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Micah Barry

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ABSTRACT

In Georgia, the Georgia Whistleblower Act ("GWA") protects public employees who report unlawful activity. Recent court decisions have reduced the GWA to a state of uselessness. Federal whistleblower law provides useful insights on how the Georgia General Assembly can amend the GWA to restore and enhance its effectiveness. This article details the history of the GWA and recent court decisions. The article then examines federal whistleblower law. Finally, it provides recommendations, including draft amendment language.

I. INTRODUCTION

Whistleblowers—those who disclose illegal, immoral, or illegitimate practices of their employers to those in a position to rectify those practices—serve important functions in our society.[1] By exposing illegal actions, whistleblowers "expose, deter, and curtail wrongdoing."[2] Recognizing the importance of protecting whistleblowers, the federal

* Principal, The Law Office of Micah Barry; Of Counsel, The Kirby G. Smith Law Firm, LLC; Ph.D. anticipated 2021, University of Georgia College of Education; J.D. 2014, University of Toledo College of Law; B.A. 2010 The Ohio State University. I would like to thank Kirby G. Smith and Amanda Brookhuis.

[1] *See* Elletta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AM. BUS. L.J. 177, 178 (2002).

[2] *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000).

government and all fifty states have enacted whistleblower protection statutes.[3]

In Georgia, public employees receive whistleblower protections from the Georgia Whistleblower Act ("GWA").[4] Enacted in 1993, the GWA initially only covered members of the Executive Branch of the state, excluding the Governor's Office, but it has since been expanded to cover all state and local government employees in Georgia.[5] As this article will show, recent developments in case law under the GWA have drastically reduced the whistleblower protections afforded to public employees in the state, and the statute is due for an amendment.

Part II of this article will provide details of the GWA's statutory language and the state of the GWA prior to 2015. Part III will discuss recent developments in GWA litigation, including updated case law and a trend the author has personally seen in the course of litigating several cases under the GWA. Part IV will examine the federal Whistleblower Protection Act ("WPA") and the Whistleblower Protection Enhancement Act ("WPEA").

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[3] *See* Robert G. Vaughn, *State Whistleblower Status and the Future of Whistleblower Protection Symposium: Whistleblower Protection*, 51 ADMIN. L. REV. 581, 581–83 (1999) (collecting statutes).

[4] O.C.G.A. § 45-1-4. Literature on the GWA is divided about what to call the statute, as no title appears in the body of the act. *Compare* Seth Eisenberg, *Public Officers and Employees - General Provisions*, 24 GA. ST. U. L. REV. 309, 311 (2007) (referring to the statute as the "Whistleblower Protection Act" and using the acronym "WPA"), *with* Kimberly J. Doud, *Recent Development: Public Employment Whistle-Blowers Act:* North Georgia Regional Educational Service Agency v. Weaver: 527 S.E.2d 864 (Ga. 2000), 30 STETSON L. REV. 1233, 1233–34 (2000) (referring to the statute as "Georgia's whistleblower statute"), *and* Murray-Obertein v. Georgia Gov't Transparency and Campaign Fin. Comm'n, 812 S.E.2d 28**,** 29 (Ga. Ct. App. 2018) (referring to the statute as the "Georgia Whistleblower Act" and using the acronym "GWA"). The statute bears the section title "Complaint or information from public employees as to fraud, waste, and abuse in state programs and operations." O.C.G.A. § 45-1-4. Within the practice area, "Georgia Whistleblower Act" and "GWA" have become the norm.

[5] Seth Eisenberg, *Public Officers and Employees - General Provisions*, 24 GA. ST. U. L. REV. 309, 311–13; 216–17 (2007); *see also* 2005 Ga. H.B. 665; 2007 Ga. H.B. 16. The statute was further amended in 2009 and 2011 to reflect administrative changes to certain administrative agencies in the state. *See* 2009 Ga. S.B. 97; 2011 Ga. H.B. 642.

Part V will provide the author's recommendation for amendment to the GWA. Finally, Part VI will briefly conclude.

II. GWA: THE BASICS

A. The Statute

The GWA is divided into six subsections, labeled (a)-(f). Subsection (a) provides definitions for various terms used in the statute. The definitions will only be recited here as they become relevant to explain other provisions of the GWA. Two definitions, however, are important from the beginning: "public employer" and "public employee."

The GWA defines a "public employer" as:

> [T]he executive, judicial, or legislative branch of the state; any other department, board, bureau, commission, authority, or other agency of the state which employs or appoints a public employee or public employees; or any local or regional governmental entity that receives any funds from the State of Georgia or any state agency.[6]

Section (a)(3) provides:

> 'Public employee' means any person who is employed by the executive, judicial, or legislative branch of the state or by any other department, board, bureau, commission, authority, or other agency of the state. This term also includes all employees, officials, and administrators of any agency covered by the rules of the State Personnel Board and any local or regional governmental entity that receives any funds from the State of Georgia or any state agency.[7]

Subsection (b) of the GWA permits public employers to receive and investigate complaints and report regarding possible "fraud, waste, and abuse in or relating to any state programs and operations under the

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[6] O.C.G.A. § 45-1-4(a)(4).
[7] O.C.G.A. § 45-1-4(a)(3).

jurisdiction of such public employer."[8] This subsection grants public employers jurisdiction to handle complaints and investigations internally, rather than having to involve the state government or law enforcement with every report.[9] But, "fraud, waste, and abuse" are not defined in the statute.

Subsection (c) provides for the confidentiality of public employees who complain. The subsection does not specify whether it applies to all complaints of fraud, waste, and abuse. As discussed below, the anti-retaliation provision of subsection (d) is narrower than the jurisdictional provision of (b). It is unclear where subsection (c) falls, and no case law provides clarity. Presumably, subsection (c) applies to all reports under (b).

Subsection (d) is the anti-retaliation provision of the GWA. It provides:

> (1) No public employer shall make, adopt, or enforce any policy or practice preventing a public employee from disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency.
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> (2) No public employer shall retaliate against a public employee for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency, unless the disclosure was made with knowledge that the disclosure was false or with reckless disregard for its truth or falsity.
>
> (3) No public employer shall retaliate against a public employee for objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation.
>
> (4) Paragraphs (1), (2), and (3) of this subsection shall not apply to policies or practices which implement, or to actions by public employers against public employees who violate, privilege or

[8] O.C.G.A. § 45-1-4(b).

[9] O.C.G.A. § 45-1-4(b); *see also* Colon v. Fulton Cty., 751 S.E.2d 307, 311–12 (Ga. 2013).

> confidentiality obligations recognized by constitutional, statutory, or common law.[10]

Several terms in subsection (d) are defined in subsection (a). "Law, rule or regulation" means "any federal, state, or local statute or ordinance or any rule or regulation adopted according to any federal, state, or local statute or ordinance."[11] A "supervisor" is any person

> (A) To whom a public employer has given authority to direct and control the work performance of the affected public employee;
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> (B) To whom a public employer has given authority to take corrective action regarding a violation of or noncompliance with a law, rule or regulation of which the public employee complains; or
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> (C) Who has been designated by a public employer to receive complaints regarding a violation of or noncompliance with a law, rule, or regulation.[12]

"Government agency" means any agency of federal, state, or local government charged with the enforcement of laws, rules, or regulations.[13] Finally,

> "Retaliate" or "retaliation" refers to the discharge, suspension, or demotion by a public employer of a public employee or any other adverse employment action taken by a public employer against a public employee in the terms or conditions of employment for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or government agency.[14]

Subsections (e) and (f) provide the right of action, jurisdictional limitation, statute of limitations, and remedies for whistleblowers. Actions under the GWA cannot be brought in a magistrate court or state court; they

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[10] O.C.G.A. § 45-1-4(d).
[11] O.C.G.A. § 45-1-4(a)(2).
[12] O.C.G.A. § 45-1-4(a)(6).
[13] O.C.G.A. § 45-1-4(a)(1).
[14] O.C.G.A. § 45-1-4(a)(5).

must be brought in superior court.[15] The statute of limitations is one year after discovery of the retaliation, with a three-year statute of repose.[16] The remedies for a successful public employee include: an injunction restraining continued violations; reinstatement to the same or an equivalent position; reinstatement of fringe benefits and seniority; lost wages, benefits, and other remuneration; compensatory damages; and reasonable attorney's fees, costs, and expenses.[17]

B. The GWA Prior to 2015

Prior to 2015, the exact framework for analyzing GWA claims was unclear. Unofficially, courts used the federal *McDonnell Douglas* framework for analyzing cases.[18]

> Under the familiar *McDonnell Douglas* framework, the plaintiff must first create an inference of discrimination through his prima facie case. Once the plaintiff has made out the elements of the prima facie case, the burden shifts to the employer to articulate a non-discriminatory basis for its employment action. If the employer meets this burden, the inference of discrimination drops out of the case entirely, and the plaintiff has the opportunity to show by a preponderance of the evidence that the proffered reasons were pretextual. Where the plaintiff succeeds in discrediting the employer's proffered reasons, the trier of fact may conclude that the employer intentionally discriminated.[19]

To show a prima facie case of retaliation under the GWA, a plaintiff had to show that:

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[15] O.C.G.A. § 45-1-4-(e)(1).
[16] *Id.*
[17] O.C.G.A. § 45-1-4(e)(2)–(f).
[18] Forrester v. Georgia Dep't of Human Servs., 708 S.E.2d 660, 665–66 (Ga. Ct. App. 2011) (physical precedent only). *But see* Freeman v. Smith, 750 S.E.2d 739, 741–42 (Ga. Ct. App. 2013) (declining to formally adopt the *McDonnell Douglas* framework).
[19] Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 767–68 (11th Cir. 2005) (internal quotations omitted).

> (1) the employer falls under the statute's definition of a 'public employer'; (2) the employee disclosed a violation of or noncompliance with a law, rule, or regulation to either a supervisor or government agency; (3) the employee was then discharged, suspended, demoted, or suffered some other adverse employment decision by the public employer; and (4) there is some causal relation between (2) and (3).[20]

For the sake of brevity, the first element will be referred to as coverage, the second as protected activity, the third as an adverse action, and the fourth as causation. While early GWA litigation focused on coverage, these cases became irrelevant after the statute was amended to increase the scope of public employers and public employees.[21] Following the GWA amendments, coverage ceased being a serious issue in litigation, with one exception that will be discussed in Part III.[22]

As mentioned above, the anti-retaliation provision of the GWA protects reports of or objections to "violation[s] of or noncompliance with a law, rule, or regulation," while the jurisdictional section covers reports of "fraud, waste, or abuse."[23] The anti-retaliation provision is narrower in scope. Reporting theft by employees from the employer was protected.[24] But reporting embezzlement by an employee at a prior employer was not protected.[25] Reporting general safety concerns was also not protected.[26] Reporting personal concerns intended to get help for a troubled friend and

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[20] *Forrester*, 708 S.E.2d at 666.
[21] *See, e.g.*, N. Ga. Reg'l Educ. Serv. Agency v. Weaver, 527 S.E.2d 864 (Ga. 2000); *see also* Eisenberg, *supra* note 5, at 311–13, 316–17; 2005 Ga. H.B. 665; 2007 Ga. H.B. 16.
[22] *See, e.g.*, *Forrester*, 708 S.E.2d at 666–67 (physical precedent only).
[23] *Compare* O.C.G.A. § 45-1-4(d), *with* O.C.G.A. § 45-1-4(a).
[24] Jones v. Bd. of Regents of the Univ. Sys. of Ga., 585 S.E.2d 138, 143 (Ga. Ct. App. 2003).
[25] Brathwaite v. Fulton-DeKalb Hosp. Auth., 729 S.E.2d 625, 629 (Ga. Ct. App. 2012).
[26] Edmonds v. Bd. of Regents of the Univ. Sys. of Ga., 689 S.E.2d 352, 357 (Ga. Ct. App. 2009).

coworker also did not constitute protected activity.[27] Objecting to conduct that could amount to obstruction of justice, however, was protected.[28]

The statute provides that "discharge, suspension, [and] demotion" are adverse actions.[29] In *Jones v. Board of Regents of the University System of Georgia*, the Georgia Court of Appeals considered whether resigning in lieu of termination (often referred to as "involuntary resignation") constituted an adverse action.[30] The *Jones* court answered in the affirmative.[31] While this rule is still the general consensus, the *Jones* court based its reasoning—at least in part—on language in a prior version of the GWA that prohibited threatening action against an employee.[32] That language was removed from the statute with the 2005 amendment.[33] When the issue seemed to reappear in *Albers v. Georgia Board of Regents of the University System of Georgia*, the *Albers* court held that giving an employee the option of resigning under threat of termination did not constitute an adverse action for the purposes of the statute of limitations where the employee did not resign and was not terminated until months later.[34] Because *Albers* did not specifically address *Jones* or its reasoning, and because *Jones* has not been overruled by any subsequent cases, *Jones* may still be good law despite the statutory amendment.

The statute also mentions "other adverse employment action[s]."[35] In *Freeman v. Smith*, the Georgia Court of Appeals incorporated federal Title

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[27] *Forrester* 708 S.E.2d at 667–68.
[28] Albers v. Georgia Bd. of Regents of the Univ. Sys. of Ga., 766 S.E.2d 520, 523 (Ga. Ct. App. 2014).
[29] O.C.G.A. § 45-1-4(a)(5).
[30] Jones v. Bd. of Regents of the Univ. Sys. of Ga., 585 S.E.2d 138, 143–44 (Ga. Ct. App. 2003).
[31] *Id.*
[32] *Id.*
[33] 2005 Ga. H.B. 665.
[34] Albers v. Georgia Bd. of Regents of the Univ. Sys. of Ga., 766 S.E.2d 520, 524–26 (Ga. Ct. App. 2014).
[35] *Id.*

VII cases to determine whether an action was "materially adverse."[36] Under Title VII case law, an action is materially adverse if "a reasonable employee would have found the challenged action materially adverse, meaning that it might well have dissuaded a reasonable employee from making the statutorily-protected disclosure."[37] Further, "The actionable employer conduct must be 'significant,' rather than 'trivial.'"[38] For example, informing an employee that her subordinate is about to be transferred away did not rise to the level of an adverse action.[39] There is also confusion regarding when a transfer is actionable due to a lack of case law and the refusal of the General Assembly to include "transfer" in the statute after it had been proposed.[40]

For the final prima facie element, indicia of causation included temporal proximity between the protected activity and adverse action, a supervisor's reaction to the protected activity, and evidence of pretext.[41] For temporal proximity, the general rule was that an adverse action must accrue within three months of the protected activity; delay beyond three months was generally fatal to a claim.[42] A GWA plaintiff could survive substantial delay, however, if there was other evidence suggesting causation.[43]

After the employer articulated a legitimate non-retaliatory business reason for the adverse action, the employee needed to show that the reason was pretextual.[44] The employee could show the reason was pretextual

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[36] Freeman v. Smith, 750 S.E.2d 739, 744 (Ga. Ct. App. 2013).
[37] *Id.* at 744 (citing Cobb v. City of Roswell, 533 Fed. Appx. 888, 896 (11th Cir. 2013)).
[38] *Id.* (citing Burlington Northern & Santa Fe R. Co. v. White, 548 U.S. 53, 67–68 (2006)).
[39] *Id.*
[40] *See* Eisenberg, *supra* note 5, at 315–16, 318–19.
[41] Jones v. Bd. of Regents of the Univ. Sys. of Ga., 585 S.E.2d 138, 143–44 (Ga. Ct. App. 2003).
[42] *See* Freeman v. Smith, 750 S.E.2d 739, 743 (2013); *see also* Albers v. Georgia Bd. of Regents of the Univ. Sys. of Ga., 766 S.E.2d 520, 524 (Ga. Ct. App. 2014).
[43] *Albers*, 766 S.E.2d at 524.
[44] Forrester v. Georgia Dep't of Human Servs., 708 S.E.2d 660, 666 (Ga. Ct. App. 2011) (physical precedent only).

through direct evidence that contradicted the employer's reason or circumstantial evidence suggesting that the proffered reason was not the actual reason for the adverse action.[45] Circumstantial evidence of pretext included inconsistencies in stated reasons for the adverse action, evidence of reactions to protected activity, comparator evidence of similarly situated employees who were treated differently, and close temporal proximity.[46]

III. RECENT DEVELOPMENTS IN GWA CASE LAW

Since 2015, the appellate courts have trended towards declining procedural hurdles for plaintiffs but increasing substantive requirements to a level that has practically eliminated a GWA plaintiff's chance of success. As a result of recent cases, interpretation of the GWA has diverged from prior case law so substantially that it is no longer effectual.

In *Tuohy v. City of Atlanta*, the Georgia Court of Appeals embraced the *McDonnell Douglas* burden-shifting framework.[47] The *Tuohy* court, however, confused several lawyers practicing in the area. Its discussion of pretext was odd. The *Tuohy* court first quoted *Bailey v. Stonecrest Condo Association*, for the following passage: "In discussing this issue, the Georgia Supreme Court has held that pretext is established by a direct showing that discriminatory reason more likely motivated the defendant or by an indirect showing that the defendant's explanation is not credible."[48] This was consistent with the pretext analysis used in *Caldon*.[49]

The *Tuohy* court then quoted an unreported Eleventh Circuit case for the following proposition:

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[45] Caldon v. Bd. of Regents of the Univ. Sys. of Ga., 715 S.E.2d 487, 490 (Ga. Ct. App. 2011).
[46] *Id.* at 491.
[47] Tuohy v. City of Atlanta, 771 S.E.2d 501, 504–05 (Ga. Ct. App. 2015).
[48] *Tuohy*, 771 S.E.2d. at 506 (quoting Bailey v. Stonecrest Condo Ass'n, 696 S.E.2d 462, 468–69 (Ga. Ct. App. 2010)).
[49] *Caldon*, 715 S.E.2d. at 490.

> A reason is not pretextual unless it is shown both that the reason was false, and that discrimination or retaliation was the real reason. If the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason, or showing that the decision was based on erroneous facts.[50]

This new test is virtually impossible to meet. It converts what was previously an "or" into an "and." An employee must provide direct evidence of retaliation *and* disprove whatever reason the employer concocts after the employer has had time to search for a "legitimate" reason. The idea that an employee must disprove every alleged reason for an adverse action and prove that retaliation was the real reason in order to survive summary judgment and get to trial makes no sense. Georgia is a strongly at-will jurisdiction.[51] Georgia courts "typically adjudicate against employees claiming wrongful discharge, regardless of the reason for the termination."[52] Given this hostility, a GWA plaintiff can only see a jury if the plaintiff can prove that they never engaged in any misconduct, never experienced even a temporary performance decline, and never made a single mistake. This standard is impossible to meet. Plaintiffs are left hoping that their defendants' lawyers make a mistake during the course of investigation or litigation and provide only false accusations.

The chain of citations for the quote providing this new test leads to *St. Mary's Honor Center v. Hicks*, a Supreme Court case that dealt with the issue of when a plaintiff is *entitled* to summary judgment, not when a

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[50] *Tuohy*, 771 S.E.2d. at 506 (quoting Tarmas v. Secretary of the Navy, 433 Fed. Appx. 754, 761 (11th Cir. 2011)).
[51] Eisenberg, *supra* note 5, at 309–11.
[52] *Id.* at 310.

plaintiff *survives* a defendant's motion for summary judgment.[53] The Court stated,

> Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, no additional proof of discrimination is *required*. But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principal . . . that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the ultimate burden of persuasion.[54]

The *Tuohy* court declined to choose between the two tests it provided, stating that the plaintiff could not survive summary judgment under either.[55] By providing this new test, however, the *Tuohy* court opened a veritable Pandora's box in trial courts, with government defendants claiming that the new—significantly harsher—test applies.[56] In at least one case, the author could only argue—unsuccessfully—that the *Tuohy* court did not actually create a new test, based on the court's failure to apply the test.[57] The situation became even worse, however, when the Georgia Court of Appeals confirmed the new test in *Harris v. City of Atlanta*.[58]

In the next published case from the Georgia Court of Appeals after *Tuohy*, *Franklin v. Eaves*, GWA plaintiffs received some good news.[59] In *Franklin*, the plaintiff stated at summary judgment that the first act of retaliation against her (the removal of some of her job duties) occurred on

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[53] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (2013). The *Tuohy* court quoted Tarmas v. Sec'y of the Navy, 433 Fed. Appx. 754, 761 (11th Cir. 2011), which cited Brooks v. Cty. Comm'n, 446 F.3d 1160, 1163 (11th Cir. 2006), which quoted *St. Mary's*.

[54] *Id.* (internal quotations omitted) (emphasis in original).

[55] Tuohy v. City of Atlanta, 771 S.E.2d 501, 506–07 (Ga. Ct. App. 2015).

[56] Due to confidentiality concerns, the author is unable to provide specific trial court citations. This assertion is based on experience in GWA litigation.

[57] The author is unable to disclose the case citation due to confidentiality concerns.

[58] Harris v. City of Atlanta, 813 S.E.2d 420, 424 (Ga. Ct. App. 2018).

[59] Franklin v. Eaves, 787 S.E.2d 265 (Ga. Ct. App. 2016).

August 27, 2012.[60] Additional acts of retaliation were alleged to have occurred on October 12, 2012, October 17, 2012, December 2012, January 25, 2013, and June 2013.[61] The plaintiff filed her GWA claim on October 11, 2013, more than one year from the first act of retaliation.[62] The trial court granted summary judgment to the defendant on the grounds that the action was past the one-year statute of limitations.[63]

On appeal, Franklin argued that she did not learn of the August and October actions until October 24, 2012, which was within one year of her filing.[64] The court allowed this argument to succeed, stating that Franklin was not required to argue that she did not discover the retaliation until later when the defendant bore the burden of proving that the action was filed late and relied solely on a limited admission that the first act of retaliation actually occurred prior to October 11, 2012.[65] The *Franklin* court also adopted provisions of federal law that state that each discrete adverse action is independently actionable and carries its own statute of limitations.[66]

Following *Franklin* were a pair of plaintiff-friendly cases. In *West v. City of Albany*, the United States District Court for the Middle District of Georgia faced a motion for judgment on the pleadings based on a failure to provide the city with *ante litem* notice pursuant to O.C.G.A. § 36-33-5.[67] The district court, unsure whether *ante litem* notice was required in GWA cases, certified the question to the Georgia Supreme Court.[68] At roughly the same time, in *Riggins v. City of Atlanta*, the Fulton County Superior Courts

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[60] *Id.* at 269.
[61] *Id*.
[62] *Id.*
[63] *Id.*
[64] *Franklin*, 787 S.E.2d 270. The date of discovery was apparently in the evidence at the trial court, but was not argued until the appeal. *Id.* at 268–71.
[65] *Id.* at 271.
[66] *Id.* at 270–71 (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)).
[67] West v. City of Albany, 797 S.E.2d 809, 810 (Ga. 2017).
[68] *Id.*

dismissed a complaint based upon the failure to provide *ante litem* notice under O.C.G.A. § 36-33-5.[69]

The municipal *ante litem* requirement states in part:

> (a) No person, firm, or corporation having a claim for money damages against any municipal corporation on account of injuries to person or property shall bring any action against the municipal corporation for such injuries, without first giving notice as provided in the Code section.
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> (b) Within six months of the happening of the event upon which a claim against a municipal corporation is predicated, the person, firm, or corporation having the claim shall present the claim in writing to the governing authority of the municipal corporation for adjustment, stating the time, place, and extent of the injury, as nearly as practicable, and the negligence which caused the injury. No action shall be entertained by the courts against the municipal corporation until the cause of action therein has first been presented to the governing authority for adjustment.[70]

The Georgia Court of Appeals had previously ruled that the state *ante litem* notice requirement did not apply to GWA claims, which could independently effect a waiver of sovereign immunity.[71] Given the precedent set by *Tuttle* and the clear references to negligence in the municipal statute, this pair of cases surprised many in the practice who assumed that the *ante litem* statutes applied to torts, not the GWA. Luckily, the Georgia Supreme Court ruled that the municipal *ante litem* requirement did not apply to the GWA.[72] The Georgia Court of Appeals soon followed the rule set by *West* and reversed the Fulton County Superior Court's dismissal of the *Riggins* GWA claim.[73]

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[69] Riggins v. City of Atlanta, 798 S.E.2d 730, 730–31 (Ga. Ct. App. 2017).
[70] O.C.G.A. § 36-33-5.
[71] Tuttle v. Bd. of Regents of the Univ. Sys. of Ga., 756 S.E.2d 585, 589 (Ga. Ct. App. 2014).
[72] *West*, 797 S.E.2d at 814.
[73] *Riggins*, 798 S.E.2d. at 730–31.

After a few helpful decisions, the decision in *Coward v. MCG Health, Inc.* dashed the plaintiffs' hopes.[74] In *Coward*, the employer terminated two nurses for allegedly complaining that chronic short-staffing nearly led to a psychiatric patient's suicide.[75] At summary judgment, the defendant argued that the plaintiffs had only reported and objected to general safety concerns, which are not protected.[76] But there was a complication. While preparing the response to the defendant's motion for summary judgment, the plaintiffs' attorney discovered that the chronic short-staffing, if true, did violate a law, rule, or regulation.[77]

The trial court granted summary judgment to the defendant, finding that the plaintiffs had not engaged in protected activity.[78] On appeal, the Georgia Court of Appeals affirmed.[79] The court qualified its ruling by saying, "[i]n reaching this conclusion, we need not determine what terminology is required to trigger the protections of the Whistleblower Statute, nor do we believe that the statute requires specific magic words."[80] But the court was clear that an employee must allege and disclose that the employer is violating a law, rule, or regulation prior to termination.[81]

This new rule is devastating for GWA plaintiffs. Requiring employees to identify a law, rule, or regulation prior to termination shrinks the pool of potentially successful plaintiffs to those with legal training. Based on the author's experience as an employment litigator, the chances of an average

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[74] Coward v. MCG Health, Inc., 802 S.E.2d 396 (Ga. Ct. App. 2017).
[75] *Id.* at 397–98.
[76] *Id.* at 399–400; *see also* Edmonds v. Bd. of Regents of the Univ. Sys. of Ga., 689 S.E.2d 352, 357 (Ga. Ct. App. 2009).
[77] The court does not specifically state this, but it said, "Coward did not allege that MCG Health violated a law, rule, or regulation until she filed her response to MCG Health's motion for summary judgment." *Coward*, 802 S.E.2d at 400. The court also stated, "Bargerorn, like Coward, did not disclose a violation or failure to comply with any law, rule, or regulation prior to her termination." *Id.*
[78] *Id.* at 397.
[79] *Id.* at 401.
[80] *Coward*, 802 S.E.2d. at 400.
[81] *Id.* at 400.

employee knowing the law is beyond slim. *Coward* presents a common scenario: one in which an employee reports something wrong, gets fired, and then hires an attorney, who must then determine whether the report was sufficient. The statutory scheme covers the lack of legal knowledge on the part of the general populace. The provision of the GWA that protects disclosures protects them so long as they are not "made with knowledge that the disclosure is false or with reckless disregard for its truth or falsity."[82] The objection provision covers objections and refusals to participate in any practice the employee "has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation."[83]

The next GWA case to come out of the Georgia Court of Appeals was *Murray-Obertein v. Georgia Government Transparency and Campaign Finance Commission*.[84] In *Murray-Obertein*, the Georgia Court of Appeals resurrected an old question: Who is covered by the GWA? The issue in *Murray-Obertein* was whether former employees are protected from retaliation.[85] After a dispute with her employer ended in settlement, the Executive Secretary of Murray-Obertein's employer began making derogatory comments about her to the media.[86]

Murray-Obertein looked to recent cases solidifying the relationship between the GWA and federal retaliation law under Title VII; she then argued that the rule in *Robinson v. Shell Oil Co.* should apply.[87] The *Robinson* Court held that Title VII protected former employees from retaliation.[88] Even though it reaffirmed acceptance of the federal *McDonnell*

[82] O.C.G.A. § 45-1-4(d)(2).
[83] O.C.G.A. § 45-1-4(d)(3).
[84] Murray-Obertein v. Ga. Gov't Transparency and Campaign Fin. Comm'n, 812 S.E.2d 28 (Ga. Ct. App. 2018).
[85] *Id.* at 29.
[86] *Id.*
[87] *Id.* at 30 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).
[88] *Robinson,* 519 U.S. at 346.

Douglas framework, the Georgia Court of Appeals declined to follow federal cases for former employees.[89]

The *Murray-Obertein* decision harms plaintiffs, who suffer substantial disadvantages finding new jobs and often have to leave their profession or industry entirely.[90] This decision results in a near absence of protections for (1) bad references that are misleading but do not rise to the level of defamation; (2) statements to licensing agencies regarding the plaintiff's termination; (3) statements to the media designed to harm the plaintiff's reputation; and (4) pension denials when the pensions are not governed by ERISA.

The next GWA case to come before the Georgia Court of Appeals was the return of *Franklin v. Eaves*,[91] this time named *Franklin v. Pitts*.[92] After the case returned to the trial court, the court granted summary judgment to the defendant.[93] It ruled that: (1) the plaintiff failed to establish protected activity; (2) all but two alleged adverse actions did not rise to the level of adverse actions; (3) the plaintiff failed to establish a causal connection between the alleged protected activity and the alleged adverse actions; and (4) the plaintiff failed to establish pretext for the two accepted adverse actions.[94] The court only considered rulings (2) and (4).[95]

The trial court counted two transfer/promotion opportunity denials as adverse actions.[96] The court did not count a third job opportunity as an adverse action because the plaintiff provided "no evidence showing that the

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[89] *Murray-Obertein*, 812 S.E.2d. at 30–31.
[90] *See* Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 666–669 (2018) (detailing stories of whistleblowers).
[91] *See supra* nn.57–64.
[92] Franklin v. Pitts, 826 S.E.2d 427, 430 (Ga. Ct. App. 2019). The defendant's name was changed because the chairman of the Fulton County Board of Commissioners—who was sued in his official capacity—changed. *See id.*
[93] *Id.* at 430–31.
[94] *Id.* at 431–32.
[95] *See id.* at 439.
[96] *Id.* at 432.

County denied her a specific transfer opportunity."[97] The remaining potential adverse actions were: "delaying a request to attend a training session; change of job duties from credentialing providers and credit card processing to electronic funds transfer duties; [and] denial of leave requests and requests for documentation of leave."[98]

The court had to decide whether these counted as adverse actions, and the court framed the discussion around whether to adopt the Title VII standard for substantive discrimination or for retaliation.[99] The court noted that the Eleventh Circuit has described the federal retaliation standard as "materially adverse," while referring to the substantive discrimination standard as "serious and material change in terms, conditions or privileges of employment."[100] Which standard would apply was decisive; similar adverse actions were covered in the applicable federal case, *Burlington Northern and Santa Fe Railway Co. v. White*.[101]

In *Burlington North*, the plaintiff—the sole female employee in her department—complained that her supervisor was making sexual and discriminatory comments to and about her.[102] The supervisor was punished, but—later that same month and during the same meeting wherein the plaintiff was informed of the supervisor's discipline—the plaintiff's employer told her that she was being moved from operating a forklift to

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[97] *Id.* at 432 n.3.
[98] *Id.*
[99] *Id.* at 433–34.
[100] *Id.* at 434 (citing Crawford v. Carroll, 529 F.3d 961, 974 n.14 (11th Cir. 2008).
[101] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). For those who are new to employment law, please note that the Georgia Court of Appeals referred to the *Burlington North* standard as the "*Burlington* standard." *See Pitts*, 826 S.E.2d 427 at 434-35. Practitioners in the area are familiar with a *Burlington North* standard, which is discussed here, and a separate *Burlington* standard, which concerns sexual harassment and comes from the case Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). For the author's sanity, this paper will use the industry norm and refer to the "*Burlington North* standard."
[102] *Burlington North*, 548 U.S. at 57–58.

general laborer tasks.[103] After the plaintiff filed a charge with the Equal Employment Opportunity Commission, her employer charged her with insubordination and suspended her pay.[104] Although the plaintiff experienced thirty-seven days of suspension without pay, the suspension was reversed through an internal grievance process, and she was awarded backpay for the thirty-seven days, bringing her lost wages to $0.[105]

After comparing the statutory text of Title VII's prohibition on discrimination with the prohibition on retaliation, the Court concluded that the prohibition on retaliation was broader than the prohibition on discrimination.[106] Title VII's prohibition on discrimination states:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. [107]

Title VII's prohibition on retaliation states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to

[103] *Id.* at 58.
[104] *Id*.
[105] *Id.* at 58–59.
[106] *Id.* at 61–64.
[107] 42 U.S.C. § 2000e-2(a).

> discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. [108]

The Court then set forth the *Burlington North* standard, which is: "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[109] Reassignments and suspensions, even when the employee suffers no loss of pay or status, can act as a deterrent or serve as a symbolic punishment.[110] These actions are, therefore, actionable in retaliation cases.[111] This standard was used in *Freeman v. Smith*, as detailed in the prior section.[112]

Faced with similar adverse actions, the Georgia Court of Appeals took the same basic approach: they compared the text of the GWA with the anti-discrimination and anti-retaliation provisions of Title VII.[113] Concluding that the GWA's language is closer to Title VII's anti-discrimination provision, the court concluded that the *Burlington North* standard is not appropriate for GWA cases.[114] The court then adopted the stricter "serious and material change in terms, conditions or privileges of employment," and found that the challenged adverse actions did not rise to the necessary level to be actionable under the GWA.[115]

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[108] 42 U.S.C. § 2000e-3(a).
[109] *Burlington North*, 548 U.S. at 68 (internal quotations omitted).
[110] *Id.* at 70–73.
[111] *Id*.
[112] Freeman v. Smith, 750 S.E.2d 739 (Ga. Ct. App. 2013); *see supra* nn.34–38.
[113] Franklin v. Pitts, 826 S.E.2d 427, 433–35 (Ga. Ct. App. 2019).
[114] *Id.* at 434–35.
[115] *Id.* at 437–38.

Turning to the remaining adverse actions—the denial of two transfers/promotions—the court reaffirmed the *Tuohy* and *Harris* standard of pretext.[116] Because of the harshness of this standard, the plaintiff was unable to show pretext, and the grant of summary judgment was affirmed.[117]

Adopting the anti-discrimination standard instead of the anti-retaliation provision of Title VII may have been an appropriate textual analysis, but it defeated the purposes of the GWA, which is an anti-retaliation statute. The *Burlington North* standard focuses on deterrence, which is the point of an anti-retaliation statute.[118] By allowing employers to "make an example of" an employee in an open act of hostility that falls short of the harsher anti-discrimination statute, the employer can deter employees and prevent reports of misconduct, all without ramification.

An additional development is currently working its way through the courts, though it has not yet led to an opinion.[119] At least one large public employer has attempted to argue for the judicial adoption of what is known as the "employee duty rule." This rule comes from litigation under the federal WPA prior to the adoption of the WPEA, which overruled those cases.[120]

The employee duty rule states that an employee does not engage in protected activity when the employee reports something within the scope of that employee's ordinary job duties.[121] Under this rule, a compliance officer

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[116] *Id.* at 438.
[117] *Id.* at 438–39.
[118] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006).
[119] Due to confidentiality concerns, the author is unable to provide citations to cases, but the author has seen this development arise multiple times.
[120] Ann C. Hodges & Justin Pugh, *Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle*, 52 U.C. DAVIS L. REV. ONLINE 1, 27 (2018); Heidi Kitrosser, *On Public Employees and Judicial Buck-Passing: The Respective Roles of Statutory and Constitutional Protections for Government Whistleblowers*, 94 NOTRE DAME L. REV. 1699, 1708 (2019).
[121] Wolf v. Pac. Nat'l Bank, No. 09-21531, 2010 WL 5888778, at *10 (S.D. Fla. Dec. 28, 2010) (collecting cases).

would not be protected by the GWA because the compliance officer's job is to find and report violations of laws, rules, and regulations. At the federal level, Congress passed the WPEA to overturn this rule.[122] State whistleblower laws, however, are often unclear because they do not provide or prohibit an employee duty rule.[123] Georgia is one of these states; it does not provide or prohibit the rule in its whistleblower statute.[124] In the author's experience, Georgia trial courts have been unwilling to weigh in on the employee duty rule, instead relying on the cases referenced above to dismiss cases and avoid the discussion.

The employee duty rule is likely to make its way to the Georgia Court of Appeals at some point, and, if adopted, it will be disastrous for public whistleblowers in Georgia. The employee duty rule is particularly dangerous in light of *Coward*. The employees who are likely to know which law is being broken and identify a violated law, rule, or regulation for their employer are probably the ones whose job duties specifically involve reporting violations of that law, rule, or regulation. They likely received training on the law, rule, or regulation because it is their job to find and report potential violations. Employees who see that something is wrong, but are not sure what, will run into the *Coward* rule. Employees who are trained and experienced at spotting violations will run into the employee duty rule. Either way, there will be no protection, and the GWA will be nearly useless.

IV. FEDERAL EMPLOYEE WHISTLEBLOWER LAW

As shown above, Georgia courts have compared the GWA to Title VII and made GWA cases more difficult for plaintiffs than Title VII cases. For

[122] Samantha Arrington Sliney, *Department of Homeland Security v. MacLean: The Supreme Court's Interpretation of the Application of Whistleblower Protection Laws to Disclosures Made Contrary to Transportation Security Administration Regulations*, 8 N.E. U. L.J. 397, 400 (2016).
[123] *See* Hodges & Pugh, *supra* note 117, at 27.
[124] *See generally* O.C.G.A. § 45-1-4.

federal employee whistleblowers, however, the applicable law is the Whistleblower Protection Act.[125] Copying the federal WPA in its entirety is likely not the solution for the problems facing the GWA, but some parts of the WPA can provide useful inspiration for how the problems with the GWA may be addressed.

Although whistleblower protections at the federal level can be traced back to 1778,[126] the modern iteration was first enacted within the 1978 Civil Service Reform Act.[127] In 1989, Congress unanimously passed the current WPA.[128] As amended in 1994 and again with the passage of the WPEA in 2012,[129] the WPA protects most employees and applicants of the federal Executive Branch and the Government Printing Office.[130] It also protects former employees.[131]

The WPA does not use the *McDonnell Douglas* framework; instead, it uses a different framework. The plaintiff must first prove—by a preponderance of the evidence—his or her *prima facie* case by showing

> (1) the acting official had the authority to take any personnel action; (2) the aggrieved employee made a protected disclosure; (3) the acting official used his authority to take or refuse to take, a

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[125] 5 U.S.C. § 2302(b)(8).
[126] Connor Berkebile, Note, *The Puzzle of Whistleblower Protection Legislation: Assembling the Piecemeal*, 28 IND. INT'L & COMP. L. REV. 1, 7–8 (2018).
[127] *See* Sliney, *supra* note 120, at 399.
[128] *Id.* at 399–400.
[129] *See id.* at 400; *see also* Pub. L. No. 112–199.
[130] The WPA excludes employees who are "excepted from the competitive service because of [their job's] confidential, policy-determining, policy-making, or policy-advocating character." 5 U.S.C. § 2302(a)(2)(B)(i). Certain positions may also be excluded from coverage by an Executive Order of the President, but the exclusion cannot come after the adverse personnel action. 5 U.S.C. § 2302(a)(2)(B)(ii). Additionally, the WPA excludes from coverage employees involved in foreign intelligence and counter-intelligence operations. 5 U.S.C. § 2302(a)(2)(C)(ii). Although employees of the Federal Bureau of Investigation are listed in the excluded category, they are covered separately, with specific requirements concerning how reports are made. 5 U.S.C. § 2303.
[131] 5 U.S.C. § 1221.

> personnel action; and (4) the protected disclosure was a contributing factor in the agency's personnel action.[132]

The first element is important because of how adverse actions work under the WPA. Because it is tied to the adverse action prong (element (3) above), the two will be discussed together.

An adverse action under the WPA is when an employee "take[s] or fail[s] to take, or threaten[s] to take or fail to take, a personnel action" against a covered employee or applicant.[133] The list of "personnel action[s]" is long, comprising twelve numbered items, only one of which covers traditional adverse actions like suspension, demotion, and removal.[134] The WPA covers actions such as temporary details,[135] performance evaluations,[136] and the implementation or enforcement of nondisclosure policies or agreements.[137] Authority to take the action matters both because the list of actions is broad and because threats to take an action are also covered.[138] The first element, when added to the third, ensures that the adverse action is genuine.

For the second element, protected activity, the WPA protects employees and applicants who disclose information they reasonably believe shows:

> (i) any violation of any law, rule or regulation, or
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> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order

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[132] King v. Dep't of the Army, 570 Fed. Appx. 863, 865 (11th Cir. 2014) (citing Chambers v. Dep't of the Interior, 602 F.3d 1370, 1376 (Fed. Cir. 2010)).
[133] 5 U.S.C. § 2302(b)(8).
[134] 5 U.S.C. § 2302(a)(2)(A); *see also* 5 U.S.C. §§ 7502, 7512.
[135] 5 U.S.C. § 2302(a)(2)(A)(iv).
[136] 5 U.S.C. § 2302(a)(2)(A)(viii).
[137] 5 U.S.C. § 2302(a)(2)(A)(xi).
[138] 5 U.S.C. § 2302(b)(8).

> to be kept secret in the interest of national defense or the conduct of foreign affairs.[139]

The WPA also protects:

> any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences –
>
> (i) any violation (other than a violation of this section) of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[140]

The distinction between the two provisions stems from the fact that a disclosure need not be to internal authorities or law enforcement; a disclosure can be made to the media, so long as the disclosure is not prohibited by law.[141]

Disclosures can be formal or informal,[142] may be made directly to a supervisor or the person alleged to be committing—or attempting to commit—a violation,[143] need not be made in writing or while the employee was on duty,[144] and are still protected if made during the normal course of an employee's duties.[145] A disclosure is protected even when the employee has an impure motive in making it.[146] The WPA also has a participation clause, which protects employees who "exercise . . . any appeal, complaint,

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[139] 5 U.S.C. § 2302(b)(8)(A).
[140] 5 U.S.C. § 2302(b)(8)(B).
[141] *See, e.g.*, Dept. of Homeland Sec. v. MacLean, 574 U.S. 383, 917 (2014); Chambers v. Dep't of the Interior, 602 F.3d 1370, 1378 (Fed. Cir. 2010).
[142] 5 U.S.C. § 2302(a)(2)(D).
[143] 5 U.S.C. § 2302(f)(1)(A).
[144] 5 U.S.C. § 2302(f)(1)(D)-(E).
[145] 5 U.S.C. § 2302(f)(2).
[146] 5 U.S.C. § 2302(f)(1)(C).

or grievance right;"[147] testify or lawfully assist someone else in exercising an appeal, complaint, or grievance right;[148] or cooperate with an investigation.[149] Finally, the WPA has an objection clause to protect employees who refuse to obey an order that would violate a law, rule, or regulation.[150]

The WPA sets out a statutory list of factors to be considered for causation using the contributing factor standard.[151] The statutory factors to consider are: "(A) the official taking the personnel action knew of the disclosure or protected activity; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action."[152] "The words 'a contributing factor' . . . mean *any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision*."[153] This standard is much more lenient towards employees than the normal standards, such as the *McDonnell Douglas* framework, which require proof that the "protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor."[154]

Once the employee proves their *prima facie* case, the burden shifts back to the employer, who must do more than merely articulate an alleged reason for the action; it must prove by clear and convincing evidence that it would have taken the same action in the absence of protected activity.[155] The factors to consider when deciding whether an agency has satisfied its

[147] 5 U.S.C. § 2302(b)(9)(A).
[148] 5 U.S.C. § 2302(b)(9)(B).
[149] 5 U.S.C. § 2302(b)(9)(C).
[150] 5 U.S.C. § 2302(b)(9)(D).
[151] 5 U.S.C. § 1221(e)(1).
[152] *Id.*
[153] Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (emphasis in original) (collecting legislative history of the WPA).
[154] *Id.* at 1140.
[155] 5 U.S.C. § 1221(e)(2); *see also Marano*, 2 F.3d at 1141.

burden are known as the *Carr* factors,[156] from *Carr v. Social Security Administration*.[157] The *Carr* factors are as follows:

> (1) the strength of the agency's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.[158]

The requirement that the government prove its case by clear and convincing evidence was deliberate, as indicated by the following quote on the Congressional record:

> "Clear and convincing evidence" is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action – in other words, that the agency action was tainted. Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.[159]

Congress has also used this type of burden shifting in cases under the Consumer Product Safety Improvement Act,[160] the Energy Reorganization

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[156] *See, e.g.*, Whitmore v. Dep't of Labor, 680 F.3d 1353, 1365 (Fed. Cir. 2012).
[157] Carr v. Soc. Sec. Admin., 185 F.3d 1318 (Fed. Cir. 1999).
[158] *Id.* at 1323 (numbering added).
[159] 135 Cong. Rec. H747–48 (daily ed. Mar. 21, 1989); *see also Whitmore*, 680 F.3d at 1367 (quoting the same passage).
[160] 15 U.S.C. § 2087; *see, e.g.*, Lenzi v. Systemax, Inc., 944 F.3d 97, 114 (2nd Cir. 2019).

Act,[161] the Federal Railroad Safety Act,[162] and the Sarbanes-Oxley Act.[163] This burden shifting is significantly more employee friendly than the *McDonnell Douglas* framework, but there are solid reasons for adopting it in actions against the government.

If the employee wins their case, they are entitled to "corrective action."[164] "Corrective action" may include reinstatement to the same or a similar position, back pay and benefits, medical costs, travel expenses, consequential damages, and compensatory damages.[165] A prevailing employee, former employee, or applicant is entitled to attorney fees and litigation costs.[166] These remedies are similar to those in the GWA.[167]

V. RECOMMENDATIONS

The first available solution to the recent court decisions eviscerating the GWA is for the Georgia Supreme Court to begin to take GWA cases again and overrule the Georgia Court of Appeals. All the recent cases discussed above have been decided at the court of appeals. For some reason, the Georgia Supreme Court is not weighing in on the problem. Assuming the Georgia Supreme Court does not intend to overrule the Georgia Court of Appeals, it will be up to the Georgia General Assembly to amend the GWA.

Keeping with the order in which this paper introduced the GWA, the following areas require amendment: (A) coverage; (B) protected activity; (C) adverse action; and (D) causation and burden shifting. A full copy of the suggested amended version of the GWA is included in Appendix A.

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[161] 42 U.S.C. § 5851; *see, e.g.*, Sanders v. Energy Nw., 812 F.3d 1193, 1197 (9th Cir. 2016).
[162] 49 U.S.C. § 20109; *see, e.g.*, Pan Am Railways, Inc. v. U.S. Dep't of Labor, 855 F.3d 29, 36 (1st Cir. 2017).
[163] 18 U.S.C. § 1514A; *see, e.g.*, Harp v. Charter Commc'ns, Inc., 558 F.3d 722, 723 (7th Cir. 2009).
[164] 5 U.S.C. § 1221(e)(1).
[165] 5 U.S.C. § 1221(g)(1)(A).
[166] 5 U.S.C. § 1221(g)(1)(B); 5 U.S.C. § 1221(g)(2).
[167] *See supra* note 14.

A. Coverage

The problem that has developed regarding coverage is the lack of protection for former employees.[168] The clearest solution is to amend the definition of "public employee" at O.C.G.A. § 45-1-4(a)(3). The suggested language would read:

> (3) "Public employee" means any person who is employed by the executive, judicial, or legislative branch of the state or by any other department, board, bureau, commission, authority, or other agency of the state. This term also includes all employees, officials, and administrators of any agency covered by the rules of the State Personnel Board and any local or regional governmental entity that receives any funds from the State of Georgia or any state agency. <u>This term also includes former public employees and applicants for public employment.</u>

"[A]pplicants for public employment" was added to address a scenario where a public employer tells a former employee's prospective new employer about the employee's protected activity and ruins the employee's chance of getting a new job. In the absence of a confidentiality agreement or the above amended language, the former employer would not be liable in this scenario.[169]

The above suggested language would likely require some additional language in the protected activity section to prevent protection for activities outside the scope of government operations. Those edits will be addressed in the next section.

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[168] *See supra* nn. 81–86.

[169] *See* Murray-Obertein v. Ga. Gov't Transparency and Campaign Fin. Comm'n, 812 S.E.2d 28, 30-31 (Ga. Ct. App. 2018); *see also* O.C.G.A. § 34-1-4. If O.C.G.A. § 45-1-4(c) is amended or interpreted to protect reports under subsection (d), then there would be an argument for liability for the former employer, but this is unlikely to happen. *See supra* p. 7 (discussion of subsections (b) and (c)).

B. Protected Activity

The problems facing protected activity are the *Coward* rule[170] and the potential employee duty rule.[171] Additionally, an amendment to the GWA will be required if coverage is extended to former employees and applicants. The three kinds of protected activity discussed are disclosures,[172] participation,[173] and objections.[174] The author recommends adding a definition of these items to the definitions list in subsection (a) of the GWA, which would then include the following items:

> (7) "Protected activity" means any activity constituting a protected disclosure, protected participation, or a protected objection. Disclosures, participation, and objections are protected regardless of whether the activity:
>
> > (A) is made or performed during the normal course of duties of the public employee;
> >
> > (B) is made to a supervisor or to a person who participated in an activity that the public employee reasonably believed to be covered by the protected activity;
> >
> > (C) reveals information that had been previously disclosed;
> >
> > (D) is made in writing; or
> >
> > (E) is made or performed while the public employee is off duty;
>
> but disclosures and objections shall only constitute protected activity if made while the public employee is employed by a public employer.

[170] *See supra* nn. 71–80
[171] *See supra* nn. 116–120.
[172] O.C.G.A. § 45-1-4(d)(2); 5 U.S.C. § 2302(b)(8).
[173] 5 U.S.C. § 2302(b)(9)(A)-(C).
[174] O.C.G.A. § 45-1-4(d)(3); 5 U.S.C. § 2302(b)(9)(D).

(8) "Protected disclosure" means a formal or informal communication or transmission of information to a supervisor or government agency by a public employee which the public employee reasonably believes evidences:

(A) any violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(9) "Protected participation" means:

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation that concerns or relates to retaliation under this Code section;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information in an investigation, hearing, or court proceeding in connection with protected activity under this Code section.

(10) "Protected objection" means objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation.

The language for protected disclosures is taken directly from the WPA, with a modification to keep the scope limited to reports to a supervisor or government agency, as is the current limitation within the GWA.[175] Language was added to ensure that disclosures and objections are only protected if they occur while the employee is employed by a public employer. This is designed to make sure that reports and objections must be made to the public employer, but participation can happen after the employee has left. This ensures that a prospective or former employee

[175] 5 U.S.C. § 2302(b)(8); O.C.G.A. § 45-1-4.

cannot gain protection (and a potential lawsuit) preemptively to increase his or her chances of being hired or preventing a bad reference, while still protecting those who engage in legitimate activities, including investigations, hearings, or court proceedings after the employee has left.

The fact that a disclosure is defined as "information constituting a violation" should remove the *Coward* rule. The language in proposed section (7)(A) is designed to foreclose the employee duty rule. Other added language not specifically mentioned above is meant to track the WPA and use clearer language to help resist judicial pushback against an amendment.

In an effort to provide uniformity throughout the GWA and apply the confidentiality provision of subsection (c) to all reports, subsection (b) should be amended as follows:

> (b) A public employer may receive and investigate protected disclosures ~~complaints or information from any public employee~~ concerning~~ the possible existence of any activity constituting fraud, waste, and abuse in~~ or relating to any state programs and operations under the jurisdiction of such public employer.

In addition, subsections (B) and (C) from the definition of "supervisor" should be amended as follows:

> (B) To whom a public employer has given authority to take corrective action regarding a protected disclosure by a~~ violation of or noncompliance with a law, rule, or regulation of which the~~ public employee~~ complains~~; or
>
> (C) Who has been designated by a public employer to receive protected disclosures~~ complaints regarding a violation of or noncompliance with a law, rule, or regulation~~.

C. Adverse Action

The full scope of protected activity under the WPA is likely neither necessary for the GWA nor likely to be passed in Georgia. Adopting the *Burlington North* standard should be sufficient. The best way to do so is to

amend the definition of "retaliation," which would change subsection (a)(5) to read as follows:

> (5) "Retaliate" or "retaliation" refers to the discharge, suspension, or demotion by a public employer of a public employee or any other adverse employment action taken by a public employer against a public employee that might dissuade a reasonable employee from engaging in protected activity.~~in the terms or conditions of employment for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or government agency.~~

To adopt this standard and harmonize subsection (d) with the other changes presented, subsections (1) through (4) would be adjusted as follows:

> (1) No public employer shall make, adopt, or enforce any policy or practice preventing a public employee from engaging in protected activity.~~ disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency.~~
>
> (2) No public employer shall retaliate against a public employee for engaging in protected activity.~~ for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency, unless the disclosure was made with knowledge that the disclosure was false or with reckless disregard for its truth or falsity.~~
>
> ~~(3) No public employer shall retaliate against a public employee for objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe in in violation of or noncompliance with a law, rule, or regulation.~~
>
> ~~(4)~~(3) Paragraphs (1) and (2)~~(1), (2), and (3)~~ of this subsection shall not apply to policies or practices which implement, or to actions by public employers against employees who violate, privilege or confidentiality obligations recognized by constitutional, statutory, or common law.

D. Causation and Burden Shifting

Because of how the courts have handled burden shifting,[176] the author recommends switching to the WPA contributing factor test, which affects causation and burden shifting together. To prevent shifting subsection (e)(2), the following language—taken largely from the WPA,[177] with some language taken from the mixed motive language from Title VII[178]—would be added:

(g)

(1) Subject to the provisions of paragraph (2), in any case under this Code section, the court shall order relief under paragraphs (e) and (f) if the public employee has demonstrated that protected activity was a contributing factor in retaliation against the public employee by the public employer, even though other factors also motivated the adverse action. The public employee may demonstrate that the protected activity was a contributing factor in the personnel action through circumstantial evidence.

(2) Relief under paragraphs (e) and (f) may not be ordered if, after a finding that protected activity was a contributing factor, the public employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of such protected activity.

VI. CONCLUSION

Because Georgia courts are unwilling to enforce the GWA, the General Assembly must act to protect taxpayers from unlawful acts by public servants. This includes protecting those public employees who fulfill their duty and report wrongdoing. By looking to federal whistleblower protections, the General Assembly can address the recent court decisions

[176] *See supra* nn. 44–55.
[177] 5 U.S.C. § 1221(e).
[178] 42 U.S.C. § 2000e-2(m)

that have eviscerated the GWA through an amendment. By incorporating aspects of other functioning anti-retaliation laws, the language provided within this article will overrule the recent judicial push-back against the GWA while balancing the interests of the public, public employees, and public employers.

APPENDIX

The Amended GWA, O.C.G.A. § 45-1-4:

(a) As used in this Code section, the term:

(1) "Government agency" means any agency of federal, state, or local government charged with the enforcement of laws, rules, or regulations.

(2) "Law, rule, or regulation" includes any federal, state, or local statute or ordinance or any rule or regulation adopted according to any federal, state, or local statute or ordinance.

(3) "Public employee" means any person who is employed by the executive, judicial, or legislative branch of the state or by any other department, board, bureau, commission, authority, or other agency of the state. This term also includes all employees, officials, and administrators of any agency covered by the rules of the State Personnel Board and any local or regional governmental entity that receives any funds from the State of Georgia or any state agency. This term also includes former public employees and applicants for public employment.

(4) "Public employer" means the executive, judicial, or legislative branch of the state; any other department, board, bureau, commission, authority, or other agency of the state which employs or appoints a public employee or public employees; or any local or regional governmental entity that receives any funds from the State of Georgia or any state agency.

(5) "Retaliate" or "retaliation" refers to the discharge, suspension, or demotion by a public employer of a public employee or any other adverse employment action taken by a public employer against a public employee that might dissuade a reasonable employee from engaging in protected activity.~~in the terms or conditions of employment for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or government agency.~~

(6) "Supervisor" means any individual:

(A) To whom a public employer has given authority to direct and control the work performance of the affected public employee;

(B) To whom a public employer has given authority to take corrective action regarding a protected disclosure by a violation of or noncompliance with a law, rule, or regulation of which the public employee complains; or

(C) Who has been designated by a public employer to receive protected disclosures complaints regarding a violation of or noncompliance with a law, rule, or regulation.

(7) "Protected activity" means any activity constituting a protected disclosure, protected participation, or a protected objection. Disclosures, participation, and objections are protected regardless of whether the activity:

(A) is made or performed during the normal course of duties of the public employee;

(B) is made to a supervisor or to a person who participated in an activity that the public employee reasonably believed to be covered by the protected activity;

(C) reveals information that had been previously disclosed;

(D) is made in writing; or

(E) is made or performed while the public employee is off duty;

but disclosures and objections shall only constitute protected activity if made while the public employee is employed by a public employer.

(8) "Protected disclosure" means a formal or informal communication or transmission of information to a supervisor or government agency by a public employee which the public employee reasonably believes evidences:

(A) any violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(9) "Protected participation" means:

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation that concerns or relates to retaliation under this Code section;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information in an investigation, hearing, or court proceeding in connection with protected activity under this Code section.

(10) "Protected objection" means objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation.

(b) A public employer may receive and investigate protected disclosures ~~complaints or information from any public employee~~ concerning ~~the possible existence of any activity constituting fraud, waste, and abuse in~~ or relating to any state programs and operations under the jurisdiction of such public employer.

(c) Notwithstanding any other law to the contrary, such public employer shall not after receipt of a complaint or information from a public employee disclose the identity of the public employee without the written consent of such public employee, unless the public employer determines such disclosure is necessary and unavoidable during the course of the investigation. In such event, the public employee shall be notified in writing at least seven days prior to such disclosure.

(d)

(1) No public employer shall make, adopt, or enforce any policy or practice preventing a public employee from engaging in protected activity ~~disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency~~.

(2) No public employer shall retaliate against a public employee for engaging in protected activity ~~for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency, unless the disclosure was made with knowledge that the disclosure was false or with reckless disregard for its truth or falsity.~~

~~(3) No public employer shall retaliate against a public employee for objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe in in violation of or noncompliance with a law, rule, or regulation.~~

~~(4)~~(3) Paragraphs (1) and (2)~~(1), (2), and (3)~~ of this subsection shall not apply to policies or practices which implement, or to actions by public employers against employees who violate, privilege or confidentiality obligations recognized by constitutional, statutory, or common law.

(e)

(1) A public employee who has been the object of retaliation in violation of this Code section may institute a civil action in superior court for relief as set forth in paragraph (2) of this subsection within one year after discovering the retaliation or within three years after the retaliation, whichever is earlier.

(2) In any action brought pursuant to this subsection, the court may order any or all of the following relief:

(A) An injunction restraining continued violation of this Code section;

(B) Reinstatement of the employee to the same position held before the retaliation or to an equivalent position;

(C) Reinstatement of full fringe benefits and seniority rights;

(D) Compensation for lost wages, benefits, and other remuneration; and

(E) Any other compensatory damages allowable at law.

(F) A court may award reasonable attorney's fees, court costs, and expenses to a prevailing public employee.

(g)

(1) Subject to the provisions of paragraph (2), in any case under this Code section, the court shall order relief under paragraphs (e) and (f) if the public employee has demonstrated that protected activity was a contributing factor in retaliation against the public employee by the public employer, even though other factors also motivated the adverse action. The public employee may demonstrate that the protected activity was a contributing factor in the personnel action through circumstantial evidence.

(2) Relief under paragraphs (e) and (f) may not be ordered if, after a finding that protected activity was a contributing factor, the public employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of such protected activity.