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THE PROFESSOR AS WHISTLEBLOWER: THE TANGLED WORLD OF CONSTITUTIONAL AND STATUTORY PROTECTIONS

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The Professor as Whistleblower: The Tangled World of Constitutional and Statutory Protections Jennifer S. Bard

Introduction .......................................................................................................................... 5
  1.1 Background .................................................................................................................. 8
  1.2 Questions .................................................................................................................... 11
  1.6 Significance ................................................................................................................ 12
  1.7 Implications of Article ............................................................................................ 13

Section 2: Federal Constitutional Protection Against Retaliation for Whistleblowing Available to Employees of Public Institutions of Higher Education .......................................................................................................................... 14
  Due Process Protection Under the Fourteenth Amendment ........................................ 15
  Do Public Employees Have Greater Protection Against Adverse Employment Action? .......................................................................................................................... 16
  Is Academic Freedom a Form of Constitutional Protection ........................................ 17
  First Amendment Protection in Higher Education Post-Garcetti ................................ 24
  NOT ALL SPEECH IN THE CLASSROOM IS PROTECTED BY THE FIRST AMENDMENT .............................................................................................................. 26

2.10 Federal Statutes and Regulations Specific to IHEs ..................................................... 30
  The Role of Federal and State Anti-Discrimination Laws in Whistleblower Retaliation Acts ................................................................................................................ 31
  Qui Tam Actions Brought Under the Federal False Claims Act ................................. 34
  Requirements for Bringing a Qui Tam Action ................................................................. 40
  Whistleblower Protection in Qui Tam Actions ............................................................... 41
  State Statutes and Regulations ....................................................................................... 42
  State Whistleblower Protection Laws ........................................................................... 43
  Qui Tam Actions Brought Under State False Claims Acts .......................................... 46

Federal Statutes Which Protect Whistleblowers at Both Public and Private IHEs Against Retaliation .................................................................................................................. 53
  The Clery Act .................................................................................................................. 54
  The Family Educational Rights and Privacy Act (FERPA) ............................................ 54
  State Whistleblower Statutes ......................................................................................... 55
  Anti-Retaliation Provisions of Title IX ......................................................................... 59
  Discrimination and Title IX .......................................................................................... 59
  Title IV of the Federal Higher Education Act ................................................................ 61
  American Recovery and Reinvestment Act of 2009 (ARRA) ...................................... 62
  The Americans with Disabilities Act ............................................................................ 64
  Retaliation Associated with Claims of Discrimination: Civil Rights Issues ................ 65
  Retaliation for Activities Inconsistent with the Religious Mission of an IHE ............... 65

2.1 Internal Legal Protections Against Retaliation ......................................................... 66
  Protection Against Retaliation Based on Explicit Contracts ....................................... 68
Protection Against Retaliation Based on Implicit Contracts .............................................69
Faculty Handbooks ........................................................................................................69
3.3 Methodology of Scenario Drafting ............................................................................72
  3.3.1 Weaknesses of the Scenario Method .................................................................76
  3.3.2 Description of Scenarios ....................................................................................77
3.5 Steps for Completion of the Article ............................................................................77
3.6 Conclusion ................................................................................................................77
SECTION 4 – SCENARIO ANALYSIS ................................................................................78
4.1 Introduction .................................................................................................................78
  What are the significant gaps in protection against adverse employment actions for good faith disclosures of information? ........78
4.3 .................................................................................................................................78
  4.3.1 Protection Against Retaliation Based on Explicit Contracts ..............................79
  4.3.2 Protection Against Retaliation Based on Implicit Contracts ..............................80
  4.3.3 Operating Procedures .......................................................................................80
4.4 Introduction to Scenario Analysis for Understanding External Legal Protections for Whistleblowers ..................................................82
4.5 Analysis of Scenario One: The Bearer of Bad News ..............................................84
  4.5.1 Purpose of Scenario One ...................................................................................84
  4.5.2 Background to Scenario One ............................................................................84
  4.5.3 Description of Scenario One .............................................................................84
4.6 Discussion of Scenario One .......................................................................................85
  4.6.1 What U.S. Constitutional protections are available? .......................................85
  Due Process Protection .................................................................................................86
  First Amendment Protection .......................................................................................87
  Speech on a Matter of Public Concern .......................................................................89
  First Amendment Protection for the Content of the Speech:
    Academic Freedom .....................................................................................................93
  Has Professor A Suffered Retaliation Under the First Amendment? .....................94
  Is a Change of Teaching Assignment Retaliation in a First Amendment Case? ........94
  Are the IHE’s Actions an Impermissible Forum Closure? .....................................95
4.8 Protection Offered by Title IX ..................................................................................99
  Does Professor A Have the Obligation to Reporter Under Title IX? ......................103
  Is Professor A Protected from Retaliation by Title IX? ...........................................105
  Is Being Re-Assigned Retaliation Under Title IX? ...................................................106
  Can Professor A Invoke the Protection of the Federal False Claims Act? ..............108
4.9 What Are the Protections Available to Professor A Under State
Conclusions ................................................................................................................. 138

Recommendations for IHEs: Develop Internal Protections for
Whistleblowers Based on the Interests and Needs of the
Individual Institution. .................................................................................................. 140

5.3 Recommendations for Further Research ......................................................... 141

5.4 Conclusion ............................................................................................................. 143
THE PROFESSOR AS WHISTLEBLOWER: THE TANGLED WORLD OF CONSTITUTIONAL AND STATUTORY PROTECTIONS

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INTRODUCTION

“You cannot bite the hand that feeds you and insist on staying on for the banquet.”

It should not be surprising that fans of the reality TV show *Duck Dynasty* claimed a violation of their First Amendment rights when the father of the family chronicled in the show was suspended by the network following the publication of racist and homophobic statements he made in a magazine interview. Given the absence of what used to be called “civics” in U.S. schools, we do not expect much nuanced understanding of the Constitution among the lay public or even among politicians.

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4 New Annenberg Survey Asks: “How Well Do Americans Understand the Constitution?” (Sept. 16, 2011) ("Since knowing how democracy works predicts civic participation and support for protecting our system of government, these results are worrisome," said Kathleen Hall Jamieson, Director of the Annenberg Public Policy Center (APPC). "The nation should be troubled by the extent to which civic education is downplayed in its schools.") http://www.ennenbergpublicpolicycenter.org/new-annenberg-survey-asks-how-well-do-americans-understand-the-constitution/

5 See e.g. statements from Louisiana’s Governor Bobby Jindal (“Phil Robertson and his family are great citizens of the State of Louisiana. The politically correct crowd is
However, what is more surprising is how little the highly educated faculty at our nation’s colleges and universities understand the limited protection they have against being disciplined or fired for statements they make as part of their obligation to participate in university governance. This lack of understanding is evidenced by how often faculty find themselves fired, demoted or otherwise suffering an adverse employment action following expression of views either critical or against the interests of their employer. The purpose of this article is to shed light on the inconsistent and patchwork nature of whistleblower protection for faculty in the United States. It will closely consider the highly unsettled state of First Amendment law following a dramatic split among the Circuits regarding Constitutional protection for expressions about issues of academic governance and administration for employees of public universities. But it will also consider the tangled and inconsistent protections available through specific federal laws related to higher education, to general protections under the False Claims Act which can be claimed by any individual working for an institution which receives federal funding and to protections from an equally inconsistent series of state laws tolerant of all viewpoints, except those they disagree with. I don’t agree with quite a bit of stuff I read in magazine interviews or see on TV. In fact, come to think of it, I find a good bit of it offensive. But I also acknowledge that this is a free country and everyone is entitled to express their views. In fact, I remember when TV networks believed in the First Amendment. It is a messed up situation when Miley Cyrus gets a laugh, and Phil Robertson gets suspended.


6 7 Garcetti v. Ceballos, 547 U.S. 410, 425 (2006); Demers v. Austin 37 IER Cases 1040, 14 Cal. Daily Op. Serv. 1031, 2014 Daily Journal D.A.R. 11901011 (2014)(finding special First Amendment protection for university professors speaking about matters of public governance); But see Adams v. University of North Carolina Wilmington, 640 F.23d 550 (4th Cir. 2011)(limiting First Amendment Protection to speech directly related to a professor’s academic areas of expertise); Abcarian v. McDonald, 617 F.3d 931,938 (7th Cir. 2010)(“speech concerning administrative policies not related to academic freedom and not in the public interest); Idaho State University Faculty Association for the Preservation of the First Amendment v. Idaho State University, . Not Reported in F.Supp.2d, 2012 WL 1313304 (D.Idaho), 33 IER Cases 1199(denying faculty access to university email in order to circulate material critical of the administration not a violation of the First Amendment).
related to public employees. 8

This article considers one kind of speech, whistleblowing, engaged in by one category of employees, faculty at both public and private colleges and universities in the United States. This topic is therefore broader than, but inclusive of, the circuit split over the application of Garcetti. It provides an overview of the legal protection against adverse employment actions available to professors working at both public and private institutions of higher education (IHEs) in the United States who bring forward information of public concern to which they have access through their job responsibilities (Whistleblowers). This is a topic that transcends traditional doctrinal boundaries because the activity “faculty speech about a matter of public interest” can trigger a wide array of legal remedies depending on the identity of the speaker, the location, the status of the employer as public or private and the content of the information. Rather than focus on any one source of whistleblower protection, this article takes a holistic approach of considering the range of sometimes overlapping and sometimes stand alone protections available to faculty. It also points out the substantial gaps in coverage and the areas of uncertainty created by Circuit Court interpretations of the Supreme Court’s most recent case considering public employee speech.

Its analysis and conclusions while focused on professors are more broadly applicable to understanding the limits of First Amendment protection for speech by all whistleblowers employed by a municipal, state, or federal government (public employees) and the complete lack of such protection for private employees.

However, this article specifically considers professors because although colleges and universities are required to comply with the same employment laws as any other employer, courts have routinely looked at cases involving professors, and other employees, as at least meriting special analysis, even if the results are often quite similar to similarly situated litigants in other sectors of employment. Since whistleblowing by its nature is a form of expression, this article will consider the role the First Amendment to the United

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8For the purposes of this article, “whistleblowers” are defined as: “[i]ndividuals who report misconduct” and “frequently facing retaliation for doing so.” Leslie Griffin, Watch Out for Whistleblowers, 33 J. L. Med. & Ethics 160, 160 (2005).
States Constitution plays in providing protection to employees of IHEs who face adverse employment actions as a direct result of speech of public concern. In addition to direct protection from the First Amendment, this article considers applicable whistleblower protection provisions attached to individual statutes, like the Clery Act\textsuperscript{9} and Title IX\textsuperscript{10}, as well as the whistleblower protection provisions of the Federal False Claims Act\textsuperscript{11} and the functionally equivalent statutes now being adopted by many states.\textsuperscript{12} It also considers the state whistleblower protection statutes, available in some form to many, although not all, public employees. In particular, it looks at how these statutes function in the environment of higher education. Finally, within the context of applying state and Federal law to realistic scenarios it will consider the protection offered by contractual relationships between IHEs and their employees. These include explicit contracts such as tenure and collective bargaining agreements but also implicit protections extended through policies adopted by an IHE and published in institutional handbooks or web pages.

1.1 Background

Working at a college or a university is not like working for a government agency or a private company of similar size. One of the significant challenges to being an administrator in an IHE is that the work environment is often perceived differently from a typical workplace. As one author explained, “[d]ue to their efforts to foster academic freedom and the free exchange of ideas, colleges and universities tolerate a wider spectrum of behavior, particularly with respect to faculty, than many nonacademic organizations would permit.”\textsuperscript{13} Moreover:


\textsuperscript{12} See Tax Payers Against Fraud Education Fund, States With False Claims Acts (2012) available at http://www.taf.org/states-false-claims-acts (compiling states that have their own version of the False Claims Act).

\textsuperscript{13} Barbara A. Lee & Kathleen A. Reinhart, Dealing with Troublesome College Faculty and Staff: Legal and Policy Issues, 37 J.C. & U.L. 359, 360 (2011).
Because administrators, especially those trained as faculty, typically have had little or no preparation to supervise employees, they may be hesitant to respond to performance or behavior problems until those problems have become dysfunctional for the unit. Thus the culture of colleges and universities may complicate efforts to ensure that faculty and staff perform their jobs appropriately and conduct themselves professionally. This observation is supported by the large volume of employment-related litigation that makes it way to federal and state courts from IHEs. This article considers a subset of employment disputes in which the employee’s main claim is retaliation for whistleblowing. Specifically, these are claims by faculty members that they have had adverse employment actions taken against them for statements in which the faculty members expressed an opinion or brought forward information which is not to their employers’ liking but which is for the general benefit of the public. These whistleblowing situations are therefore distinct from the factual situations giving rise to a claim of retaliation following an employee’s assertion of her rights under antidiscrimination laws, such as those that prohibit discrimination based on race or age. They are distinct because they involve matters of public concern rather than issues of concern only to the individual employee claiming discrimination. The Supreme Court has devoted considerable time and effort to distinguishing between the Constitutional protection for speech enjoyed by citizens as a whole versus that enjoyed by citizens employed by the government. As this article will explain, at some point a public employee complaining about his boss or other workplace issue is different from the same person supporting a candidate or marching in an anti-war protest outside of work hours. The dividing line has been whether the employee is speaking about a matter of public concern or one that is of private concern and therefore no different than any workplace dispute. However, in 2006 the Court decided *Garcetti v. Ceballos* which significantly narrowed the definition of a “matter of public concern” by excluding any matter that was part of a public

14 *Id.*
employee’s job description.\textsuperscript{15} In response to an impassioned dissent by Justice Souter decrying the effect the decision would have on academic freedom, Justice Kennedy, writing for the majority, noted that “there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” This brief statement was not enough to prevent subsequent federal courts from directly denying faculty members protection unless their claim was for retaliation based on ideas or views directly related to their areas of expertise about which they were hired to teach.\textsuperscript{16}

However, in February of 2014 the Ninth Circuit Court of Appeals took Justice Kennedy’s words as a directive to find that “expression related to academic scholarship or classroom instruction” did have additional protection and moreover, that protected academic writing is not confined to scholarship.” As the court explained, much academic writing is, of course, scholarship. But academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring. Depending on its scope and character, such writing may well address matters of public concern….”\textsuperscript{17} Although this holding came in the form of overturning the granting of summary judgment and is not a final determination of any of the underlying issues, it demonstrates how unsettled the extent of protection faculty members have for expressing their views on matters of self-governance. It should therefore be no surprise that faculty members

Faculty members often believe, mistakenly, that statements made either in the course of their governance responsibilities are protected speech under the First Amendment to the United States Constitution. However, this is absolutely not true in the case of faculty working at private


institutions and, following the Supreme Court’s 2006 opinion in *Garcetti v. Ceballos*, probably not true for faculty at public institutions either.

A large part of the on-going lack of clarity regarding how *Garcetti* might apply to faculty is the lack of a clear definition of whistleblowing. A recent decision by the 9th Circuit claims expands the definition of protected speech by a faculty member beyond the boundaries of his specific area of disciplinary expertise to include writings and statements related to how the university is, or should, be governed. Specifically, the Court overturned a motion granting the University Summary Judgment and therefore a pamphlet proposing the reorganization of a division of the university was of public interest and did enjoy protection. This is in direct contrast to nearly every other court to consider this issue since *Garcetti* denied protection for employees making internal criticisms to their supervisor.

Moreover, although the U.S. Supreme Court has never clearly defined the extent to which a Constitutionally recognized form of “academic freedom” protects ideas expressed by faculty members at public institutions in their writing or teaching, it has, in *Garcetti*, strongly signaled that disclosing information acquired through their employment is outside the scope Constitutional protection.

### 1.2 Questions

This article will address the following questions:

1. What are the internal sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?

2. What are the external sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?
   - What U.S. Constitutional protections are available?
   - What Federal Statutes provide protections?
   - What State Laws provide protection?

3. What are the significant gaps in protection against
adverse employment actions for good faith disclosures of information?

Section one includes an introduction comprising of a background of the law of higher education and of whistleblowing. These include general overviews and material focused on the specific protections offered by specific statutes. Finally, it will consider the literature of whistleblowing itself, which includes studies of whistleblowers, their motivations, and their experiences when their identities are known to their employers. Section two is a detailed analysis of the specific cases, regulations, statutes and laws that apply to the three research questions. It also considers law review articles and other secondary sources relevant to the topics of whistleblowing and of the regulation of higher education. The Third section applies the law reviewed in section three to a series of four scenarios developed from a review of recent whistleblower cases. These scenarios provide the factual information necessary to analyze and explain the relevant legal conclusions. Each scenario considers seven questions to analyze the extent of protection available to employees of IHEs who face potential retaliation for whistleblowing. The fifth and final section applies the findings from the analysis of research questions within the context of the four scenarios presented in Section Four. It also identifies the significant gaps in protection against adverse employment actions for good faith disclosures of information.

1.6 Significance

The questions examined in this article are significant because they are ones that faculty employees of IHEs have to face every day. The decision about whether or not to voice a concern to a supervisor or to file a complaint is a difficult one because there is so little consistency in the law. Moreover, while the legal framework of whistleblower protection for professors at private colleges and universities is relatively straightforward because there has never been any Constitutional protection, the situation is less clear for faculty employed by public IHEs following the Supreme Court decision of *Garcetti v. Ceballos*, which if id

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did not change, then certainly clarified the extent to which public employees could face adverse employment actions even if the information they disclosed did meet the public interest test. In the years since Garcetti was decided, the concern expressed by the dissenting justices about the chilling effect its holding will have on speech by academics has been validated. In a 2011 article, law professors Bauries and Schach point out that “[t]he Court's failure to explicitly say that the Garcetti rule does not extend to academic speech leaves an ominous alternative possible implication that the rule may apply to such speech, after all.”

This is exactly what appears to have happened in cases speech by faculty members which has been found to be unrelated to the content of their writings or teachings. This distinction is emerging as more courts hear disputes involving an interpretation as Garcetti. As Professor Kerry Brian Melear writes distinguishing a 2011 case from the Fourth Circuit, Adams v. University of North Carolina-Wilmington, from other, earlier opinions, “A critical distinction separating Adams from other federal circuit cases is that the speech in question involves publications, presentations, and other forms of intellectual output, although not directly related to the faculty member's academic field.”

Given the significance of this issue, there is a pressing need for this research because there are no up-to-date comprehensive overviews of higher education law from the perspective of protections against adverse employment actions available for whistleblowers in IHEs.

1.7 Implications of Article

Upon completion, this analysis will serve as a useful framework for IHEs, as well as for their faculty and those who administer the institution, to better understand the parameters of the

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available legal protection for employees against retaliation for
expressions of opinion or statements of fact related to their
employment by the IHE. It will also clarify the extent to which
“Academic Freedom” is recognized by courts in the United
States as a protection for academics for statements they make
both inside and outside of the classroom. This analysis will help
to frame the issue of protection for speech within higher
education for those responsible for making policy and
legislation.

SECTION 2: FEDERAL CONSTITUTIONAL PROTECTION AGAINST
RETAILATION FOR WHISTLEBLOWING AVAILABLE TO EMPLOYEES
OF PUBLIC INSTITUTIONS OF HIGHER EDUCATION

The extent to which professors at public institutions of higher
education have First Amendment protection against retaliation
for speech depends on how the reviewing court conceptualizes
the nature of the speech and the context in which it is expressed.
23 On a continuum, it is fair to say that speech directly related
to a professor’s area of academic expertise has the most
protection and speech that refers to matters outside of the
classroom or the academic journal or conference the least. As a
result, “insofar as the federal Constitution is concerned, a private
university can engage in private acts of discrimination, prohibit
student protests, or expel a student without affording the
procedural safeguards that a public university is constitutionally

23 Bridget R. Nugent and Julee T. Flood, Rescuing Academic Freedom from Garcetti
v. Ceballos: An Evaluation of Current Case Law and a Proposal for the Protection of Core
Academic, Administrative and Advisory Speech, 40 J.C. & U.L. 115, 116 (2014)(“Academic freedom is a conceptual freedom.”)).
required to provide.”

This distinction applies equally to the way private, versus public, IHEs can treat their employees. The two Constitutional protections most frequently cited as protecting employees of IHEs against retaliation for whistleblowing are the Due Process provision of the Fifth Amendment to the U.S. Constitution as extended to the individual states by the Fourteenth Amendment and the Freedom of Expression and Religion provisions of First Amendment of the Constitution. These protections are not dependent on or associated with any act of Congress or judicial opinion. Instead, they exist independently to protect all citizens against unlawful restraints of speech.

Due Process Protection Under the Fourteenth Amendment

All public employees have a constitutionally protected property interest in their jobs which is not available to individuals employed by private entities. Although employees of private IHEs may have similar protections, they are based on internal sources and are not based in the U.S. Constitution. The Fourteenth Amendment prohibits a state from depriving “any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Tepper and White write that this means that the state must use fair procedures and cannot act in an “arbitrary or capricious” manner. “It is important to note,” they caution, “that procedural due process does not guarantee any particular outcome, such as guaranteeing that a tenured faculty member will not be terminated.”

In the 2006 case of Garcetti v. Ceballos, the U.S. Supreme Court found that public employees had no First Amendment protection against retaliation for speech directly related to their jobs as opposed to speech related to their role as a citizen. The Court wrote:

When a citizen enters government service, he must accept certain

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24 Id.


27 Id.
limitations on his freedom in order for
the government to provide efficient
public services. While the First
Amendment invests public employees
with certain rights, it does not empower
them to constitutionalize the employee
grievance. 28

Addressing directly the situation of a state employee who faces retaliation for reporting what would otherwise be a matter of public interest, the Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” 29 What this means for cases brought after 2006 is that employees of state universities can be fired, or otherwise retaliated against, for bringing unwelcome information to their supervisors so long as it is information they learned in the course of their job duties.

Do Public Employees Have Greater Protection Against Adverse Employment Action?

Employees of private IHEs can be, and often are, fired for public statements they have made. 30 There is a considerable difference in the protection available against termination at a public university than at a private one. A public university must provide faculty and staff due process of law which means that they must have notice of the accusations against them and a reasonable opportunity to counter these accusations at a hearing. Moreover, the university bears the burden of providing that it is not acting in a manner which is “arbitrary or capricious.” Private universities, on the other hand, are under no such constraint. Their only obligations to faculty, staff or students are those to which they have agreed by contract. Although this contract can take the form of a code of conduct or handbook rather than an individually drafted legal document its terms are still within the institution, not the individual’s control because it is the institution which drafts the documents.

No employee of a state institution can be fired or disciplined without

29 Id. at 421.
30 Eugene Volokh, University Associate VP of Human Resources Sues Over Firing Based on Anti-Gay-Rights Newspaper Article, VOLOKH.COM, (last visited July 18, 2012).
what has been described by the Supreme Court as “Due Process of Law.” This means that the employee must receive the basics of process identified by the Court for every case in which a citizen is deprived of a benefit that he was previously granted by the Government. Due Process means more, however, than providing notice, opportunity for hearing and impartial review. It also has a substantive component which demands that the decision to take action was based on reasonable deliberation which was not “arbitrary and capricious” and that was essentially the same in quality provided by others in similar circumstances. Essentially what this prevents is the IHE circumventing the usual process of disciplining or firing an employee in the case of whistleblowers. It also means that the IHE has to engage in a similar review process for all whistleblowers.

Is Academic Freedom a Form of Constitutional Protection

The United States Constitution makes no mention of “Academic Freedom” but the U.S. Supreme Court has recognized it as “special concern of the First Amendment.”31 Legal scholars today believe that if there is such a thing as “academic freedom” it belongs to the institution, not the individual employee. Tepper & White argue that when federal courts defer to a university’s decisions based on “academic freedom” it is the freedom of the institution to make its own personnel and other decisions rather than the freedom of an individual faculty member.32 Thus, a faculty member who suffers an adverse employment action is often mistaken in his belief that the court will find his academic freedom violated. Rather, the court is likely to uphold the action on the basis of the institution’s academic freedom. While the Supreme Court has never retreated from its support of universities as places where free speech is important, it has very much distinguished between the role of individual professors as integral aspects of the preservation of democracy and as employees of the university. Many of the “academic freedom” cases which come before the court are over tenure denials and

32Tepper & White, supra note 100, at 180.
raise issues other than free speech.\textsuperscript{33} What is often misunderstood by individual professors claiming academic freedom is that for the most part the Supreme Court views academic freedom as belonging to the IHE itself, not to individual faculty, staff or students. So long as a university is organized so that decisions are made through academic self-governance the Supreme Court is likely to defer to the IHE’s judgment over the individual’s professors.\textsuperscript{34} This is especially true when it comes to what courses are taught.

One of the most difficult aspects of analyzing the protections available to employees of IHEs in issues that involve communications or disclosures is the complete lack of a standard legal doctrine describing the characteristics of what is generally called “academic freedom.”\textsuperscript{35} As Professor Neil Hutchens summed up the situation, “Despite statements strongly supportive of academic freedom in several opinions, Supreme Court decisions have failed to offer clear guidance on standards that courts should follow in evaluating academic freedom claims by faculty members in public higher education.”\textsuperscript{36}

Noted First Amendment scholar and former dean of the Georgetown Law School, Judith Areen, explained that, although the Supreme Court has recognized the existence of something called “academic freedom,” it “[h]as not developed a coherent theory to guide constitutional protection of academic freedom.”\textsuperscript{37} Circuit Courts of Appeal, the next level below the Supreme Court for questions involving issues of Constitutional law, have concluded very different things about what constitutes academic freedom and whether or not it is protected.

\textsuperscript{33} Id. at 135, n.58 (citing Vargas-Figueroa v. Saldana, 826 F.2d 160, 162-63 (1st Cir. 1987) (“Courts have wisely recognized the importance of allowing universities to run their own affairs (and to make their own mistakes). To do otherwise threatens the diversity of thought, speech, teaching and research both within and among universities upon which free academic life depends.”)). At the same time, we recognize that Congress has committed to the federal courts a duty which we may not abdicate: that of eliminating workplace discrimination, within educational settings as well as without. Brown v. Trs. Boston Univ., 891 F.2d 337, 346 (1st Cir. 1989) (“Academic freedom does not embrace the freedom to discriminate”).


\textsuperscript{35} Id.

\textsuperscript{36} Id. at 149.

\textsuperscript{37} Judith Areen, Government As Educator: A New Understanding Of First Amendment Protection Of Academic Freedom And Governance, 97 GEO. L.J. 945, 946 (2009).
example, in *Urofsky v. Gilmore*, the Fourth Circuit Court of Appeals in 2000 stated that, “to the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors. . . .”  

Yet it did so without addressing, let alone directly disputing, the Seventh Circuit’s 1985 decision in *Piarowski v. Illinois Community College District*, which described academic freedom as an “equivocal” term that “is used to denote both the freedom of the academy . . . and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy. . . .”

One useful delimiting principle is that when the United States Supreme Court has used the term “academic freedom” in relation to the First Amendment it has always done so in cases involving employees and professors at public universities. Private IHEs may choose to grant their employees protections against adverse actions for activities involving their employment, but only public IHEs have ever had this obligation imposed upon them by a court. That said, the Supreme Court has made some very strong statements linking academic freedom and the First Amendment. In striking down laws that required employees at a public university to take a loyalty oath to the United States government Justice Frankfurter wrote that:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the “marketplace of ideas.” The Nation's future depends upon leaders trained

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through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, (rather) than through any kind of authoritative selection.\textsuperscript{40}

More recently, the Court expressed the view of the importance of academic freedom to the nation, writing:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.\textsuperscript{41}

Surveying the Court’s history of opinions on the topic of academic freedom, professors Robert J. Tepper and Craig G. White, raise the basic unresolved question of how the Garcetti decision will apply to employees of IHEs when they write about the core issues of academic freedom in terms of the classroom and of other speech in the university setting. They write that “[a]cademic freedom is an important component of a public university, but is it valued enough to warrant more First Amendment constitutional protection for academic personnel

\textsuperscript{40} Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citations omitted) (overturning New York law and university policy that allowed the firing of academic employees for refusal to take a loyalty oath to the United States Government).

\textsuperscript{41} Sweezy v. N.H., 354 U.S. 234, 250 (1957).
than for other public employees?"^{42}

A recent law review article concluded that “[a]t its core, professional academic freedom for college and university teachers involves the following: (1) freedom in research and publication, (2) freedom in classroom discussion concerning the curriculum, and (3) freedom to speak or write as citizens.”^{43} Yet although this statement accurately summarizes what the court has said in the past about these three specific activities, it does not mean that post Garcetti courts would treat whistleblowers who happen to work for a public university any differently than a whistleblower who works for the district attorney. Indeed federal courts which have interpreted claims by employees of public IHEs since Garcetti have not assumed any academic freedom based exemptions.^{44}

Moreover, a university is absolutely entitled to structure its curriculum and make decisions about offering some courses rather than others.^{45} For example, if a university chooses to avoid the issue of Holocaust denial it can choose not to hire professors who take that as their field of study and not to offer courses in that area.^{46} While it is unlikely that a university with a college of liberal arts would choose not to have an entire history department in order to avoid the topic, it certainly could do so. Once a university has made the larger decision not to offer a course in a specific area, its ability to prevent the topic from being raised in other courses is even greater because they are by definition not the areas of expertise of the professors teaching other subjects. A component of a university’s right to select what courses will be offered is its right to specify the content of these courses. For example, the activities of Canadian physics Professor Denis Rancourt who deliberately chose to change the content of a course he was required to teach is often cited as

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^{42} Tepper & White, supra note 100, at 126; see also Cheryl A. Cameron, Laura E. Meyers & Steven G. Olswang, Academic Bills of Rights: Conflict in the Classroom, 31 J.C. & U.L. 243 (2005).
^{43} Id.
^{45} Areen, 97 Geo. L.J. 945 at 946.
being beyond the outer limit of academic freedom.\textsuperscript{47} In a blog post in the \textit{New York Times}, Professor Fish told that story of Professor Denis Rancourt at the University of Ottawa who taught a course required for all environmental science majors but rather than teach actual principles of physics he engaged in what he called “‘Academic Squatting, [where] you take a course that was assigned and you make it into something else, something you feel is more important, more relevant and that students will appreciate more, that they need more in their program of study.’”\textsuperscript{48} According to Fish:

My assessment of the way in which some academics contrive to turn serial irresponsibility into a form of heroism under the banner of academic freedom has now been at once confirmed and challenged by events at the University of Ottawa, where the administration announced on Feb. 6 that it has “recommended to the Board of Governors the dismissal with cause of Professor Denis Rancourt from his faculty position.”\textsuperscript{49}

In \textit{Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty}, Robert J. Tepper and Craig G. White consider the core issues of academic freedom in terms of the classroom and of other speech in the university setting.\textsuperscript{50} They write, “[a]cademic freedom is an important component of a public university, but is it valued enough to warrant more First Amendment constitutional protection for academic personnel than for other public employees?”\textsuperscript{51} They identify three main components of academic freedom: “(1) freedom in research and publication, (2) freedom in classroom discussions concerning the curriculum, and (3) freedom to speak and write as citizens.”\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{47} Stanley Fish, \textit{The Two Languages of Academic Freedom}, \textit{OPINIONATOR} (Feb. 8, 2009), http://opinionator.blogs.nytimes.com/2009/02/08/the-two-languages-of-academic-freedom/?ref=opinion.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Tepper \& White, supra note 100.
\item \textsuperscript{51} Id. at 126.
\item \textsuperscript{52} Id.
\end{itemize}
They also identify tenure as “an employment status that protects academic employees from dismissal absent serious misconduct, incompetence or financial exigency.” In explaining how the holding in *Garcetti v. Ceballos* has changed the protections granted by the earlier *Pickering* and *Connick* cases, they note that while those two cases created a test for protecting speech of “public concern,” *Garcetti* “added a new requirement in this area: the speech must involve the public employee speaking as a citizen and must not be pursuant to the employee’s job responsibilities.” They note that after *Garcetti*:

[T]he capacity in which the employee complains becomes all-important, and those complaints made outside of one’s job responsibilities—and about which the speaker would presumably have less knowledge—are more likely to be protected than complaints by a person in a position to know about the situation by virtue of job responsibilities.

As a District Court Judge applying *Garcetti* in a case involving the firing of a university librarian explains, “[i]ssues involving curriculum, scheduling, and routine academic matters are not generally considered to be matters of public concern.” Therefore, a faculty member employed by an IHE would not be able to invoke First Amendment protection for publically criticizing these activities. As a commentator in a student note points out, these activities are “core functions of the university” about which faculty should have protection to speak freely. In contrast, employees of a government agency are not expected or required to take on governance responsibilities. Therefore, they are able to avoid making statements critical of how the entity is being run in a way that is not available to faculty members.

Tepper and White looked specifically into the protections available

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53 Id. at 127.
54 Id. at 171.
55 Id.
58 Id.
within the academic context and identified three: tenure, academic regulation imposed by accrediting bodies or other regulatory entities, collective bargaining agreements or other contracts, state whistleblower statutes and perhaps state constitutions. However, their article points out that none of these are as strong as a blanket first amendment protection for public employees. Tenure, they note, is only available to some employees of an IHE. Many employees, at IHEs and elsewhere, believe that they cannot be fired for “speech.” This is a fundamental misunderstanding of the first amendment which has absolutely no application in a private IHE and following the Supreme Court’s decision in *Garcetti v. Ceballos* very little in a public one.

*First Amendment Protection in Higher Education Post-Garcetti*

Since the *Garcetti* decision, the extent to which it would change the way courts would review complaints of retaliation based on academic freedom has been a topic of considerable interest to authors of law review articles. The question scholars have raised since *Garcetti* is whether to what extent professors at public universities have any more protection than any other public employee. If not, then the First Amendment does not provide protection against retaliation for exercising academic freedom. Professor Richard Peltz concludes in *Penumbral Academic Freedom: Interpreting the Tenure Contract in a Time of Constitutional Impotence* that “recent legal developments have cast serious doubt on whether academic freedom has a constitutional dimension.”59 Considering the *Garcetti* Court’s limitation on the protection of public employees, he notes that:

What sets the academic at a public college or university apart from other public officials is that the academic’s job is free expression: expression in teaching, in research, and in the course of public service. The ideal of academic freedom, whether or not a legal concept, means to afford the academic independence from the employer in the

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He concludes that indeed under the public employee speech doctrine there is little or no Constitutional protection and therefore he argues that going forward these protections must be protected specifically by contract.

Although courts have always afford K-12 teachers less academic freedom than university professors, Professor Susan P. Stuart’s conclusion that the Stuart argues that the “message the Supreme Court has sent to public employees, including teachers, is they can be fired even if they are doing their jobs correctly” provides a clear analysis of how Garcetti could be employed in any academic setting. 61 Calling the Garcetti decision “[P]erhaps one of the most extraordinarily ill-considered—and short-sighted—opinions penned by the United States Supreme Court in recent years.”62 She contends that the effect of the decision will be that “teachers who care enough about their profession and their students believe they should speak up about those matters as the right, the ethical, and the professional thing to do.” However, the Court now says that teachers, as public employees, do not have the same protections as ordinary citizens. She continues writing that “[w]hen it comes to speech and acts otherwise protected by the First Amendment. Garcetti now forces teachers to choose between their professionalism and their livelihood.”63

Courts adjudicating the claims of professors at public universities that they have suffered an adverse employment action because of things they said or wrote have delivered very different opinions on what kinds of speech Garcetti does and does not protect. The primary divisions have been between speech which is directly related to the faculty member’s academic specialty and that which is more broadly related to the faculty member’s speech related to the governance of the University itself.

60 Id.
61 Id. at 1282-83.
62 Id.
Much of the protest against efforts to make classroom activity available for public scrutiny comes from a substantial misunderstanding about the protection offered by the First Amendment. Part of this comes from a misunderstanding about the scope of Constitutional protection. It is only available as protection against governmental actions. In practical terms, that means a private school cannot violate a professor’s First Amendment rights because it is not a government actor. This can be confusing because private schools are required to obey federal anti-discrimination laws which sometimes mirror Constitutional protections. As a result, professors who claim they have been discriminated against on the basis of race and religion can bring this claim to federal court but it is not being decided on Constitutional grounds. For example, the Seventh Circuit Court of Appeals upheld a private college’s right not to renew the contract of a cosmetology professor who distributed religious pamphlets condemning homosexuality. The Court wrote that even though the professor was expressing her religious beliefs, she had no right to do so against the objections of the college which was hiring her to teach cosmetology. Moreover, private IHEs and especially those with a religious affiliation are almost always allowed to make decisions on the basis of their expression of beliefs contrary to the doctrine of the sponsoring religious institution. For example, the objection by the Bishop of Newark, New Jersey to a course on “Gay Marriage” taught by a professor at Seton Hall University generated negative publicity but was not illegal. Equally, Marquette University’s decision not to hire a professor whose field of study took a lesbian perspective was criticized, but was legal.

In another example of a court exploring the extent to which the First Amendment provides protection against adverse employment actions the U.S. District Court for the Southern

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64 Piggee v. Carl Sandburg Coll., 464 F.3d 667, 668 (7th Cir. 2006).
65 Id.
District of Mississippi dismissed the complaint of an adjunct faculty member in the music department whose contact was not renewed on the basis of his violating the university’s non-discrimination policy. The facts, which the faculty member did not dispute, concerned a student’s complaints about negative comments Dr. Nichols made about “working with homosexuals and how the New York musical environment is impacted by homosexuality.” Dr. Nichols argued that these comments reflected his personal religious views and were therefore protected by the First Amendment.

The Sixth Circuit then applied the following analysis to determining whether or not the professor’s expressions of his views about homosexuality in the context of giving a music lesson to a student were entitled to First Amendment protection. Quoting *Modica v. Taylor*, it wrote:

[T]o prove a retaliation claim based on the First Amendment, the plaintiff must prove: (1) he suffered an adverse employment action; (2) the speech involved a matter of public concern; (3) his interest in commenting on matters of public concern outweighs the University’s interest in promoting efficiency; and (4) the speech motivated the adverse employment action.67

The Court then noted that “[i]n 2006, the United States Supreme Court added an additional element: “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”68 Applying those standards, the Federal Court held:

[O]n one hand, Dr. Nichols's duties as a University employee included giving voice lessons, not giving moral, sexual, or religious advice to his students, so his statements were not made pursuant to his official duties. Therefore, the content of the conversations with [his student], although tangentially related to the challenges of New York City's

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68 Id. (quoting ).
entertainment industry, are best characterized as speech unrelated to Dr. Nichols’s official duties.69

Yet, on the other hand, the Court noted that “the courts have consistently taken a broad view of what constitutes classroom speech that is not afforded protection under the First Amendment. . . .”70 So even if not part of his job description, because:

The statements were made in the classroom setting by a professor to a student . . . [e]ven were this court to concede that Dr. Nichols’s speech was that of a citizen on a matter of public concern [and not part of his job as a voice instructor], Dr. Nichols has failed to demonstrate that his interest in making these comments outweighs the University’s interest in promoting efficiency.71

The fact that the court here found the university’s interest would outweigh Dr. Nichols whether or not Garcetti applied, illustrates how difficult it is for a professor to claim First Amendment protection against retaliation. Here, the university’s interests were based on the student’s reaction, his taking of offense, to the professors’ comments about the sexual orientation of members of the New York music world.

Looking specifically at the university classroom Professors Richard Fossey & Joseph C. Beckham agree.72 They provide an overview of cases in which federal courts have again and again have “declined the opportunity” to find that faculty at institutions of higher education had any Constitutional protection for speech than other public employees. Fossey and Beckham’s analysis is important because it concludes that “in the absence of a clear delineation of the concept of academic freedom by the United States Supreme Court, lower federal courts have defined the faculty member’s academic freedom rights narrowly in relationship to teaching activities.”73 They elaborate that based on their review of the case law:

On one hand, academic freedom appears

69 Id.
70 Id.
72 Richard Fossey & Joseph C. Beckham, Commentary, University Authority Over Teaching Activities: Institutional Regulation May Override a Faculty Member’s Academic Freedom, 228 Ed. L. Rep. 1, 21-22 (2008).
73 Id.
to protect the rights of faculty to research, write, teach and publish without fear of retaliation based on the ideas that the faculty member conveys. On another, academic freedom gives higher education institutions the right to determine on academic grounds the four essential freedoms of the academy [which are] ... determining who may teach, what will be taught, how it shall be taught, and who may be admitted to study.\textsuperscript{74}

Other commentators are equally negative.\textsuperscript{75}

2.10 Faculty Speech About University Governance

The greatest confusion regarding the extent to which faculty members have protected speech is when the issue is neither directly relevant to their academic specialty nor of interest to the general public outside of the university. Because faculty members are required to serve on committees and engage in other self-governance activities, they often must become involved in discussions about how the university itself is run. Yet under the clear terms of Garcetti, this kind of speech is definitely not protected for other public employees. The question, then, is whether having the status of a faculty member at a public university creates an exception to Garcetti that does not apply to other public employees. It is on this point that lower courts are split.

A Federal District Court Judge in Texas put the issue squarely when she held that a faculty member at a public university did not have First Amendment Protection for making “complaints to the Board of Regents regarding credentials of some faculty, faculty salaries, treatment of students, accreditation of the pharmacy program, and student dismissals” because these matters “are not matters of public concern under the law.”\textsuperscript{76} She went on to explain that “Contrary to Plaintiff’s contentions, it is not the law

\textsuperscript{74} Id. at 21 (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).
that a speech by an employee relating to the governance of a university is
public speech protected by the First Amendment unless the speech is part of
the employee's official duties.” Instead, for First Amendment protection,
the employee must speak “as a citizen on a matter of public concern.”
Under this definition, no internal complaint would have any First
Amendment Protection.

In direct contrast, however, the Ninth Circuit Court of Appeals explicitly recognized

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2.10  Federal Statutes and Regulations Specific to IHEs

The most direct source of congressional power to control private
IHEs is found in Article I, § 8 of the Constitution, which allows
Congress to spend federal money in order to promote the
nation’s safety and welfare.\textsuperscript{77} The Supreme Court has, since
1936, consistently held that with this power to spend money
comes the power to impose restrictions on those entities which
accept the money. This is true even if the restriction, or
condition for accepting the money, is not one Congress could
have imposed directly. As the Court explained, “the power of
Congress to authorize expenditure of public monies for public
purposes is not limited by the direct grants of legislative power
found in the Constitution.”\textsuperscript{78}

Both a public IHE which receives some of its funding from a
state and a private IHE which accepts federal funding are equally
contractually obligated to comply with the conditions the federal
government imposes. Public and private IHEs are also both
equally bound by the federal anti-discrimination in employment
laws applicable to all employers.\textsuperscript{79} Relying on these principles,
the Supreme Court has twice in recent history authorized

\textsuperscript{77}U.S. CONST. art. I, § 8.
\textsuperscript{78}Butler v. U.S., 297 U.S. 1 (1936).
\textsuperscript{79}Unless otherwise specified, all charts in this article were created by the candidate.
sweeping exercise of federal authority over the activities of IHEs. In *Bob Jones University v. United States*, the Supreme Court held that the university could be stripped of its tax-exempt status if it continued its religiously based policy of banning inter-racial dating. Writing about the decision, Professor Martha Minnow noted that the Court did not base its decision on violation of a specific statute so much as it “[r]easoned that the tax exemption, as a privilege, had to comport with law and public policy.” The result has been for the Supreme Court to set itself up as the final authority on when an IHE is or is not acting in accordance with public policy even when it is not violating any specific law. It exercised and re-enforced this authority dramatically in 2006 when it held that IHEs were required to allow the military to recruit on campus even though other employers which violated the university’s anti-discrimination policies were not permitted on campus. *Rumsfeld v. Forum for Academic and Institutional Rights* (Solomon Amendment Decision) upheld the government’s argument that failure to comply with federal policy could result in the complete elimination for eligibility of all federal funding including financial aid and research grants. The practical effect of the *Bob Jones* and *Solomon* decisions is to grant the federal government sweeping authority to withhold tax exempt status as well as make an IHE ineligible for any federal funding, including financial aid, if in the Supreme Court’s opinion it is acting against public policy whether that policy is expressed in a specific statute or not.

The Role of Federal and State Anti-Discrimination Laws in Whistleblower Retaliation Acts

There is a close relationship between the legal analysis of whistleblower claims and the legal analysis of claims of illegal discrimination because the major state and Federal laws providing protection against discrimination itself also provide

82 (holding that private universities must allow military recruiters on campus or risk eligibility for all federal funding).
83 *Id.*
protection against retaliation for bringing such a claim. As a result, federal courts faced with a “stand-alone” whistleblower case will often look to discrimination cases with a retaliation component as precedent.

The majority of Federal Anti-discrimination laws originate in Title VII of the Civil Rights Act of 1964 (Title VII). 84 Federal and state anti-discrimination laws are generally applicable to all employers. As a result, all IHEs, subject to some exceptions for faith-based IHEs, are subject to the same federal and state laws prohibiting discrimination on the base of age, sex, race, religion, national origin and disability as are any other large employer. These laws are enforced by the U.S. Equal Employment Opportunity Commission. (EEOC) 85 As the EEOC explains its role:

All of the laws we enforce make it illegal to fire, demote, harass, or otherwise “retaliate” against people (applicants or employees) because they filed a charge of discrimination, because they complained to their employer or other covered entity about discrimination on the job, or because they participated in an employment discrimination proceeding (such as an investigation or lawsuit). 86

While Title VII anti-employment discrimination law applies to institutions of higher education, there are also anti-discrimination laws which apply specifically to education and are far broader than employment issues. The Department of Education’s Office of Civil Rights enforces five specific laws prohibiting discrimination by entities which receive federal funds. 87

The Department of Education specifically requires compliance with Title VI and Title VII which explicitly prohibit retaliation against those who allege discrimination:

Programs and activities that receive ED funds must operate in a non-discriminatory manner. These may

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include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing and employment, if it affects those who are intended to benefit from the Federal funds. Also, a recipient may not retaliate against any person because he or she opposed an unlawful educational practice or policy, or made charges, testified or participated in any complaint action under Title VI. For a recipient to retaliate in any way is considered a violation of Title VI. 88

It is in the specific definition of “retaliation” that anti-discrimination cases and direct whistleblower cases, including those under the False Claims Act, overlap. 89 To establish a prima-facie case of retaliation, a plaintiff in a Title VII action must show: “(i) that he [or she] engaged in protected opposition to discrimination, (ii) that a reasonable employee would have found the challenged action materially adverse, and (iii) that a causal connection existed between the protected activity and the materially adverse action.” 90

The federal and state laws prohibiting discrimination do, in some cases, overlap with Constitutional provisions. However, they are far more extensive both because they cover categories without Constitutional protection, such as age discrimination, and apply

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91 Proctor v. United Parcel Serv., 502 F.3d 1200, 1208 (10th Cir. 2007) (quoting Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1202 (10th Cir. 2006)).
equally to both public and private employers.\textsuperscript{91} Most states also have anti-employment discrimination laws which at least track and often exceed Federal law.\textsuperscript{92} Often claims are brought under both state and federal law and the EEOC and the state agency work together. In the states that possess their own employment discrimination legislation, the EEOC must generally “defer” to state or local remedies.\textsuperscript{93} As the Second Circuit explained the relationship, “[b]oth Title VII and NMHRA claims must be administratively exhausted before being brought in federal court. Title VII creates a work-sharing deferral system between the EEOC and the states that have their own employment discrimination legislation.”\textsuperscript{94}

\begin{quote}
Qui Tam Actions Brought Under the Federal False Claims Act
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Congress passed the False Claims Act\textsuperscript{95} during the Civil War to address the fraudulent bill which war suppliers were presenting to the Union for payment and it has continued to serve as the government’s strongest tool to recover funds it has paid out under false pretenses.\textsuperscript{96} It both encourages whistleblowing by sharing up to 30\% of the government’s recovery, and attorney’s costs, when the information results in a successful recovery and by providing whistleblower protection whether or not the claim is successful. The False Claims Act is a Federal law that harshly penalizes fraud by those engaged in activities paid for with federal funds. This includes straight forward fraud such as a doctor submitting an inflated claim for payment by Medicare, but it also applies far more broadly to situations in which an entity like an IHE provides fraudulent information to an accrediting agency in order to qualify for eligibility to participate in the Title IV federal student loan program. Simply put, “[t]he qui tam provision of the False Claims Act allows private

\begin{footnotesize}
\begin{enumerate}
\item \textit{Employment Discrimination Fact Sheets, TEXAS WORKFORCE COMMISSION},
\item (quoting 42 U.S.C. § 2000e–5(c)).
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
citizens, acting on behalf of the government, to recover treble damages from anyone who has committed a fraud upon the government.”

The False Claims Act extends either civil or criminal liability to any person “who knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval.” The elements of a False Claims Act action are that the defendant: (1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury. Recent successes in pursuing False Claims Act claims in cases of health care fraud have made promoting whistleblowing in this context a high priority for the federal government. In a warning to pharmaceutical companies Senator Chuck Grassley warned that:

The False Claims Act is a proven success in both identifying and deterring fraud and recovering fraudulently obtained taxpayer dollars. The more that can be done to create awareness of it, the more good it can do. Congress has long seen the need for providing protection to federal employees who learn of fraud, waste or abuse in government culture where those who speak up about possible fraud are rewarded rather than retaliated against is one way to fulfill that responsibility. . . .There can never be too many taxpayer watchdogs.

The False Claims Act is especially powerful because unlike most Federal laws which create a cause of action only for the Federal Government itself, the False Claims Act extends its reach by allowing anyone who learns of a false claim against the Government to, on their own, bring a claim on the Government’s behalf. Like a sheriff putting together a posse to hunt a fugitive,

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the False Claims Act deputizes everyone who might be in a position to know about a false claim against the government and provides them with an incentive to do so by sharing in the money recovered as well as attorney fees. Of particular relevance here, to further encourage potential whistleblowers to come forward, the government also extends protection against retaliation.

This practice of allowing private citizens to bring actions on a government’s behalf is a very old British doctrine still called by its Latin name: A *qui tam* action. As a court recently explained in a claim against University of Georgia researchers for making false statements in an application for a research grant to the Department of Environmental Protection, “‘qui tam’ is an abbreviation for the Latin phrase ‘*qui tam pro doino rege quam pro se ipso in hac parte sequiter,*’ which means ‘who as well for the king as for himself sues in this matter.’”[100] The individuals who bring the action on the Government’s behalf are not called by the ordinary term of “plaintiff” but rather by a specific Latin term, “Relator.”[101] Relators are required to notify the government of their intent to bring the action so that the government can join the suit.

In an overview of both private and governmental whistleblowing around the globe, Professor Wim Vandekerckhove of Ghent University describes the “paradigm case” in the U.S. Qui Tam system as one where “the whistleblower transfers inside information to the US Government in exchange for a reward.”[102] Vandekerckhove further explains that “[t]his arrangement has even been conceptualized by courts as the government purchasing information it might not otherwise acquire.”[103] Dworkin and Near point out that “motive” is an important issue in evaluating whistleblower programs. They cite differences in the evolution of the False Claims Act from an older model that “viewed whistleblowing as an act of conscience and

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[100] Walker, 738 F. Supp. 2d at 1287, n.1 (citing Black’s Law Dictionary 1368 (9th ed. 2009)). Because Latin is a dead language, Latin terms used in law often have more than one acceptable pronunciation. The most standard pronunciation of Qui Tam is “kwi tam.” See Qui Tam Action, *Speak English*, (last visited May 8, 2011). But “Kee Tam” is equally appropriate (and is what I was taught). See How is Qui Tam Pronounced?, *Whistle Law*, (last visited May 8, 2011); see also *Dessen, Mosses & Risotto*, Are Qui Tam and Whistleblower Statutes the Same?, (last visited May 8, 2011) (generally explaining Qui Tam claims).


[103] Id.
responsibility” as opposed to a “new” model that “values information over motivation.”

Researchers studying the whistleblowing practices in the non-profit sector, however, note that the main motivation is not money. It is to improve an organization or even a society in which the whistleblower feels a strong, personal commitment. A person like this is not directly motivated by money.

The law permits anyone with knowledge of fraud involving a wrongful claim for payment to the federal government to file their own claim on the government’s behalf. The Relator must notify the government of its intention and give the government, through the U.S. Justice Department, the opportunity to bring the case on its own behalf. If the Justice Department chooses to do so it still pays the relator a percentage of the funds recovered. If the Justice Department declines and the relator is successful, she receives a larger percentage of the recovery and, even more importantly, attorney fees. The availability of attorney fees is an incentive for private attorneys to take on these cases and has resulted in an active area of practice. Both qui tam actions link the whistleblower’s recovery directly to the amount recovered by the government.

Although qui tam actions have come a long way from their original role of monitoring defense contractors and are now brought in almost every context involving federal money which, as the current Supreme Court is interpreting the Constitution, essentially every exchange of goods and services in the country. Qui tam has come to IHEs in two major forms. The first is through the Federal Government’s war against health care fraud. Qui tam actions have become quite common in university settings in the areas of allegations of misspent federal grant funds and in academic medical centers’ billing practices. They have also very recently become very common risks for for-profit IHEs as the government seeks out fraud in financial aid practices.

IHEs have increasingly faced actions brought through the False Claims Act based on their activities as a recipient of government research funds or by billing Medicare through their affiliated hospitals. Both of these activities are especially lucrative for qui tam relators because the False Claims Act “defines “claim” as

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each individual “request or demand ... for money or property” amounts add up quickly. As one commentator explained:

This means, for example, that each false request for payment submitted by a doctor will be considered a separate claim, amenable to separate $5,500-$11,000 penalties. Then, any monetary damages resulting from the fraudulent claims that are inflicted on the government are trebled. Therefore, potential recoveries, especially in the medical arena, can quickly escalate into the “tens or hundreds of millions of dollars.”

Equally, an IHE which processes hundreds of student loans or recruits hundreds of students can also generate large awards. Recently attention has shifted to violations of the Higher Education Act that governs the practices of IHEs who enroll students receiving Federal financial aid and veteran’s benefits. In November 2010 the University of Phoenix, a for-profit-corporation, settled a False Claims Act case with the Justice Department for $78.5 million. On May 2, 2011 the U.S. Department of Justice announced that it was joining a complaint first brought by a Relator against Education Management Corp. (EDMC), a for-profit-company, on the basis that it violated the Higher Education Act. The key limitation of the False Claims Act is that it can only be invoked when an entity makes an illegal claim for payment or makes a misstatement in seeking payment. Therefore, a successful False Claims Act case requires the existence of a law that was broken.

The Association of Private Colleges and Universities have been very successful in blocking the efforts of the current U.S. Department of Education to impose regulations that would form the basis of a qui tam action. On June 30, 2011 a Federal District Court Judge in Washington, D.C. struck down several

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108 Id.
regulations that would impose limits on how much federal financial aid could go to students who based on their “debt-to-income ratios” were unlikely to repay. These included direct prohibitions on lending money to students above specific debt-to-income ratios and also to limit the ability of students to borrow money to attend schools whose students did not meet specific levels of obtaining employment which paid enough to make it possible for them to pay back their loans. Although the result of the opinion was to uphold some portions of the regulation and strike down others, Danny Weil, an educator, attorney, and critic of the for-profit education industry used the decision as an example of the industry’s influence. He wrote that:

Knowing that the for-profit union, APSCU, will spend literally millions and millions of taxpayer monies to influence the courts and the coin-operated politicians aligned so closely with them, this ruling cannot be seen as anything but a victory for the APSCU and its members. It is another loss for students.

So although the Department of Education continues to monitor the for-profit education industry closely, their ability to act is limited by the provisions of the rules and regulations which govern the industry’s behavior. A University of Phoenix employee who, for example, brings information will only be eligible for whistleblower protection if that behavior is in fact illegal or if he has a good faith belief that is illegal. Such a fine distinction may not be apparent to an employee who sees a school encouraging students to enroll and borrow money which it is unlikely that they can repay.

Nevertheless, the False Claims Act still plays an important role in providing statutory protection for employees of IHEs. For example, the text below is from the website of a prominent

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Philadelphia law firm advertising its success in representing IHEs facing qui tam actions:

Drinker Biddle’s Qui Tam team has experience counseling and defending institutions of higher education in a range of qui tam actions, including: Representing several schools in qui tam actions relating to Title IV funds; Representing a university alleged to have violated Department of Education rules by paying bonuses to its recruiters; and representing an academic medical center in a qui tam action under Medicare Fraud and Abuse laws relating to the United Network for Organ Sharing (UNOS) organ transplant program.111

**Requirements for Bringing a Qui Tam Action**

The requirements for an individual to bring a qui tam action under the False Claims Act are set out by statute. One requirement which is particularly troublesome to potential relators is a set of rules designed to protect the government against paying relators for bringing it information available through public sources. As written, § 3730(3)(4)(A) states:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing . . . or from the news media, unless the action is brought by the Attorney General or the person bringing the action is the original source of the information.

Explaining the reason for this provision, the Sixth Circuit wrote that “[w]e find it difficult to understand how one can be a ‘true whistleblower’ unless she is responsible for alerting the government to the alleged fraud before such information is in the

111 False Claims Act/Qui Tam, DRINKERBIDDLE, (last visited July 18, 2012).
However, this provision has become more restrictive since the Supreme Court’s interpretation that not only is an employee barred from bringing a suit based on information known to the federal government, she is also barred from bringing one known to the state government—even if the state chooses to take no action to address the fraud. This effect of this decision is to penalize an employee who first brings information to her supervisors’ attention rather than first filing a Qui Tam Act action.

**Whistleblower Protection in Qui Tam Actions**

Invoking the whistleblower protection provided by the Qui Tam Act can require complying with the often complex rules associated with bringing such a claim. However, a plaintiff can receive protection as a whistleblower even if her qui tam action is dismissed. In upholding protection for an employee whose qui tam action it found to be without merit because it was based on information already available to the government, the Sixth Circuit noted that “to further encourage whistleblowers, [the False Claims Act] provides protection for those who pursue or contribute to qui tam actions.” It went on to cite the statute’s provision that:

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

The court further wrote that “the legislative history indicates that Congress understood “that few individuals will expose fraud if they fear

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113 Graham County Soil and Water Conservation District et al. v. United States ex rel. Wilson, 130 S.Ct. 1396 (2010).
114 Barthle II, supra note 179.
their disclosures will lead to harassment, demotion, loss of employment or any other form of retaliation.”

However, in order to qualify the potential qui tam relator must prove that the employer was aware of her actions. This can be difficult to prove in the case where an employee already has a poor relationship with the employer. For example, an employee who complained to his employer about fraudulent activity in relation to a government contract was found not to have whistleblower protection because “he never used the terms ‘illegal,’ ‘unlawful,’ or ‘qui tam action.’” Faced with a very real possibility of both not being able to prove a qui tam action and not qualifying for whistleblower protection, an employee still faces considerable risk.

State Statutes and Regulations

Introducing an essay entitled Public Colleges and Universities, Brad Cowell writes that “[i]n the modern era, each of the fifty states has a complex mix of public and private higher education institutions and a variety of governance systems.” He summarizes that given this structure, “diversity, rather than uniformity, characterizes public higher education in the United States.” He contrasts states like Texas which have unified systems in which a state board answerable to the legislature oversees all the public IHEs in the state with states like Minnesota and California, which have state constitutions declaring that their universities are “autonomous” and not subject to legislative control.

Even in a state like California where universities are free of state legislative control, all states must comply with Federal law. A state cannot have its own laws which conflict either with existing Federal law or with when a state regulation directly conflicts with a federal one. However, while individual states cannot provide less protection from discrimination by employers than the federal government but they can, and many do, provide

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116 Id.
117 Robertson v. Bell Helicopter Textron, 32 F.3d. 948, 951 (5th Cir. 1994).
118 Brad Cowell, Public Colleges and Universities, in CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW 10 (2005).
119 Id. at 20.
120 Id.
significantly more. These protections are notable in the area of sexual orientation where many states have specific prohibitions against discrimination while Title VII, the Federal law, has none. These differences can also be significant in the case of discrimination based on disabilities with some states recognizing obesity as a protected condition while the Federal law for the most part does not.

State Whistleblower Protection Laws

In his *Garcetti* dissent, Justice Souter criticized the majority’s reliance on state whistleblower laws as sufficient protection by pointing out that they were inconsistent. He wrote that, “the current understanding of statutory protection: individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.” The same is true of the kind of protection offered employees of public IHEs who attempt to invoke their state’s whistleblower protection act. Both the type of protection offered and the terms for receiving it are very different depending on the IHEs’ location.

The case before the *Garcetti* Court concerned the rights of public employees. Therefore, whether or not its conclusions about the adequacy of individual state’s whistleblower protection laws to protect the First Amendment rights of public employees are correct, they have no bearing on protection against retaliation for employees of private IHEs. For the

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121 Oregon Governor Signs Gay Rights Bills, MSNBC, (last visited July 18, 2012).
same reason, the discussion of state whistleblower laws below also only consider employees of public IHEs are unavailable as a remedy for employees of private IHEs. The purpose of whistleblower protection laws is to protect society by extending the reach of enforcement mechanisms. As Wim Vandekerckhove explains, “whistleblowing policies . . . offer[r] the possibility [for an employee] to raise concern about practices within an organization one does not have the power to alter or to prevent.”126 Whistleblowing in general has been the subject of considerable public attention as a series of highly public incidents such as Enron, 9-11, the banking collapse and even nuclear safety in Japan has been portrayed as avoidable had those in power listened to warnings brought by insiders. The public’s interest in whistleblowing has resulted in the U.S. Congress’ passing what has become a series of new laws intended to prevent financial fraud on the public by enlisting insiders to bring fraud to light. Recognizing that the fear of retaliation could discourage whistleblowing both the Federal Government and almost every State in the Union has enacted laws protecting whistleblowers against retaliation.127 Most legal commentators use words like “chaos” or “patchwork” to describe the current state of legal protection for whistleblowers in the United States. This is because there is no comprehensive system of statutes which provide protection against retaliation for those who bring forward information of public interest. As one lawyer seeking clients on her website explains, in all caps:

THERE IS NOT ONE WHISTLEBLOWER LAW PROTECTING AGAINST RETALIATION. Instead, there are various laws and regulations that provide protection from retaliation in specific circumstances. Who you are, what you reported/disclosed, and to whom, is relevant in determining whether there are any legal protections from retaliation.128

128 Whistleblower, A. Alene Anderson Law Offices (all caps in original) (last visited July 18, 2012).
In other words, whistleblower laws are intended to encourage people who know of a violation of the law or a danger to the public’s health or safety to come forward without fear of retaliation. Yet despite the public endorsement of whistleblowing evidenced by the existence of whistleblower protection statutes, it also goes against a general understanding that an employee will be loyal to his employer. Social scientists who study the phenomena of whistleblowing consistently conclude that the experience of being “a whistleblower” has a negative effect on employees’ regardless of the kind of statutory anti-retaliation, or even reward, provisions intended to protect against retaliation. As Andrade explains, this is because depending on the kind of employment, the retaliation can extend far beyond the confines of the job where the whistleblowing occurred. He writes “in many niche industries informal blacklists exist that ensure the whistleblower never works in his/her field again.”

The field of higher education is just such a niche industry. The best examples come from the fields of academic medicine and science where acts of whistleblowing have, again and again, been documented as ending careers. The prestigious journal Science documented what happened to the graduate students at the University of Wisconsin who reported to officials (accurately) that she was falsifying her data and thus putting the entire university’s grant funding at risk. The journal reports that “[a]lthough the university handled the case by the book, the graduate students caught in the middle have found that for all the talk about honesty’s place in science, little good has come to them.” Interviewing the six students involved they found that:

Three of the students, who had invested a combined 16 years in obtaining their Ph.D.’s, have quit school. Two others are starting over; one moving to a lab at the University of Colorado, extending the amount of time it will take them to get their doctorates by years. The five graduate students who spoke with Science also described discouraging...


encounters with other faculty members, whom they say sided with [the lab director] before all the facts became available.  

An investigator at the Office of Research Integrity, which conducts these fraud investigations when federal funding is involved, told the report that what happened to the students didn’t surprise her. She told the report that, “[m]y feeling is it's never a good career move to become a whistleblower.”

Alford characterizes the average whistleblower as: [A] fifty-five year old nuclear engineer working behind the counter at Radio Shack. Divorced and in debt to his lawyers, he lives in a two-room rented apartment. He has no retirement plan and few prospects for advancement.

In the words of another researcher, whistleblowing can be “occupational suicide.”

Whistleblower laws either stand on their own as general protection for those who make known fraud, waste or abuse of government funds or they are attached to specific legislature schemes to enhance their enforcement by providing protection to those who bring violations to light.

Qui Tam Actions Brought Under State False Claims Acts

Seeing the success the Federal Government has had in recovering large sums through the False Claims Act many states have added or strengthened laws which would provide similar incentives for individuals, whether state employees or not, to pursue cases of fraud against State Government. As one law firm writes explaining its practice to potential whistleblowers:

131 Id.
132 Id.
In addition to bringing cases pursuant to the False Claims Act, we also bring claims on behalf of state governments that have been defrauded. Several states, including California, have *qui tam* statutes similar to the Federal False Claims Act, and it is not uncommon for [us] to bring a false claims act case on behalf of a state when we represent a Relator whose evidence demonstrates that a state is being defrauded.\(^\text{136}\)

This trend is reflected in a case brought under both federal and state qui tam actions against Education Management Corporation (EDMC), which is a for-profit corporation that manages colleges. Although originally brought as a qui tam action, the government joined the suit and is alleging that EDMC wrongly received financial aid funds by violating regulations governing recruiter compensation and by submitting false documents to gain eligibility for state-based aid.\(^\text{137}\)

### 2.1 Whistleblower Law

One of the first things to understand about whistleblower protection laws is that they are uniformly poor in providing meaningful protection.\(^\text{138}\) The first reason they do such a poor job is that although there are many individual laws there is no over-all regulatory scheme. If protective legislation is visualized as an umbrella then the one provided whistleblowers is not only full of holes but usually blown completely away. Another reason, according to the leading academic expert on whistleblowing laws, is that they are highly specific. So rather than protect whistleblowing in general, each law is quite specific about who is protected, what kinds of disclosures trigger protection against retaliation, and how the whistleblower must proceed in making her complaint. Because the terms of most whistleblower protection laws are so specific, the result is that although the public may benefit from the information being

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\(^{136}\) Upholding the Public Trust and Obtaining Recoveries for Whistleblowers, *LIEFY CARRASER*, (last visited July 18, 2012).


\(^{138}\) See Richard Moherly, Protecting Whistleblowers by Contract, *79 U. COLO. L. REV. 975, 979 (2008)* (“[a]lmost all the benefits of whistleblower disclosures go to people other than the whistleblower, while most of the costs fall on the individual whistleblower.”).
brought to light, the person who did so could well find themselves without any protection against retaliation. Moreover, adding whistleblower protection to existing laws is still seen by legislators and scholars as a successful way of extending enforcement. Congress has resisted efforts to limit the whistleblower provisions of Sarbanes-Oxley and included them in the anti-fraud provisions of the Dodd-Frank Act. Professor Miriam Cherry has advocated extending whistleblower protection to anyone reporting a violation of Federal law regardless of their employment status. No matter what the underlying basis of the accusation that an IHE has made a false claim for payment to the Federal Government, the employee making it is automatically protected against retaliation. A study published in the Annals of Internal Medicine tracking the experiences of relators between 1996 found that despite “a strict prohibition on retaliatory action against whistleblowers” under the statute, “the cases we analyzed frequently included descriptions of the considerable pressures put on whistleblowers and the many unpleasant experiences they faced after helping initiate DOJ enforcement actions.” For example, according to the authors of the study, a physician who brought an action against his hospital “reported that his hospital employer fired him and then prevented him from informing his patients of his relocation.” This led the authors to conclude that despite the potential for significant financial gain, “[t]he ongoing viability of the qui tam model depends on the willingness of whistleblowers to come forward.”

The issue of “willingness to come forward” is an important distinction between those who wish to remain at their institution, or in their industry, after bringing a qui tam action and those who would be content to take the money they recover and move on to other work. Many of the cases brought recently against

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141 Aaron S. Kesselheim & David M. Sudders, Whistleblower-Initiated Enforcement Actions against Health Care Fraud and Abuse in the United States, 1996 to 2004, 149 ANNALS INTERNAL MED. 342 (2008). (Study of 379 cases brought by private individuals alleging violations of Medicaid and Medicare laws shows that although between 1996 and 2005 these whistleblowers received over one billion dollars as their share of the $ 9.3 billion recovered by the federal government).
142 Id. at 347 (citing J.S. Lubalin & J.L. Matheson, The Fallout: What Happens to Whistleblowers and Those Accused by Exonerated of Scientific Misconduct?, 5 SCI. ENG. ETHICS 229 (1999)).
143 Id. at 347.
pharmaceutical companies come from drug representatives like
the ones who claimed to be “appalled by Pfizer's tactics in
selling the pain drug Bextra,” Yet these drug reps are more
likely to achieve long term satisfaction from their fifth of $102
Million Dollars than would be a professor who could never teach
or research again.

Given the regularity with which whistleblowers face retaliation,
one researcher asked the question “[w]hy would anyone in [the
situation of a whistleblower] choose to go to public authorities
or to their superiors with observations of organizational
wrongdoing?” After all, she writes:

There is no question that whistleblowers
are putting themselves at risk because
the person bringing the charge is of
lesser authority in the hierarchy of the
organization than is the person or
persons being charged . . . . Those above
the whistleblower in the organizational
hierarchy . . . control the job
performance evaluations that the
employee/whistleblower will receive,
they control the terms and conditions of
their work and under employment-at-
will circumstances, they control even
the capacity of the dissenting employee
to remain in their job.144

Moreover, she continues, even if the whistleblower sues for retaliatory
discharge, “the individual incumbents who are responsible for the firing
can hire all the attorneys they want from the company (or the public
coffer).”145

Allegations of retaliation are often complicated by the fact that
whistleblowers often have a history of poor relations with
administrators. Even whistleblowers who keep their jobs report
that their careers stalled afterwards, and even new employers
looked at them with suspicion.146 Research suggests that many
people who come forward with information simply do not

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144 Brita Bjorkelo, Stale Einarson, Morten Birkeland Nielsen, & Stig Berge Mathiesen, Silence is Golden? Characteristics and Experiences
145 Id.
146 Elizabeth Tippett, The Promise Of Compelled Whistleblowing: What The Corporate Governance Provisions Of Sarbanes Oxley Mean
For Employment Law, 11 EMPL. RTS. & EMPLOY. POLICY J. 1 (2007).
understand the long-term consequences.\textsuperscript{147} Writing about the role of whistleblowers in corporate America, Professor Elizabeth Tippett notes the pervasive “social stigma” associated with whistleblowing.\textsuperscript{148} She writes that:

\begin{quote}
Despite the statutory protections available, however, the empirical evidence demonstrates continuing retaliation against whistleblowers. Whistleblowers suffer heavy psychological and professional costs for their disclosures. A survey of eighty-four whistleblowers found that “82% experienced harassment after blowing the whistle, 60% were fired, 17% lost their homes, and 10% admitted to attempted suicide.”\textsuperscript{149}
\end{quote}

Either they believe “that their history of excellent performance in the firm will insulate them from any retaliation” or “[t]hey are generally unaware of the research literature that demonstrates the prevalence of retaliatory findings, and they may simply underestimate the probability of retaliation, until they are so far committed that they must now wage a war to retrieve their own honor.”\textsuperscript{150}

Of even greater concern, Tippett writes, “most whistleblowers I interviewed mistakenly believed that the extant laws and their ‘right to free speech’ would protect them.”\textsuperscript{151} Peter Rost quotes a study of whistleblowers at St. Elizabeth’s hospital in Washington that concludes, “[o]nly 16 percent say that they wouldn’t blow the whistle again” despite the negative consequences.\textsuperscript{152}

Another study found that whistleblowers and their families suffer decreased physical and emotional health.\textsuperscript{153} Andrade notes that “[e]ven when whistleblowers are ultimately vindicated, like the pair of NASA engineers who disclosed the technical failures that led to the Challenger disaster, they are often subject to continuing social marginalization by co-

\textsuperscript{147} Id.
\textsuperscript{148} Id. at \textsuperscript{1}.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Peter Rost, \textit{The Whistleblower: Confessions of a Healthcare Hitman} (2006)
workers.”
Sometimes whistleblowers receive substantial public praise: Coleen Rowley who warned the FBI before the terrorist attacks on 9-11 of suspicious activities in local flight schools, and Sherron Watkins who, it is said, brought down Enron with a single phone call. Such individuals enjoy public approbation and perhaps even lucrative careers as motivational speakers. Time Magazine voted Rowley and Watkins “Person of the Year” for 2002. Yet as Adrade puts it in his article titled From Pariah to Parrhesiastes: Reconceptualizing the Whistleblower in A Complex World, “whistleblowing” is often seen negatively. As he explains:

The ambivalence whistleblowing provokes stems from the central dilemma of divided loyalties at the heart of the ethics of whistleblowing. On the one side are those who argue that employees owe their allegiance, first and foremost, to the organization which provides them with a livelihood....Whistleblowers then are rightly regarded as ...as a social outcast; in blowing the whistle the whistleblower is cast out from the organization in order that the organization retains its prerogative to define its actions.

Indeed, both Cooper and Rowley stated that they hated the term whistleblower” with Cooper complaining it was too much like “tattletale.” Sherron Watkins reported that “she was made to feel like an outcast at the company.”

Given this grim prognosis, most would wonder why would anyone do it? And the answer research suggests is that people do

153 Julio Anthony Andrade, From Pariah to Parrhesiastes: Reconceptualising the Whistleblower in a Complex World, STELLENBOSCH UNIV.
155 Julio Anthony Andrade, From Pariah to Parrhesiastes: Reconceptualising the Whistleblower in a Complex World, STELLENBOSCH UNIV.
156 Id.
157 Tippett, supra note 228.
it because they think it is right. However, Whistleblowing seldom goes well for the whistleblower.158 Much of the literature on whistleblowing in IHEs comes from the field of academic medicine. Describing two cases in which medical researchers faced harsh punishments, ethicists Rosalind Rhodes and JJ Strain write:

To effect a change in the current status quo the incentives for addressing problematic behaviour have to be changed. Ethically appropriate reactions to researcher misconduct would be far more likely if whistleblowers could be seen as helpful colleagues and as valued friends of the institution instead of its enemies. We advocate this kind of transformation, not only to address the misdeeds of academic medicine but to create a moral environment for all who have to work in it and learn from it.159

Many have suggested that the very nature of scientific research, activity taken far outside the view of the public which could cause serious threats to health and safety, imposes an obligation on scientists to be whistleblowers when they perceived danger.160 While a few scientific whistleblowers occasionally receive large monetary awards, it is likely that they will no longer be able to work in scientific research, the field to which they have devoted extensive years of training.161


160 See generally Thomas Alured Faunce & Susannah Jefferys, Whistleblowing and Scientific Misconduct: Renewing Legal And Virtue Ethics Foundations, 26 MED. & L. 567, 581-82 (2007); see also Michael Davis, Some Paradoxes of Whistleblowing, 15(1) BUS. & PROF. ETHICS J. 3, 7 (arguing that whistleblowing is actually a moral obligation of anyone who finds out about a potential harm to human safety).

161 Andrew Pollack & Duff Wilson, A Pfizer Whistle-Blower Is Awarded $1.4 Million, N.Y. TIMES (Apr. 2, 2010), available at; see alsoThe-Scientist.com, http://www.the-scientist.com/community/posts/85fa50 (last visited June 23, 2010) (Becky Maclaine is a biologist who recently recovered 1.37 million from Pfizer based on her claim that she was fired for raising concerns about research she was doing for Pfizer on genetically engineered viruses. Maclaine alleged she had been made sick from the virus.).
Unfortunately, a small but significant proportion of complainants reported very serious consequences of their whistleblowing. At least ten percent of complainants reported each of the following: Eight whistleblowers (12%) reported being fired, not being renewed, and/or being denied salary increases, 14 reported losing research support (21%), and 7 whistleblowers (10%) reported losing staff support and/or receiving less desirable work assignments.¹⁶²

**Federal Statutes Which Protect Whistleblowers at Both Public and Private IHEs Against Retaliation**

Aside from the False Claims Act, there are other specific federal statutes which provide direct protection against retaliation for whistleblowing. This next section considers the protections available for employees of IHEs who allege retaliation based on information they disclosed which would not form the basis for a quit tam action. In other words, where there has been no fraud against the government. Although the False Claims Act provides protection against retaliation, whistleblower statutes are there to provide incentives when there is no financial gain to anyone. The differences in legal protection against retaliation enjoyed by public versus private employees are not a concern when the protection comes from a specific federal statute which is generally applicable to all colleges and universities. The statutes include those that target specific dangers to the public in areas like trucking, pipeline, railroad or nuclear safety which are beyond the scope of this article, but which may well arise on a large campus with a very active research program,¹⁶³ and those directly linked to statutes affecting IHEs. There are at least seventeen federal statutes that incorporate explicit whistleblower protection for employees of private companies.¹⁶⁴ These include “protecting employees who report violations of various trucking, airline, nuclear power, pipeline, environmental, rail, consumer product and securities laws” and are overseen by the

¹⁶² [*footnote*]

¹⁶³ For example, following 9-11 Congress passed laws to protect public transportation employees who came forward with information about possible safety hazards. OSHA to PATH: no retaliation against injured employee, WHISTLEBLOWERS PROTECTION BLOG (May 12, 2010).

Occupational Safety & Health Administration (OSHA) through its office of the Whistleblower Protection Program (OWPP). 165

The Clery Act

The most recent expansion of whistleblower protection specific to employees of IHEs is the whistleblower protection to the Clery Act. In 1986 Jeanne Clery, 19 years old, was raped and murdered in her college dorm room. 166 Her parents discovered that there had been 38 violent crimes in the area of Jeanne’s dorm over the past three years—none of which made public by the university. Outrage over this incident led Congress to pass 20 USC § 1092(f), the Clery Act, which mandates that all colleges and universities whose students receive federal financial aid publish regular reports of crime on or near campus. 167 The Clery Act is one of the few laws specifically applicable to IHEs with explicit whistleblower protection. 168 Although the Clery Act now contains a whistleblower provision, it did not when first passed. 169

The Family Educational Rights and Privacy Act (FERPA)

Unlike the Clery Act, FERPA contains no independent whistleblower protection for those who make known violations. However, there are indications that it may in the future. Although law enforcement personnel are able to investigate possible crimes regardless of who brought them to their attention, until 2008 the Department of Education could only investigate FERPA violations brought to them by someone directly protected. That changed in 2008 when it was amended so as to empower the Department of Education to investigate violations even if there was no complaint from either a student or parent. Writing in FERPA CLEAR AND SIMPLE, Clifford

165 See e.g., .
166 CLERY CENTER FOR SECURITY ON CAMPUS, (last visited July 18, 2012); Jeanne Clery Disclosure of Campus Security Policy, FAIRFIELD.EDU, (last visited July 18, 2012).
167 The act does not define “timely.” Virginia Tech University is currently appealing a finding by the Department of Education that it violated the Clery Act by not giving a timely warning about a possible shooter on campus. Zach Crizer, Debate Over Clarity of Clery Act Ensues as Tech Appeals Fines, COLLEGIATE TIMES (Apr. 28, 2011).
169 Amendments to Clery Act Require Universities to Immediately Warn Campuses of Emergencies, SPLC (Aug. 15, 2008).
Ramirez explains “that the [agency] may choose to launch an investigation on its own initiative is a momentous change.”\textsuperscript{170} He then explains that the agency’s motivation was a case titled \textit{Gonzaga University v. Doe} in which “so many administrator were involved in an the unofficial investigation of the student in question, that if any one of them had raised a concern about whether FERPA or other ethical practices supported the investigation and the actions taking place, the situation might have been circumvented early on.”\textsuperscript{171} Although opening the door to complaints from those with knowledge of a violation is not the same as protecting complainants, it is an acknowledgement of the importance of providing opportunities for those with knowledge of illegal activity to bring their concerns forward. It will be interesting to see if, over time, complainants will experience adverse employment action which will trigger a call for whistleblower protection.

\textit{State Whistleblower Statutes}

One of the most serious limits is the existing laws inability to address retaliation which does not take the form of an actual dismissal or demotion.\textsuperscript{172} The threshold question in most actions seeking the protection of a State Whistleblower Statute is whether or not the plaintiff complied with specific terms of the statute under which he seeks protection, not whether or not he has been retaliated against for reporting information. Most state whistleblower protection statutes are drafted by legislatures and then interpreted by courts in a way that make it very difficult for most people seeking protection to meet with all the statutory requirements. For example, in \textit{University of Houston v. Barth} a jury awarded Stephen Barth, a tenured professor at the University’s hotel management school, damages and attorney’s fees based on his claims of retaliation.\textsuperscript{173} In the spring of 1999, Professor Barth reported to the University’s chief financial officer and its general counsel that his direct supervisor, the dean of the college of Hotel Management, had “engaged in questionable accounting practices, mishandled university funds, and entered into an unauthorized contract for services on behalf

\textsuperscript{171} Id.
\textsuperscript{172} Moberly, supra note 220
\textsuperscript{173} Univ. of Houston v. Barth, 365 S.W.3d 438 (Tex.App.—Houston [1st Dist.] 2011).
of the college.” The Dean gave Barth a “marginal” rating at
his next annual review, took away his travel funds, cancelled a
symposium that Barth ran every year and demoted him.
In 2001 Barth filed suit under the Texas Whistleblower Act. This
triggered a series of legal proceedings that, by the time the trial
went to jury in 2005, had cost Barth $265,000 in attorney’s fees.
Although the jury awarded him these fees as well as $40,000 in
damages and $265,000 in attorney fees, Barth remained in
litigation with the university through 2011 when an appellate
court resolved a dispute over jurisdiction in his favor.
Professor Barth’s case is instructive not just because of the time
and expense it took him to bring it, but also because of dispute
over whether or not he was protected under the Whistleblower
Act. The Act prohibits retaliation against public employees
who report official wrongdoing and it allows them to file suit
against a state or local governmental body for damages and/or
reinstatement, lost wages, costs, and legal fees.”
There was no dispute that Barth was a public employee or that the dean, his
supervisor, had engaged in official wrongdoing. However, the
requirements for bringing suit specifically required that
employees make “good-faith reports of a violation of law to an
appropriate law-enforcement authority.” The University
argued that Barth’s report to the chief financial officer and
the chief legal counsel did not trigger the protections of the statute
because they were not law-enforcement authorities. Although
the courts eventually held that in the context of his workplace
these were appropriate law-enforcement authorities, it provides
an excellent example of how easy it is for a potential
whistleblower to find himself ineligible for protection because of
a failure to comply precisely with the terms of the Act.
One jurisdictional problem state whistleblowers face is that
many statutes only protecting those who report conditions which
do not affect them personally. This is intended to limit the use
of whistleblower statutes in wrongful termination cases. For
example, in Williams v. St. Ramsey Medical Center, Inc., a
woman employed in the human resources department claimed
she was fired because she made complaints about her supervisor.

174 Id. at 609.
175 See id. at 609-10 available at .
176 State Whistleblower Laws, NATIONAL CONFERENCE OF STATE LEGISLATORS,
177 Id.
These complaints included “(1) reporting that others that worked for [the supervisor] were working off the clock, (2) reporting suspected violations of food and housing regulations, and (3) reporting suspected copyright violations.” However, the Minnesota Supreme Court rejected her claim, without a factual hearing holding that “[n]one of these is sufficient to establish a prima facie case” because they were “nonspecific” complaints about general practices and therefore “not actionable.”

Justifying this requirement, the Minnesota Supreme Court held that the Act:

[C]onnotes an action by a neutral-one who is not personally and uniquely affronted by the employer’s unlawful conduct but rather one who “blows the whistle” for the protection of the general public or, at the least, some third person or persons in addition to the whistleblower. Were it otherwise, every allegedly wrongful termination of employment could, with a bit of ingenuity, be cast as a claim pursuant to [the whistleblower statute].

Because the retaliation which the whistleblower alleges is often an illegal firing, it is difficult to prove that the claim is not personal. The same Minnesota Court explained the “report must be made for the protection of the public or some other person, not just the employee’s own rights.”

Most but not all states have some kind of has a whistleblower statute which protects employees who report that their employer has violated a state or Federal law. Many states also have statutes which apply to state employees, including university employees, from retaliation for bringing forward information about illegal activity or, in some statutes, waste, fraud or abuse of state funds. Some states go further than provide protection;

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179 Id.
180 Id.
181 Id.
182 Id.
they impose an affirmative duty to report fraud, waste or abuse on their state employees. Employees of IHEs are covered by these statutes to the same extent as any other similarly situated employee. So if a state’s whistleblower statute protects from retaliation any employee who reports a violation of a law, then employees of both public and private IHEs are covered. However, if, like many whistleblower statutes, it only provides protection to state employees, then only those working at public IHEs can invoke their protection. The scope of the protection, then, depends entirely on the wording of the statute. In a very few states, whistleblower protection extends beyond the reporting of a violation of law or even waste, fraud or abuse. For example, in Oklahoma a public employee is protected from retaliation if he or she “discusses the operation of” his or her employing agency with someone like “the print media, governor, legislature or any others in a position to initiate corrective action or investigate the agency.”

Most state whistleblower statutes set out such specific requirements for protection that retaliation claims are dismissed on procedural grounds without the court ever considering the underlying allegations of wrong-doing. For example, an individual with knowledge of a danger to the public’s health or safety may find herself fired because she reported it to her direct supervisor rather than public entity specified by a specific statute.

Most states provide some kind of legal protection to their employees who disclose waste, fraud, or abuse in government. Thirty-nine states have whistleblower statutes that provide general whistleblower protection to public employees, twenty-three states provide general protection for all employees, and fourteen states provide specific protection to persons reporting certain environmental misconduct. Unfortunately, most whistleblowers facing retaliation are unable to invoke the protections of these laws because they are so narrowly drafted. For example, in most states the act which triggers retaliation must be directly related to reporting a statutory violation.

In June 2012, the former assistant director of the University’s


football program, Jerry Sandusky, was convicted of 45 counts of sexual abuse against young boys in the shower facilities of the university. He associated with the boys as part of a charity he founded. As horrifying as these events are, what quickly attracted the most attention were the allegations that many employees of Penn State were aware of Sandusky’s behavior. These facts are detailed in an extensive report commissioned by the trustees of Penn State and drafted by former head of the Federal Bureau of Investigation, Louis J. Freeh. As of the writing of this article, there is particular attention being paid to reports made by then assistant coach Mike McQuery who saw Sandusky engaged in raping a young boy and who brought his concerns directly to his boss, the now deceased head football coach Joe Paterno. It is believed that McQuery has filed a whistleblower action against the university alleging retaliation for his complaint.

**Anti-Retaliation Provisions of Title IX**

Title IX is the short name of a law passed by Congress which prohibits institutions of higher education which receive federal funds to discriminate based on sex.

**Discrimination and Title IX**

Title IX of the Education Amendments of 1972 (Title IX) prohibits gender discrimination therefore protects from retaliation those who claim that they have been subject to it. Unlike employment discrimination statutes which must be brought by the individual discriminated against, Title IX provides protection for those who report gender discrimination, but who do not necessarily experience it themselves. It is

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190 Mike Dawson, McQueary Files Notice of Intent to Sue Penn State, CENTRE DAILY.COM, http://www.centredaily.com/2012/05/08/3190660/mike-mcqueary-files-notice-of.html.


193 34 C.F.R. §100.7(e) (2004) (“no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint,”)
therefore much more directly a whistleblower protection statute than the ones which simply protect those making their own claims of discrimination. In other words, a coach or a faculty member who complains about unequal treatment of female athletes is protected against retaliation even though not one of the athletes directly discriminated again. The Supreme Court recently addressed retaliation further in *Thompson v. Stainless*.

One area of particular interest to IHEs is the protection against retaliation for claims of violations of Title IX in athletics programs. However, it has been interpreted as providing protection against retaliation in the context of its application to athletics programs. The U.S. Supreme Court, in *Jackson v. Birmingham* clarified what had been considerable doubt among the circuit courts by holding that it was unlawful to retaliate against an individual who brought to light a violation of Title IX. In *Jackson*, a high school girls’ basketball coach alleged he was unlawfully fired after complaining that the team had received less resources than the boys’ team. Agreeing that he had been retaliated against and finding that he had a private right of action, Justice O’Connor wrote:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX’s private cause of action. Retaliation is, by definition, an intentional act. It is a form of “discrimination” because the complainant is being subjected to differential treatment.

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195 Moltz, supra note .
196 See Ann Bartow, Noting the Passing of Jan Kemp, UGA Athletics Whistleblower, Feminist Law Professors (Dec. 8, 2008); Moltz, supra note .
Title IV of the Federal Higher Education Act

Many of the protections available to employees of IHEs come from the provision of specific statutory provisions binding on institutions that accept federal funding. Title IV of the Federal Higher Education Act sets out the terms of eligibility for IHEs who wish to enroll students receiving federally subsidized student loans.\textsuperscript{199}

In Grove City College v. Bell, the Supreme Court held that a school would be considered a “recipient institution” for the purpose of requiring compliance with federal regulation “if any student on campus received an education loan or a grant, and that funds could be withheld from school programs that were found to be not compliant with regulations.” As a report from the U.S. Department of Education explains:

\begin{quote}
All public and private postsecondary institutions that participate in Title IV must comply with HEA. Title IV institutions have signed Program Participation Agreements (PPAs) with the U.S. Department of Education (ED) to administer these financial assistance programs. They include: Pell Grants; Federal Supplemental Educational Opportunity Grants (FSEOGs); the Federal Work Study Program; Federal Perkins Loans; the Direct Loan Program; and the Leveraging Educational Assistance Partnership (LEAP).\textsuperscript{200}
\end{quote}

The Department of Education’s 2011 annual report states that “approximately 6,300 post-secondary institutions—including the lion’s share of religiously affiliated programs, from liberal Georgetown to conservative Liberty, Oral Roberts, and Regent Universities—received federal aid last year, paving the way for more than 17 million students to enroll in


school.”

One of the few IHEs to refuse all federal funds is Hillsdale, which states on its website:

*In 1975 the federal government said that Hillsdale had to sign a form stating that we did not discriminate on the basis of sex. Hillsdale College has never discriminated on any basis, and has never accepted federal taxpayer subsidies of any sort, so the College felt no obligation to comply, fearing that doing so would open the door to additional federal mandates and control.*

**American Recovery and Reinvestment Act of 2009 (ARRA)**

As part of the effort to combat the effects of the collapse of the banking system and the ensuing economic crash, Congress passed the American Recovery and Reinvestment Act of 2009 (ARRA) which was intended to stimulate the economy. Some of the ARRA funds went directly to institutions of higher education. ARRAR is a statute of particular interest to this article because it contains its own specific whistleblower protection provisions beyond what would ordinarily be provided through the False Claims Act. For the purposes of this article it is necessary to look to judicial decisions in employment discrimination for guidance because they occur more often and therefore will usually reflect the standards for finding retaliation in that Circuit. In other words, there is considerable but not complete overlap between employment discrimination actions and whistleblower actions. The reason for the rise in retaliation claims is simple—they are

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easier to prove and the damage awards are often higher than claims of discrimination. Retaliation claims typically assert that an employer took some adverse action against an employee, because the employee exercised a legal right, such as filing a discrimination claim. Courts often rule in favor of employees in the retaliation part of their lawsuits, even when the underlying discrimination claim is dismissed.  

There are many examples of this decreased tolerance for retaliation in academic settings. In *Finch v. Xavier University* a court ruled in favor of two faculty members who had been blamed for internal dissension and then fired explaining that:

In order to establish a prima facie case of retaliation, a plaintiff must establish that: 1) she engaged in activity protected by the discrimination statutes; 2) the exercise of her civil rights was known to the defendant; 3) thereafter, the defendant took an employment action adverse to the plaintiff; and 4) there was a causal connection between the protected activity and the adverse employment action.

Employees who allege retaliation for filing discrimination claims are actually complaining of a double harm. First, they allege that they were, unlawfully, treated differently than others based on a protected characteristic and second that they were retaliated against for complaining of the illegal discrimination. The Supreme Court has been quite sympathetic to these retaliation claims even when it, or a lower court, finds that there has been no underlying illegal discrimination because to do otherwise would be to discourage employees from seeking the protection which Congress has given them. As Justice Breyer explained in *Burlington Northern*, actions by an employer which “might have dissuaded a reasonable worker” from complaining about discrimination will count as prohibited retaliation. Depending on the context, “retaliation might be found in an unfavorable annual evaluation, an unwelcome schedule change, or other action well

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205 Cathleen Hampton,  (July 27, 2010).
207 Id.
short of losing a job.”

In order to succeed in bringing a claim for retaliation, an employee must prove by a preponderance of the evidence that she has suffered unlawful retaliation because she engaged in a protected activity. For the purposes of this article, that protected activity is “whistleblowing.” More specifically, the “whistleblowing” here is about a matter of public concern.

**The Americans with Disabilities Act**

The Americans with Disabilities Act protects students and employees of both public and private IHEs but it does so through different provisions of the statute. It also contains explicit anti-retaliation.

An IHE cannot, for example, fail to hire or once hired failed to provide accommodations to an employee with a disability any more than could a bank or an insurance company. Just because the obligations are the same, however, does not mean that they are equally easy to comply with. Explaining the special challenges faced by IHEs in facing requests for accommodations from faculty with mental disabilities, Lee and Rinehart note that the legal requirement of an employer to specify the “essential functions” of a job “is not an easy task” when it comes to faculty members who “not only teach but serve on committees, advise students, conduct research, write grant proposals, mentor graduate students, consult, and perform service to their institution, community, state, nation and discipline.”

They point out, for example, that while “[i]n nonacademic settings, getting along with one’s supervisor or one’s peers has been ruled an essential function of virtually every job” yet this is seldom explicitly included in a faculty member’s job description. As a result, there have been steady streams of cases in which faculty members have claimed retaliation based on their request for accommodations or on their complaint that they have

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210 Id., supra note , at 374.

211 Id.

suffered age or sex discrimination. These increased after a Supreme Court decision in 2006 which clarified plaintiffs’ ability to seek damages for retaliation in ADA cases and a 2009 decision making a similar ruling for Title VII discrimination cases. Describing the phenomena, one commentator wrote that: “[a]ccording to EEOC data, retaliation charges more than tripled between 1992 and 2009 and now comprise 36 percent (93,277) of the total charges filed, making it the number one complaint filed with the EEOC.” The EEOC is the federal agency responsible for enforcing employment discrimination laws including Title VII of the Civil Rights Act (Title VII), the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA). Another statutory scheme with anti-retaliation provisions is the Fair Labor standards Act (FLSA).

**Retaliation Associated with Claims of Discrimination:**

**Civil Rights Issues**

As noted in the introduction one of the purposes of this article is to identify when claims of retaliation actually refer to legally protected acts of whistleblowing. In order to do that it is helpful to distinguish between two equally illegal, but structurally different, employment practices: retaliation for bringing claims of individual discrimination and retaliation for bringing information forward that concerns harm suffered by others.

**Retaliation for Activities Inconsistent with the Religious Mission of an IHE**

As discussed earlier, the Supreme Court has been quite clear that a school’s religious mission cannot serve as a pretext for unlawful discrimination. However, as a practical matter both

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Congress and the Court have, since Bob Jones, given sectarian schools considerable leeway in allowing employment practices that, in other contexts, would be discriminatory.\footnote{Richard T. Foltin, Reconciling Equal Protection and Religious Liberty, 39-Jan Hum. Rts. 2 (2013).} An observer of these practices would be excused for wondering how it makes sense for the Court to decide that some religiously based discrimination is unreasonable, such as a ban on inter-racial dating, and others, a refusal to hire homosexuals, is not. The answer is a legalistic one. The Court looks to the current state of legal protection either evidenced by State laws or by its own opinions. Thus, in Bob Jones it pointed to its own decision in Loving v. Virginia that held restrictions on inter-racial marriage unconstitutional regardless of religious motivation. It has been less willing to make these decisions in regards to discrimination against homosexuals because there is as yet no national consensus.\footnote{LAMBDA Legal, How the Law Accepted Gays, LAMBDA LEGAL (Apr. 29, 2011).} Indeed, states have made their differences on this issue clear with some explicitly passing legislation prohibiting discrimination based on sexual-preference and others equally explicitly passing legislation prohibiting practices such as same-sex marriage or adoption. Sectarian schools have won cases alleging retaliation against faculty on the basis of sexual orientation and it will be an interesting issue to see how the courts will view similar cases from non-sectarian schools. There is likely to be considerable regional variation.\footnote{Frank Scialdone, Workplace Discrimination: Carving a Public Policy Exception to Ohio’s At-Will Employment Doctrine, 11 L. & SEX. 193 (2002); For an overview of the status of laws prohibiting employment discrimination based on sexual orientation see Employment and Rights in the Workplace, LAMBDA LEGAL, http://www.lambdalegal.org/issues/employment-and-rights-in-the-workplace (last visited July 18, 2012).}

2.1 Internal Legal Protections Against Retaliation

The legal protections discussed so far have all been external to the IHE in that they come from what Kaplin and Lee define as “external sources.” These include Constitutions, statutes, regulations, and judicial opinions. The other source of “law” Kaplin and Lee identify as binding the actions of an IHE is internal. It comes from obligations it imposes on itself. These fall into two major categories: the policies with which it agrees to bind itself and the agreements which it enters into with its employees.

Kaplin and Lee describe “internal law,” as “a keystone” IHE’s
“internal governance systems.” They explain that “higher education institutions create ‘internal law’ that delineates authority and rights, and embodies the rules and procedures, by which the institutions govern themselves.” Finally, they describe “three main sources of internal law” which are “institutional rules and regulations, institutional contracts, and academic custom and use.” In contrast, they describe external law as “constraining” internal law which is “created by the federal government and state and local governments through their own governance processes.”

All IHE’s have two options when developing internal law. They can choose to provide no more protections than are required by external law or they can develop internal law that exceeds their external legal obligations. This study considers the categories of protection and provide examples of how IHEs have created their own procedures within each category. Internal law is especially important in the case of private IHEs, which unlike public IHEs, are not required to provide U.S. Constitutional provisions. Unless the subject of the whistleblowing is a violation of a federal statute that has anti-retaliation provisions attached to it or that meets the requirements of a federal or state qui tam action, contract law offers the primary remedy for a faculty member at a private school who faces an adverse employment action after bringing forward a matter of public concern.

There are two main categories of internal law relevant to protecting whistleblowers from retaliation: explicit contracts and implicit contracts. While they all fall under the legal category of “contract,” there need not be a formal agreement signed by the faculty member and a representative of the IHE in order for it to be binding.

As Kaplin and Lee explain, “[s]ince private institutions are not subject to…constitutional requirements, or to state procedural statutes and regulations, contract law may be the primary or sole basis for establishing and testing the scope of their procedural obligation to faculty members.” What this means is that, an employee of a private IHE who cannot claim protection under the anti-retaliation provisions of a statute binding to her IHE, she

223 KAPLIN & LEE, supra note 35, at 3.
224 Id.
225 Id.
226 Id.
must base her claim on contract. There are two different ways an IHE can form a contractual obligation with a faculty member. The first is a formal contract or letter agreement and the second is through the terms of a faculty handbook or other policy. Although both can be equally binding on the IHE, the first is sometimes described as an “explicit” contract and the second an “implicit contract.”

Protection Against Retaliation Based on Explicit Contracts

An explicit contract takes the form of a document signed by both a faculty member, or his representative, and a representative of the IHE. While many employees of IHEs work without formal contracts, courts usually do find a contractual relationship between faculty and the IHE that employs them. This is based either on an actual contract signed by both parties or on an implied contract, either in the form of a letter of employment which states the terms of employment or in the form of an employee handbook or other publication by the IHE which contains statements about the terms of employment. Collective bargaining agreements between organized groups of faculty members and the IHE are also an example of an “explicit” contract since it is reduced to writing and its terms are available to both parties at the time of its signing. An employee can link her claim of retaliation with the provisions of a specific applicable whistleblower protection provision in a federal or state statute, her only source of protection is contractual. This can either be an actual written contract, either as an individual or through a labor union, or a constructive contract formed by publication of a policy or rule by the IHE in a handbook or website. This was demonstrated in

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227 Id.
229 AAUP, Faculty Handbooks as Enforceable Contracts: A State Guide, at viii (2009) (In the introduction to its publication, Faculty Handbooks as Enforceable Contracts: A State Guide, the American Association of University Professors notes that faculty employees of an IHE “almost always has a contract or a letter of appointment” in contrast to employees at will who have no such document. In addition to what is essentially a direct contract between the individual faculty member and the IHE, “a majority of states have held that contractual terms can at times be implied from communications such as oral assurances, pre-employment statements, or handbooks.”).
Saha v. George Washington University when the District Court for the District of Columbia recognized the Faculty Code and the Faculty Handbook as creating contractual obligations between a faculty member and the university. In that case, the court dismissed 17 of 18 claims because the faculty member did not allege facts which would constitute a breach of either document. However, it let stand an allegation of a “potential breach of contract” based on a provision in the Faculty Code that allowed faculty access to evidence used in a dismissal hearing. the court found that “As for most of the alleged most, even if true, would not constitute breaches of contract.”

Protection Against Retaliation Based on Implicit Contracts

The term “implicit contract” refers to a binding agreement between two parties which may not take the form of a formal writing. In the context of an IHE these can take the form of an operating procedure, a faculty handbook, or even representations made by the IHE on a website or in some other form of publication.

Faculty Handbooks

In addition to the protection offered by individual federal or state statutes, almost all IHEs have Faculty Handbooks which describe their own internal operating procedures. Many of these contain specific mechanisms as protection against retaliation. In public IHEs, the anti-retaliation language of the grievance procedure often tracks that of the particular state’s whistleblower protection statute. For example, the University of Colorado operates a website that accepts anonymous reports of a long list of concerns including:

- Conflicts of interest or fiscal misconduct by CSU System or employees;
- Violations of federal or state law or regulation;
- Serious or recurring violations of Board of Governors policy, or applicable institutional policy, in the performance of official duties;
- Research or scientific misconduct;
- Waste of

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resources, funds or property; Serious or recurring abuse of official authority; Public safety issues; Animal Care and Welfare Concerns. Private schools have considerable flexibility in developing policies related to whistleblowing behavior. Absent of any contract or other agreement in which they wish to bind themselves, they are not required to have any whistleblower protection beyond that associated with specific federal or state statutes. Yet, many do. One extraordinary example is Albion College, which describes itself as “an independent, coeducational residential college . . . committed to the liberal arts tradition” and “historically related to the United Methodist Church” has an unusually detailed whistleblower policy described under the heading “Whistleblower Policy” that “Albion College is committed to maintaining the highest ethical standards.” It asserts that:

All members of the College community have a responsibility to report violations or suspected violations of laws, regulations, College policy or procedure, inappropriate behaviour regarding business practices, accounting or bookkeeping, or use of institutional resources.

The policy goes on to explain that, in addition to the communal responsibility to report violations or suspected violations:

The College has a responsibility to investigate and report to appropriate parties allegations of suspected improper activities and to protect those employees, who, in good faith, report these activities to the proper authority.”

It is clear as well on its anti-retaliation policy, stating, “An employee who retaliates against someone who has reported

or suspected violation in good faith is subject to discipline up to and including termination of employment.\textsuperscript{235}

There is tremendous variety in State law as to how and when a faculty handbook can create an enforceable contract. For example, the American Association of University Professors notes that courts in different states have reached different conclusions on questions like, “[m]ay a faculty handbook become part of a professor’s employment contract based on the university’s established practices, even when no express reference to the handbook exists in that contract?” A New York court found that the terms of a faculty handbook were not incorporated into an agreement between a faculty member and the institution unless the professor could “demonstrate both reliance upon its terms and resulting detriment.” Otherwise, the words of the employment letter alone set out the terms of the relationship.\textsuperscript{236}

In contrast, a court in New Mexico held that a handbook “govern[ed] the relationship between the faculty members and the university’s administration,” even if the professor’s individual contract “made no reference” to it.\textsuperscript{237} “What is the legal effect of a disclaimer in a faculty handbook in which a college or university disavows any intent to be contractually bound by the contents?” and “When a university or college updates its faculty handbook or merges with another institution, does the new or the old handbook control a professors’ claim?” While an employee at a private IHE may have only the provisions of the Handbook to rely on, they also play a role in clarifying the relationship between a public IHE and its faculty. For example, “Do faculty members at public institutions have a constitutionally protected due process and property interest in continued employment based on a handbook’s provisions?”\textsuperscript{238}

Sometimes, State law makes explicit the role of the faculty handbook in resolving disputes. For example, Texas law provides that “standing alone [faculty handbooks] constitute no more than guidelines absent express reciprocal agreements

\begin{itemize}
\item[\textsuperscript{235}] \textit{ALBION COLLEGE: ABOUT ALBION, Whistle-Blower Policy}, http (last visited February 22, 2013).
\item[\textsuperscript{237}] Hillis v. Meister, 483 P.2d 1314 (N.M. App. 1971).
\item[\textsuperscript{238}] \textit{Id.}
\end{itemize}
addressing discharge protocols and, therefore, professor enjoyed no property interest in continued employment or an assurance of tenure.”

### 3.3 Methodology of Scenario Drafting

Most sources trace the origin of creating scenarios of likely events to plan for the future to the U.S. Air Force following World War II. Although these scenarios are based on ones in reported cases, they have been developed to identify the legal issues raised by the facts in the scenario and then engaging in a legal analysis of these issues. Unlike legal analysis whose main goal is to predict the outcome of how a court or agency will decide a specific dispute, scenario drafting is the process of developing a tool in order to study a wide range of future events and of developing options for responding to them. The literature on how to develop scenarios is primarily descriptive. There is, for example, almost nothing written about how to validate scenarios in the way there is on how to test and validate surveys and instruments.

As Professor Aceves explains, scenarios “do not offer predictions” but “rather are stories that are designed to encourage reflection about the future in an organized and creative way.”

As Cairns notes, “There is no one established methodology for constructing scenarios, methods range from simple unstructured models based on intuition and reasoned judgment to highly sophisticated probabilistic algorithms and causal simulation models.”

They go on to identify three main approaches to scenario planning. Aceves and Cairnes use an approach they call “Intuitive Logic.” This method “relies on the development of scenarios from ‘disciplined intuition’ rather than “mathematical or computer simulation models.” They also describe a second approach they call “Trend-Impact Analysis,” which is mainly concerned with “the effects of trends” on future events. It involves collecting data from

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241 Id.
242 Id.
243 Id.
“existing trends” and “extrapolate[ing]” them “into the future.” 244 The third approach they describe is “Cross-Impact” analysis, which “attempt to identify not only the individual probabilities of impacting events . . . but also the interactions between impacting events.” 245 It is therefore a method of taking into account the “interdependencies of events.”

In providing an overview of all three methods, Cairnes concludes that “the central concept underlying scenario-planning models is that there are some elements of the future environment which can be predicted within reasonable confidence intervals but there are other variables which, by their nature, are fundamentally unpredictable.” 246 Given this inherent unpredictability, they note that “the central problem in scenario development, then, is the fact that aside from a limited set of tools, the task is essentially a creative one and the process is ‘more art than science.” 247

In addition to the methods Cairns describes, the Central Intelligence Agency has developed several methodologies for creating scenarios that predict the result when several different events happen at once. 248 Called a method of generating “corrected probabilities” this analysis allows the researcher to predict what would happen to military preparedness if an earthquake happened at the same time as a pandemic flu epidemic, by studying what is known about the results of each event happening alone and then “forecasting . . . the interdependencies of events.” 249

Explaining the role of scenario analysis in business organizations, Postma et al, write a “scenario is an internally consistent view of what the future might turn out to be, not a forecast but one possible future outcome.” 249 They studied the effects of having managers develop scenarios in order to develop new products. They found that the process of developing
scenarios helped managers to learn “how and to what extent the policy environment is subject to change, which changes there will be, which consequences these changes might have, how they can be anticipated, and how to act upon this.” Presently, the most literature on methodologies of developing scenarios comes from the field of Future Studies which Piiranien, et al. describe as an effort to answer the question, “what ought to be in the future for us to reach these certain goals?” Although so far no published source explicitly compares, legal analysis to Future Studies a comparison between the two shows their similarities. In legal analysis, the goal is to predict how a court would decide a case in the future based on decisions, and other information, from the past. Future Studies considers options for responding to future events which it models according to information about past events. Given this similarity of goals, it should not be surprising that the law makes heavy use of scenarios in both teaching legal analysis and more directly in presenting legal arguments to the courts. A legal argument is essentially the construction of a scenario for the judge to endorse. As one handbook to legal reasoning advises:

An excellent way to learn to apply precedent and to make persuasive legal argument is to start with a hypothetical issue that has not yet been decided by the Court and then to develop the arguments that could be made to the Court on both sides of the issue... [This is]... the basic structure of many law school examinations.

The job of the lawyer is to convince the judge that the scenario, which is a legal interpretation favorable to her client, is an accurate one based on past information. Recent research shows that even Supreme Court Justices often do not know what conclusions their colleagues will reach even though the consensus of the Court will become the right answer to the legal

250 Id.
problem brought before them.\textsuperscript{253} A guide for new law students explains that the best way to study is to create “fact examples that illustrate the coverage of each rule” because “rules are fact specific.”\textsuperscript{254} Whether called “fact examples,” “vignettes” or “scenarios” these constructions are the foundation for legal analysis.

This method is particularly suitable for law because, unlike fields where all conditions can be controlled, it is impossible to actually create an experiment on which to base a prediction of a future result. It is not possible to request that a court supply an advisory opinion in response to a hypothetical question.\textsuperscript{255} In a book intended to explain legal reasoning to law students, Professor William Huhn writes that “[t]he study of law is not a science. Rules of law are not immutable like laws of nature. Rules of law do not describe objective truth, they reflect subjective intentions.”\textsuperscript{256} For that reason, “[t]he lawyer’s task is not to deduce the law from an unchanging set of first principles, but rather to predict how the law will emerge from a number of sources and a welter of conflicting values.”\textsuperscript{257} More specifically, within the U.S. legal system, only a person who has suffered a legally recognized harm can bring an action in court. This is called having standing and it is her burden to prove that the person she is bringing it against was the direct cause of her harm. As one law review note explains:

> The Supreme Court has taught that this requirement gives life to the distinction between academic and judicial work: it tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.\textsuperscript{258}


\textsuperscript{254}John Delaney, How to Do Your Best on Law School Exams (2001).

\textsuperscript{255}Van Geel, supra note \textsuperscript{365}, at 41.

\textsuperscript{256}Huhn, supra note 3\textsuperscript{21}, at 10.

\textsuperscript{257}Id.

\textsuperscript{258}Indraneel Sur, How Far Do Voices Carry: Dissents From Denial of Rehearing En Banc, 2006 Wis. L. Rev. 1315, 1335, n.188 (quoting ).
Moreover, like scenarios that predict future events, before a court issues a decision there is no right answer. The “right” answer is the one announced by the court of controlling jurisdiction.\textsuperscript{259}

The CIA method relies on mathematical analysis of probabilities. Lawyers generally do not engage in this kind of predictive analysis, although political scientists do. Instead, lawyers rely on more qualitative heuristics such as a general belief that Congress is likely to draft laws in the future similar to ones they have drafted in the past. For example, Congress often adds, or strengthens, whistleblower protection to existing statutes in order to increase enforcement. They do so based on the results of adding similar protections in other statutes.

3.3.1 Weaknesses of the Scenario Method

The weakness of the scenario method is that rather than studying an actual set of facts, it is studying a hypothetical one. Describing these weaknesses, Olli Pitkänen of the Helsinki Institute for Information Technology writes that:

The [scenario] method has some noteworthy threats to validity. I may make mistakes in defining the factors, choose wrong attributes, create scenarios that do not represent adequately the future situations, analyze the scenarios to insufficient depth, make erroneous conclusions, identify legal challenges incorrectly or insufficiently, and finally assess and therefore prioritize some issues erroneously.

Moreover, he writes that:

From an interpretivist/critical perspective it is not possible to create an accurate model of reality in the first place. Instead, the reality is interpreted and reinterpreted in various social contexts, aiming at exposing relevant aspects and viewpoints of the reality for a particular discourse in a particular context. Therefore, instead of formal

\textsuperscript{259} William H. Rehnquist, The Supreme Court 255 (2d ed. 2001) (“There simply is no demonstrably ‘right’ answer to the question involved in many of our difficult cases.”).
validity, what matters is the pragmatic and operational relevance of the results to the stakeholders and the context.\textsuperscript{260}

The concerns he expresses are similar to Cairnes, et al. who conclude their overview of scenario methodology with the observation that “[a]ll the procedures described in the literature rely heavily on subjective judgments. . .”\textsuperscript{261}

\subsection{3.3.2 Description of Scenarios}

The scenarios considered here raise the kind of issues where employees of IHEs are likely to find themselves in a position of having to choose between bringing forward information or not. The scenarios are set in public, private and faith-based IHEs to allow an analysis based on the legally significant differences between the way these kinds of IHEs are required by U.S. law to treat employees who disclose or bring forward information they learned during the course of their jobs.

\subsection{3.5 Steps for Completion of the Article}

\subsection{3.6 Conclusion}

In conclusion, this article used a method of applying legal analysis to scenarios in order to assess the extent of protection available to specific categories of IHE employees. It did so based on an analysis of primary legal source materials, cases, statutes, and regulations. It also considered secondary legal sources that provide other lawyer’s analysis of the source materials. Finally, it incorporated information from research describing the characteristics of whistleblowers and their experiences. It applied standard legal tools of analysis used in the practice of law to predict how courts will apply the law. Within the field of scholarly legal research, this method is called a “Doctrinal” or “Black-Letter” methodology because its focus is on finding rules and applying them rather than on a “sociolegal” or “empirical” approach that would study their effectiveness.

\textsuperscript{260} Id.

\textsuperscript{261} Cairnes, supra note 353, at 10.
SECTION 4 – SCENARIO ANALYSIS

4.1 Introduction

The purpose of this section is to review and analyze the legal protections available to employees of institutions of higher educations (who engaged in whistleblowing behavior. Each scenario is based on actual cases and is designed to include facts that significantly affect the legal result. The scenarios consider the following legal questions:

What are the internal sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?

What are the external sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?

What U.S. Constitutional protections are available?

What Federal Statutes provide protections?

What State Laws provide protection?

What are the significant gaps in protection against adverse employment actions for good faith disclosures of information?

4.3

What are the internal sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?

Kaplin and Lee describe external sources, or to use their words “internal law,” as “a keystone” IHE’s “internal governance systems.”\(^{262}\) They explain that “higher education institutions create ‘internal law’ that delineates authority and rights, and embodies the rules and procedures, by which the institutions govern themselves.”\(^{263}\) Finally, they describe “three main sources of internal law” which are “institutional rules and regulations, institutional contracts, and academic custom and

\(^{262}\) KAPLIN & LEE, supra note 35, at 3.

\(^{263}\) Id.
use.” In contrast, they describe external law as “constraining” internal law that is “created by the federal government and state and local governments through their own governance processes.”

In addition to internal law, all IHEs face some form of external regulation. This external regulation will shape and, as Kaplin and Lee phrase it, “circumscribe” their internal procedures. However, all IHE’s have two options when developing internal law. They can choose to provide no more protections than are required by external law or they can develop internal law that exceeds their external legal obligations. This article considers the categories of protection and provides examples of how IHEs have created their own procedures within each category. Internal law is especially important in the case of private IHEs, which unlike public IHEs, are not required to provide U.S. Constitutional provisions. Unless the subject of the whistleblowing is a violation of a federal statute that has anti-retaliation provisions attached to it or that meets the requirements of a federal or state qui tam action, contract law offers the primary remedy for a faculty member at a private school who faces an adverse employment action after bringing forward a matter of public concern.

There are two main categories of internal law relevant to protecting whistleblowers from retaliation: explicit contracts and implicit contracts. While they all fall under the legal category of “contract,” there need not be a formal agreement signed by the faculty member and a representative of the IHE in order for it to be binding.

4.3.1 Protection Against Retaliation Based on Explicit Contracts

An explicit contract takes the form of a document signed by both a faculty member, or his representative, and a representative of the IHE. While many employees of IHEs work without formal contracts, courts usually do find a contractual relationship between faculty and the IHE that employs them. This is based either on an actual contract signed by both parties or on an implied contract, either in the form of a letter of employment which states the terms of employment or in the form of an employee handbook or other publication by the IHE which

264 Id.
contains statements about the terms of employment.\textsuperscript{265}

4.3.2 \textit{Protection Against Retaliation Based on Implicit Contracts}

The term “implicit contract” refers to a binding agreement between two parties that may not take the form of a formal writing.\textsuperscript{266} In the context of an IHE these can take the form of an operating procedure, a faculty handbook, or even representations made by the IHE on a website or in some other form of publication.

4.3.3 \textit{Operating Procedures}

In addition to the protection offered by individual federal or state statutes, almost all IHEs have their own internal operating procedures and many of these contain specific mechanisms as protection against retaliation. In public IHEs, the anti-retaliation language of the grievance procedure often tracks that of the particular state’s whistleblower protection statute. For example, the University of Colorado operates a website that accepts anonymous reports of a long list of concerns including:

- Conflicts of interest or fiscal misconduct by CSU System or employees;
- Violations of federal or State law or regulation;
- Serious or recurring violations of Board of Governors policy, or applicable institutional policy, in the performance of official duties;
- Research or scientific misconduct;
- Waste of resources, funds or property;
- Serious or recurring abuse of official authority;
- Public safety issues;
- Animal Care and

\textsuperscript{265} AAUP, \textit{Faculty Handbooks as Enforceable Contracts: A State Guide}, at viii (2009) (In the introduction to its publication, Faculty Handbooks as Enforceable Contracts: A State Guide, the American Association of University Professors notes that faculty employees of an IHE “almost always has a contract or a letter of appointment” in contrast to employees at will who have no such document. In addition to what is essentially a direct contract between the individual faculty member and the IHE, “a majority of states have held that contractual terms can at times be implied from communications such as oral assurances, pre-employment statements, or handbooks.”).

\textsuperscript{266} Kaplin & Lee at 128.
Welfare Concerns. 267
Private schools have considerable flexibility in developing policies related to whistleblowing behavior. Absent of any contract or other agreement in which they wish to bind themselves, they are not required to have any whistleblower protection beyond that associated with specific federal or state statutes. Yet, many do. One extraordinary example is Albion College, which describes itself as “an independent, coeducational residential college . . . committed to the liberal arts tradition” and “historically related to the United Methodist Church” has an unusually detailed whistleblower policy described under the heading “Whistleblower Policy” that “Albion College is committed to maintaining the highest ethical standards.” It asserts that “All members of the College community have a responsibility to report violations or suspected violations of laws, regulations, College policy or procedure, inappropriate behaviour regarding business practices, accounting or bookkeeping, or use of institutional resources.” The policy goes on to explain that, in addition to the communal responsibility to report violations or suspected violations, “The College has a responsibility to investigate and report to appropriate parties allegations of suspected improper activities and to protect those employees, who, in good faith, report these activities to the proper authority.” 268 It is clear as well on its anti-retaliation policy, stating, “An employee who retaliates against someone who has reported or suspected violation in good faith is subject to discipline up to and including termination of employment.” 269
There is tremendous variety in state law as to how and when a faculty handbook can create an enforceable contract. For example, the American Association of University Professors notes that courts in different states have reached different conclusions on questions like, “May a faculty handbook become part of a professor’s employment contract based on the university’s established practices, even when no express reference to the handbook exists in that contract?” A New York

court found that the terms of a faculty handbook were not incorporated into an agreement between a faculty member and the institution unless the professor could “demonstrate both reliance upon its terms and resulting detriment.” Otherwise, the words of the employment letter alone set out the terms of the relationship.270 In contrast, a court in New Mexico held that a handbook “govern[ed] the relationship between the faculty members and the university’s administration,” even if the professor’s individual contract “made no reference” to it.271 “What is the legal effect of a disclaimer in a faculty handbook in which a college or university disavows any intent to be contractually bound by the contents?” and “When a university or college updates its faculty handbook or merges with another institution, does the new or the old handbook control a professors’ claim?” While an employee at a private IHE may have only the provisions of the Handbook to rely on, they also play a role in clarifying the relationship between a public IHE and its faculty. A Handbook might, for example, clarify a question like “[d]o faculty members at public institutions have a constitutionally protected due process and property interest in continued employment based on a handbook’s provisions?”272 Sometimes, State law makes explicit the role of the faculty handbook in resolving disputes. For example, Texas law provides that “standing alone [faculty handbooks] constitute no more than guidelines absent express reciprocal agreements addressing discharge protocols and, therefore, professor enjoyed no property interest in continued employment or an assurance of tenure.”

4.4 Introduction to Scenario Analysis for Understanding External Legal Protections for Whistleblowers

Each of the four scenarios consider the question “What are the external sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?”

272 Id.
The analysis of each scenario is divided into three sections:

What U.S. Constitutional protections are available?
What Federal Statutes provide protections?
What State Laws provide protection?

After utilizing the four scenarios to identify and analyze external legal protections, this article will then consider the significant gaps in protection against adverse employment actions for good faith disclosures of information?

The discussion of available external legal sources of law applicable to the faculty member in each scenario will inform the answer to Research Question #3 by pointing out the legal requirements that must be proved in order to obtain the protection against retaliation offered by the various provisions of law.

Because the available legal protections span the entire range of state and federal, public and private, and internal and external law, not every scenario will invoke every legal issue. However, in order to thoroughly analyze each scenario, each analysis is conducted using the same organizational structure. The scenarios consider: (1) a situation where there is specific statutory protection for the content of the whistleblowing; (2) a scenario where the faculty member can seek protection under his state’s whistleblower protection act; (3) a scenario where a faculty member is eligible to bring suit under the Federal False Claims Act; and (4) a scenario where the faculty member is obligated to report under the laws of his state.

As discussed earlier, there are few if any legal definitions of the term “Whistleblower.” Instead, it is an informal term used by courts, legislatures, employees and employers alike to describe an individual who risks retaliation from his employer in order to bring forward information of public interest that his employer would have preferred to keep private. The analysis will consider the major factors relevant to determining whether or not the employee is eligible to seek protection as a whistleblower. These factors include:

What kind of IHE is involved? (public, private, faith-based?)
In what state is the IHE located?
What kind of information did the Whistleblower bring forward?
To whom was the information given?
What statutes are implicated?
When did the incident happen?
What is Whistleblower’s employment status (e.g., tenured, tenure-track, contract, no contract)?

4.5 Analysis of Scenario One: The Bearer of Bad News

4.5.1 Purpose of Scenario One

The purpose of this scenario is to analyze a fact situation that invokes a number of different areas of protection including a Federal Statute with explicit whistleblower protection. Here, the professor involved obtains second hand information about possible illegal activity that he takes to his supervisor.

4.5.2 Background to Scenario One

Title IX is enforced by the Department of Education’s Office of Enforcement (DOE). In its 2012 Annual Report, the DOE reported that it received “nearly 3,000 Title IX complaints.” While many complaints involved several different issues, the DOE identified 923 of these complaints contained allegations of sex discrimination in athletics.273 It reports that:

Female student athletes often received inferior medical and training services from less experienced staff. In addition, unlike the men’s teams, when the women’s teams went on “away” games, they were crowded into hotel rooms or had to make long journeys back home on the same day as their games.274

Moreover, 483 of the cases involved issues of retaliation.275

4.5.3 Description of Scenario One

Professor A has been employed in a tenure-track position at an IHE for four years. His annual reviews have been excellent and he anticipates receiving tenure in two years when he is eligible

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274 Id. at 7
275 Id.
to apply. He teaches a course every semester that is popular with student athletes. One of the students, a young woman on the soccer team, submitted a paper that complained that the trainers for the male athletes are professionals but the female athletes are trained by graduate students. The student states that she is concerned that this situation is resulting in significant harm to female athletes. After reading the paper and unsure who to tell about the student’s concerns, Professor A seeks out his department chairperson to discuss the information. He tells the chairperson that he believes the student is accurately reporting the facts as she experiences them. His department chairperson is a strong supporter of the university’s athletic program. Shortly after meeting with his chairperson, Professor A receives a letter stating that his contract will not be renewed at the end of the year and, until then, he will not be teaching the course. The letter states no reason for the non-renewal. Professor A believes both the non-renewal and the reassignment are in direct retaliation for his report to the departmental chairperson.

4.6 Discussion of Scenario One

This scenario is deliberately ambiguous. It raises issues of the difference between the employment protection available to public employees and private ones. It also considers the requirements for satisfying the anti-retaliation provisions of Title IX. This discussion addresses Research Question #2 and its subparts by reviewing the applicable external laws.

4.6.1 What U.S. Constitutional protections are available?

Employees of public IHEs who face retaliation for whistleblowing may be able to invoke Constitutional protections unavailable to employees of private IHEs. The U.S. Supreme Court has, specifically, recognized that professors working at public IHEs can have a property or liberty interest in continued employment. Therefore, when a professor at public IHE is dismissed, as in the case of Professor A, he may be entitled to “procedural safeguards before the decision becomes final.”

When the dismissal is based on whistleblowing behavior, there

277 Kaplin & Lee, supra note 35, at 229.
is an additional overlay of First Amendment protection.

*Due Process Protection*

The first source of Constitutional protection available to professors at public IHE’s who face an adverse employment decision is the Due Process Clause of the Fourteenth Amendment, which protects against a governmental taking of property without due process of law. In two different 1972 decisions the U.S. Supreme Court recognized that faculty members could have both property and liberty interests in their jobs and described IHE’s obligations to satisfy Due Process. Based on the facts of the scenario, Professor A has not had or been offered any kind of hearing. Therefore, Professor A may make a claim that his chairperson was acting on behalf of the state. If a public IHE takes action against a faculty member with an expectation of continuing employment, either through tenure or through another form of contract, it must provide a “fair hearing.” The specific requirements of a “fair hearing” vary according to the severity of the property interest being taken away. The Supreme Court in *Cleveland Board of Education v. Loudermill*\(^{278}\) established the necessary components of a hearing to dismiss a public employee. First, before a decision can be made to dismiss a tenured public employee he “is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence and an opportunity to present his side of the story.”\(^{279}\) Although the termination hearing does not have to mirror a court proceeding, the employee has a right to notice of the reasons for dismissal, to know when the hearing will be scheduled, to have a “meaningful opportunity to be heard” and to have an “impartial panel” make the decision.

However, Professor A’s status as an untenured faculty member employed on a year to year contract means that he probably cannot establish that he had an expectation of being employed beyond the terms of his contract. In both *Board of Regents v. Roth*\(^{280}\) and *Perry v. Sindermann*,\(^{281}\) the U.S. Supreme Court distinguished between faculty members who had a property

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\(^{279}\) *Id.* at 546

\(^{280}\) Bd. of Regents v. Roth, 408 U.S. 564 (1972).

\(^{281}\) Perry v. Sindermann, 408 U.S. 593 (1972).
interest in employment because of expectations created by the university and those who were employed on a year to year basis. The Court in both cases found that a faculty member working pursuant to a contract has no protected interest in having it continue. Moreover, the U.S. Supreme Court in Perry found that being on the tenure track did not create an expectation of continued employment. Therefore, there was no deprivation of a property interest for contract non-renewal. It wrote, “It stretches the concept too far to suggest that a person is deprived of ‘liberty’ when he simply is not rehired in one job but remains as free as before to seek another.” The Court explained that had the university taken actions which hindered the professor’s finding another job such as falsely claiming “that he had been guilty of dishonesty or immorality” or if “they take steps which would “bar the [faculty member] from all other public employment in state universities,” then there might be a deprivation.

Federal Courts applying Roth and Sindermann have emphasized that a professor’s expectations of continued employment are based on policies and promises made voluntarily by the employing institution. There is no Constitutional obligation to provide tenure. However, once a professor is tenured, he has an expectation of continued employment. A professor who has a year to year contract has no such expectation once the contract has expired.

First Amendment Protection

Even if Professor A has no expectation of continued employment which would trigger protection under the Due Process Clause, if Professor A’s employer is a public IHE, he can make a claim, based on the First Amendment, that the decision not to renew his contract was based on his communications with his chairperson about the potential sex discrimination. This is because, again, a public IHE acts with the authority of the state.

Although professors at both public and private IHEs have the right to be free of government infringement of their First Amendment, when the alleged deprivation comes from the employing IHE itself, as it does in Scenario One, only professors

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282 Id. at 573-75.
283 Roth, 408 U.S. at 567; Perry, 408 U.S. at 599.
at public IHEs can invoke the Constitutional protection. As Kaplan & Lee explain, “[w]hen the restraint is internal...for example, when a provost or dean allegedly infringes a faculty member’s free speech, the First Amendment generally protects only faculty members in public institutions.” The First Amendment to the U.S. Constitution states that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Public employees can sue their employers for violations of any of their Constitutional rights under the authority of 42 U.S.C. § 1983 which is referred to as a “Section 1983 Action.” Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution.

There are several ways in which the events in Scenario One could trigger a First Amendment claim pursuant to Section 1983. The most likely are the ones described below. First, the IHE’s actions could be seen as a restriction on Professor A’s right to speak as a citizen about a matter of public concern. Second, the IHE’s actions could be characterized as suppressing “academic scholarship or college instruction.” Third, the IHE’s actions could be characterized as depriving Professor of a public forum for speaking based on its dislike for the content of his words. Each of these will be discussed in more detail below.

In order to prevail in an action based on a violation of his First Amendment rights, Professor A will have to prove all four

284 KAPLIN & LEE, supra note 35, at 196.
elements established by the Supreme Court. Failure to prove any one of them will result in his case being dismissed:
that his speech was protected by the First Amendment;
that his employer was aware of the speech;
that he suffered an adverse employment decision; and
that the adverse employment decision was a result of his protected speech.\textsuperscript{286}

Professor A can prove these factors, then he makes a prima facie case and the burden shifts to the IHE to prove a “nondiscriminatory basis” for its decision.

\textit{Speech on a Matter of Public Concern}

The strongest argument Professor A has that his speech was protected by the First Amendment is that he was speaking about a matter of public interest. In addition to having a property or liberty interest in continued employment, all public employees have the same protection as any other citizen from government suppression of their freedom of speech. However, this freedom is limited when the speech is pursuant to their official duties as opposed to their private statements as an individual. Because whistleblowing is an activity inherently related to information acquired by an employee but not available to the public, it receives much less protection than would speech involving matters of private concern.

In 2007 the United States Supreme Court made the distinction clear in \textit{Ceballos v. Garcetti}, stating that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”\textsuperscript{287} Since then, federal courts have applied the \textit{Garcetti} standard many times and have developed standards for distinguishing between public employees’ private and employee-related speech.

The \textit{Garcetti} Court endorsed the test developed in two earlier cases that in order to determine whether a public employee was discharged because he exercised his rights under the first amendment, the employee must prove that he was speaking as a citizen rather than as an employee\textsuperscript{288} and “whether the speech

\textsuperscript{286} \textit{Id.}

\textsuperscript{287} \textit{Id.}

\textsuperscript{288} \textit{Id.}
was on a topic of public concern.” As the *Garcetti* Court recognized, “‘conducting these inquiries sometimes has proved difficult.”²⁸⁹ As a federal district court in Louisiana explained recently, “although the distinction between matters of public concern and matters of private concern is not always clear, matters of public concern are generally considered to be “any matter of political, social, or other concern to the community.”²⁹⁰:  

Courts of Appeal all over the country have interpreted this provision and, for the most part, found that the speech was not as a private citizen and, therefore, not protected. For example, the Seventh Circuit Court of Appeals has taken the position that, “a public employee’s speech was not protected by the First Amendment whenever the employee’s job duties arguably included the kind of speech at issue.”²⁹¹ 

Over the past 25 years, the U.S. Supreme Court has decided a series of cases intended to establish the boundaries of First Amendment protection available to public employees. *Garcetti v. Ceballos* is the most recent decision in which the Court directly limited the protection for public employees whose statements are directly related to their “official employment responsibilities.”²⁹² The Court found that Ceballos, a deputy district attorney, was speaking on a matter of public concern but was not protected because he was doing so as part of his assigned job duties. The *Garcetti* court explained that “the [e]xpressions were made pursuant to his [job] duties…. That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline.”²⁹³ 

Professor A’s statement that he believed the university was discriminating in its allocation of resources for women’s sports concerns a violation of Federal law, Title IX.²⁹⁴ Therefore, it

²⁸⁹ Id. at 424.
²⁹² See Tran, at 45 AKRON L.R. 982.
²⁹³ Id.
would meet the first requirement for protected speech by a public employee because it involved his expressing an opinion about a “legitimate” matter of “public concern” as opposed to an issue that only affected him personally. However, the Supreme Court in *Garcetti* severely limited this protection to cases where the public employee was speaking about matters of public concern other than ones he knew about because of his job duties. Therefore, it would be likely that a court reviewing Professor A’s case in light of *Garcetti* would find that the knowledge about a possible Title IX violation came directly from his employment responsibility to read student papers submitted in his class. In this case, Professor A’s speech would not be protected. In contrast, had Professor A faced retaliation after writing an op-ed piece in the local newspaper criticizing the unequal treatment of men’s and women’s sports based on publically available information, the *Garcetti* holding would not deprive him of jurisdiction because he would be expressing an opinion, just as any private citizen would, not based on information he acquired as part of his job.

The *Garcetti* opinion was the product of a divided Court and one of the greatest points of contention was its meaning in the context of higher education. Responding in the main opinion to criticisms in the dissenting opinions, Justice Kennedy wrote for the Court that:

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.  

Justice Souter, in a strongly worded dissent, expressed concern that the holding of the case was “spacious enough to include

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295 *See* KAPLIN & LEE, *supra* note 35, at 197.
296 *Garcetti*, 547 U.S. at 424.
even the teaching of a public university professor.” He went on to write that he “hop[ed] that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write pursuant to…official duties.” In other words, the Garcetti opinion, as applied to a professor, could be read as removing all First Amendment protection. This is because if a professor’s job is to teach and write, then he has no protection for the content of what he teaches and writes. Since Garcetti there has been no decided case that directly raises the issue of protection from adverse employment in the situation Justice Souter feared. Applying this test in 2011, the Tenth Circuit Court of Appeals found that a professor who had written letters to the newspaper and paid for an advertisement criticizing the president of the university for “conspiring to shift engineering to the University of Idaho so that Idaho State University could create a medical school” was acting as a private citizen. In doing so, it overturned the decision of the court below that had emphasized the fact that the professor identified himself by job title in the letters. The Court of Appeals explained that:

[T]he issue is not whether Plaintiff identified himself as a University professor at the time he made the statements. It is also not whether his criticisms concerned administration actions that would impact his official duties or that the statements he made were based upon information he acquired while performing those duties. The fact that the speech at issue concerned the subject matter of the public employee's employment is not dispositive because “[t]he First Amendment protects some expressions related to the speaker's job.” The controlling issue is whether Plaintiff's statements were made pursuant to his duties as a professor at the University.

297 Id at 438-39 (Souter, J., dissenting).
299 Id.
The Tenth Circuit Court of Appeals concluded that because there was neither evidence that the professor’s “official duties included making public statements on behalf of the University regarding the subject matter of his letters” nor that “his employment responsibilities included creating the statements that were published in the newspaper…his speech was [as] a private citizen.”

The Court further held that even though his letters did include “personal grievances” the “issue of creating a medical school…was a matter of public concern.”

*First Amendment Protection for the Content of the Speech: Academic Freedom*

Another way Professor A could invoke First Amendment Protection is if he can prove that his speech is not related to his job duties, is of public interest, and is being suppressed by the university based on its desire to suppress criticism about the athletics program. This can be a subtle distinction, but in Scenario One it means is that if the IHE’s decision to reassign the class and not renew Professor A’s contract was based on his views which the IHE didn’t like, then there is a separate category of First Amendment Protection.

The U.S. Supreme Court recognizes a different between suppression of speech based on the need of a public employee to control the flow of information and suppression of speech based on governmental dislike of its content. Whether or not preventing Professor A’s teaching of the class or not renewing his contract is a retaliatory action depends on whether or not the IHE attempted to prevent students from hearing what he had to say. If so, the circumstances would put the IHE’s actions into the category of the most serious restraint on speech: prior restraint based on official dislike of the speech’s content. A considerable body of case law exists to protect the content of a professor’s speech in class and even his or her right to teach a class. However, unless Professor A can prove that his reassignment is an attempt to keep students from hearing his views, he cannot claim any right to teach a particular class.

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300 Id.
301 Id.
302 Areen, 97 Geo. L.J., at 946.
Has Professor A Suffered Retaliation Under the First Amendment?

There are no facts in Scenario One that clarify whether the chairperson made the decision not to renew Professor A’s contract based on their exchange about possible safety issues or sex discrimination, or even if the decision was the chairperson’s to make. Even if the Chairperson was the decision-maker, it can be very difficult to prove the basis on which an employment decision was made. Assuming Professor A can prove that his employment decision was based upon the content of his speech, the next difficult question is whether he has suffered legally actionable retaliation as a result of exercising a right granted by the U.S. Constitution.

Is a Change of Teaching Assignment Retaliation in a First Amendment Case?

Even if Professor A succeeds in proving that the content of his speech was protected by the First Amendment, he still faces the challenge of proving that his employer was aware of the speech and that he suffered an adverse employment action as a result. Finally, even if he can prove that his employer was aware of his speech and retaliated based on that awareness, Professor A must prove that his contract non-renewal and his removal from the classroom are, in fact, acts that qualify as prohibited retaliation. Federal Courts define retaliation narrowly as job loss when reviewing incidents involving the First Amendment. As noted earlier, the U.S. Supreme Court has held directly that a decision to renew a contract is not considered termination. Judge Easterbrook of the Seventh Circuit Court of Appeals considered the issue of class re-assignment in declining to issue an injunction to prevent a schedule change. Although he acknowledged that “the loss of teaching or scholarly experience in a particular field” could be harmful to a professor, the university’s interest in making a teaching schedule outweighed the individual professor’s interest in teaching a specific

304 Frank S. Ravitch, Playing the Proof Game: Intelligent Design and the Law, 113 PENN ST. L. REV. 841, 845 (2009)  (citing Perry Education Ass’n v. Perry Local Educators Ass’n, 460 U.S. 37 (1963)).
306 Webb v. Board of Trustees of Ball State University, 167 F.3d 1146, 1149(1999).
He explained: “[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.”

It is very unlikely that a change of teaching assignment would be found to be retaliation in a first amendment case.

Are the IHE’s Actions an Impermissible Forum Closure?

Some professors who face discipline for the content of their teaching might claimed a First Amendment violation based on the Public Forum Doctrine. This has become a popular although unsuccessful argument of those who seek to teach the theory of creationism along with evolution in IHE science classes. Although this area of the law has yet to be clearly explained by the Supreme Court in the context of an IHE classroom or indeed in any other location. A law review article titled, The Ongoing Mystery of the Limited Public Forum Doctrine describes how difficult it is to apply. However, this is inapplicable to Professor A’s situation because the university has no obligation to provide any kind of public forum for faculty members to express their concern about possible violations of the law. As Professor Richard Ravitch explains, a classroom at an IHE is, at most, a Limited Public Forum and “access to a limited public forum requires that one meet the terms of the forum.” An IHE does not have to grant anyone a forum. However, if it does it cannot distinguish between those whose views it agrees with and those whose views it does not agree with. This is a practice recognized by the U.S. Supreme Court as an attempt to prevent speech by limiting access to those whose viewpoints it seeks to suppress. Also, Professor A is

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307 Id. at 1150.
308 Id.
311 113 Penn St. L. Rev. at 845.
not entitled to protection under the principles that require public universities to make available “public forums” for speech. Several federal cases have held that, because an employee’s office or classroom was located on the campus of a public IHE, this does not constitute depriving him of a “public forum” for the purposes of First Amendment protection. The University has no obligation to provide Professor A with a forum to express his views on the athletics program. However, it cannot deprive him and at the same time make space available to someone whose views the IHE endorses. The Supreme Court has recognized that the crucial question [for application of time, place and manner restrictions] is whether the manner of expression is incompatible with the normal activity of a particular place at a particular time. The Supreme Court has established the following factors for determining whether or not speech is protected because it takes place in a public forum. These are: “whether the speech occurred in a (1) traditional public forum, (2) designated public forum, or (3) limited/nonpublic forum, in order to then determine the level of scrutiny that is applied to governmental regulation of speech within the forum. For a traditional public forum and a designated public forum, any regulation of speech must survive the highest level of First Amendment scrutiny. For a limited public forum or a non-public forum, a regulation of speech will be upheld so long as the regulation is “viewpoint neutral and reasonable.”

Courts applying this claim to public universities have consistently held that “[a university] classroom constitutes a nonpublic forum, meaning that school officials could regulate the speech that takes place there ‘in any reasonable manner.’” However, once a university has established rules for speech in a limited public forum it must follow them without regard to whether or not it likes the viewpoint of the speaker. “must respect the lawful boundaries it has set for itself.”

2002 (2010) (“[I]f the government is not vigilant in maintaining the forum's focus or otherwise opens the forum for general discussion, it cannot exclude speakers based on subject matter without satisfying strict scrutiny.”).

313 See KAPLIN & LEE, supra note 35, at 201 (citing Cal. Dep’t of Educ., 97 F.2d 1204, 1209, 1214-15 (9th Cir. 1996)).
315 33 Nova L. Rev., at 332.
316 Id. at 328-329.
317 See also Blake Lawrence, The First Amendment In The Multicultural Climate Of
This remains a topic of considerable debate in the area of content based restrictions. For example, one law student note critical of the *Garcetti* decision have argued that “the public employee speech doctrine to academic speech is inappropriate because a public university is more akin to a forum for the dissemination of ideas than a traditional public employer, which the government created for the purposes of disseminating a coherent government message.”  

But a limited public forum is one that is not completely open to anyone who wishes to speak, but rather available within certain “time, place and manner restrictions.” This means that a university does not have to open its classrooms to anyone who wishes to come in and address students, but once it has hired a professor and assigned him a course, it “cannot discipline faculty for their viewpoints.”

In other words, although a public IHE can decide the content of a course and has discretion to assign a professor to teach it based on his qualifications, it cannot use disagreement with the faculty’s point of view within that content area as a criterion. As Professor Alan Chen explains, this distinction between the ability to dictate content but not viewpoint creates a “paradox” because “by definition, curricular decisions are a form of subject matter discrimination. A university's requirement that its chemistry professors teach organic chemistry, and not political science, is content based, as is an English department's decision to offer a course in Nineteenth Century Romantic Literature rather than Postmodern Literary Criticism.” On the other hand, he argues, “the law ought not immediately treat such selectivity as suspect because it is so closely and clearly related to the university's academic mission.” He concludes on the side of deference stating that “[w]e may or may not agree with the decision, but we are not usually concerned that the university

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319 Id.


321 Id. at 968.

322 Id. at 967.
is trying to prevent students' exposure to political science or postmodern thought.\textsuperscript{323}

So although professors have argued for expansion of the public forum doctrine to the classroom, so far courts have declined to accept this argument. In conclusion, even if a court were to find that Professor A’s classroom was a “limited public forum” the University would still be well within its rights to determine whether or not to renew his teaching contract. Summarizing the current state of law regarding academic freedom, Professor Chen opines that “Few would argue with the proposition that the Supreme Court would do well to establish clearer guidance about the existence and scope of a constitutional doctrine of individual academic freedom. Despite the best efforts of lower courts and academic commentators, this area of law remains enigmatic.”\textsuperscript{324}

\textit{What Federal Statutes provide protections to Professor A?}

Although the U.S. Constitution only protects employees of public IHEs from the actions of their employers, and not employees of private IHEs, most Federal statutes are applicable to public and private IHE employees based upon conditions imposed by receipt of Title IV financial assistance or IRS non-profit status. For example, all employers in the United States must comply with Federal laws that prohibit discrimination based on age, race, or disability. Many of the federal statutes containing whistleblower protection are specific to employees in a particular industry. The Department of Labor has been designated to enforce twenty different statutes with specific whistleblower protections. These statutes are narrowly tailored to regulate behavior in three major categories: Environmental and Nuclear Safety Laws; Transportation Industry Laws; Consumer and Investor Protection Laws.\textsuperscript{325}

The statutes most relevant to Scenario One are the two federal statutes that primarily extend whistleblower protection to activity likely to occur on an IHE: Title IX of the Education Amendments of 1972 and the Jeanne Clery Disclosure of

\begin{footnotes}
\item[323] Id.
\end{footnotes}
Campus Security Policy and Campus Crime Statistics Act as amended in the 2008 Higher Education Act. Since the whistleblower provision took effect, although the Clery Act imposes reporting recommendations on thousands of campuses across the country, there have been few cases in which the U.S. Department of Education has penalized an IHE for failure to comply. As Christopher Blake, associate director of the International Association of Campus Law Enforcement Administrators, explained in a 2011 newspaper interview, "a Clery investigation in and of itself is unusual… There have only been about 40 in the last 10 or 12 years." So far, there have been no reports of an investigation involving an individual who claimed retaliation for trying to comply with the Clery Act on their campus. The events at Penn State have attracted the U.S. Department of Education’s attention, but it remains to be seen if this investigation involves a whistleblower.

Given the newness and scarcity of Clery Act cases, Title IX has been the primary statute referred to by IHE employees in whistleblowing cases. In Scenario One, the exchange between Professor A and his chairperson involved an allegation of sex discrimination in athletics. Professor A’s concerns are most likely to fall under the jurisdiction of Title IX of the Education Amendments of 1972, which states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

4.8 Protection Offered by Title IX

All IHEs are subject to federal anti-discrimination laws. The U.

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S. Department of Education enforces Title IX through its Office of Civil Rights (OCR). The OCR reports that “Title IX covers state and local agencies that receive ED funds. These agencies include approximately 16,000 local school districts, 3,200 colleges and universities, and 5,000 for-profit schools as well as libraries and museums.”331 Since no more than a handful of IHE’s in the United States have declined all federal funds, it effectively governs behavior on all campuses. Not only does Title IX prohibit discrimination, it prohibits retaliation against those who complain of it. The Office for Civil Rights (OCR) instructs that “a recipient may not retaliate against any person because he or she opposed an unlawful educational practice or policy, or made charges, testified or participated in any complaint action under Title IX. For a recipient to retaliate in any way is considered a violation of Title IX.”332

It is not necessary to file a formal complaint with the OCR to be protected from retaliation. Suffering retaliation for complaining within the institution about sex discrimination is equally protected. In *Jackson v. Birmingham Board of Education*, the leading case which established protection from retaliation for bringing a Title IX claim, Justice O’Connor wrote, “Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination [under Title IX].”333 She elaborated, “Retaliation . . . is, by definition, an intentional act.”334 Retaliation is discrimination because it subjects the complaining party to differential treatment, and it “is discrimination ‘on the basis of sex’ because it is an intentional response to . . . an allegation of sex discrimination.”335

A threshold question to ask about Scenario One is whether Professor A has raised his own concern about a possible violation of Title IX or has he merely stated a concern voiced by one of his students? Is there a legal distinction between these

331 *Id.*
332 *ED.GOV, Title IX and Sex Discrimination*, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last visited February 22, 2013).
334 *Id.* at 169.
335 *Id.* at 168.
two actions? For Title IX there is no distinction. Even though Professor A has no direct knowledge of the difference in education of the trainers provided to female and to male athletes, he is eligible to file a complaint. The OCR explains that:

[A]nyone who believes there has been an act of discrimination on the basis of sex against any person or group in a program or activity which receives ED financial assistance, may file a complaint with OCR under Title IX. The person or organization filing the complaint need not be a victim of the alleged discrimination but may complain on behalf of another person or group.336

The OCR’s manual specifically instructs that:

A complaint must be filed within 180 days of the date of the alleged discrimination, unless the time for filing is extended for good cause by the Enforcement Office Director. If you have also filed a complaint under an institutional grievance process, see the time limit discussed at the end of this section.

It then specifies what a formal complaint should contain:

Complaint letters should explain who was discriminated against; in what way; by whom or by what institution or agency; when the discrimination took place; who was harmed; who can be contacted for further information; the name, address and telephone number of

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the complainant(s) and the alleged offending institution or agency; and as much background information as possible about the alleged discriminatory act(s).  

In order to invoke the anti-retaliation provisions of Title IX, Professor A will have to establish that he is within the class of people the statute is intended to protect from retaliation and that his communications with his chairperson qualified as a “complaint” under Title IX. As long as he is acting in good faith, the question of whether or not Professor A is entitled to protection from Title IX is separate from whether or not the IHE has actually violated Title IX. As part of establishing good faith, he need not prove he is familiar with the specific provisions of Title IX. Violations of Title IX are investigated by the Department of Education’s Office for Civil Rights (OCR). Title IX is unusual because although the statute itself does not contain a private right of action for individuals who either claim discrimination or retaliation, the U.S. Supreme Court recognized one by holding that such protection was essential to its enforcement.  

Professor A does not have to file an actual complaint with the OCR in order to qualify for protection against retaliation under Title IX. The OCR provides written enforcement guidance, which states that an IHE that is a “recipient [of Federal financial assistance] may not retaliate against any person because he or she opposed an unlawful educational practice or policy, or made charges, testified or participated in any complaint action under Title IX.”  

It specifies, however, that while “The person or organization filing the complaint need not be a victim of the alleged discrimination but may complain on behalf of another person or group” the complaint “should be sent to the OCR enforcement office that serves the state in which the alleged discrimination


occurred. A complaint must be filed within 180 days of the date of the alleged discrimination.” The OCR offers an alternative for complainants who first proceed through their “institution’s grievance process and use that process to have the complaint resolved,” which is to extend the time for filing with the OCR “within 60 days after the last act of the institutional grievance process.”

Does Professor A Have the Obligation to Reporter Under Title IX?

Another question raised in Scenario One is whether Professor A was ever under an obligation to report the information he learned from the student’s paper to the OCR? Title IX does impose reporting obligations on IHE’s but the obligation does not necessarily bind everyone on the faculty. One key distinction is between a report of discrimination and one of violence or abuse based on sex. It is a mistake to view Title IX as a law that primarily concerns athletics. Athletics is only one area in which an IHE can be found to have engaged in illegal discrimination based on sex. The U.S. Department of Education is placing increasing emphasis on the prevention of sexual abuse, harassment and violence on campus. This is reflected in a recent “Dear Colleague Letter” which established recommended procedures for investigating claims of abuse. The obligation to comply with Title IX is that of the institution receiving federal funding, not any one individual faculty member. Beyond requiring that an institution designate a “Title IX Coordinator” the Department of Education does not specify how an IHE must go about the process of complying. An IHE


343 See generally Paul M. Anderson, Title IX at Forty: An Introduction and Historical
cannot, however, avoid liability by not taking adequate steps to learn of violations. In a case involving student on student harassment, the U.S. Supreme Court has held that an institution is responsible for a violation of Title IX if it acts with “deliberate indifference to known acts of harassment.”\textsuperscript{344} It is therefore up to each IHE to develop policies which will bring information about violation to the attention of officials who can take action on behalf of the institution. Title IX identifies the obligations of “responsible employees” who can “address and remedy gender-based discrimination and harassment.”\textsuperscript{345} The Title IX coordinator is, according to the Justice Department, “the responsible employee of the recipient with major responsibility for Title IX compliance efforts.” Each institution can decide how to organize the flow of information to the Title IX coordinator. Although Title IX identifies no mandatory reporters, most IHE’s have policies about who does and does not have obligations to bring information forward to the Title IX coordinator.

Most of the examples available concern the obligation to report sexual assault which is discrimination in its most serious form. As the Association of Title IX Administrators (ATIXA) explains in an article titled, “Does The Law Require A Faculty Member To Report Knowledge Of A Sexual Assault On Campus? The answer is “not necessarily”, but “policy might.”\textsuperscript{346} It writes that “while an IHE can, if it wishes, impose that obligation on every employee, most encourage but do not require faculty members who are not advisors of recognized student organizations to report possible violations.”\textsuperscript{347}

In its own model policy it addresses the issue in a section which encourages students to “seek advice from certain resources who are not required to tell anyone else your private, personally identifiable information unless there is cause for fear for your safety, or the safety of others.”\textsuperscript{348}

\textsuperscript{345} Id.
\textsuperscript{348} ATIXA, \textit{Gender-Based And Sexual Misconduct Model Policy},
The ATIXA policy explains that “these are individuals who the university has not specifically designated as “responsible employees” for purposes of putting the institution on notice and for whom mandatory reporting is required, other than in the stated limited circumstances.” It explains further that these individuals are employees “without supervisory responsibility or remedial authority to address sexual misconduct, such as RAs, faculty members, advisors to student organizations, career services staff, admissions officers, student activities personnel, and many others.”

Therefore, if the policy at Professor A’s institution is a typical one, as the discrimination is not in the form of child abuse or some other act which would require reporting by a state law and because he does not seem to have been designated a “responsible employee” for the purpose of reporting Title IX violations, it is unlikely that he faces an internal requirement to report an allegation of discrimination.

**Is Professor A Protected from Retaliation by Title IX?**

Assuming good faith, the next question is whether Professor A has legal standing to bring a complaint under Title IX? The U.S. Supreme Court established in Jackson that Title IX’s anti-retaliation provisions are available to those who complained to their supervisors of sex discrimination in education even if they themselves were not discriminated against. If Professor A can prove that he suffered an adverse employment action because he “opposed” his institution’s violation of Title IX, he could recover for retaliation even if the U.S. Department of Education finds no Title IX violation. As Peter Lake, director for the Center for Excellence in Higher Education Law and Policy at Stetson University, explained, “it is not uncommon to see someone lodge a discrimination claim, lose, and lodge a retaliation claim [after the discrimination claim]. . . .It is a little easier to prove a retaliation claim over a discrimination claim.”

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349 Id.


Is Being Re-Assigned Retaliation Under Title IX?

Like many federal anti-discrimination statutes, courts interpreting Title IX have applied the interpretations in retaliation cases made in the far more numerous cases alleging sex discrimination under Title VII. The U.S. Supreme Court has defined retaliation more broadly in discrimination cases brought under Title VII analysis than in claims brought for violations of First Amendment rights.\textsuperscript{352} Law Professor Richard Moberly has concluded that the Court “focuses on the notion that protecting employees from retaliation will enhance the enforcement of the nation’s laws.” \textsuperscript{353} The Court has, so far, neither recognized nor explained this disparity between its view of retaliation in First Amendment cases and in discrimination cases.

It is unlikely that being prevented from teaching a class would qualify as retaliation in a First Amendment case. However, it may be considered retaliation in a Title IX discrimination case. In determining whether job reassignment, or any other activity, is retaliation, the U.S. Supreme Court looks at the specific terms of the statute or, if no specific language defining retaliatory behavior exists, it applies the standards it developed for allegations of retaliation following claims of discrimination under Title VII. These standards are identified by the name of the case in which they were developed—\textit{Burlington Northern}. Because Title IX’s anti-retaliation provisions are broad but not detailed, “For a recipient to retaliate in any way is considered a violation of Title IX,” a court considering whether or not Professor A had faced retaliation would likely apply the \textit{Burlington Northern} standards.\textsuperscript{354}

In \textit{Burlington Northern}, the U.S. Supreme Court held directly that “reassignment” of job duties could be a form of retaliation under Title VII. Stating its standard directly, the Court wrote that:

Contrary to Burlington’s claim, a reassignment of duties can constitute retaliatory discrimination where both former and present duties fall within the


\textsuperscript{353} \textit{Id.} at 388 n.67.

same job description. Almost every job category involves some duties that are less desirable than others. That is why the EEOC has consistently recognized retaliatory work assignments a forbidden retaliation.\(^\text{355}\)

The U.S. Supreme Court wrote that “reassignment” to less desirable duties is frequently seen by employees as an act of retaliation even when there are no financial penalties. In very direct language, the Court stated that “the anti-retaliation provision [of Title VII] is not limited to actions affecting employment terms and conditions.” Identifying the purpose of the anti-retaliation provision as being a tool to prevent the discrimination prohibited by statute, the Court stated that to prove retaliation a plaintiff must show that the act “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.” The court added that, to be actionable, the retaliation had to take the form of “material adversity to separate significant from trivial harms.” The Court also made clear that it would interpret anti-retaliation provisions very broadly because they were intended to “[p]revent employer interference with “unfettered access” to Title VII's remedial mechanisms by prohibiting employer actions that are likely to deter discrimination victims from complaining to the EEOC, the courts, and employers.”\(^\text{356}\)

The defendants in the Burlington Northern case argued that they had not retaliated against the plaintiff, but rather had exercised their discretion to assign her to another job at the same pay.\(^\text{357}\) The Court, however, disagreed and concluded that whether or not a “reassignment” was retaliatory was a matter of fact for the jury to decide\(^\text{358}\). Since the jury found reassignment from “forklift operator” to “track laborer duties” was retaliation, demotion because the “duties were more arduous and dirtier” and “the latter position was considered a better job” then it was the kind of action which would prevent employees from pursuing anti-discrimination claims and was, therefore, retaliation.\(^\text{359}\)

\(^{355}\) Id.


\(^{357}\) Id. at 71.

\(^{358}\) Id.

\(^{359}\) Id.
Can Professor A Invoke the Protection of the Federal False Claims Act?

As an employee of a public IHE, Professor A cannot bring a suit under the False Claims Act (FCA). In a recent case, a U.S. District Court Judge dismissing an FCA claim explained that, “[o]ver the years, numerous FCA claims have been brought in the context of higher education. Due to Eleventh Amendment sovereign immunity, state colleges and universities are immune from qui tam liability under the FCA.”

4.9 What Are the Protections Available to Professor A Under State Law?

State Whistleblower Laws

If Professor A works at a public IHE he might be eligible for state whistleblower protection depending on the wording of the applicable statute in his state. These statutes are extremely varied. In some states, there must be a violation of a specific state, not federal, law. Others, more generally require an allegation of fraud, waste or abuse in addition to a violation of a specific law.

State Anti-Discrimination Laws

It often the case in discrimination cases that a state or even a city has laws that either parallel or provide more protection than Federal law. This is because, while no state can offer less protection against discrimination than the federal government, any state or municipality can offer more. Moreover, many of the cities which offer their own extended protections are home to a major university. Indiana, for example, does not have laws prohibiting against employment discrimination based on sexual orientation, but Indianapolis, Bloomington and South Bend do. Several states have their own disability discrimination

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360 See Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 787-88 (2000) (FCA “does not subject a State (or state agency) to liability in such actions.”).
361 Gayland O. Heathcoat II, For-Profits Under Fire: The False Claims Act as a Regulatory Check on the For-Profit Education Sector, 24 LOY. CONSUMER L. REV. 1, 18 (2011) (discussing how different regulation affect the behavior of for-profit versus not-for-profit colleges).
362 Evelyn Gentry, Knowing the Differences Between Federal, State, and Local
laws which provide protection for discrimination based on obesity, which is not included in the Americans with the Disabilities Act.\textsuperscript{363} Although it does not appear that Professor A is claiming that he has suffered from illegal discrimination, he may be able to take advantage of the anti-retaliation provisions of a State law that parallels Title IX.

4.10 Conclusion for Scenario One

As stated in the First Amendment analysis of Scenario One, in order to prevail in an action based on a violation of his First Amendment rights, Professor A will have to prove the following four elements in his claim:

that his speech was protected by the First Amendment;
that his employer was aware of the speech;
that he suffered an adverse employment decision; and
that the adverse employment decision was a result of his protected speech.\textsuperscript{364}

Because Professor A’s speech did not take place in a classroom, it will be very hard for him to prove that his contract non-renewal is based on the university’s desire to keep students from hearing his views. Although professors have made claims that a decision not to renew their contract based on statements made outside the classroom is actionable as a deprivation of a public forum, so far this has not been successful. Moreover, Professor A faces two substantial barriers beyond the fact that his speech did not take place in the classroom. The first is the Supreme Court’s clear holdings in \textit{Perry v. Sindermann}\textsuperscript{365} that non-renewal of a contract is not, without further evidence of discrimination, a deprivation of the right to teach. A professor on a year to year contract has no rights beyond that contract. Professor A’s greatest challenge will be to prove a link between expressing his concerns about sex discrimination and the decision not to renew his contract. Unlike a professor with tenure, which is often viewed in legal terms as a long-term

\textsuperscript{363}Antidiscrimination Laws, 22 IND. EMPLOYMENT L. EMP. LETTER (September 2012).


\textsuperscript{365}Perry v. Sindermann, 408 U.S. 593 (1972)
contract with an expectation of renewal, the IHE has no obligation to Professor A beyond the terms of its contract with him. Therefore, Professor A will have to prove that: (1) the IHE employee who made the decision to reassign his course and not renew his contract knew of the statements he made athletics trainers and sex discrimination, and (2) that his class reassignment and contract non-renewal were based upon those statements. In legal terms, this called proof of causation. If Professor A can prove causation, then he will be able to provide proof that he is entitled to protection from retaliation caused by his speech.

The issue here, again, is that public employees do not lose their rights as citizens. Public IHE’s have an obligation to provide members of the public access to campus. The Eighth Circuit Court of Appeals in Putnam v. Keller ruled that a decision to ban a professor whose contract had not been renewed from campus was inappropriate because he had the same rights as other members of the public. So long as he was not disruptive and did not make threats, he could not be banned.366

As discussed earlier in Scenario One, as a public employee, Professor A may have First Amendment protection if he can prove that his contract was not renewed because of his statements to his chairperson. Because Professor A works at a public IHE and, therefore, has a protected property right in continued employment, he can invoke his rights under the U.S. Constitution to seek Due Process before losing his job. However, Professor A will have to prove that he had a reasonable expectation for continued employment. This will require evidence of a contract that is annual in nature or has statements related to continued employment, policies and procedures that provide conditions for continued employment, or other similar documentation that constitute “contractual” obligations for the IHE. Absent a contractual relationship for continued employment, it is unlikely that Professor A will survive a motion to dismiss his complaint unless he can show that the IHE acted in a way that made it unduly difficult for him to get another job. Finally, he will have to prove that reporting the information about the possible Title IX violation was not part of his job but rather speech of general public interest. He may be more successful on this claim since his job was to teach, not

to monitor the athletic system.
A far stronger source of protection for Professor A here comes from the anti-retaliation project recognized by the Supreme Court for those reporting sex discrimination in violation of Title IX. Although as a faculty member with no involvement in athletics, Professor A is not a mandatory reporter, his status as someone with knowledge of the violation is sufficient for him to receive protection against retaliation. He is also entitled to protection even though he is not suffering from discrimination. By seeking to make a violation known and expressing his concern, he puts himself in the position of one “opposing” Title IX discrimination. Finally, depending upon the location of the IHE and state or local statutes, Professor A may be able to get protection under additional whistleblower or related law.

4.11  Scenario Two: Invoking State Whistleblower Protection

Purpose of Scenario Two:

The purpose of this scenario is to demonstrate the limitations of state whistleblower laws in protection of professors in public IHE’s.

Background of Scenario Two

This scenario is closely based on the actual facts of a series of decisions regarding a dispute between the University of Houston and Professor Stephen Barth which resulted in over ten years of litigation before being 367 resolved in the whistleblower’s favor. The arguments raised by the public IHE to deny the professor both the status of a whistleblower and to deny retaliation can be generalized to issues faced by professors employed by public universities in other states.

Description of Scenario Two

Professor B is a tenured professor at a private IHE with a history of exemplary reviews by his supervisor. He has a leadership position in his department and has received considerable praise.

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by his previous supervisors for an annual symposium he organizes. The symposium has been profitable for the university and, with the university’s full knowledge and permission, Professor B receives $25,000 annually in extra compensation for the symposium. Professor B is informed by his college’s business manager that the Dean of the college has engaged in questionable accounting practices, mishandled university funds, and entered into unauthorized contracts for services on behalf of the college. Professor B brings these concerns directly to the Dean who becomes quite angry and denies wrong-doing. The Dean immediately cuts Professor B’s travel budget and cancels the symposium. He also removes him from his position as Department Chairperson. Professor B brings his concerns about both the Dean’s financial transactions and the subsequent adverse employment actions to the Provost of the university and to the Chief Compliance Officer. They do not intervene. Over the next two years, Professor B receives two unsatisfactory employment ratings from the Dean in post-tenure reviews. If this continues, he will be at direct risk of having his tenure revoked based upon university policy.

**Discussion of Scenario Two**

In order to seek external protection against retaliation, Professor B will have to identify a specific Constitutional provision or statute which provides such protection. There is no “general” protection for whistleblowing activity. In Scenario Two, the Dean’s behavior, which Professor B reported to the Provost and Chief Compliance Officer, is a general violation of State law governing how money should be handled and how contractors should be hired. Thus, Scenario Two focuses specifically on addressing State law as an external source of law, in order to analyze this component of Research Question #2, and does not cover federal or Constitutional provisions.

**Constitutional Protections**

As a faculty member at a public IHE, Professor B. has the same protection under the U.S. Constitution as Professor A. in Scenario One. However, the state whistleblower law is likely to be a more effective remedy because most of these statutes allow the faculty member to recover for money damages and attorney fees.

**Federal Law Protections**
There are no specific Federal laws which protect Professor B in this situation. If some of the funds his Dean was misusing came from federal grant money, then he might be able to file a complaint with the funding agency. However, he would not have a personal right of action. He would not have any mechanism to recover damages.

**State Law Protections**

Professor B’s strongest claim for protection against retaliation as a whistleblower is to seek the protection of his state’s whistleblower protection act. The effect of this, if he qualifies, would be to make him eligible for protection if his employer’s conduct met the statute’s definition of retaliation. This is in contrast to a violation of a specific law, such as the federal statute known as the Clery Act, which requires reporting of on-campus crime that narrowly characterizes the kind of information whose disclosure triggers protection. The Clery Act acquired anti-retaliation protection as part of the 2008 the Higher Education Opportunity Act (HEOA). The addition was explained in a “Dear Colleague” letter under the heading “Whistleblower Protection and Anti-Retaliation” of HEOA section 488(e) HEA section 485(f):

> The HEOA states that nothing in the law shall be construed to permit an institution to take retaliatory action against anyone with respect to the implementation of any provision of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.

In contrast to the Clery Act, state whistleblower statutes vary considerably in the kinds of statements protected and the procedural requirements for making a valid claim. What they all share, however, is threshold requirements for going forward that, if defined narrowly by courts, often limit the ability of whistleblowers to bring their case to court. The Texas Whistleblower Act is a good example; it: “prohibits retaliation

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368 Higher Education Opportunity Act (HEOA) § 488(e); Higher Education Act (HEA) § 485(f) (The HEOA states that nothing in the law shall be construed to permit an institution to take retaliatory action against anyone with respect to the implementation of any provision of the “Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.”).
against public employees who report official wrongdoing.” The Act states:

[A] state or local governmental body may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.369

However, because the Act does not describe what constitutes a “violation of the law,” it does not protect employees who act to prevent a law from being broken. For example, in one Texas case a whistleblower was denied protection because he tried to prevent the Department of Transportation (TxDOT) from entering into what he, in good faith, believed would be an illegal contract. He did qualify for protection from the retaliation he suffered, however, because the Texas Supreme Court concluded that at the time of his whistleblowing activity, TxDOT had not yet broken the law. Therefore, he was not reporting a “violation of the law” as required by the whistleblower statute. Describing the deficiencies in the Texas Whistleblower Act, a commentator wrote, “courts are dismissing whistleblower claims made in good faith before considering the merits of these claims.”370 The most common reasons for rejection are that the statutes’ description of what kinds of information is and is not protected can result in dismissal before the case even reaches a review of its merits. As one commentator suggested, the “legislature can achieve optimal protection for whistleblowers by amending the Texas Whistleblower Act to include more liberal reporting requirements. The best way to do this is to focus on two definitions: (1) violation of law, and (2) appropriate law enforcement authority.”371

One of the primary risks of narrowly interpreting a statute is

370 Id.
making it difficult for potential whistleblowers to predict whether they will be protected or not. The law itself requires that “each governmental employer” must “notify employees of their rights under the Act” by “posting an appropriately worded sign in a prominent place in the workplace.” In addition:

To establish a claim for retaliation under the Act, the claimant must prove the following elements: (1) he is a public employee; (2) he acted in good faith in making a report; (3) the report involved a violation of law; (4) the report was made to an appropriate law enforcement authority; and (5) he suffered retaliation as a result of making the report.

Has Professor B been retaliated against?

States differ in what they recognize as “retaliation” under their whistleblower statues. Courts in Texas apply the Title VII standard when determining whether an act is retaliatory. In 2007 the Texas Supreme Court recently held that "a personnel action is adverse within the meaning of the Whistleblower Act if it would be likely to dissuade a reasonable, similarly situated worker from making a report under the Act.” In the case of job reassignment, they look at whether or not there is a clear difference in the quality of the two assignments. In rejecting a claim that a lateral transfer was retaliatory, the Texas Second Court of Appeals in Fort Worth wrote, “Personnel action” is defined in the Act as “an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation.”

Conclusion for Scenario Two

Faculty members at public IHEs have the same protection as any

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other public employee would under the state’s whistleblower statute. However, these statutes are, collectively, difficult to invoke because they have very specific criteria for the kind of illegal activity which triggers protection, and for how the report should be made. A professor might believe she has obtained the protection of her state’s whistleblower statute only to find that she has failed to comply with one of its requirements.

4.12 Scenario Three: A Qui Tam Relator

Purpose of Scenario Three

This scenario emphasizes a major difference in the options available to whistleblowers at a private IHE as opposed to a public one. A private IHE which receives federal funding, as all but a handful do, is subject to the penalties of making a false claim for payment against the government if it certifies that it is in compliance with the eligibility standards. The False Claims Act provides not just broad protection for whistleblowers who know of fraud against the government but also provides a substantial incentive by allowing the whistleblower to recover a percentage of three times the damages recovered. It also pays for attorney’s fees. However, it is also complicated law which can leave those invoking its protection in a no better or considerably worse situation than they were before blowing the whistle. Scenario Three demonstrates some of the law’s complexities.

Background of Scenario Three

Although the False Claims Act applies to all private entities seeking payment from the government, and therefore available to employees at any private IHE, the most recent activity has come from actions brought against the for-profit sector. Both Congress and the Department of Education, through the Justice Department, have made investigating for-profit IHE’s a high priority. This is because these institutions usually have a very high percentage of their students receiving federal financial aid and a very low graduation rate. As the New York Times editorialized:

For-profit schools enroll about 12 percent of the nation’s higher-education
students yet receive about a quarter of all federal student aid; their students account for almost half of all defaults. In general, these institutions get more than 80 percent of their revenues from federal student aid.\footnote{375 Tamar Lewin, \textit{U.S to Join Suit Against For-Profit College Chain}, \textbf{THE NEW YORK TIMES} (May 2, 2011) http://www.nytimes.com/2011/05/03/education/03edmc.html?_r=0.}

\textit{Description of Scenario Three}

Professor C is a member of the psychology department of a small, for-profit college which does not offer tenure. Every year, the department certifies to the state that its students have completed sufficient hours of supervised therapy to take the counselor licensing exam. Professor C knows that the department’s reports inaccurate and inflated student hours. In addition, she is angry over a series of disputes with the administration over other matters. She cannot file a law suit directly because Title IV of the Higher Education Act does not contain a private right of action.\footnote{376 Monsi L’Ggrke v. Lois Benkula, 966 F.2d 1346 (10th Cir. 1992) (“The express language of the Higher Education Act, and the regulations promulgated thereunder, does not create a private cause of action, and there is nothing in the Act’s language, structure or legislative history from which a congressional intent to provide such a remedy can be implied. No provision provides for student enforcement or entitlement to civil damages.”).} Professor C contacts a lawyer and files a qui tam action under the False Claims Act. Her lawyer submits a request to the federal government, through the Justice Department, to intervene. The federal government investigates and finds out that, although the department was filing incorrect statements of supervised therapy hours, due to the increased need for counselors, the state had granted a waiver for which Professor C’s school qualified. Thus, her department was in compliance with this aspect of the State law. Rightly suspecting that Professor C was the source of the complaint, she receives a letter from her supervisor firing her and stating that the kind of disloyalty she displayed in filing the law suit was inconsistent with the school’s values.

\textit{Discussion of Scenario Three}

Scenario Three considers events occurring at a private, for-profit IHE.
What Federal Statutes provide protections?

Private IHEs are particularly vulnerable to qui tam suits because they must certify compliance with the provisions of the Higher Education Act (HEA) to qualify for Title IV federal student financial aid.\textsuperscript{377} Certifying compliance with hundreds of rules and regulations covering financial and curricular issues creates heightened scrutiny on almost all of an institution’s activities.\textsuperscript{378} In other words, the HEA includes hundreds of provisions with which an IHE can be out of compliance.

The False Claims Act extends either civil or criminal liability to any person:

\begin{quote}
\textit{[W]ho knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval.}\textsuperscript{379}
\end{quote}

The elements of a False Claims Act action are that the defendant:

\begin{quote}
\textit{[M]ade a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury.}\textsuperscript{380}
\end{quote}

The most common variety of False Claims Act suits is where a for-profit institution falsely certifies that it is in compliance with the program participation agreement (PPA) required by the U.S. Department of Education in order to receive Title IV financial assistance funding. This funding enables the institution to

\textsuperscript{377} \textit{Higher Education Act} (HEA) (1965), Pub.L. No. 89–329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.))(“In order to be eligible to receive Title IV funding, an educational institution must meet certain requirements and sign a “Program Participation Agreement” (PPA) with the Secretary of Education. By signing the PPA, the institution makes certain promises and certifications to the federal government.” 34 C.F.R. § 668.14).


provide its students federal financial aid in the form of loans, grants, and veteran’s benefits. While any IHE might be motivated to make a false claim, at the time of this analysis there is considerable concern in Congress and in the U.S. Justice Department that this behavior is prevalent in for-profit IHEs. As the Court in United States v. ITT Educational Services explained:

As the Court in United States v. ITT Educational Services explained:

The overarching concern is that educational entities that might be motivated by profit rather than rankings or other industry benchmarks have every incentive to maximize enrollment by recruiting unqualified students who will not be able to repay their loans, and the financial consequences of these defaults will trickle down to the detriment of the federal government and its taxpayers.

Recently, the federal government has joined with individual states to file complaints alleging that for-profit institutions have violated regulations prohibiting them from offering incentives to their employees for enrolling students who subsequently receive Title IV financial aid funds. A report issued in July 2012 by the U.S. Senate Committee on Health, Education, Labor, and Pensions (chaired by Senator Tom Harkin) concluded:

A 2-year investigation demonstrated that Federal taxpayers are investing billions of dollars a year, $32 billion in the most recent year, in companies that operate for-profit colleges. Yet, more than half of the students who enrolled in those colleges in 2008–9 left without a degree or diploma within a median of 4 months.
For example, on August 8, 2011, the Justice Department announced that the “United States has intervened and filed a complaint in a whistleblower suit pending under the False Claims Act against Education Management Corporation (EDMC).”\(^{384}\) The press release from Senator Harkin’s Office explains that “the government alleges … this provider of post-secondary education [is distributing] marketing materials deceived prospective students by falsely inflating job placement statistics at its many campuses around the country.” Sobek is quoted as saying, “They manipulated the job placement rates by counting students working in a job that they did not need the degree for… In my opinion, it’s a wretched fraud.”\(^{385}\) Although the Federal False Claims Act is binding throughout the country, Circuit Courts of Appeal apply different tests and standards in interpreting what elements are necessary for a valid claim. Professor C will likely be required to prove her employer knew of her claim and, therefore, will be able to allege facts supporting a direct connection between filing of the law suit and being fired.

**Can Professor C Get Protection Against Retaliation Under the False Claims Act?**

The FCA does extend protection against retaliation to qui tam relators who are unable to prove the allegations on which they based their claim. But the damages available for retaliation alone are based on lost salary or other direct expenses of the plaintiff rather than a share of three times the amount of the false claim.\(^{386}\) So employees may find themselves with relatively little money, in comparison to a share of the recovery in a successful qui tam action, and a damaged reputation, which makes it difficult for them to obtain other similar employment. The FCA protects employees from being “discharged, demoted . . . or in any other manner discriminated against in the terms and

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conditions of employment ... because of lawful acts done by the 
employee . . . in furtherance of an [FCA] action . . . .”

An FCA retaliation claim requires proof of three elements: (1) the employee must have been engaging in conduct protected under the Act; (2) the employer must have known that the employee was engaging in such conduct; and (3) the employer must have discriminated against the employee because of her protected conduct.

She has already cleared one of the greatest barriers to protection against retaliation which is that she filed her action while still employed. Although she would be eligible to share in the federal government’s recovery had she filed after she left, she would not be entitled to protection against post-employment retaliation. Regardless of the specifics of the regulations violated, all qui tam actions work the same way.

**Limitations of the FCA for IHE Whistleblowers**

Although qui tam actions against for-profit IHEs have the potential of very high payouts, there are many hurdles both to bringing a qui tam action and to getting protection from retaliation. The two largest hurdles are that, unless the government chooses to become involved, the individual whistleblower must bring the action at his or her expense. This immediately puts the plaintiff at a disadvantage against a large corporation that has substantial resources to defend itself and the plaintiff’s law firm must bear the costs of litigation. The second hurdle is that the requirements for qualifying as a qui tam relator are highly specific, so winning a share of the recovery depends on how the court interprets often complex provisions of the HEA. A common situation is one in which several different employees individually approach the federal government with a claim based on the same facts. Only the first complainant is qualified to be a qui tam relator.

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Among the many barriers to filing, the employee must prove that the IHE actually made a false claim for payment, not just that it violated Federal laws. For example, in a qui tam suit against Corinthian Colleges, Inc. (Corinthian) alleging a system of providing incentives to recruiters, the U.S. Ninth Circuit Court of Appeals held that proof that Corinthian fired employees who did not meet recruiting quotas was not itself a violation of the ban against incentive compensation. In other words, employees have no federal protection from being fired for a refusal to violate the law.\(^{389}\)

Another continuing risk for qui tam relators is the requirement that the information on which they base their cases must not already be publically disclosed. A case from the Southern District of Indiana involving ITT adds depth to the picture of how difficult it can be for a qui tam relator to succeed. In *Halasa v. ITT Educational Services*, the director of a technical institute operated by ITT filed a FCA case alleging that he was fired in “unlawful retaliation” for reporting to his supervisor serious violations of the law. But he reported to the most senior officials he dealt with on a regular basis, they were not the officials who made the decision to fire him, and Halasa could not prove a direct link between his reports to his supervisors and the decision made by the higher administrators to terminate him. Judge Diane Wood of the Indiana Seventh Circuit Court of Appeals wrote in dismissing his case and ordering him to pay ITT over $36,000 for court expenses, “[C]ompanies are not liable under the False Claims Act for every scrap of information that someone in or outside the chain of responsibility might have.”\(^{390}\)

Yet another difficulty faced by potential qui tam relators in higher education cases is demonstrated in *Brazill v. California Northstate College of Pharmacy*, in which the plaintiff, who was a licensed pharmacist, claimed that he was fired in retaliation for “vocally challenging the College administration’s tuition practices as illegal and detrimental to the College’s accreditation process.” However, because the college was unaccredited and therefore not eligible for Title IV funds, it was not required to certify compliance with Federal law. The court concluded by explaining that “Plaintiff’s allegations only suggest that he was

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390 *Id.*
attempting to get the College to comply with Federal law and meet accreditation standards, not that he was trying to recover money for the government or investigating fraud claims.\textsuperscript{391}

\textit{What State Laws provide protection?}

Many States are now adopting their own version of the False Claims Act to encourage whistleblowers with knowledge of attempts to defraud the state. Some of these are targeted specifically to fraud involving the Medicaid program, but others are broader. As an employee of a private IHE, Professor C cannot claim protection under her State’s Whistleblower Statute.

\textit{Conclusion for Scenario Three}

This scenario considers the situation of a professor employed by a private IHE who has knowledge of a false claim for payment being made to the Federal Government. Professors at public IHEs do not have this option. If successful, such a professor would be eligible for a share of the treble damages recovered by the government. However, even if the government is not successful in its action against the IHE, the professor who brought the information forward is still protected against retaliation. However, as this scenario demonstrates even a professor acting on a good faith belief that her employer has made a false claim can be without protection if the court finds it was never under any obligation to do so.

\textit{4.13 Scenario Four: The Mandatory Reporter}

\textit{4.13.1 Purpose of Scenario Four}

The purpose of this scenario is to highlight the difficult situation faced by employees of IHE’s who have a legal obligation to report a specific kind of wrong-doing. These employees face the risk of legal penalty for not reporting and retaliation if they do report. While all statutes with a mandatory reporting requirement provide protection against retaliation, like state whistleblower statutes there are specific eligibility requirements. Scenario Four highlights the limits of anti-retaliation provisions in an employment sector like higher education where personal

\textsuperscript{391} Id.
relationships are an important factor in being hired and in succeeding. Moreover, unlike an admissions officer who may have skills applicable to another field, faculty members at IHE’s may have very specific areas of expertise which are only marketable at their existing level of compensation and responsibility within the context of higher education.

Background of Scenario Four

This scenario is based on the recent events at Pennsylvania State University in which a long-time associate coach was convicted of child molestation. The facts here come from the report commissioned by the trustees of Pennsylvania State University and drafted by former FBI director Louis G. Freeh (The Freeh Report) as news accounts, and court filings. Mr. Freeh and his team conducted “over 430 interviews of various individuals that include current and former University employees from various departments across the University, as well as current and past Trustees, former coaches, athletes and others in the community.” In addition, it “analyzed over 3.5 million emails and other documents.” According to Mr. Freeh this analysis resulted in “independent discover of critical 1998 and 2001 emails” which he described as “the most important evidence in this investigation” related to Michael McQueary’s witnessing of Sandusky’s “sexual assault.” Mr. McQueary’s contract was not renewed by the University and he has not been able to find another coaching job. He is currently suing the University for defamation based on their statements that he was not truthful in his reports of what he witnessed.

Sandusky was indicted by a Grand Jury and found guilty by a jury of 45 counts of child sexual abuse. According to the testimony at trial, the crimes took place on campus over a period of more than twenty years. Although Mr. Sandusky’s advocacy for young boys received widespread publicity, few were present to witness the abuse which, for the most part, took place in private. However, throughout the twenty year period there were individuals who witnessed incidents in the locker-room. One of those was Mr. McQueary, who in 2001 was a graduate assistant in the football program, testified that, on the night of February 9, 2001, he saw Mr. Sandusky in the shower with a young boy. He brought his concerns to then football coach, Joe Paterno. While university officials have said that Mr. McQueary was not specific that what he saw might have been criminal, recently released grand jury testimony shows that Mr. Paterno recalls being told by Mr. McQueary that the behavior he saw was “sexual.”

At the time of this research, the Penn State litigation is underway and several university administrators have been charged with criminal offenses. Although the facts of the Penn State case are still coming to light, they provide a context where an IHE employee reported activity that may be found to have resulted in retaliation.

Recent news reports recount the end of Mr. McQueary’s career, even as other Penn State University officials have been indicted and are facing trial. As a sports journalist described the situation, “He’s a 37-year-old whose career, the one he once poured himself into, has stalled out. When new coach Bill O’Brien replaced Paterno, every assistant got a chance to interview, the lawsuit alleges, except Mike McQueary.” Mr. McQueary has fought back. “I don’t think I’ve done anything wrong to lose that job,” McQueary testified in June. “The reporter continues to describe Mr. McQueary’s situation, writing, “he’s out of work. He’s out of money. He’s out of his career. He’s out of Penn State’s support system even as the school pays for the defense of [the two top administrators who heard his accusations but did nothing].”

It is Mr. McQueary’s claim in a whistleblower suit he has filed in Pennsylvania State Court that Penn State’s president’s “unconditional support” for the administrators who did not act on the information he gave them “essentially branded McQueary a liar and ruined him.” He now claims that “his employer picked sides and killed his career and reputation. All he's ever done, he said, was tell the truth. And now he's paying for it.” Instead of having the lifetime career as a coach at Penn State he expected, he is “beaten up and broken down, swinging back with just about all he has left.”

Although Mike McQueary remains unemployed, Penn State is vigorously defending itself against his suit. Recently Penn State’s attorney Nancy Conrad filed a brief opposing Mr. McQueary’s claims stating that, "It is not enough that the alleged victim of a statement be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured his standing in the community of a respectable society."

Disclaimer Related to Scenario Four

The long period of time over which the events of the Penn State sex abuse scandal unfolded add a substantial layer of complication for legal analysis. Therefore, the scenario based on this situation is deliberately constructed to exclude issues of timing or statute of limitations. Rather, it assumes that only a short period of time separated Mr. McQueary’s witnessing the crime, his reporting it to university officials, and his eventual testimony which led to Mr. Sandusky’s conviction. Moreover, as of the writing of this article the two senior university officials who were indicted with Mr. Sandusky have not yet been tried. They are, therefore, only accused, not convicted. Finally, the Freeh report is being strongly criticized as inaccurate by both Penn State University and the Paterno family. In sum, Scenario Four was drafted based on the publically available information at the time of the research. Penn State has moved to dismiss Mr. McQueary’s law suit as being too vague to satisfy the standards of the Pennsylvania Whistleblower statute. Mr.

396 Id.
398 Id.
Sandusky still maintains that he is innocent of all charges.

*Scenario Four*

Professor D is a tenure-track assistant professor in exercise science at a large public university who works for additional compensation with a summer athletic camp for youth in the university community. During camp activities, he observes what he later describes as a “highly inappropriate” and “sexual” contact between an athletics staff member, Roy, and a young boy (obviously a minor and not a student at the university) in the locker room showers. Professor D reports what he sees to the camp director, Bob, who reports his statements to university officials, including the athletics director. Professor D is called in by the Athletic Director to tell these university officials what he has seen. He does so and hears nothing more about the incident. Roy remains employed. Five years later, Professor D is now an assistant professor on a year to year contract. He hears about this incident again when he is asked to testify in front of a criminal grand jury that is investigating the athletics staff member, Roy, who he saw act inappropriately with the minor young boy and the university officials to whom he told his story. After the grand jury indicts three men, Professor D is called as a witness for the prosecution and testifies at the trial. By now, everyone at the university is aware of what he saw and his actions since then. Professor D learns at a news conference called by the new president of the university that the university believes he did not act appropriately and that he will not be allowed to work in the athletics summer camp in the future, nor have any other contact with the institution’s athletics programs. He earns more than $20,000 each year by working in the summer camps, and has submitted several grant proposals related to athletic conditioning and performance that will be placed in jeopardy by such action. In addition, his academic department is closely aligned with the athletics department and the president’s public statements will harm his ability to seek promotion to the rank of professor, and relationships with his colleagues and students in the program. He has begun applying to faculty roles in his discipline but does not receive invitations to interview despite apparent qualifications for the roles. In addition, he is now the focus for substantial public criticism after the university is heavily sanctioned by the NCAA.
Discussion of Scenario Four

Scenario Four considers events at a public IHE.

What U.S. Constitutional protections are available?

As an employee of a public IHE, Professor D has a protected liberty and property interest in his job. Although usually contract non-renewal does not usually require Due Process protection because a contract employee does not have an expectation of continuing employment, Professor D’s case may qualify as an exception. This is because the IHE did not just fail to renew Professor D’s contract, they made statements critical of his honesty. The U.S. Supreme Court in *Perry v. Sindermann* held that actions by an IHE which made it more difficult for an employee to get another job might be a violation of due process. Since the act that brought negative attention to Professor D included bringing forward information about possible criminal activity, he may also qualify for protection under the First Amendment. As a public employee, Professor D has the right to be free from state retaliation, in this case his employer, for statements he makes about matters of public interest which are not part of his job duties. The question Professor D will raise is whether it was part of his job to monitor coaches more senior than he was for possible illegal behavior.

What Federal Statutes provide protections?

If Professor D had made his report today, he might be able to seek the protection of Title IX because sexual abuse has increasingly been recognized as a violation of Title IX. However, Professor D would still face the difficult issue of proving that the young boy was a “student” to whom his IHE had obligations.

What State Laws provide protection?

There are two primary areas of protection under State Law. The first is the protection that would be available if Professor D was a mandatory reporter of child abuse. The second would be under his state’s whistleblower statute.

Is Professor D a Mandatory Reporter of Child Abuse?

In addition to statutes which provide protection for
whistleblowers in order to encourage greater enforcement of the law, there are statutes which actually require reporting. The most common form of this statute is one which makes witnesses of child abuse or neglect mandatory reporters. However, there are also ones binding on individuals in the financial industry. The laws regarding child abuse are all directly targeted at minors. However, the current reality at most IHEs is that employees, including coaches and professors, have frequent contact with minors during community engagement activities as well as summer programs. In states which mandate report of partner abuse, it is even more likely that employees of IHE will face this obligation.

All but two states have statutes which require specific categories of professionals to report child abuse or neglect. This category commonly includes teachers, health-care workers, social workers, law enforcement officers and child care workers. Some states extend the obligation to commercial film or photographic processors, substance abuse counselors, domestic violence workers, clergy members, and animal control officers. Eighteen states go further and impose obligations by “any person who suspects child abuse or neglect” whatever their profession. Four states have recently “designated as mandatory reporters faculty, administrators, athletics staff, and other employees and volunteers at institutions of higher learning, including public and private colleges and universities and vocational and technical schools.”

Beyond child abuse, there is considerable variety among the states about what kinds of abuse behavior carries reporting obligations. These include elder abuse, partner abuse and, in a growing trend, animal abuse.

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400 Id.


402 Id.

403 Id.

404 Id.

abuse. Because the law in this area is so varied, it is not always clear whether or not an individual who observes a form of abuse or neglect is obligated to report. However, the federal government requires that in order to be eligible to receive funding under the Child Abuse Prevention and Treatment Act (CAPTA), “[s]tates are required to establish provisions for immunity from liability for individuals making good faith reports of suspected or known instances of child abuse or neglect.” This form of immunity protects both those who are and those who are not required to report child abuse from “civil or criminal liability.” As a result, the person who reports child abuse in good faith is protected from a suit by the abuser. This is similar to laws already in existence in most states have general protection for those who, in good faith, report a violation of the law to appropriate law enforcement officials.

What State Statutes Provide Protection?

In almost every state with a whistleblower protection statute for public employees, a report of criminal activity would be the kind of information protected. However, even when the subject matter of what the employee is reporting is clearly within the bounds of the statute, he must comply with the specific terms of the statute in regard to the timing of the complaint and to whom it was made. These requirements usually specify to whom the whistleblower must report. In Texas, of the law requires that the witness submits a report to a law enforcement official with the authority to address the specific type of behavior being reported. In other states, the witness must report the incident to a person of authority within the agency or institution itself or to an office of the state government that has been created to receive such complaints. For example, the Connecticut statute requires that a complaint be made to the auditors of public accounts. If Professor D hesitates or reports to the wrong person, he may find himself without protection.

406 Id.
Moreover, states differ in their definition of what constitutes retaliation. Although as discussed above, federal courts primarily follow the *Burlington Northern* Standards, state standards on, for example, whether reassignment constitutes retaliation are very different. Some states track federal standards of looking at adverse employment actions broadly and others only protect against actual termination of employment.\footnote{Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. Colo. L. Rev. 975, 980 (2008) (“[”)}

Another issue Professor D faces is his state’s laws regarding the mandatory reporting of child abuse. In almost every state with such a statute teachers are required by law to report even the suspicion that a child is being abused or neglected to the relevant child protective services agency.\footnote{Anna Stolley Persky, *Beyond the Penn State Scandal: Child Abuse Reporting Laws*, DC BAR (June, 2012), available at http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/june_2012/childabuse.cfm.} But whether or not Professor D’s state would view him as having the obligations of a “teacher” to a child who is not a student of the school where he works is likely to be a matter of judicial interpretation. If Professor D is a mandatory reporter, he is almost certainly entitled to protection against retaliation; however, if Professor D is not a mandatory reporter he may or may not be protected.

Both Title IX which prohibits discrimination based on sex in education and the overlapping protection of Title VII which more generally prohibits discrimination based on sex in the workplace, contain exceptions for faith based IHE’s.

*Conclusion for Scenario Four*

Scenario Four considered the situation of an untenured faculty member at a public IHE who has been a witness to possible criminal activity. As a result, he may have an obligation to file a report of suspected wrong-doing. If he is a mandatory reporter, it is likely that the statute which compels reporting will also provide protection against retaliation. But if he does not qualify for protection as a mandatory reporter, he must rely on the same protection that would be available to any other faculty member in his situation. As an untenured faculty member on a year to year contract, he is in the least favorable situation to invoke constitutional protection. Instead, he must rely on the
whistleblower protection attached to a specific federal statute or to his state’s own whistleblower protection statute.

4.14 Discussion of Research Question Three

The scenarios described above consider the answers to Research Questions 1 and 2. Research Question 3 asks: “What are the significant gaps in protection against adverse employment actions for good faith disclosures of information by Faculty at IHE’s?” As the four scenarios analyzed in this section demonstrate, there are many gaps in protection. The gaps fall into three main categories.

Gaps in Protection Depending on State Action

First, there is the gap between the protection available to employees and public and private IHE’s. Because private IHE’s are not State Actors, they need not provide their employees with Fourteenth Amendment Due Process, nor do any adverse employment actions they take raise issues of possible violations of the First Amendment. Also, only employees of public IHEs are eligible for protection under their state’s version of a whistleblower protection law. Finally, only employees of private IHE’s are eligible to make a claim under the Federal False Claims Act. Employees at public IHEs cannot seek government protection for bringing forward information that their institution is deliberately defrauding the government.

Gaps in Protection Depending on Nature of the Alleged Illegal Activity

Second, there is a difference in the types of protections available to whistleblowers depending upon the provisions in the law that applies to the specific subject matter. Some statutes, such as those prohibiting sex discrimination or requiring the reporting of crime on campus, provide protection against retaliation, while other statutes do not. For example, a faculty member with knowledge that her institution is both failing to report crime on campus and is inappropriately making student academic records available to marketing companies, would have protection against retaliation for reporting the first violation but not the second violation. It is unlikely that the faculty member involved would know, in advance, the risk she is taking when reporting a Clery
Act violation (specific campus crimes) as opposed to a violation of the Family Educational Rights and Privacy Act (FERPA or the “Buckley Amendment” which pertains to student records).

Gaps in Protection Are Narrowly Circumscribed and Inconsistent Across the Spectrum of Federal and State Laws and Regulations

Finally, there are substantial gaps created by the rules for qualifying for protection in all of the Constitutional and statutory provisions analyzed in the scenarios above. The four scenarios analyzed above are all examples of the kinds of gaps in protection employees at IHE’s face when bringing forward information of public interest. Whether or not an employee who bears bad news is in fact a whistleblower and protected from retaliation was a key question asked, but essentially left unanswered, in the U.S. Supreme Court’s most recent consideration of the extent to which public employees’ speech at work was subject to First Amendment protection. “According to the National Whistleblower Center, “one of the most hotly contested issues in whistleblower law is the exact definition of protected whistleblower activity. Some states have very narrow definitions while others have definitions that are very broad.” It, therefore, advises that “An employee or his or her attorney should thoroughly research the State law regarding the definition for his or her state.”

The general Constitutional protections under Due Process are only available to employees at public IHE’s who can prove an expectation of continued employment. At most public IHE’s, only tenured faculty have a reasonable expectation of continued employment.

First Amendment protections are available to all employees at an IHE, but the 2006 U.S. Supreme Court’s decision in Garcetti, and the subsequent cases interpreting it exclude whistleblower type speech from First Amendment protection. Employees have no Constitutional claim for protection if they suffer an adverse employment decision based on communication of information as part of their job duties. Moreover, even though the Garcetti Court explicitly denied that it was limiting the rights of

professor’s to speak freely in their classrooms or scholarship, the U.S. Supreme Court has consistently declined to protect public employees from adverse employment decisions other than termination in First Amendment cases. There are very few federal statutes with whistleblower protection that directly regulate behavior on a college or university campus. Title IX has well-defined whistleblower protection but covers only a very specific area of conduct. The Clery Act is relatively new and its protections have yet to be tested. State whistleblower statutes are particularly difficult to predict because invoking their protection depends on precise compliance with the form and timing of the report. The False Claims Act, which provides not just protection from retaliation but a share of the government’s recovery, is only available to employees of private IHE’s and it, too, has very specific provisions for filing a valid claim. One of the features of whistleblower protection in general, which applies to IHEs as much as other employment setting, is that the large volume of laws and provisions which provide protection against retaliation do not necessarily provide protections against retaliation to the individual employee. As Tom Devine, the Legal Director of the Government Accountability Project, a non-profit group based in Washington, DC that describes itself as “nation’s leading whistleblower protection and advocacy organization” put it:

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at
The analysis of these four scenarios and the discussion of the gaps in protection faced by faculty members employed by IHEs demonstrates how difficult it is for any individual faculty member to predict whether or not he would be protected from retaliation if he engaged in whistleblowing activity. Given the considerable flexibility IHE’s have in developing their own internal protections, the latter are the best option for encouraging employees to come forward with information. Most public IHEs are forced to interact with both Constitutional protections available to their faculty and to their state’s whistleblower protection laws. Private IHEs, on the other hand, are not bound by either external constraints, but only need be concerned with whistleblower provisions attached to specific statutes which apply to all IHE’s, and to the provisions of the False Claims Act which empower their employees to bring fraud actions on behalf of the government. For the most part, then, the relationship between the faculty and the IHE is governed entirely by internal law such as contracts or policies to which the IHE has agreed to be bound. Otherwise, a professor at a private IHE is no different from an employee-at-will in any other job.

Perhaps the core problem with the legal protections available for whistleblowers in IHEs is one it shares with other fields where personal reputation is an important part of getting a job. Study after study, incident after incident, shows that even when the whistleblower is reporting important information of public interest and even if he receives protection from retaliation, whistleblowing is a career-ending event. This is because, even when the whistleblower was a mandatory reporter, the behavior violates the corporate culture of loyalty. A recent review of the National Whistleblower Center’s Handbook for potential whistleblowers reflects this view in its headline: “The Complete Guide to Snitching.”

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negative view writing that, “Disappointingly, the book does not touch on the morality of whistleblowing, or elaborate on the potential conflicts of interest in the increasing body of legislation offering financial rewards for people coming forward. Rather than the romantic image of a lone worker fighting doggedly against evil capital….”

Reports of the experiences of whistleblowers are far from romantic. A recent profile of James Holzrichter who in 2005 recovered $6.2 million in a False Claims Act action against his employer, Northrop-Grumman, is typical of the findings of many academic surveys. The reporter recounts that Holzrichter’s “court complaint, filed in 1989, languished for years, and so did Holzrichter. He wasn't able to find work as an auditor. He received more than 400 rejection letters from employers who weren't interested, he believes, in hiring a snitch. Desperate to support his wife and four children, he scrubbed toilets and delivered the Chicago Tribune. At his lowest moment, he moved his family into a homeless shelter.” Asked whether or not he still felt it was “worth it” to file the qui tam action, he replied, “I don't know if it was worth it. I have the money, but how can I give my children their childhood back?”

SECTION 5

This section will review and summarize the article’s purpose, its conclusions and recommendations.

5.1 Purpose

The purpose of this article was to describe the internal and external sources of law providing protection to faculty members at IHEs who face adverse employment actions for disclosing or reporting information of public interest and of relevance to their employment. These legal protections were described by analyzing scenarios representing factual situations in which a faculty member at an IHE might face an adverse employment action in retaliation for disclosing information against the

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5.2 Problem Statement and Methodology

The main problem addressed in this article is the lack of comprehensive protection available to faculty members at IHEs, which results in an inability to predict when whistleblowers will be protected from retaliation for disclosing information of public interest. The methodologies used in this study included legal research and scenario analysis. Section 1 presented three primary research questions:

What are the internal sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?

What are the external sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?

What U.S. Constitutional protections are available?

What Federal Statutes provide protections?

What State Laws provide protection?

What are the significant gaps in protection against adverse employment actions for good faith disclosures of information?

Section 2 reviewed the legal and social science literature related to whistleblower protection for faculty members at institutions of higher education.

Section 3 described the research procedures employed in this investigation and explained their purpose. In summary, the researcher developed scenarios representing common situations in which faculty members at IHEs would have access to information that was: (a) unavailable to the public, and (b) of public, as opposed to personal or private, interest. Specifically, this information concerned either violations of rights protected under the U.S. Constitution, violations of state or federal
statutes, regulations or rules, or violations of internal policies and procedures. The situations described in the scenarios were developed from descriptions of real situations that became publically known either through lawsuits, administrative proceedings, published writings by individuals with first-hand knowledge, or press reports. In addition, scenarios were created from facts drawn from more than one event to avoid distracting or confounding issues raised by individual situations.

Conclusions

The primary internal source of law providing protection to employees comes from the enforcement of contractual obligations entered into voluntarily by the IHE. The most common example of this is the employee handbook. Increasingly, statements of policy made on an IHE’s Website are being interpreted by courts as equivalent to such statements made in a single document labeled “handbook.” Other common examples are individual contracts, contracts negotiated collectively, and statements in hiring letters. Many disputes also arise over oral statements made either at the time of hiring or during employment. The laws of individual states vary considerably in regard to the extent to which employee handbooks, statements on Websites, oral statements, and statements in offer letters become binding agreements. Moreover, the standards used by different federal district courts and federal circuit courts of appeal vary considerably in how they determine whether statements in employee handbooks, Websites, oral statements, and offer letters create binding agreements.

There are many external sources of law protecting employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment. These include general federal and state constitutional provisions regarding speech that are sometimes referred to as “academic freedom” concerns. Statutes are an additional source of law that extend protection to public but not private employees. In addition, there are specific federal, state and local statutes which are triggered by the specific content of the information being disclosed.

Employees of public IHEs have additional protection against adverse employment action under the Fifth Amendment of the
U.S. Constitution as interpreted by the Fourteenth Amendment. These provisions provide professors with the right to a fair process for appealing any adverse employment action taken against them and prevent the IHE from proceeding in a manner that is arbitrary and capricious.

Because almost all IHEs are dependent on maintaining eligibility for federal funding, both public and private employees have protection from federal statutes prohibiting discrimination by IHEs and prohibit false claims for payment against the government. In addition, depending on the subject matter of the disclosure, employees of both public and private IHEs may have protection from whistleblower protections attached to specific activities, such as reporting violations of the Clery Act; or of health and safety violations specific to activities in which an IHE might engage, such as nuclear safety laws.

Finally, employees of IHEs can seek protection from state law. In states in which whistleblower protection, laws are available to all employees; employees of public IHEs may be protected if they follow the terms of the statute precisely. Also, employees of IHEs may have additional protection if retaliated against for alleging discrimination, which is illegal according to the laws of the state or municipality in which the IHE is located. These protections may be more extensive than the protection against discrimination made available by Federal law. Some states extend limited whistleblower protection to employees of private IHEs, again depending on the nature of the information disclosed.

Yet despite the many legal protections for whistleblowers, there are still considerable gaps in protection against adverse employment. The significant gaps are in retaliation for disclosing information about activities that do not fall under the terms of specific statutes. Another specific gap comes from the requirements for invoking the protection provided by statutes that would otherwise be applicable. Thus, an employee who files a complaint in the manner required by a statute may not be entitled to protection, even though the statute would otherwise provide it.

Conclusions This article reveals wide gaps in protection for employees at IHEs who engage in whistleblowing activities. An analysis of scenarios shows how easy it is for an employee to
fail to achieve protection when it would otherwise be available because of that employee’s lack of awareness of the procedural requirements. Also, protection significantly differs for employees of public and private IHEs. In addition, because no comprehensive system of protection exists, it would be difficult for any individual faculty member to know what activities would or would not warrant protection. This lack of a comprehensive system of protection means that if whistleblowers are seen as serving an important role in enforcing an IHE’s legal and ethical obligations, then the lack of consistency in protection against retaliation makes it much less likely that they can play a strong role in assuring compliance.

*Recommendations for IHEs: Develop Internal Protections for Whistleblowers Based on the Interests and Needs of the Individual Institution.*

The analysis of the law as applied to the four scenarios show significant gaps in protections against adverse employment actions for good faith disclosures of information. IHE’s that seek to use its employees as a source of information to enhance compliance with its legal obligations and ethical aspirations. Professors considering becoming whistleblowers cannot rely on existing external protections against retaliation, which, are too uncertain and inconsistent as sources of protection. In anticipation of the need to whistleblow, faculties should use the the mechanisms of self-governance available to them to advocate that their institutions develop own internal procedures to protect and enhance whistleblowing. Companies are adding anti-retaliation and whistleblower protection provisions into their corporate charters. The following two recommendations are essential components to be considered in developing such institutional policies:

Communicate clearly the internal and external whistleblower protections available to employees so that all are aware of the consequences of violation.

Communicate clearly the behaviors which Courts have identified as retaliatory so that supervisors can avoid the consequences of a costly and time-consuming retaliation lawsuits even when there is no underlying violation of the law.
5.3 Recommendations for Further Research

This article identifies many issues that would benefit from further research using different methodologies. Further research is needed to answer questions about the prevalence of whistleblowing in higher education because, if whistleblowing cases follow the same pattern as other disputes in higher education, most cases are settled before any legal involvement and the majority before the cases reaches a final decision by a judge or jury. Also, using methodologies that involve direct contact with employees and administrators at IHEs could also produce information about their perceptions of the need for whistleblower protections. Many of the research questions listed below have been the basis of studies in other industries—such as science, medicine, and business—but have not been studied in IHEs.

What do faculty and other employees at IHEs know about availability of whistleblower protection?
What attitudes do faculty have about the need for whistleblower protection?
What is the prevalence of whistleblowing in higher education?
What happens to faculty who become identified as whistleblowers?
What is the effect of whistleblowing at IHEs? Do incidents of whistleblowing result in greater compliance?
How do the views of administrators, faculty, and staff issue in regard to questions about whistleblowing?
What are the differences in public, private, and faith-based IHEs in regard to whistleblower policies, attitudes about whistleblowers, and prevalence of noncompliance?
What are the characteristics of whistleblower policies in IHEs?

Limitations

One of the inherent limitations of a legal analysis is that it is a retrospective review of decided cases. In order to find out more about faculty whistleblowing at colleges and universities it will be necessary to use different methodologies. These could include quantitative, qualitative, textual analysis, mixed methods, and observational studies.
For example, surveying or interviewing IHE employees about their attitudes toward whistleblowing and their personal experiences with it would be helpful in finding out if the existing structure of internal and external protections have any impact on
individual behavior. In order to this it would be necessary to develop an appropriate attitude scale.\footnote{Meredith D. Gall, Joyce P. Gall & Walter R. Borg, Educational Research: An Introduction 228 (8th ed. 2007).}

Then, using the scenarios developed here, a researcher could develop a Likert scale to determine the level of agreement with a statement like “In this scenario, the professor would have protection against retaliation for whistleblowing.” The information gathered could then be used to develop questionnaires and interviews “to collect data about phenomena that are not directly observable: inner experience, opinions, values, interests and the like.”\footnote{Id. at 247 (citing I.E. SEIDMAN, INTERVIEWING AS QUALITATIVE RESEARCH: A GUIDE FOR RESEARCHERS IN EDUCATION AND THE SOCIAL SCIENCES (2d ed 1997)).}

For a qualitative study, which does not seek to generalize from the results, the scenarios would become part of either an “informal-conversational interview,” an interview based on a “general interview guide,” or a “standardized open-ended interview.”\footnotemark[419]

For a quantitative study, the scenarios would be part of either an “unstructured interview” or a “semi-structured” or “structured” interview in which each subject would be asked about his or her reactions after reading the same scenarios.\footnote{Id. at 246.}

A qualitative study would be better suited to finding out how employees of IHEs see the act of whistleblowing in the context of their employment. Do they see it as a positive act? An obligation? A quantitative survey would be better suited to assessing the extent of knowledge about whistleblower protection laws. It would also be helpful in better identifying how much whistleblowing actually goes on in higher education and what motivates people who do blow the whistle.\footnote{Id. at 246.}

Once data is collected for a quantitative survey, the researcher could then look for factors that correlate with knowledge of whistleblower law.

In what are called “predictor studies,” the researcher could analyze the data for any evidence of associations between previously identified categories of respondents.\footnote{Id. at 346.} For example, are tenured professors more likely to be knowledgeable about whistleblower protection than untenured? Are professors in the sciences more likely to be knowledgeable about whistleblower law?
protections than professors in the humanities? These are called “predictor studies” because the result is the ability to reliably and accurately predict the level of knowledge of a specific identified group. The results might then possibly state, “If the subject is an untenured professor in the sciences, then there is a 40% chance she will be knowledgeable about whistleblower laws.”

A correlation study might find that professors in the sciences are more likely to know, and it might even be able to find out, if that is part of the data collected, that professors in the sciences who report receiving training know more than those who do not. But it cannot be the basis of concluding that the training caused the increase in knowledge. The professors with more knowledge may well be those with more interest in the subject who would have acquired the information with or without a formal training course. The only way to tell if training increased knowledge would be, again, to design an experiment in which some professors had training and some did not.

The training example described above is only one of the many ways that the issues raised in this article could be the basis for further research. The scenarios could also be tested for validity and reliability much as an item in a test or questionnaire could be.423

Finally, it would be useful to directly study institutions, like Albion College, that have strong, internal whistleblower policies. This study could take the form of qualitative research that would show the role that these policies play, if any, in the life of the individual college. In addition, research studies could compare whether colleges with strong internal policies achieve greater compliance with their goals than those that do not have strong policies. Do colleges that provide more protection have more complaints? And if so, do those complaints actually result in more compliance.

5.4 Conclusion

The external legal protections available to faculty at IHEs who face retaliatory employment action for the act of disclosing information of public importance are both inconsistent and complex. This raises two problems. First, as a practical matter, it is very difficult for either faculty or administrators to know in

423Id. at 195.
advance what kinds of whistleblowing activities are or are not protected. Moreover, even among protected activities, there is uncertainty about how courts will evaluate any particular whistleblower’s eligibility for the protection offered by the statute. Faculty should be aware that, although acting in good faith is a necessary component in obtaining protection from an adverse employment action, it is no guarantee of protection.

The second problem, however, is much larger and more holistic. The goal of external whistleblower provisions is to enforce specific laws or, in the case of broad state whistleblower statutes, to prevent waste, fraud, and abuse of state funds. However, each IHE is its own community with its own interest, needs, goals, and objectives. At times, an IHE’s interests may coincide with the government; for example, it is in both of their interests to encourage enforcement of the Clery Act. However, if IHEs are truly interested in bringing forward the kind of information that only whistleblowers are likely to know, the most effective way of doing that is by developing internal policies, procedures and training programs to promote employee behaviors that it values.