

Wrongful Discharge of Independent Contractors: A Source-Derivative Approach to Deciding Who May Bring a Claim for Violation of Public Policy

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INTRODUCTION

Michael Smith is employed as a bookkeeper with Acme Company. He has no contract limiting Acme's right to terminate him. Some of Acme's customers are suing Acme for fraud, and Michael is subpoenaed to testify in the suit. A manager at Acme tells Michael that if he gives testimony harmful to the company, he will be discharged. Michael testifies truthfully, and the next day he is fired. He sues Acme for wrongful discharge of employment.

Despite the traditional rule that an employee hired for an indefinite period can be fired for any reason, most courts would allow Michael to bring such a wrongful termination claim against Acme, because Acme's behavior contravenes an important public policy—encouraging truthful testimony.

Now suppose the same facts, except Michael works not as an employee, but as an independent contractor hired for an indefinite period. In most courts, Michael will not be able to bring such a wrongful termination claim, although the same public policy is at issue. Why is there a distinction between Michael the employee and Michael the independent contractor? When should considerations of public policy restrict a company's ability to terminate the services of an independent contractor?

This question is not merely an academic one. The incidence of such claims has increased in recent years. The courts in most such cases have refused to allow independent contractors to base a wrongful termination claim on a violation of public policy; the claims are often dismissed with little or no analysis. These cases deserve a closer look than they have received to date.

In determining whether and when such a cause of action should be available to independent contractors, it is necessary to re-examine the reasons the public policy exception to the employment-at-will rule was adopted and how it has evolved. Courts recognizing a cause of action for wrongful discharge for violation of public policy tend to do so when an employer discharges an em-

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ployee in retaliation for refusing to violate the law, reporting unlawful conduct, or performing some civic duty.¹ Courts also tend to allow such a claim when an employee is discharged in retaliation for exercising some right, such as filing a worker's compensation claim.² A plaintiff pursuing this type of claim must point to some expression of public policy that the employer has violated by the termination. In Michael Smith's case, for example, one can find an expression of the public policy encouraging truthful testimony in the statute making perjury a crime.

This Article proposes a "source-derivative" approach to these types of cases: When an independent contractor presses a claim for wrongful termination based on a public policy violation, instead of basing its decision solely on employment status, the court needs to take a close look at the source of public policy offered by the plaintiff. Assuming it is a statute, the most commonly cited source of public policy, the court must first ask what the purpose of the statute is. Was it enacted to protect the plaintiff as an employee? Or is the statute's purpose to protect some public good that is not dependent on the plaintiff's employment status?

When the underlying source of public policy was enacted to promote a public policy that is not dependent on an employment relationship between the parties, there is no reason to limit the public policy case to employees. For example, the public policy at stake in Michael Smith's case—the prevention of perjury—has nothing to do with regulating the employer-employee relationship. The purpose of the statute outlawing perjury transcends the parties' relationship. Michael Smith should therefore be able to bring a wrongful termination claim, regardless of his employment status.

On the other hand, independent contractors should not be able to base wrongful termination claims on a source of public policy that was written to protect employees only. For example, suppose that an independent contractor is terminated for refusing to take a polygraph examination. If the sole expression of public policy to which the contractor can point is a statute prohibiting *employers* from giving polygraph tests to *employees*, then the contractor should not be permitted to use that statute as the basis of a wrongful discharge claim.

Parts I and II of this Article outline, respectively, the American employment-at-will rule and the development of the public policy exception to that rule. Part III discusses the current state of case law considering the application of the public policy exception to independent contractors. These cases are then reconsidered in Part IV using the proposed source-derivative approach to this type of wrongful discharge claim, with explanations of how such an approach is consistent with the traditional judicial function of invalidating contractual

1. See *infra* notes 57, 58, 60, and accompanying text.

2. See *infra* note 59, and accompanying text.

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terms that violate public policy.

I. THE EMPLOYMENT-AT-WILL RULE

The American employment-at-will rule says that absent a contract otherwise, an employer may fire an employee for any reason or no reason at all without incurring legal liability.³

This was a departure from the rule in English common law, where indefinite service relationships were presumed to be for a year.⁴ Early American cases considering the issue of employment duration often looked to the English rule.⁵ But the English rule had been based on the classification of master and servant law as a domestic relation,⁶ and as the industrial revolution progressed and the employment relationship became more commercial, the cases increasingly did not fit into the traditional master-servant framework.⁷ The result was a confused state of the law on the issue of indefinite hirings.⁸

In his 1877 treatise on master and servant law, Horace Wood purported to resolve the issue in American law. He pronounced:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may service. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.

Some since have questioned Wood's scholarship on this issue, asserting

3. *Payne v. Western & Atl. R.R. Co.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds by Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915). Of course, employer and employee may contract for a definite term, but this is atypical outside the collective bargaining arena. One reason individual employees might not negotiate a just-cause termination provision is that an employee attempting to obtain such a just-cause term in his or her contract might be perceived as a slacker, and not hired. Shubha Ghosh, *Property Rules, Liability Rules, and Termination Rights: A Fresh Look at the Employment at Will Debate with Applications to Franchising and Family Law*, 75 OR. L. REV. 969, 981 (1996).

4. Blackstone wrote:

If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not.

1 WILLIAM BLACKSTONE, COMMENTARIES *413.

5. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 122 (1976); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L.J. 85, 91 (1982).

6. Feinman, *supra* note 5, at 123.

7. *Id.*; see also, Jacoby, *supra* note 5, at 91.

8. Jacoby, *supra* note 5, at 109-10.

9. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877).

that the rule was unsupported by the authorities on which he relied.¹⁰ Nevertheless, the rule was thereafter generally adopted at common law across the country, and became known as the employment-at-will rule or doctrine.¹¹ Strict application of the rule—i.e., applying the rule without exception—produced some harsh results for employees. Courts dismissed, for example, claims by employees fired for serving jury duty,¹² reporting an employer's illegal stock manipulations to authorities,¹³ and refusing to vote for an employer's choice of candidates in a city election.¹⁴

The rule has been characterized as one reflecting the 19th century's philosophy of free enterprise, which included an employer's unrestrained right to discharge employees.¹⁵ A common justification for the at-will doctrine was the contract rule that mutuality of obligation must exist for an employment contract to be binding: If employees could end the relationship at will by quitting, the employer should be able to do the same.¹⁶ Critics of the mutuality rationale have countered that obligations between employers and employees need not be mutual,¹⁷ and that in a modern economy, the employee's freedom to terminate the relationship is often illusory.¹⁸ Today, the few modern courts that adhere to the traditional at-will rule without common law exceptions tend to do so because of a belief that creating such a cause of action is best left to the legislature.¹⁹

10. E.g., Feinman, *supra* note 5, at 126-27; Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733, 734 (1991); Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1083-85 (1984); J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974). Other commentators have come to Wood's defense. See, e.g., Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91 (1996) (arguing that although Wood did not adequately support his assertion, he was correct in stating that employment at will was the rule in the United States at that time); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 554 (1990) (arguing that Wood's authorities did support the principle for which Wood cited them).

11. Feinman, *supra* note 5, at 126; Jacoby, *supra* note 5, at 113; Shapiro & Tune, *supra* note 10, at 342.

12. *Mallard v. Boring*, 182 Cal. App. 2d 390 (Cal. Ct. App. 1960).

13. *Marin v. Jacuzzi*, 224 Cal. App. 2d 549 (Cal. Ct. App. 1964).

14. *Bell v. Faulkner*, 75 S.W.2d 612 (Mo. Ct. App. 1934).

15. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416 (1967); Alfred W. Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge for Our Season*, 24 RUTGERS L. REV. 480, 481 (1970); Shapiro & Tune, *supra* note 10, at 343-44.

16. Blades, *supra* note 15, at 1419; Clyde W. Summers, *Individual Protection Against Unjust Dismissal Time for a Statute*, 62 VA. L. REV. 481, 484 (1976); Summers, *supra* note 10, at 1097-98.

17. Blades, *supra* note 15, at 1419; Summers, *supra* note 10, at 1098.

18. *Erube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1045 (Utah 1989).

19. E.g., *Hinrichs v. Tranquillaire Hosp.*, 352 So.2d 1130, 1131 (Ala. 1977); *Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86, 89-90 (N.Y. 1983).

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II. EVOLUTION OF THE COMMON LAW PUBLIC POLICY EXCEPTION TO THE EMPLOYMENT AT-WILL RULE

The employment-at-will doctrine has come under much criticism over the past several decades as being anachronistic and out of step with the post-industrial age, and in the 1960s and 1970s, the lack of remedies for wrongfully discharged employees prompted commentators to call for a limit on the employer's freedom to discharge.²⁰

Employment at will is still the presumption in nearly every state.²¹ (It is a statutory rule in a few states.²² In most states, however, it remains a judicial doctrine.) But now there are various exceptions to the rule. That is, courts in most jurisdictions still recognize the traditional rule, but to varying degrees courts have recognized, and legislatures have enacted, exceptions to it. Today, discharged employees must plead such an exception to state a cause of action.

Statutory exceptions to the employment-at-will rule include legislation prohibiting termination for union activities, or for discrimination based on race, sex, disability, age, and other characteristics. Many jurisdictions have also enacted statutes protecting employees from retaliation for taking certain actions, for example reporting unlawful conduct to authorities.²³ Public employees of-

20. *E.g.*, 3A LAWRENCE A. CUNNINGHAM & ARTHUR J. JACOBSON, CORBIN ON CONTRACTS § 674 (Supp. 1998); Blades, *supra* note 15; Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *Individual Protection*, *supra* note 16; Daniel A. Mathews, Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975).

21. Montana is the exception. Montana's Wrongful Discharge From Employment Act of 1987 provides a statutory cause of action to employees discharged without good cause, once the employee has completed a probationary period. The statute defines "good cause" as "reasonably job-related grounds for dismissal based on failure to satisfactorily perform job duties, disruption of employer's operation or other, legitimate business reason." MONT. CODE ANN. § 39-2-903(5) (1999). The statute also provides for a statutory public policy exception, discussed *infra* note 29.

22. *E.g.*, CAL. LAB. CODE § 2922 (West Supp. 2000); GA. CODE ANN. § 34-7-1 (Supp. 2000); LA. CIV. CODE ANN. art. 2747 (West 1973); N.D. CENT. CODE § 34-03-01 (Supp. 1999); S.D. CODIFIED LAWS § 60-4-4 (Michie Supp. 2000). Despite such codification, the courts in some of these states have carved out exceptions to the at-will rule. *See, e.g.*, Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (recognizing exception to at-will rule based on violation of public policy); Johnson v. Kreiser's Inc., 433 N.W.2d 225 (S.D. 1988).

23. State and federal statutes prohibiting retaliation against "whistleblowing" vary widely in their scope, application, and remedies. For example, some cover all employees; others cover only public employees. Some statutes protect the employee only if he or she reports to a governmental agency; others protect those who make an internal report. Some are appendages to substantive regulatory programs, such as the Occupational Safety and Health Act, 29 U.S.C. § 660 (Supp. 1998). Such anti-retaliation provisions do not always provide a private right of action, but merely permit the aggrieved employee the right to file a complaint with the appropriate administrative agency, which then has the discretion to take action. *See* WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES 280-86 (2d ed. 1993); 2 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 11.7-11.8 (4th ed. 1998); MARK A. ROTHSTEIN, ET. AL., EMPLOYMENT LAW § 9.18 (1994) [hereinafter ROTHSTEIN, ET. AL.]; MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 923 (4th ed. 1998) [hereinafter ROTHSTEIN AND LIEBMAN]; INDIVIDUAL EMPLOYMENT RIGHTS MANUAL (BNA) 527:118-22 (1998) (and cases cited therein).

ten have additional remedies under statutory or constitutional provisions.

Depending on the jurisdiction, common law exceptions to the at-will rule might, for example, be based on breach of an express or implied promise of continuing employment,²⁴ a breach of the implied covenant of good faith and fair dealing,²⁵ or an employer's violation of public policy. The idea behind this public policy exception is that despite the traditional at-will rule, "a discharge is wrongful and actionable if it is motivated by the fact that the employee did something that public policy encourages or that he refused to do something that public policy forbids or condemns."²⁶

This article focuses only on this common law public policy exception to the at-will rule.

*Petermann v. International Brotherhood of Teamsters, Local 396*²⁷ is widely regarded as the first case in which a court recognized a wrongful discharge action based on an employer's violation of public policy. Peter Petermann was employed as a business agent for the defendant union. The union's secretary-treasurer had hired Petermann and told him that his employment would continue as long as his work was satisfactory. Petermann was thereafter subpoenaed to testify before a committee of the California legislature. He alleged that the union's secretary-treasurer instructed him to make certain false statements to the committee. Petermann testified truthfully and was fired the next day.

The California Court of Appeals held that the traditional employment-at-will rule was limited by considerations of public policy:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute. . . . To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contami-

24. In these cases, courts hold employers to their assurances that they will terminate only for just cause and/or utilize certain disciplinary procedures before termination. Courts will review employer representations such as employee handbooks and oral statements. Courts vary widely on what statements will bind an employer, and when a disclaimer will negate those promises. See ROTHSTEIN, ET. AL., *supra* note 23, §§ 9.2-9.5; George L. Blum, Annotation, *Effectiveness of Employer's Disclaimer of Representations in Personnel Manual or Employee Handbook Altering At-Will Employment Relationship*, 17 A.L.R.5th 1 (1994); Theresa Ludwig Kruk, Annotation, *Right to Discharge Allegedly "At-Will" Employee as Affected by Employer's Promulgation of Employment Policies as to Discharge*, 33 A.L.R.4th 120 (1984).

25. Few states have applied the covenant to indefinite employment relationships. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.17a (1982); ROTHSTEIN, ET. AL., *supra* note 23, § 9.6. Courts that do accept such a cause of action tend to do so when the employer has denied the employee commissions or benefits already earned during the employment. ROTHSTEIN, ET. AL., *supra* note 23, § 9.6.

26. *Percival v. General Motors Corp.*, 539 F.2d 1126, 1130 (8th Cir. 1976).

27. 344 P.2d 25 (Cal. Ct. App. 1959).

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nate the honest administration of public affairs. This is patently contrary to the public welfare. The law must encourage and not discourage truthful testimony. The public policy of this state requires that every impediment, however remote to the above objective, must be struck down when encountered.²⁸

Since *Petermann*, most states have recognized a common law exception to the employment-at-will rule based on a violation of public policy.²⁹ In most of those jurisdictions, a wrongful discharge claim based on violation of public

28. *Id.* at 27.

29. See PERRITT, *supra* note 23, §§ 7.1. State courts did not accept the public policy exception overnight; while the *Petermann* case was decided in 1959, most states did not recognize the public policy exception until the 1970s and 1980s.

In a few states a public policy exception has been codified. For example, New Jersey's Conscientious Employee Protection Act includes a prohibition against retaliation when an employee objects to or refuses to participate in any activity, policy, or practice that she reasonably believes is incompatible with a clear mandate of public policy regarding public health, safety, or welfare. N.J. STAT. ANN. § 34:19-3 (West 1995). Montana's Wrongful Discharge from Employment Act of 1987 provides a cause of action for employees discharged in retaliation for refusing to violate public policy or reporting a public policy violation. MONT. CODE ANN. § 39-2-904(1) (1999). The statute defines "public policy" as "a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule." *Id.* § 39-2-903(7).

A few states have not adopted a common law public policy exception to the employment-at-will rule. See, e.g., *Cunningham v. Dabbs*, 703 So. 2d 979 (Ala. 1997) (reiterating Alabama's refusal to recognize the public-policy exception, but allowing claims of outrage and privacy when plaintiff was harassed and discharged for getting married); *Ochab v. Morrison Inc.*, 517 So. 2d 763 (Fla. Dist. Ct. App. 1987) (denying public policy claim to bartender discharged for refusing to serve intoxicated patron); *Jellico v. Effingham County*, 471 S.E.2d 36 (Ga. Ct. App. 1996) (failing to recognize claim for building inspector fired for refusing to certify buildings in violation of building codes); *Gil v. Metal Service Corp.*, 412 So. 2d 706 (La. Ct. App. 1982) (refusing to recognize public policy claim for employee discharged for refusal to violate consumer protection law); *Pacheco v. Raytheon Co.*, 623 A.2d 464 (R.I. 1993) (stating "unequivocally" there is no cause of action for wrongful discharge in Rhode Island). New York's highest court, in *Murphy v. American Home Products Corp.*, 448 N.E.2d 86 (1983), declined to recognize a common law cause of action based on public policy for an employee terminated for reporting co-employees' illegal accounting practices to upper management and because of age discrimination. In *Wieder v. Skala*, 609 N.E.2d 105 (N.Y. 1992), however, the court did allow a breach-of-implied-contract claim brought by a law firm associate fired for insisting on the firm's compliance with code of professional responsibility by reporting fellow associate's misconduct.

The Court of Appeals of Minnesota recognized a common law public policy exception in *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 592 (1986). The Minnesota Supreme Court granted the petition for review, but before it issued its opinion the legislature enacted a whistleblower statute, MINN. STAT. § 181.932 (1999). The status of the common law claim is unclear. Federal courts have said that the common law public policy claim does not exist since the whistleblower statute was enacted. See *Thompson v. Campbell*, 845 F. Supp. 665, 676 (D. Minn. 1994), and cases cited therein.

The Arizona Supreme Court recognized a common law public policy exception in *Wagenseller v. Scottsdale Memorial Hospital*, 710 P.2d 1025 (1985). In 1996, however, the state legislature enacted the Arizona Employment Protection Act. ARIZ. REV. STAT. §§ 23-1501 to 1502 (2000). The AEPA codifies the employment-at-will doctrine, but makes exceptions. For example, an employee may bring a wrongful discharge claim under the Act if discharged in retaliation for certain protected acts. The statute to a limited extent thus codifies the public policy exception, laying out nine protected acts: refusal to violate the state constitution or a state statute; reasonable disclosure by the employee of the employer's violation of the state constitution or a state statute; exercise of workers' compensation rights; jury service; exercise of voting rights; exercise of choice regarding union membership; service in the National Guard or armed forces; exercise of right to be free from extortion of fees or gratuities as a condition of employment; and exercise of the right to be free from coercion to purchase goods or supplies from any particular person as a condition of employment. The Act explicitly abolished the common law public policy claim. ARIZ. REV. STAT. § 23-1501.3(c).

policy sounds in tort,³⁰ reflecting the recognition that the duties breached by employers in these cases are not part of any contract between the parties but are duties imposed by law outside the contract.³¹

While common law exceptions to the employment-at-will doctrine are principally a matter of state law, courts have also allowed wrongful discharge claims in maritime cases based on public policy violation as an exception to the general rule that a seaman's employment is terminable at will.³²

Even among those states that recognize a common law public policy exception to the employment-at-will doctrine, there is no universally accepted definition of a public policy violation. About the only thing all courts agree on is that public policy "as a concept is notoriously resistant to precise definition."³³

Lord Truro's definition is still a good starting point:

Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.³⁴

Public policy may also be said

to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.³⁵

The meaning of "public policy" will necessarily depend on the nature and

30. FARNSWORTH, *supra* note 25, § 7.17a.

31. 82 AM. JUR. 2d *Wrongful Discharge* § 17 (1992); see *Koehrer v. Superior Court*, 226 Cal. Rptr. 820, 826 (Cal. Ct. App. 1986) ("[T]he theoretical reason for labeling the discharge wrongful ... is not based on the terms and conditions of the contract, but rather arises out of a duty implied in law on the part of the employer to conduct its affairs in compliance with public policy ..."); *Wilson v. City of Monroe*, 943 P.2d 1134, 1136 (Wash. Ct. App. 1997) ("[Plaintiff's] right to be free from wrongful termination in contravention of public policy may not be altered or waived by private agreement, and is therefore a nonnegotiable right.").

32. See, e.g., *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981) (allowing seaman's wrongful discharge claim for retaliation against plaintiff's personal injury suit brought under Jones Act); *Reyes v. Energy Transportation Corp.*, 96 Civ. 3321, 1997 U.S. Dist. LEXIS 6864 (S.D.N.Y. 1997) (allowing same claim in refusal-to-rehire case); *Borden v. Amoco Coastwise Trading Co.*, 985 F. Supp. 692 (S.D. Tex. 1997) (applying maritime and Texas law and allowing claim by tug boat captain fired for refusing to sail vessel into a storm carrying crew and extremely toxic chemicals); *Seymore v. Lake Tahoe Cruises, Inc.*, 888 F. Supp. 1029, 1034-35 (E.D. Cal. 1995) (allowing claim when plaintiff-ship captain was fired for refusing to take out passenger vessel with leaking hull); *Baiton v. Carnival Cruise Lines, Inc.*, 661 So. 2d 313 (Fla. Ct. App. 1995) (allowing claim for retaliation for being willing to testify on behalf of co-employee in Jones Act suit against employer, and for refusing to give false statement in same). But see, e.g., *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991) (refusing to permit claim by seaman fired in retaliation for refusing to carry out assignment that would have violated federal statute limiting number of hours boat was allowed to operate).

33. *Gantt v. Sentry Ins.*, 824 P.2d 680, 687 (Cal. 1992).

34. *Egerton v. Earl Brownlow*, 4 D. 1, 196 (1853).

35. *Pittsburgh, C., C. & St. L. Ry. Co., v. Kinney*, 115 N.E. 505, 507 (Ohio 1916).

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context of the case at hand, and the courts have struggled with the definition in the context of wrongful discharge claims. The Supreme Court of Wisconsin has struck a commonly expressed note of hesitance: "Courts should proceed cautiously when making public policy determinations. No employer should be subject to suit merely because a discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it."³⁶ In a frequently quoted passage, the Illinois Supreme Court has said that "a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed."³⁷ The Oregon Supreme Court has framed the issue by asking whether there is an important community interest at stake, such that a termination interfering with such interest warrants compensation.³⁸

In determining when a case warrants application of the public policy exception, some courts have drawn an analogy to illegal contracts. The California Supreme Court, for example, has said that "at root, the public policy exception rests on the recognition that in a civilized society the rights of each person are necessarily limited by the rights of others and of the public large; this is the delicate balance which holds such societies together"³⁹ It concluded that it is "a very short and logical step, therefore, from declining to enforce contracts inimical to law or the public interest, to refusing to sanction terminations in contravention of fundamental public policy."⁴⁰ That same court, in a subsequent case, noted that "the doctrinal foundation of the public policy tort is not so much the *plaintiff's* continued interest in employment as the preservation of the *public* interest"⁴¹ An employee who states a wrongful discharge claim for violation of public policy "is provided a remedy in tort *not only* to compensate the individual plaintiff for the loss of employment but as an indirect means of vindicating fundamental *public policy itself*."⁴²

Courts often approach public policy cases by balancing the interests of the employee, the employer, and the public. A court will typically identify the employee's interest as one of job continuity and the employer's interest as one of running a business with minimal interference.⁴³ The interests of the public will

36. Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (1983).

37. Palmateer v. International Harvester Co., 421 N.E.2d 876, 878-79 (1981).

38. Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (affirming award of compensatory damages for wrongful discharge due to employee's serving jury duty).

39. Gantt v. Sentry Ins., 824 P.2d 680, 686-87 (Cal. 1992).

40. *Id.* at 687.

41. General Dynamics Corp. v. Superior Court, 876 P.2d 487, 497 (Cal. 1994).

42. *Id.*

43. See, e.g., Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981); Adler v. American Standard Corp., 432 A.2d 464, 470 (Md. 1981); Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 71 (1980). The balancing act was criticized in Note, *Protecting Employees At-Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1949-50 (1983): "Courts often present their determinations of the public interest as the result of a 'balancing' of the social interests at stake. The rhetoric of balancing

vary according to the particular facts of a case. In addition, courts often identify the interests of the public in workforce stability and discouragement of litigation.⁴⁴

Courts differ in how they articulate the *prima facie* wrongful discharge claim based on a public policy violation. But while the vocabulary may differ from court to court, the core elements of the claim tend to be these: (1) The plaintiff must identify some expression of public policy that is implicated by the discharge. (In Michael Smith's case, that expression would be the criminal prohibition against perjury.) (2) The plaintiff's act or refusal to act promotes the public policy. (Michael testified truthfully at a court proceeding.) (3) The defendant fired the plaintiff because of the plaintiff's act or refusal to act. (Michael was fired allegedly because of his testimony.)⁴⁵ Whether the plaintiff has identified a public policy to support a claim is usually a question of law, but whether the discharge in fact violates that policy is usually a question for the jury.⁴⁶ The employee bears the burden of proving that the termination violates notions of public policy.⁴⁷

The public policy exception will be applied only when the plaintiff can identify a specific expression of public policy.⁴⁸ Michael Smith could satisfy this requirement by pointing to the statute making perjury a crime. Courts prefer statutory expressions of public policy to form the basis of this type of wrongful discharge action,⁴⁹ and are likely to accept state constitutional provisions as sources of public policy, at least to the extent those provisions reach private action.⁵⁰ Numerous courts accept case law as a source of public policy in wrongful discharge cases, but courts are reluctant to glean public policy in the absence of constitutional or statutory authority.⁵¹ Still other courts have accepted federal law⁵² or the law of other states⁵³ as a source of public policy,

tends to conceal the court's ability to control the outcome of any such balance by its choice of the interests to be weighed." (Citations omitted).

44. *E.g.*, *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 71 (1980); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983).

45. *See* FARNSWORTH, *supra* note 25, § 7.17a, at 368 ("All courts insist on a causal connection between the protected activity and the discharge."). Some courts have permitted public policy cases to be brought for retaliatory action short of discharge. *See infra* note 65.

46. ROTHSTEIN, ET. AL., *supra* note 23, § 9.10. In New Hampshire, however, both questions ordinarily go to the jury. *Short v. School Administrative Unit*, 612 A.2d 364, 370 (N.H. 1992); *Cloutier v. Great Atlantic & Pacific Tea Co., Inc.*, 436 A.2d 1140, 1145, 1147 (N.H. 1981).

47. *See* PERRITT, *supra* note 23, § 7.2.

48. *Id.* § 7.10.

49. ROTHSTEIN, ET. AL., *supra* note 23, § 9.10.

50. PERRITT, *supra* note 23, § 7.11; ROTHSTEIN, ET. AL., *supra* note 23, § 9.10.

51. PERRITT, *supra* note 23, § 7.16; ROTHSTEIN, ET. AL., *supra* note 23, § 9.10.

52. PERRITT, *supra* note 23, § 7.13.

53. *E.g.*, *Reinneck v. Taco Bell Corp.*, 696 N.E.2d 839 (Ill. App. 1998) (allowing claim when plaintiff fired in retaliation for filing claim against defendant under another state's workers' compensation law); *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992) (holding that laws of other states may provide basis of public policy claim under appropriate circumstances).

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with some courts going so far as to allow public policy claims based on administrative rules, regulations, or decisions.⁵⁴ Courts have differed over whether to recognize as sources of public policy local codes or ordinances,⁵⁵ and professional ethics rules.⁵⁶

The cases allowing a wrongful discharge claim for violation of public policy tend to be those in which the plaintiff was discharged in retaliation for refusing to perform an unlawful act;⁵⁷ reporting illegal activity (whistleblowing);⁵⁸ exercising some right (usually statutory);⁵⁹ or performing a civic duty.⁶⁰

54. *E.g.*, *Green v. Ralee Engineering Co.*, 960 P.2d 1046 (Cal. 1998); *Norris v. Hawaiian Airlines, Inc.*, 842 P.2d 634 (Haw. 1992); *Walt's Drive-A-Way Service, Inc. v. Powell*, 638 N.E.2d 857 (Ind. App. 1994); *Winkelman v. Beloit Memorial Hospital*, 483 N.W.2d 12 (Wis. 1992).

55. *Compare, e.g.*, *Morishige v. Spencecliff Corp.*, 720 F. Supp. 829 (D. Haw. 1989) (allowing claim based on city building and liquor codes), with *Kramer v. Mayor & City Council of Baltimore*, 723 A.2d 529 (Md. Ct. App. 1999) (disallowing claim based on city charter), *Greenwood v. Taft, Stettinius & Hollister*, 663 N.E.2d 1030 (Ohio App. 1995) (refusing claim based on municipal gay-rights ordinance; public policy must be uniform statewide), *appeal denied with dissent*, 662 N.E.2d 22 (Ohio 1996), and *Webb v. Puget Sound Broad. Co.*, 1998 Wash. App. LEXIS 1795, *8-9 (rejecting claim based on municipal ordinance).

56. *See* Genna H. Rosten, Annotation, *Wrongful Discharge Based on Public Policy Derived from Professional Ethics Codes*, 52 A.L.R.5th 405 (1997).

57. *E.g.*, *Drake v. Advance Construction Service, Inc.*, 117 F.3d 203 (5th Cir. 1997) (applying Mississippi law) (refusing to submit false quality-control reports to U.S. Army Corps of Engineers); *Woodson v. AMF Leisureland Centers, Inc.*, 842 F.2d 699 (3d Cir. 1988) (applying Pennsylvania law) (discharging bartender for refusing to serve visibly intoxicated patron, in violation of state liquor code); *Webb v. HCA Health Serv.*, 780 S.W.2d 571 (Ark. 1989) (refusing to falsify medical records required by Medicaid and Medicare); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (refusing to participate in illegal price-fixing scheme); *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992) (refusing to violate federal statute by providing NASA with false information regarding product quality and pricing); *Faulkner v. United Technologies Corp.*, 693 A.2d 293 (Conn. 1997) (refusing to defraud U.S. government by using defective parts in helicopters produced for Army); *Adams v. George W. Cochran & Co., Inc.*, 597 A.2d 28 (D.C. 1991) (refusing to drive truck that lacked required inspection sticker); *Norris v. Hawaiian Airlines, Inc.*, 842 P.2d 634 (Haw. 1992) (refusing to falsify airline maintenance records in violation of FAA regulations); *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988) (refusing to drive truck over legal weight limit); *DeRose v. Putnam Mgmt. Co.*, 496 N.E.2d 428 (Mass. 1986) (refusing to testify falsely at criminal trial); *Trombetta v. Detroit, T. & I. R.R.*, 265 N.W.2d 385 (Mich. Ct. App. 1978) (refusing to falsify pollution control records in violation of state law); *Coman v. Thomas Manufacturing Co., Inc.*, 381 S.E.2d 445 (N.C. 1989) (refusing to violate federal regulations by driving truck excessive hours and falsifying records); *Todd v. Frank's Tong Service, Inc.*, 784 P.2d 47 (Okla. 1989) (refusing to drive truck with defective brakes, headlights, and turn signals, in violation of state law); *Anderson v. Evergreen International Airlines, Inc.*, 886 P.2d 1068 (Or. Ct. App. 1994) (refusing to use defective parts in defendant's aircraft, and refusing to cover up safety violations); *Strange v. Nationwide Mutual Ins. Co.*, 867 F. Supp. 1209 (E.D. Pa. 1994) (applying Pennsylvania law and refusing to follow illegal "redlining" practices); *Dugan v. Bell Telephone of Pennsylvania*, 876 F. Supp. 713 (W.D. Penn. 1994) (applying Pennsylvania law and refusing to participate in destruction of records subpoenaed by state legislature); *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822 (Tenn. 1994) (refusing to violate laws requiring trucks be inspected for safety violations before driving); *Nguyen v. Technical and Scientific Application, Inc.*, 981 S.W.2d 900 (Tex. Ct. App. 1998) (refusing to violate federal criminal copyright laws); *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992) (refusing to falsify tax and customs documents); *Collins v. Elkay Mining Co.*, 371 S.E.2d 46 (W. Va. 1988) (refusing to falsify mine safety reports and refusing to violate mine safety laws); *Kempfer v. Automated Finishing, Inc.*, 564 N.W.2d 692 (Wis. 1997) (refusing to drive delivery truck without proper licensing).

58. *E.g.*, *Liberatore v. Melville Corp.*, 168 F.3d 1326 (D.C. Cir. 1999) (reporting to management that temperature control problems in pharmacy produced adulterated drugs, and threatening to report same to Food and Drug Administration); *Paoletta v. Browning-Ferris, Inc.*, 158 F.3d 183 (3d Cir. 1998)

(applying Delaware law and protesting employer's scheme of fraudulently billing clients); *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980) (reporting to superiors that food products were being falsely and misleadingly labeled, in violation of state's Uniform Food, Drug and Cosmetics Act); *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (supplying police with information about co-employee's criminal activities, and agreeing to testify regarding same); *Palmer v. Brown*, 752 P.2d 685 (Kan. 1988) (disclosing allegedly improper medicaid billing practices); *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539 (Miss. 1996) (reporting forgery by employer's administrator); *Olinger v. General Heating & Cooling Co.*, 896 S.W.2d 43 (Mo. Ct. App. 1994) (reporting employer's mail fraud to FBI, and cooperating with investigation); *Howard v. Waremart, Inc.*, 935 P.2d 432 (Or. Ct. App. 1997) (reporting to senior management that immediate supervisor was selling mislabeled, spoiled meat to supermarket customers); *Garner v. Morrison Knudsen Corp.*, 456 S.E.2d 907 (S.C. 1995) (reporting unsafe working conditions and radioactive contamination to government and news media, and voluntarily testifying to nuclear safety board about same); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978) (reporting illegal bank overcharges of customers, and cooperating with auditors regarding same); *Hausman v. St. Croix Care Ctr.*, 571 N.W.2d 393 (Wis. 1997) (reporting abuse and neglect of nursing home patients).

Many states have enacted statutes to prohibit retaliation against whistleblowers. There are also federal provisions protecting whistleblowers in certain circumstances. See *supra* note 23. Some of those statutes, by their terms, include a prohibition against retaliation that violates public policy (e.g., New Jersey's Conscientious Employee Protection Act, N.J. STAT. ANN. § 34:19-3, and Montana's Wrongful Discharge from Employment Act of 1987, MONT. CODE ANN. § 39-2-904(1)).

59. E.g., *Lara v. Thomas*, 512 N.W.2d 777 (Iowa 1994) (filing claim of partial unemployment insurance when plaintiff's hours were cut); *Willoughby v. Gencorp., Inc.*, 809 S.W.2d 858 (Ky. Ct. App. 1990) (collecting temporary disability benefits); *Ambroz v. Cornhusker Square Ltd.*, 416 N.W.2d 510 (Neb. 1987) (refusing to take statutorily prohibited polygraph test); *Chapman v. Adia Services, Inc.*, 688 N.E.2d 604 (Ohio Ct. App. 1997) (finding public policy in right to redress for injuries); *Raykovitz v. K Mart Corp.*, 665 A.2d 833 (Pa. Super. 1995) (firing part-time employee for filing for unemployment insurance benefits after losing full-time job with other employer); *Hume v. American Disposal Co.*, 880 P.2d 988, 993 (Wash. 1994) (asserting wage claim); *McClung v. Marion County Comm'n*, 360 S.E.2d 221 (W. Va. 1987) (filing action for wage and hour violations).

A frequent case of this type has been discharge in retaliation for filing a claim under a workers' compensation statute. See Theresa Ludwig Kruk, Annotation, *Recovery for Discharge from Employment in Retaliation for Filing Workers' Compensation Claim*, 32 A.L.R. 4th 1221 (1984) and cases cited therein. Many states now have anti-retaliation provision in their workers' compensation statutes. *Id.* In some of those states, the statutory remedy is by its terms exclusive. E.g., ARK. CODE ANN. § 11-9-107(e).

60. E.g., *Fredrick v. Simmons Airlines, Inc.*, 144 F.3d 500 (7th Cir. 1998) (applying Illinois law and discussing publicly safety problems of employer's aircraft); *Girgenti v. Cali-Con, Inc.*, 544 A.2d 655 (Conn. Ct. App. 1988) (firing movie projectionist for turning on lights during movie, emptying theater, to aid police in looking for burglar); *Washington v. Guest Services, Inc.*, 718 A.2d 1071 (D.C. 1998) (trying to stop co-employee from spraying poisonous cleaning fluid next to uncovered food to be served in retirement home, and reporting same to employer); *Carl v. Children's Hosp.*, 702 A.2d 159 (D.C. 1997) (testifying before legislature regarding tort reform, taking position adverse to employer, and appearing as expert witness in medical malpractice trial); *Cloutier v. Great Atlantic & Pacific Tea Co., Inc.*, 436 A.2d 1140 (N.H. 1981) (refusing to force employees to make bank deposits under dangerous conditions); *Babick v. Oregon Arena Corp.*, 160 Ore. App. 140 (1999) (firing employee for arresting concertgoers committing crimes because arrests made for bad press for arena); *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985) (obeying subpoena); *Gardner v. Loomis Armored Inc.*, 913 P.2d 377 (Wash. 1996) (firing armored car driver/guard for violating company rule by leaving armored truck to assist citizen in danger).

These cases have often involved retaliation for serving jury duty. E.g., *Call v. Scott Brass, Inc.*, 553 N.E.2d 1225 (Ind. Ct. App. 1990); *Shaffer v. Frontrunner, Inc.*, 566 N.E.2d 193 (Ohio Ct. App. 1990); *Nees v. Hocks*, 536 P.2d 512 (Or. 1975); *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. 1978); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992). Of course, cases allowing a claim for discharge in retaliation for complying with a summons for jury duty or a subpoena can also be classed with claims of employees fired for refusing to do illegal acts, in that refusing to comply with such directives by the court is unlawful. As Professor Rothstein points out, not all cases fit neatly into categories. See ROTHSTEIN, ET. AL., *supra* note 23, § 9.9.

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Not all states, however, have allowed claims on all these grounds, and the courts often take different approaches even to the same type of claims. For example, some courts have held that the public policy exception will protect an employee who is fired for refusing to perform an unlawful act only if such conduct would expose the employee to criminal penalties.⁶¹ Certain courts will allow only whistleblowers who first report illegal conduct to governmental authorities to pursue a public policy claim while others will protect an employee who makes a report only within the company.⁶² And indeed, some courts will not allow the claim when the employee was under no legal duty to act.⁶³

Courts differ as to when a statute (such as one prohibiting discrimination or protecting whistleblowers) will preclude a common law public policy claim. Even if a court concludes that the legislature in enacting a particular statute did not intend to preempt the common law public policy claim, it still might decide that the remedy provided by the statute makes a common law claim unnecessary.⁶⁴

Some courts have permitted plaintiffs to pursue claims for retaliation that

61. *E.g.*, *Guthrie v. Tifco Industries*, 941 F.2d 374 (5th Cir. 1991) (applying Texas law and denying claim to employee terminated for refusing to violate customs regulations, because such violation does not carry criminal penalties); *Miller v. Fairfield Communities, Inc.*, 382 S.E.2d 16, 19 (S.C. Ct. App. 1989) (refusing to expand the public policy exception "outside the sphere of criminal sanctions"); *Hancock v. Express One Int'l, Inc.*, 800 S.W.2d 634 (Tex. Ct. App. 1990) (denying claim to airline pilot fired for refusing to fly under conditions violating FAA regulations, because noncompliance with regulations carried only civil penalties); *Medina v. Lanabi Inc.*, 855 S.W.2d 161 (Tex. Ct. App. 1993) (denying claim to apartment managers fired for refusing to discriminate against tenants based on race, because such conduct would not subject plaintiffs to criminal penalties); *Brierty v. Dooley Helicopters, Inc.*, No. H-92-3956, 1993 U.S. Dist. LEXIS 16332 (S.D. Tex. Nov. 12, 1993) (applying Texas law and denying claim by helicopter pilots terminated for refusing to fly helicopters not maintained per federal standards, because by so flying, plaintiffs were not risking criminal penalties; only had they actually killed, injured, or endangered someone would they have been criminally liable!); *see Andrews v. Bon Secours-St. Mary's Hospital of Richmond*, 43 Va. Cir. 486 (1997) (denying claim for nurse terminated for her objections to concealing sexual assault of psychiatric patient, including denying victim food and water, until hospital inspectors left, because failure to object would not have subjected plaintiff to criminal sanctions).

62. *ROTHSTEIN, ET. AL.*, *supra* note 23, § 9.12 (permitting employees to invoke the public policy exception for internal reporting would allow employers an opportunity to cure potential problems by taking steps internally).

63. *E.g.*, *Smith v. Calgon Carbon Corp.*, 917 F.2d 1338 (3d Cir. 1990) (applying Pennsylvania law and denying relief to employee reporting to management employer's pollution of air and water as pollution control was not the employee's responsibility); *Brown v. Hammond*, 810 F. Supp. 644 (E.D. Pa. 1993) (applying Pennsylvania law and denying claim to paralegal terminated for informing authorities and clients of employer's improper billing practices; court finding that it was not plaintiff's job to report such misconduct); *Hennessy v. Santiago*, 709 A.2d 1269 (Pa. Super. 1998) (denying claim for counselor at residence for mentally retarded terminated for assisting resident in pressing rape complaint against another resident, where the court found plaintiff was not required by law to help victim); *see Hausman v. St. Croix Care Ctr.*, 571 N.W.2d 393 (Wis. 1997) (allowing claim by nurse/social worker fired for reporting abuse and neglect of nursing home patients, but only because plaintiff had affirmative duty by statute to make such report).

64. Courts vary on how they approach cases in which common law claims and statutory schemes overlap. *See INDIVIDUAL EMPLOYMENT RIGHTS MANUAL* (BNA) 527:118-22 (1998) (and cases cited therein); *ROTHSTEIN, ET. AL.*, *supra* note 23, § 9.21; *ROTHSTEIN AND LIEBMAN*, *supra* note 23, at 927.

falls short of termination.⁶⁵ Some cases have extended the protection to employees who are by contract subject to discharge only for just cause.⁶⁶ Others have limited the public policy exception to at-will arrangements.⁶⁷

The opinions often focus on whether the termination implicates public concerns or whether it is merely an issue of private concerns. The California Supreme Court, for example, said in *Foley v. Interactive Data Corp.* that what is vindicated through such a wrongful discharge action "is not the terms or promises arising out of the particular employment relationship involved, but rather the public interest in not permitting employers to impose as a condition of employment a requirement that an employee act in a manner contrary to fundamental public policy."⁶⁸ The *Foley* court framed the question as "whether the discharge is against public policy and affects a duty which inures to the benefit of the public at large rather than to a particular employer or employee."⁶⁹

65. *E.g.*, *Holland v. Hardee's Food Systems, Inc.*, 853 F. Supp. 848 (E.D. Pa. 1994) (applying Pennsylvania law and seeking claim for termination of benefits); *Garcia v. Rockwell Int'l Corp.*, 232 Cal. Rptr. 490 (Cal. Ct. App. 1986) (dealing with suspension and demotion); *Brigham v. Dillon Cos., Inc.*, 935 P.2d 1054 (Kan. 1997) (dealing with demotion). See Mark A. Rothstein, *Wrongful Refusal to Hire: Attacking the Other Half of the Employment-at-Will Rule*, 24 CONN. L. REV. 97, 123 (1991), who makes the case for allowing a public policy-based tort action for refusal to hire in certain circumstances, and Mark Berger, *Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee*, 16 YALE L. & POL'Y REV. 1, 51 (1997), who advocates application of the public policy exception to cases of nonrenewal of an employment contract where there has been a pattern of renewal.

66. *E.g.*, *Davies v. American Airlines, Inc.*, 971 F.2d 463, 469 (10th Cir. 1992) (applying Oklahoma law and observing "when an employer discharges an employee in violation of . . . public policy, society is equally aggrieved whether the employee is 'at will' or can be discharged only for 'just cause.'"); *Koehrer v. Superior Court*, 226 Cal. Rptr. 820, 826 (Cal. Ct. App. 1986) ("The theoretical reason for labeling the discharge wrongful . . . is not based on the terms and conditions of the contract, but rather arises out of a duty implied in law on the part of the employer to conduct its affairs in compliance with public policy . . . We focus on the public policy aspect of the wrongful discharge tort in holding that the cause of action does not depend on the contractual status of the employment relationship."); *Ewing v. Koppers Co., Inc.*, 537 A.2d 1173 (Md. 1988) ("[P]articular vulnerability of at will employees . . . was only one of the factors considered by the Court [in recognizing the public policy exception]. . . . The public policy component of the tort is significant, and recognition of the availability of this cause of action to all employees, at will and contractual, will foster the State's interest in deterring particularly reprehensible conduct. Moreover, it would be illogical to deny the contract employee access to the courts equal to that afforded the at will employee."); *Retherford v. AT&T Communications*, 844 P.2d 949, 960 (Utah 1992) ("A primary purpose behind giving employees a right to sue for discharges in violation of public policy is to protect the vital state interests embodied in such policies."); *Wilson v. City of Monroe*, 943 P.2d 1134, 1136 (Wash. Ct. App. 1997) ("[Plaintiff's] right to be free from wrongful termination in contravention of public policy may not be altered or waived by private agreement, and is therefore a nonnegotiable right. Furthermore, the right does not originate in the [collective-bargaining agreement] provision that requires just cause for termination, or depend on interpretation of the CBA—the right is independent of any contractual agreement between [plaintiff and defendant].") (footnotes omitted).

67. *E.g.*, *Silva v. Albuquerque Assembly & Distribution Freeport Warehouse Corp.*, 738 P.2d 513, 515 (N.M. 1987) ("Obviously, if an employee is protected from wrongful discharge by an employment contract, the intended protection afforded by the retaliatory discharge action is unnecessary and inapplicable.").

68. 765 P.2d 373, 377 n.7 (1988).

69. *Id.* at 379.

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More recently, in *Collier v. Superior Court*,⁷⁰ the California Court of Appeal allowed a claim made by an employee who was fired for reporting (internally) that co-employees were engaged in various illegal conduct, including bribery, kickbacks, embezzlement, tax evasion, and price fixing.⁷¹ The court focused on the costs to third parties, recognizing that “the circle of harm resulting from the alleged wrongdoing encompassed far more than the purely private interest of petitioner’s employer.”⁷² In the same vein, the Arizona Supreme Court said in *Wagenseller v. Scottsdale Memorial Hospital*,⁷³ that only those pronouncements of public policy that “have a singularly public purpose” will provide the basis for a wrongful discharge claim.⁷⁴ “Where the interest involved is merely private or proprietary, the exception does not apply.”⁷⁵

Distinguishing the public’s interests from the “merely private or proprietary” is not easy. One can say that a single unemployed individual has an effect, however minimal, on the economy.⁷⁶ All public policy cases that courts have permitted to go forward are thus in some way “public.”⁷⁷ But in some cases, the public’s interests are more directly or more immediately implicated than in others. Consider the worker who is dismissed for refusing to drive a truck with bad brakes. The most immediate interest at stake is highway safety, a policy that transcends the employment relationship. The public policy exception in this case is designed to counteract the externalities of the traditional terminable-at-will rule, that is, the costs to society of giving free rein to employers to discharge for any reason.⁷⁸ The objective in this case “is not the protection of the individual worker per se,”⁷⁹ but the benefit to the community of having only safe vehicles on the road.

Now consider the case of the worker fired in retaliation for filing a work-

70. 279 Cal. Rptr. 453 (Cal. Ct. App. 1991).

71. *Id.* at 455.

72. *Id.* at 456.

73. 710 P.2d 1025 (Ariz. 1985).

74. *Id.* at 1034. The *Wagenseller* decision preceded the Arizona legislature’s enactment of the *Arizona Employment Protection Act*, which abolished the common law public policy claim. See *supra* note 29.

75. 710 P.2d at 1034.

76. Brian Berger discusses the societal costs arising from job insecurity and unemployment in Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 168-69 (1981). Lisa B. Bingham points out that even the classic case of retaliation for filing a workers’ compensation claim implicates more than the employee’s private right, in that the state has an interest in minimizing workplace injuries and maintaining records regarding occupational safety and health. *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 381 (1994).

77. Stewart J. Schwab criticizes the public-or-private language as unhelpful. He argues that a better way to approach this type of wrongful discharge case is by “recalling a central purpose of tort law — to control the adverse effect on third parties created by contracting parties.” *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1945 (1996).

78. Jeffrey L. Harrison, *The Price of the Public Policy Modification of the Terminable-at-Will Rule*, 34 LAB. L.J. 581, 582 (1983).

79. *Id.*

ers' compensation claim. Courts allow a public policy claim in such cases to give effect to the respective workers' compensation statutes. In one of the earliest cases allowing a claim of wrongful discharge for violation of public policy, the Indiana Supreme Court recognized that the fear of being discharged for filing a claim "would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation — opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation."⁸⁰ Toward the same goal of promoting compliance with worker-protection laws, employees have also successfully invoked the public policy exception after being discharged for exercising rights under other laws, such as those setting wages and hours and prohibiting polygraphs.⁸¹

Both the employee fired for refusing to drive an unsafe truck and the employee fired for filing a workers' compensation claim are entitled to invoke the public policy exception, though not exactly for the same reason.⁸² In both cases, there are public interests at stake. In the workers' compensation case, the primary goal is to give effect to an employee's rights under a worker-protection law, while in the case of the dangerous truck, the most immediate concern is protecting the traveling public from harm.⁸³

III. THE PUBLIC POLICY EXCEPTION AND THE INDEPENDENT CONTRACTOR

An independent contractor is one who renders service to another, but who follows the hiring party's direction only as to the results of work, and not as to the means by which it is to be accomplished.⁸⁴ "When one thinks of an independent contractor relationship, one normally thinks of one firm hiring a second firm—with its own staff, equipment, and resources—to do certain work, instead of having its own employees do it."⁸⁵ Alternatively, an independent contractor might be a self-employed individual hired to do a job. The term

80. *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425, 427 (Ind. 1973). *Accord*, *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 734 (Ky. 1983) ("The only effective way to prevent an employer from interfering with his employees' rights to seek compensation is to recognize that the latter has a cause of action for retaliatory discharge when the discharge is motivated by the desire to punish the employee for seeking the benefits to which he is entitled by law.").

81. *See supra* note 59.

82. *See* Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U.L. REV. 263, 298 (1999) (noting that some public policy limitations on the freedom of contract are intended to protect specific third parties or classes of people, while others are intended to protect society generally).

83. Of course, the line between the two cases is not bright. The highway safety laws will also protect the truck-driving employee. And the workers' compensation system affects not only the injured worker, but co-workers, family, and, to the extent the injured worker without benefits might become a public charge, the welfare system.

84. *See* BLACK'S LAW DICTIONARY 774 (7th ed. 1999).

85. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS §5 (May 1994) *available at* http://www.dol.gov/dol/_sec/public/media/reports/dunlop/section5.htm [hereinafter DUNLOP REPORT].

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“independent contractor” is used broadly herein to include both firms and individuals. Most of the relevant case law, however, has involved individual contractors.

The Bureau of Labor Statistics estimates that about 8.5 million individual workers, 6.7 percent of the U.S. workforce, are independent contractors.⁸⁶ Many are contractors because they enjoy the flexibility of self-employment; others are dissatisfied and would prefer employment.⁸⁷ There is little official data on the trend of using independent contractors instead of employees.⁸⁸ Yet, there is at least a perception that more companies are classifying workers as independent contractors, often terminating employees, and hiring them back as independent contractors, with the same job duties, but no benefits and sometimes lower pay.⁸⁹

Independent contractors are generally not covered by protective labor legislation, such as anti-discrimination statutes and wage and hour laws.⁹⁰ A hiring entity does not have to pay social security, Medicare, or federal unemployment insurance taxes on behalf of independent contractors. Nor do employers need to withhold federal income taxes for independent contractors.

As contemporary working arrangements become increasingly more varied, classifying such relationships becomes more difficult. There is no convenient bright-line test to differentiate employees from independent contractors. A variety of methods, none of them easy to use, have been developed to define “employee” in different contexts.⁹¹

86. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS* (1997). The Bureau of Labor Statistics recognized, however, the difficulty of distinguishing independent contractors and employees. U.S. DEP'T OF LABOR, *FUTUREWORK: TRENDS AND CHALLENGES FOR WORK IN THE 21ST CENTURY* § 7 (1999) [hereinafter *FUTUREWORK*].

87. Susan N. Houseman, *Flexible Staffing Arrangements* § 5 (1999) available at http://www.dol.gov/dol/asp/public/futurework/conference/staffing_toc.htm.

88. *See Id.* at § 4.

89. *See* DUNLOP REPORT, *supra* note 85, at 35; Lewis L. Maltby & David C. Yamada, *Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 245-46 (1997); Lisa Stansky, *Changing Shifts*, A.B.A. J., June 1997, at 55, 56-57; Steven Greenhouse, *Item in Tax Bill Poses Threat to Job Benefits*, N.Y. TIMES, July 20, 1997, at A18. In a high-profile case, workers at Microsoft sued the company for denial of benefits because of such misclassification. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996), *rev'd en banc*, 120 F.3d 1006 (9th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1098 (1998). The number of such suits appears to be growing, with workers suing for denial of benefits, denial of overtime pay, and denial of reimbursement of business expenses based on their companies misclassification of them as independent contractors. *See* Andrea Foster, *Congress Eyes Contractor Issue*, NAT'L L.J., June 28, 1999, at B1.

90. A possible exception is 42 U.S.C. § 1981, which prohibits intentional discrimination on the basis of race or ethnicity in the making of contracts. The application of 42 U.S.C. § 1981 is not by its terms limited to employees. *See* Maltby & Yamada, *supra* note 89, at 256-59 (discussing the possibilities and limitations for independent contractors bringing claims based on violation of 42 U.S.C. § 1981). At least one state anti-discrimination law also covers independent contractors. *See, e.g.,* *Marquis v. City of Spokane*, 922 P.2d 43 (Wash. 1996) (holding that state's anti-discrimination statute applies to independent contractors).

91. Anthony P. Carnevale, et al., *Contingent Workers and Employment Law*, in *CONTINGENT WORK* 281, 286-91 (Kathleen Barker & Kathleen Christensen eds., 1998); Maltby & Yamada, *supra*

In a growing number of cases, plaintiffs have asked courts to apply the public policy exception to discharges of independent contractors. Most courts have refused, although few state high courts have decided the issue. Little is said in some of these decisions about the public's respective interests. Instead, the courts to date generally have decided these cases by first determining the employment status of the respective plaintiffs. If the court decides the plaintiff was an employee, it will then proceed to examine the public policy question. If, on the other hand, the court decides that the plaintiff was not an employee, the plaintiff loses, cutting off further consideration of the public's interest in the case. Thus, with few exceptions, the courts' decisions have turned on the employment status of the plaintiff, rather than the underlying public policy at issue. Courts on that basis have denied relief to independent contractors terminated, for example, for refusing to engage in bribery, refusing to violate liquor laws, and objecting to illegal accounting practices.⁹²

Many of the cases in which this question has been raised have been diversity cases brought in federal courts, which are reluctant to set precedent on issues of state common law. Not all the cases considering the issue are officially published. The cases considering this issue tend to be brief, sometimes terse, and many provide little or no rationale for their conclusions. Of the cases that do provide some kind of analysis, some deny the claim, at least in part, because independent contractors have greater control over their jobs than employees do.⁹³ At least one court was concerned about a potential threat to commercial stability should non-employees be availed of such a cause of action.⁹⁴

IV. A SOURCE-DERIVATIVE APPROACH TO DECIDING WHO MAY BRING A WRONGFUL DISCHARGE CASE BASED ON PUBLIC POLICY VIOLATION

When courts deciding wrongful termination cases based on violation of public policy fixate on the plaintiff's employment status, they often lose sight of the public's interests. At the same time, the cause of action should not necessarily be available to independent contractors in every case.

In deciding whether an independent contractor should be permitted to invoke the claim in a particular case, the court should first look at the source of public policy the plaintiff has identified. What is the specific policy at issue? What would be the justification for applying the exception to an employee under the same facts? Is the public policy one of protecting employees because of their status as employees? Let us assume, for example, that the expression

note 89, at 250-52.

92. See *infra* notes 135, 148-55 and accompanying text.

93. E.g., *Premier Wine & Spirits v. E. & J. Gallo Winery*, 846 F.2d 537, 540 (9th Cir. 1988) (applying California law); *Sistare-Meyer v. Young Men's Christian Ass'n*, 58 Cal. App. 4th 10, 16 (Cal. Ct. App. 1997); *MacDougall v. Weichert*, 677 A.2d 162, 166 (N.J. 1996).

94. *Harris v. Atlantic Richfield Co.*, 14 Cal. App. 4th 70, 82 (Cal. Ct. App. 1993).

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of public policy in a given case is a statute. What is the purpose of the statute? Was it enacted to protect employees, as such? Or was the broader purpose to protect some public good that is not dependent on an employment relationship between the parties?

If the underlying source for the public policy was enacted to protect employees, *as employees*, then the independent contractor should not be able to use it as the sole basis for a wrongful discharge claim. Suppose, for example, that an independent contractor is terminated because he refuses to take a poly-graph test, and the only relevant source of public policy is a state statute prohibiting such tests. We need to look at that statute to determine whether it was enacted to protect employees, or whether it has a broader purpose. If the statute by its terms is limited to employees, and the plaintiff is not an “employee” as it is defined under that statute, then the plaintiff should not be able to rely on that enactment as the basis for a wrongful termination claim. Assume, however, that an independent contractor’s services are terminated because she refuses to commit perjury in litigation involving the company. The underlying source of public policy would be the criminal statute prohibiting perjury. Such a statute was not enacted to protect employees, but rather to prevent people from lying under oath. While it will have a tangential effect on employees (employees, like everyone one, are required to obey the law), it is not an employee-protection measure. In such cases where the underlying source is not an employee-protection measure, there is no principled reason to deny the contractor-plaintiff relief; such cases should be decided without regard to the plaintiff’s employment status.

This approach directs the inquiry to the purpose of the underlying source, rather than the parties’ relationship.⁹⁵ An independent contractor with an indefinite arrangement should be permitted to bring a wrongful termination claim based on a public policy violation when the underlying source of public policy is not dependent on employment status. Independent contractors with a contract for a definite period or for termination only for just cause should be permitted to bring such a claim if in that jurisdiction an employee working under those terms would be permitted to do so.

A. Using a Source-Derivative Approach To Reconsider the Cases Deciding Whether Independent Contractors May Bring a Wrongful Termination Claim for Violation of Public Policy

How would the cases considering this issue have been decided using a source-derivative approach? While this approach differs from that taken by most courts to date, the results in many of those cases would not differ.

The following Sections discuss and reconsider two groups of cases that

95. See Pettit, *supra* note 82, at 298.

have decided whether independent contractors may bring wrongful discharge claims based on a public policy violation. In the first group are cases that, for the most part, decide the issue based on employment status, but whose results would probably be the same using a source-derivative approach. That is, regardless of employment status, the plaintiff would have probably lost on a theory of public policy violation. In the second group are claims that probably would have been allowed to proceed under a source-derivative approach.⁹⁶

Group I: Claims that likely fail regardless of plaintiff's employment status

The cases presenting weak factual bases for a public policy claim fail regardless of employment status. For example, the court in *Ambrosino v. Metropolitan Life Insurance Co.*,⁹⁷ refused to allow a claim by a doctor terminated because of his past chemical dependency. Ambrosino was a podiatrist who had entered into a participating-physician agreement with the defendant in 1990. The agreement designated Ambrosino as an independent contractor, and allowed termination at will by either party with thirty days notice. The agreement would also terminate automatically if the physician were placed on probation, reprimanded, or fined by an agency with disciplinary authority over the physician.⁹⁸ In 1994, the Board of Podiatric Medicine placed Ambrosino on probation for six years because of a short-term dependency on demerol in 1991 and his conduct during that period of dependency. That conduct included seeing patients while under the influence of demerol and using demerol prescribed for his patients.⁹⁹ The defendant terminated its agreement with Ambrosino, who sued on several theories, including a claim based on violation of public policy. He argued that the state had a public policy of encouraging the rehabilitation of persons with chemical dependencies. The court granted summary judgment on the public policy claim because Ambrosino was an independent contractor. The district court cited to state cases denying the public policy claim to independent contractors, but otherwise did not discuss the reasons for distinguishing the plaintiff based on employment status. The court in *Ambrosino* based its decision on the plaintiff's employment status. But the doctor's claim would likely have failed even if he had been an employee because courts have generally denied protection under a public policy theory to employees terminated for their efforts at rehabilitation.¹⁰⁰

96. I recognize the limitations of looking at cases through a different lens than that used by the parties and the courts. Had the cases been approached the way I would have approached them, for example, the parties might have briefed them differently, and the opinions might have included more detail about the underlying sources of public policy.

97. 899 F. Supp. 438 (N.D. Cal. 1995).

98. *Id.* at 440.

99. *Id.*

100. See, e.g., *Sullivan v. Delta Air Lines, Inc.*, 58 Cal. App. 4th 938 (Cal. Ct. App. 1997) (denying claim to employee fired because of her voluntary participation in drug/alcohol rehabilitation program);

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In *Kozera v. Connecticut Motor Club, Inc.*,¹⁰¹ a Connecticut case, the plaintiff was an independent contractor who had an agreement with the defendant to provide roadside assistance to its members. The agreement was terminable by either party on seven days notice. The motor club canceled the contract when a local newspaper ran an article announcing that plaintiff had been arrested. (The opinion does not say what the charge was.) Kozera sued for wrongful termination of the agreement in violation of public policy. The court decided that the plaintiff could not invoke the claim because it did not apply outside the employment context. But Kozera probably would have lost even if he had been an employee, in that the courts have generally found that the presumption of innocence accorded criminal defendants does not suffice as an expression of public policy in wrongful discharge cases.¹⁰²

In *Shah v. New England Life Insurance Co.*,¹⁰³ the plaintiff was an independent insurance agent who was fired for violating the rules of the National Association of Securities Dealers, a false accusation according to the plaintiff. The federal district court, applying Illinois law, granted defendant's motion to dismiss solely on the ground that plaintiff, as an independent contractor, was not entitled to the public policy claim.¹⁰⁴ Although the court decided the case on the basis of Shah's employment status, the result was consistent with most public policy cases brought by employees fired on the basis of false accusations of on-the-job misconduct. Such employees do not fare well under the common law public policy theory, as courts typically find that there is no requirement of due process before termination of private employees.¹⁰⁵

Selof v. Island Foods, Inc., 623 N.E.2d 386 (Ill. Ct. App. 1993) (denying claim to employee fired because she sought treatment for alcoholism); Rothweil v. Wetterau, Inc., 820 S.W.2d 557 (Mo. App. 1991) (denying claim for employee discharged because of drug/alcohol addiction, employer having denied request for rehabilitation). Whether an individual with a history of chemical or alcohol dependency has a claim under a statute is a separate inquiry. John Ambrosino, for example, did have a viable claim under a state anti-discrimination statute. 899 F. Supp. at 444-45.

101. No. CV94315537S, 1996 Conn. Super. LEXIS 1067 (Conn. Super. Ct. Apr. 25, 1996).

102. See, e.g., *Kinoshita v. Canadian Pac. Airlines, Ltd.*, 803 F.2d 471 (9th Cir. 1986) (applying Hawaii law) (disallowing common law public policy claim based on discharge following airline employees' arrest for drug dealing where the court found that plaintiffs were fired because of the perception that plaintiffs were involved in drug trade); *Raffaele v. Ryder Dedicated Logistics, Inc.*, 931 F. Supp. 76 (D. Mass. 1996) (applying Massachusetts law) (disallowing claim where truck driver was fired for receiving a traffic citation, which he successfully challenged, while aiding stranded motorist); *Borschel v. City of Perry*, 512 N.W.2d 565 (Iowa 1994) (rejecting public policy claim for police officer charged with, but not convicted of, sexual abuse of daughter); *Rank v. Township of Annville*, 641 A.2d 667 (Pa. Commw. Ct. 1994) (denying claim to employee fired because of charges of drug possession, which were dismissed).

103. No. 98-C5355, 1998 U.S. Dist. LEXIS 18509, at *4 (N.D. Ill. Nov. 18, 1998).

104. *Id.* at *17.

105. See, e.g., *Nunez v. Sahara Nevada Corp.*, 677 F. Supp. 1471 (D. Nev. 1988) (applying Nevada law) (barring claim for employee fired based on accusation of misconduct where employee denied opportunity to confront accusers); *Morris v. Hartford Courant Co.*, 513 A.2d 66 (Conn. 1986) (denying claim to employee fired on basis of false allegations of misappropriating company funds, on the grounds that false accusations of criminal activity did not implicate public policy); *Zuniga v. Sears, Roebuck & Co.*, 671 P.2d 662 (N.M. Ct. App. 1983) (denying public policy claim to employee fired based on erroneous accusation of attempted theft); *Gillespie v. St. Joseph's University*, 513 A.2d 471 (Pa. Super. Ct.

Similarly, the plaintiff in *Ziehlsdorf v. American Family Insurance Group*¹⁰⁶ would likely not have succeeded in his claim even if he had been an employee. In *Ziehlsdorf*, the Wisconsin Court of Appeals considered the wrongful termination case of an independent insurance agent who complied with the insurance company's directive to stop writing insurance policies for black customers and, as a result, failed to meet his minimum production requirements. The court said that if the public policy exception is to be afforded independent contractors, it was up to the state supreme court to do so. It declined to discuss the matter further. The court began and ended the analysis with the plaintiff's employment status. Instead, the case should have turned, as it probably would have had *Ziehlsdorf* been an employee, on the fact that he did not refuse to break the law or report the illegal practice.

The facts in *Sammarco v. Anthem Insurance Cos.*,¹⁰⁷ where the firing of the plaintiff-physicians was allegedly motivated by the defendant's desire to increase profits, would not provide similarly-situated employees with a viable public policy claim. *Sammarco* arose out of the merger of several health insurance carriers and the subsequent termination of the plaintiffs' contracts as physician-providers for one of those carriers. The physicians sued for wrongful termination of their contracts, which were terminable at will. One of the claims was for violation of public policy, based on the plaintiffs' assertion that they were terminated for no reason other than the insurance companies' profit motive.¹⁰⁸ Although plaintiffs were clearly not employees, the court did not dismiss their claim on that ground. Rather, the court dismissed the claim because the "plaintiffs have failed to identify any public policy in Ohio that discourages businesses, even those in such public-welfare industries as health care, from profiting or increasing their profits."¹⁰⁹ Noting that the plaintiffs had not alleged that patient care would be compromised by termination of their contracts,¹¹⁰ the court said that despite some limits on the freedom of insurers to eliminate coverage in certain circumstances, "the free-market philosophy reigns, and most likely will continue to reign as long as individuals have access to adequate medical care—even if that care is not provided by a patient's first-

1986) (denying claim to employee fired as a result of false accusations of criminal conduct); *Cisco v. United Parcel Servs., Inc.*, 476 A.2d 1340, 1344 (Pa. Super. Ct. 1984) (disallowing claim of employee discharged based on charges of theft, which resulted in acquittal); *Reninger v. State Dep't. of Corrections*, 951 P.2d 782, 787 (Wash. 1998) (en banc) (denying claim to corrections officers constructively discharged as result of false accusations of leaving firearms unsecured, upon court finding that termination did not affect public collectively). But see, e.g., *Hodges v. Gibson Products Co.*, 811 P.2d 151, 165-67 (Utah 1991) (allowing claim by store employee fired and prosecuted for theft, even after guilty party confessed, where public policy articulated in statute prohibiting false criminal accusations).

106. No. 89-2391, 1990 WL 149183, at *1 (Wis. Ct. App. Jul. 18, 1990), *review denied*, 461 N.W.2d 446 (Wis. 1990).

107. 723 N.E.2d 128 (1998).

108. *Id.* at 131-32.

109. 723 N.E.2d at 133-34.

110. *Id.* at 134.

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choice physician.”¹¹¹

Two of the factually weaker public policy claims made by independent contractors involved terminations based on the contractors’ business competition with the hiring parties. One of these was *Cogan v. Harford Memorial Hospital*,¹¹² a case applying Maryland law. The defendant hospital contracted with Cogan to act as Chief of Radiology. The contract was terminable by either party on 120 days notice. When the plaintiff announced his intention to open a competing radiology clinic, the hospital terminated the relationship. Cogan sued on a number of theories, including a common law public policy claim. The court granted defendant’s summary judgment on that claim because Cogan was an independent contractor, not an employee. The court also said, however, that regardless of his employment situation, there was no evidence from which a jury could find any wrongful acts on the part of the hospital. The court did not provide any rationale for distinguishing between employees and independent contractors; it merely cited to other cases that had come to the same conclusion on this question. Yet the result in *Cogan* was consistent with precedents where the plaintiffs were employees. An employee who announces an intention to open a business to compete with the employer is unlikely to be successful on a public policy claim.

Another case involving competition with the hiring company was a Missouri case, *Princess House, Inc. v. Lindsey*.¹¹³ The plaintiff in that case manufactured and sold crystal products through “home parties” in private homes. Defendants were sales organizers for these parties. Sales organizers recruited consultants – salespeople who demonstrated the merchandise and took orders at parties. While still working for Princess House, defendants started working for another company that sold products using the home party sales method. Princess House terminated its relationships with defendants, and the break-up resulted in protracted litigation between the parties. While one of the defendants’ twelve counterclaims was for wrongful discharge in violation of public policy, their case was essentially one of breach of contract, apparently for discontinuing certain payments the company had been making to them as a cut of the sales made by the consultants they had recruited. The court granted Princess House’s motion for summary judgment on the public policy count because it found no employment relationship. However, there were no facts on the face of the opinion to indicate that the sales organizers would have had a viable public policy argument even if they had been employees.

Some of the cases brought by independent contractors have involved allegations of discrimination. *Carney v. Dexter Shoe Co.*,¹¹⁴ for example, was a

111. *Id.*

112. 843 F. Supp. 1013 (D. Md. 1994).

113. 918 F. Supp. 1356 (W.D. Mo. 1994), *aff’d*, 77 F.3d 486 (8th Cir. 1996).

114. 701 F. Supp. 1093 (D. N.J. 1988).

New Jersey case of alleged age discrimination. George Carney was a 60-year-old independent sales representative for defendant. When Dexter terminated their relationship, Carney sued, alleging violation of federal and state anti-discrimination statutes, and violation of public policy. The federal district court decided that Carney was an independent contractor, not an employee. The discrimination statutes by their terms covered only employees, so the court granted defendant's summary judgment on those counts. The court also decided that the decision to terminate Carney "had nothing to do with his acting pursuant to a clear mandate of public policy" and thus failed as a matter of law.¹¹⁵ The court noted, too, that there was no New Jersey precedent for allowing independent contractors to pursue common law public policy claims.¹¹⁶

In another discrimination case, *Robinson v. Ladd Furniture, Inc.*,¹¹⁷ the federal district court denied an independent contract's public policy claim under both California and North Carolina law. Sam Robinson was a furniture sales representative with a territory in California. He sold furniture manufactured by defendant, a North Carolina company. Ladd Furniture terminated Robinson and Robinson sued, alleging that his termination was based on age discrimination, in violation of public policy.¹¹⁸ The court found that Robinson was an independent contractor, and therefore was not entitled to invoke the public policy exception under either California or North Carolina law.¹¹⁹ The court's analysis of California law on this point was limited to its citation of *Harris v. Atlantic Richfield*,¹²⁰ wherein the California Court of Appeals denied a public policy claim in a commercial contractual dispute.¹²¹ When examining the question under North Carolina law, however, it did look at the federal *Age Discrimination in Employment Act*¹²² as a source of public policy.¹²³ The court decided that the ADEA by its terms clearly applies only to employees.¹²⁴ Therefore, an independent contractor could not base his public policy claim on the ADEA.

The Idaho Supreme Court considered essentially the same question in *Ostrander v. Farm Bureau Mutual Insurance Co.*¹²⁵ Diane Ostrander, an inde-

115. *Id.* at 1103.

116. *Id.* at 1102.

117. 872 F. Supp. 248 (M.D. N.C. 1994).

118. *Id.* at 252. Robinson also alleged a violation of California's anti-discrimination statute. The court decided that as an independent contractor, he was not covered by the statute. *Id.*

119. *Id.* at 252-54.

120. 17 Cal. Rptr. 2d 649 (Cal. Ct. App. 1993).

121. 872 F. Supp. at 253.

122. 29 U.S.C. §§ 621-634 (2000).

123. 872 F. Supp. at 253. It is not apparent from the opinion whether the plaintiff cited this source, or any other source, of public policy in briefing this issue. The ADEA is, however, the only public policy source the court discussed in the opinion.

124. *Id.*

125. 851 P.2d 946 (Idaho 1993). Five years before *Ostrander* was decided, an independent insurance agent had raised a public policy claim in *Anderson v. Farm Bureau Mutual Ins. Co. of Idaho, Inc.*,

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pendent insurance agent, filed a wrongful discharge claim alleging discrimination based on age and sex. One count of her complaint was for violation of public policies embodied in federal and state anti-discrimination statutes. The court decided that because Ostrander was not in the class of persons protected by these statutes, she could not claim a public policy violation based on them.¹²⁶

Using a source-derivative approach, the results in *Robinson*, *Carney*, and *Ostrander* were probably correct, in that the plaintiffs apparently relied on as expressions of public policy statutes that protect only employees.¹²⁷ In *Sistare-Meyer v. Young Men's Christian Association*,¹²⁸ however, the plaintiff invoked an anti-discrimination provision in a state constitution. Anna Maria Sistare-Meyer entered into a contract with the defendant to provide dancing instruction at the YMCA. The contract was terminable at will with one week's notice. When the defendant terminated the contract, Sistare-Meyer claimed that her firing had been motivated by race discrimination. She sued on a number of theories, including one based on a violation of public policy. The plaintiff cited a provision of the California Constitution, which provides that "[a] person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."¹²⁹ In deciding whether the plaintiff-contractor was entitled to invoke a public policy exception, the California Court of Appeal looked at the source – the constitutional provision itself. However, the court stopped short of a thorough review of the section's text and purpose.¹³⁰ Instead, it simply

732 P.2d 699 (Idaho Ct. App. 1987). The court found that the alleged reason for termination – selling insurance policies from defendant's competitors – did not violate public policy, so it did not need to decide whether the public policy exception might apply to independent contractors. The following year, a case reached the Idaho Supreme Court in which the plaintiff, an independent insurance agent, was discharged for refusing to change his part-time schedule to a full-time one and for consulting an attorney regarding threatened termination. *Clement v. Farmers Ins. Exchange*, 766 P.2d 768 (Idaho 1988). In a split decision, the court found that no public policy was violated, and therefore did not directly address the employer-contractor distinction. One concurring justice would have denied the plaintiff relief solely because he was not an employee. *Id.* at 771-72. In a relatively lengthy and forceful dissent, another justice wrote that he was unconvinced that there is any difference between independent contractors and employees-at-will in cases of public policy violation or bad faith discharge (finding "no merit in a hair-splitting distinction between bad faith and public policy exceptions in employment-at-will terminations generally"). 766 P.2d at 775.

126. See Donald A. Mouton, Casenote and Comment: *Ostrander v. Farm Bureau Mutual Insurance Company: Why is the Idaho Supreme Court Providing No Recourse to Independent Contractors Discharged in Bad Faith?*, 31 IDAHO L. REV. 353 (1994) (criticizing the decision and its lack of analysis).

127. Even employees with discrimination claims are often precluded from bringing common law claims. See sources cited at *supra* note 64 and accompanying text.

128. 67 Cal. Rptr. 2d 840 (Cal. Ct. App. 1997).

129. *Id.* at 842 (quoting CAL. CONST. art. I, § 8). The court stressed that it was not deciding whether the provision accords independent contractors constitutional rights against private parties with whom they contract. Instead, it limited its inquiry to whether the provision expresses a public policy against discrimination that would support a wrongful discharge claim for independent contractors. *Id.* at 842-43.

130. *Id.* at 843. The court's job in this endeavor was not made easier by the unresolved issue of whether the provision covers private as well as state action. See *Id.*

concluded that the provision was not a "sufficiently clear expression of a well established policy against discrimination by persons who engage independent contractors to perform work or services."¹³¹ The court inferred from the provision that the policy against race discrimination must yield "in some circumstances to competing concerns about the general welfare."¹³² With that, the court employed a balancing test: the constitutional policy against discrimination versus the competing policy concerns underlying the "long standing distinction between employees and independent contractors[.]"¹³³ The court explained that "[i]ndependent contractors typically have greater control over the way in which they carry out their work than employees, and businesses assume fewer duties with respect to independent contractors than employees. Thus, the independent contractor status provides the hiring party and the worker with an alternative relationship that gives each more freedom and flexibility than the employer-employee relationship."¹³⁴ A source-derivative analysis would have required the court to delve into the purpose, scope, and coverage of the constitutional provision offered by the plaintiff as the source of public policy. But the court did not do so, instead detouring into a test that purported to balance racial equality with a flexible work arrangement. Because the court did not ask the right questions, it is unclear how *Sistare-Meyer* would have been decided using a source-derivative approach.

The claims in the Group I cases discussed above probably would have failed regardless of the respective plaintiffs' employment status. In the following cases, however, the result might have been different had the courts used a source-derivative approach.

Group II: Claims that would likely be viable under a source-derivative analysis

Those independent contractors terminated for refusing to do something unlawful, or for reporting or objecting to unlawful activities present the strongest public policy cases; had they been employees, most courts would have allowed their cases to proceed. Yet the courts have generally denied such claims by independent contractors. In those cases, the courts typically focus on the

131. *Id.* at 843-44.

132. *Id.* at 844.

133. *Id.*

134. *Id.* (citations omitted). The court also noted that independent contractors are generally not covered by anti-discrimination statutes. *Id.* However, that fact is not relevant to the question of whether the state constitution provides an expression of public policy sufficient to sustain a public policy claim.

In an earlier case, a federal district court applying California law denied without discussion of public policy an independent contractor's common law claim for wrongful discharge based on age discrimination, finding that no such common law claim existed for such discrimination regardless of employment status. *Lumia v. Roper Pump Co.*, 724 F. Supp. 694, 697 (N.D. Cal. 1989).

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plaintiff's employment status, often ignoring the public policy at stake.

In *New Horizons Electronics Marketing, Inc. v. Clarion Corp. of America*,¹³⁵ for example, the court denied a cause of action to an independent sales representative terminated allegedly for refusing to engage in bribery. The Illinois trial court granted defendant's motion for summary judgment on plaintiff's claim based on a public policy violation, concluding that the claim was restricted to employees. The Appellate Court of Illinois affirmed the dismissal. It said that the rationale underlying public policy exception is "based on the recognition that 'employer and employee do not stand on equal footing,' and a proper balance must be maintained among the employee's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood and society's interest in seeing its public policies carried out."¹³⁶ The court considered the dynamics of the employer-employee relationship, but gave insufficient regard to the enforcement of the underlying source of public policy—the statute prohibiting bribery.

The Illinois case of *Driveaway and Truckaway Service, Inc. v. Aaron Driveaway & Truckaway Co.*¹³⁷ also involved a plaintiff terminated allegedly for refusing to break the law. The plaintiff had entered into an agency agreement with a vehicle-transport company. The agent-plaintiff sued the principal for terminating the agreement when the former refused to participate in illegal schemes involving violations of the Illinois Commerce Commission regulations, Interstate Commerce Commission requirements, and federal and state tax laws. The federal district court granted the defendant's motion to dismiss because it decided that the public policy exception was available only to employees under Illinois law, and the plaintiff here was an agent, not an employee. The court said that there was "no hint of unequal bargaining power between [the parties]. . . . This clearly was not a situation where the two parties did 'not stand on equal footing' as in an employment at-will scenario."¹³⁸ The court also noted "that the *availability* of a contractual remedy rather than the existence of one in fact is all that is required to find that a sufficient legal remedy exists here."¹³⁹ Though a similarly situated employee would have been allowed to sue for tort damages in Illinois for a public policy violation,¹⁴⁰ the court decided that the contract remedy would suffice here. The court pre-

135. 561 N.E.2d 283 (Ill. App. Ct. 1990), *appeal denied*, 567 N.E.2d 334 (Ill. 1991).

136. 561 N.E.2d at 285 (quoting *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981)).

137. 781 F. Supp. 548 (N.D. Ill. 1991).

138. *Id.* at 552 (quoting *Palmateer*, 421 N.E.2d at 878).

139. *Id.*

140. An action for wrongful discharge based on violation of public policy is a tort in Illinois. *Kel-say v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978). Illinois courts have allowed employees terminable only for cause to bring such an action, their remedies not limited to those under contract. *Ryherd v. General Cable Co.*, 530 N.E.2d 431, 435 (Ill. 1988) (stating that an employee's right to recover for retaliatory discharge "cannot be negotiated or bargained away").

sumed, without indicating its basis, that "[a]gents who are wrongfully discharged by their principals will routinely seek compensatory damages well above those found in employer-employee discharge cases."¹⁴¹ That difference in compensatory damages, the court concluded, would provide "sufficient deterrent against potential indiscretions by a principal."¹⁴² Like the court in *New Horizons*, the court in *Driveaway* gave short shrift to the enforcement of the laws cited as the sources of public policy.

The court in *Driveaway* raised the issue of unequal bargaining power.¹⁴³ The court's implication (and assumption) was that contractors as a class were on an equal footing with their hiring parties and did not need to be protected in the way employees do. But to say that independent contractors enjoy equal bargaining power with hiring parties is, at least, an overgeneralization. Not all independent contractors are non-employees by choice. While some choose the flexibility of contracting work, others do such work because they are unable to find a company to hire them as employees. Many are contractors because they were terminated as employees and rehired as contractors.¹⁴⁴ In the end, however, bargaining power should not determine the outcome of cases where the purpose is to protect the public's interests. Courts often recognize limitations on contracts for public-policy reasons that "touch upon matters of substance related to the public welfare rather than aspects of the bargaining process between the parties."¹⁴⁵ The primary concern in this type of wrongful discharge cases must properly remain with societal or third-party interests.¹⁴⁶ Even if the

141. 781 F. Supp. at 553.

142. *Id.*

143. 781 F. Supp. at 552 (stating that there is no hint of unequal bargaining power between the parties). The court in *Wilmington v. Harvest Insurance Cos.*, 521 N.E.2d 953 (Ind. Ct. App. 1988) refers to the public policy claim as one developed to protect employees. It, too, was presented with the question of whether to apply the public policy exception to independent contractors. The court did not reach that issue because it decided that whatever plaintiff's status, he did not have a valid claim. The court did note however that the public policy exception "being humanitarian in purpose," did not apply to independent contractors, but to employees only. *Id.* at 956.

144. See *supra* notes 86-89 and accompanying text.

145. RESTATEMENT (SECOND) OF CONTRACTS, ch. 8, Introductory Note (1981). The court in *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142 (N.J. 1992), for example, considered the validity of a termination provision that barred departing members of a law firm from collecting severance compensation if they continued to represent or solicit firm clients within one year of departure. The court held the provision void as against public policy because it inhibited the clients' choice of counsel, not because of a disparity in the parties' relative bargaining positions. *Id.* at 150.

While bargaining power is not directly relevant in deciding whether public policy is implicated, it might affect the number of cases in which the threat of retaliation is effective; where there is equal bargaining power, presumably there is less leverage of the hiring party over the contractor and less likelihood that the contractor would be put in the position of choosing between doing what is in the public's interest and losing a contract.

146. Jeffrey L. Harrison makes the point that under the public policy rationale, "the focus is not on protecting the employee's interest in employment expectations. Instead, the goal is primarily one of protecting the public interest; benefits accruing to employees are incidental." Jeffrey L. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327, 351 (1984).

Few courts will admit to rationalizing an employee's wrongful discharge action on the grounds of

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contractor enjoys equal bargaining power with the hiring party, the contractor might undervalue the public's interest. The contractor might decide that the loss of this beneficial relationship with the other party is not worth pushing the public's interest. (Presumably, the contractor is benefiting from the relationship, or he would not be contracting with the other party.) We should also want to provide an incentive for contractors to do what is in the public interest, regardless of the parties' relative bargaining position.¹⁴⁷

Premier Wine & Spirits v. E. & J. Gallo Winery,¹⁴⁸ a case applying California law, involved the termination of a distributorship allegedly because the distributor refused to violate the law. Premier, a wholesaler of liquor in South Dakota, had an agreement to distribute Gallo's products to retailers. The agreement was terminable by either party with 30 days notice. Premier alleged that Gallo terminated the distributorship because Premier refused to engage in "setting" of Gallo's products at the retail shops. The court described setting as a wholesaler's practice of arranging the products of retailers in such a way that the wholesaler's product gets favorable shelf location. The South Dakota Attorney General had issued a directive to all liquor wholesalers in that state that stocking shelves on behalf of a retailer constituted a form of kickback, "the offering of something of financial value to induce the sale of an alcoholic beverage."¹⁴⁹ Premier had also entered into a consent order with the state of South Dakota by which it was bound not to give kickbacks to retailers. Setting products would subject Premier to loss of its wholesale license (and, presumably, contempt of court if such practice indeed violated the consent order). Premier alleged that Gallo sought to have Premier set shelves in violation of the Attorney General's directive and in apparent violation of the consent order; when Premier refused, Gallo terminated the agreement. The federal district court gave summary judgment for Gallo, and the Ninth Circuit affirmed, deciding that the California courts would not permit the public policy exception on these facts. While it recognized that while the principle underlying the exception is "logically capable of extension beyond the employment relation,"¹⁵⁰ it reasoned that "there is a consideration that makes it peculiarly apt in that setting

unequal bargaining power. Professor Harrison observes that courts "traditionally have been reluctant to speak directly to the issue of unequal bargaining power in any area of law, including the area of employment contracts." *Id.* at 355. Nevertheless, the perceived equal bargaining position has been cited as a reason not to extend the public policy exception to independent contractors. *E.g.*, *Driveaway & Truckaway Service, Inc. v. Aaron Driveaway & Truckaway Co.*, 781 F. Supp. 548, 552 (N.D. Ill. 1991). We cannot know how many other courts might have been silently influenced by concerns of bargaining power in denying the public policy exception to independent contractors.

147. As Professor Harrison has said, the public policy basis for permitting wrongful discharge actions "could justify intrusion even in instances in which the employee willingly agrees to conditions for continued employment that would be inconsistent with the interests of third parties." Harrison, *supra* note 146, at 351.

148. 846 F.2d 537 (9th Cir. 1988).

149. *Id.* at 539.

150. *Id.* at 540.

and not in a broader context: it is normal for an employee to take directions from his employer. In the ordinary commercial world, the control of one party's actions by another is not so usual or so close."¹⁵¹ Therefore, the court concluded, "[i]t is hard to forecast that California would extend the principles of [the public policy exception] to the relation of producer and nonexclusive wholesaler."¹⁵²

The result in *Premier Wine & Spirits* would likely have been different under a source-derivative approach. If the defendant had discharged an employee for refusing to violate liquor laws, the employee would probably have a public policy claim.¹⁵³ The liquor laws were not enacted to protect employees. If they are worth enforcing by protecting employees who refuse to violate them, then they are worth enforcing by protecting non-employees who do the same. The court noted that hiring parties have less control over independent contractors than they do over employees, but did not explain why that difference in control should preclude independent contractors as a class from pursuing public policy claims.

*Vista West, Inc. v. North American Philips Corp.*¹⁵⁴ was a case of alleged whistleblowing decided under California law. Vista West distributed products manufactured by the defendant, NAPC. The relationship between Vista West and NAPC was governed by a series of written contracts providing that the distributorship was terminable at will by either party with 30 days notice. In Vista West's suit, it claimed that its distributorship was terminated because Vista West had complained about the defendant's accounting practices, which allegedly violated state and federal securities laws. (The opinion does not say to whom the complaint was made.) The Ninth Circuit affirmed a grant of summary judgment against Vista West, noting the lack of precedent for extending the cause of action outside the employment context in California.¹⁵⁵ The court did not discuss the underlying securities statutes in granting summary judgment to the defendant. Presumably, however, the securities laws were not written as employee-protection measures. If an employee-plaintiff with the same discharge claim had been able to base a public policy claim on these statutes, Vista West should have also been able to do so.

151. *Id.*

152. *Id.* The tone of the court's opinion suggests that it doubted Premier's story. The court noted that Premier's current president testified in a deposition that he believed Gallo had terminated the distributorship because it wanted to be with another distributor, which was owned by a friend of the Gallo family. Premier's general counsel provided similar testimony, and added that Premier's merchandising manager and Gallo representatives did not work well together. Premier's former president had testified that the breakup was because Premier had changed ownership. "However, Premier now argues that a jury could infer that Premier was terminated for refusing to respond to Gallo's requests to set the shelves of retailers." *Id.* at 539.

153. See *supra* note 57.

154. No. 87-2492, 1989 WL 52707 (9th Cir. May 15, 1989) (unpublished disposition).

155. *Id.* at *7-8.

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In another California case, *Brown v. Allstate Ins. Co.*,¹⁵⁶ the plaintiff was a plumber who did contracting and insurance claim work for defendant. Allstate terminated its relationship with Brown allegedly because he had objected to the company's violations of the state insurance code. Brown sued for unlawful termination, and Allstate filed a motion to dismiss. The federal district court indicated that if plaintiff were an employee, his allegations would suffice to survive the motion, but if an independent contractor, he would be out of luck. The court denied defendant's motion to dismiss because plaintiff's status—"a fundamental, dispositive factual dispute"¹⁵⁷—still needed to be determined. There is little background information in the *Brown* opinion. It provides no additional information about the alleged insurance code violations or any other aspects of the plaintiff's public policy claim, but the insurance code offered as the source of public policy was a statute prohibiting unfair practices in the insurance business, not an employee-protection statute.¹⁵⁸ Given that the court had already decided that the policy underlying the insurance statute was worthy of protection, there was no reason to distinguish Brown the employee from Brown the independent contractor. Therefore, using a source-derivative approach, he should have been able to pursue his claim.¹⁵⁹

The issue of applying the public policy exception to independent contractors reached the Supreme Court of New Jersey in *MacDougall v. Weichert*.¹⁶⁰ John MacDougall, was a real estate sales associate for defendant, Weichert Realtors, in its office in Chester, New Jersey. They had a written agreement describing MacDougall as an independent contractor. The agreement was terminable by either party upon written notice. MacDougall was also a member of the Borough Council in Chester. As a member of the Council, MacDougall voted for an ordinance that would ban parking in front of a building in town that was owned by a long-time Weichert client. The client was unhappy about the vote, and Weichert terminated MacDougall. MacDougall sued Weichert for wrongful termination in violation of public policy. The trial granted Weichert's motion for summary judgment, and MacDougall appealed. Two of the issues the New Jersey Supreme Court had before it were (1) whether the case involved a violation of public policy, and (2) whether MacDougall could invoke the exception.

156. 17 F. Supp. 2d 1134 (S.D. Cal. 1998).

157. *Id.* at 1138.

158. CAL. INS. CODE § 790 (West 1993).

159. *Birchem v. Knights of Columbus*, 116 F.3d 310 (8th Cir. 1997) (applying North Dakota law) was a similar case that might have been allowed to go forward had the plaintiff been an employee, although the facts presented are incomplete. Keith Birchem was terminated allegedly because he had accused defendant's general insurance agent of improper trade practices. He sued for wrongful termination on a public policy theory, arguing that he was in fact an employee. He conceded that his retaliation claim failed if he was an independent contractor. The court found he was an independent contractor and he lost.

160. 677 A.2d 162 (N.J. 1996).

John MacDougall offered two state statutes as sources of public policy to support his claim. The first makes it a criminal offense to threaten harm indirectly or directly to a public official to influence the official's vote.¹⁶¹ The second statute makes it a crime to harm someone in retaliation for her service as a public servant.¹⁶² In a fractured opinion, the court decided that these statutes prohibiting the improper influence of public officials "are the source of a clear mandate of public policy that serves to protect an employee from the threat or infliction of unlawful harm that is intended to influence his or her official action as an elected legislative representative."¹⁶³ The court also looked to conflict-of-interest laws, which demand that an officeholder discharge duties with undivided loyalty.¹⁶⁴ The court found that such conflict-of-interest laws "not only impose duties on public employees but they also constitute constraints on persons dealing with public employees. These laws give added substantive meaning and lend strength to the clear mandate of public policy that has its basic source in the laws that proscribe harmful conduct directed at public officials."¹⁶⁵

The court remanded the case to the trial court to decide "the issue of whether Weichert's conduct in terminating plaintiff's employment was based on interests or relationships that would constitute an impermissible conflict of interest and may have offended the standards that govern conflicts interest [sic], thereby violating a clear mandate of public policy."¹⁶⁶

But regardless of how the trial court on remand might resolve that issue, the Supreme Court of New Jersey decided that the public policy exception was not available to independent contractors. The majority's entire discussion on the subject was this:

The wrongful discharge doctrine is grounded in public policy and is designed to protect employees when failing to do so would violate a clear mandate of public policy. It does not protect independent contractors. The doctrine grew out of a need to protect at-will employees, who are under the total control of the employer and without separate or independent contractual rights that provide employment protections.¹⁶⁷

161. See N.J. STAT. ANN. § 2C:27-3 (West 1995).

162. See N.J. STAT. ANN. § 2C:27-5 (West 1995).

163. *MacDougall*, 677 A.2d at 173.

164. See *id.* at 172-73 (quoting N.J. STAT. ANN. § 40A:9-22.5(d) (West 1995)).

165. *Id.* at 173.

166. *Id.* In a sharp dissent, Chief Justice Wilentz found a clear violation of public policy: There is nothing complex about this case except the majority's treatment of it. It is a simple case, as is the principle that should govern it: in New Jersey an employer should not be able to fire an employee because, as a public official, that employee refuses to participate in a corrupt fix.

Id. at 176 (Wilentz, J., dissenting). "The majority appears to weigh the employer's interest against the employee's, disregarding the public's interest." *Id.* at 185. He agreed, however, that the case needed to be remanded on the question of MacDougall's employment status. *Id.* at 177-178.

167. *Id.* at 166. Chief Justice Wilentz was more hesitant about denying the exception to all inde-

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(Because the trial court had not decided the issue of MacDougall's employment status, the court left that determination to the trial court on remand.) The court reached this decision despite its agreement with the plaintiff that the underlying sources of public policy were meant to avoid undue influence of public officials.¹⁶⁸ Under a source-derivative approach, MacDougall's employment status *at that point* becomes irrelevant to the analysis. Once the court accepted that the interest at stake was the prevention of corruption in government, it should have disregarded any distinctions between employee and independent contractor.

In *Harris v. Atlantic Richfield Co.*,¹⁶⁹ a convenience store franchisee sued the franchisor for "tortious breach of written contract in violation of public policy,"¹⁷⁰ among other claims. Harris alleged that the franchisor had "mistreated him" during his operation of the store by "failing to repair and refurbish his unit as promised in retaliation for his failure to comply with [the franchisor's] pricing dictates and his report of an underground gasoline leak to the authorities."¹⁷¹ The case went to trial, and the jury found for Harris on the public policy claim. The trial court granted judgment notwithstanding the verdict on that claim. Harris appealed, and the court of appeals affirmed the trial court's decision on that issue. The appeals court acknowledged that the principle supporting a public policy claim was logically capable of extension.¹⁷²

It declined, however, to extend it in this case. The court was concerned that extending the tort to commercial contracts would undermine commercial stability, creating "the potential of turning every breach of contract dispute into a punitive damage claim."¹⁷³ While the allegations in *Harris* are not clear (particularly as to the legality of the alleged pricing irregularity), it seems that if the plaintiff's relationship with defendant was terminated for reporting a gas leak to authorities, he should have prevailed on his claim for violation of public policy.¹⁷⁴

pendent contractors, and said that there was no need to decide the issue in that case. He would have instructed the lower court to look more closely at the parties' relationship to see if the level of plaintiffs' dependence on the defendant warranted a finding that he was an employee for purposes of applying the public policy exception. *See id.* at 177-78 (Wilentz, J., dissenting).

168. *Id.* at 172-73. Seven years earlier, however, that court decided that employees covered by union contracts are entitled to invoke the public policy exception, even though their contract permitted termination only for just cause. *LePore v. National Tool and Mfg. Co.*, 557 A.2d 1371 (N.J. 1989). In a case outside the employment context, the Supreme Court of New Jersey had in 1983 decided that a racehorse owner could not be excluded from a racetrack for reasons that violate public policy. *Marzocca v. Ferone*, 461 A.2d 1133 (N.J. 1983). In doing so, the court drew the analogy to the public policy exception to the employment-at-will rule. *Id.* at 1137.

169. 17 Cal. Rptr. 2d 649 (Cal. Ct. App. 1993).

170. *Id.* at 650.

171. *Id.*

172. *Id.* at 656.

173. *Id.*

174. *Werner v. New Balance Athletic Shoe, Inc.*, 824 F. Supp. 890 (D. Minn. 1993) was another decision in which the court denied the independent contractor's claim for public policy violation, but

As illustrated above, the trend has been to refuse relief to independent contractors claiming a public policy violation. There have, however, been a few notable exceptions. For example, in *Caplan v. St. Joseph's Hospital*,¹⁷⁵ a California Court of Appeals case allowed an independent contractor to pursue a public policy claim, not for wrongful discharge, but for wrongful withholding of wages. Caplan was a physician in defendant hospital's emergency room who was terminated when the hospital closed. Before the shutdown, Caplan learned that the hospital had been withholding patient refunds: patients who had prepaid a portion of their bills were not refunded the money when their insurance companies made payment. Caplan gave an interview to a local television news station about the withholding. When the hospital closed, it owed Caplan more than \$10,000 in back wages. It refused to pay him the money in retaliation for his interview.¹⁷⁶ Caplan sued for back wages. The court de-

apparently did not do so on the basis of his employment status. The Minnesota Supreme Court has not definitively spoken on the fate of its common law public policy exception since the passage of that state's whistleblower statute, but federal courts have said that there is no viable common law claim under a public policy theory, even for employees. See *supra* note 29. In *Werner*, the plaintiff was an independent marketer of defendant's shoes who alleged he had been fired for refusing to participate in a price-fixing scheme. Werner brought suit in federal court, asserting several claims, including one for discharge in violation of public policy under Minnesota law. The court granted New Balance summary judgment. Following the federal precedents, the court in *Werner* said that even employees in Minnesota do not have a public policy common law claim, and that it would not extend a protection to independent contractors that was not available to employees. *Id.* at 893.

Other cases have also declined to extend the public policy claim outside the employment context, but without providing sufficient facts or analysis for useful discussion. *E.g.*, *Olsen v. City of Seattle*, No. 97-35640, 1998 U.S. App. LEXIS 29979, *2 (9th Cir. Nov. 20, 1998) (applying Washington law) (denying police officers' claim arising out of defendant's "refusal to provide them with certain employment benefits and its decision to scale back its use of traffic control officers"); *Burnett Techno-Metrics, Inc. v. TSI, Inc.*, 44 F.3d 641 (8th Cir. 1994) (applying Minnesota law) (declining to extend public policy claim to an independent contractor whose termination was "retaliatory," opinion providing no other information regarding circumstances of discharge); *McNeill v. Security Benefit Life Ins. Co.*, 28 F.3d 891 (8th Cir. 1994) (applying Arkansas law) (denying claim to insurance agents terminated for objecting to defendant's proposed sale of life insurance policies to financially weaker insurer; underlying source of public policy unclear); *McClure v. American Family Mutual Insurance Co.*, 29 F. Supp. 2d 1046, 1060 (D. Minn. 1998), (denying claim to independent insurance agents terminated allegedly for contacting state legislature "concerning the suitability of certain insurance products for consumers, including products for their clients"; court finding no public policy claim and therefore not directly addressing application to independent contractors); *Derthink v. Bassett-Walker, Inc.*, 904 F. Supp. 510 (W.D. Va. 1995) (applying Virginia law) (not making clear the specific basis for plaintiff's wrongful termination claim, saying only that it involved "business interest and good will," interests that did not implicate public concerns); *Abrahamson v. NME Hospitals, Inc.*, 241 Cal. Rptr. 396, 397 (Cal. Ct. App. 1987) (denying claim to physician terminated allegedly for refusing to condone defendant's "failure to provide patient care"); *Dahlgren v. Caring and Sharing, Inc.*, No. C1-88-2275, 1989 Minn. App. LEXIS 318, *4, (without discussion, denying claim to independent contractor-plaintiff); *D.C. Amarasinghe v. Sentara Hosps.*, 21 Va. Cir. 76, 77, Case No. C89-1758, 1990 Va. Cir. LEXIS 261 (finding no public policy violation when physician's hospital staff privileges terminated in retaliation for plaintiff's "previous exercise of a lawful right to seek legal redress of grievances"); *Dulles Mutual Benefit Ass'n v. Air Transit*, 15 Va. Cir. 140, Case No. 9956, 1989 Va. Cir. LEXIS 48 (finding no public policy violation for termination by private entity because of plaintiffs' exercise of free speech and right of assembly; also finding public policy claim not applicable to franchisees or independent contractors).

175. 233 Cal. Rptr. 901 (1987) (not officially published).

176. The hospital's chairman of the board admitted in his deposition that one reason for not paying Caplan was because of his interview. *Id.* at 902.

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cided that the hospital's retaliatory refusal to pay the back wages violated public policy, and that tort remedies were appropriate.¹⁷⁷ The hospital argued that Caplan was not entitled to the public policy claim because he was an independent contractor rather than an employee. The court correctly concluded that "the distinction seems trivial," and that to deny the public policy exception to independent contractors "would be to exalt form over substance."¹⁷⁸ The court also noted, however, that "[f]or all practical purposes, Caplan was an employee: he was paid a monthly salary, required to follow hospital guidelines, and subject to discharge."¹⁷⁹ Although the case did not delve into the sources of public policy, it seems plain that the public policy of not allowing hospitals to cheat patients is soundly based in statutes prohibiting fraud, and perhaps other statutes regulating hospitals. As the bases for the action were not employee-protection measures, there was no reason to deny such a public policy claim to an independent contractor.

The New Hampshire Supreme Court in *Harper v. Healthsource New Hampshire*¹⁸⁰ became the first state high court to allow a non-employee to bring a wrongful termination complaint based on a public policy violation. Paul Harper was a participating physician with defendant, a health maintenance organization. Their contract was terminable without cause by either party upon six months notice.¹⁸¹ Over the course of Harper's relationship with Healthsource, the portion of Harper's patient base insured in some way by Healthsource had grown to about 30 to 40 percent. Harper alleged that after nine years as a participating physician with Healthsource, he realized that Healthsource had been manipulating patient treatment records, and that such inaccuracies were affecting subsequent patient reports. When Harper notified Healthsource of his concerns about the accuracy of his patients' records, Healthsource informed him that they had reviewed the situation and found no problem with patient care. It also informed him that his contract was being terminated for failing to satisfy "recredentialing criteria."¹⁸² After Harper exhausted his appeal remedies with Healthsource management, he sued for wrongful termination of the agreement. One of his several counts alleged that the termination violated public policy.¹⁸³ The trial court dismissed all Harper's claims and Harper appealed.

The New Hampshire Supreme Court decided that the trial court had erred in dismissing the public policy claim despite the lack of an employment rela-

177. *Id.* at 905.

178. *Id.*

179. *Id.*

180. 674 A.2d 962 (1996).

181. The contract also provided for termination with cause for nine enumerated grounds. *Id.* at 964.

182. *Id.* at 963.

183. *Id.* at 964.

tionship. The court found Harper's relationship with Healthsource difficult to define, Harper being neither an employee nor an independent contractor in the way case law traditionally views such a relationship.¹⁸⁴ Regardless of Harper's status, the court said that it would not permit a termination that contravenes public policy.¹⁸⁵ It decided that the public had a "substantial interest in the relationship between health maintenance organizations and their preferred provider physicians as well. This relationship is perhaps the most important factor in linking a particular physician with a particular patient. . . . [T]he termination of [Harper's] relationship with Healthsource affects more than just his own interest."¹⁸⁶

The court found clear public policy in state statutes that create parameters for preferred provider agreements between health insurers and physicians such as Harper's. The New Hampshire legislature stated that the general policy behind that chapter was that such agreements must be "fair and in the public interest."¹⁸⁷ The court also found a public policy in the common law's recognition that the doctor-patient relationship "ought to be sedulously fostered,"¹⁸⁸ noting that evidentiary privileges protecting communications between patient and physician recognize society's determination to place the doctor-patient relationship "on a different footing" than most others.¹⁸⁹ The court in *Harper* correctly emphasized the interests of the patients involved, rather than the relationship between physician and health maintenance organization. The court did not ultimately decide whether the facts rose to the level of a public policy; the question in New Hampshire ordinarily being one for the jury,¹⁹⁰ the court sent the case back to the trial court.

In another case involving health care providers, a federal district court in New Jersey allowed non-employees to pursue a public policy claim for wrongful termination. In *New Jersey Psychological Ass'n v. MCC Behavioral Care, Inc.*,¹⁹¹ the plaintiffs were psychologists who contracted as providers for

184. *Id.* at 965.

185. *Id.*

186. *Id.* at 966 (citation omitted).

187. *Id.* (quoting N.H. REV STAT. ANN § 420-C:1 (1991)).

188. *Id.* (quoting 8 J. WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. 1961)).

189. *Id.* The Court of Appeals of Colorado has recently decided that a provision providing for termination without cause in a service agreement between a physician and medical group treating patients enrolled in a prepaid health plan did not violate public policy. *Grossman v. Columbine Med. Group, Inc.*, No. 98CA0668, 1999 Colo. App. LEXIS 286, *8-14 (Colo. Ct. App. Nov. 12, 1999). There were apparently no allegations in that case, however, that the actual reason for plaintiffs' terminations (not provided in the opinion) violated public policy. The issue was simply whether any no-cause termination provision in such an agreement violates public policy. The dissent would have found that such a provision violates public policy because of the detrimental effects on patient care and on the physician's livelihood. *Id.*

190. *Short v. School Admin. Unit*, 612 A.2d 364, 370 (N.H. 1992); *Cloutier v. Great Atlantic & Pacific Tea Co., Inc.*, 436 A.2d 1140, 1145 (N.H. 1981).

191. No. 96-3080, 1997 U.S. Dist. LEXIS 16338 (D.N.J. Sept. 17, 1997).

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MCC, a managed care organization for mental health and substance abuse services. MCC terminated the plaintiffs, allegedly because it did not agree with the plaintiffs' patient treatment plans. The plaintiff-psychologists' suit included a count for violation of public policy. The court denied MCC's motion to dismiss, citing as sources of public policy state regulations requiring that health maintenance organizations' "utilization management determinations shall be based on written clinical criteria and protocols developed with the involvement from practicing physicians and other licensed health care providers within the network."¹⁹² The regulations also provided that "all determinations to deny or limit an admission, service, procedure or extension of stay shall be rendered by a physician" and not by other employees of the organization.¹⁹³

Finally, the regulations also provided for providers "to advocate for patients with regard to utilization management determinations."¹⁹⁴ The court, stressing the patient's interest in a continuing relationship with a physician, also looked to a New Jersey Supreme Court decision that found a "strong public interest which prevents hospitals from 'arbitrarily foreclosing otherwise qualified doctors from their staffs.'"¹⁹⁵

The focus in *New Jersey Psychological Association* was, as it should be, on the public policies involving patient care, rather than on the plaintiff's employment status. Whether the facts warranted the invocation of the public policy exception in that case is not as clear, the opinion denoting only that there was a disagreement between the parties about patient care.

While not squarely deciding the issue, the Oklahoma Supreme Court in *Rosenfeld v. Thirteenth Street Corp.*,¹⁹⁶ has indicated that a public policy claim should not depend on a showing of an employment relationship. In *Rosenfeld*, the court allowed a physician to sue for a wrongful denial of staff privileges at defendant-hospital. The claim was based on alleged retaliation for reporting various illegal and unethical practices that included allowing incompetent physicians to treat patients, fraudulently billing insurance companies, and falsifying medical records.¹⁹⁷ The court found that the plaintiff was an employee, and so did not need to decide whether a similarly situated independent contractor would have had a claim under the same theory. However, the court did note that the duty not to discharge a person for attempting to correct illegal and unethical acts exists independently of the contract. "Consequently, whether the

192. *Id.* at *11 (quoting N.J. ADMIN CODE 8:38-8.1).

193. *Id.* (quoting N.J. ADMIN CODE 8:38-8.3).

194. *Id.* (citing N.J. ADMIN CODE 8:38-3.6).

195. *Id.* at *10 (quoting *Nanavati v. Burdette Tomlin Memorial Hosp.*, 526 A.2d 697 (1987) (citations omitted)).

196. 117. Lab. Cas. (CCH) ¶56,446 (June 13, 1989).

197. The plaintiff also alleged that the denial of his privileges was motivated by anti-Semitism. The court, in reversing summary judgment for defendant, did not clearly distinguish between the issues of religious discrimination and whistleblowing.

underlying contract which forms the parties' relationship is an employment contract 'at will' or 'for cause' or *creates some other form of relationship, would appear to be irrelevant in determining whether a violation of public policy has occurred.*"¹⁹⁸ The court in *Rosenfeld* thus recognized that the proper inquiry should be on the public policy raised—here, the patients' safety and financial protection—rather than on the form of the parties' relationship.

B. The Source-Derivative Approach and the Traditional Judicial Function of Invalidating Contractual Terms that Violate Public Policy

It is a traditional judicial function to invalidate contracts or terms that violate public policy, regardless of the character of the contracting parties.¹⁹⁹ Courts have thus restricted the right to terminate relationships outside the workplace when such termination would violate public policy. Courts in such cases have correctly focused on the public policies at issue, instead of on the nature of the parties' relationship. In *L'Orange v. Med. Protective Co.*,²⁰⁰ for example, the Sixth Circuit, applying Ohio law, decided that a malpractice insurance carrier could not cancel the policy of a dentist in retaliation for testifying at a malpractice suit against another dentist insured by the same carrier. The insurance policy was cancelable by either party with ten days' notice, but the court found that the insurer's actions violated public policy. The court cited criminal statutes prohibiting witness intimidation and noting the need for medical professionals as experts in malpractice cases.²⁰¹ The court in *L'Orange* said it would be meaningless to distinguish between the prohibition against creating a contract to accomplish witness intimidation and the threat of termination to effect the same goal.²⁰²

Principles of public policy have also been invoked to prohibit retaliatory termination of tenancies. In the landmark case of *Edwards v. Habib*,²⁰³ a month-to-month tenant was evicted in retaliation for reporting her landlord's housing sanitation code violations to housing authorities. The court allowed the tenant to assert a retaliatory-eviction defense based on District of Columbia statutes and for reasons of public policy: "[W]hile the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities."²⁰⁴

198. No. 68, 585, 1989 Okla. LEXIS 105, at *13 (Okla. June 13, 1989) (emphasis added).

199. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 145.

200. 394 F.2d 57 (1968).

201. *Id.* at 62.

202. *Id.* at 63. *But cf.* *Silver Eagle Co. v. National Union Fire Ins. Co.*, 423 P.2d 944 (Or. 1967) (finding no violation of public policy when insurer cancelled coverage in anticipation of substantial liability as result of insured's sale of defective products).

203. 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

204. *Id.* at 699.

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The court recognized that the underlying remedial legislation would be useless if landlords could intimidate those who report violations.²⁰⁵

Other courts have followed *Edwards*' lead.²⁰⁶ The Supreme Court of Utah, for example, has recognized the defense when tenants were evicted for complaining of violations of health department regulations.²⁰⁷ The Supreme Court of Wisconsin has allowed the defense where the landlord evicted month-to-month tenants after they complained to health authorities of housing code sanitation violations.²⁰⁸ The California Supreme Court has recognized the defense in cases where tenants suffered retaliation for withholding rent to make the property habitable²⁰⁹ where tenant-farmworkers were evicted from company-controlled housing for suing the landlord-employer for violations of a farmworker protection statute²¹⁰ and where a tenant was evicted because she had reported to police that the landlord had sexually assaulted her niece.²¹¹

While most cases allowing tenants to invoke a retaliation defense involve residential tenancies, the Restatement takes no position as to whether such protection should be extended to commercial or industrial property.²¹² The California Court of Appeal allowed a commercial tenant to invoke the defense in *Custom Parking, Inc. v. Superior Court*,²¹³ in which the defendant, a month-to-month tenant, alleged it was evicted because its employees refused to testify falsely in litigation involving the landlord and other tenants. The landlord sued the tenant for unlawful detainer when the tenant refused to vacate the premises. The tenant based its defense on public policy grounds. The court found no reason to distinguish between residential and commercial tenancies in these circumstances:

It states the obvious to say that there is a strong public policy against intimidating witnesses in a lawsuit from testifying honestly. In this context, the distinction between a commercial and a residential tenancy pales into insignificance. . . . Here, to preclude the defense [of retaliatory eviction] would be to create a class of litigants, commercial landlords, with a legally sanctioned means of punishing tenants who testify honestly but adversely to the landlord in a lawsuit between the landlord and third parties. To countenance such a result would be to put a judicial imprimatur upon attempts to impair the truth-finding process of our legal system.²¹⁴

205. *Id.* at 701.

206. Today, many jurisdictions also offer statutory protection against retaliatory eviction. See Annotation, *Retaliatory Eviction of Tenant for Reporting Landlord's Violation of Law*, 23 A.L.R. 5th 140 (1994); RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT §§ 14.8–14.9 (1977).

207. *Building Monitoring Systems, Inc. v. Paxton*, 905 P.2d 1215 (Utah 1995).

208. *Dickhut v. Norton*, 173 N.W.2d 297 (Wis. 1970).

209. *Schweiger v. Superior Court*, 476 P.2d 97 (Cal. 1970).

210. *S. P. Growers Association v. Rodriguez*, 552 P.2d 721 (Cal. 1976).

211. *Barela v. Superior Court*, 636 P.2d 582 (Cal. 1981). See RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT §§ 14.7–8 (1977), and cases cited therein.

212. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 14.8 (1977).

213. 187 Cal. Rptr. 674 (1982).

214. *Id.* at 681–82.

The California Court of Appeal in *Mobil Oil Corp. v. Handley*,²¹⁵ similarly decided that the commercial/residential distinction was not determinative when a petroleum distributor's lease was allegedly terminated in retaliation for exercising his rights under state franchise law. Instead, the court said, the real issue was the possibility of frustration of statutory purpose; if the plaintiff-distributor could be evicted for exercising his statutory rights, the obvious aim of the underlying statute would be thwarted.²¹⁶

The Supreme Court of Hawaii in *Windward Partners v. Santos*,²¹⁷ permitted the defense where farming tenants were evicted in retaliation for testifying at a public hearing against the landlord's plans to re-designate the land as non-farm property. The leases of some of the tenants restricted the use of the premises to residential use; the leases of the other tenants were restricted to agricultural use. The court's decision did not turn on the distinction, finding that all the tenant-defendants had a statutory right to testify at the public hearing and that denying the defense to the non-residential tenants would frustrate the legislative intent of that statute.²¹⁸

The courts permitting commercial tenants to invoke a retaliation defense focused on the specific public policy at issue, not on the type of tenancy involved. Whether a common law "wrongful termination" claim involves a tenancy, insurance coverage, or working relationship, courts that look first at the public interest at stake, rather than the nature of the parties' relationship, pro-

215. 143 Cal. Rptr. 321 (1978).

216. *Id.* at 327-28. *But see, e.g., Mobil Oil Corp. v. Rubinfeld*, 370 N.Y.S.2d 943 (N.Y. App. Div. 1975) (refusing equitable defense to commercial tenant-franchisee whose lease was not renewed allegedly because tenant resisted landlord-franchisor's efforts to violate antitrust laws); *William C. Cornitus, Inc. v. Wheeler*, 556 P.2d 666 (Or. 1976) (refusing to extend retaliation defense to commercial tenant whose lease was not renewed allegedly because of his refusal to engage in anti-competitive practices and his refusal to agree to unlawful lease terms). Availability of the retaliatory-eviction defense to commercial tenancies when such leases are intertwined with franchise agreements might also be affected by statutes governing franchise relationships.

The District of Columbia Court of Appeals in *Espenschied v. Mallick*, 633 A.2d 388 (1993), refused to extend the retaliatory-eviction defense to commercial tenants who were evicted allegedly for complaining of damage to the building structure and for assisting residential tenants in the same building in pursuing their housing violation complaints. The court did, however, leave open the possibility that under appropriate facts, a commercial tenant might assert a retaliation defense. *Id.* at 395.

A commercial tenant was recently permitted in *Longview v. International Raw Materials*, 979 P.2d 917 (Wash. Ct. App. 1999), to invoke the retaliation defense when he was evicted by his landlord after publicly expressing concern about environmental hazards in the subject premises. Because the landlord was a government entity, the court looked not only to the *Edwards* line of cases, but to constitutional principles. In extending the defense to the commercial tenants, the court looked to two U.S. Supreme Court cases deciding that the First Amendment protects independent contractors from the termination or non-renewal of at-will government contracts in retaliation for their exercise of freedom of speech or political association. *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) and *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996). In deciding those cases, the Supreme Court emphasized the interests at stake, rejecting a rule that would have made the extent of First Amendment rights dependent on the terminated party's employment status.

217. 577 P.2d 326 (1978).

218. *Id.* at 333-34.

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mote the enforcement of the laws that are the sources of public policy.²¹⁹

CONCLUSION

To decide wrongful discharge cases for violation of public policy based only on employment status is to lose sight of the primary purpose of allowing such a claim—protecting the public's interests. Unfortunately, most courts to date have done just that. The alternative approach outlined here requires a closer look at the source of the public policy in a particular case to determine whether its purpose is to protect employees only or whether its purpose is one that transcends the employment relationship. This source-derivative method of examining wrongful termination cases based on public policy violations is consistent with the common law tradition of intervening in a contractual relationship when the public's interest warrants, while respecting the integrity of the underlying source of public policy. This approach also keeps the focus on the public's interests at a time when modern working relationships are becoming more fluid and difficult to categorize.

219. An approach similar to the one outlined in this article might apply to retaliatory evictions. A court would look to the source of the public policy on which the tenant's defense is based. Is the source's purpose to protect only residential tenants (such as a health code provision that applies only to homes)? Or is the purpose one that is not dependent on the relationship of the parties (such as a perjury statute)?

