PROTECTING CITIZEN EMPLOYEES FROM EMPLOYER RETALIATION: A COMPARATIVE ANALYSIS

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An employer's demand for an employee's loyalty, time, effort and pursuit of the employer's choice of goals can pose a real dilemma for an employee if the employer's demands conflict with the employee's sense of duty to the public interest. Following an employer's instructions, preserving its confidences, and facilitating its business practices might violate the law in some instances. Strict observance of the employer's work schedule and production goals might make public service as a juror, witness, or voter impossible. Employer demands and public interests cannot always be reconciled, and an employee may have to choose one at the expense of the other.

"Citizen employees" are employees who choose public duty at some cost to their employer and who risk employer retaliation as a result.[1] Citizen employees are defined by their conduct. They question business practices that may involve wrongful activity, resist instructions to aid wrongful activity, complain to higher management or law enforcement authorities about illegal activity, or take time from work to serve the public despite the competing demands of their employment. This article is a very brief description of the need for and unique challenges of providing legal protection for citizen employees.

A citizen employee can provoke a wide range of hostile responses by his employer or fellow employees and managers, who might regard his conduct as insubordinate, disloyal, and even threatening. In this regard citizen employees resemble other special groups of employees defined by law according to their potentially provocative conduct, including employees who exercise personal rights under employment statutes or who support collective bargaining.[2] The defining conduct for each of these protected groups tends to provoke retaliation. Such employee conduct may be essential to achieve a public goal, such as the creation and enjoyment of certain employee rights. What sets citizen employees apart from other employee groups defined by their conduct is the object of citizen employee conduct, which is to further a public interest rather than individual or collective employee interests.[3]

Protecting a citizen employee from retaliation might seem relatively straightforward if the employee were already protected from discharge or other adverse action, as employees sometimes are under contract or certain employment law regimes. In the U.S., however, most employees serve "at will."[4] Under the law of "employment at will," an employer need not prove that its decision to discipline an employee was supported by a good or fair reason. It

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[1] For a more expansive treatment of many of the issues addressed in this article, see, Richard Carlson, *Citizen Employees*, 70 LA. L. REV. 237 (2009), also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354766

[2] *See, e.g.*, National Labor Relations Act, 29 U.S.C. §157 (which grants legal protection for employees who engage in concerted action for the purpose of collective bargaining, among other things).

[3] There are a number of reasons why it is helpful to think of citizen employees as a class distinct from other employee groups defined by conduct. *See* Carlson, *Citizen Employees*, *supra* note 1, at 293-312.

[4] *See, e.g., Walker v. AT&T Tech.*, 995 F.2d 846,849 (8th Cir. 1993). *See also generally* RICHARD CARLSON, EMPLOYMENT LAW 684-688 (2d ed. 2009).

need only rebut an accusation, if any, that it was motivated by one of the many possible "illegal" reasons. Illegal reasons for discipline are quite numerous, and generally involve particularly undesirable and frequent employer motivations, such as age, race or gender discrimination.

An employer's motivation to retaliate because an employee thwarted or reported wrongdoing or performed a public service might to be exactly the sort of motivation that should be prohibited. In fact, there are many federal and state statutes that prohibit employer retaliation against particular conduct that fits within the realm of citizen employee behavior,[5] and there are many court decisions that declare limited "common law" (non-statutory) protection for citizen employees. The Sarbanes Oxley Act[6] (SOX) is certainly the best known of the many laws that apply to different categories of citizen employees. SOX prohibits employer retaliation against employees who report certain types of unlawful business activity within publicly traded corporations. Moreover, the U.S. Supreme Court has recently elevated awareness of the issue of citizen employees by deciding no fewer than six cases important to citizen employees during the past five years.[7]

In reality, however, the U.S. legal system remains somewhat ambivalent toward citizen employees. As a matter of comparative law this attitude might not seem surprising, because it appears that other national legal systems are also ambivalent toward or even uninterested in citizen employees insofar providing any special protection,[8] but many other nations already provide or purport to provide protection in the form of a general requirement of "cause" for discharge or discipline. In the U.S., the ambivalence of the legal system toward

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[5] Looking only at federal statutes, and excluding employment statutes that provide anti-retaliation protection in their enforcement provisions, there are at least nineteen laws protecting employees for defined conduct serving particular public interests, including most recently the American Recovery and Reinvestment Act of 2009. *See* CARLSON'S FEDERAL EMPLOYMENT LAWS ANNOTATED 2008, p. 637 (Thomson West 2008). If one adds enforcement provisions of federal employment laws like Title VII, which prohibit retaliation against an employee who has "opposed" unlawful, employment practices, 42 U.S.C. §2000e-3, the total is somewhere between twenty and thirty, depending on one's definition of "citizen employee" and one's interpretation of some federal statutes. For a collection of such employment discrimination statutes and their anti-retaliation provisions, see CARLSON'S FEDERAL EMPLOYMENT LAWS ANNOTATED 2008, p. 540 (Thomson West 2008)

Even more statutes protect citizen employees at the state level. Texas, which tends to be comparatively conservative in the creation of employee rights, has at least fifteen separate statutes protecting various forms of citizen employee conduct. *See* Austin v. Healthtrust, Inc., 967 S.W.2d 400 (1998).

[6] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, sec. 846, 116 Stat. 745 (codified in scattered sections of 15 & 18 U.S.C.).

[7] Crawford v. Metropolitan Government of Nashville and Davidson County, ___ U.S. ___, 129 S. Ct. 846 (2009) (Title VII's "opposition" clause prohibits retaliation against an employee whose statement to employer's own investigators corroborates another employee's allegation of harassment); Gomez-Perez v. Potter, 128 S.Ct. 1931 (2008) (statute prohibiting "discrimination on the basis of age" against federal employees implicitly includes prohibition against retaliation); CBOCS West, Inc. v. Humphries, ___ U.S. ___, 128 S.Ct. 1951 (2006) (Reconstruction Era civil rights law guaranteeing that all persons shall have the same right "to make and enforce contracts … as in enjoyed by white citizens" implicitly includes a prohibition against retaliation against those who complain of violations of this provision); Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (regarding what adverse actions violate an explicit anti-retaliation provision in federal employment discrimination law); Jackson v. Birmingham Bd. of Education, 544 U.S. 167 (2005) (finding that a federal prohibition against discrimination in education implicitly prohibits employer retaliation against employees who report such discrimination); Garcetti v. Ceballos, 547 U.S. 410 (2006) (First Amendment does not protect public employees whose speech is pursuant to their official duties).

[8] *See* **Error! Main Document Only.**Matthias Schmidt, *"Whistle Blowing" Regulation and Accounting Standards Enforcement in Germany and Europe—An Economic Perspective*, 25 INT'L REV. L. & ECON. 143 (2005)

citizen employees is particularly important because there is no general protection against discipline that is merely "unfair." Moreover, ambivalence can still undermine effective protection even under a law requiring good or just cause for discipline, because disciplinary action is not the only form of employer retaliation. Employees can be injured or discouraged if they know that managers who control access to raises and promotions will be displeased by conduct that favors the public interest over the employer's interest. Of course, even a law that seems on its surface to vigorously prohibit employer retaliation might fall short for any of a variety of technical or administrative reasons. For example, while SOX was once widely regarded as the gold standard for anti-retaliation laws in the U.S., recent research shows that employee claimants rarely succeed in proceedings under SOX, due at least in part to restrictive coverage and procedural or administrative hurdles.[9]

Enacting effective anti-retaliation laws for citizen employees is important because there are compelling reasons to believe that employers do interfere with and retaliate against citizen employees, and that the lack of protection deters some would-be citizen employees and thereby facilitates crime and abuse of public interests. Surveys of workplace behavior and records of corporate scandal in the U.S. give reason to suspect that management suppression of citizen employee conduct is widespread and causes serious harm to the public's economic, environmental, safety and health interests.[10] These surveys and scandals suggest that many employees are persuaded to assist in illegal activity or opposition to public interests, and that an even greater number look the other way and fail to oppose or report the activity.

Granting employees a legal remedy for retaliation tips the balance more favorably toward the public interest. Admittedly, a legal right to oppose, and if necessary sue an employer or its managers might not appeal to many employees who are otherwise secure in their jobs or who feel a greater loyalty to the firm or its management.[11] However, offering employees a legal remedy for retaliation has at least three potentially important effects. First, it increases the possibility that at least one employee will act for the public interest, and that possibility might be enough to deter or reveal the misconduct. Second, an employer's own awareness of the remedy is likely to make it more careful to comply with the law. Finally, one employee's demonstration of the remedy by lawsuit can shock actual or potential wrongdoers, encourage other potential citizen employees, and counteract a creeping culture of wrongdoing within a firm.

U.S. lawmakers have frequently acknowledged the need to protect citizen employees, as attested by numerous laws enacted over the span of more than a century.[12] However, in contrast with the comprehensive legislation prohibiting race or gender discrimination,[13] each

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[9] Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WILLIAM & MARY L. REV 65 (2007).

[10] *See* Robert Walters and Michael Marin, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 331 (2005) (reporting that people earning less than $35,000 annually were especially likely to experience action by their employers to discourage them from jury service); Richard Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, at 1108, 1120 (2006); James Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 OR. L. REV. 435, 460 (2004); Carlson, *Citizen Employees*, *supra* note 1 at 252-56.

[11] There are some laws that sweeten the rewards for whistleblowers by providing bounties for successful whistleblowing. *See, e.g.*, the False Claims Act, 31 U.S.C. §3730.

[12] *See* Carlson, *Citizen Employees*, *supra* note 1, at 256-276.

[13] *See* 42 U.S.C. §§2000e et seq. (popularly known as "Title VII") (prohibiting discrimination in employment on the basis of race, color, national origin, sex, or religion.

law prohibiting retaliation against citizen employees tends to address only narrow categories of employees, limited forms of conduct (such as reporting to public law enforcement authorities), and specific public policies.[14] SOX exemplifies this approach. It applies only to publicly traded corporations, not privately owned corporations or non-profit entities.[15] Even an employee of a covered corporation is not protected unless he reported a violation of one of a specific set of federal securities and fraud statutes.[16] *Refusing to engage in* a violation of federal securities or fraud statutes, or reporting or resisting a violation of some other type of law does not appear fall within the scope of SOX.[17]

Limitations such as these are typical of U.S. legislation protecting citizen employees, with the result that many employees who act in the public interest are without protection for the employment sector of which they are a part, the conduct in which they engaged, or the policy they supported. Gaps in protection are a special problem in a legal regime based on employment at will. If there is no rule specifically prohibiting the employer's action, the employer need not have a fair or just reason for its action.

The lack of comprehensive law is probably a reflection of judges' and lawmakers' ambivalence toward citizen employees, and of their doubt whether it is possible to draft a law of general applicability that offers a suitable balance of employer, employee and public interests. There are several reasons for ambivalence. First, opponents worry that citizen employee complaints are likely to be more difficult and expensive to investigate and to rebut than other wrongful discharge claims. Fear of a new and costly wave of litigation is heightened by the possibility of an employee's tactical engagement in protected activity either to forestall disciplinary action or to provide a colorable basis to challenge disciplinary action that is actually based on some legitimate ground. Opponents of citizen employee laws also argue that employees will use such protection as a self-serving excuse for insubordination or to blackmail their supervisors. Existing laws for citizen employees provide a measure of experience which may be useful in gauging the seriousness of these concerns. In general, it appears that laws prohibiting retaliation against citizen employees have been much less burdensome to employers than other laws prohibiting race, gender, age or other forms of discrimination. Moreover, considering the benefits that citizen employee protection can deliver in the form of better compliance and law enforcement, the additional costs of litigation or opportunistic employee behavior are probably well within an acceptable range.

Still, any truly comprehensive law for protecting citizen employees will likely need to address the sorts of objections that apparently have slowed the progress of the law. One key

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[14] *See* Carlson, *Citizen Employees*, *supra* note 1, at 276-281.

[15] *See* Dana Brakman Reiser, Dana Brakman Reiser, *Enron.org: Whey Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205 (2004). Some recent decisions even suggest that SOX will not protect employees of subsidiaries of publicly-traded corporations. Moberly, *Unfulfilled Expectations*, *supra* note 9, at 33.

[16] SOX protects an employee only if he reported a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, a rule or regulation of the Securities or Exchange Commission, or a federal law relating to fraud against shareholders. 18 U.S.C. §1514A(a)(1). The mere possibility that reported "fraud" could adversely affect the company's financial condition, and thereby be adverse to shareholders, is not enough to qualify as the basis for protected reporting. Moberly, *Unfulfilled Expectations, supra* note 17, at 35, 54–55. *See also* Geoffrey C. Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 BOSTON UNIV. L. REV. 91, 110 (2007) (summarizing decisions of administrative law judges under SOX).

[17] Getman v. Southwest Securitiers, No. 04-059 (ARB July 29, 2005). The decision is described in Moberly, *supra* note 9, at 55-56.

to drafting effective but acceptable citizen employee protection is to encourage suitable behavior by both employees and employers in the event of a clash between business and public interests. There are at least three ways in which citizen employee legislation can channel employer and employee behavior in ways likely to reduce conflict while furthering the public interest.

First, in the case of employee behavior, protective legislation should require reasonable conduct proportionate to the nature and seriousness of the public interest at stake. A British law protecting whistleblowers provides one model for this approach. British law recognizes three levels of whistleblowing: internal (within the firm), external (to law enforcement authorities) and beyond (mainly the media).[18] An employee gains protection by beginning at the first level and working his way to the third level only if the first two levels have failed. One can imagine a similar approach to other forms of protected conduct, such as a refusal to assist in an illegal act. For example, refusing to carry out an employer's order might be over-zealous and cause undue interference with legitimate business if the potential harm to the public good is not immediate and can be addressed over time.

Second, in the case of employer behavior, the law should provide a reward for the employer's creation of procedures to receive employee objections and review potential conflicts with the public interest. In this regard, SOX may provide a useful model. Among other things, SOX requires covered employers to establish protected channels of communication and investigation to address employee questions, reports and grievances.[19]

Finally, a law for the protection of citizen employees should require both employers and employees to engage in the sort of "interactive" pursuit of accommodation that the courts now require of employers and employees in cases of disability or religious discrimination. The interactive process rule encourages employers and employees to communicate reasonably about potential conflicts, to explore solutions, to and to educate each other about their (or the public's) respective interests and needs.[20]

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[18] Schmidt, *supra* note 8, at 155-56.

[19] *See* Moberly, *Structural Model*, supra note 47.

[20] *See* Carlson, *supra* note 1, at 290.