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Blown Whistle Falls on Deaf Ears: The Eighth Circuit Interprets MAP-21's Whistleblower Provision

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NOTE

Blown Whistle Falls on Deaf Ears: The Eighth Circuit Interprets MAP-21's Whistleblower Provision

Barcomb v. Gen. Motors, LLC., 978 F.3d 545 (8th Cir. 2020).

Sarah (Walters) Porter[*]

I. INTRODUCTION

In recent years, whistleblowers have been praised as heroes by onlookers and in the media for bravely unveiling wrongdoing by their employers, but whistleblowers have not always enjoyed this white-hat status.[1] These private employees expose themselves to serious risks of backlash and retaliation from their employers, historically without any guaranteed protection from Congress or their respective state legislatures.[2] Decades-old social norms and corporate culture prioritized loyalty from employees. They allowed employers to fire employees who spoke out against the company and even blackball them from their respective industries.[3] With blind loyalty or termination being the only options for employees witnessing wrongdoing within their company, silence was the norm.[4] Over the last few decades, Congress has increasingly recognized the public importance of protecting these whistleblowers and has enacted

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[1] David Kwok, *The Public Wrong of Whistleblower Retaliation*, 69 HASTINGS L.J. 1225, 1227 (2018).

[2] *Id.*

[3] Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form A Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51 (2011).

[4] *Id.*

more than two dozen statutes mandating protection from retaliation in a wide variety of industries, with more than half the states following suit.[5]

In *Barcomb v. General Motors*, Richard Barcomb, a mechanic at a General Motors, LLC ("GM") manufacturing plant, sued GM in federal court, alleging he was terminated for complaining about reports by his coworkers in the Final Process Repair Department, falsely claiming to have repaired defects in the steering plugs and other safety-related aspects of vehicles.[6] Barcomb alleged his firing violated the whistleblower provision of the Moving Ahead for Progress in the 21st Century Act ("MAP-21").[7] In addressing this issue as one of first impression, the Eighth Circuit affirmed the district court's grant of summary judgment in favor of GM, finding that "MAP-21's text protects employees who report 'information relating to any motor vehicle defect' – not those who report problems with a process for ensuring quality control along the assembly line."[8]

This Note begins with an explanation of the facts and holding of the *Barcomb* decision. Part III reviews the history of federal whistleblower statutes, outlines the text of the whistleblower provision of MAP-21, and concludes with a discussion of the intended interpretation of federal whistleblower statutes based on established precedent. Part IV outlines the majority opinion of the Eighth Circuit as well as the dissenting opinion by Judge Melloy. Part V describes an alternative claim available for whistleblowers and discusses why it is often an inadequate remedy. Ultimately, this Note argues that MAP-21's whistleblower provision should be broadly construed in favor of protecting whistleblowers to follow precedent set by federal courts interpreting similar whistleblower statutes.

II. FACTS AND HOLDING

Richard Barcomb, a long-time GM employee, began working in GM's Final Process Repair Department in a Wentzville, Missouri manufacturing plant in 2014.[9] His duties included repairing any defects found in the vehicles coming off the manufacturing line that had occurred

[5] Kwok, *supra* note 1, at 1227.

[6] Barcomb v. Gen. Motors LLC, 978 F.3d 545, 547–48 (8th Cir. 2020).

[7] Barcomb v. Gen. Motors LLC, 4:16-CV-01884-SNLJ, 2019 WL 296479, at 1 (E.D. Mo. Jan. 23, 2019), *aff'd sub nom. Barcomb*, 978 F.3d 545 (8th Cir. 2020).

[8] *Barcomb*, 978 F.3d at 550.

[9] *Barcomb*, 2019 WL 296479, at 1. Barcomb worked for GM for 17 years in a variety of different roles throughout the nation. *Id.*

in an earlier stage of production.[10] As vehicles proceeded through the assembly line and errors occurred, employees were required to report and keep a log of damaged vehicles in the Global Standard Inspection Process ("GSIP"), an electronic repair-tracking system, as well as on paper tickets.[11] The vehicles then went through the Final Repair stage.[12] In this stage, mechanics like Barcomb would repair the errors marked in the GSIP and on the tickets.[13] Upon completion, the employee would mark the repair as complete in GSIP and on the paper ticket.[14] The vehicle was then tested once more and sent through a final inspection process.[15]

In January 2015, Barcomb began suspecting that his co-workers were falsely documenting repairs as complete in the GSIP system without completing them.[16] The unresolved errors ranged from simple cosmetic issues to more serious, safety-related concerns, both of which could have passed through the Final Process Repair Department undetected.[17] Concerned with the safety of the vehicles, Barcomb began making the necessary repairs himself based on the paper tickets found on each windshield.[18] On one occasion, Barcomb found that both the paper ticket and the GSIP indicated that a broken steering plug had been repaired, but a note on the vehicle's windshield indicated otherwise.[19] Barcomb made the necessary repair and reported the incident to GM's safety hotline.[20] He also made reports to his supervisor, shift leaders, and the General Assembly Area Manager regarding several specific incomplete repairs and the false reporting done by his co-workers.[21] Eventually, GM conducted a high-level internal investigation, which resulted in corrective action.[22] However, Barcomb's repeated reports, including ones made in March and April of 2016, began to annoy his superiors and co-workers, causing

[10] *Barcomb*, 978 F.3d at 547.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 551 (Melloy, J., concurring in part and dissenting in part).
[22] *Id.*; Opening Brief of Appellant at 30–31, *Barcomb*, 978 F.3d 545.

significant workplace stress for Barcomb.[23] On March 4, 2016, after one such report, Barcomb found a rubber rat in a noose at his workstation.[24]

On March 31, 2016, Barcomb was reprimanded for not being at his workstation, resulting in a disciplinary meeting between him and his superiors.[25] When leaving the meeting, his superiors reported Barcomb said something like, "I'll see you guys at your funeral."[26] Barcomb denied this and claimed he said something like, "this is a mistake."[27] Barcomb was placed on a three-day suspension, during which he saw a doctor for anxiety.[28] He then went on sick leave for four weeks.[29] Upon his return to work on May 2, 2016, his superiors presented him with two disciplinary options, both of which he declined.[30] Barcomb was fired because his alleged threat created what his superiors deemed a hostile work environment.[31]

On April 15, 2016, Barcomb filed a complaint with the Occupational Safety and Health Administration ("OSHA") against GM for retaliation and notified GM of the complaint that same day.[32] On December 1, 2016, Barcomb filed suit in federal district court against GM, asserting two claims.[33] The first was a retaliatory discharge claim under Section 31307 of the Moving Ahead for Progress in the 21st Century Act, and the second alleged wrongful termination in violation of Missouri's public policy exception to at-will employment, which protects employees who are

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[23] *Barcomb*, 978 F.3d at 551 (Melloy, J., concurring in part and dissenting in part).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Appellee's Brief at 4, *Barcomb*, 978 F.3d 545.

[29] *Id.* at 5.

[30] *Barcomb*, 978 F.3d at 552 (Melloy, J., concurring in part and dissenting in part). Barcomb was offered a 30-day suspension if he agreed not to file a grievance challenging the discipline, which he declined. Appellee's Brief at 5, *Barcomb*, 978 F.3d 545. He was then offered a 14-day suspension with an 18-month probationary period if he agreed not to file a grievance challenging the discipline, which he also declined. *Id.*

[31] *Barcomb*, 978 F.3d at 552 (Melloy, J., concurring in part and dissenting in part).

[32] Appellant's Opening Brief at 5, *Barcomb*, 978 F.3d 545.

[33] Barcomb v. Gen. Motors LLC., 4:16-CV-01884-SNLJ, 2019 WL 296479, at 2 (E.D. Mo. Jan. 23, 2019).

terminated for reporting violations of the law.[34] GM moved for summary judgment, asserting that Barcomb did not engage in protected activity under MAP-21 because that statute only pertains to information related to defects in vehicles that have fully completed the manufacturing process, not those relating to errors found during the manufacturing process.[35] The United States District Court for the Eastern District of Missouri granted GM's motion for summary judgment, finding that retaliation for "'complaints on the misuse of the GSIP system as a whole and the false reporting by one co-worker in particular' was not actionable under MAP-21."[36] Because the MAP-21 claim failed, the second claim of wrongful termination failed as well.[37] Barcomb appealed to the United States Court of Appeals for the Eighth Circuit.[38]

The central question on appeal involved interpreting Section 30171 of MAP-21 to determine whether the statute requires that a complaint relate to post-manufacturing defects to constitute protected activity or whether the statute protects reports of defects during the manufacturing process.[39] Barcomb argued three points on appeal.[40] First, that the definitional section of the Motor Vehicle Act did not limit protected activities under Section 30171 to post-manufacturing whistleblowing.[41] Second, he claimed the district court's holding conflicted with the letter and spirit of whistleblower protections under Section 30171.[42] Without protecting reports related to defects in the manufacturing process, almost no employees in the department would be protected.[43] Finally, Barcomb asserted that he did, in fact, report information relating to defects on fully manufactured vehicles, which the text of the statute explicitly covered.[44]

The United States Court of Appeals for the Eighth Circuit affirmed the district court's grant of summary judgment based upon a narrow

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[34] Appellant's Opening Brief at 5, *Barcomb*, 978 F.3d at 547. MAP-21 "prohibits motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement . . . ." 49 U.S.C. § 30171(a)(1).

[35] *Barcomb*, 2019 WL 296479 at 3.

[36] *Barcomb*, 978 F.3d at 547.

[37] *Barcomb*, 2019 WL 296479 at 4. Missouri case law requires that a wrongful termination claim be "based on a constitutional provision, a statute, a regulation based on a statute, or a rule promulgated by a government body." *Id.*

[38] *Barcomb*, 978 F.3d at 547.

[39] *Id.* at 548.

[40] *Id.* at 548–50.

[41] *Id.* at 548.

[42] *Id.* at 549.

[43] *Id.*

[44] *See id.* at 549–50.

interpretation of Section 30171 and MAP-21's corresponding definitions.[45] The court found that because Barcomb's reports simply identified a potential risk of defect caused by errors in the reporting system, rather than "information about processes that *created defects* in motor vehicles," they did not qualify as protected activity under MAP-21.[46]

III. LEGAL BACKGROUND

This Part first discusses the history of federal whistleblower statutes and describes the policy rationales behind protecting whistleblowers. Next, it outlines the text and key definitions of the whistleblower provision of MAP-21 and the statute's legislative history and purpose. This Part concludes with a discussion of a few precedential cases in which courts have interpreted similar whistleblower statutes.

A. History and Purpose of Federal Whistleblower Protection Statutes

The first protections for whistleblowers in the United States were established in 1777 when ten revolutionary sailors and marines reported misconduct by the Commander of the Continental Navy.[47] In response, the commander filed a criminal libel suit against the whistleblowers, and two of them were arrested.[48] Within the month, Congress enacted the nation's first mandatory whistleblower law.[49] It stated, "it is the duty of all persons in the service of the United States… to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge."[50] Congress also voted to cover the legal costs of the whistleblowers' defense.[51] The whistleblowers won, and Congress paid out $1,418 in legal expenses, which amounts to $36,959 today.[52] While that particular case resulted in a favorable outcome for the whistleblowers, historically, employees who have reported wrongdoing by their employers have been labeled as

[45] *Id.* at 550.

[46] *Id.* at 549–50.

[47] Elizabeth A. Williams, *Blowing the Whistle While Gasping for Air*, 18 LOY. MAR. L.J. 219, 222–23 (2019).

[48] *Id.* at 222.

[49] *Id.* at 222–23.

[50] *Id.*

[51] *Id.* at 223.

[52] *Id.*

snitches and instantly fired for speaking out against their company, no questions asked.[53] The threat of such significant consequences has caused whistleblowers to stay silent rather than act on the unlawful activities they witness.[54]

Unfortunately, this silence has had significant consequences, ranging from serious safety violations in the automobile industry to government intelligence failures leading up to the terrorist attacks of September 11th.[55] Over the past few decades, following the enactment of almost two dozen federal laws prohibiting retaliation, the United States has seen a significant increase in the number of employees raising concerns about perceived unlawful activities on the part of their employers.[56] The tide began to turn, and these individuals started receiving recognition and praise for coming forward.[57] In 2002, Time Magazine even put three whistleblowers on its cover, labeling that year "The Year of the Whistleblower."[58]

Today, there are more than two dozen federal whistleblower statutes; some strictly protect government employees, while others protect private employees in specific industries.[59] States are now following suit, with more than half enacting general whistleblower protections for public employees – though only eight states have enacted protections for private employees.[60] The essential role of whistleblowing has become increasingly apparent. Over time, governmental protection has expanded to enable these employees to help the government unveil unlawful and potentially harmful activities without fear of retaliation.[61] This has led to more than 3,000 whistleblowing cases reported in 2018 and 2019

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[53] Hesch, *supra* note 3, at 53.

[54] *Id.*

[55] *Id.* at 51–53.

[56] *See* Debra S. Katz, *Emerging Issues in Whistleblower Law and Retaliation*, PRAC. L., Dec. 2017, at 37.

[57] Brandon Gaille, *23 Important Whistleblower Statistics*, BRANDON GAILLE SMALL BUS. & MKTG. ADVICE (May 23, 2017), https://brandongaille.com/22-important-whistleblowing-statistics/ [https://perma.cc/B3BG-6VTH].

[58] *Id.*

[59] *See* STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW 165–67 (Carolina Academic Press 2017); *see also* OCCUPATIONAL SAFETY & HEALTH ADMIN., OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION DIRECTORATE OF WHISTLEBLOWER PROTECTION PROGRAMS (DWPP) WHISTLEBLOWER STATUTES SUMMARY CHART 1–11 (2021), https://www.whistleblowers.gov/sites/wb/files/2021-06/Whistleblower_Statutes_Summary_Chart_FINAL_6-7-21.pdf [https://perma.cc/NMM7-UY67].

[60] WILLBORN, *supra* note 59, at 167.

[61] Williams, *supra* note 47, at 225.

respectively and more than 3400 cases in 2020.[62] This increase, however, does not mean that the whistleblowers are successful on their claims. A court's interpretation of the applicable whistleblower provision is often the deciding factor in whether that individual will receive protection.[63] This includes recent whistleblower statutes such as MAP-21.

B. The Moving Ahead for Progress in the 21st Century Act

As defined in the National Traffic and Motor Vehicle Safety Act of 1966, a "defect" includes "any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment."[64] "Motor vehicle equipment" means "any system, part, or component of a motor vehicle as originally manufactured."[65] According to internal OSHA documents describing its view of the scope and coverage protected activity for MAP-21's whistleblower provision, Section 30171 does not require that the employee report an actual violation of a motor vehicle safety law.[66] Rather, an employee is protected for providing information relating to any activity that he or she reasonably believes to be a defect, noncompliance, or violation.[67] A report based on a belief that a violation or defect exists that is mistaken but objectively reasonable under the circumstances is considered protected activity.[68]

Chapter 301 of Title 49 of the United States Code gives the National Highway Traffic Safety Administration ("NHTSA") the authority to

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[62] OCCUPATIONAL SAFETY & HEALTH ADMIN., WHISTLEBLOWER DOCKETED CASES RECEIVED: FY2015 – FY2020 1 (2020), https://www.osha.gov/sites/default/files/3D_Charts-Received_Closed.pdf [https://perma.cc/5BXE-MAYT]. In 2020, reports were most commonly filed under the Occupational Safety and Health Act, the Surface Transportation Assistance Act, the Federal Railroad Safety Act, and the Sarbanes-Oxley Act. *Id.*

[63] *See, e.g.*, Haley v. Retsinas, 138 F.3d 1245, 1249 (8th Cir. 1998); Neal v. Honeywell, Inc., 826 F. Supp. 266, 270 (N.D. Ill. 1993); N.L.R.B. v. Scrivener, 405 U.S. 117, 122 (1972).

[64] 49 U.S.C. § 30102(a)(3) (2016).

[65] 49 U.S.C. § 30102(a)(8)(A).

[66] OSHA WHISTLEBLOWER PROTECTION PROGRAM, INVESTIGATOR'S DESK AID TO THE MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY ACT (MAP-21) EMPLOYEE PROTECTION PROVISION 49 U.S.C. § 30171 4–5 (last visited Jan. 4, 2022), https://www.osha.gov/sites/default/files/MAP-21-Desk-Aid-FINAL-1-13-2020-002.pdf [https://perma.cc/39Y9-WB5C].

[67] *Id.* at 4.

[68] *Id.* at 5. Although this is the viewpoint expressed in the summary sheet released by OSHA, this does not align with the Eighth Circuit's interpretation of the statute, discussed infra Part IV.

promulgate motor vehicle safety standards. It also details other reporting and notification requirements for auto manufacturers and parts suppliers.[69] Chapter 301 of the United States Code, where MAP-21 is found, is titled "Motor Vehicle Safety."[70] At the beginning of this chapter, Congress laid out a broad statement of the purpose and policy behind the provisions found within: to "reduce traffic accidents and deaths and injuries resulting from traffic accidents… by prescrib[ing] motor vehicle safety standards…and carry[ing] out needed safety research and development."[71] Former President Barack Obama signed MAP-21 into law on July 6, 2012.[72] The law authorized funding for multiple highway and transportation programs and included the whistleblower provision at issue in *Barcomb* – Section 30171.[73] This provision protects employees of automobile manufacturers, parts suppliers, and dealerships from retaliation or discrimination for providing information to their employers or the United States Department of Transportation "about motor vehicle defects, noncompliance, or violations of the notification or reporting requirements enforced by the National Highway Traffic Safety Administration (NHTSA) or for engaging in related protected activities set forth in the provision."[74] The agency responsible for enforcing this provision is the Secretary of Labor, which in turn delegates the responsibility to the OSHA.[75]

The whistleblower provision of MAP-21, Section 30171, specifically provides that:

> No motor vehicle manufacturer, part supplier, or dealership may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)… provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or the Secretary of Transportation information relating to any motor vehicle defect, noncompliance, or

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[69] OCCUPATIONAL SAFETY & HEALTH ADMIN., FILING WHISTLEBLOWER COMPLAINTS UNDER THE MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY ACT (2016), https://www.autosafety.org/wp-content/uploads/2018/07/MAP-21-Whistleblower-OSHA-Fact-Sheet.pdf [https://perma.cc/382Q-2GKZ].

[70] 49 U.S.C. § 30101 (1994).

[71] *Id.*

[72] Judith E. Kramer, *OSHA Adds Another Whistleblower Provision to its Arsenal*, 9 NO. 12 FED. EMP. L. INSIDER 7 (Aug. 2012).

[73] *Id.*

[74] *Id.*

[75] *Id.*

> any violation or alleged violation of any notification or reporting requirement of this chapter.[76]

Federal courts' interpretation of several other whistleblower provisions helped to inform the Eighth Circuit's interpretation of section 30171.

C. Interpretation of Similar Federal Whistleblower Protection Statutes

In general, whistleblower statutes are to be broadly construed in order to further the statutes' remedial purpose.[77] Courts will first look to the "text of the statute itself, and if the plain meaning of the language clearly expresses the meaning Congress intended, the judicial inquiry ends there."[78] However, if the language is ambiguous, courts must consider the "purpose, the subject matter and the condition of affairs which led to its enactment."[79] In *Haley v. Retsinas*, a former employee brought an action under the whistleblower provision of the Federal Deposit Insurance Act, alleging he was wrongfully terminated from his position as a bank examiner for the Office of Thrift Supervision ("OTS") because of the information he provided about potential unlawful activity on the part of his employer.[80] The section at issue provided that:

> No Federal banking agency ... may discharge ... any employee ... because the employee (or any person *acting pursuant to the request of the employee*) provided information to any such agency ... regarding any possible violation of any law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[81]

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[76] 49 U.S.C. § 30171 (2012).

[77] Neal v. Honeywell, Inc., 826 F. Supp. 266, 270 (N.D. Ill. 1993) ("Many courts have addressed issues similar to the one before us today under different federal whistleblower protection statutes. Almost without exception, they have held that the coverage of the statute at issue should be broadly construed so as to include internal, or 'intracorporate' whistleblowing, even where the conduct involved did not come under the literal terms of the statute.").

[78] Haley v. Retsinas, 138 F.3d 1245, 1249 (8th Cir. 1998).

[79] *Id.* (quoting United States v. S.A., 129 F.3d 995, 998 (8th Cir. 1997)).

[80] *Id.* at 1246–48.

[81] *Id.* at 1249 (quoting 12 U.S.C. § 1831j(a)(2)). "Federal banking agency" includes the FDIC and the Director of the Office of Thrift Supervision. 12 U.S.C. § 1831j(e); *Haley*, 138 F.3d at 1249.

Haley had uncovered potential violations of federal banking laws and regulations by his employer while inspecting an OTS-regulated firm. He raised these concerns with Bayard Plowman, the managing officer of the firm that would be harmed by his employer's actions.[82] When Plowman told Haley that he intended to bring this situation to the attention of Congress or the FDIC, Haley drafted a memorandum outlining his understanding of OTS's allegedly unlawful activity. Haley sent the memorandum to his superiors, a state regulator in the county, and Plowman – instructing Plowman to use the memorandum in any way necessary, although not specifically requesting that it be handed over to the FDIC.[83] Haley was subsequently terminated for providing confidential information to an outside third party.[84]

The first issue in the case was whether Haley's conduct constituted a "request" sufficient to trigger the protections afforded by the statute.[85] In construing the language of the statute, particularly the meaning of the word "request," the Eighth Circuit noted that if the meaning of the statute is unclear from the text, "courts tend to construe it broadly, in favor of protecting the whistleblower," as this was the best way to "avoid a nonsensical result and to effectuate the underlying purposes of the law."[86] The court also used this broad interpretive approach when resolving the second issue in the case – whether Haley's memo, which merely included his own personal disagreement with his employer's policy and no specific illegal activity, constituted "information regarding possible violations of any law."[87] The court again adopted a broad approach and determined Haley's personal criticisms of his employer's activities sufficient to qualify as protected activity under the statute.[88]

In *N.L.R.B. v. Scrivener*, the Supreme Court of the United States unanimously held that language found in the National Labor Relations Act covered a whistleblower who did not meet the literal requirements of the statute.[89] The section at issue in the case provided that, "It shall be an unfair labor practice for an employer… to discharge or otherwise discriminate against an employee *because he has filed charges or given testimony under this Act*."[90] The issue was whether an employee who

[82] *Haley*, 138 F.3d at 1247.
[83] *Id.* at 1247–48.
[84] *Id.* at 1248.
[85] *Id.* at 1249.
[86] *Id.* at 1250 (quoting United States v. S.A., 129 F.3d 995, 998 (8th Cir. 1997)).
[87] *Id.* at 1251 (quoting 12 U.S.C. § 1831j(a)(2)).
[88] *Id.*
[89] N.L.R.B. v. Scrivener, 405 U.S. 117, 122 (1972).
[90] *Id.* at 117–18 (quoting 29 U.S.C. § 158) (emphasis added).

provided a sworn statement to the National Labor Relations Board field examiner that was investigating unfair labor practices by that employer, but who did not file a charge or testify at a formal hearing, was protected from retaliation under the statute.[91] The Court broadly construed the protections of the Act for several reasons, including that its textual analysis revealed that the words "or otherwise discriminate" were intended by Congress to "afford broad rather than narrow protection to the employee." And because a broad construction comported with the congressional purpose of the Act [92] An alternative interpretation would have provided "unequal and inconsistent protection."[93]

In *Bechtel Constr. Co v. Secretary of Labor*, the statute at issue provided protection for any employee who "commenced, caused to be commenced…testif[ied] in…or assisted or participated in any manner in…a proceeding for the administration or enforcement of any requirement imposed under…the Atomic Energy Act."[94] In that case, the employee had repeatedly raised concerns about safety procedures for handling contaminated tools to his supervisors.[95] The Eleventh Circuit determined that although the Act did not define the term "proceeding," under a broad construction of the statute, the employee's informal complaints were indeed protected.[96] The court found it was appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws to "encourage safety concerns to be raised and resolved promptly and at the lowest possible level of bureaucracy."[97]

IV. INSTANT DECISION

This Part outlines the majority opinion of the Eighth Circuit, beginning with its interpretation of the whistleblower provision of MAP-21. It describes the arguments raised by Barbomb, as well as the court's response to each. This Part concludes with an explanation of the dissenting opinion by Judge Melloy, which emphasizes the application of the plain language of the statute and congressional intent for interpreting the whistleblower protections of MAP-21.

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[91] *Id.* at 118.

[92] *Id.* at 121–25.

[93] *Id.* at 124.

[94] Bechtel Const. Co. v. Sec'y of Lab., 50 F.3d 926, 931 (11th Cir. 1995) (quoting 42 U.S.C. § 5851(a)(1)–(3)).

[95] *Id.*

[96] *Id.* at 931–32.

[97] *Id.* at 933.

A. Majority Opinion

In *Barcomb*, the Eighth Circuit reviewed the lower court's ruling *de novo*. It affirmed the grant of summary judgment in favor of GM because it found Barcomb's complaints were not protected activity under MAP-21.[98] The court began its analysis with the statutory text.[99] Specifically, MAP-21 protects employees that provide "information relating to any motor vehicle defect."[100] The court recited the statutory definition of a defect, which "includes any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment" and noted that the "definition [wa]s, unfortunately, circular."[101] To clarify, the Eighth Circuit resorted to a dictionary definition published near in time to the National Traffic and Motor Vehicle Safety Act of 1966, stating that a defect is the "want or absence of something necessary for completeness, perfection, or adequacy in form or function."[102] The court defined a motor vehicle and motor vehicle equipment, emphasizing that each one of these definitions focuses on the resulting product rather than the internal manufacturing process or quality assurance systems used by

[98] Barcomb v. Gen. Motors, LLC., 978 F.3d 545, 548 (8th Cir. 2020). Barcomb also appealed the district court's grant of $7,094 in costs to GM. *Id.* at 550. Barcomb argued that GM's counsel did not submit a verified bill of costs within the twenty-one day requirement and therefore, the grant of costs was an abuse of discretion by the district court. *Id.* On this issue, the United States Court of Appeals for the Eighth Circuit reversed as to the postage and shipping costs of $76.50. *Id.* Because this issue does not relate to application of the statute at hand, it will not be discussed further in this note. *See id.*

[99] *Id.* at 548.

[100] *Id.* (quoting 49 U.S.C. § 30171(a)(1) (2018)). In full, MAP-21 states: "No motor vehicle manufacturer, part supplier, or dealership may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or the Secretary of Transportation information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of this chapter."49 U.S.C. § 30171(a)(1). Because Barcomb's arguments rely solely on the phrase "information relating to any motor vehicle defect," that is the portion the court, and this Note, highlights. *Barcomb*, 978 F.3d at 548 (quoting 49 U.S.C. § 30171(a)(1)).

[101] *Barcomb*, 978 F.3d at 548.

[102] *Barcomb*, 978 F.3d at 548 (quoting Webster's Third New International Dictionary (1976)); National Traffic and Motor Vehicle Safety Act of 1966 Pub. L. 89–563, 80 Stat. 718 (1966).

automakers.[103] Therefore, the Eighth Circuit interpreted MAP-21 as protecting employees who provide information about an issue with the "completeness, perfection, or adequacy of the performance, construction, a component, or the material of a motor vehicle or its components."[104] The court continued to rely on this "finished-product focused" characterization of the statute's protections throughout the opinion, as opposed to also including process defects.[105]

The Eighth Circuit addressed each of Barcomb's arguments in turn.[106] First, Barcomb argued that he "provided substantial information regarding a pattern or practice of false repairs of specific motor vehicle defects," which the language of the statute explicitly covered.[107] The court framed his argument as being about "the misuse of the GSIP system as a whole and the false reporting by one co-worker in particular."[108] The court stated the subject of that complaint did not fall under "information related to a motor vehicle defect" because the GSIP system was just one of two systems used to track needed repairs.[109] If both systems failed, there was still a note attached to the vehicle instructing employees what to fix. Therefore, the court said this was not "information related to a motor vehicle defect."[110]

Barcomb next argued that the district court improperly restricted MAP-21's protection to post-manufacture or completed vehicle defects.[111] He argued that "a violation of law need not 'be completed' or be specifically cited for reporting to constitute protected activity."[112] The court squarely rejected this argument because it said Barcomb never reported an alleged violation of law or an alleged violation of a Federal Motor Vehicle Safety Standard.[113] Rather, he only claimed that he was retaliated against for "reporting information related to motor vehicle defects."[114] Under the court's view, the false reporting of repairs for motor

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[103] *Id.*

[104] *Id.*

[105] *Id.* at 550.

[106] *Id.* at 548–51.

[107] *Id.* at 548 (quoting Opening Brief of Appellant at 30, *Barcomb*, 978 F.3d 545); 49 U.S.C. § 30171(a)(1).

[108] *Barcomb*, 978 F.3d at 547–48.

[109] *Id.* at 549.

[110] *Id.* at 550.

[111] *Id.* at 549.

[112] *Id.*

[113] *Id.*

[114] *Id.*

vehicle defects is not a violation of the law.[115] Curiously, the court provided no further explanation for this holding, and its apparent departure from the text of section 30171.

Barcomb also argued that MAP-21 protects the expression of "reasonable, but mistaken, beliefs about legal violations."[116] Thus, even if he was incorrect that the false reporting constituted a violation of the law or of Federal Motor Vehicle Safety Standards, his belief was reasonable and thus should be protected.[117] In response, the court emphasized that the other whistleblower statutes cited by Barcomb in support of this argument are not drafted identically.[118] For example, 49 U.S.C. § 20109, which protects railroad employees, protects those who provide information relating to "conduct which the employee *reasonably believes* constitutes a violation of any Federal law, rule, or regulation."[119] MAP-21, on the other hand, protects those who provide information relating to "any violation or *alleged* violation of any notification or reporting requirement of this chapter," and those who object or refuse to participate in "any activity that the employee *reasonably believe[s]* to be in violation" of this chapter.[120] The Eighth Circuit narrowed in on the fact that these provisions made no specific mention of a reasonable belief pertaining to "an alleged motor vehicle defect."[121] The court distinguished reports of technical violations of the law from reports of motor vehicle defects and decided MAP-21 covered only the former.[122]

Finally, Barcomb warned that refusing to protect information related to the manufacturing process would exempt almost all automotive manufacturing employees from MAP-21's anti-retaliation protections because they only work on unfinished vehicles.[123] The Eighth Circuit again relied on its "finished-product" characterization of MAP-21's protections.[124] Although MAP-21's plain language protects reports of "information relating to motor vehicle defects," the court's interpretation of MAP-21's statutory definitions found they all related to finished products rather than the processes that lead to the finished product.[125] The

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[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 550.

Eighth Circuit conceded that there was indeed a "fine distinction between a report about a process and a report about the process's result."[126] However, the court emphasized that Barcomb's reports showed only that if a defect was identified on the assembly line, then one of two quality assurance systems may not reflect it.[127] Therefore, the court concluded, Barcomb simply identified a potential risk caused by errors in the reporting system; it was not a report of information about processes that "*created defects* in motor vehicles or motor vehicle equipment."[128]

B. Dissenting Opinion (Melloy, J.)

Judge Melloy authored a dissent in which he emphasized the plain language of the statute and Congress's intent to broadly protect whistleblowers as support for a broader interpretation of MAP-21's protections.[129] Judge Melloy noted that while Congress originally enacted the National Traffic and Motor Vehicle Safety Act to improve traffic safety and reduce traffic accidents, in 2012, MAP-21 amended it to add whistleblower protections in the automobile industry.[130] Judge Melloy critiqued the majority for reading the whistleblower protections in two separate parts.[131] The majority held that whistleblowers who provide information related to any *violation* or alleged violation of any reporting requirement of the chapter might rely on their own reasonable belief that such a violation has occurred, purely because the word "alleged" is included in that portion.[132] However, a whistleblower who simply provides information related to any *motor vehicle defect* cannot report mere allegations of a defect because the provision does not say "alleged motor vehicle defect."[133]

Judge Melloy began his own analysis by restating the plain language of the statute: that a whistleblower must simply provide "information relating to any motor vehicle defect" in order to gain protection.[134] Although the statute does not define "relating to," Judge Melloy noted that the phrase has not previously been interpreted as a strict or limiting term

[126] *Id.* at 549.
[127] *Id.*
[128] *Id.* at 549–50.
[129] *Id.* at 553 (Melloy, J., concurring in part and dissenting in part).
[130] *Id.* at 551.
[131] *Id.* at 552.
[132] *Id.* at 551.
[133] *Id.*
[134] *Id.*

and cited multiple examples of such interpretation.[135] Therefore, in giving full effect to the phrase "relating to," Judge Melloy concluded Barcomb's reports of incomplete repairs and false reporting of repairs fell plainly within the protections of MAP-21.[136]

V. COMMENT

Although whistleblowers have historically been frowned upon for being "disloyal" to employers, their bravery plays a crucial role in society – one that enhances public health and safety and forces employers, including government officials and agencies, to be held accountable for their unlawful activity. There is an alternative remedy to statutory claims for whistleblowers – the common law tort of wrongful termination in violation of public policy, which Barcomb attempted to bring here. Although that claim is beneficial to whistleblowers in some circumstances, it often does not provide an adequate remedy when the individual's statutory whistleblower claim fails. Many policy reasons cut in favor of continued protection of whistleblowers, such as promoting legal compliance by employers and avoiding the governmental expense of watchdog and investigative resources. To that end, when language within a whistleblower provision is ambiguous, such as the language at issue in *Barcomb*, the statute should be broadly construed in favor of the whistleblower in order to align with precedent established by interpretations of similar federal whistleblower statutes.

A. A Potential Alternative for Whistleblowers – Wrongful Discharge in Violation of Public Policy

The vast majority of states recognize that an employer's right to terminate at-will employees should be limited in cases where such termination is deemed contrary to public policy.[137] Therefore, most states recognize the common law tort of wrongful discharge in violation of public policy as an exception to at-will employment.[138] The most compelling justification for this doctrine, which regulates contractual relationships between employers and employees, is to protect third parties.[139] This claim is typically brought in only a handful of contexts,

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[135] *Id.*

[136] *Id.* at 553.

[137] STEPHEN P. PEPE & SCOTT H. DUNHAM, AVOIDING AND DEFENDING WRONGFUL DISCHARGE CLAIMS § 1:5 (2022), Westlaw ADWDC.

[138] *Id.*

[139] WILLBORN, *supra* note 59, at 135.

including when an employee refuses to commit an unlawful act and is therefore terminated or when an employee is terminated for seeking to exercise a statutory right, such as filing a claim for benefits under a workers' compensation statute.[140] However, the rationale of protecting third parties fits most squarely with a whistleblower claim – one brought by an employee who experiences retaliation as a result of his or her reports of a company's wrongful or unlawful conduct.[141] Because the employer's wrongful or unlawful conduct could have widespread ramifications for the general public, such as in the auto industry, protection of third parties as a justification for the violation of public policy claim is readily apparent.[142]

While most jurisdictions recognize this cause of action, courts continue to struggle to define its parameters and have taken vastly different approaches in defining "public policy."[143] For example, in *Polmateer v. International Harvester Co.*¸ the Illinois Supreme Court explained that while "there is no precise definition of the term," it generally concerns "what is right and just and what affects the citizens of the State collectively."[144] Other courts, however, require the public policy exception be "carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions" so that employers are aware of the "fundamental public policies of the state and nation as expressed in their constitutions and statutes."[145] Thus, these courts will only apply the doctrine where a constitutional provision or statute directly defines a public policy.

In situations where a specific statute addresses the alleged wrongful conduct, courts have split over whether the statutory remedy should preempt the common law claim of wrongful discharge in violation of public policy.[146] Some state legislatures have acted to explicitly allow claimants to pursue both, such as in Arizona, while others leave it up to the courts to decide.[147] However, recent trends indicate that courts often

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[140] *Id.* at 138.

[141] *Id.*

[142] *Id.* at 135.

[143] Pepe, *supra* note 137.

[144] Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).

[145] Gantt v. Sentry Ins., 824 P.2d 680, 687–88 (Cal. 1992).

[146] *See, e.g.*, WILLBORN, *supra* note 59, at 142–43.

[147] *Id.* The Arizona legislature allows both but limits the remedy to that prescribed in the statute, if one exists. *Id.* The Arizona Employment Protection Act of 1996 states: "If the statute provides a remedy to an employee for a violation of the statute, the remedies provided to an employee for violation of the statute are the exclusive remedies for the violation of the statute or the public policy set forth in or arising out of the statute….If the statute does not provide a remedy to an employee for

reject wrongful discharge claims if an adequate alternative remedy already exists.[148] For example, courts will not allow an employee discharged based on race to pursue a common-law wrongful discharge claim; instead, the employee must pursue a race discrimination claim under Title VII or various state statutes.[149]

Similarly, when a specific whistleblower statute provides a remedy, states vary on whether the statute provides the exclusive remedy or whether individuals may also elect to pursue the common-law wrongful discharge claim.[150] Courts holding that statutory remedies preempt common law rights of action create a problem for whistleblowers such as Barcomb. These whistleblowers are not afforded protection under a whistleblower statute based on minute definitional discrepancies and a narrow interpretation that does not cover the individual's conduct, even though the individual risked his or her job and reputation to report wrongdoing within the company.[151] Because whistleblowers cannot also bring a common law wrongful discharge claim, they are left with no

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the violation of the statute, the employee shall have the right to bring a tort claim for wrongful termination in violation of the public policy set forth in the statute. ARIZ. REV. STAT. ANN. § 23-1501(3)(b) (2021).

[148] WILLBORN, *supra* note 59, at 142; *see, e.g.*, Lawson v. Gault, 2013 WL 2010224, at *1 (D.S.C. 2013) (plaintiff cannot bring common law public policy discharge claim alleging termination for exercising First Amendment right to run for elective office against her boss since 42 U.S.C. § 1983 provides adequate remedy); Hein v. AT&T Operations, Inc., 2010 WL 5313526, at *5 (D. Colo. 2010) (plaintiff states no common law public policy discharge claim based on employer's alleged violation of Sarbanes-Oxley (SOX) Act where that federal statute provides adequate remedy); Robinette v. WESTconsin Credit Union, 686 F. Supp. 2d 1206, 1208 (W.D. Wis. 2010) (federal bankruptcy statute provides adequate remedy for plaintiff allegedly discharged for filing bankruptcy; common law public policy claim dismissed).

[149] WILLBORN, *supra* note 59, at 142; *see, e.g.*, Clinton v. State ex rel. Locan Cty. Election Bd., 29 P.3d 543, 546 (Okla. 2001) (holding that an employee who is terminated due to pregnancy must pursue the adequate federal stator remedy, rather than a wrongful-discharge claim, even though her discharge violated the state's clear and compelling public policy against pregnancy discrimination).

[150] WILLBORN, *supra* note 59, at 166–67. For example, in Michigan, the Michigan Whistleblower Protection Act provides the exclusive remedy for employees that are fired for reporting their employer's unlawful activities. *See* Shuttleworth v. Riverside Osteopathic Hosp., 477 N.W.2d 453, 455 (Mich. Ct. App. 1991).

[151] WILLBORN, *supra* note 59, at 166; *see, e.g.*, Allen v. Charter County of Wayne, 192 Fed. Appx. 347, 353 (6th Cir. 2006) (because state whistleblower statute protects employees allegedly terminated for reporting illegal practices, plaintiff could not bring common law public policy discharge claim based on such circumstances, even though court also found that plaintiff could not make out statutory whistleblower claim).

remedy whatsoever.[152] Similarly, if the individual is in a jurisdiction that does allow pursuit of both but requires the wrongful termination claim to be "tethered" to policies explicitly found in the state constitution or statutes, this essentially causes one claim to depend upon the success of the other.[153] Therefore, when whistleblower statutes are not construed broadly to favor the whistleblower to effectuate the purpose of the protection, whistleblowers may be left with no common law remedy either.

B. Policy Rationales and Interpretation of Other Federal Whistleblower Statutes

The various federal whistleblower statutes with differing statutory language cannot all be uniformly interpreted to favor the whistleblower regardless of context. However, when interpreting the ambiguous language found in these statutes, courts should generally adopt an approach that keeps the public policy rationale of whistleblower protection at the forefront of the interpretation, while also relying on application of the plain language, the history and purpose of the particular statute, and any applicable precedent. When interpreting a statute, courts will first look to the text of the statute itself and adopt the plain meaning of the language if it unambiguously expresses the meaning Congress intended.[154] However, if the language is ambiguous, courts are to consider the "purpose, the subject matter and the condition of affairs which led to its enactment."[155]

There are many policy rationales for the protection of whistleblowers. The first, which is fairly intuitive, is that whistleblower protection "promotes legal compliance by employers."[156] In turn, when employers are forced to comply with the laws to which they are subject, the health, safety, and welfare of the public are enhanced.[157] Whistleblowers also provide an essential public benefit because of their

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[152] *See* WILLBORN, *supra* note 59, at 166.

[153] *See id.*; *see* Jennings v. Marralle, 876 P.2d 1074, 1076 (Cal. 1994) (employee of employer that was too small to be covered by state antidiscrimination statute cannot use that statute as expression of public policy on which to base common law wrongful discharge claim for age discrimination).

[154] Haley v. Retsinas, 138 F.3d 1245, 1249 (8th Cir. 1998).

[155] *Id.*

[156] Peter D. Banick, Note, *"Case Note: The "In-House" Whistleblower: Walking the Line Between Good Cop and Bad Cop"*, 37 WM. MITCHELL L. REV. 1868, 1874 (2011).

[157] *Id.*

valued perspective – an inside look that "increases the likelihood of discovery and the need to report wrongdoing."[158] Second, whistleblowers facing significant career and financial risk would be far less likely to unveil wrongful and unlawful activity by their employers without protection.[159] History indicates that a lack of protection breeds silence. Third, protecting whistleblowers avoids less favorable alternatives, such as greater government expenditures on watchdog and investigative resources.[160] Finally, there is an "inherent sense of unfairness and injustice [that] would result in the absence of whistleblower protection."[161] Society should not punish individuals for reporting what they reasonably believe to be unlawful or unethical behavior that also may be physically or economically harmful to the general public.

As demonstrated by *Scrivener* and *Haley*, when the meaning of a federal whistleblower statute is ambiguous, courts tend to, in consideration of the purpose and condition of affairs that led to its enactment, construe the statute broadly – in favor of protecting the whistleblower.[162] The statute at issue in *Haley* instructed that "no Federal banking agency may discharge any employee…because the employee (or any person acting pursuant to the *request* of the employee) provided *information…regarding any possible violation of any law or regulation* . . . ."[163] The court had to construe the ambiguous phrases within the statute to determine whether Haley's conduct constituted a "request" and whether the information provided was "information regarding any possible violations of the law."[164] Similarly, in *Barcomb*, the court was tasked with construing the meaning of ambiguous language found in a federal whistleblower protection statute.[165] The Eighth Circuit interpreted both the meaning of the word "defect" as well as the phrase "relating to" with a narrow approach in favor of the employer rather than the whistleblower.[166] The court acknowledged the ambiguity of the phrase "relating to," calling it a "broad and indeterminate phrase," but still proceeded to construe it narrowly.[167] In contrast, in *Haley*, once the court determined the phrase

[158] *Id.* at 1875.

[159] *Id.* at 1876.

[160] *Id.* at 1875–76.

[161] *Id.* at 1876.

[162] Hill v. Mr. Money Fin. Co. & First Citizens Banc Corp., 309 Fed. Appx. 950, 961 (6th Cir. 2009).

[163] Haley v. Retsinas, 138 F.3d 1245, 1249 (8th Cir. 1998) (emphasis added).

[164] *Id.* at 1248.

[165] Barcomb v. Gen. Motors, LLC., 978 F.3d 545, 550 (8th Cir. 2020) (majority).

[166] *Id.*

[167] *Id.*

"request" was ambiguous, it construed the statute broadly to protect the whistleblower because that was the best way to "avoid a nonsensical result and to effectuate the underlying purposes of the law."[168] Similarly, in *Bechtel* and *Scrivener*, the respective courts found it appropriate to give a broad construction to remedial statutes, such as whistleblower protection laws, to "encourage safety concerns to be raised and resolved promptly" as well as to effectuate the broad congressional purpose attached to the respective statutes at issue in those cases.[169]

The court in *Barcomb* determined that the phrase "relating to," which the statute failed to define, was ambiguous, and the word "defect" was "unfortunately circular" in its definition.[170] Therefore, the Eighth Circuit should have adopted a broad construction to protect Barcomb.[171] This construction would have advanced the broad purpose of the statute in its entirety – which was to "reduce traffic accidents and deaths and injuries resulting from traffic accidents…by prescrib[ing] motor vehicle safety standards… and carry[ing] out needed safety research and development."[172] Barcomb's tasks at the GM manufacturing plant involved carrying out "needed safety development" by fulfilling crucial quality assurance checks.[173] His reports involved co-workers who were actively falsifying reports of repairs in the final production stage for motor vehicles.[174] As Judge Melloy pointed out in his dissent, these vehicles could very well have reached the end of the manufacturing process with these defects going unnoticed.[175] Thus, when applying the broadly construed language of the statute to the facts of the case, Barcomb's reports of incomplete and false repairs should indeed be included as protected reports of "information relating to motor vehicle defects."[176]

VI. CONCLUSION

In *Barcomb v. General Motors*, the Eighth Circuit refused to broadly interpret ambiguous language in the whistleblower protection provision of MAP-21, even though established precedent instructs otherwise. As a

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[168] *Haley*, 138 F.3d at 1250.

[169] Bechtel Constr. Co. v. Sec'y of Lab., 50 F.3d 926, 931 (11th Cir. 1995); N.L.R.B. v. Scrivener, 405 U.S. 117, 122 (1972).

[170] *Barcomb*, 978 F.3d at 548.

[171] *Id.*

[172] 49 U.S.C. § 30101 (1994).

[173] *Barcomb*, 978 F.3d at 547.

[174] *Id.* at 548.

[175] *Id.* at 553 (Melloy, J., concurring in part and dissenting in part).

[176] 49 U.S.C. § 30171(a)(1) (2012).

result, whistleblowers, who often may lack an adequate alternative remedy, may think twice before raising safety concerns similar to those raised by Barcomb. A statute that is broadly designed to encourage employees to report any information relating to motor vehicle defects has now been established as protecting only those who raise concerns about post-manufacturing defects – leaving open to retaliation those employees that witness and report information relating to defects along the production line.