The New York "Whistleblower" Law: A Ten-Year Perspective

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I. *Introduction*

In addition to the recognition of implied contractual rights to job security in employment relationships of an indefinite duration,[1] many jurisdictions during the 1980s recognized through case law or statutory enactments so-called "public policy" exceptions to the employment-at-will rule.[2] Under the public policy exception, employees may be protected against retaliatory discharges by their employers for exercising a statutory right, for refusing to violate the law, and for reporting actual or suspected violations of federal, state and local laws unless the employee knows the report to be false. The last exception is generally referred to as "whistleblower" protection and also protects employees who participate in an investigation, hearing or inquiry conducted by a government authority or court.[3]

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AUTHOR'S NOTE: As this Article went to press, the New York Court of Appeals rendered a significant whistleblower decision in *Wieder v. Skala,* ____ N.Y.2d ____, N.Y.L.J., 12/30/92, p. 25, col. 1 (reversing in part the case cited in note 45 *infra*), by holding that Disciplinary Rule ("DR") 1-103(A) imposes an "implied obligation of good faith and fair dealing" in every employment relationship between or among attorneys. The *Wieder* decision therefore creates a cause of action in contract for attorneys who are summarily dismissed for complying with their ethical obligations under DR 1-103(A) by reporting the professional misconduct of other attorneys. *Wieder* does not, however, create a cause of action for attorney-whistleblowers either in tort or under the provisions of N.Y. Lab. Law §740 (McKinney 1988). Moreover, the Court of Appeals cautioned that its decision in *Wieder* does not mean that all provisions of the Code of Professional Responsibility should be deemed incorporated as an implied in law term in employment relationships between or among attorneys.

[1]*See* DeGiuseppe, "*Weiner v. McGraw-Hill, Inc.*: Ten Years After," 19 Westchester Bar J. ____ (Summer 1992).

[2]The employment-at-will rule provides that employment relationships of an indefinite duration may be terminated by either party at any time with or without cause or notice. *See* DeGiuseppe, "The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits," 10 Fordham Urb. L.J. 1, 3-8 (1981).

[3]For a discussion of the development of the public policy exception, see DeGiuseppe, "The Recognition of Public Policy Exceptions to the Employment-at-Will Rule: A Legislative Function?" 11 Fordham Urb. L.J. 721, 753-67 (1983).

In 1984, New York became one of the first jurisdictions to enact a whistleblower statute for both private and public sector employees.[4] The effectiveness of the New York law has, however, been questioned particularly in light of its failure to protect employees who mistakenly report employer conduct which the employee "reasonably believes" to be illegal.[5] The New York whistleblower statute has also been criticized for limiting its protection to "a substantial and specific danger to the public health or safety" as opposed to protecting employees who report violations of any relevant law, rule or regulation.[6]

This Article analyzes the historical development of New York's whistleblower law over the past ten years and examines the continued reluctance of the New York Court of Appeals as expressed in *Murphy v. American Home Products Corp.*[7] and subsequent case law to recognize exceptions to the employment-at-will rule in the absence of legislative action. This Article also reviews relevant case developments under the New York whistleblower statute and examines the issue of whether the whistleblower law should be amended.

II. *Historical Development*

In 1982, a bill concerning whistleblower protection was passed by the New York State Assembly, but failed to gain the needed support in the State Senate.[8] In early 1983, a whistleblower bill was reintroduced in the New York State Legislature.[9] Unlike the present version of New York law, the proposed bill provided whistleblower protection to private sector employees for disclosing "to a supervisory authority or to a public body an activity, policy, or practice of the employer that the employee reasonably believes to be a violation of law or regulation, or that the employee reasonably believes poses a substantial and impending danger to public health or safety. . . ."[10]

The 1983 whistleblower bill, unlike the present law, further proposed protection for private sector employees who (1) provided information to, testified before, or otherwise cooperated with a public

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[4]N.Y. Lab. Law §740 (McKinney 1988) (private sector employees); N.Y. Civ. Serv. Law §75-b (McKinney Supp. 1992) (public sector employees).

[5]*E.g.*, Feerick, "Toward A Model Whistleblowing Law," 19 Fordham Urb. L.J. 585 (Spring 1992).

[6]*E.g.*, Minda & Raab, "Time For An Unjust Dismissal Statute in New York," 54 Brooklyn L. Rev. 1137 (1989); Feliu & Outten, "New York's Whistleblower Law—A Legislative Response to '*Murphy*'," N.Y.L.J., Nov. 28, 1984, at 1, col. 3.

[7]58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

[8]S.9566, A.12451 (1982); DeGiuseppe, *supra* note 3, at 738 n.89.

[9]S.1153, A.2126 (1983); DeGiuseppe, *supra* note 3, at 738 n.89.

[10]DeGiuseppe, *supra* note 3, at 738 n.89.

body conducting an investigation, hearing or inquiry with respect to any violation of law, rule or regulation; and (2) refused to participate in or otherwise objected to conduct which the employee reasonably believed either involved a violation of law, rule or regulation or posed a substantial and impending danger to public health or safety. The 1983 bill also contained an interesting provision that allowed an employee to disclose to the news media a situation which presented a serious imminent threat to human health or safety in cases where disclosure had already been made to a government body and that body had failed to take appropriate action within a reasonable time.[11] Although the bill was passed by the State Assembly, it never became law.[12]

Another bill that failed to become law was in fact passed by the New York State Legislature in 1983 and submitted to the Governor in order to protect certain licensed professional employees against retaliatory discharges or other punitive action for refusing to engage in "professional misconduct" as that term is defined in the New York Education Law.[13] A proposed "Unjust Dismissal of Employees Act"[14] providing for the arbitration of alleged wrongful termination of employment claims was also submitted to the labor committees of the New York State Assembly and Senate during the 1983 sessions. The provisions of this proposed legislation would have been applicable only to non-union workers employed by enterprises having 500 or more employees.

While the New York State Legislature in 1983 was considering various types of statutory protections for at-will employees, the New York Court of Appeals during the same year in *Murphy v. American Home Products Corp.*[15] declined to recognize whistleblower or other public policy protection for at-will employees stating that "such recognition must await action of the Legislature."[16]

The specific details of the *Murphy* case demonstrate a typical whistleblower fact pattern. The plaintiff, a 59-year-old assistant treasurer and accountant, was allegedly dismissed after twenty-three years of distinguished service in retaliation for reporting to the defendant's officers and directors, as required by internal company regulations, "that he had uncovered at least $50 million in illegal ac-

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[11]*Id.* at 738-39 n.89.

[12]Feliu & Outten, *supra* note 6, at 7 n.17, col. 3.

[13]S.4937, A.6610 (1983); DeGiuseppe, *supra* note 3, at 761-62 n.231; *see* N.Y. Educ. Law §§ 6506, 6509, 6509-a (McKinney 1985 & Supp. 1992).

[14]DeGiuseppe, *supra* note 3, at 739 n.89.

[15]58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

[16]*Id.* at 297, 448 N.E.2d at 87, 461 N.Y.S.2d at 233.

count manipulations of secret pension reserves which improperly inflated the company's growth in income and allowed high-ranking officers to reap unwarranted bonuses from a management incentive plan. . . ."[17] Plaintiff also alleged, among other things, that he was dismissed in retaliation for his own refusal to engage in the alleged accounting improprieties.[18]

Despite these compelling facts, the Court of Appeals dismissed the plaintiff's cause of action for abusive discharge stating "that such a significant change in our law is best left to the Legislature."[19] In reaching its decision, the *Murphy* court reasoned that the New York State Legislature with its "infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of various segments of the community that would be directly affected . . . , and to investigate and anticipate the impact of imposition of such liability" was best suited to determine whether "such a significant change" in the at-will employment relationship was appropriate.[20] In support of its decision, the court cited various New York State laws protecting employees from dismissal for engaging in protected activity,[21] and also noted that proposed whistleblower legislation was then pending before the Legislature.[22]

In 1987, the New York Court of Appeals in *Sabetay v. Sterling Drug, Inc.*,[23] reaffirmed its decision in *Murphy* to decline to recog-

[17]*Id.* at 298, 448 N.E.2d at 87, 461 N.Y.S.2d at 233. The defendant's "Master Accounting Manual," according to the plaintiff, "mandated that he act as a whistle blower with regard to any financial irregularities committed by the defendant's personnel." Brief for Plaintiff-Respondent-Cross-Appellant at 9, *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

[18]The plaintiff in *Murphy* also alleged that age was a contributing factor to his dismissal in violation of N.Y. Exec. Law §296(1)(a) (McKinney 1982). With respect to this cause of action, the New York Court of Appeals held that plaintiff had timely filed a complaint for age discrimination in court based on the three-year statute of limitations N.Y. Civ. Prac. Law §214(2) (McKinney 1990) as opposed to the one-year period of N.Y. Exec. Law §297(5) (McKinney 1982). The court limited the one-year period to actions commenced before the New York State Human Rights Commission. 58 N.Y.2d at 306-07, 448 N.E.2d at 92-93, 461 N.Y.S.2d at 238-39.

[19]58 N.Y.2d at 301, 448 N.E.2d at 89, 461 N.Y.S.2d at 235.

[20]*Id.* at 302, 448 N.E.2d at 89-90, 461 N.Y.S.2d at 236.

[21]The *Murphy* court cited the following examples of such laws: N.Y. Jud. Law §519 (McKinney 1992) (prohibiting employee dismissals based on jury service); N.Y. Exec. Law §296(1)(e) (McKinney 1982) (barring employee dismissals for opposing unlawful discriminatory practices; for filing a complaint; or for participating in Human Rights proceeding); N.Y. Lab. Law §215 (McKinney 1986) (prohibiting discharge of employee for making labor law violation complaint or for participating in labor law proceeding).

[22]58 N.Y.2d at 302 n.1, 448 N.E.2d at 90 n.1, 461 N.Y.S.2d at 236 n.1.

[23]69 N.Y.2d 329, 506 N.E.2d 919, 514 N.Y.S.2d 209 (1987).

nize whistleblower protection in the absence of legislative action stating "that significant alteration of employment relationships, such as plaintiff urges, is best left to the Legislature . . . , because stability and predictability in contractual affairs is a highly jurisprudential value."[24] As in *Murphy,* the plaintiff in *Sabetay* had alleged that "he was wrongfully discharged from employment because he refused to participate in certain improper, unethical and illegal activities, and because he 'blew the whistle' on these alleged activities."[25]

III. *The New York Whistleblower Law*

In June 1984, a compromise whistleblower bill protecting both private and public sector employees was passed by the New York State Legislature and ultimately signed into law by Governor Cuomo on August 1, 1984.[26] The private sector protection, which went into effect on September 1, 1984, is set forth in Section 740 of the Labor Law and provides in relevant part:

> 2. Prohibitions. An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:
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> (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety;
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> (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or
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> (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.[27]

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[24]*Id.* at 336, 506 N.E.2d at 923, 514 N.Y.S.2d at 213.

[25]*Id.* at 331, 506 N.E.2d at 919-20, 514 N.Y.S.2d at 210.

[26]Feliu & Outten, *supra* note 6, at 7 n.17, col. 3. The legislative history of the New York whistleblower statute indicates that the final bill was apparently the result of a merger of a public employee bill proposed by Governor Cuomo in January 1984 and a greatly revised version of the 1983 Assembly bill that was reintroduced in 1984, but was never actually voted on by the Legislature. *Id.* According to one article on this subject, "[t]he Whistleblower Statute was a legislative compromise. Strong management lobbying caused the statute to be modified prior to its enactment." Minda & Raab, *supra* note 6, at 1183 n.168.

[27]N.Y. Lab. Law §740(2) (McKinney 1988).

The phrase "retaliatory personnel action" is broadly defined to include "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment."[28] The statute further provides, however, that the protection against "retaliatory personnel action" does not apply in cases where an employee has not brought the "violation of law, rule or regulation to the attention of a supervisor of the employer and has afforded such employer a reasonable opportunity to correct [the] activity, policy or practice" that is the subject of the employee's complaint.[29]

While the whistleblower law provides private sector employees with the rights of reinstatement, backpay, and other equitable relief, including attorneys' fees, for violations of Section 740, the law also provides that employers may be awarded reasonable attorneys' fees and court costs "if the court determines that an action brought by an employee under this section was without basis in law or in fact."[30]

The limited scope of Section 740 is further confirmed by the comments contained in the Bill Jacket which provides in relevant part: "[t]his bill protects public and private employees only in situations where disclosures of violations of law, rule or regulation would adversely affect public health and safety."[31] Similarly, the Attorney General's Memorandum regarding the applicability of Section 740 states: "[t]he bill is intended to protect employees who disclose to governmental authorities information about, or refuse to engage in, employer wrongdoing which is dangerous, unsafe or inimical to the public welfare."[32]

The Attorney General's Memorandum further provides examples of conduct that would not, in his opinion, come within the purview of the law:

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[28]*Id.* §740(1)(e).

[29]*Id.* §740(3). The whistleblower statute also contains an election of remedies provision that constitutes "a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law." *Id.* §740(7); *see Gonzalez v. John T. Mather Memorial Hosp.,* 147 Misc. 2d 1082, 559 N.Y.S.2d 467 (Sup. Ct. Suffolk Co. 1990).

[30]N.Y. Lab. Law §740(6) (McKinney 1988). Since the relief provided by Section 740 is equitable in nature, there is no right to a jury trial. *Scaduto v. Restaurant Associates Indus., Inc.,* 180 A.D.2d 458, 579 N.Y.S.2d 381 (1st Dep't 1992).

[31]Bill Jacket, S.10074 (1984) (quoted in *Remba v. Federation Employment & Guidance Serv.,* 149 A.D.2d 131, 134, 545 N.Y.S.2d 140, 142 (1st Dep't 1989)).

[32]Attorney General's Memorandum, S.10074 (1984) (quoted in *Remba v. Federation Employment & Guidance Serv.,* 149 A.D.2d 131, 134, 545 N.Y.S.2d 140, 142 (1st Dep't 1989)).

> This bill, however, does not clearly protect all "whistle blower" employees. It is unclear whether the bill would, in all situations, provide a remedy for employees who refuse to engage in or who reveal illegal financial or accounting practices, such as filing false tax returns on the employer's behalf. If we are ever to make a dent in the wide-spread abuses known as "white collar" crime, employees who disclose such illegal practices must be confident that they, too, will be protected. I urge that this defect in the bill be cured by future legislation. Nevertheless, this bill is a critical first step and for the reasons stated, I urge its approval.[33]

As a result of its limited scope, Section 740 of the Labor Law has been widely criticized since its enactment in 1984, and has provided inadequate relief to employees seeking whistleblower protection against retaliatory discharges or other adverse personnel actions. Unlike the whistleblower protection found in the public sector law[34] and in other jurisdictions,[35] the New York statute only protects private sector employees who engage in whistleblower activities involving *actual* violations of laws, rules or regulations which create or present "a substantial and specific danger to the public health or safety."[36] The law therefore fails to protect an employee who, among other things, reports a suspected violation of the law which the employee "reasonably believes" to be unlawful but which is found not to be illegal. Nor does Section 740 of the Labor Law protect employees who report actual violations of law that do not

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[33]*Id.*

[34]N.Y. Civ. Serv. Law §75-b (McKinney Supp. 1992), which provides in relevant part:

> A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a rule or regulation which violation creates and presents a substantial and specific danger to the public health and safety; or (ii) which the employee reasonably believes is true and reasonably believes constitutes an improper governmental action.

New York City has enacted its own whistleblower law covering public employees of the City. N.Y.C. Admin. Code §12-113 (1986). This law protects public employees for reporting employer conduct that the employee "knows or reasonably believes to involve corruption . . . or conflict of interest." *Id.*

[35]*E.g.*, Conn. Gen. Stat. Ann. §31-51m (West Supp. 1992); Me. Rev. Stat. Ann. tit. 26, §§ 831-840 (West 1988); Mich. Comp. Laws Ann. §§15.361 to 15.369 (West 1981 & Supp. 1992); N.J. Stat. Ann. §§ 34:19-1 to 34:19-8 (West 1988 & Supp. 1992).

[36]N.Y. Lab. Law §740(2)(a)-(c) (McKinney 1988).

meet the "substantial and specific danger to the public health or safety" test.[37]

IV. *Relevant Case Law*

The difficulties in asserting a viable whistleblower claim under Section 740 of the Labor Law are amply demonstrated by relevant case law. Perhaps the decision in *Kern v. De Paul Mental Health Services Inc.*[38] best exemplifies the harsh results of the "actual" violation standard of the whistleblower law. In this case, the plaintiff, a part-time program aide at a community residence for the mentally handicapped, was dismissed after reporting to the District Attorney's office what she perceived to be non-consensual sexual activity between two handicapped residents of the home. Since evidence was submitted to the court that the sexual activity was in fact consensual, the court granted summary judgment in favor of the defendant on the grounds that there was no factual or legal basis to support the plaintiff's alleged violations of applicable law.[39] The Appellate Division, Fourth Department unanimously affirmed this judgment on appeal.

Similarly, in *Connolly v. Harry Macklowe Real Estate Co.,*[40] the Appellate Division, First Department held that plaintiff's allegations that she was dismissed in retaliation for attempting to warn management that a building manager's temper and other erratic behavior constituted a danger to other tenants did not establish an "actual" violation law as required by Section 740. In *Bellingham v. Symbol Technologies,*[41] a plaintiff-manager who claimed that he was dismissed for disclosing sexual harassment complaints made by other employees did not state a cause of action under Section 740 where the record did not reveal "any reasonable investigation by plaintiff premised on an actual violation of law."

Equally disturbing has been the reluctance of courts to find that adequately alleged violations of applicable law did not create a "sub-

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[37]*Remba v. Federation Employment & Guidance Serv.,* 149 A.D.2d 131, 135, 545 N.Y.S.2d 140, 143 (1st Dep't 1989) ("The law requires that there be not only an actual, as opposed to a possible, violation, but also an actual and substantial present danger to the public health."), *aff'd mem.,* 76 N.Y.2d 801, 559 N.E.2d 655, 559 N.Y.S.2d 961 (1990).

[38]139 Misc. 2d 970, 529 N.Y.S.2d 265 (Sup. Ct. Monroe Co. 1988), *aff'd mem.*, 152 A.D.2d 957, 544 N.Y.S.2d 252 (4th Dep't), *appeal denied,* 74 N.Y.2d 615, 549 N.E.2d 151, 549 N.Y.S.2d 960 (1989).

[39]139 Misc. 2d at 972, 529 N.Y.S.2d at 266-67.

[40]161 A.D.2d 520, 555 N.Y.S.2d 790 (1st Dep't 1990).

[41]N.Y.L.J., Dec. 12, 1989, at 25, col. 1B (Sup. Ct. Nassau Co. 1989).

stantial and specific danger to the public health or safety" as required by Section 740 of the Labor Law. The Supreme Court, New York County, in *Vella v. United Cerebral Palsy of New York City, Inc.*[42] reached this conclusion in a case where the plaintiff alleged that he was dismissed for reporting violations of the Not-For-Profit Corporation Law with respect to overpayments made towards the purchase of specially designed plumbing supplies by a defendant receiving and expending public moneys. Allegations of a constructive discharge based on sexual and religious harassment also did not suffice in *Leibowitz v. Bank Leumi Trust Co. of New York*[43] to create the requisite "substantial and specific danger" within the meaning of Section 740.

Other Section 740 cases which have been dismissed for lack of an adequate showing of a "substantial and specific danger to the public health or safety" include allegations of fraudulent billing of New York City for job placements that were never made by the defendant;[44] the refusal of a law firm to report an associate to the Disciplinary Committee for alleged violations of the Code of Professional Responsibility;[45] and the dismissal of a nurse for refusing to disclose confidential medical records of another employee without the appropriate written authority even if the disclosure would have violated a New York State law proscribing "professional misconduct."[46]

The New York courts have also made clear that employees are not protected from retaliatory discharges for refusing to engage in illegal activity that is not within the scope of Section 740 of the Labor Law. For example, in *Lamagna v. New York State Association For the Help of Retarded Children, Inc.*[47] the Appellate Division, Second Department held that an employee who claimed that he was dismissed based on his discovery of and refusal to participate in alleged fiscal improprieties did not state a claim under the whistleblower statute. Similarly, in *Braig v. Palace Co.*[48] a hotel manager who was discharged allegedly for refusing to cooperate in

[42]141 Misc. 2d 976, 535 N.Y.S.2d 292 (Sup. Ct. N.Y. Co. 1988).

[43]152 A.D.2d 169, 548 N.Y.S.2d 513 (2d Dep't 1989).

[44]*Remba v. Federation Employment & Guidance Serv.*, 149 A.D.2d 131, 545 N.Y.S.2d 140 (1st Dep't 1989), *aff'd mem.*, 76 N.Y.2d 801, 559 N.E.2d 655, 559 N.Y.S.2d 961 (1990).

[45]*Wieder v. Skala*, 144 Misc. 2d 346, 544 N.Y.S.2d 971 (Sup. Ct. N.Y. Co. 1989), *aff'd mem.*, 167 A.D.2d 265, 562 N.Y.S.2d 930 (1st Dep't 1990).

[46]*Easterson v. Long Island Jewish Med. Center*, 156 A.D.2d 636, 549 N.Y.S.2d 135 (2d Dep't 1989), *leave to appeal denied*, 76 N.Y.2d 704, 559 N.E.2d 677, 559 N.Y.S.2d 983 (1990).

[47]158 A.D.2d 588, 551 N.Y.S.2d 556 (2d Dep't 1990).

[48]4 IER Cas. 1264 (Sup. Ct. N.Y. Co. 1989).

an illegal check-cashing scheme did not have a viable cause of action under Section 740.

The cases that have upheld claims based on the New York whistleblower statute are relatively few.[49] Recently, in *Bordell v. General Electric Co.*[50] the Appellate Division, Third Department held that Section 740 of the New York Labor Law was not preempted by federal law in a case involving the reporting of alleged safety violations at a federally-owned, privately operated nuclear facility.

V. *Conclusion*

Although the stated purpose of Section 740 of the Labor Law is "to encourage those at the working level to report hazards to supervisors,"[51] it is clear that this statute has failed to achieve this goal. As a result, it appears that the statute should be amended in at least several respects in order to achieve its stated purpose.

First, the New York whistleblower law should be amended to protect employees who either report or participate in a proceeding involving employer conduct which an employee "reasonably believes" to be a violation of applicable law. This standard had been set forth in the 1982 and 1983 whistleblower bills passed by the New York State Assembly and is found in the whistleblower statutes enacted in Connecticut, New Jersey, and certain other jurisdictions.[52] The current standard of limiting protection to employees who report *actual* violations has clearly discouraged employees from making reports designed to ensure the welfare of the public health and safety.

Secondly, the protection of the New York whistleblower law should be expanded to encompass violations of *any* law, rule or regulations. As made clear by the *Murphy* decision and subsequent case law, this protection does not now exist in New York. Moreover, at the time that Section 740 was enacted, there already existed a number of federal whistleblower laws designed to encourage employees to report without fear of reprisal employer violations of the environmental and safety standards set forth in these laws.[53] As a result,

[49]*E.g., DaSilva v. Clarkson Arms, Inc.*, N.Y.L.J., Nov. 2, 1989, at 24, col. 2B (Sup. Ct. N.Y. Co. 1989).

[50]164 A.D.2d 497, 564 N.Y.S.2d 802 (3d Dep't 1990). For additional federal preemption cases, see Givens, Supplementary Practice Commentary at 52, N.Y. Lab Law §740 (McKinney Supp. 1992).

[51]Givens, Practice Commentary at 546, N.Y. Lab. Law §740 (McKinney 1988).

[52]*See* note 35 *supra.*

[53]*E.g.*, Energy Reorganization Act of 1974, 42 U.S.C. §5851; Air Pollution Prevention and Control Act, 42 U.S.C. §7622; Federal Water Pollution Control Act, 33 U.S.C. §1367.

the current purview of the New York whistleblower law appears to be redundant in many respects to the federal legislation and needs to be expanded particularly in light of the New York Court of Appeals' continued reluctance to recognize common law protection for employee whistleblowers.

Finally, the New York whistleblower statute should be amended to protect employees who refuse to participate in activities which the employee "reasonably believes" to be unlawful. Once again, this provision was contained in the 1982 and 1983 bills that had been passed by the State Assembly but was not included in the current statutory framework.

As urged by the Attorney General's Memorandum to Section 740, the foregoing deficiencies in the New York whistleblower law should "be cured by future legislation."[54] After more than eight years of waiting for more comprehensive whistleblower protection, the time is ripe for the New York State Legislature to pass the legislation required to cure the deficiencies identified in the Attorney General's Memorandum and exemplified by relevant case law. Perhaps the best solution is to adopt the 1983 whistleblower bill which was modelled after laws enacted in other jurisdictions and appears to offer the requisite level of employee whistleblower protection.

[54]*See* note 33 *supra*, and accompanying text. It should be noted that a model Employment Termination Act was approved by a vote of 31 to 19 by the National Conference of Commissioners on Uniform State Laws on August 8, 1991. 137 L.R.R. (BNA) 522 (Aug. 26, 1991). The model act would establish a "good cause" dismissal standard and exclusive arbitration procedure for employees who have worked for the same employer for at least one year, provided that the employer employs at least five workers. The model act also proposes to eliminate common law rights in tort or implied contract for employees covered by the "good cause" standard.