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An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements

Gerard Sinzdak[†]

INTRODUCTION

Sherron Watkins is regarded as a hero for her decision to blow the whistle on the illegal activities of her employer Enron.¹ Had Enron survived the resulting scandal, however, the company could have fired or otherwise retaliated against Watkins with legal impunity.² Under Texas's whistleblower law, employees of private employers receive legal protection against retaliation only if they report wrongdoing to an external law enforcement agency.³ Because Watkins reported her concerns only to Enron CEO Kenneth Lay,⁴ her actions did not meet Texas's strict report recipient requirement.⁵

The Texas whistleblower law is not unique. Most state whistleblower statutes restrict the parties to whom a whistleblower may report in order to receive protection from retaliation.⁶ The majority of states, for example, protect only those employees who file reports with external government bodies.⁷ In

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1. Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 30, 2002, at 30.

2. Watkins expected the company to "just stick [her] in a corner and treat [her] like a pariah and sort of force [her] out." Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1051-52 (2004).

3. TEX. GOV'T CODE ANN. § 554.002(b) (2004).

4. Cherry, *supra* note 2, at 1036-37.

5. Following Enron and other corporate scandals, Congress passed the Sarbanes-Oxley Act ("SOX"). SOX provides protection to employees of public companies who, like Watkins, report violations of securities and accounting regulations. Unlike Texas's whistleblower law, SOX protects both employees who report internally to supervisors and externally to government regulators. Sarbanes-Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A (2006)).

6. See *infra* Part II.C.

7. See, e.g., CAL. LAB. CODE § 1102.5 (West 2008); CONN. GEN. STAT. § 31-51m (1992);

these states, employees who, like Watkins, only report employer wrongdoing internally cannot rely on the protections of their state whistleblower law. A few states take the opposite approach, requiring employees to first report their suspicions internally to supervisors.⁸ Virtually no states protect those who choose to report to the media or other non-governmental third parties.

This Comment analyzes the arguments both for and against strict report recipient requirements. This analysis reveals that neither an external nor an internal report recipient requirement provides sufficient protection to whistleblowing employees, who face a very real threat of retaliation.⁹ Studies indicate that whistleblowers choose their report recipient based on a wide variety of practical considerations—including the employee's status in an organization, the status of the wrongdoer, the organization's culture, and the significance of the wrongdoing.¹⁰ A rigid report recipient requirement—whether external or internal—cannot match the diversity of situations in which employees find themselves. An unduly restrictive reporting requirement therefore inevitably leaves many good-faith whistleblowers unprotected.¹¹

In order to avoid unjust denials of protection, this Comment proposes that states adopt a more open-ended report recipient standard. More specifically, states should provide protection to employees who report either internally to a supervisor or externally to a government body so long as the employee possessed both a subjectively and objectively reasonable belief that the recipient could correct the employer's unlawful behavior. State laws should also extend protection to employees who report to the media or to other third parties via the Internet when certain conditions are met. This flexible standard would more accurately reflect the variety of situations confronting employees. In addition, the reasonableness requirement would protect employers' interest in avoiding meritless lawsuits from "chronic complainers"¹² and would promote society's interest in effective law enforcement.

MICH. COMP. LAWS § 15.361 (2006).

8. See, e.g., N.J. STAT. ANN. § 34:19-1 to -8 (2008); N.Y. LAB. LAW § 740 (McKinney 2008); OHIO REV. CODE ANN. § 4113.52 (West 2008).

9. See generally MARCIA P. MICELI & JANET P. NEAR, *BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES* (1992) (discussing evidence of retaliation against whistleblowers); David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. L.J. 109, 113, 123 (1995) (describing a study that reveals that retaliation was a primary concern for federal employees who considered blowing the whistle); Laura Simoff, Comment, *Confusion and Deterrence: The Problems that Arise From a Deficiency in Uniform Laws and Procedures for Environmental "Whistleblowers,"* 8 DICK. J. ENVTL. L. & POL'Y 325, 342 (1999) (describing the high incidence of retaliation against whistleblowers in the science community).

10. See Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 162-63 (1994) (providing study of whistleblowers and their motivations).

11. See *infra* Part II.

12. See *Blackburn v. United Parcel Serv., Inc.*, 3 F. Supp. 2d 504, 517 (D.N.J. 1998) (providing an example of a lawsuit brought by a "chronic complainer").

Section I of this Comment provides an overview of the salient features of current state and federal whistleblower laws. The case studies presented in Section II illustrate the application of four such laws to recent whistleblowers. Section III then analyzes the policies which underlie various report receipt requirements and demonstrates why restrictive requirements afford inadequate protection to employees. Finally, Section IV presents a proposal for a more flexible approach to report recipient requirements and applies the proposed standard to the case studies detailed in Section II.

I

CURRENT WHISTLEBLOWER PROTECTIONS: RATIONALES AND SOURCES

Whistleblowers provide a valuable service to both their employers and the public at large. In just the past year, whistleblowers have played a prominent role in the discovery and remediation of employer and government misconduct in such areas as aviation safety,¹³ public health,¹⁴ privacy,¹⁵ and corporate sales and marketing practices.¹⁶ Employees are often in a unique position to recognize and report wrongdoing within both the private and public sectors.¹⁷ They can alert employers to problems before those problems escalate. If an employer refuses to resolve an issue, employees may be the only parties capable of reporting the problem to external authorities.¹⁸ As one court noted, “[w]ithout employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses.”¹⁹ The presence of

13. See Matthew L. Wald & Micheline Maynard, *Behind the Chaos in Air Travel, a Pendulum Swing at the F.A.A.*, N.Y. TIMES, Apr. 13, 2008, at A1 (discussing the actions of two FAA whistleblowers).

14. Ana Radelat, *CDC Enters Fray of Tainted Trailers*, USA TODAY, Apr. 2, 2008, at 3A (detailing story of whistleblower at the CDC who called attention to the dangers of formaldehyde fumes in trailers that the Federal Emergency Management Agency had provided to people displaced by hurricanes Rita and Katrina); see also John Carey, *What Ever Happened to 'An Apple a Day'?*, BUS. WK., Mar. 31, 2008, at 93 (whistleblowing activity of a pharmaceutical sales representative resulted in Warner-Lambert's criminal conviction and payment of \$340 million fine).

15. Eric Lichtblau & David Stout, *Report on F.B.I. Use of Personal Data*, N.Y. TIMES, Mar. 13, 2008, available at <http://www.nytimes.com/2008/03/13/washington/13cnd-fbi.html> (describing whistleblower's role in uncovering the FBI's misuse of personal information).

16. Linda A. Johnson, *Merck to Pay \$671 million to Settle Whistle-Blower Suit*, S.F. CHRON., Feb. 8, 2008, at C2 (detailing agreement by Merck to pay \$671 million to the U.S. government to settle charges that its sales and marketing practices violated federal law; the charges resulted from an investigation that began when two whistleblowers reported Merck's conduct to public officials).

17. See, e.g., Stefan Rutzel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 TEMP. ENVTL. L. & TECH. J. 1, 2 (1995) (discussing the critical role that employees play in alerting companies and government regulators to violations of environmental laws).

18. “Seventy-five to eighty percent of the information on which the Inspectors General Act [sic] comes from so-called whistleblowers.” 135 CONG. REC. H752 (daily ed. Mar. 21, 1989).

19. *Dolan v. Cont'l Airlines*, 563 N.W.2d 23, 26 (Mich. 1997).

whistleblowers may also help deter misconduct in the first instance.²⁰ Finally, information provided by whistleblowers can substantially reduce the cost to the public of detection and investigation of wrongdoing or corruption.²¹

Despite, or perhaps because of, their important role as legal monitors, whistleblowers are frequently the victims of retaliation.²² Over the past three decades, legislators and judges on both the federal and state level have grappled with the issue of how best to protect these employees.²³ A consistent view has not emerged.²⁴

The diverging approaches adopted by lawmakers stems from the myriad and often conflicting factors and policy goals that a judge or legislator must evaluate when deciding how best to craft or interpret a whistleblower law. For example, a lawmaker must consider whether the primary purpose of a whistleblower law is to protect those who have made a good-faith effort to report wrongdoing or whether the purpose is to provide incentives to encourage reporting in the first place.²⁵ In other words, should whistleblower laws provide protection or incentives or both? Practical questions also arise over what legal requirements are feasible from an employee's perspective and what incentives are most likely to prove effective. A legislator or judge must further decide whether whistleblower protections or incentives should vary based on the law an employer is allegedly violating or whether they should apply regardless of the legal violation. Designers of a whistleblower law must also weigh the interests of employers. A law that provides employees with excessive protections or incentives may lead to unwarranted government investigations,

20. See Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 108 (2000) (noting that state legislatures implement whistleblower laws as a mechanism for deterring wrongful conduct by employers).

21. See Simoff, *supra* note 9, at 326 (noting that whistleblowers help reduce the public cost of monitoring and detection).

22. See, e.g., Rebecca L. Dobias, *Amending the Whistleblower Protection Act: Will Federal Employees Finally Speak Without Fear?*, 13 FED. CIR. B.J. 117 (2003) (discussing a 2000 study by the Merit Systems Protection Board which revealed that one in fourteen federal employees experienced retaliation after reporting government misconduct, fraud, waste, or abuse); see also Simoff, *supra* note 9, at 342 (discussing a study by the Office of Research Integrity of the United States Department of Health & Human Service which reported that more than two-thirds of scientific whistleblowers experience negative consequences for their actions, including one in four whistleblowers losing their job).

23. This Comment addresses whistleblower statutes and protections for whistleblowers that are provided by the common law. Other, non-whistleblower-specific laws may provide additional protections in some circumstances. For example, government employees may receive protection from the First Amendment if their disclosures meet certain requirements. See Terry Morehead Dworkin & Elletta Sangrey Callahan, *Employee Disclosures to the Media: When is a "Source" a "Sourcerer"?*, 15 HASTINGS COMM. & ENT. L.J. 357, 369-73 (1993) (discussing whistleblowing and the First Amendment). These non-whistleblower specific options are beyond the scope of this Comment.

24. See *infra* Part II.C.

25. See Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000) (describing the incentive and protection approaches of various federal whistleblower laws).

disruptive work environments, and unfair publicity.

This diverse set of policy choices has led to an equally diverse array of whistleblower statutes and associated requirements. Some statutes, for instance, protect an employee only if the employee reports an actual violation of the law.²⁶ By contrast, some statutes protect employees who are mistaken about an employer's wrongdoing, so long as the employee reasonably believed that wrongdoing had occurred.²⁷ Many statutes offer protection for a report of any violation of a law, statute, or regulation.²⁸ Others protect only those employees who report legal violations that pose "a substantial and specific danger to the public health or safety."²⁹ Some statutes cover only public employees,³⁰ while others apply to both public and private employees.³¹

The area of whistleblower law that has generated the greatest controversy, however, concerns requirements over the appropriate recipient of a whistleblower's report. Most lawmakers agree that whistleblowers should not receive protection for reporting to just anyone. However, significant disagreement exists as to who should qualify as an appropriate recipient. At the moment, three alternatives predominate. These are: (1) protecting only those employees who report externally to a government agency, (2) protecting only those employees who report internally to a supervisor or senior executive, and (3) protecting employees who report *either* externally to a government agency or internally to a supervisor or senior executive.³² Each of these options represents a particular choice among the policy decisions described above. Category three, for example, reflects a choice to offer broad protection to employees, perhaps at the expense of more tailored incentives. An internal reporting requirement, on the other hand, demonstrates a more employer-centric view while external reporting requirements focus on the public role of whistleblowers. Section III of this Comment analyzes each of the report requirement options in detail and the policy choices that they reveal.³³ This

26. See *id.* at Appendix A (table excludes Wyoming's whistleblower protection statute, which provides protection to public employees. WYO. STAT. ANN. § 9-11-103 (2007)).

27. See N.J. STAT. ANN. §§ 34:19-1 to -8 (West 2000).

28. See, e.g., CAL. LAB. CODE § 1102.5 (West 2008); N.J. STAT. ANN. 34:19-2 (West 2000).

29. N.Y. LAB. LAW § 740(2)(a) (2006).

30. See, e.g., ILL. COMP. STAT. § 395/0.01-1 (1993).

31. See, e.g., CAL. LAB. CODE § 1102.5 (West 2008).

32. Variation exists within these three categories. For example, within the external report requirement category, some state and federal statutes require whistleblowers to report to a particular government agency, while others allow reports to any government entity. See *infra* Part I.A-C. Likewise, some statutes that require internal reporting allow an external report if the employer fails to correct the violation within a reasonable time, while others do not. See OHIO REV. CODE ANN. § 4113.52(C) (LexisNexis 2008). For the purposes of this Comment, these minor variations are not relevant. The analysis of each of the three broad categories almost always applies with equal force to the variations within a category.

33. Option three, allowing either external or internal reporting, is similar to the standard that this paper proposes. Its advantages and disadvantages are therefore discussed in Part IV.

analysis indicates that a modified version of the broad protection offered by option three provides the most desirable solution.

A. Federal and State Whistleblower Laws

Before turning to an exploration of the three report requirement options described above, a brief review of the current sources of whistleblower laws is necessary. Whistleblowers can currently seek protection from three sources: federal statutes, state statutes, and wrongful discharge claims based on state common law exceptions to the employment-at-will doctrine. As discussed below, federal legislators and courts have taken a very different approach to report recipient requirements than their state counterparts. For the most part, federal laws are quite hospitable to a whistleblower's choice of report recipient, allowing employees to report either internally or externally.³⁴ State laws, on the other hand, almost invariably limit report recipients.³⁵

Although federal whistleblower laws are generally more protective than state laws with respect to report recipients, they only protect reports of very specific types of employer wrongdoing—namely, violations of a limited number of federal laws. The whistleblower provisions of Sarbanes Oxley, for example, protect only employees of public companies who report unlawful accounting and other financial practices. Because the number of legal violations to which federal whistleblower laws apply is limited,³⁶ most private employees must rely on state whistleblower laws, which generally cover reports of a violation of any statute or regulation.³⁷

B. Federal Statutes

Federal legislators and courts have taken a different approach to report recipient requirements than the majority of their state counterparts. As this section of the Comment will discuss, Congress and the federal courts have, with few exceptions, provided whistleblowers with significant discretion when choosing a report's recipient. For example, the Whistleblower Protection Act of 1989 ("the WPA"), the successor to the ineffective Civil Service Reform Act of 1978,³⁸ provides general whistleblower protection to most federal employees and allows reporting to anyone.³⁹ It also provides a specific external entity to whom whistleblowers may report, namely the Office of Special Counsel ("the

34. See *infra* Part I.B.

35. The majority of states require a report to an external government agency; a few require that the employee report internally first. See *infra* Part II.C.

36. See *infra* note 59.

37. See *supra* note 28.

38. See Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 532-35 (1999) (discussing the ineffectiveness of the CSRA).

39. 5 U.S.C. § 2302(b)(8) (2006).

OSC").⁴⁰ The OSC investigates both the alleged violations that whistleblowers report and claims of retaliation against whistleblowers.⁴¹

While the WPA applies only to federal employees, some federal statutes extend whistleblower protections to workers in the private sector. For instance, the Clean Air Act⁴², the Energy Reorganization Act⁴³, the Safe Drinking Water Act⁴⁴, and the Occupational Safety and Health Act⁴⁵ all provide some form of protection to public or private employees who report employer actions that violate the respective statute. The Sarbanes-Oxley Act is a prominent recent example. It provides protection to employees of publicly traded companies who report violations of federal securities laws.⁴⁶

These topic-specific statutes, as interpreted by the federal courts, also provide employees with significant discretion when deciding on a report recipient.⁴⁷ The language of the whistleblowing provisions in most of the topic-specific statutes is nearly identical,⁴⁸ but also ambiguous as "to whom" a whistleblower must report in order to receive protection.⁴⁹ The Clean Water Act provides a good example. Under that Act, it is unlawful for an employer to fire or discriminate against any employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter."⁵⁰ Since the Environmental Protection Agency ("EPA") enforces the Clean Water Act, the provision could be read to require an employee to initiate a formal "proceeding" with the EPA. The Third Circuit, however, rejected this narrow interpretation.⁵¹ It held that an employee's internal complaint to his employer qualified as a "proceeding" under the Clean Water Act and was therefore protected whistleblowing activity.⁵² The court justified extending the Clean Water Act's whistleblowing protection to internal whistleblowers by emphasizing the important role that

40. *Id.*

41. 5 U.S.C. § 1212(a) (2006).

42. 42 U.S.C. § 7622 (2008).

43. 42 U.S.C. § 5851 (2008).

44. 42 U.S.C. § 300j-9i (2008).

45. 29 U.S.C. § 660(c) (2006).

46. 18 U.S.C. § 1514A (2006).

47. See Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 276-79 (1991) (discussing the federal court's broad approach to topic-specific statutes).

48. *Id.* at 270 n.13.

49. The language used in the Sarbanes-Oxley Act is an exception to this practice. It clearly delineates to whom a report must be made. The report must be made to: a federal regulatory body or law enforcement agency, any member of Congress, or a person with supervisory authority over the employee. 18 U.S.C. § 1514A(a)(1) (2006).

50. 33 U.S.C. § 1367(a) (2006).

51. *Passaic Valley Sewerage Comm'rs v. Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993).

52. *Id.* at 478-79.

whistleblowers play in effectuating the Clean Water Act's substantive goals.⁵³ According to the Third Circuit, the importance of this role warranted interpreting the whistleblowing protections of the Act as broadly as possible. The court also noted that most employees naturally report internally first and therefore the Act's whistleblowing protection "would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency."⁵⁴ Thus, the Clean Water Act's whistleblower provision protects both external and internal whistleblowers. Relying on similar rationales, other federal courts have interpreted the other topic-specific statutes in a similarly broad manner.⁵⁵

Thus, federal statutes generally allow a fairly broad range of report recipients. Employees can typically report either externally to an appropriate government agency or internally to a supervisor. In some cases, a report to a non-governmental external body, such as the media, may also qualify an employee for protection.⁵⁶ Such broad protection is justified on both normative and practical grounds. Congress and federal courts recognize that whistleblowers serve an important function in assuring compliance with the substantive goals of federal statutes.⁵⁷ Employees are often the first to become aware of possible health, safety, quality, and other legal violations by employers. The courts also recognize that, in practice, employees utilize multiple channels to report their employer's violations and should therefore not be required to report externally.⁵⁸

Federal statutory protection does, however, have its limitations. The broadest statute, the Whistleblower Protection Act, protects only federal employees. Topic-specific statutes offer whistleblower protection to both public and private employees, but these statutes only apply to a narrow set of

53. *Id.*

54. *Id.* at 478.

55. See, e.g., *Rayner v. Smirl*, 873 F.2d 60, 63-64 (4th Cir. 1989) (holding that whistleblower provision of Federal Railroad Safety Act protects internal and external complaints); *Kan. Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510-12 (10th Cir. 1985) (affirming that internal reports are protected under ERA); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (holding that whistleblower protection provision of Fair Labor Standards Act includes internal complaints); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1984) (holding that employee who made internal safety and quality control complaints protected under whistleblower provision of Energy Reorganization Act); *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772, 779 (D.C. Cir. 1974) (holding that a coal miner who complained to foreman is protected under the Federal Coal Mine Health and Safety Act); *Donovan v. R.D. Anderson Constr. Co.*, 552 F. Supp. 249 (D. Kan. 1982) (extending OSHA's whistleblowing protections to employee who reported potential employer violations to the media).

56. See 5 U.S.C. § 2302(b)(8) (2006) (the WPA allows reports to "any person"); see also *Donovan*, 552 F. Supp. at 249 (extending OSHA's whistleblowing protections to employee who reported potential employer violations to the media).

57. See *Passaic Valley Sewerage Comm'rs*, 992 F.2d at 478 (affirming that the legislative intent of the Clean Water Act's whistleblower provisions was to facilitate employer compliance with the Act's requirements).

58. *Id.* at 478-79.

unlawful activities. Employees who report violations of state law or violations of the many federal laws that do not contain whistleblower provisions⁵⁹ are therefore not covered by federal statutes. Thus, in many situations, employees of private companies or state and local governments cannot seek federal whistleblower protection.

C. State Statutes

Whistleblower statutes are available in some form in every state.⁶⁰ State statutory protection, like federal statutory protection, includes both general whistleblower statutes⁶¹ and topic-specific statutes that contain whistleblower provisions.⁶² This Comment focuses on the former.

Forty-seven of the fifty states currently offer general whistleblower protection to employees.⁶³ However, the statutory requirements that employees must meet in order to receive protection vary widely by state.⁶⁴ The major areas of difference include the class of protected employees,⁶⁵ the appropriate recipient of the employee's report,⁶⁶ the nature of the employer activity that the employee reports,⁶⁷ whether the employee's report must be accurate,⁶⁸ and the

59. The total number of topic-specific federal statutes that offer whistleblower protection is not available. However, the Department of Labor has jurisdiction over the whistleblower provisions of 14 statutes: Energy Reorganization Act of 1974 (ERA), The Clean Water Act, Toxic Substances Control Act of 1976, Solid Waste Disposal Act of 1976, Clean Air Act of 1977, Comprehensive Environmental Response, Compensation & Liability Act of 1980, Pipeline Safety Improvement Act of 2002 (Pipeline Safety), Safe Drinking Water Act of 1974, The Surface Transportation Assistance Act, The Aviation Investment and Reform Act, The Sarbanes-Oxley Act, OSHA, The International Safe Container Act, and The Asbestos Hazard Emergency Response Act of 1986. William Dorsey, *An Overview of Whistleblower Protection Claims at the United States Department of Labor*, 26 J. NAT'L ASS'N ADMIN. L. JUDGES 43, 51 (2006).

60. Callahan & Dworkin, *supra* note 20, at 107.

61. See *id.* at Appendix A (providing list of whistleblower statutes by state).

62. Topic-specific statutes cover employer violations in areas such as occupational safety and health, elder care, child care, Medicaid fraud, employee statutory rights such as minimum wage, education, and the environment. See *id.*; see also Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 582 n.3 (1999) (providing representative sample of topic-specific statutes).

63. See Callahan & Dworkin, *supra* note 20, at Appendix A (table excludes Wyoming's whistleblower protection statute that provides protection to public employees. WYO. STAT. ANN. § 9-11-103 (2007)).

64. The disparity in requirements across states has been heavily criticized by commentators. One commentator describes current state whistleblower protections as "murky, piecemeal, disorganized, and [inconsistent] from jurisdiction to jurisdiction." Cherry, *supra* note 2, at 1049.

65. Twenty-three states offer general protection to both private and public employees, while twenty-four states provide general protection to only public employees. See Callahan & Dworkin, *supra* note 20, at Appendix A.

66. See Callahan & Dworkin, *supra* note 20, at 108 (noting that the area "of greatest divergence" among state whistleblower laws is "among legislatively-designated recipients").

67. While many state statutes protect employees who report any violation of a law, rule, or regulation, New York's whistleblower law only protects reports of violations that pose "a substantial and specific danger to the public health or safety." N.Y. LAB. LAW § 740(2)(a)

available remedies.⁶⁹

The area of greatest divergence among states, and the subject of this Comment, is the requirement of "to whom" an employee must report.⁷⁰ Several states require employees to report wrongdoing externally to a public body.⁷¹ Of these, some provide protection only if the employee reports wrongdoing to a government entity that is capable of taking appropriate action.⁷² Still others limit the appropriate external public recipient to one or two specific government entities.⁷³ Some states take the opposite approach, requiring employees to report internally (at least initially) in order to receive protection.⁷⁴ Many of these states, however, do provide an exception to the internal reporting requirement if the employee reasonably believes that supervisors are involved in the wrongdoing or that correction of the violation by the employer is otherwise unlikely.⁷⁵ Only a handful of states take the broader federal

(McKinney 2006). On the other hand, Alaska and Wisconsin's statutes protect disclosures of threats to public health and safety as well as legal violations. ALASKA STAT. § 39.90.140(3)(B) (2006); WIS. STAT. ANN. § 230.80(5)(b) (West 2007).

68. New York, Florida, and Louisiana, for example, provide protection only if the employer actually violated the law. FL. STAT. § 112.3187(6) (2008); N.Y. LAB. LAW § 740(1)(c) (McKinney 2006); *See also* *Bordell v. Gen. Elec. Co.*, 622 N.Y.S.2d 1001 (N.Y. App. Div. 1995) (holding that N.Y. private sector whistleblower statute requires actual violation of the law by employer); *Hale v. Touro Infirmary*, 886 So. 2d 1210 (La. Ct. App. 2004) (concluding that Louisiana's whistleblower statute requires employees to demonstrate an actual violation of law by their employer). California and New Jersey, on the other hand, only require that the employee had a reasonable belief that the employer's conduct violated the law. CAL. LAB. CODE § 1102.5 (West 2008); N.J. STAT. ANN. 34:19-3 (West 2000).

69. Available remedies include: damages (including back pay), tort damages, equitable relief (such as reinstatement), or "appropriate relief." *See* Vaughn, *supra* note 62, at 611-13 (discussing state approaches).

70. Callahan & Dworkin, *supra* note 20, at 108.

71. These states include: Arizona, California, Connecticut, Hawaii, Iowa, Kentucky, Michigan, and Rhode Island. *See* ARIZ. REV. STAT. ANN. § 38-531 (2001); CAL. LAB. CODE § 1102.5 (West 2008); CONN. GEN. STAT. § 31-51m (1992); HAW. REV. STAT. § 378-61 (2004); IOWA CODE § 70A.28 (2006); KY. REV. STAT. ANN. § 61.102 (LexisNexis 2008); MICH. COMP. LAWS § 15.361 (2006); R.I. GEN. LAWS § 28-50-2 (2008).

72. For example, Florida's whistleblower statute protects only employees who have reported to an "agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act." FL. STAT. § 112.3187(6) (2008). Texas law requires that the report be made to "an appropriate law enforcement authority." TEX. GOV'T CODE ANN. § 554.002(b) (2004).

73. A Washington employee must make his or her report to the office of the state auditor, while a North Dakota employee must report to an agency head, state's attorney, or attorney general. WASH. REV. CODE § 42.40.020(8) (2007); N.D. CENT. CODE § 34-11.1-04(1) (2004).

74. Alaska, Colorado, Maine, Indiana, New Jersey, New York, New Hampshire, Massachusetts, Ohio, and Wisconsin all require some form of internal disclosure. ALASKA STAT. § 39.90.110 (2006); COLO. REV. STAT. § 24-114-102 (2008); ME. REV. STAT. ANN. tit. 26, § 833 (1987); IND. CODE § 22-5-3-3 (1990); N.H. REV. STAT. ANN. § 275-E:2 (1988); N.J. STAT. ANN. § 34:19-1 to -8 (2008); N.Y. LAB. LAW § 740 (McKinney 2008); MASS. GEN. LAWS ch. 149 § 185 (2008); OHIO REV. CODE ANN. § 4113.52 (West 2008); WIS. STAT. ANN. § 230.81 (2003).

75. Alaska, Maine, Massachusetts, New Hampshire, and New Jersey's statutes have a reasonable belief exception to the internal reporting requirement. ALASKA STAT. § 39.90.110 (2006); ME. REV. STAT. ANN. tit. 26, § 833 (1987); MASS. GEN. LAWS ch. 149 § 185 (2008); N.H.

approach—providing protection to employees who choose to make either an internal report to a superior or an external report to a public body.⁷⁶ Almost all states reject or discourage reporting to third parties such as the media.⁷⁷

D. State Common Law Protection: The Public Policy Exception to Employment-at-Will

Around forty states recognize the common law tort of wrongful discharge in violation of public policy.⁷⁸ Some of these jurisdictions apply the tort to employees who are fired for whistleblowing.⁷⁹ As with state statutory requirements, the elements of a whistleblowing-based wrongful discharge claim vary considerably from state to state.⁸⁰ For example, some courts apply the tort only if an employee blows the whistle externally.⁸¹ States also differ on the types of legal violations that can support a whistleblower's public policy claim. Some states require that the employer's unlawful conduct violate a state statute.⁸² If the conduct only violates federal law, an employee who reports the wrongdoing is not protected.⁸³ Others take a broader approach, protecting whistleblowers who report the suspected violation of any state or federal statute, constitutional provision, or regulation.⁸⁴ Finally, some state courts have held that their state whistleblower statute preempts a common law wrongful discharge claim, while other state courts allow both statutory and common law causes of action.⁸⁵

Thus, the common law wrongful discharge tort provides a possible alternative to whistleblowers who are not covered by state whistleblower statutes or who seek punitive damages.⁸⁶ Like state statutory protections, however, the requirements of a common law claim vary substantially from

REV. STAT. ANN. § 275-E:2 (1988); N.J. STAT. ANN. § 34:19-1 to -8 (2008).

76. These states include: Kansas, Minnesota, North Carolina, Pennsylvania, and West Virginia. KAN. STAT. ANN. § 75-2973 (2006); MINN. STAT. § 181.932 (2006); N.C. GEN. STAT. § 126-84 (2007); 43 PA. CONS. STAT. ANN. § 1423 (West 2006); W. VA. CODE § 6C-1-2 (2006).

77. See Callahan & Dworkin, *supra* note 10, at 156-57.

78. See Callahan & Dworkin, *supra* note 20, at Appendix A (listing the states that allow a public policy claim).

79. See, e.g., *Green v. Ralee Eng'g Co.*, 960 P.2d 1046 (Cal. 1998); *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876 (Ill. 1981); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985).

80. *Cherry*, *supra* note 2, at 1045-46 (discussing the variation in the required elements of state public policy claims).

81. See, e.g., *Wiltsie v. Baby Grand Corp.*, 774 P.2d 432 (Nev. 1989); *House v. Carter-Wallace Inc.*, 556 A.2d 353 (N.J. Super. Ct. App. Div. 1989).

82. *Cherry*, *supra* note 2, at 1045-46 (analyzing the variation in state common law claims).

83. See *Guy v. Travenol Labs., Inc.*, 812 F.2d 911 (4th Cir. 1987).

84. See *Green*, 960 P.2d at 1046 (holding that California law recognizes both a statutory and common law whistleblowing claim).

85. See Callahan & Dworkin, *supra* note 20, at 126-29 (discussing the interplay of state statutory and common law whistleblower claims).

86. Whistleblower statutes do not typically allow for punitive damages. See *Vaughn*, *supra* note 62, at 611-13.

jurisdiction to jurisdiction. As with state whistleblower statutes, this variation includes whether the whistleblower must report externally or internally in order to receive protection.

II CASE STUDIES

The following four case studies demonstrate the application of rigid report recipient requirements. Three involve state laws that require either an external report to a government agency or an internal report to a supervisor. The fourth involves a federal law that limits allowable report recipients even further. Collectively, the case studies reveal the often harsh consequences of a legislature's decision to restrict allowable report recipients.

A. Contreras v. Ferro Corp., 652 N.E.2d 940 (Ohio 1995)

In *Contreras v. Ferro Corp.*, Phillip Contreras (plaintiff), former vice president of and general counsel at Ferro Corp., lost his job after reporting evidence of wrongdoing to his company's president.⁸⁷ In August 1988, a Ferro employee informed Contreras that a general manager and several employees within one of Ferro's divisions were engaged in the theft of customer property. Contreras did not initially report the issue to either of his superiors, Ferro's CEO, Adolph Posnic, and Ferro's president, Albert Bersticker. He chose not to do so in part because the general manager suspected of wrongdoing and Bersticker were close friends.⁸⁸

Although Contreras did not report the issue to his superiors, he did initiate his own investigation. This is significant because Ohio's whistleblower statute requires an employee to make a reasonable and good-faith effort to determine the accuracy of his or her information.⁸⁹ As part of his investigation, Contreras contacted several individuals outside of Ferro, including a private investigator, the local police, and a district attorney.⁹⁰

In December 1988, Contreras completed his investigation. The investigation not only confirmed the original allegation, but also revealed evidence of drug abuse and additional thefts within the division. Contreras then advised Bersticker of the investigation's results and provided written documentation. Posnick and Bersticker fired Contreras within a month.⁹¹

In May 1989, Contreras initiated a lawsuit against Ferro, claiming that he had been fired in retaliation for revealing the embarrassing results of his investigation. The Ohio Supreme Court, however, did not reach the merits of

87. *Contreras v. Ferro Corp.*, 652 N.E.2d 940, 940-42 (Ohio 1995).

88. *Id.* at 940-41.

89. OHIO REV. CODE ANN. § 4113.52(C) (LexisNexis 2008).

90. *Contreras*, 652 N.E.2d at 945.

91. *Id.* at 940-42.

Contreras's claim. Rather, it dismissed Contreras's claim on the grounds that he had failed to meet Ohio's statutory reporting requirements.⁹² The Ohio statute requires whistleblowers to first notify their employer both orally and in writing of the suspected violation.⁹³ Only if the employer fails to correct the violation or make a good-faith and reasonable effort to correct the problem can the employee file an external report with the appropriate agency.⁹⁴ In Contreras's case, the court held that Contreras's decision to contact external parties during his investigation violated Ohio's internal notification requirement.⁹⁵ The court also rejected Contreras's argument that Ohio's reasonable investigation requirement compelled him to contact external parties.⁹⁶

This case illustrates the pitfalls of internal reporting requirements. Contreras's decisions appear to be both sensible and motivated by a desire to correct serious wrongdoing. He initially refrained from reporting the unsubstantiated allegations about the manager because of the close personal relationship between the manager and Contreras's superior.⁹⁷ The decision is particularly rational in light of Ohio's requirement that an employee conduct a reasonable investigation.⁹⁸ Moreover, given the nature of the alleged wrongdoing—criminal activity involving potential felonies—it is not surprising that Contreras sought advice from the police and a district attorney.⁹⁹ Finally, Contreras reported the wrongdoing to his superiors as soon as his investigation confirmed the allegations.¹⁰⁰ Yet, despite the serious nature of the reported legal violations and Contreras's reasonable efforts to confirm and correct those violations, the court concluded he was barred from filing a retaliation claim under Ohio's whistleblower law.¹⁰¹

This analysis is not intended to suggest that ignorance of the requirements of a state's whistleblower law should be excused. Rather, it demonstrates that the law itself is flawed. As corporate general counsel, Contreras should have known the law's internal reporting requirement. However, even if Contreras had known the law, he very likely would still have chosen to investigate before reporting to his superiors due to the personal relationship that existed between his superior and the asserted wrongdoer, and due to Ohio's investigation requirement. Alternatively, if Contreras knew that reporting internally to the CEO or president was his only option, he may have chosen not to report at all rather than risk informal (if not formal) retaliation. Thus, the requirements of

92. *Id.* at 945.

93. OHIO REV. CODE ANN. § 4113.52(A)(1)(a) (LexisNexis 2008).

94. *Id.*

95. *Contreras*, 652 N.E.2d at 945.

96. *Id.*

97. *See id.* at 940-41.

98. *See* OHIO REV. CODE ANN. § 4113.52(A)(1)(a) (LexisNexis 2008).

99. *Contreras*, 652 N.E.2d at 945.

100. *See id.* at 940.

101. *See id.* at 945.

the Ohio whistleblower statute placed Contreras in the difficult position of either saying nothing and allowing serious criminal activity to continue or filing a report with his supervisors and facing likely retaliation.

B. City of Fort Worth v. DeOreo, 114 S.W.3d 664 (Tex. App. 2003)

In *City of Fort Worth v. DeOreo*, Cynthia DeOreo, a female police officer, filed a claim under the Texas Whistleblower Act,¹⁰² alleging that the City of Fort Worth constructively discharged her in retaliation for reporting acts of sexual harassment and other unlawful conduct by fellow officers.¹⁰³ DeOreo was an eight-year veteran of the police force when her difficulties began.¹⁰⁴ On two occasions, she filed official reports with her supervisors that alleged that she had been sexually harassed by fellow officers.¹⁰⁵ She also forwarded a copy of her second report to the Fort Worth police department's internal affairs division. DeOreo filed these reports pursuant to the official sexual harassment policy of the City and Police Department of Fort Worth, which requires supervisors to conduct a timely and thorough investigation of all reports of sexual harassment.¹⁰⁶ Approximately one month after filing her second report, DeOreo resigned.¹⁰⁷ She subsequently filed a retaliatory discharge claim under the Texas Whistleblower Act.¹⁰⁸

The Texas Court of Appeals concluded that her internal reports of sexual harassment did not qualify as protected activity under Texas law.¹⁰⁹ Despite the fact that DeOreo made the reports to her superiors through established internal channels and that the recipients of the reports were members of the police department, the Texas court held that the report's recipients did not qualify as "an appropriate law enforcement authority," as required by the Texas Whistleblower Act.¹¹⁰

The court based its conclusion on a decision by the Texas Supreme Court which had held that the "appropriate law enforcement authority" language in the Texas Whistleblower Act requires that a report be made to the "proper agency."¹¹¹ The court found that the proper agency to which DeOreo should have reported was one with the particular "authority to regulate under, enforce, investigate, or prosecute a violation of Texas's sexual harassment and

102. See TEX. GOV'T. CODE ANN. § 554.002 (2004).

103. *City of Fort Worth v. DeOreo*, 114 S.W.3d 664, 667-68 (Tex. App. 2003). One of the officers, DeOreo's ex-husband, eventually pled guilty to felony false imprisonment. *Id.*

104. *Id.* at 667.

105. *Id.* at 671-73.

106. *Id.* at 674.

107. *Id.* at 668.

108. *Id.*

109. *Id.* at 669-70.

110. *Id.* at 699.

111. *Id.* at 668.

employment retaliation statutes.”¹¹² Although the court acknowledged that the City (including the police department) had a general authority to regulate, investigate, and prosecute sexual harassment claims, this general power was not enough to establish the police department as a proper agency.¹¹³ The appropriate agency in this case was the Texas Commission on Human Rights, which possesses the specific authority to enforce sexual harassment and retaliation claims.¹¹⁴ Because DeOreo reported only to police department officials, the court concluded she was not entitled to the protection of the Texas whistleblower laws with respect to those reports.¹¹⁵

Like the plaintiff in *Contreras*, DeOreo appears to have made reasonable decisions aimed at correcting wrongdoing. She submitted her sexual harassment claims through an established internal channel.¹¹⁶ The recipients of her report had the power to investigate and had previously investigated reports of sexual harassment within the police department.¹¹⁷ The superiors to whom she reported also had the ability to discipline officers who violated the policies and had done so in response to DeOreo’s previous complaints.¹¹⁸ Moreover, because DeOreo was a non-managerial employee in a traditionally insular government department, her decision to report internally is not surprising.¹¹⁹ The combined effect of the Texas whistleblower statute’s rigid report recipient requirement and the court’s narrow interpretation thereof effectively allowed the police department’s internal procedures to serve as a shield against whistleblower liability.¹²⁰

C. Green v. Ralee Engineering, 960 P.2d 1046 (Cal. 1998)

In *Green v. Ralee Engineering*, Richard Green (plaintiff), was a quality control inspector for Ralee Engineering (defendant), a supplier of airline equipment to major aviation companies such as Boeing and Northrop.¹²¹ In 1990, Green allegedly noticed that the company was shipping parts to Boeing and other customers that had failed quality control inspections.¹²² This alleged practice violated various Federal Aviation Administration safety regulations.¹²³ Over the next two years, Green repeatedly complained about the practice to his

112. *Id.* at 669.

113. *See id.*

114. *See id.* (citing *City of Weatherford v. Catron*, 83 S.W.3d 261, 268-69 (Tex. App. 2002) (holding that only reports of sexual harassment made to the Texas Commission on Human Rights qualify for whistleblower protection under Texas law)).

115. *DeOreo*, 114 S.W.3d at 668-69.

116. *Id.* at 674.

117. *Id.*

118. *Id.*

119. *Id.* at 667.

120. *See id.*

121. *Green v. Ralee Eng’g Co.*, 960 P.2d 1046, 1049 (Cal. 1998).

122. *Id.* at 1049-50.

123. *Id.* at 1050.

supervisors, other management personnel, and the company's president.¹²⁴ He did not, however, file an external report with the FAA.¹²⁵ Although the company made some changes in response to Green's reports, the shipment of defective parts largely continued.¹²⁶ When Green began to gather formal evidence, the defendant fired him.¹²⁷

Following his termination, Green filed a wrongful termination action against the defendant, alleging that he had been fired in retaliation for his whistleblowing activities. Green did not base his claims on California's whistleblower statute,¹²⁸ which requires employees to report wrongdoing to a public agency. Since Green's reports were submitted internally, he was not entitled to the statute's protection.¹²⁹

Because statutory protection was unavailable, Green argued that his discharge was in violation of the state's public policy. The California Supreme Court agreed.¹³⁰ It held that, although California's whistleblower statute required external reporting, the statute nonetheless reflected a "broad public policy interest in encouraging workplace whistleblowers to report unlawful acts."¹³¹ The public's significant interest in airline passenger safety also supported Green's public policy argument.¹³² Thus, although Green's whistleblowing activities were entirely internal, the court recognized that his actions promoted important societal interests.

Although Green ultimately recovered under a public policy tort theory,¹³³ the importance of the California Supreme Court's decision on Green's statutory claim should not be overlooked. First, Green's public policy claim succeeded because a matter of significant public importance, airline safety, was at stake. A California employee who reports a less significant violation of the law may not be able to rely on a public policy claim. Second, many state whistleblower statutes share California's external reporting requirement, but do not recognize a public policy exception for whistleblowing. To the extent that *Green* serves as precedent for courts in other states, the *Green* court's decision could be very important.

Moreover, the decision of the California legislature to deny statutory protection to individuals like Green exemplifies the limitations of external report recipient requirements. Green's actions were both reasonable and diligent. Green also had significant personal incentives to resolve his concerns

124. *Id.* at 1049.

125. *Id.*

126. *Id.*

127. *Id.*

128. CAL. LAB. CODE § 1102.5 (West 2004).

129. *Green*, 960 P.2d at 1052.

130. *Id.* at 1060.

131. *Id.* at 1052.

132. *Id.* at 1053.

133. *Id.* at 1061.

internally, as he had served as an employee of the defendant company for twenty years and was in his fifties when he discovered his employer's wrongdoings. He complained about his employer's behavior repeatedly and continued to pursue those complaints even after the employer dismissed them. Green further alleged that he was fired when he began collecting formal evidence of the defendant's unlawful conduct.¹³⁴ This allegation suggests the defendant may have terminated Green in an attempt to reduce the likelihood that an external report would be found credible by any government agency where such a report was received. In sum, by mandating that employees report the wrongdoings of their employer externally, California's whistleblower law may fail to protect conscientious individuals who take reasonable and practical steps to correct unlawful or dangerous conduct.

D. Walleri v. Federal Home Loan Bank of Seattle, 83 F.3d 1575 (9th Cir. 1996)

In *Walleri v. Federal Home Loan Bank of Seattle*, Lisa Walleri (plaintiff) worked as a bank examiner for the Federal Home Loan Bank of Seattle (the FHLBS) (defendant).¹³⁵ The FHLBS was one of twelve regional federal home loan banks who conducted examinations of savings and loan associations on behalf of the Federal Home Loan Bank Board ("the Bank Board"), the federal agency charged with overseeing savings and loans.¹³⁶ In October 1988, Walleri submitted a report to her supervisors that described irregularities at Far West Federal Bank.¹³⁷ Walleri's supervisors disagreed with her and revised her report to reflect their own perspectives.¹³⁸ Walleri refused to sign the revised report, prompting her supervisors to remove her from the Far West assignment.¹³⁹ Following her removal from the case, Walleri filed a critical account of the events with the Bank Board.¹⁴⁰ FHLBS fired her a few months later.¹⁴¹

Walleri filed suit against FHLBS on the grounds that her termination violated the whistleblower provision of the Federal Deposit Insurance Corporation Improvement Act of 1991.¹⁴² The Act's whistleblowing provision prohibits retaliation against employees who report suspected wrongdoing to one of five federal banking agencies: the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve Board, the Federal Housing Finance

134. See *id.* at 1050.

135. *Walleri v. Federal Home Loan Bank of Seattle*, 83 F.3d 1575, 1578 (9th Cir. 1996).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1579.

142. *Id.* (discussing 12 U.S.C. § 1831j (2006)). Although passed in 1991, this Act applied retroactively to January 1, 1987, thereby covering the events of Walleri's case.

Board, the Comptroller of Currency, and the Office of Thrift Supervision (OTS).¹⁴³ Although Walleri made her report to the Bank Board, rather than one of the five listed agencies, she argued that the Act's whistleblowing provision should nonetheless apply. Walleri contended that, because Congress eliminated the Bank Board in 1989 while simultaneously creating the OTS as its successor, her report to the Bank Board in 1988 should be interpreted as equivalent to a report made to the OTS from 1989 onward.¹⁴⁴ As Walleri pointed out, to require a report to the OTS in 1988 would have required a report to an agency that did not yet exist.¹⁴⁵

Despite recognizing that Walleri's argument was "cogent[.]" the court refused to accept the argument.¹⁴⁶ Instead, the court adhered to the strict language of the statute. Since the Bank Board was not one of the statutorily authorized whistleblower report recipients, the court held that Walleri's reports to the Bank Board could not form the basis of a whistleblower claim.¹⁴⁷

While the result in *Walleri* may have been due primarily to an oversight by Congress,¹⁴⁸ the case nonetheless reflects the downside of specific external reporting requirements. Walleri reported suspected violations of the law to a party she reasonably believed would correct the problem. Unfortunately, because Congress failed to include that party in its list of acceptable recipients, Walleri did not receive whistleblower protection.¹⁴⁹

III

POLICY ARGUMENTS FOR AND AGAINST INTERNAL, EXTERNAL AND OTHER REPORT RECIPIENT OPTIONS

As indicated in Section I of this Comment, legislatures and courts typically take one of three approaches to report recipient requirements: Many require external reporting to a government body, some require internal reporting, and a few allow either. This section will demonstrate that each of the possible reporting options has merit, but only under certain conditions. By electing a particular option, legislators and courts fail to adequately protect those whistleblowers who find themselves in a situation that would be best served by one of the other options. For this reason, this Comment recommends

143. *Id.*

144. *Id.* at 1581.

145. *Id.*

146. *Id.*

147. *Id.* at 1581-82.

148. The court in *Walleri* acknowledged that Congress's failure to include the Bank Board on its list was likely an inadvertent omission. *See id.*

149. A similar situation arose in *Wyrick v. TWA Credit Union*, 804 F. Supp. 1176 (W.D. Mo. 1992), where a credit union employee reported alleged unlawful activity to the credit union's Supervisory Board and Board of Directors. After the employee was terminated, she filed a claim under the whistleblower provision of the Federal Credit Union Act. *Id.* at 1179-80. The Act, however, only protects those who file reports with the Attorney General or the National Credit Union Administrative Board. As the employee did neither, the court dismissed her claim. *Id.*

a more flexible, open-ended approach to report recipient requirements that provides much broader protections than most current state statutes.

A. External Reporting Requirements

Many state statutes provide protection to a whistleblower only if he or she reports alleged wrongdoing to a public agency. Proponents of an external reporting requirement emphasize the whistleblower's role in protecting the public's welfare¹⁵⁰ and in promoting enforcement of particular statutes.¹⁵¹ Under this view, whistleblowing laws are primarily concerned with protecting society and the public good, not individual employee rights.¹⁵² Proponents of external reporting requirements stress that unlawful activity must be brought to the public's attention and properly investigated in order to ensure widespread compliance with the law and proper redress of injured parties.¹⁵³ If compliance is left to the employer's discretion, these individuals contend, too many problems will remain unaddressed and too many law-breakers left undeterred.¹⁵⁴ In addition, advocates of external reporting requirement note that alerting public authorities to particular problems reduces the costs of investigation while providing legislators with data that can help inform future legislation.¹⁵⁵ Finally, to the extent that the employer's actions are criminal, proper deterrence and retribution requires the involvement of the criminal justice system.

Employer violations of environmental laws illustrate the potential benefit of external reporting requirements. The goal of most whistleblowers is to correct an unlawful or immoral practice.¹⁵⁶ Violations of environmental laws, however, often have third-party effects that continue to cause harm even after an unlawful practice ends. The act of polluting, for example, can have adverse

150. See Joseph C. Telezinski, Jr., Comment, *Without Warning – The Danger of Protecting "Whistleblowers" Who Don't Blow the Whistle*, 27 W. ST. U. L. REV. 397, 416 (2000) (discussing benefits of an external reporting requirement).

151. See *Wyrick*, 804 F. Supp. at 1179 ("If the information is never brought to [the regulatory authority's] attention, but [is brought to the attention of] a nonregulatory authority instead, the regulatory authority does not have the chance to take corrective or preventive measures as is the goal of the statute.").

152. See Telezinski, *supra* note 150, at 416 (discussing benefits of an external reporting requirement).

153. *Id.*

154. It may be cheaper, for example, for an employer to cover up a problem or buy a whistleblower's silence than to correct the wrongdoing. See, e.g., Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1121-25 (2006) (detailing the problem of executive "blocking and filtering" of employee whistleblower reports); Rutzel, *supra* note 17, at 35 (discussing concern that an organization may attempt to "buy" a whistleblower's silence).

155. See Rutzel, *supra* note 17, at 15 (discussing the reduction in public costs that whistleblowing helps achieve).

156. Callahan & Dworkin, *supra* note 10, at 166 (discussing the motivations of whistleblowers).

effects that persist long after the polluting activity ceases.¹⁵⁷ Even if past unlawful activity has no future impacts, there may be victims of past practices who deserve compensation. In these situations, government action may be necessary. To the extent that internal whistleblowers do not make external reports if employers cease to act unlawfully, internal report requirements may enable employers to avoid compensating third parties who were victimized by past practices or allow employers to otherwise avoid paying the full costs of rectifying the situation (such as the costs of an environmental clean-up).¹⁵⁸

Another argument occasionally used to justify an external reporting requirement is that the employer-employee relationship is private and should thus be beyond the purview of the judicial system.¹⁵⁹ According to this view, limiting whistleblower protection to external reports ensures that courts do not interfere with the internal business affairs of employers.¹⁶⁰ It assumes that employees will take matters of sufficient societal importance to external authorities and should be protected only for doing so. Under this theory, matters that remain entirely internal are private and are best resolved by employers. The problem with this view is that it assumes that an external reporting requirement will serve as an accurate screen for public versus private matters. As indicated by the research discussed in this Comment,¹⁶¹ many employees choose their report recipient based on a host of factors, only one of which is the severity of the legal violation.

The main problem with an external reporting requirement is that it ignores the practical reality that most whistleblowers report internally first.¹⁶² Employees prefer internal reporting for a number of reasons. These include feelings of loyalty to an employer, a belief that the employer can more effectively deal with the problem, fears that an external report could lead to termination, a desire to maintain a positive working relationship with the employer, and a lack of awareness as to the appropriate external recipient.¹⁶³

157. Rutzel, *supra* note 17, at 34-35 (discussing the effects of environmental disasters on third parties and the need for external whistleblowing in such cases).

158. *Id.*

159. *Id.* at 14-15 (discussing private nature of employee-employer relationship).

160. The Nevada Supreme Court's opinion in *Wiltzie* supplies an example of this view. In *Wiltzie*, a casino terminated a poker room manager after the manager reported his supervisor's illegal activities to senior management. *Wiltzie v. Baby Grand Corp.*, 774 P.2d 432, 432 (Nev. 1989) Although noting that "[n]o public policy is more basic than the enforcement of our gaming laws," the Court denied the manager's whistleblower claim. *Id.* at 433. It concluded that the manager acted in a "merely private or proprietary" manner when he chose to report internally rather than to the appropriate authorities. *Id.*

161. See *infra* notes 162-65.

162. See John A. Gray, *The Scope of Whistleblower Protection in the State of Maryland: A Comprehensive Statute is Needed*, 33 U. BALT. L. REV. 225, 226-27 (2004) (noting that whistleblowers "typically disclose their concerns externally only after they have received no corrective response internally, and only after much agonizing."); see also Dworkin & Callahan, *supra* note 47, at 281 n.71 (noting that whistleblowers generally report internally first).

163. See Michael Kane, *Whistleblowers: Are They Protected?*, 20 OHIO N.U. L. REV.

The plaintiff in *Green* serves as an illustration of the type of employee who might prefer internal reporting. Green had worked for his employer for over twenty years when he first became aware of his employer's wrongdoing.¹⁶⁴ He was in his fifties at the time.¹⁶⁵ Given his age and the possibility of retaliation (including both termination and industry blackballing),¹⁶⁶ Green had good reasons to avoid unnecessarily disrupting his relationship with his employer. After more than twenty years of employment, he may also have felt a sense of loyalty to the organization, and a desire to allow the organization to solve the problem before undergoing the burden of a government investigation. Finally, Green had no reason, at least initially, to suspect that his employer would not resolve the problem.

Because employees prefer internal reporting, a statute that protects only external disclosures can actually lead to fewer reports of unlawful activity overall. The California Court of Appeals recognized this effect in its opinion in *Collier v. Superior Court*.¹⁶⁷ While discussing California's whistleblower statute, which requires external reporting, the court noted:

If public policy were strictly circumscribed by this statute to provide protection from retaliation only where employees report their reasonable suspicions directly to a public agency, a very practical interest in self preservation could deter employees from taking any action regarding reasonably founded suspicions of criminal conduct by coworkers. Under that circumstance, an employee who reports his or her suspicions to the employer would risk termination or other workplace retaliation. If this employee makes a report directly to a law enforcement agency, the employee would be protected from termination or other retaliation by the employer under Labor Code section 1102.5, but would face an obvious disruption of his or her relationship with the employer, who would be in the unfortunate position of responding to a public agency without first having had an opportunity to deal internally with the suspected problem. These discouraging options would leave the employee with only one truly safe course: do nothing at all.¹⁶⁸

This reasoning further amplifies why the private employer-employee relationship rationale fails. If legislators and courts are not willing to intervene when employers retaliate against internal whistleblowers, employees may choose not to report wrongdoing to anyone.

There are other reasons why an external reporting requirement may be less

1007, 1025 (1994) (noting that up to 75% of federal employees are unaware of their whistleblowing rights).

164. *Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1049-50 (Cal. 1998).

165. *Id.*

166. *See supra* note 9.

167. *See Collier v. Superior Court*, 279 Cal. Rptr. 453, 455-46 (Cal. Ct. App. 1991).

168. *Id.* at 456.

than ideal. For instance, while some violations of the law may require attention from the public, many do not. If employers are willing to correct a violation and the violation has had little impact on third parties, an internal report may be a much quicker and more cost efficient means of resolving the issue than an external report and investigation.¹⁶⁹ This is likewise true when the employee is mistaken about the employer's conduct or its legality. If provided the opportunity, an employer could presumably correct an employee's misapprehension quickly. An external report of such matters might, on the other hand, lead to a costly and unnecessary investigation. For these reasons, a whistleblowing statute that discourages internal reporting might lead to less efficient problem-solving in some circumstances.¹⁷⁰

In summary, an external, public body reporting requirement is advantageous because it provides a public accounting of employer wrongdoing. This accounting helps to safeguard the interests of third-party victims of employer misconduct, to deter other wrongdoers, and to inform future legislative actions. However, such a reporting requirement fails to recognize the reality that employees generally report problems internally. By failing to protect internal disclosures, legislators and courts may actually discourage whistleblowers from reporting unlawful activity to anyone. Moreover, an external requirement may, in some cases, unnecessarily increase the time and cost required to correct a problem.

B. Internal Reporting Requirements

Several states require employees to first report internally in order to receive whistleblower protection.¹⁷¹ Proponents of an internal reporting requirement argue that the employer should be provided with an opportunity to correct a problem before external authorities are notified and that whistleblower laws should supply employees with incentives to notify employers first. According to its supporters, an internal reporting requirement helps to preserve the corporate chain of command, to avoid unwarranted negative publicity, to encourage employee loyalty, and to avoid disruption of the employer-employee

169. See *Passaic Valley Sewerage Comm'rs v. Dep't of Labor*, 992 F.2d 474, 478-79 (3d Cir. 1993) (noting that "it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance"); see also Jarod S. Gonzalez, *Sox, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials*, 9 U. PA. J. LAB. & EMP. L. 25, 28 (2006) (noting that whistleblower claims filed with the Department of Labor "tended to languish within the department for years").

170. See *Lanning v. Morris Mobile Meals, Inc.*, 720 N.E.2d 1128, 1130-31 (Ill. App. Ct. 1999) (noting that employers are in the best position to correct illegal activity on the part of employees).

171. See *supra* Part II.C.

relationship.¹⁷² In addition, some argue that employers can resolve problems more quickly and efficiently than an external government body.¹⁷³ This is particularly true when an employee is mistaken about the employer's conduct or the legality thereof and the employee can have his or her concerns allayed by the employer quite easily. In addition, not only do employers prefer internal reporting, but, as described above, employees also generally prefer to report internally first.¹⁷⁴

Critics of internal reporting requirements worry that such requirements invite employer cover-up and retaliation.¹⁷⁵ Several studies support the view that employer retaliation is prevalent.¹⁷⁶ In one study of eighty-four whistleblowers, "82% experienced harassment after blowing the whistle, 60% were fired, 17% lost their homes, and 10% admitted to attempted suicide."¹⁷⁷ Therefore, contrary to the belief of those who support internal reporting requirements, employees cannot necessarily assume that their employer is ready and willing to solve problems brought to its attention.¹⁷⁸

Moreover, while many employees report internally first, there are nonetheless employees who prefer external reporting. Professors Callahan and Dworkin identified the characteristics of these employees through an analysis of two whistleblowing studies.¹⁷⁹ According to Callahan and Dworkin, employees are likely to report externally when superiors are involved in the wrongdoing, when an illegal activity is essential to an organization's well-being, when the employer failed to respond to previous complaints, or when an employer's organizational culture is hostile to dissent.¹⁸⁰

The plaintiff in *Contreras* provides a good example of the type of individual who might prefer to report externally. Recall that in *Contreras* a subordinate employee notified Contreras that he suspected fellow employees

172. Simoff, *supra* note 9, at 338-39 (providing arguments in favor of internal reporting requirements); see also Culp, *supra* note 9, at 133-34 (providing arguments in favor of internal reporting requirements).

173. See *Passaic Valley Sewerage Comm'rs*, 992 F.2d at 479; see also *Lanning*, 720 N.E.2d at 1128 (discussing efficiency rationale).

174. See *supra* note 162.

175. See Rutzel, *supra* note 17, at 34-35 (discussing employer cover-up); see also Vaughn, *supra* note 62, at 599-602 (discussing employer cover-up).

176. See, e.g., Dobias, *supra* note 22, at 117 (discussing a 2000 study by the Merit Systems Protection Board which revealed that one in fourteen federal employees experienced retaliation after reporting government misconduct, fraud, waste, or abuse); see also Simoff, *supra* note 9, at 326 (discussing a study by the Office of Research Integrity of the United States Department of Health & Human Services which reported that more than two thirds of scientific whistleblowers experience negative consequences for their actions, including one in four whistleblowers losing their job).

177. Culp, *supra* note 9, at 113.

178. See Vaughn, *supra* note 62, at 599-602 (noting that state statutes that require internal whistleblowing "rest upon an exaggerated acceptance of institutional regularity, an acceptance belied by the experience leading to whistleblower protection").

179. Callahan & Dworkin, *supra* note 10, at 164.

180. *Id.*

were engaged in illegal activities. The accusation implicated a manager who was a close friend of Contreras's superior. Rather than report the unsubstantiated allegation immediately, Contreras chose to investigate. He may have done so for multiple reasons. He may have feared retaliation if the allegations proved false. Or he may have feared a cover-up given the stature of the individuals involved. Despite these potential concerns, Ohio law discouraged Contreras from seeking external help. When he did seek such help, he lost the protection of Ohio's whistleblower statute.

Internal reporting requirements are also disadvantageous in situations where a violation of the law necessitates external enforcement. As discussed previously, violations of environmental statutes may require government intervention even after the illegal conduct ends.¹⁸¹ When an employer halts an unlawful activity in response to an internal report, however, whistleblowers are less likely to report externally.¹⁸² Thus, in some situations, an internal reporting requirement can lead to under-correction.

In summary, internal reporting requirements afford employers the opportunity to correct wrongdoing without the expense, publicity, and disruption of an external investigation. The reporting requirement is optimal to the extent that companies are law-abiding and wish to correct wrongdoing. Evidence suggests, however, that companies do not welcome whistleblowers with open arms. Both formal and informal retaliation against whistleblowers is a significant problem. Where the possibility of retaliation exists or where an organization's culture discourages dissent, an internal report may not be feasible. In these situations, an inflexible internal reporting requirement may discourage any kind of reporting. Finally, some unlawful activity, like environmental law violations, may require external enforcement. If employees are required to report these violations internally, significant third party effects may remain unaddressed.

C. External Reporting to the Media or Advocacy Groups

Though rare, federal law does protect employees who blow the whistle to the media in some cases. The Federal False Claims Act, for example, protects those who make an initial report to the media,¹⁸³ while the Whistleblower Protection Act of 1989 permits federal employees to report to any person.¹⁸⁴ Where federal statutes are silent or ambiguous as to appropriate report recipients, some federal courts have interpreted the statutes to permit reports to

181. See *supra* Part III.A.

182. See *id.* (stating that whistleblowers are more likely to report externally when a problem is not resolved).

183. See 31 U.S.C. § 3730(e)(4)(A) (2006) (allowing "original source[s]" of media whistleblowers to bring action under the code section).

184. 5 U.S.C. § 2302(b)(8) (2006).

the media. In *Donovan v. R.D. Andersen Construction Company, Inc.*,¹⁸⁵ for example, the court held that the whistleblower provision of the Occupational Health and Safety Act (OSHA) protects employees who report violations of the Act directly to the news media. Because the Act protects only employees who “file[] . . . complaint[s],” the employer argued that it afforded protection only to employees who submit reports either internally with their employer or externally with the relevant government agency.¹⁸⁶ The court disagreed. Citing the broad remedial purpose of OSHA—namely, to correct workplace health and safety problems—the *Donovan* court concluded that an expansive view of the statute’s whistleblower provision was necessary and that such protection should include reports to the media.¹⁸⁷

While some federal lawmakers have been receptive to whistleblowing to the media, state legislators have not. State statutory protection for employees who blow the whistle to the media or other third parties is very limited.¹⁸⁸ No state statute designates the media as an appropriate report recipient.¹⁸⁹ Moreover, many state statutes explicitly prohibit reports to the media.¹⁹⁰ In the few reported cases involving media whistleblowers, state courts have been likewise unsympathetic.¹⁹¹

Critics of media whistleblowing are quick to point out its disadvantages. First, because news organizations are unlikely to report a story if it is not sufficiently sensational, nor investigate if the subject matter seems esoteric,¹⁹² a report to the media will not necessarily draw public attention. Second, even where a news outlet or another third party recognizes the significance of a whistleblower’s claim, these groups have no direct means of influencing an employer’s conduct.¹⁹³ While government agencies and internal supervisors possess oversight and enforcement capabilities, the media and third party advocacy groups can effect change only indirectly through negative publicity. Third, as with external reports to governmental bodies, reports to the media do not provide an employer with an opportunity to resolve an issue internally. If an employer is willing to correct a problem or if an employee is mistaken about

185. *Donovan v. R.D. Anderson Constr. Co.*, 552 F. Supp. 249, 249 (D. Kan. 1982).

186. *Id.* at 252.

187. *Id.* at 253.

188. Dworkin & Callahan, *supra* note 23, at 364.

189. *Id.*

190. See Callahan & Dworkin, *supra* note 20, at 108 (discussing state statutes).

191. See *Dennison v. Pa. Dep’t of Corr.*, 268 F. Supp. 2d 387, 407 (M.D. Pa. 2003) (holding that the media and third party advocacy groups are not “appropriate authorities” under Pennsylvania whistleblower statutes); *Calabro v. Nassau Univ. Med. Ctr.*, 424 F. Supp. 2d 465, 474-75 (E.D.N.Y. 2006) (holding that an employee who reported employer’s serious health code violations to a local newspaper was not protected under the New York whistleblower statute).

192. See Dworkin & Callahan, *supra* note 23, at 393 (discussing profit motives of news outlets).

193. See Cherry, *supra* note 2, at 1065 (noting that third parties lack direct means of influencing employer behavior).

the employer's wrongdoing, a report to the media can lead to unwarranted negative publicity.

Media whistleblowing offers several benefits, however. First, although the media cannot directly influence corporate behavior, negative publicity or the mere threat of negative publicity can deter corporate misconduct or compel corrective measures.¹⁹⁴ Second, the media often serves as a corporate and governmental watchdog and can spur action when the government either is complicit in wrongdoing or is slow to respond to whistleblower complaints.¹⁹⁵ Third, the confidential relationship that exists between members of the press and their sources provide whistleblowers an incentive to come forward and offers protection from retaliation.¹⁹⁶

These benefits imply that media whistleblowers should be protected in certain circumstances. Such circumstances include situations where the employer or a government agency is slow to respond to a whistleblower's report or an employer threatens to retaliate against the whistleblower.¹⁹⁷ The media's involvement can increase the likelihood that an issue will be resolved or can provide protection (in the form of anonymity) to the employee. The threat of negative publicity may also deter further wrongdoing.

Finally, a report to the media may be justified if the employer's conduct creates an imminent danger to the public's health and safety.¹⁹⁸ Professor David Culp cites the *Challenger* disaster as an example of a situation where a direct report to the media, or even to those persons whose safety is directly threatened, should be protected.¹⁹⁹ Prior to the *Challenger* disaster, engineers at the company that designed the space shuttle's rocket boosters were aware of the dangers of a cold-weather launch.²⁰⁰ Their repeated warnings to both their employer and National Aeronautics and Space Administration (NASA), however, went unheeded.²⁰¹ The engineers did not blow the whistle externally

194. See Andrew Cowan, Note, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387 (1992) (discussing the deterrent value of the threat of negative publicity).

195. Dworkin & Callahan, *supra* note 23, at 385-86; see Stanley Holmes, *Airline Safety: A Whistleblower's Tale*, BUS. WK., Feb. 11, 2008, at 48 (describing retaliation by the Federal Aviation Administration against its own inspectors for reporting suspected safety violations committed by major airlines).

196. Dworkin & Callahan, *supra* note 23, at 393.

197. The threat of retaliation may be particularly effective at deterring whistleblowing if the employee is relatively powerless in the organization, if the wrongdoer is a senior member of the organization, or if the wrongdoing plays a central role in the employer's business. See Callahan & Dworkin, *supra* note 10, at 164 (discussing the reasons why employees turn to the media).

198. See Dworkin & Callahan, *supra* note 23, at 396-97.

199. Culp, *supra* note 9, at 135.

200. *Id.*

201. *Id.* These warnings included discussions that took place on the night before the launch. *Id.*

until after the disaster occurred.²⁰² Given both the magnitude of the potential disaster and the specificity of the danger, a report to the media or even to the astronauts may have been warranted. Culp argues that such a report should be protected even absent the intransigence of NASA and the engineer's employer.²⁰³

D. External Reporting Via the Internet

The Internet now provides employees with another channel to report wrongdoing. According to one estimate, there are over thirty million web journals, or blogs, currently in existence.²⁰⁴ While no law protects whistleblowers who report wrongdoing through a blog,²⁰⁵ blogs offer several potential advantages to whistleblowers. First, a blogger can reach a wide audience, including an employer's customers, investors, and employees.²⁰⁶ Like a media report, a blog posting that reaches the correct audience can jumpstart a government investigation or otherwise influence employer behavior.²⁰⁷ Second, blogging, like reporting to the media, can be done anonymously.²⁰⁸ Third, creating or posting on a blog is not difficult or expensive. Thus, blogs are a very accessible outlet for whistleblowers. Finally, bloggers can publish any type of wrongdoing. A blogger, unlike a media whistleblower, need not worry that his information is sufficiently newsworthy to merit widespread reporting.

Internet whistleblowing has several drawbacks, however. Like a media whistleblower, a blogger cannot be sure that his report will reach a party who is capable of correcting the employer's illegal activity or any audience at all. Moreover, unlike a newspaper or other media outlet, few blogs receive attention beyond a small, personal audience.²⁰⁹ The Internet also lacks a

202. *Id.*

203. *Id.*

204. Rafael Gely & Leonard Bierman, *Workplace Blogs and Workers' Privacy*, 66 LA. L. REV. 1079, 1085 (2006).

205. See Electronic Frontier Foundation, *Blogger's FAQ: Labor Law*, <http://www.eff.org/bloggers/lg/faq-labor.php> (discussing legal protections for workplace bloggers).

206. A 2004 study by the Pew Institute indicated that over 32 million Americans read blogs. LEE RAINIE, PEW INTERNET & AM. LIFE PROJECT, *THE STATE OF BLOGGING* (2005), available at http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf.

207. See Jonathan Silverstein, *Desperate Whistleblower Turns to YouTube*, ABC NEWS, Aug. 29, 2006, available at <http://abcnews.go.com/Technology/story?id=2371149&page=1> (discussing whistleblower's use of the Internet to help spur a government investigation into alleged wrongdoing at Lockheed Martin).

208. See Electronic Frontier Foundation, *How to Blog Safely*, <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php> (describing how to blog anonymously).

209. AMANDA LENHART & SUSANNAH FOX, PEW INTERNET & AM. LIFE PROJECT, *BLOGGERS: A PORTRAIT OF THE INTERNET'S NEW STORYTELLERS* (2006), available at <http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf> (reporting that just 10% of all blogs receive attention from public officials while half of all bloggers state that their audience is made up of people they personally know).

censoring function. Anonymous bloggers can instantly report their concerns (whether or not well-founded) with little fear of reprisal.²¹⁰ Newspapers, on the other hand, must consider the reputations of both the reporter and the publication. Because the same incentive does not necessarily exist for bloggers, blogs may contain a higher percentage of false or incorrect claims.

Because blog postings are more likely to be incorrect and are less likely to reach an appropriate audience, whistleblower statutes should not provide protection to a whistleblower who relies solely on blogging. However, legislators may want to permit Internet whistleblowing in some situations. For example, if an employer and the responsible government agency refuse to correct an alleged wrongdoing, the employee may justifiably turn to the Internet. Given the Internet's lack of a self-censoring mechanism, however, employee bloggers should only receive protection if their suspicions prove correct. This compromise would protect the employer's interest in avoiding undeserved negative publicity, while encouraging blogging when other resolution mechanisms fail.

The story of a recent Internet whistleblower²¹¹ provides an example of when Internet whistleblowing may deserve protection. In August 2006, Michael De Kort, an engineer at Lockheed Martin, was fired shortly after posting a video on the website YouTube.²¹² The video described several defects in a fleet of boats that Lockheed had refurbished for the Coast Guard. Prior to posting the video, De Kort had reported his concerns to his supervisors, the Coast Guard, and members of Congress. According to De Kort, supervisors at both Lockheed and the Coast Guard told him to remain quiet because the project was behind schedule and over budget. Frustrated with the lack of a response from Lockheed and the government, De Kort created the video. Several thousand individuals viewed De Kort's ten-minute clip, which also garnered significant press coverage. This attention ultimately led one Congressman to demand a public explanation from Lockheed.²¹³ If De Kort's allegations prove true, therefore, his Internet posting will have succeeded in resolving a problem that both internal and external reports did not. Such a report merits whistleblower protection.

IV

PROPOSED SOLUTION: REASONABLENESS STANDARD

Many state whistleblower statutes are inadequate because they impose rigid report recipient requirements. To the extent that employees understand

210. Defamation laws may provide some check on bloggers.

211. See Griff Witte, *On YouTube, Charges of Security Flaws*, WASH. POST, Aug. 29, 2006, at D1.

212. *Id.*

213. *Id.*

their rights prior to blowing the whistle,²¹⁴ a particular reporting requirement can discourage employees from reporting at all.²¹⁵ For those employees who do not understand their rights, reporting requirements frequently disappoint good-faith attempts to correct wrongdoing.²¹⁶ When the law denies protection to whistleblowers on technical grounds, other potential whistleblowers may be discouraged.

In addition, because employees are generally unaware of whistleblower rights,²¹⁷ their selection of a report recipient is primarily driven by practical considerations. These considerations include the type and significance of the alleged misconduct, the employee's status within the organization (both in terms of experience and position), the organizational status of the wrongdoers, the organization's culture, and the fear of retaliation.²¹⁸ A single reporting requirement cannot account for the diversity of situations employees face.

For these reasons, I propose a flexible, three-tiered standard for report recipient requirements. First, a whistleblower should receive protection for internal reports to supervisors *or* external reports to a government body so long as the employee reasonably believes that the report recipient can remedy the alleged wrongdoing. This belief must be both objectively and subjectively reasonable. Second, employees who report wrongdoing to the media or third party advocacy groups should receive protection if they can show that both an internal and an external report would have been ineffective.²¹⁹ Third, legislators should protect an employee who reports wrongdoing via the Internet if the employee has tried other channels to no avail, the employee reasonably believes that his or her posting will reach a recipient who can resolve the issue, and the employer is actually violating the law.

In order to determine whether an employee possesses an objectively reasonable belief that his or her report recipient will remedy the alleged wrongdoing, a judge or jury would evaluate a number of factors. These factors include: the employee's relationship with the employer (including the employee's tenure, seniority, and job responsibilities); the report recipient's identity and position within or outside the company; the seriousness of the alleged wrongdoing; the centrality of the misconduct to the organization's mission; the identity of the wrongdoers and their role within the organization; the employer's responsiveness to previous complaints; the existence of established internal reporting channels; and, if the report is external, the nature of the work performed by the relevant government agency. For example, an

214. One federal study indicated that as many as 75% of federal employees are unaware of their whistleblowing rights. Kane, *supra* note 163, at 1025.

215. See Collier v. Superior Court, 279 Cal. Rptr. 453, 455-46 (Cal. Ct. App. 1991).

216. See *supra* Part II.

217. See *supra* note 163.

218. See Callahan & Dworkin, *supra* note 10, at 162-63.

219. One situation where this might be true is where an employer's conduct creates an imminent and substantial risk of public harm.

employee who reports suspected unlawful conduct to a superior through an established internal channel that has been effective in the past or to a government agency that is tasked with monitoring the suspected conduct would likely meet the objective element of the proposed standard. On the other hand, an employee who complains to a co-worker who is not in a position to remedy the problem or who has been unresponsive to past complaints may not have acted in manner consistent with that of a reasonable person who wished to solve the problem.

The subjective component of the proposed test would require the court to evaluate whether the employee actually believed she was reporting the matter to an individual who would resolve the problem. Most conscientious whistleblowers, such as those detailed in the case studies above, will possess the requisite subjective belief.²²⁰ However, an employee who chronically complains and demonstrates no interest in the remediation of those complaints might not meet the subjective portion of the standard (even if the employee filed his complaints with an objectively reasonable party).

A. Advantages of a Flexible Standard

The proposed standard would more adequately reflect the diversity of situations in which whistleblowers find themselves. In *Contreras*, for example, the fear of retaliation from superiors and the nature of the alleged wrongdoing prompted the employee to seek external help.²²¹ By contrast, the employees in *DeOreo* and *Green* may have chosen to make internal reports because they belonged to an organization with well-established internal reporting procedures or because they did not want to disrupt a longstanding relationship with their employer.²²² A flexible standard could protect employees in both situations because it would protect employees who, like the employees in *DeOreo*, *Green*, and *Contreras*, choose a reasonable report recipient.

A flexible standard also avoids the unprincipled denial of protection to good-faith whistleblowers. In *Walleri*, for example, the plaintiff reported unlawful conduct to a government agency that Congress may have inadvertently excluded from the list of acceptable report recipients.²²³ In *DeOreo*, the plaintiff was allegedly fired after she filed (in accordance with police department procedures) a report of sexual harassment with her superiors. According to the court, the report was insufficient to afford her whistleblower protection because the police department was not the government agency

220. See, e.g., *City of Fort Worth v. DeOreo*, 114 S.W.3d 664, 671-73 (Tex. App. 2003) (DeOreo filed internal complaints with supervisors in police department who had responded to complaints in the past).

221. See *supra* Part II.A.

222. See *supra* Part II.B-C.

223. See *supra* Part II.D.

tasked with enforcing sexual discrimination laws.²²⁴ Despite following internal procedures and submitting her report of wrongdoing to the police department, DeOreo received no protection. A more flexible standard would, by contrast, protect both Walleri and DeOreo because both chose a report recipient that they reasonably believed could remedy their employer's wrongdoing.

Finally, a broader approach to whistleblower protection may encourage whistleblowing more generally. The current patchwork of state protections creates confusion for potential whistleblowers and therefore discourages whistleblowing. Moreover, when the law fails to protect good-faith whistleblowers such as the plaintiffs in *Contreras*, *DeOreo*, *Green*, and *Walleri*, courts and legislators may create the perception that whistleblowers are without legal recourse. Given the high risk of retaliation that whistleblowers face,²²⁵ a perceived lack of legal protection may further dissuade employees from coming forward. A broader, more flexible standard would promote the belief that whistleblowers can rely on the courts for vindication and would make retaliation more expensive for employers.

B. Disadvantages of a Flexible Standard

A flexible reporting standard has two primary disadvantages. First, it gives employees discretion when choosing a report's recipient. As a result, employees will not always report to the optimal individual or agency. For example, the EPA may be the optimal report recipient in an environmental whistleblowing case. A flexible report recipient standard, however, would likely protect both a report to the EPA and to an internal supervisor. In other words, a flexible standard, unlike an internal or external recipient requirement, does not create incentives to report to a particular entity.

The second disadvantage of a flexible standard is that it may encourage or prolong lawsuits. Where a whistleblower does not meet explicit reporting requirements, a judge can summarily dismiss the case.²²⁶ A more flexible "reasonableness" standard would likely make early judicial disposition more difficult because of its fact-intensive nature. In addition, lawyers are less likely to file cases where employees have clearly failed to meet a statute's explicit requirements. A flexible standard would encourage more terminated employees to file suit.

An increase in the number of lawsuits is not problematic, however, if whistleblowers have meritorious claims. In fact, a more flexible standard is designed to increase the protections afforded to whistleblowers, and this additional protection will naturally lead to an increase in the number of suits filed. The problem arises where a flexible standard fosters unmeritorious or

224. See *supra* Part II.B.

225. See *supra* note 9.

226. See *supra* Part II.

frivolous claims.²²⁷ One district court described this phenomenon as the “chronic complainer” problem.²²⁸ With a broader, more flexible approach, a disgruntled employee may have more incentive to file a claim. Even if ultimately unsuccessful, an unmeritorious lawsuit can require employers to expend significant financial and non-financial resources defending the action.

C. Response to Disadvantages

The first drawback of a flexible recipient standard is that it does not incentivize a whistleblower to report to a particular recipient. As an empirical matter, however, it is not clear that specific reporting requirements currently provide the desired incentives.²²⁹ An employee’s choice of report recipient is driven by pragmatic considerations, not by statutory requirements.²³⁰

In addition, if legislators are concerned with providing incentives to whistleblowers, they can do so directly. The federal False Claims Act (“the FCA”), for example, offers financial incentives to those who blow the whistle on government contractors.²³¹ Under the FCA, a whistleblower can receive up to 30% of the amount recovered from a contractor who is defrauding the government.²³² This incentive has led to remarkable results. Between 1986 and 2005, the government recovered over \$9 billion from government contractors, while FCA whistleblowers earned over \$1.5 billion.²³³ States can adopt similar incentives to encourage whistleblowers to report to particular recipients. For example, environmental laws could offer financial rewards to those who file claims with the EPA or the equivalent state agency that lead to employer sanctions. Likewise, employers who wish to promote internal whistleblowing could offer financial or other incentives to employees to report internally first.

The second disadvantage of a more flexible recipient standard is that it might encourage or prolong unmeritorious lawsuits. However, several arguments suggest that this concern is not warranted. First, multiple federal statutes and even a few state statutes already contain broad report recipient

227. Joshua L. Baker, *Chapter 484: The Strongest Whistleblower Protection Law in the Nation – Did We Need It, and Can We Really Afford It?*, 35 MCGEORGE L. REV. 569, 578 (2004) (discussing the possibility that a more protective amendment to California’s whistleblower law could lead to more litigation and abuse of California companies “by disgruntled employees as well as those engaged in organized efforts to harass particular companies”).

228. See *Blackburn v. United Parcel Serv., Inc.*, 3 F. Supp. 2d 504, 517 (D.N.J. 1998) (noting while the New Jersey whistleblower statute is considered the broadest in the nation, “it is still a ‘Whistleblower Act,’ not a ‘Chronic Complainer Act.’”).

229. See also Gray, *supra* note 162, at 226 (noting that whistleblowers “typically disclose their concerns externally only after they have received no corrective response internally, and only after much agonizing.”).

230. Callahan & Dworkin, *supra* note 10, at 151.

231. See 31 U.S.C. § 3729 (2006).

232. 31 U.S.C. § 3730(d)(1)-(2).

233. Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN. ST. L. REV. 625, 643-44 (2007).

provisions.²³⁴ There is no evidence that broader standards have led to a deluge of claims or unduly burdened the court system.

Second, the proposed standard requires that an employee have both an objectively and subjectively reasonable belief that the chosen recipient can effect change. If an employer historically ignores a frequently complaining employee, that employee is unlikely to meet this requirement. Moreover, the objective reasonableness element of the standard does not preclude the possibility of summary judgment. For example, New Jersey's whistleblower statute protects employees who report what they reasonably believe is a violation of any law, rule, or regulation, even if that belief is mistaken.²³⁵ Despite this fairly broad protection, courts have granted summary judgment in favor of employers on the grounds that an employee failed to establish that he or she had an objectively reasonable belief that the employer violated the law.²³⁶ Courts could similarly grant summary judgment to employers where employees cannot demonstrate that they possess an objectively reasonable belief that a report recipient would correct the employer's unlawful conduct.

Third, the recipient requirement is only one element of a whistleblower's retaliation claim.²³⁷ The existence of additional requirements minimizes the likelihood that a more flexible recipient standard will lead to an increase in undeserving claims. In *Blackburn v. United Parcel Service*,²³⁸ for instance, the court held that a UPS employee's "forest of complaints" did not meet New Jersey's requirement that an employee reasonably believe that he or she is reporting unlawful acts.²³⁹ Similarly, in *Colon*, the court dismissed an employee's claim on the grounds that the employee could not establish a causal connection between his termination and his alleged whistleblowing conduct.²⁴⁰ Thus, an unmeritorious claim will not proceed if the other requirements of a retaliation claim are not met.

D. Applying the Proposed Standard

The proposed standard would likely lead to a different outcome in the four cases discussed in section II.B. In *Contreras*, the plaintiff contacted external law enforcement agencies as part of his investigation into alleged theft and drug

234. See *supra* Part II.

235. N.J. STAT. ANN. § 34:19-3 (West 2000).

236. See, e.g., *Blackburn v. United Parcel Serv., Inc.*, 3 F. Supp. 2d 504, 517 (D.N.J. 1998); *Colon v. Prudential Ins. Co. of Am.*, No. L-10588-02, 2006 WL 507732, at *11 (N.J. Super. Ct. App. Div. Mar. 3, 2006).

237. The other elements vary by state, but they generally include the nature of the violation (some states only protect violations of a particular type or severity), the accuracy of the employee's suspicions (some states require that the employer is actually violating the law while others only require that the employee have reasonable belief that the employer is violating the law), retaliatory conduct by the employer, and causation.

238. *Blackburn*, 3 F. Supp. 2d at 517.

239. *Id.*

240. *Colon*, 2006 WL 507732 at *11.

use by co-workers.²⁴¹ Because the local police and state's attorney are specifically tasked with investigating such crimes, Contreras's decision to seek their assistance was objectively reasonable. Contreras also subjectively believed that these authorities could help resolve the issue. Thus he would meet the proposed standard and be afforded whistleblower protection.

Contreras's eventual report to his superiors would likely also receive protection under the new standard. Absent a history of indifference to complaints, an internal report to a superior will almost always be both subjectively and objectively reasonable. In Contreras's case, he reported the results of his investigation to the company's president. Such an individual is obviously in a position to bring about change. While a court could find that the president's personal relationship with the wrongdoer rendered Contreras's belief that the president would act on his information unreasonable, it is more likely that Contreras acted reasonably given the absence of additional indicators of the president's indifference to internal complaints. For these reasons, Contreras's internal report, as well as his external report, would likely meet the proposed standard.

In *DeOreo*, the plaintiff filed two internal reports of sexual harassment.²⁴² These reports could not form the basis of a whistleblower claim under Texas law, however, because the court did not deem the internal channel to be an "appropriate law enforcement authority."²⁴³ Under the proposed standard, however, the reports would likely warrant protection because several facts render DeOreo's decision to report internally both objectively and subjectively reasonable. First, DeOreo had utilized the same internal reporting channel in the past and the issues identified in her reports had been resolved to her satisfaction.²⁴⁴ Second, the Fort Worth Police Department encouraged employees to resolve issues through internal channels.²⁴⁵ It would be anomalous to deny protection to employees who utilize those channels in good faith. Third, DeOreo reported potential violations of the law to the police department. DeOreo could reasonably expect that the police department would take allegations of unlawful activity by its employees seriously. In sum, DeOreo had both an objectively and subjectively reasonable belief that the recipients of her internal report could bring about change, and thus would be protected under the proposed whistleblower standard.

In *Green*, the plaintiff, a twenty-year employee, submitted multiple complaints to his supervisors about allegedly unlawful conduct occurring in the

241. *Contreras v. Ferro Corp.*, 652 N.E.2d 940, 940 (Ohio 1995).

242. *City of Fort Worth v. DeOreo*, 114 S.W.3d 664, 668 (Tex. App. 2003).

243. *Id.* at 669.

244. In one instance, she reported that her husband, a fellow police officer, assaulted her while off duty. As a result of the report, her husband was convicted of criminal charges and dismissed from the police force. *Id.* at 667-68, 671-75.

245. The Fort Worth police department, like most police departments, had an Internal Affairs department. *Id.*

workplace.²⁴⁶ Although the company did not respond to Green's most serious allegations, it did correct several lesser practices.²⁴⁷ Green, therefore, had reason to believe that his reports could lead to a change in company practices. In addition, Green was terminated as he began to gather more formal evidence of his employer's violations. These efforts to collect formal evidence and to escalate his complaints demonstrate that he was not simply a chronic complainer who remained satisfied with ineffective internal reports. Rather, he conscientiously sought to correct his employer's serious wrongdoing in a manner that was objectively and subjectively reasonable.

The *Walleri* case would almost certainly come out differently under the new standard. Walleri filed her report with the FHLBB, the immediate predecessor to the OTS.²⁴⁸ Congress recognized the reasonableness of such a report when it granted whistleblower protection to employees who report to the OTS.²⁴⁹ Walleri was therefore denied whistleblower protection not because her choice of recipients was unreasonable, but because Congress inadvertently excluded the FHLBB from its list of report recipients.

In each of the above cases, the whistleblowers reported wrongdoings to reasonable recipients. These employees did not receive protection, however, because they did not meet the rigid reporting requirements of the applicable whistleblower statutes. A more flexible standard would help avoid these absurd results.

A flexible standard would not protect all employees who complain, however. In *Blackburn*, for example, an employee submitted "a potpourri of . . . unrelated complaints" to supervisors over a several month period.²⁵⁰ These complaints were largely ignored.²⁵¹ The proposed recipient standard would likely not protect such an employee. The employer's repeated disregard for prior complaints is evidence that the employee did not have the requisite objective or subjective reasonable belief that his reports would correct the employer's wrongdoing. Likewise, complaints to non-supervisory co-workers or to external sources that are unlikely to resolve an issue are not likely to receive protection.

CONCLUSION

There is little dispute that whistleblowers play an important role in corporate oversight and law enforcement. Despite, or perhaps because of, their

246. *Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1050 (Cal. 1998).

247. *See id.* at 1049-50.

248. *Walleri v. Federal Home Loan Bank of Seattle*, 83 F.3d 1575, 1578-79 (9th Cir. 1996).

249. *Id.* at 1579.

250. *Blackburn v. United Parcel Serv., Inc.*, 3 F. Supp. 2d 504, 517 (D.N.J. 1998).

251. The employee's supervisors denied even receiving several written complaints that the employee introduced at trial. *Id.*

value as watchdogs, whistleblowers are frequently the victims of both formal and informal retaliation. Unfortunately, most current state whistleblower laws do not provide adequate protection. The overwhelming majority of states impose inflexible report recipient requirements on whistleblowers and deny protection to those individuals who make reports to disfavored recipients. Most states require employees to file a complaint with an external government body. In the states that adopt this rule, individuals who make only internal reports receive no state statutory protection. A few states utilize the opposite rule, requiring employees to report internally to receive legal protection from retaliation. Virtually no state law allows reporting to the media or other non-governmental third parties.

While each particular recipient rule is sensible under certain conditions, no single rule sufficiently reflects the diversity of situations in which whistleblowers find themselves. For example, while an external reporting requirement may promote public accountability, it fails to recognize the practical reality that most whistleblowers report internally. The decision by legislators to limit protection to only those whistleblowers who report to a particular recipient therefore results in frequent denials of protection to otherwise good-faith whistleblowers.

In order to avoid such unjust results, states should adopt a more flexible report recipient standard. Rather than limiting the possible recipients, states should allow employees to report either internally or externally to any government agency so long as the employee possesses an objectively and subjectively reasonable belief that the report's recipient can alter the employer's unlawful conduct. A flexible standard would also afford protection, under limited circumstances, to an employee who reports to the media or by using the Internet.

A flexible standard provides several advantages. First, unlike a restrictive, specific-recipient standard, it can protect a more diverse set of deserving whistleblowers. Second, a flexible standard avoids the seemingly arbitrary denial of protection to otherwise good-faith whistleblowers like the plaintiffs in *Contreras*, *DeOreo*, *Green*, and *Walleri*. Finally, by increasing the amount and availability of protection, a more flexible standard will promote whistleblowing more generally.