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The Public Policy Exception to At-Will Employment

Public Policy and At-Will Employment

Definition of Public Policy

In Vermont, employers cannot fire workers in violation of public policy. Our Supreme Court adopted the following definition of public policy in 1986:

In substance, [public policy] may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.

Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic. When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though such policy has never been so written in the bond, whether it be Constitution, statute, or decree of court. *It has frequently been said that such public policy, is a composite of constitutional provisions, statutes, and judicial decisions, and some courts have gone so far as to hold that it is limited to these. The obvious fallacy of such a conclusion is quite apparent from the most superficial examination.* When a contract is contrary to some provision of the Constitution, we say it is prohibited by the Constitution, not by public policy. When a contract is contrary to a statute, we say it is prohibited by a statute, not by a public policy. When a contract is contrary to

a settled line of judicial decisions, we say it is prohibited by the law of the land, but we do not say it is contrary to public policy. Public policy is the cornerstone—the foundation—of all Constitutions, statutes, and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them. If this be not true, whence came the first judicial decision on matter of public policy? There was no precedent for it, else it would not have been the first. (*Pittsburgh, Cincinnati, Chicago & St. Louis Railway v. Kinney*, 95 Ohio St. 64, 68-69, 115 N.E. 505, 507 (1916)).¹

Earlier, our Court stated public policy is not static but still may void a contract:

It is said in *Griswold v. Illinois Central R. R. Co.*, 90 Iowa, 265, that "public policy is variable; that the very reverse of that which is the policy of the public at one time, may become public policy at another time, and hence no fixed rule can be given by which to determine what is public policy; that the authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society."²

Anyone who is still tempted to say public policy can be defined exactly should heed our Court in *State v. Barnett*: "The term 'public policy' being of such vague and uncertain meaning, and of such variable quantity, has frequently been said not to be susceptible of exact or precise definition. It is stated in *State v. Bowman*, 184 Mo. App. 549, 553, 170 S.W. 700, 701: 'that one of the best definitions, perhaps, is that of Justice Story, which applied the term to that which 'conflicts with the morals of the time, and contravenes any established interest of society.'"³ Therefore, the Court in *Barnett* held that contract terms could be voided as against public policy only when "it could be said that they were injurious to the interests of the public or contravened some established interest of society."⁴

Examples of "clear and compelling public policy" violations that trump an at-will employment contract are given in *Jones v. Keogh*:

- dismissal for serving on a jury;
- dismissal for filing a workers' compensation claim;
- dismissal for serving on a jury;
- dismissal for refusing to perjure oneself.⁵

Typical examples in other jurisdictions are:

- refusing to participate in an illegal activity;
- performing an important public obligation;
- exercising a legal right or interest;
- exposing some wrongdoing by the employer;
- performing an act that public policy would encourage;
- refusing to do something that public policy would condemn, when the discharge is coupled with a showing of bad faith, malice or retaliation.⁶

Vermont Cases

There are few Vermont Supreme Court cases regarding public policy exceptions to any area of contract law. The concept is old, however. In 1867, the Court voided a bond between the liquor commissioner and agents he appointed as against public policy.⁷ In 1934, the Court listed "public policy" as one of the three grounds on which it could refuse to enforce a non-competition covenant.⁸ Several Vermont cases, including all of the above except *Payne*, show when an employment contract will not be voided on account of public policy. In *Jones v. Keogh*,⁹ a worker alleged she had been fired through bad faith and malice, and in retaliation for asserting rights to vacation and sick leave. The Court explicitly adhered to the employment at-will rule in *Mullaney v. C. H. Goss Co.*,¹⁰ and declined to adopt the rule in *Monge v. Beebe Rubber Co.*,¹¹ which held that a firing motivated by bad faith, malice, or retaliation violated public policy. In *Brower v. Holmes Transportation, Inc.*,¹² the Court still seemed skeptical of the *Monge* rule. In *Madden v. Omega Optical, Inc.*,¹³ the Court found no violation of clear and compelling public policy when an employer fired workers who refused to sign a non-competition agreement. Consistent with old cases,¹⁴ public policy concerns are not implicated

where employees “exercised merely private rights.”¹⁵

The first successful Vermont public policy case regarding employment succeeded because the Court viewed the concept expansively. In *Payne v. Rozendaal*,¹⁶ the Court held that age discrimination violated public policy even if it occurred before the legislature forbade it. The Court began by saying “under an ‘at will’ employment contract, an employee may be discharged at any time with or without cause, ‘unless there is a clear and compelling public policy against the reason advanced for the discharge.’”¹⁷ The Court then recognized that public policy in the employment context may be found in sources other than statutes and constitutions.¹⁸ The *Payne* Court held that a compelling public policy is to prevent injuries to the public, especially in matters of public health.¹⁹

There are limits, however. In *Adams v. Green Mountain R. Co.*,²⁰ a fired employee claimed the employer’s reason for firing was pretextual and won a jury verdict for firing in violation of public policy. The Court reversed, holding that the former employee failed to prove that employer fired her for reporting to her immediate supervisor a verbal and physical confrontation that former employee had with another supervisor. The reversal was not on account of the jury instruction, however, which read:

plaintiff was entitled to judgment on her claim of retaliatory discharge in violation of public policy if she proved by a preponderance of the evidence that (1) she was engaged in activity protected by public policy; (2) defendant knew of the protected activity; (3) defendant fired her; and (4) the sole or principal reason for her discharge was that she had engaged in protected activity.²¹

This was borrowed from *Robertson v. Mylan Laboratories, Inc.*,²² a Vermont Fair Employment Practices Act case, except that the fourth element in *Robertson* was merely “a causal connection between the protected activity and the adverse employment action.”

Physicians and Ethical Codes

There is one Vermont Supreme Court case allowing an employee to go to trial on a public policy exception stemming from an ethical code, *LoPresti v. Rutland Regional Health Services, Inc.*²³ The Court noted:

Other jurisdictions recognize that professional ethical codes can be

an important source of public policy in employment matters involving employees who are subject to the mandates of such codes. *Mariani*, 916 P.2d at 524-25 (relying on state professional accountancy ethical codes as source of public policy in wrongful discharge case); *Pierce v. Ortho Pharm.*, 417 A.2d 505, 513-14 (N.J. 1980) (accepting professional codes of ethics as source of public policy, but rejecting wrongful discharge claim of doctor who failed to prove that conduct requested by employer would lead to an ethical violation). In *Pierce*, the New Jersey Supreme Court observed that “[e]mployees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers.” 471 A.2d at 512; see also *Mariani*, 916 P.2d at 525 (“[E]thical codes are central to a professional employee’s activities, there may be a conflict at times between the demands of an employer and the employee’s professional ethics.”).²⁴

Our Court stated, “We agree, as a general matter, with those courts that accept professional ethical codes as potential sources of public policy.”²⁵

Because this is the only Vermont case allowing an employee to use a professional ethical code to define public policy, note the background: Dr. LoPresti claimed among other things that his employer fired him for refusing to refer his patients to certain other of the employer’s doctors who he believed provided substandard or unnecessary care to his patients. Dr. LoPresti claimed that, by firing him for this reason, the employer violated Vermont public policy. The Superior Court granted the employer summary judgment. The Supreme Court reversed on the public policy issue only. The case was settled on remand.

The Supreme Court detailed the claim thus:

As a primary care physician, Dr. LoPresti often had to refer patients to specialists for further care, and, as part of his referral responsibility, he would follow up with patients to assess their status after receiving specialized treatment. Dr. LoPresti began practicing in the Rutland area in 1991. In his affidavit, Dr. LoPresti stated that, after several years in the area, he had familiarized himself with

the practices of many area specialists. During the course of his practice with Physician Group, Dr. LoPresti developed concerns about the quality of care that some of his patients were receiving from particular Physician Group specialists. Dr. LoPresti alleged that one Physician Group doctor, Orthopedic Surgeon Doe, (FN2) was “performing unnecessary procedures unnecessarily hospitalizing patients.” Dr. LoPresti also concluded that two other Physician Group specialists, Obstetrician Doe and Surgeon Doe, were “providing clearly substandard care” that had “actually harmed more than one patient.” Though he routinely referred patients to other doctors within Physician Group, Dr. LoPresti greatly reduced the number of referrals he was making to the three specialists or stopped referring patients to them altogether. At one point, Physician Group’s President, Thomas Huebner, apparently told Dr. LoPresti that Orthopedic Surgeon Doe was complaining about the small number of cases that Dr. LoPresti had been referring to him.²⁶

Dr. LoPresti was one of two physicians in the employer’s Manchester office. His contract was canceled, supposedly because the employer was closing the Manchester office on account of insufficient revenue. The other physician in the employer’s Manchester office was not fired, although Dr. LoPresti claimed her performance had been documented to be inferior to his. She, however, had been making regular referrals to the Physician Group specialists that Dr. LoPresti avoided using.

Initially, Dr. LoPresti had alleged that his employer retaliated against him because he complained about proposed benchmarks for physician profitability, which related to the number of patients a Physician Group doctor should see in one day. During discovery, however, he learned that his not referring patients to certain other physicians in the group might be the reason for canceling his contract.

Thereupon, LoPresti moved to amend his Complaint to allege that his referrals had been guided by both the American Medical Association’s Principles of Medical Ethics (AMA Principles) and the Physician Group’s own internal Code of Ethics. He also claimed that the implied covenant of good faith and fair dealing prohibited the Physician Group from firing him for failure to refer because that would undermine the parties’

reasonable expectations about the contract's common purpose. Further, he claimed that clear and compelling public policy forbade the Physician Group from firing him over his referral practices. He claimed that his decision not to refer patients to certain specialists was guided heavily by Vermont's prohibition on unprofessional conduct in 26 V.S.A. §§ 1354, 1398, and by numerous provisions of the AMA Principles. He argued that his obligation to abide by the ethical code of his profession, thereby protecting his patients, took precedence over Physician Group's conflicting demands. The Supreme Court rejected his good faith and fair dealing argument and a promissory estoppel argument, but let him proceed on the public policy argument.

Under *LoPresti*, and *Rocky Mtn. Hosp. & Med. Serv. v. Mariani*,²⁷ which our Court treated favorably, the following appear to be the elements of a public policy claim resting on a professional ethical code:

1. The ethical code is sufficiently concrete to notify employers and employees of the behavior it requires. (Or, as expressed in *Mariani*, "the action directed by the employer would violate a statute or clearly expressed public policy.")
2. The specific provisions in the ethical code relied upon apply in the particular professional context in which the employee is working.
3. The code provision primarily benefits the public, not the profession alone.
4. The employer directs the employee to perform an illegal or unethical act as part of the employee's duties. (This is required in *Mariani*.)
5. The employee believes in good faith that the conduct requested by the employer would violate an ethical rule that satisfies the preceding definition. "[A]n employee cannot rely on his or her personal moral beliefs, or on an overly cautious reading of the mandates in a particular code."²⁸
6. The employee refuses the employer's request.
7. The employer was or should have been aware that the employee's refusal was based upon the employee's reasonable belief that the act was illegal or violated the ethical code.²⁹

8. The employee's refusal to perform the requested act in violation of public policy causes the termination.³⁰

This analysis applies to all terminations, not just firings of purely at-will employees. In *LoPresti*, the Supreme Court rejected the employer's argument that the public policy exception did not shield the employee because he had a written contract that provided six months notice before he could be terminated.

Violations of clear and compelling public policy based on ethical codes may be distinguished from mere professional disagreements. An example of the latter is in *Dulude v. Fletcher Allen Health Care, Inc.*³¹ There the Court held that, as a matter of law, a nurse's professional disagreements with the employer hospital's narcotics practices were insufficient to support a public policy claim. Patients had complained, and an internal audit had indicated that the nurse's medication practices were aberrant.³² She was under strict supervision. Multiple letters of understanding between her and the hospital clearly indicated that she would be fired for any deviation from the hospital's pain medication policies.³³ Despite these warnings, the nurse deviated from the hospital pain medication policy several times.³⁴ The Court refused to accept the nurse's claim that public policy prevented the hospital from lawfully firing her. As the Court explained,

The substantial difference in professional status between the nurse in *Dulude* and Dr. *LoPresti* distinguishes the two cases. The nurse in *Dulude* worked as a hospital employee under the direct supervision of other licensed medical professionals—a status that afforded her less discretion over patient care decisions than that required of Dr. *LoPresti*, a primary care physician. Her job was to execute policies established by supervisors. *Dulude*, 174 Vt. at 77, 807 A.2d at 393. Time and again, she proved herself incapable of abiding by specific pain-medication-administration plans and directives from her supervisors. By contrast, as a primary care physician, Dr. *LoPresti* was solely responsible for deciding which of the various area specialists would best treat his patients. Nothing in the record before us indicates that he was expected or required to receive approval from supervisors before making referrals.³⁵ How do we tell when an employer

and an employee are having a mere professional disagreement and when an employer is asking an employee to violate public policy? Some guidance is provided in *Rosenfeld v. Thirteenth Street Corp.*³⁶ *Rosenfeld*, a staff physician, challenged a hospital's "unjust dismissal" and revocation of staff privileges. He alleged tortious, illegal, and unethical employer misconduct as contrary to public policy. The Oklahoma court said:

Heretofore recognized public policy exceptions to the terminable at-will doctrine protect the so-called "whistle blower" who exposes illegal and unethical activity on the part of an employer. This Court is without authority to substitute its judgment for that of the hospital by accepting jurisdiction of a controversy arising from the exercise of discretion and judgment by the hospital's governing body. In the present controversy, however, the Appellant contends that the decision to terminate him from the hospital was based upon considerations in direct violation of public policy. Mandates of public policy are not subject to the exercise of administrative discretion and managerial judgment. Such policies are mandatory expressions of constitutional, statutory or decisional law ...³⁷

Even if the employer tells the worker to do something that clearly violates public policy embodied in an ethical code or statute and is not merely the subject of a professional disagreement, the worker still may lack protection if the worker's profession (as opposed to his job) does not directly serve the employer's business. There are no Vermont cases on the subject, but there is a recent New York high court case, *Horn v. New York Times*.³⁸ Dr. *Horn* unsuccessfully sued the New York Times for wrongful firing. She alleged that the Times directed her to give it employees' confidential medical records without those employees' consent or knowledge, in violation of statute. She also said it directed her to misinform employees that certain injuries and illnesses were not work related when, in fact, they were, so as to reduce the number of workers' compensation claims. She claimed that the Times fired her because she refused to follow these illegal instructions. Relying on *Wieder v. Skala*,³⁹ the attorney case discussed below, the trial and intermediate courts held the suit permissible. The high court reversed. It refused to expand the public policy exception to New

York's employment-at-will doctrine to physicians, at least under these facts, and ordered the case dismissed.

In *Horn*, the high court majority defined the issue: "At issue in this appeal is whether the narrow exception to the at-will employment doctrine adopted in *Wieder* ... encompasses a *physician employed by a nonmedical employer*."⁴⁰ The first strike against *Horn* was that she "was employed as the Associate Medical Director of the Times' in-house Medical Department, where whatever medical care and treatment she rendered was provided only to fellow employees and only as directed by her employer." It was apparently important to the *Horn* majority that

while *Horn* alleges that, in fact, her "primary responsibilities" "were to provide medical care, treatment and advice to employees of the Times," the sole concrete example of these "primary responsibilities" offered in her complaint is the "determin[ation] if injuries suffered by Times employees were work-related, thus making the employees eligible for Worker's Compensation payments."⁴¹

The second strike against Dr. *Horn* was apparently that her work was supposed to benefit not only other employees who were hurt, but also to benefit the employer, and that, unlike the associate attorney in *Wieder* (discussed below), she was part of corporate management. Therefore, according to the majority, "to the extent that *Horn*, in fact, treated Times employees as part of her job responsibilities, her provision of these professional services did not occupy 'the very core' or 'the only purpose' of her employment with the Times, unlike *Wieder's* provision of legal services for his firm's clients."⁴² This is quaint, in view of what we hear about what some big New York law firms regard as the true purpose of associates who bill by the hour.

The third strike against Dr. *Horn* was that the ethical standards and statute that she said her employer asked her to violate (and thus risk losing her license) "were not central to *Horn's* 'conduct [of] her practice on [her] employer's behalf."⁴³ The high court further distinguished *Wieder* thus, discussing the statute on patient-physician confidentiality:

Nonetheless, the principle of physician-patient confidentiality—unlike DR 1-103(a)—is not a self-policing rule critical to professional self-regulation. More importantly, because of the absence of a common

professional enterprise between *Horn* and the Times, the Education Law provisions cited by *Horn* do not impose a mutual obligation on the employer and the employee in this case.⁴⁴

Lawyers and Ethical Codes

There are no reported Vermont public policy cases brought by fired lawyers, but lawyers may fare better than doctors in asserting the public policy exception to at-will employment, at least as long as they are not in-house counsel. In *Wieder v. Skala*,⁴⁵ discussed in *Horn*, *Wieder* was an associate in a law firm. Another associate neglected a project and then lied to *Wieder* in order to cover up his inattention. When *Wieder* asked the firm's partners to report the associate's misconduct to the state disciplinary authorities, as required by DR 1-103(a) of New York's Code of Professional Responsibility, they balked. Later, the firm fired *Wieder*. He sued, claiming retaliatory discharge and breach of implied contract. The trial court dismissed his complaint on account of the employment-at-will doctrine and the intermediate appellate court affirmed.

The high court reversed, reinstating *Wieder's* claim for breach of contract. It distinguished earlier cases of plaintiffs working in the financial departments of large companies, providing professional accounting services in furtherance of their corporate responsibilities. In contrast, it said *Wieder's* provision of professional services to the firm's clients as a member of the bar "was at the very core and, indeed, the *only* purpose of his association with [the law firm] ... [His] duties and responsibilities as a lawyer and as an associate of the firm [are] so closely linked as to be incapable of separation."⁴⁶

The *Wieder* court also deemed the ethical rule indispensable to the unique function of attorney self-regulation, a judgment that it said it was best situated to make since the regulation of lawyers in New York was been delegated by the legislature to the judiciary. Further, it noted *Wieder's* failure to comply with DR 1-103(a) put him at risk of suspension or disbarment. It concluded "these unique characteristics of the legal profession in respect to [DR 1-103(a)] make the relationship of an associate to a law firm employer intrinsically different from that of the financial managers to the corporate employers in *Murphy* and *Sabetay*," the financial cases, which "call[ed] for a different rule regarding the

implied obligation of good faith and fair dealing" It also pointed out, however, that it did *not* mean to "suggest that each provision of the Code of Professional Responsibility should be deemed incorporated as an implied-in-law term in every contractual relationship between or among lawyers."⁴⁷

Finally, and at what the same court in *Horn*⁴⁸ said was the heart of its holding, the court in *Wieder* observed that *Wieder* and the law firm were engaged in a "common professional enterprise," the practice of law.⁴⁹

Because of their common endeavor, *Wieder* and his firm were *mutually* bound to follow DR 1-103(a). We specifically quoted the passage in *Murphy* (reprinted in *Sabetay*) warning that in order for any condition to be implied in a contract, that condition must aid and further the agreement's underlying terms, and held that DR 1-103(a) did so because "[u]nlike *Murphy* and *Sabetay*, giving effect to an implied understanding—that in their common endeavor of providing legal services [*Wieder*] and the firm would comply with the governing rules and standards and that the firm would not act in any way to impede or discourage [*Wieder's*] compliance—would be 'in aid and furtherance of [the central purpose] of the agreement of the parties.'"⁵⁰

Note also that *Wieder* involved a code promulgated by an arm of the government that included governmentally sanctioned punishment for a violator. In some jurisdictions, a merely private code, with no government connection, does not amount to a statement of public policy.⁵¹

Preemption by Statute

Some public policy claims are preempted by statute. For example, the Labor Management Relations Act⁵² preempted an employee's claim under Vermont law for firing in violation of public policy.⁵³ The district court held that a claim under Vermont law was not available to employees who were protected by just cause provisions in collective bargaining agreements.

On the other hand, the mere fact that the employee possibly could have made a claim under the False Claims Act did not disqualify him in *Regimbald v. General Elec. Co.*⁵⁴ *Regimbald* accused co-employees of "mischarging," meaning that they were "falsely reporting employee work time, which in turn results in a false pay

voucher.” He claimed the employees in his work area responded to questions about the possibility of mischarging by falsely accusing him of having made threatening and sexually inappropriate remarks. Because Regimbald claimed he was reporting conduct that might have been intended to commit a fraud upon the federal government, and because the court had to view that claim in a light most favorable to him as the non-moving party, the court found that Regimbald’s conduct was protected activity for the purpose of his retaliatory discharge claim. It nevertheless granted the employer summary judgment because the employer showed Regimbald’s questions were not the reason for firing him.

Application Only to Employers, Not Managers

At least in Vermont, public policy claims can be made only against employers. The federal trial court rejected a claim against a supervisor in an individual capacity for wrongful discharge in violation of public policy.⁵⁵

Whistleblowers

Relation to Public Policy Cases

It seems to me that whistleblowing in the private sector is merely one species of the public policy exception to at-will employment. It is distinguished from other species because it requires an affirmative act that brings wrongdoing to light. This act is more than the passive resistance to an unlawful or unethical act that generally gives an employee public policy protection.

Where the whistle is blown often makes a big difference. Whistleblowing in the public sector differs because it involves constitutional free speech guarantees. Whistleblowing in the regular civil service part of the public sector seems to involve a firing less often, probably because firings typically must be for just cause. Instead, it seems more to involve changes in job duties. In the exempt civil service, where just cause may not be required, whistleblowing is more like what occurs in the private sector.

Whistleblower Suits in Private Employment

At least in Vermont and the Second Circuit, there are few examples of common law whistleblower suits by private employees. One is *Sullivan v. Massachusetts Mut. Life Ins. Co.*⁵⁶ A worker alleged that he was terminated

in breach of contract and in violation of public policy because he internally reported suspected violations of securities laws. Denying the defendants’ motion for summary judgment, the district court held that Massachusetts law would impose liability on the employer if the worker were fired because he blew the whistle on illegal activity, even if the worker were not a victim of the illegal activity and even if the activity did not concern public health or safety. The district court said the employer could be liable even though the worker merely complained internally about alleged insider trading, as long as he did it in good faith. The employee conceded that he could not prove actual violations of securities laws, but the court held the employer could be liable if it discharged the worker for reporting suspected violations, and if the whistleblower’s belief was reasonable and in good faith. Summary judgment was denied because there were issues of fact as to whether the whistleblower reasonably believed that there had been violations and whether he was fired because he blew the whistle.

Whistleblower Statutes: Protection and Preemption

Whistleblowing cases are mostly statutory. Indeed, some courts have held that whistleblowing statutes preempt common law.⁵⁷ In a Washington case,⁵⁸ employees claimed they needed permanent sick leave after their employer retaliated against them for reporting safety violations, mismanagement, and fraud at a nuclear facility. They nevertheless were foreclosed from pursuing a cause of action for constructive discharge in violation of public policy because the court held that the administrative process for whistleblower complaints in the federal Energy Reorganization Act (ERA) adequately protected the public policy of protecting against waste and fraud in nuclear industry.

In other jurisdictions, the mere presence of a whistleblower statute does not preempt a common law claim. A Tennessee employee was fired for reporting illegal or unethical conduct. The employee established the clear public policy necessary to state a claim for retaliatory discharge based on his having reported an agent’s fraud to the Department of Commerce and Insurance. The court held the Whistleblower Act merely added to the remedy provided by the common law tort for retaliatory

discharge.⁵⁹ In Illinois, the intermediate appellate court reversed a decision applying preemption because “a statute will not be construed as taking away a common-law right existing at the time of its enactment unless the pre-existing right is so repugnant to the statute that the survival of the common-law right would in effect deprive the statute of its efficacy and render its provisions nugatory.”⁶⁰ The court concluded that the legislature meant to specially benefit whistleblowers who reported misconduct to government authorities but not to strip protection from those who reported to their private superiors instead. On the other hand, a Kentucky decision resembles the trial court decision reversed in the preceding case: a whistleblower who did not report to the authority designated by statute could not invoke the public policy exception to employment at will.⁶¹

Therefore, when researching a whistleblowing case, note any statute involved in the precedents. Common examples are the federal False Claims Act⁶² and the Employee Retirement Income Security Act of 1974 (ERISA).⁶³ There is at least one Vermont ERISA case, *Klein v. Banknorth Group, Inc.*⁶⁴ There, an ex-employee disclosed documents concerning potential ERISA violations by her employer—to her own lawyer. This did not meet the criterion of providing information or testimony in an ERISA-related inquiry or proceeding and, thus, did not fall under the section protecting employees from discharge.

When a statute is involved, exact compliance may be required. For a whistleblower’s report to qualify as under the Minnesota Whistleblower Act, it must “blow the whistle” by notifying the employer of a violation of law that is a *clearly mandated public policy*. Moreover, to be protected from retaliation under the statute, the employee had to make the report *for the purpose of exposing illegality*.⁶⁵

Whistleblower Suits Based on Contracts

Whistleblower claims may also rest on employment contracts. There has been an unsuccessful claim under the Vermont State Employees Association contract.⁶⁶ Union members can also succeed as whistleblowers. A cause of action for wrongful discharge in violation of public policy is available to employees who are dischargeable only for cause and who may be covered by a collective bargaining agreement.⁶⁷

Vermont Cases

There are fewer Vermont cases on whistleblowers than on the public policy exception in general.

A. Private employees

There is at least one Vermont case on whistleblowing by a private employee, but it is statutory. It is not helpful here, because the chief issue was whether the Department of Defense properly determined that the claim rested on events that occurred before the whistleblowing statute took effect and was thus invalid.⁶⁸

B. State employees

Perhaps the first reference to whistleblowing is in *Grievance of Morrissey*.⁶⁹ There, the Court had to balance a public employee's free speech rights against the government's interest in maintaining efficiency and discipline:

The task is a difficult one because the government's burden in justifying a particular discharge varies depending upon the nature of the employee's expression ... If, for example, the employee is engaged in whistleblowing activities, for example, then the government's interest in avoiding office disruption would not be afforded much weight in the balance.⁷⁰

What was hypothetical in *Morrissey* was real in *In re Robins*,⁷¹ the case of a state permit reviewer who was asked to certify that waste disposal by Ben and Jerry's did not endanger public health. This case shows how our Court actually balances free speech rights against the government's interest in avoiding disruption and defines free speech rights. Robins' primary job was "to review and make recommendations on permits for the disposal of residual matter gathered in waste water treatment by determining whether permit applications complied with technical standards established by the DEC to address potential health hazards of residual disposal."⁷² He refused to certify that "the Department staff," of which he apparently was one, "has reviewed the above project and application and finds it to conform with current technical standards." He refused because he did not think the application conformed, although his superiors did.⁷³ He cited the professional engineers' ethical code and 26 V.S.A. § 1191(c)(5), which forbids "making any material misrepresentation in the practice of engineering." He grieved the order compelling him to sign the certification and identified no other adverse job action. The Labor Relations Board denied his claim.

In *Robins*, the Supreme Court deferred to the Board's ruling that the employee was not entitled to invoke the ethical code and statute because a professional engineer's credential was not required for his position and because his superior had told him that signing a permit did not "implicate the ethical standards of a professional engineer."⁷⁴ It also found that the superior's order to sign the certification did not interfere with the employee's right of free speech, when the employee was permitted to give her a memorandum explaining why no permit should be issued. Because no First Amendment concern was thus involved, the Court held that *Mt. Healthy Board of Education v. Doyle*⁷⁵ did not apply. In *Mount Healthy*, the Supreme Court had set forth three criteria a public employee must meet in a First Amendment claim: (1) the speech was constitutionally protected; (2) the plaintiff suffered an adverse employment action; and (3) the protected speech was a "substantial" or "motivating" factor for the retaliatory conduct.⁷⁶ If the plaintiff meets all three, the defendant may still win by showing, by a preponderance of the evidence, that it would have undertaken the same adverse employment action "even in the absence of the protected conduct."⁷⁷ Despite its rejection of the applicability of *Mt. Healthy*, the Court nevertheless went on to analyze Robins's claim under *Mt. Healthy*:

Given the limited capacity in which grievant signed the certification, his ability to express freely his concerns and objections to the permit application, and the fact that ultimate responsibility for interpreting the technical standards lay with someone else, the employer's interest in issuing permits in a timely and efficient manner outweighs grievant's interest in refusing to prepare and sign the certification.⁷⁸

C. Local employees

There is a little Vermont law on whistleblowers in local government. In *Knight v. Town of North Hero*,⁷⁹ the plaintiff was employed as a part-time assistant town clerk and assistant town treasurer for approximately eight years, until she was fired on March 10, 1995. Richard Cassidy represented the plaintiff and Robert Erdmann represented the Town. Judge Sessions summarized the facts as follows in denying the defendants summary judgment:

At the 1995 Town Meeting, the Town placed before the voters a budget

article concerning the salary and compensation of Knight. During the discussion of this item, voters at the Town Meeting asked Knight various questions regarding her duties and salary as Assistant Town Clerk. She then expressed her concern about a computer system recently purchased by the Town for accounting purposes, which Knight was required to use in the course of her job. No one at the Town Meeting had asked about the accounting system and no one else at in attendance addressed the issue.

... On Friday, March 10, 1995, Knight returned to work, where, by letter dated March 10, 1995 and signed by Defendant Hutchins, she was terminated, effective immediately. On that same date, she received a check for current payment and severance pay, which had been drawn up in advance.⁸⁰

Knight alleged her firing violated 42 U.S.C. § 1983 because she was terminated for exercising her rights of free speech and free assembly under the federal First Amendment and Articles 13 and 20, respectively, of the Vermont Constitution. She also claimed it violated a compelling public policy under Vermont law. The district court applied *Mt. Healthy*:⁸¹

In order for the speech of a public employee to be protected under the First Amendment, the employee must establish that the speech relates to a *matter of public concern*, and that the employee's interest in expressing his or herself on the matter is not *outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."* *Connick*, 461 U.S. at 142 (quoting *Pickering v. Board of Educ. of Township High Sch. Dist.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)). *Whether a plaintiff's speech addresses a matter of public concern is a question of law for the court to determine "by the content, form, and context of a given statement, as revealed by the whole record."* 461 U.S. at 147-48, n.7. Thus, the Court is required to consider "both the nature of the speech and the nature of the services performed by the employee." *Blum v. Schlegel*, 18 F.3d 1005, 1011 (2d Cir. 1994).⁸²

The Town conceded that the plaintiff's acts did not adversely affect her performance of public duties. It did,

however, assert that her complaint was merely a private concern. The district court disagreed:

The mere fact that Knight objected to a computer system which she was required to use in the course of her job does not automatically render her complaint about the system a matter of private concern. Indeed, her first-hand familiarity with the computer system and its alleged inadequacies may provide Knight with special insight into how the workings of the Town might be improved. "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters*, 511 U.S. at 674 (citing *Pickering*, 391 U.S. at 572) ... The Court concludes that the efficacy of the Town's accounting system is a "matter of political ... concern to the community," and is therefore a matter of public concern. *Connick*, 461 U.S. at 146.⁸³

This decision shows that timing can be important in showing causation. The Town argued that the decision to fire Knight was made before she spoke at the Town Meeting. However, Knight presented contrary evidence. The court concluded,

This is quintessentially the type of dispute to be resolved by the finder of fact. As the Second Circuit has made clear, summary judgment should be used only sparingly where, as here, the material fact at issue is an employer's intent, motivation, or state of mind. *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988).⁸⁴

Professional Whistleblowers Unprotected

Beware the case of the whistleblower whose essential job required him to blow the whistle. If he is discriminated against because he blew it, he may really have "blown it" as far as free speech protection goes. In *Garcetti v. Ceballos*,⁸⁵ a deputy prosecutor sued under 42 U.S.C. § 1983 because the county and his superiors retaliated against him for recommending dropping a prosecution because the police's evidence was suspect. His claim was denied because, when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes. Therefore, the Constitution does not insulate their communications from discipline.

The *Garcetti* Court did begin by stating

that public employees have some free speech rights. It acknowledged, "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."⁸⁶ It also acknowledged, "That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work." Further, the mere fact that Ceballos's whistleblowing concerned his own job did not disqualify him: "The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive."⁸⁷

Instead, what doomed Ceballos's case was "that his expressions were made pursuant to his duties as a calendar deputy."⁸⁸ "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."⁸⁹ The Court explained,

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.⁹⁰

The Court also explained what it was *not* deciding:

... the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. *We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate.*⁹¹

Finally, Court did not give public employers free rein to strip whistleblowers of First Amendment protection by adding a duty to report misconduct to every employee's job description:

We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions ... The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to

the duties an employee actually is expected to perform, and *the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.*⁹²

The chief difficulty after *Garcetti* lies in determining whether the whistleblowing was part of the public employee's job. "As comprehensive as *Garcetti* is, we are still left without a standard or a guide to help us balance or maneuver through those public statements that may be mixed, or rather disguised because the scope of job responsibilities are not so manifest."⁹³

The mere fact that a worker's duties include reporting misconduct will not doom a case under *Garcetti*.⁹⁴ A post-*Garcetti* example exists in our federal circuit.⁹⁵ A nurse sued a state mental health hospital and her former supervisors under 42 U.S.C. § 1983, for, among other things, retaliating against her for exercising her free speech rights. The defendants argued that *Garcetti* barred the whistleblowing nurse's claim. They said her complaints to her supervisors about employees sleeping on the job and using excessive restraints were pursuant to her official duties because Work Rule # 22 forbade behavior that endangers the safety and welfare of persons and Work Rule # 30 required employees to report violations of existing work rules, policies, procedures, or regulations.

The district court denied the employer summary judgment. It noted that in *Garcetti*, because there was no dispute that Ceballos had written his memo pursuant to his employment duties, the Supreme Court did not articulate a "comprehensive framework for defining the scope of an employee's duties." The court noted that, under *Garcetti*, the inquiry is a practical one, and material issues of fact existed as to whether the nurse's job duties required *her in particular* to blow the whistle:

First, as the Supreme Court held in *Garcetti*, the fact that plaintiff expressed her views at work, rather than publicly, is not dispositive. 126 S.Ct. at 1959 ("Employees in some cases may receive First Amendment protection for expressions made at work."). Further, while Work Rule # 30 imposes a general duty on "all DMHAS employees," plaintiff testified that she never received any training about the work rules or about reports of work rule violations, see Barclay

Dep. at 170, 332, and that when she first started at CVH she filed a couple of written reports concerning incidents of use of excessive force and Hughes ripped them up and told her "we don't do this kind of thing here," *Id.* at 171-73. Plaintiff also testified that she "didn't know there was a report to file [for work rule violations] ... I've asked for forms before. 'Is there a form that needs to be filled out to file a complaint? No, Deborah. You just tell me Deborah.' Paul Hughes told me that. Althea Clark told me that. Everyone told me that." *Id.* at 169. *Defendants have not demonstrated that reporting potential work rule violations relating to patient care was particularly within the province of plaintiff's professional duties, more so than that of other DMHAS employees. Accordingly, the record does not establish incontrovertibly that plaintiff made her complaints concerning use of excessive force/restraints and employees sleeping on duty as part of the discharge of her duties as a nurse, and Garcetti is not controlling.*⁹⁶

New Federal Legislation

Just this summer, Congress provided strong whistleblower protections for private workers in consumer-product industries, the Consumer Product Safety Improvement Act of 2008. On 30 July 2008, the House voted 424-1 in favor of the final bill; the Senate followed suit the next day by a vote of 89-3. With little fanfare, the President signed it on 14 August. Section 219 of this Act contains strong new protection for employees of manufacturers, private labelers, distributors, and retailers who either

- blow the whistle to the employer, the Federal Government, or the attorney general of a State about conduct the employee reasonably believes violates the laws enforced by the Consumer Product Safety Commission or
- refuse to violate those laws.

Claims of retaliation are filed with the U.S. Department of Labor and investigated by the whistleblower office in the Occupational Health and Safety Administration. The employee has the right to de novo review in a jury trial in the appropriate U.S. district court if the Secretary of Labor denies relief or has not issued a final decision within 210 days. Authorized relief includes not only back-pay, injunctive relief, and attorneys' fees and costs, but also compensatory damages.

More whistleblower legislation is awaiting U. S. Senate approval. With Congress newly insistent on government accountability, an expansion of whistleblower protections was passed in the House, by a vote of 331-94, in March 2007. The WPEA would make many much-needed improvements to current law protecting federal employee whistleblowers, including:

- authorizing jury trials for federal whistleblower violations;
- authorizing awards of compensatory and punitive damages;
- removing the monopoly of the Federal Circuit Court of Appeals and overturning some of its decisions (like the requirement of "irrefragable" proof);
- extending whistleblower protections to Transportation Security Administration employees (previously excluded from virtually all federal employment laws); and
- overturning *Garcetti v. Ceballos* for federal employees.

Congress is still working on reconciling this with a somewhat weaker Senate version.

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¹ *Payne v. Rozendaal*, 147 Vt. 488, 492-93, 520 A.2d 586, 588-89 (1986) (emphasis added).

² *Osgood v. Central Vermont Ry. Co.*, 77 Vt. 334, 343, 60 A. 137 (1904) (refusing to void indemnity in lease); *accord Bessette v. St. Albans Co-operative Creamery, Inc.*, 107 Vt. 103, 111 (1935) (refusing to void stock agreement as against public policy when it was wholly a private concern between the parties in a cooperative).

³ 110 Vt. 221, 232, 3 A.2d 521, 526 (1939) (citations omitted).

⁴ 110 Vt. at 526.

⁵ 137 Vt. 562, 564, 409 A.2d 581 (1979).

⁶ *Hinson v. Cameron*, 742 P.2d 549 (Okla.

1987).

⁷ *Baldwin v. Coburn*, 39 Vt. 441, 444-46 (1867).

⁸ *Dyar Sales & Machinery Co. v. Bleiler*, 106 Vt. 425, 434 (1934).

⁹ 137 Vt. 562, 564, 409 A.2d 581, 582 (1979).

¹⁰ 97 Vt. 82, 122 A. 430 (1923).

¹¹ 114 N.H. 130, 316 A.2d 549 (1974) (since limited).

¹² 140 Vt. 114, 117, 435 A.2d 952 (1981).

¹³ 165 Vt. 306, 313, 683 A.2d 386 (1996).

¹⁴ *Osgood*, 77 Vt. at 343; *Bessette*, 107 Vt. at 111.

¹⁵ *Marcoux-Norton v. Kmart Corp.*, 907 F.Supp. 766, 771, 132 Lab.Cas. P 58, 142, 10 IER Cases 1768 (D.Vt. 1993).

¹⁶ 147 Vt. 488, 491-92, 520 A.2d 586, 588 (1986).

¹⁷ *Jones v. Keough*, 137 Vt. 562, 564, 409 A.2d 581, 582 (1979) (emphasis in original).

¹⁸ *Id.* at 493-94, 520 A.2d at 589 (rejecting notion that public policy exception to at-will employment must be legislatively defined).

¹⁹ See 147 Vt at 492, 520 A.2d at 588.

²⁰ 2004 VT 75, 177 Vt. 521, 862 A.2d 233, 21 IER Cases 1868 (mem.).

²¹ *Id.* ¶ 7, 177 Vt. at 523.

²² 2004 VT 15 ¶ 42, 176 Vt. 356, 848 A.2d 310.

²³ 2004 VT 105, 177 Vt. 316; 865 A.2d 1102.

²⁴ *Id.* ¶ 22.

²⁵ *Id.* ¶ 23.

²⁶ *Id.* ¶ 4.

²⁷ 916 P.2d 519 (Colo. 1996).

²⁸ *LoPresti* ¶ 23.

²⁹ This is required in *Mariani* and follows logically from point (2). Because *LoPresti* did not claim his employer was actually aware that his not referring to certain physicians was based on such a belief, the reversal of summary judgment in *LoPresti* strengthens the "should have been aware" variant.

³⁰ This is required in *Mariani*.

³¹ 174 Vt. 74, 807 A.2d 390 (2002).

³² *Id.* at 76-77, 807 A.2d at 393.

³³ *Id.* at 77-78, 807 A.2d at 393-94.

³⁴ *Id.*

³⁵ *LoPresti*, 2004 VT 105, 177 Vt. 316; 865 A.2d 1102 (distinguishing *Dulude*).

³⁶ 1989 Okla. LEXIS 105; 4 I.E.R. Cas. (BNA) 770; 117 Lab. Cas. (CCH) P56,446.

³⁷ 1989 Okla. LEXIS 105 (emphasis added).

³⁸ 100 N.Y.2d 85, 790 N.E.2d 753, 760 N.Y.S.2d 378, 19 IER Cases 1262 (2003).

³⁹ 80 N.Y.2d 628, 593 N.Y.S.2d 752, 609 N.E.2d 105 (1992).

⁴⁰ 790 N.E.2d at 753-54, 760 N.Y.S. at 378-79 (emphasis added).

⁴¹ 790 N.E.2d at 758, 760 N.Y.S.2d at 383.

⁴² 790 N.E.2d at 758, 760 N.Y.S.2d at 383 (emphasis added).

⁴³ 790 N.E.2d at 758-59, 760 N.Y.S.2d at 383-84.

⁴⁴ *Id.* at 757, 760 N.Y.S. at 382 (emphasis added).

⁴⁵ 80 N.Y.2d 628, 593 N.Y.S.2d 752, 609 N.E.2d 105 (1992).

⁴⁶ *Id.* at 635 (emphasis added).

⁴⁷ *Wieder*, 80 N.Y.2d at 637.

⁴⁸ 790 N.E.2d at 757-58, 760 N.Y.S.2d at 382-83.

⁴⁹ 80 N.Y. 2d at 638.

⁵⁰ *Horn*, 790 N.E.2d at 757-58, 760 N.Y.S.2d at 382-83 (quoting *Murphy*, 58 N.Y.2d at 304, 461 N.Y.S.2d 232, 448 N.E.2d 86)

- (fourth alteration in original).
- ⁵¹ See *Jaynes v. Centura Health Corp.*, 148 P.3d 241,244 (Colo. 2006).
- ⁵² 29 U.S.C. § 185.
- ⁵³ *Laramee v. French & Bean Co.*, 830 F.Supp. 803, 144 L.R.R.M. (BNA) 2997 (D.Vt.1993). 2007 WL 128963 (D.Vt. 2007).
- ⁵⁴ *United States ex rel. Harris v. EPS, Inc.*, 2006 WL 1348173 (D.Vt. 2006), 802 F.Supp. 716, Fed. Sec. L. Rep. P 97,299, 7 IER Cases 1414 (D. Conn.1992) (applying Massachusetts law).
- ⁵⁷ E.g., *Ahanotu v. Massachusetts Turnpike Authority*, 466 F.Supp.2d 378 (D. Mass. 2006).
- ⁵⁸ *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wash.2d 168, 125 P.3d 119 (2005).
- ⁵⁹ *Guy v. Mutual of Omaha Ins. Co.*, 79 S.W.3d 528 (Tenn. 2002).
- ⁶⁰ *Callahan v. Edgewater Care & Rehabilitation Center, Inc.*, 374 Ill.App.3d 630, 872 N.E.2d 551,554, 313 Ill.Dec. 568,571, 154 Lab.Cas. P 60,445, 26 IER Cases 609 (2007).
- ⁶¹ *Miracle v. Bell County Emergency Medical Services*, 237 S.W.3d 555 (Ky. App. 2007). 31 U.S.C. § 3730(b)(1).
- ⁶² 29 U.S.C. § 1140.
- ⁶⁴ 977 F.Supp. 302, 21 Employee Benefits Cas. 2240 (D.Vt.1997).
- ⁶⁵ *Skare v. Extendicare Health Services, Inc.*, 431 F.Supp.2d 969 (D.Minn. 2006).
- ⁶⁶ *In re Robins*, 169 Vt. 377,385, 737 A.2d 370 (1999).
- ⁶⁷ *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wash.2d 168, 125 P.3d 119 (2005).
- ⁶⁸ *Micalizzi v. Rumsfeld*, 247 F. Supp.2d 556 (D.Vt. 2003).
- ⁶⁹ 149 Vt. 1,16, 538 A.2d 678 (1987).
- ⁷⁰ *Id.* (citations omitted).
- ⁷¹ 169 Vt. 377, 737 A.2d 370 (1999).
- ⁷² *Id.* at 378.
- ⁷³ *Id.* at 379.
- ⁷⁴ *Id.* at 381.
- ⁷⁵ 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).
- ⁷⁶ *Id.* at 283-87.
- ⁷⁷ *Id.* at 287.
- ⁷⁸ *Id.* at 384-85.
- ⁷⁹ 971 F. Supp. 155; 1997 U.S. Dist. LEXIS 11292 (D. Vt. 1997).
- ⁸⁰ *Id.* at 156-57
- ⁸¹ 429 U.S. 274, discussed *supra* at n. 75.
- ⁸² 971 F. Supp at 157-58 (emphasis added).
- ⁸³ *Id.*
- ⁸⁴ *Id.*
- ⁸⁵ 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).
- ⁸⁶ *Id.* at 1958.
- ⁸⁷ *Id.* at 1959.
- ⁸⁸ *Id.* at 1959-60.
- ⁸⁹ *Id.* at 1960.
- ⁹⁰ *Id.*
- ⁹¹ *Id.* at 1961 (emphasis added).
- ⁹² *Id.* at 1961-62 (emphasis added).
- ⁹³ *Jackson v. Jimino*, 506 F. Supp. 2d 105, 2007 WL 1160409 (N.D.N.Y. 2007).
- ⁹⁴ *Foster v. Bowie Co.*, No. 2:05-cv-00526 (E.D. Tx. 2007).
- ⁹⁵ *Barclay v. Michalsky*, 451 F.Supp.2d 386 (D. Conn. 2006).
- ⁹⁶ 451 F. Supp.2d at 395-96 (emphasis added).

