WRONGFUL DISCHARGE AND FEDERAL PREEMPTION: NUCLEAR WHISTLEBLOWER PROTECTION UNDER STATE LAW AND SECTION 210 OF THE ENERGY REORGANIZATION ACT

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> No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less.
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> *Silkwood v. Kerr-McGee Corp.*[1]

I. INTRODUCTION

A whistleblower is an employee who discloses conduct by his or her employer that the employee reasonably believes to be a violation of any law, rule, or regulation.[2] Whistleblowers have drawn nearly universal praise for helping to ensure that their employers obey the law.[3] They perform valuable civic services by revealing information that their employers chose to suppress.[4] Employees are in a unique

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* Managing Editor, 1989–90, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW. This Comment is dedicated to the staff of the Government Accountability Project, in recognition of their tireless efforts on behalf of nuclear whistleblowers.

[1] 464 U.S. 238, 256 (1984).

[2] Kohn & Carpenter, *Nuclear Whistleblower Protection and the Scope of Protected Activity Under Section 210 of the Energy Reorganization Act*, 4 ANTIOCH L.J. 73, 74 (1986).

[3] *See, e.g., Is Whistle-Blowing the Same as Informing?*, 39 BUS. & SOC'Y REV. 4, 4–17 (1981); Nader, *An Anatomy of Whistle Blowing*, in WHISTLE BLOWING 3 (R. Nader, P. Petkas, K. Blackwell eds. 1972).

[4] *Is Whistle-Blowing the Same as Informing?*, *supra* note 3, at 5.

position to uncover wrongdoing in the workplace.[5] They can tell more readily than governmental inspectors whether their employers are violating safety standards.[6] In recent years, while agency budgets have been cut, the employee whistleblower is often the only source of information about company activities that threaten public health and safety.[7] The whistleblower thus becomes the public's, and the government's, only way of discovering employer misconduct.[8]

Although whistleblowing benefits us all as taxpayers, consumers, and workers, whistleblowers nonetheless often suffer for their conscientious actions.[9] Employers retaliate against employee whistleblowers in various ways.[10] Such retaliatory actions may include discharge, demotion, harassment, blacklisting, and other forms of discrimination.[11] In recognition of the whistleblowers' plight, Congress and several states have attempted to protect whistleblowers from retaliatory discrimination.

Some states provide discharged whistleblowers with a common-law cause of action.[12] Other states have enacted statutes designed to protect whistleblowers from retaliation by their employers.[13] In addition, Congress has provided statutory protections for whistleblowers.[14] Section 210 of the Energy Reorganization Act[15] protects nuclear whistleblowers.[16]

Because discharged nuclear whistleblowers have a remedy under section 210,[17] courts have had to decide whether state remedies are

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[5] Andrews, *When You Whistle Where You Work . . .* , STUDENT LAW., Mar. 1983, at 10, 11.

[6] *Id.*

[7] *Id.*

[8] *Is Whistle-Blowing the Same as Informing?*, *supra* note 3, at 10; Andrews, *supra* note 5, at 11.

[9] *Is Whistle-Blowing the Same as Informing?*, *supra* note 3, at 5–6.

[10] *See* Andrews, *supra* note 5, at 11–12.

[11] *Id.*

[12] *See, e.g.*, Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 861, 878 (Mo. Ct. App. 1985) (recognizing a wrongful discharge cause of action for an employee who was discharged for reporting employer violations of federal law); *see also infra* notes 35–43 and accompanying text.

[13] *See, e.g.*, PA. STAT. ANN. tit. 43, §§ 1421–28 (Purdon Supp. 1988); *see also infra* notes 60–61 and accompanying text.

[14] *See generally* Kohn & Kohn, *An Overview of Federal and State Whistleblower Protections*, 4 ANTIOCH L.J. 99, 100–07, app. at 114–52 (1986).

[15] 42 U.S.C. § 5851 (1988).

[16] *See id.* § 5851(a)–(b). The Nuclear Regulatory Commission (NRC) has promulgated regulations pursuant to section 210. *See* 10 C.F.R. § 30.7 (1988). These regulations protect such activities as providing the NRC with information about possible violations of nuclear regulations and testifying in any NRC proceeding. *See id.* § 30.7(a).

[17] *See* 42 U.S.C. § 5851(b).

available in addition to section 210. Several nuclear whistleblowers, instead of pursuing the section 210 remedy, have brought state court actions seeking job reinstatement.[18] Courts have split evenly on the issue of whether nuclear whistleblowers can bring state court actions.[19] These courts have disagreed on the issues of whether section 210 preempts state court jurisdiction[20] and whether Congress intended section 210 to be the exclusive remedy for nuclear whistleblowers.[21]

This Comment examines the remedies available to nuclear whistleblowers whose employers discriminate against them in retaliation for their whistleblowing. Section III analyzes nuclear whistleblower case law and determines whether section 210 preempts state whistleblower remedies. Next, this Comment explores other environmental statutes that contain whistleblower provisions upon which Congress modeled section 210. Examining how courts have construed these provisions reveals several bases for allowing state court actions in addition to the federal statutory remedies. Finally, section IV's objective is to predict the potential effect that the proposed Uniform Health and Safety Whistleblowers Protection Act[22] will have on these issues if the bill becomes law.

This Comment concludes that courts should not apply the preemption doctrine in the area of nuclear whistleblower protection. In enacting section 210, Congress clearly declared a policy that nuclear whistleblowing should be protected, not punished. When a court

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[18] *See infra* notes 114–35 and accompanying text.

[19] Four courts have allowed nuclear whistleblowers to bring state court wrongful discharge actions. *See* Norris v. Lumbermen's Mut. Casualty Co., 881 F.2d 1144, 1151 (1st Cir. 1989); Gaballah v. PG & E, 711 F. Supp. 988, 991 (N.D. Cal. 1989); Stokes v. Bechtel N. Am. Power Corp., 614 F. Supp. 732, 744–45 (N.D. Cal. 1985); Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 509, 485 N.E.2d 372, 376 (1985), *cert. denied*, 475 U.S. 1122 (1986). In four other cases, courts held that section 210 precludes nuclear whistleblowers from bringing state court actions. *See* Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 637 (2d Cir. 1989); English v. General Elec., 683 F. Supp. 1006, 1013–15 (E.D.N.C. 1988), *aff'd per curiam*, 871 F.2d 22 (4th Cir. 1989), *cert. granted*, 58 U.S.L.W. 3467 (U.S. Jan. 22, 1990); Snow v. Bechtel Constr. Inc., 647 F. Supp. 1514, 1517–19 (C.D. Cal. 1986); Chrisman v. Philips Indus., 751 P.2d 140, 145 (Kan. 1988).

[20] *Compare Wheeler*, 108 Ill. 2d at 509, 485 N.E.2d at 376 (in enacting section 210, Congress did not intend to preempt the field of nuclear whistleblower protection) *with English*, 683 F. Supp. at 1015 (finding that section 210 preempts state law wrongful discharge actions). *See generally infra* notes 112–89 and accompanying text.

[21] *Compare Stokes*, 614 F. Supp. at 744 (by enacting section 210, Congress intended to provide *a* remedy, not *the* remedy, for nuclear whistleblowers) *with Norman*, 873 F.2d at 637 (the administrative remedy provided in section 210 is exclusive). *See generally infra* notes 190–209 and accompanying text.

[22] S. 2095, 100th Cong., 2d Sess. (1988); H.R. 4305, 100th Cong., 2d Sess. (1988).

finds that section 210 is an exclusive remedy, it does not advance, but rather obstructs, this congressional policy.

II. State and Federal Protection for Whistleblowers

A. State Common-Law Protection

Some states provide discharged whistleblowers with a common-law cause of action.[23] Many states, however, do not provide remedies for whistleblowers.[24] Whether a whistleblower has a remedy in any given jurisdiction will depend on that jurisdiction's law of wrongful discharge.

1. The Employment-at-Will Doctrine and the Public Policy Exception

Traditionally, at common law, courts have enforced the "employment-at-will" doctrine.[25] Under this rule, employers are free to discharge noncontractual employees for good cause, bad cause, or no cause at all.[26] Likewise, an at-will employee can terminate the employment relationship at any time.[27] In recent years, however, most jurisdictions have modified the employment-at-will rule by judicial decision[28] or by statute.[29]

The most common modification of the employment-at-will rule is the public policy exception. Most states have adopted some form of

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[23] *See, e.g.*, Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 249, 250, 743 S.W.2d 380, 385, 386 (1988) (employee discharged in retaliation for reporting employer's violations of federal regulations has a cause of action for wrongful discharge); *see also infra* notes 35–42 and accompanying text.

[24] *See, e.g.*, Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1059–61 (Ind. Ct. App. 1980) (employee discharged in retaliation for reporting employer's violations of federal regulations does not have a cause of action); *see also infra* notes 33, 38.

[25] *See, e.g.*, Coppage v. Kansas, 236 U.S. 1, 13–14 (1915) (employer's right to terminate employees at will is grounded in the United States Constitution). The employment-at-will doctrine is also known as the "terminable-at-will" rule, *see, e.g.*, Bierley v. American Cast Iron Pipe Co., 374 So. 2d 1341, 1343 (Ala. 1979), and the "fire-at-will" rule. *See, e.g.*, Patton v. J.C. Penney, 301 Or. 117, 122, 719 P.2d 854, 857 (1986).

[26] Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404, 1405 (1967) (quoting Payne v. Western & Atl. R.R., 82 Tenn. 507, 519–20 (1884)).

[27] *See, e.g.*, Schriner v. Meginnis Ford Co., 228 Neb. 85, 87–88, 421 N.W.2d 755, 757 (1988).

[28] *See infra* notes 35–43 and accompanying text.

[29] *See infra* notes 60–61 and accompanying text.

the public policy exception.[30] The public policy exception provides that an employer cannot discharge an at-will employee if the discharge contravenes public policy.[31] If the discharge is contrary to public policy, the discharged employee has a cause of action for wrongful discharge.[32]

Some states have not adopted any form of public policy exception and continue to adhere to the employment-at-will rule.[33] In these states, then, whistleblowers have no remedies under state law. Even

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[30] California was the first state to provide a discharged employee with a cause of action where the discharge contravened public policy. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 189–90, 344 P.2d 25, 27–28 (1959) (employee who was discharged for refusing employer's orders to commit perjury has a cause of action). *See generally* Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201 (1985); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983); Annotation, *Modern Status of Rule that Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R. 4TH 544 (1982 & Supp. 1988).

[31] *See, e.g.*, Parnar v. Americana Hotels, 65 Haw. 370, 380, 652 P.2d 625, 631 (1982). *See generally* Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329 (1982).

[32] *See, e.g.*, Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 249, 743 S.W.2d 380, 385 (1988); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 316, 299 N.W.2d 147, 151 (1980). Instead of "wrongful discharge," some courts use other terms, such as "retaliatory discharge," *see, e.g.*, Hansen v. Harrah's, 100 Nev. 60, 64, 675 P.2d 394, 396 (1984), and "abusive discharge." *See, e.g.*, Salazar v. Furr's, Inc., 629 F. Supp. 1403, 1408 (D.N.M. 1986).

[33] Five jurisdictions have not adopted any public policy exception. *See* Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725, 728 (Ala. 1987) (Alabama Supreme Court has "repeatedly refused" to modify the employment-at-will rule); Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130, 1131 (Ala. 1977) (no wrongful discharge cause of action for employee who was terminated for refusing to falsify employer's documents); Hartley v. Ocean Reef Club, 476 So. 2d 1327, 1330 (Fla. Dist. Ct. App. 1985) (any public policy exception should be created by the legislature, not the courts); Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 103, 491 N.E.2d 1114, 1117 (1986) (court refused to recognize a wrongful discharge cause of action where an employee was discharged in retaliation for reporting to his superiors that the company was conducting its business in violation of law); Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 103, 483 N.E.2d 150, 153 (1985) (at-will employment is terminable for "any reason which is not contrary to law"); Rose v. Allied Dev. Co., 719 P.2d 83, 84–85 (Utah 1986) (employment contract of indefinite duration may be terminated at will by either party without cause); Volino v. General Dynamics, 539 A.2d 531, 532 (R.I. 1988) (no exception to the employment-at-will doctrine for an employee who alleged that he was discharged for reporting employer's malpractice); *but see* Cummins v. EG & G Sealol, Inc., 690 F. Supp. 134, 136–37 (D.R.I. 1988) (concluding that the *Volino* court implicitly recognized a whistleblower cause of action). Three of these states, however, have enacted statutes that prohibit retaliation against public-sector whistleblowers. *See* FLA. STAT. ANN. § 112.3187 (West Supp. 1989); R.I. GEN. LAWS § 36-15-3 (Supp. 1988); UTAH CODE ANN. §§ 67-21-1 to -9 (1986).

Georgia enforces the employment-at-will doctrine by statute. *See* GA. CODE ANN. § 34-7-1 (1988); *see also* Mr. B's Oil Co. v. Register, 181 Ga. App. 166, 167, 351 S.E.2d 533, 534 (1986) (an employer is free to discharge an at-will employee regardless of the motives involved); Taylor v. Foremost-McKesson, Inc., 656 F.2d 1029, 1031–32 (5th Cir. Unit B Sept. 1981) (employee who alleged that he was discharged for investigating possibly criminal company activities has no cause of action under Georgia law).

among states that have adopted the public policy exception, the scope of protected activity varies from jurisdiction to jurisdiction.[34] Thus, even in a jurisdiction that has adopted the public policy exception, the availability of a cause of action for nuclear whistleblowers depends upon whether the jurisdiction's public policy exception is broad enough to protect whistleblowers.

Several states have expressly held that whistleblowers have a cause of action for wrongful discharge.[35] Some of these states only

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[34] *See infra* notes 35–43 and accompanying text.

[35] *See* Wagner v. City of Globe, 150 Ariz. 82, 89–90, 722 P.2d 250, 257–58 (1986) (a whistleblower has a cause of action if the whistleblowing exposes "illegal or unsafe practices" and "serves a public purpose" rather than merely advancing the whistleblower's own private interests); Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 249, 250, 743 S.W.2d 380, 385, 386 (1988) (public policy exception protects employees who are discharged for reporting violations of state or federal law); Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 511, 485 N.E.2d 372, 377 (1985) (nuclear employee discharged for refusing to work with equipment that plaintiff alleged did not comply with nuclear regulations sufficiently stated a cause of action for wrongful discharge), *cert. denied*, 475 U.S. 1122 (1986); Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 878 (Mo. Ct. App. 1985) (allowing a cause of action for an employee who was discharged for refusing to violate the law and for threatening to report employer's violations of Food and Drug Administration regulations); Fielder v. Southco, Inc. of South Carolina, 699 F. Supp. 577, 577–78 (W.D. Va. 1988) (Virginia's public policy exception held to provide a cause of action for an employee who alleged that he was discharged in retaliation for reporting employer misconduct, where the public policy was provided by Title VII's prohibition of retaliatory discrimination against employees who oppose unlawful employment practices); Cagle v. Burns and Roe, Inc., 106 Wash. 2d 911, 913, 726 P.2d 434, 435 (1986) (allowing a cause of action where employee was discharged for threatening to report to the NRC that defendant employer ordered her to violate NRC regulations). *See generally* Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277, 278–88 (1983); Mauk, *supra* note 30, at 239–45; Note, *State Law Protection of At-Will Employees Who "Blow the Whistle,"* 65 U. DET. L. REV. 551, 560–63 (1988); Note, *Remedies for Employees Discharged for Reporting an Employer's Violation of Federal Law*, 42 WASH. & LEE L. REV. 1383 (1985). *But see* Marshall & Wicker, *The Status of the At-Will Employment Doctrine in Virginia After* Bowman v. State Bank of Keysville, 20 U. RICH. L. REV. 267 (1986) (arguing that Virginia's public policy exception does not protect whistleblowers). Arizona, Illinois, and Washington have also enacted statutory protections for public-sector whistleblowers. *See* ARIZ. REV. STAT. ANN. § 38-532 (1985); ILL. REV. STAT. ch. 127, ¶ 63b119c.1 (Smith-Hurd Supp. 1988); WASH. REV. CODE ANN. §§ 42.40.010–.900 (Supp. 1989).

The Tennessee Supreme Court has expressed a willingness to recognize a whistleblower cause of action under the appropriate circumstances. *See* Chism v. Mid-South Milling Co., 762 S.W.2d 552, 557 (Tenn. 1988). In dismissing the complaint, the court indicated that it "might be persuaded" to recognize a cause of action where an employee is discharged in retaliation for refusing to remain silent about his employer's violations of federal law if such an employee "properly raise[s] the issue." *Id.* at 555. A Tennessee statute protects public-sector employee whistleblowers. *See* TENN. CODE ANN. §§ 8-50-601 to -604 (1988).

The Massachusetts Supreme Judicial Court has assumed, without deciding, that whistleblowers have a cause of action under the public policy exception. *See* Mello v. Stop & Shop, 402 Mass. 555, 560 n.6, 524 N.E.2d 105, 108 n.6 (1988). The First Circuit Court of Appeals has suggested that Massachusetts would provide a cause of action for discharged nuclear whistleblowers. *See* Norris v. Lumbermen's Mut. Casualty Co., 881 F.2d 1144, 1153 (1st Cir.

protect whistleblowers who report violations of state law.[36] One jurisdiction, while recognizing that whistleblowers deserve protection, has nevertheless held that a discharged employee has no cause of action if there is any other remedy available.[37] Several states have

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1989). The New Mexico Supreme Court has likewise deferred decision on whether whistleblowing is protected by the public policy exception. *See* Sanchez v. *The New Mexican*, 106 N.M. 76, 79, 738 P.2d 1321, 1324 (1987). New Mexico courts, however, do not provide a wrongful discharge cause of action where a discharged employee has another remedy. Salazar v. Furr's, Inc., 629 F. Supp. 1403, 1409 (D.N.M. 1986).

The District of Columbia continues to adhere to the employment-at-will doctrine. *See, e.g.*, Hall v. Ford, 856 F.2d 255, 267 (D.C. Cir. 1988) (District of Columbia "does not currently recognize" a public policy exception). The United States District Court for the District of Columbia has, however, held that D.C. courts would recognize a cause of action where the discharge of an employee violates a statutorily expressed public policy. *See* Adler v. Columbia Historical Soc'y, 690 F. Supp. 9, 16–17 (D.D.C. 1988); Newman v. Legal Serv. Corp., 628 F. Supp. 535, 539 (D.D.C. 1986).

The Wyoming Supreme Court has assumed that, given the appropriate circumstances, they might recognize a tort action for discharge in contravention of public policy. *See* Allen v. Safeway Stores, 699 P.2d 277, 284 (Wyo. 1985). The court has cautioned, however, that if another remedy exists, there is no need for a court-imposed tort action. *Id.*

[36] West Virginia adopted a whistleblower cause of action in Harless v. First National Bank, 162 W. Va. 116, 124, 246 S.E.2d 270, 275 (1978). Although the plaintiff in *Harless* alleged that he informed his superiors that the defendant bank violated both state and federal law, the court based its ruling on the defendant's state law violations. *Id.* at 117, 125–26, 246 S.E.2d at 272, 275–76.

Alaska has declined to decide whether to accept or reject a public policy exception. *See* Arco Alaska v. Akers, 753 P.2d 1150, 1153 (Alaska 1988). Alaska, however, imposes an implied covenant of good faith and fair dealing in all at-will employment arrangements. Mitford v. de Lasala, 666 P.2d 1000, 1007 (Alaska 1983). The public policy exception is encompassed within this implied covenant. Knight v. American Guard & Alert, Inc., 714 P.2d 788, 792 (Alaska 1986). The Alaska Supreme Court has found that the implied covenant of good faith and fair dealing provides a cause of action for a discharged whistleblower. *Id.* at 792. The plaintiff in *Knight* alleged that the defendant employer discharged him for reporting his coworkers' abuse of alcohol and drugs on the job. *Id.* at 790.

The Nebraska Supreme Court has found that a whistleblower has a wrongful discharge cause of action. Schriner v. Meginnis Ford Co., 228 Neb. 85, 91, 421 N.W.2d 755, 759 (1988). The court, however, held that a whistleblower has a cause of action only if he or she was discharged for reporting violations of state criminal law. *Id.* at 92, 421 N.W.2d at 759.

[37] *See* Walsh v. Consolidated Freightways, 278 Or. 347, 351–53, 563 P.2d 1205, 1208–09 (1977) ("[E]mployers should not be allowed to discharge employees solely for complaining about safety problems," but discharged employee had no tort remedy because existing remedies under OSHA were adequate to protect the interests of society and employees); *see also* Corbin v. Sinclair Mktg., 684 P.2d 265, 267 (Colo. Ct. App. 1984) (the public policy exception in Colorado does not extend to a discharged employee who has a statutory remedy); Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985) (where a statute prohibits an act and specifies the available remedy, the aggrieved party is limited to the remedy provided by the statute); Salazar v. Furr's, Inc., 629 F. Supp. 1403, 1409 (D.N.M. 1986) (no wrongful discharge cause of action is available where the law provides a discharged employee with another remedy); Allen v. Safeway Stores, 699 P.2d 277, 284 (Wyo. 1985) (if another remedy exists, there is no need for a court-imposed tort action). Washington courts have not decided whether a wrongful discharge cause of action exists where the declaration of public policy is expressed in a statute

expressly rejected the whistleblower exception to the employment-at-will rule.[38]

Similar to the whistleblower's situation is that of an employee who is discharged for disobeying his or her employer's instructions to commit an unlawful act. Several jurisdictions recognize that such an employee has a wrongful discharge cause of action.[39] In most of these

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already providing a remedy. *See* Grimwood v. University of Puget Sound, 110 Wash. 2d 355, 367, 753 P.2d 517, 523 (1988).

These rules regarding exclusivity of remedies are based not on preemption, but on independent state grounds. Each state has taken the position that the terminable-at-will rule should not be altered unless the discharged employee has no other recourse except the courts. *See, e.g., Salazar*, 629 F. Supp. at 1409 (wrongful discharge tort remedy is unnecessary if a discharged whistleblower has the protection of another cause of action).

[38] *See* Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1059–61 (Ind. Ct. App. 1980) (employee discharged in retaliation for reporting employer's violations of Food and Drug Administration regulations does not have a cause of action for wrongful discharge); Buethe v. Britt Airlines, 787 F.2d 1194, 1197 (7th Cir. 1986) (the Indiana tort of wrongful termination does not protect whistleblowing); Chrisman v. Philips Indus., 751 P.2d 140, 145 (Kan. 1988) (rejecting nuclear whistleblower's wrongful discharge action); English v. General Elec., 683 F. Supp. 1006, 1016 (E.D.N.C. 1988) (nuclear whistleblower does not have a cause of action under North Carolina law), *aff'd per curiam*, 871 F.2d 22 (4th Cir. 1989); Bushko v. Miller Brewing Co., 134 Wis. 2d 136, 146–47, 396 N.W.2d 167, 172 (1986) (court refused to recognize a whistleblower exception on the grounds that whistleblowing is "merely praiseworthy" and is not protected under Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 573–74, 335 N.W.2d 834, 840 (1983)). Indiana, Kansas, and Wisconsin have nevertheless enacted statutes protecting public-sector whistleblowers. *See* IND. CODE ANN. § 4-15-10-4 (Burns 1986 & Supp. 1988); KAN. STAT. ANN. § 75-2973 (1984); WIS. STAT. ANN. §§ 230.80–.89 (West 1987).

[39] *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 189–90, 344 P.2d 25, 27–28 (1959) (recognizing a wrongful discharge cause of action where employer discharged employee for refusing to commit perjury); McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390, 393 & n.1 (Ind. 1988) (although Indiana law does not protect whistleblowers, an employee who was discharged for refusing to commit an illegal act for which he could have been personally liable stated a cause of action); Trombetta v. Detroit, Toledo & Ironton R.R., 81 Mich. App. 489, 496, 265 N.W.2d 385, 388 (1978) (employee who was discharged for refusing to falsify pollution reports has a wrongful discharge cause of action); Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 878 (Mo. Ct. App. 1985) (an employee discharged for refusing to violate federal law has a wrongful discharge cause of action); Burk v. K-Mart Corp., 770 P.2d 24, 28–29 (Okla. 1989) (recognizing a cause of action where an employee is discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy); Watson v. Cleveland Chair Co., No. 113, slip op. (Tenn. Ct. App. Oct. 27, 1987) (employee discharged for refusing to violate state and federal law has a cause of action regardless of the existence of a federal remedy); Cagle v. Burns and Roe, Inc., 106 Wash. 2d 911, 913, 726 P.2d 434, 435 (1986) (allowing a cause of action for a discharged employee who refused employer's orders to violate federal nuclear regulations).

The Colorado Court of Appeals has assumed, without deciding, that an employer cannot discharge an employee in retaliation for the employee's refusal to violate federal law. *See* Farmer v. Central Bancorporation, 761 P.2d 220, 221 (Colo. Ct. App. 1988). Colorado courts, however, do not extend the public policy exception to a plaintiff who has a statutory remedy.

states, however, a discharged employee has a cause of action only if he or she has refused to violate state law[40] or criminal law.[41]

In addition, many states provide a cause of action for discharged employees when the discharge was in violation of the law. Some of these jurisdictions grant discharged employees a cause of action when the discharge violates federal law.[42] Most,

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Corbin v. Sinclair Mktg., 684 P.2d 265, 267 (Colo. Ct. App. 1984). Colorado has enacted a statute that protects public-sector whistleblowers. *See* COLO. REV. STAT. §§ 24-50.5-101 to -107 (1988).

[40] *See* Hobson v. McLean Hosp. Corp., 402 Mass. 413, 416, 522 N.E.2d 975, 977 (1988) (plaintiff stated a claim for wrongful discharge by alleging that she was fired in retaliation for refusing to violate state and municipal laws and regulations); Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985) (employee discharged for refusing employer's order to disobey a subpoena has a cause of action); Bushko v. Miller Brewing Co., 134 Wis. 2d 136, 146, 396 N.W.2d 167, 172 (1986) (public policy exception limited to employees who have been discharged for refusing to violate state statutory or constitutional law). South Carolina and Wisconsin, however, provide protection for public-sector employees who report their employers' violations of state or federal law. *See* S.C. CODE ANN. §§ 8-27-10 to -50 (Law. Co-op. Supp. 1988); WIS. STAT. ANN. §§ 230.80–.89 (West 1987).

South Dakota has recognized a cause of action where an employee is discharged in retaliation for refusing to commit a criminal or unlawful act, but thus far has only applied this public policy exception where the employee has refused to violate state law. *See* Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 227 (S.D. 1988).

[41] Laws v. Aetna Fin. Co., 667 F. Supp. 342, 348–49 (N.D. Miss. 1987) (recognizing a wrongful discharge cause of action for an employee who refused to violate state and federal law where his failure to do so would have subjected him to criminal liability); Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (a discharged employee has a cause of action only if the sole reason for the discharge was the employee's refusal to violate a state or federal law that carries a criminal penalty). In Texas, however, public-sector whistleblowers are protected. *See* TEX. REV. CIV. STAT. ANN. art. 6252-16a (Vernon Supp. 1989).

[42] *See* Parnar v. Americana Hotels, 65 Haw. 370, 380, 652 P.2d 625, 631 (1982) (employee discharged in violation of federal antitrust law, 15 U.S.C. § 15 (1988), has a wrongful discharge cause of action); Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 923, 436 A.2d 1140, 1144–45 (1981) (Occupational Safety and Health Act (OSHA), 29 U.S.C. § 654(a) (1988), provides the necessary public policy to support a wrongful termination claim); Staggie v. Idaho Falls Consol. Hospitals, 110 Idaho 349, 352, 715 P.2d 1019, 1022 (Ct. App. 1986) (adopting New Hampshire's public policy exception, requiring plaintiff to demonstrate that he or she was discharged for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn); Burk v. K-Mart Corp., 770 P.2d 24, 28–29 (Okla. 1989) (recognizing a cause of action where a discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory, or decisional law); *see also* Aubry, *Employers and Employees: A Call for Oklahoma's Adoption of the Whistle-Blower Exception to the Employment-at-Will Doctrine*, 40 OKLA. L. REV. 285 (1987). An Oklahoma statute protects public-sector whistleblowers from retaliatory discrimination. *See* OKLA. STAT. ANN. tit. 74, § 841.7 (West 1987).

In Kentucky, there is no specific requirement that the public policy be based on state law. *See* Brown v. Physicians Mut. Ins. Co., 679 S.W.2d 836, 838 (Ky. Ct. App. 1984) (recognizing a cause of action where employment is terminated in violation of "a legislature's" express or implied expression of public policy). Kentucky courts, however, adhere to an exclusive-remedy

however, require discharged employees to show that they were discharged in violation of state law.[43]

2. Which Jurisdictions Provide Whistleblowers with a Cause of Action?

A nuclear whistleblower would have a remedy in most of the jurisdictions that have included whistleblowing within the public policy exception. Because nuclear regulatory laws are exclusively federal,[44] an employee discharged for reporting nuclear violations would not have a cause of action in those jurisdictions that protect only employees who report violations of state law. Because a federal remedy is available to nuclear whistleblowers,[45] they would not have a cause of action in those jurisdictions that employ exclusive-remedy

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rule. Where a statute prohibits an act and specifies the available remedy, the aggrieved party is limited to the remedy provided by the statute. Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985). Kentucky provides protection for public-sector whistleblowers. *See* KY. REV. STAT. ANN. §§ 61.101–.103 (Michie 1986).

A federal district court has held that federal law can provide the basis for Maryland public policy. *See* Adler v. American Standard Corp., 538 F. Supp. 572, 578, 579 (D. Md. 1982), *rev'd*, 830 F.2d 1303 (4th Cir. 1987). The Fourth Circuit Court of Appeals' reversal of *Adler*, however, places this portion of the district court's decision in serious doubt. *See Adler*, 830 F.2d at 1307. Maryland provides statutory protection for public-sector whistleblowers. *See* MD. ANN. CODE art. 64A, §§ 12G–12J (1988).

[43] Three states have expressly limited the public policy exception to cases where the discharge contravenes state law. *See* Anco Constr. Co. v. Freeman, 236 Kan. 626, 629, 693 P.2d 1183, 1186 (1985) (public policy exception in Kansas is "narrowly drawn," applying only to interests protected by state law); Wiltsie v. Baby Grand Corp., 774 P.2d 432, 433 (Nev. 1989) (because plaintiff reported his employer's state law violations to his supervisor rather than to the appropriate authorities, the plaintiff was "merely acting in a private or proprietary manner," and the discharge did not violate "an established public policy of this state"); Coman v. Thomas Mfg. Co., 371 S.E.2d 731, 735 (N.C. Ct. App. 1988) (wrongful discharge cause of action exists in North Carolina only where the state legislature specifically gives an employee a right to sue an employer for retaliatory discharge). Kansas and North Carolina, moreover, have rejected the proposition that nuclear whistleblowers have a wrongful discharge cause of action under the public policy exception. *See* Chrisman v. Philips Indus., 751 P.2d 140, 145 (Kan. 1988); English v. General Elec., 683 F. Supp. 1006, 1015 (E.D.N.C. 1988), *aff'd per curiam*, 871 F.2d 22 (4th Cir. 1989). Kansas, however, provides statutory protection for public-sector whistleblowers. *See* KAN. STAT. ANN. § 75-2973 (1984).

Three jurisdictions have allowed a cause of action where a discharge violates state law, but have not yet decided whether an employee whose discharge violates federal law has a cause of action. *See* Heller v. Dover Warehouse Mkt., 515 A.2d 178, 181 (Del. Super. Ct. 1986); Springer v. Weeks and Leo Co., 429 N.W.2d 558, 560 (Iowa 1988); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 794–95 (N.D. 1987). All three of these states provide public-sector whistleblowers with statutory protection. *See* DEL. CODE ANN. tit. 29, § 5115 (1983); IOWA CODE ANN. §§ 79.28–.29 (West Supp. 1988); N.D. CENT. CODE § 34-11.1-04 (Supp. 1985 & Supp. 1987).

[44] *See infra* notes 101–03 and accompanying text.

[45] *See* 42 U.S.C. § 5851 (1988); *see also infra* notes 77–96 and accompanying text.

rules.[46] The states that have expressly refused to adopt a whistleblower exception to the employment-at-will doctrine would deny relief to a nuclear whistleblower unless there is a change in the common law of any of these jurisdictions.

An employee who has been discharged for refusing to violate nuclear laws or regulations would have a cause of action in a jurisdiction that protects employees who refuse to violate federal law.[47] In some jurisdictions, discharged employees would have to show that, had they followed their employers' orders to violate nuclear regulatory law, the employees would have been subject to criminal liability.[48]

Because federal law prohibits the discharge of nuclear whistleblowers,[49] such whistleblowers would have a remedy in jurisdictions that protect employees whose discharge violates federal law. They would not have a cause of action, however, in a jurisdiction that prohibits only discharge in violation of state law, unless such a jurisdiction expanded its public policy exception to prohibit discharge in violation of federal law as well.

The jurisdictions that provide a wrongful discharge cause of action typically require the employee to suffer discharge, not merely retaliatory discrimination, in order to establish a cause of action.[50] Thus, nuclear whistleblowers whose employers discriminate against them, but do not fire them, would not have a wrongful discharge cause of action in these jurisdictions. Some jurisdictions have thus far only protected whistleblowers who reported their employers' wrongdoing to public authorities.[51] Others, however, have provided

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[46] *See supra* note 37 and accompanying text.

[47] *See supra* notes 39–41 and accompanying text.

[48] *See supra* note 41 and accompanying text.

[49] *See* 42 U.S.C. § 5851(a); *see also* 10 C.F.R. § 30.7 (1988).

[50] Some states provide a wrongful discharge cause of action where there has been a "constructive discharge." *See, e.g.*, Wilson v. Board of County Comm'rs, 703 P.2d 1257, 1259 (Colo. 1985) (to prove constructive discharge, plaintiff employee must show deliberate action on the part of defendant employer that renders the employee's working conditions so intolerable that the employee has no other choice but to resign); Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 250, 743 S.W.2d 380, 386 (1988) (constructive discharge exists only when a reasonable person would have resigned under the same or similar circumstances); Collins v. Baker's Supermkts., 223 Neb. 365, 368, 389 N.W.2d 774, 776–77 (1986) (employee not constructively discharged where he retained a job with defendant employer at a "substantial, though reduced" wage).

[51] *See, e.g.*, Wagner v. City of Globe, 150 Ariz. 82, 84, 90, 722 P.2d 250, 252, 258 (1986) (granting a wrongful discharge cause of action to a police officer who was discharged for reporting suspected illegal detention to local magistrate); *Sterling Drug*, 294 Ark. at 242, 249, 743 S.W.2d at 381, 386 (recognizing a wrongful discharge cause of action where employee was discharged for reporting employer's illegal activity to the General Services Administration);

relief to employees who reported wrongdoing to public authorities or directly to their employers.[52]

Jurisdictions that provide whistleblowers with a wrongful discharge cause of action typically allow a broad range of damages.[53] These jurisdictions allow successful whistleblower plaintiffs to obtain reinstatement and back pay,[54] as well as damages for emotional distress[55] and loss of professional reputation.[56] Punitive damages are also generally available in a wrongful discharge action.[57]

Courts impose the same statute of limitations for a wrongful discharge action as for any other tort action, typically two or three years.[58] As in most tort actions, however, a whistleblower who wins on a wrongful discharge claim cannot recover attorney's fees.[59]

B. State Whistleblower Protection Statutes

Many states have enacted statutes that provide remedies for discharged whistleblowers. Twenty states now have statutes that protect public-sector employees from discharge in retaliation for re-

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Wiltsie v. Baby Grand Corp., 774 P.2d 432, 433–34 (Nev. 1989) (plaintiff failed to come within the public policy exception because he reported illegal activity to his supervisor rather than to the appropriate authorities); House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 48–49, 556 A.2d 353, 356 (1989) (New Jersey law does not protect an employee's internal complaints where the employee has failed to bring the alleged violation of public policy to the attention of a governmental authority).

[52] *See* Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 509–10, 485 N.E.2d 372, 376 (1985) (whether plaintiff's whistleblowing activity was protected by public policy did not depend on whether plaintiff reported violations to the NRC or to his employer), *cert. denied*, 475 U.S. 1122 (1986); Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 878 (Mo. Ct. App. 1986) (providing a cause of action when an employee is discharged for reporting misconduct to his or her superiors or to public authorities).

[53] *See generally* Korotkin, *Damages in Wrongful Termination Cases*, A.B.A. J., May 1989, at 84–88.

[54] *See, e.g.*, Redemske v. Village of Romeoville, 85 Ill. App. 3d 286, 295, 406 N.E.2d 602, 609 (1980). *See generally* Annotation, *Damages Recoverable for Wrongful Discharge of At-Will Employee*, 44 A.L.R. 4TH 1131, 1147–48 (1986).

[55] *See, e.g.*, Cagle v. Burns and Roe, Inc., 106 Wash. 2d 911, 913, 726 P.2d 434, 435 (1986); Harless v. First Nat'l Bank, 162 W. Va. 116, 126, 246 S.E.2d 270, 276 (1978); *see also* Annotation, *supra* note 54, at 1152–54.

[56] *See, e.g.*, Wiskotoni v. Michigan Nat'l Bank—West, 716 F.2d 378, 390 (6th Cir. 1983); *see also* Annotation, *supra* note 54, at 1154.

[57] *See, e.g.*, *Boyle*, 700 S.W.2d at 866; Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186–87, 384 N.E.2d 353, 359–60 (1978); *see also* Annotation, *supra* note 54, at 1155–59.

[58] *See, e.g.*, WASH. REV. CODE ANN. § 4.16.130 (1988) (two years); Burton v. Tribble, 189 Ark. 58, 60, 70 S.W.2d 503, 504 (1934) (three-year statute of limitations applies to all tort actions not otherwise limited by law).

[59] Section 210, by contrast, authorizes the Secretary of Labor to award attorney's fees to a successful plaintiff. 42 U.S.C. § 5851(b)(2)(B)(ii) (1988).

porting their employers' unlawful conduct.[60] Ten states have enacted statutes protecting whistleblowers in both the public and the private sectors.[61] Nearly all state whistleblower statutes protect employees who report violations of state and federal laws or regulations.[62] These

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[60] *See* ARIZ. REV. STAT. ANN. §§ 38-531 to -532 (1985); COLO. REV. STAT. §§ 24-50.5-101 to -107 (1988); DEL. CODE ANN. tit. 29, § 5115 (1983); FLA. STAT. ANN. § 112.3187 (West Supp. 1989); ILL. REV. STAT. ch. 127, ¶ 63b119c.1 (Smith-Hurd Supp. 1988); IND. CODE ANN. § 4-15-10-4 (Burns 1986 & Supp. 1988); IOWA CODE ANN. §§ 79.28–.29 (West Supp. 1988); KAN. STAT. ANN. § 75-2973 (1984); KY. REV. STAT. ANN. §§ 61.101–.103 (Michie 1986); MD. ANN. CODE art. 64A, §§ 12G–12J (1988); N.D. CENT. CODE § 34-11.1-04 (Supp. 1985 & Supp. 1987); OKLA. STAT. ANN. tit. 74, §§ 841.7–.9 (West 1987); OR. REV. STAT. § 240.316(5) (1986); R.I. GEN. LAWS §§ 36-15-1 to -10 (1988); S.C. CODE ANN. §§ 8-27-10 to -50 (Law. Co-op. Supp. 1988); TENN. CODE ANN. §§ 8-50-601 to -604 (1988); TEX. REV. CIV. STAT. ANN. art. 6252-16a (Vernon Supp. 1989); UTAH CODE ANN. §§ 67-21-1 to -9 (1986); WASH. REV. CODE ANN. §§ 42.40.010–.900 (Supp. 1989); WIS. STAT. ANN. §§ 230.80–.89 (West 1987).

Three of these states also protect private-sector whistleblowers. *See* Wagner v. City of Globe, 150 Ariz. 82, 89–90, 722 P.2d 250, 257–58 (1986); Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 510, 485 N.E.2d 372, 377 (1985), *cert. denied*, 475 U.S. 1122 (1986); Cagle v. Burns and Roe, Inc., 106 Wash. 2d 911, 913, 726 P.2d 434, 435 (1986). Another, Tennessee, has expressed a willingness to consider recognizing a whistleblower cause of action. *See* Chism v. Mid-South Milling Co., 762 S.W.2d 552, 555, 557 (Tenn. 1988); *see also supra* note 35.

Others have explicitly refused to provide private-sector whistleblowers with a cause of action. *See* Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1061 (Ind. Ct. App. 1980); Chrisman v. Philips Indus., 751 P.2d 140, 145 (Kan. 1988); Bushko v. Miller Brewing Co., 134 Wis. 2d 136, 145–46, 396 N.W.2d 167, 172 (1986); *see also supra* note 38.

Several of these states have thus far declined to recognize a cause of action for private-sector whistleblowers. *See* Heller v. Dover Warehouse Mkt., 515 A.2d 178, 181 (Del. Super. Ct. 1986); Hartley v. Ocean Reef Club, 476 So. 2d 1327, 1330 (Fla. Dist. Ct. App. 1985); Springer v. Weeks and Leo Co., 429 N.W.2d 558, 560 (Iowa 1988); Adler v. American Standard Corp., 830 F.2d 1303, 1307 (4th Cir. 1987); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 794–95 (N.D. 1987); Hinson v. Cameron, 742 P.2d 549, 557 (Okla. 1987); Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985); Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985); Volino v. General Dynamics, 539 A.2d 531, 532 (R.I. 1988); *but see* Cummins v. EG & G Sealol, Inc., 690 F. Supp. 134, 136–37 (D.R.I. 1988) (concluding that the *Volino* court implicitly recognized a whistleblower cause of action).

Other states would deny relief to private-sector whistleblowers on the grounds that section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851 (1988), provides a remedy for them. *See* Corbin v. Sinclair Mktg., 684 P.2d 265, 267 (Colo. Ct. App. 1984); Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985); Walsh v. Consolidated Freightways, 278 Or. 347, 351–52, 563 P.2d 1205, 1208 (1977); *see also supra* note 37 and accompanying text.

[61] *See* CAL. LAB. CODE ANN. § 1102.5 (West Supp. 1989); CAL. GOV'T CODE §§ 10540–10551 (West 1980); CONN. GEN. STAT. ANN. § 31-51m (West Supp. 1988); LA. REV. STAT. ANN. § 30:2027 (West 1989) (protecting employees who report environmental violations); ME. REV. STAT. ANN. tit. 26, §§ 831–840 (1988); MICH. STAT. ANN. § 17.428 (Callaghan 1982 & Supp. 1988); MINN. STAT. ANN. §§ 181.931–.935 (West Supp. 1989); MONT. CODE ANN. §§ 39-2-901 to -914 (1987); N.J. STAT. ANN. §§ 34:19-1 to -8 (West 1988); N.Y. LAB. LAW § 740 (McKinney 1988); N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1989); PA. STAT. ANN. tit. 43, §§ 1421–28 (Purdon Supp. 1988). *See generally* Note, *supra* note 35, at 563–65.

[62] *See* CAL. LAB. CODE § 1102.5(b) (West Supp. 1989); CAL. GOV'T CODE § 10542(b) (West 1980); CONN. GEN. STAT. ANN. § 31-51m(b) (West Supp. 1988); LA. REV. STAT. ANN. § 30:2027(A) (West 1989); ME. REV. STAT. ANN. tit. 26, § 833(1)(A) (1988); MICH. STAT. ANN.

statutes, then, would provide relief to employees who report their employers' violations of federal nuclear regulations. Some of these statutes also protect employees who participate in investigations into employer misconduct.[63]

Unlike common-law jurisdictions, which protect only discharged whistleblowers,[64] states with whistleblower statutes provide reme-

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§ 17.428(2) (Callaghan 1982); MINN. STAT. ANN. § 181.932(1)(a) (West Supp. 1989); MONT. CODE ANN. §§ 39-2-903 to -904 (1987); N.J. STAT. ANN. § 34:19-3(a) (West 1988); N.Y. LAB. LAW § 740 (McKinney 1988); N.Y. CIV. SERV. LAW § 75-b(2)(a) (McKinney Supp. 1989); PA. STAT. ANN. tit. 43, § 1423(a) (Purdon Supp. 1988); ARIZ. REV. STAT. ANN. § 38-532(A)(1) (1985); COLO. REV. STAT. § 24-50.5-102(2) (1988); DEL. CODE ANN. tit. 29, § 5115(a) (1983); FLA. STAT. ANN. § 112.3187(5)(a) (West Supp. 1989); ILL. REV. STAT. ch. 127, ¶ 63b119c.1(1)(i)–(ii) (Smith-Hurd Supp. 1988); IND. CODE ANN. § 4-15-10-4(a) (Burns 1986); IOWA CODE ANN. § 79.28 (West Supp. 1988); KAN. STAT. ANN. § 75-2973(b)(1) (1984); KY. REV. STAT. ANN. § 61.102(1) (Michie 1986); MD. ANN. CODE art. 64A, § 12G(a)(1)(i) (1988); N.D. CENT. CODE § 34-11.1-04(1) (Supp. 1987); OKLA. STAT. ANN. tit. 74, § 841.7 (West 1987); OR. REV. STAT. § 240.316(5) (1986); R.I. GEN. LAWS § 36-15-3(1) (Supp. 1988); S.C. CODE ANN. § 8-27-20 (Law. Co-op. Supp. 1988); TENN. CODE ANN. § 8-50-602 (1988); TEX. REV. CIV. STAT. ANN. art. 6252-16a(2) (Vernon Supp. 1989); UTAH CODE ANN. § 67-21-3(1) (1986); WASH. REV. CODE ANN. § 42.40.030(1) (Supp. 1989); WIS. STAT. ANN. § 230.81(1) (West 1987).

Most of these statutes do not require potential whistleblowers to be certain that their employers have committed a violation of law. They typically protect whistleblowers who report suspected violations. *See* CONN. GEN. STAT. ANN. § 31-51m(b) (West Supp. 1988); MICH. STAT. ANN. § 17.428(2) (Callaghan 1982); DEL. CODE ANN. tit. 29, § 5115(a) (1983); FLA. STAT. ANN. § 112.3187(5) (West Supp. 1989); KY. REV. STAT. ANN. § 61.102(1) (Michie 1986). They also protect whistleblowers who have a good-faith belief, *see* LA. REV. STAT. ANN. § 30:2027(A) (West 1989); ME. REV. STAT. ANN. tit. 26, § 833(1)(A) (1988); MINN. STAT. ANN. § 181.932(2)(a) (West Supp. 1989); PA. STAT. ANN. tit. 43, § 1423 (Purdon Supp. 1988); KY. REV. STAT. ANN. § 61.102(1) (Michie 1986); TEX. REV. CIV. STAT. ANN. art. 6252-16a(2) (Vernon Supp. 1989); WASH. REV. CODE ANN. § 42.40.050(1)(a) (Supp. 1989), or a reasonable belief that their employers have violated the law, *see* CAL. LAB. CODE § 1002.5(b) (West Supp. 1989); N.J. STAT. ANN. § 34:19-3(a) (West 1988); ARIZ. REV. STAT. ANN. § 38-532(A) (1985); ILL. REV. STAT. ch. 127, ¶ 63b119c.1(1) (Smith-Hurd Supp. 1988); IND. CODE ANN. § 4-15-10-4(c) (Burns 1986); IOWA CODE ANN. § 79.28(2) (West Supp. 1988); MD. ANN. CODE art. 64A, § 12G(a)(1) (1988); R.I. GEN. LAWS § 36-15-3(1) (Supp. 1988); WIS. STAT. ANN. § 230.80(5) (West 1987), or unless the employee knows the report to be false. *See* COLO. REV. STAT. § 24-50.5-103(1)(a) (1988); KAN. STAT. ANN. § 75-2973(c)(4)(A) (1984); N.D. CENT. CODE § 34-11.1-04(3) (Supp. 1987); UTAH CODE ANN. § 67-21-3(1)(c) (1986).

[63] *See* CONN. GEN. STAT. ANN. § 31-51m(b) (West Supp. 1988); ME. REV. STAT. ANN. tit. 26, § 833(1)(c) (1988); MICH. STAT. ANN. § 17.428(2) (Callaghan 1982); MINN. STAT. ANN. § 181.932(1)(b) (West Supp. 1989); N.J. STAT. ANN. § 34:19-3(b) (West 1988); N.Y. LAB. LAW § 740(2)(b) (McKinney 1988); PA. STAT. ANN. tit. 43, § 1423(b) (Purdon Supp. 1988); COLO. REV. STAT. § 24-50.5-102(2) (1988); FLA. STAT. ANN. § 112.3187(7) (West Supp. 1989); R.I. GEN. LAWS § 36-15-3(2) (Supp. 1988); S.C. CODE ANN. § 8-27-20 (Law. Co-op. Supp. 1988); UTAH CODE ANN. § 67-21-3(2) (1986).

Hawaii prohibits retaliation against an employee who "receives a summons, responds thereto, serves as a witness or attends court as a prospective witness." HAW. REV. STAT. § 621-10.5 (1988). Similarly, South Carolina prohibits the discharge of an employee who complies with a subpoena or serves on a jury. *See* S.C. CODE ANN. § 41-1-70 (Law. Co-op. Supp. 1988).

[64] *See supra* note 50 and accompanying text.

dies for employees whose employers discriminate against them in any way in retaliation for their whistleblowing.[65] Many of these statutes, unlike most common-law jurisdictions,[66] protect whistleblowers who report misconduct directly to their employers or to anyone else.[67] In these states, then, a nuclear whistleblower need

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[65] *See* CAL. LAB. CODE ANN. § 1102.5(b) (West Supp. 1989); CONN. GEN. STAT. ANN. § 31-51m(b) (West Supp. 1988); LA. REV. STAT. ANN. § 30:2027(B)(1) (West 1989); ME. REV. STAT. ANN. tit. 26, § 833(1) (1988); MICH. STAT. ANN. § 17.428(2) (Callaghan 1982); MINN. STAT. ANN. § 181.932(1) (West Supp. 1989); MONT. CODE ANN. §§ 39-2-903 to -904 (1987) (prohibiting discharge and "constructive discharge"); N.J. STAT. ANN. § 34:19-3 (West 1988); N.Y. LAB. LAW § 740(2) (McKinney 1988); N.Y. CIV. SERV. LAW § 75-b(2)(a) (McKinney Supp. 1989); PA. STAT. ANN. tit. 43, § 1423 (Purdon Supp. 1988); ARIZ. REV. STAT. ANN. § 38-532(A) (1985); COLO. REV. STAT. § 24-50.5-103(1) (1988); DEL. CODE ANN. tit. 29, § 5115(a) (1983); FLA. STAT. ANN. § 112.3187(4) (West Supp. 1989); ILL. REV. STAT. ch. 127, ¶ 63b119c.1(2) (Smith-Hurd Supp. 1988); IND. CODE ANN. § 4-15-10-4(b), 4-15-10-5 (Burns 1986); IOWA CODE ANN. § 79.28(2) (West Supp. 1988); KAN. STAT. ANN. § 75-2973(d) (1984); KY. REV. STAT. ANN. § 61.102(1) (Michie 1986); MD. ANN. CODE art. 64A, § 12G(a)(1) (1988); N.D. CENT. CODE § 34-11.1-04(2) (Supp. 1985 & Supp. 1987); OKLA. STAT. ANN. tit. 74, § 841.7 (West 1987); OR. REV. STAT. § 240.316(5) (1986); R.I. GEN. LAWS § 36-15-3 (Supp. 1988); S.C. CODE ANN. § 8-27-30(A) (Law. Co-op. Supp. 1988) (protecting employees who have suffered retaliation within one year of disclosing employer misconduct); TENN. CODE ANN. § 8-50-603(a) (1988); TEX. REV. CIV. STAT. ANN. art. 6252-16a(2) (Vernon Supp. 1989); UTAH CODE ANN. § 67-21-3 (1986); WASH. REV. CODE ANN. § 42.40.030 (Supp. 1989) (prohibiting retaliatory discrimination within two years of employee whistleblowing); WIS. STAT. ANN. § 230.83(1) (West 1987).

By contrast, most jurisdictions that recognize a wrongful discharge cause of action require that the plaintiff employee be discharged before a court will grant relief. *See supra* note 50 and accompanying text.

[66] *See supra* notes 51–52 and accompanying text.

[67] Some states protect only employees who report employer misconduct to a governmental body. *See* CAL. LAB. CODE § 1102.5(b) (West Supp. 1989); CAL. GOV'T CODE § 10543(a) (West Supp. 1989) (Joint Legislative Audit Committee or Auditor General); CONN. GEN. STAT. ANN. § 31-51m(b) (West Supp. 1988); MICH. STAT. ANN. § 17.428(2) (Callaghan 1982); N.Y. CIV. SERV. LAW § 75-b(2)(a) (McKinney Supp. 1989); ARIZ. REV. STAT. ANN. § 38-532(A) (1985); DEL. CODE ANN. tit. 29, § 5115(a) (1983) (Office of Auditor of Accounts); FLA. STAT. ANN. § 112.3187(6) (West Supp. 1989); IOWA CODE ANN. § 79.29 (West Supp. 1988); KY. REV. STAT. ANN. § 61.102(1) (Michie 1986); OR. REV. STAT. § 240.316(5)(a) (1986); R.I. GEN. LAWS § 36-15-3(1) (Supp. 1988); TENN. CODE ANN. § 8-50-602 (1988) (an elected public official); TEX. REV. CIV. STAT. ANN. art. 6252-16a(2) (Vernon Supp. 1989); UTAH CODE ANN. § 67-21-4(4) (1986); WASH. REV. CODE ANN. § 42.40.030 (Supp. 1989) (Office of the State Auditor).

Other states protect employees who report misconduct to a public body or to their employers, *see* ME. REV. STAT. ANN. tit. 26, § 833(1) (1988); MINN. STAT. ANN. § 181.932(1)(a) (West Supp. 1989); MONT. CODE ANN. § 39-2-904 (1987); N.J. STAT. ANN. § 34:19-3(a) (West 1988); N.Y. LAB. LAW § 740(2)(a) (McKinney 1988); PA. STAT. ANN. tit. 43, § 1423(a) (Purdon Supp. 1988); N.D. CENT. CODE § 34-11.1-04(1) (Supp. 1987), or to any other person. *See* LA. REV. STAT. ANN. § 30:2027(A) (West 1989); COLO. REV. STAT. § 24-50.5-102(2) (1988); ILL. REV. STAT. ch. 127, ¶ 63b119c.1(1) (Smith-Hurd Supp. 1988); IND. CODE ANN. § 4-15-10-4(a) (Burns 1986); IOWA CODE ANN. § 79.28(2) (West Supp. 1988); KAN. STAT. ANN. § 75-2973(b)(1) (1984); MD. ANN. CODE art. 64A, § 12G(a)(1) (1988); OKLA. STAT. ANN. tit. 74, § 841.7 (West 1987); S.C. CODE ANN. § 8-27-20 (Law. Co-op. Supp. 1988); WIS. STAT. ANN. § 230.81(1) (West 1987). These statutes protect "internal whistleblowers" who inform their employers of illegal or improper conduct. *See infra* note 87.

not report employer misconduct to public authorities in order to have a cause of action. In a few states, a would-be nuclear whistleblower would have a cause of action even if he or she did not actually blow the whistle. These states protect employees who were about to report,[68] or threatened to report,[69] employer misconduct.

Most state whistleblower protection statutes provide for remedies similar to those available in common-law jurisdictions. Most whistleblower statutes authorize civil actions.[70] Some of these statutes, however, impose ninety-day[71] or one-year[72] statutes of limitations. Most of them authorize all appropriate relief,[73] including punitive

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[68] *See* MICH. STAT. ANN. § 17.428(2) (Callaghan 1982); PA. STAT. ANN. tit. 43, § 1423(a) (Purdon Supp. 1988); OKLA. STAT. ANN. tit. 74, § 841.7 (West 1988) (prohibiting retaliatory discrimination against an employee for "providing or offering to provide information" regarding employer misconduct); R.I. GEN. LAWS § 36-15-3 (Supp. 1988); UTAH CODE ANN. § 67-21-4(4) (1986) (protecting employees who were discharged while "intending to report" employer misconduct).

[69] *See* N.J. STAT ANN. § 34:19-3(a) (West 1988); N.Y. LAB. LAW § 740(2)(a) (McKinney 1988).

[70] *See* CAL. GOV'T CODE § 10543(c) (West 1980); LA. REV. STAT. ANN. § 30:2027(B) (West 1989); MINN. STAT. ANN. § 181.935(a) (West Supp. 1989); N.Y. CIV. SERV. LAW § 75-b(3)(c) (McKinney Supp. 1989); PA. STAT. ANN. tit. 43, § 1424(a) (Purdon Supp. 1988) (imposing a 180-day statute of limitations); COLO. REV. STAT. §§ 24-50.5-104 to -105 (1988); R.I. GEN. LAWS § 36-15-4(a) (Supp. 1988) (three-year statute of limitations); S.C. CODE ANN. § 8-27-30(A) (Law. Co-op. Supp. 1988) (two-year statute of limitations); TENN. CODE ANN. § 8-50-603(b) (1988); TEX. REV. CIV. STAT. ANN. art. 6252-16a(3)(c) (Vernon Supp. 1989); WASH. REV. CODE ANN. § 42.40.050(1)(b) (Supp. 1989).

Some states provide administrative remedies. *See* KAN. STAT. ANN. § 75-2973(d) (1984) (30-day statute of limitations); MD. ANN. CODE art. 64A, §§ 12H–12I (1988); OKLA. STAT. ANN. tit. 74, § 841.7 (West 1987) (30-day statute of limitations); OR. REV. STAT. § 240.316(5)(d) (1986); WIS. STAT. ANN. § 230.85 (West 1987) (160-day statute of limitations).

Two states allow a discharged whistleblower to bring a civil action only after exhausting all available administrative remedies. *See* CONN. GEN. STAT. ANN. § 31-51m(c) (West Supp. 1988); FLA. STAT. ANN. § 112.3187(8) (West Supp. 1989).

Several states require that, before blowing the whistle, employees must bring any suspected violations to the attention of their superiors and allow them reasonable time to correct any violations. *See* ME. REV. STAT. ANN. tit. 26, § 833(2) (1988); N.J. STAT. ANN. § 34:19-4 (West 1988); N.Y. LAB. LAW § 740(3) (McKinney 1988); N.Y. CIV. SERV. LAW § 75-b(2)(b) (McKinney Supp. 1989); COLO. REV. STAT. § 24-50.5-103(2) (1988); IND. CODE ANN. § 4-15-10-4(a) (Burns 1986); UTAH CODE ANN. § 67-21-3(1)(a) (1986); WASH. REV. CODE ANN. § 42.40.060 (Supp. 1989); WIS. STAT. ANN. § 230.81(1)(a) (West 1987). Kansas and Kentucky, by contrast, expressly provide that a public-sector employee is under no duty to inform his or her superiors of any wrongdoing before blowing the whistle. *See* KAN. STAT. ANN. § 75-2973(b)(2) (1984); KY. REV. STAT. ANN. § 61.102(1) (Michie 1986).

[71] *See* CONN. GEN. STAT. ANN. § 31-51m(c) (West Supp. 1988); MICH. STAT. ANN. § 17.428(3) (Callaghan 1982); DEL. CODE ANN. tit. 29, § 5115(b) (1983); FLA. STAT. ANN. § 112.3187(8) (West Supp. 1989); KY. REV. STAT. ANN. § 61.103(1) (Michie 1986); UTAH CODE ANN. § 67-21-4(1) (1986).

[72] *See* N.J. STAT. ANN. § 34:19-5 (West 1988); N.Y. LAB. LAW § 740(4)(a) (McKinney 1988).

[73] *See, e.g.*, COLO. REV. STAT. §§ 24-50.5-104(2) to -105 (1988).

damages,[74] and some allow whistleblowers to recover attorney's fees.[75]

C. Federal Protection for Nuclear Whistleblowers: Section 210 of the Energy Reorganization Act

In addition to the states, Congress has established statutory protections for whistleblowers.[76] In 1978, Congress amended the Energy Reorganization Act of 1974,[77] adding section 210.[78] Section 210 protects any person whose employer is licensed by the Nuclear Regulatory Commission (NRC), or has applied for a license, or is a contractor or subcontractor of an NRC licensee or applicant.[79] Section 210 prohibits any such employer from discharging or otherwise discriminating against an employee who has reported nuclear violations[80] or who has taken part in any action[81] to carry out the purposes of the Atomic Energy Act[82] or the Energy Reorganization Act.[83]

Section 210 provides the nuclear whistleblower with an administrative remedy.[84] Any employee who believes that he or she has been discharged or discriminated against in violation of section 210 may file a complaint with the Secretary of Labor.[85]

In order to have a remedy under section 210, a nuclear whistleblower need not be discharged. Section 210 protects whistleblowers who suffer any kind of retaliation by their employers.[86] According to the prevailing view, section 210 protects both the "internal whistleblower,"[87] who reports misconduct to his or her employer, and

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[74] *See, e.g.*, MONT. CODE ANN. § 39-2-905(2) (1987); TEX. REV. CIV. STAT. ANN. art. 6252-16a(4)(a)(2) (Vernon Supp. 1989).

[75] *See, e.g.*, PA. STAT. ANN. tit. 43, § 1425 (Purdon Supp. 1988); FLA. STAT. ANN. § 112.3187(9)(d) (West Supp. 1989); UTAH CODE ANN. §§ 67-21-4 to -5 (1986).

[76] *See supra* note 14.

[77] 42 U.S.C. §§ 5801–5891 (1988).

[78] *Id.* § 5851.

[79] *Id.* § 5851(a).

[80] *See* 10 C.F.R. § 30.7(a) (1988).

[81] *See* 42 U.S.C. § 5851(a); *see also* 10 C.F.R. § 30.7.

[82] 42 U.S.C. §§ 2011–2296 (1988).

[83] *Id.* §§ 5801–5891.

[84] *See id.* § 5851(b); *see also* Fidell & Marcoux, *The Nuclear Industry Employee Protection Provisions of Federal Law*, PUB. UTIL. FORT., Nov. 11, 1982, at 15–16.

[85] 42 U.S.C. § 5851(b)(1).

[86] *See id.* § 5851(a). See DeFord v. Secretary of Labor, 700 F.2d 281, 285–87 (6th Cir. 1983), for a discussion of the essential elements of a discrimination claim under section 210.

[87] If a whistleblower is discharged for making internal complaints, he or she will not put the authorities on notice of his or her employer's safety violations until filing a claim in state

employees who report their employers' violations to a public entity.[88] Section 210 also protects employees who have been discharged when they were about to blow the whistle.[89] Like some state whistleblower statutes,[90] section 210 protects not only employees who on their own initiative report employer misconduct, but also protects employees who assist or participate in any investigation of their employers.[91]

In contrast to common-law jurisdictions and most state statutes,[92] section 210 imposes a thirty-day statute of limitations.[93] Like state law, section 210 allows an aggrieved whistleblower to be reinstated and to recover compensatory damages from the defendant employer.[94] The Secretary of Labor, however, has determined that section 210 does not authorize the recovery of damages for medical expenses or damages to reputation resulting from a violation of section 210.[95] Moreover, a discharged whistleblower in most circumstances cannot receive punitive damages under section 210.[96]

III. Preemption and Exclusivity

A. Background: The Preemption Doctrine

The existence of a federal remedy for nuclear whistleblowers raises the issue of whether section 210 preempts state remedies for nuclear whistleblowers. Congress may preempt state authority by stating its intent to do so.[97] Absent explicit preemptive language,

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court or with the Secretary of Labor. The view of the Secretary of Labor and of most courts and commentators is that such "internal whistleblowing" merits section 210 protection. *See generally* Drachsler, Brown & Root v. Donovan: *An Exercise in Judicial Myopia*, 38 LAB. L.J. 311 (May 1987); Kohn & Carpenter, *supra* note 2; Anglin, *Whistleblowers, Nuclear Plant Safety, and Job Protection*, PUB. UTIL. FORT., April 17, 1986, at 56–57; Annotation, *Whistleblowers' Protection Under Energy Reorganization Act § 210 (42 USCS § 5851)*, 79 A.L.R. FED. 631, 639–42 (1986).

[88] *See* 42 U.S.C. § 5851(a).

[89] *See id.*

[90] *See supra* note 63 and accompanying text.

[91] 42 U.S.C. § 5851(a).

[92] *See supra* notes 58, 71–72 and accompanying text.

[93] 42 U.S.C. § 5851(b).

[94] *Id.* § 5851(b)(2)(B)(ii).

[95] *See* DeFord v. Secretary of Labor, 700 F.2d 281, 284 (6th Cir. 1983). The Sixth Circuit Court of Appeals, however, disagreed with the Secretary's determination, holding that such damages are recoverable under section 210. *Id.* at 288.

[96] A whistleblower can only be awarded punitive damages under section 210 if an employer has failed to comply with the Secretary of Labor's order to reinstate the whistleblower. 42 U.S.C. § 5851(d).

[97] Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 203 (1983) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

Congress can preempt state law if it evidences an intent to occupy a given field.[98] This intent may be inferred from a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[99] If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted.[100]

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*,[101] the United States Supreme Court ruled that the federal government occupies the field of nuclear safety regulation, thereby preempting state regulation, except the limited powers expressly ceded to the states.[102] The federal scheme of nuclear safety regulation thus preempts any state attempt to regulate nuclear safety.[103] The *Pacific Gas & Electric* decision, however, allows states to regulate nuclear power other than for safety reasons.[104]

In *Silkwood v. Kerr-McGee Corp.*,[105] the Supreme Court addressed the issue of whether federal law preempts all state attempts at nuclear regulation.[106] The Court noted that regulation of an industry can be exerted effectively through an award of damages.[107] The Court nevertheless held that an Oklahoma court's punitive damages award for an employee's radiation injuries did not frustrate Congress's objective of precluding dual regulation of radiation hazards.[108]

The *Silkwood* Court thus established a new standard for preemption of state damages awards.[109] Federal law preempts any state law

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[98] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

[99] *Pacific Gas & Elec.*, 461 U.S. at 204 (quoting Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)).

[100] *Silkwood*, 464 U.S. at 248.

[101] 461 U.S. 190 (1983).

[102] *Id.* at 212. *See generally* Woychik, *California's Nuclear Disposal Law Confronts the Nuclear Waste Management Dilemma: State Power to Regulate Reactors*, 14 ENVTL. L. 359, 383–97 (1984); Note, *Preemption—Atomic Energy*, 24 NAT. RES. J. 761 (1984).

[103] *See* Snow v. Bechtel Constr. Inc., 647 F. Supp. 1514, 1517 (C.D. Cal. 1986). *See generally* Note, *Preemption of State Regulation of Nuclear Power*, 5 J. ENERGY L. & POL'Y 135 (1983).

[104] *See, e.g.*, Casenote, *Punitive Damages Award Against Nuclear Power Company Threatens Exclusivity of Federal Control:* Silkwood v. Kerr-McGee Corp., 26 B.C.L. REV. 727, 734 (1985) (citing *Pacific Gas & Elec.*, 461 U.S. at 207–08).

[105] 464 U.S. 238 (1984).

[106] *See id.* at 248–58.

[107] *Id.* at 249 (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)); *see* Note, Silkwood v. Kerr-McGee Corp.: *Regulation Through Punitive Damages*, 11 OHIO N.U.L. REV. 827 (1984).

[108] *Silkwood*, 464 U.S. at 257. *See generally* Casenote, *supra* note 104; Note, *Federal Supremacy Versus Legitimate State Interests in Nuclear Regulation:* Pacific Gas & Electric *and* Silkwood, 33 CATH. U.L. REV. 899, 327–34 (1984).

[109] Note, *supra* note 108, at 930.

that conflicts with it, that is, if it is impossible to comply with both state and federal law.[110] In the absence of an irreconcilable conflict, preemption should be judged on whether a state standard in a damages action would frustrate the objectives of federal law.[111]

B. Nuclear Whistleblower Case Law

Several courts have addressed the issue of whether section 210 preempts state jurisdiction over nuclear whistleblower suits. Some of these courts held that section 210 is preemptive.[112] Others, however, held that nuclear whistleblowers have remedies under state law in spite of the availability of the section 210 remedy.[113]

In *Stokes v. Bechtel North American Power Corp.*,[114] the plaintiff, an engineer at the defendant's Diablo Canyon nuclear power plant, alleged that he refused to suppress information concerning quality assurance problems and design miscalculations at Diablo Canyon.[115] Stokes sued in state court, alleging that Bechtel discharged him in retaliation for his refusal to suppress safety violations.[116] The defendant removed the case to the United States District Court for the Northern District of California,[117] which remanded the case to state court, finding that section 210 does not preempt state jurisdiction.[118] The court concluded that, because section 210 does not preempt, but rather supplements, state protections for nuclear whistleblowers, the plaintiff was free to bring an action alleging a violation of state law.[119]

Similarly, in *Wheeler v. Caterpillar Tractor Co.*,[120] the Illinois Supreme Court found that section 210 does not preclude state remedies for nuclear whistleblowers.[121] In *Wheeler*, the plaintiff refused

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[110] *Silkwood*, 464 U.S. at 248 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

[111] *Id.* at 256; *see also id.* at 249 (federal law preempts any state law that stands as an obstacle to the accomplishment of the "full purposes and objectives of Congress") (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[112] *See infra* notes 128–35 and accompanying text.

[113] *See infra* notes 114–25 and accompanying text.

[114] 614 F. Supp. 732 (N.D. Cal. 1985).

[115] *Id.* at 735.

[116] *Id.*

[117] Removal jurisdiction was based on the preemption issue raised by section 210. *Id.*

[118] *Id.* at 742.

[119] *Id.* at 744–45; *see also* Gaballah v. PG & E, 711 F. Supp. 988, 991 (N.D. Cal. 1989) (section 210 does not bar a state court action based on state law).

[120] 108 Ill. 2d 502, 485 N.E.2d 372 (1985), *cert. denied*, 475 U.S. 1122 (1986).

[121] *Id.* at 509–11, 485 N.E.2d at 376–77.

to work with the defendant's cobalt x-ray unit on the grounds that the defendant's operation of the unit violated NRC regulations.[122] Wheeler alleged that his discharge was in retaliation for his refusal to work with the unsafe equipment and that it was therefore in contravention of public policy.[123] The court held that Congress, in enacting section 210, did not intend to preempt the field of nuclear whistleblower protection.[124] The court therefore reversed a lower court's dismissal of the plaintiff's wrongful discharge claim.[125] Most recently, the First Circuit Court of Appeals in *Norris v. Lumbermen's Mutual Casualty Co.*[126] held that, because there is no conflict between section 210 and state law actions for wrongful discharge, section 210 does not preempt such actions.[127]

Other courts, however, have held that section 210 preempts state whistleblower remedies and provides the exclusive remedy for nuclear whistleblowers. In *Snow v. Bechtel Construction Inc.*,[128] the United States District Court for the Central District of California dismissed a nuclear whistleblower's wrongful discharge claim.[129] The court found that section 210 is part of the federal scheme of nuclear safety regulation and therefore preempts state court jurisdiction over nuclear whistleblower claims.[130] According to the *Snow* court, Congress intended section 210 to be the exclusive remedy for nuclear whistleblowers.[131]

Similarly, in *English v. General Electric*,[132] the plaintiff informed her employer and the NRC of safety violations at the defendant's nuclear fuel manufacturing plant.[133] English alleged that, in retaliation for her reports to the NRC, her employer discriminated against her and then fired her.[134] The court dismissed the plaintiff's wrongful

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[122] *Id.* at 504–05, 485 N.E.2d at 374.
[123] *Id.* at 505, 485 N.E.2d at 374.
[124] *Id.* at 509, 485 N.E.2d at 376.
[125] *Id.* at 511, 485 N.E.2d at 376.
[126] 881 F.2d 1144 (1st Cir. 1989).
[127] *Id.* at 1151.
[128] 647 F. Supp. 1514 (C.D. Cal. 1986).
[129] *Id.* at 1519.
[130] *Id.* at 1517; *accord* Chrisman v. Philips Indus., 751 P.2d 140, 145 (Kan. 1988).
[131] *Snow*, 647 F. Supp. at 1518; *accord* Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 637 (2d Cir. 1989).
[132] 683 F. Supp. 1006 (E.D.N.C. 1988), *aff'd per curiam*, 871 F.2d 22 (4th Cir. 1989), *cert. granted*, 58 U.S.L.W. 3467 (U.S. Jan. 22, 1990).
[133] *Id.* at 1008.
[134] *Id.* at 1009.

discharge claim, finding that Congress, in enacting section 210, intended to preempt state protections for nuclear whistleblowers.[135]

IV. Does Section 210 Preempt State Whistleblower Remedies?

Section 210 does not expressly preempt state protection for nuclear whistleblowers. Nowhere in section 210 or anywhere else has Congress expressly preempted state authority over nuclear whistleblower remedies.[136] The next question, then, is whether whistleblower protection constitutes nuclear safety regulation, a field the federal government has occupied to the exclusion of the states.

A. Does Whistleblower Protection Constitute Safety Regulation?

Because the federal government has completely occupied the field of nuclear safety regulation,[137] section 210 is preemptive if it is part of the federal scheme of nuclear safety regulation. The question, then, revolves around the primary purpose behind nuclear whistleblower protection.

Courts have disagreed on whether the purpose of whistleblower protection is to regulate nuclear safety or to protect the whistleblower's job security. In *Snow v. Bechtel Construction Inc.*,[138] the

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[135] *Id.* at 1013–15.

[136] Two courts have considered the absence of preemptive language in section 210 to be indicative of a lack of congressional intent to preempt state whistleblower remedies. *See* Norris v. Lumbermen's Mut. Casualty Co., 881 F.2d 1144, 1150 (1st Cir. 1989); Gaballah v. PG & E, 711 F. Supp. 988, 989 (N.D. Cal. 1989).

[137] *See supra* notes 98–103 and accompanying text. The *English v. General Electric* court held that section 210 represents a congressional intent to occupy the field of nuclear whistleblower protection. 683 F. Supp. at 1015. The *Gaballah v. PG & E* court, however, found that section 210 "can hardly be regarded as pervasive federal regulation of employer-employee relations in the nuclear power industry." 711 F. Supp. at 990. Occupation of a field is not normally found absent "persuasive reasons for doing so, that is 'either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" Casenote, *supra* note 104, at 727 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)). Congress has not unmistakably ordained that it has occupied the field of nuclear whistleblower protection. The nature of whistleblower protection, moreover, is not such that federal occupation is the only permissible conclusion. Many states now protect whistleblowers, *see supra* notes 35–36, 60–61 and accompanying text, and nuclear whistleblower protection, unlike nuclear safety, does not present "'technical safety considerations . . . of such complexity that it is not likely that any State would be prepared to deal with them.'" Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 250 (1984) (quoting H.R. Rep. No. 1125, 86th Cong., 1st Sess. 3 (1959)).

[138] 647 F. Supp. 1514 (C.D. Cal. 1986).

court conceded that preserving a whistleblower's position was an "essential corollary" to section 210, but found that this protection was secondary to the primary purpose of regulating safety.[139] The court found that section 210 preempted Snow's state law action to the extent that he claimed that his discharge resulted from his complaints about safety violations.[140] The court apparently assumed that Snow's tort action constituted an attempt to use a state court to regulate nuclear safety based upon state law.[141] Because federal law precludes the use of state courts for this purpose, the court dismissed Snow's complaint for lack of jurisdiction.[142]

In *Chrisman v. Philips Industries*,[143] the Kansas Supreme Court likewise found that section 210 is part of the occupied field of nuclear safety regulation.[144] The court pointed out that section 210 not only provides a remedy for whistleblowers, but also provides the Nuclear Regulatory Commission with "invaluable information" from nuclear industry employees who are most likely to discover safety problems.[145] Thus, the court found that section 210 is primarily a safety regulation, and that, because Congress had preempted the field, the plaintiff had no state law claim.[146]

In *Stokes v. Bechtel North American Power Corp.*,[147] the court disagreed, finding that the public policy upon which the plaintiff based his claim was not the federal interest in nuclear safety, rather it was the state policy of protecting job security.[148] The court considered it significant that the plaintiff was not suing to compel defendant's compliance with nuclear regulations. Although Stokes addressed safety concerns before filing suit, when he refused to suppress the defendant's violations,[149] his suit involved safety reg-

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[139] *Id.* at 1518.

[140] *Id.* at 1519.

[141] *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 249 (1959) (regulation can be "effectively asserted through an award of damages").

[142] *See supra* notes 102–03 and accompanying text.

[143] 751 P.2d 140 (Kan. 1988).

[144] *Id.* at 145.

[145] *Id.*

[146] *Id.*

[147] 614 F. Supp. 732 (N.D. Cal. 1985).

[148] *Id.* at 742; *cf.* Casenote, *supra* note 104, at 740 (state action may permissibly affect the safety of nuclear power if that action has some other legitimate nonsafety-related purpose, but may not permissibly regulate safety if the impact on safety is itself the purpose of the state action) (citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 216 (1983)).

[149] *Stokes*, 614 F. Supp. at 735.

ulation only peripherally, if at all.[150] The court found that Stokes was merely seeking to enforce his right to not be unlawfully fired.[151]

Even the *English v. General Electric* court, which dismissed a whistleblower's claim, conceded that section 210 was not a safety regulation.[152] The court found that the plaintiff's complaint concerned nuclear safety to some extent, but that nuclear safety was only tangential to the plaintiff's action.[153] Congress did not intend section 210 to be a regulator of nuclear safety.[154] Section 210's legislative history revealed to the *English* court that employee protection was the "paramount congressional intent."[155] The prevailing view, then, is that the purpose of whistleblower protection is primarily remedial, not regulatory. Section 210, therefore, is not part of the federal scheme of nuclear safety regulation.

B. Do State Whistleblower Remedies Frustrate Section 210's Objectives?

If *Stokes* and *English* are correct in holding that section 210 is not a nuclear safety regulation, section 210 can nevertheless preempt

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[150] *Id.* at 742; *cf.* Norris v. Lumbermen's Mut. Casualty Co., 881 F.2d 1144, 1150 (1st Cir. 1989) (a nuclear whistleblower's state law action for wrongful discharge "does not affect in any way the safety standards promulgated by the Nuclear Regulatory Commission"). *But see* Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 637 (2d Cir. 1989) ("We are not dealing here with a collateral matter that is only peripherally related to the safety concerns implicit in section 210.").

[151] *Stokes*, 614 F. Supp. at 742.

[152] 683 F. Supp. 1006, 1012–13 (E.D.N.C. 1988), *aff'd per curiam*, 871 F.2d 22 (4th Cir. 1989), *cert. granted*, 58 U.S.L.W. 3467 (U.S. Jan. 22, 1990).

[153] *Id.* at 1012.

[154] *Id.* at 1013; *accord Norris*, 881 F.2d at 1150 (section 210 is "primarily concerned with protecting whistle blowers"). The *Silkwood* Court based its holding that Congress has occupied the field of nuclear safety regulation on the technical complexity involved. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 250 (1984) (regulation of nuclear safety presents "'technical safety considerations . . . of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future'") (quoting H.R. REP. NO. 1125, 86th Cong., 1st Sess. 3 (1959)). Because nuclear whistleblower protection does not require the same level of technical expertise, the rationale for the federal occupation of the field of nuclear safety does not justify occupation of the field of whistleblower protection.

[155] *English*, 683 F. Supp. at 1013; *see* S. REP. NO. 95-848, 95th Cong., 2d Sess. 29, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7303. The Senate Report reveals that employee protection is section 210's primary purpose. The Report's initial section announces that section 210 "offers protection to employees who believe they have been fired or discriminated against" in retaliation for their whistleblowing activities. *Id.* Later, in the summary section, the Report reveals Congress's expectation that, under section 210, "employees . . . could help assure that employers do not violate requirements of the Atomic Energy Act." *Id.* at 7304. The structure of the Report thus suggests that employee protection is section 210's primary purpose, and that more effective nuclear safety regulation was intended to be an additional benefit of section 210.

state court remedies. If it is impossible to comply with both state law and section 210, then there is an irreconcilable conflict between the two, and section 210 is therefore preemptive. It is not impossible to comply with both section 210 and state law,[156] so section 210 is not preemptive under this test. Section 210 is preemptive, however, if state whistleblower remedies obstruct the purposes and objectives served by section 210.

Because of the factual distinctions between *Silkwood* and the nuclear whistleblower situation,[157] courts deciding whistleblower cases are not bound by the *Silkwood* ruling that state remedies are not

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[156] An employer can comply with both section 210 and state tort law merely by not discharging or otherwise discriminating against employee whistleblowers. *See* Gaballah v. PG & E, 711 F. Supp. 988, 990 (N.D. Cal. 1989) (defendant employer failed to show that the conflict between state law and section 210 was "so pronounced that 'compliance with both . . . [is] a physical impossibility'") (quoting Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983)).

[157] Several courts have pointed out the distinctions between *Silkwood* and wrongful discharge cases brought by nuclear whistleblowers. A discharged whistleblower's alleged injury is retaliatory termination, whereas the claim in *Silkwood* was personal injury. *See* Snow v. Bechtel Constr. Inc., 647 F. Supp. 1514, 1519 (C.D. Cal. 1986). The *Snow* court also pointed out that the *Silkwood* Court explicitly restricted its holding to radiation injuries. *Id.*; *see Silkwood*, 464 U.S. at 256 (Supreme Court limited its preemption analysis to the issue of damages for radiation injuries, noting that there could be instances in which federal law would preempt the recovery of damages based on state law).

The *English v. General Electric* court pointed out that the federal statute implicated in *Silkwood*, the Price-Anderson Act, 42 U.S.C. § 2210 (1982), unlike section 210, indicated that Congress did not intend to preempt state tort remedies for persons injured by nuclear accidents. *See Silkwood*, 464 U.S. at 251–56. Moreover, the Supreme Court in *Silkwood* found the absence of a federal remedy significant, concluding that Congress could not possibly have intended to provide persons injured by nuclear accidents with no judicial recourse. Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 516, 485 N.E.2d 372, 379 (1985) (Moran and Ryan, JJ., dissenting) (citing *Silkwood*, 464 U.S. at 251), *cert. denied*, 475 U.S. 1122 (1986). Section 210, by contrast, provides nuclear whistleblowers with a federal remedy. *See* 42 U.S.C. § 5851 (1988).

In Stokes v. Bechtel North American Power Corp., 614 F. Supp. 732, 740–42 (N.D. Cal. 1985), by contrast, the court relied on *Silkwood* and held that the federal scheme of nuclear safety regulation does not preclude a nuclear whistleblower's state court claim. The court did not address the factual distinctions between *Silkwood* and the nuclear whistleblower's situation. Instead, the court pointed out that the Supreme Court has acknowledged legitimate state concerns in the nuclear energy area. *Id.* at 741. Because the Supreme Court has not yet fully formulated "the ambit of permissible state involvement," the *Stokes* court chose to consider the spirit of the *Silkwood* decision, rather than limit the Supreme Court's holding to its particular facts. *Id.* The *Gaballah v. PG & E* court likewise relied on *Silkwood*, pointing out that "[t]here is no apparent reason why Congress should have wanted to bar persons who complained about safety violations from a jury trial and the recovery of punitive damages but not to bar persons who suffered injuries from those violations." 711 F. Supp. 988, 990 (N.D. Cal. 1989); *accord* Norris v. Lumbermen's Mut. Casualty Co., 881 F.2d 1144, 1151 (1st Cir. 1989) ("There is no good reason for barring state remedies to whistle blowers but allowing punitive damages under state law to those who are injured by nuclear mishaps that might not have occurred if the whistle blower's complaints had been investigated.").

preempted. As the *Stokes* court pointed out, however, *Silkwood* indicates that the federal government does not have preemptive power over "'all matters nuclear.'"[158] *Silkwood* makes clear that state attempts to regulate nuclear power are not automatically preempted by the federal regulatory scheme.[159] Rather, state law is preempted only if it frustrates Congress's purposes. It thus becomes necessary to determine whether state whistleblower remedies frustrate any congressional objectives embodied in section 210.

In *English v. General Electric*,[160] the court found that state remedies for nuclear whistleblowers could potentially frustrate three of the congressional objectives embodied in section 210, and that any state law claims are therefore preempted.[161] First, the court found that state jurisdiction over nuclear whistleblower claims could frustrate the congressional policy of denying relief to whistleblowers who by their own initiative violate nuclear regulations.[162] The court pointed out that a state court would not be restricted by section 210(g).[163] Subsection (g) expressly states that section 210 will not protect any employee who, acting without direction from his or her employer, deliberately violates any nuclear regulation.[164] A whistleblower left unprotected by section 210 by operation of subsection (g) could maintain a state court action, frustrating section 210(g)'s purpose.[165]

To illustrate, the *English* court presented a hypothetical situation in which a plaintiff employee blows the whistle on a defendant em-

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[158] *Stokes*, 614 F. Supp. at 741. *Silkwood* made it clear to the *Stokes* court that, while federal law occupies the field of radiological safety, there is another field—whose boundaries are not yet fully defined—in which federal law does not preempt independent state law protections. *Id.*; *cf.* Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854, 861 (Mo. Ct. App. 1985) (if plaintiffs' recovery of personal injury damages under state tort law would merely inconvenience the defendant and make the operation of its business more costly, there is no frustration of federal policy or purpose).

[159] *Stokes*, 614 F. Supp. at 740–41. The *Stokes* court read *Silkwood* as putting to rest "the shibboleth of automatic preemption of 'all matters nuclear.'" *Id.*

[160] 683 F. Supp. 1006 (E.D.N.C. 1988), *aff'd per curiam*, 871 F.2d 22 (4th Cir. 1989), *cert. granted*, 58 U.S.L.W. 3467 (U.S. Jan. 22, 1990).

[161] *Id.* at 1013–15. *But see Norris*, 881 F.2d at 1150 ("We do not see how the bringing of a state law wrongful discharge action by an employee for a discharge based on whistle blowing can interfere with the safe operation of nuclear energy plants.").

[162] *English*, 683 F. Supp. at 1013–14. *But see* Gaballah v. PG & E, 711 F. Supp. 988, 990 (N.D. Cal. 1989) (Congress intended section 210(g) to bar a federal remedy to nuclear whistleblowers with unclean hands; "to say that it meant to bar them from any state law remedy would be pure speculation").

[163] *English*, 683 F. Supp. at 1014; *see* 42 U.S.C. § 5851(g) (1988).

[164] *See* 42 U.S.C. § 5851(g).

[165] *English*, 683 F. Supp. at 1014.

ployer. The employee deliberately caused the violation she reported and did so without her employer's direction, and is therefore denied relief under section 210(g). A state court would likewise deny relief under the equitable "clean hands" doctrine.[166]

If the employee deliberately caused a violation unrelated to the violation she reported, section 210 would still not protect her should she be discharged.[167] She could, however, recover in state court, because a state court would not be required to impose section 210(g).[168] By providing relief to a whistleblower to whom Congress has intended to deny relief, a state court would frustrate the congressional objective embodied in section 210(g).

The *English* court also found that state whistleblower remedies could obstruct what the court considered to be a congressional intent to deny punitive damages to nuclear whistleblowers.[169] The court claimed that Congress's failure to provide for punitive damages in section 210 evidenced a congressional intent to preempt state court remedies.[170] The court reasoned that this silence reflected Congress's "informed judgment" that "in no circumstances" should a nuclear whistleblower receive punitive damages.[171]

Finally, the court reasoned that state jurisdiction could frustrate the congressional objective of providing swift resolution of nuclear whistleblower claims.[172] The court noted that, while states typically impose a two- or three-year statute of limitations,[173] section 210's statute of limitations is thirty days.[174] The court inferred that, by imposing such a short statute of limitations, Congress's purpose was to allow the regulatory authorities to discover potential hazards and violations that might otherwise have gone undiscovered if not for the thirty-day statute of limitations.[175]

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[166] *Id.* at 1013–14. The "clean hands" doctrine is an equitable principle whereby a court denies relief to a party who is guilty of improper conduct in the matter as to which the party seeks relief. *Id.* The doctrine derives from the equitable canon, "He who comes to equity must come with clean hands." D. WILLIMAN, LEGAL TERMINOLOGY 108 (1986).

[167] *English*, 683 F. Supp. at 1013; *see also supra* notes 163–66 and accompanying text.

[168] *English*, 683 F. Supp. at 1014.

[169] *Id.*

[170] *Id. But see* Gaballah v. PG & E, 711 F. Supp. 988, 990 (N.D. Cal. 1989) (finding that Congress's failure to provide for punitive damages is evidence that the section 210 remedy would be considered inadequate by many plaintiffs "and hence not likely to have been intended as exclusive by Congress").

[171] *English*, 683 F. Supp. at 1014.

[172] *Id.* at 1014–15.

[173] *See supra* note 58.

[174] *English*, 683 F. Supp. at 1014; *see also* 42 U.S.C. § 5851(b)(1) (1988).

[175] *English*, 683 F. Supp. at 1014.

The court also emphasized that a short statute of limitations and the speed with which the Secretary must resolve a complaint[176] allow the employee to be restored to his or her position without a substantial interruption in lifestyle or livelihood.[177] Such a quick resolution also allows an employee to remain active in his or her field of expertise within the nuclear industry.[178]

The *English* court's reasoning, however, is flawed.[179] A state court could easily avoid obstructing the congressional objective of denying relief to whistleblowers with "unclean hands." A state court faced with a whistleblower who caused a violation unrelated to the reported violation could deny relief under the "clean hands" doctrine. Although the *English* court emphasized that state courts are not required to deny relief to such a whistleblower,[180] it is within a state court's discretion to do so. A state court could serve the congressional purpose underlying section 210(g)[181] by treating subsection (g) as a federal law defense available to employers in appropriate state court cases.[182] In *Gaballah v. PG & E*,[183] the court pointed out that, even if some state court actions were preempted by section 210(g), it would not be necessary to bar all wrongful discharge actions, including those in which subsection (g) would not be in issue.[184]

The *English* court is mistaken, moreover, insofar as it reads section 210 to authorize punitive damages "in no circumstances."[185] Section 210(d) authorizes the Secretary of Labor to file a civil action in federal district court to enforce an order requiring reinstatement of a whistleblower.[186] In such an action, a district court has authority under section 210 to grant "all appropriate relief," including punitive damages.[187]

Finally, the *English* court's conclusion that state remedies frustrate the congressional objectives embodied in section 210's statute

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[176] *See* 42 U.S.C. § 5851.

[177] *English*, 683 F. Supp. at 1014.

[178] *Id.*

[179] *See* Norris v. Lumbermen's Mut. Casualty Co., 881 F.2d 1144, 1150 (1st Cir. 1989); Gaballah v. PG & E, 711 F. Supp. 988, 990 (N.D. Cal. 1989).

[180] *English*, 683 F. Supp. at 1014.

[181] *See* 42 U.S.C. § 5851(g) (1988); *see also* S. REP. No. 95-848, 95th Cong., 2d Sess. 29, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7303.

[182] *Gaballah*, 711 F. Supp. at 990; *accord Norris*, 881 F.2d at 1150.

[183] 711 F. Supp. 988 (N.D. Cal. 1989).

[184] *Id.* at 990; *see also Norris*, 881 F.2d at 1150 (section 210(g) "presents only a speculative conflict not a real one").

[185] *English*, 683 F. Supp. at 1014.

[186] 42 U.S.C. § 5851(d).

[187] *Id.*

of limitations is particularly untenable. The court apparently assumed that nuclear whistleblowers do not inform the regulatory authorities of employer violations until they file section 210 claims or sue in state court. Typically, however, whistleblowers put authorities on notice of employer violations when they report their employers' misconduct, not when they sue for reinstatement.[188] Thus, in the majority of cases, whether a whistleblower files a claim within section 210's thirty-day statute of limitations or under a longer state statute of limitations will not affect the ability of regulatory authorities to address safety violations quickly.

Moreover, the court's decision does not further, but instead frustrates, the advantages of section 210's statute of limitations. The court reasoned that a thirty-day statute of limitations allows expeditious relief for aggrieved whistleblowers.[189] A longer statute of limitations and slower resolution of a case in court will, of course, delay relief to a whistleblower. It is difficult to understand, however, how the court's denial of relief furthers the congressional objectives of restoring whistleblowers to their positions and allowing them to remain active in their respective fields of expertise. An aggrieved nuclear whistleblower would presumably prefer a delayed remedy over no remedy at all.

C. Is Section 210's Remedy Exclusive?

In addition to the preemption issue, courts have grappled with a similar yet distinct question—whether Congress intended section 210 to be the exclusive remedy for nuclear whistleblowers. Courts have disagreed on this issue. Congress has not stated that the section 210 remedy shall be exclusive, nor has Congress expressly preserved state remedies. Courts, therefore, have attempted to divine congressional intent from section 210's language and legislative history.

In *Gaballah v. PG & E*,[190] the court found that the section 210 remedy is "minimal."[191] The court surmised that the remedy under section 210 would be considered inadequate by many plaintiffs "and hence not likely to have been intended as exclusive by Congress."[192] The *Stokes* court disagreed, finding that section 210 provides a com-

[188] *See supra* note 87.

[189] 683 F. Supp. at 1015.

[190] 711 F. Supp. 988 (N.D. Cal. 1989).

[191] *Id.* at 990. The court based this conclusion on the fact that section 210 affords neither punitive damages nor a jury trial. *Id.* at 990–91.

[192] *Id.* at 990.

prehensive scheme of relief.[193] The court nevertheless concluded that section 210 does not constitute the "panacea" for discharged nuclear whistleblowers.[194] The court found that Congress intended section 210 to supplement, not to supplant, state court remedies.[195]

Based on a consideration of section 210's language and legislative history, the *Stokes* court concluded that Congress intended to provide *a* remedy, not *the* remedy, for nuclear whistleblowers.[196] The permissive character[197] of the section 210 remedy suggested to the *Stokes* court that Congress intended to provide an elective, rather than a preemptive, remedy.[198] From the perspective of the *Stokes* court, the legislative history[199] underscored the federal remedy's permissive character.[200]

In *Snow v. Bechtel Construction Inc.*,[201] the court disagreed, holding that in spite of section 210's permissive language,[202] it nevertheless provides an exclusive remedy.[203] The court reasoned that it would make little sense for Congress to require a nuclear whistleblower to file a complaint[204] by employing nonpermissive terms such as "shall." Permissive terms such as "may" and "could" are not at all inconsistent with a federal remedy's exclusivity.[205] Consequently,

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[193] Stokes v. Bechtel N. Am. Power Corp., 614 F. Supp. 732, 744 (N.D. Cal. 1985); *accord* Norris v. Lumbermen's Mut. Casualty Co., 881 F.2d 1144, 1151 (1st Cir. 1989); Chrisman v. Philips Indus., 751 P.2d 140, 145 (Kan. 1988) (section 210 provides a "substantial and effective remedy").

[194] *Stokes*, 614 F. Supp. at 743.

[195] *Id.* at 744.

[196] *Id.* (emphasis in original).

[197] *Id.* 42 U.S.C. § 5851(b)(1) (1988) provides that a nuclear whistleblower "may" file a complaint with the Secretary of Labor. 42 U.S.C. § 5851(c)(1) provides that a whistleblower "may obtain review" of the Secretary's order.

[198] *Stokes*, 614 F. Supp. at 744; *accord Norris*, 881 F.2d at 1147 (section 210 "permits but does not mandate" the filing of a claim with the Labor Department).

[199] *See* S. REP. NO. 95-848, 95th Cong., 2d Sess. 29, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7303, 7304 (section 210 provides an administrative remedy under which a discharged whistleblower "could" seek redress for a section 210(a) violation).

[200] *Stokes*, 614 F. Supp. at 744.

[201] 647 F. Supp. 1514 (C.D. Cal. 1986).

[202] *See supra* note 197 and accompanying text.

[203] *Snow*, 647 F. Supp. at 1518; *accord* Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 637 (2d Cir. 1989).

[204] *Snow*, 647 F. Supp. at 1518.

[205] *Id.* The *Snow* court also pointed out that, like the Energy Reorganization Act, the Federal Mine Safety and Health Act (FMSHA) includes a whistleblower provision cast in permissive terms. *See* 30 U.S.C. § 815(c) (1988) (a whistleblower "may" file a complaint with the Secretary of Labor). Congress patterned section 210 after this provision. *See* S. REP. NO. 95-848, 95th Cong., 2d Sess. 29, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7303. The court noted that, in Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468, 1476

section 210's permissive character did not suggest to the *Snow* court that Congress intended to provide an elective, rather than an exclusive, remedy.

The United States Department of Labor's policy, however, is that section 210 is not exclusive. The Secretary of Labor, who is responsible for enforcing section 210,[206] has ruled that dismissal of a section 210 complaint should be without prejudice, so that such a dismissal will not preclude a plaintiff's similar claims in state court.[207] Thus, it appears that in the judgment of the Secretary, the section 210 remedy supplements, rather than excludes, state remedies.[208]

As a general principle, courts, when interpreting a statute, should defer to the judgment of the agency to whom Congress has delegated authority.[209] Thus, when construing section 210, courts should defer to the Secretary of Labor's judgment that state court remedies are available to nuclear whistleblowers.

D. Other Statutes' Whistleblower Provisions

Section 210's legislative history[210] indicates that Congress patterned the nuclear whistleblower provision after similar provisions in the Clean Air Act (CAA),[211] the Federal Water Pollution Control Act (FWPCA),[212] and the Federal Mine Safety and Health Act (FMSHA).[213] Judicial interpretation of these whistleblower provisions[214] sheds some light on the issue of whether section 210's remedy is exclusive.

(9th Cir. 1984), the Ninth Circuit Court of Appeals found that, in spite of its permissive language, the FMSHA provides an exclusive remedy. *See infra* notes 216–23 and accompanying text.

[206] *See* 42 U.S.C. § 5851(b) (1988).

[207] *See* English v. General Elec., 683 F. Supp. 1006, 1015 n.3 (E.D.N.C. 1988), *aff'd per curiam*, 871 F.2d 22 (4th Cir. 1989), *cert. granted*, 58 U.S.L.W. 3467 (U.S. Jan. 22, 1990).

[208] The *English* court conceded that "[p]erhaps" this is so, but the Secretary was deciding the issue of res judicata, not preemption. *Id.*

[209] *See, e.g.*, Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer).

[210] S. REP. NO. 95-848, 95th Cong., 2d Sess. 29, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7303.

[211] 42 U.S.C. § 7622 (1988).

[212] 33 U.S.C. § 1367 (1988).

[213] 30 U.S.C. § 815(c) (1988).

[214] No court has yet decided the issue of whether the FWPCA's whistleblower provision (33 U.S.C. § 1367) is preemptive or exclusive.

1. The Federal Mine Safety and Health Act

Two courts have addressed the question of whether the FMSHA's whistleblower provision[215] provides an exclusive remedy. In *Olguin v. Inspiration Consolidated Copper Co.*,[216] the United States Court of Appeals for the Ninth Circuit found the remedy to be exclusive.[217] In *Olguin*, the plaintiff sued in Arizona state court, alleging that, in violation of the FMSHA,[218] his employer discharged him in retaliation for filing a safety complaint with the Mine Safety and Health Administration.[219] The court of appeals found that the FMSHA[220] and section 301 of the National Labor Relations Act[221] provided the plaintiff with sufficient remedies,[222] and that these remedies were exclusive.[223]

In *Wiggins v. Eastern Associated Coal Corp.*,[224] West Virginia's highest court reached the opposite conclusion.[225] Wiggins, a foreman in the defendant's coal mine, refused to operate equipment that he considered unsafe and the defendant fired him, in alleged violation of the FMSHA.[226] Although the FMSHA's whistleblower provision does not state explicitly whether its remedy is exclusive, the defendant coal company argued that, under West Virginia law, the plaintiff's statutory remedy is exclusive.[227] West Virginia courts have, however, recognized an exception to the exclusivity rule when the available statutory remedy is inadequate.[228]

The court conceded that the provision of a comprehensive remedial scheme is a strong indication of a legislative intent of exclusivity.[229] The court found the FMSHA remedy to be limited, however, rather than comprehensive.[230] The damages recoverable in a tort action are broader than those available administratively.[231] The statutory rem-

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[215] 30 U.S.C. § 815(c).
[216] 740 F.2d 1468 (9th Cir. 1984).
[217] *Id.* at 1476.
[218] *See* 30 U.S.C. § 815(c)(1).
[219] *Olguin*, 740 F.2d at 1471.
[220] 30 U.S.C. § 815(c)(2).
[221] 29 U.S.C. § 158(a)(4) (1988).
[222] *Olguin*, 740 F.2d at 1475.
[223] *Id.* at 1476.
[224] 357 S.E.2d 745 (W. Va. 1987).
[225] *Id.* at 748.
[226] *Id.* at 746.
[227] *Id.* at 747 (citing Lynch v. Merchants Nat'l Bank, 22 W. Va. 554, 557 (1883)).
[228] *Id.* (citing Price v. Boone County Ambulance Auth., 337 S.E.2d 913, 916 (W. Va. 1985)).
[229] *Id.* at 748.
[230] *Id.*
[231] *See id.*

edy provides for reinstatement, back pay, and injunctions,[232] but these remedies do not compensate the whistleblower for such personal injuries as anguish, physical symptoms of stress, a sense of degradation, and the cost of psychiatric care.[233] Because of the limited nature of the FMSHA's remedy, the court held that the remedy is not exclusive.

The *Wiggins* court concluded that the limited nature of the FMSHA's whistleblower remedy was one factor indicating a lack of congressional intent to make the statutory remedy exclusive.[234] The statute's silence on the exclusivity issue and the West Virginia rule that safety statutes are to be construed liberally in favor of their beneficiaries[235] were other factors militating against a finding of exclusivity.[236]

2. The Clean Air Act

In *Phipps v. Clark Oil & Refining Corp.*,[237] the Minnesota Court of Appeals held that the Clean Air Act's whistleblower provision does not provide an exclusive remedy.[238] The court found that the CAA did not preclude a state law wrongful discharge claim for an employee who had been fired for refusing to violate CAA regulations.[239]

In *Phipps*, the defendant ordered the plaintiff to dispense leaded gasoline into a customer's vehicle.[240] Phipps refused, pointing out that CAA regulations required unleaded gasoline for that particular vehicle. The defendant fired Phipps, and Phipps sued in state court.[241]

The defendant employer argued that the CAA is a comprehensive statute providing sufficient remedies to carry out its policies.[242] The defendant argued that, by including remedies in the Act, Congress precluded the creation of other remedies. The Minnesota Court of

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[232] *Id.* Section 210 requires the Secretary of Labor to order any party found to have violated 42 U.S.C. § 5851(a) (1988) to "take affirmative action to abate the violation." 42 U.S.C. § 5851(b)(2)(B)(i).

[233] *Wiggins*, 357 S.E.2d at 748.

[234] *Id.*

[235] *Id.* (citing State *ex rel.* Perry v. Miller, 300 S.E.2d 622, 624 (W. Va. 1983)).

[236] *Id.*

[237] 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987).

[238] *Id.* at 593.

[239] *Id.*

[240] *Id.* at 589.

[241] *Id.*

[242] *Id.* at 593.

Appeals disagreed, finding that Congress did not intend to preclude all other remedies.[243] The court found that the plaintiff's wrongful discharge claim did not contravene the federal policy embodied in the CAA whistleblower provision.[244] Rather, the state law action advanced an already-declared congressional policy that employees who carry out the CAA's purposes should be protected from retaliatory discharge.[245]

The reasoning employed by the *Wiggins* and *Phipps* courts is persuasive. It should apply equally as well to section 210 because Congress patterned section 210 after the provisions at issue in these two cases.[246] As in the FMSHA, Congress did not state that the section 210 remedy is exclusive. Section 210, moreover, is a limited, rather than a comprehensive, remedy.[247] State remedies should be available to help supplement the limited damages recoverable under section 210 and to provide for such damages as emotional distress.

The West Virginia rule that safety statutes are to be construed liberally in favor of their beneficiaries should be extended to remedial statutes like section 210. Nuclear whistleblowers are clearly the intended beneficiaries of section 210. When courts construe section 210 to be exclusive, the result is often that whistleblowers are left without a remedy. A liberal construction of section 210 can ensure that Congress's intended beneficiaries are protected from retaliation.

The *Phipps* reasoning is particularly persuasive. The preemption doctrine is predicated on a policy of preventing states from obstructing congressional objectives. The *Phipps* court reasoned that allowing state remedies advances, rather than obstructs, an already-declared congressional policy of protecting whistleblowers from retaliation.

This reasoning applies to section 210 as well as to the Clean Air Act. By enacting section 210, Congress clearly expressed its intent

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[243] *Id.*

[244] *Id.*; *see* 42 U.S.C. § 7622 (1988).

[245] *Phipps*, 396 N.W.2d at 593; *see also* Norris v. Lumbermen's Mut. Casualty Co., 881 F.2d 1144, 1151 (1st Cir. 1989) (state law actions brought by nuclear whistle blowers "may strengthen and expand the established public policy of protecting whistle blowers in the nuclear energy industry"); *cf.* Lally v. Copygraphics, 85 N.J. 668, 670–71, 428 A.2d 1317, 1318 (1981) (allowing a common-law wrongful discharge action in addition to an administrative remedy provided by state workers' compensation statute on the grounds that a judicial remedy "will effectuate statutory objectives" and complement legislative policies).

[246] *See* S. REP. NO. 95-848, 95th Cong., 2d Sess. 29, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7303; *see also supra* notes 210–13 and accompanying text.

[247] Gaballah v. PG & E, 711 F. Supp. 988, 990–91 (N.D. Cal. 1989); *see also supra* notes 92–95 and accompanying text.

to protect the job security of nuclear whistleblowers. Congress did not express any intent to make the section 210 remedy exclusive. If a court infers such an intent and denies relief to a whistleblower, the court clearly contravenes the stated policy of protecting whistleblowers from retaliatory discharge. It is difficult to understand why such a clear expression of congressional intent should be frustrated in favor of an inferred intent to provide an exclusive remedy, which is supported by neither section 210's text nor its legislative history.[248]

V. THE UNIFORM HEALTH AND SAFETY WHISTLEBLOWERS PROTECTION ACT

Senator Howard Metzenbaum of Ohio has introduced a bill that would resolve the issue of whether federal statutory whistleblower remedies preempt state remedies. The proposed Uniform Health and Safety Whistleblowers Protection Act[249] would provide a remedy for all private-sector employees who suffer any retaliation for reporting their employers' violations of federal law.[250] The Act would grant any such whistleblower the right to seek an administrative remedy with the United States Department of Labor.[251] The proposed law would provide expressly that its remedy would be in addition to, not in lieu of, any available state law remedies.[252]

If Congress passes this bill, it would resolve the preemption issue by affirming that the federal whistleblower remedy is not exclusive.[253] This does not mean, however, that a discharged nuclear whistleblower could then bring a wrongful discharge action in any jurisdiction in the United States. Many jurisdictions do not provide a remedy for discharged whistleblowers.[254]

It is possible, moreover, that state courts could find the federal remedy to be the nuclear whistleblower's exclusive remedy in spite of the language of the proposed Act. Courts could find that nuclear whistleblower protection constitutes nuclear safety regulation,[255] and is therefore preempted by the federal remedy.

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[248] *See Norris*, 881 F.2d at 1150 ("[T]here is nothing in the words of the statute or its legislative history indicating a congressional intent to bar a whistle blower from bringing a state action for wrongful discharge.").

[249] S. 2095, 100th Cong., 2d Sess. (1988); H.R. 4305, 100th Cong., 2d Sess. (1988).

[250] *Id.* § 5.

[251] *Id.*

[252] *Id.* § 8(a).

[253] *See id.*

[254] *See supra* notes 33–43 and accompanying text.

[255] *See supra* notes 138–46 and accompanying text.

State courts could also limit nuclear whistleblowers to the federal remedy based upon state common-law rules regarding exclusive remedies.[256] These rules are based on state policy, not congressional intent,[257] so they would remain binding regardless of any congressional intent to insure that the federal remedy is not construed to be exclusive.

VI. CONCLUSION

Congress and a host of states have recognized the importance of whistleblowing and have enacted statutory protections for whistleblowers. Section 210 represents unmistakable evidence that Congress intends nuclear whistleblowers to be protected from unjust discharge. Courts should adhere to this clear congressional intent and should not obstruct it by reading into section 210 an unexpressed intent to provide an exclusive nuclear whistleblower remedy. Although nuclear whistleblowing, and the protection provided by section 210, have the beneficial effect of promoting nuclear safety, section 210's primary purpose is to protect the whistleblower, not to promote safety. Section 210, then, is not part of the federal scheme of nuclear regulation. Finding section 210 to be preemptive often leaves the nuclear whistleblower with no available remedy. It is painfully obvious that, in the case of section 210, preemption defeats, rather than serves, congressional objectives.

The proposed Uniform Health and Safety Whistleblowers Protection Act would resolve the preemption controversy, but would not be a panacea for discharged whistleblowers who seek state court remedies. There are still many jurisdictions that do not provide a tort remedy for whistleblowers. In most states, wrongful discharge is a recent development in the law, and the parameters of the public policy exception are still evolving. One can only hope that more states recognize the merits of whistleblowing and see the need to create a judicial remedy for whistleblowers. Whistleblowing should be rewarded and appreciated. When whistleblowers are punished for their actions, the courts should provide them with the protection they deserve.

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[256] *See supra* note 37 and accompanying text.

[257] *See id.*