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Kraus v. New Rochelle Hosp. Medical Ctr.: Are Whistleblowers Finally Getting the Protection They Need?

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NOTES

KRAUS V. NEW ROCHELLE HOSP. MEDICAL CTR.: ARE WHISTLEBLOWERS FINALLY GETTING THE PROTECTION THEY NEED?

INTRODUCTION

The term “whistleblower” is apparently derived from the act of English bobbies (policemen) blowing their whistles, upon becoming aware of the commission of a crime, to alert the general public and other law enforcement officials within the zone of danger about the criminal act. To many, however, the word “whistleblower” represents heroes who risk their lives or careers for the benefit of society. On the other hand, critics perceive them to be nothing short of “tattletales,” “snitches,” or “industrial spies” who toss out employee loyalty for furtherance of their own political, ethical, moral, or personal agendas. Whether considered a valued protector of society or simply a self motivated stool pigeon, a whistleblower is defined as someone “who, believing that the public interest overrides the interest of the organization he serves, publicly ‘blows the whistle’ if the organization is involved in corrupt, illegal, fraudulent, or harmful activity.”

1. Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 727 (Tex. 1990) (Doggett, J., concurring) (citing BLOWING THE WHISTLE 18 (Charles Peters & Taylor Branch eds., 1972)). Modern day analogies to the whistleblower include: a referee blowing the whistle to enforce the rules of the game; a police officer blowing the whistle to direct traffic; a lifeguard blowing the whistle to direct swimmers; and a foreman blowing the whistle to communicate to the workers. Kent D. Strader, Comment, Counterclaims Against Whistleblowers: Should Counterclaims Against Qui Tam Plaintiffs be Allowed in False Claims Act Cases?, 62 U. CIN. L. REV. 713, 764 (1993).


If the "whistle" is blown, the employees who speak out risk not only retaliation by their employers but also devastation of their careers. Retaliation may be in the form of a demotion, co-worker harassment, denial of advancement, or termination. Employers rationalize this harsh treatment of whistleblowers by claiming that discharge is necessary to enforce employee loyalty, to avoid disruptions of employee morale, to preserve internal company security and procedures, or to avoid public embarrassment of the employer. In addition to the very real possibility that whistleblowers may lose their jobs, prospective employers may fear hiring whistleblowers, which could make a known whistleblower practically unhireable. Considering these possible consequences of whistleblowing, a potential whistleblower must sincerely believe that the protection of society from wrongdoing is paramount to any other personal considerations including the loss of one's career.

Until recently, whistleblowers had no legal recourse for enduring the consequences of whistleblowing. Over the last few decades, however, whistleblower protection laws have been passed by Congress as well as a majority of the state legislatures.

Part I of this note focuses on the history and intent of New York's whistleblower statute. Part II dissects New York's statutory whistleblower protection and examines relevant case law. Part III explores the first victory for whistleblowers under the New York Whistleblower Statute. Part IV presents an overview of other states' whistleblower statutes.

Part V explores the problems with New York's whistleblower statute, including possible amendments to broaden the statute's otherwise limited protection. Although New York was one of the first jurisdictions to enact a whistleblower statute, its protection of

5. Lofgren, supra note 4, at 317. For a complete discussion of psychological, social, and economic considerations involving a whistleblower's decision, see generally MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES (1992).
8. Lofgren, supra note 4, at 317.
9. Lofgren, supra note 4, at 317.
11. See infra note 113 and accompanying text.
13. Id. For example, this section — enacted in 1984 — deals with private sector em-
whistleblowers is severely limited.

I. HISTORICAL DEVELOPMENT AND INTENT

Protection for whistleblowers commenced only a little over a decade ago. In 1982, the New York State Assembly passed a whistleblower protection bill, but it failed to gain State Senate approval. In early 1983, a whistleblower bill was reintroduced in the New York State Legislature; this proposed bill provided greater protection to private sector employees than the statute finally enacted. Both the standing law and the 1983 proposed bill included protection for whistleblowers who disclose "to a supervisory authority or to a public body an activity, policy, or practice of the employer that the employee reasonably believes to be a violation of law or regulation, or that the employee reasonably believes poses a substantial and impending danger to public health or safety." However, the 1983 proposed bill offered protection to private sector employees who (1) provided information to, testified before, or otherwise cooperated with a public body conducting an investigation, hearing or inquiry with respect to any violation of law, rule or regulation; and (2) refused to participate in, or otherwise objected to, conduct which the employee reasonably believed either involved a violation of law, rule, regulation, or posed a substantial and impending danger to public health or safety. In addition, the proposed 1983 bill contained a provision allowing an employee to disclose to the media situations presenting a serious imminent threat to human health or safety, where disclosure to a government body had already been made, and where that body had failed to take appropriate action within a reasonable time. Although the bill was passed by the State Assembly, it never became law.

Yet another bill which failed to become law involved prote-
tion of certain licensed professional employees against retaliatory discharges or other punitive action for refusing to engage in professional misconduct.20

While the New York State Legislature was considering several types of statutory protections for at-will employees,21 the New York Court of Appeals, New York's highest court, in Murphy v. American Home Products Corp.,22 declined to recognize whistleblower protection under the common law, stating that "such recognition must await action of the Legislature."23 In Murphy, the plaintiff, a fifty-nine year-old assistant treasurer and accountant, was allegedly dismissed in retaliation for reporting the defendant-employer's improprieties to its officers and directors.24 Murphy also alleged that he was dismissed in retaliation for his refusal to personally engage in the alleged accounting improprieties.25 Despite the plaintiff's persuasive arguments, the Court of Appeals dismissed the cause of action, stating "that such a significant change in our law is best left to the Legislature."26

The goal of New York Labor Law § 740, the current whistleblower statute, is to encourage those at the working level to report hazards, improprieties and wrongdoings to supervisors, and if necessary, to public authorities.27 The provision, if it works as in-

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21. The employment-at-will doctrine provides that, absent an express agreement to contrary, either employer or employee may terminate their relationship at any time, for any reason. This employment relationship has no specific duration, and may be terminated at will by either the employee or the employer, for or without cause. BLACK'S LAW DICTIONARY 525 (6th ed. 1990). See also Sabetay v. Sterling Drug, Inc., 506 N.E.2d 919 (N.Y. 1987).
23. Id. at 87.
24. This reporting was required by internal company regulations. Specifically, plaintiff reported "that he had uncovered at least $50 million in illegal account manipulations of secret pension reserves which improperly inflated the company's growth in income and allowed high-ranking officers to reap unwarranted bonuses from a management incentive plan." Id.
25. Id.
26. Id. at 89. The court reasoned that the New York State Legislature had "infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of various segments of the community that would be directly affected . . . , and to investigate and anticipate the impact of imposition of such liability," and was best suited to determine if such a significant change was appropriate. The court also noted that proposed whistleblower legislation was then pending before the legislature. Id. at 89-90.
tended, “would help to offset somewhat the frequent tendency of layers within organizations to screen out information which might cause embarrassment if [that information] reached the top of the organization or the outside.”28 Despite this praiseworthy goal, this statute completely fails to provide the protection whistleblowing employees deserve.29 Whistleblowers “risk their lives and careers for the public good”; therefore, they must be ensured protection.30

II. NEW YORK’S WHISTLEBLOWER STATUTE

In 1984, New York State Governor Cuomo signed into law what is commonly known as New York’s Whistleblower Statute.31 This law created an express statutory exception to the employment at-will rule for the purpose of encouraging employees to report illegal practices without fear of reprisal.32 The private sector protection, effectuated on September 1, 1984, provides in relevant part:

2. Prohibitions. An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:

   (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety;

   (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or

   (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.33

The statute defines “retaliatory personnel action” broadly to in-

28. Id.
30. Lofgren, supra note 4, at 316.
31. This law is entitled “Retaliatory Personnel Action by Employers.” N.Y. LAB. LAW § 740 (McKinney 1988 & Supp. 1994). See also N.Y. CIV. SERV. LAW § 75(b) (McKinney Supp. 1990) (this law forbids retaliatory action by public employers). N.Y. CIV. SERV. LAW § 75(b) is a broader statute; it affords more protection to employees than N.Y. LAB. LAW § 740. This note will not address the issue of retaliatory firing of a public employee.

Legislative history indicates that this final bill was the result of a merger of a public employee bill proposed by Governor Cuomo in January 1984 and a revised version of the 1983 Assembly bill; see supra note 15 and accompanying text.
32. Minda, supra note 29, at 276.
33. N.Y. LAB. LAW § 740(2) (McKinney 1988).
clude "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment."34 However, the severe limits imposed by the Legislature have curtailed the implementation of this statute by providing that the protection against "retaliatory personnel action" will only apply in cases where an employee has brought the "violation of law, rule or regulation to the attention of a supervisor of the employer and has afforded such employer a reasonable opportunity to correct [the] activity, policy or practice" that is the subject of the employee’s complaint.35

In addition to the above limitation, the statute includes a daunting deterrent to employees contemplating bringing suit against employers for "retaliatory personnel action"; the statute includes a provision which allows for the awarding of attorneys’ fees and court costs against the employee-plaintiff "if the court determines that an action brought by an employee under [§ 740] was without basis in law or in fact."36 The effectiveness of the statute must be questioned when employees’ good faith reporting of employers’ illegal or unsafe practices may be punished by the awarding of attorneys’ fees and court costs against them.

Further proof of § 740’s narrow application may be found in comments contained in the Act’s Bill Jacket, which state that § 740 “protects public and private employees only in situations where disclosures of violations of law, rule or regulation” would prevent adverse effects to the public health and safety.37 Similarly, the New York State Attorney General’s Memorandum discussing the application of § 740 states: “[t]he bill is intended to protect employees who disclose to governmental authorities information about, or refuse to engage in, employer wrongdoing which is dangerous, unsafe or inimical to the public welfare.”38

34. Id. § 740(1)(e).
35. Id. § 740(3).
36. Id. § 740(6).
38. Attorney General’s Memorandum, S.10074 (1984) (quoted in Remba, 545 N.Y.S.2d at 142). The Attorney General’s Memorandum further provides an example of conduct that would not, in his opinion, come within the purview of the law:

This bill, however, does not clearly protect all “whistleblower” employees. It is unclear whether the bill would, in all situations, provide a remedy for employees who refuse to engage in or who reveal illegal financial or accounting practices, such as filing false tax returns on the employers behalf. If we are ever to make a
Because of the statute’s express limitations, it fails to protect an employee who reports a suspected violation of the law which the employee “reasonably believes” to be unlawful but which is later found to be legal. The statute further fails to protect employees who report actual violations of law that do not meet the “substantial and specific danger to the public health or safety” test.  

The difficulties in asserting a viable claim under New York’s whistleblower statute become magnified upon examination of specific sections of the statute. In particular, problems arise when potential claimants try to fall within the narrow scope of the statute’s requirement that the violation must create a substantial and specific danger to public health or safety, that there must be notice to the employer of the violation, or that an “actual” violation of law, rule or regulation, rather than a reasonable belief that a wrongdoing, has occurred.

A. The “Actual” Violation Requirement

The New York whistleblower statute’s requirement that there be an “actual” violation of law, rule or regulation, rather than a good faith belief that there has been a violation, presents too harsh a standard to meet. This standard leaves an employee who reports a situation that falls short of an actual illegality unprotected from retaliation.

In Kern v. DePaul Mental Health Serv., for example, the plaintiff, a part-time resident aide at a residence for mentally handicapped individuals, alleged a male resident of the facility engaged in nonconsensual intercourse with another resident under circumstances that appeared to be rape. The plaintiff alleged that she was terminated by the hospital for whistleblowing when she reported the matter.
to the district attorney’s office.\textsuperscript{44}

The court chose to interpret the whistleblower statute to mean that the mere “belief on the part of the employee that a violation has occurred is not sufficient to invoke the statute’s protection.”\textsuperscript{45} Thus, although the employee had acted in good faith and disclosed the conditions at the hospital with the risk of retaliation, the facts did not demonstrate an “actual” violation of law.\textsuperscript{46} Consequently, the plaintiff was unable to invoke the protection of the statute.\textsuperscript{47}

In \textit{Connolly v. Harry Macklowe Real Estate Co.},\textsuperscript{48} the First Department of the Appellate Division of New York likewise held that plaintiffs must establish an “actual” violation of law, rule or regulation in order to maintain a cause of action.\textsuperscript{49} In \textit{Connolly}, the plaintiff alleged that she was dismissed in response to notifying management that a building manager’s “erratically violent” behavior posed a danger to tenants in the building.\textsuperscript{50} The court held that the plaintiff failed to delineate a violated law and reversed the trial court’s denial of the defendant’s motion to dismiss.\textsuperscript{51}

Similarly, other New York courts have held that an “actual” violation must be alleged in order for a plaintiff to maintain this cause of action. In \textit{Bellingham v. Symbol Technologies},\textsuperscript{52} the court ruled that a plaintiff failed to properly plead a cause of action because the record did not reveal “any reasonable investigation by the plaintiff premised on an actual violation of law.”\textsuperscript{53}

Many claimants have been left unprotected as a result of the New York courts’ strict interpretation of the statute’s requirement of an “actual” violation. This signals to potential whistleblowers that their good faith belief of a wrongdoing may be inadequate unless an unquestionable violation of law, rule or regulation has occurred. Because of this, many potential whistleblowers will opt not to blow the
whistle for fear that they will not be protected under this statute. The strict “actual” violation requirement demands that whistleblowers be able to determine whether an actual violation of law occurred prior to coming forward with information. Many whistleblowers may not be able to draw that legal conclusion.

B. Notice to Supervisor Requirement

A plaintiff is prevented from successfully asserting a cause of action unless the disclosure for which he or she allegedly was fired was brought to the attention of a supervisor before the employee made any public disclosure. In addition, a whistleblower must have given the employer a reasonable opportunity to correct the situation before making any public disclosure.

If the purpose behind the statute is to protect the public from these illegal activities, what is the reasoning for keeping these problems in-house? While giving employers the opportunity to correct problems rather than risk public embarrassment seems both compelling and honorable, it also affords them ample time to cover up any wrongdoing or, if necessary, terminate the whistleblower. Employees are stripped of any anonymity when they are required to bring the incriminating information before their supervisors. Not only does this requirement serve to deter whistleblowers from coming forward, but absent such notification to a supervisor, they will not be protected by the statute.

Since the goal of this statute is to restrict employers from their frequent tendency to shield potentially damaging information from the public, commentators have argued that it is not wise to place the undue burden on the whistleblower of notifying the supervisor before public disclosure. Another difficulty with the notice requirement is that the whistleblower’s report may never amount to anything more than an initial report; however, it could potentially lead to that person being branded as a disloyal employee or ostracized by fellow co-

54. N.Y. LAB. LAW § 740(3) (McKinney 1988).
55. Id.
56. See generally Feerick, supra note 41, at 592.
58. See Feerick, supra note 41, at 592.
59. See Feerick, supra note 41, at 592.
60. See, e.g., Givens, supra note 27, at 546-47.
workers, thus creating a work environment that is unbearable. Simplicity put, the notice to supervisor requirement subjects the whistleblower to a double-edged sword: either remain silent and suffer internal harm, or report a suspected violation and endure unknown risks and retaliations.

C. The Substantial and Specific Danger to the Public Health and Safety Requirement

The protection offered under New York's whistleblower statute is also limited to those who report a violation that "creates and presents a substantial and specific danger to the public health or safety." This narrow provision of the statute affords no protection to whistleblowers who reveal other significant abuses such as breach of fiduciary duty, intentional mismanagement, ethical or legal violations by employers, or any abuses that do not violate the "substantial and specific danger to public health or safety" requirement. Furthermore, some courts have even imposed the additional requirement that there be more than a single close-ended isolated incident in this provision. Such a requirement would further dilute the protection of whistleblowers under the statute.

A number of appellate and lower court decisions illustrate the reluctance of courts to find that adequately alleged violations of law, rules, or regulations, create a substantial and specific danger to public health or safety. For example, in *Remba v. Federation Employment & Guidance Serv.*, the plaintiff alleged that her employer fraudulently billed New York City for job placements that were never performed and that she was fired because of her objection and unwillingness to participate in the scheme. The First Department held that the plaintiff was not entitled to relief because her allegations of fraudulent billing failed to establish a substantial and specific danger to the public health or safety. However, since the employer's alleged

64. Givens, *supra* note 27, at 554.
67. Id. at 141.
68. Id. at 143. The dissent contended that the plaintiff should have been afforded an opportunity to show, through discovery and other procedures, how this alleged violation of
fraudulent billing involved illegal and harmful acts directly against the City government, the dissent opined that it “directly affected the interests of the public and may well be construed as adversely affecting the public health and safety within the statutory context.”

The Supreme Court of New York County reached a similar decision in Vella v. United Cerebral Palsy, Inc. In Vella, the plaintiff alleged that he was terminated from employment after eleven years of excellent performance because he reported violations of the Not-For-Profit Corporation Law. The alleged violations by the defendant, who was receiving and expending public monies, included an overpayment being made towards the purchase of specially designed plumbing fixtures for the United Cerebral Palsy facilities. The plaintiff's complaint was dismissed because the alleged violation, even though it related to plumbing facilities needed to specifically accommodate the needs of handicapped people, did not in and of itself constitute a substantial and specific danger to the public health.

The allegations of retaliatory firing asserted in Leibowitz v. Bank Leumi Trust Co. also failed to establish the requisite substantial and specific danger to the public health or safety. The Second De-

law was directly related to the public interest the statute is meant to protect. Id. at 146 (Ellerin, J., dissenting).

The dissent grounded its argument, in large part, on the premise that the intended goal of the whistleblower law was to prohibit employers from firing at-will employees for reasons “contrary to public policy” and that the instant case fell into this category. Id. The majority dismissed this argument, stating in a footnote that “[s]uch an argument ignores the codification of the public policy, as set forth in Labor Law § 740(2)(a), which requires a showing that the violation of law ‘creates and presents a substantial and specific danger to the public health or safety.’” Id. at 142 n.1.

69. Id. at 146 (Ellerin, J., dissenting).
71. Id. at 293.
72. Id. at 293-94. The law alleged to have been violated, N.Y. NOT-FOR-PROFIT CORP. LAW § 717(a) (McKinney 1988), was not considered to be a violation that posed a danger to the public health and safety. Vella, 535 N.Y.S.2d at 294.
73. The court did grant the plaintiff leave to replead, in part due to the allegations set forth in plaintiff's papers opposing defendant's motion to dismiss. Vella, 535 N.Y.S.2d at 294.
75. In Leibowitz, the plaintiff pleaded several different causes of action against her former employer following the employer's alleged use of religious and ethnic slurs towards her: retaliatory discharge, harassment (which the court held was actually a claim for wrongful discharge that could not be maintained by an at-will employee) and intentional infliction of emotional distress. Id. at 515.

The court upheld the lower court's dismissal of the action for intentional infliction of emotional distress; the concurring opinion stated that the conduct alleged “must consist of
partment affirmed the trial court’s dismissal of the plaintiff’s complaint because the defendant’s alleged violation of improper billing did not constitute a substantial and specific danger to the public health or safety.  

Other whistleblower protection cases have been dismissed for failing to maintain the “substantial and specific danger to the public health or safety” requirement based upon ethical and professional violations. In Wieder v. Skala, an attorney alleged that he was terminated because he insisted that the firm report an associate to the Disciplinary Committee of the Appellate Division of New York for violating the Code of Professional Responsibility. Similarly, in Easterson v. Long Island Jewish Medical Ctr., a nurse alleged that she was wrongfully dismissed after refusing to comply with her employer’s request to disclose the confidential medical records of another employee without the appropriate authorization; thus the nurse was fired because she would not violate a New York law proscribing “professional misconduct.”

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76. The Appellate Division provided a very thorough discussion of both the legislative history and prior case law regarding the whistleblower statute before aligning itself with the majority of opinions that have consistently denied employees protection under the statute. Id. at 516-20.


79. Id. at 972.


81. Id. at 136. The hospital’s policy was not to release employee records until after that employee signed a consent form. Id.

82. Id. Once again, the court refused to enforce the statute enacted to protect employees from these situations. N.Y. LAB. LAW § 740 (2)(c) (McKinney 1988). In Easterson, the employee was faced with a lose-lose situation; the court simply read the plain meaning of the statute without any regard for the consequences to the employee. Easterson, 549 N.Y.S.2d at 136. The court stated that “[e]ven assuming that the disclosure of the medical records was in violation of the cited provisions of the Education Law and regulations, the defendant’s alleged wrongdoing did not threaten the health or safety of the public at large.” Id.

The thrust of the court’s argument was that it is fine for an employer to request that an employee break the law so long as the public at large is not threatened. This case illustrates how imperative it is to widen the scope of protection to employees who report violations of law by their employers. Id.
The public health or safety limitation has created an auspicious amount of case law by denying protection to whistleblowers who reveal employer wrongdoings that fall short of the requirement. The most disturbing and appalling of those decisions was Kern v. DePaul Mental Health Serv., Inc. In a unanimous decision, the Fourth Department upheld the lower court’s dismissal of a claim under the whistleblower’s statute involving a situation that demonstrates the most obvious need for expanding protection under this statute. The plaintiff believed she had witnessed a rape of a mental patient while at work; after reporting the matter to the district attorney’s office, she was terminated by the hospital for whistleblowing.

The Appellate Division agreed with the lower court’s decision, remarking that even if the plaintiff had stated an “actual” violation of the law, the alleged rape “may have presented a danger to the health or safety of the individual patient, but did not threaten the health or safety of the public at large.” This intolerable comment is a classic illustration of New York courts’ refusal to consider the possibility that whistleblowers may serve the public interest by alerting state or local officials to serious problems — here the questionable effectiveness of the hospital’s security — which, although affecting a single individual in the lawsuit’s context, in reality may affect the well-being of many citizens.

Since a hospital is an institution that is supposed to be a safe environment for patient care, a strong argument can be made that the rape of a mental patient under this custodial care threatens the health and safety of the patient and the public. Therefore, the incident created a “substantial and specific danger to the public health or safety.”


85. Kern, 544 N.Y.S.2d at 252-53. See also supra text accompanying notes 42-47.

86. Id. at 266.

87. Id. at 253. The court stated that the alleged illegalities consisted of neglect of a patient, failure to report an incident of neglect, improper deletion of an entry concerning such incident, and an improper attempt to persuade the plaintiff to change her entry of the incident. Id. However, the court held that because it only affected one patient, or perhaps because it concerned only one mental patient, it was not a threat to the health or safety of the public at large so as to afford statutory protection to the employee for reporting the violation. Id.
since the conditions responsible for allowing the alleged rape significantly affect the welfare of other patients and the general public. As one commentator has pointed out, "[s]urely, a statute that provides no remedy for an employee who has the courage and moral outrage to report what she perceived to be a rape is indefensible." It is absurd for the legislature and courts to require or even suggest that the damage reach the level of a national crisis, such as the accident at Three Mile Island, for whistleblowers to be protected. Harm to one person should be enough.

It is disturbing that New York's whistleblower statute too often leaves employees who have a good faith belief that an actual violation has occurred, creating a substantial and specific danger to the public health and safety, unprotected from employer retaliation. This statute sends a confusing message to employees. On the one hand, the statute encourages whistleblowing, but on the other hand, whistleblowers are prevented from taking advantage of this legislative protection if it is later determined that a reasonable mistake was made. This statute dictates that whistleblowers must risk their lives and careers in exchange for absolute uncertainty. The whistleblowers who were once filled with courage are now unjustly strapped with fear.

III. **KRAUS V. NEW ROCHELLE HOSP. MEDICAL CENTER**

*Kraus* represents a landmark ruling in favor of plaintiff's recovery under New York's whistleblower statute. The plaintiff, Barbara Kraus, claimed that she was terminated by New Rochelle Hospital Medical Center because she disclosed activities at the hospital which presented a "substantial and specific danger to the public health or

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88. See Feerick, *supra* note 41, at 589.
90. This statute has a perverse attorneys' fee provision that provides that a court, in its discretion, may order that reasonable attorneys' fees, court costs and disbursements be awarded to an employer if the court determines that an action brought by an employee under this section was without basis in law or in fact. N.Y. LAB. LAW § 740(6) (McKinney 1988).

These reverse legal fees provide a sanction against baseless litigation brought to coerce a settlement or as part of a groundless vendetta against the employer, perhaps initiated because an employee is unhappy over being subjected to adverse action clearly 'predicated' on unrelated reasons. Feerick, *supra* note 41, at 7.

Unfortunately, most employees are unable to pay substantial reverse legal fees, and are often intimidated by fear of losing their life savings. Feerick, *supra* note 41, at 8.
Prior to the time of her firing, Kraus was Vice President of Nursing Services. On or about October 14, 1987, nurses from the Intensive Care Unit reported to Kraus that a doctor had entered that he had performed a surgical procedure called a bronchoscopy on four patients’ charts. The nurses’ concern stemmed from a lack of evidence supporting the fact that the procedures were indeed performed, mainly because: (1) the nurses were in the Intensive Care Unit continually monitoring these four patients and never observed the bronchoscopies being performed; (2) the doctor had failed to advise any of the nurses that a bronchoscopy had been performed so that the patients reactions and responses to the procedure could be recorded; (3) there were no log entries in the hospital’s records to indicate that the equipment needed to perform bronchoscopies had been removed from the Respiratory Unit during the time in question; and (4) the hospital consent forms to the performance of the bronchoscopy were either not obtained or were of questionable quality.

After conducting an investigation, Kraus disclosed to her supervisor what she had learned from the Intensive Care Unit nurses. Kraus “acted in good faith when she reported to her supervisor what she reasonably perceived to be unsafe and illegal practices.” Shortly thereafter, the hospital Medical Board and the Board President ordered an internal investigation by an Ad Hoc Committee. After the Ad Hoc Committee exculpated the doctor, a Medical Board meeting was conducted with both the doctor and Kraus present. Following this meeting, there were rumors that Kraus would be fired.

Based upon an anonymous phone call, the State Department of

92. Id.
93. Id.
94. Id. A bronchoscopy is an inspection of the interior of a bronchus, a bronchoscope is the instrument used for inspecting the interior of the bronchi for the detection and removal of foreign bodies. STEDMAN’S MEDICAL DICTIONARY 195 (24th ed. 1982).
96. Id.
97. Id.
98. The Ad Hoc Committee consisted of four doctors from the Department of Medicine, the doctor’s department. The Ad Hoc Committee found no wrongdoing on the doctor’s part and criticized Ms. Kraus for her disclosure of allegations to persons other than the Director of Medicine. Id.
99. Id.
100. Id. Additionally, a “Dump Barbara Kraus” sign appeared in the medical lounge, leading the nursing management group to submit a petition supporting Ms. Kraus and lodge a formal complaint regarding what they considered the unprofessional conduct and treatment of Ms. Kraus by the Medical Board. Id.
Health investigated the bronchoscopies involved in the controversy. Soon thereafter, the Medical Board passed a unanimous vote of no confidence against Kraus. The court found that the Medical Board assumed Kraus to be responsible for the anonymous phone call to the Department of Health. The no confidence vote was published in the hospital’s newsletter despite requests from Kraus that it not be published. As a result, the already-existing tension between the nursing and medical staff resulting from the incident worsened.

In response to the increased tension, the hospital’s Board of Governors appointed a “Special Review Committee.” By letter dated June 6, 1988, Kraus was informed that she was fired. Kraus then brought suit under the whistleblower statute, alleging that she was fired in retaliation for the information she disclosed to her supervisor.

The court stated in its decision that “[b]y failing to publicly disagree with the published no confidence vote and by not publicly stating that plaintiff was carrying out her responsibility in reporting the situation, [the hospital] was inferentially adopting the position of the Medical Board and engaging in retaliatory personnel action.” The hospital could have easily separated itself from the Medical Board by stating that it did not agree with the no confidence vote.

101. Id.
102. Id.
103. Id.
104. Id.
105. Id.
106. The defendant argued that Kraus’ refusal to cooperate with the Special Review Committee was the basis for her termination. Kraus vehemently denied these allegations. Id.

On April 8, 1988, Kraus, accompanied by her attorney, appeared before the Special Review Committee but declined to answer any questions on advice from counsel, who was trying to insure that the meeting would not be a guise for pre-trial discovery by defendant. Id. Subsequently, the Special Review Committee sought to have Kraus meet them without her attorney present; however, no such meeting took place. Id.

It is interesting to note that during the first seven weeks of the Special Review Committee’s investigation, it did not meet with Kraus, although it met with numerous other persons, including some who obviously had little or no information as to why the Medical Board voted no confidence. Id. at 28. Furthermore, on one occasion, the Special Review Committee refused Kraus’ request for a stenographer. Id.

107. Id. at 27.
108. Id.
109. Id. The hospital’s administrators did not publicly support the plaintiff, although they privately commended her for her courage. Id.
110. Id.
Relying on these findings, it was the court's opinion that the plaintiff met her burden of establishing a prima facie case of retaliatory action by the employer. The court then found that the employer did not successfully meet the burden of establishing that Mrs. Kraus was discharged for an independent, legitimate reason which was not a pretext for its action. The relief granted to Mrs. Kraus consisted of the compensation for lost wages, benefits and payment by the hospital of reasonable costs, disbursements, and attorney's fees; however, the court did not grant her reinstatement.

While this decision broke ground for employee protection under New York's whistleblower statute, it still remains to be seen if other courts will follow the precedent set by Kraus or continue to enforce

111. See Axel v. Duffy-Mott Co., 389 N.E.2d 1075 (N.Y. 1979) (holding that once an employee introduces evidence of a retaliatory discharge, the burden may shift to the employer to prove that the termination was for a legitimate reason independent of such retaliatory motive); Maloff v. City Comm'n on Human Rights, 387 N.E.2d 1217 (N.Y. 1979) (holding that when weighed against a prima facie case of sex discrimination, a University's assertion that an associate professor was a "troublemaker" was not sufficient to meet its burden of showing an independent legitimate reason to justify her termination); Pace College v. Comm'n on Human Rights, 339 N.E.2d 880 (N.Y. 1975) (holding that once a prima facie showing of discrimination has been made, the burden shifts to the employer to show that the employee was terminated for some independently legitimate reason which was neither pretextual nor substantially influenced by the discrimination).

112. Once the plaintiff establishes the prima facie case for retaliatory action by the employer, the burden then shifts to the defendant employer to show an alternative reason for the firing. The court found the following to be true: Kraus' employment record over seven years indicated that she was "above average" and "capable of advancement"; that until she reported the conduct at issue to her supervisor, her record was unblemished; that there was no meaningful support in the record for the hospital's proffered explanation of the dismissal — namely, Kraus' lack of cooperation with the Special Review Committee and finally that the hospital's rationale for Kraus' firing was contrived and pretextual. Kraus, N.Y. L.J., July 29, 1993, at 28.

113. Id. The court determined that past wages amounted to $281,000.00, which was the difference between what Kraus would have earned if she continued on as Vice-President of Nursing ($390,200.00) and what she earned during this period ($109,200.00). Id. The court also granted her past fringe benefits of $70,250.00, future wages of $320,000.00, and future fringe benefits of $32,000.00, for a total award of $703,250.00. Id.

In an unpublished decision entered by Judge Francis A. Nicolai, August 22, 1994, Kraus was awarded $587,000.00 in attorneys' fees, a figure that represented 83% of the requested fee. Solo Attorney Gets $587,000 Fee For Work in Whistleblower Action, N.Y. L.J., August 29, 1994, at 1.

In deciding against granting reinstatement, the court noted that a tension filled and acrimonious atmosphere existed at the hospital between doctors and plaintiff during the last months of her employment and that it was highly unlikely that a harmonious working relationship would be established if plaintiff were reinstated to her former position. Although the court noted that this tension was not the fault of the plaintiff, it felt that this tension would create an unacceptable risk of detrimental care to the patients. Kraus, N.Y. L.J., July 29, 1993, at 28.
stringent interpretations of the wording of the statute. However, the blame for any lack of plaintiff’s recovery does not lie solely with the courts, rather, the fault also lies with the legislature’s creation of a statute that is too narrow and fails to adequately protect whistleblowers.

IV. AN OVERVIEW OF OTHER STATE WHISTLEBLOWER STATUTES

The imperative need for federal whistleblower protection is demonstrated through the fact that a majority of the states have passed their own separate laws to protect whistleblowers. These statutes share the proposition that violation reporting will be encouraged if whistleblowers are afforded protection.

State statutes differ regarding which party the whistleblower must report a suspected violation to in order to be afforded protection. Many states require a reporting outside the organization to which the whistleblower belongs. Other state statutes allow the employee to report internally or to a public office.


115. See, e.g., COLO. REV. STAT. ANN. § 24-50.5-101 (West 1990). This is not to be construed as states offering blanket protection to whistleblowers who allege wrongdoings. A distinction needs to be drawn between the situation where an employee reports a wrongdoing for the good of the public and suffers retaliation, as opposed to the situation where the employee reports a wrongdoing for the purpose of getting even with a supervisor or just to fulfill the whistleblower’s own personal agenda.

116. Even among the states that require external reporting, there are variations as to whom the report must be made. Delaware and Washington require reporting to a particular public office or official. DEL. CODE ANN. tit. 29, § 5115 (1991) (Office of Auditor of Ac-
disclose either internally or externally; either explicitly by offering an employee a choice of outlets\textsuperscript{117} or implicitly by not covering the topic.\textsuperscript{118} Other state statutes require mandatory disclosure internally.\textsuperscript{119}

Comparing New York's whistleblower statute to other states' whistleblower statutes, it is evident that New York fails to provide the necessary protection to whistleblowers.\textsuperscript{120} While New York requires that there be an "actual" violation of law, rule or regulation\textsuperscript{121} California\textsuperscript{122} and New Jersey\textsuperscript{123} only require that the employee have a reasonable belief that an employer has violated the law counts); WASH. REV. CODE ANN. § 42.40.010 (West 1991) (Office of State Auditor).

Florida requires reporting to a public body with authority to take action in response to the wrongdoing. FLA. STAT. ch. 112.3187 (1992).


119. In most instances, the required internal report is only the first step. IND. CODE ANN. § 4-15-10-4 (West 1991) (first to supervisor or appointing authority, then to anyone); ME. REV. STAT. ANN. tit. 26, § 833(2) (West 1988) (first to person having supervisory authority with the employer, then to public body); N.H. REV. STAT. ANN. § 275-E:2(II) (Supp. 1993) (first to person having supervisory authority with the employer, after that no specific person to report to); N.J. STAT. ANN. § 34:19-4 (West 1988 & Supp. 1994) (written notice to supervisor first, then to public body).

Some statutes allow an employee to make an external report after giving the employer a reasonable amount of time to correct the problem. IND. CODE ANN. § 4-15-10-4 (West 1991) (external reporting permitted if a good faith effort is not made to correct the problem within a reasonable time); ME. REV. STAT. ANN. tit. 26, § 833(2) (West 1988) (reasonable opportunity to correct); N.J. REV. STAT. ANN. § 275-E:2(II) (Supp. 1993) (reasonable opportunity to correct the violation); N.J. STAT. ANN. § 34:19-4 (West 1988 & Supp. 1994) (afford the employer as reasonable opportunity to correct); OHIO REV. CODE ANN. § 4113.52 (Baldwin 1988) (if no good faith effort to correct within 24 hours; only protects whistleblowing pertaining to criminal offense or imminent risk).

120. See Gary Minda & Katie R. Raab, Unjust Dismissal of Employees At-Will: Are Disclaimers a Final Solution, 15 FORDHAM URB. L.J. 533, 544 n.82 (1987).

121. N.Y. LAB. LAW § 740(2)(a) (McKinney 1988).

122. See CAL. LAB. CODE § 1102.5(a),(b) (West 1989).

in order to be afforded protection from retaliatory discharge. Michigan,\textsuperscript{124} Connecticut,\textsuperscript{125} and Maine\textsuperscript{126} merely require that the employees have a real or suspected belief that a law was violated when they blow the whistle.

Moreover, these statutes do not restrict the violation reported to one which endangers the public health and safety, but require only that the violation affect the public interest.\textsuperscript{127} These statutes have the effect of encouraging employees to come forward and reveal any illegal employer activities in the workplace.\textsuperscript{128} It is for these reasons that New York's whistleblower statute must be reconsidered and modified to ensure whistleblowers the protection they desperately need and deserve.

V. AMENDING THE NEW YORK WHISTLEBLOWER STATUTE

This note has addressed several of the major faults in New York Labor Law § 740. Now it is time to reconsider these problems and suggest alternative standards that courts should apply when considering employer retaliatory firings.

First, to rectify New York's problems, the requirement in the statute of a reporting of an "actual" violation must be less strict. It needs to be modified so that a good faith belief on the part of the employee will be protected.\textsuperscript{129} Too often, employees who have a good faith belief of a violation of law occurring by their employer will not come forward with information that might be useful in protecting the public from harm.\textsuperscript{130} This is due, in large part, to employees' fear of retaliation by their employers. If the statute under which whistleblowers are protected were modified, so that employees who reported a good faith belief violations were protected by statute, more employees would likely come forward. This would be harmoni-

\textsuperscript{125} See Conn. Gen. Stat. Ann. § 31-51m (West 1987 & Supp. 1994) (prohibiting employer retaliation against an employee "because the employee ... reports, verbally or in writing, a violation or a suspected violation of any state or federal law or regulation ... to a public body.").
\textsuperscript{126} See Me. Rev. Stat. Ann. tit. 26, §§ 831-840 (West 1988) (prohibiting employer retaliation against an employee who in good faith reports what the employee has reasonably come to believe is a violation of a law or regulation).
\textsuperscript{127} See statutes cited supra notes 122-23.
\textsuperscript{128} Malin, supra note 7, at 1-2.
\textsuperscript{130} See supra notes 3-4 and accompanying text.
ous with the intended purpose of the statute, i.e. the reporting of situations that might lead to the harm of the public health and safety. Second, the statute further requires that the employee report a suspected violation to a supervisor before external reporting can occur. This requirement is not logical if one contemplates the original intended purpose of the statute. If the goal is to prevent the tendency of layers within organizations to screen out potentially embarrassing information, then why does the statute require a whistleblower to make an internal report before reporting the information externally? The statute must be modified so as to align the intended purpose of the statute with the reporting procedure.

Third, the statutory requirement of a violation "creating and present[ing] a substantial and specific danger to the public health or safety" is too narrow in scope. This should be modified so that more employees will be encouraged to come forward and reveal their employers' illegal activities regardless of whether they involve public health or safety. Too often, employees have been denied protection by the court because they have failed to meet this difficult requirement. Employees should not have to forfeit their protection solely because the courts do not view the violation to be a danger to "enough" of the public. Harm to one person, as in Kern, should be enough to invoke the statute's protection.

Finally, the whistleblower statute must include a provision for punitive damages against an employer who commits a retaliatory firing. The present statute, even if it contained the above mentioned changes, does not create a disincentive for employers who consider retaliatory firings. A provision allowing for fired employees to recover punitive damages would do just that. It would make an employer think long and hard before committing a retaliatory firing. In the only decision to grant an employee recovery on this theory, the court

131. See Givens, supra note 27, at 546.
132. Givens, supra note 27, at 546.
133. N.Y. LAB. LAW § 740(3) (McKinney 1988).
134. See Givens, supra note 27, at 546.
136. See supra text accompanying note 83.
137. See Kern v. DePaul Mental Health Svcs., 544 N.Y.S.2d 252, 253 (App. Div. 1989) (holding that even if plaintiff had reported an actual violation, § 740 requirements were not met because only one hospital patient was affected), appeal denied, 549 N.E.2d 151 (N.Y. 1989).
awarded past and future earnings, but hardly created a situation where an employer would be discouraged from repeating this behavior. Realizing these limitations, it is clear that the New York whistleblower statute provides merely the illusion of protection.

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