

WORKING GROUP ON CHAPTER 4 OF THE PROPOSED  
RESTATEMENT OF EMPLOYMENT LAW: THE TORT OF  
WRONGFUL DISCIPLINE IN VIOLATION OF PUBLIC POLICY

BY

JOSEPH R. GRODIN,<sup>\*</sup> PAUL M. SECUNDA,<sup>\*\*</sup> RICHARD A. BALES,<sup>\*\*\*</sup>  
ROBERTO L. CORRADA,<sup>\*\*\*\*</sup> CATHERINE L. FISK,<sup>\*\*\*\*\*</sup> AND  
PAULINE T. KIM<sup>\*\*\*\*\*</sup>

I.	INTRODUCTION .....	160
II.	SECTION 4.01 .....	161
	A. <i>Comment a: Scope</i> .....	164
	B. <i>Comment b: Constructive Discharge and Other Employer Discipline</i> .....	165
	C. <i>Comment c: Statutory Preclusion of a Common-Law Public-Policy Tort</i> .....	167
	D. <i>Comment d: Adequacy of Statutory Remedy as a Bar to Recovery</i> .....	172
	E. <i>Comment e</i> .....	181
III.	SECTION 4.02 .....	183
	A. <i>Comment a: Protected Activities</i> .....	184
	B. <i>Comment b: Comment on Subsection (a)</i> .....	185
	C. <i>Comment c: Comment on Subsection (b)</i> .....	186
	D. <i>Comment d: Comment on Subsection (c)</i> .....	187
	E. <i>Comment f: Comment on Subsection (e)</i> .....	188

<sup>\*</sup> Distinguished Emeritus Professor of Law, University of California-Hastings College of the Law and Co-Chair of the Labor Law Group, Working Group on the Proposed Restatement of Employment Law, Chapter 4, The Tort of Wrongful Discipline in Violation of Public Policy. For their valuable assistance on this project, all of the authors thank their research assistants: Alicia Kim, Amy MacArdy, Justin Kanter, and Jason Chester.

<sup>\*\*</sup> Associate Professor of Law, the Marquette University Law School and Co-Chair of the of the Labor Law Group, Working Group on the Proposed Restatement of Employment Law, Chapter 4, The Tort of Wrongful Discipline in Violation of Public Policy.

<sup>\*\*\*</sup> Associate Dean of Faculty Development and Professor of Law, Northern Kentucky University Salmon P. Chase College of Law.

<sup>\*\*\*\*</sup> Professor of Law, University of Denver Sturm College of Law.

<sup>\*\*\*\*\*</sup> Chancellor's Professor of Law, University of California-Irvine School of Law.

<sup>\*\*\*\*\*</sup> Associate Dean for Research and Faculty Development and Professor of Law, Washington University Law School.

F.	<i>Comment g: Employee’s Reasonable, Good-Faith Belief in the Illegality of Employer’s Actions</i> .....	192
G.	<i>Comment h: Comment on Subsection (f)</i> .....	194
IV.	SECTION 4.03 .....	195
A.	<i>Comment a: Single vs. Multiple Sources of Public Policy</i> .....	196
B.	<i>Comment b: Constitutions as Sources of Public Policy</i> .....	197
C.	<i>Comment c: Statutes and Ordinances</i> .....	199
D.	<i>Comment d: Decisional Law</i> .....	199
E.	<i>Comment e: Administrative Regulations, Decisions, and Orders</i> .....	201
F.	<i>Comment f: Established Principles of Professional Conduct</i> .....	202
V.	CONCLUSION.....	203

## I. INTRODUCTION

The purpose of this commentary on Chapter 4 of the Proposed ALI *Restatement of Employment Law*,<sup>1</sup> concerning the tort of wrongful discipline in violation of public policy, is to closely evaluate the current draft in light of the appropriate purposes for a Restatement. Although some value exists in merely stating the consensus respecting these rules, the mission of the ALI extends beyond that, to better adapt the law to social needs and secure the better administration of justice. Our principal problem with the current *Restatement* draft is that it does not adequately recognize the dynamic nature of this area of law and uses language which some lawyers and judges (assuming the proposed *Restatement* has some impact) may interpret to foreclose further development. We therefore wish to help foster a Restatement that is not only rooted in precedent, but also seeks to reframe the law while retaining enough flexibility and open texture to allow the law to evolve in response to new realities.

As will become evident to the reader of this commentary, we believe the core theory of a tort claim for wrongful discharge based on public policy is well established. On the other hand, we are also of the opinion that there are numerous areas of disagreement among states about subsidiary issues. These secondary questions are well identified even if a consensus has not always emerged as to how these secondary questions should be answered.

This commentary is divided into three sections, representing each of

1. This commentary is based on the RESTATEMENT (THIRD) OF EMPLOYMENT LAW (Council Draft No. 3, 2008).

the major sections of Chapter 4. The first part, following this introduction, analyzes Section 4.01, which sets out the basic contours of a claim for wrongful discipline in violation of public policy. The next part analyzes Section 4.02, which advances the basic parameters of employee activities protected under the tort. The part that follows analyzes Section 4.03, which considers the appropriate sources of public policy for the tort.

Our principal objections to this draft stem from a concern about making sure the tort protects as many workers for as many of their activities as possible.<sup>2</sup> We are most concerned as a group with the following: (1) in section 4.01, with the indeterminacy of the language concerning “adequate alternative remedies”<sup>3</sup> and the apparent confusion of the draft which conflates principles of federal preemption and legislative preclusion;<sup>4</sup> (2) in section 4.02, with the potential lack of protection for employees’ private and off-duty activities and for attorney discharges related to reporting of ethical issues;<sup>5</sup> and (3) in section 4.03, with the exclusion of international law from sources of public policy and the requirement that public policy must always be “clearly established and clearly formulated” to serve as the basis for this tort claim.<sup>6</sup>

## II. SECTION 4.01<sup>7</sup>

### § 4.01 Employer Discipline in Violation of Public Policy

**(a) An employer that discharges or takes other material adverse action against an employee because the employee has or will engage in protected activity under § 4.02 is subject to liability in tort for wrongful discipline in violation of public policy, unless the statute or other law that forms the basis of the applicable public policy precludes tort liability or provides an adequate alternative remedy.**

**(b) “Other material adverse action” in this Section means an action short of discharge that is reasonably likely to deter similarly situated employees from engaging in the protected activity in which the employee engaged, including actions that significantly affect employee compensation or working conditions.<sup>8</sup>**

2. Although the concept of the public policy tort is well accepted by almost all states, its contours are sufficiently unsettled and are changing sufficiently rapidly that one might conclude that a Restatement of the tort is inappropriate at this time.

3. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. d, at 117-18.

4. *See id.* § 4.01 cmt.c, at 116.

5. *See generally id.* § 4.02, at 133.

6. *See generally id.* § 4.03, at 148.

7. Catherine L. Fisk and Pauline T. Kim are the authors of this section.

8. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01(a)-(b), at 115.

The black letter statement of the law in section 4.01 sets out the basic contours of a claim for wrongful discharge or discipline in violation of public policy. For the most part, this proposed section captures the doctrine of the public policy tort in a coherent manner. However, we are concerned that the last phrase in subsection (a) is unnecessarily vague, does little to clarify an area of the law that is currently quite confused, and fails to offer a coherent method for analysis in an area in which courts have also failed to provide coherent analysis. In particular, the phrase “unless the statute or other law that forms the basis of the applicable public policy precludes tort liability or provides an adequate alternative remedy”<sup>9</sup> does not offer much guidance to litigants or courts as to *when* a statute should or will be found to preclude tort liability or *what* constitutes an “adequate alternative remedy.”

Comments c and d address in greater detail the circumstances in which a state court may decide not to recognize a common law public policy tort claim when the public policy is grounded in a legislative enactment.<sup>10</sup> Comment c asserts that a state legislature’s intent to make a statutory remedy exclusive will bar recognition of a tort claim based on the public policy expressed in that statute.<sup>11</sup> Comment d asserts that, when legislative intent is unclear, a court will decline to recognize a tort claim when the statutory remedy is adequate.<sup>12</sup> Together, the two comments suggest a two-part test: (1) legislative intent; and (2) adequacy of alternative remedy.<sup>13</sup>

While the concept of the two-part test seems appropriate, Comments c and d do not clarify how legislative intent is to be discerned or when an alternative remedy is “adequate.”<sup>14</sup> The analysis is further confused by the reliance on federal preemption cases.<sup>15</sup> As we discuss below, we believe that the current draft improperly conflates federal preemption and the exclusivity of state statutory provisions, and that the clarity of the proposed *Restatement* would be improved by separating these concepts.<sup>16</sup> There is no such thing as a state law “preempting” a common law cause of action and, strictly speaking, “preclusion” refers to the effect of prior judgments on subsequent litigation. (Although courts sometimes use both terms to describe the effect of state statutory remedies on common law claims, the

9. *Id.* § 4.01(a), at 115.

10. *See id.* § 4.01 cmts. c-d, at 116-18.

11. *Id.* § 4.01 cmt. c, at 116.

12. *Id.* § 4.01 cmt. d, at 117-18.

13. *See id.*

14. *See id.* § 4.01 cmts. c-d, at 116-18.

15. *Id.* § 4.01 cmt. c, reporters’ notes, at 125-26.

16. *See infra* part C.

use is imprecise and confusing.) Ordinarily, a state statute does not eliminate a common law claim unless it does so expressly, not by implication. The proper inquiry, therefore, is whether the enactment of a statute on a topic either eliminates an existing common law claim or should be read as directing a court to refrain from allowing a claim in the area covered by the statute. Current case law regarding the effect of statutory remedies on the availability of the common law public policy tort is inconsistent and arguably incoherent. Moreover, the reasoning of individual decisions is often garbled, conclusory or both. Thus, this is an area where the proposed *Restatement* could significantly improve the clarity and logic of the law if it did more to identify the relevant elements of the analysis and explain the rationale behind the doctrine.

With that goal in mind, we suggest adding language to provide more guidance on how statutory enactments should affect the availability of the public policy tort. One possibility is to address this issue in a separate subsection. For example, in subsection (a), the phrase “unless the statute or other law that forms the basis of the applicable public policy precludes tort liability or provides an adequate alternative remedy” could be deleted, which would leave that section, “[a]n employer that discharges or takes other material adverse action against an employee because the employee has or will engage in protected activity under § 4.02 is subject to liability in tort for wrongful discipline in violation of public policy.”<sup>17</sup>

Then, a third subsection (c) could be added as follows:

(c) In cases in which the source of public policy is statutory:

(i) if the relevant statute expressly indicates that it is intended to bar other remedies, a court should not recognize a claim against the employer for wrongful discipline in violation of public policy;

(ii) if the relevant statute expressly indicates that it is not intended to bar other remedies, a claim against the employer for wrongful discipline in violation of public policy should be recognized in appropriate circumstances;

(iii) if the relevant statute does not clearly express an intent to bar or not to bar other remedies, a court may decline to recognize a claim for wrongful discipline in violation of public policy when the statute provides a remedy that is sufficient to protect both the public interest and the injured employee. In determining whether a remedy is sufficient to protect the public interest and the injured employee, a variety of factors should be considered, including but not limited to:

–the comprehensiveness of the regulation of the employment relationship;

17. *Id.* § 4.01(a), at 115.

- the strength of the public policy and whether it is expressed in sources other than the statute providing a remedy;
- the extent of the remedy provided by statute;
- the extent of employee control over the enforcement process; and
- the procedural restrictions placed on pursuing the statutory claim.

This approach would make clear that legislative intent governs when it is clearly expressed. It avoids the uncertainty of trying to discern “implied” legislative intent. It also offers greater guidance regarding the factors relevant for determining whether a statutory remedy is adequate to protect the public interest and the injured employee. We explain in greater detail why we think this is a better approach in our analysis of the Comments and Reporters’ Notes below.<sup>18</sup> In addition, we offer specific suggestions relating to the Comments and Reporters’ Notes.

#### A. Comment a: Scope

Comment a sets out the basic contours of a wrongful discipline claim based on public policy.<sup>19</sup> The Comment accurately reflects the fact that a consensus has emerged recognizing a cause of action for wrongful discharge in violation of public policy,<sup>20</sup> and that the vast majority of states that recognize such a claim treat it as a non-waivable tort.<sup>21</sup>

The Comment, however, starts out with a somewhat vague historical claim: that common law courts did not scrutinize the reasons for an employer’s discharge of an at-will employee.<sup>22</sup> Although this may be an accurate statement of Wood’s Rule, which many courts adopted for some forms of employment in the early part of the 20th century, other forms of employment relation were never governed by it. Moreover, the phrase raises questions about the practices of equity courts, and it controversially

18. *See infra* Part C.

19. *Id.* § 4.01 cmt. a, at 115.

20. *Id.* at 115, 120-22. As the reporters’ notes indicate, the tort has been recognized by Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 120-22. Additionally, federal courts applying state law have suggested that the tort would be recognized in Colorado and Massachusetts. *Id.* at 120-21.

21. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. a, at 115; *see, e.g.*, *Gonzalez v. Prestress Eng’g Corp.*, 503 N.E.2d 308, 312 (Ill. 1986); *Coleman v. Safeway Stores, Inc.*, 752 P.2d 645, 650-51 (Kan. 1988); *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980) (recognizing cause of action under both tort and contract theories); *Collins v. Rizkana*, 652 N.E.2d 653 (Ohio 1995); *Smith v. Bates Tech. College*, 991 P.2d 1135, 1141 (Wash. 2000) (citing *Wilson v. City of Monroe*, 943 P.2d 1134, 1136 (Wash. App. 1997)).

22. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. a, at 115.

suggests an antiquity and universality to the at-will rule. We suggest removing the draft *Restatement* from that particular controversy about legal history by deleting the first two sentences of Comment a and replacing them with a sentence along the lines of “A consensus has emerged in recent decades that recognizes a cause of action in tort for wrongful discharge in violation of public policy.”

We also suggest deleting the sentence: “This Restatement adopts the emerging view, that the tort also should be available when employer discipline in violation of public policy falls short of discharge but is still reasonably likely to deter employees from engaging in protected activity.” This topic is dealt with in Comment b in detail and its appearance in Comment a is distracting without adding anything to the analysis in either Comment.

*B. Comment b: Constructive Discharge and Other Employer Discipline*

Comment b explains subsection (b) of the “black letter” statement of the law: that the public policy tort claim should extend not only to cases involving employee discharge or constructive discharge, but also to claims involving “other material adverse action.” There are very few decided cases addressing tort claims based on employer actions less severe than discharge, but we agree that the approach taken by the draft *Restatement* makes sense. As the draft notes, courts have begun to recognize that other adverse actions short of discharge can have the same effect of deterring employees from engaging in activities that public policy would favor.<sup>23</sup> It might also be helpful to note in the Comment that this approach is consistent with protections against retaliation under federal and state antidiscrimination laws, as well as anti-retaliation provisions intended to safeguard many other statutory rights. The clarity and predictability of the law will be enhanced if the general approach to protecting against retaliation is consistent between statutory and common law claims across most employment rights contexts.

A further reason supporting the *Restatement* approach – one hinted at, but not fully explained in Comment b – is that courts are unlikely to be flooded with wrongful discipline claims. Current employees are extremely unlikely to bring claims, given the costs of suit and the potential for harming an ongoing employment relationship, unless the retaliatory action taken by the employer significantly affected the employee’s compensation

23. *See id.* § 4.01 cmt. b, at 116.

or working conditions.<sup>24</sup>

Comment b includes two illustrations that provide context for a “material adverse action” short of discharge. Illustration 1 describes an employer who is demoted for filing a workers’ compensation claim.<sup>25</sup> Illustration 2 describes an employee who files a workers’ compensation claim, then is subsequently no longer invited for drinks after work.<sup>26</sup> Illustrations 1 and 2 uses “X” to refer both to the employing company and to the individual supervisor. That wording is confusing and should be clarified by not using the same letter to refer to different parties. In addition, Illustration 2 should make clear that whether a supervisor’s refusal to invite an employee for drinks after work is “a material adverse action” depends upon the context. In many workplaces, it would not be materially adverse, but it is possible that exclusion from “drinks after work” that included clients or involved discussions about major business development opportunities would constitute a significant adverse action.

The Reporters’ Notes on Comment b cite several cases that do not support the proposition they are cited for.<sup>27</sup> For example, *Peterson v. Minneapolis Community Development Agency*,<sup>28</sup> is not a wrongful discharge in violation of public policy case, and it is not a decision designated for publication. It is inadvisable to cite unpublished decisions as statements of authoritative legal rules. While *Sheets v. Knight*, another case cited, states that an employee who resigned may bring a public policy claim under a constructive discharge theory, that case involved an employee who was told to resign or be fired, and it also found that the plaintiff had not pleaded a proper public policy claim.<sup>29</sup> A better reasoned, more recent, and more directly on point case from Oregon is *McGanty v. Staudenraus*.<sup>30</sup> Additionally, *Carpenter v. Miller*,<sup>31</sup> another case cited in the Reporters’

24. Comment b states only “[i]n part because employees are reluctant to sue their current employer,” to explain why there are so few reported cases involving adverse action other than discharge or constructive discharge. *Id.* For a discussion of the difficulties facing employees who wish to sue their current employers, see, for example, Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 19, 19-20, 25-42 (2005); Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 EMP. RTS. & EMP. POL’Y J. 395, 396-97, 410-11 (2006).

25. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. b, illus. 1.

26. *Id.* § 4.01 cmt. b, illus. 2.

27. See *id.* § 4.01 reporters’ notes cmt. b, at 123-24 (citing, among others, *Peterson v. Minneapolis Cmty. Dev. Agency*, No. C7-94-510, 1994 Minn. App. LEXIS 834 (Minn. App. Aug. 23, 1994); *Sheets v. Knight*, 779 P.2d 1000 (Ore. 1989); *Carpenter v. Miller*, 325 S.E.2d 123 (W. Va. 1984); *Strozinsky v. Sch. Dist.*, 614 N.W.2d 443 (Wis. 2000)).

28. No. C7-94-510, 1994 Minn. App. LEXIS at 834.

29. 779 P.2d 1000 (Or. 1989).

30. 901 P.2d 841 (Or. 1995).

31. 325 S.E.2d 123 (W.Va. 1984).

Notes, is not relevant, as it arose under a West Virginia statute protecting miners from retaliation for participation in mine safety proceedings; it did not involve a common law claim. Finally, *Strozinsky v. School District*,<sup>32</sup> does not address the question of wrongful discipline as the Reporters' Notes suggest.<sup>33</sup> That case should be cited in the first paragraph of Comment b as one of the cases recognizing a constructive discharge in violation of public policy.

*C. Comment c: Statutory Preclusion of a Common-Law Public-Policy Tort*

As explained above, we believe that the phrase "statutory preclusion" is both imprecise and confusing. Comment c might more accurately be entitled "statutory bar of a common law property tort" or "effect of exclusive statutory remedies."

Comment c asserts that express or implied legislative intent to create an exclusive remedy bars a court from recognizing a public policy tort claim based on the statutory public policy. As we explain more fully below, we agree with the statement regarding *express* intent, but we suggest that the Comment avoid reliance on the concept of implied legislative intent and on the federal preemption cases from which it draws.

First, as to express intent, we agree that if the legislature expressly indicates its intent that a statutory remedy be the exclusive remedy, courts will not allow a common law public policy claim. Most states' constitutions presumably contain some separation of powers or other structural principle that would obligate state courts to respect a legislature's express decision that a statutory remedy be exclusive. Similarly, courts should honor the legislature's expressed intent that statutory remedies *not* be exclusive. As we discuss below, the language of comment d suggests that courts may disregard express legislative intent *not* to bar common law claims.<sup>34</sup> It would be helpful to clarify in Comment c that express legislative intent regarding exclusivity or non-exclusivity of remedies should govern. We have suggested language for a proposed new subsection (c) of section 4.01 to make this explicit. Subsection (c) would make clear that a court may decline to create a common law claim even where the legislature expressly intended that the statutory remedies not be exclusive,

32. 614 N.W.2d 443 (Wis. 2000).

33. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 reporters' notes cmt. b, at 124.

34. *Id.* § 4.01 cmt. d, at 117 (stating that most courts decline to recognize a common law action for discharge in violation of public policy when the discharge would also violate an antidiscrimination statute even when that statute expressly states that it is not intended to bar common law remedies that might exist for the same injury).

but that is a matter of the court's common lawmaking power, not a matter of legislative intent or "preclusion."

A more difficult question is how courts should respond when the legislature has not explicitly addressed the question of whether statutory remedies should be exclusive. Comment c states that "[w]hether a legislature has impliedly indicated that a statutory remedy precludes a common-law tort is a question of legislative intent."<sup>35</sup> This statement is circular and offers no guidance as to *how* courts are to know when a legislature intended to imply that the statutory remedies are exclusive.

"Implied intent" is a notoriously vague and ambiguous concept. Some courts suggest that the mere fact that the legislature acted implies an intent to bar common law actions,<sup>36</sup> but there is little factual basis for this assumption. Very often the legislature failed to consider the relationship between a statute and other claims at all. Other courts rely on canons of interpretation,<sup>37</sup> but these are often contradictory and are not effective at discerning true legislative intent. In some states, such as California, that have a very large number of statutory enactments regulating employment, courts seldom conclude that legislative enactments reflect the legislature's intent that the statutory remedies be exclusive, and the legislature has never suggested that the coexistence of statutory and tort remedies is inappropriate.<sup>38</sup>

The concept of "implied intent" is almost invariably a legal fiction: courts attribute an intent to the legislature to bar or not bar other actions for reasons other than the legislature's actual intent. Rather than pursuing the fiction of "implied intent," we think it is more logically satisfactory to consider explicitly the underlying reasons for and against recognizing a common law tort claim in those situations where the legislature has failed to clearly state whether statutory remedies shall be exclusive. As explained in the discussion of Comment d, below, we believe that considerations such as the comprehensiveness of the remedial regime or the adequacy of the statutory remedies are relevant to deciding whether the common law tort should be recognized when the public policy is articulated in a statute that provides a remedy to the injured worker.

Comment c relies on two examples. One is the Montana Wrongful Discharge from Employment Act,<sup>39</sup> which was clearly intended to create a

35. *Id.* § 4.01 cmt. c, at 116.

36. *See, e.g.,* Conner v. National Pest Control Ass'n, Inc., 513 S.E.2d 398, 400 (Va. 1999).

37. *See, e.g.,* City of Waco v. Lopez, 259 S.W.3d 147,153 (Tex. 2008).

38. *See, e.g.,* McDonald v. Antelope Valley Community College Dist., 194 P.3d 1026,1039 (Cal. 2008).

39. MONT. CODE ANN. §§ 39-2-901 to 39-2-917 (2007).

comprehensive statutory scheme that limits employers' ability to discharge their employees and to bar common law tort and contract claims. However, the Montana statute is of no help in the other forty-nine states, none of which have similar legislation expressly intended to replace all common law claims with a comprehensive statutory regime governing employment discharges.<sup>40</sup> The second example in Comment c is the Employee Retirement Income Security Act (ERISA). ERISA presents the issue of *federal* preemption of state law, whether statutory or common law, a question that is both legally and conceptually distinct from the question of whether a *state* statute creates the exclusive remedy for harms which might also be remedied through a state common law action as a matter of state law. As we explain below, both the clarity and the logic of the *Restatement* would be advanced if Comment c focused on this question rather relying on examples of federal preemption.

There are at least five reasons to avoid reliance on federal preemption doctrine. First, whether a state legislative remedy is exclusive is a matter of state law appropriate for treatment in a *Restatement*. By contrast, federal preemption of state law is a matter of federal law, and the draft *Restatement* does not and should not purport to restate the mix of federal statutory and constitutional law that comprises it. Second, federal preemption cases are not particularly useful even as analogies (rather than as statements of the governing principle) because federal preemption law is itself complex and confused; state law will not be clarified by relying on a notoriously confusing body of federal law. Third, even if preemption law were clear, the federal preemption cases do not provide helpful analogies because they are motivated by concerns about federal-state relations that are not relevant to the relationship between state statutes and common law claims. Fourth, the difficulty the federal preemption cases have had in addressing the question of legislative intent illustrates the problems with relying on "implied intent." In several of the federal preemption cases cited in the Reporters' Notes, the courts searched for a legislative intent to preempt state law based on the comprehensiveness of the federal regulation (so-called "field preemption") or based on a judgment that state regulation would be inconsistent with the federal balancing of interests (so-called "conflict preemption").<sup>41</sup> In the context of relations between a state

40. 29 U.S.C. §§ 1001-1461 (2000).

41. The Reporters' Notes cite seven preemption cases in support of Comment c. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 reporters' notes cmt. c, at 125-26. Two of those deal with express preemption. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (involving the express preemption in ERISA); *Andrews v. Alaska Operating Eng'rs-Employers Training Trust Fund*, 871 P.2d 1142 (Alaska 1994) (same). In all five others, the courts analyzed the cases as presenting field or

legislature and state court (as opposed to the context of federal-state relations) these considerations are more logically analyzed not in terms of “implied intent,” but as some of the factors influencing whether a court should recognize or decline to recognize the public policy tort. Fifth, ERISA preemption cases in particular are not appropriate examples to help discern the effect of state statutes, because ERISA’s uniquely broad preemptive effect is based on explicit statutory language and a federal purpose – insuring national uniformity in the law regulating employee benefit plans – that have no analogy to the question whether all or some state statutes have remedies that are exclusive of common law tort claims.

In sum, Comment c should state that the first inquiry is whether the legislature expressly intended a statute to be the exclusive remedy for harms caused by employer actions contrary to the policy of the statute. If it has clearly stated its intent, no further inquiry is necessary. If the legislature failed to express its intent with respect to exclusivity of remedies, courts should proceed to the second step of the inquiry: whether the statutory regime is adequate to protect the employee and the public interest.

The confusion caused by the conflation of preemption and exclusivity of remedies analyses is exacerbated by the Reporters’ Notes on Comment c, which relies largely on preemption cases. The Reporters’ Notes describe the cases as “preclusion” cases, but they are in fact cases deciding whether federal law preempts state law. Two are ERISA preemption cases.<sup>42</sup> One is an Employee Polygraph Protection Act preemption case which involved the extremely unusual situation of an effort to apply a state tort claim to a contractor for the federal National Security Agency.<sup>43</sup> The remaining cases are a National Bank Act preemption case,<sup>44</sup> a Federal Surface

conflict preemption issues. *English v. Gen. Elec. Co.*, 496 U.S. 72 (1980) (analyzing the issue as one of field or conflict preemption and finding neither); *Stehney v. Perry*, 101 F.3d 925, 938-39 (3d Cir. 1996) (finding preemption under conflict preemption); *Parten v. Consol. Freightways Corp.*, 923 F.2d 580, 582-83 (8th Cir. 1991) (analyzing the issue under field and conflict preemption and finding no preemption); *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473, 474-76 (8th Cir. 1990) (analyzing the matter under conflict preemption and finding none); *Marczak v. Drexel Nat’l Bank*, 542 N.E.2d 787, 791 (Ill. App. 1989) (relying on a case that while not using preemption language, essentially used a conflict preemption analysis to find state common law cause of action barred).

42. The Supreme Court, in *Ingersoll-Rand Co.*, 498 U.S. at 143, held that ERISA preempted a state claim for wrongful discipline when the employee alleged that he was fired to prevent his pension from vesting. Similarly, the Alaska Supreme Court, in *Andrews*, 871 P.2d at 1147, held that ERISA preempted a state public policy tort claim brought by an employee of an ERISA fund alleging he was fired in retaliation for reporting a fund trustee’s misuse of ERISA benefit fund assets.

43. *Stehney*, 101 F.3d at 938.

44. In *Marczak*, 542 N.E.2d at 790, the Appellate Court of Illinois held that the National Bank Act did not bar the plaintiff’s claims for intentional interference with an employment relationship or unjust dismissal. Although the National Bank Act bars claims for unjust dismissal of officers because the Bank cannot bargain away its right to dismiss officers at will, the unjust dismissal claim was not barred on the facts alleged because it did not appear that the plaintiff had been appointed or dismissed by action of the

Transportation Assistance Act preemption case,<sup>45</sup> an OSHA preemption case,<sup>46</sup> and *English v. General Electric Co.*, the Supreme Court's leading case on whether a detailed federal regulatory regime that contains whistleblower protections preempts state tort claims brought by whistleblowers.<sup>47</sup> As the Reporters' Notes explain, the Court held that, "[o]rdinarily, the mere existence of a federal regulatory or enforcement scheme, even one as detailed as § 210 [of the Energy Reorganization Act] does not by itself imply preemption of state remedies."<sup>48</sup> None of these cases addresses the issue discussed in Comment c and in section 4.01. We suggest that the Reporters' Notes to Comment c be revised to distinguish the issues of preemption and exclusivity of remedies, to acknowledge that different policies underlie each doctrine, and to acknowledge that the same rules do not necessarily apply. We would then suggest that the Reporters' Notes deal mainly with state law decisions finding that the state legislature has intended a statute to bar or to not bar a state common law remedy.

Only two of the cases cited in the Reporters' Notes address the issue of when common law claims are barred by a statutory remedy. One involves the unique situation of Montana. As noted above, because it is quite clear from the language, history, and purpose of the Montana Wrongful Termination Act that the legislature intended to bar all state tort and contract claims regarding employee discharge, it is of only limited utility in the other forty-nine states in which legislative intent to replace all common law claims with a comprehensive statutory regime governing employment discharges does not exist. Only one of the cases cited in the

bank's board of directors, which was required to make an employee an officer. *Id.* at 791. This case also fails to support the commentary in c because the plaintiff did not allege a public policy tort claim. *See id.* at 790.

45. In *Parten v. Consol. Freightways Corp.*, 923 F.2d 580, 583 (8th Cir. 1991), the court held that the Surface Transportation Assistance Act did not preempt a Minnesota statutory whistleblower and public policy claim brought by a shop foreman who alleged he was pressured to move dangerous trucks out of the maintenance facility and to falsify records.

46. The court in *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473, 475 (8th Cir. 1990), held that OSHA did not preempt a state law whistleblower public policy tort claim brought by an employee who alleged she was fired for reporting OSHA violations.

47. *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990). We note that *English* contains a discussion of whether the comprehensiveness of a federal statutory regime that includes an administrative procedure to protect whistleblowers should be held to preempt state public policy tort claims, and that the preemption analysis the Court articulated (which focused on implied congressional intent) contains some of the same considerations that are discussed below under the adequacy of alternative remedies. For the reasons we explain below, the factors discussed in *English* (e.g., whether an administrative procedure that provides limited damages should be found to displace a civil cause of action for tort damages) should more appropriately be analyzed as whether the statute provides remedies sufficient to protect the employee's and the public's interest in encouraging whistleblowing, and not in terms of whether the legislature impliedly intended to prevent a court from allowing a tort claim.

48. *Id.* at 80; *see also* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 reporters' notes cmt. c, at 126 (quoting *English*).

Reporters' Notes concerns the issue actually addressed by the Restatement: it is an Illinois federal district court decision (which of course is not binding precedent in Illinois courts) holding that the Illinois Human Rights Act bars a common law claim.<sup>49</sup> Two of the cited cases are inapposite. Neither *Marczak v. Drexel National Bank*,<sup>50</sup> nor *Alvarado-Morales v. Digital Equipment Corp.*,<sup>51</sup> involved public policy tort claims. In *Marczak*, the plaintiff alleged an "unjust dismissal" claim that she was fired "without cause."<sup>52</sup> In *Alvarado-Morales*, the claim alleged was the tort of causing physical and emotional harm.<sup>53</sup> Neither of these cases supports the proposition that statutory remedies bar a common law public policy tort claim. The persuasiveness of both section 4.01 and Comment c would be significantly enhanced if the Reporters' Notes discussed cases that support the proposition asserted in Comment c.

*D. Comment d: Adequacy of Statutory Remedy as a Bar to Recovery*

Comment d addresses the second step in determining the effect of a statutory remedy on the public policy tort claim. It states that such claims will not be recognized when the statutory remedy is "adequate." A state statute does not normally eliminate common law claims unless it does so expressly; prospective legislative repudiation of the common law is not done by implication. The better way to formulate the issue is the following: when the legislature has not expressly indicated whether a statutory remedy is exclusive, then a court should decline to recognize the common law public policy tort only when the statutory remedies fully vindicate the relevant public policy.

The problem with the formulation in the current draft is determining what an "adequate alternative remedy" is. Comment d identifies two concerns underlying the "adequate alternative remedy" rule: first, whether the legislature "has chosen what it considers to be the appropriate remedy" when it passed the statute; and second, "the aptness of an incremental development of the common law."<sup>54</sup> We think the first concern inappropriately returns to the question of legislative intent discussed in

49. In *Johnson v. Baxter Healthcare Corp.*, 907 F. Supp. 271 (N.D. Ill. 1995), the district court found no Illinois Supreme Court cases on point and held that the Illinois state antidiscrimination law was the exclusive remedy. The court also held, in the alternative, that the plaintiff's prior litigation under the state statute barred the common law claim as a matter of res judicata.

50. 542 N.E.2d 787 (Ill. App. Ct. 1989).

51. 843 F.2d 613 (1st Cir. 1988).

52. *Marczak*, 542 N.E.2d at 790.

53. *Alvarado-Morales*, 843 F.2d at 616.

54. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. d, at 117.

Comment c, and that the second concern, while appropriately the focus of the test here, needs to be further elaborated.

The first of these concerns (“while the legislature has identified the public policy at issue in the statutory enactment, it also has chosen what it considers to be the appropriate remedy”) essentially repeats the first test discussed in Comment c by focusing on legislative intent. Moreover, the test itself is circular (as is the reasoning of many courts): it offers the conclusion – “the legislature has decided that its remedy is adequate and exclusive” – as the analysis to the question of whether the remedy is adequate, when the failure of the legislature to address a statute’s preclusive effect gave rise to the question in the first place. Because Comment c addresses the question of legislative intent to preclude common law remedies, we believe that Comment d – the inquiry after the legislature’s express statements have been examined – should focus on “the aptness of an incremental development of the common law” *without* regard to the legislature’s intent.

The analytic distinction between legislative intent and adequacy of remedies is also blurred in later language of Comment d. Comment d states, “Many [state] statutes expressly declare that the statute does not preclude common-law or other remedies. Nevertheless, because the statutory remedies are considered adequate, most courts decline to recognize a common-law action . . . .”<sup>55</sup>

To the extent that this sentence suggests that even a clear statement of legislative intent that a statute not be the exclusive remedy is not determinative on the issue, it clearly conflicts with the principle of legislative supremacy. Moreover, Comment d asserts (in the first paragraph) that legislatures are in the best position to weigh the costs and benefits of alternative remedial schemes. If that is so, courts should not disregard an explicit statement by the legislature that statutory remedies are *not* intended to be exclusive. A court might decide that tort remedies are unnecessary or undesirable in a given situation, but such a decision cannot be justified on the grounds that the legislature has weighed the costs and benefits.

On the other hand, even if the legislature clearly intended that a statute not bar a claim providing other remedies, a court might nevertheless conclude that a common law claim should not be recognized in circumstances in which the public interest and the employee are adequately protected. In the two-part framework articulated by the Restatement, this

55. *Id.*

inquiry would occur at the second step and would focus on factors relevant to determining whether the public's and employee's interests are protected, not on the legislature's intent. In short, where a legislature explicitly states that a statute shall not displace other remedies, a court is not *compelled* to allow a common law claim, but the decision whether to allow a common law claim cannot be based on legislative intent. It must instead be an exercise of the court's power to define the scope of the common law.

In considering whether a public policy claim should be recognized in a particular situation, Comment d suggests that courts consider whether the tort is "needed" and is "worth the costs."<sup>56</sup> Here, what is needed is to give greater content to the idea of an "adequate remedy" and whether a tort is "needed" and "worth the costs." The fundamental inquiry should be whether the statutory remedies adequately protect the public policy and the injured employee. Comment d suggests three factors that go to these questions: (1) "whether the employee has a private cause of action under the statute"; (2) "whether the employee can appeal the decision of an administrative body to court"; and (3) "whether the relief available under the statute is comprehensive in scope."<sup>57</sup> These factors are reasonable as a matter of policy and a plausible reading of the cases.

The phrasing of Comment d suggests that the factors are not exhaustive ("courts properly look to a variety of factors. These include . . .").<sup>58</sup> It would be better to clearly state that the list is not intended to be exhaustive. The cases, including those discussed in the Reporters' Notes, might fairly be read to identify some additional factors (also not exhaustive): (1) the comprehensiveness of the statute's regulation of the employment relationship; (2) the strength of the public policy and whether it is expressed in sources other than the statute providing a remedy; (3) the extent of the remedy provided by statute and its adequacy in protecting the public interest and the employee; (4) the extent of employee control over the enforcement process (which includes the availability of a private right of action but also would address whether the employee must exhaust administrative remedies under the control of an agency); and (5) the procedural restrictions placed on pursuing the statutory claim (this would address exceedingly short statutes of limitations, harsh concepts of waiver or exhaustion, high burdens of proof, and the like).

Although Illustration 6 is, by itself, a reasonable example of the application of factor (5) listed above (a statute "which provides an adequate

56. *Id.*

57. *Id.*

58. *Id.*

remedy but requires that any action be brought within 180 days of discharge”),<sup>59</sup> it might be helpful to suggest what kind of statute of limitations would be so short as to suggest that a court should not find the statutory regime to be the exclusive remedy – thirty days, sixty days? The Reporters’ Notes state that Illustration 6 is based on the case of *Campbell v. Town of Plymouth*.<sup>60</sup> However, the facts in *Campbell* are quite different from the hypothetical posed in Illustration 6. The case involved a plaintiff who alleged that he was discharged because he refused to submit erroneous and fraudulent information in a report.<sup>61</sup> Moreover, the plaintiff in that case alleged breach of an implied covenant of good faith and fair dealing, not a wrongful discharge in violation of public policy tort claim.<sup>62</sup>

Finally, another Illustration that shows how other factors in the nonexclusive list might be applied in practice would be helpful. For example, if the employee invoked other sources of public policy besides the statute whose procedures she failed to invoke, a court might conclude that a public policy claim was necessary to protect the public interest and the public policy expressed in those multiple sources of public policy.<sup>63</sup> Such an Illustration might be based on *Pytlinski v. Brocar Products, Inc.*, in which the Ohio Supreme Court allowed a public policy tort claim notwithstanding the running of the statute of limitations for the state whistleblower act because of “the abundance of Ohio statutory and constitutional provisions that support workplace safety and form the basis for Ohio’s public policy” favoring workplace safety.<sup>64</sup>

When Comment d moves from the general enumeration of factors to specific examples, some problems arise. First, Comment d states that, “reinstatement with back pay has been considered adequate in appropriate cases.”<sup>65</sup> This statement is unhelpfully vague: what is an appropriate case? If Comment d is meant to suggest a general rule that any statute offering reinstatement with backpay presumptively offers an adequate remedy and that common law protections are therefore unnecessary, this seems inconsistent with the purposes of the public policy tort and with the law of many states. Focusing on whether the remedy sufficiently protects the public interest and the injured employee, reinstatement and backpay should

59. *Id.* § 4.01 cmt. d, illus. 6.

60. *Id.* § 4.01 reporters’ notes cmt. d, at 130 (citing *Campbell v. Town of Plymouth*, 811 A.2d 243 (Conn. App. 2002)). The citation to *Campbell* is incorrectly given as 811 A.2d 342 (Conn. 2002).

61. *Campbell*, 811 A.2d at 248.

62. *Id.*

63. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03.

64. 760 N.E.2d 385, 387 (Ohio 2002).

65. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. d, at 117.

generally *not* be viewed as an adequate remedy making the common law tort unnecessary. The prospect of reinstatement with back pay by itself is frequently an inadequate incentive for an employee to assert rights and an inadequate deterrent to prevent an employer from violating the law. A well-known example of the inadequacy of reinstatement and back pay is offered by federal labor law, an area of law notorious for violations of law and widely criticized for the inadequacy of deterrence. Reinstatement and backpay are generally insufficient for several reasons. Reinstatement often does not occur, because by the time it is ordered, the employee has long since taken another job. When it does occur, reinstatement often does not last, as the employee may be fired or laid off for “other” reasons shortly after being reinstated. Years of delay between the wrongful discharge and the reinstatement give the employer the benefit of its illegal conduct. The expense of litigation eats up the entirety of a backpay award for all but the most highly compensated employees and thus makes it difficult for employees to find legal representation. The duty to mitigate reduces the backpay award to a small sum. Backpay does not compensate for significant consequential damages of job loss (loss of health insurance, mortgage foreclosure, family disruption caused by inability to pay school expenses or the necessity of moving the family to a new job). In short, many employees cannot afford to risk job loss even for a short time and thus, if they know the remedy is limited to backpay, will conclude that the private costs of job loss are not worth the public benefits of whistleblowing or other conduct that the public policy tort is designed to protect.

In any case, reinstatement and backpay are contract or equitable remedies intended to make the plaintiff whole by giving the benefit of the bargain; they are not tort remedies, which are intended to compensate for consequential damage. Tort remedies exist precisely because courts have recognized that contract remedies and make-whole relief are inadequate to protect public policy. The overwhelming majority of states hold that the public policy claim is a tort claim because it arises from a duty imposed by law, as we discuss in part E, below, and therefore, tort remedies are necessary and appropriate.

Comment d’s statement about reinstatement with backpay may not be intended as a presumptive rule but instead as an introduction to the two examples that follow in the Comment: the example of Title VII and state antidiscrimination laws and the example of civil service laws. The cases refusing to recognize a common law tort because of the remedial schemes of these statutes are better explained under other factors in the analysis. As to the antidiscrimination cases, the comprehensiveness of the statutory regulation is better justification, but it should be noted that many states do

recognize public policy tort claims when the policy is articulated in the antidiscrimination law and do not find the statutory remedies to be exclusive.<sup>66</sup> As to the exclusivity of civil service regimes, the policy justification not only has to do with the comprehensiveness of the civil service regulation of the entire relationship between public employees and the government as employer but also with the desire to protect the public treasury from tort liability.

After discussing the two examples of antidiscrimination and civil service laws, Comment d makes a somewhat confusing transition to the question whether public policy claims may be brought against small employers that are excluded from statutory coverage.<sup>67</sup> Because the paragraph focuses only on small employer exemptions, it would be better to rephrase the first sentence of the paragraph to make explicit the focus of the paragraph. The current phrasing, which refers to statutes that provide “an adequate remedy for a defined set of employees but not other employees” or that “include[] procedural requirements that must be met before a covered employee can obtain a remedy,” identifies issues that are not addressed in the paragraph and raise different problems than that of tort claims against small employers. A separate paragraph covering onerous procedural requirements or statutes with partial coverage would be warranted. Moreover, for the reasons discussed above regarding the desirability of reducing the emphasis on legislative intent and increasing the focus on the policies underlying recognition of the public policy tort claim, the clarity of the analysis would be helped by removing references to legislative intent in the two paragraphs on small employers.

The small employer problem is significant enough and raises issues that are distinct enough to warrant a separate paragraph. The paragraph articulates a number of policy justifications for declining to allow common law tort claims against employers that are excluded from statutory coverage on the grounds of the number of employees. It would be clearer to list them and consider each in turn. Comment d begins the subject by suggesting that legislative intent may provide guidance.<sup>68</sup> Here as elsewhere, legislative intent is unlikely to be a significant aid to courts, as legislatures frequently may not sort out their intent.

One of the policies discussed in Comment d is the notion of associational freedom of the employer.<sup>69</sup> This is a policy that seems to

66. *See, e.g.*, *Kruchowski v. Weyerhaeuser Co.*, 202 P.3d 144, 151 (Okla. 2008).

67. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01, cmt. d, at 117-18.

68. *Id.* at 118.

69. *Id.*

apply largely in the case of antidiscrimination laws that has little application to many of the situations covered by the public policy tort (e.g. whistleblowing). Moreover, the status of associational freedom as a counter to anti-discrimination law is sufficiently unclear and controversial. Associational freedom may be a First Amendment limit on Title VII coverage, or Title VII may represent a pragmatic political compromise Congress reached. Given this controversy, the proposed Restatement should avoid enshrining it as a matter of state common law.

Comment d also refers to the “Mrs. Murphy’s boardinghouse” exception in Title VIII of the Civil Rights Act of 1968.<sup>70</sup> As a stylistic matter, this reference is quite arcane – most readers of the proposed *Restatement* will have no idea of the passage of Civil Rights Act and the legislative history to which this phrase refers. The phrase was used not as part of the debate on Title VII, but rather in the debate of the public accommodations provisions. More important, as a substantive matter, without an explanation of the hypothetical to which it refers, readers will not know the contours of the exception that the proposed *Restatement* intends to recognize: Is it the number of employees? Is it the fact that the employer (“Mrs. Murphy”) is operating out of her private home? Is it that the employer is a person, not a corporation? The reference here invites readers to envision an elderly white woman being compelled to accept young black men into bedrooms in her home and invokes all the racism and sexism that goes along with that. It’s a controversial image, to say the least, and does not help courts disentangle associational privacy claims that may be morally questionable (protecting white womanhood) from those that might be legitimate (which are not identified). Illustration 5, intended to address this issue, does not help: it makes the employer a real estate office, but then in the last sentence refers to “small, generally family-owned businesses.”<sup>71</sup> One may assume that since Illustration 5 makes no other reference to family ownership, the ownership structure of the employer is irrelevant and the only relevant consideration is the number of employees. But, if that is the case, the policy justification for declining to allow a tort claim against a small employer remains obscure.

The small employer exclusion is unwarranted in the law if the proposed *Restatement* is read to suggest the only factor to consider is the statutory minimum number of employees. When there is a source for the public policy claim other than the statute, such as a constitutional prohibition on race, gender, or other discrimination, there may be a basis

70. *Id.*

71. *Id.* § 4.01 cmt. d, illus. 5.

for a tort claim regardless of the size of the employer because of the importance of the constitutional prohibition.<sup>72</sup> Recognizing this, Comment d suggests that the small employer exclusion is not to be simply a mechanical application of the minimum number of employees test articulated in the statute.<sup>73</sup> Yet it never comes to grips with how courts should distinguish between small employer exclusions that are about the burdens of recordkeeping, which would suggest a tort claim would be allowed, and small employer exclusions that are about freedom from substantive regulation, which would suggest a tort claim would not be allowed. If the rationale for the small employer exclusion is one of associational privacy, it would seem that a statute exempting employers with fewer than fifty employees would not counsel against recognizing a public policy tort claim against an exempt employer, but if the rationale is saving employers from the burden of substantive regulation the statutory exemption might suggest that the claim not be recognized. At a minimum, it would clarify the law and assist courts if the proposed Restatement disentangled the various policies underlying recognition of tort claims against small employers and linked them to various different factors courts should consider.

The Reporters' Notes on Comment d do not help distinguish the circumstances in which courts refuse to allow tort claims against employers too small to be covered by the statute that is asserted to be the source of public policy. The Reporters' Notes would be more helpful if they sorted the cases according to the specific circumstances when a court will or will not recognize a public policy tort claim and the specific reasons courts give for their conclusions.

As it is, the vagueness and confusion discussed above as to the test for when courts conclude statutory remedies are exclusive is reflected in the discussion of the cases in the Reporters' Notes. For example, the Reporters' Notes cite *Ficalora v. Lockheed Corp.*, for the proposition that California's Fair Employment and Housing Act (FEHA) bars state wrongful discharge claims.<sup>74</sup> But later, the Reporters' Notes cite *City of Moorpark v. Superior Court*, for the proposition that California's FEHA does not preclude a wrongful discharge claim.<sup>75</sup> One reason that the Reporters' Notes offer conflicting authority from the same jurisdiction is that *Ficalora* was

72. See *Badih v. Myers*, 43 Cal. Rptr. 2d 229 (App. 1995).

73. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. d, at 117-18.

74. *Id.* § 4.01 reporters' notes cmt. d, at 127 (citing *Ficarola v. Lockheed Corp.*, 238 Cal. Rptr. 360, 362 (App. 1987) without indicating in the cite that this was a decision by the California Court of Appeal).

75. *Id.* at 128 (citing *City of Moorpark v. Super. Ct.*, 959 P.2d 752 (Cal. 1998)).

overruled by the California Supreme Court in *Rojo v. Kliger*.<sup>76</sup> The point here is not to nitpick about citations. Rather, the problem is that the reader needs more guidance about when and why the existence of a statutory remedy leads a court not to recognize a common law claim in order to understand the factors of the analysis. Similarly, the Reporters' Notes discuss the split among the courts and cite *Jennings v. Marralle*, for the proposition that, "[o]ther states refuse to recognize a wrongful-discipline claim when the legislature exempts employers from the statute, deferring to the substantive policy of the legislature not to burden small employers with liability."<sup>77</sup> *Jennings* involved a disability discrimination claim. But the Reporters' Notes overlook another California case, *Badih v. Myers*,<sup>78</sup> which held that the California constitution's prohibition of sex discrimination supported a public policy tort claim against a small employer even though FEHA did not. The problem is not that the proposed *Restatement* fails to adopt the California law position across the board; it's that the mere citation of cases does not help the reader distinguish the circumstances when a court will or should recognize a public policy tort claim in the presence of a statutory remedy from those where it will or should not.

Finally, the Reporters' Notes cite *Rheinecker v. Forest Labs*,<sup>79</sup> a federal district court case anticipating Ohio state law, but a later case by the Ohio Supreme Court holding that a public policy tort is not barred by the whistleblower statute repudiated *Rheinecker*.<sup>80</sup> The Reporters' Notes also cite *Bush v. Lucas*,<sup>81</sup> but *Lucas* involves a constitutional tort claim, not a claim for wrongful discharge in violation of public policy and is therefore inapposite. Finally, the Reporters' Notes cite two additional cases, *Clinton v. State ex rel Logan County*<sup>82</sup> and *Walsh v. Consolidated Freightways*,<sup>83</sup> which arguably are no longer good law.<sup>84</sup>

76. 801 P.2d 373, 383 (Cal. 1990).

77. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 reporters' notes cmt. d, at 129 (citing *Jennings v. Maralle*, 876 P.2d 1074 (Cal. 1994)).

78. 43 Cal. Rptr. 2d 229, 231 (App. 1995).

79. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 reporters' notes cmt. d, at 127 (citing *Rheinecker v. Forest Labs., Inc.*, 813 F. Supp. 1307 (S.D. Ohio 1993)).

80. *Kulch v. Structural Fibers*, 677 N.E.2d 308 (Ohio 1997); see also *Pytlinski v. Brocar Prod., Inc.*, 760 N.E.2d 385 (Ohio 2002) (statute of limitations for state whistleblower act does not bar common law public policy claim because Ohio public policy favoring workplace safety is an independent basis for public policy tort).

81. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 reporters' notes cmt. d, at 127 (citing *Bush v. Lucas*, 462 U.S. 367 (1983)).

82. *Id.* at 128 (citing *Clinton v. State ex rel. Logan County Election Bd.*, 29 P.3d 543 (Okla. 2001)).

83. *Id.* at 128-29 (citing *Walsh v. Consol. Freightways*, 563 P.2d 1205 (Or. 1977)).

84. On *Clinton's* continuing effect, see *Saint v. Data Exchange, Inc.*, 145 P.3d 1037 (Okla. 2006);

*E. Comment e*

Comment e states that the public policy tort is available “notwithstanding any agreement . . . that purports to preclude such claims.”<sup>85</sup> It contrasts situations in which a private contract provides a remedy and those in which a legislature has provided a remedy by statute, suggesting that the latter situation is different because the legislature has weighed the competing public-policy factors. It then mentions private arbitration in passing and refers to Chapter 10 of the proposed *Restatement*.<sup>86</sup> Although we agree generally with the conclusion that the public policy tort is available notwithstanding any private agreement, Comment e confusingly conflates the non-waivable nature of the wrongful discipline in violation of public policy claim with the question of whether the existence of alternative remedies should dissuade a court from making a tort claim available.

We believe Comment e would be clearer if it were entitled “Irrelevance of parties’ agreement” and simply stated that, like torts generally, a claim of wrongful discipline in violation of public policy arises because of a breach of duty imposed by law, and that therefore, the intent of the parties and any agreement they have reached is irrelevant in determining whether the duty exists in a particular situation. As the California Supreme Court stated in *Tameny v. Atlantic Richfield Co.*,

an employee’s action for wrongful discharge is ex delicto and subjects an employer to tort liability . . . [A]n employer’s obligation to refrain from discharging an employee . . . does not depend upon any express or implied “promises set forth in the [employment] contract,” but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies.<sup>87</sup>

As a result, the claim is available regardless of whether an employee is employed at will, pursuant to a fixed term contract, or pursuant to an indefinite term just cause contract.

The effect that the existence of a legislative remedy might have on the availability of the public policy tort (discussed above under Comments c and d) simply has no relevance to the central point here – that private parties cannot contract around the tort. Reprising the “adequate alternative remedy” discussion here merely confuses the issue. Similarly, it is confusing to refer to private arbitration, because it introduces the question

Boyles v. AG Equipment Co., 506 F.Supp.2d 809 (N.D. Okla. 2007). On the current validity of *Walsh*, see *Cantley v. DSMF, Inc.*, 422 F. Supp. 2d 1214 (D. Or. 2006).

85. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. e, at 119.

86. *Id.*

87. 610 P.2d 1330, 1335 (Cal. 1980) (quoting *Eads v. Marks*, 249 P.2d 257, 260 (Cal. 1952)).

of whether and when an employee can be required to arbitrate a claim into the analysis of whether a claim is entirely waived. The focus of this section should be on the existence and contours of the public policy tort. Whether certain procedural rights can be waived by private agreement is a wholly separate topic and appropriately dealt with in a separate chapter of the proposed *Restatement*. We suggest deleting all references to the adequacy of legislatively provided remedies and to private arbitration in Comment e.

A substantial portion of the Reporters' Notes on Comment e addresses the question of the availability of the public policy tort for workers covered by collective bargaining agreements. For reasons similar to those discussed in relation to legislative remedies and agreements to arbitrate, the presence of a collective bargaining agreement should not enter into the analysis. The basic principle is quite straightforward: the public policy claim should be available to employees regardless of whether they are working under a contract – including a collective bargaining agreement – because the claim is intended to protect public policy, not privately bargained interests. Contractual terms are simply irrelevant to the existence of a public policy claim. To this extent, we agree with the position taken in the Reporters' Notes that workers covered by a collective bargaining agreement “should not have less protection than at-will employees on an issue of public policy.”<sup>88</sup> To the extent that the next sentence suggests that the availability of alternative remedies is somehow relevant to the analysis, however, we disagree. Claims of employer discipline in violation of public policy should be allowed to proceed notwithstanding the existence of a contractual agreement; alternative remedies are simply not relevant).

Like in the reliance on ERISA cases discussed above, we are concerned that the discussion of preemption under section 301 of the Labor Management Relations Act is misplaced. Preemption under section 301 is a controversial and not very coherent body of doctrine. Moreover, it is based entirely on federal law, not the state common law that is the typical focus of a *Restatement*. Additionally, it is unclear whether the description of the law under section 301 contained in the Reporters' Notes is accurate. The Reporters' Notes state that “a two-part inquiry” is used to assess whether a tort claim is preempted by section 301,<sup>89</sup> but the cases offer no support for that claim, and federal common law does not generally inquire about whether “adequate remedies” exist in deciding the whether 301 preempts a state law claim. For example, in *Lingle v. Norge Division of Magic Chef*,

88. This statement is made at RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 reporters' notes cmt. e, at 131-32.

89. *Id.* at 130.

*Inc.*, the Court held that an employee covered by a collective bargaining agreement may bring a state tort claim alleging retaliation for filing a workers' compensation claim without examining the adequacy of the remedies under the collective bargaining agreement.<sup>90</sup> The only issue upon which the Court focused is whether resolution of the state tort claim would require interpretation of the collective bargaining agreement, and the Court concluded that it did not.<sup>91</sup> The Reporters' Notes acknowledge elsewhere that the only issue in section 301 preemption cases is whether resolution of the state claim would require interpretation of the collective bargaining agreement, but the phrasing of the sentences that precede that statement suggest that the two-part test applies.<sup>92</sup>

We think the better course would be to acknowledge that section 301 preemption may come into play, without trying to restate the law under section 301, and then to make clear that from the perspective of the common law, the existence of a contractual agreement, including a collective bargaining agreement, is irrelevant to the availability of the wrongful discipline in violation of public policy claim because the latter sounds in tort, is based on a duty imposed by law and protects public policy, not private interests.

### III. SECTION 4.02<sup>93</sup>

#### **§ 4.02 Employer Discipline in Violation of Public Policy: Protected Activities**

**An employer is subject to liability in tort under § 4.01 for disciplining an employee who acting in a reasonable manner**

- (a) refuses to commit an act that the employee in good faith believes violates a law or established principle of professional conduct that protects the public interest;**
- (b) performs a public duty or obligation that the employee in good faith believes is imposed by law;**
- (c) files a charge or claims a benefit under the procedures of an employment statute or law (irrespective of whether the charge or claim is found meritorious);**
- (d) reports or inquires about employer conduct that the employee in good faith believes violates a law or established principle of professional conduct protective of the public interest; or**

90. 486 U.S. 399, 413 (1988).

91. *Id.* at 401, 413.

92. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 reporters' notes cmt. e, at 130.

93. Richard A. Bales and Roberto L. Corrada are the authors of the critique of Section 4.02.

**(e) engages in other activity directly furthering a substantial public policy.**

The black letter statement of the law in section 4.02 sets out the basic parameters of activities protected under a claim for wrongful discipline in violation of public policy. For the most part, this section of the proposed *Restatement* captures the nature of activities protected under the doctrine of the public policy tort in a reasoned manner. However, there are three basic problems with this section. First, the cited cases frequently do not support the proposition for which they are cited, and the facts and holdings are recited incorrectly. Second, the comments and illustrations frequently are inconsistent with the text. Invariably, the text is capable of a broad, relatively pro-employee interpretation, while the comments and illustrations are much more restrictive. Third, a substantial group of activities are missing from subsections (a) through (e), such as off-duty conduct activities and activities involving privacy.

*A. Comment a: Protected Activities*

The gist of Comment a is that for an activity to be protected under this tort, it must be conduct directly furthering a substantial public policy. There are two problems with this Comment. The first problem is that it is unclear whether off-duty conduct can be a basis for public policy. Examples of off-duty conduct that might be protected this way include the cases cited in the Reporters' Notes to Comment d, such as attending alcohol rehabilitation treatment,<sup>95</sup> getting married or divorced or otherwise maintaining personal relationships,<sup>96</sup> or other examples, such as posting questionable photos of oneself on MySpace. While the Reporters' Notes cite to cases holding that these types of activities are not protected, there is no analysis of the decisions. Similarly, invasion of employee privacy is not listed in section 4.02 and only cursorily discussed in the notes to Comment d, as discussed below. The proposed *Restatement* should either expressly protect such conduct/privacy or should leave the issue open for future development by the courts.

The second problem is that the cases cited as support for Illustration 4

94. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02.

95. See *Selof v. Island Foods, Inc.*, 623 N.E.2d 386, 386, 389 (Ill. App. 1993) (discussing an employee's discharge because of hospitalization and attending alcohol rehabilitation treatment but finding no retaliatory discharge because the employee's "interest in obtaining treatment appears to be of a personal nature rather than one involving a clearly mandated public policy.").

96. See *McCluskey v. Clark Oil & Refining Corp.*, 498 N.E.2d 559, 559 (Ill. App. 1986) (holding that no clearly mandated public policy existed to support a retaliatory discharge claim when an employee is fired for marrying a coworker).

do not stand for the proposition for which they are cited. Illustration 4 purports to show how public policy can protect an employee who has a “close personal association” with an employee who is engaged in protected activity.<sup>97</sup> The cited case, however, focuses not on the “close personal relationship” between the employees, but on the supervisor/employee relationship between the employees. In *Rothrock v. Rothrock Motor Sales, Inc.*, the court found the son (E1 in the illustration) was retaliated against for seeking worker’s compensation (WC) benefits.<sup>98</sup> The court extended this improper retaliation to the termination of the father (E2 in the Illustration) because the father was asked as the son’s supervisor to coerce the son into waiving WC benefits.<sup>99</sup> However, the court explicitly noted that although the close relationship between the father and the son “makes the case more compelling, it does not limit its holding.”<sup>100</sup> The rationale for the court’s holding regarding the father’s termination came from “self-evident” precedent establishing an exception to at-will termination “whenever an employer seeks to compel a supervisory employee to thwart a subordinate employee’s unquestioned right to WC benefits.”<sup>101</sup> Factually, what is important about the relationship between the two employees is not that the father was the son’s father, but that he was the son’s supervisor, a distinction that the Illustration fails to note. We recommend a less unique case be highlighted in the *Restatement*.

*B. Comment b: Comment on Subsection (a)*

Comment b outlines a common form of protected activity in this context: employees disciplined for refusal to commit unlawful acts, including situations where lawyers refuse to undertake action inconsistent with their professional ethics. Of the Illustrations set forth under Comment b, Illustration 7 is likely to be controversial. It is borrowed from the *Restatement (Third) of the Law Governing Lawyers*<sup>102</sup> and provides

97. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 illus. 4.

98. 883 A.2d 511, 512-14 (Pa. 2005).

99. *Id.* at 511-15, 517.

100. *Id.* at 515 n.9.

101. *Id.* at 516.

102. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §32 cmt. b (2000). That provides

when a lawyer is also an employee of a client (for example, a lawyer employed as inside legal counsel by a corporation or government agency), . . . [the] lawyer-employee . . . has the same rights as other employees under applicable law to recover for bad-faith discharge, for example if the client discharged the lawyer for refusing to perform an unlawful act. Because of the importance of such a lawyer’s role in assuring law compliance, the public policy that supports a remedy for such discharges is at least as strong in the case of lawyers as it is for other employees. The power a client employer

Employee E works as in-house counsel for employer X, X discharges E for insisting that X report an associate lawyer's misconduct, which included making several false and fraudulent material representations in a court filing. Reporting such misconduct is required by the code of professional ethics duly promulgated and applicable to lawyers like E. X has retaliated against E in violation of public policy.<sup>103</sup>

The Reporters' Notes here should acknowledge that there is a split of authority over whether the lawyer has the same rights as other non-lawyer employees to recover for retaliatory discharge<sup>104</sup> and should explain why the proposed *Restatement* takes the better approach. Support for the *Restatement's* position generally can be found in an article by Alex B. Long,<sup>105</sup> arguing that the public policy tort, at least in the context of attorney discharge, should be modeled on the current law against retaliation found in Title VII jurisprudence. Counter arguments to the *Restatement* position are offered up by Cathryn C. Dakin<sup>106</sup> and Terri M. Kirik.<sup>107</sup>

We believe this *Restatement* should go further than the *Restatement (Third) Governing Lawyers* and protect attorneys when the requirements of a Code are permissive.<sup>108</sup> In the case of "permissive" conduct under an applicable code of professional responsibility, the analysis would proceed to the further inquiry: (1) is the lawyer's conduct the type that would be protected in the case of a non-lawyer, and (2) is the lawyer free by virtue of statute or ethics rule from the strictures of confidentiality vis-à-vis the lawyer/client in order to fully pursue a claim?

### C. Comment c: Comment on Subsection (b)

Comment c involves situations where employees are disciplined for

possesses over a lawyer-employee is substantial, compared to that of a client over an independent lawyer. Giving an employed lawyer a remedy for wrongful discharge does not significantly impair the client's choice of counsel.

*Id.* (internal cross-references omitted).

103. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 illus. 7.

104. Compare Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043, 1084-99 (2008) (arguing that there should be a cause of action for discharge in violation of public policy similar to the retaliation cause of action available under Title VII), with Cathryn C. Dakin, Note, *Protecting Attorneys Against Wrongful Discharge: Extension of the Public Policy Exception*, 44 CASE W. RES. L. REV. 1043, 1045 (1995) (suggesting that ethical rules lack the full force of law that should be required for a public policy tort); and 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).

105. Long, *supra* note 104, at 1084-89.

106. Dakin, *supra* note 104.

107. Kirik, *supra* note 104.

108. See, e.g., *Crews v. Buckman Labs*, 78 S.W. 3d 852, 857, 865-66 (Tenn. 2002) (holding that an employee could bring a claim for retaliatory discharge in violation of public policy for complying with a permissive obligation under the Tennessee Code of Professional Responsibility).

seeking to fulfill public obligations, like jury service. A problem with this Comment is that many examples other than just jury duty and filing a police report are available and should be included as illustrations. For instance, we would add to the draft recognition of situations in which employees take official stands as part of their public service on executive, legislative, and judicial bodies.<sup>109</sup> The Reporters' Notes also contain many examples that easily could serve as illustrations. More detail on what case underlies Illustration 10,<sup>110</sup> and potential variations on this theme, would be helpful.

*D. Comment d: Comment on Subsection (c)*

Comment d explains the rationale for protecting employees who seek to vindicate the public interest. There are six problems with this Comment.

First, Illustration 13, describes a worker who files a workers' compensation claim for an injury the worker knows does not exist.<sup>111</sup> This illustration is inconsistent with the language of 4.02(c). Although 4.02 (a), (b), and (d) each contain an "employee good faith" requirement, 4.02(c) does not. Illustration 13, however, would impose a good-faith requirement on 4.02(c) where none exists. Illustration 13 therefore should be stricken.

Second, as discussed above, one might argue that public policy is broad enough to protect employees seeking benefits outside of the employment relationship, such as marriage/divorce, attending rehabilitation programs, using social networking websites, etc. Consequently, we again urge an amendment to the proposed *Restatement* allowing for this possibility.

Third, we are confused by what seems to be a change from previous drafts of the *Restatement*. A prior draft of the *Restatement* discussed unwaivable rights and unenforceable conditions in a separate subsection (d).<sup>112</sup> Without that separation, Illustrations 14, 16, and 17 do not seem to fit with Comment d. We would recommend that the proposed *Restatement* revert to the old subsection for clarity's sake. On the other hand, and assuming these Illustrations do fit here, a fourth problem with this section

109. See *MacDougall v. Weichert*, 677 A. 2d 162, 167-68, 172-73 (N.J. 1996) (discharge of employee for his particular vote on Borough Council matter would violate public policy).

110. Illustration 10 posits an employee discharged for tardiness when the employee is late because he or she witnessed a car accident on the way to work and are required by police to complete an accident report. Under Illustration 10, the employer has retaliated against the employee for performing a public duty.

111. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 illus. 13.

112. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01(d) (Tentative Draft No. 1, 2008) [hereinafter TENTATIVE DRAFT 1].

is that it requires that the right be *actually* nonwaivable or the clause unenforceable. A more progressive approach would require only the employee's good-faith belief. Employees, most of whom are not lawyers, should not be expected to ascertain with absolute precision the legal enforceability of a right or contract clause.

Fifth, the section does not explain the meaning of "waivable" and "nonwaivable" rights. Nor does it make any attempt to explain which rights are waivable and which are nonwaivable. Absent such explanations, this section is very confusing.

Sixth, the Reporters' Notes misstate the holding of the Third Circuit in *Novosel v. Nationwide Insurance Co.*<sup>113</sup> The court did not hold that the discharge violated the constitutional free speech "right" of the private-sector employee, as the Reporters' Notes state.<sup>114</sup> Rather, the court held that the constitution created a public policy favoring free speech, and that the discharge violated that public policy.<sup>115</sup> The distinction is important, because the Reporters' Notes do not adequately explain the basis for concluding that policies emanating from constitutional sources are not an important enough source of public policy to protect employees against discharge. True, most courts have correctly pointed out that constitutional protections do not apply to private-sector employees. However, the issue of whether a constitutional violation exists is analytically distinct from the issue of whether the constitution creates a public policy. Thus, the majority approach does not necessarily foreclose the possibility that, in the future, courts might find that constitutions create policy upon which a public policy tort might rest. Additionally, a significant minority of states recognize that at least some state constitutional provisions articulate public policies that can be the basis for tort claims by private sector employees. This issue is discussed further in Section 4.03, below.

#### *E. Comment f: Comment on Subsection (e)*

Comment f concerns the scope of whistleblower claims under the common law of tort. There are five problems with this subsection.

First, the word "whistleblower" should be somewhere in the bolded language of subsection (e). Researchers will do word searches on it, so it should be in the text.

Second, Comment f sets out a three-part test to measure the

113. 721 F.2d 894 (3d Cir. 1983).

114. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 reporters' notes cmt. d, at 144.

115. *Novosel*, 721 F.2d at 898-900.

reasonableness of the employee's conduct in blowing the whistle on the activity.<sup>116</sup> The second part of this test is: "(2) Was the employee reasonable in believing the conduct was illegal?" This requirement that the employee's belief in illegality be objectively reasonable is inconsistent with the text of Section 4.02(e), and should be stricken from Comment f, as discussed below.

Third, Comment f also sets out a test for determining when whistleblower bypass of internal reporting might be reasonable.<sup>117</sup> This test should be in the text of 4.02 and should be fleshed out in more detail. Merely imposing a "reasonableness" standard on the issue of whether an employee should report unlawful activity internally or externally dodges the difficult issue.

Fourth, this subsection should protect employees who *oppose* unlawful activity, not just those who report it. This would be consistent with the antiretaliation clause of Title VII, which contains both a participation and an opposition clause<sup>118</sup> and which was recently interpreted by the Supreme Court in *Crawford v. Metropolitan Government* to protect employees who complain of illegal activity when asked about it during internal investigations even if those employees had not reported the illegal activity.<sup>119</sup>

Fifth, many of the cases cited in this subsection do not support the propositions for which they are cited, or their holdings or facts are misstated. For example, the Reporters' Notes say Illustration 18 is based on *Kanagy v. Fiesta Salons, Inc.*<sup>120</sup> However, the case does not support the Illustration for which it is cited, for two reasons. First, the Illustration says the retaliation was for reporting that a product did not comply with federal product-safety regulations.<sup>121</sup> However, the case involved a plaintiff-employee discharged for reporting that her supervisor was practicing cosmetology without a state license.<sup>122</sup> Second, the Illustration is about a wrongful discharge for *internal* whistleblowing (a report to a supervisor), while *Kanagy* is about *external* whistleblowing (a report to an investigator

116. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 cmt. f, at 138 (creating a test that asks 1. whether the employee believed the conduct reported was illegal; 2. whether that belief was reasonable and 3. whether the report was made in a reasonable manner)

117. *Id.*

118. 42 U.S.C. § 2000e-3 (2000).

119. 129 S. Ct. 846, 849, 851-53 (2009).

120. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 reporters' notes cmt. f, at 147 (citing *Kanagy v. Fiesta Salons, Inc.*, 541 S.E.2d 616 (W. Va. 2000)).

121. *Id.* § 4.02 illus. 18, at 138.

122. *Kanagy*, S.E.2d at 617-18, 622-23.

for a licensing board).<sup>123</sup> Because of the difference in protections for internal and external whistleblowing in different states, a better case example should be chosen.

Likewise, Illustration 22, which involves whistleblowing by a spouse, is not supported by the case cited for it in the Reporters' Notes, *McLean v. Hyland Enterprises, Inc.*<sup>124</sup> Mr. and Mrs. McLean both were fired after Mr. McLean refused an assignment to use an unsafe modified mast truck to pull a well.<sup>125</sup> Unlike in the Illustration, (1) both spouses were employed by the employer; (2) Mr. McLean – not Mrs. McLean – reported the purported safety violation; (3) Mr. McLean did not report the purported safety violation until after he had been fired; (4) Mrs. McLean argued that she was fired in retaliation for Mr. McLean's having reported the safety violation; (5) the state workers' safety division investigated and found that there had been no safety violation; (6) there was nothing in the case about many reports of safety violations having been made, or of safety violations being widely known within the company; and (7) the court found that because the McLeans had access to an administrative remedy, they had no claim for wrongful discharge.<sup>126</sup> In short, the case as described in the Illustration bears little resemblance to the actual case.

Regarding the parenthetical summary in the Reporters' Notes for *Mueller v. Union Pacific Railroad*,<sup>127</sup> it should be clarified that what is "too vague" is Nebraska courts' stance on the public policy exception. The Nebraska Supreme Court stated in *Mueller* that it had yet to "express[] an inclination toward any position with respect to" the exception, and the court declined in *Mueller* to reach the issue because the criminal acts over which the exception was being argued could not be imputed to the defendant-employer in that case.<sup>128</sup> The court did not actually hold that public policy was too vague; rather, it declined to take any position on the public policy exception.<sup>129</sup>

Another case cited in the Reporters' Notes on Comment f is *Hayes v.*

123. Compare RESTATEMENT (THIRD) OF EMPLOYMENT LAW, § 4.02, cmt. f., illus. 18, at 138 ("X discharges E for reporting this information to E's supervisor."), with *Kanagy*, S.E.2d at 622-23 (noting that the employee was discharged for "providing information . . . to an investigator for the West Virginia Board of Barbers and Cosmetologists").

124. RESTATEMENT (THIRD) OF EMPLOYMENT LAW, § 4.02 reporters' notes cmt. f, at 147 (citing *McLean v. Hyland Enterprises, Inc.*, 34 P.3d 1262 (Wyo. 2001)).

125. *McLean*, 34 P.3d at 1265-66.

126. *Id.* at 1265-66, 1268-72.

127. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 reporters' notes cmt. f, at 145 (citing *Mueller v. Union Pac. R.R.*, 371 N.W.2d 732 (Neb. 1985)).

128. *Mueller*, 371 N.W.2d at 737-39.

129. *Id.*

*Eateries, Inc.*<sup>130</sup> M. Derek Zolner wrote a Note critical of *Hayes*, arguing:

The analytical framework established by the Oklahoma Supreme Court in *Hayes* is problematic [because] the court's definition of public policy ignores the fact that the Oklahoma legislature has criminalized embezzlement and made a determination that this activity is contrary to the public interest[.] . . . the public/private distinction drawn by the *Hayes* court rejects the notion that reporting a crime to law enforcement officials necessarily involves the public[, and] . . . the practical effect of *Hayes* is that it could have a chilling effect on employees who may or may not now decide to report crimes because they fear losing their job.<sup>131</sup>

Also in the Reporters' Notes, the parenthetical summary for *Lindemood v. Office of the State Attorney, Ninth Judicial Circuit*, incorrectly states that the plaintiff in the case was an independent contractor.<sup>132</sup> The plaintiff in *Lindemood* "was an *employee* of the State Attorney's Office" and as such she was protected from wrongful discharge under Florida's public whistleblower statute.<sup>133</sup>

Another case in the Reporters' Notes is, *Wholey v. Sears, Roebuck & Co.*<sup>134</sup> *Wholey* is extensively discussed in an article by Benjamin S. Haley, who argues that a seminal case, *Porterfield v. Mascari II, Inc.*,<sup>135</sup> mischaracterized *Wholey* as precedent and failed "to make a clear statement on whether public policies that secure individual rights against the state may be vindicated by the tort of wrongful discharge" in Maryland.<sup>136</sup> The *Porterfield* court held that termination of an employee for consulting an attorney about an employment dispute does not violate public policy,<sup>137</sup> which Haley argues potentially threatens the precedential value of *Wholey* by narrowing its holding and failing to provide a clear and manageable standard in its stead.<sup>138</sup>

130. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 reporters' notes cmt. f, at 145 (citing *Hayes v. Eateries, Inc.*, 905 P.2d 778 (Okla. 1995)).

131. M. Derek Zolner, Note, *Employment Law: Report a Crime, Lose Your Job: The Oklahoma Supreme Court Reins in the Public Policy Exception in Hayes v. Eateries, Inc.*, 50 OKLA. L. REV. 585, 599 (1997).

132. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 reporters' notes cmt. f, at 147 (citing *Lindemood v. Office of the State Att'y*, Ninth Jud. Circuit, 731 So. 2d 829 (Fla. Dist. Ct. App. 1999)).

133. *Lindemood*, 731 So.2d at 831 (emphasis added).

134. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 reporters' notes cmt. f, at 147 (citing *Wholey v. Sears, Roebuck & Co.*, 803 A.2d 482 (Md. 2002)).

135. 823 A.2d 590 (Md. 2003).

136. Benjamin S. Haley, Note, *Porterfield v. Mascari II, Inc.: "A Clear Mandate of Public Policy" Remains Unclear in Maryland's Wrongful Discharge Jurisprudence*, 63 MD. L. REV. 605, 627-29, 631-32 (2004).

137. *Porterfield*, 823 A.2d at 593, 605-09.

138. Haley, *supra* note 136, at 627-29.

*F. Comment g: Employee's Reasonable, Good-Faith Belief in the Illegality of Employer's Actions*

Comment g focuses on the belief that an employee must have regarding the employer's alleged illegal activity. There are two problems with this Comment.

First, the Comment requires that the employee's belief that the employer is engaging in illegal activity be "reasonable," whereas the text of the proposed *Restatement* does not. Comment g should drop the word "reasonable" and merely require a good-faith belief in the illegality.

Courts are split on the issue of whether to require reasonableness or merely good faith,<sup>139</sup> and the majority of courts require both.<sup>140</sup> The proposed *Restatement* approach of requiring only good faith is the more progressive option. Comment g should be edited to comport with the good-faith-only approach in the text of section 4.02. Therefore, the word "reasonable" should be stricken from the title and from the first two sentences of Comment g.

Further, none of the subsections contain a requirement that the employee's belief in illegality be objectively reasonable. The only requirement of "reasonableness" is found in the first sentence of section 4.02, which provides that only an employee "acting in a reasonable manner" is protected.

The "acting in a reasonable manner" clause is described in Comment f, which explains that under some circumstances, it might be reasonable for a whistleblower to complain internally, and in other circumstances, it might be reasonable for a whistleblower to complain externally.<sup>141</sup> For present purposes, the critical point is that the proposed *Restatement* makes a distinction between "acts" and "beliefs." "Acts" are what the employee does after forming a "belief" of illegality. There is nothing in the text of the *Restatement* that requires that "beliefs" be "reasonable" – only that they be held "in good faith."

The second problem with Comment g is that it, but not the text of

139. See e.g. Lawrence D. Rosenthal, *Reading Too Much Into What the Court Doesn't Write: How Some Federal Courts Have Limited Title VII's Retaliation Clause's Protections After Clark County School District v. Breeden*, 83 WASH. L. REV. 345, 353-355 n. 60 (describing the former debate in Title VII's case law on whether an employee had to prove a good-faith reasonable belief that they had opposed unlawful conduct).

140. See e.g. RESTATEMENT (THIRD) OF EMPLOYMENT LAW, § 4.02, Reporters' Notes, cmt. g (listing examples of courts that require a good-faith reasonable belief); *Crumpacker v. Kansas Dep't of Human Res.*, 338 F.3d 1163, 1171 (10th Cir. 2003) (requiring a reasonable, good-faith belief to succeed on a Title VII retaliation claim).

141. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 cmt. f.

section 4.02, requires that the laws at issue express an important public policy. Employees should be protected from being required to violate a law, or from reporting employer violations of a law, regardless of whether that law expresses an important public policy.

For example, section 4.02(a) provides protection for an employee who “refuses to commit an act that the employee in good faith believes violates a law or established principle of professional conduct that protects the public interest.” The phrase, “[*T*]hat protects the public interest,” is an adjectival phrase modifying “conduct.” That phrase does *not* modify “law.” As such, under a grammatical interpretation of section 4.02, an employee who refuses to violate a law would be protected regardless of whether that law is one “that protects the public interest.” Similarly, in section 4.02(d), the adjectival phrase “protective of the public interest” modifies “conduct” and not “law,” so an employee who reports unlawful activity would be protected regardless of whether the law is “protective of the public interest.”

Comment g, though ambiguous, seems to state the contrary by stating that “[t]his section protects specified employee conduct only if . . . the employee is either being asked to commit an unlawful act or has witnessed unlawful employer conduct *that would impair an important public policy.*”<sup>142</sup> The ambiguity is removed by Illustration 25. In Illustration 25, an employer fires an employee for refusing to participate in the employer’s illegal activity. The employee is *not protected*, however, because the law that the employer is demanding the employee violate is not a law “protective of the public interest.”<sup>143</sup>

It is unreasonable to expect employees to discern which laws are “in the public interest” and which are not. All laws should be assumed to be in the public interest; employees should be protected for refusing to violate, or for reasonably reporting the employer’s violation, of *any* law. For these reasons, Illustration 25 and the phrase italicized above both should be cut from Comment g.

Finally, the Reporters’ Notes to Comment g also discuss the good faith defense under the Sarbanes-Oxley Act of 2002 (SOX),<sup>144</sup> a statute which focuses on the protection of private sector employees of corporations from retaliation and wrongdoing. Although arguments exist that SOX should be discussed more explicitly in other sections, it appears misplaced here. Its interpretation concerns primarily federal law, not traditional, common law employment law, and thus, not a topic of this proposed

142. *Id.* § 4.02 cmt. g, at 139 (emphasis added).

143. *Id.* § 4.02 illus. 25, at 140.

144. 18 U.S.C. § 1514A (2000).

*Restatement.*<sup>145</sup>

*G. Comment h: Comment on Subsection (f)*

Comment h concerns the fact that not all protected activity will fall in the more common forms of protected activity, and we are generally in agreement that protected activities under this proposed *Restatement* should be broadly construed to meet the purposes of these types of tort.

The summary of *Cilley v. N.H. Ball Bearings*, in the Reporters' Notes,<sup>146</sup> misstates the facts, and the holding is inconsistent with the text of the proposed *Restatement*. The summary states that the plaintiff was fired because he refused to lie on behalf of *another manager* who was improperly using company employees for personal gain.<sup>147</sup> To the contrary, it was the *plaintiff himself* who had been using company employees for personal gain – this was the reason the employer gave for the discharge.<sup>148</sup> The plaintiff's public policy argument had nothing to do with the use of employees for personal gain: he was arguing "that his discharge was caused by another official's desire to get 'revenge' against him," which "grew in part from [the plaintiff's] earlier refusal to lie to the company president on the other official's behalf" about a matter unrelated to the plaintiff's use of company employees.<sup>149</sup> The court reversed summary judgment for the employer, holding that a "jury could find [that plaintiff] was discharged for refusing to lie and that public policy supports such truthfulness."<sup>150</sup>

This case should be removed from the Reporters' Notes to Comment h. The case is confusing factually. Few courts likely would hold that "a refusal to lie" about something not implicating a legal or public policy, without more, states a public policy claim. The text of the proposed *Restatement* does not support the notion that an employee's refusal to lie to the company president about internal matters, without more, would support a public policy tort. Also, as discussed in section 4.03, the proposed *Restatement* would not support such a claim, because the purported public policy is not traceable to a statute or other law.

145. See Beverley H. Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1, 36-37 n.188 (2007) (emphasizing that traditional employment law is not applicable to SOX cases).

146. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 reporters' notes cmt. h (citing *Cilley v. N.H. Ball Bearings*, 514 A.2d 818 (N.H. 1986))

147. *Id.* at 148.

148. *Cilley*, 514 A.2d at 818.

149. *Id.* at 821.

150. *Id.*

IV. SECTION 4.03<sup>151</sup>**§ 4.03 Employer Discipline in Violation of Public Policy: Sources of Public Policy**

Sources of public policy for the tort of employer discipline in violation of public policy under § 4.01 include:

- (a) federal and state constitutions;
- (b) federal, state, and local statutes, ordinances, and decisional law;
- (c) federal, state, and local administrative regulations, decisions, and orders; and
- (d) established principles of professional conduct protective of the public interest.<sup>152</sup>

The black letter statement of the law in section 4.03 sets out the sources of law which may make up public policy for a claim of wrongful discipline in violation of public policy. This section of the proposed *Restatement*, for the most part, clarifies, and expands on, the sources of law that courts may rely upon for public policy torts. Yet, there are additional sources of public policy not mentioned and some subsidiary issues that should be addressed that would more accurately reflect the dynamic nature of this area of the law.

With regard to additional sources of public policy, and consistent with the increased emphasis on global and transnational trends in law, scholars have argued that customary international law should be considered state common law.<sup>153</sup> On the other hand, a federal treaty to which the United States is party is part of federal law (though whether more like a statute or part of federal common law is unsettled). To clarify that both of these international sources of law may, in appropriate cases, be sources of public policy, we recommend that subsection (e) should read: “established principles of customary international law or foreign treaties to which the United States is party.” We also suggest that a subsection (f) be added that would state: “recognized private standards for the protection of public health or safety.”<sup>154</sup>

Although the inclusion of these sources of public policy may be

151. The critique of section 4.03 was written by Paul M. Secunda.

152. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03.

153. See Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT. 503, 630 (2008) (noting that “[O]ne theory of U.S. foreign relations law is that customary international law is part of state common law”).

154. See *Mehlman v. Mobil Oil Corp.*, 707 A.2d 1000 (N.J. 1998) (industry guideline on product safety as clear mandate of public policy).

appropriately discussed in the comments on statutes and decisional law as sources of public policy, having separate subsections, as proposed, describing these sources of law would eliminate any ambiguity.

*A. Comment a: Single vs. Multiple Sources of Public Policy*

Comment a rightly notes that while many public policy torts are based on single sources of public policy, there are other sources of public policy that rely on a combination of or on multiple, independent sources of public policy.<sup>155</sup> On the other hand, case law does not necessarily support the proposition that the public policy has to be both “clearly established and clearly formulated.”<sup>156</sup>

Other issues include a disconnect between the topic of Comment a and the cases cited in the Reporters’ Notes, which discuss a broad vs. narrow interpretation of public policy. It would be better if Comment a would start with a broad statement that public policy can derive from federal and state constitutional, statutory, administrative, and ethical legal materials. Comment a could then discuss the broad and narrow interpretations of public policy by different states. Then, and only then, it could discuss the fact that some states recognize single sources of public policy, whereas other states accept multiple sources.

As far as the distinction between single and multiple sources of law is concerned, Comment a is accurate insofar as there are states that recognize a public policy contained both in single sources of law like workers’ compensation statutes, jury service statutes, or whistleblower laws,<sup>157</sup> and

155. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 cmt. a, at 149.

156. *See, e.g.,* *Palmateer v. Int’l Harvester Co.*, 421 N.E. 2d 876 (Ill. 1981). The Court in *Palmateer* stated,

In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State’s constitution and statutes and, when they are silent, in its judicial decisions . . . . Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen’s social rights, duties, and responsibilities before the tort will be allowed.

*Id.* at 878-79; *see also, e.g.,* *Boyle v. Vista Eyewear*, 700 S.W.2d 859, 871-77 (Mo. App. 1985); *Gardner v. Loomis Armored, Inc.*, 913 P.2d 377 (Wash. 1996); *Feliciano v. 7-Eleven, Inc.*, 559 S.E. 2d 713 (W. Va. 2001).

157. *See, e.g.,* *McClain v. Birmingham Coca-Cola Bottling Co.*, 578 So.2d 1299 (Ala. 1991) (involving retaliation for filing a workers’ compensation claim, which was prohibited explicitly by state statute); *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427 (Alaska 2004) (involving an employee who filed a complaint with the state Occupational Safety and Health office); *Smith v. Piezo Tech. & Prof’l Adm’rs*, 427 So.2d 182 (Fla. 1983) (involving retaliation for filing a workers’ compensation claim); *Geary v. Telular Corp.*, 793 N.E.2d 128 (Ill. App. 2003) (involving the Illinois Wage Payment and Collection Act and finding that a single violation of the statute did not implicate a clearly mandated public policy); *Palmer v. Brown*, 752 P.2d 685 (Kan. 1988) (involving blowing the whistle on Medicaid

within multiple sources of law. Surprisingly, however, no multiple source cases are mentioned in the Reporters' Notes to Comment a. Cases that could be added to the Notes include: *Reust v. Alaska Petroleum Contractors, Inc.*,<sup>158</sup> *Fingerhut v. Children's National Medical Center*,<sup>159</sup> and *Antinerella v. Rioux*.<sup>160</sup>

Comment a also states that public policy must be "clearly established and clearly formulated."<sup>161</sup> Although there are a number of courts which look disapprovingly on vague statements of policy to support public policy torts,<sup>162</sup> other cases, including many listed in the Reporters' Notes to Comment a, permit broad, open-ended statements of public policy.<sup>163</sup> Because no consensus exists on this issue, we suggest that the sentence, "[t]he key requirement is that the public policy be clearly established and clearly formulated," be deleted or at the very least, softened to take into account the approach to public policy taken by some states.

Comment a also states that "the principal issue is whether the statute that forms the basis of the public policy precludes judicial recognition of the tort claim or provides an adequate alternative remedy."<sup>164</sup> For reasons discussed in the comments to section 4.01, this sentence is confusing and no reason exists for it being in section 4.03. We therefore suggest that this sentence be deleted from Comment a.

#### *B. Comment b: Constitutions as Sources of Public Policy*

Comment b, which discusses federal and state constitutional law as sources of public policy, is accurate that there is sometimes a challenge figuring out the public policy from broad provisions stated at a high level

billing practices).

158. 127 P.3d 807 (Alaska 2005) (noting that a number of statutes contain witness protection provisions, including the Alaska Occupational Safety and Health Act, the Alaska Human Rights Law, and the Alaska Assisted Living Homes Act).

159. 738 A.2d 799 (D.C. App. 1999) (finding that the three statutes on which plaintiff relied, §§ 1-142, 22-704 and 4-175, in concert with § 4-114 and its implementing regulations, "reflect a clear mandate of public policy" against the termination of a police officer who records and reports a bribe of a government official).

160. 642 A.2d 699 (Conn. 1994) (finding public policy tort where high sheriff's alleged misconduct violated General Statutes §§ 6-36, 6-46, both of which authorize the removal from office of sheriffs who engage in fee splitting), *overruled on other grounds*, *Miller v. Egan*, 828 A.2d 549 (Conn. 2003).

161. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 cmt. a, at 149.

162. *See, e.g.*, *Coors Brewing Co. v. Floyd*, 978 P.2d 663 (Colo. 1999); *Carl v. Children's Hosp.*, 702 A.2d 159 (D.C. 1997); *Porterfield v. Mascari II, Inc.*, 823 A.2d 590 (Md. 2003); *Touchard v. La-Z-Boy, Inc.*, 148 P.3d 945 (Utah 2006).

163. *Palmateer v. Int'l Harvester Co.*, 421 N.E. 2d 876 (Ill. 1981); *Boyle v. Vista Eyewear*, 700 S.W.2d 859 (Mo. Ct. App. 1985); *Gardner v. Loomis Armored, Inc.*, 913 P.2d 377 (Wash. 1996); *Feliciano v. 7-Eleven, Inc.*, 559 S.E. 2d 713 (W. Va. 2001).

164. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 cmt. a, at 149.

of generality.<sup>165</sup> Nevertheless, we agree that generally the policies underlying constitutional provisions should serve as the source of public policy.

The pitfalls of depending on constitutional provisions themselves, which mostly require some form of state action to be applicable, is demonstrated in the case of *Novosel v. Nationwide Insurance Co.*<sup>166</sup> As we pointed out in our commentary to Section 4.02:

The court did not hold that the discharge violated the constitutional free speech “right” of the private-sector employee . . . . Rather, the court held that the constitution created a public policy favoring free speech, and that the discharge violated that public policy . . . . However, the issue of whether a constitutional violation exists is analytically distinct from the issue of whether the constitution creates a public policy. Thus, the majority approach does not necessarily foreclose the possibility that, in the future, courts might find that constitutions create policy upon which a public policy tort might rest.<sup>167</sup>

To make this point clearer, we recommend adding another sentence to Comment b: “Although the privacy protections found in the Fourth and Fourteenth Amendment do not protect private workers, courts may find that federal and state constitutions create policies respecting privacy in the workplace upon which a public policy tort may rest.”

Additionally, the Reporters’ Notes to Comment b should cite to *Vasek v. Board of County Commissioners of Noble County*,<sup>168</sup> to support this proposition. Currently, the Reporters’ Notes to comment b state that the decisions that do recognize public policy in constitutional provisions are “of limited precedential value.”<sup>169</sup> Based on this clarification, the Reporters’ Notes to Comment b should delete that phrase.

Finally, the notion that states recognize policy embedded in their state constitutions as the source of law for public policy torts can be bolstered by citing to: *Galati v. America West Airlines, Inc.*,<sup>170</sup> *Fitzgerald v. Salsbury Chemical Inc.*,<sup>171</sup> *Whitings v. Wolfson Casing Corp.*,<sup>172</sup> and *Moshtaghi v.*

165. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 cmt. b, at 149.

166. 721 F.2d 894 (3d Cir. 1983).

167. See *supra* text accompanying notes 114-15 (citations omitted).

168. 186 P.3d 928 (Okla. 2008) (claim for wrongful discharge under public policy exception may be based on a federal constitutional provision that prescribes a norm of conduct for Oklahoma).

169. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 reporters’ notes cmt. b, at 153.

170. 69 P.3d 1011 (Ariz. App. 2003) (observing that Arizona legislation enumerates four circumstances under which an employee may bring a wrongful termination action in Arizona, one of which is when the employer terminates an employee in retaliation for refusing to commit an act in violation of the state constitution).

171. 613 N.W.2d 275, 283 (Iowa 2000) (“In determining whether a clear, well-recognized public policy exists for purposes of a cause of action, we have primarily looked to our statutes but have also indicated our Constitution to be an additional source.”).

*The Citadel*.<sup>173</sup> The Reporters Notes' to Comment b should be amended to add these cases and to note that state constitutions are subject to the same analysis as federal constitutions.

### C. Comment c: Statutes and Ordinances

Comment c states that federal, state, and local statutes and ordinances may generally act as sources of public policy.<sup>174</sup> Although it is accurate to state that, "whether a particular federal, state, or local enactment evinces a public policy . . . is a matter of state law as ultimately determined by the state's highest court," we also believe the other language in this Comment concerning federal preemption is confusing and erroneous. For reasons stated in the Commentary to section 4.01, Comments c and d, we recommend that the following language be deleted: "Under the Supremacy Clause of the federal constitution, a federal statute may preempt state or local law, including the employer-discipline tort itself."

Comment c also cross-references the reader to section 4.01, Comment c. We recommend that this sentence be deleted from this Comment, because it is not necessary to explain the sources of law for public policy. The statement as it reads now also is inconsistent with the suggested change to the Restatement in section 4.01, as well as with revisions to Comments c and d.

### D. Comment d: Decisional Law

Comment d accurately states that decisional law may be the source of public policy.<sup>175</sup> Nevertheless, we would add a sentence to this Comment which would make clear that decisional law as public policy may be from other states, as long as the underlying policy has been sufficiently established. Although decisional law that forms the basis for public policy is generally from the same state in which the court applying the public policy tort doctrine sits,<sup>176</sup> some states have started to look at decisional law from other states as the basis for public policy.<sup>177</sup>

172. 618 S.E.2d 750, 753 (N.C. App. 2005) ("The public policy exception to the at-will employment doctrine is confined to the express statements contained within our General Statutes or our Constitution.").

173. 443 S.E.2d 915 (S.C. App. 1994) (recognizing public policy of free speech in the Constitution of the State of South Carolina).

174. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 cmt. c, at 150.

175. *Id.* § 4.03 cmt. d, at 150.

176. *See, e.g.,* Faulkner v. United Technologies Corp., 693 A.2d 293 (Conn. 1997); Wholey v. Sears Roebuck, 803 A.2d 482 (Md. App. 2002).

177. *See, e.g.,* Dunwoody v. Handskill Corp., 60 P.3d 1135, 1142 (Or. App. 2003) ("We look for

As far as the Illustrations are concerned, one of them does not appear to be based on any actual case law. For instance, Illustration 1 is based on *Geary v. United States Steel Corp.*<sup>178</sup> But *Geary* did not involve a claim that judicially created law in the products liability area should be the basis of public policy. Instead, it merely involved a claim for an exception for employment at-will based on safety concerns the employee had. It held, “only that where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship and no clear mandate of public policy is violated thereby, an employee at will has no right of action against his employer for wrongful discharge.”<sup>179</sup>

We would recommend that Illustration 1 be changed to a case dealing specifically with an assertion of public policy based on decisional law, perhaps even one concerning customary international law, as discussed *supra*.

A problem also exists with regard to the Reporters’ Notes to Comment d. The decisions cited on whether decisional law may be the source of public policy are drawn only from the years 1975 and 1981. Yet, there are many more recent cases.<sup>180</sup> Additionally, the Reporters’ Notes also suggest that “most” states are reluctant to derive public policy “entirely” from judge-made law.<sup>181</sup> The Reporters’ Notes cite to a 1998 California case (quoting a 1992 California case<sup>182</sup>) for this proposition. Yet, in addition to the cases from Maryland and Connecticut noted in the previous paragraph, other states appear to recognize that public policy torts can be based on purely decisional law, including Kansas,<sup>183</sup> New Jersey,<sup>184</sup> and West Virginia.<sup>185</sup> All of these cases are more recent than the case cited in the

‘evidence’ of such a [public policy] in constitutional and statutory provisions, as well as in the case law of this and other jurisdictions.”).

178. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 reporters’ notes cmt. d, at 154 (citing *Geary v. U.S. Steel Corp.*, 319 A.2d 174 (Pa. 1974)).

179. *Geary*, 319 A.2d at 184-85.

180. *See, e.g.*, *Faulkner v. United Tech. Corp.*, 693 A.2d 293 (Conn. 1997) (allowing for public policy claims based on decisional law); *Wholey v. Sears Roebuck*, 803 A.2d 482 (Md. Ct. App. 2002).

181. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 reporters’ notes cmt. d, at 154 (citing *Green v. Ralee Eng’g Co.*, 960 P.2d 1046, 1048 (Cal. 1998)).

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

183. *Hysten v. Burlington N. Santa Fe Ry. Co.*, 108 P.3d 437, 440 (Kan. 2004) (“The public policy of a state is the law of that state as found in its constitution, its statutory enactments, and its judicial decisions.”).

184. *Ballinger v. Delaware River Port Auth.*, 800 A.2d 97, 108 (N.J. 2002) (“Sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions, as well as professional codes of ethics under certain circumstances.”).

185. *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713 (W.Va. 2001) (“[t]o identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions.”) (citation and internal quotation marks omitted).

proposed *Restatement*, which suggests that there might be a move by state courts to begin to rely more frequently on judicially-created law as a source of public policy. In any event, the proposed *Restatement* appears to agree with this outcome when it takes the position that, as long as the “judicially articulated public policy is sufficiently well established[,] . . . there should be no bar to recognizing decisional law as the source of relevant public policy.”<sup>186</sup> Based on this conclusion and the evidence from other jurisdictions, we believe the last sentence of the first paragraph of the Reporters’ Notes to Comment d, which states that “[m]ost courts are reluctant to predicate a tort action entirely on judge-made law,” should be deleted.

*E. Comment e: Administrative Regulations, Decisions, and Orders*

Comment e is accurate that administrative regulations, decisions, and orders that concern safety, health, or welfare, are proper sources of public policy. On the other hand, the Comment is also right to note that administrative rules based on purely administrative concerns are not generally deemed to be sources of public policy.<sup>187</sup>

The persuasiveness of Comment e could be enhanced by adding more recent cases to the Reporters’ Notes to Comment e including: *Bonidy v. Vail Valley Center*,<sup>188</sup> *Schumann v. Dianon Systems, Inc.*,<sup>189</sup> *Coman v. Thomas Manufacturing Co., Inc.*,<sup>190</sup> and *Hobson v. McLean Hospital Corp.*<sup>191</sup>

Illustration 3 is based on the case of *Franklin v. Swift Transportation Co.*,<sup>192</sup> and stands for the proposition that administrative regulations must implicate an important public policy to serve as the basis of a public policy tort. It may be useful to add the other side of the equation with an Illustration establishing when an administrative regulation does implicate public policies. One possible candidate for this new illustration is *Green v.*

186. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 reporters’ notes cmt. d, at 154.

187. *See id.* § 4.03 cmt. e, at 150-51.

188. 186 P.3d 80 (Colo. App. 2008) (finding administrative regulations may be sources of public policy in some circumstances).

189. No. CV0550007475, 2007 Conn. Super. LEXIS 2505 (Sept. 24, 2007) (holding that regulations established pursuant to statutory authority can establish a public policy).

190. 381 S.E.2d 445 (N.C. 1989) (termination of truck driver who refused to violate federal rules adopted in state administrative code violated public policy).

191. 522 N.E.2d 975 (Mass. 1988) (hospital employee responsible for enforcing State safety regulations governing patient care, alleging to have been fired for performing her job accordingly, stated a claim for wrongful termination under the public policy exception).

192. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 reporters’ notes cmt. e, illus. 3, at 155 (citing *Franklin v. Swift Transp. Co.*, 210 S.W. 3d 521 (Tenn. App. 2006)).

*Ralee Engineering Co.*<sup>193</sup> In *Green*, the California Supreme Court held that an at-will employee could assert a public policy tort based on federal safety regulations promulgated to promote the proper manufacture and inspection of component airline parts.<sup>194</sup> Illustration 4 thus could read:

4. An employee, E, worked for an employer, X, that manufactured aircraft components. E complained about company inspection practices which he believed compromised aviation safety. X terminated E for making these complaints. Because E's complaint about inspection practices was based on Federal Aviation Act regulations promoting proper manufacture and inspection of component airline parts, and those regulations implicated important public policies affecting public safety, E may proceed with his public policy tort action based on these federal regulations.<sup>195</sup>

*F. Comment f: Established Principles of Professional Conduct*

Comment f accurately states that established principles of professional conduct may act as a source of public policy.<sup>196</sup> Although many states have not yet taken a position on this issue, seven states have persuasively argued for relying on this source of law for public policy,<sup>197</sup> and we therefore believe the proposed *Restatement* takes the right position on the merits. However, adverse holdings do exist,<sup>198</sup> and the proposed *Restatement* should cite to such cases to show the evolving state of the law in this area.

The Reporters' Notes to Comment f cite to three states that rightly permit professional conduct rules to be the source of law for public policy torts.<sup>199</sup> Additional cites that could be added to bolster this proposition include: *LoPresti v. Rutland Regional Health Services, Inc.*,<sup>200</sup> *Crews v. Buckman Laboratories International, Inc.*,<sup>201</sup> *General Dynamics*

193. 960 P.2d 1046 (Cal. 1998).

194. *Id.* at 1054-55.

195. The Reporters' Notes to Comment e should then be amended to add an entry that states: "Illustration 4 is based on *Green v. Ralee Engineering Co.*, 960 P.2d 1046 (Cal. 1998)."

196. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 cmt. f, at 151.

197. The seven states are Delaware, Colorado, Vermont, New Jersey, New York, California, and Tennessee, and the cases are discussed in the text that follows this note.

198. *See, e.g., Wright v. Shriners Hosp.*, 589 N.E.2d 1241, 1244 (Mass. 1992) ("We would hesitate to declare that the ethical code of a private professional organization can be a source of recognized public policy.").

199. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 reporters' notes cmt. f, at 155 (citing *Rocky Mountain Hosp. & Med. Serv. v. Miriani*, 916 P.2d 519 (Colo. 1996); *Searin v. E.G. Hutton Group, Inc.*, 652 A.2d 578 (Del. Ch. 1994); *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (N.J. 1980).

200. 865 A.2d 1102 (Vt. 2004) (accepting medical ethical code as potential source of public policy).

201. 78 S.W.3d 852 (Tenn. 2002) (holding in-house counsel may bring a common-law action for retaliatory discharge resulting from counsel's compliance with a provision of the Code of Professional Responsibility that represents a clear and definitive statement of public policy).

*Corp. v. Superior Court*,<sup>202</sup> and *Wieder v. Skala*.<sup>203</sup>

Consistent with the last sentence of Comment f, the Reporters' Notes should add that, like administrative regulations, some ethical rules do not implicate important public policies and thus, do not serve as the basis of a public policy tort claim.<sup>204</sup> Appropriately, Illustration 5 makes this point.<sup>205</sup>

## V. CONCLUSION

Unlike some aspects of the law of employment covered in other chapters of the proposed *Restatement*, there is general acceptance of the tort of wrongful discipline in violation of public policy as a concept, and the text of the proposed *Restatement* reflects this fact. Nevertheless, work remains to be done in the proposed *Restatement* on coherently and rigorously describing the contours of the tort. In this area of law, as the saying goes, the devil is in the details. For the proposed *Restatement* to achieve its aim of providing an aid to state courts in improving the administration of the law, it would be desirable to revise the text of sections 4.01, 4.02, and 4.03 to state the rules with greater clarity and to include certain widely recognized applications of the public policy claim that are not in the current draft. In addition, it is important that the comments and illustrations be revised so that they are consistent with the text of the sections. As explained above, in many places in the current draft, the comments and illustrations are inconsistent with the text of the sections they are supposed to explicate.

202. 876 P.2d 487 (Cal. 1994) (in-house counsel could claim retaliatory discharge where discharge was for reasons violating mandatory ethical obligations or where non-attorney employee could bring claim and some provision allowed counsel to depart from client confidentiality rule).

203. 609 N.E.2d 105 (N.Y. 1992) (finding an exception to employment-at-will through implying-in-law an obligation to follow professional conduct rule DR-1-103(a)).

204. See *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873 (D.C. App. 1998) (finding no public policy tort claim where an attorney claimed she was terminated for refusing to violate rules of professional conduct, specifically Rules 5.1 and 5.2, because those laws do not impose a duty upon the subordinate attorney to report anything to her superiors.).

205. Illustration 5 is based on *Warthen v. Toms River Cmty. Mem'l Hosp.*, 488 A.2d 229 (N.J. Super. App. Div. 1985). RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 reporters' notes cmt. f, illus. 5, at 155, cite that case incorrectly. The case name does not include the "Community Memorial" portion of the Hospital's name, and the first page number is inaccurately typed as 299, rather than 229. The insertion of "Community Memorial" may seem trivial but the major legal databases may not return the case without it, depending on how a person searches, particularly where the citation is also incorrect.