

Winter 2000

## Retaliatory Discharge for Attorney-Employees in Private Practice: To Do, or Not to Do, the Right Thing, 33 J. Marshall L. Rev. 383 (2000)

Terri Martin Kirik

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Business Organizations Law Commons](#), [Courts Commons](#), [Labor and Employment Law Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

Terri Martin Kirik, Retaliatory Discharge for Attorney-Employees in Private Practice: To Do, or Not to Do, the Right Thing, 33 J. Marshall L. Rev. 383 (2000)

<https://repository.law.uic.edu/lawreview/vol33/iss2/3>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact [repository@jmls.edu](mailto:repository@jmls.edu).

# RETALIATORY DISCHARGE FOR ATTORNEY-EMPLOYEES IN PRIVATE PRACTICE: TO DO, OR NOT TO DO, THE “RIGHT THING”

TERRI MARTIN KIRIK\*

## INTRODUCTION

You are a licensed attorney working as an associate for a private law firm. After a few years of employment, you are promoted to office manager and you report directly to the firm's partners.<sup>1</sup> Your new responsibilities include supervising the collection department, along with reviewing and signing consumer debt collection complaints. Things are looking rosy, so in addition to making your law school loan payments, you purchase a larger home and buy a second car. However, you discover that your firm is filing consumer debt collection actions in violation of the venue provisions of federal and state laws.<sup>2</sup> You speak with your law firm's principal partner about the problem and he tells you it will be corrected. When you discover that the violations continue, do you refuse to sign the collection complaints and again approach the partner with your concerns?

You are placed in a moral and ethical dilemma. You realize that your employer's conduct is illegal. You are quite aware of your ethical obligations as an attorney to avoid participating in unlawful practices and to report misconduct. You also know that you have mortgage payments to make and school loans to repay. But it appears that your employer is bent on doing the “wrong thing.”

Perhaps you visit the partner again and a short time later, you are relieved of your responsibilities in the collection department. A few weeks later, you are fired. You feel this

---

\* J.D., The John Marshall Law School, June 1999. Ms. Kirik is an attorney with the law firm of Pappas & Schnell, P.C. in Rock Island, Illinois, where she practices employment law. The Author extends deep appreciation to Stuart R. Lefstein, Esq., of Rock Island, Illinois, for his endless encouragement.

1. This scenario is based upon the facts in *Jacobson v. Knepper & Moga, P.C.*, 688 N.E.2d 813 (Ill. App. Ct. 1997), *rev'd*, 706 N.E.2d 491 (Ill. 1998).

2. See *Jacobson*, 688 N.E.2d at 814 for details of Mr. Jacobson's complaint.

termination is in retaliation for your insistence that the law firm do the "right thing." Do you have a cause of action against your employer, or are you precluded from such a retaliatory discharge action? According to the Illinois Supreme Court, an attorney who takes the ethical high road by following the *Rules of Professional Responsibility* does not have the foundation for a claim of retaliatory discharge.<sup>3</sup>

This Article maintains that a claim for retaliatory discharge should be afforded to attorneys who are fired by law firms for refusing to violate the law and/or their professional ethics.<sup>4</sup> This remedy would encourage attorneys to do the "right thing" when their employers are bent on doing "the wrong thing."<sup>5</sup> Part I of this Article reviews the law of at-will employment and the exceptions to at-will firing. Part II examines the ethical obligations of attorneys and compares the attorney-client relationship of in-house attorneys with the obligations of attorneys employed by private law firms. Part III discusses wrongful discharge lawsuits attorneys file and the remedies available, if any. Finally, Part IV proposes that a public policy under a professional code exception to the at-will employment doctrine be extended to attorney-employees fired by their law firm for refusing to violate the law and/or their professional ethics.

## I. THE CONCEPT OF AT-WILL EMPLOYMENT AND ITS EXCEPTIONS

*[T]he employer is not so absolute a sovereign of the job that there are not limits to his prerogative.*<sup>6</sup>

Historically, under the common law, employers were entitled

---

3. *Jacobson*, 706 N.E.2d at 494 (Freeman, J., dissenting).

4. This Article will focus on the private law firm attorney-employee's claim for retaliatory discharge. For extensive discussions regarding in-house and corporate counsels' right to sue for retaliatory discharge, see Sara A. Corello, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389 (1992); Raymis H.C. Kim, *In-House Counsel's Wrongful Discharge Action Under the Public Policy Exception and Retaliatory Discharge Doctrine*, 67 WASH. L. REV. 893 (1992); John Jacob Kobus, Jr., *Establishing Corporate Counsel's Right to Sue for Retaliatory Discharge*, 29 VAL. U. L. REV. 1343 (1995); Elliot M. Lonker, Note, *General Dynamics v. Superior Court: One Giant Step Forward for In-House Counsel or One Small Step Back to the Status Quo?*, 31 CAL. W. L. REV. 277 (1995); Patricia Leigh O'Dell, *Retaliatory Discharge: Corporate Counsel in a Catch-22*, 44 ALA. L. REV. 573 (1993); Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO. J. LEGAL ETHICS 553 (1988); and Michael P. Sheehan, *Retaliatory Discharge of In-House Counsel: A Cause of Action—Ethical Obligations v. Fiduciary Duties*, 45 DEPAUL L. REV. 859 (1996).

5. *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 113 (Ill. 1991) (Freeman, J., dissenting). Justice Freeman commented that ethical incentives alone are not sufficient when "doing 'the right thing' will often result in termination by an employer bent on doing the 'wrong thing.'" *Id.* at 113.

6. *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1336 (Cal. 1980).

to hire and fire employees as they pleased.<sup>7</sup> An employer could discharge an at-will employee for good cause, no cause or even bad cause, without incurring legal liability.<sup>8</sup> However, the circumstances behind many firings, such as discharging a long-term employee to avoid compensation obligations<sup>9</sup> or firing an employee who filed a workers' compensation claim<sup>10</sup> or terminating a worker who refused to commit perjury,<sup>11</sup> cried out for legal remedy. Today, the employer's right to terminate his employees is not absolute. Recognized exceptions to the at-will doctrine are generally based upon theories of contract and tort, as well as statutory remedies. Some jurisdictions limit wrongful discharge actions to breach of contract claims,<sup>12</sup> some allow public policy exceptions to at-will discharge under the tort of retaliatory discharge,<sup>13</sup> and other jurisdictions recognize claims under both

---

7. *Payne v. Western & Atl. R.R. Co.*, 81 Tenn. 507, 518 (Tenn. 1884).

8. *Morriss v. Coleman Co.*, 738 P.2d 841, 846 (Kan. 1987). See also *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439, 442 (7th Cir. 1964) (holding that employers were free to fire without notice and for any reason or no reason); *Ramirez v. IBP, Inc.*, 913 F. Supp. 1421, 1428 (D. Kan. 1995) (noting that in the absence of an express or implied contract of duration, employment is terminable at the will of either party); *Mack v. McDonnell Douglas Helicopter Co.*, 880 P.2d 1173, 1175 (Ariz. Ct. App. 1994) (stating that an employee's at-will employment could be terminated at the pleasure of either the employee or the employer); *Zimmerman v. Buchheit of Sparta, Inc.*, 645 N.E.2d 877, 879 (Ill. 1994) (noting that "a noncontracted employee is one who serves at the employer's will, and the employer may discharge such an employee for any reason or no reason"); *McLaughlin v. Gastrointestinal Specialists, Inc.*, 696 A.2d 173, 176 (Pa. Super. Ct. 1997) (quoting *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170, 1179 (Pa. Super. Ct. 1997)) (stating that Pennsylvania courts have protected the employer's "unfettered right to discharge an at-will employee for any or no reason in the absence of a contractual or statutory prohibition").

9. *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1258 (Mass. 1977).

10. *Kelsay v. Motorola*, 384 N.E.2d 353, 357 (Ill. 1978).

11. *Petermann v. International Bhd. of Teamsters Local 396*, 344 P.2d 25, 28 (Cal. Dist. Ct. App. 1959).

12. See *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988) (adopting the exclusive contract approach, but noting that if an employer's conduct is "egregious" in breaching the employment contract, "the employee can still claim tort damages on a cause of action for outrage"); *Fortune*, 364 N.E.2d at 1255-56 (holding that defendant's written contract contained an implied covenant of good faith and fair dealing, and a termination not made in good faith is a breach of the contract); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983) (holding that a contract theory is most appropriate since a discharge action is based upon implied provisions of the contract for employment).

13. *Wagner v. City of Globe*, 722 P.2d 250, 258 (Ariz. 1986); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981). See *Kobus, supra* note 4, at 1345-46 and accompanying footnotes for a listing of states adopting the public policy exception.

theories of contract and tort.<sup>14</sup> However, there are cases in jurisdictions where a plaintiff's status as an attorney will prevent any remedy at all for wrongful termination.<sup>15</sup> Section A looks at the employment contract and its implied terms. Section B discusses the tort of retaliatory discharge and the public policy exceptions to the at-will doctrine, as well as statutes enacted to protect employees from wrongful discharge.

### A. *The Employment Contract*

The general rule regarding employment contracts is that if the contract is for a definite term, the employee may be discharged before the expiration of the term only for breach of a contractual provision or other "good cause."<sup>16</sup> Like most employees, the majority of attorneys employed by law firms do not have a written contract of employment containing a durational provision. In searching for a solution to the problem of unfair termination using a contract analysis, courts may look beyond the express terms of an employment contract to the implied term of an oral or written contract, the implied covenant of good faith and fair dealing, and the employee handbook.<sup>17</sup>

#### 1. *The At-Will Presumption in the Employment Setting*

While an employment contract is presumed to be terminable at will, this presumption is rebuttable if evidence exists of an implied condition to the contrary.<sup>18</sup> Additionally, some jurisdictions recognize that while an employer may fire an at-will employee for good cause or no cause, the employer has a duty to the employee to refrain from terminating the employment for bad cause.<sup>19</sup>

---

14. *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980).

15. *See Jacobson v. Knepper & Moga P.C.*, 706 N.E.2d 491, 494 (Ill. 1998) (holding that an attorney employed by a private law firm does not have an action for retaliatory discharge against its attorney-employer); *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 110 (Ill. 1991) (refusing to allow in-house attorney to sue his employer because the employee-attorney obeyed his ethical obligations); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343, 348 (Ill. App. Ct. 1986) (holding there is no cause of action for retaliatory discharge by an attorney whose employment is terminated by a client). See discussion *infra* Part III.A.

16. *Rosecrans v. Intermountain Soap & Chem. Co.*, 605 P.2d 963, 965 (Idaho 1980).

17. *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 924 (Cal. Ct. App. 1981).

18. *Id.* However, good motives do not overcome this strong presumption in favor of at-will employment. *Geary v. United States Steel Corp.*, 319 A.2d 174, 179-80 (Pa. 1974).

19. *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1036 (Ariz. 1985). *But see Salter v. Alfa Ins. Co.*, 561 So. 2d 1050, 1054 (Ala. 1990) (holding that an employer has a right to terminate an at-will employee even if it does so "maliciously or for some other improper reason").

In *Pugh v. See's Candies, Inc.*,<sup>20</sup> a court concluded that an employer's oral statements established an implied contract.<sup>21</sup> Pugh, an employee who worked his way from dishwasher to a vice presidential position, was with See's Candies for thirty-two years.<sup>22</sup> During his employment, Pugh was recognized for his accomplishments, never criticized for his performance, and never denied a raise or a bonus.<sup>23</sup> Pugh's employer frequently told him that "if you are loyal to [See's] and do a good job, your future is secure."<sup>24</sup> Under the "totality of the relationship" between Pugh and his employer, the court held that a jury could find an implied promise of continued employment that would allow him to be fired only for cause.<sup>25</sup>

## 2. *The Implied Covenant of Good Faith and Fair Dealing*

To determine whether the protection of an implied promise of continued employment exists, courts consider a variety of factors. These factors include (1) the employer's personnel policies or practices, (2) the employee's longevity of service, (3) the employer's actions or communication reflecting assurance of continued employment, and (4) industry practices.<sup>26</sup> The *Restatement (Second) of Contracts* states that "every contract imposes upon each party a duty of good faith and fair dealing in its performance or its enforcement."<sup>27</sup> A minority of courts have extended this duty to employment contracts and applied this implied covenant of good faith and fair dealing to terminable-at-will employment contracts.<sup>28</sup> These jurisdictions limit remedies for a breach of the covenant to contract damages, rather than recognizing the cause of action as a tort.<sup>29</sup>

---

20. 171 Cal. Rptr. at 917.

21. *Id.* at 927.

22. *Id.* at 918.

23. *Id.* at 919-20.

24. *Id.* at 919.

25. *Pugh*, 171 Cal. Rptr. at 927.

26. *Id.* at 925-26.

27. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

28. *Reed v. Municipality of Anchorage*, 782 P.2d 1155, 1158 (Alaska 1989); *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744,748 (Idaho 1989); *Prout v. Sears, Roebuck & Co.*, 772 P.2d 288, 291 (Mont. 1989). See also *Morriss v. Coleman Co.*, 738 P.2d 841, 850-51 (Kan. 1987) for a non-inclusive list of jurisdictions adopting the implied covenant of good faith and fair dealing which include, in part, *Petersen v. First Federal Savings & Loan Ass'n of Puerto Rico*, 617 F. Supp. 1039 (D. V.I. 1985); *Koehrer v. Superior Court*, 226 Cal. Rptr. 820 (Ct. App. 1986); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *Cilley v. New Hampshire Ball Bearings, Inc.*, 514 A.2d 818 (N.H. 1986); *Hall v. Farmers Insurance Exchange*, 713 P.2d 1027 (Okla. 1986) and *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331 (Tex. App. 1986).

29. See *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1036 (Ariz.

The majority of jurisdictions, however, reject the implied covenant in the context of employment at-will.<sup>30</sup> The refusal stems from concern that adoption of the covenant "would place undue restrictions on management and would infringe on the employer's legitimate exercise of management discretion."<sup>31</sup> In *Calleon v. Miyagi*,<sup>32</sup> the Supreme Court of Hawaii declined to adopt the *Pugh* rationale and "refused to follow a minority of other jurisdictions in implying a good faith requirement into every employment situation, thereby 'subjecting each discharge to judicial incursions into the amorphous concept of bad faith.'"<sup>33</sup>

### 3. *Employee Handbooks*

A personnel manual or employee handbook that includes substantive provisions for a required procedure before termination occurs, or imposes a system of progressive discipline before firing, could be found to be contractually enforceable.<sup>34</sup> An employee handbook may create an enforceable contract when the necessary requirements to form a contract are present.<sup>35</sup> The handbook must be disseminated in a manner so that an employee is aware of its contents, and it must contain a clear promise that an employee would reasonably believe to be an offer.<sup>36</sup> Additionally, the employee must accept the offer by continuing to work.<sup>37</sup> The

---

1985) (holding that the covenant of good faith and fair dealing is a breach of contract compensable only by contract damages); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 373 (Cal. 1988) (holding same); *Metcalf*, 778 P.2d at 748 (holding same).

30. See *Morriss*, 738 P.2d at 851 (rejecting the application of an implied covenant of good faith and fair dealing to employment at-will contracts because such a covenant is overly broad). *Morriss* contains a non-inclusive list of jurisdictions rejecting the implied covenant of good faith and fair dealing in the context of employment at-will. *Id.* The list includes, in part, *Minihan v. American Pharmaceutical Ass'n*, 812 F.2d 726 (D.C. Cir. 1987); *Borowski v. Vitro Corp.*, 634 F. Supp. 252 (D. Md. 1986); *Salazar v. Furr's Inc.*, 629 F. Supp. 1403 (D. N.M. 1986); *Frichter v. National Life & Accident Insurance Co.*, 620 F. Supp. 922 (E.D. La. 1985); *Hostettler v. Pioneer Hi-Bred International, Inc.* 624 F. Supp. 169 (S.D. Ind. 1985); *Pittman v. Larson Distrib. Co.*, 724 P.2d 1379 (Colo. Ct. App. 1986); *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781 (Conn. 1984); *Dumas v. Kessler & Maguire Funeral Home*, 380 N.W.2d 544 (Minn. App. 1986). *Id.*

31. *Metcalf*, 778 P.2d at 748.

32. 876 P.2d 1278 (Haw. 1994).

33. *Id.* at 1286 (citing *Kinoshita v. Canadian Pac. Airlines, Ltd.*, 724 P.2d 110, 115 (Haw. 1986)).

34. *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1264 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985).

35. *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987). The basic requisites of contract formation are, of course, offer, acceptance, and consideration. *Id.*

36. *Id.*

37. *Id.*

employee's continued employment will constitute consideration when these conditions are present.<sup>38</sup> When the employee handbook creates an enforceable contract, it modifies the at-will nature of his employment.<sup>39</sup> Additionally, for a handbook to create an enforceable implied employment contract, the provisions in the handbook must be specific, and the employee must be induced to remain on the job and not "actively seek other employment."<sup>40</sup>

Clear and unambiguous disclaimers of contractual intent may be effective in preventing an implied contract.<sup>41</sup> However, unilateral modification of the handbook to include such contractual disclaimers that diminish employee benefits or lack consideration between the parties may not be enforceable against existing employees.<sup>42</sup>

In states that do not recognize an implied covenant of good faith and fair dealing in the employment context, courts turn to other sources of the law to find a remedy for wrongful termination.

### *B. The Tort of Retaliatory Discharge*

The tort of retaliatory discharge is generally a limited and narrow exception to the general rule of at-will employment.<sup>43</sup> To establish a cause of action for retaliatory discharge, a plaintiff must demonstrate that he was discharged in retaliation for his activities, and that the discharge contravenes a clearly mandated public policy.<sup>44</sup>

#### *1. Exceptions to the At-Will Doctrine Based Upon Public Policy*

Public policy has been defined as a "principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good."<sup>45</sup> An exception to the at-will doctrine must further a "policy affecting the public interest, which must be fundamental or substantial when the company discharges an employee."<sup>46</sup> Violations of internal practices that

---

38. *Id.*

39. *Id.*

40. *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1088 (Wash. 1984).

41. *See Hart v. Seven Resorts, Inc.*, 947 P.2d 846, 852 (Ariz. Ct. App. 1997) (holding that an at-will employment was not modified where a personnel manual stated that employees were terminable at-will and employees signed a form was signed indicating their understanding that employment was terminable at-will).

42. *Doyle v. Holy Cross Hosp.*, 708 N.E.2d 1140, 1145 (Ill. 1999).

43. *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 107 (Ill. 1991) (citing *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 353 (Ill. 1978)).

44. *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1357 (Ill. 1985).

45. *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 871 (Mo. Ct. App. 1985) (citing *Brawner v. Brawner*, 327 S.W.2d 808, 812 (Mo. 1959)).

46. *Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1050 (Cal. 1998) (citing *Foley v. Interactive Data Corp.*, 765 P.2d 373, 380 n.11 (Cal. 1988)).

affect only the interests of employers or employees, and not the general public, generally will not give rise to tort damages.<sup>47</sup>

Public policy exceptions to the general rule of at-will employment have been recognized for an employee who has been discharged for the following acts or omissions: (1) "refus[ing] to perform an illegal act,"<sup>48</sup> (2) reporting an alleged violation of law or public policy by his employer or fellow employees, also known as "whistle blowing,"<sup>49</sup> (3) exercising a statutory right or privilege that "sound public policy would encourage,"<sup>50</sup> and (4) filing workers' compensation claims.<sup>51</sup> Generally, the courts find public policy in either the state constitutions<sup>52</sup> or statutory provisions<sup>53</sup> to rationalize a retaliatory discharge claim. Some courts have adopted a broader view of the public policy exception to include administrative regulations<sup>54</sup> and prior judicial decisions.<sup>55</sup> A few jurisdictions have recognized that sound and specific public policy may be found in professional codes of ethics.<sup>56</sup>

## 2. Statutes Relating to Wrongful Discharge

States that have enacted statutes relating to wrongful

---

47. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 380 (Cal. 1988).

48. *See Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1336 (Cal. 1980) (holding that "an employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests"); *Petermann v. International Bhd. of Teamsters Local 396*, 344 P.2d 25, 27-28 (Cal. 1959) (holding that it was wrongful to fire an employee who refused to commit perjury); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (holding that an exception to the employment at-will doctrine exists "for an employee who is discharged for the sole reason that the employee refused to perform an illegal act").

49. *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 879 (Ill. 1981).

50. *Boyle*, 700 S.W.2d at 875-76. These rights or privileges would include accepting jury duty, "seeking public office, asserting a right to elect... collective bargaining representatives, or joining a labor union." *Id.* at 875.

51. *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 357 (Ill. 1978). *See also Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988) (holding that an application of state law is preempted by § 301 of the Labor Management Relations Act only if the application necessitates the interpretation of a collective bargaining agreement).

52. *Boyle*, 700 S.W.2d at 871 (citing *In re Rahn's Estate*, 291 S.W. 120, 123 (Mo. 1927)).

53. *Id.* (citing *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 625 (Haw. 1982)).

54. *Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1054 (Cal. 1998).

55. *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1033-34 (Ariz. 1985).

56. *Rocky Mountain Hosp. & Med. Serv.*, 916 P.2d 519, 525 (Colo. 1996); *Yetter v. Ward Trucking Corp.*, 585 A.2d 1022, 1026 (Pa. Super. Ct. 1991); *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980). *See discussion infra* Part III.D. for jurisdictions recognizing sound public policy in professional codes of ethics.

discharge provide the employee with statutory protection for violations covered under the law. Public policy may be codified in a statute.<sup>57</sup> For example, although "whistle-blowing" is recognized as a public policy exception to the at-will doctrine of employment, the enactment of "whistle-blower" statutes also gives an employee statutory protection for disclosing his employer's or co-worker's illegal misconduct.<sup>58</sup> Federal employees have the protection of a federal whistle-blower statute.<sup>59</sup> However, state whistle-blower laws may apply only to employees of a "public body."<sup>60</sup>

Oftentimes, the protection of a whistle-blower will depend on whether the employee reported the violation to a federal or state agency rather than to the employer. For example, merely complaining within the workplace that workers were exposed to toxic chemicals without adequate ventilation may be considered a private interest not warranting protection.<sup>61</sup> In a similar situation, good faith reporting of computer-assisted fraud to company management may not be considered a "clear and substantial public policy."<sup>62</sup>

Wrongful discharge statutes extend protection to employees beyond that of a "whistle-blower."<sup>63</sup> These statutes benefit the employee by eliminating common law defenses, thereby imposing a "good cause" discharge requirement on the employer.<sup>64</sup> If the discharge is considered "wrongful," most courts classify the employer's action as tortious and award damages accordingly. Tort damages may include lost wages and other employee benefits.<sup>65</sup> Punitive damages may be allowed in cases involving

---

57. See Kobus, *supra* note 4, at 1345-47 for further discussion.

58. See, e.g., ALASKA STAT. § 18.60.089 (Michie 1999). See *Reed v. Municipality of Anchorage*, 782 P.2d 1155, 1159 (Alaska 1989) (holding that the Alaskan statute does not preclude an employee from instituting an action under tort or contract theory). Cf. *List v. Anchor Paint Mfg. Co.*, 910 P.2d 1011, 1015 (Okla. 1996) (holding that the statutory cause of action for wrongful discharge is the employee's exclusive remedy and the employee may not sue for wrongful discharge in violation of public policy).

59. 5 U.S.C. § 2301(b)(9) (1999).

60. *Holewinski v. Children's Hosp.*, 649 A.2d 712, 715 (Pa. Super. Ct. 1994).

61. *McLaughlin v. Gastrointestinal Specialists, Inc.*, 696 A.2d 173, 177-78 (Pa. Super. Ct. 1997).

62. *Fox v. MCI Comm. Corp.*, 931 P.2d 857, 861 (Utah 1997).

63. See, e.g., *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 838, (1983) (citing WIS. STAT. §§ 756.25(1), 45.50, 812.235, 111.37(4) (1983)). Under Wisconsin statute, an employer may not discharge at-will employees for absences due to jury service, military service, or for refusal to submit to honesty-testing or a garnishment of wages. *Id.*

64. *Meech v. Hillhaven W., Inc.*, 776 P.2d 488, 506 (Mont. 1989). Good cause is defined here as "reasonable job-related grounds for dismissal based on failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reasons." *Id.*

65. *Id.* at 504.

outrageous conduct.<sup>66</sup>

Exceptions to at-will employment are based upon clearly mandated public policy. Definite statements of public policy may be found within the attorneys' professional code of ethics.

## II. THE ETHICAL OBLIGATIONS OF ATTORNEYS

*In a civilized life, law floats in a sea of ethics. Each is indispensable to civilization. Without law, we should be at the mercy of the least scrupulous; without ethics, law could not exist.*<sup>67</sup>

A licensed attorney has professional responsibilities dictated to him by his state's supreme court. These responsibilities are usually patterned after the American Bar Association's *Model Code of Professional Responsibility*<sup>68</sup> or the *Model Rules of Professional Conduct (Model Rules)*.<sup>69</sup> Section A discusses pertinent portions of the *Model Rules*<sup>70</sup> regarding confidentiality and the attorney-client relationship. Section B explains the substantial differences of the attorney-client relationship between employment of in-house attorneys and private law firm attorneys.

### A. The ABA Model Rules of Professional Responsibility

The American Bar Association *Model Rules of Professional Conduct* seek to safeguard the attorney-client privilege and other confidential information by restricting a lawyer's ability to disclose communications made in confidence between the lawyer and the client.

#### 1. The Duty of Confidentiality

The ABA Model Rule 1.6, *Confidentiality of Information*, states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the

66. *Id.*; *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 877 (Ill. 1981).

67. Fred J. Cook, *The Corrupt Society*, THE NATION, 1-8 June 1963, at 453 (quoting Chief Justice Earl Warren).

68. See generally MODEL CODE OF PROF'L RESPONSIBILITY (1996).

69. See generally MODEL RULES OF PROF'L CONDUCT (1996). See also Anthony J. Blackwell, *Weider's Paradox: Reporting Legal Misconduct in Law Firms*, 1992/1993 ANN. SURV. AM. L. 9, 22-26 (1993) (providing a history of the duty to report attorney misconduct).

70. The discussion in this Article is limited to the ABA MODEL RULES. While many states pattern their rules of conduct after the ABA MODEL RULES, rules of professional conduct vary from state to state. See Blackwell, *supra* note 69, at 24-26 and accompanying footnotes (listing those states adhering to the MODEL CODE and those states adopting the MODEL RULES).

representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.<sup>71</sup>

The purpose of the rule of confidentiality is to enhance the effectiveness of legal advice by "encourag[ing] full and frank communication between attorneys and their clients. . . ."<sup>72</sup> "The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics."<sup>73</sup> This duty of confidentiality applies in every context where the attorney-client privilege does not apply.<sup>74</sup> The lawyer's duty of confidentiality covers all information relating to the representation of a client, regardless of its source.<sup>75</sup> The exceptions to the duty of confidentiality noted in Model Rule 1.6(b) allow an attorney to disclose information that is necessary only "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."<sup>76</sup>

Many of the *Model Rules* serve as a type of self-regulation for practicing attorneys.

## 2. Self-regulation of the Legal Profession

ABA Model Rule 8.3, *Reporting Professional Misconduct*, creates the attorney's obligation to report misconduct of another attorney. It states, in part:

(a) A lawyer having knowledge that another lawyer has committed a

71. MODEL RULES OF PROF'L CONDUCT Rule 1.6 (1996).

72. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

73. MODEL RULES OF PROF'L CONDUCT Rule 1.6 cmt. (1996).

74. *Id.*

75. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-380 (1994).

76. MODEL RULES OF PROF'L CONDUCT Rule 1.6(b)(2) (1996). *See also* Sheehan, *supra* note 4, at 865 (maintaining that the attorney-client relationship is not harmed by a retaliatory discharge action for in-house counsel because the codes of professional conduct provide exceptions for criminal and fraudulent conduct).

violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform that appropriate professional authority.

....

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.<sup>77</sup>

Thus, a lawyer has a duty to report another lawyer's misconduct.<sup>78</sup> For example, a lawyer may be disbarred for participating in the unethical conduct of his firm and failing to report the conduct.<sup>79</sup> And, an attorney's failure to report misconduct of his client's former attorney who converted the client's settlement funds, may warrant a one-year suspension.<sup>80</sup> However, Model Rule 8.3(b) expressly exempts confidential information from the reporting requirement, under Model Rule 1.6. The duty of confidentiality may prohibit an attorney from reporting the misconduct of another attorney without the client's consent when confidential information would be disclosed.<sup>81</sup> This duty of confidentiality supersedes the duty to report misconduct.<sup>82</sup> Obviously, this raises concern over the effectiveness of the legal profession's self-regulation.<sup>83</sup>

A lawyer's first duty is to both the court and the proper

---

77. MODEL RULES OF PROF'L CONDUCT Rule 8.3(a)&(c) (1996).

78. *Kevlik v. Goldstein*, 724 F.2d 844, 846 (1st Cir. 1984).

79. *Attorney Grievance Comm'n v. Kahn*, 431 A.2d 1336, 1352 (Md. 1981).

80. *In re Himmel*, 533 N.E.2d 790, 796 (Ill. 1988).

81. *In re Ethics Advisory Panel Op. No. 921*, 627 A.2d 317, 323 (R.I. 1993). See Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. 93-28 (1994) (stating that when a client instructs a lawyer not to report a former lawyer who converted estate funds for personal use, the requirement of confidentiality supersedes the obligation to report this misconduct); Oregon State Bar Ass'n, Bd. of Governors, Formal Op. 1991-95 (1991) (stating that a lawyer may not report misconduct of the client's former lawyer if it would disclose the client's confidence, unless the client consents); Connecticut Bar Ass'n, Comm. on Prof'l Ethics, Informal Op. 89-14 (1989) (noting that an in-house lawyer who learns that company attorneys entered into an illegal payment agreement with an informant may not report the misconduct because such disclosure would implicate the company). *But see* Connecticut Bar Ass'n, Comm. on Prof'l Ethics, Informal Op. 95-17 (1995) (stating that falsifying a complaint to avoid having the suit barred by the statute of limitations must be reported promptly and confidentiality will not be used as a shield against disclosure of that information).

82. *Ethics Advisory Panel Op.*, 627 A.2d at 323.

83. Because of the concern for effective self-regulation of the legal system, the Supreme Court of Rhode Island requested a further study on possible amendments to the confidentiality rule. *Id.*

administration of justice.<sup>84</sup> Model Rule 3.3(a), *Candor Toward the Tribunal*, states, in part, "[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; [or] (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."<sup>85</sup> The court may suspend an attorney for altering or falsifying documents submitted to the court.<sup>86</sup> Moreover, courts may consider the American Bar Association's *Standards for Imposing Lawyer Sanctions*<sup>87</sup> in deciding the fate of an attorney subject to discipline.

### 3. *The Attorney-Client Relationship*

The ethical duty of confidentiality prohibits an attorney from revealing information relating to his representation of a client.<sup>88</sup> Similarly, the attorney-client privilege prevents a court from using its powers of subpoena and contempt to force an attorney to disclose confidential communications between him and his client.<sup>89</sup> Because an attorney may invoke this attorney-client privilege, the attorney does not threaten client confidentiality when suing the attorney-employer for retaliatory discharge.

### 4. *The Private Law Firm Attorney and the In-House Attorney*

The attorney-client status is not involved when a private law firm discharges one of its attorney-employees. A client may discharge a lawyer with or without cause.<sup>90</sup> A "client" means a person or entity that "employs or retains an attorney . . . to appear for him in courts, advise, assist, and defend him in legal proceedings, and to act for him in any legal business."<sup>91</sup> When the client is a corporation, the attorney-client privilege includes communications between the lawyer and high-ranking corporate officials.<sup>92</sup> When a corporation employs in-house counsel, the corporation is not only the attorney's employer; the corporation is also the attorney's client. Because of the relationship between corporate counsel and the client, who is also the employer, breach of the duty of confidentiality may be a concern in retaliatory discharge claims by former corporate and in-house attorneys.<sup>93</sup>

---

84. *State v. Taylor*, 648 So. 2d 701, 701 (Fla. 1995).

85. MODEL RULES OF PROF'L CONDUCT Rule 3.3(a)(1) & (2) (1996).

86. *In re Reciprocal Discipline of Page*, 955 P.2d 239, 243-44 (Or. 1998).

87. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1992).

88. MODEL RULES OF PROF'L CONDUCT Rule 1.6 cmt. (1996).

89. *Id.*

90. See ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1397 (1977) (stating that "no lawyer can continue to represent a client who does not wish to be represented").

91. BLACK'S LAW DICTIONARY 254 (6th ed. 1990).

92. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

93. This Article focuses primarily on private attorneys and their wrongful

However, the employer-law firm is not the attorney-employee's "client." Accordingly, there is no threat to confidentiality and no compromise of the attorney-client relationship when an attorney-employee who is wrongfully discharged by the employer-law firm brings an action. If there is a need to set forth confidential information (such as the identity of the law firm's client) in establishing the attorney-employee's claim or in defending the allegations against the attorney-employer, protective measures are readily available. To protect disclosure of client confidences, courts may utilize "sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings . . . and, in camera proceedings."<sup>94</sup> The integrity of the attorney-client privilege remains intact and the public interest in punishing fraudulent behavior of employers may be vindicated.

Attorneys who have lost their jobs for upholding the sanctity of their profession in their refusal to violate their ethics have sought remedies for wrongful termination against their employers.

### III. ATTORNEYS AND THEIR WRONGFUL DISCHARGE ACTIONS

*Attorneys may be unpopular, but they are not yet fair game.*<sup>95</sup>

Attorneys, like other employees, may be the subjects of wrongful termination. The nature of the legal profession places emphasis on the attorney-client relationship and the duty of confidentiality. Courts are concerned that allowing attorneys' claims for retaliatory discharge against their employers will result in a breach of legal ethics. Ironically, it is often the attorney's adherence to the professional code of ethics that results in his wrongful discharge.<sup>96</sup> Section A examines the attorney-client

---

discharge claims against attorney-employers. *See generally* Stephen C. Dillard, *When Principles Clash: The In-House Counsel as Renegade or Whistleblower*, 63 DEF. COUNS. J. 206 (1996); Robert Fitzpatrick, *The Duty of Confidentiality: When May an Attorney Suing His/Her Former Employer Divulge Client Confidences Obtained During the Course of His/Her Employment?*, SC08 A.L.I.-A.B.A. 167 (1997) (discussing the duty of confidentiality and the in-house attorney employment dilemma); Todd Myers, *The In-House Attorney Employment Dilemma*, 6-WTR KAN. J.L. & PUB. POLY 147 (1997).

94. *General Dynamics Corp. v. Superior Court*, 876 P.2d 487, 504 (Cal. 1994). *See Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 11 (1st Cir. 1998) (holding that rescission of a seal order involving information that was subject to an attorney-client privilege was abuse of discretion).

95. *Golightly-Howell v. Oil, Chem. & Atomic Workers Int'l Union*, 806 F. Supp. 921, 924 (D. Colo. 1992). This statement was made by District Judge Carrigan in his conclusion that the plaintiff's "status as an attorney cannot excuse an employer's violation of its contractual . . . obligation." *Id.*

96. *See Blackwell, supra* note 69, at 11 (discussing the "ethical paradox" that requires attorneys to report professional misconduct at the risk of being

relationship and attorneys' claims under wrongful discharge theories. Section B reviews wrongful discharge actions based in contract. Section C discusses lawsuits based in tort. Section D considers cases in which courts recognize professional code of ethics as sources for the public policy exception to at-will employment.

#### A. *The Attorney-Client Relationship and Wrongful Discharge Claims*

There is concern that allowing attorneys to sue their employers will have a "chilling effect" on the attorney-client relationship.<sup>97</sup> Additionally, there are a few cases where the mere fact that the plaintiff is an attorney will prevent any recovery whatsoever for wrongful discharge.

In *Herbster v. North American Co. for Life & Health Insurance*,<sup>98</sup> the court denied an in-house attorney a remedy for wrongful discharge. Herbster was chief legal counsel for North American Co. When Herbster refused to destroy requested discovery information that would support allegations of fraud in a lawsuit pending against the company, North American fired him.<sup>99</sup> Herbster argued that his relationship with North American was more permanent than an attorney-client relationship, because he looked to North American for job security and compensation.<sup>100</sup> The court refused to separate Herbster's role as an employee from his profession as an attorney.<sup>101</sup> The court denied extension of the tort of retaliatory discharge to attorneys because the "mutual trust, exchanges of confidence . . . and [the] personal nature of the attorney-client relationship" would suffer serious impact.<sup>102</sup>

Five years later, in his dissent in *Balla v. Gambro, Inc.*,<sup>103</sup> Justice Freeman contended that the majority in *Herbster* ignored the fact that North American decided to proceed with illegal conduct, contrary to attorney Herbster's advice.<sup>104</sup> Justice Freeman further noted that "[i]t is that conduct, not the attorney's ethical obligations, which is the predicate of the retaliatory discharge claim."<sup>105</sup>

*Balla* also held that a former in-house attorney did not have a cause of action against his employer for retaliatory discharge.<sup>106</sup>

---

fired from their firms).

97. *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 110 (Ill. 1991).

98. 501 N.E.2d 343, 348 (Ill. App. Ct. 1986).

99. *Id.* at 344.

100. *Id.* at 346.

101. *Id.*

102. *Id.* at 348.

103. 584 N.E.2d 104 (Ill. 1991) (Freeman, J., dissenting).

104. *Id.* at 115.

105. *Id.* at 114.

106. *Id.* at 104.

Gambro was a distributor of kidney dialysis equipment.<sup>107</sup> When Balla became aware that a shipment of certain dialyzers was defective and could cause an acute health risk if used, he told Gambro's president to reject the shipment.<sup>108</sup> Without Balla's knowledge, Gambro accepted the shipment and intended to sell the equipment. When Balla found out about the sale, he told Gambro's President that he would do whatever was necessary to stop the sale of the equipment.<sup>109</sup> Balla was subsequently fired.<sup>110</sup> Balla reported the shipment of the dialyzers to the Federal Drug Administration, which then seized the product and rendered the dialyzers adulterated.<sup>111</sup> The *Balla* court felt that public policy was "adequately safeguarded without extending the tort of retaliatory discharge to in-house counsel."<sup>112</sup> The court disagreed with Balla's assertion that, without the remedy of retaliatory discharge, in-house attorneys would be faced with a "Hobson's choice" of either complying with the client-employer's wishes, thereby risking the loss of one's professional license or being subject to criminal sanctions, or in the alternative, refusing to comply with the client-employer's wishes, thereby risking the loss of one's livelihood.<sup>113</sup> The court, instead, simply stated that as an attorney, Balla had no choice but to report the defective dialyzers to the FDA and had a duty to withdraw from continued representation of Gambro.<sup>114</sup>

The court in *General Dynamics v. Superior Court* felt that referring to the duty of withdrawal as a "remedy" was illusory.<sup>115</sup> The dissenting Justice in *Balla* felt that it was naïve.<sup>116</sup> The courts, as well as most attorneys, want to believe that attorneys will always "do the right thing."<sup>117</sup> However, when attorneys are faced with the possibility of losing their livelihood and means of feeding their families, the temptation will be present to ignore or rationalize away ethical obligations.<sup>118</sup> Justice Freeman stated that to allow a corporate employer to go forward with illegal conduct contrary to the advice of its in-house counsel and then to fire that same in-house counsel without fear of sanctions is "truly to give . . . assistance and protection of the courts to scoundrels."<sup>119</sup> A corporate employer should not be protected simply because the

---

107. *Id.* at 105.

108. *Balla*, 584 N.E.2d at 106.

109. *Id.*

110. *Id.*

111. *Id.* at 106.

112. *Id.* at 108.

113. *Balla*, 584 N.E.2d at 109.

114. *Id.*

115. 876 P.2d 487, 502 (Ca. 1994).

116. *Balla*, 584 N.E.2d at 114.

117. *Id.* at 113.

118. *Id.*

119. *Id.* at 114.

employee it has fired for "blowing the whistle" happens to be an attorney.<sup>120</sup> Additionally, the Illinois Bar Association did not receive the *Balla* decision well. The governors of this Association voted to file a brief to urge the Illinois Supreme Court to reverse the decision.<sup>121</sup>

Unfortunately, in *Jacobson v. Knepper & Moga, P.C.*,<sup>122</sup> the Supreme Court of Illinois followed its reasoning in *Balla* and held that an attorney employed by a law firm may not maintain a cause of action against his employer for retaliatory discharge.<sup>123</sup> Overruling the Appellate Court for the First District, the court again reiterated its position that an attorney's ethical obligations contain sufficient safeguards to protect public policy and found it unnecessary to extend the tort of retaliatory discharge to the employee-attorney.<sup>124</sup> Justice Freeman, again dissenting, noted that attorneys "[have] been stripped of a remedy which Illinois clearly affords to all other employees in such 'whistle-blowing' situations."<sup>125</sup>

While the majority of jurisdictions allow an attorney to bring a wrongful discharge claim against his employer, those courts require that the discharge violate a specific expression of public policy. In *McGonagle v. Union Fidelity Corp.*,<sup>126</sup> the court reversed a jury verdict in favor of a general counsel for his wrongful discharge action.<sup>127</sup> McGonagle, a former general counsel to an insurance company, refused to approve insurance mailings which violated insurance laws in several states.<sup>128</sup> McGonagle alleged that his subsequent termination violated a compelling mandate of public policy.<sup>129</sup> However, the court found that there was no violation based upon public policy because the insurance laws were general expressions of the state's monitoring of the insurance industry.<sup>130</sup> The court felt bound by Pennsylvania law and stated that "unless an employee identifies a 'specific' expression of public policy violated by his discharge, it will not be labeled as wrongful and within the sphere of public policy."<sup>131</sup>

There is, of course, concern that client confidences will be revealed if a wrongful discharge action is maintained. In *Eckhaus*

---

120. *Id.*

121. Patricia Manson, *Let Fired Counsel Sue, ISBA to Urge*, CHI. DAILY L. BULL., Sept. 14, 1998, at 1.

122. 706 N.E.2d 491 (Ill. 1998) (Freeman, J., dissenting).

123. *Id.* at 494.

124. *Id.*

125. *Id.*

126. 556 A.2d 878, 885 (Pa. Super. Ct. 1989).

127. *Id.*

128. *Id.* at 879.

129. *Id.* at 881.

130. *Id.* at 885.

131. *McGonagle*, 556 A.2d at 885.

*v. Alfa-Laval, Inc.*,<sup>132</sup> the court held that a former general counsel could not maintain a defamation action against a corporation, since the action would result in revealing client confidences and secrets.<sup>133</sup> Eckhaus had an employment contract with Alfa-Laval that provided for termination for cause.<sup>134</sup> The defamation claim involved an evaluation memorandum containing allegations of professional incompetence that Eckhaus claimed was published in reckless disregard for the truth.<sup>135</sup> The court granted the employer's motion for summary judgment because further prosecution of the defamation action would require Eckhaus to reveal "further facts constituting client confidences and secrets."<sup>136</sup> This disclosure, the court maintained, would violate the New York *Code of Professional Responsibility*, which prohibits an attorney from disclosing information gained in the professional relationship between a client and an attorney.<sup>137</sup>

However, most courts have outrightly rejected the notion that a plaintiff's status as an attorney should bar recovery. In *Golightly-Howell v. Oil, Chemical & Atomic Workers International Union*,<sup>138</sup> the court concluded that an employee's status as an in-house attorney did not excuse an employer's violation of its contractual obligation; the court refused to conclude that the attorney-client relationship would bar a former in-house counsel's claim for breach of contract.<sup>139</sup> The court in *Nordling v. Northern States Power Co.*<sup>140</sup> also held that the attorney-client relationship does not preclude in-house attorneys from bringing wrongful discharge claims against a corporate employer.<sup>141</sup> Additionally, an individual's status as an attorney should not prevent him from seeking damages from an employer for violations of the attorney's civil rights.<sup>142</sup>

---

132. 764 F. Supp. 34 (S.D.N.Y. 1991).

133. *Id.* at 38.

134. *Id.* at 35 n.1.

135. *Id.* at 36.

136. *Id.* at 38.

137. *Eckhaus*, 764 F. Supp. at 38.

138. 806 F. Supp. 921, 924 (D. Colo. 1992).

139. *Id.* at 924.

140. 478 N.W.2d 498 (Minn. 1991). See *infra* notes 152-57, 193-96 and accompanying text for further discussion of the *Nordling* case.

141. *Nordling*, 478 N.W.2d at 502.

142. See *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 182 (3d Cir. 1985) (allowing sex discrimination claim to be maintained by an in-house counsel against her employer); but see *Holland v. Board of County Comm'r*, 883 P.2d 500, 509 (Colo. Ct. App. 1994) (holding that a retaliatory discharge claim by a former county attorney was barred by the Governmental Immunity Act); *Gaiamo & Vreeburg v. Smith*, 599 N.Y.S.2d 841, 844 (App. Div. 1993) (holding that a white lawyer had no civil rights claims when discharged by a black client who wanted a black attorney).

### B. Wrongful Termination Based on Contract

Attorneys have brought wrongful discharge claims under contract theories. In *Wieder v. Skala*,<sup>143</sup> a law firm fired an associate for insisting that the law firm report the misconduct of one of its lawyers. The court allowed the associate's wrongful discharge lawsuit against his former partners under a breach of contract theory.<sup>144</sup>

Employee handbooks may create enforceable contractual rights if the traditional requirements for contract foundation are present.<sup>145</sup> Courts have allowed attorneys to maintain lawsuits against their employers for breach of contract based upon employee handbooks. In *Golightly-Howell*,<sup>146</sup> the court recognized a former in-house attorney's breach of implied covenant of good faith and fair dealing claim against her employer.<sup>147</sup> The court found that Ms. Golightly-Howell's employment contract was subject to a "just cause" contract based upon the employee manual.<sup>148</sup>

Similarly, in *Mourad v. Automobile Club Insurance Ass'n*,<sup>149</sup> the court allowed an attorney employed by an insurance company to maintain his lawsuit against his employer, based upon a breach of a "just cause" contract in the employer's policy manual and pamphlets.<sup>150</sup> The jury's finding that the employer discharged Mourad in retaliation for his failure to violate his code of professional ethics was a sufficient basis for a breach of a just-cause contract.<sup>151</sup>

In *Nordling*,<sup>152</sup> the court also allowed a former in-house attorney's claim based upon an action for breach of a contractual provision in an employee handbook.<sup>153</sup> Northern States maintained a handbook that provided steps for "Positive Discipline" in the discharging employees.<sup>154</sup> Northern States fired Nordling without warning and without following the steps dictated in the handbook.<sup>155</sup> Nordling contended that the company fired him because he objected to a proposed investigation of the

---

143. 609 N.E.2d 105, 110 (N.Y. 1992).

144. *Id.* at 110. See Blackwell, *supra* note 69, at 18 (questioning the court of appeal's refusal to recognize a broader theory of protection for reporting attorneys).

145. *Wieder*, 609 N.E.2d at 110.

146. 806 F. Supp. 921 (D. Colo. 1992).

147. *Id.* at 924.

148. *Id.* at 925.

149. 465 N.W.2d 395 (Mich. Ct. App. 1991).

150. *Id.* at 397.

151. *Id.* at 402.

152. *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991).

153. *Id.* at 502.

154. *Id.* at 499.

155. *Id.* at 500.

personal lifestyles of Northern States' employees, which Nordling said had the "connotation of conducting illegal activities."<sup>156</sup> The court saw "no reason to deny the job security aspects of the employer-employee relationship if this can be done without violence to the integrity of the attorney-client relationship."<sup>157</sup>

However, in *Michaelson v. Minnesota Mining & Manufacturing Co.*,<sup>158</sup> the court held that an employee handbook did not modify an in-house counsel's at-will employment, since Minnesota courts do not read an implied covenant of good faith and fair dealing into employment contracts.<sup>159</sup>

Recovery under a contract theory does not yield satisfactory damages for an attorney who moves his family, buys a new home, and places his children in a new school, only to be suddenly fired for upholding the ethics he assumed were sacred to the legal profession. Limiting the attorney-employee's remedy for wrongful discharge to a contract theory does nothing to encourage the reporting of unethical and illegal behavior. Extending protection to attorney-whistle-blowers in a cause of action for retaliatory discharge is one way to provide an incentive for attorneys to comply with their ethical obligations and do the "right thing."

### C. *The Attorney and the Tort of Retaliatory Discharge*

While a retaliatory discharge claim may implicate the attorney-client relationship and raise issues of confidentiality and client wrongdoing, courts have recognized the need to provide a remedy for attorneys fired in retaliation for confronting their employer's unethical conduct.<sup>160</sup> For instance, courts generally recognize the tort of retaliatory discharge for employee-attorneys if the claim relates to explicit statutory or ethical norms that are of public importance, and if the attorney can prove the claim without violation of his obligation to respect client confidences.<sup>161</sup> Additionally, to sustain a claim, an attorney must prove that his employer fired or constructively discharged him from his position.<sup>162</sup>

---

156. *Id.*

157. *Nordling*, 478 N.W.2d at 502.

158. 474 N.W.2d 174 (Minn. App. Ct. 1991).

159. *Id.* at 181.

160. See *supra* Part III.A. for further discussion.

161. *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161, 166-67 (Mass. 1995).

162. *Id.* at 168. See *Zimmerman v. Buchheit of Sparta, Inc.*, 645 N.E.2d 877, 882 (Ill. 1995) (holding there is no cause of action predicated on retaliatory demotion); *White v. Washington*, 929 P.2d 396, 408 (Wash. 1996) (refusing to recognize the tort of wrongful transfer). *But see* *Brigham v. Dillon Co.*, 935 P.2d 1054, 1059-60 (Kan. 1997) (holding that a cause of action for "retaliatory demotion is a necessary and logical extension of the cause of action for retaliatory discharge").

In *General Dynamics Corp. v. Superior Court*,<sup>163</sup> the California Supreme Court recognized the attorney's dilemma of adhering to the *Rules of Professional Conduct* while surrendering to the employer's illegitimate demands.<sup>164</sup> General Dynamics abruptly fired Andrew Rose, who was under consideration for general counsel, after Rose had worked there for fourteen years.<sup>165</sup> General Dynamics stated that the company's reason for the firing was its loss of confidence in Rose's legal ability.<sup>166</sup> Rose filed a complaint under breach of implied contract and public policy tort claims. Rose alleged that the real reasons for his termination included his investigation into company officials' widespread drug use and their cover-up, his protest of General Dynamics' refusal to investigate the office "bugging" of the company's chief of security, and his warnings to General Dynamics of its violation of the federal Fair Labor Standards Act.<sup>167</sup> Courts "do not require nonlawyer employees to quietly surrender their jobs rather than 'go along' with an employer's unlawful demands."<sup>168</sup> Although Rose's complaint failed to state that the rules of professional responsibility supported the conduct leading to his termination, the court stated that it would allow a retaliatory discharge remedy where the employer made illegitimate demands and the attorney insisted on following his clear ethical duties under the *Rules of Professional Conduct*.<sup>169</sup>

Similarly, in *GTE Products Corp. v. Stewart*,<sup>170</sup> the court held that an in-house counsel may maintain a wrongful discharge action for refusing to violate ethical norms, provided the attorney can prove his claim without violating his obligation to respect client confidences.<sup>171</sup> Stewart was an employee of GTE for over eleven years and resigned when he felt he would "have to abandon unpopular but legally sound positions" regarding his stand on consumer safety.<sup>172</sup> However, because Stewart failed to establish that he was constructively discharged,<sup>173</sup> the employer's summary judgment was affirmed.<sup>174</sup>

In *Willy v. Coastal States Management Co.*,<sup>175</sup> the court held that an attorney's status as in-house counsel does not preclude the

---

163. 876 P.2d 487 (Cal. 1994).

164. *Id.* at 501.

165. *Id.* at 490.

166. *Id.*

167. *Id.* at 490-91.

168. *General Dynamics*, 876 P.2d at 502.

169. *Id.* at 501.

170. 653 N.E.2d 161 (Mass. 1995).

171. *Id.* at 166-67.

172. *Id.* at 164.

173. *Id.* at 168.

174. *Id.* at 169.

175. 939 S.W.2d 193 (Tex. Ct. App. 1996).

attorney from maintaining a claim for retaliatory discharge, provided that he could prove the claim without violation of his obligation to protect a client's confidences.<sup>176</sup> Additionally, the *Rules of Professional Conduct*, imposing a duty of confidentiality, did not preclude an in-house counsel from bringing a retaliatory discharge claim against her former employer, said the court in *Kachmar v. SunGard Data Systems, Inc.*<sup>177</sup>

In *Parker v. M & T Chemicals, Inc.*,<sup>178</sup> the defendant fired an attorney for refusing to copy documents containing a competitor's trade secrets; the court concluded that Parker was entitled to monetary damages for the employer's retaliatory discharge.<sup>179</sup> The court stated that public policy in favor of whistle-blowing on illegal conduct overrides an attorney's duties of confidentiality.<sup>180</sup>

Also, in *Klages v. Sperry Corp.*,<sup>181</sup> the court upheld a wrongful discharge action by an in-house counsel fired for investigating real estate commissions that the employer paid to the company president's wife. The court found that Klages' allegation of his employer's specific intent<sup>182</sup> to harm or coerce him to break a law or compromise himself withstood dismissal of a wrongful discharge claim under Pennsylvania law.<sup>183</sup> The court noted that Klages' discharge interfered with his interest in properly performing his duties as an attorney under the mandates of his code of professional ethics.<sup>184</sup> *Klages* furthered the public social interests of disclosing security law violations, which outweighed the employer's power to discharge for the express purpose of harming the employee.<sup>185</sup>

In *Mourad v. Automobile Club Insurance Ass'n*,<sup>186</sup> Mourad, an attorney employed by an insurance company, claimed that the company demoted him for refusing to comply with unethical and illegal orders from his non-attorney supervisor.<sup>187</sup> The court noted that the plaintiff, as supervisor over lawsuits involving catastrophic injury, was an attorney for the insureds. "The fact remains that an insurance defense attorney represents the insured

---

176. *Id.* at 200.

177. 109 F.3d 173, 180 (3d Cir. 1997).

178. 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989).

179. *Id.* at 220.

180. *Id.* at 221-22.

181. 1984 WL 49135, 118 L.R.R.M. (BNA) 2463 (E.D. Pa. 1984).

182. *But see* *Krajsa v. Key Punch*, 622 A.2d 355, 360 (Pa. Super. Ct. 1984) (rejecting the specific intent to harm theory for wrongful discharge and holding that only exception to at-will actions is where the discharge violates clear mandates of public policy).

183. *Klages*, 1984 WL 49135, at \*7 (citing *Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 618 (Pa. Super. Ct. 1984)).

184. *Id.* at \*8.

185. *Id.*

186. 465 N.W.2d 395 (Mich. Ct. App. 1991).

187. *Id.*

and not the insurance company."<sup>188</sup> The court went on to say that the "fact that an insurance company may directly pay the attorney fee rather than merely reimbursing its insured does not affect the nature of the attorney-client relationship nor does it change the fact that the attorney represents the insured client and only owes a duty to that insured client."<sup>189</sup> The court noted that the defendant should have known that Mourad was bound by a code of professional conduct, and that the defendants were bound by a code when contracting not to terminate Mourad without good cause.<sup>190</sup> The court, however, disallowed Mourad's retaliatory discharge claim because it was duplicative of, and inconsistent with, a holding for a breach of contract.<sup>191</sup>

While the *Nordling* court allowed a former in-house attorney's claim based upon contract,<sup>192</sup> the court held that the attorney-client relationship does not preclude an attorney from bringing a retaliatory discharge claim.<sup>193</sup> However, the court found that *Nordling* failed to establish his claim, based on Minnesota's whistle-blower statute.<sup>194</sup> The statute provides that an employer shall not discharge an employee who, "in good faith, reports a violation or suspected violation of any federal or state law" to an employer or official.<sup>195</sup> Based upon the fact that Northern States promptly discarded the employee surveillance plan in question after its officers outside the legal department discovered the plan, and because the court was unable to determine what kind of surveillance was even considered, the court dismissed the attorney's retaliatory claim.<sup>196</sup>

While courts have afforded the claim of retaliatory discharge to attorneys wrongfully terminated, at the same time, they find public policy exceptions to the at-will employment doctrine.

#### D. Professional Codes of Ethics and the Wrongful Discharge Suit

Several courts have found professional ethics codes as viable sources of the public policy exception to at-will employment.

*Pierce v. Ortho Pharmaceutical Corp.*<sup>197</sup> is one of the leading cases recognizing that a professional code of ethics may identify a

---

188. *Id.* at 400 (citing *Atlanta Int'l Ins. Co. v. Bell*, 448 N.W.2d 804, 804 (Mich. App. Ct. 1989)).

189. *Id.*

190. *Id.*

191. *Mourad*, 465 N.W.2d at 400. See *supra* notes 149-51 and accompanying text for a discussion of the plaintiff's breach of contract claim.

192. See *supra* notes 152-57 and accompanying text.

193. *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 502 (Minn. 1991).

194. *Id.* at 504.

195. *Id.*

196. *Id.*

197. 417 A.2d 505, 512 (N.J. 1980) (Pashman, J., dissenting).

specific expression of public policy. Grace Pierce was a physician and an at-will employee of Ortho Pharmaceutical Corp.<sup>198</sup> She refused to continue a research project for development of a drug named loperamide. Her objection in continuing was over the use of saccharin in the formula.<sup>199</sup> Pierce claimed that continuing the project would violate her Hippocratic oath as a physician.<sup>200</sup> Pierce's employer removed her from the project and subsequently Pierce resigned because she felt she was being demoted.<sup>201</sup> Pierce filed a wrongful discharge action. The court stated that professional codes of ethics might contain an expression of public policy.<sup>202</sup> An employee who is fired for refusing to perform an act that would violate these ethics may bring a wrongful discharge action against the employer.<sup>203</sup> While the majority found that the Hippocratic oath did not contain a clear mandate of public policy that prevented Dr. Pierce from continuing her research,<sup>204</sup> the dissent concluded that there are a number of recognized codes of medical ethics that provide a "clear mandate of public policy."<sup>205</sup> Therefore, Dr. Pierce was entitled to "claim the protection of one or more of these recognized codes of professional ethics."<sup>206</sup>

Additionally, courts have held that rules of professional conduct for accountants constitute sufficient public purpose for wrongful discharge claims.<sup>207</sup> In *Rocky Mountain Hospital & Medical Service v. Mariani*, the Supreme Court of Colorado, sitting en banc, stated that the "integrity and objectivity" provision of the accountants' professional rules was a "sufficiently clear mandate of public policy."<sup>208</sup> Diana Mariani was an at-will employee and a licensed certified public accountant for Colorado Blue Cross Blue Shield (BCBS).<sup>209</sup> Mariani discovered some irregular accounting practices in BCBS's records and complained to her supervisor.<sup>210</sup> When BCBS fired Mariani, she filed suit against BCBS and her supervisor.<sup>211</sup> One of her claims was for retaliatory discharge in

---

198. *Id.* at 506.

199. *Id.* at 507.

200. *Id.*

201. *Id.* at 507.

202. *Pierce*, 417 A.2d at 512.

203. *Id.*

204. *Id.* at 514.

205. *Id.* at 515.

206. *Id.* at 518.

207. *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 528 (Colo. 1996).

208. *Id.* at 526.

209. *Id.* at 521.

210. *Id.* at 521-22. The irregular accounting practices included omission of expenses on IRS reports, failure to list a large surplus note on a financial statement, misrepresentation of the financial status of Rock Mountain Life, and mischaracterization of the benefits of a merger. *Id.*

211. *Id.* at 522.

violation of public policy.<sup>212</sup> In refusing to limit the sources of public policy for a wrongful discharge claim to constitutional or statutory provisions, the court held that professional ethics codes may be a source of public policy.<sup>213</sup> The court noted that the Colorado State Board of Accountancy *Rules of Professional Conduct* govern practicing certified public accountants and provide for state Board professional discipline for failure to abide by its rules.<sup>214</sup> The rules of professional conduct for accountants ensure the accurate reporting of financial information to the public and allow the public and businesses to rely upon this information.<sup>215</sup> The legislature endorsed this important public purpose in Colorado's statutes.<sup>216</sup> The accountancy rules provide clear direction to an accountant as to the scope of duty, and clear notice to an employer that accountants have a duty to report financial information fairly and accurately.<sup>217</sup> Because the rules are clear and of public importance, the court held that the rules represent a "clear mandate of public policy."<sup>218</sup> The court found that Mariani established a prima facie case of wrongful discharge for refusing to falsify accounting information based upon her professional rules of conduct.<sup>219</sup>

In *Kalman v. Grand Union Co.*,<sup>220</sup> the court held that the *Code of Ethics* of the American Pharmaceutical Association represented a clear mandate of public policy.<sup>221</sup> Kalman was a pharmacist for the defendant's pharmacy located in its grocery store.<sup>222</sup> New Jersey statute required a registered pharmacist to be on duty whenever the store was open.<sup>223</sup> When Kalman's supervisor told him that the pharmacy would be closed although the store was to remain open on July 4, Kalman informed the supervisor that state regulations required the pharmacy to remain open and that his own license could be revoked for violating the regulation.<sup>224</sup> The supervisor told Kalman that "no one would know."<sup>225</sup> As a result of Kalman's phone call to the State Board of Pharmacy, the pharmacy was required to stay open on July 4 and 5, and Kalman

---

212. *Rocky Mountain Hosp.*, 916 P.2d at 522.

213. *Id.* at 525.

214. *Id.* at 526.

215. *Id.*

216. *Id.*

217. *Rocky Mountain Hosp.*, 916 P.2d at 526.

218. *Id.*

219. *Id.* at 528.

220. 443 A.2d 728 (N.J. Super. Ct. 1982).

221. *Id.* at 730-31.

222. *Id.* at 728.

223. *Id.* at 730.

224. *Id.* at 729.

225. *Kalman*, 443 A.2d at 729.

was fired.<sup>226</sup> Kalman filed a wrongful discharge action, contending that the company fired him for attempting to follow a state regulation and his own code of professional ethics.<sup>227</sup> The court concluded that Kalman's discharge was contrary to public policy as evidenced by his professional code of ethics and reversed the defendant's grant for summary judgment.<sup>228</sup>

The ABA's *Model Rules of Professional Responsibility* express clear and specific public policy. An attorney-employer should not go unpunished for criminal or fraudulent behavior and the *Model Rules* entrust the attorney to report this type of conduct.<sup>229</sup> The *Model Rules* provide specific guidance to the attorney-employer; each and every attorney-employer is quite aware of these rules.

#### IV. PUBLIC POLICY BY PROFESSIONAL CODE EXCEPTION AND ATTORNEY-EMPLOYEES IN PRIVATE PRACTICE

*Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth.*<sup>230</sup>

Private law firm attorneys wrongfully discharged for refusing to violate their professional code of ethics should be allowed a cause of action for retaliatory discharge. Courts should recognize a "public policy by professional code exception" to the at-will employment of an attorney-employee in private practice.

A claim of retaliatory discharge by an attorney-employee fired by a private law firm would not violate the attorney's obligation to respect client confidences because this claim may be established without breaching ethical obligations to a former employer. There would be no chill of the attorney-client relationship. The threat of confidentiality breach is not present in the relationship between the attorney-employer and the attorney-employee in private practice because the private law firm employer is not the attorney-employee's client. Just as the employee's status as an attorney should not bar the employee from a remedy for wrongful discharge, the status of an employer as an attorney is no reason to provide that individual with immunity from a wrongful termination claim.

One of the reasons for the tort of retaliatory discharge was the recognition that workers do not "stand on equal footing" with

---

226. *Id.*

227. *Id.*

228. *Id.* at 731.

229. MODEL RULES OF PROF'L CONDUCT Rule 8.3(a)&(c) (1996).

230. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 19-20 (1924).

employers.<sup>231</sup> This is true with attorneys. An attorney does not enjoy a "mutuality of choice."<sup>232</sup> An attorney may not be mobile because of the sheer number of licensed attorneys. Moreover, an attorney's marketability may be damaged when the employer wrongfully discharges him from employment. Cases like *Herbster* may invite employers to state that a discharged attorney was fired for "unsatisfactory job performance."<sup>233</sup> These factors would seriously impair an attorney's search for new employment. An attorney-employee should be able to enjoy the protections afforded to a non-attorney employee in the area of wrongful discharge.

The *Code of Ethics* provides a definite statement of public policy. The *Model Rules* of ethics "define the minimal standards applicable to lawyers, and these standards are in turn linked to important values affecting the public interest."<sup>234</sup> All attorneys must adhere to the regulations set forth in their code of ethics. When an employer is also an attorney, the employer is expected to know the fundamental public policies expressed in those regulations. The policy behind the *Model Rules* affects society at large—the *Model Rules* are not mere internal regulations of the profession.

The *Model Rules* do not afford sufficient safeguards to protect the public interest. To deny an attorney-employee of a private law firm a remedy for adhering to his professional ethics does not encourage respect for the law. It weeds out the honest attorneys. However, allowing such a remedy would discourage the attorney-employer from inducing the attorney-employee to participate in or overlook illegal schemes. Moreover, to allow such a remedy would reinforce the integrity of the practice of law. This remedy would further encourage attorneys to do the "right thing" in the face of attorney-employers insistent on doing "the wrong thing."

#### CONCLUSION

*[Stripping attorneys of a remedy in "whistle-blowing" situations, reminds attorneys that] "it is economically more advantageous to keep quiet than to follow the dictates of the Rules of Professional Conduct."*<sup>235</sup>

---

231. *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967)).

232. Michael L. Closen & Mark E. Wojcik, *Lawyers Out in the Cold*, 73 A.B.A. J. 94, 96 (1987).

233. *Id.* at 94.

234. Stephen C. Dillard, *When Principles Clash: The In-House Counsel as Renegade or Whistleblower*, 63 DEF. COUNS. J. 206, 210 (1996).

235. *Jacobson v. Knepper & Moga, P.C.*, 706 N.E.2d 491, 494 (Ill. 1998) (Freeman, J., dissenting). Justice Freeman made this observation when the

You were fired for refusing to violate your ethical duties. You did not compromise client confidences. You are unable to find a job because your former employer has indicated on your employment records that you were fired for “unsatisfactory job performance.” You know this “unsatisfactory performance” was the result of choosing to abide by your professional ethics instead of participating in the unethical acts of your employer. You did the “right thing” and even reported the misconduct of a fellow attorney to the appropriate public authorities.

[T]here is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession. Erecting or countenancing disincentives to compliance with the applicable rules of professional conduct . . . would subvert the central professional purpose of his relationship with the firm—the lawful and ethical practice of law.<sup>236</sup>

You, the attorney-employee, questioned the practices of your attorney-employer, did the “right thing,” and as a result were fired. Clearly, public interest mandates revealing improper attorney conduct.

The *Rules of Professional Conduct* do not provide adequate safeguards to protect the public interest. “[T]o say that the categorical nature of ethical obligations is sufficient to ensure that the ethical obligations will be satisfied simply ignores reality.”<sup>237</sup> “Attorneys are no less human than non-attorneys and . . . no less given to the temptation to either ignore or rationalize away their ethical obligations when complying . . . may render them unable to feed and support their families.”<sup>238</sup>

Attorneys need to be secure in knowing that their jobs are safe if they remain faithful to those fundamental public policies reflected in their professional ethics codes. Protection against the wrongful discharge of attorneys fired for doing the “right thing” when their attorney-employers are bent on doing the “wrong thing” encourages honorable conduct and the reporting of dishonest lawyers and promotes respect within the legal profession.

Preserve your job or preserve your legal ethics? With the allowance of a retaliatory discharge tort, attorney-employees are no longer faced with “Hobson’s choice.” Attorneys must adhere to their professional ethics, and they should expect their colleagues

---

*Jacobson* court disallowed a private attorney’s claim for retaliatory discharge based upon the attorney’s refusal to violate his ethical obligations. *Id.*

236. *Weider v. Skala*, 609 N.E.2d 105, 108 (N.Y. 1992).

237. *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 113 (Ill. 1991) (Freeman, J., dissenting).

238. *Id.*

to do the same. When attorneys acting as employers do not respect their ethics and retaliate against attorney-employees for "squealing" by depriving them of their livelihoods, protection should be afforded to the honest attorney-employee for doing the "right thing."

