COMMENT

DON'T WHISTLE WHILE YOU WORK: WISCONSIN'S VANISHING PROTECTIONS FOR PUBLIC EMPLOYEE WHISTLEBLOWERS

COREY TRIGGS*

Public employee whistleblowers are widely recognized as essential to the fair and efficient provision of government services. As a result, the number of statutory schemes designed to shelter civil servants from retaliation for whistleblower disclosures has increased dramatically in recent decades. Every U.S. state now has such a law on the books. Wisconsin, however, has an especially weak protective system. Its public employee whistleblower law, as written, covers too little and affords scant remedies. What's more, Wisconsin courts have reached beyond this already narrow text to unreasonably further restrict the law's application, to the point it retains little relevance as remedy. At present, Wisconsin law neither incentivizes blowing the whistle nor protects those courageous enough to do so.

Wisconsin's meager whistleblower protections are in large part due to a 2015 Wisconsin Supreme Court decision, *State Department of Justice v. State Department of Workforce Development* ("*DOJ v. DWD*"), which greatly reduces the breadth of the whistleblower law's coverage, compounding its original deficiencies. The majority opinion applies unsound methods of statutory interpretation to justify its disregard for the whistleblower law's explicit command of liberal construction—to serious effect. This Comment argues that the whistleblower law's undoing by the Wisconsin Supreme Court threatens the integrity of state government in both fact and perception.

Indeed, Wisconsin's withering commitment to the whistleblower subverts the ideals that animated its pioneering system of civil service. Fortunately, however, there are relatively low-cost legislative fixes available to correct the whistleblower law's present inadequacies. This Comment proposes statutory changes informed by historical and direct observation, social-psychological research, and the wide variety of whistleblower statutes in force in other jurisdictions. By expanding the whistleblower law's coverage and invigorating its incentives, these reforms would reduce misconduct in public office and position Wisconsin as a national leader in transparency and good governance.

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* J.D. Candidate, University of Wisconsin Law School, May 2019. The idea for this Comment, as well as some of its arguments and observations (where noted), draw from the author's experience as an Equal Rights Officer for the Wisconsin Equal Rights Division from 2013 to 2016. Thank you to the *Wisconsin Law Review* and to Kole Oswald and Andrew Fabianczyk for their valuable comments and suggestions.

INTRODUCTION

Every U.S. state has enacted statutory protections for public employee whistleblowers as a means to preserve the integrity of its civil service system—systems designed to ensure that those entrusted with the sovereign authority of the state are hired, fired, disciplined, and promoted based only on objective, fair considerations of their merit and actions.[1] However, state-level whistleblower laws vary widely in scope and effectiveness.[2] In Wisconsin, public employee whistleblowers punished by government actors in retaliation for their disclosures

1. *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000); William M. Haines, *Fifty Years of Civil Service: An Informal Review of the Origins and Development of Wisconsin Civil Service*, 39 WIS. MAG. HIST. 30, 30–31 (1955) (describing the motivating purposes underlying civil service reform).

2. Callahan & Dworkin, *supra* note 1, at 100.

confront an unusually daunting path in utilizing statutory protections to redress their injuries.[3]

Wisconsin's whistleblower law generally prohibits retaliation against public employees for their reports of protected information concerning wrongful acts such as fraud, abuse, mismanagement, and violations of laws or regulations.[4] Although limited in scope,[5] Wisconsin's whistleblower law is a particularly important source of protection for public employee whistleblowers. The whistleblower law is so crucial because other potential avenues for relief, such as constitutional or contractual claims, are either unattractive or entirely unavailable to many public employees.[6] Nonetheless, judicial treatment of the whistleblower law has rendered it essentially useless as a means to protect public employees who report government malfeasance.[7] Most notably, the Wisconsin Supreme Court's recent decision in *State Department of Justice v. State Department of Workforce Development* ("*DOJ v. DWD*")[8] announced significant new barriers to the protection of those civil servants brave enough to call attention to alleged abuses, often at considerable personal and professional risk.[9] In addition to the dangerous practical effects of the decision, the majority opinion in *DOJ v. DWD* represents a deeply flawed exercise of statutory interpretation that undermines the clearly stated legislative objectives motivating the whistleblower law.[10]

DOJ v. DWD's long path through the state's administrative and judicial structures also illustrates the protracted process whistleblowers often endure when they attempt to vindicate their rights. Wisconsin's whistleblower law tasks the Equal Rights Division ("ERD") of the state's Department of Workforce Development with investigating and adjudicating complaints.[11] The ERD determined that the employee who initiated the litigation that led to *DOJ v. DWD*, Joell Schigur, had been unlawfully retaliated against.[12]

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3. *See infra* Part II.
4. *See* WIS. STAT. §§ 230.80–.89 (2015–16).
5. *See infra* Section II.A.
6. *See infra* Section II.B.
7. *See, e.g.*, *State Dep't of Justice v. State Dep't of Workforce Dev.*, 875 N.W.2d 545, 566 (Wis. 2015) (A.W. Bradley, J., dissenting) ("The consequences of this decision may be far-reaching. Not only will whistleblowers suffer retaliation without recourse, but all of Wisconsin's citizens lose protection against government corruption. Absent legal protections, it will be the rare employee who will risk her livelihood to act as a whistleblower.").
8. 875 N.W.2d 545 (Wis. 2015).
9. *See infra* Part III.
10. *See infra* Part III.
11. *See* WIS. STAT. § 230.85(2)–(3) (2015–16).
12. *State Dep't of Justice*, 875 N.W.2d at 549.

Specifically, an administrative law judge concluded that Schigur had been demoted for telling her superiors that she believed their plan to provide state-funded, 24-hour security protection to then-Attorney General J.B. Van Hollen while he attended the Republican National Convention may violate state law and public employee regulations.[13] The state, however, appealed and Schigur ultimately lost her case before the Wisconsin Supreme Court, more than seven years after the initial complaint was filed.[14] That Schigur's complaint failed is hardly surprising. Between 2003 and 2016, Wisconsin circuit and appellate courts heard eleven cases under the whistleblower law, and in all eleven cases the courts ruled against the employee and in favor of the state employer.[15]

Schigur's experience also exemplifies how retaliation against public employee whistleblowers undermines the central innovation of the civil service system itself—employment based on merit.[16] Wisconsin, in 1905, was one of the first states to enact such a system.[17] The system's motto was "The Best Shall Serve the State."[18] Yet, this admonition rings hollow when talented public servants like Joell Schigur lose their positions merely for exposing what others may prefer remain hidden or unexpressed. Indeed, before she blew the whistle, Schigur was "a rising star in the law enforcement world."[19]

This Comment proceeds in four Parts. Part I interrogates the historical and practical questions raised by this Comment's central

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13. *Id.* at 548–49.

14. *Id.* at 548–50.

15. Gretchen Christensen & Madeline Sweitzer, *Wisconsin's Attack on Waste and Fraud Leaves Some Whistleblowers, Vulnerable Residents Behind*, WIS. CTR. FOR INVESTIGATIVE JOURNALISM (Oct. 15, 2017), http://wisconsinwatch.org/2017/10/wisconsins-attack-on-waste-and-fraud-leaves-some-whistleblowers-vulnerable-residents-behind [https://perma.cc/35P2-T3SX].

16. Wisconsin's civil service system, like that of other states, was a response to the injustice and inefficiency inherent in previous systems for public employment in which civil servants were often selected based in large part on patronage considerations, or even outright corruption. *See* Bruce Murphy, *The Best Shall Not Serve*, ISTHMUS (May 12, 2016), https://isthmus.com/opinion/opinion/end-of-civil-service-laws-leads-to-political-patronage [https://perma.cc/3V9J-UPXF]. Then-Governor Robert M. La Follette, in advocating for the enactment of Wisconsin's civil service law, asserted that any system for selection other than one based on merit was "undemocratic." Specifically, La Follette stated that "[t]o say that the test of party service should be applied is just as undemocratic as it would be to apply the test of birth or wealth or religion." Haines, *supra* note 1, at 30–31.

17. Haines, *supra* note 1, at 30.

18. *Id.* at 32.

19. Bobby Ehrlich, *Joell Schigur Warned Bosses of Possible Illegal Activity, But Wisconsin Courts Ruled She is Not a Whistleblower*, WIS. CTR. FOR INVESTIGATIVE JOURNALISM (Dec. 3, 2017), https://www.wisconsinwatch.org/2017/12/joell-schigur-warned-bosses-of-possible-illegal-activity-but-wisconsin-courts-ruled-she-is-not-a-whistleblower [https://perma.cc/L3FC-WE5Z].

claim: that *DOJ v. DWD* unjustifiably and dangerously limits the already inadequate whistleblower protections provided for in Wisconsin law. Specifically, Part I analyzes the history, purpose, and key provisions of Wisconsin's public employee whistleblower law, surveys the patchwork of federal and state whistleblowing laws, and explores how Wisconsin's whistleblower law compares to these statutory schemes. Additionally, Part I details the circumstances of Joell Schigur's whistleblower claim, its long path to the Wisconsin Supreme Court, and ultimate rejection by that body. Part II of this Comment asserts that the whistleblower law was, even prior to *DOJ v. DWD*, a flawed and underutilized statutory remedy, particularly in comparison to similar laws of other states. Because the whistleblower law represents the only meaningful avenue for relief for many public employee whistleblowers facing retaliation, these intrinsic deficits are more acutely felt. Part III argues that *DOJ v. DWD* was wrongly decided. It also explores the significant harm that might result from this decision and evaluates and ultimately rejects some counterarguments to the proposition that expansive whistleblower protections schemes are policy imperatives. Finally, Part IV proposes several solutions to reform and strengthen Wisconsin's whistleblower law.

I. WHISTLEBLOWING, WISCONSIN, AND THE DOJ

Whistleblowers are the primary method by which waste, fraud, and abuse in government are identified.[20] As a result, the federal government[21] and all fifty U.S. states[22] have enacted legislation to protect public employees from retaliation for reporting violations of law and other types of wrongful acts. These state-level protections, although varied in form and scope, are uniform in purpose.[23] They are designed to expose, redress, and discourage governmental malfeasance and waste.[24] These laws encourage public employee whistleblowers to report such wrongful conduct by reducing the risks they incur by coming forward.[25] Despite these legislative protections, whistleblowing remains an act of faith. The outcome of a whistleblower's disclosure is always uncertain. Its rewards are often delayed[26] and nearly always

20. Christensen & Sweitzer, *supra* note 15.

21. *See* Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 54 (2011).

22. Callahan & Dworkin, *supra* note 1, at 100.

23. *Id.*

24. *Id.*

25. *See, e.g.*, *Hutson v. State Pers. Comm'n*, 665 N.W.2d 212, 228 (Wis. 2003); WIS. STAT. § 230.01(2)(e) (2015–16).

26. *See infra* Section II.C.

inadequate.[27] Indeed, all too frequently, the whistleblower's only desserts are personal and professional ruin.[28]

A. Why Protect Whistleblowers?

Policymakers and the larger public both recognize the fundamental importance of whistleblowers, and, by extension, the legislative enactments that encourage and shelter their disclosures. Legislators view whistleblowing as "[a]n important source of information vital to honest government, the enforcement of laws, and the protection of the public health and safety."[29] Indeed, governments have long recognized the salutary nature of whistleblowers' reports. For instance, when Venice was a city-state, Venetian authorities established a system that permitted citizens to blow the whistle on governmental misconduct by inserting reports of wrongdoing into the mouth of a stone lion's head placed outside of a government building: the "mouth of truth."[30] The public too tends to view whistleblowers positively, rather than as disloyal troublemakers.[31] In large part this is because the act of blowing the whistle—frequently a solitary, dangerous pursuit—aligns "with the traditional American value of individualism."[32]

B. Wisconsin's Public Employee Whistleblower Law

Wisconsin's state employee whistleblower protection law ("the whistleblower law") was created by 1983 Wisconsin Act 409 and is codified in Chapter 230 of the Wisconsin Statutes.[33] This legislation is referred to as the "whistleblower law" because it was designed to "encourage [state] employees to disclose . . . [valuable] information and to protect such employees from retaliation."[34] The law provides that, subject to certain exceptions, state employees may not be

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27. *See infra* Part IV.

28. *See, e.g.*, Christensen & Sweitzer, *supra* note 15.

29. Norman D. Bishara et al., *The Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 37, 39 (2013) (quoting STEPHEN M. KOHN & MICHAEL D. KOHN, THE LABOR LAWYER'S GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF EMPLOYEE WHISTLEBLOWERS 1 (1988)).

30. *Id.*

31. Jon Knight, *Patrolling the Unfriendly Skies: Protecting Whistleblowers Through Expanded Jurisdiction*, 20 FED. CIR. B.J. 281, 285 (2010).

32. *Id.*

33. *See* WIS. STAT. §§ 230.80–.89 (2015–16).

34. *See Hutson v. State Pers. Comm'n*, 665 N.W.2d 212, 228 (Wis. 2003); § 230.01(2)(e).

retaliated against for disclosing protected "information,"[35] in a specific sequence,[36] to a statutorily approved party.[37]

The whistleblower law requires that its provisions "be construed liberally."[38] This command of liberal construction is expressly intended[39] to encourage whistleblowing disclosures and insulate whistleblowers from retaliation,[40] thereby serving the moral and prudential aims of ensuring "fair treatment."[41] It is further intended to ensure that all personnel actions are based on merit,[42] with "adequate civil service safeguards."[43] Yet, in recent years, state employees who have dared to blow the whistle on alleged public misconduct have suffered greatly for these efforts. They have been "fired, demoted and even threatened with violence after reporting problems including sexual assault in prisons, misuse of federal funds and other potential illegal activity."[44]

Several features of the whistleblower law act to limit the number of complaints investigated under its authority. For instance, the reporting process requirements prescribed by the statute are so restrictive that many complaints under the law are not taken, are dismissed, or are withdrawn at various stages in the administrative or judicial process.[45] The whistleblower law allows that "[a]n employee with knowledge of information the disclosure of which is not expressly

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35. Specifically, the statute defines information as: "[i]nformation gained by the employee which the employee reasonably believes demonstrates" a "violation of any state or federal law, rule or regulation," "[m]ismanagement or abuse of authority in state or local government," or a "substantial waste of public funds or a danger to public health and safety." § 230.80(5)(a)–(b). The statute does not define the words "disclose" or "disclosure." §§ 230.80–.89.

36. *See infra* notes 45–47 and accompanying text.

37. § 230.81(1)–(3).

38. § 230.02.

39. *Id.* (stating that "[s]tatutes applicable to the division and bureau shall be construed liberally in aid of the purposes declared in s. 230.01").

40. § 230.01(2)(e).

41. § 230.01(2)(d).

42. § 230.01(2)(a)–(b).

43. § 230.01(2)(a).

44. Christensen & Sweitzer, *supra* note 15.

45. Author's personal experience as an employee of the Equal Rights Division. The author observed whistleblower complaints rejected or withdrawn prior to investigation or later on in the administrative process for the sole reason that the claim failed to conform to the requirements of § 230.81. As to dismissal for these reasons during the judicial process upon appeal of an earlier administrative ruling, see *Bethards v. State Dept't of Workforce Dev., Equal Rights Div.*, 899 N.W.2d 364 (Wis. Ct. App. 2017), which held that an employee's whistleblower disclosure was not protected because it was first made to the Wisconsin Department of Justice's human resources director, who did not amount to a "supervisor" within the meaning of the whistleblower law.

prohibited by state or federal law, rule or regulation may disclose that information to any other person."[46] However, in order to obtain protection, "before disclosing that information to any person," the employee must first "[d]isclose the information in writing" either to the employee's supervisor or to a governmental unit selected by the Equal Rights Division of the Wisconsin Department of Workforce Development.[47] Further, public employees who believe that they have been unlawfully retaliated against for a protected disclosure must file their complaint with the Equal Rights Division within sixty days of when the retaliatory action occurred or was threatened.[48] These are merely two examples of statutory requirements that prevent more complaints from being filed, investigated, and adjudicated under Wisconsin's whistleblower law.

C. The DOJ v. DWD *Revolution*

In 2015, the Wisconsin Supreme Court decided *DOJ v. DWD*.[49] The majority opinion dramatically restricts the already-narrow range of conduct protected under the whistleblower law. The litigation centered on emails sent by a Wisconsin Department of Justice ("DOJ") employee, Joell Schigur, to DOJ officials regarding public expenditures for a security detail for then-Attorney General J.B. Van Hollen while he attended the Republican National Convention in Minnesota.[50] In the emails, Schigur expressed her belief that the use of state resources for this purpose may violate state law and Office of State Employment Relations ("OSER") civil service regulations.[51] Shortly after she sent the emails, Schigur was demoted from her position as DOJ Division of Criminal Investigation ("DCI") Public Integrity Director, and returned to her previous position as Special Agent In-Charge.[52]

Schigur had been promoted to the position of Bureau Director of the DCI on May 28, 2006.[53] Her appointment was subject to a two-year probationary period, which included quarterly performance reviews.

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46. § 230.81(1).

47. § 230.81(1)(a)–(b).

48. § 230.85 ("[W]ithin 60 days after the retaliatory action allegedly occurred or was threatened or after the employee learned of the retaliatory action or threat thereof, whichever occurs last."). Many other states provide for a longer statute of limitations for filing whistleblower complaints. *See infra* notes 100–102 and accompanying text for further information.

49. *State Dep't of Justice v. State Dep't of Workforce Dev.*, 875 N.W.2d 545, 547 (Wis. 2015).

50. *Id.* at 546–47.

51. *Id.* at 547.

52. *Id.* at 549.

53. *Id.* at 547.

Schigur received six consecutive positive performance evaluations from September 2006 to November 2007.[54] Schigur's seventh performance evaluation, completed on February 22, 2008, by her supervisor, DCI Acting Administrator Mike Myszewski, was again positive and recommended that she "be removed from probation and receive permanent status as director."[55] Myszewski also wrote a memorandum to the DOJ's human resources director recommending that Schigur's probation be ended early.[56] Nevertheless, Schigur's probation continued.[57]

Then, at an April 15, 2008, staff meeting for DCI Bureau Directors, Schigur learned that Attorney General Van Hollen would be provided with 24-hour security at the upcoming Republican National Convention in Minnesota.[58] On April 21, 2008, Schigur sent the following email to Myszewski, Jed Sperry (head of the DCI's tactical unit), and Cindy O'Donnell (Administrator of the DOJ's Division of Management Services):

> In our April 15th staff meeting, a discussion was held regarding providing the Attorney General with a 24 hour security detail of special agents while he attends the Republican National [Convention] in Minnesota. . . . The Office of State Employee Relations in the bulletin numbered OSER-0053-MRS (attached) clarified permissible political activities for state employees. According to Section 6(h), a state employee may participate as a delegate, alternate, or proxy to a political convention provided he or she is off duty and not on state property.
>
> I am concerned that providing state resources to the Attorney General while he participates in a political activity off duty may violate OSER regulations and state law. I am expressing

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54. *Id.* at 547–48.

55. *Id.* at 548. As excerpted in Justice Ann Walsh Bradley's dissenting opinion, Myszewski wrote on Schigur's performance evaluation:

> Joell continues to do an outstanding job of leading the Public Integrity Bureau and the Internet Crimes Against Children Program. Joell is a nationally recognized leader in the area of protecting children from internet predators. Joell has successfully mastered all of the objectives and standards for a bureau director. I recommend that Joell be removed from probation and receive permanent status as a director.

Id. at 559 (A.W. Bradley, J., dissenting).

56. *State Dep't of Justice v. State Dep't of Workforce Dev.*, 861 N.W.2d 789, 791 (Wis. Ct. App. 2015).

57. *Id.*

58. *Id.*

> this concern in hopes that this decision will be further evaluated to avoid possible scrutiny of our Attorney General, our agency and our special agents.[59]

Myszewski responded to Schigur via email on April 23, 2008, indicating that he would "forward [her] concerns up the chain of command so that they can be evaluated," but added that he did not believe that the provision of security in this instance constituted impermissible political activity on the part of an agent.[60] That same day, Schigur responded with another email, which read in part: "To clarify, the concern is not regarding agents participating in political activity; rather can state resources be used by the [Attorney General] at a political event where he is not representing DOJ, rather the Republican Party. Parallel issues [came up] in the Jensen/Chvala investigation."[61]

On May 21, 2008, Myszewski and O'Donnell presented Schigur with her final probationary performance evaluation.[62] This review asserted that, since her seven previous positive evaluations, Schigur had "been persistently unwilling to carry out administration policies, argumentative, disrespectful, suspicious of management, and insubordinate" as well as "openly critical and defiant of management's policies and decision making."[63] The next day, Schigur was demoted to her previous position as Special Agent In-Charge.[64]

On July 11, 2008, Schigur filed a complaint under the whistleblower law with the ERD.[65] On September 26, 2008, an ERD investigator issued an Initial Determination finding that there was probable cause to believe that the DOJ violated the whistleblower law by retaliating against Schigur.[66] As such, the case was certified for a full hearing on the merits before an ERD administrative law judge.[67] That hearing was held from September 28–30, 2009.[68] The ERD issued

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59. *State Dep't of Justice*, 875 N.W.2d at 548.

60. *Id.*

61. *Id.* Note that the "Jensen/Chvala" investigation here refers to corruption charges levelled against high-ranking Wisconsin officials in the early 2000's related to allegations of impermissible use of state resources for private, political purposes. David S. Broder, *Scandals Rocking Wisconsin Politics*, WASH. POST (June 23, 2002), https://www.washingtonpost.com/archive/politics/2002/06/23/scandals-rocking-wisconsin-politics/d7b88039-c3b0-4822-b19d-220baa8fb0d2/?utm_term=.f37b0df8ebcd [https://perma.cc/D9J9-RTQR].

62. *State Dep't of Justice*, 875 N.W.2d at 548–49.

63. *Id.* at 549.

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.*; *see also* WIS. ADMIN. CODE DWD § 218.07 (2013).

68. *State Dep't of Justice*, 875 N.W.2d at 549.

a "Final Decision and Memorandum Opinion" on April 30, 2012.[69] It concluded that Schigur had proven by a preponderance of the evidence that the DOJ had violated the whistleblower law by taking retaliatory action against her "because she lawfully disclosed, or the [DOJ] believed that she had lawfully disclosed, information" within the meaning of the law, and that the DOJ demoted her in retaliation for her disclosures.[70]

The DOJ filed a petition for judicial review of the ERD decision in Dane County Circuit Court.[71] Almost a year later, the circuit court issued a decision and order reversing the decision of the ERD.[72] The court found that Schigur had not disclosed "information"[73] within the meaning of the law and that Schigur's communications were therefore not entitled to protection.[74] Schigur appealed, and on February 5, 2015, the Wisconsin Court of Appeals affirmed the circuit court's decision.[75] Several months later the Wisconsin Supreme Court granted Schigur's petition for review.[76]

Schigur's primary argument before the Wisconsin Supreme Court was that her emails constituted protected disclosures and that she was unlawfully demoted in retaliation for these disclosures.[77] Schigur also asserted another argument in the alternative,[78] based on the whistleblower law's prohibition against disciplinary actions because of a state agency or agency representative's belief that an employee

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69. *Id.* at 550.

70. *Id.* (quoting *Joell E. Schigur*, ERD Case No. CR20082196 (Apr. 30, 2012) (final decision and memorandum opinion)).

71. *Id.*

72. *Id.*

73. "Information" for the purposes of the whistleblower law is defined as "information gained by the employee which the employee reasonably believes demonstrates:" "[a] violation of any state or federal law, rule or regulation" or "[m]ismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety." WIS. STAT. § 230.80(5) (2015–16).

74. *State Dep't of Justice*, 875 N.W.2d at 550.

75. Specifically, the Wisconsin Court of Appeals determined that:

> Schigur's statements in the emails did not disclose "information," but rather expressed her opinion that providing security to the Attorney General might be a violation of law. Accordingly, we conclude that Schigur's April 2008 emails do not satisfy the requirements for according Schigur protection from retaliatory action under WIS. STAT. § 230.83.

State Dep't of Justice v. State Dep't of Workforce Dev., 861 N.W.2d 789, 797 (Wis. Ct. App. 2015).

76. *State Dep't of Justice*, 875 N.W.2d at 550.

77. *See id.* at 547.

78. *Id.*

lawfully disclosed information protected by the law.[79] The Wisconsin Supreme Court, in a 3-2 decision, rejected all of Schigur's arguments.[80]

Indeed, the court affirmed the Wisconsin Court of Appeals decision in full.[81] The majority's decision contained four key holdings. First, the court concluded that the whistleblower law provisions at issue in the case should not be liberally construed.[82] Second, that an opinion as to the lawfulness or appropriateness of government activity is not by itself "information" as that term is defined in the whistleblower law.[83] Third, that communication of the information contained in the emails was not a "disclosure" within the meaning of the law because the content of the information was previously known to the recipients.[84] Finally, the court held that the DOJ's alleged belief that Schigur was covered under the whistleblower law did not entitle her to the law's protection.[85]

Part I of this Comment highlighted the practical importance of public employee whistleblower statutes, as evidenced by their adoption in various form by the federal government and all fifty U.S. states. Then, it described the genesis and purpose of Wisconsin's whistleblower law, as well as its key features and terms. Part I further discussed the law's application to one whistleblower who attempted to invoke its protection and the long process her whistleblower complaint tracked prior to its ultimate rejection by the Wisconsin Supreme Court. Finally, Part I outlined the Wisconsin Supreme Court's reasoning for denying Joell Schigur relief in *DOJ v. DWD*, a decision Part III of this Comment argues represents an unreasonable exercise of statutory interpretation. Part III of this Comment further argues that *DOJ v. DWD* will have significant negative consequences—particularly in light of the whistleblower law's original deficiencies, as outlined in Part II below.

II. WISCONSIN'S WHISTLEBLOWER LAW HAS ALWAYS PROVIDED INSUFFICIENT SHELTER TO WHISTLEBLOWERS

Even prior to *DOJ v. DWD*, Wisconsin's whistleblower law provided inadequate safeguards for public employee whistleblowers, in both absolute and comparative terms. Specifically, Wisconsin's

79. WIS. STAT. §§ 230.80(8)(a), 230.80(8)(c), 230.83(1) (2011–12); *State Dep't of Justice*, 875 N.W.2d at 547.

80. *State Dep't of Justice*, 875 N.W.2d. at 546, 558, 566.

81. *See id.* at 558.

82. *Id.* at 553.

83. *Id.* at 554.

84. *Id.* at 556.

85. *Id.* at 558.

protective scheme is fairly weak relative to other states.[86] It is an inchoate remedy that offers limited protections for civil servants who would come forward with information about malfeasance or waste in state government. Yet, for many Wisconsin whistleblowers, the whistleblower law is the only avenue for relief when they suffer injury consequent to their disclosures—making these deficiencies more acutely felt. Further, when complaints are filed, they are rarely successful[87] and sometimes spend years in the administrative and judicial review process.[88]

A. Wisconsin's Whistleblower Law Is Comparatively Weak

State whistleblower statutes vary widely in content, particularly as to the types of disclosures protected, the manner of reporting permitted, and the remedies provided for violations.[89] Wisconsin's whistleblower law is, on balance, less comprehensive than other states' statutory schemes. Although the whistleblower law's text embraces a wide range of potentially protected "information" concerning wrongful conduct, it offers limited remedies and narrowly circumscribes the manner of disclosure.[90]

Wisconsin's whistleblower law contains safeguards for the disclosure of a relatively expansive variety of public wrongdoing.[91] The law protects disclosures of violations of "any state or federal law, rule, or regulation," as well as "mismanagement or abuse of authority in state or local government," or a "substantial waste of public funds or a danger to public health and safety."[92] Although every state's whistleblower statute contains some protection for disclosures of law violations by government officials, only thirty-two states protect disclosures of waste, and even fewer (twenty-one states) protect reports

86. WIS. STAT. §§ 230.80–.85 (2015–16); Callahan & Dworkin, *supra* note 1, at 107.

87. *See infra* Section II.C.

88. *See, e.g.*, *State Dep't of Justice v. State Dep't of Workforce Dev.*, 875 N.W.2d 545, 548–50 (Wis. 2015); *State Dep't of Justice v. State Dep't of Workforce Dev.*, 861 N.W.2d 789, 791–92 (Wis. Ct. App. 2015).

89. Callahan & Dworkin, *supra* note 1, at 107.

90. *See* §§ 230.80–.89.

91. *See* Susan L. Wynne & Michael S. Vaughn, *Silencing Matters of Public Concern: An Analysis of State Legislative Protection of Whistleblowers in Light of the Supreme Court's Ruling in* Garcetti v. Ceballos, 8 ALA. C.R. & C.L.L. REV. 239, 265–66 (2017) (reviewing persons and disclosures protected by state-level whistleblower statutes).

92. §§ 230.80–.81.

of abuse by such officials.[93] Thus, by one measure, only eight states protect more types of disclosures than does Wisconsin.[94]

However, the protection granted by a statute that shelters a wide variety of disclosures concerning public malfeasance is only meaningful to the extent that the statute also affords employees effective avenues for reporting and sufficient remedies when retaliation occurs. It is in these areas that the original inadequacy of Wisconsin's public employee whistleblower law is most apparent. Wisconsin has one of the most onerous and limited statutory schemes with regard to the permitted manner of disclosing protected information. Nine states' whistleblower statutes protect disclosure to any person or agency, and twenty-eight more allow for reports to be made to any public body or employee.[95] By contrast, Wisconsin requires a would-be whistleblower to first "[d]isclose the information" to either "the employee's supervisor" or to "the governmental unit [selected by the Equal Rights Division]."[96] Another significantly limiting statutory provision is Wisconsin's requirement that the disclosure must first be made "in writing,"[97] while some other states permit initial disclosures in either oral or written form.[98] Many complaints under Wisconsin's whistleblower law are dismissed or withdrawn at various stages in the administrative or judicial review process because the manner of disclosure was not protected.[99] Frequently, these complaints would have been protected under the laws of other states with more liberal disclosure requirements.

Wisconsin's sixty-day limitations period for filing whistleblower claims with the Equal Rights Division also acts to remove otherwise valid whistleblowing complaints from statutory protection.[100] Many other states allow for significantly longer periods under which reports

93. Wynne & Vaughn, *supra* note 91, at 265.

94. Those states are California, Connecticut, Florida, Illinois, New Mexico, North Carolina, Tennessee, and Utah. *Id.* at 266 & n.189.

95. *Id.* at 266.

96. § 230.81(1)(a)–(b).

97. *Id.*

98. *See, e.g.*, ME. REV. STAT. ANN. tit. 26. § 833(1)(B) (2017). However, at least one state (Ohio) requires an employee to make both oral and written reports in order to gain protection. *See Contreras v. Ferro Corp.*, 652 N.E.2d 940, 943 (Ohio 1995).

99. *See* Christensen & Sweitzer *supra* note 15.

100. It is the author's experience that this threshold procedural requirement, contained in WIS. STAT. § 230.85, prevents a significant number of prospective whistleblower complaints from being filed in the first instance. The sixty-day statute of limitations also results in many filed complaints being dismissed at the "preliminary" or "initial" stage of the Equal Rights Division's administrative process.

of retaliation are protected.[101] For example, eight states' whistleblower laws stipulate a one-year statute of limitations; Washington and Rhode Island go even further, with limitations periods of two and three years, respectively.[102]

Although its reporting requirements are fairly restrictive, the remedies provided for in Wisconsin's whistleblower law compare favorably to those of other states. However, this comparison also reveals ways the law might be significantly improved. Like most states, Wisconsin's public employee whistleblower law provides for both "make whole" remedies and sanctions against the person or entity responsible for the retaliation.[103] Yet, these remedies are inadequate. As discussed later in this Comment, expanded remedies would foster a far more effective statutory scheme, both by encouraging the reporting of wrongful conduct and by deterring such acts in the first instance.[104]

B. Statutory Protection Is Often the Only Protection

Despite its shortcomings, the whistleblower law remains vital because, for many whistleblowers, it is the only avenue for relief in the face of retaliation. Wisconsin state employee whistleblowers are often unable to utilize two other causes of action frequently invoked by aggrieved public employees: the "public policy exception" to the doctrine of at-will employment, and constitutional claims under the First Amendment. These limitations render the whistleblower law especially significant—not only to the individual whistleblower, but also as a means of ensuring the integrity of state government.

Wisconsin, like every state except Montana, adheres to the common law doctrine of at-will employment.[105] Pursuant to this doctrine, most Wisconsin employees can be discharged for nearly any non-discriminatory reason.[106] A crucial limitation to this general doctrine is the "public policy exception," which is recognized by the

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101. *See* RICHARD A. LEITER & WILLIAM S. HEIN, 50 STATE STATUTORY SURVEYS: WHISTLEBLOWER STATUTES, Westlaw (2016).

102. Bishara, *supra* note 29, at 111 n.396.

103. Wynne & Vaughn, *supra* note 91, at 268.

104. *See infra* Part IV.

105. By a 1987 statute, Montana "became the only state to adopt a 'good cause' standard for discharge of employees with contracts of unspecified duration." Bradley T. Ewing et al., *The Employment Effects of a "Good Cause" Discharge Standard in Montana*, 59 INDUS. & LAB. REL. REV. 17, 17 (2005).

106. *See Tatge v. Chambers & Owen, Inc.*, 579 N.W.2d 217, 222–23 (Wis. 1998).

majority of states but varies widely in scope.[107] Employers that wrongfully discharge employees in violation of public policy are generally liable for damages in tort, which may include punitive damages and damages for emotional distress.[108] However, the Wisconsin Supreme Court has determined that remedies for wrongful discharge under the public policy exception sound in contract and are therefore restricted to reinstatement and backpay.[109] More significantly, in Wisconsin, in contrast to some other states,[110] courts have limited the public policy exception to only those instances where an employer commands or requests that an employee violate an express public policy (as evidenced by a statutory or constitutional provision), and only where the retaliatory action in question is a termination.[111]

With such severe limitations, Wisconsin's public policy protection is unavailing for a large number of whistleblowers. For example, the public policy exception is unavailable in Wisconsin to any employee who is "merely" harassed or demoted in retaliation for a whistleblower disclosure. The same is true for any employee who discloses information about wrongful government conduct, but has not been retaliated against for refusing to follow a command to herself violate a fundamental, express public policy.[112] Indeed, for this reason Joell Schigur would have no claim under the public policy exception, even if she had been terminated. Further, although the Wisconsin Supreme Court has not directly addressed whether a public employee who makes a complaint under the whistleblower law is barred from also making a

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107. STEPHEN P. PEPE & SCOTT H. DUNHAM, AVOIDING AND DEFENDING WRONGFUL DISCHARGE CLAIMS § 1:5 PUBLIC POLICY EXCEPTION TO AT-WILL RULE, Westlaw (2019).

108. Joseph C. Telezinski, Jr., Comment, *Without Warning—The Danger of Protecting "Whistleblowers" Who Don't Blow the Whistle*, 27 W. ST. U. L. REV. 397, 397, 401 (2000).

109. *See Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983).

110. California, for example, which was the first state to recognize a limitation based in public policy to the employer's right to discharge an employee at will. *See Petermann v. Int'l Bhd. of Teamsters, Local 396*, 344 P.2d 25, 28 (Cal. 1959).

111. *See Strozinsky v. Sch. Dist. of Brown Deer*, 614 N.W.2d 443, 452–53 (Wis. 2000) (describing the boundaries of the "narrow" public policy exception in Wisconsin).

112. *See id.*; *Brown v. Pick 'n Save Food Stores*, 138 F. Supp. 2d 1133, 1143 (E.D. Wis. 2001) (observing that the Wisconsin Supreme Court has narrowed the exception "to situations where the worker is terminated for refusing a command, instruction or request of the employer to violate public policy as established by existing law[,] although in [*Hausmann v. St. Croix Care Ctr.*, 571 N.W.2d 393, 398 (Wis. 1997)] the court slightly expanded the exception to include situations where a worker is terminated for complying with an affirmative legal obligation.") (citation omitted).

claim of wrongful discharge based on the public policy exception, it appears likely based on its prior holdings that it would so conclude.[113]

Whistleblowers have also sought shelter from employer retaliation in the constitutional guarantee of free speech.[114] However, such First Amendment relief is no longer applicable to nearly all public sector whistleblowing activity.[115] Prior to 2006, public employee whistleblowers could and did make claims under 42 U.S.C. § 1983.[116] Remedies for successful claims under § 1983 can include a broad range of compensatory and even punitive damages.[117] In 2006, however, the United States Supreme Court shut the door on most such whistleblowing complaints by public employees through its decision in *Garcetti v. Ceballos*.[118] The Court made clear that there is no constitutional right to blow the whistle, concluding that public employees who make statements pursuant to their official job duties are not protected against retaliation by their employer.[119] Given that essentially all whistleblowing activity by public employees concerning government misconduct is speech pursuant to those employees' official job duties, most such whistleblowers are now effectively barred from relief for retaliation through § 1983 constitutional claims.[120]

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113. *See Brockmeyer*, 335 N.W.2d at 842 n.17 (stating that "[w]here the legislature has created a statutory remedy for a wrongful discharge, that remedy is exclusive").

114. *See, e.g.*, *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968). In *Pickering*, the United State Supreme Court for the first time "extended First Amendment Protections to public employee speech that theretofore had not existed." Wynne & Vaughn, *supra* note 91, at 244.

115. *See, e.g.*, Wynne & Vaughn, *supra* note 91, at 243–44.

116. *Id.* at 244.

117. THERESA L CORRADA & ROBERTO L. CORRADA, 16 COLORADO EMPLOYMENT LAW AND PRACTICE § 12:27, Westlaw (updated Nov. 2018). However, courts generally prohibit the award of punitive damages in § 1983 suits against municipalities. *See, e.g.*, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) ("[W]e hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983.").

118. 547 U.S. 410 (2006).

119. *Id.* at 424. For in-depth analysis of the effects of *Garcetti* on public employee whistleblowers and on state-level whistleblower protections schemes, see Julian W. Kleinbrodt, Note, *Pro-whistleblower Reform in the Post*-Garcetti *Era*, 112 MICH. L. REV. 111 (2013) and Wynne & Vaughn, *supra* note 91, at 246–48.

120. *See* Paul M. Secunda, Garcetti*'s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 117 (2008) ("[*Garcetti*] does nothing less than redefine the whole conception of what role public employees should play in ensuring the fair and efficient administration of government services. Through its holding, the Court has now made it nearly impossible for conscientious public servants to speak out in the best interests of the public without jeopardizing their careers."). However, it is important to note that it is not always clear when a public employee is engaging in speech pursuant to his or her official duties for First Amendment purposes. Thus, lower courts have struggled to apply the *Garcetti*

The *Garcetti* Court determined that First Amendment protections were not necessary in this context in part because of the "powerful network of legislative enactments" designed to protect public employee whistleblowers from government retaliation.[121] However, Wisconsin's marginal statutory protections for whistleblowing state employees cannot fairly be described as such a "network." Many of the most broadly applicable whistleblower laws, with the strongest remedies, apply only to federal employees.[122] In support of its assertion that constitutional protections need not extend to public employee whistleblowers in part because of the comprehensive statutory safeguards available, the Court provides a few examples of such statutes.[123] None of these laws protect employees of the State of Wisconsin.[124] *Garcetti* and its progeny have undoubtedly chilled whistleblowing activity[125] and have made statutory whistleblowing protections, such as Wisconsin's whistleblower law, even more essential.

C. In Wisconsin, Whistleblower Complaints Are Rarely Filed, Often Deferred, and Seldom Successful

Although it is impossible to reliably estimate the extent of whistleblowing retaliation within Wisconsin government, there are certainly many such acts that never become the subject of a complaint under the whistleblower law. Despite the more than 250,000 public employees in Wisconsin,[126] relatively few complaints are ever filed. Between 2003 and 2016, only 161 complaints were made under

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standard. Some courts have adopted seemingly anomalous interpretations of this standard in order to find certain speech nonetheless protected. *See* Parker Graham, Comment, *Whistleblowers in the Workplace: The Government Employee's "Official Duty" to Tell the Truth*, 65 SMU L. REV. 685, 694–700 (2012). For an argument advocating for a renewed focus on constitutional protections for public employees despite the Court's decision in *Garcetti*, see Ruben J. Garcia, *Against Legislation*: Garcetti v. Ceballos *and the Paradox of Statutory Protection for Public Employees,* 7 FIRST AMEND. L. REV. 22 (2008).

121. *Garcetti*, 547 U.S. at 425.

122. For an overview of some of these federal whistleblower laws, see Bishara, *supra* note 29, at 44–52; Knight, *supra* note 31, at 284–87.

123. *Garcetti*, 547 U.S. at 425.

124. The examples provided by the Court are two California laws applicable only to employees of that state and a federal law applicable only to employees of the federal government. *See id.* at 425.

125. Wynne & Vaughn, *supra* note 91, at 250.

126. Tamarine Cornelius, *Wisconsin's Public Sector Is Leaner than Most Other States'*, WIS. BUDGET PROJECT (Jan. 23, 2017), http://www.wisconsinbudgetproject.org/wisconsins-public-sector-is-leaner-than-most-other-states-3 [https://perma.cc/QVC7-GPMP].

Wisconsin's whistleblower law.[127] When complaints are filed, they are not often successful. In fact, most complaints are dismissed or withdrawn at the initial stage of agency investigation.[128] Further, as Schigur's case suggests, both successful and unsuccessful claims can take many years before a final determination is reached. Even the initial stage of investigation by the Equal Rights Division, prior to an official determination and before the numerous layers of administrative and judicial review that can follow, can take upwards of a year.[129]

Additionally, only 11 of the 161 complaints filed between 2003 and 2016 advanced beyond the agency adjudication stage and were tried in Wisconsin courts.[130] In each case, courts ruled that the whistleblower law was not violated.[131] The fact that very few complaints under the whistleblower law are subject to any judicial review, and that fewer still are granted review by the Wisconsin Supreme Court, means that the rare cases that do reach that court assume an outsized importance to the interpretation of the law.

III. *DOJ v. DWD* WAS WRONGLY DECIDED, SUBVERTS LEGISLATIVE INTENT, AND INVITES CORRUPTION

This Part argues that *DOJ v. DWD* was wrongly decided. Then, this Part asserts that the decision will dramatically chill whistleblowing activity, inviting corruption and retribution against those brave (or foolhardy) enough to blow the whistle in the post-*DOJ v. DWD* Wisconsin. Finally, this Part engages with counterarguments to the idea that expansive whistleblower protections in the public sphere are policy imperatives, ultimately concluding that these arguments are either unfounded or that their animating concerns can be mitigated through carefully crafted legislation.

A. The Wisconsin Supreme Court Erred in Denying Joell Schigur Relief

The *DOJ v. DWD* majority's remaking of the whistleblower law is particularly vexing because the opinion relies on flawed methods of

127. Christensen & Sweitzer, *supra* note 15.

128. *See id.*

129. This conclusion is based on the author's experience working for the Wisconsin Equal Rights Division. Such an occurrence, while not typical of whistleblower complaints, can happen under extenuating circumstances such as where the complaint is amended after filing or where the complaint is particularly complex such that it requires extensive inquiry and briefing by the parties, even at the investigative stage.

130. Christensen & Sweitzer, *supra* note 15.

131. *Id.*

statutory interpretation. The constructions advanced by the *DOJ v. DWD* majority, although they purport to be based in the text of the whistleblower law, instead act to unmoor the law from this foundation. Specifically, the majority determines that the whistleblower law, while explicitly remedial in design, should nonetheless be strictly interpreted.[132] The majority then proceeds to attribute novel definitions to the two statutory terms at the heart of the litigation, eliminating protections for a wide array of whistleblowing activity that logically aligns with the express objectives of the law and the interests of public policy.[133]

1. THE *DOJ V. DWD* COURT DISREGARDED THE LEGISLATURE'S COMMAND OF LIBERAL CONSTRUCTION

The provisions of Wisconsin's whistleblower law should be liberally construed. Not only is the law remedial,[134] but, as the majority opinion in *DOJ v. DWD* acknowledges, the legislature has made explicit that such a construction shall be applied.[135] However, the majority opinion, as Justice Ann Walsh Bradley's dissent observes, invents a "heretofore unknown rule that bars the application of [this] explicit legislative directive."[136]

Section 230.02 of the Wisconsin Statutes provides that the whistleblower law "shall be construed liberally in aid of" the purposes set forth in the law, including: ensuring "fair treatment" of employees, "encourag[ing] disclosure of [qualifying] information," and guaranteeing that employees are "protected from retaliatory action for disclosing [such] information."[137] Despite this clear statutory directive, the Wisconsin Supreme Court determined in *DOJ v. DWD* that the explicit legislative charge of liberal construction was inapplicable to Schigur's case and that the provisions in question should be construed strictly. Specifically, the court found that, because the policy contained in the liberal construction provision applicable to the whistleblower law "contains the very language we must interpret in this case" it could not liberally construe those terms until it first defined the terms, or else it

132. *State Dep't of Justice v. State Dep't of Workforce Dev.*, 875 N.W.2d 545, 553 (Wis. 2015).

133. *See id.* at 559–66 (A.W. Bradley, J., dissenting).

134. *See, e.g.*, *Link Indus., Inc. v. Labor & Indus. Review Comm'n*, 415 N.W.2d 574, 576 (Wis. Ct. App. 1987) (expressing the general proposition that "remedial statutes must be liberally construed to effect as reasonably as possible their beneficent purpose").

135. *State Dep't of Justice*, 875 N.W.2d at 552 (citing WIS. STAT. § 230.02).

136. *Id.* at 559 (A.W. Bradley, J., dissenting).

137. §§ 230.01–.02.

would have been engaging in "circular reasoning."[138] However, as the dissenting opinion notes, this tortured application of the canons of statutory construction is "backwards" in that "[l]iberal construction of any statute consists in giving the words a meaning which renders it effectual to accomplish the purpose or fulfill the intent which it plainly discloses."[139] By contrast, the majority defines "disclosure" and "information" in an extremely narrow manner that precludes their application to Schigur's case, and then reasons that the whistleblower law need not be construed liberally because Schigur's claims therefore do not fall within the law.[140]

2. THE MAJORITY'S INTERPRETATION OF "INFORMATION" IS INCONSISTENT WITH THE STATUTORY TEXT

It was unreasonable for the *DOJ v. DWD* majority to hold that Schigur's emails merely stated an opinion and that she thus did not disclose "information." Neither the record nor the plain language of the law support the majority's conclusion. As outlined earlier in this Comment, "information" is defined in the statute as: "[I]nformation gained by the employee which the employee reasonably believes demonstrates: (a) A violation of any state or federal law, rule or regulation (b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety."[141]

Specifically, the majority held that Schigur's emails were not "information gained by the employee" because the "information" in question was merely an *opinion* as to the lawfulness or appropriateness of government activity.[142] The majority reached this conclusion by way of a hypothetical, stating that,

> [for] example, the statement "I believe that it is illegal for the government to censor free speech" does not in and of itself demonstrate that the government has censored free speech; there are no facts alleged in the conclusion that demonstrate that the government has engaged in conduct that constitutes censorship.[143]

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138. *State Dep't of Justice*, 875 N.W.2d at 552–53.
139. *Id.* at 561 (A.W. Bradley, J., dissenting).
140. *Id.* (A.W. Bradley, J., dissenting).
141. § 230.80(5).
142. *State Dep't of Justice*, 875 N.W.2d at 553.
143. *Id.* at 554.

The majority asserted that this hypothetical reveals why "information" in this context "refers to the details of the underlying conduct rather than to an opinion alone, as to the lawfulness or appropriateness of that conduct."[144]

However, this hypothetical "opinion" bears little relation to the information Schigur disclosed. Indeed, Schigur's emails contained much more substantive and specific detail than exists in the majority's generic hypothetical. Schigur was demoted after she expressed her belief that tangible, planned governmental actions which she had learned about in her official capacity would violate specific state regulations, and requested that action be taken to evaluate the action in light of its potential illegality.[145] Schigur's emails thus convey content that is "the very definition of information under that statute."[146] Even if Schigur's disclosures could be fairly evaluated as mere opinion, the plain language of the whistleblower statute embraces no such limitation on the scope of its coverage.[147]

3. THE MAJORITY'S INTERPRETATION OF "DISCLOSURE" RELIES ON IRRELEVANT PRECEDENT AND LEADS TO ABSURD RESULTS

The Wisconsin Supreme Court further held that, even assuming "Schigur's e-mail contained 'information' regarding the proposed security detail, the communication of the information to [her superiors] was not a 'disclosure' under Wis. Stat. § 230.81 because the information was already known to the recipients of the e-mails."[148] In support of this holding, the court turned to another Wisconsin Supreme Court decision construing an unrelated statute, in which the court determined that a "disclosure" of information necessarily required "a lack of knowledge on the part of the recipient."[149]

That case, *State v. Polashek,*[150] involved the construction of a penal statute which provides for criminal penalties for the unauthorized disclosure of confidential information concerning reports of suspected child abuse or neglect.[151] As the dissent asserted, *Polashek* was shaky ground on which to base the court's definition of "disclose" in the context of the whistleblower law.[152] As previously stated, the

144. *Id.* at 548.
145. *Id.* at 554.
146. *Id.* at 565 (A.W. Bradley, J., dissenting).
147. *See* § 230.80(5).
148. *State Dep't of Justice*, 875 N.W.2d at 547.
149. *Id.* at 556 (citing *State v. Polashek*, 646 N.W.2d 330, 334 (Wis. 2002)).
150. 646 N.W.2d 330 (Wis. 2002).
151. *Id.* at 331.
152. *State Dep't of Justice*, 875 N.W.2d at 563 (A.W. Bradley, J., dissenting).

whistleblower law is a remedial statute and thus, under a canon of statutory construction recognized by Wisconsin courts, the law should be liberally construed to affect the underlying purpose of the statute.[153] By contrast, penal statutes, such as those in *Polashek*, are to be construed strictly so as to avoid judicial expansion of what the legislature has deemed criminal.[154] The majority's invention of the requirement that a protected disclosure must be one that communicates "new" information is not based upon precedent that can soundly be applied to the whistleblower law, or upon any accepted methods of statutory interpretation.

Justice Ann Walsh Bradley's dissenting opinion also calls attention to the fact that the majority's decision will result in outcomes clearly at odds with the plain purpose of the law. She describes one such scenario which aptly summarizes the absurdity of the results produced by the majority's holdings: "[I]f an employee reported evidence of theft to her supervisor without knowing that he was actually the thief [,] . . . [t]he corrupt supervisor could fire the employee and she would have no protection as a whistleblower because the information was already known."[155]

B. Comprehensive Protection for Public Employee Whistleblowers Is a Policy Imperative

The sweeping new restrictions on public employee whistleblower claims announced by the Wisconsin Supreme Court in *DOJ v. DWD* threaten to chill whistleblowing, thereby undermining the integrity of state government as well as public confidence in its institutions.[156] Public employees retaliated against by their superiors for whistleblowing activity—no longer protected by the law—will suffer both personally and professionally. Although it received little public attention at the time, the broad and devastating impact of the *DOJ v. DWD* decision was immediately clear to many involved in the case.

For example, Schigur's attorney, Peter J. Fox, who has handled whistleblowing cases for more than sixteen years, stated to the Wisconsin Center for Investigative Journalism that he does not "foresee anyone being very successful" in prosecuting a whistleblowing complaint after the court's decision.[157] Fox further told the Center that

153. *Id.* at 563–64 (A.W. Bradley, J., dissenting).

154. *Id.* (A.W. Bradley, J., dissenting).

155. *Id.* at 565–66 (A.W. Bradley, J., dissenting).

156. *See* Kleinbrodt, *supra* note 119, at 113–14 (citing H.R. 67, 111th Cong. § 101(1) (2009) (finding that government entities that violate "whistleblower protection laws … undermine the confidence of the American people in the Government")).

157. Ehrlich, *supra* note 19.

he "can't imagine a case hitting all four corners of a statute [more than Schigur's case]. It nails every bit of it."[158] If Schigur's strong case collapsed under the law as presently applied, cases that are closer to the margins are now almost certain to fail.

DOJ v. DWD's threat extends far beyond the prospective whistleblower. Justice Bradley's dissenting opinion predicts that the court's decision to disregard the legislature's directive of liberal construction "will have far-reaching consequences."[159] Among these potential consequences are the protections afforded in other statutes containing similar provisions for liberal construction in aid of the statutes' remedial purposes. For instance, Wisconsin's fair employment and consumer transactions laws both contain analogous legislatives directives.[160] Justice Bradley is right to wonder whether "the legal rights of Wisconsin's workers and consumers will be similarly limited under the majority's new rule of statutory interpretation[.]"[161]

Justice Bradley also acknowledges that the effects of the decision are not solely the problem or province of whistleblowing Wisconsin civil servants. Rather, "[n]ot only will whistleblowers suffer retaliation without recourse, but all of Wisconsin's citizens lose protection against government corruption. Absent legal protections, it will be the rare employee who will risk her livelihood to act as a whistleblower."[162]

Admittedly, there are a number of counterarguments to the notion that the whistleblower law was, even prior to *DOJ v. DWD*, too restrictive as a matter of policy, and that these prudential concerns were aggravated by the Wisconsin Supreme Court decision in that matter. One such argument is that a narrow interpretation of the whistleblower law is desirable because it promotes organizational efficiency and maintains morale. This argument observes that a more expansive law, interpreted liberally, necessarily results in more complaints being filed and proceeding further through the administrative process. A liberally composed and construed statutory scheme thus consumes additional resources of the state agency tasked with investigating and adjudicating whistleblower complaints (potentially at the expense of the agency's other important duties), as well as the resources of the employing unit of state government which must defend against these claims.[163]

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158. *Id.*

159. *State Dep't of Justice*, 875 N.W.2d at 562 (A.W. Bradley, J., dissenting).

160. *Id.* (A.W. Bradley, J., dissenting).

161. *Id.* (A.W. Bradley, J., dissenting).

162. *Id.* at 567 (A.W. Bradley, J., dissenting).

163. The Equal Rights Division, which investigates and enforces violations of, for example, state-level wage & hour laws, also enforces a number of civil rights and employee leave and benefits laws. These include, among others, Wisconsin's fair employment law (WIS. STAT. § 111.31 (2015–16)), a statute protecting all Wisconsin

Another related argument is the idea that effective leadership by high-level administrative actors requires broad control over subordinates, and that when public employees are insulated from retaliation for filing specious complaints against their supervisors, the public interest is harmed. This argument rests on the contention that a significant number of whistleblowing complaints under the state law are made in bad faith or concern purely personal concerns about perceived mismanagement in state government.[164]

These arguments overstate or ignore the relatively small number of complaints filed under the whistleblower law, even prior to *DOJ v. DWD*, as well as the burden imposed on the state in investigating or responding to the subset of these complaints that are baseless or filed in bad faith.[165] Admittedly, there is some evidence that whistleblowing, in certain contexts, results in a "loss of group identity, loyalty, and morale, and a consequent loss of efficiency."[166] At the same time, some of these organizational ills that might concern critics of strong whistleblower laws also result from unaddressed government malfeasance which liberal schemes more effectively attack. Specifically, the very waste, fraud, abuse, mismanagement, and retaliation that are the subject of whistleblower laws necessarily threaten the mission of competent and scrupulous civil service.

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employees against discriminatory adverse employment actions made on the basis of their membership in a statutorily protected class; Wisconsin's family and medical leave law (§ 103.10 (2015–16)), guaranteeing certain public and private employees the right to take unpaid medical leave; and Wisconsin's open housing law (§ 106.50 (2015–16)), which is intended to combat discrimination in housing. For a list of the laws enforced by the Equal Rights Division, see *Equal Rights Division*, STATE OF WIS. DEP'T WORKFORCE DEV., https://dwd.wisconsin.gov/er/ [https://perma.cc/5UC9-CDTH].

164. The author's personal experience as an investigator for the Equal Rights Division lends some support to this proposition. Specifically, the author directly observed that a number of complaints under the whistleblower law involved allegations that could fairly be characterized as frivolous. For example, the author investigated a handful of complaints which alleged retaliation for internal reports of "mismanagement," but which appeared solely to concern disagreement with a supervisor's assignment of work to an underperforming, problem employee. One could argue that such complaints are harmful in that they expend agency resources and could serve to insulate such employees who file whistleblowing complaints from deserved discipline or other corrective action, out of a fear of litigation. However, the author also observed that many such arguably frivolous whistleblower complaints are dismissed early on in the administrative process or initially rejected for failure to state a claim under the law. Nonetheless, even complaints which are plainly specious and dismissed early on in the administrative process can be, and often are appealed—thus consuming additional public resources, both of the Equal Rights Division and of the employing unit of state government.

165. *See infra* Section II.C.

166. Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 333 (1992).

Moreover, the organizational harms that may accompany some whistleblowing activity are not as relevant or extensive as they might have once been.[167] This is due in part to the "equalization of rights" within the employment relationship.[168] In recent decades, the employer's traditionally absolute authority over employees has eroded, both as a matter of law and popular consensus. Thus, the disruptions attendant whistleblower disclosures are less surprising and less impactful.[169] Additionally, the threat of whistleblowing encourages organizations to police themselves.[170] Whistleblowers can also act as a resource for correcting wrongdoing early on—before it "irrevocably harms the organization."[171]

Arguments against expansive public employee whistleblowing laws may also underestimate the extent to which whistleblowing is a distinctively effective solution to government misconduct. Public employee whistleblowers are, by virtue of their positions, uniquely situated to address this malfeasance.[172] Opponents may also undervalue the external salutary benefits of public employee whistleblowing. For example, whistleblower protections serve important participatory and democracy-advancing functions in that whistleblowers make government more transparent and thus more responsive to the public, and also help motivate citizens to act to improve the political process.[173]

IV. EXPANDED COVERAGE, INVIGORATED INCENTIVES: PROPOSALS FOR REFORM

In the aftermath of *DOJ v. DWD*, many whistleblowers in Wisconsin have essentially no meaningful protections against retaliation by state officials. However, there are number of realistic, relatively straightforward, and complementary statutory reforms the Wisconsin legislature could enact to more effectively discourage and redress misconduct within government. These reforms all seek to address two core inadequacies of the law in its present form: its narrow coverage and lack of incentives.

One such reform is to amend the whistleblower law to create financial rewards for certain narrowly-defined whistleblowing behavior. At present, even where an employee's actions fit the particular

167. *Id*. at 333–34.

168. *Id*. at 334.

169. *Id*.

170. *Id*. at 336.

171. *Id*. at 334.

172. *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) ("Government employees are often in the best position to know what ails the agencies for which they work."); Wynne & Vaughn, *supra* note 91, at 250.

173. Knight, *supra* note 31, at 284–85.

requirements of the whistleblower law post-*DOJ v. DWD* and they are able to make a "successful" claim under the act and receive the full measure of available remedies, they may have already suffered immense personal loss and damage to their professional reputation. As such, the "make whole" remedies that the whistleblower law is limited to often fail to fully compensate an employee's injuries.

This remedial inadequacy also exists for many of the employees who receive a settlement from the state in exchange for withdrawing their whistleblower complaint, and, typically, signing a confidentiality agreement.[174] The experience of former Wisconsin state employee Candace Hemmerling illustrates this inadequacy. Hemmerling filed a whistleblower complaint in 2012, alleging that she was retaliated against by the University of Wisconsin Colleges after she reported alleged financial mismanagement and malfeasance within a federally funded education program.[175] Hemmerling's allegations were ultimately verified and the program was shut down. However, in the two years following Hemmerling's reports, her "contract was not renewed, she was demoted, and her position was eventually eliminated."[176] Although she received an (unusually large) settlement of $50,000 from the state, this came approximately four years after she filed her whistleblower complaint.[177] Hemmerling has since struggled to find work and has exhausted her retirement and other savings.[178]

Because whistleblowers often assume extraordinary risk to expose malfeasance, more needs to be done to encourage reporting. Amending the whistleblower law to create financial incentives for whistleblowers would serve many of the primary goals[179] of Wisconsin's whistleblower statute. Specifically, a provision for pecuniary reward would encourage whistleblowers to report wrongful conduct and would also promote "fairness" in the treatment of state employees in that the remedies currently available under Wisconsin law do not fully compensate for whistleblower's injuries.

Although it is difficult to speculate as to precisely which and what kind of financial incentives might expose additional wrongful conduct occurring in Wisconsin government, empirical evidence[180] and social-psychological research[181] suggest that financial incentives are more effective in encouraging whistleblowing than "make whole" remedies

174. Christensen & Sweitzer, *supra* note 15.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. WIS. STAT. § 230.01 (2015–16).
180. *See* Callahan & Dworkin, *supra* note 1, at 110.
181. *See* Callahan & Dworkin, *supra* note 166, at 296.

alone. By contrast, the "anti-retaliation only" model utilized by the vast majority of states has not proven to be a particularly effective means of encouraging reporting or discouraging governmental misconduct.[182] Wisconsin should follow the lead of the few states that do provide financial incentives.[183] Were Wisconsin to adopt such a model, one way to enact such incentives would be to make payment applicable only when retaliation occurs, as opposed to allowing payment when any misconduct or waste is confirmed to have taken place. This approach avoids creating the perverse incentive for an employee to attempt to have an adverse employment action visited against herself, in the hopes of filing a whistleblower retaliation claim and reaping the financial rewards. Obviously, the drawback of an approach that rewards whistleblowers only when they are retaliated against by their employer is that it provides fewer incentives to come forward with potentially valuable information.

One criticism of whistleblowing laws that provide financial incentives to whistleblowers is that, in some contexts, the laws serve to reward bad actors who are themselves culpable for misconduct, and to insulate these employees from retribution for their actions.[184] However, there are simple ways legislators can and do craft whistleblowing laws to reduce the risk of "allowing wrongdoers to benefit from their own misdeeds," which could create perverse incentives that "prompt the occurrence of the very behavior [the whistleblowing law] seeks to prevent."[185] Policymakers should seek to strike a balance between protecting against this risk and promoting the desirable policy goal of incentivizing employee-insiders to come forward with reports of malfeasance through financial rewards, particularly since such bad actors "often possess the most crucial information in bringing violations of the law to light."[186]

Wisconsin should enact a hybrid financial incentives model that provides for a modest flat financial award to all employees deemed to have been unlawfully retaliated against for a whistleblowing report, as well as an award of a percentage of savings or recovery to the state that results from a covered report, regardless of whether retaliation occurred. A sound financial-reward feature may also benefit from a

182. *See* Callahan & Dworkin, *supra* note 1, at 110.

183. The only states that "offer significant rewards for whistleblowing" are Florida and Illinois. *Id.*

184. *See, e.g.*, Jennifer M. Pacella, *Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code*, 17 U. PA. J. BUS. L. 345, 349–50 (2015) (describing different approaches in federal whistleblower statutes to rewards to whistleblowers themselves complicit in fraud or other criminal conduct).

185. *Id.* at 372.

186. *Id.* at 346.

provision that reduces or eliminates rewards to whistleblowing employees with "unclean hands," those who report a fraud for which they are themselves culpable to some degree. Taken together, such a "hybrid" model would most effectively incentivize reporting and promote the remedial purposes of the law. A financial incentives provision could also be limited to reports of certain types of serious misconduct[187] so as to prevent an overly onerous increase in claims and the attending administrative and financial burdens on the state.

Another solution to some of the whistleblower law's most glaring shortcomings would be to amend the statute and corresponding administrative code to direct the Equal Rights Division to complete the investigation and administrative adjudication of whistleblower claims in a more expeditious manner.[188] Such a change would significantly benefit both public employees and state agency-employers. Specifically, an accelerated resolution of whistleblowing complaints through the administrative process would provide for more immediate relief for whistleblowing employees who are wrongfully retaliated against and often wait many years before receiving remedies under the law. As described in this Comment, these delays frequently result in considerable harm to whistleblowers. Further, not only would accelerated investigation and adjudication reduce the retaliatory burdens faced by whistleblowers, such changes may also encourage future whistleblowing by other employees.[189]

A further, relatively simple means by which the whistleblower law could be strengthened to insulate more whistleblowing activity from otherwise unlawful retaliation would be to significantly expand the present sixty-day statute of limitations for filing such complaints with the Equal Rights Division. Not only is this procedural requirement more restrictive than that of many other states,[190] it is also far more restrictive than the statute of limitations periods applicable to other employee protection laws enforced by the Equal Rights Division. For

187. Such as complaints concerning fraud or waste that has caused a certain threshold financial loss to the state, or of particularly serious instances of corruption in public office.

188. The subchapter of the Wisconsin Statutes containing Wisconsin's whistleblower law, WIS. STAT. §§ 230.80–.89 (2015–16), as well as the corresponding Administrative Code regulations, WIS. ADMIN. CODE DWD § 224 (2006), detail the procedural requirements that complaining employees, their appointing agencies, and the Equal Rights Division must adhere to with regard to the filing, investigation, adjudication, review, and settlement of whistleblower complaints under the whistleblower law.

189. *See* Callahan & Dworkin, *supra* note 166, at 315 (noting that, because "timeliness has an important impact on the motivational potency of rewards," a lengthy time gap between the filing of a whistleblower claim and receipt of a financial reward, "can have a negative influence on whistleblowing").

190. *See supra* notes 100–102 and accompanying text.

example, complaints under the Wisconsin Fair Employment Act ("WFEA") may be filed within 300 days from the date of the adverse employment action.[191]

To strike the appropriate balance between protecting defending agencies from the prejudice that can result from stale claims, and the interests of plaintiffs and the general public in providing plaintiffs adequate time to raise claims,[192] Wisconsin should amend the whistleblower law's limitations period to be equivalent to the WFEA. The policy justifications for a longer (300-day) limitations period under the whistleblower law are at least as strong as those that recommend such a period under WFEA. Specifically, disclosures under the whistleblower law are by their nature more likely to implicate broader public concerns than are the individual employment discrimination complaints typical of claims under the WFEA.[193] Despite the outsized importance of whistleblower claims, the burdens imposed on the responding governmental agency in defending against claims under both laws are similar.[194] No compelling legal or policy reasons exist for this disparity between the two limitations periods.

Finally, perhaps the simplest and most effective remedy for Wisconsin's vanishing whistleblower protections would be to amend the whistleblower law to clearly define its key terms in a manner that overrules the *DOJ v. DWD* majority. The statute should be amended to make clear that there is no requirement that the information at issue be previously "unknown" to the recipient to trigger the law's protection, and that "opinions" about the lawfulness of governmental conduct are likewise sufficient to fall under the law's safeguards. Such a response would do much to reclaim and reinforce the principles underlying the

191. WIS. STAT. § 111.38 (2015–16).

192. *See* Bishara, *supra* note 29, at 111 (arguing for more permissive limitation periods in authors' proposed model state-level whistleblower laws covering both public and private sector employees).

193. That is, whistleblower claims implicate the integrity and functioning of government and the public services government provides. Specifically, the whistleblower law protects only disclosures of "information gained by the employee which the employee reasonably believes demonstrates" a "violation of any state or federal law, rule or regulation," "[m]ismanagement or abuse of authority in state or local government," or a "substantial waste of public funds or a danger to public health and safety." WIS. STAT. § 230.80(5) (2017–18). By contrast, the vast majority of claims under the WFEA relate to allegations of discrimination by a private employer against a single individual.

194. This conclusion compares a claim filed against a state agency under the whistleblower law against a claim filed against a state agency under the WFEA. Claims under both laws track an essentially identical process for agency investigation and adjudication, and have similar provisions for subsequent judicial review. Compare the WFEA, WIS. STAT. §§ 111.38–.395 (2015–16) and WIS. ADMIN. CODE DWD § 218 (2013), to Wisconsin's whistleblower law, WIS. STAT. §§ 230.80–.89 (2015–16) and WIS. ADMIN. CODE DWD § 224 (2006).

whistleblower law's creation. These two simple changes would also signal that waste, fraud, and abuse in public service are not tolerated—that those who risk their careers to report such misconduct are to be celebrated and protected, not discarded.

CONCLUSION

While a cursory reading of Wisconsin's whistleblower law may suggest a system that provides expansive protection to whistleblowers in a manner equal to the law's lofty remedial purposes, such a system never really existed. Certainly, it does not now. Indeed, closer examination reveals a number of serious failings. Although the law on its face covers a commendably broad range of conduct, it suffers from a host of intrinsic deficiencies, including weak remedies that render its protections ineffective. Additionally, the administrative process by which whistleblowers seek relief from unlawful retaliation often takes years to complete. Subsequent appeals to the court system only add to this unjustifiable delay and almost never resolve in the whistleblower's favor. Against this already dubious backdrop, Wisconsin's withering commitment to the whistleblower does grave violence to the remaining ideal of Wisconsin's civil service system.

The *DOJ v. DWD* majority developed a host of new threshold requirements that dramatically limit the coverage of the whistleblower law. *DOJ v. DWD* also severs the law from its corrective aims. It will result in the rejection of otherwise sound claims of unlawful retaliation, chill free speech, and invite corruption and mismanagement in state government.

Even amidst this grim new landscape for public employee whistleblowers in Wisconsin, there remain ways the whistleblower law might be amended or revised so as to remedy its problematic or unduly weak provisions. Legislative reforms, such as invigorated incentives for reporting and a forceful response to *DOJ v. DWD* that clearly and expansively defines the law's key terms and provides for a longer statute of limitations, would impose relatively few costs or other negative externalities. Rather, these changes would promote fairness and efficiency and position Wisconsin as a model of good governance, to the benefit of all its citizens, not just the sizable number of Wisconsinites who find employment in the structures of its state government. These reforms would also represent a significant step toward creating a landscape in which the founding motto of Wisconsin's pioneering civil service system is, for the whistleblower, more reality than illusion. A system in which talented public servants such as Joell Schigur are free to call attention to government misconduct absent fear of official retaliation. A system in which the best do serve the state.