

William & Mary Law School

William & Mary Law School Scholarship Repository

Faculty Publications

Faculty and Deans

2017

Public Policy and Workers' Rights: Wrongful Discipline Actions and Good-Faith Beliefs

Ann C. McGinley

Nicole B. Porter

Follow this and additional works at: <https://scholarship.law.wm.edu/facpubs>



Part of the [Labor and Employment Law Commons](#)

Copyright c 2017 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/facpubs>

PUBLIC POLICY AND WORKERS' RIGHTS: WRONGFUL
DISCHARGE DISCIPLINE ACTIONS AND REASONABLE
GOOD-FAITH BELIEFS

BY

ANN C. MCGINLEY* & NICOLE BUONOCORE PORTER**

I. INTRODUCTION512

II. CHAPTER 5. THE TORT OF WRONGFUL DISCHARGE IN
VIOLATION OF PUBLIC POLICY.....515

 A. *Section 5.01. Wrongful Discharge in Violation of
 Public Policy*.....515

 B. *Section 5.02. Wrongful Discharge in Violation of
 Public Policy: Protected Activities*517

 C. *Section 5.03. Wrongful Discharge in Violation of
 Public Policy: Sources of Public Policy*518

III. THE RESTATEMENT SHOULD PROTECT AGAINST
WRONGFUL DISCIPLINE AS WELL AS WRONGFUL
DISCHARGE519

 A. *Background of Wrongful Discipline Provision*.....519

 B. *Current State Court Practice: Wrongful Discipline or
 Wrongful Discharge?*520

 C. *Constructive Discharge as Substitute for Wrongful
 Discipline?*.....522

 1. *Proving Intolerable Working Conditions*523

 2. *Summary Judgment in Constructive Discharge
 Cases*525

 D. *A Potential Model: Wrongful Discipline as an Adverse
 Employment Action*526

IV. THE ERROR OF ADDING “REASONABLE” TO SECTION
5.02528

 A. *The State of the Law*.....528

 B. *The Error of Adding “Reasonable”*.....533

 1. *“Reasonable” Belief Requirement Creates an
 Unacceptably High Standard*534

 2. *Encouraging Behaviors that Protect the Public*.....537

3. Employers Are Protected by a “Good Faith” Requirement and by Requiring that the Protected Activity Be Performed in a “Reasonable Manner”	538
4. Similar Arguments Under Analogous Areas of Law.....	542
V. CONCLUSION.....	543

I. INTRODUCTION

The purpose of this paper is to provide our thoughts on Chapter 5 of the ALI's *Restatement of the Law: Employment Law* (“*Restatement of Employment Law*”), concerning “The Tort of Wrongful Discharge in Violation of Public Policy.”¹ In 2009, a group of esteemed professors provided an in-depth and detailed commentary on the prior draft of Chapter 5 of the *Restatement of Employment Law* (note that in the prior draft, current chapter 5 was chapter 4).² At that time, the Working Group was in a position to guide and influence the final version of the *Restatement of Employment Law*. Thus, the Working Group's paper provides detailed (section-by-section) critiques of the language used by the *Restatement*, as well as feedback on the comments, the illustrations, and the cases cited in the comments and illustrations.³

At this time, however, we are commenting on an already-published *Restatement of Employment Law*. Thus, we see our role in this process as both more limited and yet fairly boundless. Our role is more limited in the sense that a line-by-line critique at this stage serves very little purpose. In fact, it would be nothing but criticism or disagreement for the sake of criticizing or disagreeing with principles espoused and the rules and holdings of the cases the Reporters relied upon. But our role is also fairly boundless in the sense that, because we are relieved of the responsibility of directly influencing what is published as the *Restatement of Employment Law*, we can provide

* William S. Boyd Professor of Law, Boyd School of Law of the University of Nevada, Las Vegas. Thanks to the Wiener-Rogers Library at Boyd School of Law, and especially David McClure, for the fine research contributing to this project.

** Professor of Law, University of Toledo College of Law. The authors would like to thank Professor Ken Dau-Schmidt for inviting us to contribute to this project, and the other participants at the conference for their helpful feedback.

1. RESTATEMENT OF EMP'T LAW §§ 5.01, 5.02, 5.03 (AM. LAW INST. 2015).

2. Joseph R. Grodin et al., *Working Group on Chapter 4 of the Proposed Restatement of Employment Law: The Tort of Wrongful Discipline in Violation of Public Policy*, 13 EMP. RTS. & EMP. POL'Y J. 159 (2009) [hereinafter “*Working Group*”].

3. See generally *id.*

our ideas concerning where the law ought to be or go in this area. Moreover, we are not in the position of having to convince a large group of persons with disparate interests of the value of our proposals, or even of defending our proposals as in keeping with the history and purpose of ALI's *Restatements*. Instead, we take our critique directly to the lawmakers: judges in a common law system, as well as legislators who hope to enhance the rights of employees without harming their employers' interests. In an era of division between management and labor, changing employment relationships, weakening of labor unions in the private and public sectors, and severe income inequality, we hope to create an interest in courts and legislatures in experimentation that would improve the conditions of workers and management.

In particular, we hope that courts that consider adopting Chapter 5 of the *Restatement of Employment Law* will also consider our critiques and suggestions in determining how state common law should be interpreted in this area. Moreover, we hope to give guidance to state and local legislatures that may be interested in enacting more protective legislation for working persons in the various states, legislation that will give employers notice of their responsibilities and will encourage economic growth. Therefore, we offer specific comments on how the law could potentially be more effective in protecting employee rights while at the same time respecting employer prerogatives. Thus, we contemplate that at least some courts and/or legislatures would adopt our views of improvements to Chapter 5. Adoption of our views would, we believe, permit further experimentation among the states that will lead to better results than adoption by all states of Chapter 5 as it is now.

To be clear, the Working Group also saw its role as aspirational in nature; specifically, it stated:

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 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.⁴

Despite this broad goal, and even though the Working Group did in fact provide big-picture advice on the *Restatement*, the Working

4. *Id.* at 160.

Group's commentary was also very specific and very detailed.⁵

Our goal is different. Instead of a detailed critique of Chapter 5's provisions, we have chosen to focus on two significant issues that we see as problematic and worthy of further discussion. The first involves the elimination in the final draft of the *Restatement* of protection against wrongful *discipline*, which left only the protection against wrongful *discharge* that violates public policy. In the prior version of this chapter, section 4.01 was titled "Employee *Discipline* in Violation of Public Policy," and protected against a wide variety of employee discipline, including discharge. The final version of Chapter 5, however, protects employees against "wrongful discharge" only⁶ and comment c to section 5.01 states that this "Restatement expresses no view on whether public-policy claims based on adverse employer actions falling short of discharge or constructive discharge (termed here 'wrongful discipline') should be actionable."⁷ We argue that wrongful discipline claims should be actionable and that the *Restatement* should have specifically included wrongful discipline claims in violation of public policy.

The second significant failure that we would like to address appears in section 5.02 (protected activities), which requires that an employee "reasonably" believe a particular set of facts or circumstances in order to establish a wrongful discharge claim. Although we recognize that the provisions of section 5.02 accurately restate the law (and in some cases even expand on existing state law),⁸ we believe that requiring a "reasonable" belief is too high of a standard, especially when the reasonableness of that belief is judged by a law-trained judge's perception rather than a lay person's

5. To be clear, we are not at all criticizing what was produced in the Working Group's commentary. In fact, it is very likely that the Working Group's commentary influenced the current version of the *Restatement of Employment Law* in a positive way.

6. In fact, it is titled "The Tort of Wrongful Discharge in Violation of Public Policy." *Restatement of Employment Law*, Chapter 5, and the main section states that "[a]n employer that *discharges* an employee because the employee engages in activity protected by a well-established public policy . . . is subject to liability in tort for wrongful discharge in violation of public policy." RESTATEMENT OF EMP'T LAW § 5.01 (AM. LAW INST. 2015) (emphasis added).

7. *Id.* § 5.01 cmt. c.

8. For instance, in order to have a claim for refusing to commit an act that violates the law, or for reporting conduct that the employee believes violates a law, some states require that the act avoided or the conduct reported would *actually* violate the law rather than the more lenient framework set up by the *Restatement*, see *id.* §§ 5.02(a), 5.02(e), where the employee need only "reasonably and in good faith believe" that the conduct would violate the law. See, e.g., *Callantine v. Staff Builders, Inc.*, 271 F.3d 1124, 1130-31 (8th Cir. 2001) (stating that plaintiff loses on her public policy exception in Missouri because the act she refused to do was not actually an illegal act); *Bordell v. Gen. Elec. Co.*, 667 N.E.2d 922, 923 (N.Y. 1996) (stating that the law only protects employees who report conduct that actually violates the law).

perception of what is reasonable. Therefore, we argue that the provisions of section 5.02 should omit the requirement of a “reasonable” belief and require only a “good faith” belief that certain conduct would violate the law or harm the public in order to allow the employee’s public policy claim to proceed.

This paper will proceed in four additional parts. Part II summarizes generally the provisions of Chapter 5, the Working Group’s objections to the earlier version and recommendations for changes, and explains (when appropriate) where the final version deviated from the prior version. Part III argues that this chapter should have kept the prior version’s protection against wrongful *discipline* instead of protecting only against wrongful discharge. Part IV argues that requiring employees to have a “reasonable” belief (in addition to a good faith belief) that conduct will violate the law or harm the public’s health or safety is an inappropriately high standard and should be abandoned in favor of requiring only a good faith belief. Part V briefly concludes.

II. CHAPTER 5. THE TORT OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

A. Section 5.01. *Wrongful Discharge in Violation of Public Policy*

Section 5.01 states:

An employer that discharges an employee because the employee engages in activity protected by a well-established public policy as described in § 5.02 is subject to liability in tort for wrongful discharge in violation of public policy, unless the statute or other law forming the basis of the applicable public policy precludes tort liability or otherwise makes judicial recognition of a tort claim inappropriate.⁹

As mentioned above, this section is significantly different from the prior version (section 4.01) because it does not cover wrongful discipline that falls short of a discharge. This issue will be discussed below in Part III.¹⁰ The other difference is that the prior version had slightly different language regarding the exception to the public policy claim, when a statute or other law precludes the wrongful discharge claim. The prior version permitted a claim “unless the statute or other law that forms the basis of the applicable public policy precludes tort liability or provides an adequate alternative

9. RESTATEMENT OF EMP’T LAW § 5.01.

10. See *infra* Part III.

remedy.”¹¹ The Working Group criticized the language as being “unnecessarily vague” as well as doing “little to clarify an area of the law that is currently quite confused” and failing to “offer a coherent method for analysis in an area in which courts have also failed to provide coherent analysis.”¹²

The Working Group proposed different language to clarify the exclusions.¹³ The Working Group suggested deleting the “unless the statute or other law” language and substituting the following for “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;
 - 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.¹⁴

The drafters did not follow the Working Group’s suggestion to include the above factors, but incorporated many of the ideas of the proposed language into the comments to section 5.01.¹⁵ For instance, comment d refers to “express statutory preclusion of a common-law

11. *Working Group*, *supra* note 2, at 161.

12. *Id.* at 162.

13. *Id.* at 163.

14. *Id.* at 163-64.

15. *See, e.g.*, RESTATEMENT OF EMP’T LAW § 5.01 cmt. d, e, f.

public-policy tort,”¹⁶ which basically mirrors proposed subsection (i) above in the Working Group’s suggested addition. Comment e in the final draft is termed “Implied Statutory preclusion or otherwise inappropriate judicial recognition of a tort action,”¹⁷ and it addresses many of the factors that the Working Group identified in proposed subsection (iii) in the Working Group’s suggested addition. For instance, comment e instructs that courts should look at the adequacy of the remedy provided by the statute as well as comprehensiveness of the state statute.¹⁸ Although we assume the Working Group would have preferred that the drafters incorporate their suggested revision, it appears that some of the concerns of the Working Group have been addressed in the comments to section 5.01.

*B. Section 5.02. Wrongful Discharge in Violation of Public Policy:
Protected Activities*

Section 5.02 makes an employer liable for violation of public policy if it discharges an employee who acts reasonably and refuses to commit an act the employee reasonably and in good faith believes is illegal, performs a public duty the employee reasonably and in good faith believes is imposed by law, files a charge in good faith, refuses to waive a nonnegotiable or nonwaivable right at the employer’s insistence, reports conduct that the employee reasonably and in good faith believes is illegal, or engages in other activity that furthers public policy.¹⁹

This section varies from the prior version in two significant ways. It adds the provision: “refuses to waive a nonnegotiable or nonwaivable right.”²⁰ And more importantly for our purposes, the requirement that an employee’s belief be *reasonable* did not appear in the prior version of 4.02. Unlike the prior draft, the final version of section 5.02 requires an employee have not only a good faith belief that his or her behavior is protected but also a *reasonable* belief that it is.²¹ We will discuss this change further in Part IV.²²

16. *Id.* § 5.01 cmt. d.

17. *Id.* § 5.01 cmt. e.

18. *Id.*

19. *Id.* § 5.02.

20. Interestingly, the Working Group noted that subsection (d) had been present in an earlier draft of Chapter 5 (what used to be Chapter 4), and the Working Group suggested reinstating that provision. *Working Group, supra* note 2, at 187.

21. *Id.* at 183.

22. *See infra* Part IV.

Most of the Working Group's commentary on section 5.02 (what used to be section 4.02 in the prior draft) involved either minor critiques regarding cases cited by the draft that did not support the propositions for which they were cited or comments and illustrations that were not consistent with the text.²³ The major critique, however, was that section 4.02 did not cover activities related to off-duty conduct and activities involving privacy.²⁴ The drafters of the final version specifically addressed this critique in comment a, stating: "This Chapter does not address whether employers engage in tortious behavior if they discharge employees for certain off-duty conduct implicating protected privacy or autonomy interests. Employee privacy and autonomy issues are treated in Chapter 7."²⁵

*C. Section 5.03. Wrongful Discharge in Violation of Public Policy:
Sources of Public Policy*

Section 5.03 states:

Sources of public policy for the tort of wrongful discharge in violation of public policy under § 5.01 include:

- (a) Federal and state constitutions;
- (b) Federal, state, and local statutes, ordinances, and decisional law;
- (c) Federal, state, and local administrative regulations, decisions, orders; and
- (d) Well-established principles in a professional or occupational code of conduct protective of the public interest.²⁶

This section remains unchanged from the prior draft. The Working Group's primary critique of this section was the *Restatement's* failure to include international sources of law.²⁷ Specifically, the Working Group recommended the addition of a subsection (e) that would read: "established principles of customary international law or foreign treaties to which the United States is a party."²⁸ Obviously, the drafters of the *Restatement* did not adopt the Working Group's recommendation. We agree with the Working

23. *Working Group*, *supra* note 2, at 184.

24. *Id.*

25. RESTATEMENT OF EMP'T LAW § 5.02 cmt, a (AM. LAW INST. 2015). For a discussion of Chapter 7, see Matthew W. Finkin, *Chapter 7: Privacy and Autonomy*, 21 EMP. RTS. & EMP. POL'Y J. 589 (2017).

26. RESTATEMENT OF EMP'T LAW § 5.03.

27. *Working Group*, *supra* note 2, at 195.

28. *Id.*

Group that international sources of law should constitute valid public policy that is protected by the *Restatement's* wrongful discipline section.

III. THE RESTATEMENT SHOULD PROTECT AGAINST WRONGFUL DISCIPLINE AS WELL AS WRONGFUL DISCHARGE

A. Background of Wrongful Discipline Provision

The earlier versions of the draft *Restatement of Employment Law* included a cause of action for wrongful discipline in violation of public policy.²⁹ Section 4.01 of Tentative Draft No. 2 states:

(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 otherwise makes inappropriate judicial recognition of a tort claim.

(b) "Other material adverse action" in this Section means an action short of discharge that is reasonably likely to deter a similarly situated employee from engaging in protected activity, including an action that significantly affects employee compensation or working conditions.³⁰

The "wrongful discipline" cause of action in violation of public policy in earlier drafts of the *Restatement* created a cause of action for wrongful discipline, which included discharge and an employer's discipline that falls short of discharging the employee. According to the earlier draft, the employer's behavior must be "likely to deter a similarly situated employee from engaging in protected activity" to create a cause of action. By the time the *Restatement* was published in its final version, however, there no longer remained a cause of action for wrongful *discipline*. Instead, the final *Restatement* has a cause of action for wrongful *discharge* in violation of public policy. In other words, the *Restatement* limits a tortious discharge cause of action to disciplinary action that results in discharge or constructive discharge, even if the reasons for lesser but significant discipline would violate public policy and the discipline would likely deter employees from engaging in protective activity. The final version, section 5.01, states:

An employer that discharges an employee because the employee

29. See RESTATEMENT (THIRD) EMP'T LAW §§ 4.01, 4.02, 4.03 (AM. LAW INST., Tentative Draft No. 2, 2009).

30. See *id.*

engages in activity protected by a well-established public policy as described in § 5.02 is subject to liability in tort for wrongful discharge in violation of public policy, unless the statute or other law forming the basis of the applicable public policy precludes tort liability or otherwise makes judicial recognition of a tort claim inappropriate.³¹

This change from the earlier version of the *Restatement* effectively permits employers to punish employees for the very same reasons that it would be illegal to discharge them. The *Restatement* “expresses no view on whether public-policy claims based on adverse employer actions falling short of discharge or constructive discharge . . . should be actionable.”³²

As a result of the *Restatement*’s failure to address wrongful discipline, the only limitation on the employer’s actions that fall short of outright firing of the employee is referenced in comment c to section 5.01, which states that section 5.01 also creates a cause of action for constructive discharge. A constructive discharge section, if very broadly construed, could *potentially* provide much of the necessary protection for employees and for the public policy asserted. But given that constructive discharge is a common law doctrine that involves a rigid proof standard that is often difficult to meet, this limitation is troubling.

B. Current State Court Practice: Wrongful Discipline or Wrongful Discharge?

Most state courts recognize a tort action for wrongful discharge in violation of public policy or a similar cause of action.³³ A minority of the states recognize a wrongful discipline cause of action in violation of public policy.³⁴ In refusing to recognize wrongful discipline, courts make conclusory statements that their jurisdictions do not have a cause of action for wrongful discipline or state that they are concerned about “opening the floodgates” of litigation for minor disciplinary matters.³⁵

31. RESTATEMENT OF EMP’T LAW, § 5.01 cmt. c.

32. *Id.*

33. *Id.* § 5.01 cmt. a; see, e.g., *Mintz v. Bell Atl. Sys. Leasing, Int’l. Inc.*, 905 P.2d 559, 562 (Ariz. Ct. App. 1995) (citing to existence of wrongful discharge cause of action, but refusing to recognize wrongful failure to promote case in violation of public policy); *Jewett v. Gen. Dynamics Corp.*, No. 530943, 1997 WL 255093, at *2 (Conn. Super. Ct. May 1, 1997) (noting existence of wrongful discharge tort, but refusing to recognize wrongful demotion claim in Connecticut).

34. RESTATEMENT OF EMP’T LAW § 5.01 cmt. c.

35. See e.g., *Ryan v. Patterson Dental Supply, Inc.*, No. CV-98-1177, 2000 WL 640859, at

As a practical and policy matter, these arguments do not make much sense. First, if the purpose of the wrongful discharge tort is to protect the public policy that the employer has violated, there is less protection for the public policy if the employer may legally retaliate against the employee by disciplining rather than by discharging the employee. A more robust cause of action that includes discipline would offer significant deterrence against employer violations of public policy without necessarily creating frivolous litigation against the employer. This cause of action could use the standard listed in the earlier versions of the *Restatement* that would require an employee to prove a “materially adverse employment action,” defined as “action short of discharge that is reasonably likely to deter a similarly situated employee from engaging in protected activity, including an action that significantly affects employee compensation or working conditions.”³⁶

As the Supreme Court of Kansas, which has recognized a cause of action for wrongful demotion in violation of public policy, states:

The employers’ violation of public policy and the resulting coercive effect on the employee is the same in both situations. The loss or damage to the demoted employee differs in degree only. We do not share the employers’ concern that a torrent of litigation of insubstantial employment matters would follow in the wake of our recognition of a cause of action for retaliatory demotion and, even if we did, it does not constitute a valid reason for denying recognition of an otherwise justified cause of action.

We conclude that the recognition of a cause of action for retaliatory demotion is a necessary and logical extension of the cause of action for retaliatory discharge. To conclude otherwise would be to repudiate this court’s recognition of a cause of action for retaliatory discharge. The obvious message would be for employers to demote rather than discharge employees in retaliation for filing a workers compensation claim or whistleblowing. Thus, employers could negate this court’s decisions recognizing wrongful or retaliatory discharge by taking actions falling short of actual discharge.³⁷

Other state courts have agreed with the Kansas Supreme Court and have recognized causes of action for wrongful discipline in violation of public policy because it would protect the public policy

*24 (D. Ore. May 12, 2000); *White v. Washington*, 929 P.2d 396, 407-08 (Wash. 1997) (en banc).

36. RESTATEMENT (THIRD) EMP’T LAW §§ 4.01, 4.02, 4.03 (AM. LAW INST., Tentative Draft No. 2, 2009).

37. *Brigham v. Dillon Cos., Inc.*, 935 P.2d 1054, 1059-60 (Kan. 1997); *accord Powers v. Springfield City Schs.*, No. 98-CA-10, 1998 WL 336782, at *7 (Ct. App. Ohio June 26, 1998) (agreeing with *Brigham* and concluding that to disallow a cause of action for wrongful denial or promotion in violation of public policy would undermine state public policy).

asserted most fully.³⁸

C. Constructive Discharge as Substitute for Wrongful Discipline?

One way to defend the choice not to create a cause of action for wrongful discipline that reaches employer behavior that falls short of discharge is to argue that the types of behaviors that would constitute “materially adverse employment actions” would necessarily constitute a constructive discharge. Because, the argument goes, constructive discharge is prohibited under the *Restatement*, there should be no problem eliminating wrongful discipline from protection. Unfortunately, recognition of constructive discharge under the wrongful discharge exception may not sufficiently protect the public policy involved or the individual employee who suffers the adverse employment action that falls short of discharge. Under both federal and state laws, employees claiming that they were constructively discharged must demonstrate that the employer or its agents created working conditions that were so intolerable that the employees were forced to quit.³⁹ The standard of “intolerability” is an objective one. A reasonable person in the same situation would have to conclude that the conditions of employment were so intolerable that he or she would quit.⁴⁰ The California Supreme Court expresses the rule that is generally applicable in the states:

In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee’s resignation that a reasonable employer would realize that a reasonable person in the employee’s position would be compelled to resign.

For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees.⁴¹

In a minority of jurisdictions, the courts also require a showing that the employer had a subjective intent to force the employee to resign.⁴² Additionally, some courts require that an employee

38. See e.g., *Powers*, No. 98-CA-10, 1998 WL 336782.

39. See e.g., *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1029 (Cal. 1994) (in banc).

40. *Id.* at 1027.

41. *Id.* at 1029.

42. See, e.g., *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 418 (8th Cir. 2010); *Moore v. Kuka Welding Sys.*, 171 F.3d 1073, 1080 (6th Cir. 1999); *Martin v. Cavalier Hotel*

demonstrate that she gave the employer a reasonable opportunity to correct the conditions that she claims constituted a constructive discharge.⁴³ Illustration 1 following section 5.01 is silent on whether it requires proof of a specific subjective intent of the employer to force the employee out of the workplace or proof that an employee gave the employer a reasonable opportunity to correct the allegedly intolerable conditions, but it appears not to require such proof.⁴⁴ If interpreted this way, the constructive discharge provision of section 5.01 would at least have some beneficial value, but given the difficulty that courts impose on employees who must prove that the conditions were intolerable, the failure to include a wrongful discipline cause of action will seriously undermine the public policies supporting the wrongful discharge cause of action.

1. Proving Intolerable Working Conditions

Proving intolerability is a steep climb in many state and federal courts. Courts state that workers should expect normal frustrations and concerns in the workplace. None of these will constitute an intolerable situation.⁴⁵ And, in cases alleging discrimination and/or harassment based on protected characteristics, demonstration that the employer discriminated against the employee or that it subjected her to severe or pervasive harassing behavior because of her membership in a protected class is not sufficient to prove a constructive discharge.⁴⁶

In non-harassment cases alleging intolerable working conditions, courts will generally take into account factors such as:

Corp., 48 F.3d 1343, 1354 (4th Cir. 1995). *But see* Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982) (no specific employer intent needed); Clark v. Marsh, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981) (same); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980) (same); Slack v. Kanawha Cty. Hous. & Redev. Auth., 423 S.E.2d 547, 558 (W. Va. 1992) (same).

43. *See, e.g.*, Ames v. Nationwide Mut. Ins. Co., 760 F.3d 763, 769 (8th Cir. 2014) (concluding that plaintiff had not provided evidence that she offered her employer an opportunity to ameliorate the conditions that she alleged were discriminatory).

44. RESTATEMENT OF EMP'T LAW § 5.01 illus. 1 (AM. LAW INST. 2015).

45. *See* Turner, 876 P.2d at 1026-27.

46. *See e.g.*, Penn. State Police v. Suders, 542 U.S. 129, 146-47 (2004) (holding that a hostile-environment constructive discharge claim entails something more than a hostile environment claim and a plaintiff "must show working conditions so intolerable that a reasonable person would have felt compelled to resign"); Petrosino v. Bell Atl., 385 F.3d 210, 230 (2d Cir. 2004) (holding that a woman who was harassed through graffiti and verbal attacks, attacked by a drunken colleague, and then ridiculed for the attack, refused a promotion, and encouraged to move to another job did not suffer an intolerable situation that amounted to a constructive discharge); Shepherd v. Hunterdon Dev. Ctr., 803 A.2d 611, 628 (N.J. 2002) ("Simply put, a constructive discharge claim requires more egregious conduct than that sufficient for a hostile work environment claim.").

(1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement [or continued employment on terms less favorable than the employee's former status].⁴⁷

These are merely factors that courts should weigh in determining the intolerability of the situation. But how intolerable a situation is will depend very much on the particular environment of the workplace and the type of work that the plaintiff does. This means that, although many courts determine that a situation is not intolerable as a matter of law, these cases should instead generally go to fact finders who can assess the witnesses' stories and the workplace environment. Nonetheless, even when some or many of these factors exist, many courts conclude that a constructive discharge has not occurred as a matter of law.⁴⁸

Illustration 1 to section 5.01 of the *Restatement of Employment Law* gives the following example of a successful constructive discharge case:

E, an employee of X, is injured on the job. X's supervisor, S, urges E not to pursue a workers' compensation claim. E nevertheless files such a claim. S then demotes E for filing the claim. As a result, E is given less significant duties, must work under persons he previously supervised, and suffers a reduction in pay. Because of the demotion, E resigns. E has a claim for constructive discharge in violation of public policy because the promotion created an intolerable situation in which a reasonable employee would feel compelled to quit, and E did quit.⁴⁹

This example includes not only a demotion but also a loss in pay, less important duties, and supervision by a person whom the plaintiff previously had supervised. There is no evidence that the employer specifically intended to force the plaintiff to resign or that the plaintiff gave the employer a reasonable opportunity to ameliorate the intolerable conditions. It appears, therefore, that specific employer intent and granting a reasonable opportunity to the employer to ameliorate the situation would not be required by the *Restatement*. But this fact pattern also includes most of the facts listed as relevant to many constructive discharge cases. There is no question that at a

47. *Brown v. Bunge Corp.*, 207 F.3d 776, 782 (5th Cir. 2000) (quoting *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994)).

48. See, e.g., *Martin v. Sears Roebuck & Co.*, 899 P.2d 551, 553 (Nev. 1995).

49. RESTATEMENT OF EMP'T LAW § 5.01 illus. 1.

minimum this case should be sufficient to fulfill the intolerability requirement of a constructive discharge, but there is considerable variation as to whether a constructive discharge exists absent some of the factors, especially demotion with a reduction in pay.

2. Summary Judgment in Constructive Discharge Cases

Moreover, many courts in response to an employer's motion for summary judgment decide the question of whether there was a constructive discharge as a matter of law, and grant the defendant's motion. Whether an employee's reaction to a fraught situation constitutes a constructive discharge, however, is a fact-laden determination. Jurors are better qualified than a judge at the summary judgment stage to decide whether a constructive discharge has occurred because jurors will have the benefit of assessing the credibility of the witnesses' testimony at trial.

A good example of inappropriate fact-finding in a constructive discharge case by the federal district court that was subsequently affirmed by the court of appeals is *Ames v. Nationwide Mutual Insurance Co.*⁵⁰ In *Ames*, the Eighth Circuit Court of Appeals affirmed the lower court's grant of summary judgment to the defendant⁵¹ in a case where there were many factual allegations concerning the employer's treatment of the plaintiff that, if believed, could lead a reasonable jury to conclude that a constructive discharge had occurred. The facts, when viewed in the light most favorable to the plaintiff, were that the defendant or its agents had made numerous negative comments about the plaintiff's pregnancies; miscalculated the length of her pregnancy leave and required her to return to work early – two months after giving birth – or risk “raising red flags;” trained another employee to fill her position; refused to allow her to use the lactation room and told her she would have to wait three days to use the lactation room even though the plaintiff was obviously in pain as a result of her milk-filled breasts; told the plaintiff on the day she returned from her maternity leave that no one did her work while she was out on leave and that she would have to work overtime to catch up or she would be disciplined; never helped her to get necessary access to the lactation room or a reasonable substitute even though she was in obvious pain; and told her she should “go home to be with [her] babies” while waiving a resignation

50. 760 F.3d 763, 769 (8th Cir. 2014).

51. *Id.* at 768.

letter for her to fill out.⁵² Finally, five hours after she last breastfed her baby and in extreme pain, the employee submitted her resignation.⁵³

While reasonable minds might differ as to whether the employer intended to force the plaintiff's resignation and whether this behavior created an intolerable situation for the plaintiff and even whether she gave the employer a reasonable opportunity to ameliorate the intolerable conditions, the lower court's ruling and the court of appeals' affirmance made credibility determinations, weighed the evidence, and determined facts, functions that are better left to the fact finders. These are inappropriate determinations on a motion for summary judgment.⁵⁴ Courts considering whether an employee has a cause of action for wrongful discipline must be careful not to intrude upon the province of the jury. The jury, not the judge, in most cases, should find the facts necessary to decide whether the employee has suffered wrongful discipline.

D. A Potential Model: Wrongful Discipline as an Adverse Employment Action

In many but not all cases of wrongful discharge in violation of public policy, the employer acts in retaliation against an employee for engaging in behaviors or speech that protect the public policy of the state. To the extent these public policies are sufficiently important to protect an employee against wrongful discharge, they must also protect an employee against wrongful discipline that amounts to an adverse employment action. An adverse employment action would include a material change in the employee's working conditions or harassment that is severe or pervasive. It would include a failure to promote, a demotion, a transfer that would alter the employee's working conditions, or if the employer created or tolerated a hostile working environment as a result of the individual's engaging in the protected action. A test similar to that established by the Supreme Court in *Burlington Northern and Santa Fe Railway v. White*, case brought under the anti-retaliation provision of Title VII of the Civil

52. *Id.* at 765-66.

53. *Id.* at 766.

54. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 235-43 (1993).

Rights Act of 1964, would be useful.⁵⁵ In *Burlington Northern*, the Court established the proper test:

We conclude that the antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.⁵⁶

This test gives employees protection from retaliation that occurs inside or outside of the workplace that is sufficiently harmful to dissuade a reasonable worker from making a charge. Although this appears to be an objective test, it permits the fact finder to take into account the personal characteristics and situation of the employee in question. As the Court explained, context matters. The Court stated:

A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.⁵⁷

Thus, the fact finder needs to consider the context of the situation, the personal and professional situation of the employee, and the detriment imposed on that person by the employer's action. This objective test that considers the context of the workplace and the situation of the individual employee would encourage employees to report illegal behaviors and to engage in behaviors protected by public policy. This standard should apply to constructive discharge cases brought by plaintiffs under section 5.01 even in those states that do not adopt a broader wrongful discipline cause of action in violation of public policy. A similar test that was applied

55. 548 U.S. 53 (2006). The *Burlington Northern* test is similar to that used in an earlier version of the *Restatement of Employment Law*. That earlier version states:

"Other material adverse action" in this Section means an action short of discharge that is reasonably likely to deter a similarly situated employee from engaging in protected activity, including an action that significantly affects employee compensation or working conditions.

RESTATEMENT (THIRD) OF EMP'T LAW § 4.02(b) (AM. LAW INST., Tentative Draft No. 1, 2008).

56. *Burlington Northern & Santa Fe Ry. Co.*, 548 U.S. at 57.

57. *Id.* at 69 (citations omitted).

appropriately in the summary judgment context appears in *Martin v. Canon Business Solutions, Inc.*, a case decided by the federal district court in Colorado, which denied the defendant's motion for summary judgment.⁵⁸ In *Martin*, the plaintiff, a new mother, took leave under the Family and Medical Leave Act and ultimately sued her employer for retaliation and other related claims.⁵⁹ The *Martin* court held that there were genuine issues of material fact to be decided by a jury in determining whether the employer illegally retaliated against the employee.⁶⁰ Among the allegations supported by the evidence were a harassing environment, reassignment of some of the plaintiff's accounts, which made it difficult for her to meet her sales goals, and a refusal to provide an appropriate location to express breast milk once the plaintiff returned to work after having her baby.⁶¹

We believe that states should adopt a wrongful discipline cause of action that includes not only discharge but also discipline as well; in the absence of this decision, a court's recognition that retaliation often constitutes constructive discharge is important. Because retaliation and constructive discharge cases rest upon fact-laden determinations that are easily within the ordinary experience of the jury, the courts should not usurp the jury's role in most cases by granting summary judgment to the defendant.

IV. THE ERROR OF ADDING "REASONABLE" TO SECTION 5.02

A. The State of the Law

Section 5.02 of the *Restatement* states as follows:

An employer is subject to liability in tort under § 5.01 for discharging an employee because the employee, acting in a reasonable manner:

a refuses to commit an act that the employee *reasonably and in good faith* believes violates a law or other well-established public policy, such as a professional or occupational code of conduct protective of the public interest;

b performs a public duty or obligation that the employee *reasonably and in good faith* believes the law imposes;

58. No. 11-CV-02565-WJM-KMT, 2013 WL 4838913 (D. Colo. Sept. 10, 2013).

59. *See id.*, at *2. Thanks to Scott Moss for directing us to this well-reasoned case.

60. *Id.* at *7.

61. *Id.* at *1-3.

- c. files a charge or claims a benefit in good faith under an employment statute or law, whether or not the charge or claim is meritorious;
- d. refuses to waive a nonnegotiable or nonwaivable right when the employer's insistence on the waiver as a condition of employment, or the court's enforcement of the waiver, would violate a well-established public policy;
- e. reports or inquires about conduct that the employee *reasonably and in good faith* believes violates a law or an established principle of a professional or occupational code of conduct protective of the public interest; or
- f. engages in other activity furthering a well-established policy.⁶²

As the reader can see, sub-sections (a), (b), and (e) contain a requirement that the employee's belief be "reasonable" and in good faith. Subsection (c) addresses filing a charge or claiming a benefit, in which case the employee only needs to file the claim in good faith, whether or not the charge is meritorious. Subsection (c) is consistent with how the anti-retaliation provision of Title VII is interpreted. Title VII differentiates between "participation" and "opposition."⁶³ With respect to "participation" (filing a charge with the EEOC, filing a complaint in court, or participating in any of these proceedings), Title VII protects the plaintiff even if the plaintiff is wrong on the merits of the charge and even if the plaintiff did not have a reasonable belief that the charge was meritorious.⁶⁴

Subsection (d) does not involve a plaintiff's belief; instead, it protects an employee if the employee refuses to "waive a nonnegotiable or nonwaivable right when the employer's insistence on the waiver as a condition of employment, or the court's enforcement of the waiver, would violate a well-established public policy."⁶⁵ And subsection (f) is the catch-all defense – protecting employees for engaging in "other activity furthering a well-established policy."⁶⁶

But the other three provisions that require a "belief" all require

62. RESTATEMENT OF EMP'T LAW § 5.02 (AM. LAW INST. 2015) (emphasis added).

63. See 42 U.S.C. § 2000e-3(a) (2012).

64. See, e.g., *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000). In fact, some courts allow a valid retaliation claim even if the charge filed was not in good faith. See *id.* However, other courts require the charge to have been filed in good faith. See, e.g., *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890 (7th Cir. 2004) (stating that a charge filed in bad faith is not protected activity).

65. RESTATEMENT OF EMP'T LAW § 5.02(d).

66. *Id.* § 5.02(f).

that the belief be “reasonable” and in “good faith.” We recognize that these provisions are an accurate statement of the law.⁶⁷ For instance, in *Green v. Ralee Engineering Co.*,⁶⁸ the employee/plaintiff noticed that the defendant, who manufactured “fuselage and wing components for military and civilian aircraft,” was shipping some airplane parts that had failed the inspections that the plaintiff’s team performed on the parts.⁶⁹ When the plaintiff was terminated, he alleged that his employer terminated him in retaliation for his complaints about his employer’s inspection practices.⁷⁰ The defendant argued that the plaintiff failed to prove that the “defendant actually violated any law, including FAA regulations, or that the defendant’s alleged inadequate inspection practices were, in fact, hazardous.”⁷¹ In response, the court stated that an “employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his ‘reasonably based suspicions’ of illegal activity.”⁷²

In *Schriner v. Meginnis Ford Co.*,⁷³ the plaintiff was a body shop mechanic for the employer. At one point, he purchased a used vehicle from his employer and as part of that transaction, he was provided with an odometer statement that said the mileage of the vehicle was 48,282.⁷⁴ A few years later, when the car’s mileage read 70,000, the car developed engine trouble, and the mechanic who worked on the vehicle said that it was “virtually impossible” for a vehicle with that mileage to have sustained such severe damage and therefore, the odometer must have been rolled back prior to the purchase.⁷⁵ The plaintiff then went to the Lancaster County clerk’s office “where he was ‘mistakenly’ informed that the records indicated that the vehicle had over 100,000 miles when it was purchased by him.”⁷⁶ Thus, the plaintiff believed that his employer had fraudulently represented the

67. See, e.g., *Palmer v. Brown*, M.D., 752 P.2d 685, 689-90 (Kan. 1988) (stating that an employee can bring a cause of action if terminated in retaliation for reporting a serious infraction of law by a co-worker or the employer as long as a “reasonably prudent person would have concluded the employee’s co-worker or employer was engaged in activities that violate rules, regulations, or the law”); *Dzwonar v. McDevitt*, 828 A.2d 893, 901-02 (N.J. 2003) (stating that the plaintiff must have an objectively reasonable belief that a violation of a statute, rule, or regulation has occurred).

68. 960 P.2d 1046 (Cal. 1998).

69. *Id.* at 1049.

70. *Id.* at 1050.

71. *Id.* at 1058.

72. *Id.* at 1059.

73. 421 N.W.2d 755 (Neb. 1988).

74. *Id.* at 756.

75. *Id.*

76. *Id.*

mileage of the vehicle.⁷⁷

Based on this belief, the plaintiff contacted the Nebraska Attorney General's office concerning the "possible violation of state odometer laws."⁷⁸ Subsequently, a member of the Attorney General's office visited the dealership and investigated the transaction but found the evidence "insufficient to establish odometer fraud" for the plaintiff's vehicle.⁷⁹ The owner of Meginnis Ford found Schriener at work, yelled at him, and eventually terminated him, stating that Meginnis Ford could not tolerate "this sort of stuff" happening at the dealership.⁸⁰

While recognizing the existence of public policy claims for reporting the violation of state law, the court stated that a claim is only valid if the employee acts in "good faith and upon reasonable cause in reporting his employer's suspected violation of the criminal code."⁸¹ The court held that even though Schriener had a reasonable belief that odometer fraud had been committed by *someone*, he did not have a reasonable belief that it was his employer, Meginnis Ford, who had committed the odometer fraud.⁸² These are just a couple of examples of the many cases requiring a showing of the employee's "reasonable" belief. They illustrate that the *Restatement* drafters are correct that most courts that address this issue follow the reasonable belief rule.

To be clear, however, some courts have held that a public policy claim requires an actual violation of the law – even a reasonable, good faith belief is not enough. For instance, in *Bordell v. General Electric Co.*,⁸³ the plaintiff was employed by General Electric as a health physicist when he reported to his supervisors that some employees might have been exposed to radiation levels sufficient to trigger Department of Energy mandatory reporting requirements. When his supervisors ignored his complaint, he complained directly to the Department of Energy, and was subsequently terminated.⁸⁴ The court held that the law in New York requires an actual violation of

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 757.

81. *Id.* at 759.

82. *Id.*

83. 667 N.E.2d 922 (N.Y. 1996).

84. *Id.* at 922.

the law – a reasonable good faith belief is not enough.⁸⁵

Similarly, a Texas court, in *Bowen v. E-Systems, Inc.*, held that a public policy claim requires the plaintiff to prove the discharge was caused by the plaintiff's refusal to perform an act that could result in criminal penalties against the employee.⁸⁶ In so holding, the court refused to follow another Texas case (*Johnston v. Del Mar Distributors*) that allowed for a public policy claim for an "employee who, in good faith, believes that her employer has requested she perform an act that may subject her to criminal penalties."⁸⁷ As the court in *Bowen* makes clear, the court in *Johnston* is an outlier in Texas and referred to a situation where the employee investigated whether an act that she was asked to perform was legal or not.⁸⁸

Some courts hold that the plaintiff lacks a public policy claim when the plaintiff refuses to perform an act that she believes is unlawful, but the court does not explicitly address the issue of whether the law in that state requires a reasonable, good faith belief or an actual violation of the law. For instance, in *Callantine v. Staff Builders, Inc.*,⁸⁹ the Eighth Circuit (applying Missouri law) held that the plaintiff lacked a claim because the act she refused to perform that led to her termination (signing a backdated form to authorize Medicare coverage for home visits) was not unlawful. But the court never discussed whether the plaintiff's belief that the conduct was unlawful was reasonable and whether that would have been enough to support her claim.⁹⁰

Similarly, the Ninth Circuit (applying California law) held that a plaintiff could not bring a public policy claim when he was terminated for refusing to work based on his erroneous belief that he would be violating the law in doing so.⁹¹ The plaintiff was employed as a

85. *Id.* at 923; *see also* *Green v. Saratoga A.R.C.*, 233 A.D.2d 821, 822 (N.Y. App. Div. 1996) (refusing to overturn the holding in *Bordell* that the plaintiff must demonstrate an actual violation of law to sustain a cause of action for wrongful discharge in violation of public policy).

86. No. 05-95-00821-CV, No. 05-95-00821-CV, 1996 WL 499814, at *4 (Tex. Ct. App. 1996).

87. *Id.* at *3 (citing *Johnston v. Del Mar Distrib. Co.*, 776 S.W.2d 768 (Tex. Ct. App. 1989)).

88. *Id.* (citing *Johnston*, 776 S.W.2d at 771-72 (holding that when the employer discharges the employee for contacting a regulatory agency to determine whether a requested act is illegal, the employee must have a good faith and reasonable belief that the requested act might be illegal but doesn't need to prove that the requested act was actually illegal)); *see also* *Camunes v. Frontier Enters., Inc.*, 61 S.W.3d 579, 580-81 (Tex. Ct. App. 2001) (refusing to expand Texas public policy claims to allow claims for inquiring into whether a requested act was unlawful).

89. *Callantine v. Staff Builders, Inc.*, 271 F.3d 1124, 1131 (8th Cir. 2001).

90. *Id.*

91. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

delivery driver and he was assigned a trailer that had expired registration papers for Illinois and an expired prorated vehicle tag for California.⁹² Despite receiving a letter from his employer stating that the employer accepted complete responsibility for the lack of registration, the plaintiff refused to deliver a load in the trailer, and the employer terminated him.⁹³ The court held: "Because it was legal to drive the trailer, and because no fundamental public policy concern was involved," the district court properly dismissed the plaintiff's claims.⁹⁴ The court seemed to be applying an "actual violation" rule but it never discussed whether the plaintiff could have succeeded if he reasonably believed that he was being asked to perform an act that was unlawful.

B. The Error of Adding "Reasonable"

As stated in Part II, the prior draft of the *Restatement* did not include the requirement that the plaintiff "reasonably believe" (a) that the act being requested by the employer violates a law or established principle of professional conduct; (b) that the act performed is one that is imposed by law; or (d) that the report or inquiry about employer conduct violates a law or established principle of professional conduct.⁹⁵

Instead, the prior version of section 5.02 stated:

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

An employer is subject to liability in tort under §4.02 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 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

92. *Id.* at 656.

93. *Id.*

94. *Id.* at 659.

95. *Working Group, supra* note 2, at 183 (citing the elements of section 4.02, which, as noted above, was the section used in the prior draft of the *Restatement*).

- the public interest; or
- e. engages in other activity furthering a substantial public policy.⁹⁶

As the reader can see, there is a requirement that an employee must be “acting in a reasonable manner” for all of the activities in section 4.02, but there is not a separate requirement that each act or refusal to act must be based on a “reasonable” belief. We believe that the prior draft of the *Restatement* is the better approach.

Thus, although the *Restatement* Reporters’ addition of the word “reasonable” in subsections (a), (b), and (e) of section 5.02 is consistent with existing law, we believe the better approach is to require only a good faith belief, and that the conduct (the report, action, or refusal to act) be done in a reasonable manner. The only substantive change that would be required to the actual language of section 5.02 would be to delete the word “reasonably” in sub-sections (a), (b), and (e).

We believe this is the better approach for three reasons: (1) the “reasonable belief” requirement creates an unacceptably high standard because it assumes that lay-persons (employees) know and can understand the law in a way that is completely devoid of reality; (2) because the protected activities of section 5.02 all involve activities that arguably benefit the public, employees reporting possible illegal activity or refusing to engage in possible unlawful activity should be encouraged rather than discouraged; and (3) employers are sufficiently protected by the requirement that the report, action, or refusal to act is done in a reasonable manner and based on a good faith belief. We address each of these in turn.

1. “Reasonable” Belief Requirement Creates an Unacceptably High Standard

Requiring that an employee “reasonably” believe that a law is being (or will be) violated or that the law requires a particular action creates an unacceptably high standard. First of all, as courts and commentators have argued in the context of public policy claims⁹⁷ and

96. *Id.* at 183-84 (citing RESTATEMENT (THIRD) OF EMP’T LAW § 4.02 (AM. LAW INST., Council Draft No. 3, 2008) (emphasis added)).

97. *See, e.g., id.* at 187-88 (criticizing one of the sections for requiring more than a good-faith belief, stating: “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”); *see also* Mehlman v. Mobil Oil Corp., 707 A.2d 1000, 1015-16 (N.J. 1998) (stating that the object of the whistleblowing statute is not to “make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they

retaliation claims pursuant to anti-discrimination statutes,⁹⁸ non-lawyer employees cannot possibly be expected to know when a particular action violates the law, especially when the court uses a standard that does not look only at a particular statute, but also at the case law interpreting the statute.⁹⁹ There are several examples where the court held that employees did not have a reasonable belief that the conduct they were reporting, complaining about, or refusing to perform was illegal, and these decisions were reached by reviewing the relevant law, without asking whether a lay person, not trained in the law, would have a reason to know or understand the relevant law.¹⁰⁰ We believe it is both unrealistic and unfair to expect lay persons to have consulted with legal authorities if they honestly believe that their employer is engaging in wrongdoing or that they are being asked to engage in wrongdoing.

In addition to the reasonable belief standard requiring laypersons to have knowledge and an understanding of the law that is unrealistic, the reasonable belief requirement, as a factual matter, sometimes is applied in a way that defeats the purpose of the public policy claim. For instance, as discussed above, in *Schriner v. Meginnis*

reasonably believe to be unlawful or indisputably dangerous to the public health, safety or welfare"). Despite this statement in *Mehlman*, the court still required an "objectively reasonable belief, at the time of objection or refusal to participate in the employer's offensive activity, that such activity is either illegal, fraudulent or harmful to the public health, safety or welfare." *Id.* at 1015.

98. See, e.g., Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 76-77 (2005) (stating that "[m]ost people lack knowledge about whether what they perceive as discrimination is actually unlawful, and judicial outcomes in discrimination cases frequently depend on the identity of judges and jurors"); Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Elimination the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1131 (2007) (arguing that the objective test "forces employees to essentially become law experts before deciding whether to report behavior they believe is unlawful").

99. See, e.g., Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1492 (2007) (criticizing a decision where the court assumed that the appropriate benchmark for assessing the reasonableness of the plaintiff's belief in reporting harassing behavior was the definition of sexual harassment established in the case law). As Gorod states, when someone complains of discrimination, her belief is most often intuitive and not the result of a "studious examination of the Federal Reporters, but rather the product of popular understanding." *Id.* In contrast, the courts determine reasonableness of the plaintiff's belief based on what the law says, rather than what the general public believes. This approach holds plaintiffs responsible for understanding the current state of the law. *Id.* And in areas where the law surrounding harassment or discrimination is uncertain, Gorod points out: "if the courts cannot agree, how are individual citizens supposed to know?" *Id.* at 1495.

100. See, e.g., *Hitesman v. Bridgeway, Inc.*, 63 A.3d 230, 234-38 (Sup. Ct. N.J. 2013) (stating that the plaintiff cannot prove his claim when he was terminated for complaining about improper patient care and high rates of infection at the nursing home that he worked at because he could not point to a particular statute that the employer had violated).

Ford Co.,¹⁰¹ the Supreme Court of Nebraska held that, although a public policy claim could lie when an employee is fired because he reported possible illegal behavior of his employer (odometer fraud), the employee did not have a reasonable belief that his employer had engaged in the offense of odometer fraud.¹⁰² The court stated:

In this case, Schriner had reasonable cause to believe that odometer fraud had been committed by *someone*, but not necessarily by Meginnis Ford. He knew that the vehicle was used; there is nothing in the evidence which suggests that Schriner saw anyone at Meginnis Ford change the odometer or that Schriner had reason to believe that Meginnis Ford routinely or otherwise engaged in such a practice. In the absence of such evidence, it cannot be said Schriner had reasonable cause to believe that Meginnis Ford had violated the odometer fraud statutes¹⁰³

This is a troubling case, from our perspective. First, reasonable minds can differ regarding whether Schriner's belief was reasonable,¹⁰⁴ and yet, the procedural posture of the case is an appeal from a grant of the employer's motion for summary judgment.¹⁰⁵ This evaluation requires the fact finder to consider the employee's testimony and demeanor at trial. Second, the reasonable person standard is too susceptible to applying 20/20 hindsight to the employee's belief. As the dissent in this case noted: "The rigorous standard imposed upon employees to establish reasonable cause in these cases may well bury meritorious claims forever."¹⁰⁶ To be clear, the dissent did not challenge the reasonable cause standard, but instead, argued that the court should have let a jury decide whether the plaintiff had reasonable cause to believe that his employer had committed odometer fraud. As stated by the dissent:

The majority admits in this case that "Schriner had reasonable cause to believe that odometer fraud had been committed by *someone* . . ." I believe that "someone" *includes* his employer. If Schriner had reasonable cause to believe someone rolled back his car's odometer, it cannot possibly be unreasonable to infer that the business from which he purchased the vehicle may have been the culprit. Schriner then had reason to believe that his employer, the seller in this circumstance, had "*otherwise engaged in*" odometer fraud, even without evidence that such was a routine practice or

101. 421 N.W.2d 755 (Neb. 1988).

102. *Id.* at 759.

103. *Id.*

104. This is evidenced by the fact that there was a dissenting judge in this case.

105. *Id.* at 756.

106. *Id.* at 759 (White, J., dissenting).

without actually witnessing the act.¹⁰⁷

The dissent's difference of opinion about the reasonableness of the plaintiff's belief is precisely one of the problems with the reasonable belief requirement.¹⁰⁸

2. Encouraging Behaviors that Protect the Public

The six categories of protected activity in section 5.02 are not simply protecting employees. The reason they are included is because they are all protective of the public. In fact, when employees complain of or report behavior that only affects the employer, and is not detrimental to the public, they lose their claim. For instance, in *Fox v. MCI Communications Corp.*,¹⁰⁹ the court stated that an employee who reports wrongdoing by co-employees to his employer, rather than to public authorities, and is fired for making such reports does not have a valid public policy claim.¹¹⁰ The court stated: "Although employees may have a duty to disclose information concerning the employer's business to their employer, that duty ordinarily serves the private interest of the employer, not the public interest."¹¹¹ Moreover, the court emphasized that even though the conduct of plaintiff's co-workers may have resulted in some increased costs of the employer's products and services and thus had a minor effect on the employer's shareholders, this did not implicate a "clear and substantial public policy."¹¹² Even though we do not necessarily agree with this case, it demonstrates that the activities that are covered by section 5.02 *do* implicate the interest of the public and therefore should be encouraged and protected. If the law protects only an employee who reports suspected wrongful activity that potentially harms the public based on a reasonable belief standard, many employees who are aware of such activity will be discouraged from reporting it. The public is not served by such a rule.

107. *Id.* at 759-60.

108. *See also* Rosenthal, *supra* note 98, at 1131 (arguing that the objective standard leads to inconsistency as courts reach different conclusions as to what constitutes a reasonable belief).

109. 931 P.2d 857 (Utah 1997).

110. *Id.* at 861.

111. *Id.*

112. *Id.*; *see also* *Foley v. Interactive Data Corp.*, 765 P.2d 373, 380 (Cal. 1988) (holding that an employee who was discharged after informing his employer of former suspected criminal activity by a new employee who was to be the plaintiff's supervisor did not have a valid public policy claim because there was no public interest at stake – the suspected illegal behavior would only harm the employer and not the public).

3. Employers Are Protected by a “Good Faith” Requirement and by Requiring that the Protected Activity Be Performed in a “Reasonable Manner”

Although we recognize employers’ legitimate interests and prerogative in effectively and efficiently running their businesses as they see fit, we believe that this interest can be served by courts thoughtfully evaluating whether the employee’s activity was done in good faith and by requiring that the means by which the employee engages in protected activity be reasonable.

The good faith inquiry is straightforward¹¹³ – the court would simply inquire into whether the plaintiff honestly believed that the conduct he was reporting, complaining about, or avoiding violated a law, statute, or furthered some other substantial public policy. If the employer suspects that the employee’s attempted protected activity is not in good faith – either because the employee is attempting to harm another employee out of vengeance or some other personal animosity, or perhaps because the employee is attempting to protect himself against anticipated and legitimate discipline, this evidence would not be too difficult to uncover. An employee acting out of vengeance or some other nefarious motive will likely have discussed this with someone at the workplace. And the timing of an employee making a complaint or reporting alleged wrongdoing immediately preceding a planned (and likely leaked) discipline or termination will usually be an obvious ploy to fact-finders.

The key to protecting employers’ legitimate interests and prerogatives in effectively and efficiently running their businesses is the requirement (already present in section 5.02) that, when engaging in any of the protected activities in section 5.02, the employee must be “acting in a reasonable manner.”¹¹⁴ *Unreasonable* reports or complaints or *unreasonably* refusing to perform a requested task by the employer is what causes employers to have legitimate concerns when trying to run their businesses.

Consider this example: a nurse in a hospital honestly believes that one of the doctors has been ordering procedures to be performed on patients that the nurse thinks are harmful to the patients’ health. It turns out the nurse is wrong about her beliefs (unreasonably so), but

113. Rosenthal, *supra* note 98, at 1169 (stating that it is usually fairly easy to determine whether an employee has a subjective, good-faith belief that an employer has engaged in unlawful conduct).

114. RESTATEMENT OF EMP’T LAW § 5.02 (AM. LAW INST. 2015).

she honestly believes that, in order to protect the patients of the hospital, she needs to report this doctor to someone at the hospital. Thus, the employee schedules a meeting with a human resources (HR) representative and explains her concerns. The HR representative meets with the doctor, who explains that the employee's belief is erroneous and explains why to the HR representative's satisfaction. This is subsequently explained to the nurse, who, because she is acting reasonably, accepts the explanation and drops the matter. Nevertheless, the doctor demands that the nurse be fired, and she is. The nurse should have a valid public policy claim even though she was wrong (and unreasonably so) about whether the doctor was ordering procedures that were harmful to the patients' health. Her report did not harm the employer at all; and in fact, only harmed the doctor's ego. Even though she was unreasonable in her belief, she should still be protected.

Now change the facts a bit. The same nurse has the same good faith but unreasonable belief about the same possible wrongdoing by the doctor. But instead of one polite complaint to the HR department, the nurse loudly talks about her suspicions to other nurses, other doctors, and anyone else who will listen. Some patients overhear the nurse's accusation, and a bit of panic ensues. Even after it has been explained to the nurse why her belief is erroneous, she refuses to drop the matter. In this case, even though the plaintiff's belief about possible wrongdoing that potentially implicated the public's health was in good faith, she should not be protected. But it is not her unreasonable belief about the wrongdoing that precludes her from having a valid public policy claim; it is the *unreasonable manner* in which she attempts to engage in protected activity. In this case, her alleged protected activity did harm the employer and it would be justified in terminating her.

An example of this distinction can be found in *Almeida v. University of Medicine and Dentistry of New Jersey*,¹¹⁵ where the plaintiff was fired for not performing an x-ray that he was asked to perform. The plaintiff was a radiology technician whose job duties included performing portable x-ray examinations ordered by a physician.¹¹⁶ While he was working the midnight shift one night, a doctor he did not know asked him to complete a chest x-ray on a patient. Almeida believed that there were laws governing x-rays and

115. No. L-5746-09, 2014 WL 8240514 (N.J. Sup. Ct. Mar. 23, 2015).

116. *Id.* at *1.

that those laws stated that he was only allowed to perform an x-ray after receipt of a “*written* requisition from a licensed physician.”¹¹⁷ The plaintiff asked the doctor if he had completed a requisition for the x-ray and the doctor indicated that he had not. The plaintiff told the doctor that the doctor should call the radiology desk and submit a request and that once the request was generated, the plaintiff would perform the x-ray.¹¹⁸ The plaintiff allegedly checked with the radiology desk a couple of times during his busy shift, but no requisition had been generated.¹¹⁹ The plaintiff completed his shift at the hospital without having completed the x-ray that he had been verbally instructed to perform.¹²⁰ The patient for whom the x-ray was ordered died a half-hour after the plaintiff left.¹²¹ When questioned about why he had not completed the x-ray as ordered, the plaintiff only answered that it was a busy night shift and that he might have forgotten to do the x-ray.¹²² He submitted a written statement, asserting that he thought the x-ray request had been cancelled.¹²³ The employer eventually terminated him for failure to follow directives.¹²⁴

Plaintiff filed a complaint, challenging his discharge, and stating that he believed that performing an x-ray on a patient without a requisition form was illegal and that is why he had refused to perform the x-ray.¹²⁵ The trial court denied the employer’s motion for summary judgment, and the case went to trial.¹²⁶ At trial, the defendant moved for dismissal at the end of the plaintiff’s case and at the close of evidence, both of which were denied. The jury found for the plaintiff, and the trial court denied the defendant’s motion for judgment in its favor or a new trial.¹²⁷ The appellate court proceeded through a very detailed parsing of the various statutes and regulations that the plaintiff relied upon to support his assertion that he reasonably believed that it was unlawful for him to perform an x-ray without a written request.¹²⁸ The court stated that none of the

117. *Id.*

118. *Id.*

119. *Id.* at *2.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* Of course, he later argued that he did not complete the x-ray because the doctor who ordered it did not do so in writing.

124. *Id.* at *3.

125. *Id.*

126. *Id.* at *4.

127. *Id.*

128. *Id.* at *5.

regulations or statutes plaintiff cited contained a requirement that a licensed practitioner order an x-ray *in writing*.¹²⁹ Thus, even though the court recognized that specific knowledge of the precise source of public policy is not necessary because the purpose is not to “make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health,”¹³⁰ the court nevertheless held that the plaintiff had no “objectively reasonable belief” that a violation had occurred and reversed the jury verdict and ordered judgment for the defendant.¹³¹

The plaintiff in this case had an honest, good-faith belief that it was unlawful for him to perform an x-ray without a written requisition. In fact, the hospital policy required a written requisition. And yet, despite the trial court’s repeated denial of the defendant’s motions for judgment as a matter of law and the jury verdict in his favor – both of which indicate that reasonable minds could conclude that the plaintiff had a reasonable belief that performing the x-ray would be unlawful – the court held otherwise, substituting its own judgment of what is reasonable for the jury’s judgment.

Under our proposal, the plaintiff could have proven that he engaged in protected activity because the standard would be one of good faith, not objective reasonableness. And yet, we believe that the employer should have won, not because the plaintiff was unreasonably wrong about his belief that x-ray requests had to be in writing, but because he did not engage in his opposition activity in a “reasonable manner.” Instead of refusing to perform the x-ray, and failing to follow up to make sure it was eventually completed, if he had been acting in a “reasonable manner,” he should have reported to someone that a doctor had requested an x-ray without a written requisition and asked how to proceed. Whether the hospital exercised good business judgment in deciding to terminate him is a close call, but it does not appear to us that the decision was based on a retaliatory motive; it was instead based on the plaintiff’s failure to exercise good judgment under the circumstances.

129. *Id.* at *7.

130. *Id.* (quoting *Mehlman v. Mobil Oil Corp.*, 707 A.3d 1000, 1015-16 (N.J. 1998)).

131. *Id.* at *8.

4. Similar Arguments Under Analogous Areas of Law

As many readers know, to establish a valid retaliation claim for opposing¹³² unlawful activity under Title VII,¹³³ the Age Discrimination in Employment Act,¹³⁴ and the Americans with Disabilities Act,¹³⁵ the plaintiff generally¹³⁶ must demonstrate that she had a reasonable, good-faith belief that the conduct she complained about violated the statute.¹³⁷

132. As stated above, *supra* note 63 and accompanying text, Title VII differentiates between “opposition” and “participation” activities, giving more absolute protection when a plaintiff “participates” by filing a charge with the EEOC or filing a complaint in court. Here, we are referring to a plaintiff’s “opposition” activities, which usually involve complaining internally (to a supervisor or human resources representative) rather than filing a charge or complaint.

133. 42 U.S.C. § 2000e-3(a) (2012).

134. 29 U.S.C. § 623(d) (2012) (“It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section.”).

135. 42 U.S.C. § 12203(a) (2012) (“No person shall discriminate against any individual because such individual has opposed any act . . . made unlawful by [the ADA].”).

136. We use the word “generally” because the Supreme Court has never definitively addressed this issue. In *Clark County School District v. Breeden*, 532 U.S. 268 (2001), the Court had the opportunity to determine if the anti-retaliation provision of Title VII applies only to opposed acts that are actually unlawful under Title VII or whether a plaintiff’s good-faith, reasonable belief should suffice. *Id.* at 270. The Court recognized that the Court of Appeals for the Ninth Circuit had protected employee opposition not just to practices that are actually unlawful but also to practices that the employee could reasonably believe were unlawful. *Id.* But the Court stated that it had “no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident [the employee complained about] violated Title VII.” *Id.*

137. See, e.g., *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1311 (11th Cir. 2002) (stating that an opposition clause claim requires a reasonable and good faith belief that the employer violated Title VII); *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 913 (9th Cir. 2001) (same); *Foster v. Time Warner Entm’t Co., L.P.*, 250 F.3d 1189, 1195 (8th Cir. 2001) (same); *McMenemy v. City of Rochester*, 241 F.3d 279, 285 (2d Cir. 2001) (same); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 706-07 (7th Cir. 2000) (same); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000) (same); *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (stating that a “claim concerning the opposition clause requires that the employee have a reasonable belief that the practice the employee is opposing violates Title VII”); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 865 (3d Cir. 1990) (stating that a long line of Title VII cases hold that a plaintiff “establishes a retaliation claim if she avows that she had a reasonable belief that her employer was engaged in an unlawful employment practice and that the employer retaliated against her for protesting against that practice”); *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1019-20 (D.C. Cir. 1981) (agreeing with the standard that a plaintiff claiming retaliation need only have a reasonable and good faith belief that the underlying conduct violated Title VII). But see *Keys v. U.S. Welding, Fabricating & Mfg., Inc.*, No. CV91-0113, 1992 WL 218302, at *5 (N.D. Ohio Aug. 26, 1992) (stating that a plaintiff bringing a retaliation claim under Title VII need only have a “good faith belief” that the company practice he opposed violated Title VII). Interestingly, this case has no “negative treatment” flag on Westlaw but it seems to be clearly overruled by the Sixth Circuit’s decision in the *Johnson* case cited above. See also *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) (requiring only a good faith belief). This case was decided before the Supreme Court’s opinion in *Breeden*, but as noted by Professor Rosenthal, the 10th Circuit continued to use the subjective, good-faith test for a period of time after *Breeden*. Rosenthal, *supra* note 98, at 1136-38.

Similar to our argument here, several scholars have argued that the reasonable belief requirement under Title VII and other anti-discrimination statutes should be abandoned¹³⁸ for several reasons: that it stifles the broad remedial goals of Title VII and other anti-discrimination statutes;¹³⁹ that it places employees in an unfair catch-22 (with respect to reporting harassment);¹⁴⁰ that it judges the reasonableness of the belief based on a judge's law-trained perspective, rather than the perspective of a lay-person;¹⁴¹ and that informal complaints should be encouraged rather than discouraged.¹⁴² Although beyond the scope of this paper, we agree with these scholars' critiques of the reasonable belief requirement under anti-discrimination statutes.

V. CONCLUSION

We believe that Chapter 5 of the *Restatement of Employment Law* should have kept two features of its earlier draft: (1) creating causes of action for wrongful discharge *and* wrongful discipline that falls short of discharge; and (2) not requiring that an employee "reasonably" believe that conduct reported or avoided violates the law. Given the power that employers have over employees' lives and working conditions and the difficult economic circumstances that many employees endure, the employment-at-will doctrine creates undue pressure on employees to keep their mouths shut and to fail to engage in behaviors that support the state's public policy. One way that courts that decide to adopt the *Restatement* public policy tort can assure that their states' public policies have the maximum protection is to adopt both of the changes proposed in this paper.

138. See, e.g., Brake, *supra* note 98; Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 165-66 (2014); Gorod, *supra* note 99; Rosenthal, *supra* note 98; Craig Robert Senn, *Redefining Protected "Opposition" Activity in Employment Retaliation Cases*, 37 CARDOZO L. REV. 2035-2036 (2016).

139. See, e.g., Brake, *supra* note 98, at 55; Rosenthal, *supra* note 98, at 1150-51; Senn, *supra* note 138, at 2048.

140. See, e.g., ; Brake, *supra* note 98, at 77; Brake, *supra* note 138, at 138-44; Rosenthal, *supra* note 98, at 1149-50; Senn, *supra* note 138, at 2074-79.

141. See, e.g., Brake, *supra* note 98, at 76-77, 82; Gorod, *supra* note 99, at 1492, 1495; Rosenthal, *supra* note 98, at 1131.

142. See, e.g., Brake, *supra* note 98, at 78; Senn, *supra* note 138, at 2079-81.