Denver Law Review

Volume 70
Issue 4 *Tenth Circuit Surveys*

Article 5

January 2021

Martin Marietta v. Lorenz: Palpable Public Policy and the Superfluous Sixth Element

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MARTIN MARIETTA V. LORENZ: PALPABLE PUBLIC POLICY AND THE SUPERFLUOUS SIXTH ELEMENT

I. INTRODUCTION

The Colorado Supreme Court, in *Martin Marietta v. Lorenz*,[1] recognized on first impression a public policy exception in tort to the at-will employment doctrine.[2] "[I]n keeping with the majority of jurisdictions," and "within the framework" of prior Colorado case law,[3] the court adopted and extended the standard to establish a *prima facie* case of wrongful discharge under the public policy exception as originally set out by the Colorado Court of Appeals in *Cronk v. Intermountain Rural Electric Association*.[4] *Cronk I* stated that an employee must prove a five step *prima facie* case to qualify for an exception to the at-will employment doctrine: (1) the employee refused to perform an action; (2) ordered by the employer; (3) which would violate a specific statute; whose terms are more than a broad general statement of policy; and (5) the employee's termination resulted from the refusal to perform such action.[5] Adding to this *Cronk I* standard, the *Lorenz* court required an additional, sixth element to establish a *prima facie* case—evidence showing that the employer was aware, or reasonably should have been aware, that the employee's refusal to perform the employer's directive was based on the employee's reasonable belief that the employer's directive was illegal, contrary to clear statutory policy relating to the employee's duty as a citizen, or violative of the employee's legal rights or privileges as a worker.[6] By adding this new employer knowledge element, the *Lorenz* court ventures into a virtual frontier. No authority is cited by the court

1. 823 P.2d 100 (Colo. 1992) (en banc).

2. *Lorenz*, 823 P.2d at 108.

3. *Id.*

4. 765 P.2d 619, 622 (Colo. Ct. App. 1988), *cert. denied* (*Cronk I*), *appeal after remand*, 140 L.R.R.M. (BNA) 2149 (Colo. Ct. App. April 2, 1992), *cert. denied* (*Cronk II*).

5. *Cronk I*, 765 P.2d at 622. The *Cronk I* court interpreted Farmer v. Central Bancorporation, 761 P.2d 220 (Colo. Ct. App. 1988), which set a two-step test for exception to the at-will employment doctrine, restricted to the facts of the case. The *Farmer* court held that to gain employee protection of the public policy exception to the at-will employment doctrine, the employee must establish that (1) the refusal to carry out the employer's directive would constitute a statutory violation; and (2) the employee's discharge was a result of the refusal to violate the statute. *Farmer*, 761 P.2d at 221.

6. *Lorenz*, 823 P.2d at 109. Under the new *prima facie* standard set out by the court, the employee must prove by a preponderance of the evidence that: (1) the employer directed the employee to perform an illegal act; (2) as part of the employee's work related duties; or (3) prohibited the employee from performing a public duty, privilege or right; (4) the employer's directive would violate a specific statute relating to the health, safety, or welfare or undermine clearly expressed public policy relating to the employee's rights or privileges as a citizen or worker; (5) the employee was terminated as the result of refusing to perform the act directed by the employer; and (6) the employer was aware, or reasonably should have been aware, that the employee's refusal was based on the employee's reasonable belief that the action ordered by the employer was violative of any of the above circumstances. *Id.*

for this proposition, as noted by the dissent.[7] Currently there is no clear, accurate way to predict how the Colorado courts will apply this new standard at the trial level,[8] or how the parties will satisfy or defend against this additional employer knowledge element.[9]

This Comment will describe some of the historical legal background of the at-will employment doctrine, case law leading to this decision, the court's rationale in recognizing the public policy exception, an analysis of terminology, and an examination of the employer knowledge element as set forth in *Lorenz*. *Lorenz* is also compared with other jurisdictions' causation elements in similar fact patterns, as well as compared with current federal and state legislative trends.

This Comment concludes that the employer knowledge element, as an element of causation, is implicit within nearly all *prima facie* cases of retaliatory discharge. An employee alleging retaliatory discharge cannot prove causation without the inference of employer knowledge because an employer must have a *reason* to retaliate. The employer who retaliates must know what event concerning the employee's conduct is the source of the employer's desire to "get even." Thus, if retaliation is proved in connection with the adverse employment action taken against the employee, the employer knowledge element is implicitly proven as well. To require separate proof on the employer's knowledge of the employee's state of mind concerning the employee's act or refusal to act is superfluous once retaliation itself has been proven.

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7. *Id.* at 118 n.1 (Erickson, J., dissenting). Justice Erickson states in part, "Today's test includes a sixth prong that *substantially* changes *Cronk [I]*. . . . Indeed, the majority cites *no authority* for requiring employer knowledge of an employee's reasonable belief that a refused order was illegal." *Id.* (emphasis added). Authority does, in fact, exist for the majority's proposition. *Infra* notes 161-177 and accompanying text.

8. The trial date on remand has been set for January 24, 1994. Statement of Maxine Foster, Denver District Court Division Clerk for Courtroom 19 (April 16, 1993) (No. 81 CV 6488). Twelve years after the suit was first filed, and eighteen years after Lorenz's discharge, the parties will start over again with a new trial in accordance with the *Lorenz* holding.

9. Because the *Lorenz* rule will apply retroactively, potential recovery still exists for Lorenz. David J. Jung and Richard Harkness, in *The Facts of Wrongful Discharge*, 4 LAB. LAW. 257 (1988), discuss and criticize various surveys of jury awards in wrongful discharge cases. They note that averages are dubious at best because of their inherent sensitivity to unusually high or low awards. *Id.* at 259. Based on Jung and Harkness' review of published cases, California employees prevail in only 45% of judicially resolved cases with estimated average awards at over $200,000. *Id.* at 260-61. Their research demonstrates that the *type* of wrongful discharge affects jury awards. Of the three types of wrongful discharges recognized in California as exceptions to the at-will doctrine (retaliatory, breach of implied-in-fact contract, and violation of the implied law of good faith and fair dealing in contracts), retaliatory and bad faith cases average much higher awards than do breach of implied-in-fact contract cases. Intentional infliction of emotional distress cases, a fourth cause of action in some jurisdictions also receive lower jury awards. *Id.* at 262-64.

For other examples documenting large jury verdicts see Rulon-Miller v. International Business Mach. Corp., 162 Cal. App. 3d 241 (1984) ($100,000 compensatory and $200,000 punitive damages award relating to a wrongful termination upheld); James N. Adler & Mark Daniels, *Managing the Whistleblowing Employee*, 8 LAB. LAW. 19, 19-20 (1992) (noting multi-million dollar jury verdicts for damages in several wrongful discharge cases); James W. Hubbell, *Retaliatory Discharge and the Economics of Deterrence*, 60 U. COLO. L. REV. 91, 113 n.80 (1989) (noting that, in one survey, employees were victorious 60-90% of the time with verdicts averaging $400,000).

II. LEGAL BACKGROUND

A. *Historical Overview*

Early English common law recognized that a general hiring of a servant, in the absence of a contrary agreement, was presumed to be a one-year hiring, and no master could "put away his servant" during that year without "reasonable cause."[10] Early colonial American law generally followed the English common law regarding employment contracts, but America "did not apply criminal law to employee breaches of contract."[11] By the late 19th century, New England textile industry employers were able to discharge employees without notice, yet still demand notice from the employees when they quit.[12] After 1877, the American courts adopted a doctrine known as "Wood's Rule" of at-will employment which, in the absence of a specific duration of employment, allowed either the employer or the employee to terminate the employment contract at any time for good cause, bad cause or no cause.[13] Controversy exists over whether the cases cited by Wood[14] ac-

10. Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 721 (1991) (*quoting* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 425-26 (21st ed. 1847)) [hereinafter Peck, *Penetrating Doctrinal Camouflage*]. The Statute of Labourers provided this language attempting to protect employees hired for menial labor from termination without "reasonable cause," or without "reasonable notice," while also requiring certain classes of persons to accept employment. Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute*, 62 VA. L. REV. 481, 485 (1976). *See also* Lynn D. Feiger, *"Employment At Will" and the Discharged Employee in Colorado*, 12 COLO. LAW. 733 (1983). Even after the Statute of Labourers was repealed, English common law continued to presume employment contracts as one-year terms, and by the 19th century the general rule was that "unless otherwise explicitly agreed, employment could be terminated only after a notice period determined by the custom in the trade, and if there were no custom, only after a reasonable notice, unless cause existed[.]" Summers, *supra* at 485; Fieger, *supra* at 733. For more detailed information on the Statute of Labourers, see Cheryl S. Massingale, *At-Will Employment: Going, Going . . .*, 24 U. RICH. L. REV. 187, 188 & n.5 (1990).

Charles Smith states that when no express or implied duration of time exists in a contract of hiring (in England), the hiring is considered a general hiring for one year which extends not only to servants, but also domestics and clerks. CHARLES M. SMITH, A TREATISE ON THE LAW OF MASTER AND SERVANT *84-*85. A contract must exist for the rule to apply, and a contract will not be presumed when circumstances show that a pauper has come "to live with their relatives or others out of charity, or where the agreement was for cohabitation and not merely for service." *Id.* at *85-*86. Additionally, the presumption of a one-year hiring could be "greatly strengthened" by trade, business or occupational custom. *Id.* at *86. In the proper circumstances, an employee wrongfully dismissed before the end of the one-year term could seek a recovery of damages in the amount of wages he would have earned had he been allowed to serve to the end of the year. *Id.* at *91. If, however, the servant wrongfully quit his master's service, then the servant forfeited all claim to wages for the remainder of that year. *Id.* at *92.

11. Peck, *Penetrating Doctrinal Camouflage*, *supra* note 10, at 721.

12. *Id.*

13. H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 133, at 272-77 (2d ed. 1886). According to Wood, when the term of service in a contract of hiring is left discretionary in any way with either party, then either may "put an end thereto at any time." *Id.* at 272-73. Wood also explained that an annual rate of pay does not imply a definite term of employment where a term of employment is not otherwise stated, but merely a contract to pay a certain rate for services actually rendered. *Id.* § 136, at 284-85. Wood recognized that exceptions exist to the at-will employment doctrine, such as when the employer requires the employee to perform illegal or immoral services, or acts that would damage the employee's reputation. *Id.* § 148, at 297-98.

tually support his "at-will" theory.[15] Nevertheless, many American courts continued to follow the general doctrine of Wood's Rule in the final years of the 20th century.[16]

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14. *Id.* § 133, at 272-73.

15. Alfred W. Blumrosen, *Employer Discipline: United States Report*, 18 RUTGERS L. REV. 428, 432 (1964) (describing how the rigorous and restrictive application of Wood's rule spread rapidly throughout the country); Cornelius J. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 2 (1979) [hereinafter Peck, *Unjust Discharges*] (noting Blumrosen's demonstration that American courts followed this "erroneous" statement of law); Peck, *Penetrating Doctrinal Camouflage*, *supra* note 10, at 722 (in accord with his earlier article, but also crediting Field's New York Civil Code and 1 CAL. CIV. CODE § 1999 (1872) with contributing to Wood's proposition in codified form); Summers, *supra* note 10, (none of Wood's four cases used as authority supported his theory); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) (Wood's rule was unsupported by authorities upon which the author relied, but was ideally suited to the United States' rapidly industrializing economy); *see also* James W. Hubbell, *Retaliatory Discharge and the Economics of Deterrence*, 60 U. COLO. L. REV. 91 (1989) (arguing from an economics viewpoint that the at-will doctrine promotes allocative efficiency in the free flow of labor, but employers should be held accountable when the at-will doctrine is used to coerce employees to commit perjury or a tort); Peter S. Partee, *Reversing the Presumption of Employment At Will*, 44 VAND. L. REV. 689 (1991); Jill S. Goldsmith, Comment, 1986 ARIZ. ST. L.J. 161, 164 (1986); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-45 (1974).

Some commentators have endorsed Wood's rule as having been properly supported. *See generally* Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551 (1990). Others have endorsed the at-will employment doctrine. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Hubbell, *supra;* Larry S. Larson, *Why We Should Not Abandon the Presumption That Employment is Terminable At-Will*, 23 IDAHO L. REV. 219 (1986-87); Richard W. Power, *A Defense of the Employment At Will Rule*, 27 ST. LOUIS U. L.J. 881 (1983).

For a sampling of the frequently cited commentaries criticizing the at-will doctrine, see Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Blumrosen, *supra;* Donald H.J. Hermann & Yvonne S. Sor, *Property Rights in One's Job: The Case for Limiting Employment-at-Will*, 24 ARIZ. L. REV. 763 (1982); Donald G. Kempf, Jr. & Roger L. Taylor, *Wrongful Discharge: Historical Evolution, Current Developments and a Proposed Legislative Solution*, 28 SAN DIEGO L. REV. 117 (1991); Massingale, *supra* note 10; Peck, *Unjust Discharges*, *supra*; Peck, *Penetrating Doctrinal Camouflage*, *supra* note 10; Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988); Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988); Summers, *supra*, note 10; Paul H. Tobias, *Current Trends in Employment Dismissal Law: The Plaintiff's Perspective*, 67 NEB. L. REV. 178 (1988); Note, *Employer Opportunism and the Need for a Just Cause Standard*, 103 HARV. L. REV. 510 (1989); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *Contracts—Termination of Employment at Will—Public Policy May Modify Employer's Right to Discharge*, 14 RUTGERS L. REV. 624 (1960).

In contrast to the common law at-will doctrine, South Dakota statutes provide that the length of time which an employer and employee adopt for the estimation of wages is relevant to a determination of the term of employment. S.D. CODIFIED LAWS ANN. §§ 60-1-3 to -5 (Supp. 1992). In the absence of an agreement or custom as to rate of pay, an employee is presumed to be hired by the month at a monthly rate of reasonable wages, to be paid when the service is performed. *Id.* § 60-1-4. If the parties continue the employment relationship after the expiration of an agreement, they are presumed to have renewed the agreement for the same wages and term of service. *Id.* § 60-1-5. This sets South Dakota apart from all other U.S. jurisdictions by statutorily recognizing circumstances in the overall contractual relationship between employer and employee as factors to weigh against the strict application of the at-will doctrine. Montana, Puerto Rico and the Virgin Islands also provide statutory exceptions to at-will employment, having enacted specific wrongful discharge legislation which supersedes common law claims. *See infra* notes 195-201 and accompanying text.

16. RESTATEMENT (SECOND) OF AGENCY § 442 (1958):

B. *Precedent in Other States*

In 1959, California became the first jurisdiction to expressly recognize the public policy exception to at-will employment in *Petermann v. International Brotherhood of Teamsters Local 396.*[17] In *Petermann*, an employee of the union, was instructed by the union's secretary-treasurer to make untrue statements, under oath, to a California legislative committee. Instead, the employee truthfully answered all questions. He was discharged by the union the following day.[18] The court first acknowledged that the plaintiff was an at-will employee subject to termination for any reason at the will of either party. The court stated, however, that such an at-will contract may be limited either by statute or by considerations of public policy.[19] The court observed that the term "public policy" was imprecise, and noted that few cases could arise where the expression is not disputed.[20] The court reasoned that in order to "fully

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[*Period of Employment*] Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events.

Id. § 442. Comment b states that salary paid proportionally to units of time does not, of itself, indicate that the parties have agreed that the employment is to continue for the stated unit of time[,]. . . [but] merely indicates the rate at which the salary . . . is to be paid, and either party is privileged to terminate the relationship at any time unless further facts exist.

Id. at cmt. b. The RESTATEMENT also recognizes that when the principal directs the agent contrary to an interest which he is privileged to protect, the agent's remedy is not to violate the principal's orders but to obtain relief for breach of the principal's implied agreement not to give unreasonable directions. *Id.* § 385 cmt. d and illus. 4 (1958). Further, the RESTATEMENT provides that the agent has no duty to commit a tort or a minor crime at the command of the principal, and that such a contract is illegal. *Id.* § 418, cmt. a. Finally, the RESTATEMENT repeats the content of § 385, stating that a servant may be justified in disobeying an unreasonable rule or order which the master is not privileged to impose on him. *Id.* § 526, cmt. c. Thus, the RESTATEMENT both supports Wood's Rule and at the same time recognizes that certain exceptions exist when the principal instructs the agent to commit a tort or illegal act.

17. 344 P.2d 25 (Cal. Ct. App. 1959). *See* Peck, *Penetrating Doctrinal Camouflage*, *supra* note 10 at 723; Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, *supra* note 15, at 1822.

18. *Petermann*, 344 P.2d at 26.

19. *Id.* at 27.

20. *Id.* "Public policy" indeed escapes precise definition. For example, one interesting and poignant definition of "public policy" is: "[a] will-o'-the-wisp of the law which varies and changes with the interests, habits, needs, sentiments, and fashions of the day." BALLENTINE'S LAW DICTIONARY 1023 (3d ed. 1969) (quoting Wallihan v. Hughes, 82 S.E.2d 553 (Va. 1954)). One often cited definition of "public policy" in retaliatory discharge cases appears in Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 511 (N.J. 1980). The *Pierce* court, in defining "public policy," stated:

> [W]e must balance the interests of the employee, the employer, and the public. Employees have an interest in knowing they will not be discharged for exercising their legal rights. Employers have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy. The public has an interest in employment stability and in discouraging frivolous lawsuits by dissatisfied employees.

Id.

See also Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983) (expanding and explaining the same definition without citing to *Pierce*, the court explains that (1) employees are safeguarded against employer's acts that undermine fundamental policies, (2) employers retain flexibility to make needed personnel decisions during changing economic conditions, and (3) society benefits from a stable job market and the protection

effectuate the state's declared policy against perjury" employers must be denied the unlimited right to discharge at-will employees when the reason for dismissal was the employee's refusal to commit perjury.[21] As a result, violations of "public policy" should be defined as whatever contravenes good morals or any established interests of society, and "that which has a tendency to be injurious to the public or against the public good."[22] In reversing the trial court, the *Petermann* court found that the employee sufficiently alleged a cause of action.[23]

Fourteen years later, in 1973, a series of trend setting cases began to lay out a framework of the types of employer actions that violate "public policy." The Indiana Supreme Court in *Frampton v. Central Gas*

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against frivolous lawsuits since discharged employees who do not allege a clear expression of public policy violation will be dismissed on summary judgment or failure to state a claim); BLACK'S LAW DICTIONARY 1231 (6th ed. 1990) (defining "public policy" as "that general and well-settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation."); 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, 486 & n.32 (1991) (noting inconsistencies in the articulation of the interests involved in various case law definitions of "public policy").

21. *Petermann*, 344 P.2d at 27. The employer advised the employee on the day before the legislative committee hearing that the employee's work was "highly satisfactory," and that the employee's discharge the day following the hearing was to "punish [the employee] for testifying truthfully." *Id.* at 28. This case thus anticipates Blades' argument that employees should be permitted to bring a tort action rather than a contract action. Blades, *supra* note 15, at 1422.

22. *Id.*

23. *Petermann*, 344 P.2d at 27. In 1980, the California Court of Appeals sustained a wrongful discharge cause of action in tort brought by an employee who refused to violate the Sherman Antitrust Act by participating in his employer's price fixing scheme. Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980). The court noted the factual similarity to *Petermann* and the fact that wrongful acts committed in the course of a contractual relationship may afford both tort and contractual relief; thus the existence of a contractual relationship does not bar the pursuit of redress in tort. *Id.* at 1334. The court found that an employer's authority over its employee precludes the right to order the employee to commit a criminal act or coerce compliance with unlawful directions by discharge or threat. In the same year, the same court decided Cleary v. American Airlines, 111 Cal. App. 3d 443 (1980). Here, the court held that the employee's termination without legal cause, after 18 years of satisfactory performance violated the implied-in-law covenant of good faith and fair dealing. *Id.* at 455-56. The longevity of the employee's service combined with detrimental reliance on the employer's express employment policies operated as estoppel precluding discharge without good cause. *Id.*

For a chronological survey of recent California wrongful discharge cases, see Dabbs v. Cardiopulmonary Management Servs., 188 Cal. App. 3d 1437 (1987) (hospital respiratory therapist was not required to allege violation of a specific statute to state a wrongful discharge cause of action, but since the employee quit voluntarily, no constructive discharge could be pleaded without alleging violation of a specific statute or actual termination); Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (public policy questions must involve a matter that affects society at large rather than a personal or proprietary interest of employee or employer, and the policy must be well established or substantial); Gantt v. Sentry Ins., 824 P.2d 680 (Cal. 1992) (recognizing violations of employment public policy as falling into four categories: (1) refusing to violate a statute, (2) prohibiting the performance of a statutory obligation, (3) discharge for exercising a statutory right or privilege, and (4) discharge for reporting an alleged violation of a statute of public importance; affirming employee's cause of action without federal law preemption for termination in retaliation for testifying truthfully on behalf of a co-worker's sexual harassment claim). For a more detailed discussion of California wrongful termination law, see Kempf and Taylor, *supra* note 15.

Co.[24] analogized retaliatory discharge with retaliatory eviction in landlord-tenant law, holding that termination of an employee in retaliation for filing a Workers' Compensation claim "undermines a critically important public policy."[25] The court held that the employee stated a cause of action as an exception to the general at-will employment rule because the retaliatory discharge by the employer was an intentional, wrongful act entitling the employee to compensation.[26]

Retributive tort concepts of bad faith blended with contract principles in several subsequent cases. In 1974, the Supreme Court of New Hampshire, in *Monge v. Beebe Rubber Co.*,[27] held that a breach of employment contract occurs when an at-will employee's discharge is motivated by bad faith, malice, or retaliation.[28] The court stated that employment contracts must be balanced between the interests of both parties.[29] In a similar application of precedent, the New Hampshire Supreme Court in *Cloutier v. Great Atlantic & Pacific Tea Co.*,[30] held that an employee of over 35 years articulated a public policy cause of action when he was terminated as a store manager for a burglary that occurred in his store on his day off, because he was "at all times" responsible for the cash in the employer's store.[31] The *Cloutier* court held that to articulate a public policy exception to the at-will employment doctrine, the employee must

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24. 297 N.E.2d 425 (Ind. 1973).

25. *Id.* at 428. Interference with a citizen's rights, such as filing for worker's compensation or serving on a jury, represent clearly defined examples of "public policy" violations. *See supra*, note 20 (definitions of "public policy").

26. *Frampton*, 297 N.E.2d at 428. In addition to implying that this action sounds in tort, the court hypothesized that if an employee has no remedy for retaliatory discharge, "[w]hat then is to prevent an employer from coercing an employee?" *Id.*

27. 316 A.2d 549 (N.H. 1974).

28. *Id.*

29. *Id.* at 551. In *Monge*, when an employee needed more materials to do her job, which were refused, she was manipulated into a "no-win" situation and was fired that evening for refusing a foreman's order. The employee alleged that, in reality, she was harassed by her foreman because she refused to go out with him. His anger, condoned by the personnel manager, resulted in her termination. *Id.* at 550. She was reinstated after complaining to the union, but became ill a few days later requiring a hospital stay. The employer then terminated the employee for allegedly failing to "call-in" for a three day period. *Id.* at 550-51. The court set forth a concise formula for evaluating employment contracts:

> In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two.

Id. at 551. The court reasoned that the decision would create a "certain stability of employment," yet would not interfere with the reasonable business judgment to discharge employees freely so as to operate efficiently and profitably. *Id.* at 552. *See* Blades, *supra* note 15; Blumrosen, *supra* note 15.

30. 436 A.2d 1140 (N.H. 1981).

31. *Id.* at 1143-45. The court noted elements of bad faith: the employer discontinued police protection for employees making deposits late at night in an unsafe area and condoned leaving the cash in the safe overnight for deposit the next day; the employer later claimed the employee violated company policy; immediately after a burglary, the employer resumed police accompaniment. *Id.* at 1144. Additionally, the employee was suspended after a five minute meeting and was discharged in a similar manner after thirty-six years of employment for the employer, while the assistant manager on duty when the burglary occurred was not discharged. *Id.* The court noted that employees are entitled to a day off, and cannot be responsible to their employer "at all times." *Id.* at 1145.

first show that the employer was motivated by bad faith, malice, or retaliation.[32] Secondly, the employee must demonstrate that he was discharged because he performed an act encouraged by public policy, or refused to perform an act that public policy would condemn.[33]

The definition and scope of "public policy" was substantially broadened to include general societal interests in another important precursor to the *Lorenz* case, *Nees v. Hocks*.[34] Here, the Oregon Supreme Court held that the employer was liable, by exception to the at-will employment rule, for discharging the employee because she *wanted* to serve on a jury.[35] The court recognized certain circumstances in which an employer may commit a public policy tort by discharging an employee for a socially undesirable motive.[36] Thus, the *Nees* court created a right of recovery for employees when "substantial societal interests" had been violated.[37] Similarly, in 1978, West Virginia recognized, in *Harless v. First Nat'l Bank in Fairmont*,[38] a cause of action in tort when the employer's motivation for discharge contravenes substantial public policy.[39] The *Harless* court held that discharging an employee in retaliation for attempts to bring state and federal consumer credit law violations to the attention of the employer was a violation of public and statutory policies when the employee was protected by the statute.[40]

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32. *Id.*

33. *Id.* at 1143-44. The employee in *Cloutier* argued that the employer violated the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 654(a) (1988), by not providing police protection and endangering employees with recognized hazards at the place of employment. But the court stated that regardless of OSHA, the facts supported the conclusion that the employee was discharged for furthering the public policy objective of protecting the employees under him. *Cloutier*, 436 A.2d at 1145. *But see* Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974). In *Geary*, the employee was an at-will salesman. When the employee complained to his employer that new tubular casings designed for high-pressure use were dangerous to anyone using it, and that the testing was inadequate, the employee was ordered to "follow directions," which the employee did. *Id.* at 175. The employee persisted in taking his case to the "top" of the company, eventually resulting in the product being reevaluated and withdrawn from the market. The employee alleged his dismissal without notice violated general public policy and was malicious and abusive. *Id.* The court declared Pennsylvania an at-will state, denying the employee's cause of action for discharge in violation of public policy. *Id.* at 174-80.

Here, in contrast to the *Lorenz* case, the employee was not an expert in matters of public safety, and the court stated that mere good intentions would not overcome the employer's legitimate right to discharge him at will. *Id.* The court hinted that a high ranking employee or expert might be treated differently, but here the employee bypassed his immediate superiors trying to use "inside contacts." *Id.* The court concluded that balancing the interests of both parties weighed in favor of the employer, and the discharge was not a "spiteful retaliatory gesture designed to punish" the employee. *Id.* at 180 n.15. The court added in dictum that it was not necessary to reject other jurisdiction's public policy exceptions, but this employee failed to show "clear and compelling" mandates of public policy. *Id.* at 180.

34. 536 P.2d 512 (Or. 1975).

35. *Id.* at 516.

36. *Id.* at 515. *See also* Delaney v. Taco Time Int'l, Inc., 681 P.2d 114 (Or. 1984) (holding employer liable for discharging the employee after the employee refused to sign tortious and defamatory statements concerning another employee).

37. *Nees*, 536 P.2d at 516.

38. 246 S.E.2d 270 (W. Va. 1978).

39. *Id.* at 275.

40. *Id.* at 275-76.

Harless and *Nees* were influential in developing a public policy exception to at-will employment because they recognized that strict adherence to the at-will doctrine could bring potential harm to society in general, such as degradation of the jury system or unchecked dishonest banking procedures. In addition, other states contributed to the wealth of cases representing the expansion of public policy exceptions to the at-will rule doctrine influential to the *Lorenz* decision.[41] While Colorado never expressly rejected the possibility of recognizing a tort cause of action for

41. For example, in a chronological sampling, see Trombetta v. Detroit, Toledo & Ironton R.R. Co., 265 N.W.2d 385 (Mich. Ct. App. 1978) (recognizing exceptions to the at-will employment rule when actions contravene public policy when, as here, the employee was discharged for refusing to manipulate pollution control reports to be filed with the state pursuant to statute); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980) (dismissing an employee for ensuring that the employer's products comply with state law violates public policy when the employee must choose between risking criminal sanction or jeopardizing continued employment); Keneally v. Orgain, 606 P.2d 127 (Mont. 1980) (recognizing public policy exceptions as refusal to self-perjure, retaliation for employee's filing of Workers' Compensation benefits, refusal of sexual relations, and possibly others in the future, but denying a cause of action to the employee for failure to state a substantial or specific violation of public policy; common law now superseded by MONT. CODE ANN. §§ 39-2-903 to 914); Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981) (employee stated cause of action when he was discharged in retaliation for helping gather information to give to a local law enforcement agency concerning a co-worker's possible criminal misconduct); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984) (holding that an exception to the at-will rule exists when an employee is fired in retaliation for exercising Workers' Compensation rights); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984) (rejecting the "good faith" contract argument, but endorsing breach of implied-in-fact contracts of employment when certain policies in the employee manual have been detrimentally relied on by the employee, and recognizing a tort cause of action for employee discharge in violation of clear mandates of public policy); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985) (recognizing a "bad cause" exception to the at-will doctrine, which serves society's interest in preventing employers from discharging employees for morally wrong reasons, such as here, where the employee was fired by her supervisor in retaliation for refusing to "moon" the audience along with the other participants in a campsite skit); Allen v. Safeway Stores Inc., 699 P.2d 277 (Wyo. 1985) (recognizing that a wrongful discharge tort action as a public policy exception requires (1) that the discharge violate some well-established public policy; and (2) there be no pre-existing remedy available to the employee); Johnson v. World Color Press, Inc., 498 N.E.2d 575 (Ill. App. Ct. 1986) (employee discharged for disclosing violations of federal security and fraud laws). For an insightful view of the Washington wrongful discharge law, see Peck, *Penetrating Doctrinal Camouflage*, *supra* note 10. For an analysis of *Wagenseller*, *see* Goldsmith, *supra* note 15.

But see, e.g., Whittaker v. Care-More, Inc., 621 S.W.2d 395 (Tenn. Ct. App. 1981) (denying employee's request to modify the at-will rule when the employer failed to comply with broad claims of available work made in the employee manual, and recognizing the likelihood of frequent and vexatious lawsuits if the doctrine is changed). Note that Tennessee does not recognize an exception in contract actions, only in tort as public policy exceptions. *See* Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984). Examples of other cases denying an exception to the at-will doctrine include Muller v. Stromberg Carlson Corp., 427 So.2d 266 (Fla. Dist. Ct. App. 1983) (refusing to modify the at-will doctrine) and Murphy v. American Home Prods. Corp., 448 N.E.2d 86 (N.Y. 1983) (no implied obligation of good faith exists in employment contracts, and that rather than make new judicial law, the legislature should interpret public policy).

For a detailed state by state analysis of the acceptance of the public policy wrongful discharge cause of action, see *Lorenz*, 823 P.2d 100, 106-7 nn.2-5. Some clarification of jurisdictional categories should be noted. Delaware is listed as declining the public policy exception. *Id.* at 106 n.4. But in March 1992, a lower court recognized a public policy exception to the at-will employment rule. The employee's cause of action for wrongful termination was sustained after he was terminated in retaliation for refusing to carry out criminal acts which would have set prices in a government contract in excess of federal

wrongful discharge, several years would pass before the Colorado Supreme Court was presented with the right combination of a strong claim and supporting opinions of the Colorado Court of Appeals and other populous jurisdictions.

C. *Prior Colorado Cases*

In 1974, well before the recognition of a tort public policy exception, the Colorado Court of Appeals decided *Justice v. Stanley Aviation Corp.*[42] This contract case involved a discharged employee claiming that his confirmation letter of employment from the employer at $12,000 per year was for a definite period of one year, and that his discharge three and a half months later constituted a breach of employment contract.[43] Applying the at-will doctrine, the court rejected this argument but did not eliminate possible exceptions in contract, such as special consideration.[44] The late 1980's brought a new era of expansion in Colorado contract employment law, recognizing reasonable expectations of employees that employers should also be bound by their own promulgated disciplinary and termination procedures. For example, in *Continental Airlines v. Keenan,*[45] the Colorado Supreme Court held that an employee's reliance upon the specific procedures set out in the employee handbook may be enforceable under contract theories of promissory estoppel or unilateral contract supported by the employee's continued performance.[46] This principle remains sound in subsequent contract employment law decisions in Colorado.[47]

The issue of whether a tort cause of action could be sustained for

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regulations. Henze v. Alloy Surfaces Co., No. 91C-06-20, 1992 WL 51861, at *2 (Del. Super. Ct. March 16, 1992).

Maine, Iowa and Utah are listed as not having ruled on the issue. *Lorenz*, 823 P.2d at 107 n.4. While Maine has not yet determined what type of public policy exceptions might qualify for an exception to the at-will doctrine, the Maine Supreme Court hinted that a wrongful discharge cause of action might exist if the record shows a clearly defined contravention of public policy. Wilde v. Houlton Regional Hosp., 537 A.2d 1137 (Me. 1988). In 1989, the Iowa Supreme Court in Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989), noted two exceptions to the employment at-will doctrine: (1) tort liability when a discharge is in clear violation of a well recognized and defined public policy, and (2) detrimental reliance by an employee on a contract created by the employer's policy manual. In 1990, the Iowa Supreme Court expanded the scope of exceptions to include intimidation of employees into foregoing benefits entitled to them or risk losing their jobs. Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990). In Hodges v. Gibson Prods. Co., 811 P.2d 151 (Utah 1991), the Utah Supreme Court held that employment at-will is limited by public policy exceptions, although the court declined to indicate whether such a wrongful discharge would be in tort or contract. In Peterson v. Browning, 832 P.2d 1280 (Utah 1992), the court held that violations of statutes clearly expressing Utah public policy are an exception to at-will employment sounding in tort. *Id.* at 1283-85.

42. 530 P.2d 984 (Colo. Ct. App. 1974).

43. *Id.* at 985.

44. *Id.* at 986.

45. 731 P.2d 708 (Colo. 1987).

46. *Id.* at 711-12.

47. *See, e.g.*, Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988) (employer's failure to follow its own employment policies to be evaluated under the *Continental Airlines* standard); Allabashi v. Lincoln Nat'l Sales Corp., 824 P.2d 1 (Colo. Ct. App. 1991) (affirming jury verdict finding employer in breach of implied contract or promissory estoppel

wrongful discharge was first addressed by the Colorado Court of Appeals in *Lampe v. Presbyterian Medical Center*.[48] Here, a nurse was discharged after she attempted to comply, contrary to the supervisor's instructions, with her own interpretation of Colorado statutory regulations regarding adequate nursing shift-coverage. Faced with the issue of retaliatory termination, the court declined to expand tort law to limit the employment at-will doctrine. Significantly, however, the court left open the possibility of future wrongful discharge actions in tort if employees relied on specifically enacted statutory rights or duties,[49] as opposed to a "broad, general statement of policy"[50] similar to the statute relied on by the employee in *Lampe*.[51]

In 1988, the Colorado Court of Appeals recognized a cause of action for wrongful termination in *Montoya v. Local 3 of the International Brotherhood of Electrical Workers*.[52] Here, the employee was discharged for refusing to assist in illegal practices by management of the union.[53] The

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for failure to follow termination procedures in an employment manual relied upon by the employee). *See also supra* notes 42-46 and accompanying text.

Traditional contract causes of action in employment cases continue to be an available alternative to tort actions. *See* Pittman v. Larson Distrib. Co., 724 P.2d 1379 (Colo. Ct. App. 1986) (issue of fact existed as to whether the employee's employment contract as a salesman was terminable at will, or "permanent" employment supported by special consideration such as lower pay, experience or customer contacts); Magnuson v. Smith and Saetveit, P.C., 722 P.2d 1020 (Colo. Ct. App. 1986) (employee's refusal to obey employer's reasonable instructions constitutes a material breach of employment contract); Feiger, *supra* note 10, at 734-35.

48. 590 P.2d 513 (Colo. Ct. App. 1978).

49. Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973) (employee terminated for filing Workers' Compensation claim stated a public policy exception to the at-will rule). *Supra* notes 24-26 and accompanying text. In Stivers v. Stevens, 581 N.E.2d 1253 (Ind. Ct. App. 1991), the court expanded on *Frampton* holding that the discharge of an employee for merely suggesting that a Workers' Compensation claim would be filed, was an even stronger rationale for the *Frampton* exception to the employment at-will doctrine. *See* Barbara J. Fick, *1991 Survey of Recent Developments in Indiana Law: Labor and Employment Law*, 25 Ind. L. Rev. 1311, 1315 (1992) (the Indiana Supreme Court recognizes coercion of an employee as a public policy exception).

50. COLO. REV. STAT. §§ 12-38-201 to -217 (1973) (current version at COLO. REV. STAT. §§ 12-38.1-101 to -119 (1988)).

51. *Lampe*, 590 P.2d at 515. *See* Corbin v. Sinclair Mktg., Inc., 684 P.2d 265 (Colo. Ct. App. 1984). *Corbin* was similar to *Lampe*. The employee in *Corbin* claimed wrongful discharge in violation of the Colorado Minimum Wage Act, COLO. REV. STAT. § 8-3-1086(2)(a) and OSHA, 29 U.S.C. § 654(a), when his employer directed him to perform certain hazardous tasks. The *Corbin* court upheld the *Lampe* decision, holding that the statutes relied on by the employee were broad general statements of policy similar to those held to be inadequate in *Lampe* to justify adoption of an exception to the employment at-will rule. *Corbin*, 684 P.2d at 267. In answer to the employee's argument that his termination was in violation of the company's own policy manual and thus a breach of contract, the court upheld the at-will rule for employment contracts. *Id.* at 267. *But see* Continental Airlines v. Keenan, 731 P.2d 708 (Colo. 1987) (Colorado now recognizes promissory estoppel actions resulting from employment handbooks distributed to the employees). *Supra* notes 42-47 and accompanying text.

52. 755 P.2d 1221 (Colo. Ct. App. 1988). The court neither laid out the necessary elements required for a *prima facie* case, nor the necessary causation analysis. The court simply reversed and remanded the trial court's summary judgment dismissal of the wrongful discharge claim.

53. *Id.* at 1224-25. The court held that federal law did not preempt the employee's state court action of wrongful discharge, and an issue of fact existed as to whether the employee was wrongfully discharged for refusing to assist in illegal activities. Note that

Montoya court did not reach the issue of whether or not the action sounded in tort. Later that same year, however, the Court of Appeals, in *Cronk v. Intermountain Rural Electric Association* (*Cronk I*),[54] recognized the tort of wrongful discharge and defined the five steps necessary to establish a *prima facie* wrongful discharge exception to the employment at-will doctrine later adopted and modified by the *Lorenz* court.[55] In *Cronk I*, the employees alleged wrongful discharge for refusing to engage in illegal and irregular practices prohibited by Colorado public utility statutes.[56] The *Cronk I* decision represented a major step toward establishing solid exceptions to Colorado's employment at-will doctrine. Nevertheless, the court did not expressly hold that the action sounded in tort. In 1989, the Court of Appeals augmented *Cronk I* with its decision in *Lathrop v. Entenmann's, Inc.*,[57] allowing a wrongful discharge claim for retaliation against the employee who exercised Workers' Compensation benefits.[58] The court expressly recognized an exception to the at-will termination rule, and expanded the scope of the *Cronk I* public policy exception.[59]

Federal courts in Colorado have closely paralleled Colorado decisions recognizing exceptions to the at-will doctrine. In 1989, the U.S. District Court, in *Miedema v. Browning-Ferris Industries of Colorado*,[60] followed Colorado's determination that an employee discharged for exercising specific statutory rights or duties supports a cause of action for wrongful termination.[61] More recently, in *Mares v. Conagra Poultry Co.*,[62]

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this case is factually similar to California's Petermann v. International Brotherhood of Teamsters Local 396, 344 P.2d 25 (Cal. Ct. App. 1959) (employee discharged for refusing to commit perjury to a legislative committee); *supra* notes 17-23 and accompanying text. *See also* Farmer v. Central Bancorporation, 761 P.2d 220 (Colo. Ct. App. 1988) (suggesting that employee's discharge for refusal to violate federal banking laws could fall within a public policy exception to at-will employment, but the employee was unable to prove a violation); Gamble v. Levitz Furniture Co., 759 P.2d 761 (Colo. Ct. App. 1988), *cert. denied*, 782 P.2d 1197 (Colo. 1989) (employee's claim for wrongful discharge, if available, is not available at common law when wrongful discharge remedies are provided for by statute).

54. 765 P.2d 619 (Colo. Ct. App. 1988), *cert. denied* (*Cronk I*) *appeal after remand*, 140 L.R.R.M. (BNA) 2149 (Colo. Ct. App. April 2, 1992), *cert. denied* (*Cronk II*).

55. *Id.* at 622 ((1) the employee refused to perform an action; (2) ordered by the employer; (3) which would violate a specific statute; (4) whose terms are more than a broad general statement of policy; and (5) that the employee's termination resulted from the refusal to perform such action). *See supra* notes 5-6 and accompanying text.

56. COLO. REV. STAT. §§ 40-6-103 to -106 (1984).

57. 770 P.2d 1367 (Colo. Ct. App.), *cert. dismissed*, 778 P.2d 1370 (Colo. 1989).

58. *Id.* at 1371-73.

59. *Id.* at 1373. The *Lathrop* court relied heavily on Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973). *See supra* notes 24-26 and accompanying text; *Martin Marietta v. Lorenz*, 823 P.2d at 108 (Colo. 1992) (discussion of *Lathrop* and *Frampton*).

60. 716 F. Supp. 1369 (D. Colo. 1989).

61. *Id.* at 1371. The court, relying on *Lathrop*, 770 P.2d at 1367, held that Colorado law precludes discharging an employee for filing a Workers' Compensation claim. *See supra* notes 57-59 and accompanying text. *See also* Vaske v. DuCharme, McMillen & Assocs., Inc., 757 F. Supp. 1158 (D. Colo. 1990) (recognizing Colorado retaliation claims when employees exercise statutorily protected rights or obligations, or are discharged for refusing to commit a criminal act directed by the employer but refusing to expand existing Colorado tort law).

62. 773 F. Supp. 248 (D. Colo. 1991), *aff'd*, 971 F.2d 492 (10th Cir. 1992) (applying the modified *prima facie* standards of *Lorenz* and affirming Chief Judge Finesilver's District

the U.S. District Court declined to apply the public policy exception in the earlier 1990 Colorado appellate decision in *Lorenz v. Martin Marietta*[63] because the employee failed to allege that she was directed to violate a criminal law.[64] The court ruled,[65] and the Tenth Circuit affirmed,[66] that a federal court should not expand the existing wrongful termination law or create a new category of exceptions to the general at-will employment rule. The court held no action may be maintained based solely on the employee's allegations that she was fired for exercising statutory rights under Colorado's physician/patient testimonial privilege by refusing to complete a medical form as part of the employer's drug testing policy, when the employee did not contend the testing itself to be illegal.[67] In the 1992 post-*Lorenz* case of *Smith v. Colorado Interstate Gas Co.*,[68] the U.S. District court acknowledged that current Colorado law recognizes several public policy exceptions to the at-will employment doctrine, and allowed the employee's claims under these exceptions.[69] Although the Tenth Circuit has followed state law closely,[70] not all the federal courts have done the same.[71]

Court ruling that summary judgment for the employer was proper as the employee "never contended that she was being asked to perform an illegal act").

63. 802 P.2d 1146 (Colo. Ct. App. 1990), *aff'd as modified*, 823 P.2d 100 (Colo. 1992).

64. *Mares*, 773 F. Supp. at 252.

65. *Id.*

66. 971 F.2d 492 (10th Cir. 1992). On appeal, the Tenth Circuit affirmed the district court's reasoning, despite the application of the recently announced 1992 Martin Marietta v. Lorenz decision. *Id.* at 494-96.

67. *Id. See* COLO. REV. STAT. § 13-90-107(1) (1973).

68. 794 F. Supp. 1035 (D. Colo. 1992).

69. *Id.* at 1040-42. The court based its decision partially on both *Lorenz*, 823 P.2d 100 (Colo. 1992), and Continental Airlines v. Keenan, 731 P.2d 708 (Colo. 1987).

70. *See, e.g.*, Cooper v. Schneider Metal Mfg. Co., 945 F.2d 411, No. 90-1158 (10th Cir. 1991) (unpublished opinion of Table Decision) (District of Colorado court applying Oklahoma law in the absence of applicable Colorado public policy exception law, but recognizing the *Lathrop* decision recognizing retaliatory discharge for filing Workers' Compensation claims); White v. American Airlines, 915 F.2d 1414 (10th Cir. 1990) (employee alleged a retaliatory discharge for refusing to commit perjury on behalf of American Airlines concerning the 1979 DC-10 crash in Chicago, and the court followed Oklahoma law); Polson v. Davis, 895 F.2d 705 (10th Cir. 1990) (following Kansas law); Horne v. J.W. Gibson Well Serv. Co., 894 F.2d 1194 (10th Cir. 1990) (applying Wyoming law); Zaccardi v. Zale Corp., 856 F.2d 1473 (10th Cir. 1988) (employee's refusal to sign polygraph consent form did not violate any clear mandate of New Mexico public policy); Howcroft v. Mountain States Tel. & Tel. Co., 712 F. Supp. 1514 (D. Utah 1989) (applying Utah law).

71. Several well known federal cases have denied recovery for wrongful termination based on retaliation or public policies: Guy v. Travenol Labs., Inc., 812 F.2d 911 (4th Cir. 1987) (employee discharged for refusing to falsify records required by the Food and Drug Administration did not state an exception to the North Carolina at-will doctrine); Percival v. General Motors Corp., 539 F.2d 1126 (8th Cir. 1976) (executive alleging a malicious discharge by colleagues did not state a cause of action for wrongful termination); Fulford v. Burndy Corp., 623 F. Supp. 78 (D.N.H. 1985) (employee alleging a retaliatory discharge for having filed suit against his employer for injuries incurred by the employer's dog did not state a cause of action under New Hampshire law).

III. THE INSTANT CASE: *MARTIN MARIETTA V. LORENZ*[72]

A. *Facts*

Prior to accepting employment from Martin Marietta in 1972, Lorenz worked for Boeing Aircraft Co. on defense and aerospace projects for 16 years[73] as a specialist in fracture mechanics.[74] Lorenz was well educated at the time he accepted employment with Martin Marietta.[75] As a "principal investigator"[76] for Martin Marietta, Lorenz was responsible for quality control of projects contracted for with the National Aeronautics and Space Administration (NASA). Lorenz complained to his supervisors on several occasions about inadequate testing and poor workmanship on three separate projects.[77]

Lorenz advised his supervisor that "NDI"[78] contract proposals made to NASA involved unrealistic cost assessments resulting in a false contract price.[79] Lorenz advised his supervisors that the data was not being communicated to the appropriate NASA personnel.[80] When no action was taken by Martin Marietta, Lorenz contacted the NASA project manager to relay the data.[81] As a result of Lorenz's actions, a technical review session was held by Martin Marietta with NASA and significant technical issues about the Shuttle's safety were discussed.[82] Lorenz, who accurately drafted the minutes of the meeting,[83] was instructed by a superior to make modifications to them. Lorenz claimed the requested modifications would not accurately reflect the course of the meeting.[84] Lorenz refused to make the changes, and instead issued a memorandum stating that the modifications to the minutes were inaccurate. Lorenz

72. 823 P.2d 100 (Colo. 1992).

73. *Id.* at 102.

74. The study of stress resistance and tolerances for materials used in the construction of defense and aerospace equipment. *Id.*

75. Lorenz held a Bachelor's degree in mechanical engineering from Polytechnic Institute of Brooklyn, a Master's degree in mechanical engineering from the University of Washington, and a doctoral candidate in metallurgy at Colorado School of Mines. *See* Brief Amicus Curiae by the National Employment Lawyers Association (NELA) for the Respondent at 1, Martin Marietta v. Lorenz, 823 P.2d 100 (Colo. 1992) (No. 90 SC 583).

76. The Principal Investigator is accountable for technical objectives. *Id.*

77. The "NDI Contract" was for the purpose of producing data regarding the quality of Space Shuttle external tank designs, the "Mixed Mode Contract" involved building a testing machine to be initially researched and developed with a $25,000 NASA contribution, and the "Tug Irad Contract" was for a space "tug" vehicle. *Lorenz*, 823 P.2d at 103.

78. The words which correspond to "NDI" are not spelled out in any of the *Lorenz* appellate briefs or opinions. Although one possible definition of "NDI" is former President Reagan's "National Defense Initiative," it is not clear whether the "NDI" Contract in *Lorenz* has any connection with Reagan's "National Defense Initiative" defense policy.

79. Respondent's Answer Brief at 5, *Lorenz* (No. 90 SC 583).

80. *Id.*

81. *Lorenz*, 823 P.2d at 103.

82. Respondent's Answer Brief at 5, *Lorenz* (No. 90 SC 583).

83. *Id.*

84. Martin Marietta claimed that Lorenz never accused his superior of making false statements; that Lorenz considered the changes to be "new statements" of "new information;" and that Lorenz was really concerned with pride of authorship of the minutes. Further, "even if [the] additions were inaccurate, they were trivial." Petitioner's Reply Brief at 19-20, Martin Marietta v. Lorenz, 823 P.2d 100 (Colo. 1992) (No. 90 SC 583).

was subsequently warned by management to start cooperating.[85]

On another occasion, Lorenz was pressured to attest to the adequacy of a material for the Mixed Mode Contract.[86] Lorenz discovered that the machine could not perform its function due to shoddy workmanship.[87] He further learned that Martin Marietta had instructed employees to construct the machine for $10,000 instead of the $25,000 that NASA allocated.[88] When Lorenz complained to his supervisors, he was ridiculed.[89] A similar incident occurred concerning the Tug Irad Contract. Despite the "enormous pressure levied against him", Lorenz refused to attest to the adequacy of the material selected for the Tug,[90] and refused to write the final report because the testing was, in his opinion, inadequate.[91] Shortly thereafter Lorenz was terminated.[92]

B. *Case History*

After the presentation of Lorenz's case, the trial court granted Martin Marietta's motion to dismiss for failure to state a claim, stating that Colorado did not recognize common law tortious wrongful termination.[93] The Court of Appeals reversed, recognizing a tort claim for wrongful termination based upon a public policy exception,[94] and ap-

85. *Lorenz*, 823 P.2d at 103.

86. *Id.*

87. *Id.*

88. *Id.* Respondent's Answer Brief at 7, *Lorenz* (No. 90 SC 583).

89. Respondent's Answer Brief at 7, *Lorenz* (No. 90 SC 583); Brief Amicus Curiae at 4, *Lorenz* (No. 90 SC 583).

90. Respondent's Answer Brief at 8, *Lorenz* (No. 90 SC 583).

91. *Lorenz*, 823 P.2d at 103. Lorenz stated in testimony that "these types of issues could not be compromised without compromising . . . [his] professional integrity," or without "jeopardizing the very purpose of . . . [his] involvement" with safety in Martin Marietta's projects, and to do so would amount to "a downright fraud[.]" *Id.*

92. *Id.* at 104. Lorenz was notified of his lay-off status on July 22, 1975, and his last day of work was July 25, 1975. Lorenz filed this action on July 24, 1981. *Id.* at 115. Lorenz filed his action one day short of the expiration of the applicable statute of limitations. For a discussion of the application of the statute of limitations, see *infra* notes 93-94, 113.

93. Lorenz v. Martin Marietta Corp., 802 P.2d 1146 (Colo. Ct. App. 1990), *aff'd as modified*, 823 P.2d 100 (Colo. 1992). Colorado does have limited statutory relief for "whistleblowers:" COLO. REV. STAT. §§ 24-50.5-101 to -107 (1973) ("whistleblower" statute for protection of state employees); COLO. REV. STAT. § 5-5-106 (1973) (prohibiting termination of employees with garnered wages); COLO. REV. STAT. §§ 8-2-104, -107 (1973) (prohibiting fraudulent procurement of employees); COLO. REV. STAT. § 8-2-108 (1973) (prohibiting political firings); COLO. REV. STAT. § 8-2-108 (1)(h) (1973) (prohibiting terminations for testifying under the Labor Peace Act); COLO. REV. STAT. § 13-71-118 (1973) (prohibiting terminations of employees on jury duty). *See* Respondent's Answer Brief at 30, *Lorenz*, (No. 90 SC 583) (listing Colorado statutes restricting employer's ability to terminate their employees). The court also based the dismissal on the fact that the six-year statute of limitations started on the day Lorenz was notified of his lay-off, thus barring the action. *Lorenz*, 802 P.2d at 1148. *See* COLO. REV. STAT. § 13-80-110 (1973); *supra* note 92; *infra* notes 94, 113.

94. Lorenz v. Martin Marietta Corp., 802 P.2d 1146 (Colo. Ct. App. 1990), *aff'd as modified*, 823 P.2d 100 (Colo 1992). The appellate court also stated that the statute of limitations began to run on the day after Lorenz was terminated—the day his "injury" occurred. *Id.* at 1148-49. The court rejected Martin Marietta's argument that the statute began to run on the day Lorenz was notified. Martin Marietta's argument was based on authority involving discharges covered by state or federal statutes which provided specific filing requirements. *Id. See also* Quicker v. Colorado Civil Rights Comm'n, 747 P.2d 682

plied the *Cronk I* standard.[95] Lorenz had also alleged a violation of U.S.C. § 1001,[96] which the court held was specific enough to cover the fraud which Lorenz alleged led to his wrongful termination.[97] Applying the *Cronk I* standard retroactively,[98] the court determined that claims arising out of the state's public policy did not preempt federal labor laws.[99]

C. *The Colorado Supreme Court Opinion*

As a matter of first impression, the Colorado Supreme Court recognized a tort-based wrongful discharge cause of action.[100] However, the court modified the *Cronk I*[101] standards by adding a sixth *prima facie* element requiring the employer's knowledge, or unreasonable lack thereof, that the employee refused to perform the employer's directive because of the employee's reasonable belief that the directive was illegal or contrary to public policy.[102] Under the new *prima facie* standard set out by the court, the employee must present evidence:

> [1] that the employer directed the employee to perform an illegal act;
> [2] that the directed act be part of the employee's work related duties; or
> [3] that the employer prohibited the employee from exercising either a public duty or an important job-related right or privilege;
> [4] that the action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to either the employee's basic responsibility as a citizen or the employee's right or privilege as a worker;
> [5] that the employee was terminated as the result of refusing to perform the act directed by the employer; and
> [6] that the employer was aware, or reasonably should have been aware, that the employee's refusal to comply with the

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(Colo. App. 1987) (explaining COLO. REV. STAT. § 24-34-403 [statute of limitation] as applied to a discrimination claim filed with the Colorado Civil Rights Commission; adopting the federal rule in the absence of Colorado case law that notice of discharge begins running the statute, but improper notice equitably tolls it).

95. *Cronk I*, 765 P.2d at 622; *see supra* note 5.

96. 18 U.S.C. § 1001 (1988) (originally enacted as the Act of June 25, 1948, ch. 645, § 1001, 62 Stat. 749). 18 U.S.C. § 1001 provides that:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Id.

97. *Lorenz*, 802 P.2d at 1149.

98. *Id.* at 1150.

99. *Id.* at 1150-51.

100. Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 108-10 (Colo. 1992).

101. *Cronk I*, 765 P.2d at 622. For the *Cronk I* elements, see text accompanying notes 4-5.

102. *Lorenz*, 823 P.2d at 109.

> employer's order or directive was based on the employee's reasonable belief that the action ordered by the employer was illegal, contrary to clearly expressed statutory policy relating to the employee's duty as a citizen, or violative of the employee's legal right or privilege as a worker.[103]

The court acknowledged that Colorado has refused to enforce contracts violative of public policy.[104] Following this rationale, the court reasoned that it was "axiomatic" that a *condition* in an employment contract also be unenforceable when it is violative of public policy.[105] Neither an employer nor an employee should be allowed to perpetrate a fraud on the government. Moreover, an employee should not be forced to choose between keeping her job or committing a crime, or foregoing a duty or privilege protected by law.[106]

The court then evaluated Martin Marietta's contention that 18 U.S.C. § 1001 was too broad and general to support a wrongful discharge claim.[107] The *Lorenz* court relied on *United States v. Tobon Builes*,[108] *United States v. Diogo*,[109] and *Johnson v. World Color Press*[110] as guides to the interpretation of 18 U.S.C. § 1001, and determined that the statute was designed to protect the government and innocent people, such as Lorenz, from fraud.[111] The court was divided in a four to three decision on the issue of applying the new standard prospectively or retroactively; the majority holding that retroactive application applied.[112] The *Lorenz* case was remanded for a new trial in accordance

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103. *Id.*

104. Russell v. Courier Printing & Publishing Co., 95 P. 936 (Colo. 1908); Wood v. Casserleigh, 71 P. 360 (Colo. 1902); Pueblo & Ark. Valley R.R. v. Taylor, 6 Colo. 1 (Colo. 1881).

105. *Lorenz*, 823 P.2d at 109.

106. *Id.* at 109-110. The court relied upon *Lathrop, Cronk, Frampton,* and *Nees,* in officially recognizing this cause of action. Lathrop v. Entenmann's, Inc., 770 P.2d 1367 (Colo. Ct. App. 1989); *Cronk I*, 765 P.2d at 619; Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973); Nees v. Hocks, 536 P.2d 512 (Or. 1975).

107. Petitioner's Reply Brief at 13-16, Martin Marietta v. Lorenz, 823 P.2d 100 (Colo. 1992) (No. 90 SC 583). Martin Marietta claimed that Lorenz offered no evidence that any of the statements Martin directed of him were "*factually* false," and that Lorenz's "self-serving . . . *opinion*" was that the work was inadequate. *Id.* at 15 (emphasis in original).

108. 706 F.2d 1092 (11th Cir. 1983).

109. 320 F.2d 898 (2d Cir. 1963).

110. 498 N.E.2d 575 (Ill. App. Ct. 1986).

111. *Lorenz*, 823 P.2d at 111; *supra* note 96 (text of 18 U.S.C. § 1001). The *Lorenz* court relied on *Diogo*, where the Second Circuit found 18 U.S.C. § 1001 to contain two distinct offenses: (1) concealment of a material fact; and (2) false representation, in which "both offenses may be the same, to create or foster on the part of a Government agency a misapprehension of the true state of affairs." *Diogo*, 320 F.2d at 901-02.

The *Lorenz* court also adopted the interpretation of 18 U.S.C. § 1001 in *Johnson*, which declared the purpose behind 18 U.S.C. § 1001 as "establish[ing] a clearly mandated public policy against deceptive practices aimed at frustrating or impeding legitimate functions of government departments or agencies." *Johnson*, 498 N.E.2d at 577-78. For Tenth Circuit interpretations of this statute and its criminal elements and proof, which is beyond the scope of this Comment, see United States v. Jones, 933 F.2d 807 (10th Cir. 1991); United States v. Daily, 921 F.2d 994 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 405 (1991); United States v. Irwin, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). *See also* United States v. Gilliland, 312 U.S. 86 (1941) (interpreting the purpose prior to codification of the Act of June 25, 1948).

112. *Lorenz*, 823 P.2d at 116-20 (Erickson, J., concurring in part and dissenting in part).

with the court's newly pronounced standards.[113]

IV. ANALYSIS

A. *Unanswered Questions*

Although Colorado has now joined the majority of jurisdictions[114] in adopting the public policy exception in tort to the at-will employment doctrine, new questions arise. The *Lorenz* court provided little guidance as to what will satisfy the additional causation element of employer knowledge in the newly recognized common law tort. Proving the first five elements of a *prima facie* case under the *Cronk I* standard[115] as adopted by the *Lorenz* court, will implicitly prove the employer knowledge element. Yet the *Lorenz* court added a "*mens rea*" requirement of employer knowledge in a civil action.[116] A wrongfully discharged employee must show that his employer *knew,* or *should have known,* that the reason the employee refused to comply with the employer's order was due to the employee's reasonable belief that the act directed by the employer was illegal, statutorily protected activity, or in clear contravention of public policy relating to an employee's rights or privileges.[117] It is unclear whether these enumerations are exclusive, or whether "the public policy exception encompass[es] an employee's 'whistleblowing' activity or other conduct exposing the employer's wrongdoing[.]"[118]

These questions are only partially answered by judicial opinions subsequent to the *Lorenz* decision. Attorneys, to date, have no clear and accurate precedent to determine what evidence sufficiently meets the ad-

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The intent behind this Comment is a discussion and survey of the public policy exception to the employment at-will doctrine, and how Colorado may be affected by the *Lorenz* decision. Because the court was split only on the issue of retroactive application of the new standard, and also because of the limitations in the scope of this writing, the issues of retroactive application and running of the statute of limitations will not be analyzed.

The underlying issue behind the dissent was whether the newly adopted standard should apply to the parties before the court, as well as those on the docket for appeal. The dissent claimed that the standard in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), for determining whether a judicial decision should be applied retroactively, was improperly applied by the majority. *Lorenz*, 823 P.2d at 117-20.

113. *Supra* notes 5-6. The court also unanimously agreed that the statute of limitations did not begin to run on a tort wrongful discharge claim until the employee had been injured by being separated from his employment. *Lorenz*, 823 P.2d at 115-16; *supra* notes 92-94 & 112.

114. *Lorenz*, 823 P.2d at 108. For a state-by-state comparison chart of the status of at-will employment see 9A Lab. Rel. Rep. (BNA) 505:51-52 (July, 1992).

115. *See supra* note 5 and accompanying text.

116. 823 P.2d at 108-10. The court calls the added element an "additional evidentiary requirement." *Id.* at 110. While this may indeed be an additional evidentiary requirement, it also acts as a *mens rea* requirement of the employer's state of mind.

117. *Id.*

118. Outline of Gilbert M. Román, Esq., *Tort of Wrongful Discharge Against Public Policy in Colorado*, at 6, used for a National Employment Lawyers Association [NELA] meeting (April 24, 1992) and as part of the materials accompanying a Colorado Trial Lawyers Association ("CTLA") CLE seminar, "Hot Topics in Employment Law" (Nov. 20, 1992), section contributed by Darold W. Killmer, Esq., *Developments in the Common Law of Colorado* (on file with author). Mr. Killmer is a partner, and Mr. Román currently practices with Feiger, Collison & Killmer, in Denver, Colo. The author wishes to thank Mr. Killmer, Mr. Román, and Feiger, Collison & Killmer for their generous assistance.

ded element of employer knowledge of the employee's reasonable belief of illegality, or how the courts will construe the language set forth in *Lorenz*.[119] This section of the Comment will focus on the employer knowledge requirement in *Lorenz* as it has been interpreted by subsequent courts, what additional case law may apply to satisfy the element, and parallel legislative means of controlling wrongful discharge and whistleblowing.

The *Lorenz* court reasoned that the additional evidentiary element will result in providing the employer an opportunity to distinguish between conscientious employees truly concerned about the legality of their employer's directive, and merely subordinate employees.[120] The court further declared that the employer knowledge element provides the employer with fair notice, prior to making a termination decision, of the circumstances supporting the employee's reasonable belief that the directed act was wrongful, against public policy, or prohibiting the employee's rights or lawful privileges.[121] In recognizing a tort cause of action for wrongful discharge with an additional scienter element, the court rationalized the *Lorenz* decision as not only limiting the employer's discretion in discharging at-will employees, but also as (1) accommodating the employer's interest in worker efficiency and loyalty; (2) accommodating the employee's interest in not being coerced into having to choose between almost certain termination of employment or engaging in illegal conduct or conduct contrary to the employee's civic rights and duties; and, (3) society's interest in maintaining a balance between the two.[122]

The goals of the *Lorenz* court are relevant to today's less than satisfactory economic situation, and the ever-increasing big business control

119. Román, *supra* note 118, at 4. This requirement means that, if nothing else, Colorado plaintiff's lawyers can predict an additional hurdle in proving a *prima facie* case of wrongful discharge in tort in relation to the public policy exception to at-will employment. *Lorenz* is "not a model of clarity," leaving open other questions. For example, what types of cases may arise under the claim of "wrongful discharge" out of the nearly infinite possibilities? Is an employee protected under *Lorenz* for merely opposing her employer's wrongdoing without the protection of a specific statute or enumerated public policy? Darold W. Killmer, Esq., Remarks at CTLA Seminar: "Hot Topics in Employment Law" (Nov. 20, 1992).

The *Lorenz* court conceded that this evidentiary requirement will place on the employee an extra "burden" not articulated in *Cronk I*, but claimed that the added element will "not alter in a fundamental way the basic nature of the tort claim for wrongful discharge outlined in the *Cronk [I]* decision." *Lorenz*, 823 P.2d at 110. The court did not state any reasoning to show this extra requirement as beneficial to the public, excluding employers, or to the wrongfully discharged employee, who is already suffering an economic loss.

Martin Marietta, on the other hand, feared that recognizing a public policy exception to at-will employment would result in an "insubordinate employee [who] could *hold management hostage* by immediately threatening a claim under the generality of many statutes, leaving management to choose between maintaining industrial discipline and predicting how a jury might apply the statute." Brief for Petitioner at 27, Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo. 1992) (No. 90 SC 583) (emphasis added).

120. *Lorenz*, 823 P.2d at 110.

121. *Id.*

122. *Id.* It is interesting to note that the *Pierce* public policy definition, *supra* note 20, seems to appear in *Lorenz*.

over much of the population's everyday lives and careers. The court, however, potentially biased its own public policy decision in favor of employers by making the causation elements in a retaliatory discharge under the public policy exception more difficult to establish (at first glance) in Colorado than in other jurisdictions recognizing the exception.[123] The *Lorenz* court further complicated the legal analysis by declaring the public policy exception a tort action, yet including contract principles as part of the rationale that public policy exceptions sound in tort.[124]

In employment cases, the element of employer knowledge is also closely related to the proximity in time between the employee's refusal to act or participation in a statutorily protected activity and the time of the employee's discharge, and the burden of proving causation. If one looks only for state case law (and federal case law interpreting state law) duplicating the *Lorenz* court's specific employer knowledge element, little will be found.[125] Analogies are plentiful, however, if one examines other jurisdictions' interpretation and causation analyses of similar fact patterns, federal and state wrongful discharge statutes, and whistleblowing statutes. Many of these either expressly or implicitly require employer knowledge.[126] To make the connection between the *Lorenz* court's "public policy exception" and "whistleblowing," one must embrace the view that, in effect, they are one and the same; both falling under the broader common law category of "retaliatory discharge." The difference is a matter of semantics.

B. *Terminology and Plausible Implications*

Under the broad category of common law wrongful discharge both contract and tort actions exist.[127] Retaliatory discharge is synonymous with wrongful discharge. Both are synonymous with the public policy exception to the at-will employment rule, and it may be argued that the term "whistleblower" is likewise synonymous with all of these terms.[128]

123. *See Lorenz*, 823 P.2d at 118 n.1 (Erickson, J., dissenting) (noting that "the majority cites no authority for requiring employer knowledge of an employee's reasonable belief that a refused order was illegal").

124. *Id.* at 109. *See supra* notes 104-06 and accompanying text. The court rationalized that since Colorado has a long-standing rule that contracts violative of public policy are unenforceable, it is "axiomatic" that contractual terms in employment, such as "at-will," should "be deemed unenforceable when violative of public policy." *Lorenz*, 823 P.2d at 109. The court does not expand on or define their use of the word "axiomatic." The court seems to presume this particular relationship between contract and tort employment law to be so evident that no additional proof or reasoning is required. That is a debatable issue beyond the scope of this Comment.

125. *See infra* notes 145-59 and accompanying text.

126. *See infra* notes 160-83 and accompanying text.

127. *See* 9A Lab. Rel. Rep. (BNA) 505:51-52 (July, 1992) (state-by-state comparison chart illustrating which states recognize the contract action, which states recognize the tort action, which states recognize both, and which states recognize neither).

128. *See* Callahan, *supra* note 20, at 485 n.26 (using the terms "public policy exception claim," "wrongful discharge," and "retaliatory discharge" interchangeably); *see also* BLACK'S LAW DICTIONARY 1612-13 (6th ed. 1990) (defining "wrongful discharge" as "an at-will employee's cause of action against his former employer, alleging that his discharge

Both "retaliatory discharge" and "whistleblowing," if proven, infer a motive of the employer's desire to "get even" with the employee for the employee's words, acts, refusals or omissions to act. Yet, pursuant to the at-will employment rule, such retaliatory behavior by the employer is only actionable by the employee when a public policy exception to the at-will rule exists.[129] The synonymous relationship among the terms "public policy exception," "wrongful discharge," "retaliatory discharge," and "whistleblowing" is further supported in the facts of the *Lorenz* case.[130]

Lorenz's refusals to (1) falsify reports to NASA, and his subsequent disclosure to NASA of Martin Marietta's directive to him to change conference minutes; (2) participate in Martin Marietta's scheme to misapply NASA appropriations; and (3) submit to inadequate testing of Space Shuttle components easily fall within the accepted definitions of all four previously discussed terms. First, providing that Lorenz proves each *prima facie* element of the tort as set out in *Lorenz*, an action exists as a "wrongful" or "retaliatory discharge." Second, Lorenz's refusal to inaccurately modify conference minutes and his subsequent disclosure of his dispute with Martin Marietta to NASA, as well as Lorenz's allegation that Martin Marietta defrauded the United States in violation 18 U.S.C. § 1001[131] clearly fits the definition of a "whistleblower."[132] Finally, Lorenz's refusal to falsify reports to NASA, misapply NASA appropria-

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was in violation of state or federal anti-discrimination statutes, . . . public policy, . . . an implied employment contract, . . . or an implied covenant of good faith and fair dealing;" [with supplemental reference to "whistleblower acts"]); *Id.* at 1596 (defining "whistle blower" as "an employee who refuses to engage in and/or reports illegal or wrongful activities of his employer or fellow employees[;] . . . [e]mployer retaliation against whistle blowers is often statutorily prohibited" [with reference to "wrongful discharge"]); *Id.* at 463 (defining "constructive discharge" as occurring "when an employer *deliberately* makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation.") (emphasis added); 9A Lab. Rel. Rep. (BNA) 505:21, 25-26 (May, 1987) (comparing federal and state whistleblower protection statutes, and comparing conflicting state case law decisions as to the inclusion of "whistleblowing" within the public policy exception).

Other definitions of "constructive discharge" besides that in BLACK'S LAW DICTIONARY, *supra*, are applicable. COLO. CIVIL JURY INSTRUCTIONS 3d § 31:8 (Cum. Supp. 1993), defines "constructive discharge" as occurring when "an employer deliberately makes or allows an employee's working conditions to become so intolerable that the employee has no reasonable choice but to quit or resign and the employee does quit or resign because of those conditions," based upon a reasonable person standard. Other jurisdictions have recognized the legal possibility of constructive discharge. *See, e.g.*, Sterling Drug, Inc., v. Oxford, 743 S.W.2d 380 (Ark. 1988); Garcia v. Rockwell Int'l Corp., 232 Cal. Rptr. 490 (Cal. Ct. App. 1987) (factually similar to the *Lorenz* case); Seery v. Yale-New Haven Hosp., 554 A.2d 757 (Conn. App. Ct. 1989).

For a detailed treatment on the definition of "whistleblowing," see James N. Adler & Mark Daniels, *Managing the Whistleblowing Employee*, 8 LAB. LAW. 19, 21 & n.8 (1992). Adler and Daniels define whistleblowing as "an elusive concept" that includes an employee's (1) opposition internally or externally to their employer's conduct; (2) refusal to commit an illegal act for the employer; (3) reporting a perceived impropriety to the supervisor, governmental agency or media; or (4) bringing an action against the employer alleging the employer submitted false claims to the government. *Id.*

129. Each jurisdiction has their own definition of public policy. *See supra* note 20.

130. *See supra* notes 73-92 and accompanying text.

131. *See supra* note 96.

132. *See supra* note 128.

tions, and participate in inadequate testing clearly fit the *Lorenz* definition of the public policy exception, as these acts force Lorenz to choose between committing an illegal act or losing his job. Furthermore, Lorenz was directed to inadequately test Space Shuttle components, paid for by taxpayers, which would be trusted with the lives of astronauts who, presumably, do not know of the inadequate testing. In light of the Space Shuttle "Challenger" tragedy, it is difficult to describe a public policy more compelling than the protection of human lives.[133]

If one accepts the view that "public policy exceptions," "whistleblowing," "wrongful discharge" and "retaliatory discharge" are synonymous, and therefore are all really the same cause of action in tort, it is but one short step further to infer that any *prima facie* case of retaliatory discharge under the *Lorenz* standard inherently implies employer knowledge if the first five elements in *Lorenz* have been shown.[134] Once the employee, by a preponderance of the evidence, shows the first five *Lorenz* elements, the sixth employer knowledge element will be satisfied by implication. An analysis of the first five individual elements in the *Lorenz* standard reveals the inherent employer scienter element.

Using the *Lorenz* fact pattern, when Lorenz was directed by Martin Marietta to approve inadequate component testing, participate in a project in which NASA funds were misappropriated, and materially change the contents of official minutes of a meeting in which NASA addressed Lorenz's personal complaints of wrongdoing,[135] the first four *Lorenz* elements were satisfied.[136] Lorenz successfully showed that he refused to do something ordered by Martin Marietta which would be either against the law or against public policy. The fifth *Lorenz* element, termination of employment for refusing the employer's directive (retaliation), was satisfied when Lorenz was laid-off shortly after refusing to write the final evaluation report endorsing the Tug-Irad project.[137] At this point, the *prima facie* case is complete because the retaliation has been shown. By showing the employer's retaliation, the employee has also shown the implicit scienter element. No *prima facie* case will occur if the ordered act is not against a specific statute or a clear public policy. Realistically, how can an employer retaliate against an employee without *knowing* or *believing* the employee to have committed an act against the employer's interest, or that the employee refused to act in favor of the employer's interest? Retaliation simply cannot "exist" in the absence of a *reason* to retaliate.

Thus, since the *Lorenz* employer knowledge element is inherent within the first five *Lorenz* elements of a *prima facie* retaliatory discharge, there is no need for a separate employer knowledge element. In effect, the additional scienter element added by the *Lorenz* court is unneces-

133. *See supra* note 20 for public policy definitions.

134. *See Lorenz*, 823 P.2d at 109. *See supra* text accompanying note 103.

135. *See supra* notes 73-92 and accompanying text (factual summary of the *Lorenz* case).

136. *See supra* text accompanying note 103 (the *Lorenz* elements).

137. *See supra* text accompanying notes 90-92.

sary.[138] Cases subsequent to *Lorenz*, other jurisdictions' case law, and federal and state legislation may now be examined in a different light when the issue of causation is compared to the *Lorenz* standard. A Colorado plaintiff's attorney may find more persuasive authority available than a first impression would otherwise indicate.

C. *Cases Subsequent to Martin Marietta v. Lorenz*

The first Colorado appellate decision[139] to use the *Lorenz* standard with the additional employer knowledge element was the appeal after remand of *Cronk I*.[140] The Colorado Court of Appeals in *Cronk II*, adopted the *Lorenz* standard and applied the additional employer knowledge element.[141] The *Cronk II* decision identified *Lorenz* as a case contemplating explicit employer directives. Conversely, expanding on the *Lorenz* standard, the *Cronk II* court concluded that *Lorenz* "also embraces situations in which an employee is so directed *implicitly*, resulting in a retaliatory termination."[142]

The employer in *Cronk II* contended that the *Lorenz* standard had not been met because the employees were not directed to violate the law, nor were they fired for refusing to violate any law or public policy.[143] The employer also alleged that the "actual or constructive [employer] knowledge" element set out in *Lorenz*[144] had not been met by the employees.[145] The former employees countered that (1) they had a statutory duty to oppose their employer's intentional concealment of

138. From a non-legal perspective, the additional evidentiary requirement of employer knowledge equates to proving: "I know that you know that I know." If, of course, the employee fails to show evidence of a *prima facie* case, the employee is nothing more than an out-of-luck and out-of-court former at-will employee. If the employee cannot prove "wrongfulness" on the part of the employer in discharging the employee (retaliation), then the employer knowledge element is irrelevant.

Support for the theory that the employer knowledge element is inherent when the employer's retaliation is proven may be found in *Cronk II*, *see infra* notes 140-48 and accompanying text. *See also* Melchi v. Burns Int'l Sec. Serv., Inc., 597 F. Supp. 575, 582 (E.D. Mich. 1984) (the employer knowledge element is "simply a factor to consider in determining the principal question of causation").

139. *Cronk II* is the only Colorado appellate decision, to date, to use the *Lorenz* standard. At least one Colorado district court has adopted and applied the *Lorenz* standard. *See* Stuart v. St. Anthony Hosp. Systems, No. 91 CV 2809, slip op. 2-3 (Denver Dist. Ct. Feb. 21, 1992) (applying the *Lorenz* standard, and finding issues of fact existed as to whether the employee was discharged in retaliation for reporting specific violations of both statutes and regulations concerning medication disbursement, patient privacy, and mandatory emergency procedures) (emphasis added); Román, *supra* note 118, at 6.

140. *Cronk I*, 765 P.2d at 622. *See supra* notes 54-56 and accompanying text.

141. *Cronk II*, 140 L.R.R.M. at 2153.

142. *Id.* (emphasis added).

143. Supplemental Brief for Appellant at 2-4, *Cronk II* (No. 90 CA 0666).

144. *Lorenz*, 823 P.2d at 102.

145. Supplemental Brief for Appellant at 4-5, *Cronk II* (No. 90 CA 0666). The employer alleged that the *Cronk I* and *Lorenz* courts "wisely chose to limit such claims to those brought by employees with a *direct stake* in an issue, who *presumably are knowledgeable* of the circumstances and *in a position to assess the validity of their employer's actions*." *Id.* (emphasis added). This represents an extreme interpretation of the use of the terms "actual or constructive knowledge" quoted from *Lorenz*. "Constructive knowledge" is defined as: "[i]f one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact." BLACKS LAW DICTIONARY 314 (6th ed. 1990).

public utility statute and safety violations; (2) they refused to aid and abet these illegal practices by their employer; and (3) they were fired in retaliation for refusing to conceal these illegal practices.[146] The employees further alleged that the employer knowledge element was satisfied because the jury was required to find that the employees' exercise of a statutorily protected right or duty be a substantial or a motivating factor in the employer's decision to discharge the employees.[147] Thus, employer awareness was *implied* because "the jury could not have found that the [employees] were discharged for opposing illegal acts *without* finding that the [employers] knew they were opposing illegal acts."[148]

The *Cronk II* court agreed with the former employees, affirming the trial court jury verdicts finding that the employees' exercise of statutory duties were implicitly prohibited by the employer, thereby "comporting" with the *Lorenz* standard.[149] The *Cronk II* court concluded that the *Lorenz* employer knowledge element was satisfied because "the jury was required to consider and find that [the employer] knew or should have known that [the employees] opposed [the employer's] practices because they believed that such conduct was illegal."[150] The three former employees were each awarded an average of $535,580.00 in economic damages, punitive damages and pre-judgment interest.[151]

The United States Court of Appeals for the Tenth Circuit recently adopted the *Lorenz* standard, including the employer knowledge element, in *Mares v. Conagra Poultry Co.*[152] The employer knowledge element was not applied by the court, however, because the employee never contended that the employer's drug testing policy was illegal, but instead objected to filling out an accompanying medical form.[153]

D. *Applicable Case Law From Other Jurisdictions*

Few decisions from other jurisdictions dealing with the public policy exception "give explicit consideration to the elements of the claim,"

146. Supplemental Brief for Plaintiff-Appellees at 2-3 nn.2-5, *Cronk II* (No. 90 CA 0666). Many of the former employees' allegations were supported in the record, and Plaintiff Cronk was discharged "just two days after the [Public Utilities Commission] announced publicly it was going to investigate [the employer] for illegal activity," thus inferring that the time interval regarding Cronk's discharge *implied* retaliation. *Id.* at 2 n.4.

147. *Id.* at 4-5.

148. *Id.* at 5 (emphasis in original).

149. *Cronk II*, 140 L.R.R.M. at 2153.

150. *Id.*

151. *Id.* at 2150. For a discussion on high jury verdicts, see *supra* note 9.

152. 971 F.2d 492, 495-96 (10th Cir. 1992); *see supra* notes 62-67 and accompanying text. In another recent case, the *Lorenz* standard was adopted, but the employer knowledge issue was precluded by the granting of the employer's motion for summary judgment. Meehan v. Amax Oil & Gas, Inc., 796 F. Supp. 461, 468 (D. Colo. 1992) (granting the employer's summary judgment motion because the employee was never directed to act in a certain way, never prohibited from exercising a job-related right or privilege, and did not support his allegation that his discharge violated a clearly expressed public policy, but instead articulated only a generalized public policy). *See also* Lampe v. Presbyterian Med. Ctr., 590 P.2d 513 (Colo. Ct. App. 1978) (broad, general statements of public policy held inadequate to state a cause of action).

153. *Mares*, 971 F.2d at 496.

or "address the allocation of the burden of proof."[154] In the few opinions discussing the appropriate elements at common law, as few as one, to as many as six elements (as in the *Lorenz* case), are described with very little consistency in the approaches taken.[155] One commentator has

154. Callahan, *supra* note 20, at 488. Normally, the employee will have the burden of proving a *prima facie* case, and the employer will have the risk of nonpersuasion in cases where there is a factual dispute over the employer's motive in discharging the employee. *Id.* at 507-12 (cases involving "employer pretext" or "mixed motives). In situations where the termination is alleged by the employer to be unrelated to the employee's protected acts or refusal to act, or the employer's reasons for discharge are enumerated in statutes as exceptions, a "mixed-motive" situation exists. *Id.* Ordinarily, following the employee's prima facie case, the burden shifts to the employer to show that the "same decision" would have been made notwithstanding the employee's protected activity. At this point many courts will allow a shift back to the employee (who maintains at all times the ultimate burden of persuasion) to show that the employer's proffered reason was "mere pretext." *Id.* Employment discrimination cases are, however, "arguably distinguishable from public policy exception cases because most terminations litigated pursuant to that statute are . . . based on [the plaintiff's] membership in a protected class, as opposed to protected conduct." *Id.* at 484 n.19.

The United States Supreme Court has set out a skeletal framework for discrimination cases. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 256 (1981) (in an employment discrimination case the employee retains the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against her, and that the employer's proffered reason was pretext), *explaining and modifying* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973) (in a discrimination case the employee has the initial burden of establishing a *prima facie* case of discrimination; the burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection;" and the employee again bears the burden to prove that the employer's reason for rejection was a "cover-up," or pretextual).

The federal and state courts have not, however, been consistent in the application of the employment discrimination burden shifting in retaliatory discharge cases. *Compare* Trujillo v. Grand Junction Regional Ctr., 928 F.2d 973 (10th Cir. 1991) (following *Burdine* and *McDonnell Douglas*) *with* Swearingen v. Owens-Corning Fiberglas Corp., 968 F.2d 559, 562 (5th Cir. 1992) (one shift; employee bears the initial burden of establishing a causal link between the discharge and the protected activity [worker's compensation claim], which need only be proof that the employee's protected activity was a "determining factor" and not necessarily the sole factor in the discharge; the burden then shifts to the employer who then must rebut this presumption by showing a legitimate reason for the discharge).

State decisions also reflect a variety of burden-shifting analyses as applied to the causation element in the common-law public policy exception in tort. *See, e.g.*, Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982) (employee alleging retaliatory discharge bears the burden of proving that the discharge violates a clear mandate of public policy); Sabine Pilot Serv., Inc., v. Hauck, 687 S.W.2d 733, 736 (Tex. 1985) (employee has burden of proof and persuasion; the fact finder decides if the employer sought to have the employee commit an illegal act); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984) (employee has the burden of proving his dismissal violates a clear mandate of public policy; burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840-41 (Wis. 1983) (employee has the initial burden of proving that the dismissal violates a clear mandate of public policy; the burden shifts to the employer to prove that the dismissal was for just cause). For a detailed discussion of burdens, shifts of burdens and employer "privileges," see Callahan, *supra* note 20, at 507-14.

155. Callahan, *supra* note 20, at 488-89 nn.39-42. *See, e.g.*, Kennard v. Louis Zimmer Communications, Inc., 632 F. Supp. 635, 638 (E.D. Pa. 1986) (one element: *prima facie* case made when employee proves the discharge was for conduct protected by the public policy of the state); Sherman v. St. Barnabas Hosp., 535 F. Supp. 564, 571 (S.D.N.Y. 1982) (two elements: the employee must establish that (1) a public policy of the state of New York exists, (2) which was violated by the employer); Hinthorn v. Roland's of Bloomington, Inc., 519 N.E.2d 909, 911 (Ill. 1988) (three elements: (1) the employee must show a discharge occurred; (2) the discharge was in retaliation for her activities; and (3) that the

proposed that when an employee is discharged for exercising a statutory right or public duty, refusing to participate in wrongful or illegal activity, or "blowing the whistle" on others' harmful conduct, few distinctions are necessary between these categories.[156] Rather, the following elements are suggested: (1) an act or refusal to act by the employee; (2) which was supported by public policy, (3) bearing a causal relationship to (4) the employee's discharge.[157] The element of causation, then, appears central to understanding the employer knowledge and temporal elements. Because "an employer cannot fire an employee in retaliation for actions of which the employer is unaware," the employee, in proving a causal relationship, "must show that the employer was aware of the act or refusal to act in question prior to the discharge," and relate this to the temporal proximity of the employee's act or refusal to act, and the subsequent discharge.[158]

Although there is a dearth of case law explicitly saying so, it is reasonable to find that when an employee is discharged almost immediately after the employer becomes aware of the employee's act or refusal to act, a retaliatory motive may reasonably be inferred. The chain of causation is relatively short, and often blatant. First, the employee does or says something (or refuses same) that the employee perceives is illegal or clearly violative of "public policy."[159] Next, the employer finds out (awareness of the act *must* occur for retaliation), and, after what is often a short duration of time, the employee is either discharged, psychologically pressured by supervisors and peers to quit, or simply "laid-off." When the fact-finder determines retaliation has occurred, a demonstrable interrelationship to societal concerns must be shown, which should

discharge violated a clear mandate of Illinois public policy); Hicks v. Resolution Trust Corp., 970 F.2d 378, 381 (7th Cir. 1992) (same); *Cronk I*, 765 P.2d at 622 (five elements: the employee must prove (1) that he refused to perform an action, (2) ordered by his employer, (3) which would violate a specific statute, (4) whose terms are more than a broad general statement of policy, and (5) that his termination resulted from his refusal); *Lorenz*, 823 P.2d at 109 (six elements).

156. Callahan, *supra* note 20, at 490.

157. *Id.*

158. *Id.* at 497-98. Callahan notes that evaluation of the timing of the employee's act or refusal to act, and the employer's response (discharge or constructive discharge) "is highly relevant to the characterization of a possible connection between them." *Id.* at 498. One recent common-law decision combines these two elements in a retaliatory discharge action under the "whistleblowing" label. *See* Winters v. Houston Chronicle Publishing Co., 795 S.W. 2d 723, 732-33 (Tex. 1990) (to establish causation, the employee must demonstrate that (1) the employer had knowledge of the whistleblowing prior to the retaliation; (2) the discharge must be shown to have occurred within a reasonably short time after one or more complaints were lodged; and (3) the burden then shifts to the employer to refute the causation element by proving dismissal occurred for reasons other than the act of whistleblowing).

For examples of cases referring to the temporal element, see Hamann v. Gates Chevrolet, Inc., 910 F.2d 1417, 1420 (7th Cir. 1990) (employee failed to prove relevant timing between her refusal to act and her discharge, despite the court's recognition that rapidity and proximity in time between refusal and discharge, when considered with other circumstances, may create the necessary inference of the employer's prohibited motive); House v. Carter-Wallace, Inc., 556 A.2d 353, 357-58 (N.J. Super. Ct. App. Div. 1989) (three month interval between the employee's whistleblowing activity and discharge prevented inference of retaliatory motive). *See supra* note 138.

159. *See supra* note 20.

be given superior weight in the balancing process.[160]

As the following cases demonstrate, some authority exists supporting an employer knowledge element within a *prima facie* case of retaliatory discharge. While *Mares v. Conagra Poultry Co.*[161] follows *Lorenz*, two Tenth Circuit cases pre-dating *Lorenz* required employer knowledge as proof of causation. In *White v. American Airlines, Inc.*, an employee was discharged for refusing to commit perjury in litigation that followed the disastrous 1979 crash of an American Airlines DC-10 jetliner over Chicago's O'Hare Airport.[162] The court held that jury instructions which included a required finding that the employer knew of the employee's refusal to commit perjury prior to the employee's discharge sufficiently satisfied the causation requirement.[163] In *Stuart v. Beech Aircraft Corp.*,[164] the court applied Kansas precedent[165] and required employer knowledge in a whistleblowing case. In *Stuart*, the employee was required to prove by clear and convincing evidence that (1) a reasonable person would conclude that the employer was engaged in wrongful or illegal activity; (2) the employer had knowledge of the employee's act or refusal prior to discharge; (3) the employee was discharged in retaliation for such act or refusal; and (4) the employee's act or refusal was due to a good-faith concern about the employer's wrongful activity, and not out of spite.[166]

Prior to Colorado's wrongful discharge tort standard described in *Cronk I*,[167] and expanded by *Lorenz*,[168] the Kansas Supreme Court recognized the tort of retaliatory discharge in the whistleblowing case of *Palmer v. Brown*.[169] While the *Palmer* standard, like the *Lorenz* standard, is not a model of clarity, it does require clear and convincing evidence of the employee's good faith belief that the employer's activity was contrary to public policy or illegal, and that "the employer *had knowledge* of

160. Callahan, *supra* note 20, at 486-87.

161. 971 F.2d 492 (10th Cir. 1992).

162. 915 F.2d 1414, 1417 (10th Cir. 1990).

163. *Id.* at 1422. The *White* court affirmed the United States District Court for the Northern District of Oklahoma regarding instructions to the jury that included among the essential elements of wrongful discharge: (1) the employee was requested to commit perjury; (2) the employee refused to commit perjury and the employer *knew* of the employee's refusal; and (3) the employee was terminated because of his refusal to commit perjury. In order to find the employer liable, "the jury had to conclude that American *knew* about White's refusal to commit perjury and terminated his employment because of that refusal." *Id.* Further, the jury could find liability "only if the American officials responsible for [White's] termination were in fact *aware* that [White] refused to commit perjury." *Id.* (emphasis added).

164. 753 F. Supp. 317 (D. Kan. 1990), *aff'd*, 936 F.2d 584 (10th Cir. 1991).

165. *See* Palmer v. Brown, 752 P.2d 685, 690 (Kan. 1988).

166. *Stuart*, 753 F. Supp. at 324. *See also* Wolff v. Berkley Inc., 938 F.2d 100, 103 (8th Cir. 1991) (holding that "[i]n order to succeed on a claim for retaliatory discharge, the [employee] must prove a causal relationship between statutorily protected activity and her termination . . . [which] does not exist if the employer is not *aware* of the employee's statutorily protected activity") (emphasis added).

167. 765 P.2d 619 (Colo. Ct. App. 1988), *cert. denied, appeal after remand*, 140 L.R.R.M. (BNA) 2149 (Colo. Ct. App. 1992), *cert. denied* (*Cronk II*).

168. 823 P.2d 100 (Colo. 1992).

169. 752 P.2d 685, 690 (Kan. 1988). *Palmer* was decided in March, while *Cronk I* was decided in July.

the employee's reporting of such violation prior to discharge."[170] The *Palmer* standard requires clear and convincing evidence, rather than a "presentation" of evidence as in *Lorenz*.[171] *Palmer* was applied in *Pilcher v. Board of County Commissioners*,[172] in which the Kansas Court of Appeals interpreted the *Palmer* standard liberally by not limiting retaliatory discharge claims to violations of law pertaining to public health, safety, and the general welfare,[173] but instead indicated that First Amendment freedom of speech violations may support a whistleblowing retaliatory discharge claim.[174] These cases suggest the employer knowledge element

170. *Id.* at 690 (emphasis added). The *Palmer* standard provides that:

> To maintain such action, an employee has the burden of proving by clear and convincing evidence, under the facts of the case, a reasonably prudent person would have concluded the employee's co-worker or employer was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare; the employer had knowledge of the employee's reporting of such violation prior to discharge of the employee; and the employee was discharged in retaliation for making the report. However, the whistleblowing must have been done out of a good faith concern over the wrongful activity reported rather than from a corrupt motive such as malice, spite, jealousy or personal gain.

Id.

171. *Lorenz*, 823 P.2d at 109.

172. 787 P.2d 1204, 1208-09 (Kan. Ct. App. 1990).

173. *Id.* at 1209. In *Pilcher*, the court ruled that the employee may be entitled to damages upon proof that her employer fired her because the employer believed the employee to be the source of an uncomplimentary newspaper article. *Id.* at 1208. The court also concluded that the employee, a public employee, was discharged in contravention of public policy when she was discharged for exercising her right to free speech, as long as her speech regarded a matter of public concern. *Id. See also* O'Sullivan v. Mallon, 390 A.2d 149, 150 (N.J. Super. Ct. Law Div. 1978) (dicta) ("There are many facts which would be pertinent . . . includ[ing] whether the [employer] knew or should have known the act in question was illegal, the extent of [the employee's] training and qualifications[,] . . . and generally, the reasonableness of the acts by all of the parties.").

Cases involving truck drivers who were discharged after reporting matters of safety offer analogous fact patterns to that in *Lorenz*, and although employer knowledge is not stated as an element in these common law tort actions, the employer's knowledge may easily be implied. *See, e.g.*, McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390 (Ind. 1988) (at will truck driver stated a cause of action for wrongful discharge after he was terminated for refusing to illegally transport an overweight load); Pooler v. Maine Coal Prod., 532 A.2d 1026 (Me. 1987) (trucker failed to state a cause of action by not pointing to a violation of motor vehicle law, only a potential violation of law); Coman v. Thomas Mfg. Co., 381 S.E.2d 445 (N.C. 1989) (at-will trucker stated cause of action after he was terminated for refusing to operate his truck in violation of Dept. of Transportation regulations, and for refusing to falsify the logs of travel). *But see* Burrow v. Westinghouse Elec. Corp., 363 S.E.2d 215 (N.C. Ct. App. 1988) (at-will trucker failed to state a cause of action after being discharged for refusing to drive under allegedly unsafe conditions, because holding every discharge for failure to perform an allegedly unsafe act as actionable "would create a prolific and unwarranted source of trouble in the workplace"); *see also* Todd v. Frank's Tong Serv., Inc., 784 P.2d 47 (Okla. 1989) (former truck driver stated a cause of action when he was discharged for refusing to operate his truck in violation of Oklahoma statutes prohibiting operation of motor vehicles with defective brakes, headlights and turn signals).

174. *Pilcher*, 787 P.2d at 1208. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283, 287 (1977) (Supreme Court directed the district court on remand to apply the "same decision" test regarding whether an untenured schoolteacher was entitled to reinstatement due to denial of First Amendment rights by the school board in its decision not to rehire the teacher). *See supra* note 154 (brief discussion of burden-shifting).

The burden shifting test used in discrimination cases is an alternate type of causation test to that used in typical tort actions for wrongful discharge in state jurisdictions, but the respective results obtained are similar: the finding of discrimination or the finding of retal-

exists in several jurisdictions explicitly. They do not, however, provide a sound argument to counter the proposition that employer knowledge is inherent within a *prima facie* case of retaliatory discharge, and that most jurisdictions presumably treat such knowledge as implicit within the causation framework of a *prima facie* case of retaliatory termination.[175] Once retaliation is established, it is unnecessary to prove, as the *Lorenz* decision requires, that the employer knew or should have known of the employee's belief that the directed act was illegal, fraudulent or against clear public policy. An employer *must* know what she is retaliating against the employee for. Therefore, only the first five elements of the retaliation claim itself, as set out in *Cronk I*,[176] and modified in *Lorenz*,[177] need be proven by the employee.

Nevertheless, employment law attorneys cannot afford to overlook the employer knowledge element simply because it is implied in the causation analysis of a retaliatory discharge. This "additional evidentiary requirement"[178] of employer knowledge of the employee's belief that a directed act was illegal or contrary to clear public policy should not provide any unusual difficulties evidentially. Issues of hearsay should not present serious problems regarding proof of the employer's knowledge of the employee's act or refusal, and the subsequent retaliatory discharge. The employer's business records, reports and memoranda, or unusual absence thereof, made at or near the actual occurrence, by a person with knowledge, in the course of a regularly conducted business activity may disclose employer knowledge.[179] Likewise, depositions and interrogatories may be used to impeach inconsistent statements by witnesses or the employer.[180] Because employer knowledge is a required element of Colorado's common law tort of retaliatory discharge, hearsay as to the employer's state of mind and motive is admissible.[181] Moreover, well prepared cross-examination will also bring out employer knowledge which may have otherwise remained undisclosed.[182]

E. *Legislation*

One solution to this common law problem may lie in legislation containing specific definitions of protected (employee) and prohibited (employer) conduct. Federal discrimination and whistleblowing legislation is broad in diversity, yet at the same time limited in coverage to

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iation. Many times both are present in a successful and well pleaded plaintiff's case. Thus, some valuable analogies exist in federal discrimination cases which may prove influential in state common law wrongful discharge actions.

175. Retaliatory termination, as a term of art, should include the legal and semantic synonyms, "wrongful discharge," "whistleblowing," and "public policy exceptions" to the at-will employment doctrine. *See* Callahan, *supra* note 20, at 485 n.26. *See supra* notes 127-138 and accompanying text.

176. *Cronk I*, 765 P.2d at 622.

177. *Lorenz*, 823 P.2d at 109.

178. *Id.* at 110.

179. COLO. R. EVID. 803(6) & 803(7).

180. COLO. R. EVID. 801(d)(1) & 801(d)(2).

181. COLO. R. EVID. 803(3).

182. *See, e.g.*, 7 AM. JUR. 2D *Proof of Facts* §§ 10, 20, 24-26 (1975 & Supp. 1992).

specialized or protected classes. The employee who is *not* in a recognized class or represented by a union has analogous federal law only as secondary authority.[183] While federal "whistleblowing" statutes may

183. *See* Callahan, *supra* note 20, at 484 & n.19. Callahan notes that termination is a common element between federal statutes which provides "useful insights" in reasoning, but is distinguishable because common law wrongful discharge involves litigation generally based on protected conduct rather than membership in a protected class. *Id.*

Adler & Daniels, *supra* note 128, at 23 & n.16, have collected (for the convenience of those doing such research) a list, augmented in this Comment, of federal statutes which protect employees who report violations from employer retaliation under the following federal legislation. These statutes include: Government Employee Rights Act of 1991, 2 U.S.C. § 1212 (Supp. III 1991) (unlawful employment practices include any intimidation of, or reprisal against, employees of the Senate by any Member, or an employee of the Architect of the Capitol by the Architect of the Capitol, because of the employee's exercise of a right under this Act); Whistleblower Protection Act of 1989, 5 U.S.C. §§ 1201-1222 (1988 & Supp. III 1991) (providing protection to certain federal employees who disclose information regarding government mismanagement, fraud, violations or dangers to the public); Civil Service Reform Act of 1978, 5 U.S.C. § 2301 (1988 & Supp. III 1991) (for "whistleblowing" civil service employees disclosing agency violations, fraud, gross mismanagement or dangers to the public); Department of Defense Authorization Act of 1984, 10 U.S.C. § 1587 (1988) (for disclosures by civilian employees); Department of Defense Authorization Act of 1987, 10 U.S.C. § 2409 (1988) (for disclosures by employees of defense contractors); Toxic Substances Control Act, 15 U.S.C. § 2622 (1991) (for commencing or participating in a proceeding); Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2651 (1988) (for reporting asbestos in schools); Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3608 (1988) (for school employees publicizing an asbestos problem); Jurors' Employment Protection Act, 28 U.S.C. §§ 1861-1878 (1991) (for federal jury service); National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988) (for filing or participating in a proceeding); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3) (1988) (filing or participation in proceedings); Age Discrimination in Employment Act, 29 U.S.C. § 623 (1988 & Supp. II 1990) (for participating in proceedings); Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1988) (for filing or participating in a proceeding); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140-1141 (1988) (for providing information or participating in proceedings); Migrant, Seasonal and Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1991) (for exercising rights pursuant to § 1855); Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1988) (for commencing or participating in proceedings); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1293 (1991) (for filing or participation in a proceeding); False Claims Act, 31 U.S.C. §§ 3730-3733 (1988 & Supp. II 1990) (for employees disclosing false claims or participating in proceedings); Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1991) (for filing or participating in a proceeding); Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1988) (for commencing or participating in a proceeding); Public Health Service Act, 42 U.S.C. §§ 201-300z-10 (1991) (for refusal to participate in sterilization, abortion or research on religious or moral grounds); Safe Drinking Water Act, 42 U.S.C. § 300j-309 (1991) (for commencing or participating in a proceeding); Equal Employment Opportunity Act [Title VII of the Civil Rights Act of 1964], 42 U.S.C. § 2000e-2003 (1988) (for employee opposition and for participation in proceedings); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988) (for participating in proceedings); Solid Waste Disposal Act, 42 U.S.C. § 6971 (1991) (for commencing or participating in a proceeding); Clean Air Act, 42 U.S.C. § 7622 (1988) (for participating in proceedings); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9610 (1988) (for providing information or participating in proceedings); Federal Employers' Liability Act, 45 U.S.C. § 60 (1988) (for providing information regarding the death or injury of an employee); Railroad Safety Authorization Act of 1978, 45 U.S.C. § 441(a) (1991) (for complaining, participating in a proceeding, or refusing to work under hazardous conditions); International Safe Containers Act, 46 U.S.C. §§ 1501-1508 (1991) (for reporting of unsafe containers); Surface Transportation Assistance Act of 1978, 49 U.S.C. § 2305 (1991) (for refusing to operate an unsafe vehicle, complaining, or participating in a proceeding).

For more information on federal statutes, see DONALD W. BRODIE, INDIVIDUAL EMPLOYMENT DISPUTES: DEFINITE AND INDEFINITE TERM CONTRACTS 231-40 (1991); Peck,

not answer questions concerning state common law tort causation, a few analogies are available, especially if one agrees with the argument that any retaliatory or whistleblowing cause of action contains an implicit employer knowledge element of causation which is proven when the retaliatory termination itself is proven.[184]

Colorado has a whistleblower statute to protect state employees who disclose information regarding state agency actions which are not in the public interest.[185] This protection does not extend to private employees. An exception, however, exists when the employer is under contract or agreement with any agency, department or entity of the State of Colorado.[186] There are, however, a significant number of states which

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Penetrating Doctrinal Camouflage, *supra* note 10, at 728-30; Summers, *supra* note 15, at 11-12. *See also* 9A Lab. Rel. Rep. (BNA) 505:21-26 (May, 1987) (overview of federal whistleblowing statutes).

184. *See e.g.*, Merkel v. Scovill, Inc., 787 F.2d 174, 180 n.4 (6th Cir.), *cert. denied*, 479 U.S. 990 (1986) (if jury finds that the employee refused to sign what he believed to be a false affidavit, and the employer *knew* the information in the affidavit was false, nevertheless directing the employee to sign, and then discharges the employee for refusal to sign, such retaliation "may well be" a violation of the Age Discrimination in Employment Act), *aff'g* 573 F. Supp. 1055, 1062 (S.D. Ohio 1983) (employee asserting a wrongful discharge cause of action must prove by a preponderance of the evidence that the employer *knew* it was requesting the employee to commit perjury or falsification).

See also Oliver v. Department of Health and Human Servs., 34 M.S.P.R. 465 (1987), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988). In *Oliver*, the Merit Systems Protection Board held that to establish a claim under 5 U.S.C. § 2302(b)(8)(A), the employee must show that: "(1) a protected disclosure was made; (2) the accused official *knew* of the claimant's disclosure; (3) the adverse action under review could, under the circumstances, have been retaliation; and (4) after careful balancing of the intensity of the accused official's motive against the gravity of the misconduct, a *nexus* is established between the adverse action and the motive." *Id.* at 470 (emphasis added) The board found the "official's knowledge" element was satisfied because the employee had repeatedly transmitted memoranda to [the employer], but the employee failed to establish the required nexus. *Id.* at 471. *Cf.* Mass v. Martin Marietta Corp., 805 F. Supp. 1530, 1541 (D. Colo. 1992) (in a Title VII case, the employee failed to prove the two elements of a retaliation claim: (1) that the employee reported the illegal conduct; and (2) that the employer retaliated; additionally, the employee's retaliation claim was not "reasonably related" to the discrimination and harassment claims contained in the underlying charge).

185. COLO. REV. STAT §§ 24-50.5-101 to -107 (1988). *See* Ward v. Industrial Comm'n, 699 P.2d 960, 967-68 (Colo. 1985) (for Freedom of Speech violations, the *Mt. Healthy* "same decision" test is applicable; *see supra* note 174). *See also* Indiv. Empl. Rights Manual (BNA) at 546:5-7 (June, 1991), *supra* note 93 (other Colorado statutes prohibiting employer retaliatory discharge).

186. COLO. REV. STAT. §§ 24-114-101 to -103 (1988 & Supp. 1992). A "private enterprise under contract with a state agency" is defined as:

> [A]ny individual, firm, limited liability company, partnership, joint venture,corporation, association, or other legal entity which is a party to any type of state agreement, regardless of what it may be called, for the procurement or disposal of supplies, services, or construction for any department, office, commission, institution, board, or other agency of state government.

Id. § 24-114-101(4).

An "employee is defined as any person employed by a private enterprise under contract with a state agency. *Id.* § 24-114-101(3). "Disciplinary action" includes threat of any such discipline or penalty" (coercion) *Id.* § 24-114-101(1). "Disclosure of information" is defined as written evidence to any person, or testimony before any committee of the general assembly regarding acts, omissions, policies, procedures or regulations by a private enterprise under contract with a state agency "which, if not disclosed, could result in the waste of public funds, could endanger the public health, safety or welfare, or could otherwise adversely affect the interests of the state." *Id.* § 24-114-102(2). No supervisor or appointing authority of a private enterprise under state contract "shall initiate or adminis-

have whistleblower statutes protecting private employees.[187] Michigan is the only state which includes a judicially supplied employer knowledge "element" in a whistleblower statute which is otherwise silent as to causation.[188] The employer knowledge element is, however, "simply a factor to consider in determining the principal question of causation,"[189] It is not a distinct element of a *prima facie* case, as Colorado, along with other jurisdictions have recognized.[190]

Several states require an employee to bring the alleged violation, illegality, or unsafe condition to the attention of the employer first, allowing for a reasonable opportunity to correct the situation before the employee gains the statutory protection.[191] New Hampshire allows the

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ter any disciplinary action against any employee on account of the employee's disclosure of information concerning said enterprise." *Id.* § 24-114-102(1). Exceptions are provided where the employee discloses (1) information the employee knows to be false; or (2) information which is confidential under any other provision of law. *Id.* The employee seeking protection under this statute is obliged to "make a good faith effort" to provide the information to be disclosed to the employee's supervisor, appointing authority, or member of the general assembly *prior* to disclosure of the information. *Id.* § 12-114-102(2) (emphasis added). Any aggrieved employee may bring a civil action under this statute in district court. *Id.* § 24-114-103. The prevailing employee may recover damages, costs and "such other relief as [the court] deems appropriate." *Id.*

It is arguable that had Martin Marietta been under contract in any way with the State of Colorado, and had this statute been in existence when Lorenz was discharged (COLO. REV. STAT. 24-114-101 became effective on July 1988 for acts committed on or after that date), Lorenz would have been protected under this Colorado "whistleblower" statute, and he also would have avoided the six-step public policy tort standard set out in *Lorenz*, 823 P.2d at 109. To date, there is no published Colorado case law construing COLO. REV. STAT. §§ 24-114-101 to -103.

187. CAL. LABOR CODE § 1102.5 (West 1989); CONN. GEN. STAT. ANN. § 31-51m (West 1987 & Supp. 1992); HAW. REV. STAT. §§ 378-61 to 378-69 (Supp. 1992); LA. REV. STAT. ANN. § 30:2027 (West 1989 & Supp. 1993); ME. REV. STAT. ANN. tit. 26, §§ 831-840 (West 1988); MICH. COMP. LAWS ANN. §§ 15.361-15.369 (West 1981 & Supp. 1992); MINN. STAT. ANN. § 181.932 (West Supp. 1993); N.H. REV. STAT. ANN. §§ 275-E:1 to -E:7 (Supp. 1991); N.J. STAT. ANN. §§ 34:19-1 to 34:19-8 (West 1988 & Supp. 1992); N.Y. LABOR LAW § 740 (McKinney 1988); OHIO REV. CODE ANN. §§ 4113.51-4113.53 (Anderson 1991); R.I. GEN. LAWS § 36-15-3 (1990); TENN. CODE ANN. § 50-1-304 (1991); WIS. STAT. ANN. §§ 101.595(2), 111.322(2), 111.34(2)(c) (West 1988 & Supp. 1992). For a thorough treatment and discussion of state whistleblower statutes and their pros and cons, see Adler & Daniels, *supra* note 128, at 55-68 app. A. *See generally* Martin W. Aron, *Whistleblowers, Insubordination, and Employee Rights of Free Speech*, 43 LAB. L.J. 211 (1992) (comparing New Jersey and New York statutes); John D. Feerick, *Toward a Model Whistleblowing Law*, 19 FORDHAM URB. L.J. 585 (1992) (detailed analysis of N.Y. LABOR LAW § 740 and suggestions for an improved "model").

188. Whistleblowers' Protection Act, MICH. COMP. LAWS ANN. §§ 15.361-15.369 (West 1981 & Supp. 1992). Section 15.362 of the act states:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

189. Melchi v. Burns Int'l Sec. Servs., Inc., 597 F. Supp. 575, 582 (E.D. Mich. 1984).

190. *Lorenz*, 823 P.2d at 109; Palmer v. Brown, 752 P.2d 685 (Kan. 1988).

191. ME. REV. STAT. ANN. tit. 26, § 833(2) (West 1988); MINN. STAT. ANN. § 181.932 (West Supp. 1993); N.Y. LABOR LAW § 740 (McKinney 1988 & Supp. 1993); OHIO REV. CODE ANN. § 4113.52 (Anderson 1991).

employee to bypass advising the employer if the employee specifically believes that such reporting would not result in the employer promptly remedying the violation.[192] Likewise, New Jersey allows the employee to forgo disclosure to the employer in an emergency, when the employee is reasonably certain that the policy or practice is *known* by one or more supervisors, or when the employee fears physical harm as a result of the disclosure.[193] In cases where the employee is required to first advise the employer to gain later statutory protection, and the employee does so, the employer knowledge element at common law is patently satisfied.[194] Thus, a few state whistleblowing statutes provide guidance towards a conclusion that requiring proof of employer knowledge, as in *Lorenz*, is redundant; proving the causation element just by the employer's retaliatory act will suffice.

Only Montana, Puerto Rico, and the Virgin Islands have a comprehensive wrongful discharge statute preempting common law actions.[195] Montana currently has the most comprehensive legislation in the area of retaliatory discharge, including retaliation for the employee's refusal to violate public policy.[196] Lack of good cause and violation of the employer's own express provisions in its written personnel policies are covered as well.[197] There is no need for a specific chain of causation to be proven, as all common law remedies are preempted.[198] Discharges for retaliation for refusing to violate public policy, whistleblowing, and contractual breaches are statutorily covered by a one year statute of limitations, and mutually agreed dispute resolution through arbitration is provided for procedurally.[199] The Virgin Islands Code sets out detailed definitions of what is "just cause" for discharges; anything else is deemed to be a wrongful discharge.[200] Likewise, Puerto Rico legislation contains a list of examples of "good cause." Wrongfully or constructively discharged employees may recover one month's salary plus one week's salary for each year of service.[201]

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192. N.H. REV. STAT. ANN. § 275-E:2 (Supp. 1991).

193. N.J. STAT. ANN. § 34:19-4 (West 1988 & Supp. 1992).

194. Providing the employee, in good faith, advises the employer as to her reasonable belief that the employer's directed act was unlawful or against common public policy, the employer may be said to "have notice" or "knowledge" of the employee's point of view. Ignorance or an adverse employment decision by the employer after this notice may be described as deliberate, intentional, or at the least, done with obvious knowledge of the employee's perception of the disputed circumstances. *See* N.J. STAT. ANN. § 34:19-4 (West 1988 and Supp. 1992); *supra* note 190-92 and accompanying text.

195. 82 AM. JUR. 2D *Wrongful Discharge* § 10, at 680 n.90 (1992).

196. MONT. CODE ANN. §§ 39-2-901 to -914 (1991).

197. *Id.* § 39-2-904.

198. *Id.* § 39-2-913.

199. *Id.* §§ 39-2-904, 39-2-911, 39-2-914. Proof of fraud or actual malice is necessary to recover punitive damages. Emotional distress and pain and suffering recoveries are eliminated. *Id.* § 39-2-905. For a detailed historical analysis of case law construing Montana's Wrongful Discharge From Employment Act, see Leonard Bierman & Stuart A. Youngblood, *Interpreting Montana's Pathbreaking Wrongful Discharge From Employment Act: A Preliminary Analysis*, 53 MONT. L. REV 53 (1992).

200. V.I. CODE ANN. tit. 24, §§ 77-79 (Supp. 1987).

201. BRODIE, *supra* note 183, at 231-32 (describing P.R. LAWS ANN. tit. 29, § 185(a)-(e)).

While the Montana, Puerto Rico, and Virgin Islands statutes do not provide insight into causation analysis, due to their preemption of common law wrongful discharge claims, they do offer valuable models of how future statutory employment law may typically operate. With common law claims eliminated, as well as "add-on" claims of emotional distress, interference with contract, etc., the penalty for firing employees in retaliation for their unwanted *lawful* behavior may become nothing more than a minor inconvenience or a "slap-on-the-hand" fine accompanied with a relatively low dollar figure in back pay. $500,000 jury verdicts will become as ancient a concept as a 50 cent gallon of gas. In effect, this type of legislation represents an at-will situation, because the employer no longer has a serious deterrent to prevent retaliatory terminations. It may also indicate a renewed sense that the average worker is no more important than a chessboard pawn being sacrificed for the good of the big-business economic machine.[202]

V. CONCLUSION

Colorado's pronounced adoption of the public policy exception to the at-will employment doctrine represents a major step forward in protecting the rights and interests of the public by protecting employees who have been terminated out of spite or lawfully protected activity, yet leaves a potential "loophole" in the requirements for evidentiary proof

202. The Model Uniform Employment-Termination Act, *reported in* 9A Lab. Rel. Rep. (BNA) 540:21 (Dec. 1991), is also highly controversial. The final version was approved on August 8, 1991, but a motion to draft the Act as a uniform law, which would have a uniform measure introduced in each state legislature was defeated. *Id. See also* Callahan, *supra* note 20, at 516-17 (noting that the Model Law was met with much dissatisfaction from both the plaintiff and defense groups represented). The Act, which in many ways is similar to Montana's Wrongful Discharge From Employment Act, *see supra* notes 196-99 and accompanying text, calls for either severance pay upon termination, or "good cause" to dismiss an at-will employee who has been employed by the same employer at least one year. 9A Lab. Rel. Rep. (BNA) at § 3, 540:32-33. *See also id.* § 10, 540:42 (prohibiting retaliatory discharges in connection with protected activity under the Act).

Adoption by state legislators of the Model Uniform Employment Termination Act in the near future is unlikely. *See* Randall Samborn, *At-Will Doctrine Under Fire; Model Act Divided Employment Bar,* NAT'L L.J., Oct. 14, 1991, at 1. Proponents claim the Act will level the playing field by providing a balance between the extreme of arbitrary dismissal and costly litigation, thus allowing for a cheap and fast remedy for being fired without just cause, and also allowing employers to exercise business judgment in good faith in adjusting their workforce. Other advantages include financial predictability for employers with a potential for future insurance coverage for claims like that currently found with Workers' Compensation statutes. Opponents complain that mandatory arbitration, damage caps and preemption of common law tort and contract actions will take much of the motivation away from plaintiff's attorneys. Further, an easily insurable risk may be viewed apathetically by the employer, and the judicial systems within a state may become flooded with claims. *See generally* Kempf & Taylor, *supra* note 15 (proposing their own version of a Model Termination Act, similar in many respects to Montana's); Glenn D. Newman, *The Model Employment Termination Act in the United States: Lessons from the British Experience with Uniform Protections Against Unfair Dismissal,* 27 STAN. J. INT'L L. 393 (1990) (commentary and criticism of the Model Uniform Employment Termination Act, and an insightful comparison with the U.K.'s Employee Protection (Consolidation) Act of 1978); 82 AM. JUR. 2D *Wrongful Discharge* § 10, at 680-81 (1992).

of the employer's bad conduct.[203] The lack of precise language in *Lorenz* may be an indication that the Colorado Supreme Court wishes to retain an equally balanced test for determining whether a *prima facie* case has been met by the employee, allowing for case by case interpretations which are particularly fact driven.[204]

An at-will employee in Colorado supposedly now has protection from being terminated for refusing to violate specific laws for an employer, or for being denied the rights and privileges that come with citizenship or the job itself. The complication in this "pro-plaintiff" decision, is that the employee is now theoretically farther away from establishing a *prima facie* case then was the employee previous to this decision. While the standard expressed in *Lorenz*[205] is carefully worded so as to potentially include yet untried fact patterns, the *Cronk I* standard[206] was a "cleaner," more well-defined standard that carried a certain degree of predictability in the law.

On the other hand, it seems more likely that the employer knowledge element will be easily proven when the motive for the employee's discharge is proven to be retaliatory. This is due to the theory that once the retaliatory act itself is proven, the employer knowledge element has been implicitly proven as well. If Colorado appellate courts accept the argument that distinctions in wrongful discharge, public policy and whistleblower terminology are unnecessary because they are all forms of retaliatory discharge, the inevitable result would be agreement with the proposition that the employer knowledge element is implicitly proven, notwithstanding other evidence presented, *whenever* a retaliatory discharge itself is proven by a preponderance of the evidence. Thus, the employer knowledge element is unnecessary in proving causation in a retaliatory discharge because when a retaliatory discharge occurs, and the reason for the employer's retaliation can be traced and proven, then the employer either *should* have known, or *must* have known of the employee's act or refusal to act which prompted the employer's retaliation.

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203. Namely, the uncertainty of how the *Lorenz* employer knowledge element must be satisfied.

204. COLO. CIVIL JURY INSTRUCTIONS 3d §§ 31:9 & 31:10 (Cum. Supp. 1993) follow the *Lorenz* decision requiring the jury to find by a preponderance of the evidence, *all* of the elements set out in *Lorenz* including that the "defendant was aware or reasonably should have been aware, that plaintiff's refusal to comply with the defendant's directive was based on plaintiff's reasonable belief that to do so would have been (illegal) (contrary to plaintiff's duty as a citizen) (a violation of plaintiff's legal right or privilege as a worker)." *Id.* § 39:9. The Notes on Use for §§ 31:9 & 31:10 indicate, however, that "it is not clear whether the requirements set forth in *Lorenz* were intended to apply to a situation in which an employer discharges an employee for exercising a specific statutory right or duty without any prior order or directive not to do so." *Id.* at 264.

The author wishes to thank the Hon. Charles Pierce, Colorado Court of Appeals, and his staff, for the opportunity to inspect and copy these jury instructions and accompanying notes in the "working-manuscript" form. Judge Pierce is on the Colorado Supreme Court Committee on Pattern Jury Instructions — Civil. Thanks are also extended to Robert Truhlar, Esq., of Truhlar & Truhlar, Denver, Colorado, for advice regarding the existence of these recently proposed and adopted jury instructions.

205. *Lorenz*, 823 P.2d. at 109.

206. *See supra* note 5 and accompanying text.

In such a situation, the employer's knowledge, whether actual or constructive, *must* be present or the discharge would not be retaliatory in nature. Once the first five *prima facie* elements in *Lorenz* are satisfied, then the sixth element of required employer knowledge is also proven by implication. Should the courts in Colorado, however, continue to maintain that the employer knowledge element is both required and important, then the courts should construe this element liberally on motions for summary judgment, and allow the jury to make this combined factual and legal decision.

Another potential solution lies in the chambers of the Colorado Legislature. Other states and territories have enacted legislation to protect non-unionized employees from wrongful discharge by describing the definition of what is either "good cause" or "bad cause," and providing remedies for discharges without good cause, as well as remedies for whistleblowing.[207] Since the *Lorenz* court has not provided a *predictable* standard or solution to the public-policy exception to the at-will employment doctrine, it would be in the best interests of public policy and the tax-paying voters of Colorado, for the legislature to thoroughly address this issue, but not necessarily by following the examples of Montana or the Model Employment Termination Act. Legislation may provide a workable long-term answer. Careful consideration, however, will be necessary to draft a statute with the deterrence factor equal to that of an unpredictable jury verdict.

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207. *See supra* notes 183-202 and accompanying text.