New Hampshire Whistleblowers' Protection Act - So Much To Do, So Little Protection

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Introduction

For many, the term "whistleblower" conjures up negative images. And why not? After all, the dictionary definition of a whistleblower is "one who reveals something covert or who informs against another."[1] While most would agree that unlawful behavior, unsafe workplace practices and corruption should be stopped, nobody likes a tattletale.

In fact, in the workplace, the whistleblower often suffers retaliation. Sometimes he or she is terminated, transferred, or demoted, or his or her workload is increased. The whistleblower's performance may become subject to stricter than normal scrutiny, resulting in increasingly negative performance reviews. Moving the whistleblower's office, assigning him or her boring work, excluding him or her from meetings or important correspondence, and criticizing or embarrassing the whistleblower in front of co-workers are but a few retaliatory gestures that can be used to "punish" the whistleblower. The list of further retaliatory acts - often subtle and creative - is virtually limitless.[2]

So when is whistleblowing worth the risk? Sometimes the problem is so grave that the whistleblower believes that he or she has little choice but to report the problem and risk retaliation. Less honorably, sometimes whistleblowing is worth the risk because the whistleblower already fears termination. Regardless of the reason, the question of what protection the law provides can become all important.

A variety of state and federal laws prohibit retaliation against whistleblowers, but the protection offered by these laws is far from perfect.[3] The New Hampshire Whistleblowers' Protection Act[4] ("the Act") is no exception. The scope of the Act's protections is limited, while the burdens the whistleblower must bear in order to enjoy those protections are significant.

Nevertheless, sometimes the Act does protect whistleblowers. For example, on March 7, 1996, the New Hampshire Supreme Court upheld a New Hampshire Department of Labor decision under the Act, which: 1) found that the whistleblower had been fired from his part-time position and denied a different, full-time job in retaliation for his complaint of the employer's alleged violation of a federal statute requiring hiring preferences for disabled Vietnam veterans; and 2) ordered the employer to offer the complainant a full-time position.[5]

Most whistleblowers are not so fortunate.[6] This article explores reasons for this lack of success through a review of the New Hampshire Whistleblowers' Protection Act's provisions and limitations, including a discussion of the Act's procedural requirements and uncertainties. This discussion is followed by some suggestions for the practitioner regarding other statutory and common law approaches to consider when seeking protection for the whistleblower.

I. The New Hampshire Whistleblowers' Protection Act - Generally

The New Hampshire Whistleblowers' Protection Act became effective January 1, 1988. Its legislative history suggests that the Act was patterned after the statutes of other states, including Maine and Rhode Island.[7] At first glance, the Act's coverage may seem broad. However, a review of the Act's terms, the three reported cases interpreting the Act, and the comparable provisions of certain state and federal laws make clear that the Act's scope is, and apparently was intended to be, fairly limited.[8]

A. The Protection of Employees Who Report Illegal Actions

At the heart of the Act is the provision prohibiting retaliation against employees who report violations of the law. This section of the Act provides that:

> I. No employer shall discharge, threaten or otherwise discriminate against any employee regarding such employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (a) The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States. . . .[9]

It is important to note the parameters of this provision; the Act only protects the whistleblower who *makes a report, in good faith,* with *reasonable cause to believe* that there is a *violation of local, state or federal laws or regulations.*

Thus, unlike federal laws and the laws of some states, the Act does not protect the whistleblower who reports objectionable, but not illegal, behavior. For example, the Act would not cover a state government employee who blows the whistle on his employer's grossly wasteful, though not illegal actions.[10] Similarly, the Act would not cover a whistleblower who reports conditions or practices that, while not expressly illegal, may be putting at risk the health or safety of the employee, other individuals, or the public.[11]

The Act's protections are conditioned on the whistleblower's meeting certain procedural requirements regarding internal reporting.

The requirement that a whistleblower must have "reasonable cause to believe" that there is a violation of local, state or federal laws subjects the whistleblower's belief to scrutiny, requiring evidence to show that a reasonable person would have believed that such a violation of law had occurred. Under this objective standard, mere suspicion, or a personal, good faith belief that a legal violation had occurred is presumably not enough.[12]

The Act covers only situations where the whistleblower has made a report;[13] unlike the whistleblower laws of some other states and many federal statutes, the Act does not expressly cover a situation where a whistleblower is about to report a violation of law but has not yet done so.[14] Similarly, the Act does not expressly cover a situation where an illegal action is about to occur, but has not yet occurred.[15]

If the whistleblower's claim meets the above requirements, there is still the question of whether the whistleblower was acting in "good faith" when making the report of illegal activity. While there is no New Hampshire precedent on this point, cases from other jurisdictions suggest that with this requirement, an employer will prevail if, for example, a whistleblower, before reporting the situation to the enforcing government agency, threatens to expose the illegality if he or she does not receive something in return, such as an assurance of job security or a promotion.[16]

B. The Protection of Employees Refusing to Execute Illegal Directives

The Act also protects whistleblowers from retaliation for refusing "to execute a directive which in fact violates any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States."[17] This section of the Act imposes a stricter requirement than the reporting violations section of the Act described above. Here, the Act will protect the whistleblower only if the directive "in fact" violated the law. It would appear, therefore, that the Act will not cover even the whistleblower who reasonably believed that the directive violated the law; an actual legal violation must be proven.[18]

C. Internal Reporting Requirements

The Act's protections are conditioned on the whistleblower's meeting certain procedural requirements regarding internal reporting. Specifically, a whistleblower reporting what he or she has reasonable cause to believe is a violation of law will not be protected under the Act unless:

> the employee first brought the alleged violation to the attention of the person having supervisory authority with the employer, and then allowed the employer a reasonable opportunity to correct the violation, unless the employee had specific reason to believe that reporting such a violation to his employer would not result in promptly remedying the violation.[19]

This requirement is frequently seen in whistleblower statutes.[20] While policy arguments regarding such a requirement can be debated,[21] the requirement's practical effects remain. Specifically, as whistleblowing employees may well act before seeking legal advice, a whistleblower may fall outside of the Act's protections by reporting the situation immediately to the enforcing governmental office or agency, unaware that the Act requires the employee to first report the problem to the employer.[22] The whistleblower who inadvertently fails to comply with the Act, will presumably be able to enjoy the Act's protections only by showing a "specific reason" for believing that reporting the violation to the employer would not have resulted in a prompt remedy of the violation.[23]

Even if the whistleblower reports the problem first to the employer, the question of whether the whistleblower permitted the employer a "reasonable" enough opportunity to correct the situation will be retrospectively reviewed. The New Hampshire Department of Labor regulations under the Act,

which expired in 1994, attempted to eliminate uncertainty by defining the term "reasonable opportunity." Under these regulations, an employer's response should be "immediate" in the case of violations representing imminent danger to employees; the problem would need to be "addressed no later than the following pay period following notification" where the violation is causing loss of monetary value to the whistleblower, or "corrected within 2 calendar weeks of notification" for all other alleged violations.[24] The practical problem for the whistleblower, however, especially since the regulations on this point have expired, is that the reasonableness of the opportunity given the employer to correct the situation can only be definitively determined (by the Department of Labor or a court) in retrospect, after the whistleblower has already made an irreversible commitment by blowing the whistle.

Before the Department of Labor will hear a case regarding the employer's alleged retaliatory action, the employee also must "first make a reasonable effort to maintain or restore such employee's rights through any grievance procedure or similar process available at such employee's place of employment."[25] Again, to come within the Act's protections, the burden is on the whistleblower to: 1) be informed that protection under the Act contains such a condition; 2) determine whether there is any procedure or mechanism in his or her workplace which might be termed a "grievance procedure or similar process;" and 3) determine what might be viewed retrospectively as a "reasonable effort" to restore his or her rights under that process before reporting the violation to a higher authority. The whistleblower who errs in this regard may also fall outside the Act's protections.

D. Administrative Procedure

A whistleblower who satisfies the above described internal reporting requirements, still does not have a right to judicial review, but may "obtain a hearing with the commissioner of labor or a designee appointed by the commissioner. . . ."[26] Normally, these internal reporting and administrative procedures can be completed in six months to a year, excluding the time it takes to complete an appeal to the Supreme Court, if that occurs. Specifically, the Department of Labor reports that after a whistleblower has filed a claim, the employer is given fifteen days to respond. The whistleblower then has fifteen days to file a response and request a hearing. Hearings are currently being scheduled for dates falling approximately three months after the request. The commissioner is required to issue a decision thirty days after the hearing.[27]

After the commissioner enters an order, a party may appeal the decision pursuant to N.H. R.S.A. 541.[28] Under N.H. R.S.A. 541:3 and 6, a party must apply for a rehearing with respect to any matter determined in the action or proceeding within thirty days after any order or decision has been made by the commissioner.[29] A party then has thirty days after the application for a rehearing is denied, or thirty days after an adverse decision following a rehearing, to appeal by petition to the New Hampshire Supreme Court.[30] The New Hampshire Supreme Court's review of the Department of Labor's decision is dictated by N.H. R.S.A. 541:13.[31]

If the whistleblower is appealing a question of law, including constitutionality of the Act or authority of the commissioner to act, this administrative procedure need not be exhausted prior to filing an appeal.[32] If, however, the issue of appeal is the proper exercise of administrative discretion, then the administrative remedy must be exhausted.[33]

E. Burden of Proof

A whistleblower who proceeds to a hearing before the Department of Labor, as described above, should be aware that neither the Act nor any regulations or cases under it address the question of what the whistleblower's burden of proof might be at the hearing.

In whistleblower cases from other jurisdictions, courts have generally favored a three-stage, shifting burden of proof scheme similar to that employed in cases involving Title VII of the Civil Rights Act of 1964.[34] Under this scheme, which has its genesis in the case of *McDonnell Douglas v. Green*,[35] the whistleblower bears the burden of establishing a prima facie case by showing that: 1) he or she engaged in activity protected by the whistleblower statute; 2) he or she was the subject of adverse employment action; and 3) there was a causal connection between the protected activity and the challenged employment action.[36]

The whistleblower often cannot meet this burden of proof for lack of adequate evidence of a causal connection between the whistleblowing and the adverse employment action.

If a prima facie case is made out, the employer's conduct is presumed impermissible; the employer must then produce evidence to rebut this presumption by showing that there was a permissible reason for the challenged employment action.[37] If the employer successfully rebuts the presumption of impermissible action, the whistleblower must then prove by a preponderance that the employer's justification for the challenged employment action was merely a pretext for impermissible action.[38]

The whistleblower often cannot meet this burden of proof for lack of adequate evidence of a causal connection between the whistleblowing and the adverse employment action. The employer, however, often can show legitimate business reasons for the challenged employment action. In fact, even if the whistleblower can produce evidence that whistleblowing was a factor in the employer's decision, the whistleblower may still lose if the employer's decision was also motivated by legitimate business concerns. In such "mixed motive" cases, a "same decision" analysis is applied, allowing an employer to prevail by showing that it would have made the same decision

even had the whistleblowing not occurred.[39] Similarly, the whistleblower may be denied reinstatement if after termination the employer discovers misconduct sufficient to justify discharge (i.e., under the "after-acquired evidence doctrine").[40]

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For a whistleblower seeking redress under the New Hampshire Act, the burden of proof question is troublesome because, apart from the New Hampshire Supreme Court's recent decision applying the "same decision" analysis and the "after acquired evidence doctrine,"[41] neither the statute nor the courts have articulated the employee's and employer's respective burdens of proof. Even assuming that the general burden-shifting approach of *McDonnell Douglas* would be applied, the New Hampshire Supreme Court may adopt a completely different version of that standard.

More troublesome for the whistleblower seeking protection under the Act, however, is the "same decision" analysis itself, which has defeated numerous whistleblower claims in other jurisdictions[42] and is bound to have the same effect in many New Hampshire cases. Of course, the policy underpinnings of the "same decision" analysis lie in the need to protect the employer from the whistleblower who acts in bad faith, as it prevents the employee anticipating adverse employment action from blowing the whistle only to prevent an adverse action.[43]

The problem with the "same decision" analysis for the whistleblower, however, is that an employer who is determined to make an employee pay for blowing the whistle can often find and document performance deficiencies or improprieties that could serve as legitimate grounds for adverse personnel action. As discussed at the beginning of this article, retaliation can be subtle and creative; unfortunately, legislative protection of the whistleblower is often not effective to prevent carefully crafted retaliation by the employer.[44]

F. Remedies Under The Act

Under the Act, the commissioner or his designee may order, as deemed appropriate, "reinstatement of the employee, the payment of back pay, fringe benefits and seniority rights, any appropriate injunctive relief, or any combination of these remedies."[45] These remedies may offer less than satisfactory relief for several reasons. First, the Act does not provide for an award to cover the costs or attorneys' fees of the administrative and any judicial process. Second, many whistleblowers may not desire reinstatement for fear of further hostility and retaliation; for them, the remedies of reinstatement and seniority rights are useless. Finally, punitive and compensatory damages, including such relief for damage to reputation and career, medical costs, and emotional distress, are not specified as remedies under the Act.

By contrast, whistleblower protection statutes in other states, including Maine and Rhode Island, offer more expansive forms of relief. For example, in Rhode Island, a whistleblower may bring a civil action for "appropriate injunctive relief or actual damages, or both," with damages defined broadly as any damages for injury or loss.[46] The court may also award the Rhode Island whistleblower all or a portion of the litigation costs.[47] In Maine, attorneys' fees and civil penal damages are available if the whistleblower establishes that prior to the filing of the civil action, the whistleblower first filed a complaint with the Maine Human Rights Commission.[48] Whistleblower statutes in Alaska, California, New Jersey, North Carolina and Texas permit punitive damages.[49] The South Carolina whistleblower statute even offers the whistleblower a reward for saving public money.[50]

Federal statutory protection for whistleblowers also affords greater relief than the New Hampshire Act. For example, the Civil Service Reform Act of 1978, as amended in 1989, awards the prevailing whistleblower the costs of litigation, including attorney fees, expert witness fees, and other reasonable costs associated with the litigation.[51] Further, compensatory damages are usually available under federal employee protection statutes; such damages may include damage to reputation and career, medical expenses, emotional distress, pain and suffering, mental anguish, and lost future earnings.[52] The Safe Drinking Water Act and Toxic Substance Control Act even gives the agency the power to award exemplary damages to a prevailing whistleblower.[53]

Despite the New Hampshire Act's limited list of available relief, the practitioner should be mindful of the whistleblowers' success in obtaining the relief they desired based on the commissioner's power to award "appropriate injuctive relief" in the two New Hampshire Supreme Court cases decided under the Act. In *Appeal of Bio Energy Corp.*,[54] the whistleblower was granted back pay, even though the Act did not then provide for a back pay award. In *Appeal of New Hampshire Dept. of Employment Security*,[55] the employer was ordered to hire the whistleblower, who had previously held a part-time position, for a full-time position. Given the Supreme Court's apparent willingness to take a broad view of what constitutes "appropriate injunctive relief," whistleblowers should consider requesting expansive and creative relief,[56] such as a request that personnel records be expunged, reimbursement for lost overtime, an order to provide only good recommendations, front pay for a specified time period, restoration of all pension contributions, restoration of health and welfare benefits, costs of litigation, and/or prohibition against laying off or terminating the whistleblower in the future except for good cause.

A whistleblower should be careful to mitigate damages after the alleged retaliatory act. For example, if a whistleblower is reassigned to another position and refuses to take it because it is allegedly based on retaliation, the court may reduce any damage award, finding that the whistleblower has failed to mitigate damages.[57]

II. Alternatives to the Act

A. State Law Causes of Action

Given the Act's onerous administrative procedure and limited relief, a whistleblower may seek to pursue other causes of action, such as a common law wrongful discharge action, in lieu of or in addition to proceeding under the Act. The question is, may the whistleblower do so?

In New Hampshire, a plaintiff may not pursue a common law remedy "where the legislature intended to replace [the common law remedy] with a statutory cause of action. . . ."[58] Since the Act itself provides that it "shall not be construed to diminish or impair . . . any common law rights,"[59] a whistleblower should be able to successfully argue that the legislature did not intend to replace common law remedies with the Act, and that a whistleblower should be able to forego the administrative procedures and protections of the Act and proceed directly to court under other legal theories. The practitioner should be aware, however, that the issue of whether common law remedies are supplanted by statutory remedies has been the subject of much recent case law, with varying results.[60]

. . . review of potentially applicable federal statutes is virtually required, as federal whistleblower statutes may preempt state statutory or common law causes of action for retaliation.

If a whistleblower's claim is not covered by the Act, the whistleblower's right to proceed directly to court under other legal theories should be even clearer. Justice Horton suggested in his dissenting opinion in *Appeal of Bio Energy Corp.* that the Act should not have applied to the claimant's situation because she never reported the employer's alleged legal violation to a higher authority outside of the employer (an interpretation of the Act's requirements that the majority rejected), and thus her remedy should have been a common law wrongful discharge action.[61] This suggests that if the whistleblower's situation fails to meet the Act's requirements, for example, that there be a "violation," "reasonable cause to believe," "a report," or otherwise, the whistleblower should be able to seek judicial relief under other legal theories.

Some state common law causes of action a whistleblower could consider are causes of action for wrongful discharge under the "public policy" exception, infliction of emotional distress or defamation.[62] An action against the supervisor for intentional interference with contractual relations might also be possible if it can be shown that the supervisor was acting outside the scope of employment.[63] In addition, many state statutes prohibit discrimination or retaliation against employees and others who report violations of that statute's provisions.[64]

A whistleblower who proceeds under the Act, but who is considering a simultaneous legal action based on similar facts, should also be aware that the New Hampshire Supreme Court has made clear that, even if a court has jurisdiction over a matter concurrent with the jurisdiction of an administrative agency, the court should refrain from exercising its concurrent jurisdiction until the matter "has first been decided by the specialized agency that also has jurisdiction to decide it."[65] The requirement that a plaintiff exhaust his or her administrative remedies before seeking judicial review may also be applied, to the same effect.[66]

Of course, when considering whether and/or when to bring a common law action or an administrative claim, it must be kept in mind that decisions resulting from administrative proceedings may well have a res judicata or collateral estoppel effect on subsequent legal actions.[67]

B. Federal Remedies and Preemption

Federal whistleblower statutes may also provide a favorable alternative to the New Hampshire Act, particularly because, as referenced above, the relief available under federal statutes is often more generous than the relief available under the New Hampshire Act. There are at least twenty-seven federal statutes which explicitly prohibit retaliation against both public and private employees who report violations.[68] Federal whistleblower provisions usually are encompassed in substantive statutes and protect only conduct that is related to the underlying statutes. For example, an employee has protection against certain retaliatory acts under Title VII of the Civil Rights Act of 1964 and the Occupational Safety and Health Act.[69] As each statute has its own filing procedure and statute of limitations, remedies and scope of protected activity, the practitioner should carefully review the provisions and requirements of each potentially applicable statute.[70]

In fact, such review of potentially applicable federal statutes is virtually required, as federal whistleblower statutes may preempt state statutory or common law causes of action for retaliation.[71] Even if the applicable federal statutes do not preempt state remedies *per se*, the existence of a federal statute could preclude the availability of a common law action, as discussed above, on the theory that the statutory remedy supplants common law remedies.[72]

For federal government employees, federal statutes are usually the front line of attack; such employees are not protected by the New Hampshire Act, but may seek protection under the Civil Service Reform Act, as amended by the Whistleblower Protection Act of 1989.[73] While the protection of this federal statute is meant to be broad, it has been criticized for not offering enough protection.[74] For example, it excludes employees of intelligence and investigatory agencies and employees of bank and savings and loan regulatory agencies.[75] In addition, like the New Hampshire Act, the Civil Service Reform Act requires the whistleblower to first pursue administrative remedies; only if the whistleblower is dissatisfied with the agency's decision or the administrative agency declines to prosecute, does the whistleblower have the right to initiate a civil suit.[76] Federal government whistleblowers may also want to research possible civil rights claims under 42 U.S.C. § 1983 or § 1985,

based on either the First or Fourteenth Amendments to the United States Constitution.[77]

III. Conclusion

In sum, a practitioner evaluating a potential whistleblowing claim must consider, among other things: (1) the limited scope of coverage and remedies provided by the Act; (2) the question of other state remedies available under the circumstances; and (3) the existence of federal statutes potentially applicable to the situation and the possible preemptive effect of those statutes. While proof problems often make these cases difficult, the somewhat unsettled state of the whistleblower law in New Hampshire also adds to the challenge.

Endnotes

1. Webster's Ninth New Collegiate Dictionary *1345 (9th ed. 1988).*

2. For a discussion of various types of retaliation, *see* Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 Rutgers L. Rev. 355, 363-69 (1991); Stephen M. Kohn, *The Whistleblower Litigation Handbook: Environmental, Health and Safety Claims* § 3.4 (1990).

3. References to the laws of some other states and federal law - including the preemptive effect of some of the federal statutes - follow later in the text of this article. For a critical analysis of some federal whistleblower protections, *see*, Fisher, *supra* note 2. For an extensive discussion and compilation of federal and state whistleblower statute information, *see* Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?*, 38 S.D. L. Rev. 316 (1993); Thomas E. Egan, Comment, *Wrongful Discharge and Federal Preemption: Nuclear Whistleblower Protection Under State Law and Section 210 of the Energy Reorganization Act*, 17 B.C. Envtl. Aff. L. Rev. 405, 416-21 (1990).

4. N.H. Rev. Stat. Ann. Chapter 275-E (Supp. 1995).

5. *Appeal of New Hampshire Dept. of Employment Security*, No. 94-681 (N.H. March 7, 1996).

6. The New Hampshire Department of Labor estimates that the whistleblower prevails in less than 20% of cases brought.

7. N.H.H.R.J. 573 (March 19, 1987) (Rep. David A. Young for the Labor, Industrial and Rehabilitative Services Committee).

8. Other New Hampshire statutes prohibiting retaliation against certain protected activities include: N.H. Rev. Stat. Ann. §§ 141-E:18 (discrimination for reporting violation of asbestos management and control provisions); 147-A:12 (discrimination for reporting violation of hazardous waste management provisions); 170-E:48 (retaliation for reporting child abuse results in license revocation); 273-A:5 (discrimination for bringing complaint before public employee relations board); 273-C:6 (discrimination for reporting violation of dog and horse racing provisions); 277-A:7 (discrimination for reporting violation of the toxic substances in the workplace provisions); and 540:13-a (retaliatory evictions). In addition, some New Hampshire statutes allow for criminal penalties for retaliation against an employee. *See, e.g.*, N.H. Rev. Stat. Ann. §§ 151:27 (retaliation for reporting abuse of hospital patients); 161-F:15 (retaliation for reporting violation of elderly and adult services provisions). This article focuses only on the Whistleblowers' Protection Act.

9. N.H. Rev. Stat. Ann. § 275-E:2, I (a) (Supp. 1995).

10. *Cf.* 5 U.S.C.A. § 2302(b)(8) (part of the Civil Service Reform Act of 1978, as amended in 1989, which covers reports not only of violations of laws and regulations in government agencies, but also mismanagement, gross waste of funds, abuse of authority, or a substantial danger to public health and safety). *See also* Lofgren, *supra* note 3, at 326 (noting that the majority of state statutes protect whistleblowers whose disclosures identify governmental waste, mismanagement or abuse of authority).

11. *Cf.* Me. Rev. Stat. Ann. tit. 26, § 833.1 B (West 1994) (covering reporting of such safety risks); Mass. Gen. Laws Ann. ch. 149, § 185(b)(1) (West 1995) (covering reporting of risks to public health, safety or the environment).

12. *See Appeal of New Hampshire Dept. of Employment Security*, No. 94-681 (N.H. March 7, 1996) (whistleblower had reasonable cause to believe that the state agency had violated a federal law giving hiring preference to disabled Vietnam veterans when it declined to hire him for a particular position); *see also Bard v. Bath Iron Works*, 590 A.2d 152, 155 (Me. 1991) (interpreting virtually identical language in the Maine statute, concluding that this "reasonable cause" language requires whistleblowers to show not that they personally had a good faith belief that a violation of law occurred, but that a reasonable person might have believed the employer was acting unlawfully).

13. Although the Act does not make clear to whom the report must be made, the New Hampshire Supreme Court rejected an argument that the Act does not apply unless the employee reports the violation to someone other than the employer (i.e., to a "higher authority"). *Appeal of Bio Energy Corp.*, 135 N.H. 517, 607 A.2d 606 (1992) (Act protects the employee who begins the process of complying with the Act, regardless of whether the employer cures the violation or whether the employee further reports the violation to a higher authority); *see also Appeal of New Hampshire Dept. of Employment Security*, No. 94-681 (N.H. March 7, 1996).

14. *Cf.* R.I. Gen. Laws § 36-50-3(1) (Supp.1995); Mass. Gen. Laws Ann. ch. 149, § 185(b)(1) (West 1995); *see* Kohn, *supra* note 2, § 3.10 (discussing this aspect in a variety of the federal whistleblower protection statutes).

15. *Cf.* R.I. Gen. Laws § 36-50-3(1) (Supp. 1995); Mass. Gen. Laws Ann. ch. 149, § 185(b)(1) (West 1995).

16. *See* Lofgren, *supra* note 3, at 334.

17. N.H. Rev. Stat. Ann. § 275-E:3 (Supp. 1995).

18. *Cf.* Mass. Gen. Laws Ann. ch. 149, § 185(b)(3) (West 1995) (excusing employee from participating in any activity, policy or practice that the employee reasonably believes is in violation of a law, rule or regulation, or which the employee reasonably believes poses a risk to public health, safety, or the environment); *see also* Kohn, *supra* note 2, § 3.14 (discussing rule that employees are not required to prove the veracity of their complaints under federal whistleblower statutes).

19. N.H. Rev. Stat. Ann. § 275-E:2, II (Supp. 1995).

20. *See* Lofgren, *supra* note 3, at 327-8, n.111-13, and 329, n.125-26.

21. *See, e.g.*, Fisher, *supra* note 2, at 392-97.

22. *See* Lofgren, *supra* note 3, at 332 (discussing cases where whistleblowers were denied protection for failure to follow statutory procedures); *see also Appeal of Bio Energy Corp.*, 135 N.H. 517, 607 A.2d 606 (1992). Though New Hampshire Department of Labor regulations require the employer to post a notice regarding the employee's protections, rights and remedies under the Act, these regulations have expired. *See* N.H. Code Admin. R. Dept. of Labor 903.02 (1988) (expired Dec. 9, 1994).

23. N.H. Rev. Stat. Ann. § 275-E:2, II (Supp. 1995).

24. N.H. Code Admin. R. Dept. of Labor 903.04 (1988) (expired Dec. 9, 1994).

25. N.H. Rev. Stat. Ann. § 275-E:4, I (Supp. 1995). Note that in *Appeal of New Hampshire Department of Employment Security*, No. 94-681 (N.H. March 7, 1996), the whistleblower satisfied this requirement by attempting to appeal his discharge to the commissioner of DES; although he also filed an appeal with the personnel appeals board, the statute did not require him to pursue that appeal to its conclusion before filing a complaint under the Act.

26. N.H. Rev. Stat. Ann. § 275-E:4, I; *see Soltani v. Smith*, 812 F. Supp. 1280, 1298-99 (D.N.H. 1993).

27. Note that a whistleblower who does not wish to be reinstated but who has not yet begun work elsewhere may benefit from delay since the Act allows an award of back pay only; it does not specifically allow for front pay.

28. N.H. Rev. Stat. Ann. § 275-E:4, II (Supp. 1995).

29. *Id.* § 541:3.

30. *Id.* § 541:6.

31. *See Appeal of New Hampshire Dept. of Employment Security*, No. 94-681 (N.H. March 7, 1996).

32. *Bedford Residents Group v. Bedford*, 130 N.H. 632, 639, 547 A.2d 225, 230 (1988); *Tremblay v. Hudson*, 116 N.H. 178, 179-80, 355 A.2d 431, 432-33 (1976); *Metzger v. Brentwood*, 115 N.H. 287, 343 A.2d 24 (1975).

33. *Bedford Residents Group v. Bedford*, 130 N.H. at 639.

34. *See, e.g., Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165 (1st Cir. 1995) (applying Maine whistleblower law); *McGrath v. TCF Sav., FSB*, 502 N.W.2d 801 (Minn. Ct. App. 1993) *modified*, 509 N.W.2d 365 (Minn. 1993); *Eckstein v. Kuhn*, 408 N.W.2d 131 (Mich. Ct. App. 1987); *Ward v. Industrial Comm'n*, 699 P.2d 960 (Colo. 1985). *But see Texas Dept. of Human Servs. v. Hinds*, 904 S.W.2d 629 (Tex. 1994).

35. 411 U.S. 792 (1973).

36. *See, e.g., Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991); *see also* Kohn, *supra* note 2, §§ 3.16 & .18 (discussing the elements of a prima facie case under most federal whistleblower statutes and means of establishing discriminatory motive through circumstantial evidence).

37. *See Wytrwal*, 70 F.3d at 167.

38. *Id.*

39. *See Appeal of New Hampshire Department of Employment Security*, No. 94-681 (N.H. March 7, 1996) (citing *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1976) - a case that involved a termination of employment in alleged violation of the plaintiff's first amendment rights). *See also* cases cited at note 34; Kohn, *supra* note 2, § 3.20 (discussing federal mixed motive cases). This "same decision" analysis is often attributed to the *Mount Healthy* case and is thus often referred to as the *Mount Healthy* analysis.

40. *See Appeal of New Hampshire Department of Employment Security*, No. 94-681 (N.H. March 7, 1996).

41. *Id.*

42. *See* Fisher, *supra* note 2, at 376-80.

43. *Mount Healthy*, 429 U.S. at 286.

44. *See* Fisher, supra note 2, at 410.

45. N.H. Rev. Stat. Ann. § 275-E:4, I (Supp. 1995). Prior to 1992, the Act did not provide for an award of back pay. Nevertheless, in *Appeal of Bio Energy Corp.*, 135 N.H. 517, 522, 607 A.2d 606, 609-10 (1992), the New Hampshire Supreme Court held that an award of back pay was an indispensable power of the commissioner's ability to award injunctive relief. After this decision, the New Hampshire legislature amended the Act to give the commissioner the power to award "the payment of back pay."

46. R.I. Gen. Laws § 36-50-4 (Supp. 1995).

47. *Id.* § 36-50-5.

48. *Palesky v. Topsham*, 614 A.2d 1307, 1310 (Me. 1992); *Schlear v. Fiber Materials, Inc.*, 574 A.2d 876 (Me. 1990) (analysis of award of attorneys' fees).

49. Lofgren, *supra* note 3, at 327 n.99, n.103-07 (1993) (citing Alaska Stat. § 39.90.120; Cal. Gov't Code § 10550(c) (punitive damages available if showing of malicious action); N.J. Rev. Stat. Ann. § 34:19-5 (actual and punitive damages); N.C. Gen. Stat. § 126-87 (employee injured by a willful violation may be awarded three times the amount of actual damages); Tex. Rev. Civ. Stat. Ann. art. 6252-16a 4).

50. *Id.* at 327 n.99 (citing S.C. Code Ann. § 8-27-20 (employee reporting a violation that results in a saving of public money, must receive 25% of the estimated net savings, up to a maximum award of $2,000)).

51. Fisher, *supra* note 2, at 401-02.

52. Kohn, *supra* note 2, § 7.3. (1990).

53. *Id.* § 7.5 (citing 42 U.S.C. § 300j-9(i)(2)(B)(ii); 15 U.S.C. § 2622(b)(2)(B)).

54. 135 N.H. 517, 607 A.2d 606 (1992).

55. No. 94-681, slip op. at 9-10 (N.H. March 7, 1996).

56. *See, e.g., Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187 (1st Cir. 1994) ("all appropriate relief" in OSHA case includes monetary and exemplary damages because retaliatory discharge is an intentional tort and should have similar damages).

57. *See Hazel v. United States Postmaster Gen.*, 7 F.3d 1 (1st Cir. 1993) (decided under Title VII).

58. *Wenners v. Great State Beverages, Inc.*, 140 N.H. 100, ___, 663 A.2d 623, 625, *cert. denied*, 133 L. Ed. 2d 854, 64 U.S.L.W. 3558 (1996) (statutory remedy under the United States Bankruptcy Code for termination of debtor's employment did not provide a remedy by private employee and thus wrongful discharge claim was not dismissed); *see also Cilley v. New Hampshire Ball Bearings, Inc.*, 128 N.H. 401, 514 A.2d 818 (1986) (dismissed wrongful termination claim based on the employee's refusal to give up improperly withheld wages on grounds that employee had statutory remedy under R.S.A. 275); *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980).

59. N.H. Rev. Stat. Ann. § 275-E:5 (Supp. 1995).

60. *See, e.g., Smith v. F.W. Morse & Co., Inc.*, 1996 U.S. App. LEXIS 2022 (1st Cir. Feb. 12, 1996) (existence of a private right of action under Title VII precluded a common law wrongful discharge claim); *Miller v. CBC Cos., Inc.*, 908 F. Supp. 1054 (D.N.H. 1995); *Douglas v. Coca-Cola Bottling Co.*, No. 94-97-M, 1995 U.S. Dist. LEXIS 16616 (D.N.H. Nov. 6, 1995); cases cited at Note 58.

61. *See Appeal of Bio Energy Corp.*, 135 N.H. 517, 523, 607 A.2d 606, 610 (1992) (Horton, J., dissenting).

62. *See Soltani v. Smith*, 812 F. Supp. 1280, 1296 (D.N.H. 1993) (citing *Brown v. Allenstown*, 648 F. Supp. 831, 834, 839-40 (D.N.H. 1986)).

63. *Id.* at 1296-97.

64. *See* statutes cited at note 8. A whistleblower seeking relief under a statute should first consider if the statute provides a procedure to seek such relief. If the statute does not provide a procedure, a whistleblower must establish that the legislature intended, either expressly or by implication, that violation of that statute would give rise to a private right of action. *Marguay v. Eno*, 139 N.H. 708, 662 A.2d 272 (1995). If no private right of action under the statute is possible, the whistleblower may consider using the statute in a common law negligence action to establish the standard of conduct. *Id.*

65. *New Hampshire Div. of Human Servs. v. Allard*, 138 N.H. 604, 606-07, 644 A.2d 70, 72 (1994); *see also Sampson v. Murray*, 415 U.S. 61 (1974) (regarding injunctive relief for federal government employee while agency action pending); N.H. Rev. Stat. Ann. § 354-A:25 (statutory exclusion of civil action while agency action pending).

66. *New Hampshire Div. of Human Servs.*, 138 N.H. at 606-07, 644 A.2d 70, 72.

67. *See Appeal of Global Moving & Storage of N.H., Inc.*, 122 N.H. 784, 789, 451 A.2d 167 (1982) (res judicata); *Morin v. J.H. Valliere Co.*, 113 N.H. 431, 309 A.2d 153 (1973); *see also Day v. New Hampshire Retirement Sys.*, 138 N.H. 120, 635 A.2d 493 (1993) (collateral estoppel).

68. *See* Lofgren, *supra* note 3, at 320; Kent D. Strader, *Counterclaims Against Whistleblowers: Should Counterclaims Against Qui Tam Plaintiffs Be Allowed In False Claims Act Cases?*, 62 U. Cin. L. Rev. 713, 724 n.61 (1993).

69. *See, e.g.*, Glenn A. Guarino, Annotation, *Prohibition of Discrimination Against, or Discharge of, Employee Because of Exercise of Right Afforded by Occupational Safety and Health Act, Under § 11(c)(1) of the Act*, 66 A.L.R. Fed. 650 (1984).

70. A new twist on attracting workers to come forward with wrongdoing by their employer is contained in 1986 amendments to the United States False Claims Act made in 1986. *See* Strader, *supra* note 68. The changes

were made in an effort to encourage reporting of wrongdoing by government contractors and provide the whistleblower with 15 to 25% of any money the U.S. Government is able to recover in a resulting fraud prosecution. *See id.*

71. *See* Gregory G. Sarno, Annotation, *Federal Pre-Emption of Whistleblower's State-Law Action for Wrongful Retaliation*, 99 A.L.R. Fed. 775 (1990).

72. *See Howard v. Dorr Woolen Co.*, 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980).

73. N.H. Rev. Sat. Ann. § 275-E:1, II (definition of covered employer excludes federal governmental entities); Gregory G. Sarno & Anne M. Payne, Annotation, *Prohibition, By Civil Service Reform Act of 1978, of Reprisals Against Civil Service Whistleblowers*, 124 A.L.R. Fed. 381 (1995).

74. *See* Fisher, *supra* note 2.

75. *See* Lofgren, *supra* note 3, at 324-25.

76. *See* Fisher, *supra* note 2, at 403 (citing 5 U.S.C.A. § 1214(a)(3)).

77. *See, e.g., Soltani v. Smith*, 812 F. Supp. 1280 (D.N.H. 1993).