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WHISTLEBLOWER RIGHTS AND PROTECTIONS:
CRITIQUING FEDERAL WHISTLEBLOWER LAWS AND
RECOMMENDING FILLING IN MISSING PIECES TO FORM
A BEAUTIFUL PATCHWORK QUILT

Joel D Hesch^{*±}

I. INTRODUCTION

Until recently, whistleblowers were viewed negatively and even with hostility, suffering labels like “snitch,” “tattle tale,” or “lowlife.”¹ Corporate culture demanded loyalty, regardless of what harm resulted. As an “at will” employee, a whistleblower who dared speak out against an employer risked not only losing a job, but forever being blackballed from the industry. Because whistleblowers had few protections, remaining silent was the norm.² Even within the ranks of government workers, whistleblowing was taboo. More than thirty years ago, a Senate Report found that “federal employees are currently afraid to bring problems to the attention of their superiors.”³

Silencing whistleblowers, however, has its own dark side, which can lead to dangerous perils and even death. For instance, in late 2000, Firestone

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1. TERANCE MIETHE, *WHISTLEBLOWING AT WORK: TOUGH CHOICES IN EXPOSING FRAUD, WASTE, AND ABUSE ON THE JOB* 11-12 (1999).

2. *Id.* at 33.

3. STAFF OF S. COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., *THE WHISTLEBLOWERS* 49 (Comm. Print 1978).

began reporting tire problems, and eventually recalled 3.5 million tires.⁴ The corporation was apparently aware of some of the problems four years earlier, but kept the lid on it.⁵ Experts believe that prior to the mass recall, more than 3,000 people were seriously injured and as many as 250 killed.⁶ If whistleblowers had been encouraged to step forward, many lives may have been spared and a crisis averted.

Despite the potentially severe consequences, some have always found the courage to step forward when the burden of knowing a wrong was just too great to carry in silence. In 1974, Karen Silkwood exposed serious safety violations, including missing plutonium, at nuclear plants.⁷ Although her action resulted in massive positive change, she suffered the ultimate consequence: death in a mysterious one-car accident en route to an interview with a *New York Times* reporter.⁸

Progress is inevitable. Attitudes towards whistleblowers are rapidly changing. It may have taken millions of Americans tasting the bitterness of financial loss from corporate fraud, but in the last decade, whistleblowers are starting to be viewed as heroes. In 2002, *Time Magazine* named three whistleblowers as “Persons of the Year.”⁹ Cynthia Cooper of WorldCom¹⁰

4. August Cole, *Firestone Recalls 3.5 Mln More Tires*, MARKETWATCH.COM (Oct. 4, 2001), <http://www.marketwatch.com/story/bridgestonefirestone-recalls-35-million-more-tires>.

5. *Chronology of Firestone/Ford Recall & Knowledge [of] Tire Defects*, FORDEXPLORERROLLOVER.COM, <http://www.fordexplorerrollover.com/history/Default.cfm>.

6. *Overview of the Recall*, FIRESTONE TIRE RECALL LEGAL INFORMATION CENTER, <http://www.firestone-tire-recall.com/pages/overview.html>.

7. See generally RICHARD RASHKE, *THE KILLING OF KAREN SILKWOOD: THE STORY BEHIND THE KERR-MCGEE PLUTONIUM CASE* (2000).

8. *Karen Silkwood – Campaigner*, BBC.CO.UK (Jan. 8, 2002), <http://www.bbc.co.uk/dna/h2g2/A634213>. Although evidence showed that her car was forced off of the road by a second vehicle, no homicide investigation was ever opened. *Id.* Documents Silkwood possessed that allegedly implicated her employer, and that were to be turned over to the reporter, have never been found. *Id.*

9. Richard Lacayo & Amanda Ripley, *Persons of the Year 2002: Cynthia Cooper, Coleen Rowley, and Sherron Watkins*, TIME MAGAZINE (Dec. 22, 2002).

10. Penelope Patsuris, *The Corporate Scandal Sheet*, FORBES.COM (Aug. 26, 2002), <http://www.forbes.com/2002/07/25/accountingtracker.html>. WorldCom racked up \$750 million in SEC fines after overstating its cash flow by \$3.8 billion. *Id.* Shareholders lost \$176 billion. *Id.* Thor Olavsrud, *Judge OKs WorldCom Settlement*, INTERNET NEWS.COM (July 7, 2003), <http://www.internetnews.com/fina-news/article.php/2232051/Judge+OKs+WorldCom+Settlement.htm>. The fraud came to light only after Cynthia Cooper blew the whistle. *Id.*

and Sherron Watkins of Enron¹¹ blew the whistle on massive accounting scandals that rocked the stock markets after shareholders lost billions. FBI Agent Coleen Rowley risked her career by exposing lapses in government intelligence leading up to 9/11.

Today, it is undeniable that the contributions made by whistleblowers have had an immense positive effect on society.¹² For instance, as of 2007, 60 percent of the Department of Justice's cases of fraud against the federal government were initiated by whistleblowers, resulting in recovery of over \$20 billion for the taxpayers.¹³ From 2001 to 2011, a number of high-profile *qui tam*¹⁴ claims within the pharmaceutical industry recovered \$12 billion for fraudulent marketing and misbranding practices.¹⁵

Whistleblowing has rapidly spread to all professions and categories of harm. For instance, not only mankind, but the earth has benefitted from whistleblowing. The beauty of the Arctic National Wildlife Refuge remains intact thanks to whistleblower Charles Hamel, who ended the campaign for oil drilling in the refuge after exposing internal documents linking numerous oil companies to illegal environmental dumping in the area.¹⁶

In recognition of the valuable assistance of whistleblowers, new laws have shielded whistleblowers from many forms of retaliation and discrimination.

11. Patsuris, *supra* note 10. Prior to filing for bankruptcy in 2001, Enron was the world's largest trader of gas, electricity, water, and other commodities. After numerous illegal and fraudulent accounting, securities, and trading violations totaling over \$1 billion were revealed, Enron's stock plummeted from \$100 per share to near pennies. The fraud came to light when, in 2001, Sherron Watkins blew the whistle by exposing the highly irregular accounting methods used to hide the true state of the corporation's finances.

12. See *Winters v. Hous. Chronicle Publ'g Co.*, 795 S.W.2d 723, 727-33 (Tex. 1990).

13. Joel D. Hesch, *Understanding the 'Original Source Exception' to the False Claims Act's 'Public Disclosure Bar' in Light of the Supreme Court's Ruling in Rockwell v. United States*, 7 DEPAUL BUS. & COMM. L.J. 1, 2 n.6 (2008).

14. The term "*qui tam*" is "short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000).

15. Steven Fox, *Report Details Fraud and Abuse by Pharmaceutical Companies*, MEDSCAPE MEDICAL NEWS (Sept. 12, 2011), <http://www.medscape.com/viewarticle/749508>; see also Aaron S. Kesselheim, David M. Studdert & Michelle M. Mello, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362 NEW ENG. J. MED. 1832 (2010).

16. Allanna Sullivan, *Arctic Dogfight, Battle Over Oil Hunt In a Wildlife Refuge In Alaska Gets Nasty*, WALL ST. J. (Nov. 1, 1991); see also Stephen Kohn & William Sanjour, *Environmental Whistleblower: An Endangered Species*, ENVTL. RES. FOUND. (Feb. 1994), <http://home.comcast.net/~jurason/main/Endangered.htm>.

Altogether, over thirty federal statutes provide a loose patchwork of federal whistleblower protections or remedies. A medley of states¹⁷ recognize their own common law and statutory protections.¹⁸ An array of protection has been enacted based primarily on types of misconduct. Essentially, new protections spring up in reaction to media reports of how certain whistleblowers suffered egregious harms for standing up and doing the right thing. Because these laws apply to such a broad spectrum of conduct and have been adopted in a piecemeal fashion over several years, no steady predictable rules determine (1) who is protected, (2) what constitutes protected activity, (3) the length of the statute of limitations, (4) the burden of proof, (5) what legal forum can hear a claim, and (6) the scope of remedies. Whistleblower protections in the environmental area, for example, vary vastly from those in the financial arena, which in turn are drastically different from protections offered to government employees.

At first blush, the existing patchwork framework would appear to demand a single, unifying umbrella federal whistleblowing law. Nevertheless, because of the unique issues facing each industry or area of law, valid reasons remain for requiring different reporting requirements and providing different protections. Although a model whistleblower statute might simplify the understanding of rights and procedures, one size does not fit all. To condense all categories into one would throw out the baby with the bathwater as many particularized and necessary requirements would be shed simply for the sake of uniformity. Nevertheless, certain areas within each category can and should be improved.

This Article examines the current federal laws that provide protection to whistleblowers and proposes changes to strengthen them. After grouping the assortment of federal whistleblower statutes into six categories, this Article describes for each category who and what is protected and the remedies afforded to whistleblowers. At the end of each category, a recommendation section critically analyzes and evaluates existing laws and proposes ways to strengthen and make them more comprehensive, while still maintaining flexibility to match the particularized needs of each industry.

17. See generally James F. Barger et al., *States, Statutes, and Fraud: An Empirical Survey of Emerging State False Claims Acts*, 80 TUL. L. REV. 465 (2005).

18. Whistleblowing includes reporting wrongdoing internally to the organization or externally to the media or government regulators. This Article explores reporting of wrongdoing to federal government regulators.

Although still incomplete, the patchwork of federal whistleblower laws is beginning to resemble a beautiful quilt. As more attention is paid to the value of whistleblowing, these laws will continue to move in the right direction of not only enlisting whistleblowers to right wrongs, but to promote and encourage a culture that values human welfare over profits gained at the secret expense of human health, environmental stewardship, government waste, unfair discrimination, or fairness in the stock market.

II. CATEGORIES OF FEDERAL WHISTLEBLOWER PROTECTION STATUTES

The thirty-plus federal whistleblower statutes can be fairly grouped into six categories: (1) reporting fraud against the government; (2) federal employees reporting violations of laws, waste or mismanagement; (3) reporting discrimination; (4) reporting violations of environmental laws; (5) reporting conduct adverse to health; and (6) reporting violations of securities law.

Analyzing federal whistleblower protections by categories provides some clarity amidst the existing hodgepodge. It also provides a framework for analyzing the strengths and weaknesses of particular whistleblower protections and fosters the goal of proposing positive changes. Within each category, the history of the relevant federal laws will be discussed, including protections and remedies. At the end of each category are recommendations for improvements, which naturally flow from the systematic approach of comparing and contrasting laws within each category.

A. *Category I: Statute Protecting Whistleblowers Who Report Misconduct That Defrauds the Government*

“Great deeds are usually wrought at great risks.” – Herodotus

As much as two hundred billion dollars of taxpayer funds are likely lost annually to fraud against the federal government.¹⁹ The False Claims Act (FCA)²⁰ is the government’s primary enforcement tool in combating

19. Hesch, *supra* note 13, at 1.

20. 31 U.S.C. §§ 3729-3733 (2006). The FCA provides for triple damages when an entity submits false claims for payment of federal funds. The penalty portion of the FCA, 31 U.S.C. § 3729(a), is beyond the scope of this Article, which addresses whistleblower protections.

fraud.²¹ Even though the pre-1986 FCA permitted the Government to recover double damages, it still failed to significantly deter fraud. Therefore, in 1986, Congress made a bold move to actively court whistleblowers by adding two new FCA provisions. The first strengthened the *qui tam* provisions that permit private parties²² to file a lawsuit to redress fraud against the government and to share in the recovery.²³ The second contained anti-retaliation provisions protecting whistleblowers who report fraud against the federal government.²⁴ These provisions are proving very effective. Today, over 70 percent of the government's civil fraud recoveries are from *qui tam* cases brought by whistleblowers, resulting in nearly \$12 billion during the ten years from 1996 to 2006.²⁵

The 1986 anti-retaliation provision stated:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section . . . shall be entitled to all relief necessary to make the employee whole.²⁶

Because some courts took a narrow view of who is protected, in 2009, Congress removed the specific limiting reference to "the employer" in order to protect both current and former employees.²⁷ At the same time, it added

21. Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar"*, 1 LIBERTY U. L. REV. 111, 112 (2006).

22. A whistleblower under the FCA is known as a "relator" because they relate the fraud to the government. See *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 225 n.7 (1st Cir. 2004) ("A 'relator' is '[a] party in interest who is permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official.") (quoting BLACK'S LAW DICTIONARY 1289 (6th ed. 1990)).

23. 31 U.S.C. §§ 3730- 3732. The *qui tam* reward portion of the FCA is beyond the scope of this Article. This Article addresses whistleblower rights pertaining to retaliation or discharge.

24. 31 U.S.C. § 3730(h).

25. Hesch, *supra* note 21, at 112 & n.8.

26. 31 U.S.C. § 3730(h) (1986).

27. Fraud Enforcement & Recovery Act § 4, Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624-25 (codified at 31 U.S.C. § 3730(h) (2009)).

the terms “contractor” and “agent” to broaden the reach of who is protected.²⁸

The statute now reads:

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.²⁹

1. Who is Protected

The 2009 FCA anti-retaliation provision extends to any employee, agent, or independent contractor—broadly covering all pertinent categories of whistleblowers—of an entity that the whistleblower reasonably believes might be submitting false claims to the federal government.³⁰

The FCA does not directly specify whether an employer is liable for actions occurring after discharge, such as blacklisting the employee. Because the FCA uses the term “employee” and speaks of discrimination “in the terms and conditions of employment,” it is possible that courts may read the FCA narrowly and exclude post-employment misconduct. However, this Article proposes that a proper reading of the “or in any other manner” language would reach actions by a *former* employer.³¹ Otherwise, an employer would be immune from liability for retaliation and blacklisting occurring the moment after firing an employee. Accordingly, the FCA should be read to provide long-term protection to employees, including adverse conduct occurring after termination that might carry forward into the whistleblower’s next employment. For instance, if an employer causes a subsequent employer to discriminate against the whistleblower because of engaging in a protected activity while an employee, the former employer

28. 31 U.S.C. § 3730(h)(1).

29. *Id.*

30. *Id.*

31. For ease of discussion, in this section the term employee includes contractor or agent.

should be liable for such misconduct in order to make the employee whole.³²

2. What is Covered

As an initial matter, the FCA protects against all types of retaliation. The broad language of the statute covers those who are “*discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against.*”³³ To recover for retaliation, the courts generally require that a whistleblower prove three things: (1) that he engaged in activity protected by the FCA, (2) his employer knew he was engaged in protected activity, and (3) he was retaliated against because of it.³⁴

a. Engaged in a Protected Activity

The FCA anti-retaliation provision requires proof that the whistleblower was engaged in a protected activity, defined as “in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.”³⁵ In a broad sense, the phrase “in furtherance of” requires some motivation on the part of the employee to stop, prevent, fix, or correct potential misconduct that might violate the FCA.

Prior to the 2009 amendments, the “(h)” clause did not include “or other efforts to stop 1 or more violations of this subchapter.”³⁶ Thus, some courts incorrectly held that the employee must tell the employer he planned to file a *qui tam* action under the FCA.³⁷ Other courts, however, had more correctly interpreted protected activity broadly to cover not only the filing of a *qui tam* suit, but the process of investigating or determining whether or fraud occurred.³⁸ This is the only logical reading of the statute. Otherwise, an employee would not be protected until he had proof of fraud, hired an attorney, and was about to file a *qui tam* suit. In any event, after the 2009

32. United States *ex rel.* Kent v. Aiello, 836 F. Supp. 720, 724-26 (E.D. Cal. 1993) (allowing suit against former employer for causing a subsequent employer to retaliate).

33. 31 U.S.C. § 3730(h)(1).

34. Robertson v. Bell Helicopter, 32 F.2d 948, 951-52 (5th Cir. 1994).

35. 31 U.S.C. § 3730(h)(1).

36. Compare 31 U.S.C. § 3730(h)(1) (2009), with 31 U.S.C. § 3730(h) (1986).

37. See Robertson, 32 F.2d 948; United States *ex rel.* McKenzie v. BellSouth Telecomms., Inc., 123 F.3d 935, 944 (6th Cir. 1997) (treating the notice element as giving the employer “reason to believe that the employee was contemplating a *qui tam* action”) (quoting Mikes v. Strauss, 889 F. Supp. 746, 753 (S.D.N.Y. 1995)).

38. United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 739-40 (D.C. Cir. 1998).

amendments, it is clear that a whistleblower is protected if he reasonably suspects fraud and investigates the possible fraud, even if it turns out not to be the case.³⁹ The Supreme Court dispelled any doubt by stating that “[a] retaliation plaintiff . . . need prove only that the defendant retaliated against him for engaging in [protected activities] . . . even if the target of an investigation or action to be filed was innocent.”⁴⁰ This protection includes the process of investigating or determining whether fraud occurred.⁴¹ The employee need not even be aware of the FCA at the time, and he never needs to ultimately file a *qui tam* suit.⁴²

In short, a whistleblower is protected if he has a good faith⁴³ appreciation that he is investigating or raising concerns regarding whether his employer is violating the FCA. This protection includes trying to stop, prevent, fix, or correct potential misconduct that might constitute fraud against the government or a violation of the FCA. Again, the employee does not need to be correct that the misconduct violated the FCA. It is sufficient that he was retaliated against because he was engaged in such a protected activity.

b. Employer “knew” the Employee was Engaged in a Protected Activity

The second element requires that the employer *knew* that the employee was engaged in a protected activity. It is not sufficient that the employee secretly investigates the company without the employer ever finding out prior to taking some act, such as terminating the employee. It is axiomatic that unless an employer is aware that its employee is engaging in a protected activity, the employer cannot have discriminated or retaliated because of an improper reason.⁴⁴ Notice is satisfied, however, when the employer has

39. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

40. *Graham Cnty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 416 & n.1 (2005). Of course, the 2009 amendment adding “or other efforts to stop 1 or more violations of this subchapter” further puts that issue to bed.

41. *Yesudian*, 153 F.3d at 739-40.

42. *See, e.g., Dookeran v. Mercy Hosp. of Pittsburgh*, 281 F.3d 105, 108 (3d Cir. 2002).

43. The FCA’s legislative history confirms that good faith is all that is required. “[T]he employer would not have to be proven in violation of the False Claims Act,” but “the actions of the employee must result from a ‘good faith’ belief that violations exist.” S. REP. NO. 345, 99th Cong., 2d Sess. 32 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300. Some courts have added an objective component that “a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government.” *Fanslow v. Chi. Mfg. Ctr., Inc.*, 384 F.3d 469, 480 (7th Cir. 2004).

44. *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996).

knowledge that the employee was engaged in protected activities, such as telling a supervisor he is concerned that the costs are not billable or that the product does not conform to specification.⁴⁵ The employee need not even actually communicate directly to his supervisors if the employer has discovered it. The key to this element is showing that the employer had knowledge.

c. Retaliation “because of” the Employee’s Protected Activity

The third element requires the employee to show that the employer retaliated because the employee was engaged in protected activity. It is based on the FCA language “*because of lawful acts done*.”⁴⁶ The term “because of” requires some motivation by the employer. This means the employee must demonstrate that his discharge “was motivated, *at least in part*, by the protected conduct.”⁴⁷ The legislative history suggests a method for establishing the employer’s motive:

[T]he ‘because’ standard has developed into a two-pronged approach. One, the whistleblower must show the employer had knowledge the employee engaged in ‘protected activity’ and, two, the retaliation was motivated, at least in part, by the employee’s engaging in protected activity. Once these elements have been satisfied, the burden of proof shifts to the employer to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity.⁴⁸

45. Prior to 2009, some courts took an overly narrow and incorrect reading of the statute and apparently required that the employer be put on notice that the employee was about to file a *qui tam* suit under the FCA. For instance, the Sixth Circuit treated the notice element as leading the employer to believe the employee was contemplating a *qui tam* action.” *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 944 (6th Cir. 1997). Nevertheless, as discussed under protected activity, there is no requirement that the employee even knew about the FCA, let alone was preparing to file a *qui tam*. In any event, after 2009, adding *or other efforts to stop 1 or more violations of this subchapter* closes off any incorrect requirement of notice that a *qui tam* was about to be filed.

46. 31 U.S.C. § 3730(h)(1) (2009).

47. *Brandon v. Anesthesia & Pain Mgmt. Assoc., Ltd.*, 277 F.3d 936, 944 (7th Cir. 2002) (emphasis added).

48. S. REP. NO. 345, 99th Cong., 2d Sess. 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300. Many courts have adopted this approach. *See, e.g., United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1260 (D.C. Cir. 2004); *see also* *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (allowing a mixed motive defense in employment cases following a burden shifting approach, which is similar to that in the FCA legislative history).

The employee may prove a causal connection either by direct evidence of retaliatory intent or by indirect evidence.⁴⁹ When relying on indirect evidence to show a causal link, the employee “merely has to prove that the protected activity and the negative employment action are not completely unrelated.”⁵⁰ It is as simple as establishing that the employer was actually aware of the protected activity at the time the employer took adverse action.⁵¹ Then, “the burden of proof shifts to the employer to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity.”⁵² The employer must articulate a legitimate, nonretaliatory reason for the employment decision that is clear, reasonably specific, and worthy of credence.⁵³ At this point, the ultimate burden rests with the employee to show that he was a victim of discrimination, such as “persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”⁵⁴ The employee can also succeed by showing that the employer’s proffered reason for its employment decision is a pretext for retaliation.⁵⁵

3. Remedies

The relief portion of the anti-retaliation section of the FCA provides a good model for all other federal statutes protecting whistleblowers. It provides,

(2) **Relief.**--Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable

49. *Fellhoelter v. Dep’t of Agric.*, 568 F.3d 965, 971 (Fed. Cir. 2009) (“Because direct evidence of a deciding official’s retaliatory motive is rare, petitioners are entitled to rely on circumstantial evidence giving rise to an inference of impermissible intent.”).

50. *Holifield v. Reno*, 115 F.3d 1555, 1566 (11th Cir. 1997).

51. *Id.*

52. *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 n.4 (D.C. Cir. 1998).

53. *Mann v. Olsten Certified Healthcare Corp.*, 49 F. Supp. 2d 1307, 1317 (M.D. Ala.1999) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

54. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

55. *McDonnell Douglas Corp.*, 411 U.S. at 804.

attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.⁵⁶

Significantly, the FCA grants the employee the right to bring this claim directly in federal court and attorney fees.⁵⁷ There is no requirement of notifying any entity or obtaining any prior approvals before bringing suit. The FCA also provides a wide range of other remedies designed to make the whistleblower whole, which the Supreme Court has approved, including "reinstatement, two times the amount of backpay plus interest, special damages, litigation costs, and attorney's fees."⁵⁸ The length of time to bring the retaliation action is also appropriately set at 3 years.⁵⁹

4. Recommendations

Overall, this statute is a model worthy of following. The statute correctly states that the relief should operate to make the employee whole. Nevertheless, it does not specifically address retaliation occurring or resulting during "future" employment. One of the biggest reasons why more people do not become whistleblowers is the fear that they will be blackballed from the industry. It is the next job they are concerned with. Therefore, this Article proposes that Congress follow the lead of the New York state FCA that proscribes blackballing not only by the initial employer, but carrying forward liability into new employment, including those who retaliate against that employee in future employment.

Below is the language of the New York statute, which Congress should adopt under the federal FCA:

Any current or former employee, contractor, or agent of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or a prospective employer, because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action brought under this article or other efforts to stop

56. 31 U.S.C. § 3730(h)(2) (2009).

57. *Id.*

58. *Graham Cnty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 412 (2005) (citing 31 U.S.C. § 3730(h)).

59. 31 U.S.C. § 3730(h)(3).

one or more violations of this article, shall be entitled to all relief necessary to make the employee, contractor or agent whole.⁶⁰

B. Category II: Statute Protecting Federal Employee Whistleblowers Who Report Violations of Laws, Gross Mismanagement, Gross Waste of Funds, Abuse of Authority, or a Substantial Danger to the Public

“There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government.” – Benjamin Franklin

The United States government is continuing to employ an increasingly sizable portion of the workforce in the nation. In 1978, over 2.5 million people were employed by the federal government in the executive branch.⁶¹ Unlike many other employment sectors within the nation, however, whistleblower protections for government employees were non-existent. Reform began in late 1978 with the enactment of the Civil Service Reform Act of 1978 (CRSA).⁶² The CRSA was put into place to shield federal employees who disclosed various forms of misconduct in the workplace. Despite the good-natured intention of the CRSA, there were fundamental flaws from the onset. The lack of formal investigations and continued disclosure of whistleblower identities caused the CRSA to be virtually ineffective. These issues prompted Congress to go back to the drawing board, and in 1989 the Whistleblower Protection Act (WPA)⁶³ was enacted. With this ground-breaking law, Congress strengthened and improved protection and rights of federal employees by preventing unlawful reprisals and eliminating wrongdoing within the government by outlawing adverse employment actions against employees who report prohibited practices to the proper authorities.⁶⁴ The statutory construction of the WPA is quite distinctive compared to its counterpart whistleblower laws discussed in this Article. Unlike the vast majority of whistleblower protections, which are

60. N.Y. STATE FIN. LAW § 191(McKinney 2010).

61. Ed O’Keefe, *How Many Federal Workers Are There?* (Sept. 30, 2010), http://voices.washingtonpost.com/federal-eye/2010/09/how_many_federal_workers_are_t.html.

62. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified at 5 U.S.C. § 1101 (2006)).

63. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16. The WPA is codified through numerous sections of Chapter 5 of the United States Code, Government Organizations and Employees. It was strengthened in 1994.

64. 5 U.S.C. § 1201.

codified as provisions within much broader ranges of topics, the WPA is devoted entirely to whistleblower rights, protections, and remedies. It is a comprehensive whistleblower protection statute for most federal employees.

1. Who is Protected

The WPA extends its rights, remedies, and protections to applicants, and current and former employees of executive branch positions that fall under competitive service, career appointment, expected service, or Senior Executive Service.⁶⁵ Although this covers most of the 2.5 million federal workers, the WPA exempts the Postal Service, Postal Rate Commission, Government Accountability Office, and the National Imagery and Mapping Agency.⁶⁶ It also exempts positions that are confidential, policy-determining, policy-making, or policy-advocating in nature.⁶⁷ In addition, the President may add positions to this exempt list.⁶⁸ Similarly, the WPA exempts all employees working in the Federal security and intelligence sector, mainly the Federal Bureau of Investigation, Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, and other agencies conducting foreign intelligence or counter-intelligence.⁶⁹ When exemption is at issue, the burden of proof is on the agency to demonstrate that either Congress has expressly stated or the President has determined that the position of the whistleblower is not entitled to the WPA's protections.⁷⁰

2. What is Covered

It is unlawful to take retaliatory personnel action against a protected federal employee because that employee discloses any information⁷¹ they "reasonably believe" to be evidence of a (i) violation of any law, rule, regulation; (ii) gross mismanagement; (iii) gross waste of funds; (iv) an

65. *Id.* § 2302(a)(2)(B) (2008). The military services are not included. *Id.*

66. *Id.* § 2302(a)(2)(C).

67. *Id.* § 2302(a)(2)(B)(i).

68. *Id.* § 2302(a)(2)(B)(ii).

69. *Id.* § 2302(a)(2)(C)(ii).

70. *See Czarkowski v. Merit Sys. Prot. Bd.*, 390 F.3d 1347, 1350 (Fed. Cir. 2004).

71. If these disclosures contain confidential information, they are only protected if made to members of Congress or to the appropriate department within the agency the whistleblower is employed. S. REP. NO. 100-413, at 12 (1988). Additional protected activities include testifying or assisting with any investigation against the agency; refusing to obey an unlawful order; or exercising any administrative afforded right, such as filing a complaint, appeal, or grievance. 5 U.S.C. § 2302(b)(9)(A)-(D).

abuse of authority; or (v) a substantial and specific danger to public health or safety, as long as the public disclosure is not barred by Executive Order.⁷²

In order for the disclosure to be protected, the whistleblower must possess a reasonable belief that the information they are conveying is both accurate and falls within one of the five above-listed areas of protected activities. This simply requires the federal employee to have a “good-faith” belief. In fact, the accuracy of the disclosures is irrelevant as long as the whistleblower meets the reasonable belief standard.⁷³

The WPA is violated when adverse action occurs “because of” engaging in a protected activity. It is not necessary to prove specific intent. All that is needed is to show that the action was taken because the employee disclosed information. The type of adverse action is broad, and includes anytime the federal employer either takes or fails to take any personnel action.⁷⁴ Specifically, the WPA addresses action relating to appointment, promotion, disciplinary or corrective action, transfer or assignment, restoration, reemployment, performance evaluation, decisions concerning any benefits (including but not limited to pay, travel, education), psychiatric testing, and the residual catch-all, any significant changes to duties, responsibility, or working conditions.⁷⁵

3. Remedies

The WPA provides for several remedies to be awarded to a prevailing whistleblower. The objective of these remedies is to place the whistleblower as near as possible to the position they would be in had the unlawful retaliation not occurred.⁷⁶ Common remedies include back pay, reinstatement of related benefits, travel expenses, attorney’s fees, and other reasonable and foreseeable consequential damages.⁷⁷

The WPA spells out four ways or fora where the whistleblower can seek redress for a violation: (1) follow the agency’s established grievance process;⁷⁸(2) ask the Office of Special Counsel to institute an action;⁷⁹ (3)

72. 5 U.S.C. § 2302(b)(8)(A)(i), (ii).

73. *Id.*

74. *Id.* § 2302(a)(2)(A)(i)-(xi).

75. *Id.*

76. *Id.* § 1221(g)(1)(A)(i), (ii).

77. *Id.*; 5 U.S.C. § 1221(g)(1)(B).

78. 5 U.S.C. § 1221.

79. *Id.* § 1214(a)(3). The employee petitions the Office of Special Counsel to take “corrective action.”

appeal an adverse action to the Merit System Protection Board (MSPB), known as a “Chapter 77” appeal;⁸⁰ or (4) bring an individually maintained right of action before the MSPB (known as an individual right of action, or IRA).⁸¹ An employee may appeal a final decision by the Board to the United States Court of Appeals for the Federal Circuit.⁸²

Although there are four mechanisms for a whistleblower to contest an adverse action, in reality, there are very few options. Before any of these are available, the employee must first exhaust all administrative remedies in addressing adverse action.⁸³ In other words, the employee must scrupulously follow the procedures of the agency for internally contesting the action.

In addition, if the agency has an established grievance process in place due to a negotiated and agreed upon collective bargaining agreement (CBA) process, the terms of the CBA govern, period.⁸⁴ In short, if there is a CBA, then that is the only available process for the employee, and he must use that process. At the conclusion of the process, the whistleblower may still request that the MSPB review the decision.⁸⁵

Next, assuming the employee exhausted the internal agency process and there is no CBA, all roads must begin with the employee filing a complaint with the United States Office of Special Counsel (OSC). The OSC is an independent federal investigative agency that was created by the WPA. Within 15 days of receiving the complaint, the OSC will make a determination on whether there is a substantial likelihood that illegal retaliation took place. If so, it will require the head of the appropriate agency to conduct an internal investigation and report back to OSC within

80. *Id.* § 7701(a). Chapter 77 appeals are the most common method by which agency-employee disputes reach the MSPB. Typically, the federal worker, having exhausted intra-agency administrative procedures, requests review of the resulting disciplinary action by the Board.

81. *Id.* § 1221(a).

82. *Id.* § 7703(b)(1).

83. *Id.* § 1213(c). See J. Nelson Wilkinson, Note, *No Shelter: How the Federal Circuit Misinterpreted the Whistleblower Protection Act by Excluding De Minimis Disclosures*, 16 FED. CIR. B.J. 481, 485 n.37 (2007) (“The petition for review is not an appeal as a matter of right, and must meet certain criteria: the losing party must introduce previously unavailable evidence, or allege that the administrative law judge misinterpreted the relevant statute.”) (citing 5 C.F.R. § 1201.115(d) (2006)).

84. This is common with federal police forces and some of the other unions.

85. 5 U.S.C. § 7121(d).

60 days on the course of action the agency decided to take.⁸⁶ After receiving the agency's report, the OSC will review and determine whether the findings are reasonable.⁸⁷ If the reports appear reasonable and meet the necessary requirements, OSC will pass them on to the President and Congress for review.⁸⁸ If illegality is found, the OSC has the power to seek corrective disciplinary action against the guilty parties, usually in the form of an injunction, in front of the MSPB.⁸⁹

Thus, the process for asking OSC to institute an action occurs by taking the required first step of filing a complaint with the OSC. The OSC's decision dictates the next available process. If OSC does not provide satisfaction,⁹⁰ the employee can appeal the adverse action to the MSPB, unless the adverse action was a suspension of 14 days or less.⁹¹ Under such appeal, the employee has a right to a hearing, a transcript of the hearing, and to be represented by counsel or other representative.⁹² Of course, the appeal must be processed in accordance with the regulations prescribed by the Board.⁹³

The WPA also provides an opportunity for whistleblowers to seek an individual right of action, but only under very limited circumstances. If the OSC does not finish the process within 120 days after filing a complaint, the employee may directly petition the MSPB to review their case, which is then reviewed by an Administrative Law Judge.⁹⁴

4. Recommendations

The procedures and processes under the WPA are cumbersome. It provides very little choice to the federal employee and does not allow outside scrutiny. As whistleblowing is becoming a more acceptable and necessary tool for combating waste of precious federal funds, Congress is

86. *Id.* § 1213(c)(1).

87. *Id.* § 1213(e)(2)(A).

88. *Id.* § 1213(e)(3).

89. *Id.* § 1214(b)(1)(A)(i).

90. Assuming the employee gets a favorable determination by the OSC and the agency does not follow the corrective action within a reasonable amount of time, the OSC may petition the MSPB to do so. *Id.* § 1214(b)(2)(C).

91. *Synan v. Merit Sys. Prot. Bd.*, 765 F.2d 1099, 1100 (Fed. Cir. 1985).

92. 5 U.S.C. § 7701(a)(1)-(2).

93. *Id.* § 7701(a).

94. *Id.* § 1221(a); *see also id.* § 1214(a)(3); 5 U.S.C. § 7701(b). If they choose to do so, the MSPB may order an administrative hearing and issue a binding decision on the matter.

waking up to the need to overhaul the WPA to provide increased rights and protections, as well as to overhaul the procedures.

In 2009, members of Congress proposed additional amendments, referred to as the Whistleblower Protection Enhancement Act (WPEA).⁹⁵ The WPEA proposes colossal reform to the rights, remedies, and procedures of the WPA, nearly all heavily favoring potential whistleblowers. If enacted, the WPEA would transform federal employee whistleblower protection.

The WPEA proposed modifications of the WPA that would expand the rights and remedies afforded to government whistleblowers, while superseding many of the current legislative, judicial, and procedural requirements. These alterations can be broken down into six categories: (a) Expansion of Protected Parties; (b) Expansion of Protected Activities; (c) Expansions of What Acts on the Part of the Employer Constitute Unlawful Retaliation; (d) Legal and Procedural Changes; (e) Expansion of Available Remedies; and (f) Adjustment of Authority. The potential changes are discussed below, with a recommendation provided at the end.

a. Expansion of Protected Parties

A significant and much needed amendment to the WPA consists of terminating the requirement of the WPA that offers protections only to the first individual to come forward and report alleged misconduct. With this proposal, individuals who report previously disclosed information also will be covered as a protected party.⁹⁶ Often, it takes corroboration or multiple voices for needed change to occur.

In addition, the whistleblower's motive for coming forward and making a disclosure of alleged unlawful activity should not bar them from being a protected party.⁹⁷ For instance, if there is gross waste, then it should be addressed on its merit and the allegation not curtailed if the employee has mixed motives for stepping forward.

95. The Whistleblower Protection Enhancement Act of 2009 was initially introduced on February 3, 2009 by Senator Daniel K. Akaka (HI). S. 372, 111th Cong. (2009) (as introduced Feb. 3, 2009). After nearly a year of committee substitutes and amendments, the bill was passed by the Senate on December 10, 2010, and the House on December 22, 2010. The House approved the bill minus some of the national security provisions, which effectively sent the bill back to the Senate. Whistleblower Protection Enhancement Act of 2009, H.R. 1507, 111th Cong. (2009) (as introduced Mar. 12, 2009). As of May 2011, the bill is sitting on the Senate floor awaiting a vote on the minor amendments made by the House.

96. S. 372, 111th Cong. § 101(C) (2009).

97. *Id.*

The proposals also extend nearly identical rights and protections included in the WPA to employees of federal government intelligence agencies, notably the CIA and NSA.⁹⁸ Due to the sensitivity and discretion of intelligence agencies, they will not be directly subject to the WPA. Instead, each intelligence agency will be mandated to enforce whistleblowing rights and protections tailored specifically to their intelligence sector. They must mirror the WPA to the extent possible.⁹⁹ Certainly, granting protection to federal employees relating to secret or confidential information is warranted, provided that secret or sensitive information is not publicly disseminated.¹⁰⁰

b. Expansion of Protected Activities

If the WPEA were to be enacted, the United States Supreme Court decision in *Garcetti v. Ceballos*, holding that federal government employees do not enjoy a First Amendment right of free speech while carrying out the duties of their job, would be largely over-ruled.¹⁰¹ Rightfully, employees' speech would be protected if a disclosure of alleged misconduct is made during their normal course of duties as an employee.¹⁰²

The WPEA would also properly expand protection to other forms of disclosures, including: disclosures not made in writing, disclosures made while whistleblower is off-duty, and disclosures made to a party who participated in the activity the whistleblower reasonably believed to be a gross waste of funds, abuse of authority, or a substantial risk to public

98. 5 U.S.C. § 2305. The FBI is not included. Whistleblower rights would now shield Transportation Security Administration employees who were not previously covered. S. 372, 111th Cong. § 109 (2009).

99. S. 372, 111 Cong. § 20(a)-(c) (2009).

100. The proposed bills also include language that the Homeland Security Act of 2002 could not be cited to prevent government employees from disclosing a violation of law, mismanagement of funds, abuse of authority, or substantial danger to public health or safety. S. 372, 111th Cong. § 111 (2009). Rights and protections of government contractors would expand with the enactment of the WPEA. Specifically, government contractors would now be protected when making classified whistleblowing disclosures to U.S. Congress. S. 372 §§ 112, 115, 119. In addition, the WPEA would prevent the President from retroactively imposing a national security exemption to a whistleblower disclosure after the employee files a complaint. S. 372, 111th Cong. § 105. Currently, if national security can be compromised, then the President can exercise a discretionary power and silence the disclosure of the whistleblower after the complaint is filed. 5 U.S.C. § 2302(a)(2)(B)(ii).

101. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

102. S. 372, 111th Cong. §§ 101, 102 (2009).

health and safety.¹⁰³ It also clarifies that timing is not as important as the basis of the information such that a disclosure shall not be excluded as a protected activity due to the amount of time which has passed since the alleged unlawful action took place.¹⁰⁴

c. Expansions of What Acts on Part of the Employer Constitute Unlawful Retaliation

Arguably, one of the most significant additions of the WPEA involves personnel decisions over an employee's security clearance and access to confidential information. The WPEA would outlaw executive and intelligence agencies from taking or threatening to take an employee's security clearance because that employee has disclosed information they reasonably believe to be in violation of the WPA.¹⁰⁵ The appellate review of security clearance determinations will be subject to a specific process for intelligence agencies.¹⁰⁶

d. Legal and Procedural Changes

Currently, all WPA decision appeals must be filed in a Federal Circuit Court of Appeals in the jurisdiction in which the illegal reprisal took place.¹⁰⁷ If the WPEA is enacted, a five-year experimental period would be instituted, effectively expanding the jurisdiction of the WPA appeals to any court of appeals circuit.¹⁰⁸ The primary rationale for this temporary experiment is that only three whistleblowing plaintiffs have succeeded in appeals decided by the Federal Courts of Appeals since 1994.¹⁰⁹

Another needed change is the proposal to require that a whistleblower provide only "substantial evidence" to overcome the presumption that a federal employee has acted improperly and would establish that a whistleblower must have the objectively reasonable belief that his disclosure is protected in order to qualify for WPA protection.¹¹⁰ Currently, if the government provides evidence that the employee acted improperly, then

103. *Id.*

104. S. 372, 111th Cong. § 101.

105. S. 372, 111th Cong. § 202.

106. *Id.*

107. S. 372, 111th Cong. § 108 (2009).

108. *Id.*

109. 155 Cong. Rec. S14320-03, S1435 (daily ed. Feb. 3, 2009) (statement of Sen. Daniel Akaka).

110. H.R. 1507, 111th Cong. § 4 (2009); S. 372, 111th Cong. § 103(d) (2009).

the burden shifts to the employee to present “irrefragable proof.”¹¹¹ Congress should replace this standard in order not to have a bar set so high that virtually no one could meet it.

The proposal furnishes protected employees access to federal court jury trials for major disciplinary actions taken against them, primarily termination from federal employment.¹¹² Currently, federal employee whistleblowers have no right to a trial before a federal judge or before a jury.¹¹³ The House bill proposed granting whistleblowing employees the right to a trial by jury by adding a new subsection, subsection k, to section 1221.¹¹⁴ Because the WPA covers such a broad range of adverse actions, there should also be a limit to a right to a jury trial only if there is a significant adverse action against the employee, such as termination from federal employment. The looming threat of an employer being threatened with an expensive jury trial in federal court over very minor actions would backfire. First, it could cost the agency significantly more in litigation costs than the waste of federal funds the employee was attempting to remedy. Second, having no limit might over-empower a chronic complainer who constantly raises *de minimis* complaints.

Congress also needs to be careful not to take things too far by eliminating the *de minimis* exception set out in *Frederick v. Dep’t of Justice*.¹¹⁵ The WPA should not make it unduly difficult to take necessary action against poor-performing federal government employees. It is hard enough already to remove federal employees that believe they have been appointed for life, regardless of whether they work hard. It is not hard to envision poor-performing employees disciplined for legitimate, employment-related deficiencies to claim she previously “disclosed” that her boss used the copy machine for personal use. These are not the types of disputes that the WPA should cover, and the *de minimis* exception retains some important gate-keeping functions.

111. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (citing *Alaska Airlines v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993)).

112. S. 372, 111th Cong. § 117 (2009).

113. See 5 U.S.C. § 7701(b) (2006).

114. Under the House proposal, an employee who seeks corrective action from the MSPB may bring an action in federal district court for a trial by jury under two circumstances: (1) if the MSPB does not take final action on the claim within 180 days or (2) within 90 days of a final action by the MSPB. H.R. 1507, 111th Cong. § 9(a) (2009).

115. *Frederick v. Dep’t of Justice*, 73 F.3d 349, 353 (Fed. Cir. 1996).

e. Expansion of Available Remedies

Another good aspect of the proposed bill entitles the whistleblower to various injunctive relief and foreseeable consequential and compensatory damages, including interest.¹¹⁶ Compensatory damages, however, would be capped at \$300,000.¹¹⁷ Capping damages is a slippery slope. If the true goal is to make an employee whole, there should not be a cap.

f. Adjustment of Authority

The proposed WPEA requires all non-intelligence executive agencies to designate a Whistleblower Protection Ombudsman.¹¹⁸ This position would be charged with educating agency employees on the rights, protections, and remedies available when one files a whistleblowing claim. The designation of the ombudsman will only last five years after the date of the enactment of the WPEA.¹¹⁹ This position is created to facilitate a smooth transition for each agency adjusting to the modifications of the WPEA.

Conclusion

The WPEA would plug many of the holes where the WPA does not protect certain types or forms of disclosures and put an end to many of the judicially-created “loop-holes” of the WPA. Changes are needed to protect federal employee whistleblowers regardless of the motive, context, or formality in which the disclosure was made. In addition, all whistleblowers should be protected irrespective of whether they are the second to raise the same complaint. As discussed earlier, certain presumptions and burdens of proof also need to be corrected because the barriers they create are inappropriately burdensome. Nevertheless, Congress should not completely do away with the *de minimis* standard.

Finally, Congress should remove the restrictive administrative processes and provide for outside scrutiny. Specifically, the statute should be amended to allow for direct access to federal courts and jury trials for major disciplinary actions taken against employees, such as termination from

116. S. 372, 111th Cong. § 107 (2009). This expansion would also include reasonable expert witness fees and costs of litigation at the administrative or judicial level.

117. S. 372, 111th Cong. § 117 (2009).

118. S. 372, 111th Cong. § 120 (2009). The MSPB would be required to file annual reports providing data for all whistleblowing and anti-retaliation claims heard in previous fiscal year. S. 372, 111th Cong. § 116 (2009).

119. S. 372, 111th Cong. § 120 (2009).

federal employment. In addition, Congress should provide for a reasonable statute of limitations and provide a whistleblower with a reasonable amount of time to bring the action. People are afraid of stepping forward because of the consequence of being blackballed for blowing the whistle. Therefore, a person needs sufficient time to make such an important decision. Recently, Congress enacted a three-year statute of limitations for those retaliated against for reporting fraud against the government, which is a good benchmark for the proper length of time to bring a whistleblower claim or action.¹²⁰

C. *Category III: Statutes Protecting Whistleblowers Who Report Discrimination*

“They are a very extensive minority who have suffered discrimination and who have the same right to participation in the promise and fruits of society as every other individual.” -Bella Abzug

The second half of the 20th century brought about drastic reformation within the United States. Unlike the first half of the 1900s, where the United States was focused on objectives with global implications, such as establishing itself as a world power, the second half centered around domestic issues at the forefront of everyday American life. Arguably, beyond the developing conflict in Vietnam, the most contentious issue within the United States during this time period was the growing unrest over unequal treatment of racial minorities and the oppression of certain classes of citizens.¹²¹ As a result of this mounting turmoil, a nation-wide reform movement to eradicate discrimination in all facets of American life gained considerable traction in the early 1960s. The movement, which began to achieve equal rights for African Americans and other minorities, erupted into a movement for all protected classes and disadvantaged humans.¹²²

For the United States to turn a corner and break out of this darkened period of their young history required brave individuals to come forward and expose morally-culpable acts of discrimination, which had become almost the norm throughout much of the nation. After a decade of protest

120. 31 U.S.C. § 3730(h)(3) (2009).

121. See generally JUAN WILLIAMS, EYES ON THE PRIZE: AMERICAN'S CIVIL RIGHTS YEARS 1954-1965 (1987).

122. *Id.*

and lobbying from the grass roots of rural America to the streets of Washington D.C., Congress responded and enacted several federal laws to promote equality and fairness, notably in the American employment sector. In order to ensure these laws were enforced, anti-retaliation provisions were included, effectively providing whistleblowers the necessary protections if they came forward and reported unlawful discriminatory practices.

In order to enforce these laws and whistleblowing protections, Congress created the United States Equal Employment Opportunity Commission (EEOC),¹²³ an independent federal agency charged with enforcing four federal statutes outlawing discrimination and retaliation in the workplace: the Civil Rights Act of 1964 (Title VII),¹²⁴ the Americans with Disabilities Act,¹²⁵ the Age Discrimination in Employment Act,¹²⁶ and the Equal Pay Act.¹²⁷

Each of these statutes contains nearly identical anti-retaliation provisions, protecting employees and applicants from retaliation for blowing the whistle on alleged acts of discrimination. The EEOC is charged with investigating and hearing these complaints.¹²⁸ If it is determined that discrimination or retaliation has occurred, the EEOC will attempt to settle the claim.¹²⁹ If a settlement does not occur, the EEOC has the authority to order a hearing or even file suit on the whistleblower's behalf in federal court.¹³⁰

123. Created in 1965, the United States Equal Employment Opportunity Commission (EEOC) is charged with investigating and enforcing federal laws which make it illegal to discriminate against an applicant for employment or employee on the grounds of their race, color, religion, sex, national origin, age, disability, genetic information, or because they have complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. *The Law*, EEOC 35TH ANNIVERSARY, <http://www.eeoc.gov/eeoc/history/35th/thelaw/index.html>; *About the EEOC*, U.S. EEOC, <http://eeoc.gov/eeoc/>. The EEOC has the authority, granted by the United States Congress, to investigate charges of discrimination in the workplace and issue binding decisions, including but not limited to monetary damages and injunctive relief. *About the EEOC*, EEOC, <http://eeoc.gov/eeoc/>.

124. 42 U.S.C. § 2000e (2006).

125. *Id.* § 12101.

126. 29 U.S.C. § 621 (2006).

127. *Id.* § 206(d).

128. *Overview of Federal Sector EEO Complaint Process*, U.S. EEOC, http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

129. *Id.*

130. *Id.*

A stark contrast exists when comparing this whistleblower protection category with the others discussed in this Article. While nearly all of the whistleblowing protections discussed herein deal with preventing practices causing physical harm, danger, and financial loss, this section contains protections to guard those who report unlawful discrimination and the oppression of protected classes in the workplace. Because whistleblowing disclosures in this section do not garner large rewards, grab media headlines, or expose grave conspiracies and cover-ups, they might get overlooked. Nevertheless, complaints in the field of employment concerning discrimination in the workplace are among the most common forms of reported whistleblowing.¹³¹ In 2010 alone, 36,258 retaliation claims were filed with the EEOC, comprising 36 percent of the agency's caseload for the year.¹³²

1. Who is Protected

These four statutes protect employees and applicants who oppose unlawful discriminatory employment and labor practices in the workplace.¹³³ This umbrella of protection broadly prohibits retaliation against an individual who is "so closely related to or associated" with the whistleblower that it would discourage or prevent him from pursuing his rights.¹³⁴ Compared to other whistleblower statutes, these statutes have broad coverage. Nearly all private employers are subject to the provisions in these four statutes. Specifically, the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act apply to private employers with fifteen or more employees.¹³⁵ The Age Discrimination in Employment Act applies when a private employer has twenty or more employees, while the Equal Pay Act applies to all employers.¹³⁶

2. What is Covered

Protected parties under this category cannot be retaliated against for partaking in any activity which aides in the reporting of or opposition to

131. *Charge Statistics FY 1997 through FY 2010*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 17, 2011).

132. *Id.*

133. See *Overview of Federal Sector EEO Complaint Process*, *supra* note 128.

134. EEOC COMPLIANCE MANUAL § 8-II, 2006 WL 4672793 (E.E.O.C.C.M.), at *4 (1998) [hereinafter COMPLIANCE MANUAL].

135. 42 U.S.C. § 2000e (2006).

136. 29 U.S.C. § 630(b) (2006).

employment discrimination under the four applicable statutes. Retaliation occurs when an employer, employment agency, or labor union takes an adverse employment action against the whistleblower because of involvement in a protected activity.¹³⁷

An adverse employment action is any action taken by an employer, employment agency, or labor union in order to deter someone from opposing or reporting a discriminatory practice or preventing participation in an employment discrimination proceeding.¹³⁸ While there is no all-inclusive list, some of the most common forms of adverse employment actions include: termination, refusal to hire, demotion, and denial of promotion.¹³⁹ These four forms are also the easiest to prove and are often readily inferred from direct evidence.¹⁴⁰ Other more indirect acts such as threatening the whistleblower, handing out negative performance evaluations, increasing surveillance, reducing privileges, and giving negative references certainly are also deemed adverse.¹⁴¹ On the other hand, mere cajoling, occasional petty comments, or negative remarks warranted by an employee's poor work performance do not rise to the level of an adverse employment action.¹⁴²

Protected categories include two distinct clauses: participation and opposition. The participation clause safeguards individuals challenging employment discrimination practices enforced by the EEOC in any administrative proceeding, or in state and federal court.¹⁴³ Specifically, participation includes filing a charge of discrimination or assisting in any investigation, proceeding, or litigation against an employer.¹⁴⁴ These are the more formal methods of blowing the whistle. A party cannot be retaliated against for participating in any of these activities, regardless of whether the discrimination allegations were valid or even reasonable.¹⁴⁵ Courts will not inquire into the motive of the complainant, even if it is malicious. The

137. COMPLIANCE MANUAL, *supra* note 134, at *1.

138. *Id.* at *4.

139. *Id.* at *5.

140. *See, e.g.,* Fields v. Riverside Cement Co., 226 F. App'x 719, 724 (9th Cir. 2007) (noting that courts may infer causation); Nzeda v. Shell Oil Co., 228 F. App'x 375 (5th Cir. 2007) (noting that circumstantial evidence suffices).

141. *See* COMPLIANCE MANUAL, *supra* note 134, at *5.

142. *Facts About Retaliation*, U.S. EEOC, <http://www.eeoc.gov/laws/types/facts-retal.cfm>.

143. *See* COMPLIANCE MANUAL, *supra* note 134, at *4.

144. *Id.*

145. *Id.* at *4-*5.

EEOC and recent federal court decisions have further elaborated on why the necessity of reasonable retaliation claims has been abandoned: “To permit an employer to retaliate against a charging party based on its unilateral determination that the charge was unreasonable or otherwise unjustified would chill the rights of all individuals protected by the anti-discrimination statutes.”¹⁴⁶

The opposition clause prohibits retaliation against a protected party opposing any practice made unlawful by one of the four employment discrimination statutes.¹⁴⁷ Protected opposition clause activities are often the internal methods of exposing discrimination and retaliation. These activities include: threatening to file a charge or discrimination, refusing to obey an order reasonably believed to be discriminatory, requesting a reasonable accommodation for a disability or religious purposes, and communicating a belief to anyone that discrimination is taking place at work.¹⁴⁸

More stringent guidelines exist for opposition clause allegations. Unlike the participation clause, all claims of retaliation based on a protected opposition clause activity must be reasonable and made in good faith.¹⁴⁹ This does not mean that the allegations must be found unlawful in formal proceedings down the line.¹⁵⁰ Courts have established that requiring a finding of actual illegality would undermine

Title VII’s central purpose, the elimination of employment discrimination by informal means; destroys one of the chief means of achieving that purpose, the frank and non-disruptive exchange of ideas between employers and employees; and serves no redeeming statutory or policy purposes of its own.¹⁵¹

3. Remedies

The remedy provisions of these four anti-discrimination statutes aim to place the aggrieved whistleblower in the same position as if the improper

146. *Id.* at *5.

147. *Id.*

148. *Id.* at *1-*3.

149. *Id.* at *3.

150. *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 354 (4th Cir. 2006) (stating that the whistleblower need not show that the activity actually violated the law, but that the whistleblower had a reasonable belief).

151. *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980).

retaliation had not occurred.¹⁵² Therefore, the form of relief rests upon the subjective facts of each individual claim. Section 706(f)(2) of Title VII authorizes the EEOC to enforce not only monetary remedies, but injunctive relief as well.¹⁵³

Injunctive relief is most often provided in two situations, including immediately after the initial whistleblowing claim is filed. If it is likely that the retaliation taken by the employer will cause irreparable harm to the EEOC's ability to investigate the full validity of a whistleblower's claim, an injunction will be issued, effectively halting certain actions on the part of the employer.¹⁵⁴

Injunctive relief will also be granted when the EEOC or a court issues a decision that illegal retaliation has taken place.¹⁵⁵ The court will order the employer to halt all current discriminatory practices and to take necessary steps to avoid similar violations in the future.¹⁵⁶ The other most common form of injunctive relief is reinstatement of the whistleblowers to their former positions if they were terminated or demoted in retaliation.¹⁵⁷ A prevailing whistleblower may also be entitled to back pay, reinstatement of lost benefits, attorney's fees, expert witness fees, and applicable court costs.¹⁵⁸

In 1997, an amendment was added to the Fair Labor Standards Act,¹⁵⁹ which made compensatory and punitive damage awards available in retaliation cases involving these four federal statutes.¹⁶⁰ If the employer has a history of retaliating against employees, or if the retaliation in the case at hand was issued with malice or with reckless indifference to the federally protected rights of an aggrieved individual, then punitive damages are

152. *Remedies For Employment Discrimination*, U.S. EEOC, <http://eeoc.gov/employees/remedies.cfm>.

153. *Id.*

154. See *Garcia v. Lawn*, 805 F.2d 1400, 1405-06 (9th Cir. 1986).

155. *EEOC v. Custom Cos.*, Nos. 02 C 3768, 03 C 2293, 2007 WL 734395, at *20 (N.D. Ill. Mar. 8, 2007) (ordering the defendants to be enjoined from violating Title VII and to post a notice informing its employees about the verdict along with the employees' right to contact the EEOC without the fear of retaliation).

156. See *Remedies For Employment Discrimination*, *supra* note 152.

157. *Id.*

158. *Id.*

159. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (2006).

160. 29 U.S.C. § 216(b); Marjorie A. Shields, *Availability of Punitive Damages in Action for Retaliatory Discharge Under § 16(B) of Fair Labor Standards Act (29 U.S.C. § 216(b))*, 178 A.L.R. FED. 15 (2002).

allowed.¹⁶¹ Nevertheless, limits do exist on punitive damages depending on the overall size of the employer.¹⁶² Compensatory damages include any amount the whistleblowers have lost or accrued because of the retaliation taken against them. The EEOC or a court will also award costs to a prevailing whistleblower for medical expenses, expenses incurred while searching for new employment, or for harm suffered as a result of adverse action.¹⁶³

The complaint process for federal employee whistleblowers is much more complex than the one afforded to the private sector. The federal employee's initial step is to contact the agency's Equal Employment Office within forty-five calendar days of the alleged unlawful retaliation.¹⁶⁴ If the claim is not settled through a form of alternative dispute resolution, the aggrieved whistleblower has fifteen days to file a formal complaint.¹⁶⁵ After a formal complaint is filed, the employing agency has 180 days to investigate the complaint.¹⁶⁶ At the end of the investigation period, the whistleblower can either ask the employing agency to issue a decision or can request a hearing with the EEOC. If an agency decision is requested, then the whistleblower has thirty days to appeal the decision to the EEOC Office of Federal Operations.¹⁶⁷ If a hearing is requested instead of a final agency decision, then the case will be handed off to the EEOC for adjudication.¹⁶⁸ Federal employees must go through the administrative process outlined above before a lawsuit can be filed in an Article III or state court.¹⁶⁹ Federal whistleblowers, however, do have the opportunity to file a lawsuit in a court of competent jurisdiction if 180 days have passed since the formal complaint was filed and the agency has not issued a final decision, within 90 days of an agency decision, 180 days has passed since an agency decision

161. See *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997).

162. For employers with over 500 employees: \$300,000 limit; 201-500 employees: \$200,000 limit; 101-200 employees: \$100,000 limit; 15-100 employees: \$50,000 limit. See *Remedies For Employment Discrimination*, *supra* note 152.

163. *Id.*

164. See *Overview of Federal Sector EEO Complaint Process*, *supra* note 128.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

was appealed to the EEOC and no ruling on the appeal has been issued, and within 90 days of the EEOC decision on an appeal.¹⁷⁰

Non-government employees must file a complaint with the EEOC within 180 days of the alleged unlawful retaliation.¹⁷¹ The EEOC then has 180 days to investigate the claim and issue a determination on whether unlawful retaliation took place.¹⁷² After this 180-day period, the whistleblower may request a right to sue letter, providing 90 days to file the claim in a court of competent jurisdiction.¹⁷³

4. Recommendations

These laws should be amended to provide access to federal courts, even a jury trial, for all whistleblowers, including federal employees, who suffer from severe or significant adverse employment actions, such as termination. In those instances, the employee should have an option to go directly to court, and not only if the agency acts too slowly.

Even if Congress does not immediately amend the statute to allow direct access to courts, the administrative process needs to be streamlined. Currently, the law provides an excruciatingly short amount of time to complain to the EEOC. Again, deciding to report discrimination is a weighty decision that should not be lost in forty-five days. As discussed in *Recommendations* under *Category II*, a good benchmark length of time for whistleblowing is in years, not days, such as three years. Finally, it takes too long for the EEOC to issue rulings. One minor suggestion includes the EEOC turning to electronic filing. Perhaps more resources or agency importance needs to be added to accomplish the worthy goals of this statute.

D. Category IV: Statutes Protecting Whistleblowers Who Report Misconduct That Harms the Environment

“The most alarming of all man’s assaults upon the environment is the contamination of air, earth, rivers and sea with dangerous and even lethal materials. . . . For the first time in the history of the world, every human being is now subjected to contact with

170. *Id.*

171. *Id.* This can be extended to 300 days if the state where retaliation took place has a law extending the filing period. *Id.*

172. *Id.*

173. *Id.*

*dangerous chemicals, from the moment of conception until death.*¹⁷⁴ – Rachel Carson

There is no doubt that environmental crimes have an enormous impact on people and even nations.¹⁷⁵ Not surprisingly, some of the most famous whistleblowers have blown the whistle on environmental violations.¹⁷⁶ Hollywood has documented some of these remarkable stories in motion pictures such as *A Civil Action*¹⁷⁷ and *Erin Brockovich*.¹⁷⁸

As the 1960s drew to a close, the public witnessed a number of horrific environmental catastrophes; notably, the Santa Barbara oil spill, the dramatic increase of rampant air pollution in metropolitan areas, mass death of fish in the Great Lakes due to chemical dumping, and the continuing use of dangerous pesticides on crops.¹⁷⁹ A growing concern over environmental degradation and the lack of government response became a focal point among young Americans.¹⁸⁰

The inability of the federal government to control these damaging incidents was not due to an absence of regulations, but rather an inability to successfully enforce existing law.¹⁸¹ In fact, as discussed below, six federal statutes regulating the environment were already in place. Nevertheless, without the assistance of the community as whistleblowers, it was nearly impossible to enforce these laws, resulting in lasting harm to the

174. RACHEL CARSON, *SILENT SPRING* 4 (1962).

175. Neal Shover & Aaron S. Routh, *Environmental Crime*, 32 *CRIME & JUST.* 321, 322, 324 (2005).

176. Kohn & Sanjour, *supra* note 16.

177. *See A Civil Action* (Buena Vista Pictures 1998). This film is based on the true accounts of a case mounted by the residents of Woburn, Massachusetts against a chemical company known as W.R. Grace. Twelve children in a town of roughly 40,000 contracted a rare form of leukemia from the 1960s-1980s. The U.S. Environmental Protection Agency found that W.R. Grace, along with a local tannery and factory, were unlawfully dumping trichloroethylene, a lethal carcinogenic into the town's water supply. *Id.*

178. *See Erin Brockovich* (Universal Pictures 2000). This film is based on the true accounts of a California woman who aided in exposing a utility company's elaborate plot to unlawfully pollute local waterways and conspire to cover it up. Her findings eventually acted as the basis to one of the nation's largest class-action lawsuits. *Id.*

179. Jack Lewis, *The Spirit of the First Earth Day*, 16 *EPA J.* 8 (1990).

180. *See generally* JOHN MCCORMICK, *RECLAIMING PARADISE: THE GLOBAL ENVIRONMENTAL MOVEMENT* (1989).

181. *Id.*

environment.¹⁸² In reaction, a grass roots movement sprung up, comprised mainly of young adults. They voiced concerns and rallied to raise awareness of the increasing vulnerable state of environmental protection in the United States.¹⁸³

Through peaceful protests, nation-wide research studies, and media publications, this social movement caught fire.¹⁸⁴ The unwavering message and emphatic support reached Congress.

During a span from 1972 to 1980, partly in an effort to appease the movement and partly as a means to enforce the federal laws on the books, Congress passed six whistleblower protection bills. Each bill consisted of an amendment to an already-existing federal environmental protection law, and provided rights, protections, and remedies to whistleblowers that reported violations. These six statutes protecting whistleblowers who report misconduct that harms the environment are: the Water Pollution Control Act (WPCA),¹⁸⁵ the Safe Drinking Water Act (SDWA),¹⁸⁶ the Toxic Substance Control Act (TSCA),¹⁸⁷ the Solid Waste Disposal Act (SWDA),¹⁸⁸ the Clean Air Act (CAA),¹⁸⁹ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁹⁰

With the enactment of this new legislation, Congress declared that neither corporations nor government entities would be allowed to keep contributing to the degradation of the environment.¹⁹¹ In order to meet this objective, the help of whistleblowers was imperative. In enforcing these statutes, Congress noted the crucial role of citizens who blew the whistle:

The best source of information about what a company is actually doing or not doing is often its own employees, and this amendment would insure that an employee could provide such

182. The government recognized this need by adding whistleblower provisions to the six major environmental laws. See *infra* notes 185-190.

183. Stacy J. Silveira, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENVTL. AFF. L. REV. 497, 497-98 (2000-2001).

184. *Id.*

185. 33 U.S.C. § 1367 (2006).

186. 42 U.S.C. § 300j-9(i) (2010).

187. 15 U.S.C. § 2622 (2010).

188. 42 U.S.C. § 6971 (2006).

189. *Id.* § 7622.

190. *Id.* § 9610.

191. Act of Oct. 18, 1972, Pub. L. No. 92-500, 1972 U.S.C.C.A.N. (86 Stat. 816) 3668, 3748.

information without losing his job or otherwise suffering economically from retribution from the polluter.¹⁹²

Ultimately, each of these six statutes would include comparable anti-retaliation provisions, shielding employees from retaliation for reporting violations of federal environmental laws to the proper authorities.¹⁹³ The provision contained in the Water Pollution Control Act (WPCA) was the first step under this category to include whistleblower rights and served as a model for the ensuing five regulations.¹⁹⁴ Unlike many of the other categories discussed within this Article, a considerable amount of consistency exists between all environmental laws relating to whistleblower protections and rights, such as the filing and procedural steps a whistleblower must follow when reporting an environmental violation.¹⁹⁵ Nevertheless, one of the largest impediments to these statutes is a requirement that whistleblower violations must be filed with the Department of Labor (DOL) within thirty days of the violation.¹⁹⁶ Such a short amount of time allows little time to weigh the costs of learning of whistleblower rights and balancing the risks for blowing the whistle.

1. Who is Protected

The class of protected parties under this category is all-encompassing. Any person in the private or public sector has the right to assert an anti-retaliation claim.¹⁹⁷ This breadth of protection was anticipated and intentional. The legislative history of these six amendments reveals that Congress intended all employees to be covered, regardless of their work sector.¹⁹⁸ This coverage presents a stark contrast to other whistleblower statutes, which often draw a heavy distinction between public and private

192. Act of Aug. 7, 1977, Pub. L. No. 95-95, 1977 U.S.C.C.A.N. (91 Stat. 685) 1077, 1404.

193. Interestingly, more than one executive agency is delegated authority under these statutes. The U.S. Environmental Protection Agency (EPA) is charged with setting the environmental standards and requirements for employers to follow; while the U.S. Department of Labor (DOL) is assigned with investigating and enforcing the whistleblower protections. The investigations are conducted by the Occupational Safety and Health Administration.

194. See STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW 142 (2001).

195. *Id.* at 142-43.

196. *Id.* at 145.

197. *Id.* at 142.

198. *Id.* at 143.

sector employees.¹⁹⁹ Due to this broad construction, interpretation, and application, all employees working in the United States possess the right to file a claim against their employers under these six statutes.²⁰⁰

However, purported whistleblowers are not protected when they deliberately, and without the direction of the employer, commit violations of these statutes in an effort to report the employer.

2. What is Covered

A main focal point of this set of new laws was to halt corporations and government employers from threatening retaliation to silence those willing to expose environmental misconduct.²⁰¹ While the WPCA was being offered in the U.S. House of Representatives, Congressman William Ford stated:

[I]n offering this amendment we are only seeking to protect workers and communities from those very few in industry who refuse to face up to the fact that they are polluting our waterways, and who hope that by pressuring their employees and frightening communities with economic threats, they will gain relief from the requirement of any effluent limitation or abatement order.²⁰²

This is an example of the influence the WPCA had on the other whistleblower protections for environmental laws. This frame of thought was applied in each of these six statutes. Therefore, these protection amendments made it unlawful for an employer to discriminate against any employee for partaking in an activity protected by any of these statutes. The protected activities included filing a formal complaint asserting a violation covered under a statute, and testifying or participating in any hearing, investigation, or proceeding regarding an employer that committed a violation.²⁰³ Internal complaints, including those brought to the attention of co-workers or supervisors, are also covered under this category.²⁰⁴

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. 15 U.S.C. § 2622(a)(1), (2), (3) (2010); 33 U.S.C. § 1367(a) (2006); 42 U.S.C. § 300j-9(i)(1), (2), (3) (2010); 42 U.S.C. § 6971(a) (2006); 42 U.S.C. § 7622(a)(1), (2), (3) (2010); 42 U.S.C. § 9610(a) (2006).

204. Various United States Court of Appeals decisions addressing these environmental statutes have upheld the interpretation that the raising of internal concerns is fully protected.

The SDWA, CAA, and TSCA added a unique wrinkle by listing a new protected activity not included in the others.²⁰⁵ Specifically, an employee who is about to, but has not yet commenced any action against the employer for a violation under the SDWA, CAA, or TSCA, cannot be discriminated or retaliated against on the basis of the anticipated filing.²⁰⁶ Ultimately, this means that a whistleblower achieves protected status before officially filing a complaint, or partaking in any other listed activity if they prove the employer acted against them on that ground.

Although not all inclusive, improper forms of discrimination often surface in the form of termination, demotion, unfavorable references, rescinding of duties, and blacklisting of employees.²⁰⁷ Any employment action that discriminates or negatively affects a term or condition of employment is deemed adverse and held to be unlawful.²⁰⁸ Whistleblowers under this category file their claims with the DOL, who will investigate and adjudicate the claim in an administrative hearing.²⁰⁹ The whistleblower may appeal the DOL decision to the United States Circuit Court of Appeals.²¹⁰

3. Remedies

The six environmental whistleblower statutes are broader in many ways from the other categories. Similar to most federal whistleblower statutes, remedies include the standard reinstatement to former position, back pay with interest, and compensatory damages.²¹¹ However, the remedies under this section are more extensive and offer the victim the right to damages for pain and suffering and for loss of reputation.²¹² Other available remedies to the whistleblower include litigation costs—mainly reasonable attorney's fees

See *Bechtel v. Sec'y of Labor*, 50 F.3d 926, 932 (11th Cir. 1995); *Kansas Gas & Elec. v. Brock*, 780 F.2d 1505 (10th Cir. 1985).

205. 15 U.S.C. § 2622 (a)(1); 42 U.S.C. § 300j-9(i)(1)(A); 42 U.S.C. § 7622(a)(1).

206. *Id.*

207. 45A AM. JUR. 2D *Job Discrimination* § 234 (2002).

208. *Id.*

209. *See, e.g.*, 15 U.S.C. § 2622(b)(2)(A); 33 U.S.C. § 1367(b) (2006); 42 U.S.C. § 300j-9(i)(2)(B)(i); 42 U.S.C. § 6971(b) (2006); 42 U.S.C. § 7622(b)(2)(A); 42 U.S.C. § 9610(b) (2006).

210. *See, e.g.*, 15 U.S.C. § 2622(c); 33 U.S.C. § 1367(b); 42 U.S.C. § 300j-9(i)(3)(A); 42 U.S.C. § 6971(b); 42 U.S.C. § 7622(c); 42 U.S.C. § 9610(b).

211. *See* KOHN, *supra* note 194, at 141-42.

212. *Id.*

and expert witness fees.²¹³ These fees will only be asserted against parties committing the violation; thus, the whistleblower is not liable for their employer's fees if their claim fails.²¹⁴ To obtain these types of damages, however, they must be requested when filing the claim.²¹⁵ Prevailing whistleblowers are also entitled to any other form of affirmative relief—injunctions and abatement—necessary to subside the violation.²¹⁶

Additionally, certain provisions in the SDWA and the TSCA allow awarding whistleblowers exemplary damages.²¹⁷ Exemplary damages, better known as punitive damages, are monetary damages and will be awarded when it is determined that the employer willfully and maliciously retaliated against the whistleblower for coming forward.²¹⁸ Not only do punitive damages serve to punish the employer, but also these damages send a message to the public that this type of behavior carries grave consequences.

The remedies provisions contemplate settlement between the whistleblower and the company. In fact, the DOL—which is charged with adjudicating claims of retaliation—encourages alternative forms of dispute resolution.²¹⁹ Nevertheless, all settlement agreements for claims stemming from these six statutes must be reviewed and approved by the DOL before the terms become binding.²²⁰ The DOL must find that the terms are fair and reasonable under the circumstances,²²¹ balancing the interests of the whistleblower, the company, and the public in general. First, whistleblowers must be protected to ensure others step forward. Second, employers must not be forced to settle meritless claims. Third, the underlying harm to the

213. See 15 U.S.C. § 2622(b)(2)(B)(iv) (2010); 33 U.S.C. § 1367(c) (2006); 42 U.S.C. § 300j-9(i)(2)(B)(ii)(IV) (2010); 42 U.S.C. § 6971(c) (2006); 42 U.S.C. § 7622(b)(1)(B)(ii) (2010); 42 U.S.C. § 9610(c) (2006).

214. See *supra* note 213.

215. See *supra* note 213.

216. See, e.g., 15 U.S.C. § 2619(a)(1) (2011); 42 U.S.C. § 300g-3(b) (2011).

217. See 15 U.S.C. § 2622(b)(2)(B)(iv); 42 U.S.C. § 300j-9(2)(B)(ii)(IV).

218. Sarah Wood Borak, *The Legacy of "Deep Throat": The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No Fear Act of 2002*, 59 U. MIAMI L. REV. 617, 629 n.68 (July 2005) (citing 42 U.S.C. § 7622(b)(2)(B) (CAA); 42 U.S.C. § 300j-9(i)(2)(B)(ii) (SDWA); 33 U.S.C. § 1367(b) (CWA); 15 U.S.C. § 2622(b)(2)(B) (TSCA); 42 U.S.C. § 9610(b), (c) (CERCLA)).

219. See STEPHEN MARTIN KOHN, MICHAEL D. KOHN & DAVID K. COLAPINTO, *WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTIONS FOR CORPORATE EMPLOYEES* 119-21, 122 (2004).

220. See *Beliveau v. U.S. Dep't of Labor*, 170 F.3d 83, 87-88 (1st Cir. 1999).

221. *Id.* at 88.

environment, and hence the public, must not take a back seat to the wishes of the participants to settle the matter quickly or quietly. An ongoing imperative exists to confirm that settlements are not mere attempts to cover-up grave violations that would otherwise never become known to the government or the public. Unfortunately, the remedies provided in these statutes are not enforceable in trial courts. Thus, the whistleblower only receives the relief granted at the administrative level.

Under this category, cases are adjudicated through the administrative process. To file a claim under these six statutes, the whistleblower must submit a written complaint to the DOL's Occupational Safety and Health Administration (OSHA) within 30 days of the alleged retaliatory action.²²² The complaint must entail a summary of the facts, pertinent dates, and include details on the adverse employment action taken against the whistleblower.²²³ The 30-day statute of limitations begins tolling on the date the whistleblower is informed of the adverse employment action taken against him.²²⁴ Claimants must be conscious of this short statute of limitations because the court will only extend it when "fairness requires."²²⁵ Pursuing internal and informal resolutions to these conflicts will more than likely not extend this period.

After a complaint is properly filed, OSHA has 30 days to conduct an investigation and issue a decision.²²⁶ This decision is ultimately nonbinding if either party appeals by requesting a hearing in front of an administrative law judge.²²⁷ A party must do so within 30 days of receiving OSHA's decision, otherwise the decision becomes binding.²²⁸ If OSHA fails to comply with a timely investigation or dismisses the complaint, then an administrative law judge or the Secretary of Labor can remand the case for further investigation.²²⁹ Furthermore, if the 30-day investigative period passes without a decision being issued, then the whistleblower may request a hearing in front of an administrative law judge.²³⁰

222. 29 C.F.R. § 24.103 (2011).

223. *Id.*

224. See KOHN, KOHN & COLAPINTO, *supra* note 219, at 15.

225. See Hill v. U.S. Dep't of Labor, 65 F.3d 1331, 1335 (6th Cir. 1995).

226. 29 C.F.R. § 24.105(a) (2011).

227. *Id.* § 24.105(c).

228. *Id.*; 29 C.F.R. § 24.106(b) (2011).

229. KOHN, KOHN & COLAPINTO, *supra* note 219, at 19.

230. 29 C.F.R. § 24.105(a) (2011).

4. Recommendations

The definition of covered conduct for public complaints appears too narrow because it focuses on filing formal complaints or testimony. These statutes should be amended to clarify the point that protected activities include public complaints—such as talking to the news media or posting on Internet blogs. Additionally, these laws should be amended to provide direct access to federal courts—even a jury trial—for all whistleblowers that suffer from severe or significant adverse employment actions, such as termination.

Finally, the statute of limitations is woefully short. An action is barred if not brought within 30 days. As discussed in *Recommendations* under *Category II supra*, there is a legitimate fear of retaliation for blowing the whistle. Blackballing and other forms of retaliation frequently take place, and these dangers must be carefully weighed. Requiring a person to make such an important decision in only 30 days is a bad policy that should be remedied immediately. Three years, not 30 days, is a better benchmark for the proper length of time to bring a whistleblower claim or action.

E. Category V: Statutes Protecting Whistleblowers Who Report Misconduct That is Adverse to Health, Safety, and Welfare

“The welfare of each is bound up in the welfare of all.” – Helen Keller

For the greater part of the 1900s, the foundation and stability of the economy and job market in the United States rested in the industrial and manufacturing sector—notably, in the fields of the mining, agriculture, transportation, and technology.²³¹ For the first time in United States history, the majority of the nation’s workforce operated heavy machinery and was often exposed to hazardous and unsanitary working conditions on a daily basis.²³² As the years pressed on, disease, accident, and death rates stemming from work-related injuries of industrial and manufacturing employees climbed at an alarming rate. In 1913, the Bureau of Labor Statistics²³³ documented that approximately 23,000 industrial deaths took

231. DAVID HOUNSHELL, FROM THE AMERICAN SYSTEM TO MASS PRODUCTION, 1800-1932 (1984).

232. *Id.*

233. The Bureau of Labor Statistics (BLS) is a federal agency under the control of the U.S. Department of Labor. *About BLS*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/bls/>

place from a workforce that totaled approximately 38 million.²³⁴ This equates to 61 deaths for every 100,000 workers.²³⁵ Despite the importance of these industrial jobs, however, the United States government refrained from taking action to safeguard employees and ensuring workplace safety. During this time period, if an employee was injured on the job, then their only recourse was filing a lawsuit to recover compensatory damages.²³⁶ Not only were the bulk of these lawsuits unsuccessful, but the injured employee's reputation was often tarnished in the process.²³⁷ In fact, in the years prior to the federal statutory protections categorized under this section, only fifteen percent of plaintiffs recovered compensatory damages against the employer for workplace injuries.²³⁸

In the 1930s, as the strength of worker compensation laws and employee labor unions expanded, the movement for Congress to address the problem of workplace safety gained heavy support.²³⁹ Then, abruptly, the United States involvement in World War II halted any progress. Rapid manufacturing of equipment and materials for the war effort became the main priority, leaving behind any implementation of new safety procedures.²⁴⁰ In 1968, more than two decades after the end of World War II, Congress finally began to revisit workplace safety as accident rates continued to soar.²⁴¹ In 1968 and 1969 alone, nearly 14,000 industrial workers died on the job, with another 2 million suffering from severe work-related injuries and disabilities.²⁴² In 1970, the Occupational Safety and Health Act²⁴³ ("OSH Act") was enacted, effectively providing the blueprint

infohome.htm (last visited Sept. 16, 2011). The BLS is charged with collecting, analyzing, and disseminating labor market statistics, including working conditions and price fluxes in the economy. *Id.*

234. *Achievements in Public Health 1900-1999*, 48 MORBIDITY & MORTALITY WEEKLY REPORT, no. 22, June 11, 1999, at 461.

235. *Id.*

236. Donald Fisk, *American Labor in the 20th Century*, COMPENSATION & WORKING CONDITIONS 4 (2001).

237. *Id.*

238. *Id.*

239. Mark Aldrich, *History of Workplace Safety in the United States, 1880-1970*, EH.NET (Feb. 5, 2010), <http://eh.net/encyclopedia/article/aldrich.safety.workplace.us>.

240. *Id.*

241. *Id.*

242. John H. Stender, *Enforcing the Occupational Safety and Health Act of 1970: The Federal Government as a Catalyst*, 38 DUKE U. L. & CONTEMP. PROBS. 641, 641 (1974).

243. Occupational Safety and Health Act, 29 U.S.C. §§ 651-677 (2006).

for workplace health and safety laws in the United States. The primary objective of the OSH Act was to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions”²⁴⁴ Standards and procedures were put into place requiring employers to fashion and enforce practices and procedures to protect workers on the job.²⁴⁵ These included staying up to date on industry safety standards and ensuring protective equipment was not only available, but actually used by employees engaging in hazardous work activities.²⁴⁶ To oversee and implement these new practices, two governmental bodies were created: the Occupational Safety and Health Administration (OSHA)²⁴⁷ and the National Institute for Occupational Safety and Health (NIOSH).²⁴⁸ OSHA is an executive agency under the control of the DOL,²⁴⁹ while NIOSH is considered an independent research institute and reports to the United States Center for Disease Control.²⁵⁰

The scope of OSHA’s mandate of protecting virtually every worker from hazardous conditions is daunting. It would be unrealistic for OSHA to seek funding to hire enough employees to regularly visit—let alone police—every business. Therefore, in order to be effective, the fledgling OSH Act relied heavily upon the cooperation and involvement of the common everyday employee. Congress specifically recognized the need for employees to come forward and blow the whistle on their employer’s noncompliance with the standards set out in the Act.

Congress recognized employees to be a valuable and knowledgeable source of information regarding work place safety and health hazards . . . Congress was aware of the shortage of federal and state occupational safety inspectors, and placed great reliance on employee assistance in enforcing the Act.²⁵¹

244. *Id.* § 651(b).

245. *Id.* § 654.

246. *Id.*

247. *About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, <http://www.osha.gov/about.html> (last visited Sept. 16, 2011).

248. *About NIOSH*, THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH (NIOSH), <http://www.cdc.gov/niosh/about.html> (last visited Sept. 16, 2011).

249. *About OSHA*, *supra* note 247.

250. *About NIOSH*, *supra* note 248.

251. *See Reich v. Hoy Shoe Co.*, 32 F.3d 361, 368 (8th Cir. 1994) (internal quotation marks omitted).

In an effort to promote this vital assistance from employees, Congress included an anti-retaliation provision.²⁵² As explained below, this provision protects employees who come forward and report potential workplace hazards by assuring certain rights and remedies if any retaliation is taken against them as a result.

Shortly after the birth of OSHA and NIOSH, Congress again went to work to better safeguard the nation's employees, this time tackling the highly-dangerous nuclear industry. In 1974, the Energy Reorganization Act²⁵³ was passed, which called for the formation of the Nuclear Regulatory Commission (NRC), an independent agency charged with overseeing the nation's use of radioactive materials, mainly ensuring that people and the environment are protected from the numerous high-level risks associated with radiation.²⁵⁴ The Energy Reorganization Act contains an amendment shielding whistleblowers that work in the nuclear sector that report hazards and conditions similar to those outlawed by the OSH Act.²⁵⁵ The creation of the NRC and the whistleblower provision in the Energy and Reorganization Act were the first examples of the influence the OSH Act had on the American workforce.

Since this first instance of influence, nineteen other federal whistleblower protections relating to occupational health and safety have been passed through Congress and signed into law,²⁵⁶ and they are being administered

252. 29 U.S.C. § 660(c) (2006).

253. Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (codified in 42 U.S.C. §§ 5801-5891 (2006)).

254. 42 U.S.C. § 5801 (2006).

255. *Id.* § 5851(a)(1).

256. *See, e.g.*, National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142 (2006); Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087 (2010); Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651 (2006); Asbestos School Hazard Abatement, Employee Protection Provision, 20 U.S.C. § 4018 (2006); FDA Food Safety Modernization Act of 2010, 21 U.S.C. § 399d (2011); National Labor Relations Act, 29 U.S.C. § 158(a)(4) (2006); Fair Labor Standards Act, 29 U.S.C. §§ 215(a)(3), 216, 255 (2006); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2006); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855 (2006); Federal Mine Safety and Health Act, 30 U.S.C. § 815(c) (2006); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 948a (2006); Energy Reorganization Act, 42 U.S.C. § 5851 (2006); Seaman Whistleblower Protection, 46 U.S.C. § 2114 (2006); Safe Containers for International Cargo Act, 46 U.S.C. § 80507 (2006); Federal Railroad Safety Act, 49 U.S.C. § 20109 (2006); Truck Safety, 49 U.S.C. §§ 31101, 31105 (2006); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (2006); Department of Energy Defense Activities, Whistleblower Protection Program, 50 U.S.C. § 2702 (2006).

by the DOL, through OSHA.²⁵⁷ In all, OSHA is now the guardian protecting employees who report certain violations relating to airlines, commercial motor carriers, and consumer products, as well as environmental, financial reform, health care reform, nuclear, pipeline, public transportation agency, railroad, maritime, and securities laws.

Each of these statutes includes an anti-retaliation provision protecting whistleblowers that strongly resembles the protections, rights, and remedies laid out in the OSH Act. Because the OSH Act is the template upon which these other protective laws were based, it is analyzed in detail below.

1. Who is Protected

The OSH Act's whistleblower provision protects employees who report hazardous and unsafe working conditions.²⁵⁸ Unlike the other statutes mentioned in this section that offer protections only to employees in specific fields, the OSH Act has a very expansive interpretation of the term "protected employee." Specifically, the OSH Act defines "employee" as one who is employed in a "business of his employer which affects commerce."²⁵⁹ Employers in any business affecting commerce must adhere to the requirements set forth in the Act and are prohibited from taking any form of unlawful retaliation against an employee for partaking in a right protected by the OSH Act.²⁶⁰ Ultimately, this applies to nearly the entire workforce in the United States, including the federal government, the manufacturing and industrial sector, the retail industry, and professional offices (doctors' offices, schools, and law firms). Since the OSH Act was the first of its kind, Congress intended it to have a broad reach.²⁶¹

Despite the wide-ranging applicability of the OSH Act, some significant exceptions exist. Employees of state governments,²⁶² family-run agricultural

257. *The Whistleblower Protection Program*, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, <http://www.whistleblowers.gov/index.html> (last visited Sept. 16, 2011).

258. 29 U.S.C. § 651.

259. *Id.* § 652.

260. *Id.* § 660(c)(1).

261. *Phelps Dodge Corp. v. Occupational Safety and Health Review Comm'n*, 725 F.2d 1237, 1239 (9th Cir. 1984) ("[T]he Act gave the Secretary 'almost unlimited discretion to devise means to achieve the congressionally mandated goal of protecting employee health.'") (citations omitted); *Pub. Citizen Health Res. Group v. Tyson*, 796 F.2d 1479, 1484 (D.C. Cir. 1986) (stating that OSHA enjoys a broad Congressional mandate, albeit not unbridled).

262. State and local governments do have the option of adopting the Occupational Safety and Health Act in full. If they choose to do so, their employees will be deemed a protected party under the guidelines of the Act.

operations, the self-employed, and employment fields where more specific federal law governs do not fall under the protections of the OSH Act.²⁶³

2. What is Covered

Protected parties in this category cannot be punished or discriminated against for exercising their rights under the OSH Act.²⁶⁴ Employees in every field of employment have a right to insist on safe and healthy working conditions on the job, without fear of retaliation.²⁶⁵ To further this right, the lines of communication must be open for employees exposed to these risks. The OSH Act lists seven activities that protected parties may engage in without fear of retaliation.²⁶⁶ These protections promote and facilitate the necessary communication to report unsafe conditions. An employer may not discriminate against an employee for involvement in a protected activity.

The first activity is the right of the employee to request safety inspections of the workplace.²⁶⁷ If an employee believes he is in imminent danger of physical harm from a hazard that is in violation of the Act, then he has a right to contact the DOL and request a special site inspection.²⁶⁸ The DOL then passes the request to OSHA, to review the facts and determine whether an inspection is warranted.²⁶⁹ In an effort to better safeguard the whistleblower, the DOL upon request will keep his or her identity confidential.²⁷⁰

The second activity is a protected party's right of refusal. Employees have the right to refuse to work without being punished by their employer if a hazardous condition risking injury or death is present.²⁷¹ OSHA regulations describe this scenario:

[O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous

263. 29 U.S.C. § 653.

264. *Id.* § 660(c)(1).

265. *Id.*

266. *See, e.g.*, 29 U.S.C. § 657(f)(2) (first protected activity); 29 C.F.R. § 1977.12(b)(2) (2011) (second protected activity); 29 U.S.C. 660(c)(1) (remaining five protected activities).

267. 29 U.S.C. § 657(f)(2).

268. *Id.* § 657(f)(1).

269. *Id.*

270. *Id.*

271. 29 C.F.R. § 1977.12(b)(2).

condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.²⁷²

Therefore, under certain circumstances the right to disobey an employer and refuse to carry out tasks at work can be a protected whistleblower activity.

The remaining five protected activities are all related to the formal complaint and investigation process once an OSH Act violation is reported. The law prohibits retaliation against a whistleblower for any of the following: complaining to an employer, union, or any government agency about safety and health hazards; filing safety or health grievances; participating in conferences, hearings, or other related OSHA activities; participating in workplace safety and health committees; and engaging in union activities regarding safety and health.²⁷³

Any protected party who is discriminated against for engaging in one of these seven activities has the right to file a complaint with OSHA.²⁷⁴ The claim will be investigated by the Secretary of Labor.²⁷⁵ The person complaining of discrimination or retaliation must "initially establish a prima facie case of retaliation by showing participation in a protected activity, subsequent adverse action by the employer, and some evidence of a causal connection between the protected activity of the plaintiff and the subsequent adverse action by the employer."²⁷⁶ OSHA describes "adverse

272. *Id.*

273. 29 U.S.C. § 660(c)(1).

274. *Id.* § 660(c)(2) (requiring that the complaint must be filed within thirty (30) days of the alleged discrimination).

275. *Id.*

276. *See Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir.1993).

action” as “any action that would dissuade a reasonable employee from engaging in protected activity,”²⁷⁷ including:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denial of benefits
- Failure to hire or rehire
- Intimidation
- Making threats
- Reassignment affecting prospects for promotion
- Reducing pay or hours.²⁷⁸

Finally, circumstantial evidence is sufficient to establish a causal connection between the protected activity and the adverse employment action.²⁷⁹

3. Remedies

After investigation, if the Secretary of Labor determines that unlawful retaliation occurred in direct violation of the OSH Act, then the whistleblower will be entitled to appropriate forms of relief.²⁸⁰ The objective of the relief is to place the aggrieved employee in the same position he would have been in had the retaliation not occurred. To obtain this relief, the DOL must file suit on behalf of the whistleblower in federal court.²⁸¹

Only the Occupational Safety and Health Administration can bring a section 11(c) [whistleblower] action in court . . . OSHA makes the claim, but if OSHA decides that a case is not meritorious and refuses to proceed on behalf of the employee,

277. *The Whistleblower Protection Program*, *supra* note 257.

278. *Id.*

279. *See Schweiss*, 987 F.2d at 549. Upon establishing a prima facie case, “the employer must articulate a legitimate, nondiscriminatory [or nonretaliatory] reason for its actions. If the employer meets that burden, [the] plaintiff must prove that the proffered reason is pretextual.” *Id.*

280. 29 U.S.C. § 660(c)(2).

281. *Id.*

that employee does not have the option of pursuing his own claim under the [Occupational Safety and Health] Act.²⁸²

Unlike other whistleblower protection provisions, the remedies are not outlined in the OSH Act. Nevertheless, the standard forms of compensatory damages for whistleblower claims are often awarded, including back pay, reinstatement, and injunctive relief.²⁸³ The OSH Act has no provision for a private right of action or an award of attorney's fees.

Whistleblowers who believe they have been retaliated against for exercising their health and safety rights listed under this category may file a complaint with OSHA.²⁸⁴ Complaints must be filed within thirty days of learning of the retaliatory action.²⁸⁵ Courts have relaxed this relatively short statute of limitations, ruling that it is subject to equitable tolling. Whistleblowers who could not have discovered the retaliation until after the thirty days are not barred from filing a complaint.²⁸⁶ Furthermore, whistleblowers may elect to have a union representative, such as an attorney or foreman file the claim on their behalf.²⁸⁷ Once a complaint is properly filed, the Secretary of Labor will initiate an investigation.²⁸⁸ If the Secretary concludes an actionable violation has occurred, the DOL will sue on behalf of the whistleblower.²⁸⁹

4. Recommendations

Although OSHA has made great strides, the risks to millions of Americans in the workplace remain significant. The DOL currently recognizes that “[s]ignificant hazards and unsafe conditions still exist in U.S. workplaces.”²⁹⁰ OSHA reports that each year over 5000 Americans die from workplace injuries, 50,000 employees die from illnesses related to workplace exposures, and more than 4.3 million people suffer workplace

282. Lewis D. Solomon & Terry D. Garcia, *Protecting the Corporate Whistle Blower Under Federal Anti-Retaliation Statutes*, 5 J. CORP. L. 275, 282 (1980).

283. Trystan Phifer O’Leary, *Silencing the Whistleblower: The Gap Between Federal and State Retaliatory Discharge Laws*, 85 IOWA L. REV. 663, 676-83 (2000).

284. 29 C.F.R. § 1977.15(c) (2011).

285. *Id.* § 1977.15(d)(1).

286. *See Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421 (10th Cir. 1984).

287. 29 C.F.R § 1977.15(a).

288. 29 U.S.C. § 660(c)(2) (2006).

289. *Id.*

290. *All About OSHA*, at 5, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (2006), http://www.osha.gov/Publications/all_about_OSHA.pdf.

injuries or illnesses at a cost of over \$150 billion.²⁹¹ Therefore, the anti-discrimination provisions of these statutes need strengthening to better protect the American worker.

Perhaps the three biggest impediments to fully engaging an active body of whistleblowers are (1) the inability of the discriminated employee to bring his own civil action against his employer to recover damages, (2) the woefully short statute of limitations, and (3) the unavailability of attorney fees. Under current law, most employees have to proceed without legal counsel, leading many to forgo making a claim. Additionally, many other meritorious claims are lost because employees do not have enough time to make a tough decision to blow the whistle.

Unfortunately, the whistleblower is at the mercy of OSHA to advance his claim. If he or she is not articulate, then a busy OSHA worker might not take the case despite the worker suffering significant consequences. It is time for Congress and the DOL to bring the OSH Act into the 21st Century. First, the statutes should be amended to provide employees access to federal jury trials for major disciplinary actions taken against them—such as termination from federal employment. Second, the amount of time to bring the action should be dramatically extended from thirty days to three years.²⁹² Third, the statutes must allow for an award of attorney's fees and legal costs. It is crippling to effectively deny a whistleblower the aid of counsel when facing the decision to step forward to remedy harms that affect the safety and health of workers or to prevent or remedy the evils of retaliation.

F. Category VI: Statutes Protecting Whistleblowers Who Report Securities Violations

“The collapse of Enron was devastating to tens of thousands of people and shook the public’s confidence in corporate America.” – Robert Mueller, Director of the FBI²⁹³

291. *Id.*

292. *See supra* p. 17, Recommendations under Category II, identifying the need for a longer time for a whistleblower to weigh the risks of becoming a whistleblower and make an informed decision.

²⁹³ Press Release, *Former Enron Chairman and Chief Executive Officer Kenneth L. Lay Charged with Conspiracy, Fraud, False Statements*, DEP'T OF JUSTICE (July 8, 2004), available at http://www.justice.gov/opa/pr/2004/July/04_crm_470.htm.

The fallout of the Enron²⁹⁴ and WorldCom²⁹⁵ scandals made it evident that the corporate whistleblower protections of the 1990s were in need of massive overhaul. Lack of enforcement, length of the process, and the potential risks provided the more than forty million employees of publicly-traded companies very little incentive to blow the whistle. In the wake of these corporate scandals, Congress decided to no longer sit back and let millions of employees and investors be robbed at the hands of crooked executives, lawyers, and accountants. In July 2002, President George W. Bush signed into law the Sarbanes Oxley Act (“SOX”), effectively laying the foundation to restore investor confidence and end the corruption that led to the demise of some of America’s most prominent corporations.

In May 2002, the Senate Judiciary Committee released its findings on corporate corruption that became the basis for many of the SOX whistleblowing provisions.²⁹⁶ Perhaps the most compelling finding was the existence of a corporate culture that ultimately discouraged and prevented employees from acting honestly in the workplace.²⁹⁷ Little sense of urgency to report wrongdoing existed, mainly out of fear of losing one’s job or suffering retaliation. Without accountability or discipline, this culture would continue to prevail.²⁹⁸

Comments during the Senate Judiciary Committee hearings made it clear that had employee whistleblowing protections been in place, the corporate corruption that put an end to Enron, in turn causing millions of Americans to lose their investments, could have been avoided.²⁹⁹ Perhaps the most riveting example of the need for these protections is the story of Sherron Watkins’s attempt to blow the whistle on Enron for its fraudulent accounting practices.³⁰⁰ Prior to the passage of SOX, Enron had the right to terminate Watkins for exposing its illegal activities.³⁰¹ Unfortunately, Watkins’s story was not unique. The deeper Congress dug, the more evident it became that the millions of employees of private corporations were unprotected if they elected to blow the whistle. Upon the passage of SOX,

294. See Patsuris, *supra* note 10.

295. See Lacayo & Ripley, *supra* note 9.

296. KOHN, KOHN & COLAPINTO, *supra* note 219, at 1.

297. *Id.* at 1-2.

298. See *id.* at 2-3.

299. *Id.*

300. See Lacayo & Ripley, *supra* note 9.

301. KOHN, KOHN & COLAPINTO, *supra* note 219, at 2 (noting that “[t]he lawyers told Enron that under current law, it could simply fire the whistleblower”).

Senator Patrick Leahy said, “We [Congress] learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court.”³⁰² Because of document destruction, cover-ups, and falsifying of information, often witness testimony is the only evidence.³⁰³ In an attempt to remedy this failed system, a whistleblower provision was added to SOX,³⁰⁴ offering long overdue protections to employees while mandating that all publicly-traded companies establish internal whistleblower programs.³⁰⁵ The SOX whistleblower protections responded to “a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities . . . but even internally. This ‘corporate code of silence’ not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity.”³⁰⁶

SOX can be categorized as Congress’s first attempt to enforce uniform whistleblowing on such a large scale. Unlike the categories above that have whistleblowing provisions available to employees, SOX regulated the entire publicly-traded sector of employment.³⁰⁷

1. Who is Protected

SOX protects employees who allege that they were retaliated against for blowing the whistle on certain employers for SEC violations or shareholder fraud.³⁰⁸ SOX defines employers to include any company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)).³⁰⁹ “Employee” is broadly defined intentionally³¹⁰ and is meant to encompass

302. 148 CONG. REC. S 7358 (daily ed. July 25, 2002).

303. Edward F. Gehringer, *Missing White House E-Mail: A Whistleblowing Case Study*, 2002 American Soc’y for Eng’g Educ. Conf. and Exposition, Sess. 3661 (discussing the situation that arose in 2000 when approximately 100,000 emails were not processed through the White House’s automated records system).

304. KOHN, KOHN & COLAPINTO, *supra* note 219, at 4.

305. 15 U.S.C. § 78j-1(m)(4)(B) (2006) (stating that “[e]ach audit committee shall establish procedures for . . . the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters”).

306. S. REP. NO. 107-146, at 5 (2002).

307. KOHN, KOHN & COLAPINTO, *supra* note 219, at 6.

308. 29 C.F.R. § 1980.100(a) (2010).

309. *Id.* § 1980.101.

310. See KOHN, KOHN & COLAPINTO, *supra* note 219, at 70.

not only current and former employees, but also those who apply for employment and those whose employment could be affected by a company or company representative.³¹¹ By keeping these definitions broad, Congress kept SOX consistent with previous whistleblowing case law and statutory interpretations of the term “employee.”³¹²

SOX even extended protection to employees of non-publicly-traded companies and employees of those who do business with publicly-traded companies. The purpose was to prevent publicly-traded companies from evading the Act by hiring outside, independent contractors to conduct their business.³¹³

2. What is Covered

The Senate Judiciary Committee broadly defined the reportable offenses and protected conduct under SOX.³¹⁴ The purpose of the bill was to

create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors . . . or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent.³¹⁵

In essence, SOX offers protection to any employee who reports alleged violations of SEC rules and regulations, alleged violations of criminal and civil laws put in place to protect investors, and fraudulent activities that may potentially harm investors.³¹⁶ The protection extends to reporting (1) to Congress, (2) internally to an employer, (3) to government officials, and (4) as part of any conduct in a proceeding initiated under securities laws.³¹⁷

The term ‘employee’ as used in this Act must be given a most liberal interpretation, particularly in view of the evils the Act was designed to prevent. . . . In light of these statutory objectives, the overriding policy considerations involved would compel that the term employee be as inclusive as is rationally possible.

Id. (quoting *Landers v. Commonwealth-Lord Joint Venture*, 83-ERA-5, slip op. of ALJ at 5, adopted by SOL (Sept. 9, 1983)).

311. 29 C.F.R. § 1980.101.

312. KOHN, KOHN & COLAPINTO, *supra* note 219, at 70.

313. *See id.* at 72.

314. S. REP. NO. 107-146, at 19 (2002).

315. *Id.*

316. 18 U.S.C. § 1514A(a) (2006).

317. KOHN, KOHN & COLAPINTO, *supra* note 219, at 78-79.

Significantly, SOX does not require that an employee prove the allegations or even that the allegations be true in order to qualify for protection.³¹⁸ It is the action of bringing forth allegations that is protected. Otherwise, the barrier to stepping forward would be too high. In balancing the interest of fraud remaining secret versus sanctioning speculation, the statute built in a safeguard that the whistleblowing must be based on a reasonable belief that an illegal violation occurred.³¹⁹ Courts have held that, “[t]he accuracy or falsity of the allegations is immaterial; the plain language of the regulations only requires an objectively reasonable belief that shareholders were being defrauded to trigger [SOX’s] protections.”³²⁰ Such allegations are analyzed from an objective standard.³²¹

Assuming that a whistleblower can show a reasonable belief, to establish a *prima facie* case of retaliation based on the protected activity, the whistleblower also has the burden to show that the person retaliating had knowledge of the allegations or knew that he was acting according to a protected activity under the statute.³²² Courts allow the whistleblower to show this through circumstantial evidence given that direct evidence of intention or knowledge is very difficult to establish.

Finally, SOX prohibits employers from taking any form of adverse employment action against an employee in retaliation for engaging in a protected activity.³²³ Much like many of the terms in SOX, adverse employment action is defined and analyzed broadly. The United States Supreme Court has defined an adverse employment action as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”³²⁴

Nevertheless, not every negative action toward an employee constitutes an adverse one. Petty, slight actions such as annoyances, stray negative comments in an otherwise positive or neutral evaluation, snubbing a colleague, or negative comments that are justified by an employee’s poor

318. 18 U.S.C. § 1514A(a)(1).

319. *Id.*

320. KOHN, KOHN & COLAPINTO, *supra* note 219, at 93 (internal quotation marks omitted).

321. *Id.*

322. *See id.* at 95.

323. 18 U.S.C. § 1514A(a) (2006).

324. Harvey Sanders, *Defining an ‘adverse employment action,’* BUFF. BUS. FIRST J., March 27, 2006, available at <http://www.bizjournals.com/buffalo/stories/2006/03/27/focus3.html>.

work performance or history likely would not be considered adverse enough to support a claim under SOX.³²⁵ Care must be made, however, not to confuse minor actions with a concerted effort to use a pattern of slight, negative actions to effectively retaliate against a particular employee or done with an eye towards sending a message that whistleblowing is not tolerated.

3. Remedies

SOX contains two sections addressing the remedies whistleblowers have available to them if they suffer an adverse employment action.³²⁶ Both are nearly identical and have the same purpose of making whole the whistleblower who suffered retaliation for engaging in a protected activity.³²⁷ Under these sections, the court or administrative agency is to award the prevailing whistleblower all the relief necessary to make him whole again, as if the retaliation never took place.³²⁸ Depending on the situation, both monetary and non-monetary relief is available.

A common form of nonmonetary relief is reinstatement to the former position if the whistleblower has been discharged, demoted, or transferred.³²⁹ Finding comparable employment in the same industry after being labeled a whistleblower can be nearly impossible.³³⁰ This may explain why, unlike many other anti-retaliation statutes, Congress sent a strong message by excluding from SOX any duty by the whistleblower to mitigate damages. Nevertheless, courts may require all plaintiffs to mitigate damages, even under SOX,³³¹ and employers also seek to temper the effect by raising this point when arguing to the court for a lower damage amount.³³² Reinstating a whistleblower to his former position also sends a message to other employees that if they exercise their right to prevent illegal activities, then they can prevail and not be punished. Beyond reinstatement,

325. *Id.* (noting that “the change must be ‘more disruptive than a mere inconvenience or an alteration of job responsibilities’”).

326. KOHN, KOHN, & COLAPINTO, *supra* note 219, at 101.

327. *Id.*

328. *See Nord v. U.S. Steel Corp.*, 758 F.2d 1462, 1470-71 (11th Cir. 1985).

329. *See Reeves v. Claiborne Cnty.*, 828 F.2d 1096, 1101 (5th Cir. 1987).

330. KOHN, KOHN, & COLAPINTO, *supra* note 219, at 102.

331. *See Kalkunte v. DVI Fin. Serv.*, 2004-SOX-00056, 2005 WL 2063788, at *331, *368-69 (July 18, 2005) (finding that SOX complainants have a duty to mitigate damages).

332. *See KOHN, KOHN, & COLAPINTO, supra* note 219, at 109.

other forms of non-monetary relief include expunging of personnel files,³³³ restoration of parking privileges,³³⁴ and various forms of injunctive relief.

With respect to monetary damages, a court may award both back pay and front pay if needed to make the whistleblower whole.³³⁵ The most common form is back pay, which includes interest.³³⁶ Front pay, which requires paying the equivalent of salary without requiring the employee to return to work for the wrongdoer, is often used when the relationship between the prevailing whistleblower and the employer is so hostile that a professional working relationship cannot be reestablished.³³⁷ The front pay can last the reasonable amount of time it would take for the employee to find a new form of income. Additional forms of monetary relief include restoration of health and welfare benefits,³³⁸ lost vacation pay,³³⁹ and stock options.³⁴⁰

SOX also provides for special damages.³⁴¹ These include compensatory damages and damages for intentional torts. These are often the result of other causes of action brought in a whistleblowing claim, such as intentional infliction of emotional distress,³⁴² depression,³⁴³ and loss of professional reputation.³⁴⁴ Unlike punitive damages, compensatory damages cannot be used to punish employers.³⁴⁵ Special damages also include litigation costs, expert witness fees, and reasonable attorney's fees.³⁴⁶

Like all civil cases, alternative dispute resolution is a route that can be taken to settle SOX complaints. A settlement agreement approved by the DOL constitutes an enforceable final order and may be enforced in federal

333. *Id.* at 107.

334. *Id.*

335. *Id.* at 104-05. .

336. *Id.* at 107.

337. *See* EEOC v. Prudential Fed. Sav., 763 F.2d 1166, 1172 (10th Cir. 1985).

338. *See* Blum v. Witco Chem. Corp., 829 F.2d 367, 383 (3d Cir. 1987) (affirming an award of front pay for lost pension benefits).

339. KOHN, KOHN & COLAPINTO, *supra* note 219, at 107.

340. *Id.*

341. 18 U.S.C. § 1514A(c)(2)(C) (2006).

342. *See* Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057, 1064 (5th Cir. 1981).

343. *See* Neal v. Honeywell, Inc., 994 F. Supp. 889, 895 (E.D. Ill. 1998).

344. KOHN, KOHN, & COLAPINTO, *supra* note 219, at 108.

345. *Id.*

346. 18 U.S.C. § 1514(c)(2)(C).

court.³⁴⁷ A suit for breach of contract of a SOX settlement agreement must be filed in federal court.³⁴⁸

Although not a direct remedy to whistleblowers, SOX includes criminal penalties in certain circumstances, which have the effect of deterring retaliation. They apply to

[w]hoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.³⁴⁹

Aggrieved parties can adjudicate their claims both administratively and, in certain circumstances, through Article III courts.³⁵⁰ Under SOX, whistleblowers who believe they have suffered illegal retaliation for participating in a protected activity must file a complaint with the DOL within 90 days of the date the retaliatory action occurred.³⁵¹ The DOL will review the complaint and send it to OSHA for investigation. OSHA then issues a conclusion on its findings along with an enforceable order. Either party can appeal OSHA's order to an Administrative Law Judge ("ALJ"). The ALJ will then preside over an administrative hearing process and issue a decision, which in turn can be appealed to the United States Court of Appeals in the appropriate jurisdiction.³⁵²

In the alternative, if OSHA does not complete the investigation and issue an order within the 180 day period, then the whistleblower may remove his complaint and file suit in United States District Court.³⁵³ Moving the case to

347. 29 C.F.R. § 1980.111(e) (2011).

348. 29 C.F.R. § 1980.112(a).

349. 18 U.S.C. § 1513(e) (2006). This is more commonly referred to as obstruction of justice. The Act goes on to state that, if applicable, a violation of SOX shall also be treated as a violation of the Securities and Exchange Act of 1934. 15 U.S.C. § 7202(b)(1) (2006).

350. KOHN, KOHN, & COLAPINTO, *supra* note 219, at 38-39.

351. 18 U.S.C. § 1514A(b)(2)(D) (2006). As discussed below, the Dodd-Frank Act amended this statute to 180 days. *See* Pub. L. 111-203, § 922(c)(1)(A) (striking out "90" and inserting "180," and striking out the period at the end and inserting "or after the date on which the employee became aware of the violation").

352. KOHN, KOHN, & COLAPINTO, *supra* note 219, at 13, 17, 21, 24, 38.

353. 18 U.S.C. § 1514A(b)(1)(B).

federal court is done *de novo*, so the case essentially starts over.³⁵⁴ This often yields more favorable results to claimants because instead of an executive agency or ALJ issuing a final decision, a jury of one's peers decides the case. Whistleblowers who suffer retaliation for providing information to Congress on a potential SOX violation have the option of foregoing the administrative process and requesting a jury trial in federal court.³⁵⁵

Dodd-Frank Wall Street Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") was adopted on July 21, 2010, and significantly expanded SOX-type protections for whistleblowers.³⁵⁶ First, it expressly includes employees of subsidiaries of publicly-traded companies and parent corporations.³⁵⁷ Second, it extends the statute of limitations from 90 to 180 days.³⁵⁸ Third, it prohibits mandatory, pre-dispute arbitration agreements for SOX claims and allows for a jury trial if a case is allowed to proceed in district court.³⁵⁹

In many ways, the Dodd-Frank Act supersedes SOX because it expands protection. However, there is one glaring difference and inconsistency between the two acts. The Dodd-Frank Act protects persons when reporting externally, but they receive no protection if they report internally. SOX, on the other hand, which protects a smaller subset of whistleblowers, does protect those reporting internally, but they must rely on the weaker SOX protections instead of the more expansive protections or remedies of the Dodd-Frank Act.³⁶⁰ In essence, the Dodd-Frank Act seemingly unintentionally created a two-tiered structure of protections where

354. *Id.*

355. 18 U.S.C. § 1514A(b)(2)(E) (2011).

356. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S. Code). The remedies include reinstatement, back pay, and other relief. H.R. 4173, 111th Cong. § 922(a) (2010).

357. PUB. L. NO. 111-203.

358. *Id.* § 922(c). The Dodd-Frank Act also added that the 180 days can alternatively be from when the employee becomes aware of the violation.

359. *Id.* § 922(b)(1) (increasing whistleblower rewards: a whistleblower who voluntarily provides information leading to a successful enforcement action resulting in over \$1 million in monetary sanctions is eligible for a reward amount not less than 10% and not more than 30% of the sanctions collected).

360. 124 Stat. at 1846.

potential whistleblowers receive different sets of protections depending on whether they choose to report internally or externally. Therefore, Congress should amend the Dodd-Frank Act to protect internal reporting.

4. Recommendations

Congress did a good job of fixing most of the deficiencies in SOX whistleblower provisions by enacting the Dodd-Frank Act. As discussed above, Congress should amend the Dodd-Frank Act to protect internal reporting. Nevertheless, there are still two other significant problems with SOX and the Dodd-Frank Act relating to the statute of limitations and access to federal courts.

In addition, although the Dodd-Frank Act provides for a right to a jury, the only way a whistleblower gets into federal court (and now gets a jury) is if the DOL does not complete the investigation and issue an order within 180 days.³⁶¹ The Dodd-Frank Act should be amended to allow a whistleblower to file in district court in the first instance.

Similarly, the statute of limitations needs to be significantly lengthened. Under SOX the statute of limitations is 90 days, and under the Dodd-Frank Act it is 180 days. Although it may have sounded good to double the statute of limitations, the time is still far too short to allow a whistleblower to make a good decision on whether to become a whistleblower and risk retaliation. As discussed in prior sections, the statute of limitations should be extended to three years, thus providing time for a whistleblower to decide whether to file a complaint with the DOL under existing law or directly before a court as proposed in this Article.

III. CONCLUSION

With an ever increasing appreciation for the need and value of whistleblowers, Congress has been busily crafting a quilt made up of six large patches covering every area of needed federal whistleblower protection. Nevertheless, there are three essential pieces that do not exist in all of the sections. First, there needs to be a sufficiently longer statute of limitations, which this Article suggests should be three years, for when the claim must be filed to allow a whistleblower enough time to weigh the risks of becoming a whistleblower. Second, there should be immediate, direct access to federal courts, including jury trials, for major disciplinary actions taken against employees, such as termination from employment. Third, it is

361. KOHN, KOHN, & COLAPINTO, *supra* note 219, at 38-39.

paramount that a prevailing whistleblower be granted attorney's fees because, as a practical matter, without the assistance of legal counsel, many of the protections of these whistleblower laws will never be realized.

