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The Whistleblower Exception to the At-Will Employment Doctrine: An Economic Analysis of Environmental Policy Enforcement

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THE WHISTLEBLOWER EXCEPTION TO THE AT-WILL EMPLOYMENT DOCTRINE: AN ECONOMIC ANALYSIS OF ENVIRONMENTAL POLICY ENFORCEMENT

I. INTRODUCTION

After centuries of neglect and disconcern, the nations of the world have realized that the condition of the environment is of crucial economic importance.[1] As the constraints of resource scarcity tighten under the pressures of burgeoning worldwide demand, Pareto's questions of allocative efficiency move to the forefront of public concern.[2] The United States foresaw the hazards of environmental pollution and Congress established agencies charged with protecting the environment.[3] Government agencies have controlled and enforced environmental policy through various statutes including the Clean Air Act[4] and the Clean Water Act.[5] Congress designed these well-intentioned laws to protect and regulate society and they are often the only safeguard between the environment and harmful pollutants.[6] But environmental laws are most effective when enforced.[7] Enforcement of environmental measures is costly[8] and difficult.[9] The high costs of detection and evi-

1. The main objective of the Preparatory Committee for the United Nations Conference on Environment and Development (UNCED) preceding the Rio Summit conference was to "devise ways to change human economic behavior so that the natural environment of the planet is conserved." *Preparatory Committee Narrows Options for "Agenda 21"; United Nations Preparatory Committee for the UN Conference on the Environment and Development*, 28 U.N. MONTHLY CHRON., Dec. 1991, at 65. The committee reported that Group I proposed action concerning forest and energy conservation, Group II proposed water utilization, and Group III reviewed existing environmental laws. *Id.* Over 160 nations were expected to attend the Rio Summit as signatories to proposed treaties. *The Week Ahead: Rio De Janeiro; Helping Out Mother*, LOS ANGELES TIMES, June 2, 1992, World Report, at 1.

2. The resource efficiency theory developed by Vilfredo Pareto holds that scarce resources should be utilized to the fullest possible capacity in applications which provide the greatest return to society as a whole. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 487 (Patricia A. Mitchell, et al. eds., 1985).

3. Congress declared national environmental policy to "maintain environmental quality" through coordination of "Federal plans, functions, programs, and resources". 42 U.S.C. § 4331 (1988). Pursuant to this end, Congress established "a Council on Environmental Quality" with the passage of "The National Environmental Policy Act of 1969." National Environmental Policy Act of 1969, Pub. L. No. 91-190 , § 202, 83 Stat. 852, 854-55 (1970) (codified at 42 U.S.C. § 4342 (1988)). President Nixon added to the Council on Environmental Quality by creating the Environmental Protection Agency. Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970), *reprinted in* 5 U.S.C. app. at 1343 (1988), *and in* 84 Stat. 2086 (1970).

4. 42 U.S.C. §§ 7401-7642 (1988 & Supp. II 1990).

5. 33 U.S.C. §§ 1251-1387 (1988 & Supp. II 1990).

6. *Id.*; 42 U.S.C. § 7401-7642.

7. Economic analysis shows that effective deterrence of criminal acts and increased care in avoiding civil wrongs is a function of swift and certain penalties. *See generally*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 517 (3d ed. 1986).

8. "The Federal government now spends more than $4 billion a year on the environment, a 12-fold increase in 20 years after adjusting for inflation." Allan H. Meltzer, *Times*

dence gathering make whistleblowers extremely useful in enforcing policy.[10] As a result, legislatures have granted whistleblower protection from wrongful discharge under the public policy exception to the at-will employment doctrine.[11]

This Note focuses on the economics of the whistleblower exception to the at-will employment doctrine and its function in environmental matters. First, this Note discusses the background and development of the at-will employment doctrine. Second, this Note examines pertinent wrongful discharge and environmental whistleblower decisions. Finally,

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Board of Economists / Allan H. Meltzer: Applying Market Principles to the Cause of Saving the Environment, L. A. TIMES July 19, 1992, at D2.

9. Difficulty is often encountered because employees may be reluctant to pursue wrongful discharge actions. *See* Mitchell v. DeMario Jewelry, Inc. 361 U.S. 288, 292-93 (1960) (workers are often dissuaded from seeking redress for wrongful discharge); CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR, 213-16 (1975) (for a variety of reasons, employees often do not engage in whistleblowing).

10. "Seventy-five to eighty percent of the information on which the Inspectors General Act comes from so-called whistleblowers." 135 CONG. REC. H752 (daily ed. Mar. 21, 1989) (statement of Rep. Horton). In many cases, violations of statutes would never be detected without whistleblower action. *See Mitchell*, 361 U.S. at 292 (effective enforcement of labor standards possible only if employees approached officials in the event of grievances). Whistleblowers are crucial in environmental policy enforcement. United States v. Goodner Bros. Aircraft, 966 F.2d 380, 383 (8th Cir. 1992). In *Goodner*, discharges of phenol and methylene chloride were discovered when "a neighbor noticed 'two men dumping creamy beige, toxic-smelling waste into a ravine' on the Goodner Brothers Farm." *Id.* As a result of the whistleblowing neighbor, the EPA and the Arkansas Department of Pollution Control and Ecology investigated, resulting in a cessation of the pollution on the Goodner Brothers Farm. *Id.* Goodner Brothers Aircraft and Albert S. Goodner were convicted of criminal violations. *Id.* In the case of PICA Plating, detection of environmental violations and the imposition of several million dollars in fines occurred only after a tip to inspectors by an employee-whistleblower. Manik Roy, *Pollution Prevention, Organizational Culture, and Social Learning*, 22 ENVTL. L. 189, 194 (1991); STONE, *supra* note 9, at 213-14 (discussing how B.F. Goodrich memoranda leaked by insiders prompted FBI investigations). *Contra* James W. Hubbell, *Retaliatory Discharge and the Economics of Deterrence*, 60 U. COLO. L. REV. 91, 105 (1989) (arguing that statutory enforcement may be reduced because of false claims by whistleblowers which penalize innocent corporate behavior).

11. Federal whistleblower protection is granted to federal employees by the Whistleblower Protection Act of 1989. Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended in scattered sections of 5 U.S.C. (Supp. II 1990)). States granting statutory public policy protection against wrongful discharge of state government employees include: Colorado, COLO. REV. STAT. § 24-50.5-103 (1989); Delaware, DEL. CODE ANN. tit. 29 § 5115 (1991); Indiana, IND. CODE ANN. § 4-15-10-4 (Burns 1990); Maryland, MD. ANN. CODE art. 64A, § 12G (1988 & Supp. 1991); North Dakota, N.D. CENT. CODE § 34-11.1-04, -06 (1987); Utah, UTAH CODE ANN. §§ 67-21-1 to -9 (1986 & Supp. 1992); Washington, WASH. REV. CODE ANN. § 42.40.010y-.900 (West 1991).

Those granting statutory public policy protection against wrongful discharge to private sector employees include: California, CAL. LAB. CODE § 1102.5 (West 1989); Connecticut, CONN. GEN. STAT. ANN. § 31-51m (West 1987 & Supp. 1992); Illinois, ILL. ANN. STAT. ch. 127, para. 63b119c.1 (Smith-Hurd Supp. 1992); Iowa, IOWA CODE ANN. § 19A.19 (West 1989); Kansas, KAN. STAT. ANN. § 44-1009 (1986 & Supp. 1991); Nebraska, NEB. REV. STAT. § 48-1114 (1988); Oklahoma, OKLA. STAT. ANN. tit. 25, § 1601 (1991); Oregon, OR. REV. STAT. ANN. § 659.035 (Butterworth 1989).

States granting protection under specific "whistleblower" acts include: Maine, ME. REV. STAT. ANN. tit. 26, §§ 831-840 (West 1988); Michigan, MICH COMP. LAWS ANN. §§ 15.361-.369 (West 1981 & Supp. 1992); New Jersey, N.J. STAT. ANN. §§ 34:19-1 to -8 (West 1988); New York, N.Y. LAB. LAW § 740 (McKinney 1988).

For a discussion of various State whistleblower statutes, please refer to: Terry Morehead Dworkin and Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241 (1987).

this Note exposes the shortcomings of the exception as currently applied and proposes a modest solution.

II. BACKGROUND

At common law, workers hired for an indefinite period of time are considered employees at-will.[12] This nineteenth century doctrine allowed absolute termination by either employer or employee for good cause, bad cause, or no cause at all.[13] Modernly, there developed several exceptions to the at-will employment doctrine[14] including the public policy exception.[15] Courts created the public policy exception to protect the public from employers economically coercing illegal or immoral acts from employees.[16] Whistleblowing is one of the public policy exceptions to the at-will employment doctrine.[17] Whistleblowers face enormous difficulties when bringing action.[18] Currently, costly disincentives exist which discourage whistleblowers from bringing valid actions.[19]

Public Policy Exception to the At-Will Employment Doctrine

To understand the whistleblower exception it is necessary to discuss

12. "[T]he rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will . . . " H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877).

13. *Id.*; Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); Hubbell, *supra* note 10, at 91; Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 481 (1976).

14. Nina G. Stillman, *Workplace Claims: Wrongful Discharge, Public Policy Actions and Other Common Law Torts*, 398 PRAC. L. INST. 55 (1990).

15. Petermann v. Local 396, Int'l Bhd. of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959) (credited as the first case to recognize a public policy exception to the at-will employment doctrine, Petermann was fired from an at-will position for refusing to commit perjury). *Cf.* Russell v. Courier Printing & Publishing Co., 95 P. 936, 938 (Colo. 1908) (allowing considerations of public policy to void a contract).

16. *Petermann*, 344 P.2d at 27; *see also* Jeffrey L. Harrison, *The Price of the Public Policy Modification of the Terminable-at-Will Rule*, 34 LAB. L.J. 581, 584 (1983) (the public policy exception is designed to protect the public, not the employer or the employee).

17. United States *exrel* Marcus v. Hess, 317 U.S. 537, 540-42 (1943) (explaining that *qui tam* or informer actions have traditionally allowed recovery); Cummins v. EG & G Sealol, Inc., 690 F. Supp. 134, 138-39 (D. R.I. 1988) (cause of action for wrongful discharge of employee dismissed for "whistleblowing" activity); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270, 275-76 (W. Va. 1978) (cause of action pursuant to public policy exception where employee discharged for reporting criminal violations).

18. Thomas M. Devine & Donald G. Aplin, *Whistleblower Protection—The Gap Between the Law and Reality*, 31 How. L.J. 223 (1988) (describes the techniques used to dissuade whistleblowing); Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355 (1991); *cf.* Roy, *supra* note 10 (examines group behavior and organizational culture and its effect on individual behavior which includes deterring whistleblowers).

19. STONE, *supra* note 9, at 215 ("[T]he drawback, however, is that while the law can save the employee from being fired, it is a much harder matter to prevent the employer from making his life uncomfortable."); Devine & Aplin, *supra* note 18; Fisher, *supra* note 18, at 356 (The credo of the whistleblower should be "No good deed shall go unpunished."); Cheryl S. Massingale, *At-will Employment: Going, Going. . .*, 24 U. RICH. L. REV. 187, 200-01 (1990); Clyde W. Summers, *Labor Law as the Century Turns A Changing of the Guard*, 67 NEB. L. REV. 7, 25 (1988).

the at-will employment doctrine. The business climate of the latter half of the nineteenth century was marked by economic hardship.[20] To protect against the common phenomenon of business failures, the political and legal climate favored employer protection.[21] The employment at-will doctrine attempted to promote, foster and protect freedom of enterprise and economic expansion.[22]

The at-will employment doctrine first appeared in Horace Wood's 1877 TREATISE ON THE LAW OF MASTER AND SERVANT.[23] According to Wood's rule, employees in the United States hired for an indefinite period of time were considered employees at-will, terminable at any time for any reason.[24] Despite its questionable origins,[25] Wood's rule fit the laissez faire economic climate of the day and quickly gained widespread acceptance.[26] The at-will employment doctrine was reinforced by mutuality of duty and obligation allowing either employer or employee to terminate at will,[27] which undoubtedly enhanced its survival.[28]

The at-will employment doctrine left employees at liberty to quit jobs easily, but without legal recourse for wrongful terminations.[29] The doctrine held the potential for abusive economic coercion in violation of public policy and was eroded by *Petermann v. Local 396, Int'l Bhd. of Teamsters*.[30] The *Petermann* court held that an employer's right to discharge pursuant to the at-will employment doctrine was checked by considerations of public policy.[31] In time, other courts upheld a cause of action

20. John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 468 AM. BUS. L.J. 467, 467 (1980).

21. Blackburn, *supra* note 20, at 467.

22. *Id.* at 467-69; Hubbell, *supra* note 10, at 94; J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974); *see also* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933 (1983) [hereinafter *Public Policy*].

23. WOOD, *supra* note 12, at 272.

24. *Id.* This differs from the common law of Britain where workers hired for an indefinite period of time are considered to work from term to term with automatic renewal if the term is exceeded. Summers, *supra* note 13, at 483-84.

25. Theodore St. Antoine, *You're Fired!* 10 HUM. RTS. Winter 1982, at 32-33;

> The rule making employment arrangements of indefinite duration contracts at will, terminable by either party at any time, is not one which has roots deep in the English common law but one which sprang full-blown in 1877 from the busy and perhaps careless pen of an American treatise writer.

Id. Hubbell, *supra* note 10, at 94; Shapiro & Tune, *supra* note 22, at 341 & n.54 (demonstrating that the case law H.G. Wood cited in his treatise creating the at-will employment doctrine did not support his final conclusions); *Public Policy*, *supra* note 22, at 1933.

26. WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES 253 (1985); Charles A. Brake, Jr., Note, *Limiting the Right to Terminate at Will — Have the Courts Forgotten the Employer?* 35 VAND. L. REV. 201, 206-08 (1982); *see also Public Policy*, *supra* note 22, at 1933.

27. Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140, 1142 (N.H. 1981) (arguing that the mutual obligations of contract theory were imposed on at-will employment); Summers, *supra* note 13, at 484-85; *see also* Payne v. Western & Atl. R.R., 81 Tenn. 507, 515-20 (1884) (analyzing at-will employee dismissal in contract terms), *overruled on other grounds*, 179 S.W. 134, 138 (Tenn. 1915).

28. Blackburn, *supra* note 20, at 470; Blades, *supra* note 13, at 1419.

29. St. Antoine, *supra* note 25, at 35; Blades, *supra* note 13, at 1405.

30. Petermann v. Local 396, Int'l Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Ct. App. 1959).

31. *Id.* at 27.

for wrongful discharge pursuant to the public policy exception to the at-will employment doctrine as safeguard for public policy.[32]

Modernly, courts strike a balance between the competing interests of employer discretion, employee security and public policy.[33] Proponents of the at-will employment doctrine argue that the employer's interest in controlling the working environment must be maintained.[34] Proponents for enforcement of the at-will employment doctrine argue that, except in the most egregious instances, allowing recourse for unjust dismissal is unwarranted. These proponents contend unjust dismissal protection encourages false claims,[35] and is an inappropriate means of enforcing public policy.[36] Opponents contend that protection of the employee and society is of paramount importance.[37] If employees have no recourse, employers will coerce them into committing illegal acts to the detriment of society and, potentially, the environment.[38] Heightening these concerns is the fact that neither union collective bargaining agreements nor federal employee protection acts protect the vast majority of employees in the United States.[39] The public policy exception to the at-will employment doctrine developed through the balancing of

32. Harrison, *supra* note 16, at 581; *Public Policy, supra* note 22, at 1931.

33. Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981); Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140, 1143 (N.H. 1981); Martin Marietta Corp. v. Lorenz; 823 P.2d 100, 105 (1992) (the majority argues that proper balance between the interests of the public, employer and employee must be maintained). *But see Martin Marietta*, 823 P.2d at 119 ((Erickson concurring in part and dissenting in part) arguing that the purpose of the public policy exception is to benefit the public at large and not the individual employee).

34. Harrison, *supra* note 16; Hubbell, *supra* note 10.

35. Hubbell, *supra* note 10, 105. Opponents have been open in advocating limitation of the whistleblower exception to the at-will employment doctrine: "Any *general* standard for dealing with the discharged whistleblower, on the other hand, should protect him but not affirmatively encourage others to whistleblow." Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 J. L. REFORM 277, 302 (1983).

36. Malin, *supra* note 35, at 302 ("Relying on employee vigilantes (whistleblowers) is not necessarily sound general law enforcement policy."); *See* Harrison, *supra*, note 16, at 584-85.

37. Theodore J. St. Antoine speculates that the harms to the individual worker and society associated with job loss are severe:

> Numerous studies document the increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, ulcers, diabetes, spouse and child abuse, impaired social relationships, and various other diseases and abnormal conditions that develop even in the wake of impersonal permanent layoffs resulting from plant closures. It seems reasonable to presume that such effects are at least as severe when a worker is singled out to be discharged for some alleged deficiency or misconduct. . . . [I]t is this piercing hurt to individuals which justifies the call for reform of the at-will doctrine.

Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 67 (1988).

38. *See* Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).

39. "Excluding [company executives and entertainers who have the power to bargain for 'just cause' provisions, union employees covered by collective bargaining agreements, and public employees covered by civil service statutes] the remaining nonunion private sector exceeds 60% of the American work force and consists of over 65,000,000 employees. For them there has been no blanket protection from the 'at-will' doctrine." Paul H. Tobias, *Current Trends in Employment Dismissal Law: The Plaintiff's Perspective*, 67 NEB. L. REV. 178, 180 (1988).

these concerns.[40]

Two different approaches to the at-will employee wrongful discharge claim have emerged.[41] One approach, based in contract, charges employers with the duty to discharge in good faith arising out of the implied contract formed by various aspects of company behavior.[42] The other approach, based in tort, allows recovery where a wrongful discharge occurs in retaliation for exercising privileges, rights, or duties, or for refusing to violate the law.[43]

The majority of states now recognize a cause of action for wrongful discharge pursuant to the public-policy exception to the at-will employment doctrine.[44] Although the term "public policy" has historically been difficult to define,[45] many jurisdictions followed and expanded the rationale of *Petermann*.[46] Courts include the following discharges under the public policy exception: (1) bad faith,[47] (2) refusal to participate in criminal activity,[48] (3) retaliation for whistleblowing or invoking a public

40. *Petermann*, 344 P.2d at 27 (holding that employer's right of discharge may be checked by "considerations of public policy"); Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (arguing for the need to maintain a proper balance between the employer's interest in earning a profit, the employee's interest in earning a wage, and society's interest in public policy).

41. HOLLOWAY & LEECH, *supra* note 26, at 261 (1985); Blades, *supra* note 13, at 1419-27.

42. Smith v. Colorado Interstate Gas Co., 794 F. Supp. 1035 (D. Colo. 1992); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980); Fortune v. National Cash Register Co. 364 N.E.2d 1251 (Mass. 1977); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (Wis. 1983); HOLLOWAY & LEECH, *supra* note 26, at 261; Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 630, 649-63 (1988); Stillman, *supra* note 14, at 55.

43. Cummins v. EG & G Sealol, Inc., 690 F. Supp. 134, 138-39 (D. R.I. 1988); *Petermann*, 344 P.2d 25, at 27; Sussman v. University of Colo. Health Sciences Ctr., 706 P.2d 443 (Colo. Ct. App. 1985); Lampe v. Presbyterian Med. Ctr., 590 P.2d 513 (Colo. Ct. App. 1978); Trombetta v. Detroit, Toledo & Ironton R., 265 N.W.2d 385 (Mich. Ct. App. 1978) (employee wrongfully discharged for refusing to alter pollution control reports); Sides v. Duke Hosp., 328 S.E.2d 818 (N.C. Ct. App. 1985) (nurse discharged by hospital after testifying truthfully in an action for medical malpractice).

44. Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 106 (Colo. 1992); *see* sources cited *supra* note 11.

45. Stillman, *supra* note 14, at 55; *see also Petermann*, 344 P.2d at 27 (quoting WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS, § 546, at 675 (4th ed. 1856) ("[Public policy] has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud.") Story continues, determining that whatever is in contravention of the established interest of the public good is against public policy); Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (defining "public policy" as "what is right and just and affects the citizens of the State collectively"); *Public Policy*, *supra* note 22, at 1947.

46. 344 P.2d 25 (holding that, pursuant to concerns of public policy, an at-will employee had a cause of action for wrongful discharge resulting from failing to commit perjury); *Public Policy*, *supra* note 22, at 1932.

47. *Petermann*, 344 P.2d at 28 (applying Coats v. General Motors Corp., 39 P.2d 838, 841 (Cal. Dist. Ct. App. 1934), which acknowledged the well-settled doctrine that the employer must discharge only in good faith).

48. *Id.* at 27; Trombetta v. Detroit, Toledo & Ironton R.R., 265 N.W.2d 385 (Mich. Ct. App. 1978) (employee wrongfully discharged for not altering pollution control reports); Sides v. Duke Hosp., 328 S.E.2d 818 (N.C. Ct. App. 1985) (nurse threatened, harassed, and ultimately discharged by Duke University hospital administrators after refusing to commit perjury in an action for medical malpractice).

duty[49] or statutory right,[50] and (4) malice.[51]

The conceptual framework for wrongful discharge pursuant to the public policy exception to the at-will employment doctrine differs immensely across jurisdictions, but generally there must be a wrongful discharge that violates public policy.[52] The most common elements giving rise to a cause of action pursuant to the public policy exception to the at-will employment doctrine include: (1) an act or refusal to act, (2) supported by public policy, (3) bearing a causal relationship, (4) to the discharge.[53] Discharges for any good reason or even no reason whatsoever are not actionable; only wrongful discharges are actionable.[54] A wrongful discharge standing alone or even coupled with a private interest does not state a cause of action; rather, the wrongful discharge must impair some public policy.[55] The Colorado Supreme Court recently required that an employee must give the employer notice of the reasons for noncompliance with the unlawful order in addition to the elements above.[56]

To fully understand the public policy exception to the at-will employment doctrine, it is necessary to contemplate its policy goals. As the public policy exception to the at-will employment doctrine is currently interpreted, a wrongfully discharged employee brings suit against an employer to enforce public policy.[57] Theoretically, the employee bears the cost, the employer is deterred from future violations, and society benefits from the action.[58] This system of enforcing public policy has been criticized for being unnecessarily regressive.[59]

The most recent statement of the public policy exceptions to the at-will employment doctrine appeared in *Martin Marietta v. Lorenz*.[60] The

49. Cummins v. EG & G Sealol, Inc., 690 F. Supp. 134, 138-39 (D. R.I. 1988) (cause of action found for wrongful discharge of employee dismissed for "whistleblowing" activity); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270, 276 (W. Va. 1978) (cause of action allowed pursuant to public policy exception where employee was discharged for reporting criminal violations).

50. *See e.g.*, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (to prevent circumvention of the worker's compensation laws, an injured employee discharged in retaliation for filing for worker's compensation benefits was recognized as having a claim); Lathrop v. Entemann's Inc., 770 P.2d 1367, 1372-73 (Colo. Ct. App. 1989) (held that to allow retaliatory discharge for filing worker's compensation claims violated public policy).

51. *E.g.*, Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (malicious discharge for refusing to go out with the foreman).

52. HOLLOWAY & LEECH, *supra* note 26, at 261; Blackburn, *supra* note 20, at 472; *see also* Geary v. United States Steel Corp., 319 A.2d 174, 180 (Pa. 1974); Thompson v. St. Regis Paper Co. 685 P.2d 1081, 1089 (Wash. 1984) (holding that an employee has a claim where discharge violates a clear mandate of public policy).

53. Elletta S. Callahan, *The Public Policy Exception to the Employment At Will Rule Comes of Age: A Proposed Framework for Analysis*, 29 AM. BUS. L. J. 481, 490 (1991).

54. HOLLOWAY & LEECH, *supra* note 26, at 261.

55. *Id.*; *see also* Palmateer v. International Harvester Co., 421 N.E.2d 876 (allowing action where public concern is involved but denying action where only a private interest is involved); *Public Policy*, *supra* note 22, at 1949.

56. Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 109 (Colo. 1992).

57. Harrison, *supra* note 16, at 584.

58. *Id.*

59. *Id.*

60. *Martin*, 823 P.2d at 107.

Colorado Supreme Court held that a plaintiff employee must establish that: (1) the employer directed the employee to perform an illegal act or prevented the employee from exercising a public duty, (2) the employer's directive would violate a specific statute or clearly expressed public policy, and (3) that termination resulted from the refused performance.[61] . In addition, the plaintiff employee must give the defendant employer notice that refusal of performance is founded upon a reasonable belief that the action would violate public policy.[62]

The whistleblower public policy exception is a socially and economically valuable doctrine.[63] Environmental policy is often enforced by the State through agencies or by individuals in the community with standing to sue.[64] These individuals are limited to action either when the possibility of future environmental damage is discovered or after environmental damage has occurred.[65] The whistleblower exception to the at-will employment doctrine is an additional means of enforcing environmental policy.[66] Whistleblowers have exposed defense contractor accounting improprieties, federal prison mismanagement, mismanagement of Native American health care programs, numerous improprieties in federal agencies, and questioned the United States' system of justice.[67] Whistleblowing employees possess the advantage of prevenient action.[68] A whistleblower may proceed with a wrongful discharge claim prospective of environmental damage.[69] A whistleblower's wrongful discharge action derives from the firing itself.[70] Firing may occur before any environmental damage is suffered, or before the prospect of possi-

61. *Id.* at 109.

62. *Id.*

63. For a recent discussion supporting the public policy exceptions to the at-will employment doctrine and examining modern practical applications, *see* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990); *see also* 135 CONG. REC. H752 (daily ed. Mar. 21, 1989) (statement of Rep. Horton).

> "75 to 80 percent of the information on which the Inspectors General Act [sic] comes from so-called whistleblowers. They testify time and again and most of the information that [the inspectors] receive comes from these people . . . . Last fall we were informed that $120 Billion has been saved in the last 10 years by the inspectors general, so we are talking about big money here, and it is very important to give these kinds of protections."

Id.

64. United States v. Goodner Bros. Aircraft, Inc., 966 F.2d 380 (8th Cir. 1992) (environmental pollution discovered by whistleblowing neighbors and enforced by state and federal agencies); *see* Roy, *supra* note 10, at 194.

65. *See e.g., Goodner*, 966 F.2d at 383 (environmental damage suffered before whistleblowing neighbors discovered the damage and reported).

66. *Id.* (EPA investigation, which led to conviction, instigated because of whistleblowing neighbor); Hubbell, *supra* note 10, at 104-08; *Cf.* Fisher, *supra* note 18, at 357-58.

67. Fisher, *supra* note 18, at 357-58.

68. *See* Phung v. Waste Management, Inc., 491 N.E.2d 1114, 1116-17, (Ohio. 1986) (employee discharged for reporting legal violations to his employer, but apparently no specific violations of statutes or environmental damage had occurred at the time of discharge as these facts were not alleged in the complaint).

69. *See* Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372 (Ill. 1985), *cert. denied*, 475 U.S. 1122 (1986) (employee discharged for refusing to violate federal regulations by mishandling radioactive cobalt 60).

70. The injury occurs from the discharge itself; the interest violated is the employee's right to avoid wrongful, arbitrary loss of gainful employment. Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard* 67 NEB. L. REV. 7, 15-16 (1988).

ble environmental damage becomes publicly known.[71] Economic analysis shows that environmental policy may be efficiently enforced through whistleblower actions.

The labor market in the United States is criticized for unnecessarily repressing worker's interests.[72] The labor market partially causes worker repression. The United States functions with a "dual labor market"[73] which consists of primary market and secondary market employees.[74] The primary market tends to have higher wages, better working conditions, increased worker stability, more chance for advancement and greater due process.[75] Secondary market employees have a far lower rate of instigating wrongful discharge litigation.[76] An examination of the case law shows that the vast majority of whistleblower environmental litigation is pursued by primary market employees.[77] Secondary market employees, however, are far more likely to be exposed to and have knowledge about environmental damage.[78] These persons therefore are most in need of protection yet are most easily dissuaded from pursuing action.[79]

III. DECISIONS

In practice, the public policy exception to the at-will employment

71. *Contra*, Goodner Bros. Aircraft, Inc., 966 F.2d 380 (authorities and neighbors unaware of pollution until thousands of gallons of toxic waste had been illegally dumped and considerable environmental damage occurred).

72. *See* Charles A. Brake, Jr., *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?* 35 VAND. L. REV. 201, 204 (1982); Summers, *supra* note 69, at 25; Tobias, *supra* note 39, at 190; Note, *Public Policy*, *supra* note 22, at 1938.

73. Ryan C. Amacher and Richard J. Sweeney, *On the Integration of Labor Markets: A Definition and Test of the Radical—Segmentation Hypothesis*, 2 J. LAB. RES. 25 (1981); *Public Policy*, *supra* note 22, 1938-42; *Cf.* Jerome E. Carlin & Jan Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381 (1965) (discussing class theories of justice).

74. Carlin & Howard, *supra*, note 72, at 381; Note, *Public Policy*, *supra* note 22, at 1938-39.

75. Note, *Public Policy*, *supra* note 22, at 138-39.

76. Tobias, *supra* note 39, at 190; Note *Public Policy*, *supra* note 22, at 1938-42.

77. Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980) (quality control director discharged for assuring compliance with labeling law); Phung v. Waste Mgmt., Inc., 491 N.E.2d 1114 (Ohio 1986) (chief chemist discharged for reporting legal and ethical violations); Schwartz v. Michigan Sugar Co., 308 N.W.2d 459 (Mich. Ct. App. 1981) (company safety director wrongfully discharged for upholding health and safety regulations); Trombetta v. Detroit, Toledo & Ironton R.R., 265 N.W.2d 385 (Mich. Ct. App. 1978) (employee discharged for refusing to alter pollution control statements); Hartley v. Ocean Reef Club, Inc., 476 So.2d 1327 (Fla. Dist. Ct. App. 1985) (Executive Director of Utilities discharged for refusing to order work which would violate environmental regulations). *But cf.* Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569 (Minn. 1987) (gas station attendant brought wrongful dismissal action after discharge for refusing to violate air pollution standards); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985) (ship's crewman discharged for refusing to violate posted bilge standards).

78. *See* 135 CONG. REC. H754 (daily ed. Mar. 21, 1989) (statement of Rep. Porter).

> Mid- and low-level civil servants are the core of our Government. They are the dedicated workers who really know how our system works best, and can see clearly when abuses and fraud are taking place. They are in the best position to help Congress and the executive branch ensure the proper functioning of our Government."

Id.

79. St. Antoine, *supra* note 37, at 68.

doctrine is applied inconsistently and on an *ad hoc* basis.[80] Courts across the nation apply the whistleblower exception dis-similarly.[81] An examination of several whistleblower decisions shows that aside from the common theme of limiting employee actions for wrongful discharge somewhat, the only consistency in wrongful discharge actions is their inconsistency.

A. *Whistleblower Cases*

Federal employees are granted protection under the Federal Whistleblower's Act of 1989,[82] but this statute does virtually nothing for state or private employees. As a result, state and private sector employees proceed at the mercy of the state law in their jurisdictions.[83]

Pacheco v. Raytheon[84] aided greatly in establishing this current lack of consistency and private employee limitation to recovery.[85] In *Pacheco*, a discharged defense contractor employee sought recovery in tort as a federal whistleblower under federal statutes.[86] The district court argued that in order to determine the sufficiency of the action, the court must ask: "[i]s the plaintiff one of the class for whose especial benefit the statute was enacted?"[87] Using this rationale, recovery is denied to any plaintiff not *specifically* listed in the class of those protected. Any private sector or state employee not specifically listed as protected under the statute is barred from recovery.

The *Pacheco* court denied tort recovery under the statute arguing that even though the employee was granted statutory protection, employees are not afforded a private cause of action under federal whistleblower statutes.[88] As a result of the denial of the private cause of action, punitive and compensatory damages were not recoverable.[89] Disallowing these damages greatly reduces the value of the lawsuit to the wrongfully discharged employee and greatly reduces the cost of the lawsuit to the employer.

The *Pacheco* court also established locus of remedy as an element for recovery: "is the cause of action one that is commonly left to state law to remedy?".[90] Under that rationale, *Pacheco* allows, or requires, state rules to govern whistleblower actions.[91] State rules governing the whistleblower exception to the at-will employment doctrine are incon-

80. Patricia M. Leonard, *Unjust Dismissal of Employees at Will: Are Disclaimers a Final Solution?* 15 FORDHAM URB. L.J. 533, 543 (1987).
81. Summers, *supra* note 69, at 21.
82. Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended 5 U.S.C.A. § 2302 (1992 Supp.)).
83. *See* Leonard, *supra* note 79, at 543-44.
84. Pacheco v. Raytheon Co. 777 F.Supp. 1089, 1090 (D.R.I. 1991).
85. *Id.*
86. *Id.* at 1090.
87. *Id.* at 1091.
88. *Id.* at 1093.
89. *Id.*
90. *Id.* at 1091.
91. *Id.* at 1093.

sistent across the nation.[92] The *Pacheco* decision further adds to this inconsistency by incorporating the esoteric standards of the various states into federal law.

The courts manipulated the interests protected to deny recovery.[93] In *Foley v. Interactive Data Corp.*,[94] the court denied recovery for an at-will employee under the public policy exception.[95] In *Foley*, an employee informed his employer that his immediate supervisor at the bank was the focus of an embezzlement investigation at another bank.[96] The employer told the employee not to believe rumors.[97] The employer transferred the employee from California to Massachusetts, with a pay cut, prior to discharge.[98] The supervisor later pled guilty to felony embezzlement in federal court.[99] The employee brought an action for wrongful discharge.[100] The court determined that the employee was not entitled to recovery as a whistleblower where the interest protected was private, for the benefit of the employer, and not the public.[101] The court affirmed the award for contractual damages, but denied recovery in tort.[102]

In *Martin Marietta Corp. v. Lorenz*,[103] the plaintiff brought suit in wrongful discharge generally, but under the facts as alleged, could have sought recovery as a whistleblower.[104] The court established an additional evidentiary requirement to a cause of action for wrongful discharge: that the employee must present evidence showing that the employer was, or should reasonably have been aware that, employee's refusal to comply with the directive was based on employee's reasonable belief that the action was illegal, contrary to a clearly expressed statutory policy related to the employee's duty as a citizen, or violative of employee's legal right or privilege as a worker.[105] The court recognized that this new element established an additional burden to the claim, but argued the decision did not fundamentally change the nature of the action or recovery.[106]

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92. *See supra* note 11, and accompanying text.

93. Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).

94. 765 P.2d 373 (Cal. 1988).

95. *Id.*

96. *Id.* at 375.

97. *Id.*

98. *Id.* at 375-76.

99. *Id.* at 375, n.1.

100. *Id.* at 373.

101. *Id.* at 380.

102. *Id.* at 401.

103. Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo. 1992).

104. In *Martin Marietta*, Plaintiff was discharged from his supervisory position on the Space Shuttle project after repeatedly reporting substandard workmanship, overstated performance claims, misappropriation of materials, and budgeting discrepancies to National Aeronautics and Space Administration officials. *Id.* at 102-04.

105. *Martin Marietta*, 823 P.2d at 109.

106. *Id.* at 110.

B. *Environmental Whistleblower Cases*:

Application of the whistleblower exception is equally as varied where environmental concerns are forwarded. In *Trombetta v. Detroit, Toledo & Ironton Railroad Co.*,[107] a non-union employee was denied recovery after discharge for refusal to alter federal pollution control reports as ordered.[108] The court recognized the employee's cause of action for wrongful discharge,[109] but denied recovery based on the trial court's determination that plaintiff presented no issue of material fact.[110] The court upheld the award of costs to the defendant.[111]

Following the at-will employment doctrine, courts deny recovery where employees first reported violations to their employer.[112] In *Phung v. Waste Management, Inc.*,[113] the court denied recovery where the employee reported illegal business practices to the employer.[114] The Ohio Supreme Court refused to back away from the strict compliance with the at-will employment doctrine[115] except in instances of worker's compensation, or discrimination claims.[116]

Some jurisdictions refuse to recognize any exception to the at-will doctrine. *Hartley v. Ocean Reef Club, Inc.*[117] presented a situation where an employee was discharged for refusing to violate state and federal reverse osmosis requirements.[118] The employee sought compensatory and punitive damages for wrongful discharge from his at-will employment position but the court refused to recognize such a claim under any circumstances.[119] Other jurisdictions recognize the claim narrowly. In *Sabine Pilot Service Inc. v. Hauck*,[120] the court upheld a narrow exception to the at-will employment doctrine where the employee had refused to perform an illegal act.[121] In *Sabine*, the employee called the United States Coast Guard which verified a posted prohibition of pumping bilge into the harbor.[122] The employee refused to pump bilge and was discharged.[123] The employer argued that the discharge was the result of refusing to obey other directives.[124] The Texas Supreme Court held

107. Trombetta v. Detroit, Toledo & Ironton R.R. Co., 265 N.W.2d 385 (Mich. Ct. App. 1978).
108. *Id.*
109. *Id.* at 388.
110. *Id.* at 390.
111. *Id.*
112. *Foley*, 765 P.2d 373.
113. Phung v. Waste Mgmt., Inc., 491 N.E.2d 1114 (Ohio 1986).
114. *Id.*
115. "An at-will employee who is discharged for reporting to his employer that it is conducting its business in violation of law does not have a cause of action against the employer for wrongful discharge." *Id.* at 1117.
116. *Id.*
117. Hartley v. Ocean Reef Club, 476 So.2d 1327 (Fla. Dist. Ct. App. 1985).
118. *Id.*
119. *Id.* at 1330.
120. Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985).
121. *Id.* at 735.
122. *Id.* at 734.
123. *Id.*
124. *Id.*

that, while the narrow exception exists, "it 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."[125] Other jurisdictions place the burden on the employer, as in *Phipps v. Clark Oil*,[126] where the court allowed recovery where the employee refused to violate the Clean Air Act.[127] The court recognized a valid claim where a station attendant refused to pump leaded gasoline into an tank reserved for unleaded gasoline, despite evidence that the employee was discharged for refusing to serve a handicapped customer.[128]

IV. ANALYSIS

The current *ad hoc* system, which favors unscrupulous private employers, effectively discourages whistleblowing. Whistleblowers are prevented from acting for economic reasons because the additional costs of bringing action preclude enforcement.[129] The current system ensures that fewer employees will seek whistleblower protection under the public policy exception before discharge, fewer employees will obtain redress after wrongful discharge, and more violations of environmental public policy will occur. Economic analysis of the whistleblower exception supports this contention.

Where the cost to the employee of whistleblowing is high and the benefit is low, whistleblowing will be discouraged.[130] Reflexively, where the cost to the employer of whistleblower action is low, the benefit of pollution and wrongful discharge is increased.[131] Examination of the aforementioned decisions illustrates many of the economic realities of the at-will employment doctrine.

A. *Applications of State Standards*

The *Pacheco* court applied state standards in some circumstances to federal actions.[132] As the cases taken together show, state standards are extremely inconsistent. Inconsistency will reduce whistleblower action because state decisions are varied and would-be whistleblowers will be discouraged from acting. As an example, *Phung*[133] and *Hartley*[134] stand against recovery and, subsequently, for strict compliance with at-will employment doctrines, while *Phipps*[135] allows recovery. Whistleblowers

125. *Id.* at 735.
126. Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569 (Minn. 1987).
127. *Id.*
128. *Id.* at 570.
129. Massingale, *supra* note 19, at 200-01; Summers, *supra* note 69, at 25; Tobias, *supra* note 39, at 190.
130. *See* Posner, *supra* note 7, at 521 (discussing the effects of erroneous decisions on deterrence generally).
131. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 404-05 (1973) (discussing the effects of exogenous error).
132. Pacheco v. Raytheon Co., 777 F. Supp. 1089 (D. R.I. 1991).
133. Phung v. Waste Mgmt., Inc., 491 N.E.2d 1114 (Ohio 1986).
134. Hartley v. Ocean Reef Club, Inc., 476 So.2d 1327 (Fla. Dist. Ct. App. 1985).
135. Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569 (Minn. 1987).

are left with differences in recovery based not on their factual circumstance or behavior, but on differences of geographic location. It is a fanciful stretch of reasoning to assume that environmental legislation may be enforced to society's benefit through whistleblowing in one jurisdiction but not in another. Inconsistency discourages the employee from pursuing recovery by raising the economic costs of action. It also shields the employer from action by lowering the economic costs of defense, and ensures that wrongful discharges will go unredressed.

B. *Limitations to Employee Protection*

Decisions which limit the protection provided to employees by class, such as *Pacheco*[136] and *Foley*[137], create uncertainty as to which employees are protected from wrongful discharge. After the decisions handed down in *Phung* and *Hartley*, the employee remains uncertain whether their jurisdiction provides any protection for their position. Uncertainty reduces the value to the employee of bringing a lawsuit, and raises the potential cost if recovery is not allowed. Disincentives created by uncertainty of protection insulate employers from discharge actions and offer protection from damage awards.

C. Monetary Limitations to Recovery

Both the *Pacheco*[138] and *Foley*[139] decisions also deny a private cause of action, allowing damages for breach of contract only. Limitations on the potential award reduce the overall financial value of the lawsuit to the employee. Reciprocally, this also reduces the cost of the lawsuit for the employer. In *Trombetta*,[140] the court went farther by allowing the defendant to recover costs. The risk of paying corporate legal fees will discourage employees from bringing action, as most employees cannot currently afford their own fees.[141]

Lowering the award of the suit, as in *Foley*[142] and *Pacheco*,[143] has the same effect as exoneration since the firm avoids its liability. Exoneration decreases the incentive to blow the whistle on wrongful action and reduces the deterrent effect of the law.[144] Subsequently, enforcement of public policy declines. Wrongful action increases as enforcement decreases because it becomes marginally more efficient to engage in wrongful behavior.[145] Corporations evaluate environmental damage as

136. 777 F. Supp. 1089.
137. Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).
138. 777 F. Supp. 1089.
139. Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).
140. Trombetta v. Detroit, Toledo & Ironton R. Co., 265 N.W.2d 385 (Mich. Ct. App. 1978).
141. Summers, *supra* note 69, at 25.
142. 765 P.2d 373.
143. 777 F. Supp. 1089.
144. "In the civil setting the effects of erroneous imposition of liability and erroneous exoneration from liability are symmetrical: a reduction in the deterrent effect of the legal rule in question." POSNER, *supra* note 7, at 521.
145. *See* POSNER, *supra* note 7.

an externality, but often this evaluation is skewed by only considerations of cost to the firm.[146] Only where the cost of the wrongful behavior is raised will compliance with environmental statutes occur.[147]

Because pollution externalities are difficult to quantify,[148] the full societal cost of pollution is not taken into account.[149] Increasing the award for whistleblowing increases compliance by insuring that suit will be brought and damages will be high. Where damage awards are high and certain, firms determine that the overall cost of illegal pollution is too great to engage in, and compliance becomes the marginally cost effective solution.

For the secondary market employee bringing action, lowering the likelihood and amount of award raises difficulty in finding legal counsel.[150] Finding competent counsel has traditionally been difficult for secondary market employees.[151] Lower awards increase secondary market employee difficulty in obtaining competent counsel.[152] Attorneys representing secondary market employees tend to be the less competent and least skilled members of the profession.[153] Limiting awards to contractual damages makes contingent fee arrangements available in tort unrealistic.[154] Giving the secondary employee inadequate counsel moves the starting line back. Disallowing contingent fee damages slams the courthouse door in the secondary market employee's face.[155] Most insidious is that increasing the difficulty in employee action acts as a preclusive disincentive which grants the employer a windfall allowing violations to go unredressed.

D. *Increasing the Cost of Pursuing Action*

The practical functioning of the whistleblower exception acts as a disincentive to enforcing policy because few employees obtain a financial position to fund the costs of the litigation process without employ-

146. PICA Plating, a firm of several hundred employees specializing in custom electroplating, is a good example of cost driven non-compliance. At PICA, it became cheaper to illegally dump raw waste water containing cyanide, acid and heavy metals into area sewer systems and risk the health and safety of workers than to upgrade the treatment facility to adequate standards. Roy, *supra* note 10, at 193-94.

147. In the case of PICA, top corporate managers ignored pollution problems until a whistleblower report prompted a surprise inspection. Only after the subsequent imposition of several million dollars of fines did compliance occur. *Id.*

148. Roy, *supra* note 10, at 207.

149. "Pica's managers, then compared the social cost of pollution not with the total cost of pollution, but only with the risk borne by the employees working in unsafe conditions." *Id.* Apparently, the workers evaluated the risk similarly: "After three or four months of eighty hour weeks you don't [give a darn] about the environment." *Id.* at 194.

150. *Public Policy*, *supra* note 22, at 1942-43.

151. *Id.*; Carlin and Howard, *supra* note 72, at 381; Tobias, *supra* note 39, at 190.

152. *Public Policy*, *supra* note 22, at 1942-43; Carlin and Howard, *supra* note 72, at 428.

153. "Lawyers representing lower-class persons tend to be the least competent members of the bar, and those least likely to employ a high level or wide range of technical skills." Carlin and Howard, *supra* note 72, at 384.

154. Tobias, *supra* note 39, at 190.

155. Carlin and Howard, *supra* note 72, at 428.

ment,[156] and often are precluded from recovery.[157] Wrongfully discharged whistleblowers must fund the litigation process while supporting themselves and their families without the benefit of a paycheck.[158] Whistleblowers often have difficulty finding new employment.[159] Financial inability to sustain legal action for recovery is even more prevalent among secondary market employees.[160]

Both *Martin Marietta* and *Sabine* fundamentally change the nature of a wrongful discharge action. *Martin Marietta* requires that employees give employers notice that the refused performance is based on the reasonable belief that the performance violates the public policy. Requiring the evidentiary burden of notice in the prima facie case raises the cost of whistleblowing by increasing the cost of bringing action. Notice requirements also create "show down" style confrontations between low level employees and management. Secondary market employees reluctantly engage in these confrontations for a variety of reasons including poor legal representation.[161] Unscrupulous employers benefit from this economic windfall,[162] with employees and society paying the eventual cost. The notice requirement of *Martin Marietta* forces the secondary market employee into a confrontation with the employer. Confrontation deters the instigation of action, not based on legal considerations of the validity of the claim, but by virtue of the unequal bargaining power the employer wields.[163] Environmental damages increase as a result.

156. *See* Summers, *supra* note 69, at 25 (discussing discharged employees' lack of economic bargaining power and inability to successfully obtain legal redress for wrongful termination).

157. Pacheco v. Raytheon Co., 777 F. Supp. 1089 (D. R.I. 1991) (whistleblowing defense contractor precluded from private cause of action); Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (whistleblowing private sector employee denied recovery for tortious discharge in contravention of public policy); Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327 (Fla. Dist. Ct. App. 1985) (at-will employee had no cause of action after refusing to violate state and federal water pollution statutes and regulations).

158. Fisher, *supra* note 18, at 356 (explaining that would-be whistleblowers are deterred by the fear of losing gainful employment). Those who choose to blow the whistle face enormous difficulties and are most often laid-off or fired. *Id.* at 366; Massingale, *supra* note 19, at 200. *See* 135 CONG. REC. H752 (daily ed. Mar. 21, 1989) (statement of Rep. Sikorski) ("With the enactment of this landmark legislation, [The Whistleblower's Protection Act of 1989] employees can confidentially carry out their responsibilities without fear of retribution, of ruined careers, lost jobs, and destroyed families, hopes and dreams.").

159. Leonard, *supra* note 42, at 678; Massingale, *supra* note 19, at 187; Tobias, *supra* note 39, at 182.

160. Carlin and Howard, *supra* note 72, at 381; Hubbell, *supra* note 10, at 102; Leonard, *supra* note 42, at 533 ("One result of this inconsistency is that professional and managerial employees often prevail in wrongful discharge actions. Low-level, clerical employees seldom prevail."(footnote omitted)); *Public Policy*, *supra* note 22, at 1942-43.

161. POSNER, *supra* note 7, at 524-25; Carlin and Howard, *supra* note 72; *Public Policy*, *supra* note 22, at 1042-45.

162. Warren F. Schwartz and Gordon Tullock, *The Costs of a Legal System*, 4 J. LEGAL STUD. 75 (1975) (Examining cost as a function of sanction, where the sanction is low, the cost of noncompliance is also low. Under these circumstances the incidence of compliance will decrease as deterrence is eroded).

163. St. Antoine, *supra* note 37, at 68; "It is they, [employees] not the employer, who most need protection." *Id.*; Leonard, *supra* note 42, at 678; Summers, *supra* note 69, at 16; "[T]he unequal bargaining position of most individual workers will continue or become more acute." *Id.*

The burden of proof allocates to either the employer defendant or the employee plaintiff. By requiring notice evidence in the prima facie case, the *Martin* court decided that the plaintiff must bear the burden and costs of persuasion. Had the *Martin* court allowed the employer to offer as an affirmative defense evidence that the employee's belief was unclear or unreasonable, the burden of persuasion would fall on the employer. Under this allocation, if the employee bringing action is unable to prove the new notice element, a directed verdict is in order.[164]

The court argued that this additional requirement would not "alter in a fundamental way the basic nature" of the action.[165] But, this shift in the burden of persuasion changes the posture of the suit altering the effect of the public policy exception.

First, by requiring that the employee bear the evidentiary burden, the court implicitly raised the cost of bringing suit.[166] The plaintiff will be required to assemble more evidence and log more attorney hours all at an additional expense. Because of the inherently regressive nature of some forms of at-will employment,[167] those discharged from at-will positions are the least capable of incurring additional legal costs.[168] Further, because the awards in these cases are likely to be low and undertaken on a contingent fee, employees bringing action will have difficulty finding competent representation.[169] The *Martin* evidentiary requirement makes recovery for these actions more difficult and expensive for wrongfully discharged employees.

While the employee may have difficulty proving notice in a suit for wrongful discharge, the employer would have far less difficulty raising the same issue as an affirmative defense. Corporations possess easy access to the court system.[170] Additionally, corporations tend to retain capable counsel from the best institutions accustomed to wrongful discharge cases.[171] Corporations are more likely to be able to afford lengthy litigation and the elevated discovery expenses.[172]

The initial costs of bringing an action are born by the wrongfully discharged employee who is likely the party least capable of bearing these costs. Historically, courts reluctantly award punitive damages in

164. *See* COLO. R. CIV. P. 50; FED. R. CIV. P. 50.

165. Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 110 (Colo. 1992).

166. *See generally*, POSNER, *supra* note 7.

167. *Public Policy*, *supra* note 22, at 1937-39 (shows that there exists in the United States two labor markets, at-will employees tend to be either high level white collar employees or menial white collar and blue collar employees from lower socioeconomic niches); Carlin and Howard, *supra* note 72, 428.

168. *Public Policy*, *supra* note 22, at 1942.

169. *Id.* at 1942-43 n.84 (quoting J.CARLIN, J. HOWARD & S. MESSINGER, CIVIL JUSTICE AND THE POOR 47-48 (1967) (arguing that the tort litigation system discriminates against the poor); *Id.* at 1942 n.80 (citing Mayhew & Reiss, *The Social Organization of Legal Contracts*, 34 AM. SOC. REV. 309, 310 Table I (1969) (arguing that employees from the lower socioeconomic groups tend to be represented by attorneys from smaller firms who tend to be less competent)); *see also* Carlin & Howard, *supra* note 72, at 384-85.

170. *Id.*

171. *See generally* Carlin & Howard, *supra* note 72.

172. *Id.*

suits for wrongful discharge pursuant to the public policy exception and awards remain low.[173] Any additional costs of commencing action results in the enforcement of fewer legitimate claims for wrongful discharge. Whistleblowing will decrease commensurately.

With the *Martin* decision, the court further raised the cost of enforcement and added disincentives to bringing legal action by requiring notice as a prima facie element. This new evidentiary standard functions as an expensive disincentive, which raises the expense of litigation for the employee to the benefit of the unscrupulous employer and the detriment of society. As a result of the added costs, fewer wrongfully discharged employees will seek redress and fewer will contend the issue as a preventive measure before discharge occurs.

E. *A Proposed Solution*

Perhaps the solution lies in presumptively finding each employment relationship checked by concerns of public policy unless otherwise expressly specified in the employment contract.[174] Finding all employment contracts checked by concerns of public policy would remove the possibility of discharge occurring for improper reasons. Workers could then whistleblow where justification exists with adequate job security. Presumptive public policy concerns would bolster employment security and would further protect the fragile, unprotected environment.

Critics seem to assume that the protections afforded to the employer by the at-will employment doctrine and the public policies forewarded by whistleblower exceptions are mutually exclusive.[175] Employees, employers and the public may all obtain protection and benefit from at-will contract reformulation. With the presumption against at-will employment from the outset, the court has a stronger basis for protecting public policy while leaving the parties free to write traditional at-will employment discharge into the agreement.[176] Giving the court a stronger basis for public protection allows the court to curtail grevious abuses of the environment. Because the parties are left at liberty to shape their relationship as they may through the contract formulation process, they may negotiate job security and termination provisions. In this process, none give away any fundamental right. All must actively chart the course of the business relationship, and thereby express the importance of the right in the contract. Through the negotiation process, the true economic value of the right to discharge freely and the importance of job security come to the forefront of the individual con-

173. Pacheco v. Raytheon Co., 777 F. Supp. 1089, 1090 (D. R.I. 1991).

174. Professor Arthur Leonard argues that eliminating the at-will doctrine at the outset would increase company profitability, increase performance incentives and reduce litigation and litigation costs without denying the employer the right to discharge in good faith for poor performance. Leonard, *supra* note 42, at 678.

175. Hubbell, *supra* note 10, at 105.

176. "It is neither unfair nor contrary to contemporary contract theory to eliminate the employer's power to discharge arbitrarily without eliminating the employee's right to leave." St. Antoine, *supra* note 37, at 68.

tract. Traditional rights are molded to shape the preference of the parties to the contract, neither is denied negotiating, or traditional at-will employment doctrine provisions.

Presumption against at-will employment requires the parties to the contract to negotiate any preferences to the contrary at the outset of the employment relationship. As the doctrine is currently applied, at-will employment is not bargained for, nor found as a conclusion or last resort for interpretation, it is the last word concerning the employment relationship. At-will employment in this way gives the employer a windfall, creating expense for both the employee and society that would otherwise be precontractually negotiated for. Precontractual negotiation has the advantage of lowering overall costs by reducing litigation and associated expenses.[177] By finding at-will employment relationships only where the parties to the employment contract have expressed, the legal system could avoid the ecomomic inefficiencies which plague the status quo.

Considering the questionable origins of the at-will employment doctrine,[178] and the inefficiencies created by strict compliance, the reformulated at-will employment concept should be a natural implementation for the legal system. Given the at-will employment doctrine's deep entrenchment in current jurisprudence, the reformulated concept may not gain widespread acceptance expediently.[179]

V. CONCLUSION

Reliance on the at-will employment doctrine continues despite its dubious origins. The whistleblower exception is mired with uncertainty and hobbled with expense. The costly disincentives associated with the whistleblower exception in environmental litigation prevent valid actions. The limitation of damages grants unscrupulous employers a windfall. As a result, environmental damage unnecessarily continues. Perhaps the freedom of contract concerns raised by the proponents of the at-will employment doctrine can be squared with the goals of the public policy whistleblower exception. Until then, potential whistleblowers will silently watch and not "[give a darn] about the environment."[180]

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177. *See* Leonard, *supra* note 42, at 677-78.

178. Hubbell, *supra* note 10, at 94; Shapiro & Tune, *supra* note 22, at 341; St. Antoine, *supra* note 25, at 32-33; *Public Policy*, *supra* note 22, at 1933.

179. Reformulating the concept of at-will employment may come with difficulty as critics ardently support strict compliance with the doctrine. Harrison, *supra* note 16; Hubbell, *supra* note 10; Malin, *supra* note 35, at 302; Brake, *supra* note 26, at 207-208.

180. Roy, *supra* note 10, at 194.