliatory discharge or suggest that the plaintiff could not have proceeded under that cause of action. *Id.*

206. The *Jones* court stated that "[a]lthough only a few courts have construed the [Whistleblower] Act, there is *some indication* that the Act codifies, and therefore preempts, any common law retaliatory discharge claim based on whistle-blowing activities." *Jones*, 2006 WL 3718053, at *3 (N.D. Ill. Dec. 13, 2006) (emphasis added). This repeated assertion that the Act "codifies" the common law was hardly a substitute for legal analysis of established principles of statutory construction.

207. BLACK'S LAW DICTIONARY 275 (8th ed. 2004) defines "codification" as "[t]he process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code." This definition did not resolve the issue of whether "codifying" a law would "preempt" or "repeal" related laws.

dressed the question of preemption.[208] In addition, Representative Fritchey's comment that the Act codifies the tort was directed at situations involving whistleblowers who report to government or law enforcement agencies.[209] He said nothing about preempting this area of the common law. In short, *Callahan* correctly recognized that neither the *Jones* nor the *Riedlinger* court "conducted an analysis of the issue of when a statute preempts or repeals a common-law remedy by implication."[210]

V. IMPACT

By enacting the Whistleblower Act, the Illinois legislature demonstrated its concern for protecting people who are fired as a result of their efforts to protect the public.[211] If the *Callahan* court had decided that the Whistleblower Act repealed the tort of retaliatory discharge, many individuals who are fired for their good faith efforts to report illegal or improper conduct would be left without legal redress, a result that the legislature did not intend.[212] This, in turn, would have prevented many people from reporting wrongful activities.[213] Aside from the doctrinal arguments against preemption, there are no logical arguments for refusing to extend protection to internal whistleblowers. On the contrary, there are many reasons why policymakers should encourage internal whistleblowing.[214]

To decide which individuals should be afforded protection from retaliatory discharge, it is important to consider the purposes of whistleblower protection.[215] The primary goal of state whistleblower

208. *See supra* notes 91-203 and accompanying text.

209. *See supra* note 192 and accompanying text.

210. Callahan v. Edgewater Care & Rehab. Ctr., No. 1-06-3178, 2007 WL 1932736, at *2 (Ill. App. Ct. July 3, 2007).

211. *See supra* notes 192–197 and accompanying text.

212. *Id.*

213. *See infra* notes 219–224 and accompanying text.

214. *See infra* notes 233–235 and accompanying text.

215. Professors Dworkin and Callahan traced whistleblowing protection from its federal origins, illustrating that whistleblower protection was originally incorporated into federal statutes that had primary objectives other than protecting whistleblowers. Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 269 (1991) (providing examples, including the Railway Labor Act of 1926, 45 U.S.C. §§ 151–88 (1988), the National Labor Relations Act of 1935, 29 U.S.C. § 158 (a)(4) (1988), and the Water Pollution Control Act, 33 U.S.C. § 1367(a) (1988)). They explain that courts generally construed federal acts broadly enough to protect both internal and external whistleblowers. *Id.* at 270 ("As the circuit courts have reasoned, Congress intended to protect internal disclosures because that form of whistleblowing 'share[s] a broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality.'") (quoting Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1512 (10th Cir. 1985)). Subsequent state whistleblowing statutes, however, generally had whistleblower protec-

statutes is to correct wrongdoing.[216] Some states have determined that the best way to accomplish this is to require individuals to report wrongdoing to the law enforcement or regulatory agency capable of investigating and correcting the problem.[217] An approach requiring external whistleblowing, however, is flawed.[218] Employees are more likely to initially report improper activity internally.[219] If internal whistleblowers are not protected, "reporting of wrongdoing would be reduced as unaddressed retaliation deters potential whistleblowers and leads to the laws not being as effectively enforced."[220] Furthermore, studies show that external whistleblowers are more likely to be victims of retaliation than internal whistleblowers.[221] Therefore, requiring whistleblowers to report to a government or law enforcement agency would create a disincentive for employees to report misconduct.[222]

Moreover, if the *Callahan* court had decided that the Whistleblower Act preempts the common law claim, it would have created a perverse incentive for employers to fire employees who blow the whistle before they have a chance to report to law enforcement, thus, leaving those whistleblowers without a remedy.[223] This would defeat the purpose of whistleblower protection: encouraging employers to root out wrongdoing and take prompt action without requiring outside intervention. In short, refusing to extend protection to internal whistleblowers

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tion as their main objective, and most differed from the federal model by "spell[ing] out how the whistleblowing should proceed." Dworkin & Callahan, *supra*, at 276.

216. *Id.* at 281.

217. *Id.* ("These statutes make it clear that their purpose is to cut down on public fraud, waste, abuse of authority, and dangers to public health and safety.").

218. *See* Belline v. K-Mart Corp., 940 F.2d 184, 188 (7th Cir. 1991) ("The employee who chooses to approach his employer should not be denied a remedy simply because a direct report to law enforcement agencies might effectuate the exposure of crime more quickly. This would be a nonsensical distinction.").

219. Dworkin & Callahan, *supra* note 215, at 301.

220. *Id.* at 281 (citing Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772, 778, 781 (D.C. Cir. 1974); Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1511 (10th Cir. 1985)).

221. *Id.* at 302.

222. *Id.*

223. *See* Hicks v. Clyde Fed. Sav. & Loan Ass'n, 722 F. Supp. 501 (N.D. Ill. 1989)

> [T]o hold [that internal complaints are not protected] would allow employers to thwart an employee's retaliatory discharge claim by firing the employee before he had a chance to reach authorities. Such a system would reward ill-willed employers and penalize well-intentioned employees who attempt to rectify wrongdoing internally prior to taking public action. This court does not believe that the Illinois Supreme Court would adopt such an unpalatable construction of the tort.

Id. at 504.

would ultimately harm employers' ability to prevent and correct wrongdoing, the central aims of whistleblower protection.[224]

A secondary purpose of many state whistleblower statutes is to punish the wrongdoer.[225] Specifically, another reason that some states developed "a preference for external whistleblowing" was "a desire to prevent wrongdoers from escaping punishment."[226] Some believe that this goal may be more effectively accomplished by mandating external whistleblowing, because an employer who is "the recipient of a whistleblower's information can play a significant role in controlling its dissemination, with the intent of minimizing the consequences of a possible criminal prosecution."[227] But this secondary purpose should not significantly diminish the Act's primary purpose: preventing and correcting misbehavior.[228] Policymakers should encourage employees to report to their employers, because employers are often in the best position to address and correct misbehavior.[229]

Other rationales for denying protection to internal whistleblowers are also unconvincing. For instance, some argue that internal whistleblowers are unable to show that their discharge was in violation of public policy, because an internal report is a private matter.[230] A similar argument is that a discharge following an internal disclosure "resulted from a management dispute rather than a desire to retaliate."[231] These arguments were rejected long ago by Illinois courts,

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224. Dworkin & Callahan, *supra* note 215, at 301.

225. *Id.* at 276, 281.

226. *Id.*

227. *Id.* at 284. The legislative history suggests that the sponsors of the Illinois Whistleblower Act had in mind the dual goals of protecting public policy and punishing violations of the law. *See* H.R. 93–63, Reg. Sess. (Ill. May 22, 2003). Representative Fritchey stated:

> This is really as much, if not more so, a public safety Bill than it is an employment Bill or a whistleblower Bill. You do not want to have employees afraid to go to the authorities to disclose an environmental violation, a worker protection violation, a labor law violation, a tax evasion violation and not go to the authorities because they're afraid that doing the right thing will cost them their job.

There is no evidence, however, that the legislature intended to give external whistleblowers protection at the exclusion of internal whistleblowers. *See id.*

228. Dworkin & Callahan, *supra* note 215, at 185 ("Although prosecution may be a legitimate secondary goal of public whistleblower protection, it should not be permitted to hamper the primary objective of most whistleblowing statutes, which is to correct the wrongdoing as quickly and efficiently as possible.").

229. Lanning v. Morris Mobile Meals, Inc., 720 N.E.2d 1128, 1131 (Ill. App. Ct. 1999).

230. Dworkin & Callahan, *supra* note 215, at 295, 303.

231. *Id.* at 296. Dworkin and Callahan discussed the fact that whisleblowers can be viewed as dissidents. *Id.* at 299 (citing Janet P. Near & Maria P. Miceli, *Whistle-Blowers in Organizations: Dissidents or Reformers?*, 9 RES. IN ORGANIZATIONAL BEHAV. 321, 327–28, 330 (1987)). The legislative history of the Whistleblower Act reflects the fear of Illinois legislators that it will be too easy for employees to make incorrect or frivolous accusations. H.R. 93–63, Reg. Sess. (Ill. May 22, 2003). Even if Illinois legislators wanted to limit whistleblower protection, however,

which determined that "internal reports can also lead to the correction of behavior in violation of public policy."[232]

In addition to benefiting the employee and the public, a scheme that encourages internal whistleblowing also benefits employers. Professors Dworkin and Callahan articulated this point as follows:

> [W]histleblowers may be seen as reformers whose actions often benefit the organization. They are one of the least expensive and most efficient sources of feedback about mistakes the firm may be making. They can help identify unsafe products or practices, wasteful or fraudulent actions, and other harmful or criminal behavior. Whistleblowers can bypass the institutional barriers to communication found especially in large organizations, benefiting their employers not only by identifying problems, but also by suggesting solutions."[233]

Further, employers benefit from internal disclosures, because they give employers the chance to correct problems before they are revealed to the public.[234] Likewise, a system of internal reporting bene-

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there is no legitimate reason for drawing the line between internal and external whistleblowers. Further, Illinois legislators never expressed an interest in denying protection to internal whistleblowers.

232. *Lanning*, 720 N.E.2d at 1130. *Accord* Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372, 376 (Ill. 1985) ("We do not agree . . . that the question whether the facts as alleged involved public policy, or a matter of private concern, depended on whether a complaint was made to the regulatory authorities."). Dworkin and Callahan also debunked these arguments. In response to the argument that an internal disclosure is a private concern, they explained that "[t]he existence of public policy supporting a cause of action for employer conduct is derogation of that policy—that is, discharge of an employee—should not be contingent upon the action taken by the employee which causes the dismissal." Dworkin & Callahan, *supra* note 215, at 295. Instead, courts should focus on the employer's conduct, and whether it violated an articulated public policy. *Id.* With regard to the argument that "internal whistleblowing is disruptive of employee control and productivity," Dworkin and Callahan pointed out that "all cases holding the dismissal of an at-will worker actionable threaten the employer's legitimate interest in maximizing employee control and productivity. . . . [E]xternal whistleblowing would seem to be at least as invasive of normal operating procedures as internal whistleblowing, if not more so." *Id.* at 297. They further argue that whistleblowing is actually "prosocial behavior, or positive social behavior that is intended to benefit other persons." *Id.* at 303. Dworkin and Callahan pointed to research showing that whistleblowing is not the norm, and that "employees who go against the norm and blow the whistle tend to do so when they have direct evidence of wrongdoing and the wrongdoing is serious." *Id.* (citing Maria P. Miceli & Janet P. Near, *Individual and Situational Correlates of Whistle-blowing*, 41 PERSONNEL PSYCHOLOGY 276 (1988)). Contrary to the belief that many whistleblowers are traitors to their organizations, Dworkin and Callahan stated that "incidents of groundless or spiteful whisteblowing . . . are rare." *Id.* Moreover, studies show that many whistleblowers "are among the most dedicated and committed employees in the organization." FREDERICK ELLISTON ET AL., WHISTLEBLOWING: MANAGING DISSENT IN THE WORKPLACE 135 (1985).

233. Dworkin & Callahan, *supra* note 215, at 299–300.

234. *Id.* at 300 ("If problems exist, the employer has the opportunity privately to take corrective action and thereby reduce the likelihood of lost business, adverse publicity, litigation, fines or other criminal sanctions, and other adverse consequences."); Moberly, *supra* note 193, at 1151 ("This early detection allows corporations to avoid costs related to the negative publicity and

fits employers by giving them a chance to clarify misunderstandings in the event that an employee mistakenly believes that wrongdoing has occurred.[235]

There are, however, general problems associated with protecting whistleblowers.[236] First, in situations involving internal whistleblowing, it is often difficult to prove retaliatory discharge, because the reports involve interpersonal relationships.[237] Furthermore, whistleblowing generally hinders the employer's "legitimate interest in managerial decision-making and maximizing control and efficiency."[238] Similarly, some fear that a system of internal reporting would cause employers to refrain from "effectuating well-founded discharges" for fear of being sued and that it would cause "a less cooperative workplace atmosphere."[239]

While these concerns may be valid, the ability to enforce the objectives of whistleblower protection—correcting wrongdoing and enforcing public policy—are present in both internal and external whistleblowing.[240] Between the two, external whistleblowing often has a more disruptive and detrimental impact on employer control and workplace atmosphere.[241] Finally, even if employers must give up some control, creating an exception to the employment at-will doctrine reflects the desirability of encouraging whistleblowing to rectify wrongdoing.[242] In order to make whistleblowing an "effective tool in combating organizational wrongdoing,"[243] the legislature and judiciary must protect employees from retaliatory discharge, regardless of the recipient of the disclosure.

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government intervention that follows external whistleblowing."). *Cf.* Belline v. K-Mart Corp. 940 F.2d 184, 187 (7th Cir. 1991) (stating that requiring external whistleblowing would create "perverse incentives by inviting concerned employees to bypass internal channels altogether and immediately summon the police").

235. Dworkin & Callahan, *supra* note 215, at 304.

236. *See id.* at 305–06.

237. *Id.* at 305 (citing John H. Conway, Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777, 782; Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416–21 (1967)).

238. *Id.*

239. *Id.* at 306.

240. *Id.* ("Despite these concerns, whistleblowers well serve society's interests in encouraging lawful behavior and public accountability, to the extent that their actions prevent or redress wrongdoing.").

241. Dworkin & Callahan, *supra* note 215, at 306.

242. *Id.* at 306 n.214.

243. *Id.* at 307.

VI. CONCLUSION

The *Callahan* court correctly decided that the Illinois Whistleblower Act does not preempt the common law tort of retaliatory discharge. The court grounded its holding in principles of statutory construction and preemption. First, the Whistleblower Act contains no express language addressing the common law tort, which indicates that the legislature did not intend to preempt the tort. Second, the Act does not provide a new, comprehensive cause of action that could be read to impliedly replace the common law cause of action. Rather, the Act provides a supplementary remedy. Finally, there is evidence that the legislature wanted to provide additional protection for whistleblowers. Thus, the legislature did not intend the Act to limit whistleblower protection. The Illinois Supreme Court stated that "the Common law, having been classified and arranged into a logical system of doctrine, principles, rules, and practices, furnishes one of the most reliable backgrounds upon which analysis of the objects and purposes of a statute can be determined."[244] The development of the tort of retaliatory discharge reflects the reasoned and deliberate decision of Illinois courts to expand the remedy to both internal and external whistleblowers.[245] These courts recognized that Illinois public policy may be implicated whenever an employee is discharged for blowing the whistle. For these reasons, the *Callahan* court wisely held that the Whistleblower Act does not preempt the tort of retaliatory discharge.

*Sarah M. Baum**

244. Advincula v. United Blood Servs., 678 N.E.2d 1009, 1019–20.

245. *See supra* notes 37–63 and accompanying text.

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