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South Carolina Whistleblower Protection: The Good, the Bad, and the Ugly

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SOUTH CAROLINA WHISTLEBLOWER PROTECTION: THE GOOD, THE BAD, AND THE UGLY

I. INTRODUCTION

In 1988 South Carolina enacted a whistleblower protection law.[1] In passing this legislation South Carolina joined the growing number of states that have enacted laws to protect public employees from retaliation for reporting corruption or violations of law that involve public bodies.[2] The Act will have a positive impact on ethics in government because its existence encourages whistleblowers to report improper governmental activities. Public employees should not have to sacrifice their jobs in order to further public policy interests.[3] However, "[o]ften, the whistle blower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss."[4]

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1. Act No. 354, 1988 S.C. Acts 2648 (codified as S.C. CODE ANN. §§ 8-27-10 to -50 (Law. Co-op. Supp. 1990)). For the purposes of this Note the terms "Act," "Whistleblower Act," and "South Carolina Whistleblower Act" will be used interchangeably to designate the South Carolina whistleblower protection law.

2. ALASKA STAT. §§ 39.90.100 to .150 (Supp. 1991); ARIZ. REV. STAT. ANN. § 38-531 to -533 (Supp. 1990); CAL. GOV'T CODE §§ 10540-10551 (West 1980 & Supp. 1991); COLO. REV. STAT. §§ 24-50.5-101 to -107 (1988); CONN. GEN. STAT. ANN. § 31-51m (West Supp. 1991); DEL. CODE ANN. tit. 29, § 5115 (1983); FLA. STAT. ANN. ch. 112.3187 to .3188 (Harrison Supp. 1989 & Supp. 1990); HAW. REV. STAT. §§ 378-61 to -69 (1988); ILL. ANN. STAT. ch. 127, para. 63b119c.1 (Smith-Hurd Supp. 1991); IND. CODE ANN. § 4-15-10-4 (Burns 1990); IOWA CODE ANN. § 79.28 to .29 (West 1991); KAN. STAT. ANN. § 75-2973 (Supp. 1990); LA. REV. STAT. ANN. § 42:1169 (West 1990); ME. REV. STAT. ANN. tit. 26, §§ 831-840 (West 1988); MD. ANN. CODE art. 64A, § 12G (Supp. 1990); MICH. COMP. LAWS ANN. §§ 15.361 to .369 (West 1981 & Supp. 1991); MINN. STAT. ANN. § 181.932 (West Supp. 1991); N.H. REV. STAT. ANN. §§ 275-E:1 to -E:7 (Supp. 1990); N.J. STAT. ANN. § 34:19-1 to -8 (West 1988); N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1991); N.C. GEN. STAT. § 126-84 to -88 (1989); OHIO REV. CODE ANN. §§ 4113.51 to .53 (Anderson 1991); OR. REV. STAT. §§ 240.316, 659.035, 659.505 to .545 (1989 & Supp. 1990); 43 PA. CONS. STAT. ANN. §§ 1421-1428 (1991); R.I. GEN. LAWS §§ 36-15-1 to -10 (1990); TENN. CODE ANN. § 50-1-304 (Supp. 1991); TEX. REV. CIV. STAT. ANN. art. 6252-16a (West Supp. 1991); WASH. REV. CODE ANN. §§ 42.40.010 to .900 (West 1991); WIS. STAT. ANN. §§ 230.80 to .89 (West 1987 & Supp. 1991).

3. *See* Wagner v. City of Globe, 722 P.2d 250, 255 (Ariz. 1986) (en banc).

4. S. REP. No. 969, 95th Cong., 2d Sess. 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2730.

The South Carolina Supreme Court recently examined its first whistleblower case. In *Gamble v. City of Manning*[5] Gamble, a public employee, reported wrongdoing by the city's administration that included racially discriminatory practices and use of city resources for the mayor's personal benefit. Shortly after Gamble submitted these allegations in writing, the city suspended him. The city fired Gamble during this suspension, and Gamble brought suit alleging a violation of the Act. At trial the city produced evidence that it fired Gamble for independent cause.[6] In upholding the trial court's denial of Gamble's request for judgment notwithstanding the verdict, the court found that whether Gamble had been fired for independent cause was a question of fact for the jury.[7] The case both helps and hurts whistleblowers. If whistleblowers are victorious at trial, appellate review is limited. However, even though a presumption exists that the Whistleblower Act has been violated if the employee is terminated within one year of reporting the wrongdoing,[8] potentially weak employer justifications may create questions of fact for the jury.

Pros and cons of whistleblower protection exist. Additionally, First Amendment rights of public employees are important in whistleblower analysis. The leading United States Supreme Court cases support whistleblowing,[9] but the protection is limited. Consequently, the lower courts have applied the Supreme Court holdings with mixed results for whistleblowers.[10] An examination of whistleblower case law in other jurisdictions, an examination of recent South Carolina case law, and a review of the South Carolina Whistleblower Act will aid in determining future implications of the Act in South Carolina.

II. THE PROS AND CONS OF WHISTLEBLOWING AND WHISTLEBLOWER PROTECTION

Whistleblowing is patriotic if done for the right reasons. It can, however, amount to extortion if done for the wrong reasons. Whistleblowers are sometimes heroes; other times they are the enemy. Unfortunately, employers often do not distinguish between the two. Therefore, courts must remedy the unjust ways in which many whistleblowers are treated.

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5. 405 S.E.2d 829 (S.C. 1991).

6. *Id.* at 829-30.

7. *Id.* at 830.

8. S.C. CODE ANN. § 8-27-30 (Law. Co-op. Supp. 1990).

9. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983).

10. *See, e.g.*, Fiorillo v. United States Dept. of Justice, 795 F.2d 1544 (Fed. Cir. 1986); Porter v. Califano, 592 F.2d 770 (5th Cir. 1979).

Some courts protect whistleblowers in the private sphere of employment with a judicial exception to the employment-at-will doctrine. These courts include whistleblowing within the public-policy exception to the doctrine.[11] Similar judicial protection of whistleblowers exists in the public sphere of employment. For example, in *Wagner v. City of Globe*[12] Edward Wagner, a rookie police officer, reported that two senior officers illegally detained a vagrant. The police chief fired Wagner because he did not want "big city cops" telling him how to run his department.[13] The Arizona Supreme Court held that Wagner's complaint stated a cause of action and recognized that "whistleblowing employees have gained a measure of judicial protection."[14] The court endorsed the protection of whistleblowing, although in a limited manner. The court stated: "We believe that whistleblowing activity which serves a public purpose should be protected. So long as employees' actions are not merely private or proprietary, but instead seek to further the public good, the decision to expose illegal or unsafe practices should be encouraged."[15]

As opposed to, and sometimes in addition to, judicial protection, some states provide statutory protection for whistleblowers.[16] Michigan was the first state to enact a comprehensive law to protect whistleblowers.[17]

Courts face, however, policy dilemmas when they protect employee dissent. Historically, employees owed strict allegiance to only the employer.[18] "Employee dissent recognizes [however] . . . that employees . . . owe independent and perhaps conflicting loyalties."[19] The question is not whether the employer deserves loyalty. Loyalty is not an absolute duty; it is owed only under appropriate circumstances.

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11. *See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980); Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978); *cf.* Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985) (stating that the public policy exception in South Carolina prohibits an employer from requiring an at-will employee to violate the law).

12. 722 P.2d 250 (Ariz. 1986) (en banc).

13. *Id.* at 252.

14. *Id.* at 256 (citing Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980); Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978)).

15. *Id.* at 257.

16. *See supra* note 2.

17. Act No. 469, 1980 Mich. Pub. Acts 2048 (codified as MICH. COMP. LAWS ANN. §§ 15.361 to .369 (West 1981 & Supp. 1991)).

18. Nicholas M. Rongine, *Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing*, 23 AM. BUS. L.J. 281, 285 (1985).

19. *Id.*

Whistleblowers argue that absolute loyalty to a misbehaving employer is inconsistent with the employee-citizen's duty to protect the public's right to know.[20]

Whistleblower protection laws clearly are not intended to be vehicles for extortion.[21] "Unfortunately some . . . employees abuse whistleblower rights by using them as bargaining chips in negotiations with their bosses."[22] These employees are bad faith whistleblowers. Bad faith whistleblowers attempt to insulate themselves from discipline by threatening to expose government misconduct, and a vulnerable or negligent supervisor may feel compelled to negotiate with the whistleblower. The South Carolina Act attempts to guard against bad faith whistleblowing by protecting public sector employees that report allegations of governmental gross negligence,[23] while apparently excluding coverage for allegations of simple negligence.

Wolcott v. Champion International Corp.[24] is a prime example of bad faith whistleblowing. In *Wolcott* an employee wrote a letter to management in which the employee threatened to expose pollution problems. In the letter the employee demanded assurances about his job situation as a reward for not reporting the alleged violations. After the company received the threatening letter, a company representative met with the employee and tried to investigate his complaints. The employer suspended the employee for the threatening approach taken in the letter. A corporate manager then recommended a plan to eliminate the employee's position through a one-man reduction in force.[25] After his termination the employee sued under the Michigan Whistleblowers' Protection Act.[26] The district court dismissed the claim on a summary judgment motion because the employee failed to establish a prima facie case of retaliatory firing.[27] The judge subsequently denied motions to amend or alter the judgment and stated that the employee "reported actual violations only after an extortive

20. *See id.* at 285-86. The Colorado Whistleblower Act justifies employee protection on this right-to-know basis. COLO. REV. STAT. § 24-50.5-101 (1988); *see also* Hopkins v. City of Midland, 404 N.W.2d 744, 749 (Mich. Ct. App. 1987) ("[I]nherent in the [Michigan Whistleblower] [A]ct is a purpose to protect the public by protecting employees who report violations of laws and regulations.").

21. *See* Wolcott v. Champion Int'l Corp., 691 F. Supp. 1052, 1059 (W.D. Mich. 1987).

22. Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355, 362 (1991).

23. S.C. CODE ANN. § 8-27-20 (Law. Co-op. Supp. 1990).

24. 691 F. Supp. 1052 (W.D. Mich. 1987).

25. *Id.* at 1054-57.

26. MICH. COMP. LAWS ANN. §§ 15.361 to .369 (West 1981 & Supp. 1991).

27. *Wolcott*, 691 F. Supp. at 1058.

quid pro quo failed."[28]

Courts should deny relief to bad faith whistleblowers because these whistleblowers injure the public. For example, if courts accept the quid pro quo, corrupt government officials will remain in office. Knowledge of government misconduct should not be a private asset that the employee can sell to the government.

Until recently whistleblower protection law reflected ambiguity, hypocrisy, and distrust of whistleblowers. Unfortunately, "whistleblowers are hated, harassed and vilified" by employers.[29] According to some employers, whistleblowers are not team players; they are tattletales who cannot mind their own business.[30] Perhaps the true reason that employers feel negatively towards whistleblowers is that people in high places do not like to hear bad news about their organizations.[31] The Bible advises us, "Thou shall not speak evil of the ruler of thy people."[32] Whistleblowers are frequently criticized for being selfish, self-righteous, and critical of their leaders.

Based on the general animosity and distrust of whistleblowers, employers retaliate in a number of ways and for a number of reasons.[33] A potentially effective strategy for neutralizing employee dissent is to make the whistleblowers, rather than their messages, the issue.[34] This forces the whistleblowers to defend their employment records and raises questions regarding their credibility. The basis of the whistleblowing becomes a secondary issue and every aspect of the whistleblower's life becomes germane.

In *Gamble v. City of Manning*[35] Mayor Ridgeway used a subtler form of this neutralizing tactic. She ordered an audit of the payroll and accounts payable system which exposed that the plaintiff, and several other employees, had received extra compensation from these systems.[36] The *Gamble* opinion does not disclose whether Mayor Ridgeway knew of these infractions before she ordered the audit. If she had known, the audit would illustrate the "*Let Him Who is Without Fault Cast the First Stone*" strategy.[37]

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28. *Id.* at 1065 (on motion to alter or amend).

29. Fisher, *supra* note 22, at 359.

30. *Id.* at 360.

31. *See id.* at 359-60.

32. *Acts* 23:5 (King James).

33. *See* Fisher, *supra* note 22, at 363-69.

34. Thomas M. Devine & Donald G. Aplin, *Whistleblower Protection—The Gap Between the Law and Reality*, 31 How. L.J. 223, 224 (1988).

35. 405 S.E.2d 829 (S.C. 1991).

36. *Id.* at 830.

37. Fisher, *supra* note 22, at 364; *see* John 8:7 (King James) ("He that is without sin among you, let him first cast a stone at her.").

> A subtler form of this tactic, one that . . . gains the stature of objectivity, occurs when the boss or section chief issues directives condemning a particular type of conduct, knowing full well that the whistleblower *has already* engaged in the conduct condemned. This puts the whistleblower on the defensive and can neutralize him because the boss can, with a straight face, ask staff members to report any violations of the condemned conduct. How awful it would be if a whistleblower were caught violating a policy or rule, because the whistleblower is by definition one who is offended by rule or policy infractions.[38]

The *Gamble* audit neutralized the plaintiff's whistleblower allegations at trial. It also created a question of fact regarding his dismissal. This strategy is a classic example of how to get rid of a whistleblower. In *Gamble* this form of retaliation probably persuaded the jury to find for the employer.[39]

III. First Amendment Protection

Essentially, whistleblowing is an exercise of free speech protected by the First Amendment.[40] Accordingly, public employers cannot condition employment upon the relinquishment of this First Amendment right.[41] In *Pickering v. Board of Education*[42] the Supreme Court clarified that an individual that accepts public employment does not automatically relinquish First Amendment rights to comment on matters of public interest, even if these matters involve the individual's employer.[43] In *Brown v. Texas A & M University*[44] the court explained why whistleblowing is protected by the First Amendment:

> If whistleblowing were not within the protective bosom of the First Amendment, our government would be shorn of many of the instruments of investigation, which effectively have led to the elimination of a few bad apples among the barrels of very efficient, effective, honorable and honest public servants. Public employees are uniquely qualified to reveal unseemly machinations by their fellow employees because they observe them on a daily basis.[45]

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38. Fisher, *supra* note 22, at 364.

39. *Gamble*, 405 S.E.2d at 830. For a thorough discussion of other retaliation strategies, see Fisher, *supra* note 22, at 363-69.

40. *See* Stephen M. Kohn & Michael D. Kohn, *An Overview of Federal and State Whistleblower Protections*, 4 Antioch L.J. 99, 105 (1986).

41. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

42. 391 U.S. 563 (1968).

43. *Id.* at 568.

44. 804 F.2d 327 (5th Cir. 1986).

45. *Id.* at 337.

Pickering recognizes, however, that free speech rights are not absolute. The determination of whether an employer properly discharged an employee who engaged in speech requires a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[46] This balancing test recognizes the duality of the public employer as both a provider of services and a governmental entity subject to First Amendment constraints.[47]

The crucial initial inquiry in the *Pickering* balancing test is whether the employee comments on a matter of public concern.[48] The trial court must decide this issue of public concern as a matter of law based upon the "content, form, and context of a given statement."[49] If the employee's speech does not touch on a matter of public concern, then the court need not scrutinize the reasons for the discharge.[50] However, even if only one of several comments touches on a matter of public concern, the State must justify the discharge on legitimate grounds.[51]

The State's burden in justifying the discharge "varies depending upon the nature of the employee's expression."[52] The reviewing court should consider whether the employee's conduct impaired the superior's ability to administer discipline or created disharmony in the workplace.[53] A court also should consider if the speech impeded the speaker's performance of a duty or interfered with the regular operation of the public institution.[54]

If the employee is not in a "confidential, policymaking, or public contact role," comments to coworkers present only minimal danger to the agency's successful operation.[55] However, higher level employees may enjoy less protection because their jobs may require close working relationships that are necessary to fulfill their public duties.[56]

Although the employer's interest in avoiding disruption is one factor weighed in the *Pickering* balancing test, courts recognize that all

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46. *Pickering*, 391 U.S. at 568.
47. Rankin v. McPherson, 483 U.S. 378, 384 (1987).
48. Connick v. Myers, 461 U.S. 138 (1983).
49. *Id.* at 147-48.
50. *Id.* at 146.
51. *Id.* at 149.
52. *Id.* at 150.
53. *See id.* at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).
54. *See id.*
55. Rankin v. McPherson, 483 U.S. 378, 390-91 (1987).
56. *See Connick*, 461 U.S. at 151-52.

possible disruptions that might result from whistleblowing cannot constitute sufficient grounds to uphold a discharge.[57] In *Porter v. Califano*[58] the court explained:

> An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.[59]

However, one well-known decision reached the opposite conclusion based on the personal motives of the whistleblower. In *Fiorillo v. United States Department of Justice*[60] Fiorillo, a prison guard who previously reported several alleged improprieties of prison management, requested a transfer to a less stressful position. The warden denied the request. Fiorillo then sued the Bureau of Prisons and individual prison employees and alleged improper retaliation.[61]

After filing suit Fiorillo informed the press about his suit and made disparaging comments about the prison's management. Newspaper articles reported that the prison was, according to Fiorillo, " ' "saturated with corruption." ' "[62] Examples included incidents in which a male prison guard raped a female inmate, an inmate received an abortion in a local hospital under an assumed name, and a convicted spy enjoyed unlimited telephone privileges.[63] After Fiorillo's communications with the press, the warden suspended and demoted him.[64]

In its analysis the court noted that "[n]either party here contests that [Fiorillo's] communications to the press were the 'motivating' cause of his demotion."[65] However, the motivating cause was irrelevant because the court held that Fiorillo's communications to the press did not address a matter of public concern.[66] The court based its holding on the grounds that " '[Fiorillo's] motive for releasing such generalized and objurgatory statements to the press was for personal reasons and not to inform the public of matters of general concern,' so that [Fi-

57. *See, e.g.*, Conaway v. Smith, 853 F.2d 789, 797-98 (10th Cir. 1988) (per curiam).
58. 592 F.2d 770 (5th Cir. 1979).
59. *Id.* at 773-74.
60. 795 F.2d 1544 (Fed. Cir. 1986).
61. *Id.* at 1545-46.
62. *Id.* at 1564 app. b (quoting Gordon Dillow, *Terminal Island Guards Sue Over Corruption*, LOS ANGELES-HERALD EXAMINER, Apr. 27, 1983, at A10).
63. *Id.* at 1563 app. a (citing Dan Morain, *Terminal Island Whistle Blower Files Suit: Guard Claims Harassment for Revealing Corruption at Prison*, LOS ANGELES TIMES, Apr. 27, 1983, pt. II, at 1, 6).
64. *Id.* at 1546.
65. *Id.* at 1550.
66. *Id.* (citing Connick v. Myers, 461 U.S. 138 (1983)).

orillo] was not entitled to protection as a 'whistleblower.' "[67]

The court also applied the *Pickering* balancing test and stated, "The agency was [justifiably] concerned that [Fiorillo's] statements would have adversely affected the discipline and morale at [the prison]."[68] It is unclear, however, why the majority applied the test if Fiorillo's speech did not address a matter of public concern. The court stated that "[i]f the 'speech' is not protected, it is unnecessary to scrutinize the reasons for the demotion."[69]

The *Fiorillo* dissent discredited both the majority's concern with morale and discipline and the majority's view that Fiorillo's statements lacked public interest by pointing out that "[f]ederal criminal indictments against several prison officials and guards had already been issued,"[70] and that six newspapers considered the allegations newsworthy.[71] The dissent challenged the holding that personal animosity is a bar to recovery:

> Contrary to the statement in the majority opinion, the Court [has] imposed no requirement that "the *primary* motivation of the employee must be the desire to inform the public on matters of public concern, and not personal vindictiveness." The test of protected speech is not one of subjective motivation. The test is objective: does the employee's speech reflect a matter of *general* concern, or solely matters of internal or personal interest such as office morale, salary levels, or duty assignments?[72]

Fiorillo also is vulnerable on other grounds. To focus solely on the employee's motivation overlooks the content of the employee's speech. The content "is undoubtedly a material concern."[73] Courts should consider "the content, form, and context" of the statement.[74] The *Fiorillo* court relied, however, solely on the context in which the statement was made. Although one of Fiorillo's motives in communicating to the press

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67. *Id.* (quoting arbitrator's decision).

68. *Id.* at 1551.

69. *Id.* at 1550 (citing *Connick*, 461 U.S. at 146). Justice Brennan's dissent in *Connick*, three years earlier, virtually predicted the fault in the *Fiorillo* court's analysis. Brennan stated:

> [T]he Court distorts the balancing analysis required under *Pickering* by suggesting that one factor, the context in which the statement is made, is to be weighed *twice*—first in determining whether an employee's speech addresses a matter of public concern and then in deciding whether the statement adversely affected the government's interest as a employer.

Connick, 461 U.S. at 157-58 (Brennan, J., dissenting).

70. *Fiorillo*, 795 F.2d at 1558 (Newman, J., dissenting).

71. *Id.*

72. *Id.* at 1557 (Newman, J., dissenting) (quoting *id.* at 1550).

73. Kurtz v. Vickrey, 855 F.2d 723, 727 (11th Cir. 1988).

74. Connick v. Myers, 461 U.S. 138, 147-48 (1983).

was to help his lawsuit, he also intended to expose the warden's corruption. Fiorillo was not a bad faith whistleblower.

If a court determines that an employee's speech is protected, it must then determine whether there was a constitutional violation. Under the Supreme Court's decision in *Mount Healthy City School District Board of Education v. Doyle*[75] plaintiffs have the burden of proving that their speech is constitutionally protected and was a substantial or motivating factor in the decision not to rehire them.[76] Once a plaintiff establishes these elements, the employer can escape liability only by proving by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.[77] The employer must prove that " 'its legitimate reason, standing alone, would have induced it to make the same decision.' "[78] Proving that the same decision would have been justified, however, does not prove that the same decision would have been made.[79]

In *Mount Healthy* Doyle, the plaintiff school teacher, claimed his employer fired him for exercising his First Amendment right of free speech. Doyle informed a local radio station that the school had adopted a new dress code for teachers.[80] Doyle also was involved in prior incidents, including one in which he had made obscene gestures to a group of girls eating lunch in the school cafeteria.[81] The school board cited the obscene gestures as an independent reason not to rehire Doyle.[82] The Supreme Court found instructive a test of causation, utilized in other areas of constitutional law, "which distinguishes between a result caused by a constitutional violation and one not so caused."[83] In *Mabey v. Reagan*,[84] decided one year before *Mount Healthy*, the court acknowledged the difficulties with mixed-motive cases:

> The potential for subterfuge exacerbates our dilemma. On the one hand, our reluctance to intrude deeply into the administrative process may permit an ill-motivated decision-maker spuriously to cite appar-

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75. 429 U.S. 274 (1977).

76. *Id.* at 287 (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977)).

77. *Id.*

78. Bryson v. City of Waycross, 888 F.2d 1562, 1566 (11th Cir. 1989) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (plurality)).

79. Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 416 (1979) (quoting Ayers v. Western Line Consol. Sch. Dist., 555 F.2d 1309, 1315 (5th Cir. 1977)).

80. *Mount Healthy*, 429 U.S. at 282.

81. *Id.* at 281-82.

82. *Id.* at 283.

83. *Id.* at 286.

84. 537 F.2d 1036 (9th Cir. 1976).

> ently legitimate grounds for non-retention. On the other hand, solicitude for First Amendment rights, and the need for prophylactic rules to prevent encroachments on them, may aid an incompetent or otherwise undesirable employee.[85]

A *Mount Healthy* plaintiff will face a difficult task in that "the crucial testimony regarding causation is likely to come from the individual who made the challenged decision, and who thus has a strong personal interest in seeing it upheld."[86] The only protection *Mount Healthy* provides is that the employer "bear[s] the risk that the influence of legal and illegal motives cannot be separated, because [the employer] knowingly created the risk and because the risk was created not by innocent activity but by [the employer's] own wrongdoing."[87] However, this but-for causation test places a difficult burden on the court. "We place unrealistic expectations on our adversary system and its evidentiary format when we ask a judge to find as a matter of fact what *would have* occurred if the discrimination, already shown to have been a motivating consideration, had not so operated."[88]

The employer's burden in *Mount Healthy* is in the nature of an affirmative defense.[89] An employer may theoretically admit that it retaliated against the plaintiff, but claim that the same decision would have been made even if the protected conduct had not occurred.

The underlying premise of the *Mount Healthy* analysis is that persons who exercise their First Amendment rights should not be placed in a better position as a result of their protected activity.[90] However, the employer should face some risk that a discharged employee will benefit because the employer acted out of an illegitimate motive.[91] After all, if employers decide to retaliate, they should be prepared to accept the consequences. Nonetheless, as one commentator has noted:

> A modest amount of reflection reveals the pro-employer bias of the *Mount Healthy* test. It allows an employer to fire an employee who engages in socially-desirable conduct, such as whistleblowing, if the employer can point out an independent basis for firing the em-

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85. *Id.* at 1045 (citing Robison v. Wichita Falls & N. Tex. Community Action Corp., 507 F.2d 245, 256 (5th Cir. 1975); Russo v. Central Sch. Dist. No. 1, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973)).

86. Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 321 (1982).

87. NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983).

88. Brodin, *supra* note 86, at 320.

89. Price Waterhouse v. Hopkins, 490 U.S. 228, 246 (1989) (plurality) (citing *Transportation Management*, 462 U.S. at 400).

90. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977).

91. *See Transportation Management*, 462 U.S. at 403.

ployee. *Mount Healthy* permits this conduct even though the socially-desirable conduct was a basis for the employer's dismissal of the employee. This is the dark side of *Mount Healthy*.[92]

The *Mount Healthy* test has survived for fifteen years. The Court also has utilized it in mixed-motive cases[93] arising under Title VII of the Civil Rights Act of 1964.[94] In *Price Waterhouse v. Hopkins*,[95] a Title VII mixed-motive case, the entire Court adopted the *Mount Healthy* view when it found that once employees have established that their constitutionally protected status was a substantial or motivating factor in adverse employment decisions, employers then bear the burden of proving " 'by a preponderance of the evidence that [they] would have reached the same decision[s] . . . even in the absence of the protected conduct.' "[96]

Price Waterhouse states that an employer may not prevail in a mixed-motive case by offering a legitimate reason unless that reason actually motivated the employer at the time of the decision.[97] The employer must show that it would have made the same decision based solely on the legitimate reason.[98]

One factor a court may look to in determining if the legitimate reason actually motivated the employer is equal punishment for

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92. Fisher, *supra* note 22, at 378. *Mount Healthy* also has been criticized on the ground that it requires the employee to prove that discrimination was the sole cause of the discharge. *See* Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 626 (Minn. 1988) (en banc). *But see* Rakovich v. Wade, 850 F.2d 1180, 1190 (7th Cir. 1988) (en banc) ("Neither is [*Mount Healthy*] so burdensome that the plaintiff must show that the defendant's desire to inhibit protected conduct was the sole move for his actions.") (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977)).

93. "In mixed-motive cases . . . there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate." *Price Waterhouse*, 490 U.S. at 260 (White, J., concurring).

94. 42 U.S.C. § 2000e (1988). Section 2000e-3 provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id. § 2000e-3.

95. 490 U.S. 228 (1989) (plurality).

96. *Id.* at 249 (quoting Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)); *see also id.* at 259-60 (White, J., concurring) (citing *Mount Healthy*, 429 U.S. at 287); *id.* at 276 (O'Connor, J., concurring); *id.* at 280 (Kennedy, J., dissenting).

97. *Id.* at 252 (plurality). Under *Price Waterhouse* an employer should produce "objective evidence as to its probable decision in the absence of an impermissible motive." *Id.*

98. *Id.*

nonwhistleblowing employees who engaged in identical conduct.[99] Although an employee's misconduct may be a basis for discharge, it may not be a basis for prohibited forms of discrimination.[100]

The Court has not, however, extended the *Mount Healthy* analysis to Title VII pretext cases.[101] In *Texas Department of Community Affairs v. Burdine*,[102] a Title VII pretext case, the Court held that employees retain the burden of persuasion on all elements of their claims.[103] The *Burdine* Court clarified that the test for Title VII pretext cases announced in *McDonnell Douglas Corp. v. Green*[104] shifts to

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99. *See* Morris v. Washington Metro. Area Transit Auth., 702 F.2d 1037, 1048 (D.C. Cir. 1983).

100. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 (1976) (stating that white employees fired for stealing cargo could sue under Title VII for discrimination because a black employee charged with same offense was not discharged); Abasiekong v. City of Shelby, 744 F.2d 1055, 1057 (4th Cir. 1984) ("Had no disparate treatment favoring whites been established, the impropriety of diversion of public property to private use and enjoyment would doubtless have justified the termination . . . .") (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)).

101. *See Price Waterhouse*, 490 U.S. at 246-47 (plurality); *id.* at 260 (White, J., concurring). In pretext cases the employer asserts a legal reason for the decision, the employee asserts an illegal reason, and the court decides which is true. " '[T]he issue is whether either illegal or legal motives, but not both, were the "true" motives behind the decision.' " *Id.* at 260 (White, J., concurring) (quoting NLRB v. Transportation Management Corp., 462 U.S. 393, 400 n.5 (1983)).

102. 450 U.S. 248 (1981).

103. *Id.* at 253 (citing Board of Trustees v. Sweeney, 439 U.S. 24, 25 n.2 (1978) (per curiam); *id.* at 29 (Stevens, J., dissenting)).

104. 411 U.S. 792 (1973). Under the *McDonnell Douglas* burden of proof allocation the plaintiff has the initial burden of proving a prima facie case. To establish a prima facie case, the plaintiff must show: " '(1) that he protested practices contrary to Title VII; (2) that he was subject to an adverse action by his employer; and (3) that the adverse action is linked to the protected conduct.' " Jones v. Lyng, 669 F. Supp. 1108, 1121 (D.D.C. 1986) (quoting Segar v. Civiletti, 516 F. Supp. 314, 319 (D.D.C. 1981) (mem.)).

The burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. If the defendant carries its burden, the plaintiff must be given the opportunity to prove that the reasons offered by the employer were a pretext for unlawful discrimination. *Id.* at 804. The plaintiff can prove pretext "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256 (citing *McDonnell Douglas*, 411 U.S. at 804-05).

One difficult evidentiary issue is the extent to which the plaintiff may use the employer's prior bad acts in establishing pretext. *See, e.g.*, Krieger v. Gold Bond Bldg. Prods., 863 F.2d 1091, 1096 (2d Cir. 1988) (stating that evidence that employer had different standards for female and male employees is admissible to prove discriminatory intent); Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1135 (4th Cir. 1988) (stating that "[j]ury trials are not antiseptic events, and in a case involving racial discrimination, upsetting facts may well emerge" and should be admitted if relevant); McCluney v. Jos. Schlitz Brewing Co., 728 F.2d 924, 928 (7th Cir. 1984) (stating that em-

the employer only a burden of production.[105]

IV. STATE WHISTLEBLOWER ACTS

State courts, like the federal courts, have differed on the standard of causation to apply with claims of disparate treatment. Some states have adopted the *McDonnell Douglas* burden of proof scheme and standard of causation in analyzing whistleblower claims. Other states retain the *Mount Healthy* test. Over one-half of the states have enacted whistleblower protection laws.[106] These laws are less than ten years old; many are new and untested.

In 1981 Michigan became the first state to enact whistleblower protection legislation.[107] The Michigan Act protects public and private employees that report actual or suspected violations of law.[108] The Michigan Act provides for liberal remedies, which include reinstatement, backpay, actual damages, attorney fees, and costs.[109] In *Melchi v. Burns International Security Services, Inc.*[110] a federal court first interpreted the Michigan Whistleblowers' Protection Act. In *Melchi* the court drew an analogy between Title VII of the Civil Rights Act of 1964[111] and the Michigan Act.[112] The district court reasoned that both acts "protect the integrity of the law by removing barriers to employee efforts to report violations of the law."[113] The *Melchi* court recognized a distinction under the Michigan Act between pretext cases, in which the *McDonnell Douglas* burden of proof governs,[114] and mixed-motive cases, in which the *Mount Healthy* approach governs.[115] The court determined that the *McDonnell Douglas* prima facie case analysis "more clearly and precisely establishes a plaintiff's initial burden in a claim

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ployee may introduce any evidence that may be relevant to a showing of pretext) (quoting *McDonnell Douglas*, 411 U.S. at 804-05); Morris v. Washington Metro. Area Transit Auth., 702 F.2d 1037, 1045-47 (D.C. Cir. 1983) (holding that similar acts of retaliation are admissible to establish municipal policy or custom of retaliation).

105. *See Burdine*, 450 U.S. at 254 ("The burden that shifts to the defendant . . . is to rebut the presumption . . . .").

106. *See supra* note 2.

107. Act No. 469, 1980 Mich. Pub. Acts 2048 (codified as MICH. COMP. LAWS ANN. §§ 15.361 to .369 (West 1981 & Supp. 1991)).

108. *Id.* § 15.362.

109. *Id.* § 15.364.

110. 597 F. Supp. 575 (E.D. Mich. 1984) (mem.).

111. 42 U.S.C. § 2000e (1988).

112. *Melchi*, 597 F. Supp. at 581.

113. *Id.*

114. *Id.* at 581-82.

115. *Id.* at 582-83.

brought under the Whistleblowers' Act."[116] The court concluded, however, that the plaintiff's ultimate burden should be measured under the standards articulated in *Mount Healthy*.[117] However, in *Hopkins v. City of Midland*[118] the Michigan Court of Appeals rejected the *Mount Healthy* test in analyzing claims under the Michigan Act.[119] The court adopted instead the analysis of *Burdine* and *McDonnell Douglas*. The *Hopkins* court explained that these cases protect the rights of employers to make decisions based on legitimate business reasons and foster the goals of whistleblower law more effectively than does *Mount Healthy*'s "but for" standard.[120]

On the other hand, the Colorado Supreme Court adopted the *Mount Healthy* standard in *Ward v. Industrial Commission*.[121] According to *Ward*, fired employees must first establish that their disclosures fell within the protection afforded by the whistleblower act. The employees next must show that these disclosures were a substantial or motivating factor in the adverse employment decisions. Once the employees make these showings, the employers must then prove by a preponderance of the evidence "that [they] would have reached the same decision[s] even in the absence of protected conduct."[122] The *Ward* court gave no insight into why it preferred the *Mount Healthy* allocation of proof.

V. The South Carolina Whistleblower Act

The South Carolina Whistleblower Act became law in 1988.[123] The Act protects only employees of public bodies.[124] The Act provides a number of potential remedies, which include actual damages, court

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116. *Id.* at 582.

117. *Id.* at 583.

118. 404 N.W.2d 744 (Mich. Ct. App. 1987).

119. *Id.* at 752.

120. *Id.*

121. 699 P.2d 960, 967-68 (Colo. 1985) (en banc).

122. *Id.* at 968. Neither the Colorado nor the Michigan Act specifies a standard of causation. *See* Colo. Rev. Stat. §§ 24-50.5-101 to -107 (1988); Mich. Comp. Laws Ann. §§ 15.361 to .369 (West 1981 & Supp. 1991). Therefore, courts in these states are free to allocate the burden of proof in accordance with their views of *Burdine* and *Mount Healthy*. South Carolina courts will not have this freedom. *See infra* notes 151-53, 159-60 and accompanying text for a discussion of the South Carolina burden of proof scheme and standard of causation.

123. Act No. 354, 1988 S.C. Acts 2648 (codified as S.C. Code Ann. §§ 8-27-10 to -50 (Law. Co-op. Supp. 1990)).

124. S.C. Code Ann. § 8-27-10(2) (Law. Co-op. Supp. 1990) (definition of employee); *id.* § 8-27-50 (application of the Act).

costs, and reasonable attorney fees.[125]

Under the South Carolina Act it appears that an employee may file suit without exhausting administrative remedies.[126] In addition, employees may file suit in the county in which they live at the time of commencing the action or in the county in which the alleged unlawful activity occurred.[127] The Act also provides for a two-year statute of limitations.[128] The trial may be before a jury or a judge.[129]

In a whistleblowing case in South Carolina, the plaintiff's initial burden is to prove the existence of a protected activity. Protected activities include acts in which the plaintiff reports a violation of any state or federal law or regulation.[130] In addition, employees cannot be fired if they expose "governmental criminality, corruption, waste, fraud, gross negligence, or mismanagement" or if they testify regarding any protected matters.[131] Courts may require a report to be in writing, but at least one state protects oral reports.[132]

In South Carolina employees who wish to report a violation may call the fraud hotline established by the State Auditor's Office.[133] No other state office officially receives whistleblower reports. Employees should be able to safely report wrongdoing directly to the public official responsible for the office in which they work.[134] Employees should use caution, however, if they report the violation directly to the

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125. *Id.* § 8-27-30(C).

126. The South Carolina Whistleblower Act is silent on the issue. *See id.* §§ 8-27-10 to -50. Three other states require an employee to exhaust all available administrative remedies before filing a whistleblower suit. *See* CONN. GEN. STAT. ANN. § 31-51m(a)(4)(c) (West Supp. 1991); FLA. STAT. ANN. ch. 112.3187(8) (Harrison Supp. 1989); TEX. REV. STAT. ANN. art. 6252-16a, § 3(d) (West Supp. 1991).

127. S.C. CODE ANN. § 8-27-30(A) (Law. Co-op. Supp. 1990).

128. *Id.* § 8-27-30(D).

129. *Id.* § 8-27-30(A).

130. *Id.* § 8-27-20.

131. *Id.*

132. *See* Ward v. Industrial Comm'n, 699 P.2d 960, 967 (Colo. 1985) (en banc) (stating that the Colorado Legislature did not exclude oral disclosures from the Colorado Whistleblower Act).

133. The toll-free number is (800) 521-4493.

134. *Cf.* Travis County v. Colunga, 753 S.W.2d 716, 721 (Tex. Ct. App. 1988) (stating that the report need not be made to the most appropriate authority). Courts in other jurisdictions have held, however, that if an employee reports misconduct privately to the employer rather than to the appropriate authority, then the employee did not seek to further the public good and is not entitled to whistleblower protection. *See* Zaniecki v. P.A. Bergner & Co., 493 N.E.2d 419, 421-22 (Ill. App. Ct. 1986); Wiltsie v. Baby Grand Corp., 774 P.2d 432, 433 (Nev. 1989) (per curiam). Although the employee may lose whistleblower protection when the communication is made privately to the employer, First Amendment protection still exists. Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 415-16 (1979).

wrongdoer.[135]

In Texas an employee must report violations of law to "an appropriate law enforcement authority."[136] In *Travis County v. Colunga*[137] the court held that an appropriate law enforcement authority "includes at minimum *any* public authority having the power and duty of inquiring into the lawfulness of the questioned conduct and causing its cessation if the conduct appears to be in violation of the law."[138] *Travis County* explained that it is "highly doubtful that the Legislature intended a public employee to bear the risk of guessing erroneously as to the sometimes complex statutory powers committed to a particular public authority."[139]

Once employees decide to whom to report, they must decide what to include in their reports. One South Carolina circuit court required the employee to have a good faith belief in the allegation before reporting a violation of law.[140] A public body may fire an employee who reports an alleged violation without a good faith belief, but it may not fire an employee who acts in good faith. This distinction strikes a balance between the rights of public bodies to punish petty harassment and the rights of employees to speak out on potentially legitimate concerns.

States with whistleblower acts protect good faith reports by whistleblowers.[141] Most courts conclude that a good faith reasonable belief warrants protection.[142] In *Wagner v. City of Globe*[143] the Arizona Supreme Court stated, "The relevant inquiry is not limited to whether any particular law or regulation has been violated, although that may be important, but instead emphasizes whether some 'important public policy interest embodied in the law' has been furthered by the whistleblowing activity."[144] In *Lanes v. O'Brien*[145] the Colorado Court

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135. If an employee makes a report only to the wrongdoer, questions of extortion and bad faith may arise. *See* Wolcott v. Champion Int'l Corp., 691 F. Supp. 1052, 1059 (W.D. Mich. 1987).

136. TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 2 (West Supp. 1991).

137. 753 S.W.2d 716 (Tex. Ct. App. 1988).

138. *Id.* at 719-20 (citing City of Dallas v. Moreau, 697 S.W.2d 472, 474 (Tex. Ct. App. 1985)).

139. *Id.* at 719.

140. McGill v. University of S.C., No. 89-CP-40-4716 (S.C. Ct. C.P. Richland, Apr. 12, 1991).

141. *See supra* note 2.

142. *See, e.g.*, Lanes v. O'Brien, 746 P.2d 1366, 1373 (Colo. Ct. App. 1987), *cert. denied*, 746 P.2d 1366 (Colo. 1987); Palmer v. Brown, 752 P.2d 685, 689-90 (Kan. 1988).

143. 722 P.2d 250 (Ariz. 1986) (en banc).

144. *Id.* at 257 (citing ARIZ. REV. STAT. ANN. § 38-532(A)(1) (Supp. 1990); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1035 (Ariz. 1985) (en banc)).

145. 746 P.2d 1366 (Colo. Ct. App. 1987).

of Appeals stated: "[T]he hearing officer considered the statute to require both a good faith belief in the accuracy of the information disclosed and a reasonable foundation of fact for such belief. [The court] accept[ed] that conclusion as one having a reasonable basis in law."[146]

All South Carolina courts should adopt the *Lanes* standard of good faith belief. If South Carolina courts require a finding of an actual violation before they will protect employees under the Whistleblower Act, employees might be reluctant to report violations for fear of losing their jobs. Requiring anything more than a good faith belief and a reasonable foundation for that belief may result in a chilling effect and may deter corrective employee action.

Some states do require, however, that employees base their reports on actual violations. In New York, for example, a good faith belief by a private sector employee that a violation occurred is not sufficient.[147]

In New York a distinction exists between the levels of protection afforded private and public employees.[148] Although a good faith belief is not sufficient for reports by private sector employees, New York law does protect public employees who report conduct reasonably believed to violate federal, state, or local law.[149] Because the South Carolina Whistleblower Act affords no protection to employees of private corporations,[150] no dichotomy will exist in South Carolina, and the courts will not be required to decide whether to distinguish between private and public employees.

The South Carolina Act contains both a burden of proof scheme and a standard of causation. If a South Carolina public body fires, suspends, disciplines, threatens, or otherwise punishes an employee within one year after the employee reports a violation of law, the employee has presented a prima facie case, and retaliation is presumed.[151] How-

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146. *Id.* at 1373 (citing Lee v. State Bd. of Dental Examiners, 654 P.2d 839 (Colo. 1982)).

147. Connolly v. Harry Macklowe Real Estate Co., 555 N.Y.S.2d 790, 792 (App. Div. 1990) (mem.) (citing Remba v. Federation Employment & Guidance Serv., 545 N.Y.S.2d 140 (App. Div. 1989)); Kern v. DePaul Mental Health Servs., Inc., 529 N.Y.S.2d 265, 267 (Sup. Ct. 1988), *aff'd mem.*, 544 N.Y.S.2d 252 (App. Div.), *appeal denied*, 549 N.E.2d 151 (N.Y. 1989). In *Kern* the plaintiff reported to the district attorney that she had observed two handicapped individuals engaging in sexual intercourse. Based solely on the fact that the individuals were mentally retarded, the plaintiff assumed the sexual activity was rape. The court rejected the plaintiff's whistleblower claim because she failed to show an " 'activity, policy or practice of the employer *which is in violation of law, rule or regulation.*' " *Kern*, 529 N.Y.S.2d at 267 (quoting N.Y. LAB. LAW § 740(2)(A) (McKinney 1988)).

148. Leibowitz v. Bank Leumi Trust Co., 548 N.Y.S.2d 513, 518 (App. Div. 1989).

149. *Id.*

150. S.C. CODE ANN. § 8-27-50 (Law. Co-op. Supp. 1990).

151. *Id.* § 8-27-30(A). By including this presumption in the Act, the legislature

ever, this presumption is rebuttable and requires the employer to demonstrate that it did not fire the employee because of the reported violation.[152]

Although the South Carolina Act's rebuttable presumption shifts the burden of production to the employer, it should not shift the burden of proof to the employer.[153] The presumption is not itself any evidence of wrongdoing.

A similar rebuttable presumption arises under the Texas Act if the employer retaliates within ninety days after the employee reports a violation.[154] In *Garza v. City of Mission*[155] the court held that Texas's rebuttable presumption does not shift the burden of proof to the employer.[156] "It is the type of rebuttable presumption which can stand only in the absence of evidence to the contrary. Once sufficient evidence is produced to support a finding of the non-existence of the presumed fact, the case will then proceed as if no presumption ever existed."[157] Under the Texas Act an "ordinary" rebuttable presumption does not shift the burden of proof to the employer. Rebuttal evidence therefore eliminates the presumption although the facts that gave rise to the presumption remain for the jury's consideration.[158]

Similarly, the South Carolina Act's rebuttable presumption requires that an employer only demonstrate, not prove, the absence of a causal link between the report and the subsequent discipline.[159] The Act's allocation resembles the burden of proof allocation in Title VII pretext cases, in which "[t]he burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."[160] "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of

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seemed to acknowledge that "it is highly unlikely that an employer will declare retaliation as the motive for discharge." Wallace v. Milliken & Co., 300 S.C. 553, 557, 389 S.E.2d 448, 450 (Ct. App. 1990), *aff'd as modified*, 406 S.E.2d 358 (S.C. 1991).

152. S.C. CODE ANN. § 8-27-30(B) (Law. Co-op. Supp. 1990).

153. *Cf. id.* § 41-1-80 (stating that in an action by an employee for wrongful retaliation relating to a workers' compensation claim, "[t]he burden of proof is upon the employee").

154. TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 3(b) (West Supp. 1991).

155. 684 S.W.2d 148 (Tex. Ct. App. 1984).

156. *Id.* at 151.

157. *Id.* at 151-52 (citations omitted).

158. *Id.* at 152 (citing Pete v. Stevens, 582 S.W.2d 892, 895 (Tex. Civ. App. 1979)); *accord* Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 572 (Minn. 1987).

159. S.C. CODE ANN. § 8-27-30(B) (Law. Co-op. Supp. 1990).

160. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

specificity."[161]

Although unstated, the plaintiff probably retains the burden of persuasion under the South Carolina Act to prove a causal connection between the report and the alleged retaliation. Like Title VII pretext cases, once the employer meets its burden of production, the plaintiff must prove "that the proffered reason was not the true reason for the employment decision."[162]

Under section 8-27-40 of the South Carolina Whistleblower Act, a public body in South Carolina also may discharge an employee "for causes independent" of the protected whistleblowing.[163] Because courts focus on the existence of an independent cause in mixed-motive cases,[164] section 8-27-40 appears to have adopted the *Mount Healthy* standard of causation for mixed-motive cases under the Act.[165]

In *Gamble v. City of Manning*[166] the court interpreted section 8-27-40 and held that "there is no violation of the whistleblower statute if the employee was fired for an independent cause."[167] The court stated that whether an independent cause exists is a question of fact.[168] Thus, even if an employer relies on improper factors in reaching its decision, the employer will not be liable if it can prove the existence of an independent reason for the same decision.

Until recently it was unclear who bore the burden of proving that the employee was actually fired for an independent cause. In a recent workers' compensation case, *Wallace v. Milliken & Co.*,[169] the South Carolina Supreme Court held that "[w]hile the employer has the burden of proving its affirmative defenses, the ultimate burden is, throughout, upon the employee."[170] Similarly, under the South Carolina Whistleblower Act, the public body should not be required to show

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161. *Id.* at 255 (footnote omitted).

162. *Id.* at 256.

163. S.C. CODE ANN. § 8-27-40 (Law. Co-op. Supp. 1990). Section 8-27-40 provides: "Notwithstanding any action taken pursuant to this chapter, a public body may discharge, otherwise terminate, or suspend an employee for causes independent of those provided in Section 8-27-20." *Id.*

164. Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 624 (Minn. 1988).

165. *See supra* notes 75-79, 92 and accompanying text.

166. 405 S.2d 829 (S.C. 1991).

167. *Id.* at 830 (citing S.C. CODE ANN. § 8-27-40 (Law. Co-op. Supp. 1990)).

168. *Gamble*, 405 S.E.2d at 830.

169. 406 S.E.2d 358 (S.C. 1991).

170. *Id.* at 360 (citing Hoffman v. County of Greenville, 242 S.C. 34, 129 S.E.2d 757 (1963)). *But see* Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (stating that the burden of persuasion shifts to the employer after the employee proves that constitutionally protected conduct was a substantial or motivating factor in the employment decision) (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977)).

independent cause for an employee's termination unless it has retaliated for a cause prohibited under the Act.

The Whistleblower Act also provides the following explicit employer affirmative defenses: "[W]ilful or habitual tardiness or absence from work; being disorderly or intoxicated while at work; destruction of any of the employer's property; malingering; and embezzlement or larceny of the employer's property."[171] These are per se independent causes.

An employee who establishes a violation of the Whistleblower Act can receive an order for reinstatement and lost wages, or both,[172] in addition to actual damages, court costs, and attorney fees.[173] The South Carolina Tort Claims Act[174] prohibits any recovery of punitive damages, exemplary damages, or prejudgment interest.[175] Under the Act reinstatement is probably an equitable remedy within the trial court's discretion.[176]

In wrongful discharge cases that involve constitutional rights, the plaintiff can recover actual or compensatory damages based on common-law tort principles.[177] "Compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering.' "[178] "A plaintiff's testimony alone has been held to be sufficient proof of such damages."[179]

VI. CONCLUSION

The South Carolina Whistleblower Act protects public employees that report the improper conduct of public bodies and officials from

171. S.C. CODE ANN. § 8-27-30(B) (Law. Co-op. Supp. 1990).

172. *Id.* § 8-27-30(A).

173. *Id.* § 8-27-30(C).

174. *Id.* §§ 15-78-10 to -150.

175. *Id.* § 15-78-120(b). The South Carolina Tort Claims Act also limits the recovery of damages for loss arising from a single occurrence to $250,000. *Id.* § 15-78-120(a)(1).

176. *Cf.* Horn v. Davis Elec. Constructors, Inc., 302 S.C. 484, 487, 395 S.E.2d 724, 728 (Ct. App. 1990) (noting that an action under South Carolina's Workers' Compensation Law is equitable and that the parties and court treated the case as a law case with submission of fact issues to jury).

177. Kinsey v. Salado Indep. Sch. Dist., 916 F.2d 273, 282 (5th Cir. 1990) (citing Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986)), *reh'g granted*, 925 F.2d 118 (5th Cir. 1991) (en banc).

178. *Id.* (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)); *see also* City of Ingleside v. Kneuper, 768 S.W.2d 451 (Tex. Ct. App. 1989) (sustaining an award of damages for loss of earning capacity and mental anguish under the Texas Whistleblower Act).

179. *Kinsey*, 916 F.2d at 282 (citing Chalmers v. City of Los Angeles, 762 F.2d 753 (9th Cir. 1985)).

retaliation by their employers. The Act gives fired or otherwise punished whistleblowers their day in court.

Retaliation, like all forms of discrimination, is ugly. The Act should reward employees who risk their jobs to expose corruption. By protecting valid and good faith whistleblowing, courts send a message that no one is above the law.

Craig Berman