

# The Public Wrong of Whistleblower Retaliation

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*When employers retaliate against whistleblowers, courts and agencies often treat the retaliation as a private employment dispute best resolved by the whistleblower and employer. This cramped view of retaliation disregards Congress's contrary perspective of whistleblower retaliation as a public wrong requiring public attention. A survey of disparate Congressional enforcement mechanisms in whistleblower retaliation reveals common ground in a public mandate to investigate retaliation allegations. As limited resources constrain public investigation of every allegation, this Article proposes legislative and enforcement strategies that affirm the government's leadership role in addressing the public wrong of whistleblower retaliation.*

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INTRODUCTION

The popular media may praise whistleblowers for their roles in revealing wrongdoing, but private employees run the serious risk of employer retaliation when they choose to blow the whistle on employer wrongdoing.<sup>1</sup> Over the last century, Congress has enacted numerous statutes directing agencies to protect whistleblowers against retaliation in diverse contexts such as securities fraud, asbestos, and solid waste disposal.<sup>2</sup> This delegation of responsibility to enforce antiretaliation statutes suggests that Congress recognizes the public importance of protecting whistleblowers.

The behavior of courts and agencies, however, instead emphasizes retaliation as a private employment dispute. The Secretary of Labor has been extremely reluctant to actually litigate whistleblower retaliation cases,<sup>3</sup> and courts have limited antiretaliation efforts by expressly disclaiming the public interest angle.<sup>4</sup>

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1. See, e.g., Press Release, U.S. Dep’t of Labor, Occupational Safety & Health Admin., OSHA Orders Wells Fargo to Reinstate Whistleblower, Fully Restore Lost Earnings in Banking Industry (Apr. 3, 2017), <https://www.osha.gov/news/newsreleases/national/04032017> (covering the termination of a bank manager who reported potentially fraudulent behavior); Ann Marsh, *Unprotected: How the Feds Failed Two Wells Fargo Whistleblowers*, AM. BANKER (Aug. 14 2017, 8:35 PM), <http://www.americanbanker.com/news/unprotected-how-the-feds-failed-two-wells-fargo-whistleblowers> (criticizing OSHA’s mishandling of two whistleblower cases in the banking industry); Tom Hamburger, *Questioning the Books: Enron Memo Shows Watkins Urged Lay to Restate Earnings*, WALL ST. J., Feb. 14, 2002, at A8. See generally Jessica R. Mesmer-Magnus & Chockalingan Viswesvaran, *Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation*, 62 J. BUS. ETHICS 277 (2005) (analyzing whether intentions of whistleblowers corresponds with whistleblowers’ actions).

2. See *infra* Part II.

3. See, e.g., TOM DEVINE & TAREK F. MAASSARANI, *THE CORPORATE WHISTLEBLOWER’S SURVIVAL GUIDE: A HANDBOOK FOR COMMITTING THE TRUTH* 166 (2011) (providing that, as of 2011, the Department of Labor has only filed suit in section 11(c) occupational safety whistleblower cases thirty-two times in fifteen years); Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 199-200 (2007) (indicating that more Sarbanes-Oxley complaints are dismissed than decided on the merits); Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1764 (2007) (submitting that the ineffective of the Sarbanes-Oxley Act is illustrated by the lack of cases brought under it); OCCUPATIONAL SAFETY & HEALTH ADMIN., *WHISTLEBLOWER INVESTIGATION DATA CASES RECEIVED: FY2007-FY2017* (2017), <http://www.whistleblowers.gov/sites/default/files/3DCharts-FY2007-FY2017.pdf> (providing statistics for fiscal years 2007 through 2017).

4. See, e.g., *Guyden v. Aetna, Inc.*, 544 F.3d 376, 383 (2d Cir. 2008) (“The primary purpose of [this whistleblower] statute is to provide a private remedy for the aggrieved employee, not to publicize alleged corporate misconduct.”); *Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 78 (2d Cir. 1998) (finding that the availability of litigation in a whistleblower statute does not stand for the proposition that Congress did not intend to preclude resolution through arbitration).

The core problem is incoherent delegation of whistleblower retaliation responsibility from Congress in light of limited enforcement resources. Congress might sincerely desire thorough investigation and enforcement of all whistleblower retaliation claims by the Secretary of Labor, but insufficient resources make this impossible. Combined with numerous statutes that specify disparate enforcement responsibilities, it is unsurprising that the Secretary would simply assume that most whistleblower retaliation cases could be adequately addressed through private litigation rather than public agency litigation.

In the short term, the Secretary can re-establish the public importance of whistleblower retaliation cases by candidly acknowledging public resource limitations and shifting enforcement priorities. Rather than futilely investigating every retaliation allegation to completion, the Secretary should instead prioritize investigating the public interest in each allegation. A formal announcement that an allegation merits public attention can dissuade courts from viewing the complaint as a purely private matter.

As a broader solution, this Article proposes a principal-agent view of whistleblower antiretaliation litigation that can lead towards coherent delegation of antiretaliation efforts for various offenses. Borrowing from recent interest in whistleblower bounties, this principal-agent view emphasizes the linkage between the public interest in discovering wrongdoing and the whistleblower's private interest.<sup>5</sup> Most whistleblower statutes do not offer payment for whistleblowing, but there are a few exceptions, including the False Claims Act and Dodd-Frank.<sup>6</sup> Bounties paid under those statutes link the private agent's interests with the public interest in uncovering the wrongdoing by paying a percentage of the penalty to the whistleblower. Whistleblowers who uncover severe wrongdoing are entitled to a greater reward, while whistleblowers who reveal trivial wrongdoing receive little reward. The reward system drives whistleblowers towards the public's interest in prioritizing severe wrongdoing.

Antiretaliation efforts on behalf of whistleblowers should follow a similar analytical framework. The public, as the principal, has an interest in uncovering different types of wrongdoing. The whistleblower, as the

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5. See, e.g., Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C. DAVIS L. REV. 2215 (2017) (discussing the Securities and Exchange Commission's whistleblowing program); Kathleen Clark & Nancy J. Moore, *Financial Rewards for Whistleblowing Lawyers*, 56 B.C. L. REV. 1697 (2015) (analyzing whether attorneys are allowed to seek federal whistleblower awards); Dennis J. Ventry, Jr., *Stitches for Snitches: Lawyers as Whistleblowers*, 50 U.C. DAVIS L. REV. 1455 (2017) (challenging the argument that an attorney cannot expose a client's wrongdoing without also violating her ethical obligations).

6. See 31 U.S.C. § 3730(d) (2012); 15 U.S.C. § 78u-6 (2012).

agent, faces a disincentive to reveal wrongdoing due to the risk of employer retaliation. Her potential losses due to retaliation, however, may not be aligned with the public's interest in uncovering the wrongdoing. In fact, they may be inversely related: If the whistleblower is revealing serious wrongdoing in which there is a strong public interest, her employer is more likely to retaliate against her, which could make her less likely to come forward.

Congress, therefore, should consider the whistleblower's interests in the substantive wrongdoing in comparison with the public's interest. If her interest in the wrongdoing matches the public's interest, then she should be a desirable agent for the principal: she can be trusted to both blow the whistle and to subsequently enforce a private right against employer retaliation for revealing the wrongdoing. An Occupational Safety and Health Administration of the Department of Labor ("OSHA") violation dealing with workplace safety would be an example: an employee working in an unsafe factory floor has an interest in improving safety that matches the public's interest in workplace safety. This employee can be trusted to blow the whistle and to bring a private action against retaliation for blowing the whistle on the OSHA violation. Contrary to the existing statute, which requires OSHA to litigate the retaliation claim, this is a retaliation claim that Congress should feel comfortable delegating to the employee for litigation.

In contrast, a potential whistleblower might uncover facts possibly implying that her employer has been systematically underpaying federal taxes. The government, representing the public, has an interest in collecting taxes, but in this scenario, it is less clear that the potential employee whistleblower's interest aligns well with the government's interest. A deficient agent, for example, might raise questionable claims of tax wrongdoing because she desires greater leverage in negotiating a severance package rather than sincere beliefs about tax underpayment. There is a greater possibility here that the agent's claims on both the wrongdoing and subsequent retaliation might be suspect. Because the whistleblower may not be as good of an agent in this tax scenario in comparison to the workplace safety scenario, the government should prioritize control over enforcement of this tax antiretaliation litigation.

This framework not only helps Congress and agencies decide which retaliation cases to prioritize for government enforcement, but also improves the form of delegation to employees for litigation. This Article argues that Congress can improve delegation to employees by aligning the employee's interest with the public interest against retaliation: when the substantive offense is serious, there should be greater compensation available to the employee if she faces retaliation. Presently, most statutes

limit employee compensation for retaliation to back pay and restitution, but there is little reason to believe that an employee's salary has any direct relationship to the severity of the harm she is reporting. The public interest is strongest in uncovering serious wrongdoing, and these cases of serious wrongdoing similarly require strong investment in combating retaliation. Future whistleblowers that know of serious wrongdoing must be assured that they will have a fair chance if their employers choose to retaliate.

Part I provides background on the federal whistleblower laws regarding retaliation, highlighting Congress's general emphasis on public enforcement. Part II outlines evidence of the problematic private view of whistleblower retaliation. Part III describes various strategies that will restore the balance between public and private interests in retaliation.

#### I. BACKGROUND ON FEDERAL CIVIL WHISTLEBLOWER RETALIATION CLAIMS

The United States has passed numerous laws concerning whistleblower participation in correcting substantive wrongdoing: fraud against the government,<sup>7</sup> environmental violations,<sup>8</sup> securities violations,<sup>9</sup> and others.<sup>10</sup> The statutory regime is patchwork: only federal employees benefit from a unified whistleblowing regime.<sup>11</sup> Most federal statutes attempt to protect whistleblowers by prohibiting retaliation against the whistleblower. As a typical example, the International Safety Container Act of 1977 ("ISCA"), which regulates shipping containers, states that "[a] person may not discharge or discriminate against an employee because the employee has reported the existence of an unsafe container or a violation of this chapter or a regulation prescribed under

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7. See, e.g., Press Release, Dep't of Justice, Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014 (Nov. 20, 2014), <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014> (pertaining to the government's recovery of a combined \$5.69 billion from judgments and settlements in fraud against the government cases).

8. For an overview of protections granted to environmental whistleblowers, see Richard E. Condit, *Providing Environmental Whistleblowers with Twenty-First Century Protections*, 2 AM. U. LAB. EMP. L.F. 31 (2011).

9. See, e.g., Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1 (2012) (examining the progress and shortcomings of whistleblower protection since the passing of the Sarbanes-Oxley Act ten years prior to publication).

10. For a survey of whistleblower laws, see Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 55 (2011).

11. The unified public enforcement of federal employee retaliation claims differs greatly from the private sector system; as such, this Article will not discuss federal employee retaliation. See Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 *et seq.* (1989) and Whistleblower Protection Enhancement Act of 2012, 5 U.S.C. § 2302 *et seq.* (2012).

this chapter.”<sup>12</sup> Statutes generally offer only protection against retaliation and do not offer any express rewards for whistleblowers, but there are a handful of exceptions such as the False Claims Act<sup>13</sup> and Dodd-Frank,<sup>14</sup> which pay bounties to whistleblowers.

Society’s primary interest focuses on addressing a substantive wrong, such as environmental pollution, and a whistleblower may help identify such wrongdoing.<sup>15</sup> The government wishes to deter substantive offenses and to prosecute offenders, but there may be challenges in learning about the offenses and the responsible parties. Whistleblowers can supplement government investigation efforts. A potential whistleblower, assuming she finds a federal statute covering her claim, should consider whether she has any protection from employer retaliation for blowing the whistle.

While this Article concerns federal whistleblower statutes, it is important to note that there are other legal protections for whistleblowers. The federal statutes may interact with state and common law rights. Many states have passed a variety of whistleblower statutes, and there is the possibility of federal preemption of state whistleblower statutes.<sup>16</sup> Additionally, there are common law rights regarding retaliation against whistleblowers, particularly a public policy exception to the traditional at-will employment rule.<sup>17</sup> Federal statutory regimes may similarly impact common-law rights.<sup>18</sup>

Although they are also outside the scope of this Article, there are various federal statutes that criminalize retaliation against whistleblowers. The government can refer the corporation and individuals within for criminal sanctions such as obstruction of justice,<sup>19</sup> witness tampering,<sup>20</sup> or conspiracy charges.<sup>21</sup> Sarbanes-Oxley, for example, makes whistleblower retaliation a felony.<sup>22</sup> The presence of

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12. 46 U.S.C. § 80507(a) (2012).

13. 31 U.S.C. § 3730(d) (2012).

14. 15 U.S.C. § 78u-6 (2012).

15. See generally Richard Moberly, *The Supreme Court’s Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375 (2011) (describing judicial interest in enforcing substantive law as the basis for whistleblower retaliation decisions).

16. See Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 123–26 (2000).

17. See *id.* at 105; *id.* at 99, app. A.

18. *Id.* at 126–29.

19. 18 U.S.C. § 1503 (2012).

20. 18 U.S.C. § 1512 (2012).

21. 18 U.S.C. § 371 (2012) (criminalizing defrauding the federal government). See generally *United States v. Gricco*, 277 F.3d 339 (3d Cir. 2002) (affirming defendants’ appeal of conspiracy and tax invasion convictions).

22. 18 U.S.C. § 1513(e) (2012).

these criminal statutes also emphasize the public importance of addressing retaliation. Nonetheless, the focus of this Article is on the role of federal civil litigation in addressing whistleblower retaliation.

This Part begins with a summary of the typical elements to antiretaliation litigation, and then turns its focus to Congress's various attempts to drive public enforcement of civil whistleblower retaliation litigation.

#### A. ELEMENTS OF A WHISTLEBLOWER ANTIRETALIATION CLAIM

When a whistleblower believes she is facing retaliation from her employer for her whistleblowing behavior, she may either bring a claim to the OSHA or initiate a civil complaint in court. OSHA administratively manages most whistleblower antiretaliation regimes, regardless of the substantive area.<sup>23</sup> Both avenues for potential redress proceed with a

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23. See U.S. DEP'T OF LABOR, OSHA INSTRUCTION CPL 02-03-005, WHISTLEBLOWER INVESTIGATIONS MANUAL, Ch. 1: VIII.D.1 (May 21, 2015), [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-03-005.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-005.pdf)

In addition to the overall responsibility of enforcing Section 11(c) of the Act, the Secretary of Labor has delegated to OSHA the responsibility for investigating claims of retaliation filed by employees under the whistleblower provisions of the following twenty-one statutes, which together constitute the whistleblower protection program:

- a. Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2651
- b. International Safe Container Act (ISCA), 46 U.S.C. § 80507
- c. Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105
- d. Clean Air Act (CAA), 42 U.S.C. § 7622
- e. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610
- f. Federal Water Pollution Control Act, 33 U.S.C. § 1367
- g. Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i)
- h. Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971
- i. Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622
- j. Energy Reorganization Act (ERA), 42 U.S.C. § 5851
- k. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121
- l. Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A
- m. Pipeline Safety Improvement Act, 49 U.S.C. § 60129
- n. Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109
- o. National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142
- p. Consumer Product Safety Improvement Act, 15 U.S.C. § 2087
- q. Affordable Care Act (ACA), 29 U.S.C. § 218C
- r. Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567
- s. Seaman's Protection Act, 46 U.S.C. § 2114 (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281

common analytical framework to determine whether a whistleblower would be entitled to relief. After investigation, OSHA will make a determination as to whether a whistleblower's retaliation claim is meritorious or not.<sup>24</sup> Relief generally involves "making the victim whole" through reinstatement, back pay, and litigation costs. Some statutes go further by also authorizing punitive damages or other sanctions.<sup>25</sup>

A sample whistleblower retaliation case will help illustrate the elements of a civil action. Dr. Julio Perez, a chemist at Progenics, faced retaliation in connection with a drug called Relistor.<sup>26</sup> Progenics had completed a Phase 2 clinical trial of Relistor and was considering proceeding to a Phase 3 clinical trial in May 2008.<sup>27</sup> At that time, the company issued a press release positively describing progress on Relistor.<sup>28</sup> Executives subsequently produced a high-level confidential document that recommended not proceeding with a Phase 3 clinical trial because of problems raised by the Phase 2 clinical trial results.<sup>29</sup> Dr. Perez obtained the executive document, and he expressed concerns to superiors that the earlier press release was a "fraud against shareholders" because the company knew that recent scientific studies of the drug were disappointing.<sup>30</sup> Shortly thereafter, Progenics fired Dr. Perez.<sup>31</sup> Progenics denied retaliating against Dr. Perez, claiming that Dr. Perez was fired because he refused to disclose to superiors how he discovered the executive document.<sup>32</sup> On August 3, 2015, a federal jury found in favor of Dr. Perez and ordered Progenics Pharmaceuticals to pay \$1.66 million in compensation.<sup>33</sup>

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t. FDA Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d

u. Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21),  
v. 49 U.S.C. § 30171.

24. *Id.* at 4-1 to 4-8.

25. *See, e.g.*, 31 U.S.C. § 3730(h)(2) (2012) (authorizing reinstatement, double back pay, interest on the back pay and special damages); 49 U.S.C. § 31105(b)(3)(C) (2012) (sanctioning punitive damages up to \$250,000).

26. *Perez v. Progenics Pharmaceuticals, Inc.*, 965 F. Supp. 2d 353, 356 (S.D.N.Y. 2013) (pertaining to motion for summary judgment).

27. *Id.* at 357-58.

28. *Id.* at 358.

29. *Id.* at 359.

30. *Id.* at 359.

31. *Id.* at 359-60.

32. *Id.* at 359.

33. *See* Nate Raymond, *Progenics Pharmaceuticals Must Pay \$1.66 Million for Firing Whistleblower—Jury*, REUTERS LEGAL, WESTLAW, Aug. 3, 2015. *See generally* *Perez v. Progenics Pharmaceuticals, Inc.*, 204 F. Supp. 3d 528 (S.D.N.Y. 2016) (pertaining to post-jury trial motions).

### 1. *Protected Activity*

The first stage of the analysis is to determine whether the whistleblower engaged in protected activity. The whistleblower may have revealed information about wrongdoing, but the wrongdoing must fall within a statutory scheme.<sup>34</sup> If the whistleblower, for example, notifies authorities that her boss is parking in a no-parking zone, she may be revealing wrongdoing, but there may not be a statute that offers protection for such whistleblowing. Similarly, statutes typically require that the whistleblower attempt to notify a responsible party or government enforcement agency; contacting only the media about wrongdoing, for example, would not constitute protected activity.<sup>35</sup>

Most whistleblowing regimes simply require that a whistleblower reasonably believes that there is a substantive violation occurring.<sup>36</sup> For Dr. Perez, the relevant statute was the Sarbanes-Oxley Act, which states that publicly traded companies may not:

[D]ischarge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee . . . to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [the fraud provisions of Title 18], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to . . . a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).<sup>37</sup>

The court proceeded to determine whether Dr. Perez reasonably believed that he had uncovered evidence of securities fraud. It considered Dr. Perez's Ph.D. in chemistry, his four years of work on Relistor at Progenics, and his lack of specific training in securities law. The court concluded that a reasonable jury could find Dr. Perez's belief to be objectively reasonable.<sup>38</sup>

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34. Richard Moberly, *Protecting Whistleblowers by Contract*, 79 COLO. L. REV. 975, 977 (2008) (describing disjointed, patchwork statutory approach to whistleblower protection).

35. See, e.g., Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151 (1994).

36. See 31 U.S.C. § 5328(d)(2) (2012) ("The protections of this section shall not apply to any employee who . . . (2) knowingly or recklessly provides substantially false information to the Secretary, the Attorney General, or any Federal supervisory agency."); see also *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890 (7th Cir. 2004) (applying the "not utterly baseless" standard, which seems to correspond to reasonable, good faith belief). *But see* *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969) (even malicious materials in a charge entitled plaintiff to antiretaliation protection).

37. 18 U.S.C. § 15141 (2012).

38. *Perez*, 965 F. Supp. 2d at 365.

## 2. Adverse Employment Action

Retaliation consists of undesirable action taken against the whistleblower in response to the whistleblowing, but not all retaliation is judicially cognizable. This Article focuses on adverse employment actions, as Congress and courts have been willing to extend legal protection to this subset of retaliatory behavior, typically stemming from employers or former employers.<sup>39</sup> Such actions include firing, demotion, and marginalization in the employment context.<sup>40</sup> The second stage of the analysis is to determine whether the employee suffered an adverse employment action. For Dr. Perez, this analysis is trivial, as Progenics fired Dr. Perez.<sup>41</sup>

Although retaliation claims typically involve actions by the employer, they may also involve actions by friends, family, and society at large. Employer retaliation may come from management or coworkers, and coworker retaliation may not necessarily be sanctioned by management.<sup>42</sup> Former employers and potential employers may also retaliate against whistleblowers.<sup>43</sup> For example, former employers might speak ill of a former employee, give negative references, or even accuse the former employee of wrongdoing. Similarly, potential employers might not hire a whistleblower because of her prior whistleblowing behavior.

Retaliation may be threatened or actually performed. In a survey of military employees conducted by Michael T. Rehg et al., a wide variety of retaliatory behavior—ranging from loss of socialization, withdrawal of support to perform work functions to firing—was found.<sup>44</sup> The most frequently reported threatened retaliation was verbal harassment or intimidation, but the most frequently reported actual retaliation was poor performance appraisals.<sup>45</sup>

Courts often employ a reasonable person standard in evaluating the harm faced by the whistleblower: would a reasonable person have been

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39. See, e.g., 31 U.S.C. § 3730(h) (2012) (providing relief to “[a]ny employee, contractor, or agent” who faced retaliatory action because of their whistleblowing under the False Claims Act); 15 U.S.C. § 78u-6(B)(i) (2012) (supplying those retaliated against for whistleblowing a right of action); see also *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab*, 275 F.3d 838, 847–48 (9th Cir. 2002) (“[B]ehavior does not constitute retaliation under the False Claims Act or Major Fraud Act unless it would be sufficient to constitute an adverse employment action under Title VII.”).

40. See 15 U.S.C. § 78u-6(h)(1)(A); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (interpreting the antiretaliation provision of Title VII).

41. *Perez*, 965 F. Supp. 2d at 359–60.

42. See Mesmer-Magnus & Viswesvaran, *supra* note 1, at 281.

43. See MARCIA P. MICELI ET AL., WHISTLE-BLOWING IN ORGANIZATIONS 11 (2008).

44. Michael T. Rehg et al., *Antecedents and Outcomes of Retaliation Against Whistleblowers: Gender Differences and Power Relationships*, 19 ORG. SCI. 221, 230 (2008).

45. *Id.*

dissuaded from blowing the whistle if she knew she would face such retaliatory behavior?<sup>46</sup> Courts have relied upon legislative intent in determining the breadth of behavior that qualifies as an adverse employment action.<sup>47</sup> The underlying rationale for such analysis is likely twofold. First, courts do not want to get involved in trivial, de minimis behavior in a workplace, perhaps because they believe their time is better spent elsewhere.<sup>48</sup> Second, courts may be concerned that relief in such circumstances would be difficult and impractical. Courts might find it difficult to craft a monetary award for loss of social opportunities at the lunch hour, and injunctive relief might be difficult to oversee.

### 3. Causality

Courts have established causality as the third element of an antiretaliation claim: the protected activity must be the cause of the adverse employment action.<sup>49</sup> The core idea is that an employer who was already going to fire an employee for an acceptable reason, such as poor performance, should not be punished for retaliation because the protected activity was unrelated to the adverse employment action. In the case of Dr. Perez, Progenics argued that they fired Dr. Perez because Dr. Perez was a thief who had accessed a confidential executive memorandum.<sup>50</sup> Therefore, according to Progenics, Dr. Perez's subsequent behavior in complaining about potential securities fraud had no influence on the decision to fire him; the company claimed it would have fired such a thief regardless of subsequent whistleblowing.<sup>51</sup>

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46. See, e.g., *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 57 (“[T]he employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from [whistleblowing].”); Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2041–42 (2015) (discussing the potential impact that time without pay would have on a reasonable person regarding willingness to file complaints against their employers).

47. See, e.g., *Equal Emp’t Opportunity Comm’n v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir. 1993) (citing Congress’s “very clear intent” to conclude that Title VII forbids discrimination against a party due to protected activity conducted by that party’s friends or relatives); *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 799 (6th Cir. 2004) (holding that a literal interpretation of “discriminate against” under Title VII was inappropriate because the Sixth Circuit thought it was “unlikely that Congress intended to authorize Title VII claims over trivial matters”).

48. See, e.g., *White*, 364 F.3d at 799 (noting that the Sixth Circuit incorporated analysis of Congressional purpose into its definition of adverse employment actions in order “to prevent lawsuits based upon trivialities”); *Kent v. Iowa*, 651 F. Supp. 2d 910, 939 (S.D. Iowa 2009) (“The adverse-employment-action element is a warranted judicial interpretation of Title VII intended to deter discrimination lawsuits based on trivial employment actions, such as those that cause a ‘mere inconvenience’ or a ‘bruised ego.’”).

49. See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524–25 (2013) (discussing causation as a “standard requirement of any tort claim” in the Title VII retaliation context).

50. See *Perez v. Progenics Pharmaceuticals, Inc.*, 965 F. Supp. 2d 353, 368–69 (S.D.N.Y. 2013).

51. See *id.*

The parallel argument to causality is that courts do not wish to “reward” a bad employee. An employee who is a poor performer and would have been fired on those grounds is a detriment to the employer, and the employer suffers a loss by employing this person. Because the employee is blameworthy for her poor performance, courts might feel that it is inappropriate for that employee to benefit personally by blowing the whistle.

This analysis is difficult, though, as courts must evaluate the various motives of the employees whose behavior contributed to the adverse employment action.<sup>52</sup>

Sometimes causality overlaps substantially with the protected activity analysis. For example, a company might terminate an employee specifically because she threatened to blow the whistle on corporate behavior that was actually legal.<sup>53</sup> Thus, the company argues that the whistleblower acted in bad faith and should not be entitled to protection. Alternatively, a company might terminate an employee because of her participation, knowledge, or involvement with the illegal activity that she reported to authorities.<sup>54</sup> The company would argue that the employee was morally culpable for the illegal behavior and that she should not be rewarded with legal protection.

## B. STATUTORY EMPHASIS ON PUBLIC CIVIL ENFORCEMENT

Despite the fact that these whistleblower statutes were passed by different sessions of Congress over the past century, they share a surprising commonality: an emphasis on public enforcement. While a private harm view of retaliation would suggest much discussion regarding a private right of action against her employer, the statutes instead focus on public enforcement through civil litigation. Most of the federal statutes do not explicitly discuss a private right of action. This

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52. See U.S. DEP’T OF LABOR, *supra* note 23, at Part V.A. 3-5 (citing *Mt. Healthy City Sch. Bd. v. Doyle*, 429 U.S. 274 (1977) (mixed-motive analysis); *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (pretext analysis); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (pretext analysis)); cf. U.S. DEP’T OF LABOR, *supra* note 23, at 3-7 V.B (citing *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)).

53. See Julie Bort, *Oracle Says It Will Sue a Fired Employee Who Filed a ‘Whistleblower’ Lawsuit*, BUS. INSIDER (June 2, 2016, 11:51 AM), <http://www.businessinsider.com/oracle-says-will-sue-fired-whistleblower-employee-2016-6>.

54. Whistleblowers reporting money laundering are ineligible for retaliation protection if they participated in the offense. See 31 U.S.C. § 5328(d)(1) (2012) (“The protections of this section shall not apply to any employee who—(1) deliberately causes or participates in the alleged violation of law or regulation . . .”). Otherwise, this becomes a mixed causation question: can you fire someone for revealing their own bad behavior during the substantive claim? See, e.g., *Merritt v. Dillard Paper Co.*, 120 F.3d 1181 (11th Cir. 1997) (pertaining to retaliation against an employee for participating in another employee’s Title VII lawsuit against their employer).

Article suggests this is strong evidence that Congress recognizes the public importance of combating whistleblower retaliation.

The statutes take different approaches in describing the role of public enforcement. The most common system is to require government investigation of alleged retaliation. One statute, ISCA, authorizes government action but makes such action optional. Other statutes require government investigation and also require litigation against defendants.

### 1. *An Optional Government Role*

The ISCA prohibits retaliation against whistleblowers who report unsafe shipping containers.<sup>55</sup> The statute indicates that “the Secretary [of Labor] may investigate” a complaint of retaliation and “may bring a civil action” if there has been a violation.<sup>56</sup> The statute does not appear to require any government enforcement but it clearly authorizes public investigation and litigation.

### 2. *Government Required to Investigate*

The most common approach is to require government investigation of alleged retaliation. The Clean Air Act of 1977 (“CAA”) provides protection for whistleblowers against discharge or discrimination.<sup>57</sup> Once an employee lodges a complaint of retaliation, the statute states that “the Secretary *shall* conduct an investigation” and “[w]ithin thirty days of the receipt of such complaint, the Secretary *shall* complete such investigation.”<sup>58</sup> The statute notes that if a violation is deemed to have occurred, “the Secretary *shall* order the person who committed the violation to take affirmative action to abate the violation, and reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of employment.”<sup>59</sup> This requires the government to take some action, namely issue an order, if there has been an adverse employment action. Later in the statute, however, the government’s responsibilities are reduced: “Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary *may* file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order.”<sup>60</sup> Curiously, the government is not actually required to file a civil action to compel compliance with the remedial order. Thus,

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55. 46 U.S.C. § 80507(a) (2012).

56. § 80507(c).

57. 42 U.S.C. § 7622 (2012).

58. § 7622(b)(2)(A) (emphasis added).

59. § 7622(b)(2)(B) (emphasis added).

60. § 7622(d) (emphasis added).

while the government does bear the risk of having to issue an order, it does not explicitly bear any risk of litigation in dealing with the adverse employment action. The CAA's language is shared by the Surface Transportation Assistance Act ("STAA")<sup>61</sup> and the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century ("AIR21").<sup>62</sup>

Other statutes require investigation "as appropriate" or under certain conditions. For example, the Solid Waste Disposal Act of 1976 ("SWDA") regulates the recovery of energy and other resources from discarded materials and the management of hazardous waste.<sup>63</sup> The statute prohibits retaliation against whistleblowers and other employees participating under the act.<sup>64</sup> If retaliation is alleged, the statute indicates "the Secretary of Labor shall cause such investigation to be made as he deems appropriate."<sup>65</sup> The Federal Water Pollution Control Act<sup>66</sup> and the Comprehensive Environmental Response, Compensation, and Liability Act<sup>67</sup> contain similar "as appropriate" language.

Another example is the Energy Reorganization Act of 1978 ("ERA"), which simply requires the government to investigate and provide a written report of the results within thirty days.<sup>68</sup> Regardless of the results of the investigation, there is no further requirement for the government to litigate on behalf of the whistleblower.<sup>69</sup> The ERA has a kick-out provision, allowing a whistleblower to file an action for relief if there has been no decision after one year.<sup>70</sup>

### 3. Government Required to Investigate and Litigate

A few statutes, such as the Toxic Substances Control Act ("TSCA"), require both investigation and civil action.

Upon receiving the complaint, the Secretary *shall* conduct an investigation of the violation alleged in the complaint.<sup>71</sup> The investigation will be completed within thirty days and the Secretary shall provide written notice of the results.<sup>72</sup> Notice and opportunity for agency hearing

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61. 49 U.S.C. § 31105 (2012).

62. 49 U.S.C. § 42121.

63. 42 U.S.C. § 6902(a).

64. 42 U.S.C. § 6971(a).

65. § 6971(b).

66. 33 U.S.C. § 1367 (emphasis added).

67. 42 U.S.C. § 9610.

68. 42 U.S.C. § 5851(b)(2)(A).

69. 42 U.S.C. § 5851(d) (providing Secretary the option, but not a mandate, to file a civil action on behalf of the whistleblower).

70. § 5851(b)(4).

71. 15 U.S.C. § 2622(b)(2)(A)(1).

72. *Id.*

are provided before the Secretary makes an order on the record.<sup>73</sup> Whenever a person has failed to comply with an order issued, the Secretary *shall* file a civil action in U.S. district court.<sup>74</sup>

The Safe Drinking Water Act of 1974 (“SDWA”),<sup>75</sup> the Asbestos Hazard Emergency Response Act of 1986 (“AHERA”),<sup>76</sup> and the OSHA<sup>77</sup> similarly require both investigation and civil litigation.

### C. LIMITED DISCUSSION OF PRIVATE ENFORCEMENT

In contrast to the common specifics regarding public enforcement, most of the statutes do not discuss private enforcement. In the instances private enforcement is mentioned, Congress generally views private enforcement as a backstop to government failure.

One backstop is the “kick out” provision. The STAA, the ERA, and Sarbanes-Oxley (“SOX”)<sup>78</sup> specify a private right of action if the government fails to act.<sup>79</sup> The ERA, for example, requires the government to investigate and provide a written report regarding alleged retaliation within thirty days.<sup>80</sup> If the government fails to take action after one year, the statute states that a whistleblower may file an action for relief.<sup>81</sup>

Another type of backstop addresses the failure of government litigation as distinct from government investigation. Three statutes, the CAA,<sup>82</sup> the AIR21<sup>83</sup>, and the Pipeline Safety Improvement Act,<sup>84</sup> specify a private right of action if the government has ordered the defendant to take corrective action for retaliation. Under these statutes, the government must have found illegal retaliation and ordered the defendant to correct its behavior. Congress’s introduction of this limited private right of action suggests concern that the government might fail to follow up the order with litigation. Under these few statutes, the whistleblower can litigate compliance with the order herself.

73. § 2622(b)(2)(A).

74. 15 U.S.C. § 2622(d) (emphasis added).

75. 42 U.S.C. § 300j-9(i).

76. 15 U.S.C. § 2651.

77. 29 U.S.C. § 660 (c).

78. 18 U.S.C. § 1514A(b)(1)(B) (allowing private civil action if the Secretary of Labor has not issued a final decision within 180 days).

79. While a whistleblower reporting a securities violation under SOX must allow OSHA to first investigate a claim of retaliation, such a whistleblower may also have independent rights under Dodd-Frank to pursue a civil retaliation case against her employer regardless of OSHA participation. *See* 15 U.S.C. § 78u-6(h)(1)(B) (2012); *see also* Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013) (discussing narrower whistleblower rights under Dodd-Frank).

80. 42 U.S.C. § 5851(b)(2)(A).

81. § 5851(b)(4).

82. 42 U.S.C. § 7622(e).

83. 49 U.S.C. § 42121(b)(6).

84. 49 U.S.C. § 60129(b)(6).

One whistleblower statute that has resulted in pure private enforcement is the False Claims Act (“FCA”). The FCA generally forbids fraud against the federal government. Besides offering a reward for whistleblowers, the FCA also indicates that whistleblowers are entitled to relief in face of retaliation. It uses the passive voice to indicate that an action “may be brought” for such relief in federal district court.<sup>85</sup> The statute makes no specific reference to the role of the government in addressing retaliation. In practice, it is the whistleblower’s responsibility to obtain relief for employer retaliation in court.<sup>86</sup>

Despite the limited discussion in these federal statutes of private enforcement for retaliation, it is important to note that some courts have recognized a common law cause of action for whistleblowing retaliation in general.<sup>87</sup> While varying among the states, courts have established a public policy exception to employment-at-will, and some states extend the public policy exception to cover whistleblowing.

#### D. WHY DID CONGRESS VARY IN ITS REQUESTS FOR PUBLIC ENFORCEMENT?

While these disparate whistleblower retaliation statutes are similar in the focus on public enforcement, it is less clear why Congress decided on such variation. Why should the government be required to litigate a case of retaliation against an employee who reveals violations of the Safe Drinking Water Act, but not be required to litigate against retaliation if she reveals violations of the Clean Air Act or the Solid Waste Disposal Act? The explanation might be the statutes’ chronology: the four statutes mandating agency litigation are from the 1970s and 1980s. The statutes requiring only agency investigation extend over a greater time period, with AIR21 dating to 2000<sup>88</sup> and SWDA from 1976.<sup>89</sup> A chronological explanation, however, does not provide much insight into legislative intent.

One particularly cynical view might be that Congress did not really care about public or private enforcement. Instead, Congress’s priority was to signal to potential whistleblowers that Congress was concerned

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85. 31 U.S.C. § 3730(h)(2) (2012).

86. See CLAIRE M. SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* loc. § 5:1 (2016) (ebook).

87. See STEPHEN P. PEPE & SCOTT H. DUNHAM, *AVOIDING & DEFENDING WRONGFUL DISCHARGE CLAIMS* loc. § 1:7 (updated July 2015) (ebook).

88. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121 (2000).

89. Solid Waste Disposal Act, 42 U.S.C. § 6971 (1996).

about stopping retaliation.<sup>90</sup> Even if public or private enforcement were ineffective, the objective was to make sure that whistleblowers came forward with information. Once the whistleblower revealed her information and faced retaliation, Congress might not care if she actually faced retaliation or received compensation. In the long run, though, such a strategy is likely futile, as whistleblowers would learn of the ineffectiveness of antiretaliation efforts.

Even if there is any merit to this cynical symbolic view, it would be more helpful to consider the potential benefits of actual litigation. We may be able to draw some inferences into legislative intent by beginning with the instrumental differences between public and private enforcement. There is a substantial literature discussing the relative merits of public versus private enforcement.<sup>91</sup> Private civil litigation regarding employer retaliation has a number of advantages. The whistleblower may have a comparatively superior ability to identify retaliation, as she is already present in the workplace.<sup>92</sup> Similarly, whistleblowers may also provide greater and further resources towards litigation in comparison to constrained government budgets.<sup>93</sup> Public enforcement agencies may fail to enforce laws due to political pressures.<sup>94</sup> Therefore, a decision by Congress to require government investigation but not litigation in CAA, for example, might imply that Congress believes private resources are particularly important to litigating retaliation against whistleblowers who identify CAA violations.

Public enforcement nonetheless has its comparative advantages. The downside to private civil litigation is the lack of public accountability and control over the volume and intensity of litigation.<sup>95</sup> This may

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90. See, e.g., John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 233 (1990) (describing “symbolic” legislation that is difficult to implement but obtains political benefits for legislators); Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 *IOWA L. REV.* 413, 446 (1999) (describing Congress’s efforts to balance “the perceived political benefit of being viewed as doing something versus the real and disastrous consequences of *actually* doing something”).

91. See, e.g., Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 *J. LEGAL STUD.* 1 (1974) (discussing the creation of rules created to increase the effectiveness of law enforcement); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 *J. LEGAL STUD.* 1 (1975) (adding to previous article with new theories); A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 *J. LEGAL STUD.* 105 (1980) (analyzing the decision process in imposing monetary sanctions to certain offenses); Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 *J. L. ECON.* 255 (1993).

92. See, e.g., Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 *VA. L. REV.* 93, 108 (2005) (turning to the role of the executive branch in enforcing federal law in private actions).

93. See *id.* at 108–09.

94. See *id.* at 110.

95. See *id.* at 114–20.

manifest in under-enforcement.<sup>96</sup> Private parties may not sufficiently invest in combating retaliation, perhaps because either the litigants or the attorneys do not find the financial rewards for doing so to be sufficient. This may also manifest in over-enforcement: too many people with weak retaliation claims may bring cases forward.

Working from this theoretical background of the comparative advantages of public and private enforcement, Congressional requirement of agency enforcement of antiretaliation provisions could signal a variety of positions. One possibility is that Congress does not trust agencies to exercise discretion in case selection and therefore mandates agency enforcement of antiretaliation provisions. It is possible that Congress did not trust the Secretary of Labor to properly prioritize investigation and litigation on behalf of whistleblowers alleging retaliation under the Toxic Substances Control Act or the Safe Drinking Water Act, for example, and thus included a mandate to investigate and litigate allegations of whistleblower retaliation.

On a related line of reasoning, it is also possible that Congress expressly mandated agency action against whistleblower retaliation for specific statutes because it believed whistleblowers under those statutes, such as TSCA or OSHA, required the greatest protection from retaliation. Implicitly, Congress believed that public enforcement was the most effective method of prosecuting and deterring retaliation. This claim also implies that whistleblowers under other statutes like the Clean Air Act, do not require similarly great levels of protection from retaliation.

Another version of this argument is that Congress did not trust private enforcement of these whistleblower retaliation claims. By mandating agency investigation and litigation while providing no express private right of action, Congress might believe that OSHA whistleblowers, for example, would be particularly likely to bring questionable retaliation claims against their employers.

Substantively, though, it is difficult to understand why whistleblowers under TSCA, SDWA,<sup>97</sup> the Asbestos Hazard Emergency Response Act of 1986 (“AHERA”),<sup>98</sup> and the OSHA<sup>99</sup> stand apart from the other statutes such as the Clean Air Act and the Solid Waste Disposal Act, the Energy Reorganization Act, and the Federal Water Pollution Control Act.

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96. See, e.g., Landes & Posner, *supra* note 91, at 10–16 (comparing public and private enforcement); Shavell, *supra* note 91, at 256 (discussing possibility that private benefits to litigants do not align with societal benefits).

97. 42 U.S.C. § 300j-9(i) (2011).

98. 15 U.S.C. § 2651 (2012).

99. 29 U.S.C. § 660(c) (2012).

In contrast, it is also possible that congressional inclusion of the private rights of action more strongly signals either the importance of combating retaliation or the distrust of agency enforcement. A number of statutes include the kick-out provisions expressly providing for private rights of action when the responsible agency fails to take appropriate action. Importantly, none of the statutes mandating agency investigation and litigation incorporate such a kick-out provision. The express declaration of the private right of action might signal some distrust over the reliability of public enforcement. It may also signal the comparatively high importance of addressing retaliation against whistleblowers under the Energy Reorganization Act or SOX, for example.

#### E. A PUBLIC VIEW OF RETALIATION

Whatever Congress's specific views as to the advantages of private versus public enforcement, this Article suggests that the legislative focus on public enforcement is strong evidence that Congress recognizes the public importance of combating whistleblower retaliation. Whistleblower retaliation cases are not solely about a private whistleblower litigating against retaliation as her private interest. Even though remedies focus on back pay, reinstatement, and other compensatory elements that appear private in nature, this Article argues Congress also embraces a public view of retaliation that extends beyond a whistleblower receiving compensation for retaliation.

The common congressional mandate for agency investigation suggests that the agency, and thus the public, has an interest in learning the truth about retaliation complaints: did an employer wrongfully retaliate against the whistleblower?

This interest in learning the truth is partially divergent from the other parties' private interests. The other parties to the conflict are the defendant-employer and the whistleblower. The whistleblower's private interest is compensation—she may be happy to receive a settlement that leaves unresolved the question of actual retaliation.<sup>100</sup> Similarly, the employer may also be reluctant to invest heavily in ascertaining the truth of the retaliation. Even though the investment may help vindicate the employer should the case go to trial, the employer may rationally decide that the stakes are too low to be worth the investigation costs.<sup>101</sup> A

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100. See, e.g., Jocelyn Patricia Bond, *Efficiency Considerations and the Use of Taxpayer Resources: An Analysis of Proposed Whistleblower Protection Act Revisions*, 19 FED. CIR. B.J. 107, 137 (2009) (whistleblower plaintiffs may have an incentive to settle in order to avoid the additional expense of jury trials).

101. See Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. MARY L. REV. 65, 97 (2007) (“[A] settlement may simply reflect an employer’s increased willingness to enter ‘nuisance-value’ settlements rather than

settlement without admitting liability may be in both the whistleblower's and the employer's interests.

The public interest in learning the truth about retaliation is important for numerous reasons. The public interest incorporates a whistleblower properly receiving compensation for retaliation, and the truth is important to that process. If a whistleblower did face retaliation for revealing wrongdoing, it is in the public interest that the whistleblower receive some compensation for her loss. Without such compensation, future whistleblowers might be deterred from coming forward with important information. Similarly, the public interest also incorporates the defendant's interest in not facing frivolous allegations of retaliation.

More importantly to the public, though, is the interest in deterring others from retaliating against whistleblowers. Learning the truth about actual retaliation is a vital step in determining the scope of the problem: how and when do employers retaliate against whistleblowers? If the public does not know the truth regarding retaliation, how can potential whistleblowers be assured that it is safe to come forward? If the government can provide assurances that retaliation will be accurately detected and that violators will be punished, it hopefully can deter employers from retaliating against whistleblowers. The government has tremendous ability to deter retaliation. Its powers are not limited to solely litigating for back wages on behalf of the whistleblower. For example, the government can threaten punitive measures for retaliation. The government can refer the corporation and individuals within for criminal sanctions such as obstruction of justice,<sup>102</sup> witness tampering,<sup>103</sup> or conspiracy charges.<sup>104</sup> The government also has broad investigatory powers, allowing investigation of other facets of the employer's business. If retaliation does not occur, the costs of investigation and litigation should be reduced for all parties.

Stated another way, before a sincere whistleblower blows the whistle, her interests and the public's interests overlap greatly. She wishes to the blow the whistle and alert the public to some wrongdoing committed by her employer, and the public wants her to blow the whistle on the wrongdoing. She also desires not to face retaliation for actions.

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pay the high litigation costs of an ALJ hearing. Or employers may have settled . . . to avoid bad publicity, even if the allegations were without merit.”).

102. 18 U.S.C. § 1503 (2012).

103. 18 U.S.C. § 1512 (2012).

104. 18 U.S.C. § 371 (2012). *See* *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1034 (11th Cir. 2000) (retaliation against an employee testifying against employer “plainly describe criminal conduct in violation of 18 U.S.C. § 1512 and a criminal conspiracy in violation of 18 U.S.C. § 371.”).

She would incur personal loss if she faced retaliation, and personal loss is a disincentive to blowing the whistle. The public wants the whistleblower coming forward with information. Thus, the public also does not want the whistleblower to face retaliation. The whistleblower also would prefer to receive compensation for any losses she suffers due to retaliation, but assuming such compensation is always incomplete or imperfect, her top priority is to not face retaliation in the first place. Again, the public has an interest in reassuring the whistleblower that she will receive compensation. These are the *ex ante* interests shared by the public and the whistleblower.

After any potential retaliation has occurred, however, the public's interest and the whistleblower's interests are less compatible. The government certainly wants to see the whistleblower receive compensation if she suffered illegal retaliation. The government's interest, however, extends beyond this specific whistleblower retaliation case. The government must also consider the impact this case has on future potential whistleblowers. The government must still convince future whistleblowers that the government is on their side: they will work to deter employers from retaliating against whistleblowers and to support whistleblowers who face retaliation. To achieve this goal, the government must determine if the whistleblower actually faced illegal retaliation.

In contrast, the whistleblower is in a different position after having faced retaliation. Her best case scenario is no longer available: she believes she has already endured an adverse employment action triggered by her whistleblowing. She has thus suffered personal loss already, and ongoing litigation and investigation may similarly be immediately costly, even if additional litigation could potentially result in greater future compensation. Settlement before full investigation and litigation may be very attractive to her.

Civil retaliation claims, therefore, embrace both private and public interests. The public interest is not merely an aggregation of private interests; it is more than each whistleblower's interest in obtaining compensation. The public interest also incorporates a greater need to determine the truth regarding each claim of retaliation, as this truth is critical in fashioning an effective enforcement scheme. The public's greater interest is in preventing future retaliation and encouraging potential whistleblowers to bring forward reliable information. Congress's general requirement that OSHA investigate claims of retaliation supports this distinct public interest.

## II. THE PROBLEMATIC PRIVATE VIEW

Despite Congress's emphasis of the public interest in combating whistleblower retaliation, there are signs that OSHA and the judiciary instead treat whistleblower retaliation as a private dispute. First, courts have expressly described whistleblower retaliation actions as private in nature and rejected arguments that would support the public interest in such cases. Second, there is evidence that OSHA and the Secretary of Labor limit their participation in retaliation cases. Finally, generally unsuccessful trends of whistleblower retaliation claims suggest that the overall system is unwell.

### A. JUDICIAL LANGUAGE

Some courts have expressly described civil retaliation litigation as private in nature.<sup>105</sup> In holding a claim for retaliation as subject to arbitration, the Second Circuit described the primary purpose of the Sarbanes-Oxley whistleblower provisions as “to provide a private remedy for the aggrieved employee [and] not to publicize alleged corporate misconduct.”<sup>106</sup> As a private remedy, the retaliation claim was subject to the arbitration provisions of the employee's contract, and the Second Circuit further affirmed the confidentiality clause of the employee's arbitration agreement.<sup>107</sup> The court recognized that enforcing the arbitration's confidentiality clause would foreclose the employee of “the same opportunity to expose publicly [her employer's] alleged wrongdoing,” but “the loss of a public forum in which to air allegations of fraud does not undermine the statutory purpose of a whistleblower protection provision.”<sup>108</sup> Moreover, the court viewed an attack on arbitration confidentiality as a generalized attack on arbitration because confidentiality clauses are so common.<sup>109</sup>

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105. *See, e.g.*, *California v. IntelliGender, LLC*, 771 F.3d 1169, 1178 (9th Cir. 2014) (describing agency action under Sarbanes-Oxley whistleblower protection as “individual compensatory” relief and not an attempt to “vindicate broader governmental interests.”) (citing *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 923 (9th Cir. 2003) and *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006)). *But see, e.g.*, *Hicks v. Resolution Trust Corp.*, 738 F. Supp. 279, 285 (N.D. Ill. 1990) (whistleblower retaliation is “more than just a decision to fire an employee. It involves a decision to fire an employee for his attempts to remedy alleged violations of federal law. . . . Clearly, the matter is one effecting a major public concern.”).

106. *Guyden v. Aetna, Inc.*, 544 F.3d 376, 383 (2d Cir. 2008).

107. *See id.* at 385–86.

108. *Id.* at 384.

109. *See id.* at 385.

The purpose of discussing this Second Circuit language is not to address the merits or appropriateness of arbitration for these clauses,<sup>110</sup> but rather to highlight the court's express views as to the private nature of whistleblower retaliation claims. Nor does this Article fault the Second Circuit's position as unreasonable; its belief that the whistleblower's claims are essentially private in nature may reasonably stem from observing agency behavior. If OSHA has the right to bring an action but chooses not to do so, a possible inference is that the particular retaliation case is primary private in nature. Nonetheless, it is troubling that the Second Circuit seems comfortable in allowing the defendant to conceal potential wrongdoing through the confidentiality clause.

The Ninth Circuit has taken stronger direct action against public enforcement under OSHA. In *Leon v. IDX Systems Corp.*, the court held OSHA to be in privity with a whistleblower private retaliation claim and thus curtailed OSHA's ability to separately pursue the public interest.<sup>111</sup> Dr. Mauricio Leon worked for IDX and complained about corporate mismanagement involving misuse of federal funds.<sup>112</sup> In 2003, IDX put Dr. Leon on unpaid leave and sought to terminate his employment.<sup>113</sup> Dr. Leon complained that he was facing retaliation for whistleblowing and brought both a civil complaint under the False Claims Act in federal district court and a complaint with OSHA under the Sarbanes-Oxley Act.<sup>114</sup> In 2004, the district court determined that Dr. Leon acted in bad faith by destroying evidence; it sanctioned him by dismissing his case.<sup>115</sup> The district court, however, declined to enjoin OSHA from proceeding with its investigation of Dr. Leon's SOX antiretaliation claim against IDX: it declared that Dr. Leon and OSHA were not in privity because "their interests differed—[OSHA] represents a 'broad public interest,'" while Dr. Leon sought personal compensation.<sup>116</sup> In 2005, OSHA issued its findings and order, concluding that there was reasonable cause to believe that IDX violated SOX by retaliating against Dr. Leon.<sup>117</sup> OSHA ordered IDX to pay Dr. Leon back wages and reasonable attorneys' fees.<sup>118</sup> It also ordered IDX to post a public notice to its employees that incorporated an agreement to refrain from future retaliation, and to

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110. For a discussion on the merits of arbitration, see, for example, Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1 (2013).

111. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 954–55 (9th Cir. 2006).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 957. In addition to dismissal, the court also applied monetary sanctions against Dr. Leon.

116. *Id.* at 962.

117. *Id.* at 957.

118. *Id.*

refrain from future retaliation against Dr. Leon or any other whistleblower covered by SOX.<sup>119</sup>

The Ninth Circuit overturned the district court's decision, holding OSHA's power under SOX to be limited to private compensation and thus not part of the broader public interest.<sup>120</sup> OSHA was therefore in privity with Dr. Leon and the requirements of *res judicata* were satisfied, which paved the way for the district court to enjoin OSHA from taking action against IDX.<sup>121</sup>

The *Leon* decision is more troubling because it allows district courts to stop OSHA analysis of retaliation claims before the agency has completed its investigation of the whistleblower's claims. It is possible that Dr. Leon's egregious spoliation triggered the Ninth Circuit's hostility, but OSHA also seemed to consider the spoliation in its decision finding in favor of Dr. Leon.<sup>122</sup>

#### B. OSHA'S LOW PRIORITY OF ANTIRETALIATION

Delegation of all retaliation enforcement cases to OSHA makes sense in one regard: as a single agency, OSHA can develop expertise in analyzing allegations of adverse employment actions. This type of analysis is likely not part of the expertise of the agency handling the substantive law.

Unfortunately, OSHA is an agency primarily dedicated to workplace health and safety; antiretaliation has been described as a "bureaucratic stepchild" at the agency.<sup>123</sup> The Government Accountability Office has criticized OSHA for using timeliness as the only performance measure for its antiretaliation efforts.<sup>124</sup> The Department of Labor's Office of Inspector General has criticized OSHA for various failures after examining 1200 antiretaliation cases from 2009–10.<sup>125</sup> In a report, the OIG found that eighty percent of the investigations failed to comply with

119. *Id.*

120. *Id.* at 962–63. The court recognized that OSHA's order contemplated broad injunctive relief that did not only serve Dr. Leon's interest, but it was suspicious of OSHA's power to make such an order, and it also noted OSHA's failure to participate in appellate argument. *See id.* at 962 n.9.

121. *Id.* at 962–63.

122. *Id.* at 957.

123. DEVINE & VISWESVARAN, *supra* note 3, at 168.

124. DEVINE & VISWESVARAN, *supra* note 3, at 176 n.77–78.

125. *See* U.S. DEP'T OF LABOR, COMPLAINANTS DID NOT ALWAYS RECEIVE APPROPRIATE INVESTIGATIONS UNDER THE WHISTLEBLOWER PROTECTION PROGRAM (2010), <http://www.oig.dol.gov/public/reports/oa/2010/02-10-202-10-105.pdf> [hereinafter 2010 OIG REPORT]. Improvements were made and reported in a 2015 OIG report. OFF. OF INSPECTOR GENERAL, U.S. DEP'T OF LABOR, OSHA NEEDS TO CONTINUE TO STRENGTHEN ITS WHISTLEBLOWER PROTECTION PROGRAMS (2015), <https://www.oig.dol.gov/public/reports/oa/2015/02-15-202-10-105.pdf> [hereinafter 2015 OIG REPORT].

OSHA's own investigation procedures.<sup>126</sup> Only two percent of cases were found to be meritorious.<sup>127</sup> Roughly half of its investigations were conducted without any face-to-face interviews.<sup>128</sup>

Moreover, OSHA, for example, has sole authority to take action in antiretaliation cases stemming under section 11(c): the statute requires that OSHA investigate and litigate cases, and there is no private fallback option specified.<sup>129</sup> In fiscal year 2009, out of 1280 retaliation complaints, OSHA investigators recommended litigation in 15 cases.<sup>130</sup> The Office of the Solicitor, however, only selected four cases for litigation, a 0.31% selection rate.<sup>131</sup> Without third-party analysis of the merits of these retaliation cases, it is difficult to determine whether the lack of public enforcement was justified in these cases. Nonetheless, the low litigation enforcement rate may suggest that OSHA is not heavily invested in public litigation of whistleblower retaliation cases.

Additionally, OSHA's own retaliation investigation process emphasizes the private nature of the complaint. For example, of the eight sample factors under the egregious conduct standard,<sup>132</sup> only one factor (h) references the substantive offense: "extensive or serious violations of the substantive statute."<sup>133</sup> In the calculations for punitive damages, the substantive conduct is not directly mentioned except in a single reference

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126. See 2010 OIG REPORT, *supra* note 125, at 2.

127. See 2010 OIG REPORT, *supra* note 125, at 21.

128. 2010 OIG REPORT, *supra* note 125, at 5.

129. See 29 U.S.C. § 660.

130. DEVINE & VISWESVARAN, *supra* note 3, at 166.

131. DEVINE & VISWESVARAN, *supra* note 3, at 166.

132. U.S. DEP'T OF LABOR, *supra* note 23, at 6-9 to 6-10.

Examples of egregious conduct include, but are not limited to:

- a. A discharge accompanied by previous or simultaneous harassment or subsequent blacklisting.
- b. A complainant has been discharged because of his or her association with a whistleblower.
- c. A group of whistleblowers has been discharged.
- d. There has been a pattern or practice of retaliation in violation of the statutes that OSHA administers and the case fits the pattern.
- e. There is a policy contrary to rights protected by the statute (for example, a policy requiring safety complaints to be made to management before filing them with OSHA or restricting employee discussions with OSHA compliance officers during inspections) and the retaliation relates to this policy.
- f. A manager commits violence against the complainant.
- g. The adverse action is accompanied by public humiliation, threats of violence or other retribution against the complainant, or by violence, other retribution, or threats thereof against the complainant's family, co-workers, or friends.
- h. The retaliation is accompanied by extensive or serious violations of the substantive statute, e.g., serious violations of OSHA standards in a Section 11(c) case or serious violations of commercial motor carrier safety regulations in a STAA case.

133. U.S. DEP'T OF LABOR, *supra* note 23, at 6-9.

to the egregious conduct standards.<sup>134</sup> Violation of the substantive statute would drive the public interest in protecting the whistleblower. The rest of the factors emphasize the private nature of the retaliation. Failing to consider the import of the substantive violation can easily lead to the private view of the retaliation case.

### C. TROUBLING ENFORCEMENT STATISTICS

The existing statistics from whistleblower retaliation cases may also signal trouble with the primarily private enforcement retaliation scheme. General statistics covering whistleblower retaliation cases demonstrate very low rates of formal victories, ranging from 0.31% to 9.8%.<sup>135</sup> As OSHA's own statistics note, whistleblowers alleging retaliation under a variety of statutes generally do not fare well.<sup>136</sup> In FY 2015, retaliation claims had roughly a twenty-five percent aggregate "positive outcome" rate.<sup>137</sup> Older statistics similarly confirm these trends.<sup>138</sup> Any whistleblower viewing such statistics is likely to be discouraged, as her chances of successfully prevailing in litigation appear low. The challenge with such statistics, however, is that they do not give insight into the

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134. See U.S. DEP'T OF LABOR, *supra* note 23, at 6-10.

A number of factors should be considered in calculating a punitive damages award, including:

- a. Degree of the respondent's awareness that its conduct was illegal (see discussion above).
- b. Egregiousness of the conduct (many of the factors are discussed above).
- c. Duration and frequency of the adverse action.
- d. Respondent's response to the complaint and investigation: for example, whether the respondent admitted wrongdoing, cooperated in the investigation, offered remedies to the complainant on its own, or disciplined managers who were at fault. On the other hand, it is appropriate to consider whether the respondent was uncooperative during the investigation, covered up retaliation, falsified evidence, or misled the investigator.
- e. Financial condition of the respondent.
- f. Evidence that the respondent attempted to conceal or provide pretextual reasons for the adverse action.
- g. Evidence that the respondent tolerated or created a workplace culture that discouraged or punished whistleblowing; in other words, whistleblowers were chilled from engaging in protected activity.
- h. Deliberate nature of the retaliation or actual threats to the complainant for his/her complaints to management.
- i. Whether OSHA has found merit in whistleblower complaints in past cases against the same respondent involving the same type of conduct at issue in the complaint, so as to suggest a pattern of retaliatory conduct.
- j. Other mitigating or aggravating factors.

135. DEVINE & VISWESVARAN, *supra* note 3, at 165-66.

136. See OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 3.

137. OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 3. Positive outcome indicates a merits determination in favor of the whistleblower or any settlement.

138. See Eugene R. Fidell, *Federal Protection of Private Sector Health and Safety Whistleblowers*, 2 ADMIN L.J. 1, 9-10 (1988).

underlying merits of the cases. For example, if every whistleblower files an antiretaliation case, but in reality, very few whistleblowers actually face retaliation, we might expect to see such low success rates. In contrast, if most whistleblowers do face retaliation, but success rates are so low, the process is probably defective. The big question is whether these retaliation case outcomes properly reflect merit: is it true that very few whistleblower retaliation claims are meritorious? Even the Office of Inspector General has not conducted any systematic, third-party evaluation of the merits of these cases. Note that OSHA itself has been criticized for failing to evaluate the merits of its retaliation cases; a critical report suggests that OSHA's internal evaluation system focuses solely on timeliness of evaluation.<sup>139</sup>

First, regardless of whether the present antiretaliation litigation outcomes properly reflect merit, this Article suggests that the existence of such low success rates likely informs potential whistleblowers. While these statistics can arguably be interpreted as evidence of a successful system (if it is true that most retaliation claims are actually meritless), potential whistleblowers are likely to draw negative inferences regarding any potential retaliation claim. Knowledge of the poor success rates could dissuade potential whistleblowers from blowing the whistle in fear of retaliation. Additionally, knowledge of these poor success rates may embolden employers considering retaliation against whistleblowers. An even worse scenario is that these statistics are driving a vicious feedback loop: because potential whistleblowers see the weak statistics regarding successful retaliation litigation, only the whistleblowers with weak retaliation cases come forward in the first place. Potential whistleblowers who are good employees and should prevail in an antiretaliation case are unwilling to come forward because they have the most to lose. If good employees have better information or are otherwise more desirable as whistleblowers, this system may discourage them from coming forward.

Second, there is evidence that these weak antiretaliation litigation outcomes are due in large part to non-merit based arguments. Richard Moberly examines whistleblowers claiming retaliation under Sarbanes-Oxley, noting that employees had a win rate of 3.6%.<sup>140</sup> He conducts a more detailed examination of these cases, though. While he does not directly evaluate the merits of the cases, he does evaluate the standards by which retaliation cases were turned down. He sets aside settlements, which constitute between 11.6% and 18.3% of the cases, as he lacks data to directly measure the merits of those settlements.<sup>141</sup>

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139. 2015 OIG REPORT, *supra* note 125, at 5; *see also* 2010 OIG REPORT, *supra* note 125.

140. Moberly, *supra* note 101, at 67.

141. Moberly, *supra* note 101, at 96–98.

Looking at retaliation cases in which the employer wins (the majority of cases),<sup>142</sup> he evaluates the rationale employed by OSHA or the Administrative Law Judge (“ALJ”).<sup>143</sup> He finds that most antiretaliation claims are based on procedural or boundary grounds as opposed to the merits.<sup>144</sup> The most common procedural denial is a statute of limitations problem; OSHA and the ALJ appear reluctant to utilize equitable tolling to alleviate the 90-day time limit for filing a retaliation claim under SOX.<sup>145</sup> Common boundary grounds for denial include whether an employer is actually covered by SOX and whether the allegations of wrongdoing fit within the SOX regime.<sup>146</sup> For example, while SOX clearly covers publicly traded companies, it is unclear that SOX covers a privately held subsidiary of a publicly traded company and if the subsidiary’s employees constitute “agents” of the publicly traded company.<sup>147</sup> As an example of whether wrongdoing fits within the SOX regime, some ALJs found that a whistleblower reporting accounting errors did not constitute protected whistleblowing behavior if she were unable to tie those errors to someone’s scheme of intentional fraud on shareholders.<sup>148</sup>

Worse yet, this trend appears to be increasing. At the OSHA level, denials are increasingly based on boundary reasons.<sup>149</sup> This evidence suggests that whistleblowers are either not engaging attorneys to represent them or that the attorneys representing them are failing their clients. It is possible that the ninety-day limit under SOX is unreasonable given the constraints of investigation and legal practice. The rate at which procedural issues are increasing further suggests that either whistleblowers are not learning of the need for attorneys over time or that those attorneys representing them are not learning to do better.

### III. REAFFIRMING THE PUBLIC INTEREST IN RETALIATION

Separating the problems of the private view of retaliation from the problem of limited resources for public enforcement is difficult. One possibility is that OSHA or the Secretary of Labor embracing the private view is the cause of limited resources being applied towards public

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142. Moberly, *supra* note 101, at 96. Employees win in only 2.6% of the cases. At the ALJ level, employee withdrawal is the plurality outcome at forty percent of cases.

143. Moberly, *supra* note 101, at 102 tbl.4.

144. Moberly, *supra* note 101, at 102 100-04.

145. Moberly, *supra* note 101, at 102 tbl.4; Moberly, *supra* note 101, at 107-09.

146. Moberly, *supra* note 101, at 102 tbl.4.

147. Moberly, *supra* note 101, at 110-11.

148. Moberly, *supra* note 101, at 117-18.

149. Moberly, *supra* note 101, at 129.

enforcement. Why allocate public resources towards the litigation of private interests? It is also possible, though, that limited resources are encouraging the private review of retaliation. If OSHA is perpetually underfunded, its failure to publicly litigate retaliation cases may reinforce the perception that retaliation is a private matter. The strongest affirmation of public interest is public litigation. The most direct solution would therefore be the addition of greater enforcement resources. Given the history of OSHA and the limited funding of these enforcement efforts, however, this Article will consider a different direction.

#### A. IMMEDIATE CHANGES FOR OSHA

By statute, OSHA has a general mandate to investigate most claims of retaliation. As the public face of whistleblower antiretaliation efforts, OSHA has an immediate opportunity to affirm the public importance of combating whistleblower retaliation. This Article proposes two strategies for the agency. First, OSHA should adjust the goals of its investigation to signal the public interest in each whistleblower retaliation case. Second, OSHA should increase application of punitive sanctions to further demonstrate the public importance of combating retaliation.

##### 1. *OSHA to Prioritize Identification of Frivolous Claims in Investigation*

Given resource constraints on OSHA, this Article suggests that the broad goal of investigation should be the classification of retaliation cases into three categories: non-meritorious, possibly meritorious, and meritorious. This differs from the current binary regime that distinguishes meritorious from non-meritorious cases.<sup>150</sup> The existing regime makes sense if there are sufficient resources to obtain such accurate results in a timely fashion.

With insufficient resources, however, and time constraints such as those presented by *Leon v. IDX*, this Article suggests that OSHA's first priority in investigation should be the identification of non-meritorious cases. Dismissing or otherwise disposing of non-meritorious cases is in the public interest: society is not better off for having these cases lingering.

This strategy allows OSHA to affirm that subsequent investment in any not dismissed cases is in the public interest. OSHA may have insufficient resources to thoroughly investigate every possibly meritorious case, but it can at least affirm that additional investigation is in the public interest. In *Guyden v. Aetna*, for example, OSHA might have

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150. See U.S. DEPT OF LABOR, *supra* note 23.

been unsure as to the merits of Guyden's retaliation claim, but it had serious allegations of retaliation in other cases to investigate.<sup>151</sup> It is possible that, had OSHA spent more effort investigating, it would have uncovered stronger evidence of retaliation. OSHA could have used a possibly meritorious designation to signal to courts that it was still interested in learning the truth about the allegations in the case. Unlike the existing binary signal of meritorious versus non-meritorious that implies greater certainty about public interest, the option of a possibly meritorious designation allows OSHA to communicate an ongoing public interest even if it has insufficient resources to prioritize that particular case.

This converts the non-meritorious finding into a unilateral right of dismissal for OSHA. Such a right is similar to the substantive process under the FCA: when a whistleblower brings an allegation of fraud under the FCA, the complaint is immediately stayed and sealed.<sup>152</sup> The DOJ and the allegedly defrauded agency investigate the complaint and have three choices: they may intervene and take over the case, they may decline intervention, or they may unilaterally dismiss the case.<sup>153</sup>

This power is immediately useful because OSHA will already be investigating the whistleblower's claims. If OSHA comes to the conclusion that the whistleblower's behavior is frivolous, malicious, or otherwise unjustifiable, it can reduce the subsequent burden on the judiciary and the defendant by eliminating such retaliation claims.

As a practical matter, OSHA will not be litigating the possibly meritorious cases. It will dismiss the non-meritorious cases and litigate the meritorious cases. The whistleblower will have the burden of litigating the possibly meritorious category, but she can now proceed having some limited affirmation from OSHA.

## 2. *Increased Use of Punitive Sanctions*

Punishment of wrongful behavior is traditionally a public concern, and OSHA should emphasize existing tools for punishment to signal its distinct public interest in combating retaliation. Punishment provides the potential for retributive justice and deterrence, and numerous

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151. See *Guyden v. Aetna, Inc.*, 544 F.3d 376, 383 (2d. Cir. 2008).

152. See 31 U.S.C. § 3730(b)(2) (2012).

153. There is technically a fourth option, as the court handling the case may demand a decision from the government when the government has not come to a decision. At this point the government will file a "notice of no decision," which effectively operates as a declination of intervention. It is possible that this notice of no decision might be a deliberate DOJ choice. See R. Scott Oswald & David L. Scher, *DOJ's New 'No Decision' Tactic in 'Qui Tam' Cases Leaves Counsel Guessing*, BLOOMBERG LAW (Aug. 1, 2014), <http://www.bna.com/dojs-new-no-n17179893168/>.

statutes already provide an option for punitive sanctions.<sup>154</sup> Even if OSHA does not go so far as to increase the frequency of punitive sanctions, simply discussing punitive sanctions more frequently will highlight the public interest in retaliation cases.

OSHA's current standards for considering punitive sanctions are narrow and ill-advised. The proper standard should be recklessness: if the defendant is reckless in allowing retaliation, then punitive sanctions should apply. As long as a defendant company is aware of the substantial and unjustifiable risk that it is retaliating against a whistleblower, it should be liable for punitive damages.

This does not reflect current OSHA policy. Current policy is to apply punitive damages based on two considerations: awareness of the law and egregiousness of conduct.<sup>155</sup> The first consideration effectively creates a mistake of law defense to punitive damages: if the defendant is unaware that the adverse employment action is illegal, punitive damages should not apply. OSHA utilizes a recklessness standard as the minimum: if "the official perceived there was a risk that the action was illegal but did not stop or prevent the conduct."<sup>156</sup> The other alternative is egregious conduct, examples of which include: (1) discharge accompanied by harassment or blacklisting, (2) discharge based on association with a whistleblower, and (3) employer violence.<sup>157</sup>

Mistake of law is an improper basis to exclude punitive retaliatory liability. The proper standard should be whether the action itself is reckless or knowing, rather than the defendant's subjective awareness of the illegality of the behavior. While some may perceive retaliation law to be *malum prohibitum*, the fact that there is a common law right of action against whistleblower retaliation suggests that the public interest in protecting whistleblowers is sufficiently strong to create a presumption against individuals who retaliate against whistleblowers.

A second step is to modify the good faith defense. The good faith defense states that employers should not be liable for punitive damages if "the managers were acting on their own and the [employer] had a clear and effectively enforced policy against retaliation."<sup>158</sup> If the employer's antiretaliation policy were actually effective, it is unclear how the whistleblower could actually suffer retaliation. This clause should not be part of a defense. An employer as a corporate entity should be strictly

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154. See, e.g., 31 U.S.C. § 3730(h)(2) (authorizing reinstatement, double back pay, interest on the back pay and special damages); 49 U.S.C. § 31105(b)(3)(C) (2012) (sanctioning punitive damages up to \$250,000).

155. U.S. DEP'T OF LABOR, *supra* note 23, at 6-8.

156. U.S. DEP'T OF LABOR, *supra* note 23, at 6-8.

157. See U.S. DEP'T OF LABOR, *supra* note 23, at 6-8.

158. U.S. DEP'T OF LABOR, *supra* note 23, at 6-9.

liable for retaliation. In contrast, however, the second portion of the good faith defense makes sense. This indicates that “[p]unitive damages may not be appropriate if the respondent had a clear-cut policy against retaliation which was subsequently used to mitigate the retaliatory act.”<sup>159</sup> Mitigation by the employer should count in favor of the employer.

## B. STATUTORY REFORMS

Statutory reforms are the next major step to reaffirm the public importance of whistleblower retaliation cases. OSHA can adjust its investigatory process, but the existing statutory schemes are limiting. First, the present statutory schemes focus excessively on private compensation, leading courts to interpret the process as a private interest in nature. Congress should instead focus on sanctions that deal with the public harm of retaliation. Second, Congress should clarify the public importance of delegating litigation responsibility. Rather than the present ad hoc method of highlighting four prioritized statutory scheme, Congress should explicitly analyze the whistleblower’s ability to pursue the public interest in combating retaliation.

### 1. *Align Sanctions with the Public Interest*

Most statutes focus on whistleblower compensation. Rather than highlighting the whistleblower’s personal loss due to retaliation, however, Congress should focus on society’s losses due to retaliation. The public’s loss due to retaliation is loss of information regarding wrongdoing: if whistleblowers are afraid to report wrongdoing due to retaliation, society will not learn of the wrongdoing. Society’s loss is thus linked more strongly with the substantive violation.

When a company violates the Clean Air Act and emits dangerous pollutants into the environment, the DOJ and EPA fine the company at a level that corresponds with the harm of the pollution. If that company retaliates against a whistleblower who discloses evidence of the pollution to the government, the loss to society corresponds more strongly with the level of pollution.

An ideal system would calibrate the retaliation sanction with the social harm from the retaliation. For example, if the substantive offense causes \$10 million in harm to society, the retaliation sanction will be a fixed percentage of that harm. If the percentage is fixed at 10%, the whistleblower could obtain \$1 million from her former employer if she successfully proves retaliation. The whistleblower receives the

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159. U.S. DEP’T OF LABOR, *supra* note 23, at 6-9.

\$1 million regardless of her actual lost salary or other harms resulting from the retaliation.

Tying the civil sanction for retaliation to the magnitude of the substantive harm creates the opportunity for real deterrence of retaliation. An employer considering retaliating against a whistleblower will face a sanction commensurate with the harm of the wrongdoing. This should give the employer pause before engaging in retaliation, particularly given the general trend of employers being more likely to engage in retaliation if their wrongdoing is more severe.

If the government retains the option but not the obligation to litigate antiretaliation cases, Congress should recognize the additional private effort required to litigate such cases without government support. For example, the FCA acknowledges this burden on private enforcement by increasing the bounty percentage paid to whistleblowers who do not have the benefit of government intervention in their cases.<sup>160</sup> This example is from the substantive context for the FCA as opposed to the retaliation context. As this Article argues, though, the antiretaliation portion is similarly important in the detection and deterrence of the substantive offenses.

Besides highlighting the public interest in retaliation, this statutory proposal also improves the incentives for whistleblowers that litigate against retaliation. Under the present system that focuses on compensating a whistleblower's job losses, there is no link in the incentives for whistleblower antiretaliation litigation and the value of the substantive wrongdoing. This present structural incentive disconnect may result in both under and over investment in antiretaliation litigation. A highly compensated but marginally effective employee may blow the whistle on a trivial regulatory violation by her employer in order to gain leverage against her employer for severance. Society may not benefit from her raising the trivial regulatory violation, particularly if investigating such a violation is costlier than any benefit from correcting the violation. Nonetheless, the existing system may encourage her to over invest in antiretaliation litigation because she personally suffers substantial economic loss due to her high pay. Even though society would not want to encourage this type of whistleblowing and thus would not want to invest in deterring this "retaliation," the present structure of whistleblower compensation would encourage this litigation.

Similarly, the existing system may generate insufficient incentive for low compensation employees revealing evidence of serious employer wrongdoing. Under this scenario, it is important for society to learn of the serious wrongdoing, but there will be little incentive for the

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160. See 31 U.S.C. § 3730(d) (2012).

whistleblower to invest in antiretaliation. The whistleblower herself will only be entitled to recover her existing low compensation, and attorneys working on her behalf will see very limited upside in aggressively pursuing her case.

## 2. *Delegating Enforcement Responsibility*

Specific statutes presently obligate OSHA to litigate on behalf of specific whistleblowers. It must litigate retaliation cases falling under TSCA, the SDWA,<sup>161</sup> the AHERA,<sup>162</sup> and the OSHA,<sup>163</sup> but, as noted in Subpart I.D., it is unclear why whistleblowers under these four statutes should be privileged. If OSHA investigation finds that a whistleblower faced illegal retaliation under SDWA, it must litigate that case,<sup>164</sup> but if the whistleblower faced illegal retaliation under CAA, it is not obligated to do so.<sup>165</sup>

This Article proposes a systematic theory for evaluating who should address enforcement of employer retaliation claims. If society's interest is in combating retaliation against whistleblowers, responsibility for litigation should be allocated between OSHA and the whistleblower. Congress should adopt a unified theory of assigning litigation responsibility. In contrast to the *Leon v. IDX* decision, courts should first understand that OSHA is litigating the public interest.<sup>166</sup> Second, if OSHA decides to delegate litigation to the whistleblower, courts should understand that the whistleblower represents the *public* interest in combating the retaliation.

The allocation of litigation responsibility is a principal-agent problem: society, as the principal, has an interest in utilizing whistleblowers to learn of wrongdoing, and society needs an agent to litigate retaliation cases. The two major candidates for enforcement are private enforcement, through the whistleblower, and public enforcement by OSHA. As referenced in Subpart I.D., substantial literature discusses the relative merits of public versus private enforcement.<sup>167</sup> OSHA is resource constrained and has other priorities demanding its attention, while there are concerns about whether private parties can properly represent the public interest.

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161. 42 U.S.C. § 300j-9(i) (2012).

162. 15 U.S.C. § 2651 (2012).

163. 29 U.S.C. § 660(c) (2012).

164. *See* 42 U.S.C. § 300j-9(i).

165. *See* 42 U.S.C. § 7622 (2012).

166. *See* *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 962–63 (9th Cir. 2008).

167. *See supra* note 91.

This Article suggests that the whistleblower's interest in the substantive offense is the best reference point for her ability to represent the public interest in combating retaliation. For example, if the whistleblower is strongly concerned about breathing clean air at her work place, she is a relatively trustworthy agent to litigate retaliation under the Clean Air Act. OSHA should thus evaluate the strength of the whistleblower's interest in the substantive offense. If she has a strong interest in the substantive offense, the government should feel comfortable allowing her to litigate the civil antiretaliation claim. If she has a weak interest in the substantive offense, however, the government should prioritize public enforcement of the antiretaliation claim.

In practice, however, such a case-by-case evaluation would be difficult and costly; the existing OSHA apparatus in addressing whistleblower antiretaliation appears to be already strained. Instead, Congress should estimate the expected whistleblower interest under each federal statute. For example, under Section 11(c) of OSHA, whistleblowers will likely have a strong interest in the primary right: most whistleblowers will be employees who identify a safety violation at their place of employment. These employees have a strong interest in a safe working environment, and the government should be able to trust those employees as good agents of the public interest. This does not mean that Section 11(c) violations of OSHA do not merit public enforcement or are not in the public interest. Rather, given limited enforcement resources, public civil enforcement here is not as critical because there is an adequate private alternative.

Similar to whistleblowers under Section 11(c) of OSHA, whistleblowers under AHERA are likely to be good agents of the public interest. The dangers of asbestos are widely recognized, and individuals who blow the whistle about asbestos are likely to be the ones facing the highest risk of exposure. The government should similarly feel comfortable trusting those AHERA whistleblowers to litigate antiretaliation claims.

In contrast, the False Claims Act prohibits fraud against the federal government, but whistleblowers under the Act are typically not employees of the federal government responsible for the public fisc. Employees of government agencies routinely make decisions about how to properly spend their budgets, and they have specialized knowledge as to the costs and functions of their agency that surpass a typical taxpayer's knowledge. Government employees have a particularized interest in their agency's expenditures. In contrast, the whistleblowers have little particularized interest in controlling government fraud; their interest is likely similar to any other taxpayer. Therefore, without a strong interest in the primary right, FCA whistleblowers are less reliable as agents of the

public interest. The government should thus prioritize public enforcement of FCA retaliation cases.

This is in direct contrast to the existing statutory scheme. Presently, Congress requires public investigation and litigation for retaliation against OSHA and AHERA whistleblowers,<sup>168</sup> while the FCA makes no such requirement of public enforcement.<sup>169</sup> As a practical matter, OSHA might simply adopt this principal-agent model in its internal case prioritization system. More systemic reform would involve statutory changes that formally reduce the obligation of OSHA to address, for example, Section 11(c) retaliation cases and increase the obligation for FCA retaliation cases. Rather than requiring OSHA investigation and litigation of Section 11(c) cases, the statute should be amended to allow optional investigation and litigation, similar to the existing language under ISCA. In contrast, the FCA should be amended to incorporate agency review of retaliation cases.

### C. CHALLENGES WITH STATUTORY REFORMS

#### 1. *What to Do with Good Faith Claims*

Whistleblowers who have a good faith claim of wrongdoing but lose on their substantive claim would be disadvantaged by these statutory changes. For example, a whistleblower might alert the federal government to a CAA violation, but the federal government might decide not to bring any enforcement action against the CAA violation for political or national security reasons. Under a strict reading of this proposal, this whistleblower would not receive any monetary award if she faced retaliation. Effectively, whistleblowers bear the risk of being incorrect regarding their substantive claim, and such risk might encourage more careful investigation prior to blowing the whistle.

A less risky alternative is to give whistleblowers facing retaliation two choices for compensation: to receive the higher of the existing compensation regime or the proportional substantive value. Thus, a whistleblower who provided valuable information to the government could still obtain some compensation even if the government failed to sanction the defendant. As under the present system, she could receive as compensation for retaliation. Under this alternative, the whistleblower would not be any worse off than under the present regime. The tradeoff, however, is that this alternative does not discourage whistleblowers from bringing weak substantive claims forward. As proposed in Subpart III.A.,

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168. See 15 U.S.C. § 2651 (2012); 29 U.S.C. § 660(c) (2012).

169. See SYLVIA, *supra* note 86.

it remains important for OSHA to exercise judgment in dismissing inappropriate retaliation claims from whistleblowers.

### 2. *Deterrence Problems*

A potential flaw with this private litigation proposal is the lack of marginal deterrence: if there is a uniform civil sanction for retaliation, will employers have the incentive to commit the worst forms of retaliation? In some ways, this incentive effect may make sense: if the penalty for egregious retaliation and mild retaliation are the same, the employer might not feel pressure to avoid egregious retaliation efforts. Nonetheless, it is likely that egregious retaliation is easier to prove in a judicial setting, so employers may still be reluctant to pursue such egregious efforts.

Rather, a clustering of employer efforts to commit non-cognizable retaliation may occur. This form of retaliation is unpleasant to the employee but not recognized by a court as illegal retaliation. For example, giving an employee whistleblower the cold shoulder may make her feel unwelcome, but courts may be reluctant to recognize that as behavior meriting sanction.

This clustering effect may already exist, but the effect of the clustering may be stronger if courts lack the ability to reduce the civil sanction for retaliation. Courts may be more willing to blur the lines for cognizable retaliation if they have flexibility to set the award amounts. If the award amount is fixed, there may be severe hesitation at allowing marginal behavior to result in a large, fixed sanction.

### 3. *Combined Bounty and Antiretaliation?*

This statutory proposal borrows heavily from whistleblower bounty programs. Federal whistleblower bounty systems typically grant a percentage of the recovery to the whistleblower. For instance, a whistleblower uncovering \$10 million in fraud could gain 20% of that recovery, amounting to a \$2 million reward.<sup>170</sup> These systems promote whistleblowers as a faithful agent to the public concern for uncovering fraud. They encourage whistleblowers to pursue larger cases of wrongdoing, which are higher priorities for enforcement. In some ways, this statutory proposal is an alternative method to introduce bounties into a whistleblower scheme.

This proposal applies to statutes that do not offer a proportional bounty for the substantive offense. Most whistleblower statutes fall into this category. Statutes that have no proportional reward for substantive

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170. See 31 U.S.C. § 3730(d) (2012).

information benefit most from this proposal. In contrast, the FCA, for example, already offers a proportional bounty for whistleblowers who uncover fraud against the government.<sup>171</sup> The importance of a proportional bounty for antiretaliation based on the substantive offense is unclear in this scenario, as the potential whistleblower already can make a decision weighing the severity of the offense against the possibility of suffering retaliation.

The FCA also includes a private right against retaliation.<sup>172</sup> Because the FCA already incorporates arguably good incentives to induce whistleblowers to come forward representing the public interest, it is likely that the antiretaliation provision does not need enhancement via a proportional award. Moreover, if empirical evidence suggests that the antiretaliation litigation tends to be frivolous, misused, or otherwise induce antisocial behavior, it may be desirable to simply remove the private right of retaliation from the FCA.

#### 4. *Low Speed*

Another downside of this proposal is its time-consuming nature: antiretaliation litigation would have to wait upon the resolution of the substantive offense to determine the sanction for retaliation. Although the whistleblower could litigate her allegation of employer retaliation, the compensation available for such litigation would be unclear at the start of such litigation. The whistleblower and her attorneys might hesitate at retaliation litigation without a better understanding of the financial benefits from doing so.

This problem could be ameliorated by tying the retaliation sanction to the good faith belief of the value of the substantive claim and allowing immediate resolution of the retaliation claim. Courts could force the parallel analysis of the substantive whistleblowing claim to determine whether or not a whistleblower had a reasonable basis for her substantive claim. As long as this is determined in her favor, she should be immediately eligible for antiretaliation protection.

Early determination of a reasonable, good faith basis for the substantive claim has its risks. First is the possibility of an early false positive. It is possible that what appears to be a reasonable, good faith basis for the substantive claim may actually be false or manufactured, but additional research is required to discover this problem. For example, the whistleblower may actually be the culprit or mastermind behind the substantive offense, but she conceals her role and creates the apparent

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<sup>171</sup>. *See id.*

<sup>172</sup>. *See* 31 U.S.C. § 3730(h).

good faith evidence supporting her status as a whistleblower. A court encouraging the government to first determine her good faith status might result in antiretaliation protection for an individual that should be relieved of her position. Thus, there is a risk of a company being stuck with a malignant employee for longer than necessary, or a company having to pay a malignant employee undeserved money.

The latter risk can be somewhat mitigated by allowing courts to revisit the retaliation claim when the substantive research is completed, but such ongoing litigation is admittedly costly, and it is possible that the employee may cause additional harm or may spend the compensation resulting in an uncollectable judgment for the former employer.

The other possibility is that an early determination of the reasonable, good faith claim may be a false negative—a rapid determination that there is no reasonable, good faith basis for whistleblowing when there actually is a serious problem that deserves whistleblower attention. The false negative could cause multiple problems. One problem would be that the government might terminate its investigation at this stage. Because the government did not find sufficient early evidence of a reasonable, good faith basis for whistleblowing, it might decide that any subsequent research into the substantive claim is not worthwhile. Thus, the government might miss out on prosecuting a legitimate violation.

The more obvious problem is that the whistleblower would be improperly denied relief under this scenario. This is a less serious concern, though, since retaliation litigation in its present form can be very lengthy, and during this time the whistleblower is not entitled to immediate relief anyway.

Additionally, it seems unlikely that a court order to determine reasonableness and good faith on the whistleblower's part is going to materially affect the government's investigation—the government probably is determining its level of investment and priority in investigating the whistleblower's claims based on her initial evidence anyway. Thus, this is an early stage analysis that the government will conduct regardless of the court's order; rather, the court order simply pushes for disclosure of that initial early stage analysis.

#### D. REDUCE RELIANCE ON ANTIRETALIATION IN SUPPORT OF WHISTLEBLOWING

A final consideration is that neither the government nor private efforts may properly represent the public's interests in enforcing antiretaliation rights. After factoring in the costs of accurately evaluating employer retaliation cases, it may be the case that other forms of

encouraging whistleblowers are superior. Bounties and grants of attorneys' fees are alternative methods of encouraging whistleblowers, and whistleblowers might pursue cases if there are sufficient bounties involved, regardless of the risk of retaliation. A more thorough analysis would consider the costs, benefits, and relative efficacy of these alternatives to both reducing retaliation and improving whistleblower participation.

In the narrower context of reducing retaliation, this Article addresses two common issues that come up in existing whistleblower programs: confidentiality and internal reporting requirements. This is not an exhaustive list of alternatives, and these proposals could be used in conjunction with any of the above reforms. These two issues have a direct impact on potential retaliation, and OSHA and Congress would do well to consider these options if reducing retaliation is a priority.

### 1. *Confidentiality*

Confidentiality is a powerful tool that can mitigate risk of adverse employment actions. If the employer does not discover the identity of the whistleblower, retaliation against the whistleblower becomes rather difficult. If government agencies view retaliation as a private issue between employers and employees, however, they may expend little effort in protecting the whistleblower's identity.

The government has great capacity to protect the whistleblower's identity. The government is generally in control of the investigation process and thus can shape what the employer learns of the allegations as well as the source of the allegations. The government ostensibly has multiple investigatory tools and can obfuscate the focus of wrongdoing. Furthermore, the government can assist in privacy by urging courts to keep identifying materials sealed.<sup>173</sup> Many agencies, along with their respective statutes, incorporate a general policy of attempting to provide anonymity when whistleblowers so desire.<sup>174</sup> Nonetheless, there are exceptions. Whistleblower programs differ as to the level of secrecy they provide to whistleblowers.

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173. New York, for example, allows whistleblowers to keep records under seal if the state does not act on the whistleblower's allegations. See N.Y. STATE FIN. LAW § 190 (McKinney 2013).

174. See HELEN M. ALBERT, OFFICE OF INSPECTOR GENERAL, WHISTLEBLOWER PROTECTION, <https://www.hudoig.gov/fraud-prevention/whistleblower-protection> (last visited Apr. 21, 2018); SEC. & EXCH. COMM'N, IMPLEMENTATION OF THE WHISTLEBLOWER PROVISIONS OF SECTION 21F OF THE SECURITIES EXCHANGE ACT OF 1934 at 126–27, 131–32 (2011) <https://www.sec.gov/rules/final/2011/34-64545.pdf>; ENVTL. PROT. AGENCY, EPA OIG HOTLINE, <http://www2.epa.gov/office-inspector-general/epa-oig-hotline> (last visited Apr. 21, 2018).

*a. Short-Term Confidentiality*

Some statutory regimes provide only for short-term confidentiality. Government policy under the FCA, for example, does not provide long-term secrecy for whistleblowers. While whistleblowers enjoy temporary secrecy during the “under seal” portion of the government investigation, standard DOJ policy is to unseal cases for transparency’s sake after the investigation is complete.<sup>175</sup> This is often against the interests of both the defendant and the whistleblower: the defendant does not want the existence of a government investigation made public, and the whistleblower generally does not want her identity to be public. Nonetheless, the policy interest in transparency is strong enough that the government does not consider adverse employment actions to be a sufficient basis for maintaining secrecy about the whistleblower’s identity.

*b. Confidentiality Unless There Is Enforcement*

Another possibility is the provision of whistleblower confidentiality unless there is resulting enforcement. The STAA mandates non-disclosure of the whistleblower’s identity with one very large exception: the statute mandates disclosure of the whistleblower’s identity to the Attorney General if the matter is referred to the Attorney General for enforcement.<sup>176</sup> This is a rather limited provision of confidentiality, as whistleblowers understandably expect enforcement if they believe they are reporting wrongdoing. Nonetheless, this form of confidentiality at least reduces some risk for the whistleblower. If the whistleblower is wrong about the substantive allegation, she should be reasonably protected from retaliation given this conditional confidentiality provision.

*c. No Confidentiality*

Perhaps the most troubling for a potential whistleblower is the complete lack of confidentiality. OSHA, for example, does not allow anonymous whistleblowing. The whistleblower’s identity must be provided to the employer.<sup>177</sup> However, the Assistant Secretary of OSHA may permit a claim of privilege to protect the whistleblower’s identity if disclosure would “(1) [i]nterfere with an investigative or enforcement

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175. See RACHEL REPLOGLÉ, ASS’N. OF CORP. COUNSEL, OVERVIEW OF FEDERAL WHISTLEBLOWER REGULATIONS, <http://www.acc.com/legalresources/quickcounsel/whistleblowing.cfm> (last visited Apr. 21, 2018).

176. 49 U.S.C. § 31105(h) (2012).

177. OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, OSHA ONLINE WHISTLEBLOWER COMPLAINT FORM, OMB #1218-0236, <https://www.osha.gov/whistleblower/WBComplaint.html> (last visited Apr. 21, 2018).

action taken by OSHA under an authority delegated or assigned to OSHA in this paragraph; (2) adversely affect persons who have provided information to OSHA; or (3) deter other persons from reporting a violation of law . . . .”<sup>178</sup> This exception seems to be rather broad, and it is difficult to imagine circumstances in which disclosure would not serve one of those three standards.

## 2. Requirement of Internal Whistleblowing

While not directly addressing confidentiality, some whistleblower regimes require “internal” whistleblowing to qualify for protection against retaliation. For example, STAA states that to “qualify for [antiretaliation] protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.”<sup>179</sup> Such a requirement greatly reduces the possibility of confidentiality, unless such problems are so widespread that many employees are complaining about the same violations internally. Despite the risks of identification, though, some studies suggest that whistleblowers often conduct “internal” whistleblowing prior to notifying an external authority.<sup>180</sup>

If Congress and government agencies view retaliation against whistleblowers as a serious public problem rather than simply a private loss to the employee, they may be less likely to require or pressure whistleblowers into reporting internally. Nonetheless, if the whistleblower-triggered investigation leads to punitive sanctions against the employer, Congress may feel it is more equitable for the employer to have a chance to correct the problems by first being notified by the whistleblower.

## CONCLUSION

Despite increasing reliance on whistleblowers in law and regulatory enforcement, whistleblowers continue to face the risk of retaliation from their employers. Congress has passed numerous laws mandating public enforcement of antiretaliation statutes, suggesting that it recognizes the public importance of combating whistleblower retaliation. These legislative mandates have not been very successful, though, with courts and agencies viewing retaliation as a primarily private problem. This

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178. 65 Fed. Reg. 50017 (Aug. 16, 2000).

179. § 31105(a)(2).

180. See summary in MICELI ET AL., *supra* note 43, at 8; see also Marcia Parmerlee Miceli & Janet P. Near, *The Relationships Among Beliefs, Organizational Position, and Whistle-Blowing Status: A Discriminant Analysis*, 27 ACAD. OF MGMT. J. 687, 693 (1984) (eighty-eight percent of reported external whistleblowers also reported internal whistleblowing).

private problem view is understandable given public resource constraints and unclear priorities, but these decisions have negatively impacted the effectiveness of the legislative regime.

In the short term, OSHA can highlight the public importance of whistleblower retaliation cases by adjusting its priorities in fulfilling its legislative mandate to investigate. By prioritizing the dismissal of non-meritorious cases, OSHA can emphasize the remaining public interest in the remaining cases, even if OSHA has insufficient resources to fully investigate those remaining cases.

As a broader approach requiring statutory reforms, this Article proposed a principal-agent framework that evaluates a whistleblower's suitability as an enforcement agent for her right against employer retaliation. This framework provides guidance in understanding how agencies should prioritize retaliation enforcement. Private enforcement makes sense when the whistleblower's interests in preventing the employer's wrongdoing overlap with the public's interests. The Secretary of Labor and its delegates should thus prioritize public enforcement of retaliation cases in which the whistleblower's private interests do not match the public's interests.

Limited public enforcement resources will still leave many cases for private resolution. Proper delegation of antiretaliation for private enforcement should move beyond a simplistic view of antiretaliation as compensation for a whistleblower's individual economic loss. Instead, this Article proposed that whistleblower statutes incorporate an antiretaliation claim whose sanction is based on the severity of the substantive offense. This linkage will highlight the public interest in individual retaliation cases. Furthermore, this expanded sanction will allow private enforcement to exert deterrent power over employers considering retaliation against whistleblowers. It will encourage whistleblowers to pursue legitimate allegations of serious wrongdoing, as they will have increased assurance of payment in case of retaliation.

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