1987

Protecting Worker Complaints After Meyers Industries

Barbara Fick
Notre Dame Law School, barbara.j.fick.1@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship

Part of the Labor and Employment Law Commons

Recommended Citation
Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/267
PROTECTING WORKER COMPLAINTS AFTER MEYERS INDUSTRIES

BARBARA J. FICK*

I. INTRODUCTION

The decision of the National Labor Relations Board in *Meyers Industries* effectively pulled the rug out from under many workers who had previously enjoyed protection from retaliatory discharge for work-related claims and complaints. The law does not leave those employees wholly unprotected, however. Other statutory and common-law remedies are available to provide some of the protection afforded workers under the National Labor Relations Act (NLRA) before the *Meyers Industries* decision.

This Article examines the effect of the *Meyers Industries* decision on the protection available to workers under the NLRA, and discusses other statutory and common-law remedies protecting workers now foreclosed from NLRA protection as a result of *Meyers Industries*.

II. THE NLRA, CONCERTED ACTIVITY AND MEYERS INDUSTRIES

The underlying purpose of the NLRA is to eliminate obstructions to the free flow of interstate commerce by encouraging the practice and procedure of collective bargaining between private sector employers and their employees. To achieve this end, the NLRA protects the rights of workers to form unions and regulates the relationship between employers and unions. The essence of the statute is contained in section 7, which lists the rights of workers under the NLRA.

---

* Associate Professor of Law, Notre Dame Law School. Creighton University, B.A. 1972; University of Pennsylvania, J.D. 1976.


5. Section 7 provides:

   Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall
The source of protection under the NLRA for work-related complaints and claims is found in section 7, which gives employees the right "to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection." These employee rights are protected from employer interference, restraint, or coercion. Thus, in establishing the terms or conditions of employment, an employer may not lawfully discriminate against an employee who has engaged in concerted activity within the scope of section 7.

The key term in section 7 is "concerted," and it is in defining this term that the Meyers Industries case has its greatest impact. As the Supreme Court noted in NLRB v. City Disposal System, Inc.:

The term "concerted activities" is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals. What is not self-evident from the language of the Act, however, and what we must elucidate, is the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity.

A. Concerted Activity Before Meyers Industries

Before the Meyers Industries decision, the National Labor Relations Board (Board) had broadly construed the term "concerted," accepting both indirect and direct evidence as being probative of whether employees had engaged in concerted activity. The Board had not read the concerted requirement out of section 7. To fall within the ambit of "concerted" activity, it had always been necessary to show some link or relation between the activity of an individual and the concerns or inter-

also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .

6. Id.
7. 29 U.S.C. § 158(a)(1) provides:
   It shall be an unfair labor practice for an employer—
   (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title.
8. See, e.g., NLRB v. Erie Resistor Co., 373 U.S. 221, 231 (1963) (grant of superseniority to non-strikers held discriminatory); NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962) (discharge for engaging in concerted activity held discriminatory). Discrimination regarding terms and conditions of employment includes not only discharge, but also discipline, promotions, and wage rates.
10. Id. at 830-31 (citation omitted).
That link or relationship is clearly present when two or more employees act together on a work-related issue. Just as clearly, an individual worker voicing a purely personal complaint is not engaged in concerted activity; there is no link between the activity of the solitary, complaining worker and the concerns or interests of other workers. Between those two extremes, however, the Board has been willing to consider evidence showing that the act of an individual employee relates to the concerns or interests of other workers. The Board characterizes the individual's complaint as a continuation of the concerted activity that produced the agreement in the first place. Further, all employees share an interest in ensuring that the terms of the agreement are honored by the employer.

This link between the individual's complaint and the interests and activities of other employees created by the collective bargaining agreement is known as the Interboro doctrine, stemming from the Board's decision in Interboro Contractors, Inc. The United States Supreme Court has upheld this doctrine in several cases.

11. See Continental Mfg. Corp., 155 N.L.R.B. 255, 256-58 (1965), in which an employee's letter criticizing certain management actions regarding working conditions was not found to be concerted activity. Because the letter was not approved by the union, was not the result of group discussion, was not an expression of other employees' views, and was not intended to enlist the support of other workers, there was no link between the letter and the concerns or interests of other employees. See also Northeastern Dye Works Inc., 203 N.L.R.B. 1222, 1223 (1973) ("in order for [the complaining worker's] complaints to have been protected, they must have related to the correction of working conditions which were of concern to the group of employees allegedly being represented by him and he must have been speaking for the benefit of the interested group, not merely for himself") (footnote omitted).


14. See, e.g., Roadway Express, Inc., 217 N.L.R.B. 278 (1975), enf'd. per curiam, 532 F.2d 751 (4th Cir. 1976) (employee's refusal to drive an unsafe vehicle protected by collective bargaining agreement conferring such a right); Interboro Contractors, Inc., 157 N.L.R.B. 1295 (1966) (employees' complaint about working conditions covered under the collective bargaining agreement was concerted activity), enforced, 388 F.2d 495 (2d Cir. 1967).

Court endorsed the *Interboro* doctrine, and the rationale behind it, in *NLRB v. City Disposal Systems, Inc.* The Court characterized inter-circuit conflict over the *Interboro* doctrine as "reflect[ing] differing views regarding the nature of the relationship that must exist between the action of the individual employee and the actions of the group in order for section 7 to apply." In affirming the *Interboro* doctrine, the Court clearly stated that "the language of section 7 does not confine itself to such a narrow meaning" of concerted as that of requiring the presence of two or more employees working together toward a common goal. So long as there exists a relationship between the action of the individual and the action of the group, an individual can be engaged in concerted activity even though he acts alone.

In addition to the presence of a collective bargaining agreement, the pre-*Meyers* Board considered other facts as evidence tending to show the existence of a relationship between individual and group action. In *Alleluia Cushion,* the company discharged a worker because of his complaints, made to a state safety and health agency, alleging violations of the state safety and health law. Although the individual acted alone in making his complaints, the policy underlying the state safety and health laws served as a link between his complaints and the interests of the other workers. Thus:

[S]ince minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interests, the consent and concert of action emanates from the mere assertion of such statutory rights.

This theory is very similar to the rationale underlying the *Interboro* doctrine: just as all employees have an interest in ensuring the enforcement of their contract, so too they have an interest in ensuring enforcement of legislation designed to protect their safety at work.

17. Id. at 831. The Court also noted that "[e]ven the courts that have rejected the *Interboro* doctrine recognize the possibility that an individual employee may be engaged in concerted activity when he acts alone." Id.
18. Id.
19. Id.
21. Id. at 1000.
22. This rationale was applied in subsequent cases involving unemployment compensation, *Self Cycle & Marine Distrib. Co.*, 237 N.L.R.B. 75 (1978) (filing claims for unemployment compensation benefits entitled to § 7 protection because the benefits arise out of the employment relationship and are an aspect of national labor policy); workers' compensation, *Krispy Kreme Doughnut Co.*, 245 N.L.R.B. 1053 (1979) (workers' compensation benefits are of common interest to other employees and therefore filing a claim for benefits is protected under § 7), *enforcement denied*, 635 F.2d 304 (4th Cir. 1980); overtime claims, *United Investment Corp.*, 249 N.L.R.B. 1058 (1980) (individual employee's claim for back overtime wages was concerted activity
A corollary theory based on the Alleluia Cushion rationale held that an individual employee's refusal to engage in activity in violation of law was concerted activity. An employee's refusal to violate the law represents an attempt to guarantee legal working conditions and to ensure that the employer complies with the law. Those objectives form the link between the individual employee's actions and the concerns of other employees. When an employee acts to avoid violating state law, his actions express the common concern of all employees about their terms and conditions of employment.

The case of Diagnostic Center Hospital illustrates a second method for showing a relationship between an individual action and group concern. The employees at the Center had discussed among themselves their desire for a ten percent pay increase as well as their dissatisfaction with what they perceived to be racism, sexism, and favoritism in the workplace. Subsequently, employee Birdwell wrote a letter to the employer outlining the complaints. Although Birdwell acted on her own, the Board nevertheless found Birdwell's conduct to be concerted.

Birdwell's conduct was concerted and protected irrespective of whether she was overtly designated by other employees to act on their behalf or informed any employee that she was doing so. It is clear from the circumstances that Birdwell's fellow employees shared her concern and interest in the subject matter of the letter and, consequently, that Birdwell was acting concertedly on behalf of her fellow employees.

Thus, the Board found that individual actions based on matters of mutual concern to other employees were concerted. Evidence of the employee discussed the matter with fellow employees before filing the claim, leading to similar claims by other employees; and wage discrimination, Country Club of Little Rock, 260 N.L.R.B. 1112 (1982); Dawson Cabinet Co., 228 N.L.R.B. 290, enforcement denied, 566 F.2d 1079 (8th Cir. 1977) (cases in which wage discrimination claims found to be concerted activity because of effect on other employees and national labor policy).


27. Id. at 1217. The Board, however, held that Birdwell's discharge did not violate § 8(a)(1) because the employer was unaware of the fact that Birdwell had written the letter; therefore, protected, concerted activity was not the reason for the discharge. Id. at 1216.
ployees' discussion of the issue, as in Diagnostic Center, or evidence that the resolution of the individual employee's grievance would affect the other employees as well, can show the existence of mutual concern.

The case of Akron General Medical Center presented the latter situation. An employee complained to his employer on two separate occasions that the presence of lint and dust in the work area made it difficult for him to breathe. The Board found his complaint to be concerted, because the atmosphere in the workplace affected all employees. The employee's objective in filing the complaint encompassed the well-being of all the employees. The Board had previously expressed the Akron rationale in Oklahoma Allied Telephone Co., finding an individual's grievance about heat and fumes in the workplace to be concerted, because conditions "could not have been adjusted favorably without benefit from such adjustment flowing to the other employees."

The notion that the link between individual action and group concern could be established by indirect evidence did not render the concertedness requirement superfluous. Instead, indirect evidence provided only a presumption of concertedness that could be overcome by "evidence that fellow employees disavow such representation." Such was the case in Comet Fast Freight, Inc., in which an individual employee


29. See, e.g., Pink Moody, 237 N.L.R.B. at 40 (defective condition of a truck's brakes was a matter of mutual concern because the truck was driven by multiple employees); Akron Gen. Medical Center, 232 N.L.R.B. 920 (1977) (resolution of an employee grievance over lint and dust was of concern to the health of all employees); Air Surrey Corp., 229 N.L.R.B. 1064 (1977) (an individual employee's action in checking on the employer's ability to meet the current payroll "encompassed the well being of his fellow employees"), enforcement denied, 601 F.2d 256 (6th Cir. 1979).

31. Id. at 927. See also Air Surrey Corp., 229 N.L.R.B. at 1069.
33. Id. at 920.
34. Alleluia Cushion, 221 N.L.R.B. at 1000. The concept of proving a prima facie case by use of indirect evidence raising a presumption of the existence of the fact in question is well known in employment discrimination law. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court provided a four-part model of indirect evidence creating a presumption that the employment action was based on illegal discrimination. The presumption could be rebutted by the employer's evidence of some legitimate, nondiscriminatory reason for the employment action. See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (defendant can rebut the presumption by producing evidence of a legitimate, nondiscriminatory reason for discharge).
35. 262 N.L.R.B. 430 (1982).
refused to drive a truck that he reasonably believed was unsafe. Because other employees also drove this truck occasionally, the individual's "complaint involved a safety problem of concern to all of them."\textsuperscript{36} The defendant successfully rebutted this presumption of concertedness by offering direct evidence that the other employees did not mind driving the truck and did not join the plaintiff in his complaint. "Given such record evidence, we [the Board] would be hard-pressed to rely upon a supposition of common cause, which, in this particular case, has no basis in fact."\textsuperscript{37}

In summary, before \textit{Meyers Industries}, if the Board found that individual action was related to an issue of group concern, as evidenced by a collective bargaining agreement, a work-based statutory right, or other matters of mutual concern, then the individual action was presumed to be concerted.

**B. Concerted Activity and Meyers Industries**


\textit{Meyers Industries} altered the requisite elements of the relationship that must exist between the action of an individual employee and the concerns of the group in order for individual action to be concerted. In \textit{Meyers}, Ken Prill, a truck driver, complained to his employer on several occasions about the unsafe condition of the truck he was driving. When the company assigned another employee to drive the truck, the second employee also complained about the truck's unsafe condition. On two separate occasions, once on a trip to Ohio and once in Tennessee, Prill had complained to state authorities about the condition of the truck, and each time the authorities issued a citation. The company then discharged Prill because of his complaints and his refusal to drive the unsafe vehicle.\textsuperscript{38} The administrative law judge found that the discharge violated section 8(a)(1) of the NLRA, on the "presumption that an individual employee engages in concerted activity [within the scope of section 7] where his conduct arises out of the employment relationship and is a matter of common concern among all employees."\textsuperscript{39} Although the employer could have rebutted the presumption by showing that Prill's complaints were either not made in good faith, or were peculiar to himself and were not shared by other employees, the employer failed to do so.\textsuperscript{40} Prill's complaints, therefore, "inured to the benefit of all employees and thus constituted protected concerted

\begin{itemize}
\item \textsuperscript{36} Id. at 430 (quoting the finding of the administrative law judge).
\item \textsuperscript{37} Id. at 431.
\item \textsuperscript{38} 268 N.L.R.B. 493, 497-98 (1984).
\item \textsuperscript{39} Id. at 506.
\item \textsuperscript{40} Id. at 508.
\end{itemize}
activity."\textsuperscript{41}

The Board, however, reversed the decision of the administrative law judge in \textit{Meyers}, and in the process overruled \textit{Alleluia Cushion} and its progeny.\textsuperscript{42} The \textit{Meyers} Board characterized the \textit{Alleluia} rationale as a subjective standard, in which the Board determined which issues employees \textit{should be} concerned about, instead of looking at "observable evidence" of group action to determine which issues \textit{actually} concerned the employees.\textsuperscript{43} The effect of the subjective standard, according to the \textit{Meyers} Board, was to shift the burden of proof to the employer, who would have to prove that the activity was \textit{not} concerted.\textsuperscript{44}

The \textit{Meyers} Board proposed an "objective" standard of concerted activity to replace \textit{Alleluia Cushion}. The \textit{Meyers} standard requires that activity "be engaged in with or on the authority of other employees" in order to be concerted.\textsuperscript{45} There must be "observable evidence" of the relationship between individual activity and group concern; in other words, there must be direct evidence that the individual engaged in his activity with other employees or on their authority.\textsuperscript{46} Indirect evidence of such a relation will no longer suffice. The \textit{Meyers} Board would continue to find activity concerted when two or more employees are involved and in situations in which the \textit{Interboro} doctrine is applicable.\textsuperscript{47} The effect of this new definition of concerted activity is to remove from the protection of section 7 those circumstances governed by the rationale set forth in cases like \textit{Alleluia Cushion}, \textit{Diagnostic Center}, and \textit{Akron General Medical Center}. A brief look at several post-\textit{Meyers} cases illustrates the decline in employee protection.

In \textit{Beardon & Company, Inc.},\textsuperscript{48} the employer had a policy of refusing to recall laid-off employees who filed unemployment compensation claims during their layoffs. The Board held that neither the employee...
ployer policy nor its implementation violated section 8(a)(1).\textsuperscript{49} Filing an unemployment compensation claim did not satisfy the objective standard for concerted activity; an unemployment compensation claim is an individual act, which does not concern or involve any other employee.\textsuperscript{50} Although the employer's policy interfered with the filing of an individual claim, the policy did not interfere with concerted activity.\textsuperscript{51} Moreover, the Board found the simultaneous filing of claims by members of an employee group to be insufficient for a showing of concerted activity. The Board reasoned that the employees would be filing separate and independent claims, the validity of which would be independent of the validity of any other claim.\textsuperscript{52} 

In \textit{Jefferson Electric Co.},\textsuperscript{53} fumes spreading throughout an employer's plant sickened eleven employees, hospitalizing three of them. One of the hospitalized employees filed a complaint with the state safety and health agency and was subsequently discharged by the company.\textsuperscript{54} Relying on \textit{Meyers}, the Board held that the discharge did not violate section 8(a)(1) because there was no evidence that the employee in question had consulted with any other employees before filing the complaint, nor had any other employees been involved in the actual filing.\textsuperscript{55}

Lastly, in \textit{Mannington Mills},\textsuperscript{56} several employees complained to their elected employee representative on a joint management-employee committee about performing a certain type of work. The employee representative conveyed the complaint to the committee, which told him to discuss the issue with the foreman. The representative told the foreman that he and the other employees objected to performing the work at issue and would not do so in the future.\textsuperscript{57} The Board found that discharging the representative for making the threat to refuse to work did not violate section 8(a)(1) because the threat had not been authorized by the other employees.\textsuperscript{58} The employees' complaint did not include such a threat and the representative did not discuss the threat with the employees. Thus, although the representative's complaint to the foreman was concerted activity because it was made on the authority of

\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.} at 932 n.2. Compare this result with the \textit{pre-Meyers} case \textit{Self Cycle & Marine Distrib. Co.}, 237 N.L.R.B. 75 (1978), in which the Board held unemployment benefits to be a matter of common interest to other employees.
\textsuperscript{51} \textit{Beardon & Co.}, 272 N.L.R.B. at 932.
\textsuperscript{52} \textit{Id.} at 932 n.2.
\textsuperscript{53} 271 N.L.R.B. 1089 (1984).
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.} Compare this result with the \textit{pre-Meyers} case \textit{Alleluia Cushion}, 221 N.L.R.B. 999 (1975)
\textsuperscript{56} 272 N.L.R.B. 176 (1984).
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
other employees, the threat to refuse to perform the work was not authorized and therefore not concerted.\textsuperscript{99}

2. Appeals and Remands

On appeal, the Board's decision in \textit{Meyers Industries} was remanded by the Court of Appeals for the D.C. Circuit.\textsuperscript{60} A companion case, \textit{Herbert F. Darling, Inc.},\textsuperscript{61} was remanded by the Court of Appeals for the Second Circuit. In remanding those cases to the Board, both circuit courts held that the literal interpretation of concerted activity adopted in \textit{Meyers Industries} was not required by the National Labor Relations Act.\textsuperscript{98}

The Second Circuit specifically discussed a presumption of concerted activity based on an individual's assertion of a statutory right.

\textsuperscript{59} \textit{Id.} Compare this result with the pre-\textit{Meyers} case \textit{Steere Dairy, Inc.}, 237 N.L.R.B. 1350, 1351 (1978) (employee's complaint made on behalf of all company employees and therefore concerted).

A recent decision, however, indicates a possible retrenchment from the rationale espoused in \textit{Mannington Mills}. In \textit{Every Woman's Place, Inc.}, 282 N.L.R.B. No. 48 (1986), members Johansen and Stephens held that an employee's individual call to the Department of Labor Wage-Hour Division concerning overtime pay was a continuation of earlier group complaints about overtime made to the employer, and therefore was concerted activity. They found "concert" even though no other employee authorized the individual to make the call, and no other employees were aware that such a call was made. "It is immaterial that she was not following express instructions from the other employees in doing so. It was specifically noted in \textit{Meyers} that, when the record showed the existence of a group complaint, the Board would not require evidence of formal authorization in order to find that steps taken by individuals in furtherance of the group's goals are a continuation of activity protected by Section 7 of the Act." 282 N.L.R.B. No. 48, slip op. at 2-3. Member Stephens distinguished the \textit{Mannington Mills} case by noting that the unauthorized statement was a threat of a partial work stoppage that arguably constituted unprotected activity; he posited that specific authorization may be required when the individual employee's conduct concerns unprotected activity. \textit{Id.} at 3 n.4. Neither Stephens nor Johansen were Board members when \textit{Mannington Mills} was decided; both were on the Board when \textit{Meyers II} issued, although Johansen did not participate in that decision.

Board Chairman Dotson dissented in \textit{Every Woman's Place}, finding the decision to be a departure from the \textit{Meyers} analysis. Chairman Dotson would require a finding that individual action was "performed on authority of the protected group" in order for it to be concerted. \textit{Id.} at 7-8. \textit{See also} \textit{Salisbury Hotel, Inc.}, 283 N.L.R.B. No. 101 (1987).

\textsuperscript{60} \textit{Prill v. NLRB}, 755 F.2d 941 (D.C. Cir. 1985).

\textsuperscript{61} 273 N.L.R.B. 346 (1984), \textit{rev'd and remanded sub nom. Ewing v. NLRB}, 768 F.2d 51 (2d Cir. 1985). In that case, the Board found that an employer who refused to recall a laid-off employee based on the mistaken belief that the employee had complained to the Occupational Safety and Health Administration had not violated § 8(a)(1). There was no evidence that the employer thought the employee had acted with others in making the complaint; thus the employer did not believe the employee was engaged in concerted activity.

\textsuperscript{62} \textit{Ewing}, 768 F.2d at 54; \textit{Prill}, 755 F.2d at 950.
"Group support may rationally be assumed, absent evidence to the contrary, because fellow employees presumably want to be free to assert such a right without fear of losing their jobs." The court noted that the presumption could be rebutted by employer evidence that the individual's action was frivolous or in bad faith.

Neither the D.C. Circuit nor the Second Circuit prohibited the Board from adhering to its interpretation of "concerted" as adopted in Meyers Industries. The decisions merely stated that the "objective" standard of Meyers is not mandated by the language of the statute. The Board may still adopt that standard based on its belief that such a definition better effectuates the policies behind the Act.

On remand, the Meyers Board elected to adhere to the definition of concerted activity as formulated in the original Meyers decision. "[W]e [the Board] have exercised our discretion and have chosen the Meyers I definition over other possibly permissible standards . . . ." The Board found this interpretation "most responsive to the central purposes for which the Act was created."

The focus of the NLRA is on collective activity, and protection of that activity "lies at the heart of the Act." The Board focused on collective activity as the touchstone for its interpretation of the scope of concerted activity within the meaning of section 7.

The Board also found the analysis contained in Meyers I to be consistent with the Supreme Court’s decision in City Disposal. In City Disposal, the Court’s inquiry focused on the nexus joining the individual employee’s action to the actions of the group. In collective bargaining cases, the Court found this link to be based upon two factors: first, an individual’s assertion of a right under the collective-bargaining agreement is an extension of the collective activity that produced the agreement; and second, the assertion of that right affects all employees in the bargaining unit. The Board acknowledged that the second factor resembles the rationale of Alleluia Cushion, which deemed an individual employee’s attempt to enforce statutory rights designed for the benefit of all employees to be concerted. The Board found, however,

63. Ewing, 768 F.2d at 55.
64. Id. at 56. This holding is consistent with prior Second Circuit cases that accept the presumption of concerted activity absent a showing by the employer of bad faith on the employee’s part. See, e.g., Socony Mobil Oil Co. v. NLRB, 357 F.2d 662 (2d Cir. 1966).
65. Id. at 56; Prill, 755 F.2d at 956-57.
67. Id.
68. Id. at 4.
69. Id. at 4-6.
70. Id. at 6-7.
71. Id. at 7-9.
72. Id.
that the Court's only subsequent reference to the second factor was to link it to the "mutual aid and protection" clause of section 7, not the concerted activity clause. Thus, the first factor contained the thrust of the Court's analysis of the term "concerted."³³

Although the Board agreed that efforts to enforce statutory rights of benefit to other employees are for the purpose of mutual aid or protection, this by itself does not satisfy the showing necessary for "concerted activity." The invocation of statutory rights cannot fairly be considered an extension of collective activity. In the absence of a link to collective activity, the individual's acts are too remotely related to the activities of other employees.³⁴ Thus, the guidelines that the Board gleaned from City Disposal supported the Meyers definition of concerted activity.

This "new" definition does not state that individual employee conduct can never be concerted, but instead places limits on when the act of an individual is concerted.³⁵ Thus, an individual employee who presents a work complaint to management can be engaged in concerted activity if the group specifically authorizes the employee to speak on their behalf, or the group relies on the individual employee's action to protect their rights.³⁶ Additionally, the Meyers I definition encompasses individual action that seeks to induce group action.³⁷ Finally, even if an individual is not engaged in concerted activity, his discharge may violate section 8(a)(1) if it has a "chilling effect" on other employees' concerted activities.³⁸

Having reaffirmed the Meyers Industries' objective standard of concerted activity, the Board now interprets the NLRA as leaving unprotected those individual workers who exercise employment-based statutory rights, or act alone in furtherance of general employee concerns. The remainder of this Article will discuss alternative statutory and common-law protections available to workers in such circumstances.

---

³³ Id. at 8-9.
³⁴ Id. at 17-19. The Board also noted that, although it is required to interpret the labor laws "so as to accommodate the purposes of other Federal laws," this does not mean that the Board is required to enforce these other laws. Id. at 19.
³⁵ Id. at 11.
³⁶ Id. at 13-15.
³⁷ Id. at 15-16. In Scientific-Atlanta, Inc., 278 N.L.R.B. No. 90 (1986) (a post-Meyers I case), the Board found that the demotion of an employee for her conversations with individual employees informing them of company promotions violated § 8(a)(1). Section 7 protection extends to employee concerted activity that, at its inception, involves only a speaker and a listener.
³⁸ Meyers Indus., 281 N.L.R.B. No. 118, at 20-21; see also Unico Replacement Parts, Inc., 281 N.L.R.B. No. 46 (1986) (chilling effect resulting from supervisor threat to employee regarding complaints).
III. **Statutory Protection of Worker Complaints**

A. **Scope and Range of Anti-retaliation Statutes**

Many federal and state statutes regulating the employment relationship contain specific anti-retaliation provisions, commonly included because of the relationship between the employer and employee—the employee is in an economically dependent position vis-a-vis the employer. The employer controls the wages received by the employee, as well as the job itself. The employee who seeks to assert the rights and protections provided by employment legislation is in an especially vulnerable position because of his dependence on the employer who is the target of the legislation.

Employers are generally not pleased with laws restricting their managerial prerogatives, and tend to react negatively when these restrictions are enforced. The natural target for this reaction is the employee. Recognizing this situation, legislatures attempt to prevent the problem by including anti-retaliation provisions in many employment-related statutes.

---

79. The Supreme Court has recognized this situation:

And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent....


80. See, e.g., **Mitchell v. Robert DeMario Jewelry, Inc.**, 361 U.S. 288 (1960). In that case, the Court stated:

For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. By the proscription of retaliatory acts... Congress sought to foster a climate in which compliance with the substantive provision of the [Fair Labor Standards] Act would be enhanced.

**Id.** at 292 (citation omitted). See also **Taylor v. Brighton Corp.**, 616 F.2d 256, 260 (6th Cir. 1980) ("There was concern, however, that the possibility of retaliatory discharge might inhibit employees from reporting OSHA violations. As a result, both the House and the Senate inserted provisions prohibiting discrimination against employees who report OSHA violations.") (citation omitted); **Phillips v. Interior Bd. of Mine Operations Appeals**, 500 F.2d 772, 778 (D.C. Cir. 1974) ("Miners who insist on health and safety rules being followed... are not likely to be popular with... mine top management. Only if the miners are given... protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced.") (cert. denied, 420 U.S. 938 (1975)).

At the federal level alone, there are over a dozen laws protecting private sector workers who raise health and safety concerns about the workplace. As will be seen from the discussion in the text which follows, although the purpose behind these laws is uniform, their coverage and enforcement provisions lack consistency and congruity. Re-
Anti-retaliation provisions usually fall into four broad categories:
(1) protection of workers who participate in enforcing the statute; \(^81\) (2) protection of employees who voice their complaints about statutorily protected subject matter directly to their employers; \(^82\) (3) protection of employees who engage in activity opposing conduct prohibited by the statute; \(^83\) and (4) protection of employees who refuse to work in unsafe conditions. \(^84\) The categories are not mutually exclusive; many anti-retaliation provisions include protections falling into more than one category. \(^85\) The courts have broadly construed the protections afforded in anti-retaliation provisions so as to effectuate the legislative policies behind the statutes. \(^86\)

The scope of activities covered by these provisions includes not only the actual filing of a complaint with an agency charged with enforcing the statute at issue, but also encompasses testifying in connection with any proceedings instituted under the statute, as well as assisting the agency in its investigatory efforts. \(^87\) Although anti-retaliation acting to this patchwork quilt of employee protection, the Administrative Conference of the United States has suggested that "uniform treatment of whistleblowers would provide a more coherent statutory scheme, and would better serve [the] underlying health and safety purposes." Accordingly, the Conference has proposed draft recommendations addressing the inconsistencies and improving the adjudicatory procedures. See *Federal Protection of Private Sector Health and Safety Whistleblowers*, 52 Fed. Reg. 7879 (1987).


87. *See Scrivener*, 405 U.S. 117 (1972) (NLRA protects the filing of a com-
clauses in all employment legislation protect participation activity, a few statutes also protect an even broader range of employee activity related to exercising statutory rights. Thus, some provisions protect not only complaints made to an enforcing agency, but also those made directly to the employee's employer. The Mine Safety and Health Act (MSHA) specifically protects complaints notifying a mine operator of alleged dangers or safety and health violations. Courts have interpreted the provision in the Occupational Safety and Health Act (OSHA) protecting an employee who exercises "any right afforded by this Act" as including safety complaints made to the employer. Some courts have also construed the general participatory activity protection provided by the Energy Reorganization Act as including internal complaints made by an employee to his employer.

Both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA) protect employee opposition activity as well as participation activity. Opposition activity encompasses employee protests against unlawful employment discrimination based on race, sex, religion, national origin or age. Those protests can take the form of complaints about discriminatory treatment made di-

91. 42 U.S.C.A. § 5851(a) (West 1983).
92. See Mackowiak v. University Nuclear Sys. Inc., 735 F.2d 1159, 1163 (9th Cir. 1984) (anti-retaliation provision of the Energy Reorganization Act was modeled on, and serves the same purpose as the provision in MSHA and thus should be interpreted consistent with MSHA); Consolidated Edison Co. v. Donovan, 673 F.2d 61 (2d Cir. 1982). But see Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984) (purely internal complaints not protected by the Energy Reorganization Act).
94. ADEA, 29 U.S.C. § 623(d) (1982). The ADEA provision was modeled after one found in Title VII.
95. The employment discrimination generating the opposition activity need not actually be unlawful, so long as the employee engaging in the opposition activity reasonably believes it to be unlawful. See Montero v. Poole Silver Co., 612 F.2d 4 (1st Cir. 1980); Berg v. LaCrosse Cooler Co., 612 F.2d 1041 (7th Cir. 1980); Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978).
rectly to the employer, 96 peaceful picketing for the purpose of publicizing discriminatory conduct, 97 or even refusal to participate in illegal discrimination. 98 This area represents the broadest range of protection offered by anti-retaliation provisions.

A few statutes expressly protect employees' rights in refusing to work in unsafe circumstances. The Commercial Motor Vehicles Act prohibits an employer from discriminating against an employee for the employee's refusal to operate a vehicle if operating the vehicle would violate federal law or rules regulating commercial motor vehicle safety and health, 99 or when the employee has a "reasonable apprehension of serious injury to himself or the public because of the unsafe condition" of the vehicle. 100 The Railroad Safety Act protects railroad employees who refuse to work under hazardous conditions that a reasonable person would conclude present imminent danger of death or serious injury. 101 The courts have construed both OSHA and MSHA as protecting an employee's refusal to work when the employee has a reasonable, good-faith belief that working conditions present an imminent risk of death or serious bodily injury. 102

99. 49 U.S.C.A. § 2305(b) (West Supp. 1986). An example of such a rule would be the Department of Transportation regulation limiting the number of driving hours during a certain period of time. See 49 C.F.R. § 395 (1985).
100. 49 U.S.C.A. § 2305(b) (West Supp. 1986). To avail himself of this protection, an employee's apprehension must be such that a reasonable person under the circumstances would conclude there was a bona fide danger of accident or injury due to the unsafe condition of the vehicle. Id. The employee must also have attempted to have the employer correct the problem. Id.
101. 45 U.S.C.A. § 441(b) (West Supp. 1986). The refusal to work must be made in good faith and, when possible, communicated to the employer. Additionally, the danger must be such that there is insufficient time to correct the problem through regular channels. Id. See also Boston & Maine Corp. v. Lenfest, 799 F.2d 795, 803 (1st Cir. 1986).
102. See Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980). The Court, in affirming OSHA's protection of refusals to work, noted that this interpretation was consistent with the interpretation Congress intended the courts to give to the parallel anti-retaliation clause in MSHA. The Court stated that the legislative history of MSHA evinced Congressional intent to protect refusals to work in unsafe or unhealthy conditions. Id. at 13 n.18. See also Miller v. Federal Mine Safety & Health Review Comm'n, 687 F.2d 194 (7th Cir. 1982) (MSHA allows employees to forego work because of unsafe or unhealthy conditions); Drapkin, The Right to Refuse Hazardous Work after Whirlpool, 4 INDUS. REL. L.J. 29 (1980).
The anti-retaliation clauses in these statutes prohibit not only the discharging of employees, but also discrimination regarding any term or condition of employment.\textsuperscript{103} such as reductions in pay, and demotions. The remedies under these provisions require the employer to make-whole the employee in question, for example by awarding reinstatement and backpay.

The enforcement procedures for most of these statutes are controlled by the Secretary of Labor. The discriminatee must file a complaint with the Secretary of Labor who, after an investigation, determines if the charge has merit. When merit is found, an evidentiary hearing is held, usually before an administrative law judge who issues findings of fact, conclusions of law, and a remedial order.\textsuperscript{104} Under both the Railroad Safety Act and the NLRA, the discriminatee files his or her charge with the National Railroad Adjustment Board or the NLRB, respectively, instead of with the Secretary of Labor.\textsuperscript{105}

Most of these statutes do not provide for a private cause of action.\textsuperscript{106} The exceptions to this general rule are the Fair Labor Standards Act (FLSA), Title VII, and the ADEA. Under the FLSA, any individual whose rights have been infringed may institute an action against his employer in any federal or state court of competent jurisdiction.\textsuperscript{107} With respect to Title VII and the ADEA, an individual may file suit\textsuperscript{108} upon exhausting specified administrative prerequisites.\textsuperscript{109}

\textsuperscript{103} The anti-retaliation provisions in these statutes are generally worded to prohibit an employer from discharging or otherwise discriminating against an employee.


\textsuperscript{107} 29 U.S.C. § 216(b) (1982).

\textsuperscript{108} Case law suggests that a Title VII claimant may file suit only in federal court. See Jones v. Intermountain Power Project, 794 F.2d 546 (10th Cir. 1986); Valenzuela v. Kraft, Inc., 739 F.2d 434 (9th Cir. 1984). The ADEA, however, provides that suit may be filed in either federal or state court. 29 U.S.C. § 626(c) (1982). See also Jacobi v. High Point Label, Inc., 442 F. Supp. 518, 521 (M.D.N.C. 1977) ("clearly Congress intended for a person aggrieved by a violation of the Age Discrimination Act to have the right to bring his action in State court").

\textsuperscript{109} See generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 487-97 (regarding ADEA), 1013-1072 (regarding Title VII) (2d ed. 1983); Bukes, Administrative Prerequisites to Litigation Under Title VII of the Civil Rights Act of 1964—Recent Developments, 17 Duq. L. Rev. 633 (1979); Comment, Jurisdictional Prerequisites to Private Actions Under Title VII of the Civil Rights Act of
Finally, many states have enacted workplace legislation that mirrors the laws passed on the federal level. Many of these statutes also contain anti-retaliation provisions similar to those found in federal workplace legislation.110

B. Scope and Range of Whistleblower Statutes

Another type of statutory protection afforded workers who make work-related complaints is found in so-called "whistleblower" laws. In general, whistleblower statutes prohibit an employer from retaliating against an employee who has reported suspected violations of any state or federal law, rule, or regulation. Whistleblower statutes are much broader in scope than anti-retaliation provisions, which are somewhat limited in their protection to employees.111 The primary purpose of a

110. For examples of anti-retaliation provisions in wage laws, see ALASKA STAT. § 23.10.135(6) (1984); CONN. GEN. STAT. ANN. § 31-69(a) (West 1972); HAW. REV. STAT. § 387-12(a)(3) (1985); KAN. STAT. ANN. § 44-1210(b) (1981); ME. REV. STAT. ANN. tit. 26 § 671 (West 1974); MINN. STAT. ANN. § 177.32(2) (West Supp. 1986); N.J. STAT. ANN. § 34:11-56a 24 (West Supp. 1986); WIS. STAT. ANN. § 104.10 (West 1974).

Examples of anti-retaliation provisions in discrimination laws may be found in: ALASKA STAT. § 18.80.220(a)(4) (1986); CONN. GEN. STAT. ANN. § 46a-60(a)(4) (West 1986); HAW. REV. STAT. § 378-2(5) (1985); KAN. STAT. ANN. § 44-1009(a)(4) (1981); ME. REV. STAT. ANN. tit. 5 § 4572(E) (West 1979); MINN. STAT. REV. § 363.03(7) (West Supp. 1986); N.J. STAT. ANN. § 10:5-12(d) (West Supp. 1986); WIS. STAT. ANN. § 111.322(3) (West Supp. 1986).

Anti-retaliation provision in safety laws may be found in: ALASKA STAT. § 18.60.089 (1986); CONN. GEN. STAT. ANN. § 31-379 (West Supp. 1986); HAW. REV. STAT. § 396-8(e) (1985); IOWA CODE ANN. § 88.9(3) (West 1984); MINN. STAT. ANN. § 182.669 (West Supp. 1986); NEV. REV. STAT. § 618.445 (1985); WIS. STAT. ANN. § 101.595(2) (West Supp. 1986).

Some of the state anti-retaliation provisions do not provide make-whole remedies for the employee (i.e., reinstatement and backpay), but instead subject the employer to a monetary fine for each violation. Compare ALASKA STAT. § 23.10.140 (1984) (fine or imprisonment for retaliatory acts under wage law); CONN. GEN. STAT. ANN. § 31-69(a) (West 1972) (fine under wage law); KAN. STAT. ANN. § 44-1210(b) (1981) (fine under wage law); ME. REV. STAT. ANN. tit. 26 § 671 (West 1974) (fine under wage law) with ALASKA STAT. § 18.80.130 (1984) (make-whole remedy for retaliatory acts under discrimination law); CONN. GEN. STAT. ANN. § 31-379(b) (West Supp. 1986) (make-whole remedy for retaliatory acts under safety law); HAW. REV. STAT. § 378-5(f) (1985) (make-whole remedy under discrimination law); IOWA CODE ANN. § 88.9(3) (West 1984) (make-whole remedy under safety law); N.J. STAT. ANN. § 34:11-56a 24 (West Supp. 1986) (fine and make-whole remedies under wage law); N.J. STAT. ANN. §10:5-14.1a and § 10:5-17 (West Supp. 1986) (fine and make-whole remedies under discrimination law).

111. Anti-retaliation clauses, as demonstrated above, usually enforce only the
whistleblower law is to protect the employee who reports the violation of any type of law, whether work-related or not.

Twenty-two states, as well as the federal government, have adopted whistleblower laws. The statutes generally contain five basic provisions: coverage, prohibited employer acts, protected employee conduct, enforcement, and remedies. The statutory coverage provisions determine which groups of employers and employees are subject to the law's regulation. Some statutes cover only state employers and employees; others cover all public sector employers and employees; and rights specified in the statute containing the clause. Additionally, anti-retaliation clauses are normally found only in legislation directly regulating workplace terms or conditions of employment.


some cover both public and private sector employers and employees.\textsuperscript{116}

The range of employer acts prohibited by these laws covers the entire spectrum of retaliatory employer conduct: discharge, discipline, demotion, and wage decrease.\textsuperscript{117} The type of employee action protected from retaliation varies considerably. Two issues are involved in determining protected employee action. First, the person or entity to whom the employee makes disclosure must be ascertained. Second, the contents of the disclosure must be determined. Some statutes protect the employee who discloses information to either his employer or an appropriate government agency.\textsuperscript{118} Other statutes protect the employee only when disclosure is made to an appropriate government agency.\textsuperscript{119} Two statutes do not specify to whom the employee can disclose information, suggesting that the employee is protected regardless of the person or


The scope of this article focuses on private sector employers and employees since these are the actors affected by the Meyers decision; the NLRA does not apply to public sector employers or employees. 29 U.S.C. § 152(2)(3) (1982). Thus, the discussion of whistleblower statutes will be limited to those covering private sector employers and employees.

\textsuperscript{117} Cal. Lab. Code § 1102.5(b) ("No employer shall retaliate against an employee. . ."); Conn. Gen. Stat. Ann. § 31-51m(b) ("No employer shall discharge, discipline or otherwise penalize any employee. . ."); La. Rev. Stat. Ann. § 30:1074.1(B)(2) ("action is taken' shall include hiring, layoff, loss of promotion, loss of raise, loss of present position, loss of job duties or responsibilities, imposition of onerous duties or responsibilities . . ."); Me. Rev. Stat. Ann. tit. 26 § 833 ("An employer shall not discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment . . ."); Mich. Stat. Ann. § 17.428(2) ("An employer shall not discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment . . ."); Conscientious Employee Protection Act, ch. 105, 1986 N.J. Laws 344, § 2(e) ("Retaliatory action' means the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment."); N.Y. Lab Law § 740(1)(e) ("Retaliatory personnel action' means the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment").


entity to whom disclosure is made. Although the scope of disclosure under these statutes would probably encompass participation in, and certainly encompass testimony given in, a government investigation, hearing, or proceeding, several statutes specifically protect such employee activity.

Regarding the content of the information disclosed, most of the private sector statutes refer to either disclosures made when the employee has reasonable cause to believe there is a violation of state or federal laws, rules, or regulations, or to disclosures of suspected violations. Two statutes limit the type of information that may be safely disclosed. The New York law protects disclosure of violations only if the violations in question create a substantial and specific danger to the public health and safety. Louisiana protects only reports or complaints about possible environmental violations. Additionally, some of the statutes protect employees from retaliation for refusing to engage in activity in violation of state or federal law.

Of the nine private sector statutes, eight specifically provide for private causes of action to enforce their protections. The remedies

---

120. The Whistleblowers' Protection Act, Ch. 275-E:2, as added by 1987 N.H. Laws ch. 386, effective Jan. 1, 1988 (this statute requires, however, that the employee must bring the alleged violation to the attention of a supervisor before reporting it to others). See also La. Rev. Stat. Ann. § 30:1074.1(A).


126. Me. Rev. Stat. Ann. tit. 26 § 833; The Whistleblowers' Protection Act, Ch. 275-E:3, as added by 1987 N.H. Laws ch. 386, effective Jan. 1, 1988; Conscientious Employee Protection Act, ch. 105, 1986 N.J. Laws 344, § 3(c); N.Y. Lab Law § 2(c). The wording of the New York statute suggests that the protection for refusing to participate in activity in violation of law is limited to the scope of protected disclosure information, i.e., where the activity that violates the law creates a substantial and specific danger to the public health or safety.

provided by these statutes include reinstatement, monetary make-whole damages (including backpay), and attorneys' fees.\textsuperscript{128} The Louisiana statute provides for triple damages,\textsuperscript{129} and the New Jersey law includes a provision for punitive damages.\textsuperscript{130} The California law does not contain specific enforcement provisions.\textsuperscript{131}

A unique type of statutory protection for worker complaints is available in Connecticut. Any employer who disciplines or discharges an employee because of the employee's exercise of his constitutional rights to free speech is liable to the employee for actual and punitive damages, as well as reasonable attorneys' fees.\textsuperscript{132} The Connecticut law also covers discussions of employees with co-workers, complaints to employers, and disclosure of information to any person, consistent with free speech rights.\textsuperscript{133}

Thus, to the extent that an employee's work complaints are directed at securing enforcement of statutory rights, the employee may be statutorily protected against retaliation. The existence of statutory protection depends on whether the statute that the employee is attempting to enforce contains an anti-retaliation clause, or whether the employee's conduct falls within the ambit of a whistleblower law. This leaves the employee subject to questionable protection, sometimes dif-

\begin{itemize}
  \item \textsuperscript{130} Conscientious Employee Protection Act, ch. 105, 1986 N.J. Laws 345, § 5(f).
  \item \textsuperscript{131} Cal. Lab. Code § 1102.5.
  \item \textsuperscript{133} The court in Andersen v. E.J. Gallo Winery, Civil No. H 85-295 (JAC), Nov. 7, 1985 (D. Conn. 1986) (available on Westlaw DCTU), held that the extent of an employee's protection under the Connecticut Free Speech Act should be based upon the analysis of the Supreme Court in Connick v. Myers, 461 U.S. 138 (1983). In evaluating the free speech rights of public sector employees under the first amendment, the Connick Court applied a balancing test between the interest of the employee in commenting on matters of public concern and the interest of the employer in promoting efficiency and effectiveness in the services it performs. This formulation limits the employee's speech rights to comments on issues of public concern, leaving the employee unprotected when the speech regards a purely personal matter. See Gaj v. United States Postal Serv., 800 F.2d 64 (3d Cir. 1986) (postal employee's complaints concerning workplace safety did not rise to a level of public concern but merely reflected the employee's dissatisfaction with working conditions, and therefore were not constitutionally protected); Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985), cert. denied, 106 S. Ct. 36 (1985) (discussing factors considered in distinguishing between work-related complaints that are personal in nature from those of public interest); Callaway v. Hafeman, 628 F. Supp. 1478 (W.D. Wis. 1986) (complaint of sexual harassment not of public concern.). See generally Note, Public Employees' Free Speech Rights: Connick v. Myers Upsets the Delicate Pickering Balance, 13 N.Y.U. Rev. L. & Soc. Change 173 (1984-85).
\end{itemize}
fering from state to state for conduct that, before Meyers Industries, was protected at the federal level.

IV. COMMON LAW PROTECTION OF WORKER COMPLAINTS

The general principle of employment law in the United States is based on the "at-will" rule, by which employment for an indefinite term is considered to be at the will of either the employer or the employee. In other words, the employer can discharge an employee for good cause, no cause, or even bad cause without incurring civil liability; conversely, the employee is free to leave his employment at any time for any reason without incurring liability.

The acceptance of the at-will principle first came under serious


135. As noted by the Mississippi Supreme Court in Shaw v. Burchfield, 481 So. 2d 247 (Miss. 1985), there is a substantial difference under this principle between employer's right to discharge and an employee's right to quit:

[W]e may not remain insensitive to the fact that the impact of termination upon the employee is in general more adverse in a way that is qualitatively different than what the employer experiences when it is the employee who walks off the job. We approach this case cognizant of the force of Anatole France's pointed observation that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

Id. at 254 (footnote omitted).

Of course, the parties themselves may modify this common law arrangement by contractually agreeing to restrictions on the at-will relationship. An obvious example of such a contractual restriction is a collective bargaining agreement negotiated between employer and union setting forth the terms and conditions of employment for bargaining unit employees. These agreements commonly contain clauses prohibiting the discharge of employees except for just cause, and also provide a mechanism in the grievance-arbitration procedure for challenging employer discharges of employees. Recently, provisions contained in company handbooks and manuals have been held to constitute, under certain circumstances, legally enforceable restrictions on the at-will employment relationship. See, e.g., Woolley v. Hoffman-LaRoche, Inc., 491 A.2d 1257 (N.J. 1985), modified, 499 A.2d 515 (N.J. 1985); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441 (1982). See generally W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES 43-133 (1985); Heinsz, supra note 134, at 865-73.
attack in 1959 by the California courts in Petermann v. Teamsters Local 396. Petermann was employed by the Teamsters as a business agent, when he was subpoenaed to appear and testify before a California legislative committee. Petermann’s supervisor instructed him to give certain false testimony before the committee, and Petermann refused. The Teamsters discharged him the day after he testified. Petermann then filed a civil complaint, alleging that his discharge was the result of his refusal to commit perjury.

The court initially noted the existence of the at-will rule, but found that its applicability could be limited by statute or by considerations of public policy. Although recognizing that the notion of public policy is inherently imprecise, the court held that it embodied a principle of law that a person may not lawfully do that which is injurious to the public good. This principle imposes restrictions on otherwise private dealings for the good of the community. Thus, the court held that “[i]t would be obnoxious to the interests of the state and contrary to public policy” to allow an employer to make continued employment contingent on the employee’s commission of an illegal act—in this case, perjury.

The attack signalled by Petermann has steadily gained momentum over the past fifteen years. The rationale behind the erosion of the at-will rule has perhaps been best expressed by the Illinois Supreme Court in Palmateer v. International Harvester Co.

[Un]checked employer power, like unchecked employee power, has been seen to present a distinct threat to the public policy carefully considered and adopted by society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer’s interest in operating a business efficiently and profitably, the employee’s interest in earning a livelihood, and society’s interest in

137. Id. at 26.
138. Statutory limitations are found in such legislation as the NLRA provisions prohibiting employer discharge of employees for union activities, Title VII’s provisions prohibiting employer discharge of employees because of race, color, sex, religion, or national origin, or the anti-retaliation statutes discussed supra notes 79-110 and accompanying text, which prohibit employer discharge of employees because the employee enforced his rights under the statute.
139. Petermann, 344 P.2d at 27.
140. Id.
141. 421 N.E.2d 876 (Ill. 1981). Palmateer alleged that he was discharged by his employer, International Harvester, because he supplied information to local law enforcement officers implicating a fellow employee in criminal activities, and agreed to assist in the investigation and trial of the employee. The court held that Palmateer stated a cause of action for retaliatory discharge in violation of public policy: “[t]here is no public policy more basic . . . than the enforcement of the State’s criminal code.” Id. at 879.
Seeing its public policies carried out.\(^\text{142}\)

Recognizing the validity of the *Palmateer* principles, the courts in at least thirty states have adopted some type of public policy exception to the common law at-will rule.\(^\text{143}\) Six states have rejected any modification of the at-will rule, on the premise that the issue is best left to the legislatures to decide.\(^\text{144}\) The remainder of the states are currently undecided; however, the courts in many of these states have indicated that when appropriate cases present themselves, the courts will not be adverse to finding public policy exceptions.\(^\text{145}\)

\(^{142}\) *Id.* at 878.


\(^{144}\) See, e.g., *Meeks v. Opp Cotton Mills, Inc.*, 459 So. 2d 814 (Ala. 1984); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327 (Fla. Dist. Ct. App. 1985); *Bendix Corp. v. Flowers*, 330 S.E.2d 769 (Ga. Ct. App. 1985); *Gil v. Metal Serv. Corp.*, 412 So. 2d 706 (La. Ct. App. 1982); *Kelly v. Mississippi Valley Gas*, 397 So. 2d 874 (Miss. 1981) (but see *Shaw v. Burchfield*, 481 So. 2d 247 (Miss. 1985), in which the court suggested it might well be charged with reconsidering the at-will rule in some contexts); *Murphy v. American Home Prod. Corp.*, 58 N.Y.2d 293 (1983). The basis for this reluctance to modify the at-will rule is somewhat questionable, since the at-will rule is itself a creature of the common law. It is arguably not an inappropriate usurpation of legislative authority for a court to modify or clarify the scope and the extent of a common-law rule. See *Brockmeyer*, 335 N.W.2d at 842.

An examination of some general principles will help to flesh-out the contours of the public policy exception to the at-will rule. First, with few exceptions, the cause of action created by wrongful discharge in violation of public policy sounds in tort.\textsuperscript{146} Second, unlike the anti-retaliation provisions discussed above, the public policy exception has so far been applied only in cases involving employee discharges. The public policy exception has not been used to protect an employee who is otherwise discriminated against regarding terms or conditions of employment. The rationale behind the public policy exception appears to apply equally well to nondischarge cases, however. The potential for the employer to abuse his economic power over an employee to the detriment of public policy and the community is just as real when the employer demotes the employee or reduces his wage rate as when he fires the employee. In such a situation, the private dealings between the parties should be subject to some restriction for the good of the community.\textsuperscript{147}

Third, public policy as a principle that no one can lawfully do that which is injurious to the public or against the public good\textsuperscript{148} clearly extends beyond those issues dealing solely with an employee's working employer and suggesting that it would not recognize exception in any case); Allen v. Safeway Stores, Inc., 699 P.2d 277 (Wyo. 1985). \textit{But see} Phung v. Waste Management, Inc., 491 N.E.2d 1114 (Ohio 1986).

146. \textit{See, e.g.}, Wagenseller, 710 P.2d at 1036; Palmateer, 421 N.E.2d at 878; Murphy, 630 P.2d at 190; Firestone Textile Co. v. Meadows, 666 S.W.2d 730, 733 (Ky. 1983); Hansen, 675 P.2d at 397; Pierce, 417 A.2d at 512; Vigil, 699 P.2d at 619; Nee, 536 P.2d at 514; Ludwick, 337 S.E.2d at 216; Bowman, 331 S.E.2d at 801; Harless, 246 S.E.2d at 275 n.5. \textit{But see} Monge v. Beebe Rubber Co., 316 A.2d 549, 552 (N.H. 1974); Brockmeyer, 335 N.W.2d at 841 (both cases finding that a public policy wrongful discharge action sounds in contract).

Whether a case arises in tort or contract may affect the type of remedy available, the applicable statute of limitations, and the measure of damages. See Brockmeyer, 335 N.W.2d at 841, which held that in tort actions, the only limitation on measurement of damages is proximate cause; punitive damages may also be recovered. In contract actions, the measure of damages is limited by foreseeability and mitigation. \textit{Id.}

147. In those cases in which changes in working conditions or terms of employment are so onerous as to force a reasonable person to quit, a case of constructive discharge would certainly be cognizable under the public policy exception to the at-will rule. There is ample precedent in other types of employment litigation for recognizing such forced resignations as the legal equivalent of a discharge. See, \textit{e.g.}, Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981) (Title VII case); J.P. Stevens & Co., Inc. v. NLRB, 461 F.2d 490 (4th Cir. 1972) (NLRA case).

148. The classic formulation of public policy was set forth by Lord Truro in Egerton v. Earl Brownlow, 4 H.L. Cas. 1, 196 (1853), quoted in Wagenseller: Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.

\textit{Wagenseller}, 710 P.2d at 1034.
conditions to include issues affecting the public in general. Public policy also means, however, that the issue must implicate some "public" policy and not merely reflect the employee's purely personal interests or purely internal workplace issues. To determine the types of issues and activities implicating public policy, the courts look to state and federal constitutions, statutes, regulatory schemes, and judicial decisions.

Courts have generally recognized four categories of cases in which a discharge can violate a mandate of public policy. In the first category, if an employer discharges an employee for refusing to perform an illegal act, the employer conduct implicates public policy, because to allow employment to be conditioned on performance of illegal acts would encourage criminal conduct by employers and employees. The public has an interest in encouraging citizens to be law-abiding, not law-breaking. Petermann, the landmark public policy case, is an example of the application of this rationale. Another example is found in Sabine Pilot Service, Inc. v. Hauck, in which the company employed Hauck as a deckhand on a boat. On one occasion, the company ordered Hauck to pump the bilges into the water. Upon learning from the Coast Guard that pumping bilges into the water was illegal, Hauck refused and the company fired him. As one member of the Texas Supreme Court noted, "[a]llowing an employer to require an employee to break a law or face termination cannot help but promote a thorough disrespect for the laws and legal institutions of society."

The second category of cases involves the discharge of an employee for reporting violations of law either to his employer or to the

---

149. See, e.g., Petermann v. Teamster Local 396, 344 P.2d 25 (Cal. Ct. App. 1959) (instructing an employee to commit perjury before legislative committee); Parner v. Americana Hotels, Inc. 652 P.2d 625 (Haw. 1982) (employee cooperating with government authorities on an antitrust investigation involving the employer); Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733 (Tex. 1985) (employee refusal to pollute water in violation of federal law); Harless, 246 S.E.2d at 270 (employee attempt to enforce compliance by bank with consumer credit laws).


151. See, e.g., Wagenseller, 710 P.2d at 1033-34; Parner, 652 P.2d at 631; Palmateer, 421 N.E.2d at 878; Pierce, 417 A.2d at 512 (courts can also examine professional codes of ethics); Brockmeyer, 335 N.W.2d at 840 (courts limited to examining constitutions and statutes).

152. Petermann, 174 Cal. App. 2d at 184; see supra notes 136-40 and accompanying text (discussion of the Petermann case).

153. 687 S.W.2d 733 (Tex. 1985).

154. Id. at 735 (Kilgarlin, J., concurring).
government. The rationale supporting this is that the stated purpose behind any given law would be frustrated if persons who are in the best position to detect violations of the law may be discharged for reporting them. The Connecticut Supreme Court applied this theory in *Sheets v. Teddy's Frosted Foods, Inc.*

Sheets, while employed as quality control director, began to notice deviations between the contents of his employer's food products and the specifications listed on the product labels. The deviations violated the state food and drug act. Sheets notified the employer, in writing, about the problem; shortly thereafter, he was fired. The court held that the discharge of an employee in retaliation for his insistence that his employer comply with state law violates public policy.

Similarly, the employee in *Boyle v. Vista Eyewear, Inc.* complained to both OSHA and the federal Food and Drug Administration that legally required tests for determining the resistance of eye glass lenses to breaking and shattering were not being conducted by her employer. By discharging the employee, the employer violated public policy.

A third situation raising public policy issues involves the discharge of an employee for engaging in acts that public policy encourages. For example, in *Nees v. Hocks,* the employee was discharged after missing work because of her service as a juror. The court found a clear indication that "the jury system and jury duty are regarded as high on the scale of American institutions and citizen obligations." Thus, the Court held that permitting the employer to penalize an employee who fulfills that obligation thwarts the will of the community, and therefore violates public policy.

The final type of case arises when an employee is discharged for exercising statutory rights. The rationale behind finding that such a discharge violates public policy was clearly expressed by the Supreme Court of Indiana in *Frampton v. Central Indiana Gas Co.*, in which

155. 427 A.2d 385 (Conn. 1980). The rationale of this second category of cases is very similar to the policy underlying the whistleblower laws discussed supra at notes 111-33 and accompanying text.
156. Id. at 386, 389.
158. Id. at 878; see also Vigil v. Arzola, 699 P.2d 613 (N.M. Ct. App. 1983) (employee statements criticizing misuse of public funds); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (employee informing his employer about bank practice of overcharging customers in violation of state and federal consumer credit laws).
159. 536 P.2d 512 (Or. 1975).
160. Id. at 516.
an employee was discharged for filing a workers' compensation claim:

The Act creates a duty in the employer to compensate employees for work-related injuries (through insurance) and a right in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation—opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.163

Those courts that recognize the public policy exception to the at-will rule do not necessarily recognize the exception in all four types of cases. In fact, very few state courts recognize all four. Most courts, however, do recognize the exception when the discharge is caused by the employee's refusal to perform an illegal act, or by the employee's exercise of statutory rights.164

To the extent that a worker's complaint falls within one of the enumerated exceptions to the employment at-will doctrine, he or she may be protected from retaliatory discharge. The extent of the protection is spotty, however, and depends upon which exception, if any, a particular state recognizes. Additionally, the complaint must implicate some aspect of public policy and cannot relate solely to internal workplace concerns.

V. Conclusion

The gaps in worker protection left by Meyers Industries may be filled, to some extent, by statutory and common-law remedies. Before Meyers Industries, however, the NLRA had provided a federal blanket of protection for all covered workers; whereas the statutory and com-

163. Id. at 427. This is the same rationale behind the statutory anti-retaliation provisions discussed supra at notes 79-111 and accompanying text.

164. A few states, however, have narrowly limited the public policy exception to specific cases. Indiana, for example, first recognized the exception in Frampton, in which the plaintiff was allegedly discharged for filing a worker's compensation claim. The rationale for the exception, as expounded by the court, was broad enough to encompass a discharge for exercising any statutory right. See notes 162-63 and accompanying text. A subsequent case, however, refused to recognize an exception beyond the specific facts of Frampton. See Morgan Drive Away, Inc. v. Brant, 489 N.E.2d 933 (Ind. 1986) (court declined to extend the public policy exception beyond the specific factual situation presented in Frampton because the employment at-will doctrine is the public policy of the state, and revision is best left to the legislature).
mon-law alternatives form a patchwork quilt whose coverage varies from state to state. Moreover, complaints not implicating public policy, such as those at issue in the pre-Meyers cases of *Akron General Medical Center* and *Oklahoma Allied Telephone Co.*, do not receive protection under the existing alternatives. Lastly, the mechanisms for enforcing the alternatives, particularly the common-law remedies, are not as accessible as those provided in the NLRA.  

---

165. *See supra* notes 30-33 and accompanying text.

166. Upon filing a written complaint with a regional office of the NLRB, the investigation and subsequent litigation of a meritorious claim is conducted at government expense. The worker does not need to have separate, independent representation. That is not the case when common-law remedies are sought; there the individual worker must acquire and pay for private legal representation. *See* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 Harv. L. Rev. 1931 (1983), which notes that upper level, primary market workers make up the overwhelming majority of plaintiffs in public policy exception cases, and suggests that the underrepresentation of secondary market workers may be due, in part, to their inability to obtain adequate legal counsel.