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# Employers and Employees: A Call for Oklahoma's Adoption of the Whistle-Blower Exception to the Employment-at-Will Doctrine

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# Employers and Employees: A Call for Oklahoma's Adoption of the Whistle-Blower Exception to the Employment-at-Will Doctrine

The doctrine of terminable-at-will employment is a powerful tool in the hands of an employer. The employer's power to fire employees without cause can be used to influence the behavior of the employees.[1] If an employee is directed by his employer to perform illegal acts, the influence of the employer might be difficult to resist. Often the employee must choose between losing his livelihood and obeying the law. It is a choice that no employee should have to make.

A number of courts have developed a remedy for employees fired because they refused to disobey the law. These courts have developed a "whistle-blower" exception to the terminable-at-will doctrine. They have found that it is in the best interest of society for an employee to refuse to become the instrument of illegality. These courts have developed a cause of action for retaliatory discharge that protects an employee who has refused to act illegally, or who has exposed his employer's illegal acts.

The purpose of this note is to explore the retaliatory discharge tort for an employee who "blows the whistle" on his employer's illegal activity. Application of this cause of action to the body of law already existing in Oklahoma indicates that it is in Oklahoma's best interest to adopt it. Some Oklahoma statutes have provided narrow exceptions to the terminable-at-will doctrine, and the Oklahoma Supreme Court has shown a willingness to make judicial inroads on the at-will doctrine in *Hall v. Farmers Insurance Exchange*.[2] If presented with the opportunity, the court should also provide the whistle-blower with an exception to the terminable-at-will doctrine.

The scope of this note is limited to a discussion of the cause of action for nonunion private sector employees. The establishment of the at-will doctrine in Oklahoma is briefly discussed.[3] An analysis of some statutory exceptions to the at-will doctrine in Oklahoma is provided as well as an examination of the judicial exception suggested in *Hall*. The *Hall* exception is compared with decisions in other states in which the whistle-blower exception to the at-will doctrine has been adopted. Finally, this note demonstrates how the sound reasoning of these courts should be applied to the law of Oklahoma; it shows how the policies embodied in Oklahoma's law would be better served by extending the tort of retaliatory discharge to protect the whistle-blower.

1. *See* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967).

2. 713 P.2d 1027 (Okla. 1985).

3. For an excellent discussion of *Hall* and the at-will doctrine in Oklahoma, see Tepker, *Oklahoma's At-Will Rule: Heeding the Warnings of America's Evolving Employment Law?*, 39 OKLA. L. REV. 373 (1986).

*The Oklahoma At-Will Doctrine*

The terminable-at-will doctrine has been a mainstay in employment law since the early years of the Oklahoma legal system. In *Roddy v. United Mine Workers*,[4] the Oklahoma Supreme Court discussed the right of an at-will employee to terminate the employment relationship: "We take it as fundamental that any man, in the absence of a contract to work a definite time, has a right to quit whenever he chooses, for any reason satisfactory to him, or without any reason. . . . [H]is right to quit is absolute."[5]

An employer's right to arbitrarily discharge an at-will employee was confirmed by the Oklahoma Supreme Court in *McKelvy v. Choctaw Cotton Oil Co.*[6] The plaintiff's employment contract consisted of two letters, neither of which established a definite term of employment. The plaintiff alleged that he had been offered permanent employment. The court found that the offer of permanent employment, even if proved, would offer no protection to the employee because, "[a]s a general rule the word 'permanent', as applied to employment, is construed to mean only that the [employee] shall retain the position until one of the contracting parties shall elect to terminate it, and this election may be an arbitrary one without assigning any cause therefor."[7]

The court has since had other occasions to confirm the terminable-at-will doctrine. One court refused to find that a contract specifying an annual salary is a contract for a term of one year.[8] If no specific term is called for, the employment may be terminated at any time. An employee's waiver of his right to quit was found to provide consideration for a contract.[9] The court has found no need for the employer to show that any act of the employee caused his discharge.[10] Terminable-at-will employees may be terminated without showing cause.

Oklahoma has, however, recognized some exceptions to the terminable-at-will doctrine in the form of statutory limitations.[11] The courts that have

4. 41 Okla. 621, 139 P. 126 (1914). This case involved a suit against the union by an employee who was fired after he refused to join the union. The union had threatened to strike if he was retained.

5. *Id.*, 139 P. at 127. Since it was legal for each employee to exercise his right to quit, the court found that it was legal for the union members to exercise this right collectively. Consequently, the cause of action was defeated.

6. 52 Okla. 81, 152 P. 414 (1915).

7. *Id.*, 152 P. at 415. *See also* Willock v. Downtown Airpark, 130 F. Supp. 704 (W.D. Okla. 1955) (applying Oklahoma law to find employer's right to discharge employee at any time); Foster v. Atlas Life Ins., 154 Okla. 80, 6 P.2d 805 (1932) (holding that an oral contract for permanent employment was no more than a contract for terminable-at-will employment).

8. Singh v. Cities Serv. Corp., 554 P.2d 1367 (Okla. 1976).

9. Langdon v. Saga Corp., 569 P.2d 524 (Okla. 1977). The employment manual contained an offer for severance and vacation pay. The employee provided consideration for the contract by continuing to work.

10. Sooner Broadcasting Co. v. Grotkop, 280 P.2d 457 (Okla. 1955).

11. Under the Oklahoma Civil Rights Act, 25 OKLA. STAT. §§ 1101-1801 (1981), employers are not allowed to discharge a person based on that person's age, race, or sex. The Act also protects employees who oppose discriminatory practices by an employer. *Id.* § 1601. If an employee

recognized the whistle-blower exception have almost unanimously required that such limitations be based on clearly defined expressions of public policy.[12] Most of these expressions of public policy have been found in statutes. The Oklahoma statutes show that the legislature has recognized public policies in favor of limiting the employer's power to dismiss at-will employees.[13]

A case recently decided by the Oklahoma Supreme Court has recognized another exception to terminable-at-will contracts. In *Hall v. Farmers Insurance Exchange*,[14] the court held that Farmers had breached an implied covenant of good faith when they terminated Hall's agency contract. Hall had been an agent for Farmers for sixteen years. He had been operating for ten years under an agency contract that included a clause making the contract terminable by either party upon three months' written notice. Prior to his termination, Hall had been involved in a dispute with Farmers' district manager over what Hall believed to be an unjust termination of another agent.

Hall did not deny that the contract contained a provision for termination of the agency. Rather, he asserted that the contract contained an implied covenant of good faith and that Farmers violated that covenant by terminating his agency without cause and in bad faith. He supported this contention by showing that the termination would deprive him of $225,000 in renewal commissions. The court agreed that the contract contained an implied covenant against a bad faith assertion of the termination-at-will clause.[15]

The court specifically found that Farmers had resorted to the termination clause of the contract to deprive Hall of his future income from renewal premiums. The finding of bad faith rested upon the apparent intent of Farmers to distribute the premiums to agents who were in closer agreement with Farmers' employment policies.[16] This finding provides, by analogy,

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has been fired for his opposition to violations of the Civil Rights Act, the Oklahoma Human Rights Commission has the authority to reinstate the employee with back pay. *Id.* § 1505(c)(2) (Supp. 1985).

Other statutes subject employers who wrongfully discharge employees to criminal liability. It is a misdemeanor to discharge an employee for serving jury duty, 38 OKLA. STAT. § 34 (1981); for serving in the armed forces or militia, 44 OKLA. STAT. § 208 (1981); or for reporting wage and hour or safety violations, 40 OKLA. STAT. § 199 (1981). In Oklahoma, a person may refuse to perform an abortion without fear of being fired. 63 OKLA. STAT. § 1-741 (1981). An employee who institutes a claim under the worker's compensation law is also protected from retaliatory discharge. 85 OKLA. STAT. § 5 (1981). Employees who are discharged for serving on a jury, 38 OKLA. STAT. § 35 (1981), or for filing a worker's compensation claim, 85 OKLA. STAT. § 6 (1981), are statutorily entitled to recover damages.

12. See *infra* text accompanying notes 80-91.

13. The judicial expansion of the policy in favor of limiting this exercise of employer power is discussed *infra* text accompanying notes 79-91.

14. 713 P.2d 1027 (Okla. 1985).

15. *Id.* at 1030.

16. *Id.*

some support for the rationale of the whistle-blower exception to the terminable-at-will doctrine. When an employee objects to the illegal or unethical practices of his employer, he is likely to be replaced by someone more compliant.[17]

The supreme court found that the removal of an employee for his disagreement about the *legal* activity of his employer supported the employee's allegation of a bad faith termination.[18] It logically follows that the court would also find bad faith if an employee were terminated for refusing to participate in the *illegal* activity of his employer.[19] The employee's reason for disagreeing with the illegal activity is supported by the laws of the state. Judicial interpretation of public policy should support this type of dissent even more than Hall's objection to Farmers' employment policies.

Some of the language in *Hall* is contrary to the establishment of a wrongful discharge tort action. The court noted that Hall was not seeking recovery for income he had not yet earned.[20] His recovery was based on renewal premiums for policies that he had already sold. For a tort action for wrongful discharge to provide a meaningful remedy for the average employee, it should compensate him for future wages. The employee's termination prevents him from earning those wages.

This distinction between renewal premiums and wages is not as great as it might seem. Renewal premiums, like wages, are an expected part of an insurance agent's regular income. The court noted that $35,000 of Hall's 1978 income of $42,000 came from renewal premiums.[21] The average employee's expected income comes solely from his wages. Because of his wrongful termination, Hall recovered a substantial proportion of the income he would have received if his agency had not been terminated. An employee whose regular compensation does not include future commissions still suffers pecuniary damage from a wrongful termination, even though his future income is not as easily determined. The difficulty in determining damages should not preclude an injured party from being compensated for his injury.

### *Activity Protected by the Whistle-Blower Tort*

The exception to the at-will doctrine advocated in this note takes the form of a tort action for retaliatory discharge.[22] An employer should be liable for

17. Although this case dealt with an agency contract, the court recognized that the same reasoning should apply to this case as applies to employment contracts. *Id.*

18. *Id.*

19. "[Bad faith] implies the conscious doing of a wrong because of *dishonest purpose* or moral obliquity. . . . [I]t contemplates a state of mind affirmatively operating with furtive design or ill will." BLACK'S LAW DICTIONARY 127 (5th ed. 1979) (emphasis added).

20. 713 P.2d at 1031. *But see* Grayson v. American Airlines, Inc., 1 IER Cases 849, 851, 9 Lab. Rel. Rep. (BNA) (10th Cir. 1986) (holding that the Oklahoma Supreme Court did not intend a narrow application of *Hall* such that only earned benefits are protected).

21. 713 P.2d at 1028.

22. The Oregon Supreme Court discussed the application of a tort remedy to the situation of the wrongfully discharged employee in Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975). The

damages resulting from his interference with certain protected activities of an employee. Those activities should involve a clearly established public policy. Courts have been willing to look to the criminal law,[23] to regulatory requirements,[24] to a professional code of conduct,[25] to the common law of torts,[26] or to the Constitution[27] to find policy reasons to protect the employees' actions. Employees without the support of these clearly stated expressions of public policy are without the protection of the whistle-blower tort.[28]

The protected activities to be discussed in this note can be divided into three categories. The first category protects the employee who refuses to take part in the illegal activity of the employer. The second category is the employee's disclosure of illegal activity. These two categories are based on well-defined expressions of public policy.[29] The third category of protected activity involves employees who base their criticism of an employer's activities on moral or ethical objections. These employees are acting on personal perceptions of public policy. External expressions of public policy to

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court stated that it would "direct [its] inquiry to the question of whether the plaintiff suffered harm which the community would conclude should be compensated because of the conduct of the defendants." *Id.*, 536 P.2d at 514. The court considered this test in light of the employer's use of the right to terminate an at-will employee to coerce the employee. It determined that "there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done." *Id.*, 536 P.2d at 515.

The discharge of the plaintiff for serving jury duty was found by the court to be a situation that called for a tort remedy. Similarly, the discharge of an employee for refusing to perform an illegal act, or for disclosing illegal activity, should be considered "a socially undesirable motive." Consequently, the whistle-blower exception falls within the reasoning of the *Nees* court. A cause of action sounding in tort is an appropriate remedy.

23. Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusal to fix prices in violation of antitrust laws); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (refusal to commit perjury); Palmateer v. International Harvester, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (disclosure of criminal act by another employee).

24. Trombetta v. Detroit, Toledo & Ironton R.R., 81 Mich. App. 489, 365 N.W.2d 385 (1978) (refusal to alter pollution control reports; employee stated cause of action but failed to establish proof).

25. Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 417 A.2d 505 (1980) (dicta).

26. Delaney v. Taco Time Int'l, 297 Or. 10, 681 P.2d 114 (1984) (refusal to sign statement defaming fellow employee).

27. Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (refusal to take part in employer's political activities protected by first amendment).

28. *See, e.g.*, Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981) (plaintiff who alleged discharge after uncovering improper accounting practices did not state cause of action because he was unable to show any of the practices violated state law); Pierce v. Ortho Pharm. Corp., 86 N.J. 58, 417 A.2d 505 (1980) (plaintiff's interpretation of obligations under Hippocratic Oath is not clear expression of public policy); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (no fundamental violation of public policy as expressed in statutes or constitution where there was no affirmative request to commit perjury).

29. *See* Comment, *Protecting the Private Sector At-Will Employee Who "Blows the Whistle": A Cause of Action Based on Determinants of Public Policy*, 1977 WIS. L. REV. 777.

support these employees' actions are difficult to establish. A statute that would provide tangible support for disobedience is often not available. Employees in this category must ask the courts to protect their right to take ethical positions that are not established by legislation.[30]

*Refusal to Participate in Illegal Activity*

The whistle-blower exception to the employment-at-will doctrine is an exception based on public policy.[31] Public policy is clearly served when an employee refuses to perform an illegal act,[32] or if he discloses illegal activity.[33] This exception to the at-will doctrine enhances respect for the law by providing a legal remedy for a person who has been injured because of his attempt to comply with the law.[34]

*Petermann v. International Brotherhood of Teamsters* is an early case finding a cause of action in the employee discharged for refusing to perform an illegal act at the behest of his employer.[35] The plaintiff alleged that he was fired for refusing to commit perjury. The defendant admitted that the plaintiff's term of employment was for as long as his work was satisfactory. The plaintiff alleged that he had been informed the day before his testimony that his work was very satisfactory. He was then instructed to make certain false statements before a government commission. After testifying truthfully, he was discharged.

The court recognized that an employment relationship, such as the one described, is usually terminable at the will of either party. However, public policy considerations, although difficult to define, place limits on the right to discharge an employee.[36] One definition of an act against public policy that the court found acceptable was, "whatever contravenes good morals or any established interests of society."[37]

30. There are, however, sound policy reasons why employees should be encouraged to express their ethical concerns to their employers. These concerns could alert the employer to situations that could damage their reputation or subject them to civil liability. *Cf.* 63 OKLA. STAT. § 1-741 (1981) (employee refusing to perform abortion protected).

31. *See* Comment, *supra* note 29.

32. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

33. *See* Harless v. First Nat'l Bank, 289 S.E.2d 692 (W. Va. 1982).

34. *See* Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733 (Tex. 1985) (Kilgarlin, J., concurring).

> Absolute employment at will is a relic of early industrial times, conjuring up visions of the sweat shops described by Charles Dickens and his contemporaries. The doctrine belongs in a museum, not in our law. . . . Our duty to update this doctrine is particularly urgent when the doctrine is used as leverage to incite violations of our state and federal laws. Allowing an employer to require an employee to break a law or face termination cannot help but promote a thorough disrespect for the laws and legal institutions of our society.

*Id.* at 735.

35. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

36. *Id.*, 344 P.2d at 27.

37. *Id.*

The court noted that the solicitation or commission of perjury is unlawful. Such behavior interferes with the administration of justice and public affairs. Because of this:

> It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge an employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.[38]

The employers could have been found criminally liable for their actions. The defendant argued that this was sufficient deterrence for their alleged actions. However, the court found that the policy interests served by prohibiting perjury would be best served by providing civil sanctions in addition to the available criminal sanctions.

Two other aspects of *Petermann* merit discussion. Petermann was fired for disclosing information his employer wished to conceal. The opinion does not state whether Petermann disclosed illegal activity with his testimony, but he obviously provided information contrary to the interest of his employer. Petermann made his disclosure under the legal compulsion of a subpoena. It should, however, follow that voluntary disclosures would also be protected, if such disclosures serve the public interest.

The *Petermann* court also noted that termination for refusing to commit perjury was an example of bad faith. The court stated that an employer must act in good faith when he discharges an employee whose term of employment is to continue as long as his work is satisfactory.[39] This supported the court's finding that Petermann was entitled to a civil remedy for his wrongful discharge.

The cause of action for the discharged whistle-blower has found support in other states. In a Texas case, an employee refused to pump the bilges of his employer's boat into the water after he discovered that the procedure was illegal.[40] He alleged that he was dismissed for this refusal. The Texas Supreme Court found that these allegations stated a cause of action for retaliatory discharge. Public policy, as expressed by the criminal laws of Texas and the United States, justifies what the court called a narrow exception to the terminable-at-will doctrine for the employee who refuses to violate those laws.[41]

*Reporting Employer's Illegal Acts*

The public's interest in enforcing its laws is served when an employee refuses to perform an illegal act. This interest is also served if illegal activity

38. *Id.*

39. *Id.* The *Hall* court also discussed bad faith as part of the rationale for its decision. 713 P.2d at 1030.

40. Sabine v. Hauck, 687 S.W.2d 733 (Tex. 1985).

41. *Id.* at 735.

is brought to the attention of the appropriate authorities. Such disclosure by employees is done at considerable personal risk. Since it is in the public's interest for illegal activity to be stopped, it is also in the public's interest to protect the whistle-blower from termination.

The Illinois Supreme Court found that the public's interest was best served when an employee cooperated with law enforcement authorities in a criminal investigation.[42] The court found a clear public policy mandate in favor of enforcing the state's criminal code. The employee was protecting the interests of the public when he disclosed a possible violation of the criminal code and cooperated in the subsequent criminal investigation. The tort of retaliatory discharge was necessary to protect the public's interest in enforcing its criminal laws.[43]

Public interests are similarly protected when the enforcement of a state's credit code is enhanced by employee disclosure.[44] The West Virginia Supreme Court of Appeals noted that the legislature had perceived a public need for protecting consumers using credit and responded to the need with the credit legislation. Public policy weighed heavily against the retaliatory discharge of an employee who sought to ensure compliance with the protective statute.[45]

Employees are also protected when they report violations of state-mandated patient care standards,[46] employer theft of customer property,[47] and employer violation of air pollution standards.[48] These cases involve reports of information to appropriate enforcement authorities. Public policy is served when illegality is brought to the attention of agencies charged with the enforcement of the law.

Employees of a corporation seeking to remedy perceived illegality have had more difficulty in finding protection from the courts. This result is inconsistent with the purposes of the whistle-blower exception. If internal disclosure can bring an end to the employer's improper activities, then public policy goals are met. Accordingly, internal disclosure is an activity that should be protected.[49] The whistle-blower should be protected whether his disclosure puts an end to improper activity through internal or external action.

In *Murphy v. American Home Products Corp.*,[50] an assistant treasurer of the corporation was terminated after he uncovered illegal accounting procedures. Pursuant to corporate regulations, he reported the improprieties to other officers and to directors of the corporation. The court refused to find

42. Palmateer v. International Harvester, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee fired for reporting violation of the criminal code by another employee).

43. *Id.*, 421 N.E.2d at 880.

44. Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1982).

45. *Id.* at 276.

46. McQuary v. Bel Air Convalescent Home, 69 Or. App. 107, 684 P.2d 21 (1984).

47. Vermillion v. AAA Pro Moving & Storage, 704 P.2d 1360 (Ariz. Ct. App. 1985).

48. Trombetta v. Detroit, Toledo & Ironton R.R., 81 Mich. App. 489, 265 N.W.2d 385 (1978).

49. *See* Malin, *Protecting the Whistleblower From Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277, 313-14 (1983).

50. 58 N.Y.2d 293, 448 N.E.2d 86 (1983).

an exception to New York's established doctrine of terminable-at-will employment, finding that public policy is better determined by legislative than by judicial action.[51] Similarly, the Indiana Court of Appeals refused to find a cause of action for an employee discharged in retaliation for reporting kickbacks to superiors.[52] An employee was not entitled to relief when he was fired for reporting commercial bribes, alteration of commercial documents, and misuse of corporate funds to corporate officers.[53] The Georgia Court of Appeals declined to create a cause of action for a security guard who was fired for "unauthorized off-site surveillance" when the employee alleged that he was about to uncover criminal activity by a construction superintendent.[54]

Deference to the legislature in these cases is misplaced. The legislature has defined prohibited behavior by passing criminal laws and other regulations. Enforcement of the law is enhanced when employees use internal channels to stop or preempt illegal activity by their employer. Providing protection for employees who take such measures does not constitute expansion of the scope of the legislative enactments. The courts' action simply enables employees to encourage compliance with the law without fear of losing their jobs.

*Criticism Based on Moral or Ethical Considerations*

Employees who have been terminated for stating their objection to their employer's unethical activity have had little success in finding protection from the courts. The difficulty these employees have had in stating a cause of action has been their failure to articulate a clearly defined public policy supporting their position.

There is, however, a clearly defined public policy that protects the right of citizens to criticize the positions taken by those in positions of authority. This public policy is embodied in the first amendment to the United States Constitution. In *Novosel v. Nationwide Insurance Co.*,[55] an employee was fired for refusing to take part in the political activities of his employer. The Third Circuit Court of Appeals sought to protect the employee's freedom of expression by holding: "[A]n important public policy is at stake, we now hold that Novosel's allegations state a claim [under Pennsylvania law] in that Novosel's complaint discloses no plausible and legitimate reason for terminating his employment, and his discharge violates a clear mandate of public policy."[56]

51. *Id.*, 448 N.E.2d at 96.

52. Martin v. Platt, 386 N.E.2d 1026 (Ind. Ct. App. 1979) (deferring definition of public policy to legislature).

53. Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981) (failure to show public injury).

54. Goodroe v. Georgia Power Co., 148 Ga. App. 193, 251 S.E.2d 51 (1978) (termination-at-will authorized by statute).

55. 721 F.2d 894 (3d Cir. 1983).

56. *Id.* at 900.

*Novosel* was dealing with the freedom of an employee to express his political views. Similar reasoning should be followed to protect the freedom of an employee to express his ethical concerns about the activities of his employer. An employer, like the government, has power that can be used to control the actions of an individual.[57] This power should not be used to stifle freedom of expression. Our political process benefits when citizens are able to take part in a free exchange of ideas. Because their freedom of expression is protected, citizens are able to do this without fear of government reprisal. Similarly, employees, as corporate citizens, should be free to express their ideas about the conduct of their employer without fear of economic reprisal. Just as the freedom of expression helps protect society from the arbitrary exercise of government power, the same freedom may be used to protect society from an employer's arbitrary exercise of economic power.[58]

Employees who have based their refusal to follow their employer's directions on ethical considerations have had difficulty in finding a legal remedy for their termination. In *Pierce v. Ortho Pharmaceutical Corp.*,[59] a physician was discharged for refusing to participate in the research on a drug she considered dangerous. The doctor stated that her interpretation of the Hippocratic Oath precluded her participation. Although a clearly defined prohibition of involvement in such research might support her claim of retaliatory discharge, the court would not allow her personal interpretation of her ethical obligations to interfere with management decisions about what kind of research to pursue.[60]

The court noted that the research had not reached the stage where testing could create a risk to humans. At that point, testing would have to be approved by the Food and Drug Administration. The company was violating no regulations or administrative orders. Because continued research violated no clearly defined public policy, she could find no support for her refusal to take part in the research.[61]

Similarly, in *Geary v. United States Steel Corp.*,[62] the Pennsylvania Supreme Court found no cause of action for a salesman who refused to sell a product he believed was unsafe. The court recognized the possibility of coercion by the employer when an employee is responsible for making decisions about product safety. An employee in this position could be deterred from making decisions based on his independent judgment.[63] In this case, though, the plaintiff's duties did not include evaluation of product safety. He was a salesman, not an engineer.

57. *See* Blades, *supra* note 1, at 1405. Professor Blades notes that this power is available to the employer because of the employer's power to discharge an employee without cause.

58. *Cf.* Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry*, 24 OKLA. L. REV. 279 (1971).

59. 84 N.J. 58, 417 A.2d 505 (1980).

60. *Id.*, 417 A.2d at 512.

61. *Id.*, 417 A.2d at 514.

62. 456 Pa. 171, 319 A.2d 174 (1974).

63. *Id.*, 319 A.2d at 178.

The court expressed concern about the coercion that might be available to an employee who knows that his termination would provide him with a cause of action against his employer. The threat of a lawsuit would inhibit management's ability to make personnel decisions based on employee qualifications and thereby interfere with the employer's legitimate interest in hiring and retaining the best available personnel.[64] The court noted that even a talented employee is not valuable to the employer if he is unable to work well with fellow employees.

The plaintiff's action in bypassing his immediate supervisors to complain about the product conflicted with the company's established procedures. The court found that the plaintiff's discharge merely protected the employer's legitimate business interests, and it would not recognize a cause of action which interfered with these interests.[65]

This case presents a dangerous argument for the employer who wishes to avoid legitimate employee concerns about the corporation's responsibilities to the public.[66] When an employee discovers problems that the employer does not want to address, the employer can label the employee a troublemaker and dismiss him. This will discourage an employee from pursuing avenues within the corporate structure to remedy the perceived problems. The employer loses the opportunity to dispose of the problems before they reach a point where external remedies must be sought.[67]

One example of bad faith the Oklahoma Supreme Court found in *Hall* was Farmers' apparent desire to distribute Hall's renewal premiums among agents who were less vocal in their opposition to Farmers' employment practices.[68] The court's holding indicates a willingness to protect an employee who expresses his concern about his employer's behavior and concurrently extends informal recognition to the whistle-blower exception. If the court is willing to adopt this exception, the employee will benefit from the security of knowing that he may express his views without fear of retribution. Surely, the public also will benefit from the employer's increased awareness about the consequences of his actions.

*Whistle-Blower Exception as a Matter of Fairness to the Employee*

The *Hall* court discussed the public's interest in employment contracts. The court recognized the general freedom of private parties to enter into contracts. It also noted: "Such freedom is not absolute however, and the interests of the people of Oklahoma are not best served by a marketplace of

64. *Id.*, 319 A.2d at 179.

65. *Id.*, 319 A.2d at 180.

66. Geary's concern about the product's safety was shown to be legitimate by the subsequent withdrawal of the product from the market.

67. For example, if the defective products Geary complained about had not been withdrawn from the market, his employer faced litigation for products liability, which is potentially much greater than that faced in a suit for retaliatory discharge.

68. 713 P.2d at 1030.

cut-throat business dealings where the law of the jungle is thinly clad in contractual lace."[69] These interests are protected by a mutual covenant of good faith, which is implicit in all contracts.[70]

The covenant of good faith is a way of ensuring fairness between contracting parties. Considerations of fairness are also important to the establishment of the whistle-blower exception. An employee faces a difficult choice when he is directed by his employer to perform illegal acts. He must either follow instructions and face the risk of criminal liability, or refuse and face the risk of losing his livelihood.[71]

Employees who are faced with the choice of criminal involvement or unemployment are in a no-win situation. If the risk of prosecution is smaller than the risk of termination, the temptation is to follow the employer's instructions. Employees who are not protected by the civil employment law will lose some of their motivation to follow the criminal law. Unless employees have a means of protecting their livelihood, they may choose to serve their self-interest by complying with the command of their employer, instead of serving the public's interest by complying with the command of the law.

The Connecticut Supreme Court addressed this problem when it recognized a cause of action for a discharged quality control director who insisted on his employer's compliance with a Connecticut product-labeling law.[72] The court noted that, under the statute, the employee could have been criminally liable for failing to take action after his discovery of the labeling discrepancy.[73] The court decided that an employee "should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment."[74] Accordingly, the court found that the plaintiff's allegations stated a cause of action for retaliatory discharge.

Fairness dictates that the employee who acts to protect the public's interest (and loses his job as the result of such action) should be entitled to seek a remedy in a public forum. When an employee refuses to take part in criminal activity, he is acting in recognition of public policy that has been clearly defined by the legislature.[75] When he exposes such activity, he is promoting the public's interest in having its laws enforced.[76]

69. *Id.* at 1029.

70. *Id. Petermann v. International Bhd. of Teamsters* also discussed bad faith as a basis for its decision to grant a civil remedy to the plaintiff. His termination for refusing to commit perjury was evidence of bad faith by the defendant. The court stated that an employer must act in good faith when he discharges an employee whose term of employment is to continue as long as his work is satisfactory. *Petermann*, 174 Cal. App. 2d 184, 344 P.2d 25, 28 (1959).

71. Certainly, it must be considered unfair to force this choice upon an employee.

72. Sheets v. Freddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980).

73. *Id.*, 427 A.2d at 388.

74. *Id.*, 427 A.2d at 389.

75. See the discussion of *Petermann, supra* at text accompanying notes 35-39.

76. *See* Palmateer v. International Harvester, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee fired for reporting a violation of the criminal code by a fellow employee); Harless v. First Nat'l Bank, 289 S.E.2d 692 (W. Va. 1982) (public policy favored protecting an employee who had reported violations of the credit code by his employer). The employee who is aware of,

The risk of losing a job might deter some employees from choosing disclosure, unless they have some way of protecting their livelihood. A tort action to deter retaliatory discharge[77] or to compensate the terminated employee for the loss of employment would provide adequate protection.[78] It would allow employees to choose to disclose a violation of the public's interest without substantial personal risk. Since it is in the public's interest for illegal activity to be stopped, it is also in the public's interest to protect the whistle-blower.

*Deference to the Legislature*

Many courts faced with the problem of retaliatory discharge have shown great deference to the legislature. Courts that have allowed the discharged whistle-blower a cause of action have done so because his actions protected a public policy embodied in statutes of that jurisdiction. In *Palmateer v. International Harvester*,[79] the discharged employee's report of criminal activities furthered the public policy defined by the Illinois Criminal Code.[80] For the policies embodied in the criminal code to be realized, the laws must be enforced. The report of criminal activities enhanced the state's enforcement ability.

In *Trombetta v. Detroit, Toledo & Ironton Railroad*,[81] the Michigan Court of Appeals found that "exceptions [to the terminable-at-will doctrine] were created to prevent individuals from contravening the public policy of this state. It is without question that the public policy of this state does not condone attempts to violate its duly enacted laws."[82] Accordingly, the court held that the employee had stated a cause of action when he alleged that he was discharged for refusing to alter pollution control reports required under Michigan law.[83]

The above cases looked to statutes to determine what constitutes a clear mandate of public policy. They used this mandate to establish an exception to the common law doctrine of terminable-at-will employment. When the

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but not involved in, the illegal activity of his employer does not face as difficult a situation as the employee who is directed to perform the illegal acts. His failure to disclose the illegal activity of his employer is not likely to subject him to criminal prosecution. However, if he chooses to act in the public interest by disclosing the illegality, he faces the same risk of retaliatory discharge.

77. Punitive damages have been awarded to deter retaliatory discharge under Oklahoma's worker's compensation statute. Hicks v. Tulsa Dynaspan, 695 P.2d 17, 19 (Okla. Ct. App. 1985).

78. See *infra* text accompanying notes 92-100.

79. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

80. *Id.*, 421 N.E.2d at 880.

81. 81 Mich. App. 489, 265 N.W.2d 385 (1978).

82. *Id.*, 265 N.W.2d at 388. *See also* Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) ("We now hold that the public policy, as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine.").

83. 81 Mich. App. 489, 265 N.W.2d at 388.

discharge of an at-will employee frustrates the public policy embodied in these statutes, the employee is entitled to recover damages in tort.

Some courts have asked for more from the legislature than an expression of public policy. They have looked to the legislature to establish an exception to the terminable-at-will doctrine before an employee can recover for retaliatory discharge.[84] In *Murphy v. American Home Products Corp.*,[85] an employee alleged that he was discharged for reporting illegal accounting practices to his superiors. The court refused to establish a new cause of action without legislative involvement. The court reasoned that the legislature was better equipped to weigh the public policy considerations involved in establishing an action for retaliatory discharge. The legislature, after all, would have the opportunity to hear all sides of the issue in public hearings. Thus, contrasted with the partisan adversarial setting inherent in the litigation process, legislative enactment would provide a more balanced result in establishing an exception to the terminable-at-will doctrine.[86]

Other courts have considered the argument that the creation of a new cause of action is the prerogative of the legislature. The defendant in *Sabine Pilot Service v. Hauck* pointed to statutory exceptions to the employment at-will doctrine.[87] He argued that any other exception should also be created by the legislature. The Texas Supreme Court responded: "Although the Legislature has created those exceptions to the doctrine, this court is free to judicially amend a judicially created doctrine."[88]

This approach addresses the needs of the discharged whistle-blower more cogently than the position taken by the New York Court of Appeals in *Murphy*. Although the New York court properly stated that the best forum for establishing public policy is the legislature, it ignored the position that the courts are the best forum for determining the needs of individuals who have been harmed by the actions of others. The whistle-blower exception to the at-will doctrine provides a judicial remedy to employees whose retaliatory discharge violates existing expressions of public policy. In this instance the court is not establishing policy but applying it to the needs of an injured party.

84. *But see* Watassek v. Michigan Dep't of Mental Health, 143 Mich. App. 556, 372 N.W.2d 617 (1985) (court applied a whistle-blower statute for public employees to a situation that arose before the statute was enacted and found that this was an example of the Michigan legislature's determination that public policy should protect the whistle-blower).

85. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

86. *Id.*, 448 N.E.2d at 96, 461 N.Y.S.2d at 242. *See also* Goodroe v. Georgia Power Co., 148 Ga. App. 193, 251 S.E.2d 51 (1978) (Georgia statutes confirm terminable-at-will doctrine); Martin v. Platt, 386 N.E.2d 1026 (Ind. Ct. App. 1979) (determination of public policy should be left to the legislature).

87. 687 S.W.2d 733 (Tex. 1985).

88. *Id.* at 735. *See also* Brockmeyer v. Dun & Bradstreet, 113 Wis. 561, 335 N.W.2d 834, 842 (1983) ("The at will doctrine is a common law principle. . . . [I]t is entirely appropriate that the common law now recognize established constitutional and statutory policies in employment relationships.").

Oklahoma has several statutory exceptions to the terminable-at-will doctrine.[89] These exceptions are the legislature's acknowledgment that the employer's power over the employee's livelihood is not absolute. They recognize such important public policy interests as the need for citizens to serve jury duty, the need to maintain a militia, and the need to maintain a safe workplace. However, these statutes do not address every situation in which an employee should be protected from retaliatory discharge. As one court has said, "[W]e also believe that the legislature has not and cannot cover every type of wrongful termination that violates a clear mandate of public policy."[90]

This is clearly true. By passing statutes protecting employees from retaliatory discharge, the legislature has responded to existing needs. In some instances the statutes followed the reasoning of judicially created exceptions to the at-will doctrine.[91] In these leading cases, the courts responded to the complaints of individual employees. The employees had been injured by the retaliatory discharge; but because the discharge also violated public policy, the courts were able to provide the employees with a remedy.

By enacting the statutes, the legislature recognized the need for general application of the judicially created exceptions to at-will employment. The protection of employees from retaliatory discharge should not end with existing legislative remedies. The courts must still be able to respond to the complaints of individual employees whose discharge violates public policy. One clear violation of public policy is the retaliatory discharge of an employee who refuses to become involved in his employer's illegal activity. If the Oklahoma courts are faced with this problem, they should be free to provide a remedy.

*Balancing the Employer's Interest: Arguments for the At-Will Doctrine*

Various arguments have been advanced in support of the at-will doctrine.[92] An employee may not be forced to work for a particular employer because such a relationship is involuntary servitude—a violation of the thirteenth

89. See *supra* note 11.

90. Brockmeyer v. Dun & Bradstreet, 113 Wis. 561, 335 N.W.2d 834, 841-42 (1983).

91. For example, 85 OKLA. STAT. § 5 (1981), the retaliatory discharge provision of the worker's compensation statute was enacted after a similar remedy had been judicially created in several other states. *See* Annotation, *Workmen's Compensation: Recovery from Discharge in Retaliation For Filing Claim*, 63 A.L.R.3d 979 (1975). 38 OKLA. STAT. § 34 (1981), the statute protecting the employee who serves jury duty, was enacted after Oregon recognized a similar protection in Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

92. These will be discussed only as they relate to the whistle-blower exception. A general criticism of the at-will doctrine is beyond the scope of this note. For a general discussion of the at-will doctrine in Oklahoma, see Tepker, *supra* note 3, at 373. For the arguments in favor of strict adherence to the at-will doctrine, see Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984). A criticism of some of the abuses of the employer power created by the at-will doctrine is found in Blades, *supra* note 1.

amendment.[93] Since the employee is free to end the employment relationship at any time, the principle of mutuality of obligation suggests that the employer should also be free to end the relationship.[94] However, this note does not advocate a coerced reunion between the discharged whistle-blower and his employer. The purpose of the whistle-blower tort is to compensate the employee for the damages he has suffered from a retaliatory discharge.[95]

An employer has a legitimate interest in maintaining the most productive work force.[96] To do this he must be able to discharge his least productive employees. The employer is entitled to some discretion in determining who is or is not productive. The threat of a lawsuit for retaliatory discharge can interfere with his discretion in personnel matters.[97] However, the discharge of an employee for refusing to take part in his employer's illegal activity is not a legitimate exercise of discretion; it is a bad faith abuse of the employer's power to control his personnel. The whistle-blower tort would not interfere with the employer's legitimate exercise of discretion in his retention of quality personnel. It would only place a limit on the abuse of this discretion.

The at-will doctrine has also been praised for its administrative efficiency.[98] Professional managers have more experience than the courts in determining the feasibility of retaining employees. The costs of keeping records to show good cause for terminations are a burden on the employer. However, illegal activity also imposes a cost on society. The whistle-blower who takes action to eliminate illegal activity should be protected. If an employee can show that his termination was a result of his efforts to avoid illegal activity, it is not unfair to impose upon the employer the cost of attempting to prove that the termination was justified.

To determine if the employee should have a cause of action for retaliatory discharge, the legitimate needs of the employer must be balanced against the public policy considerations behind the whistle-blower exception. Several courts have considered factors to establish this balance. In *Novosel v. Na-*

93. "Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdicton" U.S. CONST. amend. XIII § 1.

94. *See* Tepker, *supra* note 3, at 390, discussing the inequities that make this rationale a flawed justification for the at-will doctrine.

95. In some cases punitive damages should also be awarded to punish conduct that seriously contravenes public policy. This would also protect other employees by discouraging retaliatory discharge.

96. Geary v. United States Steel Corp., 319 A.2d 174, 179 (Pa. 1974).

97. *But see* Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980).

> We are mindful that courts should not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation. We are, however, equally mindful that the myriad of employees without the bargaining power to command employment contracts for a definite term are entitled to a modicum of judicial protection when their conduct as good citizens is punished by their employers.

*Id.*, 427 A.2d at 387-88.

98. *See* Epstein, *supra* note 92, at 959-60; Tepker, *supra* note 3, at 387.

*tionwide Insurance Co.*,[99] the Third Circuit Court of Appeals suggested the following balancing factors:

(a) the nature of the actor's conduct,
(b) the actor's motive,
(c) the interest of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference, and
(g) the relations between the parties.[100]

When each of these factors is applied to the whistle-blower exception, the balance weighs heavily in favor of discharged employees. Such employees are fired for refusing to take part in their employer's illegal or unethical conduct. They are motivated by a desire to avoid criminal liability. Retaliatory discharge interferes with the employees' interest in continued employment. Societal interests are advanced by protecting employees who seek to avoid conduct contrary to the laws of society. Employees may refuse to follow instructions to engage in illegal activity without violating their contractual obligations to their employer to perform their jobs.

The at-will employment relationship is one in which employees are dependent on the good faith of their employer for their livelihood. Employers have the authority to direct the activities of their employees. If the employees refuse to follow directions, the employers have the power to fire them. This power should not be amenable to abuse by employers. The whistle-blower tort gives employees the right to limit the authority of their employer to direct their activities without risking unemployment.

### *Burden of Proof*

Once the court has recognized the cause of action, the plaintiff must prove his case. Several factors must be proved. The court must determine if the employee's termination has violated public policy and if there is a causal relationship between the firing and the wrongful action promoted by the employer. Finally, if the plaintiff has established a cause of action, he must prove his damages.

The Wisconsin Supreme Court established a division of the burden of proof for the employee who brings an action for retaliatory discharge.[101] The employee must first convince the court that "the conduct that caused the discharge was consistent with a clear and compelling public policy."[102] This

99. 721 F.2d 894 (1983).
100. *Id.* at 901.
101. Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).
102. *Id.*, 335 N.W.2d at 841.

is a question of law that must be proved to survive a motion to dismiss. By placing this burden on the employee, the court protects the employer and the judicial system from frivolous lawsuits.

This pleading requirement will probably not prevent all frivolous lawsuits. There will probably be justifiably discharged employees who will try to take advantage of the cause of action to shift their loss to their employers. This does not mean that the needs of employees who are actually injured by wrongful discharge should not be addressed by the courts. The purpose of tort actions is to allocate losses to the parties who create the loss.[103] The litigation process allows evidence to be presented that will show the party who actually caused the loss. If an employee's job performance justified his termination, his poor performance is the cause of his loss. When this is shown, the employee will not recover. But if it can be shown that the employer's wrongful act caused the employee's loss, the employee is entitled to recover his loss from the employer. This places the burden of showing some wrongful act on the employee.[104]

Frivolous lawsuits that are not overcome by this burden of proof will place some burden on the legal system. However, the possibility that some litigants will abuse the privilege of having access to the legal system should not preclude deserving plaintiffs from having an opportunity to bring meritorious claims before the court. The employee who can prove that his discharge violates a clear mandate of public policy has a claim that deserves to be heard.

Once the employee has established the public policy foundation for his cause of action, the burden of proof shifts to the employer to establish just cause for the termination.[105] This provides job security for the employee who has established a public policy in his favor. By protecting the employee who acts in the public interest, the whistle-blower exception also helps to ensure that important public policy needs will be met.[106]

### *Remedies*

Once the whistle-blower has proved his employer's liability for retaliatory discharge, he is entitled to relief. He might seek relief in a variety of ways, in-

103. *See* W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, § 4 (5th ed. 1984).

104. One court has held that the defendant does not need to prove that her employer was actually involved in illegal activity to recover for retaliatory discharge. In McQuary v. Bel Air Convalescent Home, 69 Or. App. 107, 684 P.2d 24 (1984), the plaintiff was discharged for reporting what she believed to be patient abuse in a nursing home. There was some question whether nursing home regulations would define her employer's conduct as actual abuse. The court balanced the possible public harm from erroneous reports of violations against the harm that would occur if the threat of retaliation deterred employees from reporting patient abuse. The court determined that the societal interest in safe nursing home care weighs more heavily in favor of protecting the employee who makes good faith reports of regulatory violations.

105. *But see* Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) ("[I]t is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.").

106. *Brockmeyer*, 113 Wis. 2d 561, 335 N.W.2d at 841.

cluding reinstatement and recovery of damages for pecuniary loss and emotional suffering. Punitive damages may be used to deter the kind of employer misconduct that led to the retaliatory discharge suit.

Reinstatement is an equitable remedy that courts have traditionally been reluctant to provide.[107] Because of the close personal nature of the employment relationship, the forced reunion between a discharged employee and his former employer can be a burden on both parties.[108] This is especially true in the case of an employee who has just succeeded in showing his employer to be a bad actor.

One Oklahoma limitation on the at-will doctrine provides reinstatement as a remedy for wrongful discharge. The Oklahoma Human Rights Commission has the ability to order this relief in some cases.[109] The Commission is an administrative body especially equipped to handle improper behavior by employers toward workers. Reinstatement is not as desirable a remedy for a judicially created cause of action. The courts lack the supervisory capacity to ensure a workable reunion of discharged employees with their employers.

The primary injury a discharged employee suffers is the loss of his livelihood. The average employee is operating on a budget that requires a regular source of income. He expects this income to come from his wages. When he is fired, his loss is measured not only by the lost wages but by the effect this has on his entire financial condition. If an employee has been in a position for a considerable time, he has probably accrued some benefits based on seniority.[110] Many employees depend on their employment to provide a myriad of insurance needs, most notably life and health insurance. Employees can lose the ability to obtain credit and also lose personal or real property used to secure existing credit obligations.

In one early Oklahoma case, the Oklahoma Supreme Court expressed concern about the difficulty of determining the duration of an employment relationship for an indefinite term.[111] If the employee cannot point to any exact time in the future when the employer's responsibility for payment of wages ends, it is difficult to determine the amount of lost wages. Consequently, he cannot calculate the actual damage caused by his termination.

It is admittedly difficult to determine the exact amount of compensation an employee would have earned but for his retaliatory discharge. However, it cannot be denied that the discharged employee has suffered a loss. The difficulty in determining the exact amount of recovery should not deny relief to a deserving plaintiff. Other tortfeasors have been found liable in damages for pain and suffering or for emotional distress.[112] The difficulty in determining a monetary value of these damages has not resulted in their exclusion from tort law.

107. *See* E. FARNSWORTH, CONTRACTS § 12 (1982).
108. *See* Malin, *supra* note 49, at 316-17.
109. 25 OKLA. STAT. § 1505(b)(2) (1981).
110. For example, vacation time or credit toward a pension.
111. Foster v. Atlas Life Ins. Co., 154 Okla. 80, 6 P.2d 805, 808 (1932).
112. *See* W. PROSSER & W. KEETON, *supra* note 103, § 12.

Punitive damages should also be available as a remedy for retaliatory discharge. Punitive damages are available to deter future misconduct of the employer and to deter others in the same situation from similar misconduct.[113] The use of the employer's power over the employee to coerce the employee's participation in illegal activity is misconduct that should be deterred. The ability to recover punitive damages can also be an incentive for the discharged whistle-blower to bring suit. If the employee has quickly secured alternative employment, his recovery for actual damages could be negligible. If the ability to recover damages is thus limited, the discharged employee will be reluctant to bring suit and the employer's activity will not be subjected to judicial scrutiny. If the whistle-blower's activity furthers public policy, his ability to demand satisfaction from his former employer should be reinforced by punitive damages.

### *Conclusion*

The Oklahoma Supreme Court has not decided a case dealing with the whistle-blower exception to the at-will doctrine. The public policies embodied in the laws of the state of Oklahoma would be best served if the whistle-blower could recover in tort for this retaliatory discharge. This would create greater respect for the law by protecting, rather than punishing, the employee who insists on following its requirements.

Both the legislature and the Oklahoma Supreme Court have shown a willingness to limit the absolute power of the employer to dismiss an at-will employee. The legislature has passed statutes protecting the employee who reports unsafe working conditions, who reports discriminatory employment practices, or who serves his legal obligations. However, the legislature cannot address every situation in which an employee's discharge violates public policy. Judicial involvement is necessary to fill the gap between statutory exceptions to the at-will doctrine and other public policy needs.

Discharge of the whistle-blowing employee is a clear violation of public policy. In *Hall v. Farmers Insurance Exchange*,[114] the Oklahoma Supreme Court recognized that the bad faith termination of an at-will employee will make the employer liable for damages. It is hard to imagine a clearer example of bad faith than termination of an employee for following the law. The policies of the state of Oklahoma as expressed by the legislature and the supreme court indicate that an Oklahoma whistle-blower should and would be protected by an exception to the terminable-at-will doctrine of employment.

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113. Hicks v. Tulsa Dynaspan, 695 P.2d 17, 19 (Okla. Ct. App. 1985) (punitive damages necessary to deter retaliatory discharge under worker's compensation statute).

114. 713 P.2d 1027 (Okla. 1985).