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Watching Out for the Watchdogs:  
Why a Job Duties Exception to Whistleblower Protection Makes Bad Policy  
Alex Smith\*

I. Introduction

On May 15, 2006, Joel S. Lippman, M.D., was fired because—if his allegations are to be believed—he had faithfully executed his responsibilities.<sup>1</sup> For over fifteen years, Dr. Lippman worked in the fields of pharmaceutical and medical device manufacture in various directorial and executive capacities.<sup>2</sup> In 2000, Dr. Lippman began working for Ethicon, a manufacturer of medical devices used in surgical procedures, where he served first as vice president of medical affairs and then, later, as the worldwide vice president of medical affairs and the company’s chief medical officer.<sup>3</sup> Dr. Lippman’s job duties were expansive and required him to serve on a number of internal review boards, providing his medical opinions and expertise on the safety of medical devices as well as their compliance with pertinent federal and state laws and regulations.<sup>4</sup> One of these review boards, known as the quality board, had significant power over the distribution of Ethicon’s medical devices, wielding the “final say” over whether any corrective actions were to be taken with regard to any of the products.<sup>5</sup>

As the chief medical officer, Dr. Lippman’s urged the quality board to exercise caution and restraint, recommending on numerous occasions that Ethicon refrain from beginning or continuing to market different products which Dr. Lippman deemed medically unsafe.<sup>6</sup> Some of the other members of the quality board were driven by competing motivations, representing the business

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\* J.D. Candidate, 2017, Seton Hall University School of Law; B.A., 2014, Lehigh University. Thank you to Dean Timothy Glynn and my fellow *Seton Hall Law Review* editors for their help and guidance throughout the writing of this Comment. I also extend my deepest thanks to my parents for helping me become the person I am today.

<sup>1</sup> Lippman v. Ethicon, Inc., 119 A.3d 215, 218–19 (N.J. 2015).

<sup>2</sup> *Id.* at 218.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 219.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

side of the company, and accordingly disagreed with and pushed back against Dr. Lippman's suggestions.<sup>7</sup> Dr. Lippman relied on his medical expertise, his many years of experience in the field, and his understanding of the laws governing Ethicon's various products.<sup>8</sup> He believed that it was his responsibility to "candidly and forthrightly express his opinions and concerns about the safety of a product."<sup>9</sup> Shortly before his termination, Dr. Lippman engaged in another of these quality board reviews, urging his colleagues that a product referred to as DFK-24 should be recalled.<sup>10</sup> In his opinion, the product was dangerous.<sup>11</sup> Although other members of the board were resistant, Ethicon ultimately followed Dr. Lippman's suggestion and recalled the product in either late April or early May 2006.<sup>12</sup> Within a couple of weeks of the recall, on May 15, 2006, Dr. Lippman's employment was terminated.<sup>13</sup>

In 2006, Sherilyn McCoy served as the Ethicon's company group chairperson and was Dr. Lippman's direct superior and the person to whom he reported.<sup>14</sup> According to McCoy, Dr. Lippman was terminated because of an allegedly inappropriate romantic relationship that he had engaged in with a female subordinate, though one who did not report directly to Dr. Lippman.<sup>15</sup> Ms. McCoy acknowledged that this justification was not one which, to her knowledge, had ever been used to terminate or even discipline an Ethicon employee before.<sup>16</sup> Ms. McCoy also stated that she was unaware of any written policy prohibiting that type of consensual romantic

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<sup>7</sup> *Lippman*, 119 A.3d at 219.

<sup>8</sup> *Id.* at 218.

<sup>9</sup> *Lippman v. Ethicon, Inc.*, 75 A.3d 432, 439 (N.J. Sup. Ct. App. Div. 2013).

<sup>10</sup> *Lippman*, 119 A.3d at 219.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (There was some disagreement in the record over when the recall occurred; the court stated "Ethicon eventually did so in late April or early May 2006.").

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 219.

<sup>16</sup> *Lippman*, 119 A.3d at 219.

relationship.<sup>17</sup> Dr. Lippman contends that the purported rationale for his firing was illusory and that Ethicon's true motivation was to remove what they had come to view as an obstacle standing between the company and greater profitability.<sup>18</sup>

Whether or not Dr. Lippman was removed in retaliation for his good faith efforts to alert his employer to the risks its products posed to society at large is open for debate. The factual record has not been fully developed and the case has yet to be resolved.<sup>19</sup> What should not be debatable, however, is that people in Dr. Lippman's position—watchdog employees—must be protected by laws intended to encourage employees to take action when they see their employers violating laws or putting the public in danger. In *Lippman v. Ethicon*, the New Jersey Supreme Court found this to be the case.<sup>20</sup>

This Comment will examine how various states have addressed the question of whether or not watchdog employees should be afforded whistleblower protections. Part II will examine the whistleblower protection statute in New Jersey and how it was applied in *Lippman*. Part III will look at how some other states have reached the opposite result from New Jersey in interpreting their own whistleblower protection statutes. Part IV will look at some further states that have interpreted their whistleblower protection statutes in line with New Jersey. Part V will study how the federal government has addressed the problem, and how its treatment of this issue has evolved over time. Part VI addresses the job duties exception to free speech protection for federal employees, as well as the thorny issues raised by the attorney whistleblower. Finally, Part VII will conclude and recommend what the states currently in opposition to New Jersey's approach should do going forward. In total, this Comment will argue that failing to afford whistleblower protection

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<sup>17</sup> *Id.*

<sup>18</sup> *Lippman v. Ethicon, Inc.*, 75 A.3d 432, 405–06 (N.J. Sup. Ct. App. Div. 2013).

<sup>19</sup> *Lippman v. Ethicon, Inc.*, 119 A.3d 215, 231 (N.J. 2015).

<sup>20</sup> *Id.* at 230–31.

to watchdog employees is plainly contrary to the public policy rationales underlying whistleblower protection legislation.

## II. Whistleblower Protection in New Jersey

### A. Conscientious Employee Protection Act

The New Jersey Supreme Court first addressed whistleblower protection in the 1980 case of *Pierce v. Ortho Pharmaceutical Corp.*<sup>21</sup> In that case, the court engaged in a discussion of the development of a common law cause of action for the wrongful discharge of an at-will employee in situations which constituted a clear violation of public policy.<sup>22</sup> Though the plaintiff in that case was ultimately unsuccessful, the court explicitly endorsed the approach.<sup>23</sup> In 1986, the New Jersey state legislature directly codified this decision in the passage of the Conscientious Employee Protection Act (CEPA).<sup>24</sup> The statute, in pertinent part, provides:

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of

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<sup>21</sup> *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (N.J. 1980).

<sup>22</sup> *Id.* at 508–11.

<sup>23</sup> *Id.* at 512–13.

<sup>24</sup> N.J. STAT. ANN. § 34:19 (West 2016).

law, or a rule or regulation promulgated pursuant to law by the employer or another employer, with whom there is a business relationship, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.<sup>25</sup>

This provision of CEPA, known as “Employer retaliatory action; protected employee actions,” provides protection for employees who attempt to enforce mandates, either of public policy or those expressly created by judicial decision or statute.<sup>26</sup>

CEPA is an example of what has come to be known as a whistleblower statute.<sup>27</sup>

Whistleblower statutes fall under a category of legislation known as remedial legislation, laws intended to provide a remedy for plaintiffs who have suffered what society views as an injustice.<sup>28</sup>

In order to bring about the important social goals of remedial legislation, courts must construe remedial laws in as liberal a way as their words allow, to give the legislation as broad an effect as

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<sup>25</sup> N.J. STAT. ANN. § 34:19-3 (West 2006).

<sup>26</sup> See Carolyn Dellatore, *Blowing the Whistle on CEPA: Why New Jersey’s Conscientious Employee Protection Act Has Gone Too Far*, 32 SETON HALL LEGIS. J. 375, 383–84 (2008) (describing the goals of CEPA).

<sup>27</sup> See Christopher P. Lenzo, *The Changing Contours of New Jersey Whistleblower Law*, 196 N.J. LAW., Apr. 1999, at 51 (describing CEPA as a whistleblower statute).

<sup>28</sup> *Abbamont v. Piscataway Bd. of Educ.*, 650 A.2d 958, 971 (N.J. 1994).

possible.<sup>29</sup> Accordingly, any time an employee speaks up about workplace conditions or practices that are either unsafe or unlawful, courts should strive to interpret whistleblower statutes like CEPA to provide the employee with protection from retaliatory action by the employer.<sup>30</sup>

In order to prove a claim under CEPA, the plaintiff must demonstrate the existence of four factors connected with the termination:

(1) that he . . . reasonably believed that his . . . employer's conduct was violating either a law or a rule or regulation promulgated pursuant to law; (2) that he . . . performed whistle-blowing activity described in *N.J.S.A.* 34:19-3a, c(1) or c(2); (3) an adverse employment action was taken against him . . . ; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.<sup>31</sup>

Under this standard, an employee can receive protection, even if the conduct he objected to was not unlawful.<sup>32</sup> However, it must have been reasonable to believe that the conduct violated some law or regulation, and the employee must have actually believed as such.<sup>33</sup> In this narrow way, the employee's purpose in blowing the whistle should be considered.

#### B. Application of CEPA to Watchdog Employees in *Lippman*

Against this backdrop, the New Jersey Supreme Court addressed whether CEPA's protection was meant to be extended to so-called watchdog employees.<sup>34</sup> A watchdog employee is an employee whose job duties and responsibilities explicitly require them to regularly engage in

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<sup>29</sup> *Id.*

<sup>30</sup> *Donelson v. DuPont Chambers Works*, 20 A.3d 384, 391 (N.J. 2011). *See also*, Frank J. Cavico, *Private Sector Whistleblowing and the Employment-at-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 587–88 (2004) (outlining the argument that whistleblower statutes are remedial statutes and that they should be “broadly interpreted” as a result).

<sup>31</sup> *Puglia v. Elk Pipeline, Inc.*, 100 A.3d 191, 195 (N.J. Super. Ct. App. Div. 2014), *cert. granted*, 108 A.3d 633 (N.J. 2015) (citation omitted).

<sup>32</sup> *See Dellatore, supra* note 26, at 384.

<sup>33</sup> *Dzwonar v. McDevitt*, 828 A.2d 893, 900 (N.J. 2003) (“A plaintiff who brings a claim pursuant to [CEPA] need not show that his or her employer or another employee actually violated the law or a clear mandate of public policy . . . the plaintiff must simply show that he or she ‘reasonably believes’ that to be the case.”) (citations omitted).

<sup>34</sup> *Lippman v. Ethicon, Inc.*, 119 A.3d 215, 226–28 (N.J. 2015).

the type of activity that whistleblower statutes seek to encourage.<sup>35</sup> If your job requires you to engage in behavior that would otherwise constitute whistleblowing, you are a watchdog employee.<sup>36</sup> Some common types of watchdog employees include compliance officers, ombudsmen,<sup>37</sup> in-house council, internal auditors,<sup>38</sup> and, broadly, many individuals involved in the medical field.<sup>39</sup> This last category is perhaps the most significant, as it pertains directly to the health, safety, and well-being of individuals and our society at large.<sup>40</sup> It was in this category that Dr. Lippman found himself.

In determining whether or not Dr. Lippman and watchdog employees in general fall within CEPA's protection, the court analyzed the language of the statute, specifically the use of the language "an employee."<sup>41</sup> The court noted that employee was defined within CEPA as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration."<sup>42</sup> In addition to this clear definition, and the absence of any type of

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<sup>35</sup> See *Employment Litigation*, 27 BUS. TORTS. REP. 257, 257-60 (2015) (discussing the *Lippman* decision and describing watchdog employees as "employees fulfilling 'watchdog' duties at the behest of their employer").

<sup>36</sup> See David B. Lichtenberg & David J. Treibman, *Did I Blow the Right Whistle? The Evolving Definition of a Whistleblower under New Jersey's Conscientious Employee Protection Act (CEPA)*, 291 N.J. LAW., Dec. 2014, at 54, 58 (describing watchdog employees as those who, "in light of his or her duties and responsibilities" is in a position to know when an employer's conduct is contrary to law or public policy).

<sup>37</sup> See, e.g., Erin Daly, *Garcetti in Delaware: New Limits on Public Employees' Speech*, 11 DEL. L. REV. 23, 38 (2009) (noting that "employees like ombudsmen and compliance officers" are required by their jobs "to rout out wrongdoing and internal violations").

<sup>38</sup> See, e.g., Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act "Bounty Hunting"*, 45 CONN. L. REV. 483, 505-06 (2012) (explaining that "certain individuals" had a "job function . . . to detect or investigate" violations of the law, "such as legal counsel, auditors, and internal compliance personnel").

<sup>39</sup> See, e.g., Jennifer S. Bard, *What to Do When You Can't Hear the Whistleblowing*, 9 IND. HEALTH L. REV. 1, 51-52 (2012) ("Many have suggested that the very nature of scientific research . . . imposes an obligation on scientists to be whistleblowers . . ."); Frank J. Cavico & Nancy M. Cavico, *Employment-at-Will, Public Policy, and the Nursing Profession*, 8 QUINNIPIAC HEALTH L.J. 161 (2005) (discussing the profession of nursing and how the members of the profession face ethical and professional responsibilities to report misconduct). See also Herbert G. Ogden, *The Public Policy Exception to At-Will Employment*, 34 VT. B.J., Fall 2008, at 44, 45-47 (discussing that in some jurisdictions, a doctor's ethical code could serve as the important source of public policy needed to receive whistleblower protection).

<sup>40</sup> See Cavico, *supra* note 39, at 238 (arguing that courts should take an expansive view of the public policy exception as it applies to employees whose jobs impact the "superseding societal interest in effective and excellent health care").

<sup>41</sup> *Lippman v. Ethicon, Inc.*, 119 A.3d 215, 225 (N.J. 2015).

<sup>42</sup> *Id.*



limiting language, the court also acknowledged that remedial legislation such as CEPA must be liberally construed.<sup>43</sup> Taking these considerations together, and noting the total absence of any evidence within the statute to the contrary, the court found that any construction of CEPA that would limit its application to any subset of “employees” would be contrary to legislative intent and invalid.<sup>44</sup> As such, the court found that watchdog employees were entitled to whistleblower protection, on the same terms as all other employees.<sup>45</sup>

### C. The New Jersey Supreme Court’s Failure to Enunciate a Public Policy Rationale

While this opinion certainly stands as a victory for watchdog employees and a vindication of legislative purpose and intent, the New Jersey Supreme Court could have taken this opportunity to go further, vehemently emphasizing the public policy rationale which supported the decision. As the lower court found in its separate published opinion, watchdog employees are not merely within the protections offered by CEPA, they are precisely the sort of employee who need the protection the most.<sup>46</sup> Their jobs require them to regularly, and in some cases constantly, make reports or findings to their employers that cut against the employer’s financial interests. It is easy to see why the appeals court described these employees as “most vulnerable to retaliation.”<sup>47</sup> The New Jersey Supreme Court’s failure to explicitly endorse this view is not an infirmity to the decision. The statutory construction argument on which the court relied was simple, seemingly self-evident, and entirely conclusive on the issue. No New Jersey court will have any difficulty applying the rule set forth in the decision. However, by not making the policy argument, the decision loses some of its potential instructive force.

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<sup>43</sup> *Id.*; see also *supra* notes 27–30 and accompanying text.

<sup>44</sup> *Lippman*, 119 A.3d at 227 (“There is simply no support in CEPA’s definition of ‘employee’ to restrict the Act’s application and preclude its protection of watchdog employees.”).

<sup>45</sup> *Id.*

<sup>46</sup> *Lippman v. Ethicon, Inc.*, 75 A.3d 432, 449 (N.J. Sup. Ct. App. Div. 2013).

<sup>47</sup> *Id.*

CEPA is not unique. Many states have whistleblower statutes that—though not going as far in their coverage<sup>48</sup>—are substantially similar to it in language, purpose, and effect. At the time of its passage, just under three decades ago, CEPA was the most comprehensive whistleblower statute in the nation, serving as a frontrunner in the field of employee protection.<sup>49</sup> In the years since its passage, many other states have enacted similar legislation.<sup>50</sup> In interpreting this legislation, as will be detailed below, the courts of some of these other states have reached contrary results on the status of watchdog employees.<sup>51</sup> In *Lippman*, the New Jersey Supreme Court missed an opportunity to more fully enunciate the strong public policy rationale for including watchdog employees under whistleblower protection statutes. While such a discussion would not have added clarity or ease to the application of the decision within the state, it would have expanded its efficacy for other states wishing to look to New Jersey in interpreting their own statutes.

### III. States Where Whistleblower Protection Has Been Constricted

#### A. Minnesota

In 1987, Minnesota’s legislature created a whistleblower statute intended to discourage illegal conduct by employers, encourage whistleblowing activity, and provide employees engaging in such activity with some protection.<sup>52</sup> This statute, the Minnesota Whistleblower Act (MWA), provides that:

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<sup>48</sup> See Dellatore, *supra* note 26, at 377 (describing CEPA as “one of the broadest whistleblower statutes in the country when it was enacted and . . . still one of the most expansive”).

<sup>49</sup> *Lippman*, 75 A.3d at 451.

<sup>50</sup> See, e.g., Marshall H. Tanick, *Blow the Whistle, Sound the Drum*, 63 BENCH & B. MINN., Oct. 2006, at 18, 20 (discussing that “[a]ll 50 state jurisdictions and the District of Columbia now recognize whistleblower rights . . . usually . . . based on ‘public policy’ grounds . . . or statutory provisions”).

<sup>51</sup> See generally Nancy M. Modesitt, *The Garcetti Virus*, 80 U. CINN. L. REV. 137, 162–77 (2011) (outlining the growth of the job duty exception to state whistleblower statutes since 2006).

<sup>52</sup> See Steven Andrew Smith et al., *The Canary Sings Again: New Life for the Minnesota Whistleblower Act*, 70 BENCH & B. MINN., Sep. 2013, at 14, 15 (describing some of the “self-evident” purposes of the MWA as encouraging whistleblowing and “dissuad[ing] employers from engaging in, or continuing to engage in, illegal behavior”).

An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(1) the employee, or a person acting on behalf of an employee, in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official. . .<sup>53</sup>

Like New Jersey, the Minnesota legislature defined employee in an expansive way, providing that employee, for purposes of this section, “means a person who performs services for hire in Minnesota for an employer.”<sup>54</sup> The use of the phrase “good faith” in this statute is the only notable difference between this language and the language of CEPA.<sup>55</sup> The Minnesota courts have found that the legislature’s inclusion of this phrase requires analysis of whistleblower claims to consider the purpose and intent of the purported whistleblower.<sup>56</sup> The path the courts took to reach this conclusion is worth detailing.

### 1. The Good Faith Requirement

The importance of the “good faith” language first came to light in *Obst v. Microtron, Inc.*<sup>57</sup> In that case, the plaintiff, Michael Obst, asserted that he had been terminated due to his reporting activity and sought a remedy under the whistleblower statute.<sup>58</sup> Obst’s employer Microtron, was

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<sup>53</sup> MINN. STAT. ANN. § 181.932 (West 2013).

<sup>54</sup> MINN. STAT. ANN. § 181.931 (West 2013).

<sup>55</sup> 2013 Minn. Sess. Law Serv. 83 (West 2013). In a 2013 amendment, the Minnesota legislature added a definition to § 181.931 reading, “‘Good faith’ means conduct that does not violate section 181.932, subdivision 3.” MINN. STAT. ANN. § 181.931 (West 2013). This subdivision, § 181.932, in turn, reads “False disclosures. This section does not permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth.” Minn. Stat. Ann. § 181.932 (West 2013). This change will be discussed further below.

<sup>56</sup> *Obst v. Microtron, Inc.* 614 N.W.2d 196, 202 (Minn. 2000) (“In order to determine whether a report of a violation or a suspected violation of law is made in good faith, we must look not only at the content of the report, but also at the reporter’s purpose in making the report.”).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 199 (“Obst believed that . . . the actual reason [for his termination] was the fact that he reported what he thought were violations of law to Microtron.”).

a manufacturer of wiper blades for Ford Motor Company.<sup>59</sup> According to its contract with Ford, Microtron was required to quality test the wiper blades, using multiple machines to do so, prior to shipping them to the Ford assembly plants.<sup>60</sup> Obst complained to his superiors that one of the testing machines was not functioning and that, as a result, faulty wiper blades were being shipped on to Ford.<sup>61</sup> Microtron eventually addressed the problem, but not until after Ford had voiced its own concerns over the quality of the wiper blades it had been receiving.<sup>62</sup> Shortly thereafter, Obst was terminated.<sup>63</sup> This termination was purportedly for Obst's inability to effectively communicate with peers, despite having recently received a raise and universally positive performance reviews.<sup>64</sup> Obst alleged that he had been terminated for complaining about the company's deviation from their quality control plan with Ford.<sup>65</sup>

Ultimately, Obst's complaints either covered violations that were already generally known, or did not involve a violation of any law or regulation, and so the court found that Obst was not covered by the MWA.<sup>66</sup> In arriving at this conclusion, the court discussed the meaning of the phrase "good faith" in the whistleblower statute for the first time.<sup>67</sup> The court described the good faith analysis as a "critical question," going on to provide clarity on what the question was, stating "we must look not only at the content of the report, but also at the reporter's purpose in making the report."<sup>68</sup> To support this contention, the court did not cite any Minnesota case law. Instead, the

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<sup>59</sup> *Id.* at 198–99.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 199.

<sup>62</sup> *Obst*, 614 N.W.2d at 199.

<sup>63</sup> *Id.* (noting that, "[o]n June 1, 1995, Microtron terminated Obst's employment," about three and a half months after Ford first voiced concerns about the wiper blade quality "[o]n or about February 17, 1995").

<sup>64</sup> *Id.*

<sup>65</sup> *See supra* note 58.

<sup>66</sup> *Obst*, 614 N.W.2d at 204.

<sup>67</sup> *See Smith, supra* note 52, at 15 (explaining that "[t]he narrow interpretation of 'good faith' began when courts held that whistleblowers had to prove they were 'blowing the whistle' for the 'purpose of exposing an illegality,'" and citing to *Obst*).

<sup>68</sup> *Obst*, 614 N.W.2d at 202.

court relied on a district court case from Michigan.<sup>69</sup> This was the only support offered to elucidate the content of the “critical question” and to establish that a whistleblower’s purpose is of paramount importance.

The court’s reliance on *Wolcott* was misguided, because *Wolcott*’s facts are distinguishable from those of *Obst*.<sup>70</sup> In *Wolcott*, the plaintiff did not merely fail to establish that his reports were made in “good faith.”<sup>71</sup> Rather, the court found that the plaintiff was foreclosed from receiving protection under Michigan’s whistleblower statute because of his own *bad faith* actions.<sup>72</sup> *Wolcott* involved a heavy machinery maintenance mechanic who became disgruntled following an announcement from his employer that operations would be scaled back.<sup>73</sup> Concerned about his and his coworkers’ job security, Wolcott sent his employer a threatening letter, warning that if he or his friends were to lose their jobs, he would expose a record of unlawful conduct in which his employer had engaged.<sup>74</sup> The court refused to extend whistleblower protection to Wolcott, stating that it could not reward use of the whistleblower statute in a purely offensive way by a bad faith actor.<sup>75</sup> This is very different than the reporting activity in which Mr. Obst engaged. Mr. Obst’s reporting activity was done in the interest of motor vehicle safety, and compliance with federal regulations;<sup>76</sup> at no time did he attempt to blackmail his employer. The Michigan court’s discussion of a good faith whistleblower was meant as a juxtaposition to the bad faith conduct in which Wolcott engaged, not to support a searching analysis of the whistleblower’s purpose at the time he made the report.

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<sup>69</sup> *Wolcott v. Champion Int’l Corp.*, 691 F. Supp. 1052 (W.D. Mich. 1987).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1065.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1054.

<sup>74</sup> *Id.* at 1055.

<sup>75</sup> *Wolcott*, 691 F. Supp. at 1065.

<sup>76</sup> *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 201 (Minn. 2000).

The Minnesota court in *Obst* described the holding in *Wolcott* as standing for the proposition that a whistleblower's burden is not met "where the purpose of the employee, at the time of the making of reports, was not to protect the public, but to protect the jobs of himself and his co-workers."<sup>77</sup> This ignores the fact that *Wolcott* was not merely foreclosed from protection because his purpose was not to protect the public, but rather because he engaged in bad faith, extortive behavior that ran directly contrary to the public policy goals served by whistleblower protection. The court in *Obst* also refers to the *Wolcott* court holding that "the good faith requirement of the whistle-blower statute was not met."<sup>78</sup> This is curious because, as in CEPA, the Michigan statute in question contains no "good faith" language.<sup>79</sup>

## 2. Ramifications of the Strained Reading of *Wolcott* in *Obst*

The majority in *Obst* seemed to create a new purpose element to a whistleblower claim, one which the dissenting judge in that case stated had never before been adopted and was not mandated by the language of the statute.<sup>80</sup> Justice Gilbert went on to question the propriety of a panel of judges overturning a jury verdict based upon a contrary finding of fact.<sup>81</sup> This purpose element, nevertheless, took on the "crucial question" status that the majority had ascribed it and led courts to perform searching analyses of the subjective intent of purported whistleblowers.<sup>82</sup> This line of cases developed the theory that if one's job requires one to make a report, simply

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<sup>77</sup> *Obst*, 614 N.W.2d at 202.

<sup>78</sup> *Id.*

<sup>79</sup> MICH. COMP. LAWS § 15.362 (West 2016).

<sup>80</sup> *Obst*, 614 N.W.2d at 206 (Gilbert, J., dissenting).

<sup>81</sup> *Id.*

<sup>82</sup> See generally *Gee v. Minn. State Colls. and Univs.*, 700 N.W.2d 548, 555-56 (Minn. Ct. App. 2005) (faculty advisor did not have purpose to expose illegality when the sole purpose of her action was to fulfill the responsibilities of her job); *Freeman v. Ace Tel. Ass'n*, 404 F. Supp. 2d 1127, 1140-41 (D. Minn. 2005) (financial officer did not have purpose to expose illegality when responsibilities of his job required him to report any discrepancies in accounting).

fulfilling that responsibility would not be enough to establish the requisite purpose which the statute required. This theory was given explicit approval in the case of *Kidwell v. Sybaritic, Inc.*<sup>83</sup>

In *Kidwell*, the plaintiff worked as in-house council for the defendant company and filed a series of reports highlighting some concerning practices, urging that his employer stop engaging in them.<sup>84</sup> Specifically, Kidwell made allegations that Sybaritic was engaged in tax evasion, the unlawful practice of medicine, and obstruction of justice.<sup>85</sup> Three weeks later, he was terminated.<sup>86</sup> Kidwell's stated purpose in alerting his employer of his perceived violations of law were to "pull th[e] company back into compliance" and, thereby, to ensure that further violations of law did not occur.<sup>87</sup> Despite this laudable motive, and Kidwell's good faith action in attempting to rectify the situation, the court held that he was excluded from whistleblower protection because his purpose was not to blow the whistle on the activity, but merely to do his job.<sup>88</sup> Simply put, the court decided that when an employee is fulfilling the responsibilities of his job, he is not acting with the necessary purpose to blow the whistle, which the statute requires.<sup>89</sup>

In reaching this conclusion, the plurality stated that a blanket "job duties" exception could not apply to the statute, as it does not contain any limiting language in the inclusive definition of "employee."<sup>90</sup> Despite this, the plurality went on to say that, while the legislature had not defined "good faith" within the statute, it would apply the purpose analysis developed in *Obst*.<sup>91</sup> Engaging

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<sup>83</sup> *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220 (Minn. 2010).

<sup>84</sup> *Id.* at 221–22.

<sup>85</sup> *Id.* at 222.

<sup>86</sup> *Id.* at 223.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 231.

<sup>89</sup> *Kidwell*, 784 N.W.2d at 228 (“[W]hen it is the employee’s job to report illegality, there is no basis to infer from the mere fact of a report that an employee’s report was made to ‘blow the whistle.’”).

<sup>90</sup> *Id.* at 226–27. The *Kidwell* statutory construction argument is the same one applied in *Lippman*, finding it impossible to create a subclass of employees who are not contained within the larger protected class. MINN. STAT. ANN. § 181.931 (West 2013).

<sup>91</sup> *Kidwell*, 784 N.W.2d at 227. In 2013 the legislature added a definition of good faith to the statute, which seems to run contrary to this theory. 2013 Minn. Sess. Laws Serv. (West).

in this analysis, the plurality explained that whether the reporting activity fell within the employee's job duties was a relevant consideration of the employee's subjective intent, or purpose, in making the report.<sup>92</sup> This amounts to an end-around. Unable to bar a class of employees from whistleblower protection outright, the court developed a methodology under which that class would be effectively barred.

For further support of this interpretation of the statutory language at issue, the court looked to how the federal courts had interpreted a substantially similar federal statute, the Whistleblower Protection Act of 1989 ("WPA").<sup>93</sup> This statute provided federal employees with similar whistleblower protections to that of the MWA. The court stated that in the past, it had found analysis of the WPA instructive to its analysis of the MWA.<sup>94</sup> The court focused on two cases in particular which analyzed the WPA and found that, when reporting was made as part of an employee's job duties, their level of protection was reduced.<sup>95</sup> These two cases developed the existence, within the WPA, of a limited implied job duties exception. Specifically, the "normal channels" of reporting language came from the court in *Huffman*, which the Minnesota court extended to their analysis of the state statute.<sup>96</sup>

The language of Minnesota's whistleblower protection statute provides protection for an employee who reports violations to their employer and does not restrict which employees are entitled to protection.<sup>97</sup> Nevertheless, the Minnesota Supreme Court held here that the only way Kidwell could have engaged in "good faith" whistleblowing activity—activity with the requisite

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<sup>92</sup> *Kidwell*, 784 N.W.2d at 227.

<sup>93</sup> 5 U.S.C. § 2302(b)(8) (2016).

<sup>94</sup> *Kidwell*, 784 N.W.2d at 227.

<sup>95</sup> *See Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998) (holding that in order to constitute a protected report, the whistleblower must have risked his job security); *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1344 (Fed. Cir. 2001) (holding that when an employee is assigned the task of investigating and reporting wrongdoing, and then does so through normal channels, that reporting is not a protected disclosure under the WPA).

<sup>96</sup> *Kidwell*, 784 N.W.2d at 228.

<sup>97</sup> MINN. STAT. ANN. § 181.932 (West 2013).



purpose—would be if he went outside of the “normal channels” through which his job duties required him to file reports.<sup>98</sup> By placing a higher burden on watchdog employees like Kidwell, and by removing from them one of their statutorily afforded avenues of recourse, the court has frustrated the legislature’s broad remedial purpose in effecting the legislation.<sup>99</sup>

Like the court in *Obst*, the *Kidwell* court was not unified. The plurality opinion, discussed above, was joined by only three justices. A concurrence was filed on behalf of one justice who, while agreeing that Kidwell was not entitled to protection, arrived at that conclusion on different grounds.<sup>100</sup> Finally, a dissent was filed on behalf of three other justices.<sup>101</sup> In this opinion, Justice Anderson expresses his disapproval of the weight that the plurality gave to the fact that a report was made as a part of the employee’s job duties, through the normal channels.<sup>102</sup> While the dissenting justice acknowledged that good faith was required (agreeing with the holding in *Obst*) and that purpose and subjective intent were properly examined, he disagreed that the above consideration could be seen as dispositive of the issue.<sup>103</sup> Rather, he would have held that an employee, such as Kidwell, was perfectly capable of reporting in good faith, despite having a duty to make those same reports.<sup>104</sup> Justice Anderson would leave the question of whether the required subjective intent existed in the hands of the trier of fact, not handed down in a proclamation by a panel of judges.<sup>105</sup> This approach to the question of the subjective intent of the reporter, and

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<sup>98</sup> *Kidwell*, 784 N.W.2d at 228.

<sup>99</sup> See Smith, *supra* note 52, at 15 (arguing that the holding in *Kidwell* “made it virtually impossible for anyone whose job requires compliance-monitoring to establish that a whistleblowing report was made for the purpose of exposing an illegality rather than fulfilling job duties”).

<sup>100</sup> *Kidwell*, 784 N.W.2d at 231 (Magnuson, J., concurring) (finding that Kidwell was barred from recovery due to a breach of his fiduciary duty).

<sup>101</sup> *Id.* at 234–43 (Anderson, J., dissenting).

<sup>102</sup> *Id.* at 237.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 240 (“I conclude that a jury can look to the report itself or to other evidence to find good faith.”).

<sup>105</sup> *Id.* at 240 (arguing that the content of the report itself should be the key to the good faith inquiry and that this question is “for a jury to answer, and not for [the] court to answer on appellate review”).

whether or not he acted in good faith, is more in line with the Michigan court in *Wolcott*, and more in line with the broad remedial purpose of the legislation at issue.

### 3. Impact of *Kidwell* on the Public Policy Goals of Whistleblower Protection

Quite clearly, carving this limited job duties exception out of Minnesota's whistleblower statute frustrates the legislative intent and undercuts the public policy goals sought in its enactment.<sup>106</sup> After this decision, employees in Minnesota, in positions similar to *Kidwell*'s, are placed in an unfortunate situation.<sup>107</sup> On the one hand, they can report violations of laws or regulations to their employers through the normal channels established by the normal duties of their jobs. Taking this course, however, leaves the employee vulnerable to retaliatory action by his employer. The employers will not have to fear retribution for such retaliation because, under the *Kidwell* precedent, those employees did not engage in protected conduct.<sup>108</sup> On the other hand, the employee can go outside of the normal channels and report the violations to the proper authorities, risking an uncomfortable employment relationship going forward.

Undoubtedly, there will be watchdog employees who take this latter course, justifying the Minnesota Supreme Court's approach (to some extent) and bringing to fruition the goals of the Minnesota legislature. There is also no doubt, however, that many employees will not. People are naturally self-interested, and a decision to report one's employer to the authorities will be, in the judgment of many, contrary to that interest.<sup>109</sup> It is a much safer course to not make waves, not

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<sup>106</sup> See Modesitt, *supra* note 51, at 156 (explaining that, when a job-duties exception to whistleblower protection laws exists, "less whistleblowing will occur to the detriment of public safety and public and private financial interests").

<sup>107</sup> *Id.* at 156 ("The job duties exclusion renders [watchdog employees] extremely vulnerable to retaliation for engaging in whistleblower behavior.").

<sup>108</sup> *Id.* at 158–59 (discussing how job duties exceptions upset the balance of whistleblower protection, shielding employers from liability for retaliation, and "favoring interests of employers over the interests of the public and of the employees disclosing wrongdoing").

<sup>109</sup> See generally Michael C. Jensen, *Self-Interest, Altruism, Incentives, & Agency Theory*, 8 J. APPLIED CORP. FIN. 13 (1994) (arguing that "because people are, in the end, self-interested they will have conflicts of interest over at least some issues anytime they attempt to engage in cooperative endeavors").

rock the boat, and not risk one's livelihood. The prospect of unemployment, even if accompanied by damages conferred by a successful civil suit, is daunting. If the only avenue open to certain employees is taking violations to outside authorities, it stands to reason that many employees will not take that course.<sup>110</sup>

This is, clearly, in direct contradiction to the stated goals of a whistleblower protection statute. The purpose of these statutes is to *encourage* employees to attempt to remedy violations committed by their employers by providing them with protection from retaliation.<sup>111</sup> Instead, for employees who would not be inclined to go to outside authorities, the *Kidwell* precedent *discourages* employees from taking action. If they were to do so, they would be vulnerable to retaliation and have no protection whatsoever. By allowing watchdog employees the same level of protection as any other employee, and by allowing reports made in the course of one's normal job duties to constitute protected disclosures, the broad remedial purpose of this type of legislation would be more fully realized.<sup>112</sup>

#### B. Maine

In 1983, the legislature of Maine created a whistleblower statute that is substantially similar to that of Minnesota, both in language and purpose. The statute, the Maine Whistleblower Protection Act ("MWPA"), provides, in pertinent part:

1. Discrimination prohibited. No employer may discharge, threaten or otherwise discriminate against an employee regarding the

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<sup>110</sup> See generally Modesitt, *supra* note 51, at 159 (explaining that "most whistleblowers do not use external channels to report wrongdoing" and citing to research which indicated that only thirty percent of whistleblowing was done externally).

<sup>111</sup> See Julie Jones, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-At-Will Doctrine*, 34 TEX. TECH L. REV. 1133, 1148 (2003) (arguing that whistleblower protection is necessary in order to "preserve employees' ability to assert their rights and to promote the interests of the public").

<sup>112</sup> See Modesitt, *supra* note 51, at 177 ("Foreclosing whistleblowing protection to reports made pursuant to one's job and within the chain of command . . . [has the] potential to severely constrict legitimate reporting of unlawful activity.").

employee's compensation, terms, conditions, location or privileges of employment because:

A. The employee, acting in good faith, or a person acting on behalf of the employee, reports orally or in writing to the employer or a public body what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States;

B. The employee, acting in good faith, or a person acting on behalf of the employee, reports to the employer or a public body, orally or in writing, what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual . . .<sup>113</sup>

Notably, Maine's whistleblower protection statute also contains the "good faith" language present in the Minnesota statute.<sup>114</sup> Originally, the courts in Maine had interpreted this good faith language to impart the traditional meaning, standing for the inverse proposition of bad faith.<sup>115</sup> This is illustrated concisely in the following quote from *Gammon v. Crisis Counseling Ctrs., Inc.*: "The law it cites on good faith is generally geared towards an assessment of whether the purported whistleblower made her complaints for the purpose of exposing illegal or unsafe practices. The Court is unaware of a more precise standard."<sup>116</sup> This is exactly in line with the Michigan court's analysis in *Wolcott*. Thanks to the Minnesota Supreme Court in *Kidwell*, however, a more precise standard was injected into the MWPA just nine months later.

In that subsequent case, the appellee cited *Kidwell* to argue that the MWPA should be interpreted similarly to how the MWA was in that case.<sup>117</sup> *Capalbo* involved a commercial truck driver who alleged that, prior to his termination, he had made a number of complaints to his supervisors regarding his hours worked, which were allegedly in violation of various laws and

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<sup>113</sup> ME. REV. STAT. ANN. tit. 26, § 833 (2015).

<sup>114</sup> *Id.*

<sup>115</sup> See BLACK'S LAW DICTIONARY 762 (9th ed. 2009) (designating "bad faith" as contrary to "good faith." and defining good faith as "faithfulness to one's duty or obligation").

<sup>116</sup> *Gammon v. Crisis and Counseling Ctrs., Inc.*, 762 F. Supp. 2d 165 (D. Me. 2011).

<sup>117</sup> *Capalbo v. Kris-Way Truck Leasing, Inc.*, 821 F. Supp. 2d 397, 419 (D. Me. 2011) (citing to *Kidwell*, holding that the Maine statute should be similarly construed).

regulations.<sup>118</sup> Specifically, Capalbo alleged that he was being under-compensated for overtime hours, and that he was working in excess of the maximum hours allowed for the type of work he was engaged in.<sup>119</sup> Capalbo's case was fatally flawed, however. Although he had reported his concerns to his supervisors at Kris-Way Truck Leasing, they cursorily brushed him off and told him not to worry about it, which is exactly what he did.<sup>120</sup> If Capalbo had refused to work in excess of the maximum hours allowed for commercial truck drivers and had continued to complain in the face of this instruction, then he may have been able to state a claim of protected disclosure.<sup>121</sup> However, the court never reached this possibility.

Although the court disposed of the whistleblower claim without deciding whether a job duties exception like the one found in *Kidwell* would apply, it did briefly discuss the issue.<sup>122</sup> Kris-Way urged the court to accept the *Kidwell* and *Willis* line of reasoning because it was Capalbo's responsibility to keep track of his own "hours logs" and to make sure that he was not going over the statutory maximums.<sup>123</sup> Accordingly, it argued that any reports that he made as to excessive hours were required in the normal course of his job and were made through the normal channels, thus aligning with the Minnesota precedent.<sup>124</sup> The court recited the argument but rendered no decision as to its merit.<sup>125</sup>

Two years later, however, in a curious turn of events, *Capalbo* was used in *Winslow v. Aroostook County* to sustain the proposition that "the usual rule in Maine is that a plaintiff's reports

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<sup>118</sup> *Id.* at 401–07.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 419.

<sup>121</sup> *Id.* (in denying plaintiff's claim, the court noted that no reasonable trier of fact could conclude that Capalbo had engaged in "conduct in opposition to an unlawful employment practice" as he never refused or failed to complete his work, and even stated that "he had to work excessive hours to support his family").

<sup>122</sup> *Id.*

<sup>123</sup> *Capalbo*, 821 F. Supp. 2d at 419.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

are not whistleblowing if it is part of his or her job responsibilities to make such reports.”<sup>126</sup> Indeed, in *Winslow*, *Capalbo* was the only case law interpreting the Maine statute offered to support this contention. The court, in attempting to bolster the rationality of this “usual rule,” offered only that it “is also true elsewhere,” citing to *Kidwell* and *Willis*.<sup>127</sup> In *Winslow*, the plaintiff, Dena Winslow, made and distributed a report at the express request of her employer, which detailed some compliance issues regarding the status of her employment.<sup>128</sup> Winslow distributed the report to a wider audience than to which she was instructed, an action which upset her superiors, who viewed it as insubordination.<sup>129</sup> She was subsequently terminated.<sup>130</sup>

As in *Capalbo*, the court found that the plaintiff’s reporting activity simply did not constitute whistleblowing.<sup>131</sup> This was because, although there were compliance issues, Winslow’s superiors were actively engaged in attempting to remedy them (evidenced in the fact that Winslow’s report was created and distributed at the express request of Winslow’s boss).<sup>132</sup> This alone would have been fatal to Winslow’s claim. The court, however, decided to articulate that the “usual rule” in Maine is that an employee is not engaging in protected whistleblowing when performing job responsibilities.<sup>133</sup> This usual rule, however, was based entirely on: 1) the *Capalbo* decision; and 2) the application of *Kidwell* and *Willis* (which in turn provided the sole basis for that very same *Capalbo* decision).<sup>134</sup> While the results in these two cases would likely have been the same had no job responsibilities analysis been undertaken, the resulting precedent

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<sup>126</sup> *Winslow v. Aroostook Cty.*, 736 F.3d 23, 32 (1st Cir. 2013).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 25–26.

<sup>129</sup> *Id.* at 27.

<sup>130</sup> *Id.* at 29.

<sup>131</sup> *Id.* at 31.

<sup>132</sup> *Winslow*, 736 F.3d at 32.

<sup>133</sup> *Id.* at 32 (“Though there may be exceptions, the usual rule in Maine is that a plaintiff’s reports are not whistleblowing if it is part of his or her job responsibilities to make such reports, particularly when instructed to do so by a superior.”).

<sup>134</sup> *Id.* The only support the court cited to support the “usual rule” were these three cases.

that it created has the potential to injure watchdog employees in future litigation, foreclosing them from coverage under the MWPA. In fact, that is precisely what has occurred.<sup>135</sup> This shift in the analysis of whistleblower actions in Maine illustrates the invidious potential for rulings like *Kidwell*. It also illustrates the concomitant importance for courts and legislatures to strongly and affirmatively state why the public policy supporting whistleblower protection requires that it be afforded to all employees equally.

To its credit, however, the First Circuit recently clarified some of the language used in the *Winslow* decision in *Harrison v. Granite Bay Care, Inc.*<sup>136</sup> In that case, the court explained that while the “usual rule” in Maine is that you are not a whistleblower if you make reports pursuant to job responsibilities, this is “far from holding” that watchdog employees are “wholly ineligible for statutory whistleblower protection.”<sup>137</sup> While not an outright ban, the court did go on to say that “job duties may be relevant” to analyzing a whistleblower claim under the MWPA, but that such duties will not be “dispositive of the question”.<sup>138</sup> Whether a report is made pursuant to job duties is “relevant” because it will speak to the employee’s “motivation” in making the report: whether they acted as a whistleblower or whether they were simply doing their job.<sup>139</sup> While this is not a total victory, as many employees will have an uphill battle proving their subjective intent, this will presumably make it easier for them to make it past summary judgment—and in at least

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<sup>135</sup> See, e.g., *Hall v. Mid-State Mach. Prods.*, No. 11-CV-068, 2013 WL 5510308, \*7-8 (D. Me. 2013) (finding that plaintiff could not recover for making a report which was within his normal job duties, citing only to *Capalbo* and *Huffman* for support); *Stark v. Hartt Transp. Sys., Inc.*, 37 F. Supp. 3d 445, 481-84 (D. Me. 2014) (holding that plaintiff could not recover for making required reports, engaging in a lengthy discussion citing to *Capalbo*, *Winslow*, *Hall*, and *Kidwell*); *Pippin v. Boulevard Motel Corp.*, 121 F. Supp. 3d 230, 254-56 (D. Me. 2015) (finding that the plaintiff reports were not protected when made as a part of job duties, citing *Winslow*, *Capalbo*, *Hall*, and *Stark*).

<sup>136</sup> *Harrison v. Granite Bay Care, Inc.*, 811 F.3d 36 (1st Cir. 2016).

<sup>137</sup> *Id.* at 49.

<sup>138</sup> *Id.* at 51.

<sup>139</sup> *Id.*

one case already has.<sup>140</sup> This series of events, and the course that Maine’s whistleblower law took between the *Winslow* and *Granite Bay* decisions, underscores the critical role that judicial clarity takes in shaping the law.

#### IV. States That Extend Whistleblower Protection to Watchdog Employees

Whistleblower protection statutes vary greatly state to state, both in their language and in how they have been interpreted, but “the unmistakable trend has been the broadening of protections for employees who blow the whistle.”<sup>141</sup> With this in mind, it comes as no surprise that the majority of states that have addressed the issue of a potential job duties exception to their whistleblower statutes have declined to adopt such a standard.<sup>142</sup> This is good news for employees, and should be troubling to those states that have ruled otherwise. Below is a brief summary of how some of these states have addressed this issue.

##### A. Michigan

As discussed above, protection under Michigan’s whistleblower statute (“Michigan WPA”) was not extended to Paul Wolcott because the court there determined that his reports were not made in “good faith.”<sup>143</sup> This determination was not reached because Wolcott’s reports were made pursuant to his job duties, but rather because his reports were made in *bad faith*.<sup>144</sup> Naturally a bad faith actor should not be granted whistleblower protection, which is why courts have restricted the reach of the Michigan WPA, despite any statutory language referring to

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<sup>140</sup>See *Coad v. Buckman Laboratories, Inc.*, Slip Copy, (D. Me. 2016) (“But the First Circuit has recently explained that *Winslow* did not establish a ‘job duties exception’ to the MWPA.”) (citations omitted).

<sup>141</sup> Jason Zuckerman, *Recent Developments in Whistleblower Law From a Whistleblower Lawyer’s Perspective*, SX001 ALI-CLE 851 (2015).

<sup>142</sup> See *infra* discussion below; *Mosely v. Alpha Oil and Gas Services, Inc.*, 962 F. Supp. 2d 1090, 1098 (D. N.D. 2013) (discussing the *Kidwell* decision at length, and concluding that “the court believes it unlikely that the North Dakota Supreme Court would adopt even the more limited job-duties exception recognized by the *Kidwell* plurality”).

<sup>143</sup> See *supra*, note 69-79 and accompanying text; *Wolcott v. Champion Intern. Corp.*, 691 F. Supp. 1052 (W.D. Mi. 1987).

<sup>144</sup> *Id.*



reports made in good faith.<sup>145</sup> As discussed above, however, it is perfectly consistent to exclude employees acting in bad faith from whistleblower protection while at the same time including employees who blow the whistle pursuant to their job duties.<sup>146</sup>

In fact, this is precisely how the courts have interpreted the Michigan WPA. The Supreme Court of Michigan has clearly stated that the lack of any job duties exception or limitation within the language of the Michigan WPA “renders irrelevant whether the reporting is part of the employee's assigned or regular job duties.”<sup>147</sup> Not only is there no job duties exception within the Michigan WPA, the reporter’s motivation in making a report is also “not relevant to the issue [of] whether a [reporter] has engaged in protected activity.”<sup>148</sup> Even without any explicit direction from the legislature, the courts in Michigan have afforded the Michigan WPA the broad application that it was intended to enjoy.

#### B. California

California’s general whistleblower statute is, likewise, applicable to all “employees,” on its face.<sup>149</sup> Despite the lack of any supporting language in the California whistleblower protection statute (hereinafter “CWPA”) however, courts began to graft a job duties exception onto it, first by analogy to other whistleblower statutes in the case of *Muniz v. UPS, Inc.*<sup>150</sup> Two years later, the *Muniz* decision was expanded upon by a California Court of Appeals in *Edgerly v. City of Oakland*, which held that performing one’s job duties cannot be considered protected

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<sup>145</sup> M.C.L.A. §15.362

<sup>146</sup> See *supra*, note 69-79 and accompanying text

<sup>147</sup> *Brown v. Mayor of Detroit*, 734 N.W.2d 514, 518 (Mich. 2007).

<sup>148</sup> *Whitman v. City of Burton*, 831 N.W.2d 223, 234 (Mich. 2013).

<sup>149</sup> CAL. LAB. CODE § 1102.5 (West 2016).

<sup>150</sup> See *Muniz v. UPS, Inc.*, 731 F. Supp. 961, 971 (N.D. Cal. 2010) (describing as “futile” the plaintiff’s request to amend her complaint to add an 1102.5 retaliation claim, and explaining that it would fail for the same reason her other retaliation claims failed: the “reporting” the plaintiff performed was “a part of her job duties”).

activity under the CWPA.<sup>151</sup> In reaching this conclusion the court did not cite to the statute, or to any legislative history, to support its reasoning. Nonetheless, as the statute did not instruct otherwise, the court was within its authority to interpret it in this manner.

However, this state of affairs did not last long. During the 2013 session, the California legislature amended the CWPA to make clear that it was meant to apply to all employees, “regardless of whether disclosing the information is part of the employee’s job duties.”<sup>152</sup> With this change, California’s legislators made a strong statement to the judiciary that whistleblower protection under the CWPA is intended for all employees. The message has been clearly received, with courts extending the reasoning to other whistleblower claims as well, such as wrongful discharge under the common law public policy tort.<sup>153</sup> This is a perfect illustration of the power of legislative clarity.

### C. West Virginia

The West Virginia whistleblower protection act (“WVWPA”) instructs that, in order to be considered a whistleblower, an employee must make a report in “good faith.”<sup>154</sup> Unsatisfied with this language, however, the West Virginia legislature went a step further and defined “good faith report” as one that the reporter believe is true and that “is made without malice or consideration of personal benefit.”<sup>155</sup> By clarifying this potentially ambiguous language, the

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<sup>151</sup> *Edgerly v. City of Oakland*, 211 Cal. App. 4th 1191, 1207 (Cal. Ct. App. 2012) (explaining that because the reports at issue were made pursuant to plaintiff’s job duties, she “failed to raise a triable issue of material fact supporting her claim that she engaged in protected activity”).

<sup>152</sup> CAL. LAB. CODE § 1102.5(b) (West 2016); 2013 Cal. Legis. Serv. Ch. 781 (S.B. 496) (West).

<sup>153</sup> *See Lukov v. Schindler Elevator Corp.*, 594 Fed. Appx. 357, 358 (9th Cir. 2015) (reasoning that, because the court’s and the legislature have made clear there is no job duty exception under the CWPA, they would likely apply this rule to any retaliation claim and would be “unlikely to adopt the federal rule”).

<sup>154</sup> W. VA. CODE R. § 6C-1-3 (West 2016).

<sup>155</sup> W. VA. CODE R. § 6C-1-2(d) (West 2016).

West Virginia legislature ensured that no job duties exception would be attached to the statute where one was not intended.<sup>156</sup>

This was recently confirmed by the West Virginia Supreme Court of Appeals in the case of *Taylor v. West Virginia Dept. of Health and Human Resources*.<sup>157</sup> In that case, an employee was terminated after voicing her concerns over what she “believed to be errors or irregularities” in the process through which her employer was soliciting and procuring bids for an advertising campaign.<sup>158</sup> Reversing a lower court’s order granting summary judgment on behalf of the defendant, the supreme court of appeals unequivocally announced that “our Whistle-blower Law contains no job duties exception.”<sup>159</sup> However, the court went on to say that the definition of good faith makes it “implicit . . . that the *purpose* of a report . . . [is] germane to determining whether an employee has engaged” in protected activity.<sup>160</sup> This illustrates how dangerous “good faith” language can be in the whistleblower context: even where it is explicitly defined, it will always invite inquiry into an employee’s subjective intent in making a report.

#### D. Texas

Under the Texas whistleblower protection act (“TWPA”), in order for a report to constitute protected activity, it must be made “in good faith.”<sup>161</sup> The legislature did not define good faith within the text of the statute, instead relying on the courts to interpret it broadly, in accordance with the treatment given to remedial statutes.<sup>162</sup> Taking this approach, the Supreme

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<sup>156</sup> See, e.g. *Harrison v. Granite Bay Care, Inc.*, 811 F.3d 36, n. 16 (1st Cir. 2016) (“We note that this “good faith” requirement (which appears throughout Section 1 of the Act) is the only conceivable textual hook for a possible “job duties exception.”).

<sup>157</sup> *Taylor v. West Virginia Dept. of Health and Human Resources*, slip opinion (W. Va. 2016).

<sup>158</sup> *Id.* at \*3.

<sup>159</sup> *Id.* at \*12.

<sup>160</sup> *Id.*

<sup>161</sup> TEX. GOV’T CODE ANN. § 554.002 (West 2016).

<sup>162</sup> See *Levy v. Crystal City*, 357 S.W.3d 93, 99 (Tex. App. 2011) (explaining that “the purpose of the Act is remedial and it should be liberally construed”).

Court of Texas defined good faith expansively in *Wichita County, Tex. v. Hart*.<sup>163</sup> The court explained that the good faith requirement contains both a subjective and an objective component.<sup>164</sup> Therefore, in order to perform a protected activity, an employee has to make a report with the subjective belief that “the conduct reported was a violation of law,” and that belief needs to be objectively “reasonable” in light of the circumstances.<sup>165</sup> Without any explicit direction from the legislature, the courts in Texas interpreted the “good faith” language to be synonymous, essentially, with the “reasonable belief” language from CEPA.<sup>166</sup>

With this in mind, it is little surprise that there is no job duty exception under the TWPA. This was addressed in *Rogers v. City of Fort Worth*, in which a Texas court of appeals held that the fact that an employee “made [a] report primarily in his role as an employee” did not mean that the report could not constitute protected activity.<sup>167</sup> The court went on to discuss the *Huffman* decision (which found that the Federal WPA *did* contain a job duties exception) and declined to apply it, stating that “[t]his case is not governed by the WPA” and that the TWPA was intended to protect “employees who report a violation of law.”<sup>168</sup> This is a great example of a state whistleblower statute having the effect it was designed to have: protecting employees from retaliation for their protected activities, regardless of who the employee is.<sup>169</sup>

## V. Congress Overrules the Federal Precedents

Validating the approach taken by the New Jersey court, and striking a serious blow at the foundation of *Kidwell* and its progeny, Congress passed the Whistleblower Protection

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<sup>163</sup> *Wichita County, Tex. v. Hart*, 917 S.W.2d 779 (Tex. 1996).

<sup>164</sup> *Id.* at 785.

<sup>165</sup> *Texas Dept. of Criminal Justice v. McElyea*, 239 S.W.2d 842, 850 (Tex. App. 2007).

<sup>166</sup> *See* N.J. STAT. ANN. § 34:19 (West 2016).

<sup>167</sup> *Rogers v. City of Fort Worth*, 89 S.W.3d 265, 276 (Tex. App. 2002).

<sup>168</sup> *Id.*; *see also supra* note 96 and accompanying text, and *infra* note 179 and accompanying text.

<sup>169</sup> *See, e.g. City of Weatherford v. Catron*, 83 S.W.3d 261, 270 (Tex. App. 2002) (describing as meritless the employer’s argument that Catron’s reports could not constitute protected activity because he was “simply doing his job”).

Enhancement Act (“WPEA”) in 2012.<sup>170</sup> Intended to strengthen and extend whistleblower protections, one of the most significant amendments dealt directly with the question of a job duties exception, limited or otherwise.<sup>171</sup> The amendment provided:

[I]f a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.<sup>172</sup>

Congress clearly disapproved of this job duties carve out and, accordingly, created positive legislation to ensure that it would no longer have any effect.<sup>173</sup>

This was made abundantly clear in the case of *Day v. Department of Homeland Security*.<sup>174</sup> In that case, the Merit Systems Protection Board (“MSPB”) was confronted with the question of whether or not the WPEA could be applied retroactively to cases which were pending prior to the legislation’s effective date.<sup>175</sup> The board found that, while Congress had not specifically attached retroactive effect, giving it such effect was warranted because the WPEA’s definition of what constituted a disclosure did not represent a substantive change of law and rather was merely a clarification.<sup>176</sup> The board noted that where the WPA had been ambiguous and left the question of job duty disclosures open, “[t]he WPEA plainly resolves this ambiguity and explicitly provides that these types of disclosures are covered under the WPA.”<sup>177</sup> Thus, rather than serving as a

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<sup>170</sup> Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112–199, 126 Stat. 1465–76 (codified as amended in scattered sections of 5 U.S.C.).

<sup>171</sup> 5 U.S.C.A. § 2302(f)(2) (West 2014).

<sup>172</sup> *Id.*

<sup>173</sup> See Jessica Wang, *Protecting Government Attorney Whistleblowers: Why We Need an Exception to Government Attorney-Client Privilege*, 26 GEO. J. LEGAL ETHICS 1063, 1077–78 (Fall 2013) (describing the WPEA as “closing the loophole . . . which excepted disclosures made during the normal course of duties”).

<sup>174</sup> *Day v. Dep’t of Homeland Sec.*, 119 M.S.P.R. 589 (M.S.P.B. 2013).

<sup>175</sup> *Id.* at 592.

<sup>176</sup> *Id.* at 598.

<sup>177</sup> *Id.* at 599.

change in law subsequent to *Huffman*, the WPEA clarified the law and stated that *Huffman* and its progeny had misinterpreted and misapplied the WPA. Accordingly, *Huffman* has been superseded by statute.<sup>178</sup>

This deals a serious blow to *Kidwell*, as well as to the evolving case law in Maine. To the extent that the courts' decisions rested on *Huffman*'s interpretation of the WPA, that support has vanished. This leaves the Minnesota precedent on exceedingly shaky footing. *Obst* now represents the only "good law" that supports *Kidwell*, and as noted above, *Obst* itself is only supported by a strained reading of *Wolcott*.<sup>179</sup> Maine is left in an even more unsure state, as the only remaining support for its decisions is *Kidwell*.<sup>180</sup> Perhaps more significantly than the disappearance of this support is what this change represents. The WPEA is positive proof that the legislative intent behind the WPA was to protect employees making reports as a part of their job duties. Of course, this makes perfect sense when one considers the broad remedial purposes that whistleblower protection are *supposed* to provide.

Despite this shift in the federal landscape, *Kidwell* and its progeny remains good law in Minnesota and in Maine. This is clearly an issue for watchdog employees in those states who are left without the protection that whistleblower statutes are designed to provide. They have a duty to report but, if their employer does not appreciate the contribution, they can feel free to retaliate without fear of retribution or reprisal.<sup>181</sup> This paradigm exists to the detriment to communities and the public at large, where employer wrongdoing will be less frequently checked and their activities will be allowed to continue.<sup>182</sup> Additionally, as one commentator pointed out, allowing a job duties

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<sup>178</sup> See Dan Meyer & David Berenbaum, *The Wasp's Nest: The Intelligence Community Whistleblowing & Source Protection*, 8 J. NAT'L SEC. L. & POL'Y 33 fn 110 (2015).

<sup>179</sup> See discussion *supra* Parts III.A.1–2.

<sup>180</sup> See discussion *supra* Part III.B

<sup>181</sup> See Modesitt, *supra* note 51, at 161 ("The job duties exclusion places employees into a bind, where they owe an obligation to report but are not protected when they do so.")

<sup>182</sup> *Id.* at 156.

exception to whistleblower protection “creates potential for employer abuse . . . [s]pecifically, by drafting employees’ job descriptions to include a duty to report unlawful conduct,” thereby making it more difficult for that employee to contest retaliation based on such reports.<sup>183</sup>

This is also problematic for watchdog employees in other states that have yet to decide this issue. If and when such states do confront the issue, they will look to how other states have ruled for guidance. This was illustrated by the way Maine addressed watchdog employees, citing Minnesota case law as a primary justification for its rulings.<sup>184</sup> This will be especially true in states whose whistleblower statutes are worded similarly to the MWA and the MWPA and include “good faith” language. These decisions, and the path that these states have taken, threaten to inspire courts in other states to create a similar rule and graft onto their state statutes a job duty exclusion as well.<sup>185</sup> This is partly why it is so important for courts, like the New Jersey Supreme Court in *Lippman*, to articulate not only why watchdog employees are covered under the plain language of whistleblower statutes, but also why affording whistleblower protection to watchdog employees comports with the purpose of such statutes in the first place. By making bold, decisive statements of this kind, courts can provide other states with compelling justifications for rejecting job duty exclusions, despite interpreting statutes with slightly different language and articulation.

## VI. Garcetti, the Job Duties Exception, and the Attorney Whistleblower

A job-duties exception exists in another closely related context, established in the case *Garcetti v. Ceballos*.<sup>186</sup> In that case, the respondent was a deputy district attorney in Los Angeles County who discovered some issues with an affidavit, which had been critical in obtaining a search

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<sup>183</sup> *Id.* at 161.

<sup>184</sup> See discussion *supra* Part III.B.

<sup>185</sup> See generally Modesitt, *supra* note 51, at 177 (arguing that finding a job duty exception “without statutory authority for such a broad exclusion represents judicial activism”).

<sup>186</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

warrant in a pending case.<sup>187</sup> Ceballos took great pains to bring this situation to the attention of his superiors and to have the case dismissed but, ultimately, the office proceeded with the prosecution.<sup>188</sup> Subsequently, Ceballos suffered a number of negative employment actions, including a demotion and a transfer.<sup>189</sup> Ceballos sued in district court claiming a violation of his free speech rights under the First Amendment, based on the precedent established by *Connick v. Myers*.<sup>190</sup> While Ceballos was successful on appeal to the Ninth Circuit, he ultimately lost when the Supreme Court held that speech made pursuant to an employee's normal job duties cannot be protected by the First Amendment.<sup>191</sup> The Court explained that such speech merely constituted 'employee speech,' not rising to the level of 'citizen speech.'<sup>192</sup>

A considerable amount of literature has been published discussing the holding in *Garcetti* and the potential for it to broadly impact government employees' workplace protections, including claims made under whistleblower protection statutes.<sup>193</sup> These concerns are misplaced for a couple of reasons. First, whistleblower statutes were created with employee protection in mind, and serve as a response to "the vulnerability of the at-will employee."<sup>194</sup> Therefore, it makes sense for whistleblower statutes to be applied broadly to all, without certain types of employees excluded. The First Amendment, on the other hand, was not created in order to protect employees from their

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<sup>187</sup> *Id.* at 414 (disagreeing with the affidavit's characterization of a road as a 'long driveway' and asserting that the particular road would not have allowed a car to leave tire tracks).

<sup>188</sup> *Id.* at 415.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*; *Connick v. Myers*, 461 U.S. 138 (1983) (establishing a balancing test whereby citizen speech on a matter of public concern is protected by the First Amendment, as long as the employee's legitimate interest in making the speech is not outweighed by the employer's legitimate interest in governmental efficiency).

<sup>191</sup> *Garcetti*, 547 U.S. at 421.

<sup>192</sup> *Id.*

<sup>193</sup> See e.g., Modesitt, *supra* note 51; Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117 (2008); Ruben J. Garcia, *Against Legislation: Garcetti v. Ceballos and the Paradox of Statutory Protections for Public Employees*, 7 FIRST AMEND. L. REV. 22 (2008); Christie S. Totten, *Quieting Disruption: The Mistake of Curtailing Public Employees' Free Speech Under Garcetti v. Ceballos*, 12 LEWIS & CLARK L. REV. 233 (2008).

<sup>194</sup> See Johnathan W.J. Armour, *Who's Afraid of the Big Bad Whistle?: Minnesota's Recent Trend Toward Limiting Employer Liability Under the Whistleblower Statute*, 19 HAMLINE L. REV. 107, 114 (1995).



government employers, but rather to protect all citizens from the government.<sup>195</sup> The vastly different aims of these two sources of employee protection explains why they would not offer employees the same level of protection.

Secondly, the *Garcetti* opinion itself essentially disclaimed the application of a job-duties exception to whistleblower statutes when it referred to such laws as one of the alternative means by which an employee such as Ceballos could find protection.<sup>196</sup> While the dissent noted that this was unavailing for federal employees due to the *Huffman* decision, as noted above, Congress has since amended the WPA in order to provide the protection the majority referred to.<sup>197</sup> Congress ensured that federal whistleblowing employees were protected, and the Court ensured that Constitutional claims made by such employees would be limited, thereby ensuring that the proper mechanism would be applied to such claims. The majority wanted employees such as Ceballos to have recourse, they just believed that overly constitutionalizing the federal workplace was not the proper means to provide it.

This case, as well as the *Kidwell* case discussed above, dealt with attorney whistleblowers, which raises a challenging question for whistleblower protection statutes: should certain professions be treated differently due to concerns unique to their position?<sup>198</sup> The attorney whistleblower presents two separate issues: (1) the conflict between disclosing violations of the

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<sup>195</sup> 16A AM. JUR. 2d *Constitutional Law* § 404, 415 (2016) (explaining that the Bill of Rights was “intended to protect citizens from governmental transgressions of certain fundamental rights.”).

<sup>196</sup> *Garcetti*, 547 U.S. at 425 (assuring that government employees would still be protected by the “powerful network of legislative enactments” including whistleblower protection laws.)

<sup>197</sup> *Garcetti*, 547 U.S. at 440 (Souter, J. dissenting); see discussion *supra*

<sup>198</sup> See, e.g. Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 *FORDHAM L. REV.* 1245 (2009); Kim T. Vu, *Conscripting Attorneys to Battle Corporate Fraud Without Shields or Armor? Reconsidering Retaliatory Discharge in Light of Sarbanes-Oxley*, 105 *MICH. L. REV.* 209 (2009); Peter D. Banick, *The “In-House” Whistleblower: Walking the Line Between “Good Cop, Bad Cop”*, 37 *WM. MITCHELL L. REV.* 1868 (2011); Naseem Faqihi, *Choosing Which Rule to Break First: An In-House Attorney Whistleblower’s Choices After Discovering A Possible Federal Securities Law Violation*, 82 *FORDHAM L. REV.* 3341 (2014).

law or public policy and the duty of client confidentiality; and (2) the conflict between protecting an attorney from retaliatory discharge and the right for a person or corporation to discharge their attorney.<sup>199</sup> Similar confidentiality concerns present themselves in the medical field as well. While these issues complicate the decision to blow the whistle for some employees, there is no reason to entirely exclude those employees from whistleblower protection. The public benefits from having well placed employees blow the whistle, and this is no different where attorneys are concerned.<sup>200</sup>

## VII. Conclusion

Whistleblower protection statutes are designed to protect the public by incentivizing employees to speak up when they see their employers acting contrary to either the law or to the general public interest. Employees, after all, are in many cases the best-situated individuals to see these actions and remedy them.<sup>201</sup> In *Lippman*, the New Jersey Supreme Court recognized and affirmed the principle that whistleblower statutes should be read broadly and inclusively, and should apply to all employees, with no restriction. Doing this will ensure that the purpose of whistleblower protection will be best served. Unfortunately for some watchdog employees, not all courts have ruled in this way and some states, like Maine and Minnesota, have seen an exclusion carved out of their whistleblower statutes for such employees.

Going forward, state legislatures should amend their whistleblower statutes to positively confirm that they are meant to apply to all employees, watchdog or otherwise. This will foreclose courts from creating exclusions like the ones currently in place in Minnesota and Maine. Courts in those states should overrule the harmful precedents that have been created and, in doing so,

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<sup>199</sup> See Lobel, *supra* note 198 at 1245.

<sup>200</sup> See,

<sup>201</sup> See Modesitt, *supra* note 51, at 156.

confirm the broad public policy justifications for why whistleblower protection exists in the first place. Courts in other states should do so as well to add instructive force to their rulings. Ultimately, this will lead to a better-protected workforce, more accountable employers, and a public that is less negatively impacted by employer abuses.