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WHEN DOING THE RIGHT THING MEANS LOSING YOUR JOB: REFORMING THE NEW YORK WHISTLEBLOWER STATUTE

Silvia X. Liu*

“Our lives begin to end the day we become silent about things that matter.”

– Martin Luther King Jr.¹

INTRODUCTION

In 2002, investors lost more than \$300 billion,² employees of the country’s biggest corporations lost their jobs, and millions of workers saw their retirement funds drained.³ For countless Americans, the year is remembered as “the year corporations failed them.”⁴ At a time when many were devastated by corporate fraud and troubled by the ineffectiveness of law enforcement agencies, three women became “heroes at the scene, anointed by circumstance.”⁵ Cynthia Cooper, Coleen Rowley, and Sherron Watkins were the proverbial pearly white lilies that blossomed out of the muddy waters of corporate scandals and government oversights⁶—they were whistleblowers.⁷

The term “whistleblower” is derived from “the act of an English bobby [policeman] blowing his whistle upon becoming aware of the commission of a crime to alert other law enforcement officers and the public within the zone of danger.”⁸ Today, the term

* City University of New York School of Law, J.D. candidate, May 2004. The author thanks Professor Ruthann Robson for working tirelessly with her on this article, and Professor Andrea McArdle for her valuable input. She also thanks her Mom and Dad for believing in her and allowing her to pursue her dreams.

¹ Richard Lacayo & Amanda Ripley, *Persons of the Year—Coleen Rowley, Cynthia Cooper, Sherron Watkins*, TIME, Dec. 30, 2002/Jan. 6, 2003, at 26. The quotation was printed on note pads that Enron handed out to its employees. *Id.*

² John A. Byrne, *Fall from Grace*, BUS. WEEK, Aug. 12, 2002, at 51.

³ Jonathan J. Higuera, *Corporate Backlash*, ARIZ. DAILY STAR, Sept. 22, 2002, at D1.

⁴ Adi Ignatius, *Wall Street’s Top Cop*, TIME, Dec. 30, 2002/Jan. 6, 2003, at 64.

⁵ Lacayo & Ripley, *supra* note 1, at 26.

⁶ “The pearly white lilies that blossomed out of muddy water without stain.” Chinese proverb, learned at mother’s knee.

⁷ They are also TIME’s Persons of the Year in 2002. James Kelly, *The Year of the Whistle-Blowers*, TIME, Dec. 30 2002/Jan. 6, 2003, at 8.

⁸ *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 727 (Tex. 1990) (Doggett, J., concurring); see also Joan Corbo, Note, *Kraus v. New Rochelle Hosp. Medical Ctr.: Are Whistleblowers Finally Getting the Protection They Need?*, 12 HOFSTRA LAB. L.J. 141 (1994)

has taken on the meaning of “[a]n employee who reports employer illegality to a governmental or law-enforcement agency.”⁹ Whistleblowers serve an important function in safeguarding public welfare by disclosing their employers’ wrongful conduct that the employers would prefer to conceal.¹⁰ They are people who aim to right the wrongs of their superiors by risking, at the very least, their jobs, health, privacy and sanity.¹¹ This article focuses on whistleblowers who are *private* employees. Thus, in this article, “whistleblowers” refer to *private* employees who disclose their employers’ wrongful conduct.

Uniquely situated, a whistleblower can detect the presence of illegality more readily than a governmental inspector can and is often the only person who can provide information about the employer’s wrongful conduct.¹² For example, Cynthia Cooper, head of the internal audit department of WorldCom, decided to redo the company’s financial audits after a WorldCom executive told her that corporate accounting took money from his reserve account and used it to boost WorldCom’s income.¹³ She later discovered that, in 2001, through “creative accounting,” WorldCom turned a \$662 million loss into a \$2.4 billion profit.¹⁴ She blew the whistle by informing the audit committee of WorldCom’s board of her findings.¹⁵ Soon after, the public learned that WorldCom had committed the largest accounting fraud in history by inflating its profit by \$3.8 billion.¹⁶ The number grew to \$9 billion by December, 2002.¹⁷ As of January 2003, Cooper was still assisting both the Federal Bureau of Investigation and the Securities and Exchange Commission in their investigation into WorldCom’s inappropriate accounting practices by providing data that she had secretly copied while redoing WorldCom’s financial audits.¹⁸ Throughout the ordeal of her discovering, disclosing, and assisting in the investigation of the WorldCom scandal, Cooper read and reread the 23rd

(one of the many articles that criticize the inadequacies of the New York Whistleblower Statute).

⁹ BLACK’S LAW DICTIONARY ABRIDGED 1289 (7th ed. 2000).

¹⁰ See, e.g., Thomas E. Egan, *Wrongful Discharge and Federal Preemption: Nuclear Whistleblower Protection Under State Law and Section 210 of the Energy Reorganization Act*, 17 B.C. ENVTL. AFF. L. REV. 405, 405-06 (1990).

¹¹ Lacayo & Ripley, *supra* note 1, at 26; see also Corbo, *supra* note 8, at 142.

¹² See, e.g., Egan, *supra* note 10, at 405-06.

¹³ Amanda Ripley, *The Night Detective*, TIME, Dec. 30, 2002/Jan. 6, 2003, at 37.

¹⁴ *Id.* at 39.

¹⁵ *Id.* at 39-40.

¹⁶ *Id.* at 37.

¹⁷ *Id.*

¹⁸ *Id.* at 39-40.

Psalm: "Yea, though I walk through the valley of the shadow of death, I will fear no evil: for thou art with me."¹⁹

Although revealing an employer's illegalities might not be as loathsome as death, it comes quite close. Whistleblowers right the wrongs of their employers with the full understanding that, in exchange, they might be required to pay a hefty price.²⁰ Because of the important and unique function of whistleblowers, they should be afforded protection that will not only encourage the disclosure of wrongful practices, but also the timely disclosure of these practices. However, employers and the business community as a whole, as well as some scholars, advocate for a narrow scope of protection.²¹ They believe that limited protection is necessary to enforce employee loyalty, to avoid disruptions of employee morale, to preserve internal company security and procedures, to avoid public embarrassment of the employer, and to prevent employees from abusing such protection.²²

Despite opposition from both the business and academic communities, the New York State Legislature enacted the state's Whistleblower Statute²³ in 1984 to "protect [private] employees from adverse or retaliatory personnel action by their employers when they have reported information concerning the employer's [wrongful practices]."²⁴ The statute is also intended to "promote enforcement of the law, and give needed protection to employees who wish to act as law-abiding citizens without fear of losing their job."²⁵ However noble its goals, the statute, as interpreted by the New York courts, fails to adequately protect employees who reveal their employers' illegal practices. Under the current judicial interpretation of the statute, a whistleblower like Cooper would be left without relief if she were fired for exposing the WorldCom accounting fraud that led to the loss of at least \$3 billion in shareholders' investment and 17,000 jobs.²⁶

¹⁹ *Id.* at 40.

²⁰ See Corbo, *supra* note 8, at 142.

²¹ See, e.g., Susan Sauter, *The Employee Health and Safety Whistleblower Protection Act and the Conscientious Employee: The Potential for Federal Statutory Enforcement of the Public Policy Exception to Employment at Will*, 59 U. CIN. L. REV. 513, 545 (1990); Corbo, *supra* note 8, at 142-43.

²² See, e.g., Corbo, *supra* note 8, at 142.

²³ See N.Y. Lab. Law § 740 (McKinney 2002).

²⁴ Governor's Mem. Approving N.Y. Lab. Law § 740, N.Y. Session Laws of 1984, ch. 660, 3624 (McKinney).

²⁵ *Id.*

²⁶ See Ripley, *supra* note 13, at 37. A New York State private employee often does not receive protection from federal whistleblower statutes, because "[w]hile federal whistleblower statutes provide broad protection for government employees, they pro-

There are two obvious problems with the language of the statute and the courts' interpretation of the statute. First, to obtain statutory protection, an employee must show an actual violation of the law, rule or regulation.²⁷ The employee's reasonable belief that a violation has occurred or is occurring is insufficient. Second, the actual violation of the law, rule or regulation must create and present a substantial and specific danger to public health or safety,²⁸ which the courts have interpreted to exclude corporate wrongdoing that is monetary or financial.

To solve these problems, the New York statute must be amended so that it will fulfill its goals of promoting law enforcement and providing much-needed protection to whistleblowers. Thus, instead of requiring an employee to show an actual violation of the law, rule or regulation, an employee should be protected if she or he reasonably believes that a violation of the law, rule or regulation has occurred or is occurring. In other words, if the employee can show that a reasonably prudent person under the circumstances would conclude that a violation has occurred or is occurring, then she or he should be granted statutory protection for disclosing the violation. Furthermore, the application of the statute should not be limited to violations that create and present a substantial and specific danger to public health or safety. Rather, the scope of applicable violations should be broadened to include any violation that creates and presents harm to the public welfare—this would include corporate financial wrongdoing.

Part I of this article revisits the New York courts' treatment of whistleblowers prior to the enactment of the New York Whistleblower Statute, and discusses the protection granted to whistleblowers subsequent to enactment. Part II examines the problems created by the language of the statute and the courts' interpretation of the statute. Part III explores whistleblower statutes in sister states, and Part IV suggests proposed amendments to the statute.

tect private employees primarily from retribution for enforcing only certain public health statutes." Sara A. Corello, Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389, 394 (1992).

²⁷ N.Y. Lab. Law § 740(2); see also *Bordell v. Gen. Elec. Co.*, 88 N.Y.2d 869, 871 (1996).

²⁸ N.Y. Lab. Law § 740(2).

I. NEW YORK WHISTLEBLOWER STATUTE RESTRICTS EMPLOYERS'
UNFETTERED POWER TO DISCHARGE PRIVATE EMPLOYEES

Until the New York State Legislature enacted the Whistleblower Statute in 1984, New York State law provided private employees with virtually no legal protection from retaliatory action following their exposure of employers' wrongful activities.²⁹ This was a result of the common law employment-at-will doctrine, which affords employers the unfettered power to terminate the employment of at-will employees for good, bad, or no cause at all.³⁰

The New York Court of Appeals decision in *Murphy v. American Home Products Corporation* provides an illuminating examination of the state's employment-at-will doctrine.³¹ In 1957, Joseph Murphy was hired by American Home Products Corporation as an accountant. He was fired in 1980 after more than twenty years of employment.³² Prior to his termination, in 1976, Murphy was allegedly demoted for reporting accounting inaccuracies that involved altered invoices.³³ Two years later, in 1978, he filed a report on certain illegal pension reserves, but the report was ignored by the corporation.³⁴ Then, in 1980, he again raised the same issue with two superior officials, but "he was told he did not know what he was talking about," and was fired immediately.³⁵ According to Murphy, when he returned for his belongings the next day, "he was placed under guard, barred from saying goodbye to his colleagues . . . and his possessions [were] dumped on the street beside him."³⁶ In his lawsuit against the American Home Products Corporation, Murphy claimed that he was terminated in retaliation for revealing to his superior officers that he had uncovered illegal accounting manipulations and for refusing to engage in the alleged illegal acts.³⁷

Joining the appellate and trial courts, the New York Court of Appeals ruled against Murphy, stating that it would not recognize a

²⁹ See Corbo, *supra* note 8, at 142 ("Until recently, whistleblowers had no legal recourse for enduring the consequences of whistleblowing.").

³⁰ See, e.g., *Martin v. N.Y. Life Ins. Co.*, 148 N.Y. 117, 121 (1895) ("[T]he hiring of the plaintiff was a hiring at will and the defendant [employer] was at liberty to terminate [the relationship] at any time.").

³¹ 58 N.Y.2d 293 (1983).

³² *Id.* at 297.

³³ *Murphy v. Am. Home Prod. Corp.*, 112 Misc. 2d 507, 508 (N.Y. Sup. Ct. 1982), *aff'd*, 58 N.Y.2d 293 (1983).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 508-09.

³⁷ *Murphy*, 58 N.Y.2d at 297-98. Murphy also alleged that he was terminated because he was 59 years old. *Id.*

cause of action for wrongful discharge of an at-will employee, because "such recognition must await action of the legislature."³⁸ The court also noted that such recognition would alter New York State's long-settled employment-at-will doctrine, which states that an employment for "an indefinite term . . . is presumed to be a hiring at will," and "may be freely terminated by either party at any time for any reason or even for no reason."³⁹ Changing such a well-established law, the court reasoned, "[was] best left to the legislature."⁴⁰

Subsequently, in 1984, one year after the Court of Appeals decided *Murphy*, the New York Legislature acted.⁴¹ It passed the Whistleblower Statute,⁴² and provided "affirmative protection"⁴³ to private employees who report information about their employers' violation of law, rule or regulation that creates and presents a substantial and specific danger to the public health or safety. One of the goals of the statute is to encourage those at the working level to report hazards, improprieties and wrongdoings to supervisors, and to a public authority, if necessary.⁴⁴ The hope is that the statute would encourage employees to disclose employers' wrongful conduct, protect the welfare of the people of New York State, and give needed protection to employees who wish to act as law-abiding citizens without the fear of losing their job.⁴⁵ Unfortunately, because of limitations in the statutory language and the courts' interpretation of the statute, this hope often remains just that—a hope.

³⁸ *Id.* at 297.

³⁹ *Id.* at 300 (citing *Martin v. N.Y. Life Ins. Co.*, 148 N.Y. 117, 121 (1895) ("[A] general or indefinite hiring is prima facie a hiring at will A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even" If the hiring is at will, then either the employee or the employer is at "liberty to terminate the [employment] at any time.")).

⁴⁰ *Id.* at 301.

⁴¹ It has been suggested that the Whistleblower Statute "was enacted in response to the [Court of Appeals] decision in *Murphy* . . . which upheld the corporate employer's right to terminate an at-will employee who revealed certain illegal accounting manipulations to officers and directors of the corporation and refused to engage in such improprieties." *Remba v. Fed'n Employment & Guidance Serv.*, 149 A.D.2d 131, 139-40 (N.Y. App. Div. 1989) (Ellerin, J., dissenting), *aff'd*, 76 N.Y.2d 801 (1990).

⁴² N.Y. Lab. Law § 740(2) (a).

⁴³ Judiciary, Mem. of Office of Ct. Admin., N.Y. Session Laws of 1984, ch. 665, 3875 (McKinney).

⁴⁴ *Leibowitz v. Bank Leumi Trust Co.*, 152 A.D.2d 169, 176 (N.Y. App. Div. 1989).

⁴⁵ Governor's Mem., *supra* note 24 ("Encouraging employees to bring violations to the attention of their employers and shielding them from employer retaliation if they disclose wrongful conduct to authorities, will protect the welfare of the people of this State, promote enforcement of the law, and give needed protection to employees who wish to act as law-abiding citizens without fear of losing their jobs.").

A. *The Language of the New York Whistleblower Statute Provides Limited Protection to Whistleblowers*

The most important provision of the Whistleblower Statute is Subsection Two. Entitled “Prohibitions,” it provides:

An employer shall not take any retaliatory personnel action⁴⁶ against an employee because such employee does any of the following:

- (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation⁴⁷ which violation creates and presents a substantial and specific danger to the public health or safety;
- (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or
- (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

The statute’s plain language prohibits an employer from taking any adverse or retaliatory personnel action, including termination, suspension or demotion,⁴⁸ against an employee who discloses, threatens to disclose, provides information concerning the employer’s activities, or refuses to participate in such activities that are in violation of the law, rule or regulation, and that create and present a specific and substantial danger to the public health or safety.⁴⁹

In reality, an employee has to overcome two major hurdles before falling within the protective parameters of the statute. First, an employee seeking protection has to meet an immense evidentiary burden of demonstrating that her or his employer is in *actual* violation of a law, rule or regulation.⁵⁰ This is the result of both the statute’s failure to define the term—“violation,”⁵¹ and the courts’ insistence on interpreting the term to mean “actual viola-

⁴⁶ “Retaliatory personnel action” means the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment. N.Y. Lab. Law § 740(1)(e).

⁴⁷ “Law, rule or regulation” includes any duly enacted statute or ordinance or any rule or regulation promulgated pursuant to any federal, state or local statute or ordinance. N.Y. Lab. Law § 740(1)(c).

⁴⁸ N.Y. Lab. Law § 740(1)(e).

⁴⁹ N.Y. Lab. Law § 740(2); see also *Remba v. Fed’n Employment & Guidance Serv.*, 149 A.D.2d 131, 134 (N.Y. App. Div. 1989) (referring to comments in the Bill Jacket of N.Y. Lab. Law § 740).

⁵⁰ E.g., *Bordell v. Gen. Elec. Co.*, 88 N.Y.2d 869 (1996).

⁵¹ See N.Y. Lab. Law § 740(1).

tion.” Second, the Whistleblower Statute, as it is written, protects a limited class of employees—only those who blow the whistle on activities that are illegal and that “create and present a substantial and specific danger to the public health or safety.”⁵² This has led to many criticisms since the statute’s enactment.⁵³ For example, the New York State Attorney General complained that the bill “does not *clearly* protect *all* ‘whistle blower’ employees.”⁵⁴ As if he had foreseen the recent corporate scandals, he expressed his concern that the bill would not provide a remedy for employees who “refuse to engage in or who reveal illegal financial or accounting practices,” and urged that “this defect in the bill be cured by future legislation.”⁵⁵ The Attorney General’s concern materialized when the New York courts restricted the statutory protection by categorically excluding employees who disclose corporate financial wrongdoing from the protected class of whistleblowers.

B. The New York Courts Further Narrowed the Statutory Protection Afforded to Whistleblowers

The New York courts, reluctant to depart from the long-standing doctrine of employment-at-will which guaranteed employers unfettered power to dismiss employees at any time for any or no reason, have deemed the Whistleblower Statute to be a mere “narrow and specific statutory exception” to the doctrine.⁵⁶ The courts’ interpretation of the statute, more specifically their interpretation of the term, “violation,” has produced discouraging results that lead one to wonder about the effectiveness of the statute. For example, the courts refused to provide statutory protection to Lois Kern who reported an alleged rape to the Monroe County District

⁵² See N.Y. Lab. Law § 740(2), (3).

⁵³ E.g., Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137, 1183-84 (1989) (“Unfortunately, [N.Y. Labor Law § 740] is a mere shadow of the whistleblower statutes proposed by the state assembly, the New York Civil Liberties Union, the New York State AFL-CIO, and other lobby groups[.]” and “there is much that is wrong with New York’s Whistleblower Statute.”); Corbo, *supra* note 8, at 147 (“The difficulties in asserting a viable claim under New York’s whistleblower statute become magnified upon examination of specific sections of the statute.”); Remba, 149 A.D.2d at 139-40 (Ellerin, J., dissenting) (discussing the Attorney General’s memorandum approving N.Y. Lab. Law § 740).

⁵⁴ Remba, 149 A.D.2d at 134 (citing the Attorney General’s memorandum approving N.Y. Lab. Law § 740) (internal citation and quotation marks omitted) (emphasis added).

⁵⁵ *Id.*

⁵⁶ Remba, 149 A.D.2d at 135.

Attorney's Office.⁵⁷

The employee, Lois Kern, worked as a part-time program aide at DePaul's adult community residence for mentally handicapped individuals.⁵⁸ She discovered a male resident engaging in sexual intercourse with a female resident who appeared not to have consented and who might have been coerced.⁵⁹ Kern made "a notation to that effect in the female resident's permanent file and also reported the incident to the . . . District Attorney's office."⁶⁰ Her employment was soon terminated. She then commenced a lawsuit against DePaul Mental Health Services under the newly-enacted Whistleblower Statute, alleging that the termination was the result of her disclosure.⁶¹

Both the Whistleblower Statute and the New York courts provided Kern with no relief after she lost her job for revealing a sexual intercourse occurrence that, based on the "fair implication" of the facts, could have been nonconsensual.⁶² The trial court reasoned that Kern failed to prove that her employer was in *actual* violation⁶³ of *any law*.⁶⁴ The court interpreted "violation"⁶⁵ to mean *actual* violation, and held that "[a] belief on the part of the employee that a violation has occurred is insufficient to invoke the statute's protection."⁶⁶ Thus, the trial court dismissed Kern's lawsuit.⁶⁷ The Appellate Division affirmed.⁶⁸

Another example of the ineffectiveness of the statute resulting from its limited application is *Remba v. Federation Employment and*

⁵⁷ *Kern v. DePaul Mental Health Servs.*, 139 Misc. 2d 970, 971-72 (N.Y. Sup. Ct. 1988), *aff'd*, 152 A.D.2d 957 (N.Y. App. Div. 1989), *appeal denied*, 74 N.Y.2d 615 (1989).

⁵⁸ *Id.* at 971.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 972.

⁶³ *Id.* Although "[Kern] had some factual basis for her conclusion that the alleged intercourse . . . was nonconsensual in nature," the court nonetheless found that the sexual intercourse was "consensual in nature despite the female resident's [mental] limitations." *Id.* Thus, the court found that Kern was unprotected by the statute because there was no actual violation of the law on the part of the employer.

⁶⁴ The court also ruled in favor of the defendant because, "[t]o the extent that plaintiff would be able to prove her contention that even consensual sexual intercourse violated in-house rules and regulations [of DePaul Mental Health Services], such violation, consisting of consensual sexual acts, cannot be said to create a substantial and specific danger to the public health or safety." *Id.* at 974.

⁶⁵ N.Y. Lab. Law § 740(2).

⁶⁶ *Kern*, 139 Misc. 2d at 973.

⁶⁷ *Id.* at 974.

⁶⁸ *Kern*, 152 A.D.2d at 957-58.

Guidance Service.⁶⁹ Claire Remba was employed by the defendant as a coordinator of employment services.⁷⁰ The defendant, a not-for-profit agency, received New York City funding for finding employment for job applicants, or placing them in educational or training programs.⁷¹ Remba alleged that she “was discharged because of her objection to, and refusal to participate in” the defendant’s fraudulent billing of New York City for placements it never made.⁷²

The appellate court affirmed the trial court’s ruling to dismiss Remba’s complaint, reasoning that the defendant’s practice of fraudulent billing did not create or present a substantial and specific danger to the public’s health or safety, as required by the statute.⁷³ Furthermore, the court noted that even if Remba “reasonably believed that the alleged fraudulent billing practice could create a substantial and specific danger to the public health or safety,” she would not be protected because the statute required that “there be not only an actual, as opposed to a possible, violation,” but also an *actual* and substantial presence of danger to the *public health or safety*.⁷⁴ New York’s highest court affirmed, stating that “the conduct complained of—fraudulent billing—is not the type of violation which creates a ‘substantial and specific danger to the public health or safety.’”⁷⁵ Thus, the courts denied Remba statutory protection on the ground that the violation of law did not create or present a substantial and specific danger to the *public health or safety*, even though her employer had actually engaged in fraudulent billing practices.⁷⁶ *Remba* shows that had Cynthia Cooper, the WorldCom whistleblower, been a New York State private employee,

⁶⁹ 149 A.D.2d 131 (N.Y. App. Div. 1989), *aff’d*, 76 N.Y.2d 801 (1990).

⁷⁰ *Id.* at 132.

⁷¹ *Id.* at 133.

⁷² *Id.*

⁷³ *Id.* (stating Remba “has failed to set forth facts satisfying the statute’s . . . requirement, that the alleged violation of law, i.e., fraudulent billing, would create and present a substantial and specific danger to the public health or safety”).

⁷⁴ *Id.* at 135 (stating that “[r]easonable belief as a basis for protection under [the statute] will not suffice”).

⁷⁵ *Remba v. Fed’n Employment & Guidance Serv.*, 76 N.Y.2d 801, 802 (1990) (citing *Leibowitz v. Bank Leumi Trust Co.*, 152 A.D.2d 169, 175-77 (N.Y. App. Div. 1989) (holding that fraudulent banking activities do not create a substantial and specific danger to public health or safety)); *Vella v. United Cerebral Palsy*, 141 Misc. 2d 976, 978 (N.Y. Sup. Ct. 1988) (improper purchasing practice does not create a substantial and specific danger to the public health or safety).

⁷⁶ *Remba v. Fed’n Employment & Guidance Serv.*, 149 A.D.2d 132, 139-40 (N.Y. App. Div. 1989) (Ellerin, J., dissenting) (“I cannot agree with the conclusion, that the statute does not cover the larcenous conduct here involved, based upon fraudulent billing of the City of New York for placements of unemployed persons in jobs or training that were, in fact, never made.”).

her disclosure of her employer's fraudulent accounting practices would not have entitled her to statutory protection against termination for the disclosure.

II. WHISTLEBLOWERS MUST OVERCOME TWO OBSTACLES BEFORE FALLING WITHIN THE PROTECTIVE PARAMETERS OF THE STATUTE

The cases, *Kern* and *Remba*, are just two of the many that demonstrate the inadequacy of the statute in protecting whistleblowers.⁷⁷ The legislature's failure to define the term "violation" has resulted in a judicial interpretation that greatly restricts the application of the statute. Under the current interpretation, a whistleblower would be protected only if she or he can show that the employer has *actually* violated a law, rule or regulation. Additionally, the whistleblower must show that the violation creates and presents a substantial and specific danger to the public health or safety, which, as the courts have concluded, excludes corporate wrongdoing or white-collar crimes.

A. *The New York Courts' Interpretation of "Violation" Resulted in the Denial of Protection to Whistleblowers who Disclose Violations That They Reasonably Believe Exist*

The definition of the term "violation" is crucial to the statute's applicability. Based on how the term is defined, the scope of the protection changes dramatically. The term "violation" can have three distinct meanings: an *actual* violation, an action that the employee *reasonably believes* to be a violation, or a *possible* violation.

If the term "violation" means an *actual* violation, then whether an employer is in violation can only be established by the actual existence of a violation. This implies that an employee would be protected only if she or he can prove that there is an actual violation. This interpretation offers the least statutory protection to

⁷⁷ E.g., *Pail v. Precise Imports Corp.*, 256 A.D.2d 73, 74 (N.Y. App. Div. 1998) (the cause of action was properly dismissed because "an employee's good faith but erroneous belief that . . . a violation exists [is] insufficient"); *Hughes v. Gibson Courier Serv. Corp.*, 218 A.D.2d 684, 685 (N.Y. App. Div. 1995) (plaintiff did not state a claim when he failed to prove that the employer was in actual violation and that the "alleged wrongdoing did not present an actual and substantial danger to the public health"); *Connolly v. Harry Macklowe Real Estate Co.*, 161 A.D.2d 520, 523 (N.Y. App. Div. 1990) (disclosure of "certain illegal and unsafe activities" of a co-worker is not protected, because the plaintiff merely "allege[d] in a conclusory manner that [the co-worker] is capable of 'erratically violent' behavior and, therefore, poses a danger to . . . the public"); *Lamagna v. Ass'n for the Help of Retarded Children, Inc.*, 158 A.D.2d 588, 589 (N.Y. App. Div. 1990) (refusal to participate in fiscal improprieties is not protected).

whistleblowers, because unless the employee can show that the employer actually violated or is actually violating a law, rule or regulation, the employee does not fall within the parameters of the statutory protection. The *actual* violation interpretation is currently adopted by the New York courts.⁷⁸

If the term “violation” means an action that the employee *reasonably believes* to be a violation, then the courts would use an objective standard of “reasonably prudent person” to determine whether the employer is in violation. Under this interpretation, an employee would be protected if a reasonably prudent person under the totality of the circumstances would objectively conclude that there is or has been a violation. Whistleblower statutes in many states use this definition to set the boundaries of statutory protection.⁷⁹

Finally, if the term is interpreted to mean a “*possible* violation,” then the standard would be that of the whistleblower’s “subjective and personal belief.” This meaning offers the greatest protection to whistleblowers, because despite what is actually true, or what a reasonably prudent person would believe as true, as long as the employee subjectively believes that there is a violation, she or he would be protected.

The New York Whistleblower Statute’s omission of a definition for “violation” has left the New York courts free to interpret the term as “*actual* violation.”⁸⁰ The courts reasoned that the language and legislative history of the Whistleblower Statute support a construction “requiring proof of an actual violation of law.”⁸¹ To bolster this argument, the New York Court of Appeals compared the Whistleblower Statute to the parallel public sector whistleblowers’ statute, stating that while “the public sector whistleblowers’ statute was amended to provid[e] protection for disclosure of information which the employee *reasonably believes* to be true and *reasonably believes* constitutes an improper governmental action,” there was “no similar amendment” to the private sector Whistleblower Statute.⁸²

⁷⁸ E.g., *Bordell v. Gen. Elec. Co.*, 88 N.Y.2d 869, 871 (1996).

⁷⁹ E.g., CAL. LAB. CODE § 1102.5 (West 2004); OHIO REV. CODE ANN. § 4113.52 (Anderson 2003); MINN. STAT. § 181.932 (2004); N.H. REV. STAT. ANN. § 275-E:2 (1999); N.J. STAT. ANN. § 34:19-3 (West 2003).

⁸⁰ E.g., *Remba*, 149 A.D.2d at 135 (“The law requires that there be not only an *actual*, as opposed to a possible, violation, but also an *actual* and substantial present danger to the public health.” (emphasis added)); *Bordell v. Gen. Elec. Co.*, 88 N.Y.2d 869, 871 (1996) (“[A] cause of action predicated on Labor Law § 740 requires proof of an *actual* violation.” (emphasis added)).

⁸¹ *Bordell*, 88 N.Y.2d at 871.

⁸² *Id.* (internal citation and quotation marks omitted) (emphasis added).

Furthermore, Judge Sullivan of the First Department of the Appellate Division pointed out that, prior to and since the enactment of the Whistleblower Statute, “bills have been introduced in the New York State Senate to broaden the statutory standard to one of reasonable cause [or reasonable belief]. The legislature, however, has consistently and repeatedly resisted any such change.”⁸³ Judge Patlow of the New York Supreme Court in Monroe County echoed Judge Sullivan’s statement, and remarked that prior versions of the statute “which made reference to an employee’s suspicion of violation were never passed.”⁸⁴

As a result of the courts’ decision to adopt the “*actual violation*” interpretation, the potential application of the statute has been greatly limited; and the restrictive interpretation has placed an immense burden of proof on whistleblowers seeking protection. For example, in *Bordell v. General Electric Company*,⁸⁵ Frank Bordell, a health physicist, reported, first to his supervisor and then to the Department of Energy, his preliminary finding that as many as seven employees in the defendant corporation “might have been exposed to radiation at levels sufficient to trigger the mandatory reporting requirements” of the Department of Energy.⁸⁶ He was denied relief after being discharged for whistleblowing because he could not prove that the defendant had actually violated any law.⁸⁷

While consistently interpreting the term “violation” to mean “*actual violation*,”⁸⁸ the courts have declared that the adoption of a reasonable belief standard would further the statute’s laudable purpose of encouraging employees to report violations of health and safety laws and regulations.⁸⁹ However, they emphasized that “courts are not permitted to interpret laws as they would have them written,”⁹⁰ and that “any additional protection must come from the Legislature.”⁹¹ It appears that the courts are unwilling, possibly un-

⁸³ *Remba*, 149 A.D.2d at 135. Prior to and since enactment of the statute, bills have been introduced in the New York State Legislature to broaden the statutory protection. *Id.* at 139-40; see also *Kern v. DePaul Mental Health Servs.*, 139 Misc. 2d 970, 973 (N.Y. Sup. Ct. 1988), *aff’d*, 152 A.D.2d 957 (N.Y. App. Div. 1989), *appeal denied*, 74 N.Y.2d 615 (1989).

⁸⁴ *Kern*, 139 Misc. 2d at 973 (citing to several bills introduced in the Legislature).

⁸⁵ 88 N.Y.2d 869 (1996).

⁸⁶ *Id.* at 870-71.

⁸⁷ *Id.* at 871.

⁸⁸ *E.g., id.*; *Khan v. State Univ. of N.Y. Health Sci. Ctr.*, 288 A.D.2d 350 (N.Y. App. Div. 2001) (“An employee’s good-faith reasonable belief that an actual violation of a law, rule, or regulation occurred is insufficient; there must be an actual violation.”).

⁸⁹ *Bordell v. Gen. Elec. Co.*, 208 A.D.2d 219, 221 (N.Y. App. Div. 1995).

⁹⁰ *Id.*

⁹¹ *Remba v. Fed’n Employment & Guidance Serv.*, 76 N.Y.2d 801, 803 (1990) (“[A]l-

able, to expand the limited interpretation of the term, to broaden the applicability of the statute, and to prevent troublesome decisions that are not aligned with the statute's purpose of encouraging disclosure of wrongful practices. Thus, any change of the statutory protection must be initiated by the Legislature.

The New York State Legislature should amend the Whistleblower Statute to extend protection to an employee who discloses a violation that she or he reasonably believes exists. Under the current statute, interpreted as to require proof of actual violation, prior to disclosure, each whistleblower has to "become equal parts policeman, prosecutor, judge, and jury."⁹² Moreover, an employee could never be sure that a law, rule or regulation has been *actually* violated until the defendant employer is found guilty in court.⁹³ The requirement of "actual violation" places a tremendous burden of proof on the employee, and has led to nonsensical results that are unjust, unreasonable, and contrary to the spirit of the statute.⁹⁴ The Ohio Supreme Court illustrated the absurdity of requiring an employee to show actual violation with this example: "[s]uppose . . . a dispatcher of a taxi company is told by an on-duty driver that the driver is drunk. The employee believes that the driver does indeed sound intoxicated. Does the dispatcher need to chase down the driver, perform field sobriety, breathalyzer and blood tests before he may report to his supervisor that the driver is driving while intoxicated?"⁹⁵

Given the seriousness of the alleged crime and the importance of prompt reporting, Lois Kern, the employee of DePaul's adult community residence for the mentally handicapped, should not be required to delay her reporting to the District Attorney's Office about her discovery of a male resident engaging in sexual intercourse with a female resident where "a fair implication" of the facts suggested that the sexual intercourse was nonconsensual in nature.⁹⁶ Yet, under the current judicial interpretation of the statute, it is not enough that she had evidence or reasonable belief that a rape had occurred, but rather, a jury verdict that a rape had oc-

though the present 'Whistleblower' statute has been criticized by commentators for not affording sufficient safeguards against retaliatory discharge, any additional protection must come from the Legislature.") (internal citations and quotation marks omitted)).

⁹² *Fox v. Bowling Green*, 668 N.E.2d 898, 902 (1996).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Kern v. DePaul Mental Health Servs.*, 139 Misc. 2d 970, 972 (N.Y. Sup. Ct. 1988), *aff'd*, 152 A.D.2d 957 (N.Y. App. Div. 1989), *appeal denied*, 74 N.Y.2d 615 (1989).

curred is needed to meet the requirement of actual violation. And what about Frank Bordell, the health physicist? The law should not demand that he investigate further before reporting to his supervisor and to the Department of Energy on the likely radiation exposure, especially when the employer had prevented him from conducting additional testing.⁹⁷ Bordell should not be asked to keep silent while reasonably believing that employees are being harmed. However, keeping silent is exactly what the Whistleblower Statute demands.

A whistleblower statute that expects whistleblowers to be vigilant, attuned to the public's health or safety, and sometimes even brave, should not also require employees to be infallible.⁹⁸ To require a whistleblower to show actual violation not only delays reporting of violations that endanger public welfare, but might even prevent the employee from reporting the violation at all.⁹⁹ Thus, the New York Whistleblower Statute, which mandates a showing of actual violation, should be amended because it fails to accomplish the statutory goal of encouraging disclosure by not extending the much-needed protection to employees who fear discharge prompted by the disclosure.¹⁰⁰

To correct the problems of demanding employee infallibility and of failure to accomplish statutory goals, the statute should utilize the objective standard of "reasonable belief." This standard strikes a sensible balance between an employer's power to dismiss an employee and the statutory goal of encouraging disclosure of employers' wrongful conduct. On the one hand, it will prevent outcomes similar to that of *Kern* and *Bordell*, which required proof of actual violation. On the other hand, it will allow employers to dismiss employees who report possible wrongdoing based on nothing more than a hunch. If an employee can show that, in the totality of the circumstances, she or he, as a reasonably prudent person, reasonably believes that there is or has been a violation, then why should the employee not be protected from retaliation following disclosure? This standard is a sound middle ground between *actual* violation, where a violation must actually be proven to exist, and

⁹⁷ *Bordell v. Gen. Elec. Co.*, 208 A.D.2d 219, 220 (N.Y. App. Div. 1995).

⁹⁸ *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308, 309 (1997).

⁹⁹ *Id.*

¹⁰⁰ See, e.g., *Pail v. Precise Imports Corp.*, 256 A.D.2d 73, 74 (N.Y. App. Div. 1998) (erroneous belief that a violation exists is insufficient); *Hughes v. Gibson Courier Serv. Corp.*, 218 A.D.2d 684, 685 (N.Y. App. Div. 1995) (plaintiff failed to prove actual violation); *Connolly v. Harry Macklowe Real Estate Co.*, 161 A.D.2d 520, 523 (N.Y. App. Div. 1990) (merely making allegations in a conclusory manner is insufficient).

possible violation, where a violation is based solely on the employee's subjective belief.

However, even if a whistleblower meets the actual violation requirement, she or he has only overcome one of the two hurdles to invoking statutory protection.

B. The Statutory Language of "Substantial and Specific Danger to the Public Health and Safety" Harms Private Employees who Report Corporate Wrongdoing

Like "violation," the term "substantial and specific danger to the public health and safety" is not defined in the New York Whistleblower Statute.¹⁰¹ The New York courts have held that a doctor "practicing medicine while impaired by a psychiatric disability,"¹⁰² a doctor's failure to properly document and/or obtain informed consents for a bronchoscopic procedure,¹⁰³ "negligent, poorly trained, and undisciplined" EMS paramedics attending patients,¹⁰⁴ a restaurant owner's failure to comply with structural and safety requirements,¹⁰⁵ and an employer's failure to maintain a smoke-free work area for nonsmoking employees¹⁰⁶ are violations that create and present substantial and specific danger to the public health or safety.

However, the courts have also repeatedly held that disclosure of corporate financial wrongdoing is not within the statutory protection. The New York Supreme Court ruled in a recent case, *Feinman v. Morgan Stanley Dean Witter*, that the Whistleblower Statute is inapplicable to disclosures of fraudulent or other improper economic activities.¹⁰⁷ The court further noted that if corporate wrongdoing is to be prohibited or sanctioned, "the remedy must be a legislative one. The court cannot amend the statute."¹⁰⁸ Violations such as fraudulent billing,¹⁰⁹ wrongful payments and overpayments,¹¹⁰ improper banking activities,¹¹¹ fiscal "improprie-

¹⁰¹ See N.Y. Lab. Law § 740(1).

¹⁰² *Finkelstein v. Cornell Univ. Med. Coll.*, 269 A.D.2d 114, 116 (N.Y. App. Div. 2000).

¹⁰³ *Kraus v. New Rochelle Hosp. Med. Ctr.*, 216 A.D.2d 360, 365 (N.Y. App. Div. 1995).

¹⁰⁴ *Rodgers v. Lenox Hill Hosp.*, 211 A.D.2d 248, 253 (N.Y. App. Div. 1995).

¹⁰⁵ *Granser v. Box Tree S. Ltd.*, 164 Misc. 2d 191, 198 (N.Y. Sup. Ct. 1994).

¹⁰⁶ *Bompane v. Enzolabs, Inc.*, 160 Misc. 2d 315, 319 (N.Y. Sup. Ct. 1994).

¹⁰⁷ *Feinman v. Morgan Stanley Dean Witter*, 193 Misc. 2d 496, 499 (N.Y. Sup. Ct. 2002).

¹⁰⁸ *Id.*

¹⁰⁹ E.g., *Remba v. Fed'n Employment & Guidance Serv.*, 76 N.Y.2d 801, 802 (1990) ("[A]fter reviewing the legislative history, we conclude that the conduct complained of—fraudulent billing—is not the type of violation which creates a substantial and specific danger to the public health or safety.").

¹¹⁰ *Vella v. United Cerebral Palsy, Inc.*, 141 Misc. 2d 976, 978 (N.Y. Sup. Ct. 1988).

ties,”¹¹² and violations of securities laws¹¹³ have all been deemed violations that do not create and present substantial and specific danger to the public health or safety. Thus, disclosure of such a violation is not within the statutory protection of the Whistleblower Statute.

In support of this conclusion, the courts cited to the New York State Attorney General’s memorandum approving the statute, which stated that it was “unclear” whether the bill would provide a remedy for employees who refuse to engage in, or who reveal illegal financial or accounting practices.¹¹⁴ Courts have viewed this statement to mean that disclosure of white-collar crimes is not covered by the statute and that “fraudulent billing [is] beyond the statute’s purview.”¹¹⁵ Also, the First Department of the Appellate Division stated that, in 1981, “the Legislature rejected a bill which would have protected employees from retaliatory discharge for taking actions which benefit society in general.”¹¹⁶ Instead, the statute that was passed specifically stated that for an employee to be protected, the disclosure must concern a violation that “creates and presents a substantial and specific danger to the public health or safety.”¹¹⁷ Moreover, courts observed that whistleblower statutes of other states recognize the distinction between white-collar crimes and violations of law that harm public health and safety.¹¹⁸

Although corporate wrongdoing does not necessarily create or present a substantial and specific danger to the public health or safety, its harm to the public is certainly evident, especially in the post-Enron era, where, nationally, corporate wrongdoing has cost investors billions of dollars,¹¹⁹ has led to massive job loss, and ended or deferred retirement dreams for many workers.¹²⁰ Wrongful

¹¹¹ *Leibowitz v. Bank Leumi Trust Co.*, 152 A.D.2d 169, 180 (N.Y. App. Div. 1989).

¹¹² *Lamagna v. Ass’n for the Help of Retarded Children, Inc.*, 158 A.D.2d 588, 589 (N.Y. App. Div. 1990).

¹¹³ *Feinman v. Morgan Stanley Dean Witter*, 193 Misc. 2d 496, 497 (N.Y. Sup. Ct. 2002).

¹¹⁴ *Remba v. Fed’n Employment & Guidance Serv.*, 149 A.D.2d 131, 134 (N.Y. App. Div. 1989).

¹¹⁵ *Id.* at 134-35; see, e.g., *Lamagna*, 158 A.D.2d at 589 (refusal to participate in fiscal improprieties is not protected).

¹¹⁶ *Remba*, 149 A.D.2d at 135 n.2 (citing 1981 N.Y. Assembly Bill 2566).

¹¹⁷ N.Y. Lab. Law § 740(2)(a).

¹¹⁸ *Remba*, 149 A.D.2d at 135 (citing MD. CODE ANN., art 64A, § 12G; 5 U.S.C. § 2302 (b)(8)(A)(ii), and stating that reprisal for disclosure of “mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety” is prohibited). Similar language also appears in the following statutes: 5 U.S.C. § 2303(a)(2) (2001); 10 U.S.C. § 1587(b)(1)(B), (2)(B) (2001); 20 ILL. COMP. STAT. ANN., ch 127, § 63b119c.1(1)(ii) (2004).

¹¹⁹ Byrne, *supra* note 2, at 51.

¹²⁰ Higuera, *supra* note 3.

corporate conduct has ripple effects on the nation's economy. For example, false bookkeeping, one form of corporate wrongdoing, can cause corporate collapses and investor losses in the stock market; and since "stock ownership has spread so far throughout the population[,] . . . the impact of a corporate collapse—and of the falling stock market generally—is felt by many . . . Americans."¹²¹

During the first year after the recent corporate scandals were revealed, the New York State economy lost \$2.9 billion.¹²² The state's tax revenues decreased by \$1 billion because of the lower personal income and diminished business and sales tax collection.¹²³ The New York State Common Retirement Fund, which contains the assets of the New York State and Local Employees' Retirement System, the New York State and Local Police and Firemen Retirement System, and the Public Employees' Group Life Insurance Plan, lost \$9 billion in value from its equity portfolio.¹²⁴ The New York State Comptroller estimated that the scandals contributed almost \$7 billion in losses to the New York City pension system.¹²⁵ Because of the devastation that corporate wrongdoing can cause and has caused to the nation and to New York State specifically, amending the New York Whistleblower Statute is imperative.

In her dissent, Judge Ellerin in the First Department of the Appellate Division declared that the current statute protects, or at least should protect, the disclosure of white-collar crimes on three grounds.¹²⁶ First, the Attorney General's memorandum did not state that the disclosure of white-collar crimes is not within the statutory protection; instead, it merely manifested concern because it was *unclear* whether the bill would provide a remedy in all situations.¹²⁷ Second, the Attorney General stated that the bill was intended to protect employees in connection with employer wrongdoing that was "inimical to the public welfare."¹²⁸ Corporate

¹²¹ Jonathan D. Glater, *Mad as Hell: Hard Times for White-Collar Crime*, N.Y. TIMES, July 28, 2002, § 4, at 5, col. 1.

¹²² N.Y.S. Comptroller Report, *Impact of the Corporate Scandals on New York State*, Aug. 1, 2003, available at <http://www.osc.state.ny.us/press/releases/aug03/corpgovernrpt.pdf>.

¹²³ *Id.* at 19.

¹²⁴ *Id.*

¹²⁵ *Id.* at 2.

¹²⁶ *Remba v. Fed'n Employment & Guidance Serv.*, 149 A.D.2d 131, 139 (N.Y. App. Div. 1989) (Ellerin, J., dissenting).

¹²⁷ *Id.*

¹²⁸ *Id.*

wrongdoing is certainly inimical to the public welfare,¹²⁹ as evidenced by the economic impact of recent corporate scandals. Lastly, the statute was enacted in response to *Murphy*, in which the New York Court of Appeals upheld the corporate employer's right to terminate an at-will employee who revealed certain illegal account manipulations.¹³⁰ The problem that gave rise to the statute is "significan[t] and the intent of the statute should be evaluated in that context."¹³¹

Despite the damage that can be and has been caused by corporate wrongdoing, the courts' reluctance to include disclosure of white-collar crimes under the statutory protection of the Whistleblower Statute,¹³² like their insistence on interpreting "violation" as "actual violation," has made the application of the statute inconsistent with its statutory purpose of encouraging disclosure.¹³³ Similar to the problem of defining "violation" restrictively, it appears that any change in employee protection must originate in the Legislature.

Instead of requiring proof that the violation creates and presents a substantial and specific danger to public health or safety, protection should be granted upon the disclosure of a violation of the law, rule or regulation that creates and presents *any* harm to the public welfare. This amendment will surely include the disclosure of corporate wrongdoing. The Legislature and the courts must remember that the goals of the statute are "[to] promote enforcement of the law, and [to] give needed protection to employees who wish to act as law-abiding citizens without fear of losing their job;"¹³⁴ the exclusion of disclosure of corporate wrongdoing unquestionably contradicts such goals.

III. SISTER STATES' WHISTLEBLOWER STATUTES PROVIDE GREATER PROTECTION

New York is the preeminent global financial center as well as the home to many corporate headquarters. It houses 52 of the For-

¹²⁹ *Id.*

¹³⁰ *Murphy v. Am. Home Prod. Corp.*, 58 N.Y.2d 293, 297 (1983).

¹³¹ *Id.*

¹³² Besides disclosure of corporate wrongdoing, at least one appellate court has concluded that the disclosure of violent crimes against individuals is also not within the purview of the statute. *Kern v. DePaul Mental Health Servs.*, 152 A.D.2d 957, 957-58 (N.Y. App. Div. 1989), *appeal denied*, 74 N.Y.2d 615 (1989) (stating that the alleged rape "may have presented a danger to the health or safety of the individual patient, but did not threaten the health or safety of the public at large").

¹³³ Governor's Mem., *supra* note 24.

¹³⁴ *Id.*

tune 500 companies' headquarters,¹³⁵ and the world's largest commercial and investment banking entities, such as Citigroup, J.P. Morgan Chase, and Merrill Lynch.¹³⁶ The "Big Four"¹³⁷ accounting firms are located in New York, as well as 34 of the top 100 law firms, and 17 of the top 40 management consulting firms.¹³⁸ It is also home to major distribution centers, such as Wal-Mart, Target, Home Depot, Staples and Kohl's.¹³⁹ It has a gross state product of approximately \$800 billion a year, making the state one of the world's biggest economies.¹⁴⁰

A state with such a vibrant economic life also has a considerable number of private employees. Yet, an examination of whistleblower statutes of other states reveals that they often provide greater protection to private employees than the New York Whistleblower Statute provides.¹⁴¹ For example, the Minnesota Whistleblower Statute provides that an employer shall not retaliate against an employee who "in good faith, reports a violation or *suspected* violation of any federal or state law or rule adopted pursuant to law, to an employer or to any governmental body or law enforcement official."¹⁴² In New Hampshire, an employer is prohibited from retaliating against an employee who "in good faith, reports . . . what the employee has *reasonable cause to believe* is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States."¹⁴³ The New Jersey statute states that an employer shall not take any retaliatory action

¹³⁵ Empire State Development, *New York State Economy*, at http://www.nylovesbiz.com/NYS_Home_To_Business/nyseconomy.asp (last visited Feb. 21, 2004).

¹³⁶ Empire State Development, *Industry Clusters-Financial Services*, at http://www.nylovesbiz.com/NYS_Home_To_Business/Industry_Clusters/financial_services.asp (last visited Feb. 21, 2004).

¹³⁷ The "Big Four" used to be the "Big Five" accounting firms until 2002 when "Chicago-based Arthur Andersen collapsed amid allegations of criminal wrongdoing in its role as auditor of scandal-ridden Enron Corp. and other firms." Thomas S. Mulligan, *Big Four Top Accounting Watchdog's List: Promising an Aggressive Stance, the Oversight Board Created by Congressional Reforms Gets Down to Business*, LOS ANGELES TIMES, Jan. 10, 2003, at Business Section 4.

¹³⁸ Empire State Development, *Industry Clusters-Business Services*, at http://www.nylovesbiz.com/NYS_Home_To_Business/Industry_Clusters/business_services.asp (last visited Feb. 21, 2004).

¹³⁹ Empire State Development, *Industry Clusters-Distribution*, at http://www.nylovesbiz.com/NYS_Home_To_Business/Industry_Clusters/distribution.asp (last visited Feb. 21, 2004).

¹⁴⁰ *New York State Economy*, *supra* note 135.

¹⁴¹ See, e.g., CAL. LAB. CODE § 1102.5 (West 2004); OHIO REV. CODE ANN. § 4113.52 (Anderson 2003); MINN. STAT. § 181.932 (2004); N.H. REV. STAT. ANN. § 275-E:2 (1999); N.J. STAT. ANN. § 34:19-3 (West 2003); see also Corbo, *supra* note 8, at 158-60.

¹⁴² MINN. STAT. § 181.932(1)(a) (emphasis added).

¹⁴³ N.H. REV. STAT. ANN. § 275-E:2(I)(a) (emphasis added).

against an employee because the employee discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee *reasonably believes* is in violation of a law, or a rule or regulation.¹⁴⁴ California protects an employee who discloses information to a government or law enforcement agency that the employee has *reasonable cause to believe* involves a violation of state or federal statute or regulation.¹⁴⁵

The Minnesota, New Hampshire, New Jersey and California statutes are significantly different from the New York statute. The employee does not have to show actual violation of the law; instead, the employee only needs to have reasonable cause to believe there is a violation and that she or he reports the violation in good faith.¹⁴⁶ In addition, the violation does not have to be one that creates and presents a substantial and specific danger to the public health or safety. As long as the violation fails to comply with any federal or state law or regulation, the employee is protected.

Even the Ohio statute, which offers less protection than those from Minnesota, New Hampshire, New Jersey and California, provides greater protection than the New York statute. The Ohio statute states that an employee is protected if she or he discloses a violation where “the employee *reasonably believes* that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony.”¹⁴⁷ Like the Minnesota, New Hampshire, New Jersey and California statutes, an employee does not need to prove actual violation, but only needs to show that she or he reasonably believes that there is or has been a violation. Unlike those statutes, in which disclosure of any violation of law or regulation is protected, Ohio only protects the disclosure of “a criminal offense that is likely to cause an imminent risk of physical harm to persons or a

¹⁴⁴ N.J. STAT. ANN. § 34:19-3(a).

¹⁴⁵ CAL. LAB. CODE § 1102.5(b).

¹⁴⁶ See *Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1059 (Cal. 1998) (“[A]n 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.” (internal quotation marks omitted)); *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 200 (Minn. 2000) (“While there need not be an actual violation of law, the reported conduct must at least implicate a violation of law.”); *Appeal of Smithfield Dodge, Inc.*, 749 A.2d 318, 320 (N.H. 2000) (The statute “does not require an actual violation of a law or rule but only that an employee reasonably believe that such a violation has occurred.”); *Estate of Roach v. TRW, Inc.*, 754 A.2d 544, 552 (N.J. 2000) (The statute “does not require that the activity complained of be an actual violation of a law or regulation, only that the employee ‘reasonably believes’ that to be the case.” (internal parentheses omitted)).

¹⁴⁷ OHIO REV. CODE ANN. § 4113.52(A)(1)(a) (2003) (emphasis added).

hazard to public health or safety or is a felony.”¹⁴⁸ Nonetheless, the Ohio statute would surely have protected Lois Kern against discharge for reporting an alleged sexual assault.¹⁴⁹

VI. PROPOSED AMENDMENTS TO THE NEW YORK WHISTLEBLOWER STATUTE

The New York Whistleblower Statute should be amended to state: first, that an employee must show that she or he has a reasonable belief that a violation of law, rule or regulation exists; and second, that the violation of law, rule or regulation must cause harm to the public welfare.

Thus, the amended Whistleblower Statute should read as follows:

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

- (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee *reasonably believes* is in violation of law, rule or regulation that *causes any harm to the public welfare*;
- (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer that *causes any harm to the public welfare* which the employee *reasonably believes* is occurring or has occurred; or
- (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation that *causes any harm to the public welfare* which the employee *reasonably believes* is occurring or has occurred.

CONCLUSION

Whistleblowers are heroes who, at the very least, risk their livelihood to inform the government and/or the public of wrongful acts by their employers. These employees fully understand that “[o]ur lives begin to end the day we become silent about things that matter.”¹⁵⁰ Their unquestionable value to society has been reinforced once again by the recent revelations of wrongful trading

¹⁴⁸ *Id.*

¹⁴⁹ See *Kern v. DePaul Mental Health Servs.*, 139 Misc. 2d 970, 971 (N.Y. Sup. Ct. 1988), *aff'd*, 152 A.D.2d 957 (N.Y. App. Div. 1989), *appeal denied*, 74 N.Y.2d 615 (1989).

¹⁵⁰ Lacayo & Ripley, *supra* note 1, at 27.

practices in the mutual fund industry.¹⁵¹ Noreen Harrington, a Wall Street executive, has joined Cynthia Cooper, Coleen Rowley, and Sherron Watkins, to become the latest whistleblower by exposing the “worst scandal in mutual funds since the Great Depression.”¹⁵² To effectively encourage private employees such as Harrington and Cooper to disclose acts that are harmful to the public welfare, the New York Whistleblower Statute must be amended to guarantee protection to whistleblowers who disclose a violation of law, rule or regulation that they reasonably believe causes or has caused harm to the public welfare. It is time for New York to be not only the optimum location for corporate headquarters, but also a state where private employees who volunteer as informants for the government and the public receive well deserved and desperately-needed protection.

¹⁵¹ Todd Wallack, *Anatomy of a Scandal: Anonymous Tip Helped Mutual Fund Regulators Find Where to Dig Up Bodies*, SAN FRANCISCO CHRONICLE, Dec. 23, 2003, at B1.

¹⁵² *Id.*