

LAW & ETHICS IN THE BUSINESS ENVIRONMENT 8e

CHAPTER TWO

Instructor's Manual

THE DUTY OF LOYALTY: WHISTLEBLOWING

MAIN CONCEPTS

Employment-at-will

Exceptions to employment-at-will

Sarbanes-Oxley Act (SOX)

Food safety and the Food Safety Modernization Act of 2010

Anti-Whistleblower laws

Government Accountability Project (GAP)

Public employees and freedom of speech

False Claims Act and *Qui tam* whistleblowers

***Qui tam* and fraud in healthcare**

INTRODUCTORY TIPS

The stark negative side of employment-at-will for employees can be contrasted to comfortable employment contracts signed between many corporate executives and their companies.

Although ordinary workers can be fired for any reason that is not outright discriminatory—if their bosses do not like their taste in ties, for example—executives can make major mistakes and even destroy shareholder value while maintaining not only their jobs but also handsome salaries and bonuses.

In 2002, as he was about to be indicted for tax fraud over the purchase of several works of art, and after presiding over the precipitous slide in the value of Tyco stock (it lost 81% of its value in the 6 months preceding), chief executive L. Dennis Kozlowski quit. But if he hadn't he might have kept his job, since his contract of employment—not unusual in the field—would allow Tyco to fire him only if he was convicted of a felony that involved enriching himself at the company's expense. See: David Leonhardt, "Watch It! If You Cheat They'll Throw Money At You," *New York Times*, June 9, 2002.

Warm-up exercise:

Suppose you have graduated from this college/university and have begun a full-time position with a major accounting firm.

Further, suppose you engage in the following behaviors. For each, should the firm be legally allowed to fire you? Why or why not?

- You decide to attend law school part-time, at night (after working hours).
- You decide to donate 5% of your salary every month to a Right to Life organization.
- You seem unable to learn the computer applications that are basic to your job responsibilities.
- There is no labor union for accountants, but you begin talking to your co-workers during lunch breaks, encouraging them to organize and form one.
- You wear a bright plaid jacket to the office that most people—including your supervisor—consider extremely ugly.
- You tend to burst into a rage when criticized.
- You refuse to go out on a date with your supervisor.
- You and your supervisor begin dating.
- You take a day off work for a Muslim religious observance.
- You miss work frequently because of late night partying.
- You point out to your supervisor's superior that certain procedures you have been asked to follow for a particular client do not seem to be in line with the standards of the accounting profession and may violate federal law.

As students respond, list on the board a spectrum of reasons for firing someone from what students believe (or know) are **illegal** reasons (race, sex, religion, union affiliation) to what they feel are **legitimate** reasons (excessive tardiness, inappropriate attire), with the "gray area" reasons in the middle.

Then ask if any student that has a job also has an employment contract for a stated period of time. The likelihood is that none will have such an agreement. This good way to introduce the concept of employment-at-will— a legal rule developed in the nineteenth century. Go back to the spread of reasons for firing a person, and discuss the exceptions to employment-at-will, such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and the National Labor Relations Act, which may already be somewhat familiar to students. From there, introduce the emerging tort of **wrongful discharge** in violation of public policy.

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The following material is rich with specific examples of whistleblowing. It appears as footnotes to Judge Doggett's concurrence in *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723 (Texas 1990).

The revelations of "Deep Throat," perhaps the most celebrated and successful whistleblower yet, provided crucial information to Bob Woodward and Carl Bernstein of the Washington Post concerning the Watergate burglary. The information provided by Deep Throat enabled the congressional investigating committee to learn of the plot to break into the Democratic headquarters by the Committee to Re-elect the President, and the White House's approval of the subsequent cover-up. As a result, President Nixon was forced to resign. Engineers at Hooker Chemical Company apprised their superiors in 1975 and 1976 regarding the serious danger resulting from dumping toxic wastes. Disregarding these warnings, Hooker produced the Love Canal tragedy in Niagara, New York. After obtaining the internal memoranda sent by these Hooker engineers to management, the federal government filed a \$124.5 million suit against Hooker for dumping chemical wastes in the Love Canal area of upstate New York. Of the numerous private lawsuits filed, one brought by 1,300 former residents was settled for \$20 million.

Employees throughout the nuclear industry repeatedly brought forth information demonstrating poor quality control in the construction and maintenance of several nuclear power plants. Workers complained about improper welding, clerks complained of inadequate adherence to quality control regulations, and engineers complained of poorly designed safety systems. These nuclear whistleblowers were largely ignored until a partial meltdown occurred at Three Mile Island in 1979. Since that event, whistleblowers have continued to bring forth allegations of faulty construction and quality control, with safety infractions requiring the halt to construction on several plants deemed by the Nuclear Regulatory Commission to be unsafe for operation.

The space shuttle Challenger exploded because of faulty seals in the booster rockets. For years, several engineers from the Morton Thiokol Company, the major contractor responsible for construction of the rockets, had warned highly placed administrators of major problems with the booster rocket seals. On the night before the disaster, several of these engineers warned of the seal malfunction risk in cold weather. Thiokol's executives and NASA administrators overruled the engineers, and approved the launch. "Not one engineer or technician, however, supported a decision to launch." After the disaster, "when the engineers Allan McDonald, Arnold Thompson, and Roger Boisjoly testified before the [Presidential Commission on the Space Shuttle Challenger Accident] about their strong objections to the launch, they were unceremoniously `stripped of their authority, deprived of their staffs, and prevented from seeing the critical

data about the Challenger disaster.' ” These engineers, together with two others, were collectively referred to as "the five lepers" by their fellow employees. Through the intervention of William Rogers, chair of the Presidential Commission, Roger Boisjoly and Allan McDonald were later selected to head Thiokol's booster redesign team. Boisjoly was ultimately given long-term disability leave for stress-related illness.

Thomas A. Robertson, the director of development for Firestone Tire Company, warned his executives "[w]e are making an inferior quality radial tire which will subject us to belt-edge separation at high mileage." Despite warnings by him and several of its other engineers, Firestone chose to market the tire. After selling twenty-four million tires, receiving repeated complaints of its tire quality and after *Time* magazine reported that blowouts had caused "at least 41 deaths" and hundreds of injuries, Firestone replaced three million of the tires. This tire has also been the subject of more than 250 personal injury and wrongful death suits.

The last example—dating from the late 1970's—is particularly interesting in light of recent Firestone tires-Ford Explorer fatalities.

Donn Milton v. IIT Research Institute, Questions, p. 51

1. In legal terms, why did Milton lose?

Maryland's law only permits exceptions to employment-at-will in two circumstances – when an employee is terminated for doing something required by law or when an employee is terminated for refusing to violate the law. Milton did not fall in to either category but claimed to be fulfilling his "fiduciary duty as a corporate officer." The responsibility to correct tax filings was never Milton's, nor did he face any potential liability for failing to do so. He was not terminated for refusing to engage in illegal activity, nor was he exercising a specific legal duty.

2. Is this a Pandora's Box? What is at stake here for employers?

Milton alleged that "broad fiduciary obligations of care and loyalty" should be considered a specific legal duty. This definition is far too broad and potentially would allow lawsuits related to many terminations, particularly whenever a manager disagreed with internal corporate procedures. If such public policy were created without any true direction from a legislative or regulatory source, employment-at-will would be effectively gutted. Almost every firing would leave employers open to lawsuits. The opposing argument would be that a fair definition of "duty of care and loyalty" would include preventing illegal activity in the corporation regardless of another legal duty to prevent it.

3. Ethical analysis of decision to fire Milton.

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A list of stakeholders might include:

- Dr. Milton
 - Other IITRI management & board
 - Employees of IITRI
 - Beneficiaries of scientific research performed by IITRI
 - IRS (government generally, taxpayers)

Microeconomic theory or **free market ethics**, as followed by Milton Friedman, would favor any strategy enhancing the profitability of a company short of actually committing a crime. While a free market economist would likely conclude that it would be ethical to fire Dr. Milton, IITRI's Board should look into his allegations carefully, particularly to the extent that hiding income from "unrelated business activities" within the non-profit entity of IITRI was actually illegal. If not illegal, the free market theory would allow such filings to continue. In Maryland, it is legal to fire Dr. Milton, but in the U.S., it may not be legal to claim tax-exempt status while sheltering unrelated income. Additionally, it should be noted that not all states require that an employee have a legal obligation to report illegal activities in order to receive protection as a whistleblower.

It simplifies the **utilitarian analysis** to assume that, now that Dr. Milton has been fired, IITRI's tax filing system will remain unchanged and that if he had not been fired, changes would have been made. With Dr. Milton gone then, IITRI's non-profit status—its existence in non-profit form—is at risk, bringing on serious negative consequences for the beneficiaries of IITRI research. These might include health consequences to many individuals, although it is difficult to know for certain, due to the paucity of the facts in the case. On the other hand, making the changes that Dr. Milton wanted to make would probably have ended certain for-profit activities. Again, with so few facts, it is difficult to expand the analysis; we cannot know exactly what those negative consequences might be. Yet we might assume that the non-profit activities of IITRI would have had greater value to the public (public health) than the "unrelated business activities" would have had, and so we might assume that the overall utilitarian analysis leans against firing Dr. Milton.

Deontology would suggest the firing was wrong. The right to life and health appears to be at stake, as well as the duty to tell the truth—in this case to the IRS. Dr. Milton describes himself as bound by the obligations of "care and loyalty" to the non-profit and presumably to its scientific mission.

This sounds like Kantian thinking, but it also bears shades of **virtue ethics**—allegiance to moral excellence as opposed to moral minima. Milton's clarity about what needed to be done, and his determination to follow through even after he must have realized his message was not welcome, seem like the actions of a person whose ethical response is a matter of ingrained habit. Further, Dr. Milton's ethical impulses have been developed within a community—in this case a community of medical professionals.

As for the **ethic of care**, Dr. Milton is caring for the non-profit and its mission. He is prioritizing the group of relationships that matters most in his view: between IITRI and the beneficiaries of its scientific research. Believing that IITRI's slipshod tax filings jeopardize these relationships, he responds out of a sense of responsibility for their continuation.

EMPLOYMENT-AT-WILL

It is interesting for students to see how many statutory exceptions have been made to the employment-at-will doctrine with regard to whistleblowing. Students should be encouraged to identify the public policy reasons behind the different whistleblower provisions in the statutes. A discussion of SOX is also appropriate since every future corporate executive needs to be aware of these provisions.

Another interesting discussion could be based on the ethical issue of “doing the right thing” by becoming a whistleblower versus the personal and professional risk, especially in the face of state inconsistencies in case law regarding whistleblowers.

Pierce v. Ortho Pharmaceutical Corp., Questions, p. 61

1. Dissent’s response to Dr. Pierce’s lack of specificity.

Students should look back at the Hippocratic Oath to try to identify the portion(s) of it that Dr. Pierce must have referred to in her complaint. According to the majority, this was "general language," with no specific mention of a prohibition on the kind of testing Dr. Pierce was expected to implement. Students might discuss why the majority insisted on such specificity.

The dissent makes the point that Dr. Pierce should have been given the chance to revise her complaint to conform to the majority's exacting standard. In a section not reproduced in the text, the dissent names some of the professional medical codes she could have cited:

The 1975 revision [of the Declaration of Helsinki] also prohibits doctors from conducting experiments where they are not satisfied that the possible hazards are predictable, or where they outweigh the potential benefits... Where the research program has a therapeutic purpose, the doctor may conduct experiments only where he weighs the proposal against other courses of treatment and concludes it is "the best proven...therapeutic method." The American Medical Association's own guidelines also make participation in clinical experimentation contingent upon the doctor's professional judgment regarding "the welfare, safety, and comfort of the (test subject,) and the "best interest of the patient."

The ancient Hippocratic Oath would (understandably) lack these kinds of specifics. In fact, in the Oath itself the best phrase for Pierce to use may be the promise to "use medical knowledge for the benefit of those that suffer...and to avoid from doing any harm or injustice." (Once again, we meet the distinction between commission and omission: There is no affirmative demand to

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do the right thing, only the negative—to avoid doing wrong.) Ask if this phrase would possibly support a public policy mandate in this case.

Note that, in *Pierce*, New Jersey followed the national trend to recognize a cause of action for wrongful discharge where a firing violates public policy. As it joined the trend, it did so with panache, stating that public policy could be found, not just in legislation, administrative regulations or case law, but also in a **professional code of ethics**. At that time, no other state court had mentioned professional ethics as a potential source of public policy. Arguably, the Supreme Court of New Jersey is both strikingly activist and strikingly reactionary in *Pierce*.

Discussion Points on the links to ethical theories:

The Hippocratic Oath calls for doing no harm, and the alternative ethical codes that are mentioned by the dissent "proscribe participation in clinical experimentation when a doctor perceives an unreasonable threat to human health." These codes align with **deontological** concepts: The categorical imperative of universality and reversibility; and the imperative to treat others with respect as equals, with rights to make fully informed choices about their own lives, and the right to life and health.

Dr. Pierce's ethics are presumably the result of her professional medical experience and training—she internalized these values as a doctor and a medical researcher, so we can see a **virtue ethics** connection here.

Her response also contains elements of the **ethic of care**. As the dissent puts it: "Would the majority have Dr. Pierce wait until the first infant was placed before her, ready to receive the first dose of a drug containing 44 times the concentration of saccharin permitted in 12 ounces of soda?" Dr. Pierce views this dilemma in a very particular, contextualized fashion. She sees herself as the last bulwark protecting real human babies from unnecessary cancer risks.

2. FDA procedures for new drug approval.

As the majority explains, after the company completes animal testing, it files an Investigative New Drug (IND) application. If the FDA approves that application, testing on human subjects may proceed. In other words, clinical testing (on humans) is not "imminent" in the *Pierce* scenario, if we assume the IND screening process operates effectively to identify dangerous drug formulas.

3. Are there any important stakeholder interests not mentioned here?

There are several interests the majority omits: The employees' interest in working for a company that values their opinion and advice and in feeling safe in their position so long as they are trying to do the "right" thing. The employers' interest in a workforce that prevents public harm or financial harm to the company. The public interest in drug safety in general.

4. Research: FDA Failures.

An article about Dr. Graham can be found on the Government Accountability Project website at: <http://www.whistleblower.org/program-areas/public-health/vioxxdavid-graham>. For an interview with Dr. Graham go to: <http://www.naturalnews.com/011401.html>.

5. Research: Toyota's sudden acceleration problems.

Additional information about Toyota's acceleration issue can be found here: <http://www.safetyresearch.net/toyota-sudden-unintended-acceleration/>

6. What connection might professional autonomy have with the U.S. safety regulatory scheme?

Consider relevant excerpts from Judge Doggett's concurrence in *Winters v Houston Publishing Co* 795 S.W.2d 723 (Tex. 1990):

[T]he importance of the role of the whistleblower in a democratic society dominated by large institutions:

Whistleblowing is a formal or informal role that arises in and may even be essential to rule systems, for the whistleblower functions to generate information about violations in order that sanctions or feedback to shape human behavior can occur... An institution that seriously intends to prevent...misconduct needs to recognize that it is involved in applying rules to human behavior; the institution thus needs the services of the whistleblower to provide information necessary for its rules to be enforced.... If the system of institutional rules is to work, the institution needs to utilize the whistleblower's services.

Often the very act of whistleblowing indicates that governmental regulation has been inadequate to protect the public; it "represents a breakdown of systems whose very goal is to make sure that misconduct does not occur in the first place." Thus, "[i]f the general welfare is to be protected, it will be protected by the actions of people, not the government."

—Testimony of Dr. A. Dale Console, former Research Director to Squibb Pharmaceutical Co., in M. Glazer & P. Glazer, *The Whistleblowers: Exposing Corruption in Gov't. & Industry* (1989).

7. What would have been the likely outcome had Dr. Pierce sued under New Jersey's *Conscientious Employee Protection Act*?

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Years after the *Pierce* case was decided, the New Jersey legislature adopted the following legislation protecting whistleblowers under certain situations:

34:19-3. Employer retaliatory action; protected employee actions

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

- a. Discloses, or threatens to disclose, to a supervisor or to a public body an activity, policy or practice of the employer or another employer with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;
- b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer, with whom there is a business relationship, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or
- c. Objects to, or refuses to participate in, any activity, policy or practice which the employee reasonably believes:
 - (1) is in violation of a law, or a rule or regulation promulgated pursuant to law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
 - (2) is fraudulent or criminal; or
 - (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

Under the New Jersey statute, the issue in *Pierce* would have been the reasonableness of Dr. Pierce's belief that continued testing would be incompatible with a clear mandate of public policy. Arguably, she would still have lost. Another argument would be that she should receive protection under the section of the statute protecting health care professionals from retaliation based upon objections involving patient care. Dr. Pierce, however, was not directly involved in patient care when she made her objections.

Other cases under the New Jersey law: *Potter v. Village Bank of New Jersey*, 543 A.2d 80 (1988) (former bank president and CEO sues bank for retaliatory firing for reporting director's suspected involvement in drug money laundering activities); *Fineman v. New Jersey Department of Human Services*, 640 A.2d 1161 (1994) (nursing home doctor fired for refusing, on ethical grounds, to treat more patients than there was adequate funding to handle).

8. Research: State whistleblower protection statutes

To begin a discussion of the differences discussed in the text, encourage students to look for different laws in your state or laws of other states where they have lived or would like to live.

Montana Wrongful Discharge Statute, Questions, p. 65

1. How would the *Milton* case (p. 50) have been decided had this law been in effect in Maryland?

While tax fraud does not fall within the realm of "public policy" in the Montana law, Milton could argue he was not fired for "good cause" - unless his complaints were seen to "disrupt the employer's operation." There is not enough information about Milton's performance on the job either before or after the incident of his reporting the accounting irregularities to determine the outcome.

How would Dr. Pierce (p. 57) have fared under it?

Dr. Pierce could argue she was "constructive[ly] discharge[d]," for her "refusal to violate public policy." However, the definition of public policy as "established by constitutional provision, statute, or administrative rule," is not open-ended enough to encompass professional ethical concerns, and she would lose as long as Ortho had "good cause" to fire her. Have students compare Montana's law to New Jersey's law for whistleblowers. It is broader than the Montana Act in terms of the protection it gives to a whistleblower. However, the Montana statute goes further than the New Jersey law, in that it effectively does away with employment-at-will, giving employees a right to a reason for being discharged.

How would Michael Winston (p. 62) have fared?

Michael Winston could argue he was "constructive[ly] discharge[d]," for his "refusal to violate public policy or for reporting a violation of public policy." The incident involving his report to California OSHA that resulted in freezing his budget and his refusal to misrepresent Countrywide to Moody, which led to his marginalization, should give him a strong case. Countrywide would likely have a difficult time showing a "good cause" for letting him go.

2. What parts of this law seem to benefit employees?

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The employee who refuses to be a bystander while wrongdoing takes place is protected. The one who is expected to join in the wrongdoing or be fired is also protected. The law establishes a certain degree of job security in that an employee can only be fired for "good cause" once a probationary period is past. If there is an express "good cause" provision written into a personnel policy, the law forces employers to abide by it. Further, for the more egregious examples of firing, punitive damages are available.

What parts of this law seem to benefit employers?

Unless an employee can fit her case inside the provisions of this statute, there will be no recovery under the common law. (No cause of action for implied contractual promises or in tort, for example.) Independent contractors are not covered. The relatively restrictive definition of public policy may leave many whistleblowers unprotected. Punitive damages are only allowed in extreme cases. Additionally, the law does not cover employees covered by a written collective bargaining agreement or a written contract of employment for a specific term.

3. Why do you think state laws fail to protect whistleblowers who turn to the media first? Does this seem like sound policy? Does it encourage or discourage ethical behavior?

Students will likely have different views regarding whether protection should be extended to whistleblowers that first turn to the media and its impact on ethical behavior. Most people, including lawmakers, would likely agree that a dissatisfied employee should provide the company with a chance to remedy the situation before going outside to the media. Additionally, if reporting is made to a regulatory authority or law enforcement agency, the company could be legally forced to make changes. The media lacks such authority. While the laws may influence how whistleblowers report problems, lack of media protection does not necessarily encourage or discourage ethical behavior.

BLOWING THE WHISTLE FOR FOOD SAFETY

Ken Kendrick and the Peanut Corporation of America, Questions, p. 66

1. If you were in Kendrick's shoes, what ethical issues might you confront?

Ethical issues include the fraud against customers, work safety and potentially deadly health issues from salmonella that could occur. If Kendrick were to make a report regarding these issues, there is also the impact on his employment that of other plant employees who could lose their jobs.

2. Which issues would you raise with management? How assertively?

Student answers will vary, but most will probably be most concerned about the salmonella and work safety issues.

3. Which outside agencies, organizations and/or defrauded customers would you tell? Explain.

Again, answers will vary. Students concerned with the health and safety issues may consider contacting OSHA or the CDC (Center for Disease Control) because of the potentially deadly results from failing to make such reports. Some may also feel that defrauded customers and or the FDA should be informed. That decision may be weighed against the potential job loss for plant employees that could result from informing customers or the FDA of the fraud.

Kendrick did raise issues safety/salmonella issues inside the plant. Based on a potential customer's inspection a rudimentary, mostly symbolic Quality Assurance program was started. Kendrick was distraught when a manager suggested that he manipulate the test results.

Questions (p. 66)

1. If you were Kendrick, what would you do now?

Students will likely have the same answers they had in Question 3 above. This may include contacting OSHA or the CDC. Some may suggest that the potential client needs to be contacted as well as current customers. Once again, the decision may be weighed against the potential job loss for plant employees that could result.

2. If you were Kendrick's supervisor, what would you do?

Student answers will vary. The supervisor would be facing the same ethical issues as Kendrick. As a supervisor, he or she may feel greater concern for the employees of the plant and the potential impact on them may weigh more heavily than the impact on customers.

Kendrick anonymously alerted customers and the Texas department of health in what he considered an effort to behave ethically while preserving his job. He left PCA anyway and watched as a salmonella recall was traced back to a PCA facility in Georgia.

Questions (p. 67)

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- 1. What does “I need my job and would be fired very quickly for telling you this, but I have some ethics left” mean to you? In Kendrick’s shoes, what lines would you resist crossing?**

Students should recognize the conflict between the obligation to one’s self and family versus the ethical conflict from failing to report dangerous and fraudulent activity. Each student must personally decide which lines they would resist crossing if they were in Kendrick’s shoes.

- 2. Given that attention from the salmonella outbreak did not mention the Texas plant; would you say something about it? Why or why not? If so, to whom? Would you go public?**

Due to the severity of the outbreak, most students will likely say they would report the Texas plant to the CDC since reports to the Texas Department of Health were unheeded. They may also want to contact customers of the Texas plant. Some may want to go public, but others may not because of the impact on the employees and the community where the Texas plant was located.

Kendrick sent numerous emails and went public in an effort to get the Texas plant closed. When it happened, people in the community were angry because of the job losses. Kendrick saw himself as a “prison snitch” rather than a whistleblower. He has lost his job and home, and separated from his wife. Potential employers tell him they will not hire a whistleblower and he suffers from depression. Despite it all, he said he was morally obligated to do what he did and that he would do it again.

Questions (p. 68)

- 1. Why is whistleblowing seen as a negative – like “snitching”? How do Kendrick’s actions differ from those of a “prison snitch”? What might be a basis for distinguishing between the right and wrong time to disclose negative information?**

Those negatively impacted by whistleblowing – in this case, plant employees and other members of the community - are likely to see it as “snitching”. Those who are protected by it – in this case, PCA customers and the public at large – should see it in a different light. The actions of a “prison snitch” generally are done out of self-interest only. One could argue, especially based on the outcomes, that Kendrick’s actions were completely selfless and done without regard of personal self-interest. Perhaps the basis for distinguishing between the right and wrong time to disclose negative information is motive and impact. Is the disclosure based on personal self-interest and potential gain? Is it based on an obligation to protect others without regard for the potentially negative personal consequences? What is the impact of making the disclosure? What is the impact of failing to make it?

2. Should managers want employees to report negative information to their supervisors? If so, what could they create to encourage this?

Managers should want employees to report negative information to their supervisors, giving the company the opportunity to correct issues before they get out of hand or go any further. The corporate culture and employee handbook should encourage openness and disclosure. Employees who do report information should be protected from any negative consequences and perhaps even be rewarded for coming forward.

3. In cases where whistleblowing supports a public good, what changes should be made in social perception, media, and/or public policy to encourage people to do the right thing?

The media should recognize and celebrate whistleblowers who act on behalf of the public good, without consideration of the personal impact. Public policy already offers some protections, but they should be increased. Consideration needs to be given to people like Kendrick who lost an unrelated job and is unable to find another. Perhaps financial incentives or tax breaks could be made available to the whistleblowers themselves and/or companies that hire former whistleblowers.

FOOD SAFETY MODERNIZATION ACT OF 2010

Ask the class to discuss why they think the Act only covered the FDA jurisdiction and failed to include the food items controlled by the Secretary of Agriculture.

ANTI-WHISTLEBLOWER LAWS

“Ag Gag” and Food Integrity, Questions, p. 71

1. Research: Find the Utah and Iowa statutes. Do they contain the three provisions mentioned in the article? Has there been any litigation related to either law? Have additional Ag Gag laws been based in other states since 2013?

The website <http://www.foodsafetynews.com/> provides numerous articles about food safety issues. A search of the term “Ag Gag” on the site provides information about the laws in Utah and Iowa as well as laws in other states.

Additional articles about the Iowa law include:

<http://animallawcoalition.com/ia-gov-signs-ag-gag-bill/>

<http://verdict.justia.com/2012/05/16/iowa-passes-an-ag-gag-law>

Utah articles regarding the law and litigation include:

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<http://animallawcoalition.com/utahs-ag-gag-bill-signed-into-law/>

<http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-andlaw-summer-2013/ag-gag-efforts-face-setback>

2. Research: Who funds ALEC? What is its operating budget? What is its stated philosophy? What other legislative templates has ALEC drafted?

The official site of the American Legislative Exchange Council is: <http://www.alec.org/> An Internet search leads to many additional articles about the budget and how the organization is funded.

3. Research: Who funds GAP? What is its operating budget? What is its stated philosophy? What kinds of initiatives is GAP now pursuing?

The official site of the Government Accountability Project is: <http://www.whistleblower.org>. An Internet search provides many additional articles about the organization.

4. Consider how ethical theory would apply to Ag Gag. Who are the stakeholders? How would the passage of Ag Gag laws look through the lens of free market ethics? Utilitarianism? Deontology? Virtue Ethics? The Ethics of Care?

Stakeholders in the Ag Gag controversy include consumers, agriculture firms, farmers, meat producers, and their employees. Environmentalists, animal rights and human right activists and animals themselves may also be considered stakeholders.

Free market ethics is based on the concept that the overriding goal of any corporation is to make a profit as long as it is done within the legal and ethical bounds of society. The passage of Ag Gag laws would be seen as a positive because of the impact on profits. The impact on other opposing stakeholders would not be considered under the free market ethics lens.

Because of its focus on all who are affected by a decision, **utilitarian analysis** would likely lead to a decision to oppose Ag Gag laws. The benefit to proponents of the laws may not outweigh the potentially harmful effect on consumers and factory farm workers, and the limitations on free speech, whistleblowing and investigative journalism.

Deontology would also suggest the laws are wrong. Health and safety issues as well as the duty to tell the truth are all at stake.

One could argue that human, civil and animal rights activists are a type of community who have a deeply ingrained set of ethical responsibilities or habits of goodness that are based on **virtue ethics**. This would be contrasted to the ethical beliefs of the community of those in favor in the laws who rely on animals and meat processing for their livelihood.

The **ethic of care** is concerned with maintaining significant relationships. There are several to be considered here and this viewpoint would likely focus on adapting and modifying the laws to allow for compromise and flexibility while maintaining these important relationships.

PUBLIC EMPLOYEES AND FREEDOM OF SPEECH

Garcetti v. Ceballos, Questions, p. 77

- 1. Where public employee speech is found to be pursuant to official duties, it lacks First Amendment protection. How does the majority argue in favor of this new requirement? What arguments do dissenters make for alternative methods of analysis?**

Justice Kennedy delivered the opinion of the Court and held that government employers need to maintain significant control over their employees in order to efficiently provide public services. When a communication is made pursuant to official duties for which the employee is being paid, supervisors have the right to evaluate the communication and discipline the employee. An employee does not have the right to perform his or her job however the employee sees fit.

Justice Stevens raised the point that this rule gives employees an incentive to avoid speaking frankly with their supervisors and encourages them to voice their concerns publicly instead.

Dissent led by Justice Souter stated that a speaker should not be silenced just because of government employment. Such silencing deprives the public of an opportunity to be informed on important public matters.

- 2. What values are most prominent for Justice Kennedy with the majority? For Justice Stevens in dissent? What values are framed in the dissent led by Souter? What value does Breyer mention?**

Justice Stevens' dissent discusses precluding speech that a supervisor would prefer that no one else discover and there is no difference between speaking as a citizen and speaking in the course of one's employment. The values reflected in this approach are accuracy, clarity, commitment, correctness, courage, diligence, excellence, frankness, honesty, independence, and openness.

Dissent led by Justice Souter involves these values: approachability, attentiveness, awareness, candor, discipline, discretion, excellence, fearlessness, fortitude, independence, insightfulness, making a difference, strength, watchfulness.

Dissent by Justice Breyer applies the Pickering approach and highlights the values of accuracy, awareness and effectiveness.

SIDEBAR: The case was heard twice before the Supreme Court. The first time, former Justice

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Sandra Day O'Connor was on the bench. The next argument occurred in March 2006 after Justice Samuel Alito Jr. was elevated to the Court. Justice Alito cast the fifth vote against Ceballos.

3. Whistleblowing by a Public Employee

- a. **Research:** There are multitudes of cases available via the Internet on the topic of whistleblowing by public employees.
- b. It appears that, based on the interpretation of the Mississippi courts, *Garcetti* does give people an incentive to go public instead of following the chain of command. In some cases, however, not reporting these types of issues could lead to termination.

4. Free Speech Scenarios

a. Massey's Energy Upper Big Branch Mine

- *Determining whether the employee spoke as a citizen on a matter of public concern.* With the number of deaths and mine collapses in the recent past, the information from the fired mine inspector would be a matter of public concern. The question becomes if the federal mine inspector was speaking as a citizen in public debate or as an employee. Because the complaint was internal, it is more likely done as an employee and not as a citizen, though *Garcetti* acknowledges that this is not dispositive. (547 U.S. at 420). Another indicator is whether the speech was related to the work of the employee. In this case it was. The third indicator is whether the speech was made pursuant to the job. In this case, it is not clear if the mine inspector was questioned about whether the timing of inspections was appropriate and it is not clear if mine inspectors routinely gave feedback on timing of inspections. That being the case, we presume it is outside the employee's official duties.
- *The question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the public.* This requirement is a balancing requirement – does the employer have good justification to limit the speech? There *does* not seem to be any good justification for treating this employee differently from the public. The mine inspector is charged with ensuring mine safety, which means investigating the mine at random times, and places. One appropriate justification is the need for confidentiality. It is not clear that the timing of past mine inspections is something that is confidential.
- *So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.* Disciplining a mine inspector for voicing concern

about the timing of mine inspections may affect operations as it could require the inspectors to work overtime.

- *Free Speech Claim:* Succeeds

b. **Football Coach**

- *Determining whether the employee spoke as a citizen on a matter of public concern.* It could be argued that a public school budget is a matter of concern as it deals with tax dollars. If Pinkston High School is a private school, then the argument is harder to make. Assuming it is a public school, the school budget is a matter of public record and important public debate. Working with money was a responsibility of the coach, but not a primary responsibility. Overseeing the management of the budget was not his job.
- *The question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the public.* The budgeting is an internal matter and so it is possible for the employer to treat employees differently than the public related to the budget complaints. In a public school, the board should have public meetings to discuss the budget. In this case, the underlying question is not about the public budget but is about the management of monies within the school. As this is more of an internal discussion, this question is a closer question.
- *So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.* Dissension or failing to work within the established budget procedures could be a large distraction from the ability to run the school district.
- *Free Speech Claim:* Most likely fails

Miami Dade Community College

- *Determining whether the employee spoke as a citizen on a matter of public concern.* As in the prior example, the use of public monies by the college may raise this to a public concern. If not, then this claim fails. At the same time, it is this employee's job to address potential illegalities within the system and so was not speaking as a citizen but was doing her primary job.
- *Free Speech Claim:* Fails

Sgt. Mills and the demotion

- *Determining whether the employee spoke as a citizen on a matter of public concern.* The number of crime prevention officers in total is a public concern but the number of

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officers who report through Sgt. Mills is not. If the reassigned officers were no longer on crime prevention, it is a matter of public concern. At the same time, supervising officers was a primary duty of Sgt. Mills and so internal discussions about the office structure would be part of her job. *Free Speech Claim*: Did not pass initial threshold questions and fails.

FALSE CLAIMS ACT QUI TAM WHISTLEBLOWERS

This section points out very well that whistleblowers, even though legally protected, do not have an easy decision to make and often do not have easy outcomes.

CHAPTER PROBLEMS

1. BP Atlantis – Kenneth Abbott

The situation: Kenneth Abbott was a contractor with BP who alleged violations of safety laws and policies. His contract was terminated.

The analysis: Abbott was a contractor. For the purposes of this discussion, we must assume that the contractor has the same rights under the law as an employee. This is a good opportunity for those with the background knowledge to discuss with students about the differences between independent contractors and employees.

To begin, students should remember and acknowledge that employment-at-will is the default position. To be able to sue, Abbott must rely on an exception to that default. In this case, we are looking at exceptions under state laws and under the *Garcetti* case.

The Maryland state statute (as it existed in 1998) is found on page 48 in the *Milton* case. Under that statute, employees are protected if the employee has refused to violate the law or if the employee has exercised a legal right or duty. In the Abbott case, there is no indication that there is a compulsion to report and so under Maryland's law, Abbott loses.

The New Jersey state law (as it existed in 1980) is found on page 54-55 in the *Pierce* case. Under that law, there is a narrow exception to the employment-at-will status based on membership in a profession guided by a code of professional conduct or ethics. It is not clear that Abbott is part of such a profession and so under New Jersey law, Abbott loses.

The text of the Montana law is found on page 58. Under that law, reporting a violation of violation of public policy is a protected act. Public policy is defined as concerning the public health, safety or welfare established by constitutional provision, statute or administrative rule.

Abbott was alleging a violation of law that would fall under this policy. Under the Montana statute, Abbott wins.

In the second part of the question, we assume that the whistleblower works for the Mineral Management Service, a branch of government. Under *Garcetti*, we ask 1) is the employee speaking as a citizen on a matter of public concern; 2) if yes, did the government entity have an adequate justification for treating the employee differently from any other member of the public and 3) are the restrictions limited to those necessary to maintain efficient and effective operations.

- *Determining whether the employee spoke as a citizen on a matter of public concern.* It appears that with regard to health and safety issues, this is a matter of great public concern. However, the whistleblower would be doing his/her job by reporting matters to the superior officer and so would not be speaking as a citizen.
- *Free Speech Claim:* Fails

2. Public Policy Exceptions: *Gardner v. Loomis Armored Inc.*

The employer would rely upon the concept of employment-at-will saying that there was no prohibition against firing Gardner particularly since he violated well-established company policy.

Gardner would say that his activities should fall under a public policy exception to the employment-at-will doctrine.

The Supreme Court of Washington found a clear mandate of public policy had been violated by this firing and ruled in favor of the employee as follows:

Society places the highest priority on the protection of human life. This fundamental public policy is clearly evidenced by countless statutes and judicial decisions.

The value placed on human life is demonstrated by the fact that courts have even suspended certain fundamental constitutional rights when a citizen's life is in imminent danger. For example, the 4th Amendment's protection against warrantless searches is waived under limited exigent circumstances, including situations where the search is necessary "to prevent physical harm to the officers or other persons."...[T]he public policy favoring the protection of human life also serves as a defense against most criminal charges....Homicide is justifiable if committed in the lawful defense of oneself or others. Furthermore, in a prosecution for any crime other than homicide, it is a complete defense that "[t]he actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal *he or another would be liable to immediate death or immediate grievous*

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bodily injury." (emphasis in original). These statutes show society would rather have one commit a crime under duress than refuse compliance and risk the life of whoever is threatened....

Gardner's responding to the hostage situation directly served both the Good Samaritan policy and the policy of saving lives. He was under no obligation to get involved, yet he acted as a Good Samaritan by voluntarily risking his own life and aiding a helpless victim of crime. By leaving the truck, following the suspect into the bank and disarming the suspect of his knife, Gardner unquestionably rescued the hostage from imminent life threatening harm. Furthermore, the facts of the situation tend to show Gardner reasonably believed the woman's life was in immediate danger, and he was the only source of help....Gardner's being fired for those actions will discourage similar future conduct in other employees....

Defendant argues that...Gardner was not discharged for getting involved with the hostage situation; rather, the termination was solely because Gardner violated a fundamental work rule forbidding drivers from leaving their trucks. In support of this distinction, Defendant points out Gardner's partner was not disciplined in any way for his involvement in the situation because his presence in the bank was consistent with his duties.

Defendant's argument lacks merit. Gardner broke the work rule expressly in order to save a person being chased by a man with a knife...Gardner's leaving the truck cannot be analyzed in isolation: his initial act of getting out of the truck is inextricably intertwined with his motive for leaving it and his subsequent actions.

The flaw in Defendant's argument can be demonstrated by the following example. If the truck were on fire, Gardner would have to leave the truck to save his life. If Defendant fired Gardner for leaving the burning truck, public policy would clearly be violated...

Loomis has exhaustively defended its work rule as an overriding justification. The rule is allegedly necessary to protect the safety and lives of Loomis employees. The drivers are safe inside the compartments and they can use the available two-way radio, public address system, and sirens to summon help. A driver's exiting the truck severs the partner's lifeline to safety and renders both employees more vulnerable to harm....Defendant cited a 1991 incident where an armored car driver got out of the truck in response to his partner being robbed. Upon exiting the truck, the driver was shot six times and killed.

A more specific reason for strictly enforcing the work rule involves the risk of robbers using a ploy to get the driver out of the truck. Such resourcefulness amongst thieves is not uncommon when large amounts of money are involved... A third reason behind Loomis' work rule may involve insurance policies. Some insurance companies will not cover a loss if the truck was robbed while left unattended.... This court must balance the public policies raised by Plaintiff against Loomis' legitimate interest in maintaining a safe workplace and determine whether those public policies outweigh Loomis' concerns....

The narrow public policy encouraging citizens to rescue persons from life threatening situations clearly evinces a fundamental societal interest....The value attached to such acts of heroism is plainly demonstrated by the fact that society has waived most criminal and tort penalties stemming from conduct necessarily committed in the course of saving a life. If our society has placed the rescue of a life above constitutional rights and above the criminal code, then such conduct clearly rises above a company's work rule. [citations omitted].

3. Reporting BGH: *New World Communications of Tampa, Inc. v. Akre*

The Maryland state statute (as it existed in 1998) is found on page 48 in the *Milton* case. Under that statute, employees are protected if the employee has refused to violate the law or if the employee has exercised a legal right or duty. In the Akre case, under the Maryland law, the Akres lose. They were neither exercising a legal right no refusing to violate the law. The paper had ultimate content control and because the Akres did not rewrite their article sufficiently, they were terminated.

The New Jersey state law (as it existed in 1980) is found on page 54-55 in the *Pierce* case. Under that law, there is a narrow exception to the employment-at-will status based on membership in a profession guided by a code of professional conduct or ethics. In the Akre's case, the courts may look to the code of professional ethics of the Society of Professional Journalist (www.spj.org/ethicscode.asp) which has a primary tenet of "seek the truth and report it." Because the truth about BGH may be debatable, it is not clear that this narrow exception would apply. The Akres likely lose.

The text of the Montana law is found on page 58. Under that law, reporting a violation of violation of public policy is a protected act. Public policy is defined as concerning the public health, safety or welfare established by constitutional provision, statute or administrative rule. Abbott was alleging a violation of law, which would fall under this policy. In the Akre's case, the Montana statute seems helpful, though the uncertainty of the harm of BGH still may go against the Akres. Because science is not certain, the Akres have a hard case to make.

The primary ethical issue in this case is whether the public has a right or need to know of the allegations about BGH so that they can make informed decisions about their dairy purchases. The other ethical issue in the case is whether the Akres have a right to write their story as they

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see fit or if there is some compulsion to modify the story for the superiors. Had Fox killed the story and put the Mod Squad on a different story, it may be a more satisfying result than looking like Fox attempted to force certain speech from the writers.

On appeal, the Florida appeals court reversed the jury award and stated that the Akres' threat to go to the Federal Communication Commission was not protected speech. Because the FCC's policy against distortion of the news by broadcasters was never instituted as a formal regulation, the employees did not disclose, or threaten to disclose, employer conduct that "is in violation of" a law, rule, or regulation. 866 So 2d at 1233.

4. Kit Fonshee and Beef Products International

- (a) Fonshee filed and lost a wrongful termination lawsuit against BPI.
- (b) There are many articles on the Internet about the case. One detailed analysis is found here:
<http://news.msn.com/us/pink-slime-suit-could-become-high-stakes-defamation-case>.

Opinions as to whether or not the case can be won and why it was filed will vary. It may be seen as a financial attempt to save a company that was severely negatively impacted by the ABC News Reports. It may also be seen as an attempt to protect BPI's reputation by pointing out flaws ABC's reporting and refuting many of their claims.

5. Cheryl Eckard and GlaxoSmithKline

- (a) Detailed information about Ms. Eckard's case and her \$96 million award is found here:
<http://online.wsj.com/news/articles/SB10001424052702303443904575578713255698500>
- (b) Ms. Eckard was employed as a quality assurance manager for GSK. She was sent by the company to Puerto Rico to clean up the problems. Obviously, the company could have avoided this expensive outcome by letting Ms. Eckard do her job and by following the recommendations that she made.

6. Walmart vs. GM

With the use of social media on the rise, this issue is becoming more important as employers set policies regarding its use. Opinions on the acceptability of Walmart vs. GM will vary. Students may determine that Walmart's statement is more well defined and understandable than the policy put forth by GM.

7. Guest workers and whistleblower protection

- (a) Primary stakeholders are the businesses that employ the guest workers and the workers and their families. Other American workers who may be impacted by the wages and working conditions of guest workers are also stakeholders. The businesses want to fill low-level jobs at the least possible cost. Workers are interested in earning a fair wage and acceptable and humane working conditions.

An argument in favor of whistleblower protection would be that allowing the lowest level of worker to stand up for fair and acceptable working conditions improves not only their own situation, but also those of other workers. Another is the issue of basic human rights for all individuals in all situations.

An argument against whistleblower protection is that these workers made a choice to come to the United States. They also have the choice to return to their home country. Visitors who are free to leave, they do not need to be afforded the same protection as American workers.

- (b) As of the time of the publication of this text, immigration reform is still being debated.

8. Edward Snowden

- (a) Snowden revealed classified details of government surveillance programs.
- (b) Student opinions will vary. An Internet search will provide information regarding opinions on this issue. One article that discusses citizens' opinions is found here:

<http://www.foxnews.com/us/2013/09/17/ap-norc-center-poll-highlights-americans-two-views-on-civil-liberties-terrorism/>

- (c) The United States filed espionage and other charges against Snowden. Several websites provide information about the charges including:

<http://abcnews.go.com/Politics/us-charge-nsa-leaker-edward-snowden-espionage/story?id=19461065>

As of January 2014 Snowden is in Russia. More information may be found at several websites including:

<http://www.cnn.com/2014/01/24/world/europe/russiasnowden/index.html>.

9. Policies and practices to change an organization culture

This question should lead to an interesting class discussion of organizational culture. Encourage students to think about policies that would encourage them to express their opinions and ideas, even if they go against the majority.

10. Right to work and whistleblowers

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More information about the European Union and its right to work statement is found here:

<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/righttowork.htm>

A search of “whistleblower” on the site will provide information about whistleblower regulations in the EU. Encourage students to search for information on other countries outside of the EU.

CHAPTER PROJECT

Guidelines in Appendix D.