L.B. 324: CODIFICATION OF THE PUBLIC POLICY EXCEPTION TO THE EMPLOYMENT-AT-WILL DOCTRINE IN NEBRASKA

TIMOTHY D. LOUDON†

I. INTRODUCTION

Absent a contract for a definite term, most nonunion, private-sector employment relationships in this country are presumed to be terminable at will.[1] The employment-at-will rule has been traced to an 1877 treatise by H.G. Wood, in which he wrote: "With us, the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof."[2]

In addition to a number of significant statutory inroads into the employment-at-will doctrine,[3] courts in recent years have begun to

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† Associate at the firm of Tate and Alden, P.C.; Nebraska Equal Opportunity Commission, 1981-1984; B.A., 1975, University of Nebraska-Lincoln; J.D., 1981, University of Nebraska-Lincoln.

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1. L. LARSON & P. BOROWSKY, UNJUST DISMISSAL §§ 1.01, 2.01 (1985). An oftcited statement of the employment-at-will rule provides that an employer has the unrestricted right to discharge an employee at will "for good cause, for no cause or even for cause morally wrong." Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, —, 179 S.W. 134, 137-38 (1915).

2. L. LARSON & P. BOROWSKY, *supra* note 1, § 2.04 (quoting H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877)).

3. *See, e.g.*, National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1982)) (antiretaliation provision at 29 U.S.C. § 158(a) (1982)) [hereinafter referred to as "NLRA"]; Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1982)) (antiretaliation provision at 29 U.S.C. § 215(a)(3) (1982)) [hereinafter referred to as "FLSA"]; Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1982)) [hereinafter referred to as "ADEA"] (antiretaliation provision at 29 U.S.C. § 623(d) (1982)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (1982)) (antiretaliation provision at 29 U.S.C. § 660(c)(1) (1982)) [hereinafter referred to as "OSHA"]; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e-3(a) (1982)) [hereinafter referred to as "Title VII"]. For additional citations to federal legislation restricting an employer's right to terminate an at-will employee for engaging in certain protected activities, see W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION 425-29 (1985). *See also* Unjust Discrimination in Employment Act, NEB. REV. STAT. §§ 48-1001 to -1010 (Reissue 1984) (antiretaliation provision at § 48-1004(3)); Nebraska Fair Employment Practice Act, NEB. REV. STAT. §§ 48-1101 to -1126 (Reissue 1984 & Supp. 1985) (antiretaliation provi-

develop a variety of exceptions to the at-will rule premised upon general contract and tort principles.[4] The most frequently litigated exception to the employment-at-will doctrine, however, has involved discharges violative of public policy.[5] Public policy challenges to the employment-at-will doctrine typically allege that an employee was discharged in retaliation for: (1) refusing to commit an unlawful act,[6] (2) reporting suspected violations of law or other wrongdoing to the authorities,[7] or (3) exercising or otherwise asserting a legal right[8] or a legal duty.[9]

While the Supreme Court of Nebraska has indicated that judicial acceptance of a public policy exception to the employment-at-will rule is an open question in this state,[10] the Nebraska legislature has recently demonstrated a rather remarkable movement in this direction.

In its first session of 1985, the Nebraska legislature passed Legislative Bill ("L.B.") 324,[11] which amended the antiretaliation provi-

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sions at § 48-1114(1)-(3)) [hereinafter referred to as "FEPA"]; NEB. REV. STAT. §§ 48-1219 to -1227.01 (Reissue 1984) (antiretaliation provision at § 48-1221(4)).

4. The beginning of this judicial trend to carve out and embrace various exceptions to the employment-at-will doctrine has been attributed to a 1959 California decision, Petermann v. Local 396, International Bhd. of Teamsters, 174 Cal. App. 2d 184, —, 344 P.2d 25, 27-28 (1959). *See also* L. LARSON & P. BOROWSKY, *supra* note 1, § 2.06.

5. For an excellent dissertation on the historical underpinnings and current manifestations of the public policy exception to the employment-at-will doctrine, see Wagenseller v. Scottsdale Memorial Hosp., — Ariz. —, —, 710 P.2d 1025, 1030-36 (1985). *See generally* W. HOLLOWAY & M. LEECH, *supra* note 3, at 249-306 (1985) (retaliatory discharge and public policy); H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE 175-202 (1984) (application of public policy torts related to employee dismissal cases).

6. *See, e.g., Petermann*, 174 Cal. App. 2d at 187, 344 P.2d at 27 (employee allegedly discharged for refusing to commit perjury).

7. *See, e.g.*, Palmateer v. International Harvester Co., 85 Ill. 2d 124, 127, 421 N.E.2d 876, 879 (1981) (employee allegedly discharged for reporting a fellow employee to the police for theft of company property).

8. *See, e.g.*, Frampton v. Central Ind. Gas Co., 260 Ind. 249, 253, 297 N.E.2d 425, 428 (1973) (employee allegedly discharged for initiating an action to obtain workers' compensation benefits).

9. *See, e.g.*, Kistler v. Life Care Centers, 620 F. Supp. 1268, 1268 (D. Kan. 1985) (subpoenaed employee allegedly discharged for testifying against employer's interests in unemployment compensation hearing).

10. *See* Mueller v. Union Pac. R.R., 220 Neb. 742, 751-52, 371 N.W.2d 732, 737-38 (1985).

11. L.B. 324, 88th Leg., 1st Spec. Sess., 1984-85 Neb. Laws 624 (1985) (amending NEB. REV. STAT. § 48-1102 (Reissue 1984)). L.B. 324 was introduced by Senators Donald Wesely and David Landis and was referred to the legislature's Business & Labor Committee for further consideration. With little fanfare and virtually no opposition, L.B. 324 was passed on final reading by a vote of 45-1-3 (Sen. Jerome Warner cast the sole dissenting vote). 1 NEB. LEG. J., 89th Leg., 1st Sess. 1186 (Mar. 26, 1985). It was signed into law by Governor Robert Kerrey on April 1, 1985, and became effective on September 6, 1985. *Id.* at 1299, 2737. *See also* NEB. CONST. art. III, § 27 (bills enacted into law three months after close of legislative session during which bill was passed).

sions of the Nebraska Fair Employment Practices Act ("FEPA")[12] by adding two new sections to that Act: one definitional[13] and the other substantive.[14]

This Article first addresses the traditional principles applicable to the FEPA, with particular emphasis on that Act's antiretaliation provisions. It then discusses the scope of L.B. 324 and several of the more significant aspects of this new legislation, pointing out a number of novel issues engendered by this historic legislation.

II. TRADITIONAL CONCEPTS APPLICABLE TO THE NEBRASKA FAIR EMPLOYMENT PRACTICES ACT

The Nebraska Fair Employment Practices Act prohibits employment discrimination because of a person's race, color, religion, sex, disability, marital status, or national origin.[15] The prohibitions of the FEPA apply to employers,[16] labor organizations,[17] and employment agencies.[18]

In addition to the substantive provisions of the FEPA prohibiting employment discrimination, the Act contains two broad prohibitions against retaliation, which are generally referred to as the "opposition" clause and the "participation" clause.[19] The opposition clause prohibits employers, labor organizations, and employment agencies from retaliating against any person "because he has opposed any practice made an unlawful employment practice by [the FEPA]."[20]

12. NEB. REV. STAT. §§ 48-1101 to -1126 (Reissue 1984 & Supp. 1985) (antiretaliation provisions are currently codified at § 48-1114 (Supp. 1985)).

13. NEB. REV. STAT. § 48-1102(11) (Supp. 1985) ("unlawful" defined as "acting contrary to or in defiance of the law or disobeying or disregarding the law.").

14. L.B. 324, § 3, 88th Leg., 1st Spec. Sess., 1984-85 Neb. Laws 624, 625 (codified at NEB. REV. STAT. § 48-1114(3) (Supp. 1985)) (unlawful for employer to retaliate against applicants or employees for refusing to perform unlawful acts or otherwise opposing unlawful conduct of employer).

15. NEB. REV. STAT. §§ 48-1104 to -1106 (Reissue 1984).

16. NEB. REV. STAT. §§ 48-1102(2), -1104 (Reissue 1984).

17. NEB. REV. STAT. §§ 48-1102(3), -1106 (Reissue 1984).

18. NEB. REV. STAT. §§ 48-1102(4), -1105 (Reissue 1984).

19. NEB. REV. STAT. § 48-1114 (Reissue 1984).

20. *Id.* For an exhaustive analysis of the scope of the opposition clause as it has developed under parallel federal legislation, see 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 87.12 (1984 & Supp. 1985); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 533-69 (2d ed. 1983 & Supp. 1984). The opposition clause has a potentially unlimited application to all forms of employee conduct allegedly taken in response to discriminatory employment practices. However, the courts have developed a number of limitations that serve to restrict the scope of conduct that will be viewed as constituting protected activity under the opposition clause. For example, illegal activity of any sort is unprotected. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973). The court stated: "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity [illegal 'stall-in'] against it." *Id.* Employee opposition may be characterized as excessive and,

The participation clause prohibits such entities from retaliating against any person "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the FEPA]."[21]

In construing the substantive provisions of the FEPA prohibiting employment discrimination, the Nebraska Supreme Court has repeatedly indicated its willingness to rely upon that body of case law developed under the parent federal legislation,[22] Title VII of the Civil Rights Act of 1964 ("Title VII").[23] To date, however, only one reported decision has squarely presented the Nebraska Supreme Court with a cause of action premised upon unlawful retaliation.[24] Consistent with previous decisions rendered under the FEPA, the court expressly applied federal case law to the factual situation before it.[25] It is safe to assume, then, that the Nebraska Supreme Court will continue to apply precedent developed under Title VII in construing analogous provisions of the Nebraska FEPA.

A potential conflict of interpretation may arise under the antiretaliation provisions of the FEPA, however, because L.B. 324 added a third proscription to the opposition and participation clauses: "or (3) has opposed any practice or refused to carry out any action unlawful under the laws of the United States or this state."[26] Title VII contains no analogue to the provisions of L.B. 324. Indeed, the author was unable to locate any state or federal civil rights legisla-

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thus, beyond the confines of protected opposition. Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 539 F. Supp. 437, 451 (W.D. Pa. 1982). Self-help activities such as photocopying and disseminating confidential personnel records may be found to be unprotected activity. Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025, 1036 (5th Cir. 1980). In short, the opposing activity must be reasonable under the circumstances, which involves a balancing of the employee's interest in having a work environment free of discriminatory employment practices, and the employer's interest in terminating overly disruptive, disloyal, or uncooperative employees. The applicability of federal case law to the Nebraska FEPA is discussed at notes 22-25 and accompanying text *infra*.

21. NEB. REV. STAT. § 48-1114 (Reissue 1984). The participation clause extends statutory protection to those individuals directly involved in the filing or processing of a complaint or "charge" alleging an unfair employment practice, the subsequent investigation of those allegations, and any administrative hearings held thereon. The most obvious recipients of such protection are those persons who file charges (i.e., "Charging Parties") and witnesses who have given a statement or testified during the course of an investigation or administrative hearing. *See* A. LARSON & L. LARSON, *supra* note 20, § 87.11.

22. *See, e.g.*, Airport Inn, Inc. v. Nebraska Equal Opportunity Comm'n, 217 Neb. 852, 856, 353 N.W.2d 727, 731 (1984); Zalkins Peerless Co. v. Nebraska Equal Opportunity Comm'n, 217 Neb. 289, 291, 348 N.W.2d 846, 848 (1984); Richards v. Omaha Pub. Schools, 194 Neb. 463, 466, 232 N.W.2d 29, 31 (1975).

23. 42 U.S.C. §§ 2000e - 2000e-17 (1982).

24. Harris v. Misty Lounge, Inc., 220 Neb. 678, 682, 371 N.W.2d 688, 691 (1985).

25. *Id.* at 682-83, 371 N.W.2d at 691-92.

26. NEB. REV. STAT. § 48-1114(3) (Supp. 1985).

tion containing language similar to that found in L.B. 324. Thus, the Nebraska Supreme Court may well conclude that Title VII precedent is not controlling in construing the reaches of L.B. 324. Nevertheless, it is presumed that the Nebraska Supreme Court, at a minimum, will rely upon that body of case law developed under Title VII and the FEPA in determining what employee conduct constitutes protected "opposition" and what employer conduct constitutes unlawful "retaliation."

III. SCOPE OF L.B. 324

A. GENERAL COVERAGE

First of all, it should be noted that L.B. 324 did not affect the coverage of the FEPA as it relates to those persons and entities within the jurisdictional purview of the Act. Thus, traditional principles governing the construction of covered employers, labor organizations, and employment agencies remain intact.

Rather, L.B. 324 expanded the scope of conduct considered violative of the Act.[27] Although originally described in terms of "whistleblower" legislation proscribing retaliation against those employees who refuse to perform an unlawful act,[28] L.B. 324 clearly goes further: it not only proscribes retaliation for refusing to perform an unlawful act, it also prohibits retaliation for active opposition to unlawful actions,[29] including, presumably, the reporting of unlawful actions to higher authorities.[30] Thus, the scope of L.B. 324

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27. *See* text accompanying note 26 *supra*.

28. *Hearings on L.B. 324 Before Comm. on Business and Labor*, 89th Leg., 1st Sess. 51-52 (Feb. 13, 1985) (draft form) (introductory statement of Sen. Wesely) [hereinafter cited as *Hearings*]. The term "whistleblower" is more commonly used with reference to employees who risk discharge for reporting or threatening to report wrongdoing engaged in by their employer or co-workers. L. LARSON & P. BOROWSKY, *supra* note 1, § 7.02.

29. L.B. 324, § 2, 88th Leg., 1st Spec. Sess., 1984-85 Neb. Laws 624, 625 (codified at NEB. REV. STAT. § 48-1114(3) (Supp. 1985)).

30. *See Hearings*, *supra* note 28, at 52. *See, e.g.*, DeAnda v. St. Joseph Hosp., 671 F.2d 850, 856-57 (5th Cir. 1982); Sias v. City Demonstration Agency, 588 F.2d 692, 694-95 (9th Cir. 1978); Hicks v. ABT Assoc., 572 F.2d 960, 968-69 (3d Cir. 1978). Whether L.B. 324 also proscribes retaliation taken in response to an employee's exercise of a statutory right or duty is not clear. For a discussion of public policy exception, see text accompanying notes 5-9 *supra*. Apparently, the result will depend on the specific factual circumstances surrounding the exercise of such right or duty. For example, the discharge of an employee allegedly taken in response to that employee's filing for workmen's compensation benefits, while almost certainly in violation of public policy, does not appear to be violative of the FEPA. In this instance, exercising one's right to file for workmen's compensation benefits is not "opposition" to "unlawful" acts of the employer. On the other hand, the exercise of statutory rights may itself constitute opposition to unlawful conduct, such as the filing of a complaint with the Occupational Safety and Health Administration. Similiarly, the discharge of an employee allegedly taken in response to that employee's exercise of a statutory duty, such as serving on a

is potentially as broad in application as the FEPA's opposition clause.

While the sponsors of L.B. 324 anticipated that the discharge of an employee engaged in protected activity would constitute unlawful retaliation,[31] prohibited conduct is far more extensive than the ultimate act of terminating an individual's employment. Activity considered retaliatory and, hence, violative of Title VII, has been construed in an extremely broad fashion. Retaliation in virtually any form is prohibited.[32] Furthermore, statutory protection can arise prior to the creation of the employment relationship,[33] and can continue even after the employment relationship has been severed.[34]

B. MUST THE ACTIVITY OPPOSED BE UNLAWFUL?

Early in the development of Title VII's retaliation case law, courts were confronted with the issue of whether an individual's retaliation cause of action was defeated by a finding that the underlying activity opposed by that individual was not unlawful. The near universal response of the courts over the years has been that the em-

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jury, does not appear to be violative of the FEPA. Again, there simply exists no "opposition" to an "unlawful" act of the employer. Such cases then will require a case-by-case analysis of the underlying factual circumstances. Thus, L.B. 324 is not a complete codification of the public policy exception to the employment-at-will doctrine.

31. *See Hearings*, *supra* note 28, at 51-52.

32. *See, e.g.*, Paxton v. Union Nat'l Bank, 688 F.2d 552, 571 (8th Cir. 1982) (unwarranted interrogation), *cert. denied*, 460 U.S. 1083 (1983); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982) (refusal to rehire); St. John v. Employment Dev. Dep't, 642 F.2d 273, 274 (9th Cir. 1981) (disadvantageous transfer); Smith v. Secretary of Navy, 659 F.2d 1113, 1120 (D.C. Cir. 1981) (unfavorable or unwarranted job evaluation); Romero v. Union Pac. R.R., 615 F.2d 1303, 1304 (10th Cir. 1980) (delay in reinstatement); Griffin v. Michigan Dep't of Corrections, 30 Fair Empl. Prac. Cas. (BNA) 638, 641-42 (E.D. Mich. 1982) (unwarranted reprimands); Hatton v. Ford Motor Co., 508 F. Supp. 620, 624-25 (E.D. Mich. 1981) (disadvantageous assignment); Boyajian v. Schenley Indus., 24 Fair Empl. Prac. Cas. (BNA) 1065, 1068 (S.D.N.Y. 1980) (refusal of pay raise); Hayden v. Chrysler Corp., 486 F. Supp. 557, 562 (E.D. Mich. 1980) (constructive discharge); Guilday v. Department of Justice, 485 F. Supp. 324, 326 (D. Del. 1980) (refusal to promote); Kirkland v. Buffalo Bd. of Educ., 487 F. Supp. 760, 772 (W.D.N.Y. 1979), *aff'd*, 622 F.2d 1066 (2d Cir. 1980) (refusal to hire); Smith v. Columbus Metropolitan Hous. Auth., 443 F. Supp. 61, 62-63 (S.D. Ohio 1977) (demotion); EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 69 (S.D.N.Y. 1975), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977) (suspension); Francis v. American Tel. & Tel. Co., 55 F.R.D. 202, 207 (D.D.C. 1972) (surveillance).

33. NEB. REV. STAT. § 48-1114 (Supp. 1985) (includes "applicants for employment" with an employer and "applicants for membership" in labor organizations).

34. *See, e.g.*, Shehadeh v. Chesapeake & Potomac Tel. Co., 595 F.2d 711, 719-20 (D.C. Cir. 1978) (holding that former employer may not lawfully release untrue and adverse job references to prospective employers in retaliation for prior filing of discrimination charges); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978) (holding that former employer may not withhold letters of recommendation in retaliation for employee's past conduct); Barela v. United Nuclear Corp., 462 F.2d 149, 153 (10th Cir. 1972) (holding that subsequent employer may not lawfully consider an applicant's assertion of Title VII rights against prior employer in determining whether to hire applicant).

ployee need only hold an objectively reasonable belief[35] or, alternatively, a subjectively good faith belief[36] that the activity opposed constituted a discriminatory employment practice. In other words, retaliation constitutes an entirely separate cause of action, independent of the merits of the underlying cause of action. These decisions, as a matter of policy, recognize that the initiative of aggrieved employees would be "severely chilled if they bore the risk of discharge whenever they were unable to establish conclusively the merits of their claims."[37] Moreover, a contrary result "would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances."[38] Such matters of policy are considered so compelling that one court has held an employee who files discrimination charges is protected against retaliation even if the original charges of discrimination are false and intentionally malicious.[39]

Thus, a key question facing the Nebraska Equal Opportunity Commission ("NEOC")[40] and reviewing courts[41] is whether L.B. 324 requires that the activity opposed must actually be unlawful in order to afford the protesting individual protection against retaliation. Proponents of a restrictive construction of L.B. 324 might point to the language contained in the definition of "unlawful" in support of their position. L.B. 324 defines the term "unlawful" as "acting contrary to or in defiance of the law or disobeying or disregarding the law."[42]

35. *See, e.g.*, Sisco v. J.S. Alberici Constr. Co., 655 F.2d 146, 150 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978).

36. *See, e.g.*, Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982); Monteiro v. Poole Silver Co., 615 F.2d 4, 8 (1st Cir. 1980). *See generally* A. LARSON & L. LARSON, *supra* note 20, § 87.12(b) (sufficient if employee reasonably believed that he had legitimate ground for protest).

37. Parker v. Baltimore & O.R.R., 652 F.2d 1012, 1019 (D.C. Cir. 1981).

38. *Sias*, 588 F.2d at 695.

39. *See* Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005-07 (5th Cir. 1969).

40. The Nebraska Equal Opportunity Commission is the administrative agency empowered by statute to investigate alleged violations of the FEPA and otherwise to enforce the provisions of the Act. NEB. REV. STAT. §§ 48-1116 to -1119 (Reissue 1984).

41. NEB. REV. STAT. §§ 48-1119 to -1120 (Reissue 1984). These sections provide for the appeal of final orders of the NEOC only in those instances wherein there has been a public hearing on the charges. Inasmuch as public hearings are held only when a violation of the FEPA has been established during the course of investigative proceedings, judicial review is available only in those limited circumstances wherein the NEOC has initially found a violation of the FEPA. The statute is silent as to the appeal rights of those individuals who have filed charges found to be lacking in merit which have been disposed of administratively prior to the public hearing stage. *See generally* Willborn, *Employment Discrimination Laws in Nebraska: A Procedural Labyrinth* (pt. 1), 62 NEB. L. REV. 225, 234-36 (1983) (arguing that judicial review should be available in all instances as a matter of right).

42. L.B. 324, § 1, 88th Leg., 1st Spec. Sess., 1984-85 Neb. Laws 624, 625 (codified at

However, similar arguments have been made with respect to the antiretaliation provisions of Title VII, but usually to no avail.[43]

Given the similarity between retaliatory discharges that are violative of antidiscrimination statutes and discharges that are in retaliation for opposition to other unlawful activity,[44] as well as the fact that L.B. 324 is a specific amendment to the antiretaliation provisions of the FEPA, it would appear logical to conclude that the NEOC will require only a good faith belief that the activity opposed is, in fact, unlawful. Thus, even though Title VII contains no analogue to the specific provisions of L.B. 324, the general principles developed under

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NEB. REV. STAT. § 48-1102(11) (Supp. 1985)). This section makes no attempt to distinguish the various gradients of unlawful conduct. A review of the legislative history of L.B. 324 is not particularly enlightening on this point. The only specific mention of unlawful activity concerned violations of speed limit and seat belt laws. *Hearings*, *supra* note 28, at 58 (remarks of Sen. Hall, Sen. Labedz, and Gordon McDonald, testifying in favor of L.B. 324). Vague reference was also made to accountants who are forced to "juggle the books." *Hearings*, *supra* note 28, at 61 (remarks of Ray Lineweber, testifying in favor of L.B. 324). Thus, whether the activity opposed constitutes a felony, misdemeanor, or tort is apparently irrelevant. *Hearings*, *supra* note 28, at 58.

43. Both Title VII and the FEPA contain language prohibiting retaliation against persons who oppose any practice made an "unlawful" employment practice by the respective statutes. Compare the language of the federal statute:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed *any practice made an unlawful employment practice by this subchapter*, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter,

42 U.S.C. § 2000e-3(a) (1982) (emphasis added), with the language of the state statute:

> It shall be an unlawful employment practice for an employer to discriminate against any of his or her employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he or she (1) has opposed *any practice made an unlawful employment practice by sections 48-1101 to 48-1125*, (2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under sections 48-1101 to 48-1125, or (3) has opposed any practice or refused to carry out *any action unlawful under the laws of the United States or this state.*

NEB. REV. STAT. § 48-1114 (Supp. 1985) (emphasis added). As noted previously, a retaliation cause of action is not defeated by a finding that the activity opposed is not unlawful. *See* notes 35-36 and accompanying text *supra*.

44. The parallel between retaliatory discharges that are violative of Title VII and retaliatory discharges that are violative of public policy in other contexts has been observed by at least one noted authority on the subject. *See* L. LARSON & P. BOROWSKY, *supra* note 1, § 6.10[1]. Occasional court decisions also recognize this parallel. *See, e.g.*, Hentzel v. Singer Co., 138 Cal. App. 3d 290, 297-300, 188 Cal. Rptr. 159, 164-65 (1982) (court expressly relied upon Title VII precedent in holding that an employee is protected against retaliation for complaining in good faith about working conditions he reasonably believed to be unsafe).

the antiretaliation provisions of that statute should be found to be applicable. Similarly, state "whistleblower" statutes typically extend protection to employees who in good faith report violations, or *suspected* violations of the law.[45] To hold otherwise would not only conflict with the construction otherwise applicable to the remainder of the FEPA's antiretaliation provisions, but would also subject the protesting employee to strict liability for opposing what the employee believes in good faith to be an unlawful action.

C. WHO DETERMINES WHETHER THE CONDUCT OPPOSED IS UNLAWFUL?

On the other hand, if an actual violation of the law is deemed necessary in order to trigger the protective coverage of L.B. 324, then the more complex problem of determining the legality of the conduct challenged must be addressed. Presumably, the applicant or employee would be required to point to, for example, some statute, court or administrative decision, constitutional provision, regulation, or treaty, that carries the force of law. This requirement appears clear from the plain language of L.B. 324.[46] However, even within the narrow confines of codified law, the question of illegality is typically a complex affair requiring judicial interpretation. The more difficult question then is: unlawful as determined by whom? The troubling answer to this critical question would appear to be: unlawful as determined by the NEOC.

As a policy matter, does any governmental agency have the competency to rule on the myriad of legal intricacies covering the entire spectrum, both state and federal, of legally governed behavior? Does a civil rights agency have the ability and expertise to determine the lawfulness of alleged violations of insurance, health, and banking laws? More fundamentally, *should* the NEOC have this power?

As radical as this proposition may sound, it would appear that this is precisely the result envisioned by the legislature. An amendment to L.B. 324 was proposed which would have restricted the breadth of the definition of "unlawful" by including the phrase "as determined by a court of competent jurisdiction."[47] Remarks made

45. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 31-51m (West Supp. 1985); ME. REV. STAT. ANN. tit. 26, § 833 (Supp. 1985); MICH COMP. LAWS ANN. §§ 15.361-.369 (West 1981) (Whistleblowers' Protection Act).

46. L.B. 324, § 2, 88th Leg., 1st Spec. Sess. 1984-85 Neb. Laws 624, 625 (codified at NEB. REV. STAT. § 48-1114 (Supp. 1985)).

47. 1 NEB. LEG. J., 89th Leg., 1st Sess. 629 (Feb. 14, 1985) (Business and Labor Comm. Amendment No. 244, § 11). The proposed amendment read in pertinent part: "(11) Unlawful under the laws of the United States or this state shall mean (a) acting contrary to or in defiance of the law or (b) disobeying or disregarding the law as determined by a court of competent jurisdiction." *Id.*

in the floor debate of this amendment are elucidating on this point:

> The problem with the amendment is that it has a last line that says, as determined by a court of competent jurisdiction. Because of that it is implied that you'd have to go through a court and actually determine that what you were asked to do is illegal, and the process would circumvent the normal EOC proceedings. *There is no reason to do that because they determine that sort of thing for other questions.* So we are striking that last sentence, as determined by a court of competent jurisdiction, from the committee amendment.[48]

In essence then, the legislature has delegated to an administrative agency of the state the power to determine, in the first instance, whether the conduct opposed by an individual is unlawful under state or federal laws.[49] The scope of this delegation of authority cannot be overstated. It is doubtful that the NEOC is equipped to deal with substantive questions of law over which it has absolutely no claim of expertise. For these additional reasons, it is argued herein that the NEOC should require only a good faith belief that the activity opposed is, in fact, unlawful.

D. MUST A CHARGING PARTY EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO INITIATING CIVIL ACTION?

An interesting question raised by the passage of L.B. 324 is whether a charging party alleging conduct violative of the provisions of L.B. 324 must now exhaust administrative remedies prior to challenging that conduct in a civil action. In other words, will plaintiffs, attempting to file "wrongful discharge"[50] claims in court which allege conduct that is also violative of L.B. 324, now be forced to exhaust administrative remedies with the NEOC prior to bringing such actions?

Under traditional principles applicable to Title VII and FEPA claims, the failure to exhaust administrative remedies by initiating a charge filing with either the Equal Employment Opportunity Com-

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48. Floor Debate on L.B. 324, NEB. UNICAMERAL, 89th Leg., 1st Sess. 1547 (Mar. 8, 1985) (statement of Sen. Donald Wesely) (emphasis added); *see also id.* (statement of Sen. Barrett). Senator Wesely's amendment (No. 298) ultimately prevailed, and the phrase, "as determined by a court of competent jurisdiction," was stricken from Amendment No. 244. 1 NEB. LEG. J., 89th Leg., 1st Sess. 785 (Mar. 1, 1985).

49. An interesting issue, beyond the scope of this article, is whether this apparent grant of authority represents an unconstitutional delegation of power to the NEOC.

50. W. HOLLOWAY & M. LEECH, *supra* note 3, at 249. The commentators stated:

> A newly developed rule of law is that an employee may not be discharged from employment for acting in furtherance of public policy or refusing to violate public policy. . . . The new cause of action [is] variously called "wrongful discharge," [or] "discharge in derogation of public policy. . . ."

Id.

mission ("EEOC")[51] or the NEOC has generally been held to be an absolute bar to the filing of a Title VII or FEPA action in court.[52] Due to the relatively short filing period contained in the FEPA,[53] the exhaustion requirement, if held applicable to such claims, may result in the elimination of a number of otherwise viable court challenges to the employment-at-will doctrine. An exhaustion requirement could also have the effect of locking such would-be plaintiffs into an administrative scheme from which there is no escape[54] and no guarantee of judicial review.[55]

Charging parties, however, may be able to escape exhaustion requirements by utilizing a relatively unexplored Nebraska statute.[56]

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51. 42 U.S.C. § 2000e-5 (1982). The United States Equal Employment Opportunity Commission administers and enforces the provisions of Title VII. *Id.*

52. *See, e.g.*, Miller v. Union Pac. R.R., 539 F. Supp. 134, 137 (D. Neb. 1982) (stating that "even assuming that a private right of action may be implied [under the FEPA], undoubtedly the question would arise whether plaintiff would first be required to exhaust his administrative remedies under the Nebraska FEPA before seeking judicial relief."); Thorson v. City of Omaha, 445 F. Supp. 268, 269 (D. Neb. 1978) (finding that the timely filing of a charge of discrimination with the EEOC is a prerequisite to any court action under Title VII, and that, by failing to do so, "plaintiff has failed to exhaust his administrative remedies and that jurisdiction is lacking under Title VII."); A. LARSON & L. LARSON, *supra* note 20, § 48.31; Willborn, *Employment Discrimination Laws in Nebraska: A Procedural Labyrinth* (pt. 2), 62 NEB. L. REV. 708, 717 (1983).

53. NEB. REV. STAT. § 48-1118(2) (Reissue 1984). A charge alleging violations of the FEPA must be filed within 180 days of the alleged discriminatory act. *Id.*

54. The FEPA simply lacks any mechanism by which charging parties can avoid the oftentimes lengthy and laborious administrative processing of discrimination complaints. Because the timeliness of the investigative process depends to a large extent on such factors as the NEOC's "backlog" of cases awaiting active assignment, staff turnover, staff expertise, and agency budgeting, charging parties have little or no control over the process. By way of contrast, the federal regulations allow the EEOC to issue a "right-to-sue" letter authorizing the charging party to file a Title VII lawsuit upon request 180 days after the charge filing. 29 C.F.R. § 1601.28(a)(1) (1985) (procedure concerning the institution of civil actions). The EEOC also has the discretion to issue a right-to-sue letter prior to the expiration of this 180-day waiting period where the EEOC determines it cannot complete the administrative process in a prompt manner. *Id.* § 1601.28(a)(2). On January 17, 1986, the Appropriations Committee introduced L.B. 1094. NEB. LEG. J., 89th Leg., 2d Sess. 389 (Jan. 17, 1986). The bill provides for the issuance of a right-to-sue letter in those limited circumstances wherein the NEOC has issued a reasonable cause determination, finding the respondent to have engaged in unlawful discriminatory employment practices. L.B. 1094, NEB. UNICAMERAL, 89th Leg., 2d Sess. (1986) (to amend NEB. REV. STAT. 48-1119 (Reissue 1983)). At the same time, L.B. 1094 would eliminate those provisions of the FEPA relative to the NEOC's public hearing process. The amendments to the FEPA proposed by L.B. 1094 are a partial solution at best, since the right-to-sue letter would only be available in those situations wherein the NEOC has issued a reasonable cause determination and only following completion of the NEOC's investigation of the charging party's allegations. *Id.*

55. *See* note 41 and accompanying text *supra*.

56. NEB. REV. STAT. § 20-148 (Reissue 1983). The section provides:

(1) Any person or company, as defined in section 49-801, except any political subdivision, who subjects or causes to be subjected any citizen of this state or

This statute is virtually untested,[57] but the legislative history behind its enactment indicates the central purpose to be to provide direct access to the court system, thus providing an alternative to the administrative scheme contemplated under the FEPA.[58] It remains unclear, however, whether the litigant must nevertheless initiate a timely charge filing with the NEOC prior to the filing of a civil action.

E. PREEMPTION

Although the issue is far too complex to address adequately in an article of this nature, the possible applicability of preemption principles should at least be noted.[59] Thus, where the retaliatory conduct is alleged to have been taken in response to the exercise of rights protected under federal law, state action brought pursuant to L.B. 324 may be found to be preempted by the federal legislation.

One of the most frequently cited examples of the preemption doctrine is found in the area of labor law, primarily in decisions rendered under the National Labor Relations Act ("NLRA").[60] The United States Supreme Court has held that, if the conduct at issue was "arguably" protected or prohibited by the NLRA, then state law

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other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.

(2) The remedies provided by this section shall be in addition to any other remedy provided by Chapter 20, article 1, and shall not be interpreted as denying any person the right of seeking other proper remedies provided thereunder.

57. The Nebraska Supreme Court, in Wiseman v. Keller, 218 Neb. 717, 358 N.W.2d 768 (1984), held that § 20-148 does not waive the sovereign immunity of the State of Nebraska as to actions brought in federal court pursuant to 42 U.S.C. § 1983 (1982). *Id.* at 718, 358 N.W.2d at 769. There are no other reported decisions construing the reach of this statute.

58. *Hearings on L.B. 66 Before Judiciary Comm.*, 85th Leg., 1st Sess. 2-3 (Jan. 18, 1977) (introductory statement of Sen. Chambers); Floor Debate on L.B. 66, NEB. UNICAMERAL, 85th Leg., 1st Sess. 434-35 (Feb. 11, 1977) (remarks of Sen. Chambers).

59. For an in-depth analysis of the preemption doctrine, see W. HOLLOWAY & M. LEECH, *supra* note 3, at 137-49; H. PERRITT, JR., *supra* note 5, at 61-68.

60. 29 U.S.C. §§ 151-169 (1982). *Cf.* Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904, 1914-16 (1985) (holding that § 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a) (1982), preempted state claim alleging bad faith handling of an insurance claim); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983) (holding that Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (1975), preempted state antidiscrimination laws that provide employees protection greater than that provided by federal equal opportunity laws). Where the preemptive effect of federal enactments is not explicit, "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states.' " *Allis-Chalmers*, 105 S. Ct. at 1910 (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).

could not be applied.[61] Thus, for example, if a covered employee alleges his or her discharge was in retaliation for engaging in union activities, such as his or her protesting an unfair labor practice of the employer, the action is within the exclusive jurisdiction of the National Labor Relations Board,[62] and state law should be preempted.

Where federal law specifically prohibits retaliation for exercising a statutory right,[63] the argument for preemption is stronger, especially if there exists a statutory scheme for the enforcement and vindication of such rights. Whenever a federal statute is implicated in a charge filing pursuant to L.B. 324, this important defense should be explored in detail.

IV. CONCLUSION

The legislature has granted carte blanche authority to the NEOC to ferret out and eradicate retaliatory discharges where such discharges are alleged to be in response to an individual's opposition to the unlawful activity of the employer, labor organization, or employment agency. A key question left unanswered by L.B. 324 is whether the activity opposed must, in fact, be unlawful. If traditional concepts and case law developed under the Nebraska FEPA and Title VII antiretaliation provisions are found controlling, the employee must only entertain a good faith or reasonable belief that the activity opposed is unlawful. It is also unclear to what extent charging parties will be required to exhaust administrative remedies under the FEPA prior to initiating a civil action alleging "wrongful discharge," or whether L.B. 324 now constitutes the exclusive remedy for such actions. Finally, it remains to be seen whether, and to what extent, preemption principles will be found to be applicable to actions brought pursuant to L.B. 324.

Only time will tell what effect L.B. 324 will have on the employment practices of this state, but the NEOC's declaration of its newly found role is both expansive and prophetic:

> The 1985 Nebraska legislature passed LB324 (effective 9/6/85). Under this law, The Nebraska Fair Employment Practice Act was amended to include that class of people who suffer some form of adverse treatment as a result of opposing an illegal act or; participating in a legally declared right. *In effect, conferred to the Nebraska Equal Opportunity Commission, is the right to police the public policy "Employ-*

61. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 241-45 (1959).

62. 29 U.S.C. § 160(a) (1982). The National Labor Relations Board administers and enforces the provisions of the National Labor Relations Act. 29 U.S.C. §§ 153-56, 160-61 (1982).

63. *See, e.g.*, note 3 *supra*.

ment-At-Will" exemption in Nebraska. It will be interesting to see the development of this case law as cases progress up to the court systems.[64]

64. 8 NEBRASKA EQUAL OPPORTUNITY COMMISSION UPDATE NO. 2, NEBRASKA EQUAL OPPORTUNITY COMMISSION INCORPORATES EMPLOYMENT-AT-WILL EXCEPTION INTO ITS LAW 2 (Sept.-Oct. 1985) (emphasis added).