THE LAW OF EMPLOYEE LOYALTY IN THE UNITED STATES

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This Report follows the four-part division of the Symposium topic noted in the Introduction: (1) competition by the employee against the employer; (2) employee criticism of the employer's product or behavior; (3) violations of employer confidentiality by the employee; and (4) lawsuits by the employee against the employer. Before engaging with the substance of the law, however, three preliminary points should be made. First, the law of individual employment in the United States grew out of the English law of master and servant, a law of a domestic relationship in which many of the respective obligations were legally implied. Note, for example, a leading American treatise of barely a century ago:

> [O]n the part of the master there is an implied obligation to treat the servant humanely, to employ him only in lawful pursuits, reasonably, and not to subject him to perils and dangers not ordinarily incident to the business. . . . So, too, he impliedly undertakes to employ him only in the business for which he was hired, and to furnish him with *suitable* lodging, and *good* and *wholesome* food.
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> On the part of the servant, there is an implied obligation to enter the master's service and serve him diligently and faithfully, to obey all his reasonable commands, treat him respectfully, conduct himself morally in his master's family, and to perform the duties incident to his employment honestly, with ordinary care, and due regard to his master's interest and business.[1]

Second, the sounding board against which the law now resonates is the American rule that, unless agreed to the contrary, employment is at-will; either party is free to terminate the relationship at any time and for *any* reason. Thus, insofar as employee discharge is concerned,

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1. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 165-166 (2d ed. 1886) (italics in original) (extensive references omitted).

the law of employee loyalty will be implicated only in cases where there is a contract of fixed duration or other obligation not to dismiss except for good cause (as in a collective bargaining agreement), or where a statute or common law tort limits the employer's liberty to discharge.

Third and closely related, individual employment law in the United States is primarily a creature of the states. Here one enters a highly nuanced world in which what might be lawful or protected in one state might be unlawful or unprotected in another.[2] Insofar as this Report is concerned with persistence and change in what does and does not constitute an act of "disloyalty," the reader should be aware that a high degree of simplification—even, perhaps, of oversimplification—is necessary to render the treatment manageable. Nevertheless, what follows will be mindful of the need to convey something of the legal texture.

I. COMPETITION BY THE EMPLOYEE AGAINST THE EMPLOYER

Consistent with the obligation of honesty and "due regard to his master's interest," an employee may not divert business from his or her employer to a competing business nor engage in self-dealing while in the company's employ. However, after the employment relationship has terminated the employee is perfectly free to compete with his or her former employer, unless that liberty has been contractually curtailed (a matter explained below), save that the law in all jurisdictions limits a former employee's ability to use trade secrets or other confidential business information secured from the prior employer. Less clear is what an employee may do to *prepare* for a future competitive venture (or employment) while remaining in the current employment.

A. *Disloyalty or Permissible Precompetitive Preparation*

It is quite clear that the implied duty of loyalty is breached by contacting *current* customers or clients of one's employer to solicit their business for a projected competitor. Further, under the "corporate opportunity" doctrine, a corporate officer or other high level employee who owes a "fiduciary duty" to the company may not appropriate to his or her future benefit a business opportunity presented to that person which the employer might have been inter-

2. The most comprehensive compilation is EMPLOYEE DUTY OF LOYALTY: A STATE-BY-STATE SURVEY (Stewart Manela and Arnold Pedowitz, eds., 1995) *with* 1999 Cumulative Supplement (a second edition is in press).

ested in pursuing without first offering it to the firm.[3] In this as in so many other areas of the law, however, recent academic thought has shifted from a consideration of the issue as one of ethics[4] to one of economics. Eric Talley, for example, has characterized the competing considerations that play in the "corporate opportunity" doctrine thusly:

> On the one hand, since corporations are generally perceived to enjoy a comparative advantage over their fiduciaries when it comes to production, there is a plausible justification for encouraging managers to "channel" most new projects into the firm. On the other hand, absolute deterrence of fiduciaries may sometimes be socially wasteful, particularly for projects requiring talents, flexibility, or resources that the agent possesses but the corporate entity lacks.[5]

Suffice it to say, the former employer may secure the gains realized by the former employee or the losses the employer incurred as a result of that disloyalty[6]; and the former employee may be compelled to repay all compensation paid during the period of the employee's disloyalty.[7]

On the other hand, because the law favors entrepreneurship—the freedom to develop one's skills and abilities which might also tend to increase competition, reduce prices, or improve products and services and so inure to the greater good—activity which is merely preliminary to a competitive venture short of current customer or client solicitation is not considered to be a breach of loyalty. Employees may incorporate the prospective competitor, secure financing, rent space, purchase machinery and print stationery.[8] How much further current employees may pursue their plans before breaching the duty of loyalty is a grey area where the cases become very fact-sensitive and in which different jurisdictions may view the scope of the employee's entrepreneurial liberty differently: Whether informing customers of one's *intent* to form a competitive venture is tantamount to an impermissible solicitation[9]; whether a quitting of employees *en masse* to the

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3. The leading scholarly treatment is Brudney & Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997 (1981).

4. *E.g.*, Jacobs, *Business Ethics and the Law: Obligations of a Corporate Executive*, 28 BUS. LAW. 1063 (1973).

5. Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 Yale L.J. 277, 281 (1998).

6. *See, e.g.*, Westwood Chemical Co. v. Kulick, 570 F. Supp. 1032 (S.D.N.Y. 1983).

7. *Id. See also*, Armory v. United Way Replacement Benefit Plan, 191 F.3d 140 (2nd Cir. 1999).

8. *See, e.g.*, Mercer Management Consulting v. Wilde, 920 F. Supp. 219 (D.D.C. 1996). *But see* Stokes v. Dole Nut Co., 48 Cal. Rptr. 2d 673 (Cal. App. 1995) (distinguishing liability in tort for breach of fiduciary duty from cause to dismiss for preliminary competitive activity).

9. *Compare* Sanitary Farm Dairies v. Wolf, 112 N.W.2d 46 (Minn. 1961) *with* Mal Dunn Assoc. v. Kranjac, 535 N.Y.S.2d 430 (App. Div. 1988). The distinction is more fully discussed in Jet Courier Serv. v. Mulei, 771 P.2d 486 (Colo. 1989).

competing venture is permissible[10]; whether one may solicit one's current coworkers to a future competing venture[11]; and, whether at *some* point in time the employee has an obligation to inform the employer of his or her intentions or activities,[12] in which the level of executive responsibility and the length of such activity is of importance.[13]

B. *Covenants Not to Compete*

There is no implied obligation not to compete in future, and so any restriction on competitive activity after termination is wholly a creature of contract, commonly called a "covenant not to compete." The law here also has its roots in English common law.[14] In essence, the law attempts to balance freedom of contract (and to limit overreaching by employers) with the individual's ability to engage in his or her trade or occupation, to develop his or her skills and abilities, and to provide a wider (and, perhaps, better) range of goods or services to the public. Some states have treated the issue legislatively, others entirely by judge-made law; in either case, the jurisdictions may weigh these competing interests differently.[15] California, for example, takes a very restrictive approach.[16] Only where the interest sought to be protected would be recognized by the law of unfair competition, *e.g.* trade secrets or other proprietary rights, would a covenant not to compete be allowed and only to the extent necessary to protect these spe-

10. The leading decision holding this concerted action a breach of loyalty is Duane Jones Co. v. Burke, 117 N.E.2d 237 (N.Y. 1954). It has been sharply criticized: Comment, *Permissible Employee Disloyalty and the Duane Jones Case*, 22 U. CHI. L. REV. 278 (1954) and Note, 54 COLUM. L. REV. 994 (1954). And there is authority to the contrary, *e.g.* Blackburn, Nickels & Smith v. Erickson, 366 N.W. 640 (Minn. App. 1985).

11. *Compare* Vigoro Indus. v. Crisp, 82 F.3d 785 (8th Cir. 1996) (breach of duty of loyalty under Arkansas law for a manager to solicit current co-workers to a competing venture), *with* Headquarters Buick-Nissan v. Michael Oldsmobile, 539 N.Y.S.2d 355 (App. Div. 1989) (no breach of duty to solicit fellow workers).

12. *Compare* Western Medical Consultants v. Johnson, 80 F.3d 1331 (9th Cir. 1996) (no duty to inform under Oregon law) *with* Dowd and Dowd, Ltd. v. Gleason, 672 N.E.2d 854 (Ill. App. 1996) (lawyers as "corporate officers" of law firm had a duty to disclose intention to leave *en masse* to form a competing law firm). *See generally* Cameco, Inc. v. Gedicke, 724 A.2d 783, 789 (N.J. 1999) (employees must disclose plans to establish an independent business that "might conflict" with the employer's).

13. *See* Chelsea Indus. v. Gaffney, 449 N.E.2d 320, 3426 n.20 (Mass. 1983). On how finely the duty may be distinguished *see, e.g.*, Standard Brands v. U.S. Partition & Packaging Corp., 199 F. Supp. 161 (E.D. Wis. 1961) (lavish entertainment of company's customers by executives who were actively planning competing venture amounted to wrongful solicitation because executives were, under the circumstances, under duty to disclose their plans so that employer could decide whether to expend those sums).

14. The seminal discussion is by Harlan Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 629 (1960).

15. The leading (and exhaustive) compilation is COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (Brian Malsberger, ed.) (2nd ed. 1996) and 1998 Cumulative Supplement.

16. Cal. Bus. & Prof. Code, §§ 16600-01 (1997).

cial interests.[17] Where, for example, a traffic reporting service placed its on-the-air reporters under covenants not to compete and, after they left for a competitor, claimed that their "personalities" were intangible property rights that it could protect in that fashion,[18] the California Court of Appeal would have none of it:

> Actors, musicians, athletes, and others are frequently trained, tutored, and coached to satisfy the requirements of their sponsors and audiences, but their talents belong to them to contract away as they please. . . . Simply hiring personnel who possess the requirements specified by a customer does not convert the employee into a "trade secret." In other words, a stable of trained and talented at-will employees does not constitute an employer's trade secret.[19]

On the other hand, South Dakota has made a broad legislative provision for covenants not to compete.[20] So long as the statutory conditions are met, no examination of the "reasonableness" of the covenant is required for employees who voluntarily quit or are discharged for cause, but, the reasonableness of the covenant is subject to challenge when the employee was discharged without good cause.[21]

The generally prevailing view, however, is that a covenant not to compete will be enforced if it is supported by consideration,[22] is justified by a legitimate interest of the employer, and is reasonable in the restrictions it imposes on what the employee may do, where (or for whom) and for how long in light of the employer's interest, the employee's interest, and the public interest. These are briefly explored below.

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17. *See, e.g.*, Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324 (9th Cir. 1980).

18. Metro Traffic Control v. Shadow Traffic Network, 27 Cal. Rptr. 2d 573 (Cal. App. 1994). The covenant, set out *id.* at 575, n.1, recited the expense the employer had incurred in training and developing the employee's services as supporting the covenant. The role of training costs will be additionally explored below.

19. *Id.* at 578-79.

20. S.D. Cod. L. § 53-9-11 (1990):

> An employee may agree with an employer at the time of employment or at any time during his employment not to engage directly or indirectly in the same business or profession as that of his employer for any period not exceeding two years from the date of termination of the agreement. . . .

21. Central Monitoring Service v. Zakinski, 553 N.W.2d 513 (S.D. 1996).

22. The requirement of consideration is a partial protection against employer overreaching especially in the context of a demand that someone already hired execute a covenant as a condition of retention. International Paper Co. v. Suwyn, 951 F. Supp. 445 (S.D.N.Y. 1997). Even here, however, there is considerable difference of opinion. *Compare* Miller Paper Co. v. Roberts Paper Co., 901 S.W.2d 593 (Tex. App. 1995) (covenant made as part of hire into an at-will employment is not supported by consideration) *with* Weseley Software Development Corp. v. Burdette, 977 F. Supp. 137 (D. Conn. 1997) (consideration found in continued at-will employment and new benefits attached to it). It seems beyond doubt that an at-will employee can be discharged for refusing to sign. *See*, Tatge v. Chambers & Owen, 579 N.W.2d 217 (Wis. 1998) and O'Regan v. Arbitration Forums, Ltd., 121 F.3d 160 (7th Cir. 1997) (under Illinois law).

1. Legitimate Business Interest

An employer's interest in limiting competition alone is not an interest the law will recognize to justify a restraint on an employee's occupational or entrepreneurial liberty. It is also universally recognized that an employer's need to protect its trade secrets or other confidential business information provides a legitimate basis not only for "confidentiality agreements" expressly limiting disclosure, but for covenants not to compete as well. This has been criticized on the ground that inasmuch as the law already affords a remedy for the wrongful disclosure (or potential disclosure) of that information, the covenant is superfluous.[23] The contrary view is that the means of policing the impermissible disclosure of information is so awkward that the covenant functions as an efficient prophylactic against wrongful disclosure. This pragmatic consideration washes on to the question of reasonableness of application, *i.e.* whether or not the precise employment foreclosed by the covenant is one in which the former employee actually would be in a position to use the prior employer's confidential information.[24]

Other interests recognized as legitimate, depending upon the jurisdiction, are customer contacts (the so-called "route salesmen" cases), company goodwill, the uniqueness *vel non* of the employee's services, and training costs. How these play out are illustrated in some recent cases:

Employer goodwill. In *Weber v. Tillman*,[25] the Supreme Court of Kansas confronted a noncompetition agreement between a physician (a dermatologist) and his physician-employer. The dermatologist agreed not to practice medicine within a thirty mile radius of his employer's clinic for two years. The Court held that the covenant reasonably protected the employer's investment in establishing his practice and building its goodwill over a seventeen-year period; the employee-physician had had no prior contact in the community, and his competing practice had reduced his former employer's clientele considerably. Although the question of whether the public interest is served by enforcing the agreement will be treated momentarily, the fact that the employer's patients preferred to be seen by the erstwhile physician-employee places in question whether the covenant not to compete here served any interest other than being free of competition. In a

23. *See* Phillip Closius & Henry Schatter, *Voluntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531 (1984).

24. *See, e.g.*, APAC Teleservices v. McRae, 985 F. Supp. 852 (N.D. Iowa 1997).

25. 913 P.2d 84 (Kan. 1996).

parallel case, albeit involving what the Supreme Court of Texas termed the "common calling" of automobile trim repair, the Court refused to give effect to the covenant, explaining:

> When people leave a business to work for another or to open a firm of their own, many are capable of taking with them a sizeable number of the clients whom they had served at their previous place of employment. If they were not in possession of some type of personal magnetism or personal goodwill, they would be incapable of retaining those clients or customers. Shrewd employers and franchisers know this and seek to deprive the employee/franchisee of the fruits of his goodwill by requiring that he enter into an agreement containing a restrictive covenant. The covenant is generally unfair to the employee/franchisee, for when that person is placed in the position of being unable to compete with the former employer/franchiser, his personal goodwill is effectively neutralized.[26]

In Kansas, such an agreement would legitimately protect the employer's goodwill; in Texas it would illegitimately deny the employee the ability to exploit his or her goodwill.

Customer contacts. In *West Group Broadcasting, Ltd. v. Bell*,[27] an intermediate appellate court in Missouri affirmed a refusal to enforce a covenant not to compete entered into with a radio announcer that would have precluded her employment by any competitor within a 65 mile radius for 180 days. The court recognized that radio and television stations have an interest in protecting the "broadcast personalities" they develop (and invest in); in so doing, it attended to the rationale of the "route driver" cases:

> [I]n the sales industry the goodwill of a customer frequently attaches to the employer's sales representative personally; the employer's product becomes associated in the customer's mind with that representative. The sales employee is thus frequently in a position to exert a special influence over the customer and entice that customer's business away from the employer. An employer may properly protect itself against such an eventuality for a reasonable period of time.[28]

The court avoided the analogy for it found the particular announcer's new persona and radio format entirely different from that in her prior employment. It would appear, however, that Texas has rejected the rationale of the "route driver" cases (at least for "common callings") and it remains to be seen whether an employer's investment in developing the employee's "image" should be considered an interest protectable by a covenant not to compete—as it would not be in California.

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26. Hill v. Mobile Auto Trim, 725 S.W.2d 168, 171-72 (Tex. 1987).
27. 942 S.W.2d 934 (Mo. App. 1997).
28. *Id.* at 939, quoting earlier Missouri authority.

Training costs. In *Borg-Warner Protective Services Corp. v. Guardsmark, Inc.*,[29] a federal district court confronted an agreement between a private security service and its employees that precluded, for a one year period, the performance of any security services at the same location where the employee's work had been performed. As is apparently common in the private security services business, one contractor, Borg-Warner, replaced another, Guardsmark; and, as is also apparently common in the industry, the covenants were instituted in order to make it difficult for a successor contractor to hire the predecessor's workforce, *i.e.* to hire persons who would not have to be trained in the special needs or situation of the purchaser of security services, in this case a Gap store. Because Guardsmark had trained these employees "on-the-job" at the Gap for a month without billing the customer, the protection of its training costs was held a legitimate basis for the covenant.

There is argument in the economic literature in support of the employer's interest in this regard,[30] but it remains to be seen whether or not training costs—or the new hire's lower marginal utility—are not reflected in the starting wage, or whether other means with less drastic anticompetitive effects are not available, such as contracts for the repayment of training costs by employees who quit within a certain period of time.[31] If Guardsmark had merely paid each new hire an additional month's wage in return for a covenant not to compete, there would seem to be little doubt that that agreement—supported by consideration and otherwise reasonable as to scope and duration—would be unenforceable as grounded in no interest other than keeping competitive contractors at a disadvantage. Yet in economic terms, what Guardsmark actually did (in not charging the Gap for each new hire's first month on the job) seems indistinguishable from this hypothetical alternative. Suffice it to say, other states reject training cost as an interest protectable by a covenant not to compete.[32]

2. Reasonableness

There are an enormous number of cases on what are and are not "reasonable" restrictions: On the precise nature of the future employ-

29. 946 F.Supp. 495 (E.D. Ky. 1996) (applying both Tennessee and Kentucky law).

30. Paul Rabin and Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUDIES 93 (1981).

31. Kraus, *Repayment Agreements for Employee Training Costs*, 44 LAB. L.J. 49 (1993). *But see* Brunner v. Hand Indus., 603 N.E.2d 157 (Ind. App. 1992) (repayment contract void for anti-competitive effect).

32. Louisiana amended its statute to eliminate training costs in 1989. Louisiana Acts of 1989, No. 639.

ment the former employee may engage in, the geographic scope of the limit and its duration; but it may be worth emphasizing here that the "public interest," often recited as a factor to be considered, is sometimes litigated. For example, in *Weber v. Tillman*,[33] discussed above, the question of how enforcing the covenant would affect the availability of medical services in the community was argued. After a thorough review of authority in medical employment from several jurisdictions, much of it hostile to the covenant, the Supreme Court of Kansas distinguished the case before it on the ground that these contrary decisions concerned a shortage of physicians whose specialities were "for lack of a better term, medically necessary,"[34] in contradistinction to dermatology which, presumably, the court assumed to be less important in terms of public need. In another jurisdiction, however, and in a case not involving the delivery of medical services, a federal district court stressed the public interest in fostering the mobility of employees between the two major competitors in the market "in order to hone competition."[35]

3. Remedies

It is possible for the employer injured by breach of a lawful covenant to enjoin the former employee from working in violation of its terms (and to sue the then employer for tortious interference in contract if the elements of the tort can be made out[36]). Thus the prospect has been raised of an all-too-easy means of eliminating competition by hiring at-will employees subject to the covenant one day and dismissing them the next.[37] Inasmuch as injunctive relief is a matter of equity in which, as it is said, the party seeking the injunction must have "clean hands," the circumstances of the discharge are commonly taken into account.[38]

A separate remedial question is presented when a court confronts a covenant that is unreasonable as written, but that would be supported by a legitimate interest as reasonable *if* more narrowly drawn. In some jurisdictions the courts would narrow the provisions accordingly—to "blue pencil" them—and enforce them as narrowed. But others eschew that approach as an invitation to employers to cross the line of reasonableness in anticipation of judicial narrowing in the

33. 913 P.2d 84 (Kan. 1996).
34. *Id.* at 95.
35. APAC Teleservices v. McRae, n.24, *supra* at 868.
36. *See, e.g.*, Viallok v. Medtronic, 537 N.W.2d 356 (Minn. 1998).
37. Cellular One v. Boyd, 653 So.2d 30 (La. App. 1995).
38. *See generally*, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY, n.15 *supra*.

event of transgression; they deny enforcement to any unreasonable restriction.[39]

II. Employee Criticism of the Employer or Its Product

Because of the at-will employment rule, whether or not an employee can be discharged for disparaging his employer's product, for criticizing the employer or differing with it, would be most likely to arise in one of three ways: (1) the employee is under an individual contract of employment for stated duration or under an employee handbook or manual limiting the employer's prerogative to dismiss which the law of the state would hold to be an implied contract, in either case limiting the employer's right to dismiss only to just or good cause, which would ordinarily be for a jury to decide, or the employment is governed by a collective bargaining agreement limiting the employer's ability to discharge, disputed interpretations of which are most commonly decided by a jointly-selected labor arbitrator; (2) the employee's conduct was in conjunction with activity arguably protected by the National Labor Relations Act (NLRA), in which case the National Labor Relations Board (NLRB) would have to decide, subject to judicial review, whether or not the particular conduct was statutorily protected; or, (3) the employee seeks to bring his or her conduct under whatever shelter state law may afford for activity that is taken in the public interest, where the discharge would violate "public policy."

Absent such a connection, for example to public health or safety, the prevailing rule is that an employee breaches the duty of loyalty in disparaging the employer's *product*,[40] though whether or not such disparagement amounts to cause to discharge instead of some lesser sanction depends upon the employer's (or arbitrator's) commitment to observe progressive discipline.[41] Challenges to the integrity of the

39. Some agreements make provision for liquidated damages, but here, too, reasonableness plays a roll. *Compare* Brigwell v. Albert, 666 A.2d 82 (Me. 1995) (optometrist's covenant forbidding competition within a twenty-mile radius for four years enforced "as applied" to relocation within 16 months of quitting so to trigger a liquidated damage clause of $30,000 as a "reasonable estimate" of the former employer's lost revenue), *with* National Emergency Services v. Wetherly, 456 S.E.2d 639 (Ga. App. 1995) ($25,000 sum for liquidated damages in physician's covenant not to compete considered as a penalty rather than a reasonable estimate of loss and so unenforceable).

40. *See, e.g.*, Oklahoma Fixture Co., 98 LA 1178 (Allen, 1992); Sun Furniture Co., 73 LA 335 (Ruben, 1979); Thompson Bros. Boat Mfg. Co., 56 LA 979 (Schurke, 1971).

41. In one of the few cases arising in the non-union, non-Labor Act setting, an employee remarked to a quality inspector that his employer's product was "fucking junk" and was overheard by a customer's inspector of whose presence the employee was unaware. Barry v. Posi-Seal Int'l, 647 A.2d 1031 (Conn. App. 1994). His discharge was held subject to the employer's rules on warnings and progressive discipline, which had not been followed.

employer or criticism of its behavior, however, are often part-and-parcel of a labor dispute, in which broad scope has traditionally been given to robust free speech, or may implicate the state public policy on "whistle blowing." How these have been treated by the Labor Board, labor arbitrators and the courts is explored below.

A. *Under the National Labor Relations Act*

Section 7 of The National Labor Relations Act provides that employees shall have the right, among other things, "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[42] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." However, section 10(c) includes a provision that "no order of the [National Labor Relations] Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . for cause."

Obviously, a good deal of concerted employee activity contrary to the employer's interest would be considered "disloyal" at common law—a withdrawal of services, for example—and so much is protected under the Act contrary to the common law's implied obligations; much, but not all. The leading—and highly controversial—precedent on this issue is *NLRB v. Local Union No. 1229, IBEW* ("Jefferson Standard").[43] When bargaining negotiations over the terms of a collective agreement broke down, technicians employed by a broadcasting company remained at their jobs but distributed handbills to the public highly critical of the station's programming. Those handbills contained no reference to the labor dispute, nor did they mention that a union was involved. The company discharged the employees who had circulated the handbills, claiming that it was not obligated to keep paying salaries to those who were doing their best "to tear down and bankrupt our business."[44] The NLRB refused to order the reinstatement of the discharged employees, asserting that the attack on the company's business was "hardly less 'indefensible' than acts of physical sabotage."[45] On appeal, the U.S. Supreme Court, by a divided vote, upheld the Board's decision. Concluding that the discharged employees "deliberately undertook to alienate their employer's customers by impugning the technical quality of its product," the majority

42. 29 U.S.C. §§157 (1988).
43. 346 U.S. 464 (1953).
44. *Id.* at 469.
45. Jefferson Standard Broadcasting Co., 94 NLRB 1507, 1511 (1951).

declared that "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer."[46] The dissenters pointed out that "Section 10(c) does not speak of discharge for 'disloyalty'" and warned that "to float such imprecise notions as 'discipline' and 'loyalty' in the context of labor controversies, as the basis of the right to discharge, is to open the door wide to individual judgment by Board members and judges."[47]

The case has long stood as a narrow exception to the otherwise robust breadth of statutorily protected activity. As a result, as the NLRB put it, in some cases there is a "fine line" between permissibly raising sensitive issues and impermissibly disparaging the employer or its product.[48] For example, the United States Court of Appeals for the District of Columbia Circuit, disagreeing with the Labor Board, held that an employee's mere attendance at a rally boycotting the employer's product (which boycott was not sanctioned by the union) was such disloyalty as to permit the employer to discharge.[49] Conversely, the United States Court of Appeals for the Ninth Circuit sustained the lawfulness of employee criticism of the quality of the product that the employees publicly connected to a current labor dispute.[50] So, too, public criticism of the employer on environmental grounds expressly connected to a labor dispute was held protected.[51] Where the criticism is directed only to co-workers and not to customers or the public at large, larger compass for free expression has been given.[52]

The Labor Act does not protect a deliberate and malicious falsehood[53]; but the NLRB has rather consistently held that if an employee is engaged in otherwise protected activity under the NLRA and communicates to other employees information that proves to be false, such conduct is not alone grounds for discharge. As an administrative law judge put it in one case: "Offensive, vulgar, defamatory or opprobrious remarks during the course of protected activities will not remove activities from the Act's protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service."[54]

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46. 346 U.S. at 471.
47. *Id.* at 479, 481 (Frankfurter, J., dissenting).
48. Sahara Datsun, 178 NLRB No. 148 (1986).
49. George A. Hormel & Co. v. NLRB, 962 F.2d 1061 (D.C. Cir. 1992).
50. Sierra Pub. Co. v. NLRB, 889 F.2d 210 (9th Cir. 1989). *See also* Handicabs, 318 NLRB 890 (1995) *enf'd* 95 F.3d 681 (9th Cir. 1996) (criticism of the employer directed to customers is protected).
51. Blue Circle Cement v. NLRB, 41 F.3d 203 (5th Cir. 1994).
52. *See, e.g.*, United Cable Television Corp., 29 NLRB 138 (1990) and Martin Marietta Corp., 293 NLRB 719 (1989).
53. NLRB v. New York University Medical Center, 702 F.2d 284 (2d Cir. 1983).
54. Dreis and Krump Mfg. Co., 221 NLRB 309 (1975).

B. *In Arbitration*

A number of cases involving disparagement by employees of an employer or its product have been resolved by arbitrators. Typically, the specific issue involved in such cases in whether the discharge for allegedly disloyal behavior is for "just cause" under the terms of the applicable collective bargaining agreement. As one Arbitrator put it, "Can you bite the hand that feeds you, and insist on staying for future banquets?"[55] In an often-cited arbitral opinion, *Zellerback Paper Co.*,[56] Arbitrator Gentile defined "disloyalty" as generally indicating "unfaithfulness, an absence of trust and reliance, a failure of conscientious effort, not true to the facts and a failure to observe the duty owed to the other person." On the basis of an extensive review of previous arbitration awards on this issue, he designated the following eight factors that should be accorded "controlling or pivotal weight" in these cases:

> (1) Was the act or conduct expressed orally or in writing, or (2) directed toward persons within or outside the private organization? (3) If the act or conduct was directed toward a customer or competitor of the organization, did it directly or indirectly cause damage to the business or interfere with advantageous relations between the organization and the customer or competitor? (4) If the act or conduct was directed to a governmental enforcement agency, did the employee first exhaust internal avenues of redress or correction; or was the act or conduct simply the exercise of a legal right protected by one or more applicable laws? (5) Were the statements made by employees known or reasonably believed by them to be true, false, or undetermined at the time they were made? (6) Was the tone or actual language of the statements malicious, slanderous, inflammatory, disruptive, or calculated to place the employer in a position of ridicule or disrepute? (7) Were there substantial personal rights of expression and citizenship involved? (8) Did the employer condone the act or conduct in the past, and did its policies adequately place the employee on notice of the possible or probable consequences if the act or conduct were carried out?

Arbitrators tend to uphold some form of discipline, up to and including discharge, when an employee is found to have made malicious or false statements harmful to the employer, or has made them with reckless disregard of the truth.[57] But arbitrators also tend to give broader latitude to critical employee speech that is confined within the organization, as opposed to being aired outside.

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55. Forest City Pub. Co., 58 LA 773, 783 (McCoy, 1972).

56. 75 L.A. 868 (Gentile, 1980). (The arbitrator excluded from his consideration arbitration decisions involving public agencies or public employees, which are beyond the scope of this report.)

57. *See, e.g.*, United Cable Television, 92 LA 3 (Koven, 1989).

C. *"Whistle Blowing"*

In some cases, the employee may reveal that the employer is violating a law or is in some other way breaching the public trust. These situations create a tension between an employee's sense of duty to complain within the corporation or to inform the appropriate authorities of the employer's wrongdoing (commonly referred to as "blowing the whistle") and his or her duty of loyalty to the employer—at least as the employer perceives it. As the chairman of the board of General Motors observed in 1971: "Some of the enemies of business now encourage an employee to be disloyal to the enterprise. They want to create suspicion and disharmony, and pry into the proprietary interests of the business. However this is labeled—industrial espionage, whistle blowing, or professional responsibility—it is another tactic for spreading disunity and creating conflict."[58]

A considerable number of state and federal anti-retaliation statutes protect whistle blowers; so, too, a number of state courts have recognized discharge of at-will employees to be actionable in tort where the reason for the discharge is violative of "public policy." In both settings, however, there is a considerable variation in the scope of protection: New York, which has not extended its common law to any general limit on discharge on public policy grounds, has adopted a whistleblower statute protecting the disclosure to a superior or to a public body of an employer's violation of law that "presents a substantial and specific danger to the public health and safety."[59] This exception has been read narrowly: A nurse who reports abuse of a patient by a third party caregiver may be discharged inasmuch as the report was not of an activity, policy or practice of her employer[60]; a nuclear power plant's health physicist may be discharged for reporting the exposure of employees to radiation beyond the permissible limit because he had only a "reasonable belief" the violation had occurred whereas the statute requires that there be an actual violation.[61] But New Jersey's much broader Conscientious Employee Protection Act,[62] has been given a "liberal" construction "to achieve its remedial purpose."[63] In contrast to the law in New York, "reasonable belief" of a

58. *Quoted in* ALAN WESTIN & STEPHAN SALISBURY, INDIVIDUAL RIGHTS IN THE CORPORATION 93 (1980).

59. N.Y. Labor Law § 740 (McKinney 1988).

60. Radice v. Elderplan, 630 N.Y.S.2d 326 (App. Div. 1995).

61. Bordell v. General Electric, 622 N.Y.S.2d 1001 (App. Div. 1995). *Cf.* Rogers v. Lennox Hill Hosp., 626 N.Y.S.2d 137 (App. Div. 1995) (hospital director of emergency services has action under the statute for discharge for cooperating with state investigation of paramedics of whose behavior he had personal knowledge).

62. N.J. STAT. ANN. § 34:19-1 to 8 (1999 Supp.).

63. Barrett v. Cushman & Wakefield of New Jersey, 675 A.2d 1094, 1098 (N.J. 1996).

violation of law or of public policy will trigger statutory protection. A nationally prominent toxicologist who was dismissed for protesting, within the company, his employer's distribution of gasoline in Japan with a higher than acceptable concentration of benzene was protected in that activity even though, under Japanese law, the sale of the gasoline was lawful.[64] A similar diversity of approach in applying whistle blower statutes is reflected elsewhere.[65]

So, too, among the jurisdictions that have recognized the common law tort of discharge for a reason violative of public policy, there is a similar diversity of view on how far public policy is implicated by an employee's intramural or external protest.[66] Activity held protected has included: complaint by an inspector that his employer was shipping failed aircraft parts,[67] testifying truthfully in a lawsuit against one's employer,[68] demanding that one's employer comply with federal food and drug regulations,[69] inquiring of medical insurance coverage promised by one's employer and demanding an explanation for non-coverage,[70] complying with legal obligation to report neglect or abuse of nursing home patients,[71] and reporting criminal activity to the employer or to law enforcement authorities.[72] Activity held unprotected, as implicating no limit on the employer's power to discharge, has included: reporting criminal activity, either to law enforcement authority or to company officials,[73] reporting co-worker criminal activity to the employer but not to law enforcement authority,[74] protesting a failure to follow company policies,[75] protesting an employer's failure to

64. Mehlman v. Mobil Oil Corp., 707 A.2d 1000 (N.J. 1998).

65. The leading compilation is HENRY PERRITT, EMPLOYMENT DISMISSAL LAW AND PRACTICE (4th ed. 1998). *Compare* Contreras v. Ferro Corp., 652 N.E.2d 940 (Ohio 1995) (strict compliance with statute's complex procedural provisions required) *with* Jenkins v. The Golf Channel, 714 So.2d 558 (Fla. App. 1998) (liberal construction should be given to procedural requirements). *Cf.* Chandler v. Schlumberger, Inc., 542 N.W.2d 310 (Mich. App. 1996) (whistle blower statute does not protect employee discharged for erroneous perception that he had reported a violation of law).

66. *See generally*, HENRY PERRITT, EMPLOYMENT DISMISSAL LAW AND PRACTICE, *id.*

67. Green v. Ralee Engineering Co., 61 Cal. Rptr. 2d 352 (Cal. App. 1997).

68. Page v. Columbia Natural Resources, 480 S.E.2d 817 (W. Va. 1996).

69. Lynch v. Blanke Baer & Bowey Krinko, 901 S.W.2d 147 (Mo. App. 1995).

70. Thomto v. Corborn's Inc., 871 F. Supp. 1097 (N.D. Iowa 1994) (public policy founded in the state's wage payment law).

71. Hausman v. St. Croix Care Center, 571 N.W.2d 393 (Wis. 1997) (but rejecting any broad "whistle blower" protection as a general proposition of public policy).

72. Willard v. Paracalsus Health Care Corp., 681 So.2d 539 (Miss. 1996).

73. *See, e.g.*, Austin v. Healthtrust, Inc. — The Hospital Co., 967 S.W.2d 400 (Tex. 1998). Hayes v. Eateries, Inc., 905 P.2d 778 (Okla. 1995); *cf.* Hunger v. Grand Central Sanitation, 670 A.2d 173 (Pa. Super. 1996) (no public policy violated where there was no evidence of the criminal or regulatory violation the employee had alleged).

74. Fox v. MCI Communications Corp., 931 P.2d 857 (Utah 1997).

75. Turner v. Anheuser-Busch, 32 Cal. Rptr. 2d 223 (Cal. 1994).

disclose certain product information to its customers,[76] expressing concerns about an employer's possible abuse of its tax-exempt status,[77] and threatening to report deficiencies in an employer's contractual performance to a state regulatory authority.[78]

In sum, unless an employee can bring himself or herself under the provisions of a statute on point or unless the employee's disclosure is instinct with some larger public purpose, the law in the U.S. affords no protection for speech that is critical of one's employer or reveals information that, even if not confidential, is not pegged to some protective scheme. A good example is *Marsh v. Delta Airlines*.[79] The plaintiff, a baggage handler of 26 years' service, was discharged for writing a letter to the editor of a Denver newspaper critical of his employer's plan to replace full-time employees with hourly contract workers. He "was not exposing public safety concerns, instead he was a disgruntled worker venting his frustrations to his employer whom he felt betrayed him and his coworkers."[80] This, the court concluded, breached the implied duty of loyalty.

An employee protected by the "just cause" provision of a collective bargaining agreement may also invoke a claim of conscience in defense of his or her allegedly disloyal action: *e.g.*, a utility lineman who, in uniform and while on assignment to city hall, protests his employer's rate increase to a city official[81]; an employee who protests, as a taxpayer, a policy beneficial to his employer.[82] Arbitrators have been as vexed as the courts—if not more—in deciding where the line between free speech as a citizen and disloyalty as an employee is to be drawn. As an observer put it,

> The arbitration of claims of conscience . . . present . . . difficult problems because, lacking any precise guide in the collective agreement, the arbitrator is called upon to weigh not only managerial and individual interests but competing social values. . . . [S]ome of these cases—"free speech" is one—are precisely about standards and confront deep-seated assumptions of inherent management rights; they test whether the employer's prerogative to project (or protect) its corporate image trumps the employee's claim of individ-

76. Leverton v. Alliedsignal, Inc., 991 F. Supp. 486 (E.D. Va. 1998).

77. Milton v. IIT Research Institute, 138 F.3d 519 (4th Cir. 1998).

78. Skrable v. St. Vincent Infirmary, 943 S.W.2d 236 (Ark. 1997); *accord* Thompson v. Memorial Hosp. at Easton, Md., 925 F. Supp. 400 (D. Md. 1996).

79. 952 F. Supp. 1458 (D. Colo. 1997).

80. *Id.* at 1463.

81. Appalachian Power Co., 73-2 ARB ¶ 8496 (McDermott, 1973).

82. Zellerbach Paper Co., 75 LA 868 (Gentile, 1980).

ual liberty and society's interest in the robust debate of political, economic, and social issues.[83]

III. VIOLATION OF CONFIDENTIALITY

In designating this topic as one of the four dealt with in this Symposium, the NAA Committee on International Studies decided to omit discussion of inventions, patents, trade secrets, and the like, to concentrate on other information the employer may wish to conceal, either from its employees or the general public. Simply put, the employee is required to respect the employer's prohibition on disclosure—absent an adequate connection to public policy (or whistle blowing).[84] Some states, New York for example, go beyond breach of employer policy or dictate to forbid the duplication of computer-stored information irrespective of whether that information is freely available elsewhere[85]; thus, an employee can be prosecuted for transmitting his computer files from a prior employer to his workstation in a new employment even if the information transmitted is a widely available commercial or business program.[86] Nevertheless, there are exceptions.

Employers cannot prohibit employees governed by the National Labor Relations Act from discussing their wages or terms or conditions of employment—their grievances or potential work-related problems—with one another.[87] Nor may employers prohibit such discussion with customers or clients.[88]

In general, the disclosure of confidential information is unprotected.[89] Where, for example, a secretary chanced upon a letter on her boss' desk that seemed to vindicate a former co-worker's discrimination claim against the employer, her copying the document and sending it to the former co-worker was held to be statutorily unprotected conduct for which she was permissibly discharged[90]: She "had breached her employer's trust by copying confidential material and

83. Matthew Finkin, *Employee's Duty of Loyalty: An Arbitral-Judicial Comparison*, Proceedings of the Forty-Sixth Annual Meeting of the National Academy of Arbitrators 200, 213 (Gladys Gruenberg, ed., 1994).

84. *See, e.g.*, Holler v. Buckley Broadcasting Corp., 706 A.2d 1379 (Conn. App. 1998).

85. N.Y. Penal Law § 156.30 (McKinney 1999).

86. People v. Katakam, 660 N.Y.S.2d 334 (Sup. Ct. 1997). Missouri apparently takes a similar statutory approach. *See* Pony Computer v. Equus Computer Sys., 162 F.3d 991 (8th Cir. 1998) (but evidence of specific disclosure required).

87. *See, e.g.*, NLRB v. Coca-Cola Foods Div., 670 F.2d 84 (7th Cir. 1982).

88. Handicabs v. NLRB, 95 F.2d 681 (8th Cir. 1996); Kinder-Care Learning Centers, 299 NLRB 1171 (1990).

89. *See* Laminated Pdts., 294 NLRB 816 (1989); NLRB v. Brookshire Grocery, 919 F.2d 359 (5th Cir. 1990).

90. Laughlin v. Metropolitan Washington Airports, 149 F.3d 253 (4th Cir. 1998).

sending it to an outside party."[91] Even so, the employer's ability to command confidentiality might be legally truncated. For example, in *Kampcke v. Monsanto Co.*,[92] a senior employee chanced upon a computer file (left in a computer assigned to him) that he understood to project his termination for an age-related reason. When he refused to return the file to the company, having given it to his lawyer, he was discharged for insubordination. The United States Court of Appeals for the Eighth Circuit reversed the trial court's grant of summary judgment for the company on the employee's suit brought under the Age Discrimination in Employment Act. The employee's situation, the court opined,

> is akin to the employee who is inadvertently copied on an internal memorandum, or who discovers a document mistakenly left in an office copier. Without question, employees in these situations have a duty to safeguard the employer's documents and confidential information. But when documents have been innocently acquired, and not subsequently misused, there has not been the kind of employee misconduct that would justify withdrawing otherwise appropriate . . . [statutory] protection.[93]

One judge dissented on the ground that the decision opened "another avenue of on-the-job mischief."[94]

IV. Participation by Employees in Lawsuits

The law has been summarized succinctly:

> Filing or participating as a party in a lawsuit is both expressive and associational activity. However, when such activity is directed against one's own employer, the majority view is that such activity is unprotected (absent the express insulation by a statutory antiretaliation provision) even where the underlying lawsuit did not arise out of the employment relationship.[95]

This has been extended to include participation in a stockholder derivative suit[96] and to a suit brought against a co-worker.[97] The Supreme Court of Oklahoma held, however, that an employee injured on the job by a customer could no more be discharged for pursuing a statutory compensation claim against the customer than he could for pursuing a worker's compensation claim against his employer.[98] But an

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91. *Id.* at 260.
92. 132 F.3d 442 (8th Cir. 1998).
93. *Id.* at 446.
94. *Id.* at 447 (Fagg, C.J., dissenting).
95. Matthew Finkin, Privacy in Employment Law 144 (1995) (references omitted).
96. King v. Driscoll, 638 N.E.2d 488 (Mass. 1994).
97. Grant v. Dean Witter Reynolds, 952 F. Supp. 512 (E.D. Mich. 1996).
98. Groce v. Foster, 880 P.2d 902 (Okla. 1994); Hafner v. Montana Department of Labor, 929 P.2d 233 (Mont. 1996), sustained the denial of unemployment benefits to an employee discharged for failing to inform his employer that he was engaged in a lawsuit with a customer over

employee's lawsuit against a municipality, which lawsuit the employer believed reflected badly on it, provided no basis in public policy to insulate the employee from discharge for having done so.[99] So, too, unionized employees who file suits unprotected by statutory anti-retaliation provisions face the possibility of discipline—which one arbitrator allowed to be in breach of the employee's duty of loyalty where the arbitrator characterized the lawsuit as "spiteful and vengeful."[100]

The denial of relief in these cases is predicated upon the lack of any public policy grounded in the bringing of the lawsuit where the lawsuit seeks only to vindicate a private right, not a public purpose.[101] These cases are thus all of a piece with the "public policy" limit on the discharge of at-will employees just reviewed.

V. CONCLUSION: IS THE CONCEPT OF EMPLOYEE LOYALTY IN THE U.S. CHANGING?

For a generation, the United States has experienced a high rate of job turbulence as downsizing has reached even the white collar and managerial levels.[102] The previously prevailing perception of job security, especially in large, oligopolistic, integrated companies, is eroding.[103] According to one survey, in 1997, 41% of job seekers, with a median age of 45, had worked for four or more companies.[104] Some see in this a challenge to the fundamental assumptions of the relationship of the past—and for the good. As a recent report put it: "Even if we could restore the one-company careers of the past, how many of us would prefer the conformity and deference to organizational whims that was the price of inclusion in the old hierarchies?"[105] Has the implied duty of loyalty undergone a commensurate legal change? The not unqualified answer would seem to be both yes and no.

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an alleged prior act of employment discrimination. The Court recognized that he could not be discharged under employment discrimination law for maintaining the suit; but it held he was obligated to report the conflict of interest, and his discharge for failing to do so was for statutory "misconduct."

99. Wagner v. General Elec. Co., 760 F. Supp. 1146 (E.D. Pa. 1991) (applying Pennsylvania law).

100. Southwestern Elec. Power, 84 LA 743 (Taylor, 1985). *But see* Elgria Foundry Co., 87 LA 1129 (Duda, 1986).

101. Though Wagner v. General Electric, n.99 *supra*, is difficult to sustain on that ground where the lawsuit sought to vindicate a public purpose.

102. *See generally*, STEVEN DAVIS, JOHN HALTIWAGNER & SCOTT SCHUH, JOB CREATION AND DESTRUCTION (1998).

103. *See generally*, LAWRENCE MISCHEL, JARED BERNSTEIN & JOHN SCHMITT, THE STATE OF WORKING AMERICA 1998-1999 at pp. 226-235 (1999).

104. Daniel Gold, *Switching to New Jobs*, NEW YORK TIMES, Jan. 17, 1999, § 3, p. 10. This is in contrast to 1991 figures where 23% of job seekers with a then median age of 43 had worked for four or more companies. *Id.*

105. STEPHEN HERZENBERG, JOHN ALIC & HOWARD WIAL, NEW RULES FOR A NEW ECONOMY 149-150 (1998).

On the side of change, the erosion of the implicit promise that the employer will look after the employee means that the employee must be ever more attentive to look out for himself or herself, to keep a "weather eye" open for future job opportunities. Given the growing significance of information, technology and skill levels in the modern workplace, this development could find expression in a heightened concern (or market pressure) to limit the employers' ability to require covenants not to compete. A statistical study of judicial enforcement of noncompetition clauses from the 1960s through the 1980s, to examine what kinds of clauses are most heavily litigated and which ones are most likely to be enforced by the courts, found that clauses upheld by the courts have been decreasing in duration and geographical scope.[106] This could indicate that the courts are granting greater protection to employees than heretofore, adjusting the "reasonableness" of a covenant to the greater need of employee mobility. But, it could also mean that, at least in terms of duration, the real world "shelf life" of protectable proprietary interests—especially technological information and trade secrets—has been decreasing; *i.e.* that employers are less able to show the need to protect that information for longer periods.

Further on the side of change has been the growth of the body of law constraining employer reprisal for employee speech or action, grounded in the greater public good, even when it is contrary to a management dictate. This change in law follows a sea change in public attitude and a rising public distrust of corporate centers of power starting in the 1960s.[107] Though more or less expansive, depending upon the jurisdiction—and non-existent in some jurisdictions—the current willingness of the legislatures and courts to protect acts previously considered impermissibly "disloyal" is nonetheless remarkable in the U.S. context.

Otherwise, the implied obligation of respectful obedience and "due regard for the master's interest and business," as determined by the employer without judicial intervention, endures. Will a new employment footlooseness erode the bonds of the "industrial feudalism" deprecated by critics of the 1950s?[108] And, if so, will the law follow this change in societal attitude as it has in the area of "public policy"? Or, in the face of a much-reduced union density and the consequent

106. Peter Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 10 J. CORP. LAW 483 (1990).

107. *See* Alan Westin, *Why Whistle Blowing is on the Rise*, in WHISTLE BLOWING! LOYALTY AND DISSENT IN THE CORPORATION 1 (Alan Westin, ed., 1981).

108. SANFORD JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL 246 (1997).

absence of that safe harbor for oppositional activity,[109] will an ever-present concern for future employability conduce toward continued conformity to corporate commands? If that is so, it would be unlikely for the law to be much in advance of societal change.[110]

109. A unionized employer may not dismiss an employee for purchasing a competitor's product; such is not an act of disloyalty constituting just cause to discharge under a collective agreement. *See, e.g.*, Paul Swanson, 36 LA 305 (Gochnauer, Arb., 1961). Consequently, unionized employees may display their displeasure with their employer by such purchases. *See, e.g.*, RUTH MILKMAN, FAREWELL TO THE FACTORY 48 (1997). But, absent legislation or a common law restriction, employers are free to condition at-will employment on such purchases, possibly as a public display of employee "loyalty" to the company. *See* Temple v. Aujla, 681 So.2d 1198 (Fla. App. 1996) (doctor may dismiss employee of his medical practice for taking her sick daughter to another doctor for treatment).

110. *See, e.g.*, Cotto v. United Technologies Corp., 738 A.2d 623 (Conn. 1999) (statute affording free speech rights applies to the private workplace but does not protect an employee who refuses to display the American flag).