More Accommodation, Less Technicality For Workplace Whistleblowers

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ABSTRACT: A critical element in workplace retaliation claims is the whistleblower's protected activity. This activity often consists of "opposition" activity where an employee internally complains about workplace conduct to a supervisor or Human Resources department. Importantly, federal courts protect these whistleblowers if they have a "reasonable belief" that the reported conduct was unlawful under a federal employment statute.

Assume a legal technicality (via statute, federal regulations, or precedent) renders the reported conduct lawful. Can a whistleblower still reasonably believe the conduct was unlawful? Is the internal complaint still protected opposition activity? Many federal courts answer "no" to these questions. Applying a "hypertechnical" approach, they rigidly assume that reasonable whistleblowers would have discovered, understood, and correctly applied the legal technicality to their situations before objecting to the workplace conduct. If the whistleblower is a law student or lawyer, this approach and its assumptions may be warranted. If the whistleblower is a layperson, the hypertechnical approach makes little, if any, sense.

This Article makes two unique and significant contributions to the literature in this area. First, it presents an interstatutory study of six different federal employment laws to highlight the prevalence of the hypertechnical approach. These laws are the Family and Medical Leave Act of 1993, federal employment discrimination statutes (Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Age Discrimination in Employment Act of 1967), the Fair Labor Standards Act of 1938, and the Sarbanes–Oxley Act of 2002.

Second, this Article argues that federal courts should apply a "Layperson Accommodation Approach" to evaluate a whistleblower's reasonable belief

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when a liability-absolving legal technicality exists. This approach eliminates the hypertechnical approach's rigid (and often questionable or incorrect) assumptions. Instead, it allows a more flexible, case-by-case analysis to evaluate if a reasonable layperson would, in fact, (1) discover the legal technicality relevant to the employer's conduct, (2) understand it, and (3) correctly apply it to their situation before objecting to that conduct.

This approach reflects the same "layperson protective" philosophy that Congress and federal courts have exhibited in the context of determining the validity of signed waivers of federal employment claims. And, it promotes the purpose and policy behind the antiretaliation provisions of the federal employment statutes—to encourage workplace whistleblowing and ferret out employers with retaliatory intent.

INTRODUCTION

Consider these scenarios, and ask whether federal employment law protects each whistleblower:

Scenario #1: Mindy, who is pregnant, is an employee of Company A, which is subject to the work leave provisions of the Family and Medical Leave Act of 1993 ("FMLA").[1] She asks her supervisor if she can take three (3) weeks of leave after the upcoming birth of her child. He says no. Objecting to this decision and believing it was inappropriate under federal law, Mindy complains to the Human Resources department. The next day, Company A tells her: "We have to let you go, because we don't need disloyal workers."

Scenario #2: Scout, a woman, is an employee of Company B, which is subject to the workplace discrimination provisions of Title VII of the Civil Rights Act of 1964 ("Title VII").[2] Unprompted, Scout's supervisor asks her if she wants to have sex. Objecting to this conduct and believing it was inappropriate under federal law, Scout complains to the Human Resources department. The next day, Company B fires her and tells her: "We have to let you go, because we don't want troublemakers."

Scenario #3: Buzz is an employee of Company C, which is subject to the minimum wage and overtime pay requirements of the Fair Labor Standards Act of 1938 ("FLSA").[3] He is the "Mail Department Coordinator" who supervises two mail runners, has a modest $36,000 annual salary, and works a Monday to Friday schedule. Buzz's boss tells him that he must work eight hours on four upcoming weekends. Buzz asks about overtime pay, and his supervisor says that he will not receive it. Objecting to this decision and believing it was inappropriate under federal law, Buzz complains to the Human Resources department. The next day, Company C fires him and tells him: "We have to let you go, because we don't need snitches."

To prevail in their retaliation claims, Mindy, Scout, and Buzz must demonstrate (among other elements) protected activity.[4] Generally, this activity exists in two forms. The first—"participation" activity—is a more formal report or protest, such as filing a lawsuit (or claim with the applicable federal administrative agency) or testifying, assisting, or participating in an ensuing

1. 29 U.S.C. §§ 2601–2654 (2012); *see infra* Section I.B.1.i (discussing technical and whistleblower provisions of the FMLA).

2. 42 U.S.C. §§ 2000e–2000e-17 (2006); *see infra* Section I.B.2.i (discussing technical and whistleblower provisions of Title VII and other federal employment discrimination laws).

3. 29 U.S.C. §§ 201–219 (2012); *see infra* Section I.B.3.i (discussing technical and whistleblower provisions of the FLSA).

4. *See infra* Section I.A (discussing these basic elements).

investigation or proceeding.[5] The second—"opposition" activity—is a less formal report or protest, like internally complaining about workplace conduct to a supervisor or Human Resources department.[6] Importantly, federal courts protect these opposition whistleblowers if they have a "reasonable belief" that the reported conduct was unlawful under a federal employment statute.[7]

Applying these principles, we likely think Mindy, Scout, and Buzz (all lay whistleblowers) engaged in protected opposition activity based on their reasonable beliefs about unlawful conduct. Mindy? She objected to her employer's leave denial, a basic topic covered by the FMLA. Scout? She objected to her supervisor's offensive, sex-based comment, a basic legal topic addressed by Title VII. Buzz? He objected to his employer's refusal to provide overtime pay, a basic legal topic covered by the FLSA. If you had been any of them, you would have also believed the employer had acted unlawfully and likely would have complained about it.

Now assume a *legal technicality* (via the statute, federal regulations, and/or precedent) renders the reported conduct lawful. For example:

Add to Scenario #1: Unbeknownst to Mindy, the FMLA includes these legal technicalities: (1) the employee must work at a site that has at least fifty employees (or has this number when adding other sites within seventy-five miles); (2) the employee must have worked "at least 1,250 hours" in the twelve months preceding leave commencement; and (3) the employee must have worked for the employer for at least twelve months.[8] Mindy met the second and third technicalities, but not the first—her worksite only had forty-five employees.

Add to Scenario #2: Unbeknownst to Scout, Title VII precedent establishes this legal technicality: unlawful workplace harassment arises only from "severe or pervasive" conduct, not from a single or "isolated" incident.[9] Scout does not meet this technicality—her supervisor only made the single comment.

Add to Scenario #3: Unbeknownst to Buzz, the FLSA and its regulations include these legal technicalities: overtime pay is not owed to employees if they fall under an "administrative capacity" exemption, which applies if the employee (1) receives a salary of at least $684 per week (annualized to $35,568), (2) has the "primary duty" of "office or non-manual work directly related" to the business's management or operations, and (3) exercises "discretion and independent judgment" on "matters of significance."[10] Buzz does not meet

5. *See infra* note 23 and accompanying text (discussing participation activity).

6. *See infra* note 24 and accompanying text (discussing opposition activity).

7. *See infra* Sections I.B.1.i, I.B.2.i, I.B.3.i, and I.B.4.i (discussing the reasonable belief requirement under applicable federal employment statutes).

8. 29 U.S.C. § 2611(2)(A)–(B) (2018); *see infra* Section I.B.1.i (discussing technical FMLA requirements).

9. *See infra* notes 91–92 and accompanying text (discussing technical workplace harassment requirements).

10. 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.100(a), 541.200(a) (2024); *see infra* Section I.B.3.i (discussing technical FLSA requirements).

this technicality—his $36,000 annual salary and "Mail Department Coordinator" duties place him within the exemption.

Can Mindy, Scout, and Buzz still reasonably believe the reported conduct was unlawful? Is each internal complaint still protected opposition activity? Many federal courts answer "no" to these questions. Applying a "hypertechnical" approach, they rigidly assume that reasonable whistleblowers would have discovered, understood, and correctly applied the legal technicality to their situations before objecting to the workplace conduct.[11] If the whistleblower is a law student or lawyer, this approach and its assumptions may be warranted. If the whistleblower is a layperson, the hypertechnical approach makes little, if any, sense.

Part I of this Article first discusses the basic elements of workplace retaliation claims, including the protected activity element. Next, it presents an interstatutory study of six different federal employment laws to highlight the prevalence of the hypertechnical approach. These laws are the FMLA, federal employment discrimination statutes (Title VII, the Americans with Disabilities Act of 1990 ("ADA"),[12] and the Age Discrimination in Employment Act of 1967 ("ADEA")),[13] the FLSA, and the Sarbanes–Oxley Act of 2002 ("SOX").[14] For each statute, this Part presents (1) whistleblower and sample technical provisions and (2) precedent in which federal courts apply a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of retaliation claims.

Part II proposes a "Layperson Accommodation Approach" to evaluate a whistleblower's reasonable belief when a liability-absolving legal technicality exists. This approach is warranted for three reasons. First, it eliminates the hypertechnical approach's rigid (and often questionable or incorrect) assumptions. Instead, this approach allows a more flexible, case-by-case analysis to evaluate if a reasonable layperson would, in fact, (1) discover the legal technicality relevant to the employer's conduct, (2) understand it, and (3) correctly apply it to their situation before objecting to that conduct. In making these determinations, this approach allows a court to consider various factors or variables, such as (1) the amount of experience and legal sophistication of a reasonable layperson, (2) the formality or density of the sources evidencing the legal technicality, (3) the complexity of the legal technicality itself, and (4) an understanding and availability of relevant facts needed to apply that technicality.[15]

Second, this approach reflects the same "layperson-protective" philosophy that Congress and federal courts have exhibited in the context of determining the validity of signed waivers of federal employment claims.[16] Specifically,

11. *See infra* Sections I.B.1.ii, I.B.2.ii, I.B.3.ii, I.B.4.ii (discussing applicable precedent).

12. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

13. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634.

14. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).

15. *See infra* Section II.A.

16. *See infra* Section II.B.

Congress exhibited this philosophy when enacting the Older Workers Benefit Protection Act of 1990 for releases of federal age discrimination claims.[17] Federal courts have exhibited it when adopting a "totality of circumstances" test for releases of other federal employment claims.[18]

Third, this approach promotes the purpose and policy behind the antiretaliation provisions of the federal employment statutes—to encourage workplace whistleblowing and ferret out employers with retaliatory intent.[19]

I. THE HYPERTECHNICAL APPROACH TO EVALUATE REASONABLE BELIEF BY WORKPLACE WHISTLEBLOWERS

This Part has two Subparts. The first discusses the basic elements of workplace retaliation claims, including the protected activity element. The second presents an interstatutory study of six different federal employment laws to highlight the prevalence of the hypertechnical approach.

A. RETALIATION CLAIM BASICS

Generally, a workplace whistleblower must demonstrate three elements for a retaliation claim: (1) protected activity; (2) an adverse action by the employer; and (3) a causal relationship, nexus, or connection between the protected activity and adverse action.[20] For the second element, the employer's action must be "materially adverse" so as to "dissuade a reasonable worker" from the protected activity.[21] For the third element, the whistleblower must establish that the protected activity was the but-for cause of the adverse action.[22]

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17. Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 623, 626, 630); *see infra* Section II.B.1 (discussing the Older Workers Benefit Protection Act).

18. *See infra* Section II.B.2 (discussing the totality of circumstances test).

19. *See infra* Section II.C.

20. CHARLES A. SULLIVAN, STEPHANIE BORNSTEIN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 512 n.8 (10th ed. 2022) ("[A] retaliation claim requires proof of protected conduct, an adverse action, and a causal link between the two."); MARION G. CRAIN, PAULINE T. KIM, MICHAEL SELMI & BRISHEN ROGERS, WORK LAW: CASES AND MATERIALS 577 (4th ed. 2020) ("[A]n employee must . . . establish a causal link between the adverse action and the employee's protected activity.").

21. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006) ("We conclude that the antiretaliation provision [of Title VII] . . . covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."); CRAIN ET AL., *supra* note 20, at 576 ("[T]he plaintiff must establish that she suffered a 'materially adverse' employment action, one that might dissuade a reasonable person from pursuing a claim.").

22. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) ("[T]he proper conclusion here . . . is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."); CRAIN ET AL., *supra* note 20, at 577 ("In retaliation cases, the plaintiff must also establish that retaliation was the 'but-for' cause of the materially adverse action."). A plaintiff may establish this causal relationship with various evidence. *See, e.g.*, SULLIVAN ET AL., *supra* note 20, at 87 n.5 ("The classic notion of 'direct' evidence is evidence that, if believed, proves the ultimate question at issue *without drawing any inferences*."); *id.* at 512 n.9 ("Plaintiffs often rely on timing as evidence of causation. When an

Generally, protected activity has two forms. The first—"participation" activity—is a more formal report or protest, such as filing a lawsuit (or claim with the applicable federal administrative agency) or testifying, assisting, or participating in an ensuing investigation or proceeding.[23] The second—"opposition" activity—is a less formal report or protest, like internally complaining about workplace conduct to a supervisor or Human Resources department.[24] This Article focuses on the latter.

B. ACROSS THE STATUTES

This Subpart presents an interstatutory study of six different federal employment laws to highlight the prevalence of the hypertechnical approach. These laws are the FMLA, federal employment discrimination statutes (Title VII, the ADA, and the ADEA), the FLSA, and SOX.

1. FMLA

Generally, the FMLA creates a bundle of family and medical leave rights for an "eligible employee" of a covered employer.[25] For example, it includes the right to use up to twelve weeks of unpaid leave during any twelve-month period for certain qualifying family or medical reasons.[26] These reasons include: (1) the birth or adoption of a child; (2) the need to care for a spouse, child, or parent with a "serious health condition"; or (3) the inability to work due to a "serious health condition."[27] In addition, the FMLA includes the right to reinstatement to one's position (or its equivalent) after the leave[28] and the

adverse action follows closely on the heels of protected conduct, it's not a difficult inferential leap to conclude that one may have been caused by the other—at least for purposes of a prima facie case."); CRAIN ET AL., *supra* note 20, at 550 ("Direct evidence is defined as evidence that does not require the finder of fact to draw an inference of discrimination; in other words, the evidence, by itself, establishes an intent to discriminate."); *id.* at 577 ("Timing often proves important, and while courts have generally not created bright lines, it is generally the case that the closer the time between the protected act (i.e., a complaint) and the employer's retaliation, the more likely a court is to identify the necessary causal link.").

23. *See, e.g.*, SULLIVAN ET AL., *supra* note 20, at 483 (noting that "'participation' in formal challenges to discrimination" (including "filing a charge with the EEOC") is "one kind of conduct protected by Title VII"); *id.* at 487 n.2 ("[P]articipation includes not only filing a charge or lawsuit but also testifying in court or at deposition . . . ."); *id.* at 490 ("Participation involves *formal* activities, such as filing a charge or testifying.").

24. *See, e.g.*, SULLIVAN ET AL., *supra* note 20, at 483–84 (noting that Title VII "also safeguards other kinds of less formal challenges—'opposition conduct'"); *id.* at 486 n.2 ("Internal complaints of discrimination are . . . opposition, not participation, conduct"); CRAIN ET AL., *supra* note 20, at 577 ("A recurring issue in many opposition cases, particularly those that involve sexual harassment, is whether the employee has opposed conduct that violates Title VII.").

25. *See* 29 U.S.C. § 2612 ("Leave requirement"); *id.* § 2614 ("Employment and benefits protection"); *infra* notes 36–39 and accompanying text (discussing the definition of "eligible employee"). In part, the FMLA defines "employer" to include commerce-related businesses that employ fifty or more employees for at least twenty workweeks in the relevant calendar year. 29 U.S.C. § 2611(4)(A)(i).

26. *See* 29 U.S.C. § 2612(a)(1).

27. *Id.* § 2612(a)(1)(A)–(D).

28. *Id.* § 2614(a)(1).

right to continued employment-related benefits during the leave.[29] The FMLA, in turn, generally prohibits an employer's interference with, denial, or restraint of these leave-related rights.[30]

This Subpart presents (i) the FMLA's whistleblower and sample technical provisions and (ii) precedent in which federal courts apply a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of retaliation claims.

i. Whistleblower and Sample Technical Provisions

Whistleblower Provisions. The FMLA explicitly protects both opposition and participation activity. As to opposition activity, the FMLA states that an employer engages in unlawful conduct if it discriminates against a person "for opposing any practice made unlawful by [the Act]."[31] As to participation activity, the FMLA prohibits discrimination based on filing or instituting any FMLA claim or testifying or providing information in connection with such proceeding.[32]

As evidenced by the "any practice made unlawful" language, Congress did not codify the reasonable belief requirement for protected opposition activity.[33] However, the U.S. Department of Labor ("U.S. DOL") (the agency that administers and enforces the FMLA) references this requirement in its regulations: "Individuals, and not merely employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations."[34]

Consistent with that regulation, courts have regularly applied the reasonable belief requirement to evaluate protected activity where the employer's conduct was lawful.[35] Thus, workplace whistleblowers can still engage in protected activity if they had a reasonable belief in the unlawfulness of the employer's conduct (i.e., if they were *reasonable* in believing the conduct was unlawful under the FMLA).

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29. *Id.* § 2614(a)(2).
30. *Id.* § 2615(a)(1).
31. *Id.* § 2615(a)(2).
32. *Id.* § 2615(b).
33. *See id.* § 2615(a)(2).
34. 29 C.F.R. § 825.220(e).
35. *See, e.g.*, Besser v. Tex. Gen. Land Off., 834 F. App'x 876, 888 (5th Cir. 2020) (Dennis, J., concurring in part and dissenting in part) (quoting the regulation); Phillips v. Mathews, 547 F.3d 905, 914 (8th Cir. 2008) (Colloton, J., concurring) (citing the regulation); Filius v. Mo. Dep't of Corr., No. 21-cv-01483, 2022 WL 888138, at *5 n.4 (E.D. Mo. Mar. 25, 2022) (quoting the regulation); Tate v. Philly Shipyard, Inc., No. 19-5076, 2020 WL 2306326, at *4 (E.D. Pa. Apr., 16, 2020) (same); Gourdeau v. City of Newton, 238 F. Supp. 3d 179, 188 (D. Mass. 2017) ("In fact, Congress explicitly modeled the FMLA's retaliation provision after Title VII's: ' . . . Under title VII and under section 105(a) [of the FMLA], an employee is protected against employer retaliation for opposing any practice that he or she reasonably believes to be a violation of this title.'" (quoting H.R. Rep. No. 103-8(I), at 46 (1993))); Tolston-Allen v. City of Chicago, No. 12-cv-7601, 2014 WL 1202742, at *5 (N.D. Ill. Mar. 21, 2014) (quoting the regulation); Fries v. TRI Mktg. Corp., No. 11-1052, 2012 WL 1394410, at *8 n.7 (D. Minn. Apr. 23, 2012) (same).

Technical Provisions. Importantly, the FMLA is highly technical regarding the scope of its protections and bundle of leave-related rights. For example, Congress afforded these rights only to an "eligible employee,"[36] a technical term of art with several prerequisites and exclusions. Specifically, the FMLA requires that a worker (1) be employed "for at least 12 months by the employer"[37] and (2) have "at least 1,250 hours of service with such employer during the previous 12-month period."[38] Yet even if these requirements are met, Congress nonetheless excluded workers from being "eligible employee[s]" if they are "at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50."[39]

A second example is the FMLA's highly technical definition of "serious health condition," the necessary predicate for many workers' protected leave under the Act. The FMLA and its accompanying federal regulations (from the U.S. DOL) establish the parameters of this definition. First, Congress defined "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves [either] (A) inpatient care in a hospital, hospice, or residential medical care facility or (B) continuing treatment by a health care provider."[40]

Next, the federal regulations add to this definition by expanding on the "continuing treatment" requirement.[41] Under the regulations, this requirement is met via (1) an incapacity period of "more than three consecutive, full calendar days, and any subsequent treatment" that involves "[t]reatment two or more times, within 30 days of the first day of incapacity"; (2) an incapacity period "due to a chronic serious health condition," which is further defined as a condition that "[r]equires periodic visits (defined as at least twice a year)" and "continues over an extended period of time"; (3) an incapacity period due to "[p]ermanent or long-term conditions"; and (4) any work absence period due to "multiple treatments . . . for . . . [r]estorative surgery" or another "condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment."[42]

More examples are the FMLA's highly technical leave-related limitations. For instance, when leave is for the birth or adoption of a child, Congress created the following caveats or limitations: it cannot be taken "intermittently or on a reduced leave schedule"[43] and generally requires at least thirty days'

36. 29 U.S.C. § 2611(2)(A)–(B).

37. *Id.* § 2611(2)(A)(i).

38. *Id.* § 2611(2)(A)(ii).

39. *Id.* § 2611(2)(B)(ii).

40. *Id.* § 2611(11).

41. 29 C.F.R. § 825.102 (providing an unenumerated definition for "continuing treatment by a health care provider").

42. *Id.* (describing the requirements of the definition for "continuing treatment by a health care provider" in sections (1), (3), (4), and (5)).

43. 29 U.S.C. § 2612(b)(1).

advance notice.[44] Similarly, if spouses work for the same employer and wish to take leave either (1) for the birth or adoption of their child or (2) due to the serious health condition of a spouse's parent, the FMLA states they (as a couple) are capped at an aggregate of twelve weeks of leave (each does not receive a separate twelve week leave allotment).[45]

ii. Hypertechnical Precedent

Under the FMLA, various federal courts have applied a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of retaliation claims.

A good example is an Indiana federal district court's 2012 decision in *Berna v. Ethan Allen Retail, Inc.*[46] There, Berna (a part-time furniture design employee working about twenty hours per week) requested three work leaves in late 2006.[47] On October 17, Berna requested FMLA leave to care for a sick child.[48] The employer granted this leave.[49] Next, on November 25, Berna requested FMLA leave to care for another sick child.[50] She took this leave too, although her employer had misplaced the paperwork and thus never officially approved it.[51]

Finally, on December 9, Berna requested FMLA leave to care for both sick children.[52] The employer denied this leave; it realized that (1) Berna had not met the FMLA's "eligible employee" criterion of 1,250 service hours in the twelve months before this third leave (she "was almost 200 hours short") and (2) Berna's first leave had been improperly granted for the same reason.[53] Berna spoke about this denial with her supervisor and other representatives in the employee benefits department; she was told that she would be fired if she did not return to work within days.[54] That termination occurred.[55]

Berna subsequently filed an FMLA complaint against her employer, in which she alleged, in part, that it had unlawfully retaliated against her because of her discussions about the leave denial.[56] The federal district court granted summary judgment to the employer on the FMLA retaliation claim.[57]

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44. *Id.* § 2612(e)(1).
45. *Id.* § 2612(f)(1).
46. *See generally* Berna v. Ethan Allen Retail, Inc., No. 07-cv-362, 2012 WL 3779125 (N.D. Ind. Aug. 30, 2012).
47. *Id.* at *2–3.
48. *Id.* at *2.
49. *Id.*
50. *Id.* at *3.
51. *Id.*
52. *Id.*
53. *Id.* at *3, *5.
54. *Id.* at *3.
55. *Id.*
56. *Id.* at *1.
57. *Id.* at *7.

In support of its retaliation decision, the court used a two-step process. First, the court reviewed the relevant (but technical) FMLA requirements. Specifically, it discussed the FMLA's statutory language itself—namely, the technical definition of "eligible employee" that includes the requirement that the employee work 1,250 service hours in the twelve-month period before leave commencement.[58]

Second, the court evaluated whether Berna had engaged in protected activity. Initially, the court properly observed that FMLA whistleblowers are "protected if they oppose any practice which they *reasonably believe* to be a violation of the Act or regulations."[59] Applying this standard, the court suggested that Berna (a layperson and part-time worker) should have known and understood the above-referenced technicalities and their applicability in her case.[60] For example, the court stated that Berna's service hours were "information easily within her knowledge, either from memory of her usual working hours, or from examination of her own pay records."[61] Similarly, the court observed that Berna "should have known . . . that because she had worked far fewer than 1250 hours in the prior year, she had no rights under the FMLA."[62] Given this "constructive knowledge of the hours she had worked"[63] and the FMLA's requirements, the court labeled Berna as "unreasonable,"[64] because she was "the one who has it wrong" and could not "explain how she could 'reasonably believe' any violation of Act was occurring."[65]

The *Berna* decision provides a good example of a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of FMLA retaliation claims. Moreover, several federal courts (including two U.S. Courts of Appeals) have failed to even mention the reasonable belief requirement when dismissing FMLA retaliation claims based on the plaintiff (1) working less than 1,250 service hours (and/or less than twelve service

58. *Id.* at *6.
59. *Id.* (quoting 29 C.F.R. § 825.220(e)).
60. *Id.* at *2, *5–6.
61. *Id.* at *5.
62. *Id.* at *6.
63. *Id.* at *5.
64. *Id.*
65. *Id.* at *6.

months)[66] or (2) working at a job site with less than fifty employees at that site or within seventy-five miles of it.[67]

2. Federal Employment Discrimination Laws

Several federal statutes prohibit job-based discrimination. For example, Title VII prohibits discrimination because of "race, color, religion, sex, or national origin."[68] The ADA bars discrimination against a "qualified individual" because of "disability,"[69] including failure to make "reasonable accommodation" to the known limitations of that person.[70] The ADEA prohibits discrimination because of age (forty years old or older).[71]

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66. *See, e.g.*, Walker v. Elmore Cnty. Bd. of Educ., 379 F.3d 1249, 1253 (11th Cir. 2004) (affirming summary judgment for the employer, because "[t]here can be no doubt that the request—made by an ineligible employee for leave that would begin when she would still have been ineligible—is not protected by the FMLA"); Snider v. Wolfington Body Co., No. 16-02843, 2016 WL 6071359, at *7–8 (E.D. Pa. Oct. 17, 2016) (dismissing the plaintiff's claim based on insufficient pleadings, because the facts showed the plaintiff to be "not an eligible employee"); Perteet v. Saginaw Transit Auth. Reg'l Servs., No. 13-cv-13757, 2014 WL 4637232, at *1, *6–7 (E.D. Mich. Sept. 16, 2014) (granting summary judgment for the employer, because "Perteet was not an eligible employee under the FMLA"); *cf.* McArdle v. Town of Dracut/Dracut Pub. Schs., 732 F.3d 29, 36 (1st Cir. 2013) ("In any event, in this case we need not decide whether an ineligible employee may never bring a retaliation claim under the FMLA if he is fired merely for asking if he is eligible.").

67. *See, e.g.*, Humenny v. Genex Corp., 390 F.3d 901, 906 (6th Cir. 2004) (affirming summary judgment for the employer, because "[t]his Court finds that the FMLA's 'eligible employee' requirement applies in all FMLA cases, including retaliation cases"); Wells v. Achievement Network, No. 18 Civ. 6588, 2021 WL 810220, at *14 (S.D.N.Y. Mar. 2, 2021) (granting summary judgment for the employer, because "[the employee] has not established that she was an eligible employee under the statute"); McDevitt v. Am. Expediting Co., No. 15-498, 2015 WL 4579024, at *3, *6 (E.D. Pa. July 30, 2015) (dismissing the plaintiff's claim based on insufficient pleadings, "[b]ecause the Act only confers rights on 'eligible employees,' [and] only 'eligible employees' may ordinarily bring a cause of action for retaliation or interference under the Act").

68. 42 U.S.C. § 2000e-2(a)(1); *see also* Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)) (amending Title VII to clarify that unlawful discrimination "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions"). In part, Title VII defines "employer" to include commerce-related businesses that employ fifteen or more employees for at least twenty workweeks in the relevant calendar year. 42 U.S.C. § 2000e(b).

In addition, Section 1981 prohibits employment discrimination because of race. 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . ."); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459–60 (1975) ("It is well settled among the federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." (footnote omitted)). Section 1981 was part of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981).

69. 42 U.S.C. § 12112(a)–(b).

70. *Id.* § 12112(b)(5). Like Title VII, the ADA in part defines "employer" to include commerce-related businesses that employ fifteen or more employees for at least twenty workweeks in the relevant calendar year. *Id.* § 12111(5)(A).

71. 29 U.S.C. §§ 623(a), 631(a) (limiting the ADEA's scope to persons "at least 40 years of age"). In part, the ADEA defines "employer" to include commerce-related businesses that employ twenty or more employees for at least twenty workweeks in the relevant calendar year. *Id.* § 630(b).

This Subpart presents (i) these statutes' whistleblower and sample technical provisions and (ii) precedent in which federal courts apply a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of retaliation claims.

i. Whistleblower and Sample Technical Provisions

Whistleblower Provisions. The federal employment discrimination statutes also protect both opposition and participation activity. As to opposition activity, Title VII states that an employer engages in unlawful conduct if it discriminates against a person "because he has opposed any practice made an unlawful employment practice by [Title VII]."[72] As to participation activity, Title VII prohibits discrimination based on filing a Title VII claim or on testifying, assisting, or participating in any investigation, proceeding, or hearing under Title VII.[73] The ADA and ADEA contain virtually identical provisions.[74]

As evidenced by the "any practice made . . . unlawful" language, Congress did not codify the reasonable belief requirement for protected opposition activity.[75] However, courts have regularly applied it to evaluate protected activity where the employer's conduct was lawful.[76] Thus, workplace whistleblowers

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72. 42 U.S.C. § 2000e-3(a).

73. *Id.*

74. *Id.* § 12203(a) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter [the ADA]."); 29 U.S.C. § 623(d) ("It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter [the ADEA].").

While Section 1981 does not contain an express antiretaliation provision, the Supreme Court has concluded that this statute does encompass protection from retaliation. CBOCS W., Inc. v. Humphries, 553 U.S. 442, 452, 457 (2008) ("[Section 1981's] language does not expressly refer to the claim of an individual (black or white) who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his § 1981 rights. But that fact alone is not sufficient to carry the day. . . . We consequently hold that 42 U.S.C. § 1981 encompasses claims of retaliation.").

75. *See* 42 U.S.C. § 2000e-3(a) (Title VII antiretaliation provision); *id.* § 12203(a) (ADA anti-retaliation provision); 29 U.S.C. § 623(d) (ADEA antiretaliation provision).

76. *See, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 187 (2005) (Thomas, J., dissenting) ("Although this Court has never addressed the question, no Court of Appeals requires a [sex discrimination] complainant to show more than that he had a reasonable, good-faith belief that discrimination occurred to prevail on a retaliation claim."); SULLIVAN ET AL., *supra* note 20, at 486 n.1 ("[A] plaintiff invoking the opposition clause [under federal employment discrimination laws] must demonstrate at least a reasonable good faith belief that the conduct complained of is unlawful . . . ."); *id.* at 486–87 n.2 (noting that opposition conduct under federal employment discrimination laws "must meet the reasonable, good faith belief test"); *id.* at 488 ("[A] good faith, reasonable belief in the illegality of the conduct opposed [under federal employment discrimination laws] is generally required under the opposition clause."); CRAIN ET AL., *supra* note 20, at 577 ("A recurring issue in many opposition cases, particularly those that involve sexual harassment, is whether the employee has opposed conduct that violates Title VII. Given the difficulty of individuals knowing what action would actually violate Title VII, courts have uniformly

can still engage in protected activity if they had a reasonable belief in the unlawfulness of the employer's conduct (i.e., if they were *reasonable* in believing the conduct was unlawful under Title VII, the ADA, or ADEA).

Technical Provisions. The federal employment discrimination statutes are also highly technical regarding the scope of their protections and rights.

To begin with, the ADA has technical, multilayered definitions for key coverage terms. As a first example, the ADA affords rights only to those with a "disability,"[77] a technical term of art with several prerequisites, subdefinitions, and exclusions.[78] For instance, Congress (in part) defined "disability" as "a physical or mental impairment that substantially limits one or more major life activities . . . ."[79] While lacking a definition for "substantially limits," the ADA also subdefines "major life activities" as including twenty actions or functions:

> [C]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working . . . [in addition to] the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[80]

In addition, Congress excluded various attributes from the term "disability," such as (1) "currently engaging in the illegal use of drugs"[81] (defined as the unlawful use, possession, or distribution of "a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act");[82] (2) homosexuality and bisexuality;[83] (3) "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders";[84] (4) "compulsive gambling, kleptomania, or pyromania";[85] and (5) "psychoactive substance use disorders resulting from current illegal use of drugs."[86]

As a second example, the ADA only affords rights if a disabled person is an otherwise "qualified individual," another technical term of art with several prerequisites, subdefinitions, and limitations.[87] For instance, Congress defined "qualified individual" as a person "who, with or without reasonable

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held that employees need only establish an objectively reasonable belief the that opposed conduct violated the statute.").

77. 42 U.S.C. § 12112(a).

78. *Id.* §§ 12102(1)(A), 12102(2), 12211.

79. *Id.* § 12102(1)(A).

80. *Id.* § 12102(2)(A)–(B).

81. *Id.* § 12210(a).

82. *Id.* §§ 12111(6)(B), 12210(d)(1)–(2).

83. *Id.* § 12211(a).

84. *Id.* § 12211(b)(1); *see also id.* § 12208 (noting that "'disability' shall not apply to an individual solely because that individual is a transvestite").

85. *Id.* § 12211(b)(2).

86. *Id.* § 12211(b)(3).

87. *Id.* § 12111(8)–(9).

accommodation, can perform the essential functions of the employment position."[88] While omitting a definition for "essential functions,"[89] the ADA also subdefines "reasonable accommodation" by listing almost ten measures:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[90]

Now moving to workplace harassment in general, the federal courts have created highly technical elements for these claims under Title VII, the ADA, or the ADEA. For example, courts and legal commentators have long observed that unlawful workplace harassment arises only from "severe or pervasive" conduct, not a "single incident" or "isolated" conduct.[91] The U.S. Supreme Court's 2001 decision in *Clark County School District v. Breeden* summarizes this technical element:

> Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" . . . Hence, "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[92]

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88. *Id.* § 12111(8).

89. The U.S. Equal Employment Opportunity Commission (the agency that administers and enforces the ADA) defines "essential functions" as "fundamental job duties," not "marginal functions of the position" in its federal regulations. 29 C.F.R. § 1630.2(n)(1).

90. 42 U.S.C. § 12111(9)(A)–(B).

91. *See, e.g.*, SULLIVAN ET AL., *supra* note 20, at 391 ("Cases involving few or a single racist comment, no matter how egregious, or in which the court found the harassment not to interfere with the employee's job performance, are more likely to be resolved in favor of the employer."); *id.* at 392 ("[T]he core question is frequently whether the conduct in question was 'severe or pervasive' enough to contaminate the work environment, an issue as important for other discriminatory harassment cases as it is in sexual harassment cases."); *id.* at 396 n.4 ("[T]o be actionable, conduct need be *either* severe *or* pervasive . . . ."); CRAIN ET AL., *supra* note 20, at 607 n.3 ("[T]o establish a claim of hostile work environment the plaintiff must show that the conduct was 'unwelcome,' and that it was sufficiently severe and pervasive so as to constitute a hostile working environment.").

92. Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 270–71 (2001) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 786–88 (1998)); *see also id.* at 271 (noting that a single or "isolated inciden[t]" by the plaintiff's supervisor "cannot remotely be considered 'extremely serious,' as our cases require" (alteration in original) (quoting *Faragher*, 524 U.S. at 788)); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) ("When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions

ii. Hypertechnical Precedent

This Subpart presents precedent in which federal courts apply a hypertechnical approach in two different discrimination contexts: (a) ADA-based disability (and reasonable accommodation) and (b) hostile work environment.

a. ADA Disability (and Reasonable Accommodation)

Under the ADA, various federal courts have applied a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of retaliation claims.

One clear example is the U.S. Court of Appeals for the Eleventh Circuit's 1998 decision in *Standard v. A.B.E.L. Services, Inc.*[93] There, Standard (a plaster mold maker) herniated several discs in his back while moving a heavy mold in February 1995.[94] For several months through that July, he maintained physician appointments and physical therapy sessions for his back injury.[95] During that time, Standard requested various work-related accommodations, such as (1) attending these appointments and/or sessions during part of the work day, (2) taking brief work breaks for back stretching exercises, and (3) special assistance when lifting heavier items.[96]

That August, Standard's physician suggested discontinuation of the physical therapy sessions to gauge the back's condition, but Standard's pain worsened by September.[97] Due to insurance-related and financial reasons, Standard could not resume the sessions in September, but he was able to resume work without missing further time.[98] In December, the employer decided to lay off one of the five employees in the tooling department in which Standard worked.[99] It chose Standard.[100]

Standard subsequently filed an ADA complaint against his employer, in which he alleged, in part, that it had unlawfully retaliated against him because of his disability-based accommodation requests.[101] The district court granted summary judgment to the employer on the ADA retaliation claim.[102]

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of the victim's employment and create an abusive working environment,' Title VII is violated." (citations omitted) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)); *Meritor Sav. Bank*, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" (alteration in original)).

93. Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318 (11th Cir. 1998).
94. *Id.* at 1324.
95. *Id.* at 1324–25.
96. *Id.* at 1325.
97. *Id.*
98. *Id.*
99. *Id.* at 1325–26.
100. *Id.*
101. *Id.* at 1326, 1328.
102. *Id.* at 1326.

The Eleventh Circuit affirmed.[103] In support of its retaliation decision, the court used the now-familiar two-step process. First, the court reviewed the relevant (but technical) ADA requirements.[104] For example, it discussed the ADA's statutory language—namely, the technical definition of "disability" as an "impairment that substantially limits one or more of the major life activities of [the] individual."[105] The court also cited its own circuit precedent to explain that "substantially limits" involves inquiry into three factors: "the nature and severity of the impairment," its "duration," and its "permanent or long term impact."[106] Finally, the court referenced the Equal Employment Opportunity Commission's ("EEOC") regulations to note that substantial limitation of "the major life activity of working" requires restriction as to "a class of jobs or a broad range of jobs in various classes," not just "one particular job."[107]

Second, the court evaluated whether Standard had engaged in protected activity. Initially, the court properly observed that ADA whistleblowers are protected if they "have a good faith, objectively reasonable belief" regarding the (un)lawfulness of the conduct.[108] Applying this standard, though, the court suggested that Standard (a layperson and mold maker) should have known and understood the above-referenced technicalities and their applicability in his case.[109] For example, the court observed that Standard "was taking physical therapy . . . to improve his condition" and thus had no "reason to consider his back injury as impairing his ability to work [presumably, in "a

103. *Id.* at 1329.

104. *Id.*

105. *Id.* at 1327 (quoting 42 U.S.C. § 12102(1)).

106. *Id.* at 1328 (quoting Gordon v. E.L. Hamm & Assocs., Inc., 100 F.3d 907, 911 (11th Cir. 1996)).

107. *Id.* at 1327 (quoting 29 C.F.R. § 1630.2(j)(3)(i) (2010)). After Congress enacted the ADA Amendments Act of 2008 (ADAAA), 42 U.S.C. §§ 12101–12213, the EEOC issued revised regulations on various issues, including substantial limitation and major life activities (such as working). *See, e.g.*, 29 C.F.R. § 1630.2(j)(1)(i) (2023) ("The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard."); *id.* § 1630.2(j)(2) ("Whether an individual's impairment 'substantially limits' a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the 'regarded as' prong) of this section."). The EEOC also issued revised regulations on certain issues involving the major life activity of working. *See, e.g.*, 29 C.F.R. app. § 1630.2(j)(1)(i) note (Broad Construction; Not a Demanding Standard); *id.* § 1630.2 note (Substantially Limited in Working) (describing the ADAAA as manifesting Congressional disapproval of courts' narrow construction of "substantially limited" and the reasoning for removing the "major life activity of working" from the regulations); *id.* § 1630.2(j)(4) note (Condition, Manner, or Duration) ("[W]hile the Commission's regulations retain the concept of 'condition, manner, or duration,' they no longer include the additional list of 'substantial limitation' factors contained in the previous version of the regulations (i.e., the nature and severity of the impairment, duration or expected duration of the impairment, and actual or expected permanent or long-term impact of or resulting from the impairment). . . . '[C]ondition, manner, or duration' are not intended to be used as a rigid three-part standard that must be met to establish a substantial limitation.").

108. *Standard*, 161 F.3d at 1328 ("In this context, it would be sufficient for him to show that he had a good faith, objectively reasonable belief that he was entitled to those accommodations under the ADA.").

109. *Id.* at 1328–29.

class of jobs or a broad range of jobs in various classes"] in a long term or permanent way."[110] Given this purported constructive knowledge and understanding of the ADA's requirements, the court stated that Standard's belief that his back injury was a "disability" was not "objectively reasonable."[111]

A second example is the U.S. Court of Appeals for the Seventh Circuit's 1998 decision in *Talanda v. KFC National Management Co.*[112] There, Talanda (a manager for a local fast-food chicken franchise) had hired a front counter cashier with significant "facial disfigurement" that included many missing teeth.[113] After seeing the cashier, Talanda's supervisor (1) questioned why he would have "someone like that on your service line" and (2) asked him to transfer her to a kitchen position because "we . . . required a lot of smiles and friendliness" and it would be "a turn-off to . . . see that mouth" and "unprofessional appearance."[114]

Talanda balked at his supervisor's request, noting that the cashier was performing well and that "corporations could be fined money for taking actions like this against their employees."[115] For several weeks, Talanda allowed the cashier to continue in that position, during which time he also referenced the possibility of the cashier filing a "discrimination suit" against the employer.[116] Soon after Talanda's supervisor learned this information and spoke with the human resources director, the employer fired Talanda.[117]

Talanda subsequently filed an ADA complaint against his employer, in which he alleged, in part, that it had unlawfully retaliated against him because he opposed his supervisor's disability-based transfer request for the cashier.[118] The district court granted summary judgment to the employer on the ADA retaliation claim.[119]

The Seventh Circuit affirmed.[120] In support of its retaliation decision, the court used the now-familiar two-step process. First, the court reviewed the relevant (but technical) ADA requirements. For example, the court recited the ADA's statutory language—again, the technical definition of "disability" as an impairment that "substantially limits" at least one "major life activit[y]" of the individual.[121] The court also cited the EEOC's regulations to explain that (1) "major life activities" include "such functions as 'caring for oneself,

110. *Id.* at 1328.

111. *Id.*; *see also id.* at 1329 ("In summary, Standard has not introduced any evidence that would allow a rational fact finder to conclude that his belief that he was disabled under the ADA was objectively reasonable.").

112. *See generally* Talanda v. KFC Nat'l Mgmt. Co., 140 F.3d 1090 (7th Cir. 1998).

113. *Id.* at 1092.

114. *Id.* at 1092–93.

115. *Id.* at 1093.

116. *Id.* at 1093–94.

117. *Id.* at 1094.

118. *Id.* at 1094–95.

119. *Id.*

120. *Id.* at 1097–98.

121. *Id.* at 1096 n.11.

performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working'"[122] and (2) a substantial limitation on the "major life activity of 'working'" requires restriction as to "a class of jobs or a broad range of jobs in various classes," not just "a single, particular job."[123]

Second, the court evaluated whether Talanda had engaged in protected activity.[124] Initially, the court properly observed that ADA whistleblowers are protected if they "have acted 'in good faith and *with a reasonable and sincere belief that he or she is opposing unlawful discrimination.*'"[125] Applying this standard, the court suggested that Talanda (a layperson and manager at a local fast-food franchise) should have known and understood the above-referenced technicalities and their applicability in his case.[126] For example, the court observed that Talanda's supervisor had not "include[d] any limitation on [the cashier's] ability to work at any other job."[127] Further, the court stated that no other evidence supported a reasonable inference that the cashier's "missing teeth precluded her from holding other comparable positions."[128] Given this purported constructive knowledge and understanding of the ADA's requirements, the court stated that "Talanda ought to have realized that [the cashier's] missing teeth did not limit her in the performance of a major life activity"[129]:

> Mr. Talanda's case falters at this "major life activities" criterion. . . . [W]e must conclude that it was unreasonable for Mr. Talanda to believe that KFC . . . treated [the cashier] as one who had a physical impairment that substantially limited her in [the] major life function [of working] . . . . Indeed, the record does not show that Mr. Talanda tried to ascertain, in any reasonable way, whether [his supervisor's transfer] order violated the ADA.[130]

A third example is the U.S. Court of Appeals for the Third Circuit's 2010 decision in *Sulima v. Tobyhanna Army Depot*.[131] There, Sulima (an electronics technician) suffered from morbid obesity and sleep apnea.[132] In late 2005,

122. *Id.* at 1097 (quoting 29 C.F.R. § 1630.2(i) (2010)). *But see supra* note 107 (discussing the EEOC's current regulations on substantial limitation and major life activities).

123. *Talanda*, 140 F.3d at 1097 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). *But see supra* note 107 (discussing the EEOC's current regulations on substantial limitation and major life activities).

124. *Talanda*, 140 F.3d at 1096.

125. *Id.* (quoting Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1459 (7th Cir. 1995)); *see id.* ("Specifically, in retaliation cases, whether under Title VII or the ADA, 'it is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry.'" (quoting Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982))).

126. *Id.* at 1097–98.

127. *Id.* at 1097.

128. *Id.*

129. *Id.*

130. *Id.* at 1097–98.

131. *See generally* Sulima v. Tobyhanna Army Depot, 602 F.3d 177 (3d Cir. 2010).

132. *Id.* at 181.

Sulima's physician prescribed medications for these conditions, but their use prompted gastrointestinal side effects that required frequent bathroom breaks.[133]

In late October, when a supervisor noticed Sulima's frequent bathroom trips, Sulima explained his medication's side effect, supplied an explanatory note from his doctor, and requested a work-related accommodation in the form of such frequent bathroom breaks.[134] In early December, the employer transferred Sulima to a different area that lacked work, prompting an eventual layoff in mid-December.[135]

Sulima subsequently filed an ADA complaint against his employer, in which he alleged, in part, that it had unlawfully retaliated against him because of his disability-based accommodation requests.[136] The district court granted summary judgment to the employer on the ADA retaliation claim.[137]

The Third Circuit affirmed.[138] In support of its retaliation decision, the court used the now-familiar two-step process. First, the court reviewed the relevant (but technical) ADA language and requirements. For example, the court cited the EEOC's regulations to explain that "substantially limits" involves inquiry into the "nature and severity of the impairment," its "duration," and its "permanent or long term impact."[139] The court also quoted its own circuit precedent for the principle that "[a] nonpermanent or temporary condition cannot be a substantial impairment under the ADA."[140] Finally, the court discussed precedent from "sister Courts of Appeals," concluding that "side effects" from prescribed medication can constitute an ADA impairment if two requirements are met: (1) the medication was "required in the 'prudent judgment of the medical profession'" and (2) no other medication existed that was equally effective but "lacks similarly disabling side effects."[141]

Second, the court asked whether Sulima had engaged in protected activity. Initially, the court properly observed that ADA whistleblowers are protected if they "ha[ve] a 'reasonable, good faith belief'" regarding the (un)lawfulness of the conduct.[142] Applying this standard, the court suggested that Sulima (a layperson and electronics technician) should have known and understood the

133. *Id.* at 182.

134. *Id.*

135. *Id.*

136. *Id.* at 182–83.

137. *Id.* at 183.

138. *Id.* at 188–89.

139. *Id.* at 185 (quoting 29 C.F.R. § 1630.2(j)(2)). *But see supra* note 107 (discussing the EEOC's current regulations on substantial limitation and major life activities).

140. *Sulima*, 602 F.3d at 185.

141. *Id.* at 186–87 ("[I]t is not enough to show just that the potentially disabling medication or course of treatment was prescribed or recommended by a licensed medical professional. . . . The concept of 'disability' connotes an involuntary condition, and if one can alter or remove the 'impairment' through an equally efficacious course of treatment, it should not be considered 'disabling.'").

142. *Id.* at 188 (quoting Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 759 n.2 (3d Cir. 2004)).

above-referenced technicalities and their applicability in his case.[143] For example, the court stated that Sulima had no basis to believe that the gastrointestinal side effects from his medication were "anything but temporary,"[144] because those medications "had been changed in the past, and . . . could be changed again if necessary."[145] Given this purported constructive knowledge and understanding of the ADA's requirements, the court stated that Sulima "could not have had a good faith belief that he was disabled within the meaning of the ADA."[146]

As evidenced by these and other decisions, various federal courts have applied a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of ADA retaliation claims.[147]

b. Hostile Work Environment

For workplace harassment claims under employment discrimination laws, various federal courts have also applied a hypertechnical approach to

143. *Id.* at 188–89.

144. *Id.* at 189.

145. *Id.* at 188.

146. *Id.* at 189; *see also id.* at 188 ("We agree that Sulima lacked a good faith belief that he was disabled.").

147. *See, e.g.*, Colton v. Fehrer Auto. N. Am., LLC, No. 20-12039, 2021 WL 3073780, at *1, *3 (11th Cir. July 21, 2021) (affirming dismissal of the 4'6" plaintiff's claim based on insufficient pleadings, because inadequate facts showed her subjective belief of disability-based discrimination to be "objectively reasonable" per U.S. Supreme Court precedent and EEOC regulations that "clearly state[] that height is only a physical characteristic, not a disability"); Besser v. Tex. Gen. Land Off., 834 F. App'x 876, 886–87 (5th Cir. 2020) (affirming dismissal of the plaintiff's claim based on insufficient pleadings, because inadequate facts showed he "reasonably believed" that his supervisor's comments (regarding work leave to care for a spouse with a chronic heart condition) were unlawful under applicable ADA precedent that distinguished between "illegal associational discrimination" and discrimination "because of the need to take time off to care for the relative" (quoting Erdman v. Nationwide Ins. Co., 582 F.3d 500, 510 (3d Cir. 2009))); Johnson v. McMahon, No. 18-cv-5579, 2019 WL 12435703, at *4 (N.D. Ga. Jan. 22, 2019) (dismissing the plaintiff's claim based on insufficient pleadings, because inadequate facts showed the plaintiff—who requested accommodations based on her migraines—to have an "objectively reasonable belief" that either "her migraines substantially limited a major life activity or . . . her . . . accommodation . . . allow[ed] her to perform the essential functions of the job without requiring her employer to eliminate or reallocate her job duties"); Isley v. Aker Phila. Shipyard, Inc., 191 F. Supp. 3d 466, 470 (E.D. Pa. 2016) (granting summary judgment for the employer, because the plaintiff lacked a "reasonable, good faith belief" that his finger injury (for which he requested accommodation) was (per Third Circuit precedent) "anything other than a temporary condition" (quoting *Sulima*, 602 F.3d at 188)); Keeler v. Fla. Dep't of Health, 559 F. Supp. 2d 1298, 1310 (M.D. Fla. 2008) (granting summary judgment for the employer, because the plaintiff was not "objectively reasonable" in her belief that her ADHD or OCD conditions had (per Eleventh Circuit precedent) "impair[ed] her ability to work in a long term or permanent way"), *aff'd in part, rev'd in part on other grounds*, 324 F. App'x 850 (11th Cir. 2009); Radev v. Rock-Tenn Co., No. 03-cv-1060, 2004 WL 2065803, at *2 (N.D. Ga. July 29, 2004) (granting summary judgment for the employer, because the plaintiff lacked a "reasonable and objective belief" that his "farsightedness and attendant headaches . . . precluded [him] from a broad range of jobs"); *cf.* Selenke v. Med. Imaging of Colo., 248 F.3d 1249, 1264–65 (10th Cir. 2001) (granting summary judgment for the employer on other grounds, but stating that the plaintiff had a "reasonable, good faith belief that she was disabled" in light of "case law concluding that similar disorders [to her sinusitis and breathing difficulties] may constitute protected disabilities").

evaluate the reasonable belief requirement, ultimately leading to dismissal of retaliation claims.

A good example is the Eleventh Circuit's 2007 decision in *Henderson v. Waffle House, Inc.*[148] There, Henderson was a diner waitress, and her male supervisor was the restaurant manager.[149] According to Henderson, her supervisor over a two month period (1) told her that the waitress aprons were not "big enough for people with boobs like [hers]," (2) laughingly commented that she "look[ed] like [she was] going to burst" in her shirt, (3) told her that it made him nervous when she stood close to him and that he would get in trouble if he explained why, and (4) pulled her hair and called her "Dolly."[150] Offended by the conduct, Henderson complained to the assistant manager and the company's division manager.[151] Henderson was fired one day after these complaints.[152]

Henderson subsequently filed a Title VII complaint against her employer, in which she alleged, in part, that it had unlawfully retaliated against her because of her complaints.[153] The district court granted summary judgment to the employer on the retaliation claim.[154]

The Eleventh Circuit affirmed.[155] In support of its retaliation decision, the court used the now-familiar two-step process. First, the court reviewed the relevant (but technical) elements of an actionable hostile work environment claim. For example, the court discussed its own circuit precedent requiring that conduct be "sufficiently severe or pervasive" to create an abusive work environment.[156] Still citing its own precedent, the court also explained that this element was "objective[]" and required that "a reasonable person . . . adjudge the harassment severe and pervasive" based on the totality of circumstances.[157] Finally, the court cited U.S. Supreme Court precedent for the principle that "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to" unlawful workplace harassment.[158]

Second, the court asked whether Henderson had engaged in protected activity. Initially, the court properly observed that Title VII whistleblowers are protected if they have an "objectively reasonable" belief regarding the

148. *See generally* Henderson v. Waffle House, Inc., 238 F. App'x 499 (11th Cir. 2007).
149. *Id.* at 502.
150. *Id.*
151. *Id.* at 502–03.
152. *Id.* at 503.
153. *Id.* at 500.
154. *Id.*
155. *Id.*
156. *Id.* at 500–01 (quoting Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc)).
157. *Id.* at 501 (quoting Johnson v. Booker T. Wash. Broad. Serv., Inc., 234 F.3d 501, 509 (11th Cir. 2000)).
158. *Id.* (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).

(un)lawfulness of the conduct.[159] Applying this standard, the court suggested that Henderson (a layperson and diner waitress) should have known and understood the above-referenced technicalities and their applicability in her case.[160] For example, the court stated that Henderson's "subjective belief" must be "measured against the substantive law at the time of the offense."[161] And, to that point, the court specifically restated the above-referenced principle that excluded "'simple teasing,' offhand comments, and isolated incidents."[162] Given this purported constructive knowledge and understanding of these requirements, the court stated that Henderson lacked any "objectively reasonable belief that [her supervisor] was engaging in an unlawful employment practice" under Title VII.[163]

As evidenced by this and other decisions, various federal courts have applied a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of workplace harassment-based retaliation claims. These decisions involve sexual harassment (like *Henderson*),[164]

159. *Id.* (quoting Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1351 (11th Cir. 1999)) ("Although the conduct opposed need not 'actually be sexual harassment, . . . it must be close enough to support an objectively reasonable belief that it is.'" (omission in original)).

160. *Id.* at 503.

161. *Id.* at 501.

162. *Id.* (quoting *Faragher*, 524 U.S. at 788).

163. *Id.* at 503.

164. *See, e.g.*, Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 271, 274 (2001) (noting that the plaintiff only experienced a "single incident," and then relying on the objective reasonable belief requirement to reinstate the district court's summary judgment order for the employer); Davidson v. Korman, 532 F. App'x 720, 721 n.1, 722 (9th Cir. 2013) (stating that the complaint only involved "a single conversation" and "isolated inciden[t]," and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for judgment on the pleadings under Fed. R. Civ. P. 12(c)); Grosdidier v. Broad. Bd. of Governors, 709 F.3d 19, 22–24 (D.C. Cir. 2013) (stating that the complaint did not involve conduct "so 'extreme'" or "so objectively offensive" and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for summary judgment (first quoting George v. Leavitt, 407 F.3d 405, 416 (D.C. Cir. 2005); and then quoting Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998))); Ramirez v. Miami Dade County, 509 F. App'x 896, 896–97 (11th Cir. 2013) (per curiam) (stating that the complaint did not involve conduct "severe enough" and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for summary judgment); O'Leary v. Accretive Health, Inc., 657 F.3d 625, 630–32, 638 (7th Cir. 2011) (stating that the complaint only "involved a single instance of sexually-charged remarks" and "one incident of inappropriate behavior," and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for summary judgment); Chenette v. Kenneth Cole Prods., Inc., 345 F. App'x 615, 619–20 (2d Cir. 2009) (stating that the complaint involved an insufficient "single" incident and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for summary judgment); Theriault v. Dollar Gen., 336 F. App'x 172, 174–75 (3d Cir. 2009) (same); Amos v. Tyson Foods, Inc., 153 F. App'x 637, 646, 649 (11th Cir. 2005) (same); Fogleman v. Greater Hazleton Health All., 122 F. App'x 581, 582–84 (3d Cir. 2004) (same); Van Portfliet v. H & R Block Mortg. Corp., 290 F. App'x 301, 304 (11th Cir. 2008) (stating that the complaint only involved an "isolated incident," "simple teasing," and "offhand comments," and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for judgment as a matter of law); Brannum v. Mo. Dep't of Corr., 518 F.3d 542, 548–50 (8th Cir. 2008) (stating that the complaint only involved a "single, relatively tame comment," and then relying on the objective

while others involve racial harassment,[165] age harassment,[166] and religious harassment.[167]

3. FLSA

Generally, the FLSA requires a covered employer to pay a nonexempt employee (a) at least the federally established minimum wage rate of $7.25 per hour and (b) overtime compensation (at one and a half times the applicable "regular rate" of pay) for work in excess of forty (40) hours per week.[168]

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reasonable belief requirement to affirm the district court's grant of the employer's motion for summary judgment); Greene v. A. Duie Pyle, Inc., 170 F. App'x 853, 856 (4th Cir. 2006) (stating that the complaint only involved "a few observations of lewd magazines and inappropriate jokes or drawings over a seven-month period of employment" and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for summary judgment); SULLIVAN ET AL., *supra* note 20, at 489 ("But possibly the most dramatic example is opposition to sexual harassment where the lower courts, perhaps taking the lead from *Breeden*, have in literally dozens of cases found internal complaints unprotected when the conduct opposed is analytically harassment but has not yet come close enough to the 'severe or pervasive' line."); Alex B. Long, *Retaliation Backlash*, 93 WASH. L. REV. 715, 730 (2018) ("Thus, the plaintiff will be forced to explain how she could reasonably have believed the conduct was unlawful when decisional law is clear that, generally, a single offensive utterance does not create a hostile work environment . . . .").

165. *See, e.g.*, Wright v. Monroe Cmty. Hosp., 493 F. App'x 233, 236 (2d Cir. 2012) (stating that the complaint involved conduct that was "inadequate" and "insufficient" for unlawful workplace harassment and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for judgment on the pleadings); Robinson v. Cavalry Portfolio Servs., LLC, 365 F. App'x 104, 108–14 (10th Cir. 2010) (stating that the complaint only involved "a single racist remark by a colleague," and then relying on the objective reasonable belief requirement to reverse the district court's denial of the employer's motion for judgment as a matter of law); Wilson v. Farley, 203 F. App'x 239, 242, 248 (11th Cir. 2006) (stating that the complaint only involved a "single derogatory remark" and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for summary judgment); Little v. United Techs., Carrier Transicold Div., 103 F.3d 956, 958–60 (11th Cir. 1997) (stating that the complaint only involved "a single comment by one co-worker to another" and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for summary judgment).

166. *See, e.g.*, Moten v. Warren Unilube, Inc., 448 F. App'x 647, 648 (8th Cir. 2012) (per curiam) (stating that the complaint involved conduct akin to "isolated incidents" or a "single, relatively tame comment" and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for summary judgment).

167. *See, e.g.*, Dixon v. The Hallmark Cos., 627 F.3d 849, 857, 859 (11th Cir. 2010) (stating that the complaint did not involve conduct prohibited by "some statute or case law" and then relying on the objective reasonable belief requirement to affirm the district court's grant of the employer's motion for summary judgment).

168. 29 U.S.C. §§ 206(a)(1), 207(a)(1), 213(a); *see infra* notes 171–203 and accompanying text (discussing some FLSA exemptions from the minimum wage and overtime pay requirements). In part, the FLSA's requirements apply to an employer if it is an "enterprise engaged in commerce or in the production of goods for commerce" by having commerce-engaged employees and at least $500,000 in annual gross volume of sales. 29 U.S.C. §§ 203(s)(1) (defining such term), 206(a)(1), 207(a)(1). Even if an employer does not meet this "enterprise coverage" threshold, it remains subject to the FLSA's requirements for any individual employee who is "engaged in commerce or in the production of goods for commerce." *Id.* §§ 206(a), 207(a)(1); *see* CRAIN ET AL., *supra* note 20, at 698 (discussing these FLSA "enterprise" and "individual" coverages).

This Subpart presents (i) the FLSA's whistleblower and sample technical provisions and (ii) precedent in which federal courts apply a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of retaliation claims.

i. Whistleblower and Sample Technical Provisions

Whistleblower Provisions. The FLSA also protects both opposition and participation activity. As an initial matter, the FLSA prohibits discrimination based on (1) "fil[ing] any complaint" or (2) instituting or testifying in an FLSA proceeding.[169] While this language highlights typical participation activities, federal courts have interpreted the "filed any complaint" phrase to include opposition activities, such as internal or informal complaints to an employer.[170]

As evidenced by the generic "fil[ing] any complaint" language, Congress did not codify the reasonable belief requirement for protected opposition activity.[171] However, courts have consistently applied it to evaluate protected activity where the employer's conduct was lawful.[172] Thus, workplace

169. 29 U.S.C. § 215(a)(3).

170. *See, e.g.*, Greathouse v. JHS Sec. Inc., 784 F.3d 105, 107 (2d Cir. 2015) ("We conclude that an employee may premise a section 215(a)(3) retaliation action on an oral complaint made to an employer . . . ."); *id.* at 109 ("[A]n interpretation that excludes clearly stated complaints from protection because they were made to the employer instead of a government agency would run counter to the broadly remedial purpose that the . . . FLSA serves."); Valerio v. Putnam Assocs. Inc., 173 F.3d 35, 41 (1st Cir. 1999) ("To date, the Sixth, Eighth, Tenth, and Eleventh Circuits have held that an internal complaint to the employer may satisfy § 215(a)(3) . . . . [W]e side with the Sixth, Eighth, Tenth, and Eleventh Circuits. . . . By failing to specify that the filing of any complaint need be with a court or an agency, and by using the word 'any,' Congress left open the possibility that it intended 'complaint' to relate to less formal expressions of protest, censure, resentment, or injustice conveyed to an employer."); CRAIN ET AL., *supra* note 20, at 772 ("The Supreme Court in *Kasten* [*v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 5–7 (2011),] did not reach the question of whether an employee needed to file with a government agency versus complaining internally. But most federal courts had previously interpreted § 215(a)(3) to cover internal complaints, and after *Kasten*, the Second Circuit, one of the outliers, decided that internal complaints were sufficient.").

In *Kasten*, the Supreme Court held that the FLSA's whistleblower provision covered "oral, as well as written" complaints, if "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *Kasten*, 563 U.S. at 11, 14 ("[T]he phrase 'filed any complaint' contemplates some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns."). The *Kasten* court did not address or decide whether the FLSA's whistleblower provision applied to internal or informal complaints made to an employer. *See id.* at 13 ("And insofar as the antiretaliation provision covers complaints made to employers (a matter we need not decide . . .), it would discourage the use of desirable informal workplace grievance procedures to secure compliance with the Act."); *id.* at 16–17 (stating "no view on the merits" of the argument that the FLSA whistleblower "provision applies only to complaints filed with the Government").

171. *See* 29 U.S.C. § 215(a)(3) (FLSA antiretaliation provision).

172. *See, e.g.*, Hardison v. Healthcare Training Sols., LLC, No. PWG-15-3287, 2016 WL 4376725, at *4 (D. Md. Aug. 17, 2016) ("Thus, an employee who is not eligible for protection under the FLSA's minimum wage or overtime provisions nonetheless may state a claim under the retaliation provision, provided that the employee files a good-faith complaint, based on a reasonable belief that she is entitled to minimum wage or overtime compensation . . . .").

whistleblowers can still engage in protected activity if they had a reasonable belief in the unlawfulness of the employer's conduct (i.e., if they were *reasonable* in believing the conduct was unlawful under the FLSA).

Technical Provisions. The FLSA is also highly technical regarding the scope of its protections and rights.

For example, the FLSA has dozens of technical exemptions from the Act's minimum wage and overtime pay rights.[173] First, Congress exempted employees if they serve (1) "in a bona fide executive, administrative, or professional capacity"[174] (which includes "academic administrative personnel" and "elementary or secondary school[]" teachers); (2) as an "outside salesman";[175] or (3) as a qualifying "computer systems analyst, computer programmer, [or] software engineer."[176]

In addition, the FLSA lists multiple industry-based exemptions, including those for the following workers: (1) employees of "an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center";[177] (2) certain "fishing operations" employees;[178] (3) certain agriculture employees (including specific exemptions as to tobacco, cotton ginning, and sugar cane or sugar beets);[179] (4) employees of a newspaper with a local "circulation of less than four thousand";[180] (5) switchboard employees of certain small public telephone companies;[181] (6) seamen (on certain vessels or generally);[182] (7) certain domestic servants;[183] (8) certain criminal investigators;[184] (9) certain rail or air carrier employees;[185] (10) employees who are "outside buyer[s]" in the poultry industry;[186] (11) certain small radio or television station employees;[187] (12) certain local delivery drivers;[188] (13) certain maple sap processing employees;[189] (14) certain fruit and vegetable

173. *See* 29 U.S.C. § 213(a) (multiple exemptions from both minimum wage and overtime pay), (b) (multiple exemptions from overtime pay), (d) (exemption from both), (f) (same), (g) (exemption from minimum wage), (h) (exemption from overtime pay), (i) (same), (j) (same).

174. *Id.* § 213(a)(1).

175. *Id.*

176. *Id.* § 213(a)(17).

177. *Id.* § 213(a)(3).

178. *Id.* § 213(a)(5).

179. *Id.* §§ 207(m) (tobacco), 213(a)(6), 213(b)(12)–(14) (various agricultural exemptions), 213(i) (cotton ginning), 213(j) (sugar cane or sugar beets).

180. *Id.* § 213(a)(8).

181. *Id.* § 213(a)(10).

182. *Id.* § 213(a)(12), (b)(6).

183. *Id.* § 213(a)(15), (b)(21).

184. *Id.* § 213(a)(16), (b)(30).

185. *Id.* § 213(b)(2)–(3).

186. *Id.* § 213(b)(5).

187. *Id.* § 213(b)(9).

188. *Id.* § 213(b)(11).

189. *Id.* § 213(b)(15).

processing employees;[190] (15) taxi drivers;[191] (16) certain firefighters or police officers working in lightly staffed departments;[192] (17) movie theater employees;[193] (18) certain small forestry or lumber operation employees;[194] (19) newspaper delivery employees;[195] and (20) wreath making employees.[196]

The accompanying federal regulations (from the U.S. DOL, as the agency that administers and enforces the FLSA) provide another technical layer on many of these exemptions. For the "bona fide executive capacity" exemption, these regulations impose four technical requirements: (1) the employee is paid at least $684 per week (annualized to $35,568) on a set "salary basis," (2) they have the "primary duty" of "management" of the enterprise or a department, (3) they "customarily and regularly direct[]" two or more employees, and (4) they "ha[ve] the authority to hire or fire . . . employees" (or to provide recommendations that "are given particular weight").[197]

For the "bona fide administrative capacity" exemption, the regulations keep the salary amount/basis requirement above[198] but add the following technical requirements: (1) the employee has the "primary duty . . . of office or non-manual work directly related to the [business's] management or . . . operations"; and (2) they "exercise . . . discretion and independent judgment" on "matters of significance."[199]

For the "bona fide professional" capacity exemption, the regulations split the exemption into two subcategories: learned professionals and creative professionals.[200] For learned professionals, the regulations again keep the salary amount/basis requirement above (except for teachers, lawyers, and doctors)[201] but add the following technical requirements: (1) the employee has the "primary duty" of performing "work requiring advanced knowledge" (which is then defined as "predominantly intellectual in character" and requires "consistent exercise of discretion and judgment");[202] (2) this knowledge must be "in a field of science or learning"; and (3) this knowledge must be "customarily acquired by a prolonged course of specialized intellectual instruction."[203] For creative professionals, the regulations again keep the

190. *Id.* § 213(b)(16).
191. *Id.* § 213(b)(17).
192. *Id.* § 213(b)(20).
193. *Id.* § 213(b)(27).
194. *Id.* § 213(b)(28).
195. *Id.* § 213(d).
196. *Id.*
197. 29 C.F.R. § 541.100(a). Generally, pay on a "salary basis" means regular receipt of a "predetermined amount" per pay period that is not subject to reduction based on "quality or quantity of the work performed." *Id.* § 541.602(a).
198. *Id.* § 541.200(a)(1).
199. *Id.* § 541.200(a)(2)–(3).
200. *Id.* §§ 541.300(a), 541.301 (learned professionals), 541.302 (creative professionals).
201. *Id.* §§ 541.300(a)(1), 541.303(d) (teachers), 541.304(d) (doctors and lawyers).
202. *Id.* § 541.301(a)–(b).
203. *Id.* §§ 541.300(a)(2)(i), 541.301(a)(2)–(3).

salary amount/basis requirement above[204] but add the technical requirement that the employee has the "primary duty" of performing work requiring "invention, imagination, originality or talent in a recognized field of artistic or creative endeavor" (such as music, acting, writing, or graphic arts).[205]

A second example is what time counts as "hours worked" or "compensable time" for purposes of minimum wage and overtime pay.[206] As legal commentators have observed, "hotly litigated questions arising under the FLSA" involve this very issue.[207] To illustrate, the FLSA regulations and applicable precedent state that the following time technically counts as "hours worked": (1) "[o]n-call time" if the employee "cannot use the time effectively for his own purposes,"[208] (2) "meal" time if the employee is not "completely relieved from duty,"[209] (3) "medical attention" time that is on "premises or at the direction of the employer during the employee's normal working hours,"[210] and (4) preparatory and concluding activities (tasks performed before or after a regular shift) that are "an integral and indispensable part of the principal activities" of the employee.[211]

ii. Hypertechnical Precedent

Under the FLSA, various federal courts have applied a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of retaliation claims.

A clear example is an Alabama federal district court's 2014 decision in *Baker v. Supreme Beverage Co.*[212] There, Baker (a delivery truck driver for a beverage distributor) transported beer and energy drinks daily to various Alabama restaurants and retailers.[213] In over two years of employment, he complained about overtime hours to managers almost a dozen times,[214] and

204. *Id.* § 541.300(a)(1).

205. *Id.* §§ 541.300(a)(2)(ii), 541.302(a)–(b).

206. *See id.* § 785.18; *see also id.* §§ 785.5–.45 (discussing relevant principles and applications regarding hours worked and compensable time).

207. CRAIN ET AL., *supra* note 20, at 721.

208. 29 C.F.R. § 785.17.

209. *Id.* § 785.19(a).

210. *Id.* § 785.43.

211. Steiner v. Mitchell, 350 U.S. 247, 253–54, 258 (1956) (concluding that time spent changing clothes and showering before and after work was compensable because the at issue job exposed the workers to caustic chemicals at a battery plant); *see also* Mitchell v. King Packing Co., 350 U.S. 260, 262–63 (1956) (concluding that time spent sharpening knives before and after work was compensable because the at issue job involved butchers at a meatpacking plant); 29 C.F.R. § 785.24–.26 ("Preparatory and Concluding Activities"); *id.* § 790.8(b)–(c) (stating that "'principal activities' includes all activities which are an integral part of a principal activity" and "indispensable to its performance"); CRAIN ET AL., *supra* note 20, at 738–40 (contrasting compensable time via preparatory and concluding activities with non-compensable time via mere "preliminary or postliminary" activities).

212. *See generally* Baker v. Supreme Beverage Co., No. 13-cv-00222, 2014 WL 7146790, (N.D. Ala. Dec. 15, 2014).

213. *Id.* at *2.

214. *Id.* at *3.

one of Baker's managers had referred to him as "a nuisance" because he "talk[ed] about overtime in front of other employees."[215]

On June 15, 2012, Baker arrived at work at his typical 5:30 a.m. time, only to see "more [stops] than usual" and an estimated twelve or thirteen work hours.[216] Baker told a warehouse manager that "[y]'all don't want to pay me no overtime," and he informed the manager throughout the day that he may not be able to complete the extra stops.[217] Twelve hours after the 5:30 a.m. pickup, Baker estimated about three more work hours, and returned the remaining pallets for future delivery.[218] Three days later, the employer fired Baker.[219]

Baker subsequently filed an FLSA complaint against his employer, in which he alleged, in part, that it had unlawfully retaliated against him because of his overtime and pay complaints.[220] The federal district court granted summary judgment to the employer on the FLSA retaliation claim.[221]

In support of its retaliation decision, the court used the typical two-step process. First, the court reviewed the relevant (but technical) FLSA requirements. Specifically, it discussed in detail one of the FLSA's many overtime pay exemptions—the "motor carrier" exemption.[222] The court quoted the FLSA's statutory language exempting "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service" per a specified section of the federal Motor Carrier Act ("MCA").[223] It continued by quoting from the MCA, which applies to certain "motor carrier or . . . private motor carrier" employees.[224] Finally, the court cited its own circuit precedent and noted that this exemption has multiple requirements, such as: (1) the *employer* being a "common carrier by motor vehicle," being "engaged in interstate commerce," and having "activities [that] directly affect the safety of operations of such motor vehicles" and (2) the *employee* having "business related-activities" that "directly affect . . . the safety of operation" of such vehicles.[225]

Second, the court evaluated whether Baker had engaged in protected activity. Initially, the court properly observed that FLSA whistleblowers are protected if they have an "objectively reasonable" belief regarding the

215. *Id.*
216. *Id.* at *2.
217. *Id.* at *2–3.
218. *Id.* at *2.
219. *Id.*
220. *Id.* at *1.
221. *Id.* at *1, *7.
222. *Id.* at *3–6.
223. *Id.* at *3 (quoting 29 U.S.C. § 213(b)(1)).
224. *Id.*
225. *Id.* at *4 (quoting Walters v. Am. Coach Lines of Mia., Inc., 575 F.3d 1221, 1226–27 (11th Cir. 2009) (alteration in original)).

(un)lawfulness of the conduct.[226] Applying this standard, the court suggested that Baker (a layperson and beer delivery truck driver) should have known and understood the above-referenced technicalities and their applicability in his case.[227] For example, the court stated that (1) it would "measure[]" the reasonableness of Baker's belief "against existing substantive law" on the motor carrier exemption[228] and (2) it could not view a plaintiff's belief as "objectively reasonable" if courts had "unanimity" about the lawfulness of the employer conduct.[229] Given this purported constructive knowledge and understanding of the FLSA's exemptions, the court considered Baker's overtime-related belief unreasonable: "[B]ecause the law of this Circuit . . . provides that [Supreme Beverage Co.] was not required to pay overtime wages to Baker under the motor carrier exemption, the court concludes that Baker cannot establish that he engaged in a protected activity."[230]

A second example is a Georgia federal district court's 2017 decision in *Langston v. Lookout Mountain Community Services*.[231] There, Langston worked for a community disability services business—specifically, she was a "House Manager" for a residence of a severely disabled patient.[232] She made only $26,000 per year ($500 per week) and never received overtime pay.[233] Her job duties included interviewing and making hiring recommendations for residence personnel, supervising and training them, setting staff schedules, maintaining records, and overseeing security issues.[234]

Initially, Langston worked neither weekends nor more than forty hours per week.[235] After the arrival of a new patient in February, she began working almost fifty hours per week, raising "not being paid overtime" several times with her supervisor.[236] On a Friday in late March, Langston learned that a staff

226. *Id.* at *7 (quoting Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1351 (11th Cir. 1999)); *see also id.* ("[I]n order for Baker's complaints to qualify as a 'protected activity,' Baker must establish that he 'reasonably believed' [Supreme Beverage Co.] was engaging in conduct that is unlawful under the FLSA. Significantly, this 'reasonable belief' element has an objective and a subjective component." (citation omitted)).

227. *Id.* at *5–6.

228. *Id.* at *7 (quoting *Clover*, 176 F.3d at 1351).

229. *Id.*

230. *Id.*

231. Langston v. Lookout Mountain Cmty. Servs., No. 16-cv-0239, 2017 WL 6619236, at *9–10 (N.D. Ga. Nov. 13, 2017), *aff'd*, 775 F. App'x 991 (11th Cir. 2019). The district court's opinion adopted the analysis and conclusions of the Magistrate Judge's Final Report and Recommendation ("*Langston* Magistrate Report") on the FLSA retaliation claim. *Id.* at *10. As a result, discussion of the district court's opinion used the Magistrate Report for citation purposes. The *Langston* Magistrate Report can be found at Final Report and Recommendation, Langston v. Lookout Mountain Cmty. Servs., No. 16-cv-0239, 2017 WL 6619236 (N.D. Ga. Nov. 13, 2017) (No. 16-cv-0239), 2017 WL 6612866 [hereinafter *Langston* Magistrate Report].

232. *Langston* Magistrate Report, *supra* note 231, at *2.

233. *Id.*

234. *Id.* at *3–4.

235. *Id.* at *3.

236. *Id.*

member was unable to work that weekend.[237] When a supervisor said that Langston could (and should) cover the shift, Langston again objected that she "did not get paid overtime."[238] Langston found another staff member to cover the shift.[239] The following Tuesday, the employer fired Langston.[240]

Langston subsequently filed an FLSA complaint against her employer, in which she alleged, in part, that it had unlawfully retaliated against her because of her overtime pay complaint.[241] The federal district court granted summary judgment to the employer on the FLSA retaliation claim.[242]

In support of its retaliation decision, the court used the typical two-step process. First, the court reviewed the relevant (but technical) FLSA requirements. It cited the FLSA's language regarding the executive capacity overtime pay exemption.[243] Next, it quoted federal regulations regarding the four requirements for this exemption: (1) the employee is paid at least $455 per week (annualized to $23,660) on a set salary basis, (2) they have the "primary duty" of "management" of the enterprise or a department, (3) they "customarily and regularly direct[]" two or more employees, and (4) they have authority to "hire or fire" employees (or to provide recommendations that "are given particular weight").[244] Finally, the court cited more federal regulations that (1) provided four different factors to evaluate an employee's "primary duty"[245] and (2) enumerated "fifteen specific types of generally recognized management duties" for purposes of the executive exemption.[246]

Second, the court evaluated whether Langston had engaged in protected activity. Initially, the court properly observed that FLSA whistleblowers are protected if they had an "objectively reasonable" belief regarding the (un)lawfulness of the conduct.[247] Applying this standard, the court suggested that Langston (a layperson and "House Manager" who made only $26,000 per year) should have known and understood the above-referenced technicalities and their applicability in her case.[248] For example, the court noted that it must "'presume[] that the employee has substantive knowledge of the law' when applying the objective reasonableness test" to Langston.[249] Given this purported

237. *Id.* at *6.

238. *Id.* at *7.

239. *Id.* at *7–8.

240. *Id.* at *7.

241. *Id.* at *1, *7.

242. Langston v. Lookout Mountain Cmty. Servs., No. 16-cv-0239, 2017 WL 6619236, at *9–10 (N.D. Ga. Nov. 13, 2017).

243. *Langston* Magistrate Report, *supra* note 231, at *9–10.

244. *Id.* at *10 (quoting 29 C.F.R. § 541.100(a) (2016)); *see supra* note 197 and accompanying text (discussing the current salary threshold of $684 per week (annualized to $35,568) and other requirements for this executive exemption).

245. *Id.* at *11 (quoting 29 C.F.R. § 541.700 (2023)).

246. *Id.* at *12 (quoting 29 C.F.R. § 541.102).

247. *Id.* at *14–15.

248. *Id.* at *2, *15.

249. *Id.* at *14 (quoting Padilla v. The N. Broward Hosp. Dist., 270 F. App'x 966, 970 (11th Cir. 2008)).

constructive knowledge and understanding of the FLSA's exemptions, the court stated that Langston's "many managerial duties" and "clear" and "proper[]" classification as an "exempt executive" meant that she lacked the necessary "objectively reasonable belief."[250]

As evidenced by these and other decisions, various federal courts have applied a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of FLSA retaliation claims. These decisions often include the FLSA's overtime pay exemptions, such as the executive capacity exemption (as in *Langston*),[251] administrative capacity exemption,[252] or professional capacity exemption.[253]

4. SOX

Generally, SOX creates multiple oversight and accountability measures for publicly traded companies.[254] For example, SOX created a Public Company Accounting Oversight Board to protect investor (and the public's) interests in "informative, accurate, and independent audit reports."[255] It also imposed

250. *Id.* at *15. The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's decision on the FLSA retaliation claim. Langston v. Lookout Mountain Cmty. Servs., 775 F. App'x 991, 1000–01 (11th Cir. 2019). For purposes of the appeal, the court merely assumed that Langston had satisfied a prima facie case of retaliation (including the protected activity element), as it affirmed on other grounds. *Id.* at 994, 1000–01.

251. *See, e.g.*, Report and Recommendation, Estate of Roig v. United Parcel Serv., Inc., No. 20-cv-60811, 2020 WL 6873892 (S.D. Fla. Nov. 22, 2020) (No. 20-cv-60811), 2020 WL 6875790, at *18–21 (dismissing the plaintiff's claim (under Florida's wage retaliation law) based on insufficient pleadings, because inadequate facts showed the plaintiff—who fell within Florida's and the FLSA's executive exemption—was "objectively reasonable" in believing the employer violated any applicable pay requirements). The Magistrate Judge's Report and Recommendation is cited here, because the district court's opinion simply adopted its analysis and conclusions on the Florida wage retaliation claim. *See Roig*, 2020 WL 6873892, at *1.

252. *See, e.g.*, Kaplan v. Burrows, No. 10-cv-95, 2011 WL 13298585, at *6 (M.D. Fla. Mar. 8, 2011) (granting summary judgment for the employer, because the plaintiff—who fell within the FLSA's administrative exemption—"could not have reasonably believed" the employer violated the FLSA's minimum wage requirements).

253. *See, e.g.*, Schneider v. Scottsdale Unified Sch. Dist., No. cv-21-01521, 2022 WL 901418, at *3–7 (D. Ariz. Mar. 28, 2022) (dismissing the plaintiff's claim based on insufficient pleadings, because inadequate facts showed the plaintiff—a teacher who fell withing the FLSA's professional exemption—"reasonably believed" the employer violated the FLSA's overtime pay requirements); Keith v. Univ. of Mia., 437 F. Supp. 3d 1167, 1171–73 (S.D. Fla. 2020) (dismissing the plaintiff's claim based on insufficient pleadings, because inadequate facts showed the plaintiff—an adjunct teacher who fell withing the FLSA's professional exemption—had "an objectively reasonable, good faith belief" the employer violated the FLSA's overtime pay requirements).

254. *See* Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.); CRAIN ET AL., *supra* note 20, at 494 ("Many of the statute's provisions are focused on ensuring accountability of public companies by, for example, requiring increased disclosures, strengthening the role of independent audit committees, and creating new rules to improve internal controls and reduce conflicts of interest."). Congress passed SOX in 2002, after several accounting scandals (including those involving the energy company Enron) had prompted "corporate failures, billions of dollars of shareholder losses, and massive layoffs." *Id.* at 493.

255. 15 U.S.C. § 7211(a) ("Establishment; administrative provisions."); *id.* § 7213 ("Auditing, quality control, and independence standards and rules.").

corporate responsibility requirements regarding the filing of quarterly and annual financial reports.[256] Finally, SOX prohibits improper corporate influence on the audit process[257] and requires covered companies to establish both an "internal control structure . . . for financial reporting"[258] and "a code of ethics for senior financial officers."[259]

This Subpart presents (i) SOX's whistleblower and sample technical provisions and (ii) precedent in which federal courts apply a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of retaliation claims.

i. Whistleblower and Sample Technical Provisions

Whistleblower Provisions. SOX also protects both opposition and participation activity. As to opposition activity, SOX prohibits discrimination (by a publicly traded company) based on "provid[ing] information . . . or otherwise assist[ing] in an investigation regarding . . . conduct which the employee reasonably believes constitutes a violation of" certain federal antifraud laws (or Securities and Exchange Commission ("SEC") rules or regulations).[260] As discussed below, the enumerated antifraud laws are highly technical. As to participation activity, SOX prohibits discrimination (again, by a publicly traded company) based on filing a SOX claim or testifying, participating, or assisting in any such proceeding.[261]

As evidenced by the "reasonably believes" language, Congress actually codified the reasonable belief requirement for protected opposition activity.[262] Thus, courts have routinely applied it to evaluate protected activity where the employer's conduct was lawful.[263] Thus, workplace whistleblowers can still engage in protected activity if they had a reasonable belief in the unlawfulness of the employer's conduct (i.e., if they were *reasonable* in believing the conduct was unlawful under the SOX-enumerated federal antifraud laws or SEC rules or regulations).

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256. *Id.* § 7241(a).

257. *Id.* § 7242.

258. *Id.* § 7262(a)–(b).

259. *Id.* § 7264(a), (c).

260. 18 U.S.C. § 1514A(a)(1); *see* CRAIN ET AL., *supra* note 20, at 497 ("Section 1514A clearly protects employees of public companies (i.e., companies with registered securities or that are required to file reports under the Securities and Exchange Act).").

261. 18 U.S.C. § 1514A(a)(2).

262. *Id.* § 1514A(a)(1).

263. *See, e.g.*, Wiest v. Lynch, 710 F.3d 121, 137 (3d Cir. 2013) ("In sum, we hold that the reasonable belief test is the appropriate standard with which to analyze the communications that Wiest contends constitute 'protected activity.' . . . [T]hat standard requires that an employee's communication reflect a subjective and objectively reasonable belief that his employer's conduct constitutes a violation of an enumerated provision in Section 806 [of SOX]."); Wickens v. Rite Aid Headquarters Corp., No. 19-cv-02021, 2021 WL 1375360, at *5 (M.D. Pa. Apr. 12, 2021) ("The employee's belief must be both subjectively in good faith and objectively reasonable."); CRAIN ET AL., *supra* note 20 at 507 ("In order to be protected as a whistleblower, a plaintiff must show that she reported conduct that she 'reasonably believe[d]' constitutes a violation of one of the laws listed in §1514A [of SOX].").

Technical Provisions. SOX is also highly technical regarding the scope of its protections and rights. Specifically, SOX is highly technical *within* its whistleblower provision.

For example, Congress placed two important but technical limitations on protected activity under SOX.[264] First, SOX's whistleblower provision applies only to reports about *certain forms of employer misconduct*—namely, it must involve a purported "violation of [S]ection 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders."[265] While SOX itself is silent on the topic or subject of these enumerated sections, each involves a different form of federally criminalized fraud: (1) Section 1341 deals with frauds and swindles via interstate carrier (U.S. Postal Service or otherwise);[266] (2) Section 1343 deals with fraud by wire, radio, or television;[267] (3) Section 1344 deals with bank fraud;[268] and (4) Section 1348 deals with securities and commodities fraud.[269]

Second, SOX's whistleblower provision only applies to reports that are directed to *certain recipients*.[270] Specifically, Congress stated that SOX protects these reports only "when the information or assistance is provided to or the investigation is conducted by" any of three recipients: "(A) a Federal regulatory or law enforcement agency; (B) any [m]ember of Congress or [congressional committee]; or (C) a[ny] person with supervisory authority over the employee (or [one] who has the authority to investigate, discover, or terminate [the] misconduct)."[271]

ii. Hypertechnical Precedent

Under SOX, various federal courts have applied a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of retaliation claims.

A good example is a Wisconsin federal district court's 2017 decision in *Lamb v. Rockwell Automation, Inc.*[272] There, Lamb, an information technology ("IT") employee, was part of an "IT internal controls team."[273] That team

264. 18 U.S.C. § 1514A(a)(1).

265. *Id.*; *see* CRAIN ET AL., *supra* note 20, at 494 ("[T]he statute prohibits retaliation against employees who report alleged violations of several listed statutes—namely, those related to mail fraud, wire fraud, bank fraud, and securities fraud and the rules and regulations of the Securities and Exchange Commission. Thus, the statute does not provide generalized protection for whistleblowers; rather, employees seeking protection under the statute have to show that their activities are covered by the statutory language.").

266. 18 U.S.C. § 1341.

267. *Id.* § 1343.

268. *Id.* § 1344.

269. *Id.* § 1348.

270. *Id.* § 1514A(a)(1).

271. *Id.*

272. *See generally* Lamb v. Rockwell Automation, Inc., 249 F. Supp. 3d 904 (E.D. Wis. 2017).

273. *Id.* at 907.

created computer rules or protocols to prevent "pervasive" employee access to (and "fraud or theft" regarding) confidential corporate information.[274] In part, these rules or protocols demonstrated the employer's "internal control over financial reporting for purposes of SOX compliance."[275] In late June, Lamb's supervisor asked her to "disable certain rules" or protocols.[276] If implemented, the request would effectively "hide" or "mask[]" user access and render the employer's confidential information "vulnerable,"[277] and it could also compromise the employer's "SOX compliance program" by obstructing "informed assessment of the company's internal controls" over financial reporting.[278]

Lamb objected, stating that she was "uncomfortable" with (and did not "want to do") the requested changes.[279] Over the next nine months, the relationship between Lamb and her supervisor soured, with frequent criticism of Lamb's work.[280] The following April, Lamb complained again in an e-mail to the Vice President of Law.[281] Lamb reiterated that her supervisor's rules-disabling request violated the employer's "'ethics' [rules] and 'department policies'" and could trigger "potential[ly] significant impact to the organization."[282] The employer fired Lamb at the end of the month.[283]

Lamb subsequently filed a SOX complaint against her employer, in which she alleged, in part, that it had unlawfully retaliated against her because of her complaints.[284] The federal district court granted summary judgment to the employer on the SOX retaliation claim.[285]

In support of its retaliation decision, the court used the typical two-step process. First, the court reviewed the relevant (but technical) SOX requirements. For example, it stated that the SOX whistleblower provision applied only to reports about *certain forms* of employer misconduct, such as "mail fraud, bank fraud, securities fraud, or a violation of any rule or regulation of the SEC, or any federal law relating to fraud against shareholders."[286] In addition, the court explained other SOX-based report and certification requirements, such as (1) how "high-level corporate officers" must certify corporate SEC reports as "true and not misleading" and must affirm "effective internal controls over

274. *Id.* at 906.
275. *Id.* at 907.
276. *Id.*
277. *Id.* at 907–08.
278. *Id.* at 908–09.
279. *Id.* at 907.
280. *Id.* at 908–09.
281. *Id.* at 909.
282. *Id.* (quoting Exhibit M - Lamb's 4/7/13 Message to Marc Kartman at 1, *Lamb*, 249 F. Supp. 3d 904 (No. 34-13) (on file with the *Iowa Law Review*)).
283. *Id.* at 909–10.
284. *See id.* at 905.
285. *Id.* at 905–06, 919.
286. *Id.* at 910 (quoting Harp v. Charter Commc'ns Inc., 558 F.3d 722, 723 (7th Cir. 2009)) (adding the word "a" to the quote).

financial information"[287] and (2) how outside auditors must similarly certify the effectiveness of these controls.[288] Finally, the court cited precedent from the U.S. DOL's Administrative Review Board ("ARB") (which adjudicates certain SOX complaints) and the neighboring Third Circuit, all to highlight the requirement that a reported SOX violation must be "likely to happen,"[289] "taking shape," "in motion,"[290] or "imminent,"[291] rather than mere "hypothetical future events."[292]

Second, the court evaluated whether Lamb had engaged in protected activity. Initially, the court properly observed that SOX whistleblowers are protected if they have an "objectively reasonable belief" regarding the (un)lawfulness of the conduct.[293] Applying this standard, the court suggested that Lamb (a layperson and IT employee) should have known and understood the above-referenced technicalities and their applicability in her case.[294] For example, the court stated that Lamb ignored the checks and balances within the employer's protocols, noting that "she did not consider the scope of [its] financial reporting or the other processes in place to ensure the integrity of its internal controls over financial information."[295] Alluding to these checks and balances, the court parsed at least five different steps between the rules-disabling request by Lamb's supervisor and any eventual SOX violation by the employer:

> [The] data collected would be incomplete as a result of underreporting, and that data would then be passed on to [the Controller], and then corporate superiors and outside auditors as part of Rockwell's SOX compliance program, eventually ending up in the hands of the top officials and auditors who had to sign off on Rockwell's financial statements. . . . [T]hose officials would then sign the financial statements on the basis of incomplete information and thereby violate the relevant SOX provisions because they could not certify the effectiveness of the company's internal controls over financial reporting.[296]

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287. *Id.* at 913 (discussing 15 U.S.C. § 7241(a)(2)–(4)).

288. *Id.* (discussing 15 U.S.C. § 7262(b)).

289. *Id.* at 915 (quoting Sylvester v. Parexel Int'l LLC, No. 07-123, 2011 WL 2517148, at *14 (U.S. Dep't of Lab. May 25, 2011)).

290. *Id.* (quoting *Sylvester*, 2011 WL 2517148, at *37).

291. *Id.* at 916 (quoting Wiest v. Lynch, 710 F.3d 121, 133 (3d Cir. 2013)).

292. *Id.* at 912 (quoting *Sylvester*, 2011 WL 2517148, at *37); *see also id.* at 913 ("A whistleblower claim requires an extant or likely, not theoretical or hypothetical, violation of the law.").

293. *Id.* at 910, 912 ("Objective reasonableness is assessed 'based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'" (quoting Harp v. Charter Commc'ns., Inc., 558 F.3d 722, 723 (7th Cir. 2009))).

294. *Id.* at 911–12.

295. *Id.* at 916.

296. *Id.* at 911.

Given this purported constructive knowledge and understanding of SOX's requirements, the court concluded "that no reasonable person in Lamb's position could have believed that a SOX violation was imminent at the time of her reporting"[297] because she should have realized that a SOX "violation would be perfected, if at all, only upon some later company official's signing the SEC certification."[298]

As evidenced by this and other decisions, various federal courts have applied a hypertechnical approach to evaluate the reasonable belief requirement, ultimately leading to dismissal of SOX retaliation claims.[299]

II. PROPOSING A LAYPERSON ACCOMMODATION APPROACH TO EVALUATE THE REASONABLE BELIEF BY WORKPLACE WHISTLEBLOWERS

This Article proposes a Layperson Accommodation Approach to evaluate a whistleblower's reasonable belief when a liability-absolving legal technicality exists. This approach allows a more flexible, case-by-case analysis to evaluate if a reasonable layperson would, in fact, (1) discover the legal technicality relevant to the employer's conduct, (2) understand it, and (3) correctly apply it to their situation before objecting to that conduct.

This proposed approach is warranted for three reasons. First, this approach eliminates the hypertechnical approach's rigid (and often questionable or incorrect) assumptions. Second, this approach reflects the same layperson-protective philosophy that Congress and federal courts have exhibited in the context of determining the validity of signed waivers of federal employment claims. Third, this approach promotes the purpose and policy behind the antiretaliation provisions of the federal employment statutes.

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297. *Id.* at 916 ("Whatever oversight Lamb made at the time, no reasonable person in her place would perceive that a substantial step had been taken toward a SOX violation."); *see also id.* at 911 ("[T]he Court finds that no employee with Lamb's training and experience could reasonably conclude under the circumstances that a violation of the relevant SOX provisions had occurred or was imminent."); *id.* at 913 ("No reasonable person in Lamb's place, with her training and experience, could have believed that Clement's conduct violated SOX . . . .").

298. *Id.* at 913 ("[N]o such disclosure [in violation of SOX] would occur until the false data was transmitted to the corporate leaders and they thereafter relied upon it in making SEC certifications. In short, even if one assumes as true that Clement's rule changes 'left Rockwell vulnerable to a lot of risk' and was inconsistent with 'industry best practice,' vulnerability is not itself a SOX violation, nor does industry best practice equate to legal requirements." (citation omitted)); *see also id.* at 914 ("What is lacking . . . is evidence from Lamb of any *actual instance* where her fear materialized; that is, a single example in which a Rockwell executive or outside auditor made a certification as to the corporate internal controls which was erroneous because there existed uninvestigated, high-risk . . . conflicts in the IT department."); *id.* at 919 (finding that Lamb "fail[ed] to show how anything less than a lengthy, unbroken string of hypothetical scenarios and unsupported inferences could work harm on the company").

299. *See, e.g.*, Baker v. Smith & Wesson, Inc., 40 F.4th 43, 45–47, 49–50 (1st Cir. 2022) (dismissing the plaintiff's claim based on insufficient evidence, because the plaintiff—a "Cell Coordinator" in a factory's cutting tools department—had not engaged in SOX-protected activity when he reported an alleged vendor bribery scheme); Crane v. Lithia TO, Inc., No. MO-13-cv-016, 2014 WL 11600907, at *1, *6 (W.D. Tex. Sept. 3, 2014) (dismissing the plaintiff's claim based on insufficient pleadings, because inadequate facts showed that the plaintiff—a sales manager at a car dealership—held a reasonable belief that SOX-required "mail or wires were at least incident to an essential part of" an alleged bribery or kickback scheme).

A. Eliminating the Hypertechnical Approach's Rigid (and Often Questionable or Incorrect) Assumptions

The Layperson Accommodation Approach properly eliminates the hypertechnical approach's rigid assumptions that reasonable whistleblowers would have discovered, understood, and correctly applied the legal technicality to their situations before objecting to the workplace conduct.

First, this Subpart explains these rigid assumptions. Second, it discusses why these assumptions are often questionable or inaccurate and how the proposed Layperson Accommodation Approach allows a more flexible, case-by-case analysis of a whistleblower's reasonable belief when a liability-absolving legal technicality exists.

1. The Hypertechnical Approach's Rigid Assumptions

The hypertechnical approach rests on a set of three rigid assumptions when evaluating the reasonableness of a whistleblower's belief: discovery, understanding, and correct application.

The Discovery Assumption. First, the hypertechnical approach automatically assumes that a reasonable whistleblower would have discovered the liability-absolving legal technicality relevant to the employer's conduct.

The discovery assumption is clear in many decisions discussed in Section I. For example, in *Langston*, the federal district court expressly observed that the lay whistleblower (a disabled patient's "house manager") was "presumed" to have "substantive knowledge of the law," which involved the FLSA's statutory language and U.S. DOL federal regulations regarding the administrative capacity exemption.[300]

This assumption is also clear when a court discusses the law that a whistleblower "should have" known or realized before objecting to the workplace conduct. For instance, in *Berna*, the federal district court explicitly stated that the lay whistleblower (a part-time furniture designer) "should have known" the relevant legal technicality, which involved the FMLA's statutory requirement of 1,250 service hours to be an eligible employee.[301] Similarly, in *Talanda*, the Seventh Circuit expressly observed that the lay whistleblower (a manager for a local fried chicken franchise) "ought to have realized" the relevant legal technicality, which involved the ADA's statutory language and EEOC federal regulations regarding "disability," "substantially limits," and "major life activity."[302]

Finally, the discovery assumption is clear when a court notes that a whistleblower's belief must be evaluated or "measured against" current law. For example, in *Henderson*, the Eleventh Circuit explicitly stated that the belief of a lay whistleblower (a diner waitress) must be "measured against the

300. *See supra* notes 231–50 and accompanying text (discussing Langston v. Lookout Mountain Cmty. Servs., No. 16-cv-0239, 2017 WL 6619236, at *2, *14 (N.D. Ga. Nov. 13, 2017), *aff'd*, 775 F. App'x 991 (11th Cir. 2019)).

301. Berna v. Ethan Allen Retail, Inc., No. 07-cv-362, 2012 WL 3779125, at *3–4, *6 (N.D. Ind. Aug. 30, 2012).

302. Talanda v. KFC Nat'l Mgmt. Co., 140 F.3d 1090, 1096–97 (7th Cir. 1998).

substantive law at the time of the offense," which involved federal circuit precedent regarding the "severe or pervasive" conduct requirement for workplace harassment claims.[303] And, in *Baker*, the federal district court expressly observed that the belief of a lay whistleblower (a beer delivery truck driver) would be "measured against existing substantive law," which involved the FLSA's statutory language, the MCA's statutory language, and Eleventh Circuit precedent regarding the motor carrier exemption.[304]

As evidenced by these examples, courts that apply the hypertechnical approach simply assume that a reasonable whistleblower would discover the legal technicality relevant to the employer's conduct.

The Understanding Assumption. Further, the hypertechnical approach automatically assumes that a reasonable whistleblower would have understood the liability-absolving legal technicality.

This assumption is evident from the same, above-referenced language that demonstrates a court's discovery assumption.[305] For instance, the *Langston* court's language ("presumed" to have "substantive knowledge of the law") shows its concurrent assumptions that a reasonable whistleblower would have discovered *and understood* the "substantive law" of the FLSA's executive capacity exemption. Similarly, the *Henderson* and *Baker* courts' language ("measured against" current "substantive law") show their simultaneous assumptions that reasonable whistleblowers would have discovered *and understood* "substantive law" regarding (respectively) the "severe or pervasive" requirement for workplace harassment claims and the FLSA's motor carrier exemption. The *Berna* court's language ("should have known") and the *Talanda* court's language ("ought to have realized") further evidence their concurrent assumptions—namely, that reasonable whistleblowers "should have" or "ought to have" discovered *and understood* (respectively) the FMLA's 1,250 service hours requirement and the ADA's concepts of "disability," "substantially limits," and "major life activity."

As these examples illustrate, courts that apply the hypertechnical approach quickly assume that a reasonable whistleblower would understand the legal technicality.

The Correct Application Assumption. Finally, the hypertechnical approach automatically assumes that reasonable whistleblowers would have correctly applied the legal technicality to their situations before objecting to the workplace conduct.

This correct application assumption is also clear in many decisions discussed in Section I. It is easy to spot when a court explicitly states that

303. Henderson v. Waffle House, Inc., 238 Fed. App'x 499, 501 (11th Cir. 2007).

304. Baker v. Supreme Beverage Co., No. 13-cv-00222, 2014 WL 7146790, at *2–4, *7 (N.D. Ala. Dec. 15, 2014) (quoting Clover v. Total Sys. Servs., 176 F.3d 1346, 1351 (11th Cir. 1999)).

305. This assumption is the necessary bridge between (a) the discovery assumption and (b) the correct application assumption. After all, correct application of a relevant legal rule to one's situation requires not only discovery (awareness) of it, but also understanding of it. Even if a court does not explicitly mention the understanding assumption when assessing the reasonableness of a layperson's whistleblower's belief, it is implicit.

reasonable whistleblowers should have known (1) the facts of their situations and (2) how the legal technicality interacts with those facts.

For example, in *Berna*, the federal district court expressly noted that (1) the lay whistleblower's service hours were "information easily within her knowledge, either from memory of her usual working hours, or from examination of her own pay records"[306] and (2) she thus "should have known[] that because she had worked far fewer than 1250 hours in the prior year, she had no rights under the FMLA."[307] Similarly, in *Standard*, the Eleventh Circuit explicitly observed that (1) the lay whistleblower was aware that he was "taking physical therapy . . . to improve his condition"[308] and (2) he thus had no "reason to consider his back injury as impairing his ability to work in a long term or permanent way" as required for the ADA's concepts of "disability," "substantially limit," and "major life activity."[309]

Likewise, in *Talanda*, the Seventh Circuit referenced this facts-to-law assessment, expressly noting that (1) the lay whistleblower was aware that a subordinate cashier's facial disfigurement did not impose "any limitation on her ability to work at any other job" (or otherwise "precluded her from holding other comparable positions")[310] and (2) he thus "ought to have realized that [her] missing teeth did not limit her in the performance of a major life activity" as the ADA required.[311] And, in *Lamb*, the federal district court explicitly observed that (1) the lay whistleblower knew about "the scope of [the employer's] financial reporting or the other processes in place to ensure the integrity of its internal controls over financial information"[312] and (2) she thus lacked reasonable belief "that a SOX violation was imminent at the time of her reporting" as required by the statute and applicable precedent.[313]

As these examples illustrate, courts that apply the hypertechnical approach simply assume that reasonable whistleblowers would correctly apply the legal technicality to their situations before objecting to the workplace conduct.

2. The Layperson Accommodation Approach's Flexible Considerations

The hypertechnical approach's discovery, understanding, and correct application assumptions are not problematic . . . provided they are correct. Unfortunately, each assumption is, at best, questionable and, at worst, inaccurate.

To illustrate, consider the decisions in *Baker* (an FLSA retaliation case), *Standard* (an ADA retaliation case), and *Lamb* (a SOX retaliation case). Would a reasonably acting lay whistleblower necessarily discover, understand, and

306. *Berna*, 2012 WL 3779125, at *5.
307. *Id.* at *6.
308. Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1328 (11th Cir. 1998).
309. *Id.*
310. Talanda v. KFC Nat'l Mgmt. Co., 140 F.3d 1090, 1097 (7th Cir. 1998).
311. *Id.*
312. Lamb v. Rockwell Automation, Inc., 249 F. Supp. 3d 904, 916 (E.D. Wis. 2017).
313. *Id.*

correctly apply the relevant legal technicality before objecting to the workplace conduct?

In *Baker*, the lay whistleblower was a beer delivery truck driver.[314] The FLSA legal technicality was the motor carrier exemption; and, the federal district court's opinion enumerated multiple formal sources regarding this exemption: (1) the FLSA's statutory language; (2) the cross-referenced federal Motor Carrier Act's statutory language; and (3) Eleventh Circuit precedent that listed four specific requirements for the exemption.[315]

Would a reasonably acting beer delivery truck driver automatically discover this exemption from these formal, dense legal sources, including cross-referenced statutes and federal circuit precedent? Or understand a complex, multiple requirement exemption from FLSA overtime pay? Or correctly apply it to his delivery job and route before objecting about overtime pay?

Next, in *Standard*, the lay whistleblower was a plastic mold maker.[316] The ADA legal technicality was the term "disability"; and, the Eleventh Circuit discussed several formal sources regarding this term: (1) the ADA's statutory language requiring an impairment that "substantially limits" at least one "major life activit[y]"; (2) federal circuit precedent that established three relevant factors for the "substantially limits" inquiry; and (3) the EEOC's federal regulations that clarified when "working" constitutes a "major life activity."[317]

Would a reasonably acting mold maker necessarily discover this set of limitations from these formal, dense legal sources, including federal regulations and federal circuit precedent? Or understand complex, multifactor requirements for ADA coverage? Or correctly apply them to his herniated back before objecting about accommodation denials?

Finally, in *Lamb*, the lay whistleblower was an IT employee.[318] The SOX legal technicality was its limitation to certain forms of employer misconduct (e.g., mail fraud, bank fraud, securities fraud, or violation of SEC rule or regulation or federal law regarding shareholder fraud). And, the federal district court enumerated multiple formal sources regarding this limitation: (1) SOX's statutory language (including cross-referenced provisions regarding report and certification requirements by "high-level corporate officers" and outside auditors); and (2) ARB and sister federal circuit precedent that required an "in motion" or "imminent" SOX violation.[319]

Would a reasonably-acting IT employee automatically discover this set of limitations from these formal, dense legal sources, including cross-referenced SOX provisions and ARB and federal circuit precedent? Or understand

314. Baker v. Supreme Beverage Co., No. 2:13-cv-00222, 2014 WL 7146790, at *2 (N.D. Ala. Dec. 15, 2014).

315. *Id.* at *3–6.

316. Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1323 (11th Cir. 1998).

317. *Id.* at 1327–28, 1327 n.1.

318. *Lamb*, 249 F. Supp. 3d at 906–07.

319. *Id.* at 911–15 (first quoting Sylvester v. Parexel Int'l LLC, No. 07-123, 2011 WL 2517148, at *37 (U.S. Dep't of Lab. May 25, 2011); and then quoting Wiest v. Lynch, 710 F.3d 121, 133 (3d Cir. 2013)).

complex requirements for covered forms of employer misconduct? Or correctly apply them to a request to disable IT protocols (that could compromise the employer's SOX compliance program) before objecting to the request?

With its rigid assumptions, the hypertechnical approach allows only a "yes" answer to each of these questions. And yet those uniform "yes" answers seem, at best, questionable and, at worst, inaccurate. If the whistleblower had been a law student or lawyer, those answers might be accurate.[320] But unlikely for a layperson. It is difficult to believe that a reasonably-acting beer delivery truck driver, plastic mold maker, and IT employee would (or should) discover, understand, and correctly apply the relevant legal technicalities in *Baker*, *Standard*, and *Lamb*. Simply put, the hypertechnical approach is an inflexible analysis.

In contrast, the Layperson Accommodation Approach at least allows "no" answers to each question for the *Baker*, *Standard*, and *Lamb* lay whistleblowers. This approach eliminates the hypertechnical approach's rigid assumptions and allows a more flexible, case-by-case analysis to evaluate if a reasonable layperson would, in fact, (1) discover the legal technicality relevant to the employer's conduct, (2) understand it, and (3) correctly apply it to their situation before objecting to that conduct. In making these determinations, this approach allows a court to consider various factors or variables, such as (1) the amount of experience and legal sophistication of a reasonable layperson,[321] (2) the formality or density of the sources evidencing the legal technicality, (3) the complexity of the legal technicality itself, and (4) an understanding and availability of relevant facts needed to apply that technicality.

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320. *See, e.g.*, Long, *supra* note 164, at 730 ("[B]y directly linking the reasonableness of an employee's belief to existing discrimination precedent, courts essentially require employees to be versed in the nuances of Title VII's hostile-environment law and other discrimination theories."); Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 955 (2007) (noting that "courts appear to hold an employee to the standard of what a reasonable labor and employment attorney would believe, rather than what a reasonable employee would believe"); Matthew W. Green Jr., *What's So Reasonable About Reasonableness? Rejecting a Case Law-Centered Approach to Title VII's Reasonable Belief Doctrine*, 62 U. KAN. L. REV. 759, 794–95 (2014) ("From hotel concierge to Wal-Mart cashier, nurse, doctor, or lawyer, the same case-law litmus test standard [for the reasonable belief requirement] applies, despite the fact that it is more likely than not that most persons in these disparate professions are unfamiliar with Title VII case law, let alone the law in particular circuit courts."); Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1161 (2007) ("[R]equiring nonlawyers to make these legal determinations prior to filing an internal complaint with an employer is placing an unwarranted burden upon employees."); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 103 (2005) ("The perspective from which reasonableness is measured should not be that of the judge reading and selecting the dominant legal precedents, but the reasonable employee, student, or person in the organization who wishes to further the goals of discrimination law . . . .").

321. Indeed, in the SOX context, courts have consistently evaluated the reasonable belief requirement by considering the knowledge, training, and experience of an employee. *See, e.g.*, Wadler v. Bio-Rad Lab'ys, Inc., 916 F.3d 1176, 1188 (9th Cir. 2019) ("The objective reasonableness component . . . 'is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'" (quoting *Sylvester*, 2011 WL 2517148, at *12)); Rhinehimer v. U.S. Bancorp Invs., Inc., 787 F.3d 797, 811 (6th Cir. 2015) (same); Lockheed Martin Corp. v. Admin. Rev. Bd., U.S. Dep't of Lab., 717 F.3d 1121, 1132 (10th Cir. 2013) (same); *Wiest*, 710 F.3d at 132 (same).

When applied, the Layperson Accommodation Approach likely provides retaliation protection to the *Baker*, *Standard*, and *Lamb* lay whistleblowers. First, each whistleblower likely had modest experience and legal sophistication. Next, the sources of the FLSA, ADA, and SOX legal technicalities (e.g., statutes, regulations, and circuit and other precedent) appear significantly formal or dense. In addition, each legal technicality seems complex, vague, and often litigated (e.g., the FLSA overtime exemptions; the ADA's concepts of "disability," "substantially limits," and "major life activity"; and SOX's fraud- or SEC rule-based forms of employer misconduct), rather than a simple or straightforward standard. Finally, even if these whistleblowers had access to available facts in their situations, they likely lacked an understanding of which ones were needed to apply the technicality.

If these statements are true, then a reasonable whistleblower would *not*, in fact, discover, understand, and correctly apply the legal technicality in *Baker*, *Standard*, and *Lamb* before objecting to the workplace conduct. Under the Layperson Accommodation Approach, a court would likely conclude that each lay whistleblower satisfied the reasonable belief requirement despite the liability-absolving legal technicality.

* * *

While one may argue that the proposed approach would *always* yield retaliation protection to lay whistleblowers, that point overlooks the approach's flexible, case-by-case analysis. For instance, reconsider the facts in *Berna* (an FMLA retaliation case),[322] with these two additions: (1) The employer had a well-distributed and well-understood FMLA leave policy that explained the "eligible employee" requirement and its 1,250 service hours criterion; and (2) the part-time furniture design employee had easy and immediate access to her exact service hours throughout the year, whether via her paycheck (as the federal district court had assumed) or intranet site.

In that case, the Layperson Accommodation Approach likely *denies* retaliation protection to the *Berna* lay whistleblower. First, she would have measurable experience and legal sophistication regarding the FMLA and its requirements via the well-distributed and well-understood employer policy. Next, while some sources of the FMLA legal technicalities are formal or dense (the statute itself), the employer's policy provides a more informal and accessible source for the 1,250 service hours technicality. In addition, the legal technicality does not seem overly complex or vague, as the service hours requirement is just an objective numeric threshold. Finally, given the employer's policy and accessible service hours information on the paycheck or intranet site, the whistleblower likely understood and had access to relevant facts for purposes of correctly applying the technicality.

Under these facts, a reasonable whistleblower in *Berna* would, in fact, discover, understand, and apply the FMLA legal technicality before objecting

322. *See supra* notes 46–65 and accompanying text (discussing the *Berna* decision).

to the workplace conduct. Under the Layperson Accommodation Approach, a court would likely conclude that this lay whistleblower did *not* satisfy the reasonable belief requirement due to the liability-absolving legal technicality.[323]

B. Reflecting Congressional and Judicial Layperson-Protective Philosophy

The Layperson Accommodation Approach reflects the same layperson-protective philosophy that Congress and federal courts have exhibited in the context of determining the validity of signed waivers of federal employment claims.

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323. In this hypothetical, the employer's well-distributed and well-understood FMLA policy contribute to this likely conclusion of the *absence* of reasonable belief. However, an employer's statements (via its agents, handbook, or policy) could contribute to a likely conclusion of the *presence* of reasonable belief too. For example, perhaps a supervisor or Human Resources manager (or an employee manual or handbook) has made representations or statements to employees about their protected status (and/or the employer's resulting legal obligations) under the FMLA, federal employment discrimination laws, FLSA, or SOX. *See, e.g.*, Foster v. Time Warner Ent. Co., 250 F.3d 1189, 1195 (8th Cir. 2001) (in an ADA retaliation case, concluding that the plaintiff possessed the requisite reasonable belief because the employer's Human Resources Manual "listed epilepsy as a disability protected under the ADA, and it included a modified work schedule as an example of a reasonable accommodation" (citation omitted)); Castro v. Dot's Pretzels, LLC, No. 20-2579, 2021 WL 3674739, at *8 (D. Kan. Aug. 19, 2021) (in an ADA retaliation case, concluding that the plaintiff possessed the requisite reasonable belief because the employer's agent had told her that "she would always be able to use the restroom as needed as an accommodation for [her] medical condition"); Wood v. Handy & Harman Co., No. 05-cv-532, 2006 WL 3228710, at *5 (N.D. Okla. Nov. 6, 2006) (in an FMLA retaliation case, concluding that the plaintiff possessed the requisite reasonable belief because the employer's agent (the plant manager and her supervisor) "told [her] . . . that FMLA leave was available for her husband's illness because prior leave she had taken for her own back surgery was considered medical leave"); Keating v. Gaffney, 182 F. Supp. 2d 278, 288 (E.D.N.Y. 2001) (in an ADA retaliation case, concluding that the plaintiff possessed the requisite reasonable belief because the employer's agent had told him that it "would not put him in a position that involved extended exposure to the sun and heat without the benefit of periodic shelter" due to his medical condition); Malone v. Signal Processing Techs., Inc., 826 F. Supp. 370, 376 (D. Colo. 1993) (in an FLSA retaliation case, concluding that the plaintiff may have possessed the requisite reasonable belief because the employer's agent "did not dismiss her [overtime] complaints outright and, in fact, said he would correct the situation if the law so warranted"), *abrogated on other grounds by* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

Similarly, attorney or government agency statements could contribute to a likely conclusion of the *presence* of reasonable belief. *See, e.g.*, Moakler v. Furkids, Inc., 374 F. Supp. 3d 1306, 1316 (N.D. Ga. 2019) (in an FLSA retaliation case, concluding that the plaintiff possessed the requisite reasonable belief because she "consulted an attorney with a specialty in employment law who in turn contacted [her employer] in an effort to investigate her claim"); Zalinskie v. Rosner L. Offs., P.C., No. 12-289, 2014 WL 956022, at *6 (D.N.J. Mar. 12, 2014) (in an FLSA retaliation case, concluding that the plaintiff possessed the requisite reasonable belief because "she obtained information confirming that it was illegal to dock her pay from 'the Department of Labor'"); Rasic v. City of Northlake, No. 08 c 104, 2010 WL 3365918, at *8 (N.D. Ill. Aug. 24, 2010) (in an FMLA retaliation case, concluding that the plaintiff possessed the requisite reasonable belief because he "contacted the Department of Labor and was advised that he did not have to appear pursuant to a subpoena while on FMLA leave").

1. Congress and the Older Workers Benefit Protection Act of 1990

Congress exhibited a clear layperson-protective philosophy when enacting the Older Workers Benefit Protection Act of 1990 ("OWBPA") for releases of federal age discrimination claims.[324]

Title II of the OWBPA amended the ADEA to create specific requirements for a valid, "knowing and voluntary" waiver of an age discrimination claim.[325] Generally, this waiver must meet seven requirements:

> (A) [T]he waiver is part of an [employer-employee agreement] that is written in a manner calculated to be understood by . . . the average individual . . . ;
>
> (B) the waiver specifically refers to rights or claims arising under [the ADEA];
>
> (C)the [waiver] does not [encompass] rights or claims that may arise after the date the waiver is [signed];
>
> (D) the [waiver is] in exchange for consideration [that is] in addition to anything . . . to which the [employee] is already entitled;
>
> (E) the [employee] is advised in writing to consult with an attorney prior to executing the agreement;
>
> (F) the [employee] is given a period of at least 21 days within which to consider the agreement; . . . [and]
>
> (G) the agreement provides that for a period of at least 7 days following [its] execution, the [employee] may revoke [it] . . . .[326]

In addition, the OWBPA makes two changes to these seven requirements if the waivers are part of a larger termination program (e.g., a reduction in force) offered to a "group or class of employees."[327] The first change substitutes an expanded forty-five-day consideration period.[328] The second change requires the employer to make certain information-based disclosures:

> [T]he employer . . . informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate [in the program], as to: (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such

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324. Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended at 29 U.S.C. §§ 623, 626, 630); *see also* Craig Robert Senn, *Ending Discriminatory Damages*, 64 ALA. L. REV. 187, 249–51 (2012) (discussing the OWBPA and its legislative history); Craig Robert Senn, *Fixing Inconsistent Paternalism Under Federal Employment Discrimination Law*, 58 UCLA L. REV. 947, 981–85 (2011) (same); Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test with a "Waiver Certainty" Test*, 58 FLA. L. REV. 305, 337–41 (2006) (same).

325. 29 U.S.C. § 626(f)(1).

326. *Id.* § 626(f)(1)(A)–(G); *see also* Senn, *Ending Discriminatory Damages*, *supra* note 324, at 249–51.

327. *Id.* §§ 626(f)(1)(F)(ii), (H).

328. *Id.* § 626(f)(1)(F)(ii).

> program, and any time limits applicable to such program; and (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.[329]

Aside from use of "Protection" in the OWBPA's title, Congress often alluded to its protective philosophy in the legislative history. For instance, Congress generally observed that the OWBPA should "be strictly interpreted to protect those individuals covered by the Act"[330] and was "designed to protect older workers' rights and not [] take them away."[331] Similarly, Congress noted that "certain protective factors *must* be present" when employers offer employees a waiver,[332] with the OWBPA "ensur[ing] that those [employee] choices are truly . . . informed."[333]

In addition, Congress offered protective rationales for many of the OWBPA's waiver requirements. For the first requirement ("written in a manner calculated to be understood by . . . the average individual"), Congress emphasized the importance of protection via employee comprehension: "[We] expect[] that courts will pay close attention to the language used in the agreement, to ensure that the language is readily understandable to individual employees regardless of their education or business experience."[334] Similarly, for the second requirement ("specifically refers" to ADEA rights), Congress highlighted the need for employee knowledge: "This degree of clarity and specificity increases the chances that individuals will know their rights upon execution of a waiver."[335]

Similarly, for the fifth requirement ("advised in writing to consult with an attorney"), Congress reiterated protection via employee comprehension: "Given the complexity of issues involved . . . it is vitally important that the employee understand the magnitude of what he or she is undertaking. Legal counsel is in the best position to help the individual reach that understanding."[336] For the sixth requirement (affording a twenty-one-day consideration period), Congress again highlighted the importance of employee knowledge: "An employee who is terminated needs time . . . to learn about the conditions of termination, including any benefits being offered by the employer. Time also

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329. *Id.* § 626(f)(1)(H).

330. S. REP. NO. 101-263, at 31 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1509, 1537.

331. H.R. REP. NO. 101-664, at 54 (1990); *see also* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998) ("The policy of the OWBPA is likewise clear from its title: It is designed to protect the rights and benefits of older workers. The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word.").

332. H.R. REP. NO. 101-664, at 26–27 (criticizing pre-enactment lower court decisions for failing to apply such a requirement).

333. S. REP. NO. 101-263, at 33; *see also id.* ("[G]roup termination and reduction programs . . . require additional protection for individuals from whom a waiver is sought.").

334. S. REP. NO. 101-263, at 32–33; *see also* H.R. REP. NO. 101-664, at 51 (using almost identical language to that in the Senate Report).

335. S. REP. NO. 101-263, at 32; H.R. REP. NO. 101-664, at 51.

336. H.R. REP. NO. 101-664, at 52.

is necessary to locate and consult with an attorney if the employee wants to determine what legal rights may exist."[337]

Finally, Congress offered similar protective explanations for the OWBPA's two requirement changes if the waivers are part of a larger termination program offered to a "group or class of employees." For the expanded forty-five-day consideration period, Congress reiterated protection via employee comprehension: "[M]ore time is needed to review options, understand the program, and consult with an attorney before signing away potentially valid legal claims[, g]iven that these programs often involve large numbers of employees[] and complex financial arrangements . . . ."[338] Similarly, for the added requirement of information-based disclosures, Congress restated the need for employee knowledge:

> [We] believe[] that collectively these informational requirements will permit older workers to make more informed decisions in group termination and exit incentive programs. The principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements . . . are designed to give all eligible employees a better picture of these factors.[339]

2. Courts and the Totality of Circumstances Test

The federal courts have exhibited the same layperson-protective philosophy when adopting a totality of circumstances test for releases of other federal employment claims.

Most federal courts use this totality of circumstances test to determine if an employee's waiver of other (non-ADEA) claims is "knowing and voluntary" and thus valid.[340] This test includes six or more factors or variables (depending on the federal circuit) that must be weighed and balanced:

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337. S. REP. NO. 101-263, at 33; *see also* H.R. REP. NO. 101-664, at 51 (using similar language to that in the Senate Report).

338. S. REP. NO. 101-263, at 33.

339. *Id.* at 34; *see also id.* at 32 (stating similarly that "the need for adequate information . . . is especially acute" in the context of these larger scale group termination programs); H.R. REP. NO. 101-664 at 22–23 ("The problem is particularly acute in large-scale terminations and layoffs, where an individual employee would not reasonably be expected to know or suspect that age may have played a role in the employer's decision, or that the program may be designed to remove older workers from the labor force."); *id.* at 53 ("In this setting, older workers are unlikely to be aware of possible patterns of discrimination in the program itself, or of the nature of the remedies to which they might be entitled."); *id.* at 54 ("Group termination and reduction programs stand in stark contrast to the individual separation . . . [because] employees affected by these programs have little or no basis to suspect that action is being taken based on their individual performance or characteristics."); SULLIVAN ET AL., *supra* note 20, at 695 ("Obviously, this kind of information can help recipients assess the legality of the plan from the perspective of a systemic violation.").

340. *See, e.g.*, SULLIVAN ET AL., *supra* note 20, at 698 n.2 (noting that the "dominant approach" among federal courts involved "looking to the 'totality of the circumstances' to determine whether the release was 'knowing and voluntary'"); Senn, *Knowing and Voluntary Waivers of Federal Employment*

(1) the employee's education, background, and business experience;

(2) whether the employee actually consulted with an attorney before signing the waiver;

(3) whether the employee actually played a role in negotiating or deciding the terms of the agreement;

(4) whether the employee actually knew or should have known of applicable employment rights at the time of signing the waiver;

(5) whether the employee actually read and considered the waiver before signing it;

(6) whether the employer used clear, understandable waiver language in the agreement;

(7) whether the employer provided valuable consideration to the employee in exchange for the waiver;

(8) whether the employer afforded adequate time to the employee to review and consider the waiver; and/or

(9) whether the employer advised the employee to consult with an attorney prior to signing the waiver.[341]

Courts have frequently commented on their protective philosophy when adopting the totality of circumstances test. For example, in *Coventry v. U.S. Steel Corp.*, the Third Circuit emphasized protection via employee knowledge: "A meaningful comprehension of the legal significance of a release . . . , as well as the ability to understand the literal definitions of its terms, is necessary to a 'knowing' waiver."[342] Consequently, the *Coventry* court noted that the test necessarily demands "[c]areful evaluation" of "the complete circumstances in which [the waiver] was executed," including those "considerate of the particular individual" who signed it.[343]

Similarly, in *Torrez v. Public Service Co. of New Mexico, Inc.*, the Tenth Circuit echoed the "considerate of the particular individual" language from *Coventry* and also highlighted the need for employee comprehension, stating that the

Claims, *supra* note 324, at 307, 313–31 (enumerating the federal circuits that use the totality of circumstances test).

341. For applicable precedent enumerating relevant factors or circumstances, see Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 181 n.3 (1st Cir. 1995); Adams v. Philip Morris, Inc., 67 F.3d 580, 583 (6th Cir. 1995); Pierce v. Atchison, Topeka & Santa Fe Ry. Co., 65 F.3d 562, 571 (7th Cir. 1995); Gormin v. Brown-Forman Corp., 963 F.2d 323, 327 (11th Cir. 1992); Torrez v. Pub. Serv. Co. of N.M., 908 F.2d 687, 689–90 (10th Cir. 1990); O'Hare v. Glob. Nat. Res., Inc., 898 F.2d 1015, 1017 (5th Cir. 1990); Stroman v. W. Coast Grocery Co., 884 F.2d 458, 462 (9th Cir. 1989); Bormann v. AT&T Commc'ns, Inc., 875 F.2d 399, 403 (2d Cir. 1989); Cirillo v. Arco Chem. Co., 862 F.2d 448, 451–52, 455 (3d Cir. 1988); *see also* SULLIVAN ET AL., *supra* note 20, at 698 n.2 (enumerating four of these factors or circumstances); Senn, *Knowing and Voluntary Waivers of Federal Employment Claims*, *supra* note 324, at 307–08, 313–31 (enumerating these factors or circumstances and generally discussing applicable precedent in which federal circuits listed such factors or circumstances).

342. Coventry v. U.S. Steel Corp., 856 F.2d 514, 525 (3d Cir. 1988).

343. *Id.* at 523.

totality of circumstances test "consider[ed] all relevant factors in assessing a plaintiff's knowledge."[344] Likewise, in *Riley v. American Family Mutual Insurance Co.*, the Seventh Circuit explained that consideration of the test's factors or variables may "prevent the . . . uninformed compromise of federal rights."[345]

In sum, Congress and federal courts have exhibited a clear layperson-protective philosophy in the context of determining the validity of signed waivers of federal employment claims. The OWBPA's prophylactic waiver requirements and legislative purpose reflect that philosophy, as do the totality of circumstances test's individualized factors or variables.

* * *

Unfortunately, the hypertechnical approach to evaluate the reasonable belief requirement turns Congress's and the courts' layperson-protective philosophy on its head. As discussed above in Section II.A, this approach hinges on rigid (and often questionable or incorrect) assumptions that reasonable whistleblowers would have discovered, understood, and correctly applied the legal technicality to their situations before objecting to the workplace conduct.[346]

Yet, those very assumptions about employee understanding, knowledge, and comprehension are *exactly* the kind that Congress and the courts have refused to make in the waiver context. When enacting the OWBPA, Congress assumed a *lack* of employee understanding; thus, it created protective ADEA waiver requirements to ensure that employees are "truly . . . informed," "know their rights," "make . . . informed decisions," and have "a better picture" of legal rights in their situations.[347] Likewise, when adopting the totality of circumstances test, the federal courts assumed an *absence* of employee knowledge or comprehension; thus, they included protective, employee-specific factors or variables that were (in part) "considerate of the particular individual" to ensure "meaningful comprehension" and "knowledge" of legal rights.[348] These factors include (1) the employee's education, background, and business experience and (2) whether the employee actually knew or should have known of applicable employment rights at the time of signing the waiver.

While the hypertechnical approach flatly overlooks this layperson-protective philosophy, the Layperson Accommodation Approach is just another example of it. Like the OWBPA and totality of circumstances test, the proposed approach rejects any assumptions regarding employees' discovery, understanding, and correct application of legal principles to their situations. Instead, it similarly prioritizes an employee's "meaningful comprehension" and "knowledge" by adopting a flexible, case-by-case analysis to evaluate the

344. *Torrez*, 908 F.2d at 689–90 (10th Cir. 1990).

345. Riley v. Am. Fam. Mut. Ins. Co., 881 F.2d 368, 374 (7th Cir. 1989).

346. *See supra* Section II.A.1 (discussing these assumptions).

347. *See supra* notes 324–39 and accompanying text (discussing Congress's layperson-protective philosophy when enacting the OWBPA's waiver requirements).

348. *See supra* notes 340–45 and accompanying text (discussing the courts' layperson-protective philosophy when adopting the totality of circumstances test).

likelihood of a reasonable layperson's understanding, knowledge, and comprehension. In fact, like the totality of circumstances test, the proposed approach includes employee-specific (or "considerate of the particular individual") factors or variables, such as (1) the amount of experience and legal sophistication of a reasonable layperson and (2) an understanding and availability of relevant facts needed to apply a legal technicality.[349]

Consequently, the Layperson Accommodation Approach reflects the same layperson-protective philosophy that Congress and federal courts have exhibited in the context of determining the validity of signed waivers of federal employment claims.[350]

C. PROMOTING ANTIRETALIATION PURPOSE AND POLICY

Finally, the Layperson Accommodation Approach promotes the purpose and policy behind the antiretaliation provisions of the federal employment statutes—to encourage workplace whistleblowing and ferret out employers with retaliatory intent.[351]

The U.S. Supreme Court has consistently emphasized this purpose and policy of these antiretaliation provisions. For example, in its 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White*, the Court highlighted this important purpose of encouraging employee whistleblowing: "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. 'Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.'"[352] Similarly, the *Burlington Northern* court observed: "The antiretaliation provision seeks to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers."[353]

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349. *See supra* Section II.A.2 (discussing and applying these factors or variables of the Layperson Accommodation Approach).

350. *Cf.* Senn, *Fixing Inconsistent Paternalism Under Federal Employment Discrimination Law*, *supra* note 324, at 1014–17 (also arguing that the OWBPA's protective purpose and philosophy serve as a basis for requiring employers to notify a job applicant of "known job-related safety and/or health risks (if any) that are attributable to" the applicant's disability).

351. *See* Craig Robert Senn, *Redefining Protected "Opposition" Activity in Employment Retaliation Cases*, 37 CARDOZO L. REV. 2035, 2079–83 (2016) (also arguing that antiretaliation purpose and policy serve as a basis for a "Reasonable Action" option to the reasonable belief requirement).

352. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006) (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)).

353. *Id.* at 68 (citation omitted) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)); *see also id.* at 67 ("Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective [of achieving a discrimination-free workplace] depends."); *id.* at 63 ("The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." (citation omitted)).

Unfortunately, the hypertechnical approach frustrates this purpose and policy on two levels: an employee level and an employer level. On an employee level, the hypertechnical approach simply discourages lay whistleblowers from reporting or complaining about troublesome workplace conduct. This approach ultimately punishes those whistleblowers who lack the experience and sophistication to know liability-absolving legal technicalities in their situations—they are left unprotected because they fail the reasonable belief requirement.

Consider again the part-time furniture designer in *Berna*, the plastic mold maker in *Standard*, the manager for a local fried chicken franchise in *Talanda*, the electronics technician in *Sulima*, the diner waitress in *Henderson*, the beer delivery truck driver in *Baker*, and the IT employee in *Lamb*. Would each lay whistleblower (first having lost a job and second having lost the lawsuit) be discouraged and deterred from reporting other troublesome workplace conduct? Likely, because they know that they are unprotected if there is some unknown liability-absolving legal technicality. For similar reasons, the remaining employees (aware of a whistleblowing coworker's unemployment and failed lawsuit) would be discouraged and deterred from reporting. So, while the Supreme Court has stressed the importance of "the cooperation of employees" and the "free[dom] to approach officials with . . . grievances," the hypertechnical approach stifles any such "cooperation" and "freedom" for many lay whistleblowers.[354]

354. *Id.* at 67 (quoting *Mitchell*, 361 U.S. at 292); *see also* Milman v. Fieger & Fieger, P.C., 58 F.4th 860, 869 (6th Cir. 2023) ("FMLA rights and the statute's purpose would be significantly diminished if employers could fire an employee who simply took the required initial steps to access FMLA leave."); *id.* ("There is no basis for imagining that Congress created a statutory scheme that puts the onus on employees to know preemptively whether their leave requests would fall within the scope of statutory entitlement—an aspect of the FMLA that is hardly a model of clarity . . . . Under that interpretation, the statutory structure itself would chill employees' willingness to exercise their rights under the FMLA."(citation omitted)); *id.* ("Suppose that an employee, intending to exercise her FMLA rights, meets with her employer and asks questions concerning her FMLA rights, then is fired for doing so. Concluding that no FMLA violation could occur if it turns out that the employee is not entitled to leave would render the employee unprotected during the step required to initiate the FMLA's process. Without protection, employees would be discouraged from taking authorized initial steps—including preparing or formulating a request—to access FMLA benefits. We are not to impose nonsensical readings of a statute . . . ."); Wilkins v. Packerware Corp., 260 F. App'x 98, 103 (10th Cir. 2008) ("If . . . an employee took time off to care for an ailing spouse, only to discover that the spouse had been misdiagnosed and did not suffer from a serious health condition, it would arguably serve to defeat the purpose of the statute to allow the employer to fire the employee on the basis of a doctor's misdiagnosis." (citation omitted)); Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001) ("Employees are, understandably, less likely to exercise their FMLA leave rights if they can expect to be fired or otherwise disciplined for doing so."); Long, *supra* note 164, at 731 ("[I]t is counter-productive to the goals of antidiscrimination law to hold that an employee, confronted with these situations, was unreasonable in believing that the conduct was unlawful and thus unprotected from employer retaliation. . . . The end result is a situation in which the average employee, unaware of the subtleties of federal employment law, may run the risk of being fired or otherwise retaliated against with impunity . . . ." (footnotes omitted)); Green, *supra* note 320, at 787 ("Holding employees to such an exacting standard before protecting them from retaliation has the potential to deter complaints, undermining the informal resolution of claims and avoidance of harm principles that gave rise to the reasonable belief standard."); Rosenthal, *supra* note 320, at 1159–60 ("Specifically, if employees . . . knew that their complaints to management would not be protected,

On an employer level, the hypertechnical approach allows blatant, retaliatory employers to escape scot-free. In fact, this approach—by dismissing retaliation claims due to a liability-absolving technicality—can "camouflage," conceal, or erase an employer's original, retaliatory decision. Reconsider the employers in Scenarios #1, #2, and #3 in the Introduction.[355] Company A (in Scenario #1) had clear, retaliatory intent when it fired Mindy for objecting to its leave denial: It explicitly said it was doing so "because we don't need disloyal workers." Likewise, Company B (in Scenario #2) had clear, retaliatory intent when it fired Scout for objecting to her supervisor's offensive, sex-based comment: It expressly stated it was doing so "because we don't want troublemakers." And, Company C (in Scenario #3) had clear, retaliatory intent when it fired Buzz for objecting to its refusal to provide overtime pay: It explicitly said it was doing so "because we don't need snitches." Yet, despite this direct evidence of retaliatory intent and causation,[356] the hypertechnical approach provides a proverbial escape hatch to each employer. So, Companies A, B, and C remain free to retaliate (and discriminate) again and again, especially against lay whistleblowers (like Mindy, Scout, and Buzz) who are unaware of liability-absolving legal technicalities.[357]

In contrast, the Layperson Accommodation Approach promotes antiretaliation law's purpose and policy on these same two levels. On an employee level, the proposed approach encourages lay whistleblowers to report or complain about troublesome workplace conduct. This approach does not punish those whistleblowers who lack the experience and sophistication to know about liability-absolving legal technicalities in their situations—they can still be protected because they may satisfy the reasonable belief requirement under the proposed approach's flexible, case-by-case analysis.

So, under the proposed approach, will each lay whistleblower in *Berna*, *Standard*, *Talanda*, *Sulima*, *Henderson*, *Baker*, and *Lamb* be discouraged and deterred from reporting other troublesome workplace conduct? Likely not, because they know that they can still be protected, even if there is some unknown liability-absolving legal technicality. Thus, the proposed approach encourages "the cooperation of employees" and the "free[dom] to approach officials with . . . grievances" that the Supreme Court has consistently stressed.[358]

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they would never bring those concerns to management's attention. . . . [A]fter cases . . . that require the objectively reasonable standard to be met (and which set that objective standard at a very high level), employees will be less likely to inform their employers of any offensive behavior. This, of course, frustrates Title VII's goal of eliminating workplace discrimination.").

355. *See supra* text accompanying notes 1–11.

356. *See supra* note 22 and accompanying text (discussing direct and other evidence of the causal relationship between protected activity and adverse action).

357. *Cf.* Craig Robert Senn, *Minimal Relevance: Non-Disabled Replacement Evidence in ADA Discrimination Cases*, 66 BAYLOR L. REV. 65, 105–06 (2014) (also arguing that requiring ADA plaintiffs to establish non-disabled replacement evidence as part of their prima facie case "can (and often does) allow an employer's subsequent decision to 'camouflage' or conceal—whether intentionally or unintentionally—its original, discriminatory decision" and that such a requirement "substantially frustrates the ADA's broad antidiscrimination policy by allowing camouflaged discriminators . . . to escape scot-free").

358. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 67 (quoting *Mitchell*, 361 U.S. at 292).

On an employer level, the Layperson Accommodation Approach potentially captures blatant, retaliatory employers, rather than allowing them to escape scot-free. By protecting lay whistleblowers who may not know about liability-absolving legal technicalities, this approach reduces the camouflaging, concealing, or erasing of an employer's original, retaliatory decision. For employers with clear, retaliatory intent like Companies A, B, and C in the three Introduction scenarios, the Layperson Accommodation Approach closes the escape hatch that the hypertechnical approach currently opens. As a result, the proposed approach more effectively ensures that such employers are deterred from retaliating (and discriminating) again and again, especially against lay whistleblowers who are unaware of liability-absolving legal technicalities.[359]

CONCLUSION

By applying a hypertechnical approach to evaluate the reasonable belief requirement, courts erect a clear barrier to valid retaliation claims by lay whistleblowers. These courts rigidly assume that reasonable whistleblowers would have discovered, understood, and correctly applied a liability-absolving legal technicality to their situations before objecting to the workplace conduct. Those assumptions are, at best, questionable and, at worst, inaccurate.

This Article has proposed the Layperson Accommodation Approach to shatter this barrier. This proposed approach represents a significant improvement in workplace retaliation law because it eliminates the hypertechnical approach's rigid assumptions and substitutes a more flexible, case-by-case analysis to evaluate if a reasonable layperson would, in fact, (1) discover the legal technicality relevant to the employer's conduct, (2) understand it, and (3) correctly apply it to their situation before objecting to that conduct. This approach embodies the same layperson-protective philosophy that Congress and federal courts have exhibited in the context of determining the validity of signed waivers of federal employment claims. And it more fully promotes the purpose and policy behind the antiretaliation provisions of the federal employment statutes.

359. Some legal commentators have argued that protected opposition activity should include only a subjective, good-faith requirement (i.e., that the whistleblower had an honest, good-faith belief that the reported conduct was unlawful under federal employment law). *See, e.g.*, Rosenthal, *supra* note 320, at 1149 (arguing that a retaliation plaintiff "should be required to prove only that she had a subjective, good-faith belief that the conduct she was opposing was unlawful"); *id.* at 1131 ("This [purely subjective] standard would also further Title VII's purposes by encouraging employees to come forward with complaints about potential Title VII violations and giving employers the opportunity to fix these problems before they reach the level of actionable discrimination."). For a rebuttal to this appealing proposal, see Senn, *supra* note 351, at 2083–86 (discussing the U.S. Supreme Court's "purposeful adoption of objective standards in the federal employment discrimination context").