

5-1-2016

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### Recommended Citation

Nancy M. Modesitt, *Causation in Whistleblowing Claims*, 50 U. Rich. L. Rev. 1193 (2016).

Available at: <https://scholarship.richmond.edu/lawreview/vol50/iss4/5>

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# CAUSATION IN WHISTLEBLOWING CLAIMS

*Nancy M. Modesitt \**

## INTRODUCTION

Whistleblowing cases have continued to increase in number in recent years as state and federal legislatures have added protections for employees who disclose illegal or wrongful activity by their employers.<sup>1</sup> But even as the number of cases continues to climb, cohesive and coherent doctrines applicable in whistleblowing litigation have failed to emerge. A significant reason for this is that much of whistleblower protection is statutory in nature, and federal statutes vary greatly from state statutes, even as state statutes differ. A second reason is that courts have drawn upon doctrines developed under Title VII of the Civil Rights Act of 1964 in deciding whistleblowing cases, and Supreme Court decisions as well as statutory amendments have frequently altered legal standards in these cases. And a third reason is that there are overlapping common law and statutory protections, which result in the potential for different whistleblowing doctrines to develop, even within a single state.

Causation is one of the elements of a whistleblowing case where this doctrinal confusion proliferates. While federal statutory standards appear to be coalescing around requiring the plaintiff to prove that the employee's whistleblowing was a contributing factor in causing the employee to be fired, the same cannot be said for claims brought under state law.<sup>2</sup> Causation standards in state whistleblower cases encompass a wide array of options,

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\* Associate Professor of Law, University of Baltimore School of Law. Many thanks to Richard Moberly, Jennifer Pacella, and Anuj Desai for their thoughtful suggestions and comments. I deeply appreciate the efforts of my research assistants, Jacquelyn LaHecka and Rafiq Gharbi, as well as the continued support of the law school that made this article possible.

1. NANCY M. MODESITT ET AL., *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 1-12 (3d ed. 2015).

2. Nancy M. Modesitt, *Why Whistleblowers Lose: An Empirical and Qualitative Analysis of State Court Cases*, 62 U. KAN. L. REV. 165, 172, 183 (2013).

ranging from the stringent standard of requiring that the employee establish that his or her whistleblowing was the sole cause of retaliation, to the more lenient standard of requiring that the employee prove that the whistleblowing was a motivating factor of the employer's retaliation.<sup>3</sup>

At the same time, as my earlier work illustrates, inability to prove causation is one of the more common reasons that whistleblowers fail to prevail in litigation.<sup>4</sup> This article attempts to bring coherence to the confusion of state whistleblower causation standards by: (1) explaining the causation standards presently used in federal whistleblower protection statutes; (2) identifying the proliferating causation standards used in whistleblower claims brought under state law; (3) assessing the most commonly used causation standards, including exploring the tort causation doctrine and theory that underlie some of these standards; and (4) proposing a uniform standard for causation in state whistleblower litigation.

## I. EXISTING CAUSATION STANDARDS

### A. *Overview of Whistleblower Claims and the Role of Causation*

The classic whistleblower is an employee who discloses an employer's illegal or wrongful behavior. Decades ago, these whistleblowers had no legal protections.<sup>5</sup> Employers could fire a whistleblower in retaliation for having blown the whistle on their misconduct.<sup>6</sup> However, states began to develop common law protections against such retaliation through the tort claim of wrongful discharge in violation of public policy.<sup>7</sup> Legal protections quickly expanded, beginning with federal statutory protection for federal employees who disclosed violations of law or gross mismanagement.<sup>8</sup> States followed the lead of the federal government by enacting statutes that mirrored federal law, by protecting state and local government employees from retaliation for similar

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3. MODESITT ET AL., *supra* note 1, at 8-39-8-40.

4. Modesitt, *supra* note 2, at 184.

5. MODESITT ET AL., *supra* note 1, at 1-3.

6. For a historical overview of the evolution of whistleblower protections, see generally *id.* at 1-3-1-16.

7. *Id.* at 7-3.

8. *Id.* at 8-3.

types of disclosures.<sup>9</sup> Nearly every state has some variation on this type of protection.<sup>10</sup> Additional protections for public sector employees were recognized by the United States Supreme Court under the First Amendment, providing a remedy for some government employees whose free speech rights were infringed upon by governmental retaliation for disclosing wrongdoing on a matter of public concern.<sup>11</sup>

In the private sector, while common law protections in the form of wrongful discharge claims have been accepted in some form in all fifty states, statutory protections have been slower to develop. To date, less than half of the states provide such protections,<sup>12</sup> and there is no federal law that provides general protection for whistleblowers.<sup>13</sup> However, there are topic-specific federal laws that protect whistleblowers who disclose wrongdoing of a specific nature.<sup>14</sup> Examples of these topic-specific federal laws include the Sarbanes-Oxley Act, which covers employees who disclose violations of federal securities laws,<sup>15</sup> and the Patient Protection and Affordable Care Act, which protects employees who blow the whistle on violations of that health care statute.<sup>16</sup>

While the contours of the broad array of federal statutory, state statutory, and common law whistleblower protections vary, all of these legal protections share a causation requirement: employers are prohibited from retaliating in certain ways against employees *because* the employee engaged in protected activity—however “protected activity” is defined.<sup>17</sup> This causation element derives from the common law employment at-will doctrine. Under this doctrine, employers are free to fire an employee for any or no rea-

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9. See *id.* at 8-25.

10. *Id.*

11. See, e.g., *Connick v. Myers*, 461 U.S. 138, 154 (1983). The Supreme Court has limited the availability of this claim by only allowing the claim where the employee is not speaking or disclosing wrongdoing pursuant to his or her official duties. See *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006). Thus, those who ferret out wrongdoing as a part of their job, and who then disclose that wrongdoing as required by their job, are not protected by the First Amendment.

12. See *MODESITT ET AL.*, *supra* note 1, at 6-2.

13. See *id.* at 3-1.

14. See, e.g., *id.* at 1-31.

15. 18 U.S.C. § 1514A (2012).

16. 29 U.S.C. § 218C (2012).

17. For descriptions of what constitutes “protected activity” under federal statutes, see *MODESITT ET AL.*, *supra* note 1, at 3-6. For an analysis of protected activity under state statutes, see *id.* at 6-9, 6-12. For an analysis of protected activity under common law protections, see *id.* at 7-12, 7-23.

son.<sup>18</sup> Thus, when an employee blows the whistle and is subsequently fired, the causation question is whether the employer fired the employee because of the whistleblowing—which is prohibited—or for some other reason—which is allowed by employment at-will.

In theory, this causation requirement is straightforward. Employees need to prove that the reason for their termination is because of their whistleblowing behavior.<sup>19</sup> In practice, however, the requirement becomes complicated by the realities of the workplace. Employees are rarely perfect. There is nearly always some conduct by the employee—conduct other than the whistleblowing behavior—to which the employer can point as the reason for firing the employee.<sup>20</sup> Perhaps recognizing this, courts and legislatures have fashioned a variety of approaches for assessing causation.

### B. *Causation in Claims Brought Pursuant to Federal Law*

There are two basic types of whistleblowing claims under federal law. First, there are federal statutory whistleblower claims. Federal employee whistleblowers are protected by the Whistleblower Protection Act (“WPA”).<sup>21</sup> Private sector employee whistleblowers are only protected by federal law if they blow the whistle on certain topics, such as employers who violate the Clean Air Act<sup>22</sup> or federal laws protecting consumer safety.<sup>23</sup> And there is the potential for whistleblower protections based on the First Amendment of the Constitution for employees of state governments.<sup>24</sup>

Causation standards vary among federal statutes that protect whistleblowers from retaliation.<sup>25</sup> Some statutes do not explicitly

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18. For a fairly recent discussion of the rationales underlying employment at-will, see *Greene v. Oliver Realty, Inc.*, 526 A.2d 1192, 1196–99 (Pa. Super. Ct. 1987).

19. See MODESITT ET AL., *supra* note 1, at 3-17.

20. See *id.*

21. See Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.).

22. See 42 U.S.C. § 7622 (2012).

23. See, e.g., Consumer Products Safety Improvement Act, 15 U.S.C. § 2087 (2012).

24. See MODESITT ET AL., *supra* note 1, at 8-13, 8-25 (discussing protections).

25. For an analysis of the causation requirement under federal statutes, see *id.* at 3-24–3-25.

state a causation standard,<sup>26</sup> and for such statutes, the standards have been created by courts.<sup>27</sup> These standards have changed over time. The clearest example of this mutability is found in the causation standards applied to retaliation claims brought under the federal antidiscrimination statutes.<sup>28</sup> For this reason, and because the interpretation of the antiretaliation provisions of Title VII in particular has been influential in state court whistleblowing cases, it is worth understanding the changes in causation standards under Title VII—the preeminent federal antidiscrimination statute—particularly the standards applied in retaliation claims.<sup>29</sup>

The origin of Supreme Court doctrine on causation under Title VII is *Price Waterhouse v. Hopkins*.<sup>30</sup> In *Price Waterhouse*, the causation question fractured the Court, resulting in a plurality opinion with a number of concurrences. At issue was whether an employer would be liable for sex discrimination where sex, as well as other legitimate factors, played a part in the decision not to promote a woman.<sup>31</sup> A plurality of the Court concluded that the plaintiff need not establish that sex discrimination was the only cause of the decision or even that the discrimination was the but-for cause of the decision.<sup>32</sup> Instead, the plurality concluded that the plaintiff need only show that her “gender played a motivating part in an employment decision.”<sup>33</sup> Once the plaintiff established this, the employer could avoid liability only by establishing that it would have made the same decision regardless of the plaintiff’s sex.<sup>34</sup>

Because the decision was only by a plurality of the Court, lower courts and scholars looked to the concurring opinions for guidance on what would pass muster in terms of establishing causation in the future. Justice O’Connor was seen as being the decisive vote,

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26. *See id.* at 5-9.

27. *See id.* at 5-8-5-9.

28. For an overview and explanation of the relationship between Title VII and whistleblowing claims, including the causation analysis under Title VII and its history, see *id.*

29. The classic retaliation claim is one where an employee complains of employment discrimination and the employer responds by taking some form of action against the employee—such as firing or demoting the employee. See *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 60, 67-68 (2006).

30. 490 U.S. 228, 232 (1989).

31. *Id.* at 231-32.

32. *See id.* at 241-42.

33. *Id.* at 244.

34. *Id.* at 244-45.

and her concurrence became the guiding standard that lower courts used. In her concurrence, Justice O'Connor limited this causation standard to cases where the plaintiff presents "direct evidence" of discrimination.<sup>35</sup> Thus, it appeared that there were two different standards of causation that would apply in Title VII litigation: (1) the motivating factor standard where the plaintiff had produced "direct evidence" of discrimination and (2) the but-for standard to be used where there was no such direct evidence.<sup>36</sup>

The *Price Waterhouse* approach was modified by the Civil Rights Act of 1991, which codified parts of the *Price Waterhouse* approach, while rejecting others.<sup>37</sup> Applicable to Title VII and not other antidiscrimination statutes, the 1991 Act amended Title VII to provide that Title VII is violated where a protected category is "a motivating factor" in an employment decision, even if other non-prohibited factors were also considered in making the decision.<sup>38</sup> If the plaintiff establishes this, the defendant has a limited defense as to the damages available in the claim, but cannot avoid liability.<sup>39</sup> Lower courts struggled to decide whether the motivating factor standard was limited to situations where there was direct evidence of discrimination.<sup>40</sup> Ultimately, the Supreme Court clarified that direct evidence is not required to fall within the ambit of the statute.<sup>41</sup>

Until recently,<sup>42</sup> retaliation claims brought under Title VII, which are akin to whistleblowing claims, appeared to be subject to the causation standard articulated in the 1991 Civil Rights Act, the motivating factor standard, or the standards from *Price Waterhouse*.<sup>43</sup> However, the Supreme Court set the stage for a completely different approach in *Gross v. FBL Financial Services*,

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35. *Id.* at 276 (O'Connor, J., concurring).

36. *See id.* at 262, 276.

37. *See The Civil Rights Act of 1991*, EEOC, <http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html> (last visited Apr. 15, 2016).

38. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2012).

39. *Id.* at § 2000e-5(g)(2)(B).

40. *See* Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 662 (2000).

41. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003).

42. For a description of the chain of events leading to the adoption of the but-for standard in retaliation claims under Title VII, see generally Kimberly A. Pathman, *Protecting Title VII's Antiretaliation Provision in the Wake of University of Texas Southwestern Medical Center v. Nassar*, 109 NW. U. L. REV. 475, 481 (2015).

43. *See id.* at 476-77, 477 n.3.

*Inc.*<sup>44</sup> when it decided that that neither the 1991 Act nor the *Price Waterhouse* approach to causation applied to claims brought under the Age Discrimination in Employment Act (“ADEA”).<sup>45</sup> Since the ADEA was not revised by the 1991 Civil Rights Act, the Court refused to apply the motivating factor standard contained in that statute.<sup>46</sup> It also refused to apply the *Price Waterhouse* approach.<sup>47</sup> Instead, the Court adopted a but-for causation standard.<sup>48</sup> The only source of the Court’s adoption of the but-for standard was a brief reference to tort law.<sup>49</sup>

After *Gross* was decided, the Supreme Court pushed the but-for standard into retaliation cases, beginning with retaliation claims brought under Title VII.<sup>50</sup> Lower courts have followed the Supreme Court’s lead,<sup>51</sup> applying the but-for standard to First Amendment retaliation claims.<sup>52</sup>

Even as the Supreme Court moved toward a but-for causation standard in retaliation cases, Congress moved away from it. An increasing number of federal statutes that protect whistleblowers have used a contributing factor standard that is somewhat similar to the motivating factor standard codified in the 1991 Civil Rights Act.<sup>53</sup> This variation differs from the Title VII version in two ways: (1) rather than framing the causal connection required as being a motivating factor in the employer decision, the causation standard is “a contributing factor,”<sup>54</sup> which is a slightly lower standard and (2) the effect of a finding that an unlawful motive

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44. 557 U.S. 167, 169–70 (2009).

45. *Id.* at 173, 178.

46. *Id.* at 174.

47. *Id.* at 178.

48. *Id.* at 180.

49. The Court also relied on the dictionary definition of “because of” in reaching its conclusion. *Id.* at 176.

50. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2523 (2013).

51. Some states never clearly articulated whether the motivating factor approach or the but-for standard was being used in these cases. *See, e.g., Evans v. Cowan*, 510 S.E.2d 170, 175 (N.C. Ct. App. 1999) (noting that “such protected speech or activity [must have been] the ‘motivating’ or ‘but for’ cause for [the plaintiff’s] discharge or demotion”).

52. *See, e.g., Fairley v. Andrews*, 578 F.3d 518, 526 (7th Cir. 2009) (holding that the motivating factor approach used before *Gross* has been abrogated by it and applying a but-for causation standard).

53. *See Modesitt, supra* note 2, at 183–85 (discussing causation standards under federal whistleblower protection statutes); *see also* Pub. L. No. 102-166, 105 Stat. 1071-1100.

54. *See, e.g., 29 C.F.R. § 1979.104* (2015) (identifying burdens of proof under AIR-21, a federal whistleblower protection statute).



was a factor in the employment decision at issue differs between the 1991 Act and federal whistleblower protection statutes.<sup>55</sup>

As to the former difference, the Supreme Court described the motivating factor standard as follows: the impermissible consideration “must have ‘actually played a role in [the employer’s decision-making] process and had a determinative influence on the outcome.’”<sup>56</sup> An alternative explanation is that a motivating factor is “a reason, alone or with other reasons, on which the [employer] relied when it [fired] the plaintiff.”<sup>57</sup> The contributing factor standard has been interpreted more favorably to the employee. The Federal Circuit, which has a preeminent role in adjudicating whistleblowing claims of federal employees, has defined this standard as “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.”<sup>58</sup> The language that the unlawful motivation must “affect in any way” the employer’s decision appears to encompass more situations than the language that the unlawful motivation was one upon which the employer “relied.”<sup>59</sup>

The second difference between the Title VII approach and the approach taken under federal whistleblower protection statutes is more complicated. Under Title VII, the employer is liable if an unlawful reason (i.e., discrimination based on race) was a motivating factor in the employer’s decision to fire an employee.<sup>60</sup> The employer can avoid paying damages, but not attorney’s fees, if the employer can prove that it would have fired the employee regardless of race.<sup>61</sup> In contrast, under federal whistleblower protection provisions, a finding of retaliation being a contributing factor in an employment decision does not automatically result in liability.<sup>62</sup> Rather, an employer can still avoid liability by proving by

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55. See, e.g., 29 C.F.R. § 1979.104(c) (2015).

56. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000).

57. Model Civ. Jury. Instr. 5.21 (8th Cir. 2013) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241–42 (1989)).

58. *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (discussing the standard under the WPA).

59. See *Price Waterhouse*, 490 U.S. at 251 (concluding that “[t]he plaintiff must show that the employer actually relied on her gender in making its decision”); *Marano*, 2 F.3d at 1143 (“[T]he employee only needs to demonstrate by preponderant evidence that the fact of, or content of, the protected disclosure was one of the factors that tended to affect in any way the personnel action.”).

60. 42 U.S.C. § 2000e-2(m) (2012).

61. See, e.g., *id.* § 2000e-5(g)(2)(B) (2012).

62. See, e.g., 49 U.S.C. § 42121(b)(2)(B)(ii) (2012).

clear and convincing evidence that it would have made the decision even if the employee had not blown the whistle.<sup>63</sup> Thus, in one sense, Title VII provides greater protection to employees by establishing liability when the impermissible motive (race) is a motivating factor. On the other hand, the employer's burden of proof to avoid paying damages is lower under Title VII than under many federal whistleblowing statutes, as it requires proof by a preponderance of the evidence,<sup>64</sup> while these federal whistleblower protection statutes require proof by clear and convincing evidence.<sup>65</sup> Under Title VII, a plaintiff establishing that race was a motivating factor will obtain attorney's fees,<sup>66</sup> while under the federal statutes the plaintiff would receive nothing if the affirmative defense is established.<sup>67</sup>

### C. *State Whistleblower Claims and the Bewildering Array of Causation Standards*

There are far more causation standards found in state whistleblowing cases than in federal ones. State causation standards range from the most difficult for a plaintiff to establish—the sole cause standard—to the most lenient—the contributing factor standard.<sup>68</sup> This section outlines the variety of approaches taken across the states.

It is perhaps not surprising that courts have struggled to agree upon a single causation standard in whistleblowing cases. Whistleblowing claims, at least common law ones, are a species of tort claim,<sup>69</sup> and tort law has struggled to define and describe the contours of causation.<sup>70</sup>

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63. See, e.g., *id.* (articulating the standard under the WPA).

64. See 42 U.S.C. § 2000e-5(g)(2)(B) (2012) (allowing a defense where the employer “demonstrates” that it would have taken the same action even without the impermissible motive).

65. 29 C.F.R. § 1979.104 (2015).

66. 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2012).

67. 29 C.F.R. § 1979.104 (2015).

68. See *infra* notes 71, 105 and accompanying text (discussing application of each standard).

69. The tort claim is wrongful discharge in violation of public policy. For a thorough analysis of the contours and history of this claim, see *MODESITT ET AL.*, *supra* note 1, at 7-1-7-74.

70. See Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1737 (1985) (opining that “there is no concept which has been as pervasive and yet elusive [in tort law] as the causation requirement”).

## 1. Sole Cause Standard

At one end of the spectrum lies the sole cause standard, which requires that the employee prove that the only reason for the discharge was the employee engaging in protected activity.<sup>71</sup> This standard is found in statutory claims, such as in Tennessee,<sup>72</sup> as well as common law claims, such as in Texas.<sup>73</sup> As one court described this standard, the plaintiff must establish “an exclusive causal relationship between the plaintiff’s refusal to participate in or remain silent about illegal activities and the employer’s termination of the employee.”<sup>74</sup> Or, as another court stated, this standard requires that the employee establish that “his discharge was for no reason other than his [protected activity].”<sup>75</sup> Under this standard, if there is any other reason that factors into the decision to terminate the employee—even a second illegitimate reason—the employee cannot establish the necessary causation and will be unable to prevail.<sup>76</sup>

Even jurisdictions that have adopted this standard have acknowledged, if indirectly, its problems. Texas, which first adopted the sole cause standard for common law claims, subsequently refused to adopt a sole cause standard for the statutory whistleblower protection claim.<sup>77</sup> The court noted that the standard was a high one and indicated that, absent a clear indication from the legislature in the statute, it would not impose the standard.<sup>78</sup>

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71. See, e.g., TENN. CODE ANN. § 50-1-304(b) (2015) (“No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.”).

72. See *id.*

73. *Tex. Dep’t of Human Servs. v. Hinds*, 904 S.W.2d 629, 634 (Tex. 1995); see also *Purdy v. Wright Tree Serv., Inc.*, 835 N.E.2d 209, 212 (Ind. Ct. App. 2005) (discussing standards for wrongful discharge claim and noting that “[i]n order to be successful on a claim for retaliatory discharge, a plaintiff must demonstrate that his or her discharge was solely in retaliation for the exercise of a statutory right”).

74. *Wooley v. Madison Cty., Tenn.*, 209 F. Supp. 2d 836, 845 (W.D. Tenn. 2002) (describing Tennessee’s whistleblowing statute).

75. See, e.g., *Turner v. Precision Surgical, L.L.C.*, 274 S.W.3d 245, 252 (Tex. App. 2008) (quoting *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) in discussing the “sole reason” standard).

76. See *id.* at 252–53 (holding that a wrongful discharge claim and a claim that the employee was fired for seeking workers’ compensation are mutually exclusive due to the sole reason causation standard).

77. *Hinds*, 904 S.W.2d at 635.

78. *Id.* at 634.

## 2. Determinative Factor Standard

A slightly less restrictive standard of causation is the determinative factor standard. Under this standard, the employee's protected activity must be "the determinative factor" in the employer's decision to take adverse action against the employee.<sup>79</sup> As one court noted, "[this] causation standard is high."<sup>80</sup> However, it does allow claims where there are two reasons for the employee's termination, so long as the whistleblowing was the determinative one, making it an easier standard to establish than the sole cause standard.<sup>81</sup>

A variation in language on the determinative factor standard is the "primary reason" standard. This standard requires that the plaintiff establish, at a minimum, that the primary reason for her termination was her whistleblowing.<sup>82</sup> The term "primary reason" suggests that the plaintiff must establish that her protected activity was the most important reason in the decision to take action against her.

## 3. Because of Standard

A more general standard used by some jurisdictions in establishing causation is to require that the plaintiff establish that the employer's action against the employee was because of the employee's protected conduct.<sup>83</sup> Some jurisdictions that use this approach have not clarified the precise role the protected activity must have had in the employer's decision, leaving it to the jury to determine the meaning of "because of."<sup>84</sup> For some jurisdictions, this may be due to the fact that they have adopted the *McDonnell*

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79. See, e.g., *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 289 (Iowa 2000).

80. *Id.*

81. See *id.* (stating that "the existence of other legal reasons or motives for the termination are relevant in considering causation" under the determinative factor test).

82. See, e.g., *Adams v. Green Mountain R.R. Co.*, 862 A.2d 233, 236 (Vt. 2004) (overturning the jury verdict in favor of the employee because of insufficient evidence of causation).

83. *Whitman v. City of Burton*, 831 N.W.2d 223, 233 (Mich. 2013) (requiring that the employee prove "that his employer took adverse employment action *because of* his protected activity"); *Page v. Columbia Nat. Res., Inc.*, 480 S.E.2d 817, 826 (W. Va. 1996) (noting that the employee "has the burden to provide *prima facie* that the discharge occurred *because of* the violation of . . . public policy").

84. See, e.g., *Whitman*, 831 N.W.2d at 233 (requiring that the employee prove "that his employer took adverse employment action *because of* his protected activity" without defining "because of").

*Douglas* burden-shifting approach.<sup>85</sup> In focusing on the plaintiff's burden of proving a prima facie case, followed by the defendant's obligation to articulate a legitimate reason for the termination, followed by the plaintiff's obligation to prove pretext, these courts seem to pay no attention to the precise causal connection required.<sup>86</sup>

However, other jurisdictions have been more precise. For example, in Nevada, the state supreme court clarified that, while the jury instruction that used because of language was proper, the underlying legal standard is that the employee "must demonstrate that his protected conduct was *the* proximate cause of his discharge."<sup>87</sup> The use of "the" instead of "a" suggests sole or primary causation, a high standard for the plaintiff to meet.

#### 4. But-For Standard

The but-for standard of causation is found in state cases as well as federal cases.<sup>88</sup> This standard is found in whistleblowing claims brought under statutory and common law.<sup>89</sup> As an example of the logic that results in the adoption of this standard, the Supreme Court of Texas adopted but-for causation in cases brought under the state's whistleblower protection statute, even though it had previously endorsed a sole cause standard for whistleblowing

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85. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–02 (1973) (stating that once an employee establishes a prima facie case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection).

86. *See, e.g., Teetor v. Dawson Pub. Power Dist.*, 808 N.W.2d 86, 92–93 (Neb. Ct. App. 2012) (noting the adoption of the *McDonnell Douglas* burden-shifting analysis in wrongful discharge claims and discussing the plaintiff's obligation to prove "a causal connection" without defining the type or degree of requisite causal connection); *see also Dolan v. St. Mary's Mem'l Home*, 794 N.E.2d 716, 721 (Ohio Ct. App. 2003) (using *McDonnell Douglas* burden-shifting approach and discussing the employee's burden of establishing "a causal link" without defining the term).

87. *Allum v. Valley Bank of Nev.*, 970 P.2d 1062, 1066 (Nev. 1998). Interestingly, the court refused to adopt the mixed-motive standard in the case, reasoning that the mixed-motive standard was at odds with employment at-will. *See id.*

88. *See, e.g., Town of Cheswold v. Vann*, 9 A.3d 467, 474 (Del. 2010) (alluding to but-for standard); *Johnson v. D.C.*, 935 A.2d 1113, 1119 (D.C. 2007) (noting the use of a but-for standard under the D.C. Whistleblower Protection Act); *Cokus v. Bristol Myers Squibb Co.*, 827 A.2d 1173, 1185 (N.J. Super. Ct. Law Div. 2002), *aff'd*, *Cokus v. Bristol Myers Squibb Co.*, 827 A.2d 1098 (N.J. Super. Ct. App. Div. 2003) (stating that "to sustain a claim of hostile work environment based upon an employee engaging in whistleblowing activities under [the New Jersey statute], an employee must establish that the conduct complained of would not have occurred but for his or her whistleblowing activities").

89. *See, e.g., Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 636 (Tex. 1995).

claims brought pursuant to the common law.<sup>90</sup> The court based this decision on (1) the statutory language—specifically, the statutory causation language because of appeared to be inconsistent with a sole cause standard—and (2) the fact that it comported with the court’s perspective on the appropriate balance between statutorily protected interests (i.e., whistleblowing) and the employment at-will doctrine, in part, because a sole or principal cause standard would not adequately protect whistleblowers.<sup>91</sup> The court also noted that this standard was used by the United States Supreme Court in employment cases<sup>92</sup> as well as in several other statutory whistleblower protection systems.<sup>93</sup>

## 5. Substantial Factor Standard

Quite similar to the motivating factor standard is the substantial factor standard. This standard requires that the employee prove that the protected conduct was “a substantial factor” in the employer’s decision to terminate the employee.<sup>94</sup> As one court noted, determining whether this standard is met is “an inquiry that defies precise definition,”<sup>95</sup> potentially because it is unclear just how much of a role the whistleblowing must play in the employer’s decision to take adverse action against the employee in order to become a substantial factor. This is in contrast to standards such as “a definitive cause” or “a primary cause.”

Sometimes courts apply the substantial factor test in a way that essentially turns it into a different causation standard. One court, explicitly drawing on discrimination cases, stated that in order to be a substantial factor, “the employer’s wrongful purpose must have been ‘a factor that made a difference’ in the discharge

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90. *Id.* at 632–36.

91. *Id.* (noting that the but-for causation standard “best protects employees from unlawful retaliation without punishing employers for legitimately sanctioning misconduct or harboring bad motives never acted upon”).

92. *Id.* at 635 (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 276 (1977)).

93. *Id.* at 636 (noting that both Pennsylvania and South Carolina’s whistleblower protection statutes use this standard).

94. *See, e.g., Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 539 (Tenn. 2002) (holding that the common law claim is not preempted by the statutory claim and retaining the substantial factor causation test for the common law claim); *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 405 (Utah 1998) (discussing burdens of proof in wrongful discharge claim).

95. *Ryan*, 972 P.2d at 410.

decision.”<sup>96</sup> This definition, in essence, makes the substantial factor test into a but-for test of motivation.<sup>97</sup>

Another court, in adopting the substantial factor test, attempted to provide a sense of what constitutes a substantial factor by contrasting it with the determinative factor test.<sup>98</sup> That court noted that under the determinative factor test, if an employer fires an employee because of misconduct and protected whistleblowing activity, the employee will only prevail if the employee can prove that the employer would not have fired the employee had the employee not engaged in the protected activity.<sup>99</sup> In contrast, the court noted that under the substantial factor test, the employee need only prove that the protected activity was a “significant” factor in the firing decision; the employee need not establish that he would have retained his job had he not engaged in protected activity.<sup>100</sup>

As one court noted, using the substantial factor test is appropriate for two reasons: (1) causation is difficult to prove and (2) public policy considerations “strongly favor eradication” of certain employment decisions, including retaliation against whistleblowers.<sup>101</sup>

## 6. Motivating Factor Standard

Moving further down the spectrum of standards toward a more employee-favorable standard is the motivating factor standard. In a court’s typical articulation of this standard, the employee has the burden of proving that the protected activity “was a motivat-

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96. *Estes v. Lewis & Clark Coll.*, 954 P.2d 792, 797 (Or. Ct. App. 1998) (quoting *Nelson v. Emerald People’s Util. Dist.*, 840 P.2d 1384, 1390 (Or. Ct. App. 1992), *aff’d in part, rev’d in part*, 862 P.2d 1293 (Or. 1993)).

97. *See Hardie v. Legacy Health Sys.*, 6 P.3d 531, 537–38 (Or. Ct. App. 2000) (discussing the fact that both substantial factor and but-for tests had been in use in Oregon and concluding that, regardless of terminology, the burden is on the plaintiff to show that the plaintiff would have been treated differently if the employer had not been motivated by unlawful considerations); *see also Donofry v. Autotote Sys., Inc.*, 795 A.2d 260, 274 (N.J. Super. Ct. App. Div. 2001) (holding that the trial court finding that retaliatory motive played a substantial part in employment decision would fulfill but-for test of causation).

98. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 821 P.2d 18, 30 (Wash. 1991) (en banc).

99. *Id.*

100. *Id.*

101. *See Sharbono v. Universal Underwriters Ins. Co.*, 161 P.3d 406, 425–26 (Wash. Ct. App. 2007) (citations omitted).

ing reason for their discharge.”<sup>102</sup> This differs from the determinative factor approach because the protected activity need not be decisive; it can be one of several factors that the employer took into account.<sup>103</sup>

One variation on the motivating factor standard is the “significantly motivated” standard. For example, in Wyoming, an employee must show that the “discharge was significantly motivated by retaliation for her exercise of statutory rights” in order to establish causation.<sup>104</sup> The addition of the modifier “significantly” moves the standard closer to a primary or determinative cause standard.

## 7. Contributing Factor Standard

At the other end of the spectrum from the “sole reason” standard lies the contributing factor standard. This standard merely requires the employee to prove that the protected activity was a contributing factor in the employer’s decision to terminate them.<sup>105</sup> It differs from the substantial factor standard in that it does not contain a minimum threshold of significance of the unlawful motive; it appears that as long as the whistleblowing was a part of the employer’s decision to take action against the employee, that is sufficient to establish causation.<sup>106</sup> This standard was adopted recently in Missouri for wrongful discharge claims.<sup>107</sup> However, the court adopting the standard did not explain the standard in detail.

Even though the language of “contributing factor” makes the causation standard more employee-favorable than other standards, in practice, what appears to be a contributing factor standard can transform into a more difficult standard to prove. For instance, claims brought under Kentucky’s whistleblower protection

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102. See, e.g., *Haney v. Aramark Unif. Servs., Inc.*, 17 Cal. Rptr. 3d 336, 348–49 (Cal. Ct. App. 2004).

103. See *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 434 (Alaska 2004) (applying the motivating factor test to a wrongful discharge claim based on an employee filing a complaint with OSHA); *Gasper v. Ruffin Hotel Corp. of Maryland, Inc.*, 960 A.2d 1228, 1234 (Md. Ct. Spec. App. 2008) (holding that use of “determinative” instead of “motivating” in jury instruction was in error because motivating is a lesser burden to prove).

104. *Cardwell v. Am. Linen Supply*, 843 P.2d 596, 600 (Wyo. 1992).

105. See *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 94 (Mo. 2010).

106. See *id.*

107. *Id.* at 95 (adopting the contributing factor approach).



statute use the contributing factor standard, and that standard is defined as “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision.”<sup>108</sup> The District of Columbia’s whistleblower protection statute uses the same definition.<sup>109</sup> However, in both Kentucky and the District of Columbia, the “contributing factor” language is effectively modified, either by court interpretation or other statutory provisions, such that the standard applied in litigation is ultimately higher.<sup>110</sup> In the District of Columbia, the language has been interpreted to mean that it only shields an employee who establishes “[a] record [that] supports a finding that he would not have been disciplined *except for his status* as a whistleblower.”<sup>111</sup> This interpretation turns “a contributing factor” into a but-for causation requirement. Similarly, in Kentucky, while a *prima facie* claim is established if an employee can show that whistleblowing was a contributing factor in the adverse employment decision, another statutory provision states that the employer is not liable if the employer proves by clear and convincing evidence that the whistleblowing was not “a material fact” in that decision.<sup>112</sup>

As discussed in Part I.B, the contributing factor standard is in use in numerous federal whistleblower protection statutes.

## 8. A Welter of Confusion

Some courts have issued decisions which show confusion on the issue of causation and suggest a multitude of standards that are applicable. For example, Kentucky courts have held that the standard of causation in common law claims is that the plaintiff must prove that the protected activity was “a substantial and motivating factor but for which the employee would not have been discharged.”<sup>113</sup> This statement references three different causation standards: substantial factor, motivating factor, and but-for causation. It appears to be an attempt to create a minimum threshold (substantial) of causation as well as requiring that the

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108. KY. REV. STAT. ANN. § 61.103 (West 2015).

109. D.C. CODE § 1-615.52(a)(2) (2016).

110. *See id.*; *Crawford v. D.C.*, 891 A.2d 216, 222 (D.C. 2006).

111. *Crawford*, 891 A.2d at 222 (emphasis added) (citing *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1325 (Fed. Cir. 1999)).

112. KY. REV. STAT. ANN. § 61.103 (West 2015).

113. *See, e.g., First Prop. Mgmt. Corp. v. Zarebidaki*, 867 S.W.2d 185, 188 (Ky. 1993).

employee's whistleblowing be a determinative factor in the decision to take action against the employee. Similarly, in *Donofry v. Autotote Systems, Inc.*, a New Jersey appellate court referenced four standards: but-for, substantial factor, motivating factor, and determinative factor.<sup>114</sup> Discussing substantial factor, motivating factor, and determinative factor, the court stated, "Plaintiff's ultimate burden of proof is to prove by a preponderance of the evidence that his protected, whistleblowing activity was a determinative or substantial, motivating factor in defendant's decision to terminate his employment—that it made a difference."<sup>115</sup> The court appeared to set but-for causation apart from the other three standards while suggesting that substantial factor, motivating factor, and determinative factor were all, in essence, different ways of saying motivating factor.<sup>116</sup>

Until recently, court decisions interpreting Maine's whistleblower protection statute showed a different type of confusion over the application of causation standards. In the absence of clear guidance from the state supreme court, Maine's lower courts issued decisions that indicated conflicting beliefs on what the causation standard should be. One lower court determined that in order to establish liability, a plaintiff need not establish that the whistleblowing behavior was the sole reason for her termination.<sup>117</sup> Instead, the court appeared to use the motivating factor standard, stating that,

[t]he plaintiff need not show that her whistleblower activity was the sole reason for her termination. Her overall burden is met if a reasonable jury could conclude that the defendant employer's purported reasons for her termination were false or that the employer was more likely motivated by her protected activity.<sup>118</sup>

Later in the case, the court appeared to use a but-for or sole cause standard, stating that,

[r]egarding causation, it remains in dispute whether Plaintiff was fired for the reasons Defendant maintains (e.g., due to data received from the finance director; negative feedback during the program review; and Plaintiff's reaction to an anonymous letter), or whether Plaintiff was in fact fired for her reporting of abuse to DHS and con-

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114. 795 A.2d 260, 273–74 (N.J. Super Ct. App. Div. 2001).

115. *Id.* at 273.

116. *See id.* at 273–74.

117. *Mowatt v. John Murphy Homes, Inc.*, No. Civ. A. CV-01-201, 2003 Me. Super LEXIS 126, at \*5 (May 30, 2003).

118. *Id.* (citation omitted).

sequently for losing the two largest cases in Children's Services. Resolution of these issues is for a jury.<sup>119</sup>

Another Maine case more clearly indicated that the standard would be a sole cause standard, stating that,

[t]he problem is that Plaintiff has failed to demonstrate a causal connection between her whistleblowing and termination because other factors came into play such as her refusal to serve Defendant McRae when he tried to conduct business. Hence, Defendant Pratt Abbott had a valid reason to terminate her employment and her claim must fail because she has failed to meet her burden of persuasion on the issue of causation.<sup>120</sup>

In this case, the court appeared to be suggesting that as long as the employer had a valid reason to take the action it did, causation could not be established. This language appeared to suggest a requirement that the plaintiff prove that the sole cause of the termination was whistleblowing.

In 2014, Maine's supreme court clarified the standard. In addressing the proper jury instructions in a whistleblowing claim under the state whistleblower protection statute, the court stated that, "[t]o demonstrate a causal link, the plaintiff must show that the protected activity (whistleblowing) 'was a substantial, even though perhaps not the only, factor motivating the employee's dismissal.'"<sup>121</sup> The court then explained that this required the employee to prove that the whistleblowing was a factor "that made a difference"; that is, without the whistleblowing, the employee would not have suffered from the employment decision at issue.<sup>122</sup> Even this decision is not quite clear on the standard because it suggests three different causation standards: substantial factor, motivating factor, and but-for causation (by explaining the test as requiring that whistleblowing was a factor that made a difference in how the employee was treated).<sup>123</sup>

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119. *Id.*

120. *Meserve v. Toba Tarp, Inc.*, No. CV. 02-425, 2003 Me. Super. LEXIS 175, at \*5 (Aug. 22, 2003).

121. *Caruso v. Jackson Lab.*, 98 A.3d 221, 226 (Me. 2014) (quoting *Walsh v. Town of Millinocket*, 28 A.3d 610, 615 (Me. 2011)).

122. *Id.* (quoting *Wells v. Franklin Broad. Corp.*, 403 A.2d 771, 773 (Me. 1974)).

123. *Id.*; see RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmts. a, b (AM. LAW INST. 2010) (explaining but-for causation standard).

## II. FLAWS IN EXISTING STANDARDS

The combination of confusion within states on causation along with the proliferation of standards calls for action to be taken to clarify both the appropriate standard and what that standard should mean. This section of the article assesses existing standards, including consideration of tort law—the commonly identified source of such standards. Nearly all of the existing causation standards suffer from significant flaws that make meeting them quite difficult, if not impossible, for most whistleblowers.

### A. *Standards That are More Stringent Than But-For Causation*

At one end of the spectrum lie the standards that require whistleblowers to prove causation at a level that is more exacting than the but-for standard, such as the sole cause standard and primary reason standard. These standards should not be adopted by statute or used by courts in whistleblowing cases. First, they shift the focus of litigation away from the employer's behavior onto the employee's behavior. Rather than addressing whether the employee blew the whistle and was retaliated against, the primary focus of litigation will likely be on the employee's performance of her job. This is because the employer need only establish that there was some aspect of job performance that contributed to the firing decision in order to avoid liability. The employer can admit, for purposes of summary judgment, that the employee blew the whistle, that the employer was aware of this, and that it was a factor taken into account in firing the employee, and yet still prevail. And given the reality that no employee is perfect, there will always be some aspect of job performance that can be identified as a factor that contributed to the decision. The end result of this is whistleblowing protection in name only, but not in reality. Furthermore, these standards impose a higher standard than causation standards found in tort doctrine, which, as described in Part II.B, are commonly lower standards of but-for or substantial factor causation. Thus, these standards should be avoided.

### B. *But-For Causation*

But-for causation is a standard that has the potential to become the predominant standard in whistleblowing cases because of the Supreme Court's recent adoption of it in retaliation claims

brought under Title VII.<sup>124</sup> The but-for causation standard should not be used in whistleblowing litigation because there are significant pragmatic issues with its use, its adoption from tort doctrine is not justifiable, and it lacks sufficient theoretical support.

### 1. Pragmatic Problems with the But-For Standard

Pragmatically, the but-for test is not ideal. The difficulty with the standard in whistleblowing cases is threefold: (1) it creates a binary choice for the fact-finder as to whether the employment decision at issue was due to whistleblowing or some problem in the employee's performance, and in the employment at-will setting, the employer has a significant evidentiary advantage; (2) it is nearly impossible for a plaintiff to produce affirmative proof of an employer's bad motivation because the only evidence, in this day and age, is in the mind of an individual; and (3) because of points (1) and (2), there is potential to push the focus of litigation away from the whistleblowing behavior and into a scrutiny of the employee's work performance.

As to the first problem, because employees are at-will, in order to establish liability under a but-for causation standard, whistleblowers have to prove that had they not blown the whistle, they would have avoided harm.<sup>125</sup> In practice this means that the employee must prove that the company would not have taken adverse action against him if he had not disclosed its wrongdoing.<sup>126</sup> Humans being fallible, it is inevitable that the employee has made errors at work that can serve as an employer's justification for taking action. Furthermore, the norm in the workplace has become a situation where employers document any concerns they have with employees, creating a record that they can rely upon in

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124. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013).

125. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26, cmt. b (AM. LAW INST. 2010) (explaining the but-for standard of causation as when "in the absence of the act, the outcome would not have occurred").

126. Under tort doctrine, this could be seen as distinguishing between whether the plaintiff's poor job performance or conduct was an environmental condition that should have no effect on eliminating her recovery or whether the poor job performance or conduct was a cause of her discharge, with the potential to diminish or eliminate recovery. If the former, the whistleblowing plaintiff would be akin to the thin-skulled plaintiff in torts and would be entitled to full recovery. See Mario J. Rizzo & Frank S. Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399, 1407-08 (1980) (discussing the distinction between conditions and causes in tort law).

litigation.<sup>127</sup> This record can look quite official and neutral, while the employee's rebuttals tend not to be a part of any "official" documents and thus appear to be post-hoc rationalizations or excuses.<sup>128</sup>

The second related difficulty that whistleblowers face in establishing but-for causation is that direct evidence of an employer's intent to retaliate for whistleblowing is nearly impossible to obtain.<sup>129</sup> The employee lacks the documentation of the employer's retaliatory motive needed to rebut the employer's documentation of whatever performance or conduct errors an employee has made.<sup>130</sup> And in whistleblowing cases, plaintiffs are in an even worse position than in Title VII cases in terms of producing proof of animus.<sup>131</sup> Unlike in discrimination claims, anecdotal evidence of animus toward the protected group (whistleblowers) is unlikely to exist. Attitudes toward protected groups under Title VII can be revealed in day-to-day comments, such as commenting on a woman's appearance or telling a derogatory joke.<sup>132</sup> In contrast, attitudes about whistleblowers are not a part of common, everyday discussions. There is no universe of jokes that relies on stereotypes about whistleblowers such as those that exist for protected categories under Title VII.

Perhaps because of the lack of such evidence, one of the common methods of proving causation indirectly in whistleblowing cases is to establish that the employer knew of the whistleblowing and then retaliated against the employee soon thereafter.<sup>133</sup> Un-

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127. See STEPHEN P. PEPE & SCOTT H. DUNHAM, AVOIDING & DEFENDING WRONGFUL DISCHARGE CLAIMS § 3:1 (2016) (noting that a "regular written performance evaluation procedure is also an essential, if not the crucial, element in limiting wrongful discharge lawsuits over job performance").

128. See *id.*

129. This issue is essentially the same as what occurs in Title VII litigation, where the employer argues that it had a legitimate nondiscriminatory reason for taking action against an employee, and the employee argues that the action was taken because of the employee's race, sex, color, religion, or national origin. See Marin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 515–16 (2006) (noting that evidence of improper motive is difficult to obtain and that the employer controls most of the evidence of motive).

130. *Id.*

131. But see Darren A. Feider, *Federal Whistleblower and Retaliation Laws*, WILLIAMS, KASTNER & GIBBS [http://www.williamskastner.com/uploadedFiles/Feider\\_article.pdf](http://www.williamskastner.com/uploadedFiles/Feider_article.pdf) (noting the difficulty of defending whistleblower claims) (last visited Apr. 15, 2016).

132. See, e.g., *EEOC v. Boeing Co.*, 577 F.3d 1044, 1050 (9th Cir. 2009) (holding that the supervisor's frequent demeaning and derogatory comments about women were sufficient to establish a prima facie case of sex discrimination).

133. See, e.g., *West v. Gen. Motors Corp.*, 665 N.W.2d 468, 470–71 (Mich. 2003) (dis-

fortunately for whistleblowers, courts have narrowly interpreted the context in which this circumstantial evidence is sufficient. For example, in Georgia, the court of appeals indicated that this kind of circumstantial evidence would be limited to cases where the retaliation occurred less than three months after the whistleblowing and suggested that a much shorter time of one month to six weeks might be required.<sup>134</sup> Nor is the Georgia case an outlier; there are a number of courts that have reached similar conclusions, or even more limiting conclusions, regarding the evidentiary effect of adverse action within a short time of the whistleblowing.<sup>135</sup>

The ultimate effect of these evidentiary issues is for employers to focus litigation on employee conduct and/or job performance. This is the employment litigation equivalent of the “blame the victim” approach that was used for years in sexual assault cases.<sup>136</sup> Instead of focusing on the conduct of the person who allegedly committed the assault (firing), the litigation focuses on the conduct of the person who was assaulted (fired).<sup>137</sup>

These practical problems of proof suggest that the standard for whistleblowers should be lowered if whistleblowers are to be adequately protected from retaliation.

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cussing a plaintiff who attempted to satisfy causation by showing adverse action after reporting wrongdoing).

134. *Freeman v. Smith*, 750 S.E.2d 739, 743–44 (Ga. Ct. App. 2013), *cert. denied* (Feb. 24, 2014) (stating that “‘very close’ temporal proximity” between whistleblowing and retaliation is required).

135. *See, e.g., Tuttle v. Metro. Gov’t of Nashville*, 474 F.3d 307, 321 (6th Cir. 2007) (“The law is clear that temporal proximity, standing alone, is insufficient to establish a causal connection for a retaliation claim.”); *Shaw v. Ecorse*, 770 N.W.2d 31, 41 (Mich. Ct. App. 2009) (“A temporal connection between protected activity and an adverse employment action does not, in and of itself, establish a causal connection . . . but it is evidence of causation.”) (citation omitted); *West*, 665 N.W.2d at 473 (explaining that to satisfy the causation requirement under the WPA, a “[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action”).

136. *See Ofer Zur, Rethinking ‘Don’t Blame the Victim’: The Psychology of Victimhood*, ZUR INST., <http://www.zurinstitute.com/victimhood.html> (last visited Apr. 15, 2016).

137. *Compare id.* (“The most obvious manifestations of this ‘blame the victim approach’ are rape cases. Women victims are too often blamed for being provocative, seductive, suggestive, for proposing, teasing, or just plain ‘asking for it.’”), *with West*, 665 N.W.2d at 473 (“The fact that a plaintiff engages in a ‘protected activity’ under the [WPA] does not immunize him from an otherwise legitimate, or unrelated, adverse job action.”).

## 2. Tort Doctrine and the But-For Standard

Given the Supreme Court's recitation of tort law as a justification for using but-for causation in retaliation claims brought under Title VII,<sup>138</sup> it is helpful to consider whether the but-for standard is supportable in whistleblower claims based on tort doctrine. Specifically, the Supreme Court stated that, "[c]ausation in fact—*i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim."<sup>139</sup> In support of this position, the Court cited to several sections of the First Restatement of Torts.<sup>140</sup> A closer look at tort doctrine shows that it is by no means a given that the but-for standard should be used. First, tort doctrine on causation in intentional tort claims does not indicate that the but-for standard should be the default standard in whistleblowing cases. Second, negligence causation doctrine also does not lead to the inexorable adoption of the but-for standard.

As to the first point, there is a good reason why the Court would not cite to the Second or Third Restatements of Torts: neither one supports the use of the but-for causation standard in the employment discrimination context. Nor does either support the use of the but-for test in the whistleblowing context. Employment discrimination cases, except for disparate impact claims, require proof of intent,<sup>141</sup> as do whistleblowing claims.<sup>142</sup> This makes the claims more similar to intentional tort claims than negligence claims. The Second Restatement of Torts defines causation in intentional tort cases as follows: "[i]n order that a particular act or omission may be the legal cause of an invasion of another's interest, the act or omission must be *a substantial factor* in bringing about the harm."<sup>143</sup> Thus, the Second Restatement would appear

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138. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524–25 (2013).

139. *Id.* at 2524.

140. See *id.* at 2524–25 (citing RESTATEMENT OF TORTS § 9 (AM. LAW INST. 1934) (defining "legal cause"), § 279 cmt. c (intentional infliction of physical harm), § 280 (other intentional torts), § 281(c) (negligence), § 431 cmt. a (defining "legal cause")).

141. See *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 410 (10th Cir. 1993) (noting the need to prove intentional discrimination in Title VII cases).

142. See, e.g., *Chadwell v. Koch Ref. Co., L.P.*, 251 F.3d 727, 734 (8th Cir. 2001) (noting that it is "well settled that the Minnesota Whistleblower Statute requires proof of intentional retaliation").

143. RESTATEMENT (SECOND) OF TORTS § 9 cmt. b (AM. LAW INST. 1965) (emphasis added).



to support the use of the substantial factor standard, not the but-for standard.

The Third Restatement of Torts addresses causation as a component of specific intentional tort claims rather than as one rule applied to all intentional tort claims, as the Second Restatement does.<sup>144</sup> For example, the Third Restatement indicates that while causation is usually not an issue in battery claims,<sup>145</sup> when it is, causation issues should be addressed using either the but-for test,<sup>146</sup> or, where there are multiple sufficient causes of injury—such as one tortious cause and one non-tortious cause—by allowing factual cause to be established if the tortious cause would have been sufficient absent the non-tortious cause.<sup>147</sup> In the whistleblowing context, this would translate into using the but-for test where there is not a second cause (plaintiff's job performance or conduct) at issue, and allowing a jury to decide whether the job performance or conduct and the whistleblowing were each a sufficient cause of the discharge.<sup>148</sup> As discussed above, it is the norm for employers to focus on the employee's job performance in whistleblowing cases. The default whistleblowing scenario is thus a multiple cause scenario, where the Third Restatement would use a sufficient causation approach, not the but-for test.<sup>149</sup> Thus, the Third Restatement does not support the adoption of the but-for test as the default standard in whistleblowing cases.

A lower standard than but-for causation has been used in intentional tort claims where the defendant's conduct is morally worse<sup>150</sup> than in negligence claims, where the defendant is merely acting in a manner that is unreasonably risky.<sup>151</sup> In many inten-

144. See generally RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS xiii (AM. LAW INST., Discussion Draft 2014).

145. *Id.* § 101 cmt. k (noting that “[t]he factual-cause requirements for harmful battery, that the actor be the factual cause of both the contact and the resulting harm, are ordinarily easy to apply”).

146. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. b (AM. LAW. INST., 2010) (“The standard for factual causation . . . is familiarly referred to as the ‘but-for’ test.”).

147. *Id.* § 27 cmt. 2 (“[L]iability [is imposed] when a tortfeasor’s conduct, while not necessary for the outcome, would have been a factual cause if the other competing cause had not been operating.”).

148. See Pathman, *supra* note 42, at 477.

149. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (AM. LAW. INST. 2010).

150. This is because of the intent requirement that the defendant act with knowledge that the harm is substantially certain to result from his conduct. *Id.* § 1.

151. *Id.* § 3.

tional tort claims, causation is included as a requirement, but its role in the analysis of the claim is minimal. For example, battery requires proof that the defendant acted with intent to cause a harmful or offensive contact with the plaintiff, and that such contact resulted from the defendant's action.<sup>152</sup> While causation is mentioned, it is unclear whether cases focus on but-for causation, motivating factor causation, or some other standard.<sup>153</sup>

However, there are some intentional tort claims where causation is in fact discussed in detail. One of those claims is Intentional Infliction of Emotional Distress ("IIED"), a claim notoriously viewed with skepticism by courts. In IIED cases, causation is a specific element.<sup>154</sup> However, even in these claims, there are few situations where courts have addressed what is meant by causation. For example, most courts simply state something to the effect that the plaintiff must prove a causal connection between the conduct of the defendant and the emotional distress, and that once the plaintiff establishes the requisite conduct, the jury can infer causation.<sup>155</sup> A few courts have been more specific. In *Mitchell v. Giambruno*, the court noted that proof of causation would be established if the defendant's conduct was a substantial factor in establishing the plaintiff's emotional distress.<sup>156</sup> Similarly, Mississippi has also used the substantial factor test.<sup>157</sup> Thus, causation

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152. Indeed, some courts explicitly reject the idea that causation is an element of a battery claim. See, e.g., *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 443 (Ariz. 2003) (noting that "any action brought under the [state medical malpractice statute] requires proof of elements not present in a common law action for battery, including duty, breach, and causation"). *But see Anderson v. St. Francis-St. George Hosp., Inc.*, 671 N.E.2d 225, 227 (Ohio 1996) (noting that a battery claim requires proof of causation).

153. See, e.g., *Gerety v. Demers*, 589 P.2d 180, 191 (N.M. 1978) (noting that "[a]s to causation in a battery action, the tort of battery is the wrongful touching of the patient's body which by itself gives the patient a claim for substantial damages" and saying nothing further regarding causation); *Hawkins v. Hawkins*, 400 S.E.2d 472, 475 (N.C. Ct. App. 1991), *aff'd*, 417 S.E.2d 447 (N.C. 1992) (noting that "[t]he elements of battery are intent, harmful or offensive contact, causation, and lack of privilege" and not discussing causation). *But see Flores v. Flushing Hosp. & Med. Ctr.*, 490 N.Y.S.2d 770, 772 (N.Y. App. Div. 1985) (refusing to determine whether lack of informed consent claim is negligence or battery, but noting that battery requires proof of causation using the but-for test).

154. See, e.g., *Johnson v. Thigpen*, 788 So. 2d 410, 412 (Fla. Dist. Ct. App. 2001) (articulating elements of a claim for intentional infliction of emotional distress).

155. See, e.g., *Hakkila v. Hakkila*, 812 P.2d 1320, 1324 (N.M. Ct. App. 1991) (noting that "[w]hen [the defendant's] conduct is extreme and outrageous . . . it is more likely that the severe emotional distress suffered by the victim was actually caused by the [defendant's] misconduct rather than by another source"); *Purina Mills, Inc. v. Odell*, 948 S.W.2d 927, 935-36 (Tex. App. 1997) (allowing jury to infer causation).

156. 826 N.Y.S.2d 788, 790-91 (N.Y. App. Div. 2006).

157. See, e.g., *Mississippi ex rel. State for Use & Benefit of Richardson v. Edgeworth*,

doctrine in intentional tort claims does not automatically lead to the conclusion that the but-for test should be adopted in whistle-blowing cases.

Second, even in negligence claims, tort doctrine on causation has developed significantly since the First Restatement cited by the United States Supreme Court. In the early 1900s, in assessing causation, judges combined policy judgments as to whether a defendant should be liable with more evidence-based considerations as to whether the defendant caused the plaintiff's harm when determining liability in negligence cases.<sup>158</sup> In essence, this combined what is now seen as proximate cause analysis with cause-in-fact analysis. Ultimately, policy judgments on liability were seen as belonging in proximate cause analysis, while factual issues as to whether the defendant's conduct led to the plaintiff's injury were the focus of cause-in-fact analysis.<sup>159</sup> However, it became clear that policy judgments remained in the cause-in-fact analysis.<sup>160</sup> As Wex Malone argued, the identification of potential contributing causes to an injury is an evaluative, policy-laden process.<sup>161</sup> To borrow one of Malone's examples, if a young person drives too fast on a gravel road, dislodging a rock that strikes a pedestrian, different people would identify different causes of the injury.<sup>162</sup> The driver's parents might identify the inexperience of their child as the cause; a transportation engineer might identify the road design as the cause; and a physicist might identify the velocity and trajectory of the wheel as it struck the rock as the cause.<sup>163</sup> The decision of which of these potential causes to identify for the purposes of adjudicating tort liability contains policy judgments.<sup>164</sup>

As this example illustrates, causation issues tend to arise when there are multiple events culminating in the plaintiff's injury. While the but-for test of causation is commonly used in many negligence cases, it is discarded in situations where policy de-

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214 So. 2d 579, 581 (Miss. 1968) (applying the substantial factor standard to an IIED claim).

158. Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1737 (1985).

159. *Id.* at 1737-38.

160. *Id.*

161. See Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 65-66 (1956).

162. *Id.* at 62.

163. *Id.*

164. See *id.*

mands a less rigorous standard. The first of these scenarios in tort law where causation standards vary from the but-for test is where there is more than one cause of the plaintiff's injury.<sup>165</sup> The substantial factor test has been used when two defendants are negligent and the negligence injures the plaintiff, but it is not possible to determine to what extent, if at all, either defendant's negligence injured the plaintiff.<sup>166</sup> A classic example of this is when two defendants negligently release salt water that enters the plaintiff's pond.<sup>167</sup> Even though both defendants fail the but-for test,<sup>168</sup> courts have allowed the plaintiff to recover.<sup>169</sup> Courts have also allowed recovery using the substantial factor test, where a defendant's negligence combines with a force of nature to create an injury, such as where a defendant's negligently set fire combines with a fire of unknown origins and it damages the plaintiff's property.<sup>170</sup>

In short, there are a number of situations in which the plaintiff's failure to fulfill the traditional but-for causation construct does not preclude the plaintiff from recovery in intentional torts and negligence cases. Thus, the but-for test should not be the automatic default standard in whistleblowing cases.

### 3. Causation Theory and the But-For Standard

The theoretical underpinnings of the causation doctrines noted above are hotly debated. There are a number of central theories advanced regarding the purpose of tort doctrine that have different implications for causation standards.<sup>171</sup>

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165. See James E. Viator, *When Cause-In-Fact Is More Than Fact: The Malone-Green Debate on the Role of Policy in Determining Factual Causation in Tort Law*, 44 LA. L. REV. 1519, 1526 (1984) (discussing how "the but-for test breaks down 'in situations where there are two independent factors, each being sufficient to produce the injury'" (citation omitted)).

166. See Wright, *supra* note 158, at 1792.

167. *Landers v. E. Tex. Salt Water Disposal Co.*, 248 S.W.2d 731, 731-32 (Tex. 1952).

168. This is because as to each defendant, the plaintiff would not have avoided injury even if that defendant had used reasonable care—the pond would still be damaged by the other defendant's salt water. See *id.* at 734.

169. *Id.* at 735.

170. See, e.g., *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45, 46-47, 49 (Minn. 1920).

171. Obviously, many books and articles have been written on causation theory. It would be impossible to address exhaustively tort theoretical approaches to causation. My purpose in this section is not to do so, but instead merely to illustrate that under two of the main approaches, the use of the but-for standard is not inevitable, or even obviously

Corrective justice theory is grounded in the idea that where one individual harms another, it is legally appropriate to hold that individual liable for the harm caused.<sup>172</sup> This theory generally suggests a strong causation requirement; if an individual engages in risky behavior that causes no harm, there is no "corrective justice" needed because the individual does not impose costs on another.<sup>173</sup> However, not all corrective justice theorists agree with this. Christopher Schroeder has argued that "the connection between corrective justice and causation seems simply to be assumed" and that causation is not essential to the theory.<sup>174</sup> Schroeder instead postulates that the corrective justice theory is based on three requirements: "(1) individual liability must be assessed consistently with moral norms of responsibility for one's actions; (2) victims must be made whole (compensated); and (3) the resources for satisfying (2) must come exclusively from the liability payments required by (1)."<sup>175</sup> Under this conception of corrective justice, causation is not central to the theory.<sup>176</sup> Instead, liability is predicated on holding actors accountable for the increased risk of harm to others that they create.<sup>177</sup>

Under corrective justice theories, causation in whistleblowing cases does not require the use of the but-for standard. As long as the whistleblowing was a part of the reason for the plaintiff's discharge, corrective justice theories would support employer liability commensurate with the extent the whistleblowing caused the discharge.<sup>178</sup> Thus, liability should be allowed under lower causation standards.

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correct.

172. As Richard Wright describes it, corrective justice requires "as a matter of individual justice between the plaintiff and the defendant, the defendant who has caused an injury to the plaintiff in violation of his rights in his person or property must compensate him for such injury." Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 435 (1985).

173. See Alan Schwartz, *Responsibility and Tort Liability*, 97 ETHICS 270, 270 (1986).

174. Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 445 (1990); see also Viator, *supra* note 165, at 1527-29 (discussing how fairness considerations do not necessarily support causation as a limitation on liability).

175. Schroeder, *supra* note 174, at 450.

176. *Id.* at 451.

177. *Id.*

178. Martin H. Malin, *The Distributive and Corrective Justice Concerns in the Debate Over Employment At-Will: Some Preliminary Thoughts*, 68 CHI.-KENT L. REV. 117, 125 (1992).

A second central theory of torts is the law and economics theory. Under this theory, the goal of tort law is focused on deterring behavior that is economically inefficient.<sup>179</sup> The focus of this is on a societal, rather than individual, level; thus, it takes into account what maximizes wealth for the whole, rather than for an individual.<sup>180</sup> Causation as a requirement for liability to attach is not central to this approach,<sup>181</sup> although some adherents have supported its continued existence in doctrine.<sup>182</sup> For example, Mario J. Rizzo and Frank S. Arnold have advocated for the use of causation analysis to determine apportionment of damages in torts claims using economic theories.<sup>183</sup> Employer liability for discharging whistleblowers would be appropriate under economic theories because it would encourage lawful behavior by companies, maximizing social wealth. Thus, limiting liability by using a but-for standard of causation, with the pragmatic problems that it causes, is inconsistent with this economic model.

In sum, neither tort doctrine nor theory dictates the use of a but-for causation standard. Indeed, given the typical litigation scenario, where employee performance or conduct is argued as a cause of the employee's termination, tort doctrine and theory suggest that the use of other causation standards is appropriate.

### C. *Motivating Factor/Substantial Factor Standards*

The next standards on the spectrum of causation are the substantial factor test and motivating factor test. These standards are addressed together because both suggest the requirement that the whistleblowing reach a certain level of importance in the employer's decision to take adverse action against an employee.<sup>184</sup>

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179. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972).

180. See *id.* at 32.

181. As one scholar noted, the causal inquiry is subsumed by the policy of maximizing social wealth. See Wright, *supra* note 158, at 1738–39 (describing the economic analysis of causation).

182. See William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 131 (1983); Schroeder, *supra* note 174, at 443–49 (providing an excellent synopsis of the corrective justice and law and economics approaches to causation).

183. Rizzo & Arnold, *supra* note 126, at 1405–06.

184. See John L. Flynn, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO L. J. 2009, 2010 (1995) (defining the motivating factor test); Susan R. Heylman, *Employee Must Show Work Was Substantial Factor in Disability, Alaska High Court Says*, SOC'Y FOR HUM. RESOURCE MGMT. (Jan. 27, 2012), <http://www.shrm.org/legalissues/stateandlocalresources/pages/employeemustshowwork.as>

The substantial factor test is sometimes applied in tort cases when there are multiple potential causes of harm, and yet the causes fail the but-for test.<sup>185</sup> The substantial factor test, or a variant of it, the motivating factor test, has been used in some jurisdictions as the causation standard for whistleblowing claims.<sup>186</sup> Its use has been derived from the causation standards articulated in constitutional tort claims.<sup>187</sup> While this might indicate a tendency toward broad acceptance in state courts, it has only been adopted in a small number of jurisdictions.<sup>188</sup> Furthermore, this number is likely to decrease, not increase, due to the Supreme Court's decisions in *Nassar*<sup>189</sup> and *Gross*,<sup>190</sup> which implemented the but-for test for causation as the default standard to be followed in retaliation cases.

Regardless of the state of acceptance of the substantial factor or motivating factor test, its use is not ideal in whistleblowing cases. First, as to the motivating factor standard, even though it appears to be a more favorable standard for employees than the but-for standard, Title VII litigation experience suggests that, in reality, it is not significantly helpful for plaintiffs. It is well-documented that plaintiffs in Title VII litigation do not fare particularly well.<sup>191</sup> Their success rates have remained low for years at a fairly consistent rate.<sup>192</sup> This suggests that the change in standard will not actually assist plaintiffs in establishing causation.

One potential reason that the change from but-for to motivating or substantial factor may not make much of a difference in outcomes is that it is too subtle a change. The very terminology may make it difficult to establish. "Substantial" indicates a significant factor, which may lead jurors to weigh how much of the em-

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px (defining the substantial factor test).

185. See Erik S. Knutsen, *Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach*, 38 TEX. INT'L. L. J. 249, 253 (2003).

186. See, e.g., *Taylor v. Regents of Univ. of Colo.*, 179 P.3d 246, 248 (Colo. App. 2007).

187. See *id.* (noting *Mount Healthy v. Doyle*, 429 U.S. 274, 287 (1977) as the source of the standard).

188. See, e.g., *Pierce v. Cotuit Fire Dist.*, 741 F.3d 295, 301–02 (1st Cir. 2014); *Ashman v. Barrows*, 438 F.3d 781, 784 (7th Cir. 2006); *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d Cir. 2000).

189. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524–25 (2013).

190. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176–77 (2009).

191. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104 (2009).

192. *Id.* at 106.

ployer's decision to terminate an employee was based on whistleblowing rather than other reasons. Similarly, "motivating" suggests that the illicit reason must have been the driving force behind the employer's adverse action.

It might also be that the change in standard does not adequately address the typical dynamic in employment cases, where the fundamental argument is whether an employee was fired due to an unlawful reason or any other reason.<sup>193</sup> Thus, even though the motivating factor standard allows a plaintiff to recover where there are multiple reasons for the termination and does not require that the employer's illicit motivation must surpass the but-for threshold, the litigation dynamic is still likely to lead juries to an either/or choice.<sup>194</sup> Whether the standard is but-for causation or motivating or substantial factor causation, the judge or jury is faced with a binary choice between the two explanations for the employer's adverse action: the employee's whistleblowing or the employee's job performance or conduct.<sup>195</sup> While in theory, under a motivating factor causation approach, there can be multiple factors leading to the decision to terminate the employee. The second aspect of the motivating factor test feeds into this binary choice.<sup>196</sup> Under the 1991 Civil Rights Act, the employer is able to avoid paying damages if it proves that it would have taken the same action regardless of the employee's complaint of discrimination.<sup>197</sup> This is, in essence, giving the employer a win—which goes back to the binary nature of the choice the factfinder must make. Similarly, under the federal whistleblower protection statutes, the motivating factor standard's apparent acceptance of multiple causes is undercut by the defense given to employers—if the employer would have made the same decision in the absence of whistleblowing conduct, then the employer avoids liability. Thus, even in the face of a standard that appears to allow plaintiffs to prevail when there are multiple causes for the retaliation, the choice for

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193. See *Nassar*, 133 S. Ct. at 2522, 2525.

194. See *Gross*, 557 U.S. at 170–71, 179.

195. *Nassar*, 133 S. Ct. at 2525; *Taylor v. Regents of Univ. of Colo.*, 179 P.3d 246, 247–48 (Colo. App. 2007). One could argue that the partial defense created by the 1991 Act might actually create a sliding scale of liability rather than a binary choice. However, before the defense comes into play, the plaintiff still must establish that a motivating factor in the employment decision was unlawful discrimination. *Taylor*, 179 P.3d at 247–48. It is at this point that the factfinder is faced with the choice between the plaintiff's and the employer's explanations.

196. *Taylor*, 179 P.3d at 248.

197. Civil Rights Act of 1991, 42 U.S.C. § 2002e-5(g)(B) (2012).



the factfinder remains binary at heart—is it “really” about whistleblowing, or is it “really” about a bad employee? Given the reality that the employer nearly always has some documentation—even if after the fact—of the employee’s less-than-perfect job performance, while there is almost never any documentation of an employer’s retaliatory animus, it is easier for a jury to believe the employer rather than the employee.<sup>198</sup>

As for the substantial factor test, which is primarily a tort law construct, its use in employment cases is not entirely consistent with tort theories of liability. The substantial factor test is generally justified as a doctrine by virtue of the fact that as between one innocent plaintiff and two negligent defendants, the cost of loss should fall on the negligent defendants so long as there is a sufficient causal connection between the negligence and the plaintiff’s injury.<sup>199</sup> As a matter of corrective justice, it is appropriate to hold these defendants responsible for the plaintiff’s injury.<sup>200</sup> It is also economically efficient to do so—if defendants could escape liability in these situations, there would be a gap in the incentive structure that could be exploited and could result in greater societal costs.<sup>201</sup> Defendants would not undertake safety measures that would benefit society if they were not held liable.<sup>202</sup> However, this justification is missing in the employment context. As a matter of corrective justice, rather than an innocent plaintiff and two wrongdoers, it is the defendant who points to the plaintiff as having “caused” the employment decision.<sup>203</sup> This weakens the moral basis for lowering the causation standard.<sup>204</sup> In addi-

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198. See *supra* text accompanying note 63 (discussing that, under federal whistleblower protection statutes, the defendant can avoid liability by proving that they would have fired that employee, even if the employee had not blown the whistle); see also *Mason v. Seaton*, 942 S.W.2d 470, 474 (Tenn. 1997) (suggesting that employees cannot provide direct documentation of retaliatory action because the defendants possess the documentation); Carrie Wofford & Lisa Stephanian, *Lessons from the First SOX Whistleblower Cases*, COMPLIANCE WK. (Nov. 16, 2004), [http://www.wilmerhale.com/uploadedFiles/WilmerHale\\_Shared\\_Content/Files/Editorial/Publication/firstSOX.pdf](http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/firstSOX.pdf).

199. See Knutsen, *supra* note 185, at 253 (explaining that the substantial factor test is used to determine whether the defendant’s negligent conduct was a material element in bringing about the plaintiff’s injury).

200. See *supra* notes 172–73 and accompanying text (stating that, under corrective justice theory, it is appropriate to hold individuals liable for the harm they caused).

201. See *supra* notes 179–80, 183 and accompanying text.

202. See *supra* note 183 and accompanying text.

203. See, e.g., *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 410 (Utah 1998) (finding that the plaintiff’s actions resulted in the employment decision).

204. See *supra* note 178 and accompanying text.

tion, it is not clear that economic efficiency is increased by using the substantial factor test.<sup>205</sup> Rather than creating incentives for employers to decrease wrongdoing (i.e., stop firing whistleblowers or discriminating on the basis of protected class), the substantial factor test incentivizes employers to devote resources toward establishing justifications for taking action against employees.<sup>206</sup> The more evidence the employer can produce that the employee's job performance or conduct contributed to the adverse action, the less likely it is that an employee can establish that whistleblowing was a substantial factor in the adverse action.<sup>207</sup>

#### D. *Contributing Factor Standard*

One of the most recently adopted standards in whistleblowing cases is the contributing factor standard. Used in Missouri, this standard has the potential to avoid the binary choice problem associated with the but-for, motivating factor, and substantial factor standards.<sup>208</sup> It also has the potential to shift the litigation away from employee job performance and back to the fundamental aspects of whistleblower litigation: whether the employee engaged in protected behavior and whether the employer retaliated against the employee because of that behavior.<sup>209</sup> The contributing factor standard does this because there is no materiality threshold on the employer's consideration of the employee's whistleblowing behavior.<sup>210</sup> If the employee's whistleblowing behavior contributes to the retaliation to any extent, that is sufficient; thus,

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205. See *supra* notes 179–80 and accompanying text (outlining the economic theory of tort law); see also *Wallace v. Dunn Constr. Co., Inc.*, 968 F.2d 1174, 1180 (11th Cir. 1992) (discussing how the rule in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), which requires application of the substantial factor test, creates perverse incentives).

206. See *Wallace*, 968 F.2d at 1178, 1180; Brief of Respondent at 14, *BCI Coca-Cola Bottling Co. of L.A. v. EEOC*, 450 F.3d 476 (10th Cir. 2006) (No. 06-341).

207. See, e.g., *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969–71 (9th Cir. 2001); *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001); *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 701, 715–16 (E.D. Wis. 1996).

208. See STEPHEN M. KOHN ET AL., WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTIONS FOR CORPORATE EMPLOYEES 60, 62 (2004); Amanda Stogsdill, *Discrimination After Daugherty: Are Missouri Courts "Contributing to" or "Motivated by" the Number of Cases on the Discrimination Docket?*, 73 MO. L. REV. 651, 651 (2008).

209. See Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 506–07 (2006).

210. See *id.* (explaining that the factor influencing an employer's decision does not need to be necessity or sufficiency or be dispositive in any way).

the employer cannot easily avoid liability by focusing on the employee's job performance.

Support for the use of the contributing factor standard is found in the writings of torts scholars. Professor Leon Green suggested an approach toward causation in tort claims that focuses on the question of whether the defendant's conduct contributed "in any way" to the plaintiff's injury.<sup>211</sup> If there is such contribution, causation is established.<sup>212</sup> Similarly, Richard Wright also framed the proper causation inquiry as simply whether the tortious conduct "contributed to" the injury.<sup>213</sup>

The upside of no minimum threshold of significance is also the downside of the contributing factor approach. If 99% of the reason for firing an employee was due to the employee's poor performance and only 1% was due to whistleblowing, then, in theory, the employer will still be liable because the whistleblowing was a contributing factor in the decision, and the employee would recover full damages. Thus, while the contributing factor standard appears more appropriate than the other possible standards, it has the potential to be seen as unfair from a corrective justice perspective.

### III. A NEW WHISTLEBLOWING CAUSATION STANDARD

What, then, would be the best causation standard in whistleblowing cases? Based on the assessment in Part II, a contributing factor standard appears desirable if the potential for an unjust result is corrected. To do this, the contributing factor standard should be adopted along with a variation on comparative fault.<sup>214</sup>

The primary problem with lowering the causation standard to the point where a whistleblowing plaintiff can establish causation is the potential for overcompensating the plaintiff, as described in Part II.D. However, by using a variation on comparative fault,

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211. Leon Green, *Identification of Issues in Negligence Cases*, 26 Sw. L.J. 811, 827 (1972).

212. *See id.* at 814, 827.

213. Wright, *supra* note 70, at 1744.

214. Martin J. Katz proposed a similar idea in the context of Title VII. *See Katz, supra* note 209, at 549-50. There are two primary differences between my proposal and his. First, he proposes using the motivating factor standard, while I propose the contributing factor standard. Second, he proposes a fault apportionment system, while I propose a causal apportionment system.

the predominant system in place, allocating responsibility when both the plaintiff and the defendant act negligently to cause the plaintiff's injury resolves the problem.

The bulk of states allow a plaintiff to recover in tort for injuries where she and the defendant are both causes of the injury.<sup>215</sup> For example, where the plaintiff and the defendant are driving in an unreasonably risky manner—such as texting while driving—the defendant can still be liable for the plaintiff's damages resulting from the accident. The primary variation among jurisdictions, in terms of the plaintiff's recovery, is the extent to which the plaintiff is at fault in causing the injury.<sup>216</sup> Some jurisdictions do not allow the plaintiff to recover if her fault is equal to or greater than the defendant's, but do allow recovery otherwise, merely reducing the plaintiff's recovery in proportion to the degree of the plaintiff's fault.<sup>217</sup> Others allow the plaintiff to recover even when her fault is greater than the defendant's; in these jurisdictions, the plaintiff's recovery is also reduced in proportion to the extent of the plaintiff's fault.<sup>218</sup> Only a handful of jurisdictions, holdovers from the older, traditional contributory negligence regime, categorically refuse to allow a plaintiff to recover when she is also negligent in causing her injury.<sup>219</sup>

Comparative fault systems can be viewed as either causation apportionment or liability apportionment. Emphasizing causation, the principle is that the plaintiff should not recover for the portion of the injury that she caused.<sup>220</sup> Emphasizing fault, the principle is that the plaintiff's recovery should be reduced by the percentage to which she is at fault.<sup>221</sup>

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215. See generally Thomas R. Trenkner, Annotation, *Modern Development of Comparative Negligence Doctrine Having Applicability to Negligence Actions Generally*, 78 A.L.R. 3d 339, 343–47 (1977) (explaining the history of comparative negligence adoption and listing approaches used by the states).

216. *Id.* at 347 (listing variations).

217. *Id.*

218. *Id.*

219. See, e.g., *Harrison v. Montgomery Cty. Bd. of Educ.*, 456 A.2d 894, 905 (Md. 1983) (determining that “whether to abandon the doctrine of contributory negligence in favor of comparative negligence involves fundamental and basic public policy considerations properly to be addressed by the legislature” and refusing to judicially abrogate the doctrine).

220. See Rizzo & Arnold, *supra* note 126, at 1406–07 (proposing a causal apportionment framework).

221. See John W. Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299, 302 (1980).

The concept of reduction in recovery based on the plaintiff's less-than-satisfactory behavior appears elsewhere in tort law, such as with mitigation of damages requirements. Where a plaintiff fails to act reasonably to lessen his damages, a plaintiff's recovery is reduced by virtue of that failure.<sup>222</sup> While some courts consider this causal apportionment (i.e., the plaintiff is the sole cause of any additional harm that results due to failure to mitigate), the Third Restatement of Torts has taken the position that failure to mitigate should simply be treated as the plaintiff's fault, and therefore, subject to comparative fault reductions.<sup>223</sup>

As this discussion indicates, there is significant doctrinal support within tort law for reducing a plaintiff's damages, based on contribution rather than barring recovery altogether. However, one cannot simply import comparative fault without adjustments. Comparative fault is built on a negligence standard; that is, a plaintiff's recovery is reduced only where the plaintiff's unreasonably risky behavior is a cause of his or her own injury.<sup>224</sup> This standard must be adapted to account for the baseline employment at-will rule.

Instead of reducing a plaintiff's recovery where the plaintiff behaved in an unreasonably risky manner, a comparative reduction in damages regime in whistleblowing cases would reduce the plaintiff's recovery by a percentage amount reflecting the extent to which the plaintiff's unprotected conduct was a cause of the plaintiff's discharge. This would be a causal apportionment system rather than a fault apportionment system.<sup>225</sup> The reason for focusing on causation rather than fault is twofold. First, in an employment at-will regime, the plaintiff need not be at "fault" in order to be fired; thus, fault is inapposite in the situation. Second, the importation of a reduction in damages system is necessary to resolve a causation proof issue; thus, it is more doctrinally consistent to focus on the causation question rather than determining damages based on the extent of each party's bad behavior.

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222. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 3 cmt. b (AM. LAW INST. 2000).

223. See *id.*

224. See *id.* § 3 cmt. a–b. Of course, the degree to which each party behaved badly may affect the extent to which a factfinder believes that party caused the adverse action against the employee; however, moving the focus from extent of bad behavior to extent of causation will hopefully shift this focus some.

225. Causal apportionment in tort cases has been proposed previously. See Rizzo & Arnold, *supra* note 126, at 1406 (using economic theory to justify causal apportionment).

As with comparative fault regimes in negligence, this would be an affirmative defense, with the employer required to plead and prove that the employee's behavior contributed to the resulting damages.

The causation apportionment system should also be a "pure" as opposed to a "modified" regime. A "pure" comparative fault approach, which allows the plaintiff to recover even when his fault is greater than that of the defendant, will better address the causation issues described above. If a plaintiff is barred from recovery when 51% of the reason for the termination is due to the plaintiff's own conduct, it will tend toward forcing the problematic binary choice described above. It will also produce a result that could be inconsistent with the contributing factor causation standard for employees. For example, if the whistleblowing contributed to 2% of the employee's termination, the employee would be able to establish that the whistleblowing fulfilled the causation standard, but would be unable to receive damages.

In addition, recent empirical research indicates that in modified comparative fault jurisdictions, where the plaintiff cannot recover if she is more at fault than the defendant, jury nullification distorts and undercuts the comparative fault regime.<sup>226</sup> Juries in modified systems tend to find plaintiffs to be at fault at a rate that is just below what is required to prevent plaintiffs from being barred from recovery—leading to overcompensation for such plaintiffs rather than no compensation.<sup>227</sup> Thus, a pure causal apportionment system would be the better approach.

Another reason for the adoption of a contributing factor standard coupled with a causal apportionment system in whistleblowing cases is the public importance of promoting whistleblowing. The majority of negligence claims do not involve conduct that harmed a large segment of the population; they are cases involving individuals who harmed other individuals. The public interests at stake are promoting an efficient level of safety (pursuant to law and economics theories) and ensuring that those who cause

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226. Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 U. CHI. L. REV. 945, 946 (2012) (finding that juries in modified comparative negligence jurisdictions are substantially less likely to find a plaintiff more than 50% negligent).

227. *Id.* at 975, 977.

harm to others compensate those who are harmed (pursuant to corrective justice theories).

These same interests are at stake in whistleblowing claims, but the scale of potential harm is significantly greater in whistleblowing cases. While negligence claims typically involve harm to an individual, whistleblowing claims involve harm to others beyond the individual. The core concept of the whistleblower is that a company is violating the law. The corporate violation puts the public in harm's way—whether it be financial in nature, such as whistleblowing under the Sarbanes-Oxley Act,<sup>228</sup> or physical, such as with whistleblowing under the Energy Reorganization Act.<sup>229</sup>

The difference between the interests at stake in whistleblowing litigation is highlighted by the Edward Snowden situation. Snowden, who disclosed data-gathering by the NSA, revealed information about potential unlawful governmental conduct.<sup>230</sup> If his revelations are correct, millions of Americans had their rights violated by the federal government.<sup>231</sup> This is a far cry from the interests at stake when a negligent driver hits another motorist. If a comparative fault regime is necessary to protect the interests of less-than-perfect plaintiffs in car accidents, causal apportionment is surely appropriate to protect the public interest at stake in whistleblowing cases.

Furthermore, using causal apportionment will increase the likelihood that a case will reach the jury. In the current system, it appears that courts sometimes find causation in favor of the employer even in cases where there is arguably a factual issue for the jury.<sup>232</sup> A causal apportionment system, however, decreases the likelihood that a case can be decided on a motion for summary judgment by making it far more difficult for a judge to determine that there is no factual issue for a jury to decide as to causation.

Potential arguments against importing comparative fault to this system include: (1) it is inappropriate to apply a negligence-

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228. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28, & 29 U.S.C.).

229. See 42 U.S.C. § 5851 (2012).

230. Barton Gellman, *Edward Snowden, After Months of NSA Revelations, Says His Mission's Accomplished*, WASH. POST (Dec. 23, 2013), [https://www.washingtonpost.com/world/national-security/edward-snowden-after-months-of-nsa-revelations-says-his-mission-s-accomplished/2013/12/23/49fc36de-6c1c-11e3-a523-fe73f0ff6b8d\\_story.html](https://www.washingtonpost.com/world/national-security/edward-snowden-after-months-of-nsa-revelations-says-his-mission-s-accomplished/2013/12/23/49fc36de-6c1c-11e3-a523-fe73f0ff6b8d_story.html).

231. See *id.*

232. Modesitt, *supra* note 2, at 185.

based concept in what is akin to an intentional tort case<sup>233</sup> and (2) causal apportionment is merely an additional limitation on the ability of whistleblowers to recover.<sup>234</sup>

As to the first argument, common law claims for whistleblowing are intentional tort claims. Thus, there is a legitimate argument to be made that whistleblowing claims should be informed by tort doctrine. In addition, using consistent doctrine in both common law and statutory cases would be helpful to practitioners, who currently face a bewildering array of statutory and common law standards. Furthermore, there are a number of situations in which different types of conduct are subject to comparative analysis in torts.<sup>235</sup> It is an accepted practice in some states with strict liability claims. In those cases, a company's sale of a defective product is compared with an injured plaintiff's negligence in the use of that product.<sup>236</sup> Furthermore, these comparisons have been justified by tort theorists on a number of grounds.<sup>237</sup>

While the second argument appears to have some merit in the abstract, it ignores the reality in whistleblowing cases (as well as employment discrimination). Plaintiffs are losing.<sup>238</sup> Plaintiffs are losing in large part because of difficulties in proving that it was an improper motive rather than a legitimate reason for their termination.<sup>239</sup> So long as employment remains at-will and employers can point to any basis for the firing that is not legally barred, employees will struggle to disprove employer-provided reasons for their termination. And so long as it is an all-or-nothing game in which employers have documentation supporting their reason

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233. See, e.g., Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1457–58 (2012) (arguing that the importation of what is essentially a proximate cause standard into employment discrimination law is inappropriate because discrimination is intentional in nature).

234. See, e.g., *Field v. Boyer Co., L.C.*, 952 P.2d 1078, 1088 (Utah 1998) (Stewart, J., concurring in part and dissenting in part) (stating that, in the context of applying comparative fault to intentional torts between two defendants, a comparison can distort the protections meant to protect the plaintiff).

235. See Dan B. Dobbs, *Accountability and Comparative Fault*, 47 LA. L. REV. 939, 944–47 (1987).

236. See, e.g., *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1172 (Cal. 1978) (applying comparative fault principles to reduce the plaintiff's recovery in a products liability action).

237. See, e.g., *Rizzo & Arnold*, *supra* note 126, at 1406–07 (justifying causal apportionment among tortfeasors within and beyond negligence claims based on economic theory).

238. See *Modesitt*, *supra* note 2, at 181–82.

239. See *id.*



while employees do not, judges will continue to choose the employer's reason over the employee's. But if the reasons can coexist, employees will be able to at least recover partial damages, which is significantly better than the current situation. It is not, perhaps, ideal, and it may devalue the societal interests in promoting whistleblowing. But some recovery is better than no recovery.

### CONCLUSION

The current state of whistleblowing law has produced a system of protection in name only for whistleblowers. In order to correct this, changes must be made to whistleblowing doctrine. Because causation is an aspect of the claim that has made it difficult for plaintiffs to prevail, it is a logical starting point in this process. Using a lower causation standard—the contributing factor standard—will ensure that where whistleblowing is a component in the decision to fire an employee, that employee can establish a claim. Adding in causal apportionment will allow recovery without producing windfall damages for plaintiffs. Thus, it should be adopted by statute and/or judicial decision to apply in whistleblowing cases.