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Whistling While You Work: Expanding Whistleblower Laws to Include Non-Workplace-Related Retaliation After Burlington Northern v. White

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WHISTLING WHILE YOU WORK: EXPANDING WHISTLEBLOWER LAWS TO INCLUDE NON-WORKPLACE-RELATED RETALIATION AFTER *BURLINGTON NORTHERN V. WHITE*

I. INTRODUCTION

Whistleblowers play an important role in revealing illegal, unethical, and dangerous conditions or activities. They uncover wrongdoing on a massive scale. Because the behavior they report is, by its very nature, dangerous to the public, society has an obligation to protect and encourage whistleblowers who call attention to illegal and harmful activity. Unfortunately though, existing laws leave gaps that expose whistleblowers to effective types of retaliation.[1] These gaps leave potential whistleblowers wondering what their fate will be if they report dangerous, harmful, or illegal activity. They allow employers to use non-workplace-related retaliation to silence whistleblowers as most existing laws only cover workplace-related retaliation.[2] Lawmakers need to fill this void so that legitimate whistleblowers will be encouraged to reveal dangerous behavior that harms the public.

Current laws only protect whistleblowers against retaliation if their employer takes an adverse employment action against them. Whistleblower statutes and implementing regulations explicitly state this requirement.[3] This requirement presents a problem because it excludes retaliation claims in which the retaliatory act does not affect the whistleblower's terms or conditions of employment. For example, existing laws generally leave

1. *See* STEPHEN M. KOHN, CONCEPTS AND PROCEDURE IN WHISTLEBLOWER LAW 79–80 (2001).

2. *See infra* Part III.B.2.

3. *See, e.g.*, 49 U.S.C. § 42121(a) (2000).

uncovered retaliation occurring outside of work, and retaliation occurring after the whistleblower is fired or has quit.[4]

Even though whistleblower statutes only cover workplace-related retaliation, provisions in non-whistleblower laws such as Title VII of the Civil Rights Act of 1964 now protect against out-of-work retaliation.[5] Before 2006, most United States courts of appeal required a Title VII plaintiff to prove an adverse employment action to recover for retaliation.[6] In *Burlington Northern & Santa Fe Railway Co. v. White*, however, the Supreme Court eliminated that requirement, holding that Title VII also protects against non-workplace-related retaliation.[7] The Court cited significant public policy reasons for doing so.[8] It also largely justified its holding based on Title VII's language,[9] which, unlike whistleblower laws, does not specifically require retaliation to affect the terms or conditions of employment.[10]

This landmark ruling now presents a fundamental inconsistency between whistleblower retaliation laws and non-whistleblower retaliation laws, such as Title VII. Further, this discrepancy presents an interesting issue because whistleblower retaliation case law generally adheres to Title VII precedent.[11] This ad-

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4. *See infra* Part III.

5. *See* 42 U.S.C. § 2000e-3(a) (2000). Other non-whistleblower, employment-related retaliation statutes follow Title VII's scheme. *See, e.g.*, Labor Management Relations Act 1947, 29 U.S.C. § 158(a)(4) (2000); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (2000); Family and Medical Leave Act of 1993, 29 U.S.C. § 2615(a)(2) (2000). Title VII is the most followed example and will provide the context for this comment.

6. *See infra* notes 102–05 and accompanying text.

7. 126 S. Ct. 2405, 2412–14 (2006).

8. *Id.* at 2412–13.

9. *Id.* at 2411–12.

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

42 U.S.C. § 2000e-3(a) (2000).

11. *See, e.g.*, Hirst v. Se. Airlines, Inc., 25 Indiv. Empl. Rights Cases (BNA) 1276, 1281 (Dep't of Labor 2007); *see also* DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 8 (2d ed. Supp. 2006) (stating that many courts rely on the Supreme Court's Title VII jurisprudence to interpret other whistle-

herence to Title VII case law has left commentators wondering how *Burlington Northern* will affect whistleblower litigation given that the specific workplace-related requirement in whistleblower statutes is no longer required for Title VII retaliation cases.[12]

This comment will not attempt to harmonize the different standards or predict a future course of interpretation. Instead, it will address the existing disparity as an opportunity to amend whistleblower laws to provide meaningful protection against all types of retaliation, not just those that affect the whistleblower's terms or conditions of employment. With this broad goal as a basis, this comment will specifically advocate amending all federal whistleblower statutes' retaliation provisions to conform to Title VII's retaliation provision. This would eliminate the requirement that the retaliation affect the terms or conditions of employment and incorporate the public policy rationale outlined in *Burlington Northern*.

Part II of this comment will discuss the importance of whistleblowers, and Part III will review current whistleblower statutes. Part IV will provide a brief background of pre-*Burlington Northern* Title VII retaliation claims. Part V will discuss *Burlington Northern*'s holding as the new standard in Title VII cases. Part VI will argue for reforming whistleblower laws to conform to Title VII and to incorporate *Burlington Northern*'s holding and rationale.

II. BACKGROUND AND IMPORTANCE OF WHISTLEBLOWING

Black's Law Dictionary defines a whistleblower as "[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency."[13] The name comes from the figurative action—"blowing the whistle"—involved in exposing unlawful activity.[14] Whistleblowers have been described as "ordinary hero[es]

blower laws).

12. *See* WESTMAN & MODESITT, *supra* note 11, at 66–67 (discussing the potential effects of *Burlington Northern* in how Sarbanes-Oxley is interpreted and applied).

13. BLACK'S LAW DICTIONARY 1627 (8th ed. 2004).

14. "The term is derived from the act of an English bobby blowing his whistle upon becoming aware of the commission of a crime to alert other law enforcement officers and the public within the zone of danger." Winter v. Houston Chron. Publ'g Co., 795 S.E.2d 723, 727 (Tex. 1990) (Doggett, J., concurring).

who help[ ] America function when it wants to slip into self-interest and faction."[15] They expose dangerous, illegal, and harmful activities of both governments and private organizations from the inside by providing information to supervisors, regulating authorities, or governmental bodies.[16]

Whistleblowers also play an extremely important role in uncovering and correcting governmental waste, environmental dangers, public safety violations, conspiracies, fraud, and deceit. Recent events have highlighted the importance of insiders exposing illegal or harmful activity. The trio of whistleblowers selected as *Time* magazine's Persons of the Year in 2002 perhaps best represents the important role whistleblowers have played in recent years.[17] *Time* selected three women who played roles in uncovering arguably the most massive scandals in recent history.

Two—Sherron Watkins and Cynthia Cooper—worked at Enron and WorldCom, respectively. Both revealed their companies' massive accounting irregularities before they became public.[18] These financial scandals not only caused the two companies to implode, but also brought down one of the "Big Five" accounting firms, Arthur Andersen.[19] At the time, Enron's bankruptcy was the largest ever.[20] It was eclipsed only seven months later when WorldCom filed the largest bankruptcy claim in American history.[21] These scandals cost thousands of employees their jobs.[22] Many of them had their retirement accounts invested in company stock, which became essentially worthless.[23] According to one calculation, WorldCom stockholders lost $179.3 *billion* when the company's

15. Scott Bloch, Commentary, *America Will Always Need Whistleblowers*, FED. TIMES, Jan. 29, 2007, http://www.federaltimes.com/index.php?S=2510890.

16. *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 154–55 (2007).

17. *See* Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 30, 2002, at 30.

18. *See id.*

19. *See* KURT EICHENWALD, CONSPIRACY OF FOOLS: A TRUE STORY 666–67 (2005) (discussing the repercussions and criminal consequences for Arthur Andersen as a result of Enron's and others' accounting scandals).

20. *In S.F., Enron's "E" Stands for Embarrassing*, L.A. TIMES, Aug. 31, 2002, at 3, *available at* 2002 WLNR 12464856.

21. *Id.*

22. *See* Daniel Kadlec, *WorldCon*, TIME, July 8, 2002, at 20.

23. *See id.* (noting that WorldCom stock, which peaked at $64.50 per share in 1999, fell to $0.83 following the scandal and noting a similar, albeit less severe, result for Enron shares).

fraudulent accounting practices were discovered.[24] Not only did stockholders lose their money, but American investors also lost confidence in the country's securities markets as well.[25] Vowing to combat corporate fraud, Congress passed the Sarbanes-Oxley Act as a result of these crises.[26] Besides reforming corporate accountability, it also included whistleblower protections for employees who expose fraud.[27]

Time named Coleen Rowley as its third Person of the Year after she exposed lapses in the Federal Bureau of Investigation's ("FBI") handling of terrorist suspect Zacarias Moussaoui before September 11, 2001.[28] Rowley, an FBI attorney, wrote Director Robert Mueller and later testified before Congress, claiming that the FBI brushed off and obstructed repeated pleas by her Minnesota field office to investigate Moussaoui before the World Trade Center attacks.[29] Revealing these systemic structural inefficiencies in the FBI's intelligence collection procedures led to the formation of the FBI's Office of Intelligence, which now focuses on intelligence analysis and information sharing.[30]

These recent high-profile scandals have attracted attention to the important role whistleblowers play in high-stakes activities and corporate boardrooms. Whistleblowers also reveal less glamorous, yet just as dangerous, activity nationwide. The U.S. Office of Special Counsel ("OSC"), which is charged with enforcing whistleblower laws covering federal employees, awarded Leroy Smith its Public Servant of the Year Award in 2006 after Smith reported dangerously high amounts of heavy metals in a Bureau of Prisons

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24. *See* LYNNE W. JETER, DISCONNECTED: DECEIT AND BETRAYAL AT WORLDCOM 204, 237 (2003). "The loss in total market value was calculated from the peak stock price—$64.50 on June 21, 1999—to the date of the bankruptcy filing." *Id.* at 237.

25. *See* Kadlec, *supra* note 22.

26. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). *See generally* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005) (discussing the factors leading to the passage of Sarbanes-Oxley).

27. *See* 18 U.S.C. § 1514A (2000).

28. Lacayo & Ripley, *supra* note 17, at 30.

29. *See* Amanda Ripley & Maggie Sieger, *The Special Agent*, TIME, Dec. 30, 2002, at 34; *see also* Letter from Coleen M. Rowley, Special Agent and Minneapolis Chief Div. Counsel, to Robert Mueller, FBI Dir. (May 21, 2002), http://www.time.com/time/printout/0,8816,24997,00.html.

30. *See* Press Release, FBI, FBI Creates Structure to Support Intelligence Mission (Apr. 3, 2003), *available at* http://www.fas.org/irp/news/2003/04/fbi04 0303.html.

computer disassembly plant.[31] In 2005, the OSC gave the award to Anne Whiteman.[32] Whiteman worked as an air traffic controller at the Dallas Fort Worth International Airport.[33] She revealed that other controllers and managers routinely covered up incidents in which aircraft flew dangerously close to each other.[34]

Whistleblowers bring about reform and accountability, often by exposing illegal activity. Because offenders face jail time and civil fines once their actions are exposed by whistleblowers, it is no wonder that many employers want to silence these bearers of bad news.[35] Therefore, the targets of whistleblowers frequently retaliate to silence, harass, or discredit them.[36]

Despite existing protections, most whistleblowers inevitably face retaliation, harassment, or intimidation. WorldCom whistleblower Cynthia Cooper recognized this fact and cautioned:

> Any time you step over that invisible line and become a whistleblower, you will receive some criticism. You have to know who you are at your core and accept the inevitable criticism. You must understand that there is clearly a cost associated with any actions you may take. For many, that cost may be severe.[37]

Cooper is not alone. Whistleblowers face serious repercussions in almost all instances. A recent study of whistleblowers found that "[t]he most common fallout from their whistle-blowing involved: (a) severe depression or anxiety (84%), (b) feelings of isolation or powerlessness (84%), (c) distrust of others (78%), (d) de-

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31. *See* Press Release, U.S. Office of Special Counsel, OSC Names Recipient of 2006 Public Servant Award (Sept. 7, 2006), *available at* http://www.osc.gov/documents/press/2006/pr06_16.htm.

32. Press Release, U.S. Office of Special Counsel, FAA Whistleblower Anne Whiteman Receives 2005 Special Counsel's Public Servant Award (Oct. 6, 2005), *available at* http://www.osc.gov/documents/press/2005/pr05_18.htm.

33. *Id.*

34. *See* Press Release, U.S. Office of Special Counsel, U.S. Office of Special Counsel Transmits Report of Cover-up of Operational Errors by FAA Personnel at Dallas Fort Worth Airport (June 23, 2005), *available at* http://www.osc.gov/documents/press/2005/pr05_15.htm.

35. *See, e.g.*, Moberly, *supra* note 16, at 148.

36. *See* Mariam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1051–52 (2004).

37. Michael Barrier, *One Right Path: Cynthia Cooper: MCI Vice President of Internal Audit Cynthia Cooper Believes that Where Ethics Are Concerned, You Have to Obey Your Conscience and Accept the Consequences—Interview*, INTERNAL AUDITOR, Dec. 2003, http://findarticles.com/p/articles/mi_m4153/is_6_60/ai_111737943.

clining physical health (69%), (e) severe financial decline (66%), and (f) problems with family relations (53%)."[38] The same study reported that roughly two-thirds of internal whistleblowers lost their jobs and were later blacklisted in their occupations.[39] These statistics are not surprising. Examples of retaliation against whistleblowers are far too common to discuss in depth.[40]

To feel comfortable exposing fraud and public danger, potential whistleblowers need to know that they will be protected if they make disclosures. This protection can only come from laws that effectively prevent all retaliation and encourage and fully protect whistleblowers who voluntarily disclose wrongdoing.

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38. Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 WORK AND OCCUPATIONS 107, 121 (1999).

39. *See id.* at 120.

40. For a particularly lengthy account of one whistleblower's experience, see generally PETER ROST, THE WHISTLEBLOWER: CONFESSIONS OF A HEALTHCARE HITMAN (2006), which documents Dr. Rost's fall from Vice President of a major pharmaceutical company to unemployment, including the many forms of retaliation that he endured in the process. Other stories chronicle Transportation Security Administration employees who alleged that they were retaliated against after bringing to light serious screening errors and lapses in airport security. *See* Ron Marsico, *Whistleblowers Hit Turbulence: TSA Ex-Employees Say They've Been Blackballed for Revealing Problems*, STAR-LEDGER (Newark, N.J.), Oct. 14, 2007, at 1, *available at* 2007 WLNR 20200165. Government employees have further alleged that the Office of Special Counsel, tasked with protecting federal whistleblowers, retaliated against its own employees by relocating them to distant field offices when they opposed the Special Counsel's policies. *See infra* note 46. One chilling account details a former payday lender employee's pushback when he tried to testify about the lender's illegal and predatory practices. *See* Chris Flores, *Whistle-Blowers Suing Payday Lender*, DAILY PRESS (Newport News, Va.), Oct. 26, 2007, at A1, *available at* 2007 WLNR 21151387. The lender's lobbyist allegedly told police that the employee was wanted for a sexual offense. *Id.* Police arrested him while he was waiting in the hall after testifying to the Washington, D.C. city council about his former employer's illegal practices. *Id.* After being released, he sent an e-mail to the entire Virginia General Assembly outlining the lender's practices. *Id.* He received a return e-mail soliciting his information from a "delegate," who turned out to be an investigator in Texas. *Id.* The man later found spyware programs on his computer and alleged that he received anonymous phone calls threatening him. *Id.* Stories such as these abound, and one need not look further than the daily newspaper to find similar accounts at all levels of the public and private sectors.

III. CURRENT WHISTLEBLOWER STATUTES AND THEIR SHORTCOMINGS

A. *Shortcomings of Existing Whistleblower Laws and the Need for Reform*

Whistleblower laws exist to protect and encourage those who report public safety violations, health and environmental concerns, corporate fraud, and numerous other harmful activities that may otherwise go unnoticed.[41] As stated by Congress with respect to current legislation, the laws attempt to "ensure that employees can report their concerns without the fear of possible retaliation."[42] The Supreme Court has noted that retaliation provisions exist to "ensure that employees are 'completely free from coercion against reporting' unlawful practices."[43] This purpose, however, has largely gone unfulfilled.

Existing whistleblower laws are under steady attack from experts in the field. Various authors have criticized whistleblower laws—and their implementation—based on many factors. Common criticisms come from the laws' rigid procedural rules, misapplication of the whistleblower's burden of proof by judges, and unclear standards regarding which employees, employers, and protected activities are covered by the laws.[44] One recent study of the Sarbanes-Oxley Act's whistleblower provision highlighted these issues. It reported that when a full administrative hearing is held and an administrative law judge ("ALJ") makes a determination for either the employee or employer, the employee win rate is a meager 6.5%.[45]

Another common criticism is a lack of proper enforcement by the governmental agencies responsible for investigating whistle-

41. Matthew R. Hall, Note, *An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report,* 84 KY. L.J. 643, 645 n.19 (1996).

42. H.R. REP. NO. 110-259, at 348 (2007) (Conf. Rep.).

43. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414 (2006) (quoting NLRB v. Scrivener, 405 U.S. 117, 121 (1972)).

44. *See* Moberly, *supra* note 16; *see also* John B. Chiara & Michael D. Orenstein, Note, *Whistler's Nocturne in Black and Gold—The Falling Rocket: Why the Sarbanes-Oxley Whistleblower Provision Falls Short of the Mark,* 23 HOFSTRA LAB. & EMP. L.J. 235, 251–54 (2005).

45. Moberly, *supra* note 16, at 91.

blower claims. Many have leveled attacks against the OSC.[46] The OSC's 2006 Annual Report also paints a bleak picture. It reported the results of a survey of employees who made prohibited personnel practices claims to the OSC. [47] Of the 256 people responding, just ten were satisfied with the result the OSC obtained for them.[48] Only one was very satisfied.[49] This contrasts with twenty-eight dissatisfied respondents.[50] Strikingly, 209, or more than eighty-one percent, of respondents were very dissatisfied with the OSC's results.[51]

Lawmakers have also offered criticisms of the status quo. Senator Chuck Grassley, widely known for supporting whistleblowers, recently noted on the Senate floor that "our work in this field is unfinished and more can be done."[52] He excoriated federal agencies that "prevent the truth from coming out" and that "shoot[ ] the whistleblower instead of addressing the problem."[53]

There are many reasons to criticize the existing statutory framework and enforcement of whistleblower laws. Although this comment will not specifically address the other noted deficiencies in the current state of whistleblower law, it will add to the ever-growing call for reform in this muddled and often unsupportive field. Many authors have proposed comprehensive whistleblower legislation,[54] but actual legislative reform does not seem to be gaining much traction. Although a comprehensive law would be ideal, current and future laws should nonetheless strive to provide as much protection as possible for whistleblowers.

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46. Many critics have accused the OSC of retaliating against its own employees and improperly purging backlogged cases. *See, e.g.*, Elizabeth Williamson, *Special Counsel Accused of Intimidation in Probe; Contact with Investigators Controlled, Employees Say* WASH. POST, Feb. 16, 2007, at A21. Further, the OSC allegedly cancelled Leroy Smith's 2006 Public Servant of the Year acceptance speech when it was informed that Smith was going to criticize the OSC for non-responsiveness in a subsequent address. *See* Elizabeth Williamson, *Special Counsel Cancels Award Ceremony for Whistle-Blower*, WASH. POST, Sept. 11, 2006, at A15.

47. U.S. OFFICE OF SPECIAL COUNSEL, REPORT TO CONGRESS app. at 47–51 (2006), *available at* http://www.osc.gov/documents/reports/ar–2006.pdf.

48. *See id.* at 47, 51.

49. *Id.*

50. *Id.*

51. *See id.*

52. 153 Cong. Rec. S6034 (daily ed. May 14, 2007) (statement of Sen. Grassley).

53. *Id.*

54. *See, e.g.*, KOHN, *supra* note 1, at 391–94.

B. *Overview of Existing Federal Legislation*

Because Congress has not passed comprehensive whistleblower legislation, "a significant cross section of the American workforce" is covered by various whistleblower laws, but their protections are "riddled with loopholes."[55] The failure to enact comprehensive reform has been cited by some as the "single most remarkable deficiency in the protection of legitimate whistleblower activity."[56]

One possible reason for the lack of comprehensive protection is that whistleblower protections have often been included in broader, industry-specific legislation. For example, the Sarbanes-Oxley Act broadly regulates corporate governance and accounting, while the whistleblower protections provide only a part of the broader scheme.[57]

Congress has continued to use this piecemeal approach when dealing with whistleblower laws. For example, in 2007, it extended whistleblower protection to public transportation,[58] railroad,[59] and commercial motor carrier employees[60] as part of the Implementing Recommendations of the 9/11 Commission Act of 2007. Numerous other bills have been introduced recently, which similarly grant protections only to employees in specific fields that receive national attention, such as food, drug, and consumer safety.[61] Because proposed legislation is often a reaction to a national crisis, it tends to focus on the specific area in which there was an emergency. For example, the proposed Consumer Product Safety Commission Reform Act of 2007 would have granted whistleblower protection to employees of manufacturers and retailers in an attempt to "provide greater protection for children's products" and "improve the effectiveness of consumer product recall programs"[62] just after many toys were recalled due to lead con-

55. *Id.* at 79.

56. *Id.*

57. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

58. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1413, 121 Stat. 266, 414 (to be codified at 6 U.S.C. § 1142).

59. *Id.* § 1521, 121 Stat. at 444 (to be codified at 49 U.S.C. § 20109).

60. *Id.* § 1536, 121 Stat. at 464 (to be codified at 49 U.S.C. § 31105).

61. *See, e.g.*, Consumer Food Safety Act of 2007, H.R. 3624, 110th Cong. § 419; Consumer Product Safety Commission Reform Act of 2007, S. 2045, 110th Cong. § 22; Swift Approval, Full Evaluation Drug Act, H.R. 1165, 110th Cong. § 3 (2007); Safe Food Act of 2007, S. 654, 110th Cong. § 407.

62. Consumer Product Safety Commission Reform Act of 2007, S. 2045. The whistle-

tamination.[63] As previously discussed, Congress also passed the Sarbanes-Oxley Act in the wake of a large financial crisis.

Given Congress's reluctance to move away from its piecemeal approach to whistleblower protection, federal legislation only provides protection from retaliation in specified areas, often on an industry-specific basis.[64] Over thirty different federal laws protect whistleblowers, including those in the airline,[65] banking,[66] mining,[67] and transportation industries.[68] Laws also cover those who report various environmental,[69] health,[70] and securities violations.[71] Protection is also granted to government and civil service employees,[72] as well as employees who report contractors that defraud the U.S. government.[73]

1. The Standard Scheme

Despite different statutes for each industry or class of employees, almost all whistleblower laws follow the same standard scheme.[74] This is because almost all new whistleblower laws are modeled after then-existing laws, so they are often drafted in the same way.[75] Further, because the same agencies enforce many different whistleblower statutes, the regulations and procedures

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blower protection language was later deleted.

63. *See* Anne D'Innocenzio & Natasha T. Metzler, *Lead Paint Leads to Fisher-Price Toy Recall*, WASH. POST, Aug. 2, 2007, at D3; Kelly Marshall & Rob Kelley, *Mattel Announces Third Toy Recall*, CNNMONEY.COM, Sept. 5, 2007, http://www.money.cnn.com/2007/09/05/news/companies/mattel_recall/index.htm.

64. This comment will only address federal legislation because state laws often only cover wrongful discharge as a tort. *See* KOHN, *supra* note 1, at 378. Since this comment focuses on non-workplace-related retaliation, it will not address these various state protections, except to discuss their inadequacy in protecting against non-workplace-related retaliation. *See infra* Part VI.C.2.

65. *See* 49 U.S.C. § 42121 (2000).

66. *See* 12 U.S.C. § 1790b (2000) (federal credit union employees); 12 U.S.C. § 1831j (2000) (FDIC-insured bank employees).

67. *See* 30 U.S.C. § 815(c) (2000).

68. *See* 49 U.S.C. § 31105(a) (2000).

69. *See* 15 U.S.C. § 2622 (2000) (toxic substances); 33 U.S.C. § 1367 (2000) (water pollution); 42 U.S.C. § 5851 (2000) (nuclear energy); 42 U.S.C. § 6971 (2000) (solid waste); 42 U.S.C. § 7622 (2000) (air pollution); 42 U.S.C. § 9610 (2000) (hazardous substances).

70. *See* 20 U.S.C. § 4018 (2000) (school workers revealing asbestos problems).

71. *See* 18 U.S.C. § 1514A (Supp. V 2005).

72. *See* 5 U.S.C. § 2302(b)(8)–(9) (2000).

73. *See* 31 U.S.C. § 3730(h) (2000).

74. *See* KOHN, *supra* note 1, at 79–80.

75. *See id.* at 80.

are often the same for many different laws. Most notably, the Department of Labor is charged with enforcing sixteen different federal whistleblower laws, many of which share the same regulations.[76] Because whistleblower laws are often explicitly crafted after one another, they generally follow one of two models.

A typical whistleblower protection statute following the first model states that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" engaged in a protected whistleblowing activity.[77] Many whistleblower laws track this model and specifically require in the statutory language that the retaliation affect the terms or conditions of employment.[78]

Statutes following the second model do not specify that the retaliation must affect the whistleblower's employment. A typical statute following this model states that "[n]o person shall fire or in any other way discriminate against" a whistleblower engaging in protected activity.[79] The statutes following this model, however, have implementing regulations that supply the requirement that the retaliation must affect the whistleblower's terms or conditions of employment.[80] Accordingly, whether provided by statute or regulation, all whistleblower retaliation complainants must show that the retaliation somehow affected the terms or conditions of their employment.

Working with this basic statutory framework, courts—primarily ALJs[81]—have settled on the elements of proving a prima facie case of retaliation under various whistleblower laws.

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76. For a complete list of the sixteen statutes and their implementing regulations, see U.S. Department of Labor Occupational Safety and Health Administration, The Whistle-Blower Protection Program, http://www.osha.gov/dep/oia/whistleblower/index.html (last visited Apr. 3, 2008).

77. *See, e.g.*, 42 U.S.C. § 5851(a)(1) (2000).

78. *See, e.g.*, *supra* notes 65–66, 68–70.

79. *See, e.g.*, 42 U.S.C. § 9610(a) (2000).

80. *See, e.g.*, Procedures for the Handling of Retaliation Complaints Under Federal Employee Protection Statutes, 72 Fed. Reg. 44,963 (Aug. 10, 2007) (to be codified at 29 C.F.R. pt. 24).

81. Because the Department of Labor is responsible for hearing initial complaints under numerous whistleblower laws, much of the available precedent comes from the Department of Labor's Administrative Law Judges, who hear disputes under the whistleblower statutes the department enforces. *Cf.* 29 C.F.R. § 1980.100–1980.115 (2007).

The elements are based primarily on Title VII's retaliation provision.[82] A complainant typically must show that:

> (i) The employee engaged in a protected activity;
> (ii) The respondent knew or suspected, actually or constructively, that the employee engaged in the protected activity;
> (iii) The employee suffered an unfavorable personnel action; and
> (iv) The circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the unfavorable action.[83]

These elements apply to all federal whistleblower statutes, regardless of which model of statutory construction they follow.[84]

2. The Adverse Employment Action Requirement

Whistleblower statutes generally prohibit discrimination against employees with respect to their compensation, terms, conditions, or privileges of employment.[85] A complainant can show discrimination in one of two ways.

First, complainants can claim that, because of their protected activity, their current employer took an adverse employment action against them at their current job.[86] This is a common claim whistleblowers make when alleging retaliation, and many employer actions are considered adverse employment or personnel actions, such as firing, transferring, demoting, reassigning, suspending, or refusing to rehire the whistleblower.[87] Denying pro-

82. *Compare* 42 U.S.C. § 2000e-3(a) (2000) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."), *with* 33 U.S.C. § 1367(a) (2000) ("No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.").

83. Procedures for the Handling of Retaliation Complaints, 72 Fed. Reg. at 44,964.

84. *See id.* at 44,693 (defining the scope of the regulation).

85. *See, e.g.*, 49 U.S.C. § 42121(a) (2000).

86. *See* Procedures for the Handling of Retaliation Complaints, 72 Fed. Reg. at 44, 964.

87. *See* STEPHEN M. KOHN ET AL., WHISTLEBLOWER LAW 97–100 (2004).

motions, moving offices, revoking parking privileges, giving negative performance evaluations, and denying overtime opportunities to whistleblowers have also been held to be actionable adverse employment actions.[88] Because employers can retaliate in many ways, an adverse employment action is commonly defined as an act that is "reasonably likely to deter employees from making protected disclosures."[89] Satisfying this standard, however, generally requires complainants to show that the adverse action "directly affect[ed]" their employment.[90] Because of this requirement, retaliation not directly affecting the whistleblower's current employment is often not actionable under this claim.

To fill this void, a second method of showing workplace-related retaliation is accepted. If the retaliatory act does not directly affect the whistleblower's current employment, he or she can argue that the offending employer caused specific harm to their future employment possibilities.[91] This second method is arguably more difficult to prove in court. To prove an effect on future employment, complainants generally must prove specific acts of "blacklisting [or] interfering with a complainant's subsequent employment."[92] Blacklisting is "marking an employee for avoidance in employment because she engaged in protected activity."[93] This is often difficult to prove, though, because courts require that the whistleblower prove "an objective action—there must be evidence that a specific act of blacklisting occurred."[94] The complainant's subjective feelings or lack of subsequent work opportunities can-

88. *Id.* at 98–99.

89. Halloum v. Intel Corp., Case No. 2003-SOX-0007, at 15–16 (A.L.J. Mar. 4, 2004), http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=212431 (follow ".pdf" hyperlink).

90. *See, e.g.*, Vodicka v. Dobi Med. Int'l, Inc., 23 Indiv. Empl. Rights Cases (BNA) 1698, 1706 (Dep't of Labor 2005).

91. *See* KOHN, *supra* note 87, at 98.

92. Pittman v. Siemens AG, Case No. 2007-SOX-0015, at 4 (A.L.J. July 26, 2007) http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=232183 (follow ".pdf" hyperlink) (citing Harvey v. Home Depot, Inc., Case No. 2004-SOX-20, at 4 (A.L.J. May 28, 2004), http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=217736 (follow ".pdf" hyperlink)).

93. Leveille v. N.Y. Air Nat'l Guard, Case Nos. 94-TSC-3, 94-TSC-4, 1995 WL 848112, at *8 (Dep't of Labor Dec. 11, 1995).

94. Pickett v. Tenn. Valley Auth., Case No. 01-CAA-18, at 9 (Admin. Rev. Bd. Nov. 28, 2003), http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=205526 (follow .pdf hyperlink under "Final Decision & Order") (citing Howard v. Tenn. Valley Auth., Case No. 90-ERA-24, at 3–4 (Dep't of Labor July 3, 1991), http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=129914 (follow ".pdf" hyperlink under "Final Decision & Order of Dismissal")).

not alone prove blacklisting.[95] Due to these onerous requirements, blacklisting and negative effects on future employment are often difficult to prove in a whistleblowing context.

Because of the employment-related requirements in both methods of proving retaliation, claims often fail if the whistleblower does not show that the retaliatory act "directly affected any aspect of his employment."[96] This result seems to follow naturally given the language of the statutes and their implementing regulations. It would indeed be a strained interpretation of these laws to hold that retaliation not affecting any aspect of the whistleblower's employment would be actionable. As a result, these standards leave whistleblowers unprotected against out-of-work retaliation that does not affect current or future employment.[97]

IV. BACKGROUND OF TITLE VII RETALIATION AND ITS SIGNIFICANCE IN WHISTLEBLOWER LAW

Whistleblower retaliation protections are largely modeled after Title VII's retaliation provision.[98] Because the procedures in whistleblower litigation also track Title VII retaliation litigation very closely, it is useful to explore the origins of current whistleblower laws. Further, because this comment will argue for whistleblower laws' retaliation provisions to conform to Title VII and the holding in *Burlington Northern*, an understanding of Title VII's retaliation provision and its elements are helpful before discussing *Burlington Northern* itself.

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95. *See Pickett*, Case No. 01-CAA-18, at 9.

96. *Vodicka*, 23 Indiv. Empl. Rights Cases (BNA) at 1705. For other whistleblower cases in which the complainant's retaliation claims failed due to out-of-work retaliation, see Hirst v. Se. Airlines, Inc., 25 Indiv. Empl. Rights Cases (BNA) 1276 (Dep't of Labor Jan. 31, 2007); *Pittman*, Case No. 2007-SOX-0015; Friday v. Nw. Airlines, Inc., Case Nos. 2003-AIR-19, 2003-AIR-20 (Admin. Rev. Bd. July 29, 2005), http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId= 212562 (follow ".pdf" hyperlink under "Filing by Court: ARB Final Decision and Order"); Somerson v. Mail Contractors of Am., Case No. 03-STA-11 (Admin. Rev. Bd. Oct. 14, 2003), http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=211330 (follow ".pdf" hyperlink under "Final Order Striking the Complainant's Brief & Dismissing the Complaint"); Gillilan v. Tenn. Valley Auth., Case Nos. 91-ERA-31, 91-ERA-34 (Dep't of Labor Aug. 28, 1995), http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?Case Id 137795 (follow ".pdf" hyperlink under "Decision & Remand Order"); Hanna v. Sch. Dist. of Allentown, Case No. 79-TSC-1, 1980 WL 129158 (Dep't of Labor July 28, 1980).

97. *See infra* Part VI.B for a discussion of types of out-of-work retaliation that are left uncovered.

98. *See supra* note 82.

Title VII of the Civil Rights Act of 1964[99] was passed as a part of the landmark civil rights legislation of the 1960s. Title VII sought to "assure equality of employment opportunities and to eliminate . . . discriminatory practices" in the workplace.[100] It contained not only broad substantive restrictions on employment discrimination, but also provided a provision to protect workers who opposed the acts of employment discrimination that Title VII outlawed. This retaliation provision states that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees" for engaging in protected activity, such as making a claim of illegal discrimination or participating in an investigation.[101] Notably, unlike whistleblower retaliation laws, this language does not expressly restrict the adverse action to the terms or conditions of the plaintiff-employee's employment. Despite the statutory language, most courts still required pre-*Burlington Northern* Title VII plaintiffs to show: "(1) participation in a protected activity; (2) knowledge by the employer of the employee's protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action."[102]

Before *Burlington Northern*, different circuit courts maintained different standards for how closely related the adverse action must be to the plaintiff's employment. Some circuits required a strong connection, viewing only ultimate employment decisions as adverse employment actions.[103] Other circuits used a standard that required a "materially adverse change in the terms and conditions of employment."[104] Still others did not require a connec-

99. *See* 42 U.S.C. §§ 2000e-1 to -17 (2000).

100. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

101. *See* 42 U.S.C. § 2000e-3(a) (2000).

102. Spadola v. N.Y. City Transit Auth., 242 F. Supp. 2d 284, 290 (S.D.N.Y. 2003).

103. *See* Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997) (holding that hostility by supervisors and improper handling of disability benefits in retaliation did not rise to the standard of an "ultimate employment decision" and therefore was not actionable); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (holding that Title VII only protects against major adverse decisions such as hiring, firing, and compensation).

104. Hollins v. Atl. Co., 188 F.3d 652, 662 (6th Cir. 1999); *see also* White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 799–802 (6th Cir. 2004) (en banc) (considering and rejecting broader interpretation of Title VII and reaffirming its line of cases requiring a significant change in employment status); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001) (reaffirming line of cases requiring an adverse effect on the plaintiff's terms, conditions, or benefits of employment); Robinson v. Pittsburgh, 120 F.3d 1286, 1300–01 (3d Cir. 1997) (requiring plaintiff to show that the adverse effect was enough to

tion between the adverse action and the plaintiff's employment,[105] often abrogating or explaining away their earlier decisions in which they "described the prima facie case for retaliation as requiring an adverse 'personnel' or adverse 'employment' action."[106] This circuit split eventually led the Supreme Court to take up the issue of whether Title VII's retaliation provision "confine[d] actionable retaliation to activity that affects the terms and conditions of employment" in *Burlington Northern*.[107]

V. *BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY V. WHITE*

The circuit split discussed in Part IV, along with the need for a clear standard on how harmful adverse actions must be before they are actionable, necessitated a uniform rule from the Supreme Court. The *Burlington Northern* case provided that opportunity. The case began in 1997 and wound its way through the Equal Employment Opportunity Commission, the District Court for the Western District of Tennessee, a Sixth Circuit panel, and, eventually, the Sixth Circuit sitting en banc.[108] The Sixth Circuit as a whole, however, could not agree on the proper standards to be applied in Title VII retaliation claims.[109] Thus, the Supreme Court agreed to resolve the dispute.

Burlington Northern is perhaps best known for outlining a uniform standard for how severe a retaliatory act must be before it is actionable.[110] More important for this comment, though, is the Court's holding that non-workplace-related retaliation is also ac-

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alter his terms or conditions of employment).

105. *See* Rochon v. Gonzales, 438 F.3d 1211, 1217–19 (D.C. Cir. 2006) (adopting rule that Title VII retaliation does not have to be employment-related to be actionable, despite dicta in prior cases indicating that retaliation must be employment-related); Washington v. Ill. Dep't Revenue, 420 F.3d 658, 661–62 (7th Cir. 2005) (adopting a standard that does not require retaliation to be employment-related); Ray v. Henderson, 217 F.3d 1234, 1242–43 (9th Cir. 2000) (holding that retaliation need not be related to the plaintiff-employee's employment.).

106. *See Rochon*, 438 F.3d at 1217.

107. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2408 (2006).

108. *See id.* at 2409–10.

109. *Id.* at 2410.

110. *Burlington Northern* held that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse." *Id.* at 2415; *see also* John Sanchez, *The Law of Retaliation After* Burlington Northern *and* Garcetti, 30 AM. J. TRIAL ADVOC. 539, 545–51 (2007) (further discussing this new standard and its likely impacts).

tionable in Title VII retaliation claims.[111] The Court's discussion of this holding can be broken down into two distinguishable supporting arguments. First, the statutory language does not require the adverse action to be employment-related.[112] Second, the purpose behind anti-retaliation laws would not be fulfilled if the provisions did not protect against out-of-work retaliation.[113]

The Court first noted that Title VII limited the scope of its substantive restrictions to workplace-related discrimination.[114] It then recognized that "[n]o such limiting words appear in the anti-retaliation provision."[115] The lack of limiting words required the Court to determine whether Congress intended to differentiate the scope of the two provisions.[116] To accomplish this, the Court needed to identify the purpose of the anti-retaliation provision.[117] It stated that the "anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct," in speaking out against discrimination.[118] The Court then held that "one cannot secure [that] objective by focusing only upon employer actions and harm that concern employment and the workplace."[119] Further, "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."[120] Because of this, the Court determined that even if all employment-related retaliation was eliminated, "the anti-retaliation provision's objective would *not* be achieved."[121] Thus, the anti-retaliation provision's scope could not be limited to only workplace-related retaliation because that "would not deter the many forms that effective

111. *Burlington Northern*, 126 S. Ct. at 2414.

112. *See id.*

113. *See id.* at 2412–13. For a more thorough discussion of this breakdown and the Court's holding and analysis, see Michael A. Metcalfe, Recent Decision, *Title VII's Anti-Retaliation Provision Prohibits Any Employer Conduct that Might Dissuade a Reasonable Worker from Making or Supporting a Charge of Discrimination:* Burlington Northern & Santa Fe Railway Co. v. White, 45 DUQ. L. REV. 761, 764–65 (2007).

114. *Burlington Northern*, 126 S. Ct. at 2411–12.

115. *Id.* at 2412.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*; *see also* Brief for Respondent at 12, Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (No. 05-259). For examples of types of non-workplace-related retaliation, see *supra* Part VI.B.

121. *Burlington Northern*, 126 S. Ct. at 2412.

retaliation can take."[122] The Court lastly recognized a larger policy objective secured by protecting against out-of-work retaliation:

> Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.[123]

In closing, the Court succinctly held that "[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm."[124]

VI. A CALL FOR REFORM—AMENDING WHISTLEBLOWER LAWS AND APPLYING *BURLINGTON NORTHERN* TO EXTEND THEIR SCOPE

The *Burlington Northern* decision created a fundamental inconsistency between whistleblower retaliation laws and non-whistleblower retaliation laws. The former requires an adverse employment or personnel action; the latter now does not.[125] While this inconsistency could be resolved through evolving judicial interpretation in whistleblower cases, as *Burlington Northern* did for Title VII cases, the fact that most whistleblower retaliation laws specifically require an adverse employment action does not allow for judicial modification of this element. Many federal courts extending Title VII claims to encompass out-of-work retaliation chose to follow the language of the statute instead of the judicially created cause of action, which required an adverse employment action.[126] This is not possible with whistleblower laws because the statutes and regulations themselves provide that the adverse action must be employment-related.[127] In order to harmonize retaliation claims across all fields and to provide proper

122. *Id.*

123. *Id.* at 2414 (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)).

124. *Id.*

125. *See Burlington Northern*, 126 S. Ct. at 2409.

126. *See, e.g.*, EEOC v. Outback Steakhouse, Inc., 75 F. Supp. 2d 756, 757–60 (N.D. Ohio 1999).

127. *See supra* notes 77–84 and accompanying text.

encouragement and protection for whistleblowers, existing whistleblower statutes' retaliation provisions should be modified to eliminate the requirement that the adverse action be employment-related.

Several justifications support this measure. First, and most important, are the significant public policy objectives that are served by encouraging whistleblowers to expose harmful wrongdoing.[128] In order to encourage and protect whistleblowers fully, the statutes and regulations must protect whistleblowers against out-of-work retaliation. The policy objectives discussed in *Burlington Northern* fully support this shift in whistleblower law.[129] Second, this step is necessary because current laws still leave effective methods of retaliation uncovered.[130] Finally, extending protection to out-of-work retaliation is necessary because other laws that could be applied to out-of-work retaliatory acts are largely ineffective in this context and fall short of the protections that whistleblower provisions grant.[131] Each of these justifications will be discussed in turn.

A. *Policy Objectives and the Purpose of Retaliation Laws*

Laws protect whistleblowers from retaliation because whistleblowers expose illegal and harmful acts that injure the public. Because the illegal acts are generally conducted secretly, internal whistleblowers are crucial in exposing them. Employees and other internal actors are often the only people who know about the illegal activity occurring. Thus, they are in the best, and often only, position to reveal the illegal behavior. They are frequently "the only firsthand witnesses to the [activity]. They are the only people who can testify as to 'who knew what, and when . . . .'"[132] Like Title VII, the many laws that grant whistleblowers protection "depend[ ] for [their] enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses."[133]

128. *See infra* Part VI.A.
129. *See Burlington Northern*, 126 S. Ct. at 2412–13.
130. *See infra* Part VI.B.
131. *See infra* Part VI.C.
132. S. REP. NO. 107-146, at 10 (2002).
133. *Burlington Northern*, 126 S. Ct. at 2414.

Encouraging whistleblowers to cooperate and expose wrongdoing depends heavily on potential whistleblowers knowing that they will be protected if they make disclosures or participate in investigations.[134] To effectively accomplish this, would-be whistleblowers need to be protected against all forms of retaliation, not just those that occur at work. As the Supreme Court noted in *Burlington Northern*, "a provision limited to employment-related actions would not deter the many forms that effective retaliation can take."[135] As relayed in the Senate Report of the Sarbanes-Oxley Act, "most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law."[136] Further, the Report proclaims that "U.S. laws need to encourage and protect those who report" illegal activity.[137]

The Supreme Court's decision in *Burlington Northern* provides especially strong support for modifying whistleblower laws to protect potential whistleblowers more effectively. Much of the opinion's logic can be directly applied to whistleblower law. One pertinent portion explains that "one cannot secure the [objective of anti-retaliation laws] by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would *not* be achieved."[138] The objective spoken of "is to ensure that employees are 'completely free from coercion against reporting' unlawful practices."[139] This objective, although discussed in the context of Title VII, applies equally—if not more forcefully—to whistleblower laws. These laws exist to ensure that potential whistleblowers will feel free to reveal wrongdoing.[140] It is anomalous to grant protection against non-workplace-related retaliation to those who speak out against employment discrimination, but not extend this protection to those who reveal fraud that costs investors and the public billions of dollars or those who expose dangerous national security flaws.

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134. *See* S. REP. NO. 107-146, at 10.
135. *Burlington Northern*, 126 S. Ct. at 2412.
136. S. REP. NO. 107-146, at 19.
137. *Id.*
138. *Burlington Northern*, 126 S. Ct. at 2412.
139. *Id.* at 2414 (quoting NLRB v. Scrivener, 405 U.S. 117, 121 (1972)).
140. *See Burlington*, 126 S. Ct. at 2412–13; *see also* S. REP. NO. 107-146, at 19.

B. *Effective Types of Retaliation Are Left Uncovered*

Many effective types of non-workplace-related retaliation are left uncovered by current whistleblower laws. A recent decision highlights the limitations of whistleblower retaliation provisions. In *Pittman v. Siemens AG*, the ALJ concluded that a retaliation claim under the Sarbanes-Oxley Act's whistleblower provision did not extend to an alleged harassing lawsuit and allegation of slander.[141] The ALJ held that because the complainant "was not an employee at the time of the alleged adverse act and this does not constitute blacklisting or interference with employment, [his claims were] not covered by the Act."[142] The ALJ cited *Harvey v. Home Depot, Inc.*,[143] another Sarbanes-Oxley case, in support of his ruling.[144] *Harvey* later reached the Administrative Review Board of the Department of Labor ("DOL"), which affirmed the ALJ's decision to dismiss the complainant's retaliation complaint:

> [B]ecause Harvey was not an employee of Home Depot at the time that he was allegedly harassed, the alleged harassment was not an adverse personnel action that affected the terms and conditions of his employment with Home Depot. . . . [Further,] Harvey did not present any evidence of blacklisting resulting from the alleged harassment; thus there was no support for a conclusion that the alleged harassment had adversely affected the terms or conditions of any of Harvey's subsequent employment. Consequently . . . Harvey did not allege facts to show that he met the adverse employment action element of a [Sarbanes-Oxley] complaint and, therefore . . . Harvey's second complaint [was properly dismissed] for failing to state a cause of action upon which relief may be granted under [Sarbanes-Oxley].[145]

One need not look far to find other similar examples. Complaints of harassing lawsuits as a basis for retaliation have been dismissed in several other whistleblower cases.[146] In one case

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141. Case No. 2007-SOX-0015, at 6 (A.L.J. July 26, 2007), http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=232183 (follow ".pdf" hyperlink).

142. *Id.* at 6–7.

143. Case No. 2004-SOX-20 (A.L.J. May 28, 2004) http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=217736 (follow ".pdf" hyperlink).

144. *See Pittman*, Case No. 2007-SOX-0015, at 6.

145. *Harvey*, Case No. 2004-SOX-20, at 21.

146. *See, e.g.*, Vodicka v. Dobi Med. Int'l, 23 Indiv. Empl. Rights Cases (BNA) 1698 (Dep't of Labor Dec. 23, 2005); Somerson v. Mail Contractors of Am., Case No. 03-STA-11 (Admin. Rev. Bd. Oct. 14, 2003), http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=211330 (follow ".pdf" hyperlink under "Final Order Striking the Complainant's Brief & Dismissing the Complaint"); Hanna v. Sch. Dist. of Allentown, Case No. 79-

arising under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, the DOL's Administrative Review Board determined that threats to turn in a complainant for unauthorized practice of law and banning the complainant from the employer's property had nothing to do with the complainant's terms or conditions of employment while he was on medical retirement.[147]

Cases in other contexts provide numerous examples of out-of-work retaliation that would likely not be covered under existing whistleblower laws. Several Title VII cases have involved harassing or retaliatory lawsuits that had no effect on the plaintiff's present or future employment.[148] These claims often succeeded with the courts invoking reasoning similar to that in *Burlington Northern*. One of these cases, in a lengthy exposition strikingly similar to the Supreme Court's later decision in *Burlington Northern*, declined to limit actionable retaliation to employment-related actions and held that "nothing in the plain language of the statute admits of such a qualification."[149]

Other plaintiffs have successfully claimed retaliation apart from the employment context. In one instance, cancelling a major symposium after a former employee filed a suit under the Age Discrimination in Employment Act constituted actionable retaliation.[150] Another court found that an employer's frivolous appeal of a former employee's worker's compensation award can be retaliatory.[151] Other claims, ranging from filing false criminal charges[152] to not properly investigating death threats made to an FBI

TSC-1, 1980 WL 129158 (Dep't of Labor July 28, 1980).

147. Friday v. Nw. Airlines, Inc., Case Nos. 03-AIR-19, 03-AIR-20 (Admin. Rev. Bd. July 29, 2005), http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=212562 (follow ".pdf" hyperlink under "Filing by Court: ARB Final Decision and Order").

148. *See, e.g.*, Gliatta v. Tectum, Inc., 211 F. Supp. 2d 992 (S.D. Ohio 2002) (bad-faith counterclaim); EEOC v. Outback Steakhouse, Inc., 75 F. Supp. 2d 756 (N.D. Ohio 1999) (bad-faith counterclaim); EEOC v. Va. Carolina Veneer Corp., 495 F. Supp. 2d 775 (W.D. Va. 1980) (bad-faith lawsuit).

149. *Outback Steakhouse*, 75 F. Supp. 2d at 758.

150. *See* Passer v. Am. Chem. Soc'y, 935 F.2d 322, 331 (D.C. Cir. 1991).

151. *See* Ward v. Wal-Mart Stores, Inc., 140 F. Supp. 2d 1220, 1230–32 (D.N.M. 2001).

152. *See* Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (filing criminal charges of theft and forgery); Beckham v. Grand Affair of N.C., Inc., 671 F. Supp. 415, 417, 419 (W.D.N.C. 1987) (causing a former employee to be arrested for criminal trespass on employer's property).

agent,[153] have been ruled actionable even though they did not affect the plaintiffs' terms or conditions of employment.

The primary reason for these non-workplace-related retaliation claims succeeding in other contexts is the statutory language of other retaliation laws, such as Title VII. The analysis in these cases would not carry over to whistleblower retaliation cases, however, because whistleblower laws specifically require an effect on the complainant's terms or conditions of employment.[154] This lingering requirement has the potential to preclude many legitimate whistleblower retaliation suits from being successful, despite the fact that the same retaliatory acts would be actionable under Title VII and other anti-retaliation laws. Again, this result is anomalous because both whistleblower and non-whistleblower retaliation laws seek to prevent the same harm.

C. *Other Current Laws Are Inadequate To Protect Against Uncovered Out-of-Work Retaliation*

Other laws could potentially cover retaliatory acts that whistleblower laws leave uncovered, but they are inadequate to prevent all types of retaliation. Witness and informant tampering crimes cover retaliation against whistleblowers,[155] but these claims are rarely effective.[156] Further, many states recognize a wrongful discharge tort that covers whistleblowers; this action, however, generally protects only against termination in violation of public policy.[157] This leaves no recourse for out-of-work retaliation. Finally, other unrelated laws that could cover retaliatory conduct do not provide proper relief and are inefficient.

1. Criminal Penalties

Federal witness tampering law makes it a crime to "knowingly, with the intent to retaliate, take[ ] any action harmful to any person, including interference with the lawful employment or livelihood of any person" because the person provided federal law en-

153. Rochon v. Gonzales, 438 F.3d 1211, 1213–14, 1219–20 (D.C. Cir. 2006).

154. *See Burlington Northern*, 126 S. Ct. at 2411–12.

155. *See* 18 U.S.C. § 1513 (2000).

156. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1763–65 (2007).

157. *See* KOHN, *supra* note 1, at 21.

forcement officers with truthful information regarding federal crimes.[158] The Sarbanes-Oxley Act broadened this provision's scope to its current form as part of its whistleblower protection scheme.[159] However, federal prosecutors will likely only use this measure in cases of gross misconduct by employers that is in some way uniquely egregious or particularly noteworthy. In other words, it will not be used as a response to run-of-the-mill whistleblower retaliation claims. Since broadening this provision in 2002, no one has been specifically charged under it for retaliating against a whistleblower. Further, because the criminal provision only covers information given to federal law enforcement officers, retaliation against internal whistleblowers is not a crime under this section[160] and neither is exposing conduct that does not violate a federal law.[161] The small likelihood of federal prosecutors using this provision probably will not provide much comfort to potential whistleblowers, nor will it by itself deter employers from retaliating against whistleblowers.

2. State Tort Actions for Wrongful Discharge

Many states recognize a tort action for wrongful discharge in violation of public policy.[162] These laws may cover many whistleblowers. However, these tort actions generally only extend to employees who were fired as a result of their whistleblowing.[163] The laws are often narrowly tailored as well. Under Virginia law, for example, "an employee plaintiff attempting to assert a wrongful discharge claim in violation of public policy must 'identify [a] Virginia statute establishing a public policy'" that the employer violated.[164] Most other states similarly limit this tort action to cases in which the employer fired the employee for reporting crimes, re-

158. 18 U.S.C. § 1513(e) (Supp. V 2007).

159. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1107, 116 Stat. 745, 810 (codified as amended at 18 U.S.C. § 1513(e) (Supp. V 2007)).

160. *See* 18 U.S.C. § 1513(e) (Supp. V 2007).

161. *See id.*

162. *See* KOHN, *supra* note 1, at 21.

163. *See id.*

164. McFarland v. Va. Ret. Servs. of Chesterfield, L.L.C., 477 F. Supp. 2d 727, 733 (E.D. Va. 2007) (quoting Lawrence Chrysler Plymouth Corp. v. Brooks, 465 S.E.2d 806, 809 (Va. 1996)).

fusing to participate in illegal activities, or exercising a legally protected right.[165]

While this tort provides some added protection to whistleblowers at the state level, it generally does not protect against non-workplace-related retaliation. In fact, it often does not cover other retaliation short of termination.[166] These state tort actions are, therefore, largely unhelpful when a whistleblower is subjected to out-of-work retaliation.

3. Other Unrelated Laws

Various other laws may also protect whistleblowers against retaliatory acts, including causes of action such as malicious prosecution or intentional infliction of emotional distress. These laws do not effectively combat out-of-work retaliation against whistleblowers either.

In many cases discussed above in Part VI.B, employers filed harassing lawsuits or counterclaims against a whistleblower in retaliation.[167] In some cases, the whistleblowers may have been able to recover under a tort action of malicious prosecution. This action generally requires: (1) the malicious prosecution defendant to initiate a lawsuit against the malicious prosecution plaintiff, which ends in the malicious prosecution plaintiff's favor; (2) a lack of probable cause; and (3) malice.[168] A substantial minority of jurisdictions, however, requires a malicious prosecution plaintiff to prove special injuries as a fourth and separate element.[169] Many jurisdictions require extraordinary injuries. For example, the District of Columbia, injuries to reputation, emotional distress, loss of income, and 'substantial expense in defending' have all been held to fall outside the scope of the definition of special injury."[170] These injuries are often of the type that employers seek to inflict when they file harassing lawsuits retaliating against

165. *See* KOHN, *supra* note 1, at 23. An exhaustive survey, including citations, of what each state protects follows the general discussion. *See id.* at 25–77.

166. *See id.* at 24.

167. *See, e.g.*, *supra* notes 141–49.

168. *See* Megan K. Dorritie, Annotation, *Cause of Action for the Malicious Prosecution of Civil Actions*, 32 C.O.A.2d 131, 146 (2006).

169. *See id.* at 158–59.

170. Joeckel v. Disabled Am. Veterans, 793 A.2d 1279, 1282 (D.C. 2002) (quoting Mazanderan v. McGranery, 490 A.2d 180, 182 (D.C. 1984)).

whistleblowers. These torts, because they are state actions, also vary in each jurisdiction. Therefore, the malicious prosecution tort cannot effectively accomplish the goals of uniformity in protecting whistleblowers and protection against all types of retaliation. Further, even if this tort was uniformly effective throughout the country, it would only prevent retaliation in the form of filing harassing lawsuits. Many avenues of retaliation would still be left open.

Intentional infliction of emotional distress ("IIED") claims suffer similar deficiencies. An IIED claim generally requires the plaintiff to show extreme or outrageous conduct accompanied by severe emotional distress.[171] The first hurdle would require a whistleblower to show that the employer's retaliatory act was extreme or outrageous. This is a difficult standard to prove and is much higher than the normal standard for finding an adverse action in a whistleblower context.[172] A typical IIED cause of action requires the act to be "'so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.'"[173] In the whistleblower context, the action is often judged by whether it would be "reasonably likely to deter employees from making protected disclosures."[174] There is a large gap between behavior that would dissuade a reasonable worker from making a disclosure and behavior that is extreme or outrageous, as defined above. The entire range of behavior comprising that void is left uncovered by relying on IIED claims for out-of-work retaliation.

Second, an IIED plaintiff must suffer *severe* emotional distress.[175] This is also a high standard to prove. Recovery is often limited to cases in which the plaintiff's emotional distress makes him or her incapable of performing daily activities or the plaintiff's condition is severely disabling emotionally.[176] Often, physical

171. *See generally* 86 C.J.S. *Torts* § 70 (2006) (discussing general background and cause of action of IIED tort action).

172. *See id.*

173. Soti v. Lowe's Home Ctrs., Inc., 906 So. 2d 916, 919 (Ala. 2005) (quoting Travelers Indem. Co. v. Griner, 809 So. 2d 808, 810 (Ala. 2001)).

174. Halloum v. Intel Corp., Case No. 2003-SOX-00007, at 16 (A.L.J. Mar. 4, 2004), http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=212431 (follow ".pdf" hyperlink).

175. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

176. *See* 43 AM. JUR. PROOF OF FACTS 2D *Intentional Infliction of Emotional Distress* § 10 (1985).

effects stemming from the emotional distress are crucial in proving the plaintiff's case.[177] Like the void discussed above, there is again a large range of uncovered retaliatory behavior that may dissuade a reasonable worker from making a disclosure, but would not result in such severe emotional distress as to be actionable IIED.[178]

If non-workplace-related retaliation was covered under whistleblower laws—as this comment suggests—these inefficiencies and shortcomings would be irrelevant because whistleblowers would not need to rely on state tort actions and federal criminal penalties. Whistleblowers would not have to resort to unrelated laws that were designed for other injuries in order to remedy out-of-work retaliation. They would also not be constrained by narrow or varying state causes of action that change depending on where the whistleblower brings suit. Providing whistleblowers statutory protection against non-workplace-related retaliation would provide them with a consolidated cause of action and a simple and easily implemented solution to all of the deficiencies noted above.

VII. CONCLUSION

Whistleblowers are vital to our country's continued well-being. They root out corruption, fraud, waste, and illegal or dangerous activities. They are brave enough to withstand the inevitable retaliation and criticism that they will face, yet existing laws do not adequately protect whistleblowers. Because current legislation only covers workplace-related retaliation, whistleblowers can still be subjected to non-workplace-related retaliation as a result of the disclosures they make. Due to a recent shift in Title VII law, however, plaintiffs alleging retaliation in non-whistleblower con-

177. *See id.*

178. Further, even assuming that both of these unrelated tort claims were viable, allowing a whistleblower to consolidate all of his retaliation claims into a single retaliation suit would be more efficient overall. Whistleblowers often must file their claims first with governmental agencies, such as the Department of Labor or the Office of Special Counsel. Malicious prosecution or IIED claims cannot be filed with those agencies. If non-workplace-related retaliation claims were allowed, a whistleblower could file one retaliation suit with the proper agency, instead of relying on the agency for employment-related claims, a state court for the out-of-work tort claims, and federal prosecutors for any retaliation left over. Further, the agencies and ALJs could continue to follow Title VII precedent with respect to out-of-work retaliation as they have been doing in other respects for years. Allowing all retaliation claims to be consolidated would reduce the time, money, and judicial resources involved in the process.

texts are now protected against all types of retaliation, whether employment-related or not. Despite this inconsistency, current whistleblower laws cannot be legitimately interpreted to cover non-workplace-related retaliation, which Title VII covers. Because this distinction in statutory language now produces unequal results, current and future whistleblower laws need to be amended to protect whistleblowers against the various forms of non-workplace-related retaliation that they may endure. Accordingly, the employment-related requirement for retaliation in whistleblower statutes should be eliminated and Title VII's statutory language and judicial interpretation, which together forbid out-of-work retaliation in addition to workplace-related retaliation, should be adopted in all whistleblower laws.

Robert Johnson

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