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ARTICLES

MANDATED REPORTER PROTECTIONS: MISSING IN GEORGIA

*Micah Barry**

ABSTRACT

Every state and territory in the United States, including Georgia, requires certain individuals to report suspected child abuse. In Georgia, mandated reporters are not protected from employment retaliation. This creates the potential for a mandated reporter to have to choose between criminal charges for failing to report suspected child abuse or losing their job and having a termination on their record. Protection for mandated reporters would require a new statute or amendment of a current statute. An examination of jurisdictions that provide employment protections provides inspiration for how Georgia legislators could protect mandated reporters who keep children safe.

INTRODUCTION

Every state and territory in the United States requires certain individuals to report suspected child abuse.¹ Some states require all citizens to report suspected child abuse, but most only require specific individuals and/or institutions to report.² In Georgia, only certain

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1. Child Welfare Info. Gateway, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUM. SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2016), <https://www.childwelfare.gov/pubpdfs/manda.pdf>.

2. *See id.* at 2; *see also* Leonard G. III Brown & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws With a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 57-58, 61 (2013).

statutorily-identified individuals and institutions are mandated reporters.³ Despite requiring certain people to make these reports, Georgia does not offer employment protection to prevent retaliation in the event that a supervisor, politician, or business owner has some connection to the person reported for suspected child abuse.⁴ This can present a strong disincentive from filing reports and, as a result, place children in danger unnecessarily.

Part I of this paper will introduce mandated reporters and required reports. Part II will examine general statutory protections for mandated reporters. Part III will examine the lack of meaningful employment protections and possible employment protections for reporters. Part IV will examine possible avenues of changing Georgia law to protect reporters, including portions of the Georgia Code that may require amendment and examples of protections from other states and territories.

I. MANDATED REPORTERS AND MANDATORY REPORTS: THE BASICS

A. *The Statutes*

Georgia's mandatory reporting law is spread across three statutes.⁵ The primary statute is title 19, chapter 7, article 1 of the Georgia Code, titled "Reports by physicians, treating personnel, institutions and others as to child abuse; failure to report suspected child abuse."⁶ This is often cited as the mandatory reporter statute or mandated reporter.⁷ It is often cited as *the* statute because it provides almost the entirety of the law concerning mandated reporters and mandated reports.⁸

In addition to the primary statute, the General Assembly passed title 16, chapter 12, article 3, part 2 of the Georgia Code, which adds an additional class of mandated reporters.⁹ The General Assembly also

3. Child Welfare Info. Gateway, *supra* note 1, at 2.

4. *Id.* at 3 (noting how Georgia is absent from the list of seventeen states that have employment protections).

5. See GA. CODE ANN. §§ 19-7-5 (West 2019), 16-12-100 (West 2017), 49-5-41 (West 2020).

6. See *id.* § 19-7-5.

7. See, e.g., *Williams v. Fulton Cnty. Sch. Dist.*, 181 F. Supp. 3d 1089, 1119 (N.D. Ga. 2016) (referring to the statute as "The 'mandatory reporter' statute"); see also Matthew Johnson, Note, *Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children*, 31 GA. ST. U. L. REV. 643, 657 (2015) (referring to the statute as "The Mandated Reporter Law"). For the purposes of this paper, the terminology will be "mandatory report" and "mandated reporter."

8. See GA. CODE ANN. § 19-7-5(c)(1).

9. See *id.* § 16-12-100(c).

supplemented confidentiality obligations and protections in title 49, chapter 5, article 2 of the Georgia Code.¹⁰ The statutes will be discussed in more detail in the appropriate sections.

B. Reporters

In states that specifically enumerate classes of mandated reporters, these reporters are typically professionals who work with children.¹¹ As a result of education, training, or sheer time spent working with children, these professionals are uniquely poised to detect signs of abuse or exploitation.¹² Because of their heightened ability to spot child abuse or neglect, the law imposes upon mandated reporters the duty to report when they reasonably suspect that a child is being abused, neglected, or exploited.¹³

Georgia is considered below average regarding how many classes of individuals are considered mandated reporters.¹⁴ Title 19, chapter 7, article 1 of the Georgia Code lists the following as mandated reporters:

- (A) Physicians licensed to practice medicine, physician assistants, interns, or residents;
- (B) Hospital or medical personnel;
- (C) Dentists;
- (D) Licensed psychologists and persons participating in internships to obtain licensing pursuant to [Georgia's Code regulating psychologists as a profession];
- (E) Podiatrists;

10. See *id.* § 49-5-41(g)(3)(A).

11. See Andrew Solomon, *Preventing Recurrences of the Cover-ups at Penn State & Baylor (and now Michigan State): Where Does it End*, 28 MARQ. SPORTS L. REV. 379, 405 (2018); see also Victor I. Vieth, *Passover in Minnesota: Mandated Reporting and the Unequal Protection of Abused Children*, 24 WM. MICHELL L. REV. 131, 135 (1998).

12. See Emily L. Evett, Casenote, *See No Evil, Speak No Evil: Georgia Supreme Court Narrows Requirements for Mandatory Reporters in May v. State*, 66 MERCER L. REV. 837, 843 (2015).

13. See GA. CODE ANN. § 19-7-5; see also Solomon, *supra* note 11, at 405-406.

14. See Brown & Gallagher, *supra* note 2, at 61-62.

- (F) Registered professional nurses or licensed practical nurses. . . or nurse's aides;
- (G) Professional counselors, social workers, or marriage and family therapists [licensed under Georgia law];
- (H) School teachers;
- (I) School administrators;
- (J) School counselors, visiting teachers, school social workers, or [certified school psychologists];
- (K) Child welfare agency personnel [];
- (L) Child-counseling personnel;
- (M) Child service organization personnel;
- (N) Law enforcement personnel; or
- (O) Reproductive health care facility or pregnancy resource center personnel and volunteers.¹⁵

Although the list is long, it essentially boils down to medical professionals, school personnel, and law enforcement/investigatory personnel. "School" is defined to include all public and private primary, secondary, and post-secondary educational institutions.¹⁶ In addition to those mandated reporters enumerated in the primary statute, Georgia's statute criminalizing sexual exploitation of minors and possession of child pornography mandates reports by those who "process[] or produc[e] visual or printed matter either privately or commercially" (hereinafter "photo processors").¹⁷ As will be discussed below, photo processors have a modified reporting process, which is likely why they are included in a separate statute.

While Georgia does not compel everyone to report abuse, it enables them to report abuse through official channels if they see it or reasonably

15. See GA. CODE ANN. § 19-7-5(c)(1).

16. See *id.* § 19-7-5(b)(9).

17. See *id.* § 16-12-100(c) (West 2017).

suspect it has occurred.¹⁸ Individuals who are not mandated reporters – but who report abuse anyway – are often called “permissive reporters.”¹⁹

C. Reports

1. When Reports Must Be Made

Whenever a mandated reporter “has reasonable cause to believe” that child abuse has occurred, they must make a report.²⁰ The reporter must make a report “immediately, but in no case later than 24 hours from the time there is reasonable cause to believe that suspected child abuse has occurred.”²¹ In Georgia, “child abuse” is defined as:

(A) Physical injury or death inflicted upon a child by a parent or caretaker [excluding accidents and physical discipline that does not cause injury];

(B) Neglect or exploitation of a child by a parent or caretaker thereof;

(C) Endangering a child;

(D) Sexual abuse of a child; or

(E) Sexual exploitation of a child.²²

Photo processors incur a duty to report when they reasonably believe that they have encountered “visual or printed matter” that “depicts a minor engaged in sexually explicit content.”²³

In 2014, the Georgia Supreme Court narrowed the requirement that mandated reporters make a report whenever they reasonably believe that child abuse has occurred.²⁴ In *May v. State*, a teacher in a Cherokee County high school discovered that a student who had recently transferred to a new school in Fulton County had engaged in a sexual relationship with a paraprofessional at the Cherokee County school while she was

18. *See id.* § 19-7-5(d).

19. *See* Child Welfare Info. Gateway, *supra* note 1, at 2.

20. *See* GA. CODE ANN. §§ 19-7-5(c)(1)-(2), 16-12-100(c).

21. *Id.* § 19-7-5(e).

22. *Id.* § 19-7-5(b)(4).

23. *Id.* § 16-12-100(c).

24. Evett, *supra* note 12, at 847.

enrolled there.²⁵ The sexual relationship the student disclosed constituted sexual abuse under the statute.²⁶ The student was no longer at the school, and the teacher did not report the paraprofessional.²⁷ When law enforcement were alerted to the sexual abuse, they also discovered that the teacher had failed to report the paraprofessional.²⁸ The teacher was then charged with a misdemeanor for violating the mandated reporter statute.²⁹ The case made its way to the Georgia Supreme Court, who ruled that the reporting requirement “is limited to the abuse of a child to whom the reporter ‘attends pursuant to her duties.’”³⁰ Because the student had already left the school by the time the teacher discovered the abuse, the teacher was therefore under no duty to report.³¹

The next year, the Georgia General Assembly amended the mandated reporter statute.³² The General Assembly did not increase the duty to report to cover all minors, instead adding abuse by anyone who also “attends to a child pursuant to such person’s duties as an employee of or volunteer at a hospital, school, social agency, or similar facility.”³³ Following this amendment, a mandated reporter must report suspected child abuse when (1) the reporter works with the child in the course of the reporter’s employment; or (2) when the suspected abuse involves someone who came into contact with the child by virtue of their employment or volunteer work at a hospital, school, social agency or similar facility.³⁴

2. What Goes Into a Report

A report must contain the name, address, and age of the child, to the best knowledge of the reporter.³⁵ A report must also include the names and addresses of the child’s parents or caregivers.³⁶ The nature and extent of the child’s injuries must be in the report as well, and certain mandated reporters that work in hospitals, physician offices, law enforcement, and

25. *May v. State*, 761 S.E.2d 38, 40 (Ga. 2014).

26. *See id.* at 39 n.3; *see also* GA. CODE ANN. § 19-7-5(b)(4)(E).

27. *May*, 761 S.E.2d at 39.

28. *Id.*

29. *See id.* at 40; *see also* GA. CODE ANN. § 19-7-5(h).

30. *May*, 761 S.E.2d at 45 (internal quotation omitted).

31. *Id.* at 45-46.

32. H.B. 268, 153d Gen. Assemb., Reg. Sess. (Ga. 2015).

33. *Id.*; GA. CODE ANN. § 19-7-5(c)(3).

34. GA. CODE ANN. § 19-7-5(c).

35. *Id.* § 19-7-5(e).

36. *Id.* § 19-7-5(e)(2).

schools are authorized to take pictures of the child's injuries without parental permission.³⁷ Finally, the report should contain any other information that "might be helpful in establishing the cause of the injuries and the identity of the perpetrator."³⁸ In order to meet the timing requirements, a reporter can make an initial oral report and follow up with a written report.³⁹

Photo processors do not have statutorily specified requirements for the content of their reports; they are simply required to make a report.⁴⁰ This makes sense. The photo processor is unlikely to know the child or customer or have the information other mandated reporters would possess.⁴¹

3. How Reports Are Made

Georgia is one of 18 states, along with DC and the US Virgin Islands, to set forth a chain of reporting.⁴² The processes in reporting follow the hierarchy reflected in Chart 1.⁴³

37. *Id.* Information about and evidence of injuries includes past injuries as well as current injuries. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* §16-12-100(c) (West 2017).

41. *See id.*; *see also* Symposium, *Prosecuting White-Collar Crime: The White-Collar Police Force: "Duty to Report" Statutes in Criminal Law Theory*, 11 WM. & MARY BILL OF RTS. J. 3, 15 (2002) (listing various types of required reporters by profession grouped into categories following two basic statutory patterns).

42. *See* Child Welfare Info. Gateway, *supra* note 1, at 3.

43. *See* GA. CODE ANN. §§ 16-12-100(c), 19-7-5(c)(2)-(3).

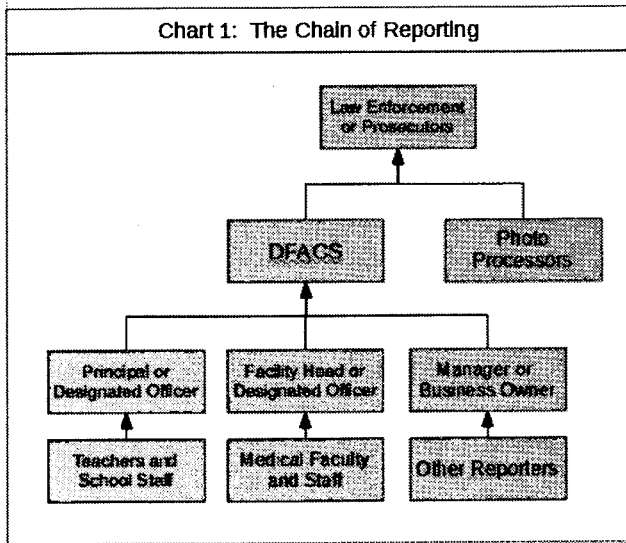


Photo processors have the simplest reporting structure; they report directly to law enforcement.⁴⁴ Other reporters have a slightly more complicated procedure.⁴⁵ A normal reporter must report to “the person in charge of [the] hospital, school, agency, or facility” in which the reporter works.⁴⁶ If a reporter discovers that the abuser works at a “hospital, school, social agency, or similar facility,” the reporter must notify the person in charge of the abuser’s employer.⁴⁷ The person in charge could be a principal, dean, department head, business owner, manager, or someone in a similar position.⁴⁸ The person in charge of an institution subject to mandatory reporting may delegate responsibilities to someone else, such as a compliance officer or human resources representative.⁴⁹ For ease of reference, I will refer to the person in charge or the designated officer as the “institutional reporter.”

Once an initial report has been made to the institutional reporter, the institutional reporter must contact the Division of Family and Child Services (hereinafter “DFACS”) at the Department of Human Services.⁵⁰ The institutional reporter is forbidden from “exercis[ing] any control, restraint, or modification or mak[ing] any other change[s] to the

44. *Id.* § 16-12-100(c).

45. *Id.* § 19-7-5(c)(1)-(3).

46. *Id.* § 19-7-5(c)(2).

47. *Id.* § 19-7-5(c)(3).

48. *Id.* § 19-7-5(c)(2)-(3).

49. *Id.*

50. *Id.* § 19-7-5(e).

information provided by the reporter.”⁵¹ DFACS screens reports, and those it “has reasonable cause to believe” or those which are substantiated by submitted evidence are reported to law enforcement or prosecutors.⁵²

II. EXISTING PROTECTIONS

The mandatory reporting statutes contain some protections for reporters, both mandated and permissive.⁵³ Two of these protections include: immunity and confidentiality.⁵⁴ Each will be detailed below.

A. Immunity

The mandatory reporting statute provides civil and criminal immunity for good faith reports.⁵⁵ Along with many other states, Georgia provides immunity to permissive reporters as well as mandatory reporters.⁵⁶ This means a reporter is generally not liable for the consequences of reporting potential child abuse.⁵⁷ Immunity attaches when either: (1) there is reasonable cause to suspect abuse (an objective test); or (2) the reporter had a good faith belief that they were obligated to make a report (a subjective test).⁵⁸ Immunity applies even when the concern of abuse is not substantiated.⁵⁹ Immunity is intended to encourage reporters to err on the side of reporting and place investigative duties onto DFACS and law enforcement, rather than requiring mandated reporters, such as doctors or teachers, to fully investigate concerns themselves.⁶⁰

B. Confidentiality

Reports of child abuse and statements connected to those reports are generally not subject to public inspection under Georgia’s Open Records

51. *Id.* § 19-7-5(c)(2)-(3).

52. *Id.* § 19-7-5(2).

53. Child Welfare Info. Gateway, *supra* note 1, at 2.

54. *Id.* at 4; *see also* Johnson, *supra* note 7, at 657.

55. *See* GA. CODE ANN. § 16-12-110(c) (West 2017).

56. *Id.* § 19-7-5(f) (West 2019); *see also* Seletha R. Butler & Valerie Njiiri, *Higher Education Governance: Proposals for Model Child Protection Governance Policy*, 2015 BYU EDUC. & L.J. 367, 375 (2015).

57. GA. CODE ANN. § 19-7-5(f).

58. *O’Heron v. Blaney*, 583 S.E.2d 834, 836 (Ga. 2003); *see also* Johnson, *supra* note 7, at 659.

59. *See O’Heron*, 583 S.E.2d at 836.

60. *Id.* at 837.

Act.⁶¹ There are two exceptions. The first is when the records are necessary for court proceedings related to the allegations of abuse.⁶² The second is when a judge – after a full hearing – approves release of the records for “legitimate research for educational, scientific, or public purposes.”⁶³ Even where a judge approves the release of records for research, the judge may still redact the identifying information of the reporter.⁶⁴

The final statute involved in Georgia’s mandatory reporting law concerns legitimate access to child abuse records for government purposes.⁶⁵ The statutes enumerate several instances in which the names of reporters cannot be disclosed.⁶⁶ For the purposes of this paper, confidentiality is not much of a protection. With the hierarchical reporting structure discussed above, a supervisor is almost guaranteed to know who made a report.⁶⁷ Even if the employee bypasses the internal report and goes straight to DFACS, the employer may still obtain access to the reporter’s identity.⁶⁸

III. PROTECTION FROM RETALIATION (OR THE LACK THEREOF)

Georgia’s mandatory reporting statute does not mention employment protections.⁶⁹ The statute does say that employers cannot “restrain” reports, which might provide an argument for protection from retaliation.⁷⁰ But Georgia courts do not recognize a public policy exception to at-will employment.⁷¹ Georgia courts consider at-will

61. GA. CODE ANN. § 19-7-5(i). Georgia’s Open Records Act is codified at GA. CODE ANN. § 50-18-70 (West 2012).

62. *Id.* § 19-7-5(i)(1).

63. *Id.* § 19-7-5(i)(2).

64. *Id.* § 19-7-5(i)(2)(C).

65. *Id.* § 49-5-41 (West 2020).

66. *Id.* §§ 49-5-41(a)(6)(D), 49-5-41(a)(7), 49-5-41(c)(7)(A), 49-5-41(c)(8)(A), 49-5-41(d)(2)(C).

67. *Id.* § 19-7-5(c)(2)-(3).

68. *See id.* § 49-5-41(a)(1) (government entities involved in protection of the child); *Id.* § 49-5-41(a)(3) (prosecuting attorneys); *Id.* § 49-5-41(a)(5)(B) (the school the child attends); *Id.* § 49-5-41(a)(9) (law enforcement agencies); *Id.* § 49-5-41(c)(1) (a treating physician); *Id.* § 49-5-41(c)(9) (any mandated reporter with an ongoing relationship with the child); *Id.* § 49-5-41(c)(10) (school principal or guidance counselor); *Id.* § 49-5-41(c)(10.1) (any school official at a school which the child attends).

69. *Compare* GA. CODE ANN. § 19-7-5, *with* ALA. CODE § 26-14-3(g), *and* S.C. CODE ANN. § 63-7-315(A) (West 2014).

70. GA. CODE ANN. § 19-7-5(c)(2)-(3).

71. *See, e.g.,* Seth Eisenberg, *Public Officers and Employees - General Provisions*, 24 GA. ST. U. L. REV. 309, 309-10 (2007).

employment to be a fundamental legislative policy of the state because it is codified in statute.⁷² No published cases have examined whether the prohibition from restraining reports extends to retaliation, but judicial hostility to implied exceptions to at-will employment lead the author to conclude that any attempts would likely be unsuccessful.⁷³

For public employees, it is clear that the mandatory reporting statute will offer no protection, with one caveat.⁷⁴ State and local government entities are protected from lawsuits by sovereign immunity.⁷⁵ Immunity “can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.”⁷⁶ While no “magic language” is required to waive immunity, immunity will only be waived when an act from the General Assembly specifically creates a right of action and provides for money damages.⁷⁷ The mandatory reporting law contains neither term, which eliminates the possibility of a retaliation suit under the statute.⁷⁸

However, public employees have one hope private employees do not. In Georgia, public employees receive the protection of the Georgia Whistleblower Act (hereinafter “GWA”).⁷⁹ Enacted in 1993, the GWA initially only covered members of the executive branch of the state, excluding the Governor’s Office, but it has since been expanded to cover all state and local government employees in Georgia.⁸⁰ The GWA waives

72. *Reilly v. Alcan Aluminum Corp.*, 528 S.E.2d 238, 239-240 (Ga. 2000); GA. CODE ANN. § 34-7-1; *see also Reid v. City of Albany*, 622 S.E.2d 875, 877 (Ga. Ct. App. 2005).

73. *Reid*, 622 S.E.2d at 877.

74. GA. CODE ANN. § 19-7-5(c).

75. *See* GA. CONST. art. I, § II, para. IX(e); *see also Colon v. Fulton Cnty.*, 751 S.E.2d 307, 310 (Ga. 2013).

76. GA. CONST. art. I, § II, para. IX(e).

77. *Colon*, 751 S.E.2d at 310.

78. *See* GA. CODE ANN. § 19-7-5.

79. *Id.* § 45-1-4 (West 2012). Literature on the GWA is divided over what to call the statute, as no title appears in the body of the act. *Compare* Eisenberg, *supra* note 71, at 311 (referring to the statute as the “Whistleblower Protection Act” and using the acronym “WPA”), *with* Kimberly J. Doud, *Recent Development*, *Public Employment: Whistle-Blowers Act: N. Ga. Reg’l Educ. Serv. Agency v. Weaver*, 527 S.E.2d 864 (Ga. 2000), 30 STETSON L. REV. 1233, 1233 (2001) (referring to the statute as “Georgia’s whistleblower statute”), *and* Murray-Oberteint v. Ga. Gov’t Transparency & Campaign Fin. Comm’n, 812 S.E.2d 28, 28 (Ga. Ct. App. 2018) (referring to the statute as the “Georgia Whistleblower Act” and using the acronym “GWA”). The statute bears the section title “Complaint or Information From Public Employees as to Fraud, Waste, and Abuse in State Programs and Operations.” GA. CODE ANN. § 45-1-4. Within the practice area, “Georgia Whistleblower Act” and “GWA” have become the norm.

80. Eisenberg, *supra* note 71, at 311-13, 316-17; *see also* H.B. 665, 148th Gen. Assemb., Reg. Sess. (Ga. 2005); H.B. 16, 149th Gen. Assemb., Reg. Sess. (Ga. 2007). The statute was further amended in 2009 and 2011 to reflect administrative changes to certain administrative agencies in the

sovereign immunity and provides remedies including reinstatement, back pay and benefits, and attorney fees.⁸¹

The problem with using the GWA is inadequate protection.⁸² Because it only covers public employees, it offers no protections for private employers.⁸³ Additionally, the GWA will only apply to a narrow set of facts among public employees.⁸⁴ In *Brathwaite v. Fulton-DeKalb Hospital Authority*, a hospital employee learned that her supervisor had been terminated from her last job for using a “school for medical coders” to defraud the former employer and steal money.⁸⁵ When the supervisor proposed sending medical coders from the same school at the new employer, the plaintiff reported what she had learned.⁸⁶ The supervisor was fired, but then rehired.⁸⁷ Shortly thereafter, the plaintiff was fired, allegedly for failing a coding test and lacking certification, even though the plaintiff had passed the test and had certification.⁸⁸ The Georgia Court of Appeals ruled that the plaintiff had not engaged in protected activity because no illegal activity had occurred *at the current employer*.⁸⁹

Under *Brathwaite*, a mandated reporter would only engage in protected activity if they reported abuse of a minor that was occurring at the place of employment.⁹⁰ A teacher who reports that a parent is likely abusing a child would not have engaged in protected activity under the GWA, and there would be no protection from retaliation.⁹¹ If our goal is to protect reporters, the GWA is not an effective mechanism to do so.

state. See H.B. 642, 151st Gen. Assemb., Reg. Sess. (Ga. 2011); S.B. 97, 150th Gen. Assemb., Reg. Sess. (Ga. 2009).

81. *Colon*, 751 S.E.2d at 310; see also GA. CODE ANN. § 45-1-4(e)-(f).

82. GA. CODE ANN. § 45-1-4(e)-(f). To prevent the discussion of the GWA from consuming the entire paper, this paper will not detail the elements of a GWA claim. The only relevant element to this discussion is “protected activity,” which deals with the scope of reports that are protected. *Id.*

83. *Id.* § 45-1-4(a)(3).

84. See *Brathwaite v. Fulton-DeKalb Hosp. Auth.*, 729 S.E.2d 625, 629 (Ga. Ct. App. 2012).

85. *Id.*

86. *Id.*

87. *Id.* at 627.

88. *Id.* at 627-28.

89. *Id.* at 628-29.

90. *Id.* at 628-29.

91. *But see Albers v. Ga. Bd. of Regents of the Univ. Sys. of Ga.*, 766 S.E.2d 520, 522-524 (Ga. Ct. App. 2014) (finding that a campus police officer did engage in protected activity when he objected to university officials attempting to interfere in an investigation and get charges against a student dropped, which could constitute obstruction of justice). Because the mandatory reporting statute prohibits employers from controlling or modifying reports, an objection to any interference would likely constitute protected activity. GA. CODE ANN. § 19-7-5(e)(2)-(3) (West 2019).

In addition to the GWA, public school teachers have one additional hope, the Fair Dismissal Act (hereinafter “FDA”).⁹² The FDA grants what are commonly referred to as “tenure” rights to public school teachers upon the acceptance of each teachers fourth consecutive yearly contract with the same school district.⁹³ If the teacher leaves for another school district after achieving tenure, the teacher is tenured again upon receiving a second contract.⁹⁴ Once a teacher receives tenure, the teacher can only be removed for one of eight enumerated reasons, which are:

- (1) Incompetency;
- (2) Insubordination;
- (3) Willful neglect of duties;
- (4) Immorality;
- (5) Inciting, encouraging, or counseling students to violate any valid state law, municipal ordinance, or policy or rule of the local board of education;
- (6) To reduce staff due to loss of students or cancellation of programs and due to no fault or performance issue of the teacher, administrator, or other employee. In the event that a teacher, administrator, or other employee is terminated or suspended pursuant to this paragraph, the local unit of administration shall specify in writing to such teacher, administrator, or other employee that the termination or suspension is due to no fault or performance issues of such teacher, administrator, or other employee;
- (7) Failure to secure and maintain necessary educational training; or
- (8) Any other good and sufficient cause.⁹⁵

The FDA also lays out detailed notice and procedural requirements, including hearings and appellate reviews by the local board of education,

92. GA. CODE ANN. § 20-2-940 (West 2013).

93. See *id.* § 20-2-942(b)(1) (West 2015); see also *Moulder v. Bartow Cnty. Bd. of Educ.*, 599 S.E.2d 495, 497 (Ga. Ct. App. 2004).

94. GA. CODE ANN. § 20-2-942(b)(4).

95. *Id.* § 20-2-940(a).

the state board of education, and state courts.⁹⁶ The notice and procedural requirements are strictly enforced, and failure or refusal to comply results in the reversal of a teacher's termination.⁹⁷ By specifically enumerating the reasons for which a teacher may be terminated, the FDA could, in theory, help stop a teacher from being terminated in retaliation for a report of child abuse. As a practical matter, however, the FDA does not provide effective protection for teachers.

The first reason the FDA is not an effective bar on retaliation is its limited scope.⁹⁸ The FDA only protects public school teachers who have achieved tenure.⁹⁹ If a teacher is promoted to an administrative or supervisory position, the FDA does not protect the teacher from being retaliated against, so long as the retaliation is limited to demotion back to being a teacher.¹⁰⁰ The FDA only protects teachers who work for a local board of education. Therefore, private school teachers are not covered, and state teachers¹⁰¹ are likely not covered.¹⁰² Charter school teachers, and teachers at charter districts, are also not covered.¹⁰³

The second reason that the FDA provides inadequate protection is that it is not designed to protect teachers from retaliation.¹⁰⁴ While the GWA allows an employee to provide evidence that the employer's alleged

96. *Id.* §§ 20-2-942(b)(2), 20-2-943.

97. *See, e.g.*, Clayton Cnty. Bd. of Educ. v. Wilmer, 753 S.E.2d 459, 467 (Ga. Ct. App. 2014).

98. Dekalb Cnty. Sch. Dist. v. Butler, 763 S.E.2d 473, 474 (Ga. 2014).

99. GA. CODE ANN. § 20-2-942(b)(1).

100. *Id.* § 20-2-942(d). The FDA was amended in 1995 to stop protecting administrators and supervisors. *DeKalb Cty. Sch. Dist.*, 763 S.E.2d at 474; GA. CODE ANN. § 20-2-942(c). If the administrator or supervisor achieved tenure first, however, the administrator or supervisor is protected from termination but not demotion. *DeKalb Cty. Sch. Dist.*, 763 S.E.2d at 475; GA. CODE ANN. § 20-2-942(d).

101. Georgia maintains three K-12 state schools: the Atlanta Area School for the Deaf, the Georgia School for the Deaf, and the Georgia Academy for the Blind. *State Schools*, GA. DEP'T OF EDUC., <https://www.gadoe.org/Curriculum-Instruction-and-Assessment/State-Schools/Pages/default.aspx> (last visited Sept. 30, 2020).

102. GA. CODE ANN. § 20-2-942(a)(1). A Westlaw search of cases citing the FDA and including the terms "blind" or "deaf" did not illuminate whether state schools are officially excluded from coverage, and the FDA does state, "[t]his part shall apply to boards of education of all public school systems in this state." *Id.* § 20-2-946. But the plain language of the statute does not include state schools, and the policies governing state schools do not include a dismissal procedure. *See State Schools*, *supra* note 101. Additionally, at least one policy mentions immediate dismissal of teachers, which implies that the FDA's procedural requirements do not apply to state schools. GA. DEPT. OF EDUC., SS-3002, REPORTS OF CRIMINAL CHARGES/FINGERPRINTING/CRIMINAL BACKGROUND CHECKS, STATE SCHOOLS, at 2 (2002).

103. *Day v. Floyd Cnty. Bd. of Educ.*, 775 S.E.2d 622, 624, 626 (Ga. Ct. App. 2015).

104. *See generally* GA. CODE ANN. § 20-2-940 (West 2013) (does not state that an employee may provide evidence that the employer's alleged reason for termination is a pretext for retaliation).

reason for termination is merely pretext for retaliation,¹⁰⁵ the FDA does not.¹⁰⁶ Evidence of pretext can be excluded altogether from consideration.¹⁰⁷ Appellate review by the state board and the courts use the “any evidence” rule, meaning that the local board’s decision must be upheld if there is any evidence supporting the assertion of the school district.¹⁰⁸ This means that the sole debate is whether the charges against the teacher are supported by any evidence, not whether there is an ulterior motive for the charges.

IV. OPTIONS FOR AMENDMENT

Assuming that we wish to protect mandated reporters,¹⁰⁹ the question becomes how best to accomplish this goal. The most comprehensive solution, amending the mandatory reporter statute to provide a private right of action with robust remedies,¹¹⁰ may be difficult to get enacted in light of Georgia’s strong policy against employment protections, particularly in the private sphere.¹¹¹ To evaluate options for amendment, two questions must be answered. First, where would protection go? Second, what enforcement mechanism would be used? Certain answers to the first question would dictate the answer to the second question. This paper will first look at where protection could be placed, and then look to other U.S. jurisdictions for an evaluation of what language could be used to create an enforcement mechanism if a new one is added to the mandated reporter statute specifically.

A. *Where Protection Could Go*

There are three intuitive places the General Assembly could place employment protection, depending on the width of coverage legislators

105. *Forrester v. Ga. Dep’t of Human Servs.*, 708 S.E.2d 660, 666 (Ga. Ct. App. 2011); *Harris v. City of Atlanta*, 813 S.E.2d 420, 424 (Ga. Ct. App. 2018).

106. *Dukes-Walton v. Atlanta Indep. Sch. Sys.*, 784 S.E.2d 37, 43-44 (Ga. Ct. App. 2016).

107. *Id.*

108. *Id.* at 176; *Moulder v. Bartow Cnty. Bd. of Educ.*, 599 S.E.2d 495, 497 (Ga. Ct. App. 2004); *Atlanta Indep. Sch. Sys. v. Wardlow*, 784 S.E.2d 799, 800 (Ga. Ct. App. 2016).

109. Although this is by no means a guarantee, there are many reasons to protect those who report illegal activity. See, e.g., Symposium, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 586–87 (1999).

110. The author assumes that development of a general public policy exception to at-will employment and wrongful discharge claim is simply not viable. See *supra* p. 9.

111. See, e.g., *Reilly v. Alcan Aluminum Corp.*, 528 S.E.2d 238, 240 (Ga. 2000); GA. CODE ANN. § 34-7-1; see also *Reid v. City of Albany*, 622 S.E.2d 875, 877 (Ga. Ct. App. 2005).

can accept.¹¹² These locations are: the Fair Employment Practices Act (hereinafter “FEPA”),¹¹³ the GWA,¹¹⁴ or the mandatory reporting statute.¹¹⁵ Each has a different purpose and scope.

The FEPA originally sought to bring an anti-discrimination mechanism to public employment.¹¹⁶ The FEPA established the Commission on Equal Opportunity and set forth an administrative hearing and remedies process for public employees.¹¹⁷ The FEPA allows limited civil remedies, including reinstatement with back pay and benefits, but it only awards limited attorney fees if a court has to enforce the administrative award.¹¹⁸ The FEPA also allows a civil fine of up to \$1,000 to be levied.¹¹⁹

Although the FEPA is geared towards combatting discrimination, the General Assembly tacked on an overtime requirement and reference to the Fair Labor Standards Act (hereinafter “FLSA”).¹²⁰ The partial adoption of the FLSA on the state level into the FEPA indicated a general desire to incorporate the FLSA’s overtime compensation requirement for public employees.¹²¹ It may have also signaled an intent for public employee overtime claims to be handled through the FEPA’s administrative process, though the section incorporating the overtime compensation requirement was not included in the list of “unlawful practices” which must go to an administrator.¹²² If the General Assembly wished to cover only public employees, including leveraging a small civil fine and limited civil remedies, the FEPA would be an appropriate location for amendment.

The second option is to amend the GWA. As discussed above, the GWA grants a private right of action with broad civil remedies to public employees.¹²³ If the General Assembly wished to limit protection to public employees but grant broad remedies, the GWA would be the best

112. *See infra* p. 16; *see also infra* p. 17.

113. GA. CODE ANN. § 45-19-20 (West 2020).

114. *Id.* § 45-1-4 (West 2012).

115. *Id.* § 19-7-5(a) (West 2019).

116. *See id.* § 45-19-21(a)(2-3).

117. *Id.* §§ 45-19-23(a)-(b), 45-19-36.

118. *Id.* §§ 45-19-38(c)-(d), 45-19-39(c).

119. *Id.* § 45-19-44(b).

120. *Id.* § 45-19-46. The Fair Labor Standards Act is codified at 29 U.S.C. § 201. *See* 29 U.S.C. § 201.

121. *See* GA. CODE ANN. § 45-19-46 (stating that certain public employee overtime provisions operate “pursuant to” or are explicitly “authorized by” the Fair Labor Standards Act).

122. *See id.* § 45-19-29 (defining unlawful practices); *Id.* § 45-19-36(b) (stating that claims regarding unlawful practices are filed through the administrative process).

123. *Id.* § 45-1-4(e)(1).

location to do so. The General Assembly could also overrule *Brathwaite* and help in other instances as well, but that is a topic for another paper.

The final option is to amend the mandatory reporter statute. This would cover all mandated reporters, and it could potentially cover permissive reporters, who are also authorized to report via the same statute.¹²⁴ Because there is no remedy provided, the General Assembly could craft its own.¹²⁵ It could grant limited civil remedies with a civil fine like the FEPA.¹²⁶ It could grant broad civil remedies like the GWA.¹²⁷ Or the General Assembly could simply extend the criminal sanctions for failing to report to any act of retaliation.¹²⁸

B. What Other States Use for Enforcement Mechanisms

For an idea of what solutions are politically realistic, we can look to other states and territories. The author conducted a state and territory survey covering all 50 states, as well as the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.¹²⁹ The author was unable to

124. *Id.* § 19-7-5(d).

125. *See generally id.* § 19-7-5 (containing no specific civil remedy for mandatory reporters punished for reporting abuse).

126. As discussed *infra*, the author surveyed 54 jurisdictions across the United States. *See infra* note 131 and accompanying text. Connecticut is the only surveyed jurisdiction that has embraced anything similar to this option. CONN. GEN. STAT. § 17a-101e(a) (West 2018). Connecticut allows the Attorney General to bring an action for a civil fine of not more than \$2,500, with a possibility of equitable relief. *Id.*; *see also* *Perez-Dickson v. City of Bridgeport*, 43 A.3d 69, 89-90 (Conn. 2012).

127. GA. CODE ANN. § 45-1-4(e).

128. *Id.* § 45-1-4(d).

129. *See* ALA. CODE § 26-14-3 (1975); ALASKA STAT. ANN. § 47.17.020 (West 2019); ARIZ. REV. STAT. ANN. § 13-3620 (2019); ARK. CODE ANN. § 12-18-204 (West 2013); CAL. PENAL CODE § 11166 (West 2019); COLO. REV. STAT. ANN. § 19-3-304 (West 2020); CONN. GEN. STAT. ANN. § 17a-101e(a) (West 2018); DEL. CODE ANN. tit. 16, § 903 (West 2017); D.C. CODE ANN. § 4-1321.02 (West 2019); FLA. STAT. ANN. § 39.201 (2019); GA. CODE ANN. § 19-7-5 (West 2019); 19 GUAM CODE ANN. § 13201 (2020); HAW. REV. STAT. ANN. § 350-1.1 (West 2020); IDAHO CODE ANN. § 16-1605 (West 2020); 325 ILL. COMP. STAT. ANN. 5/4 (West 2020); IND. CODE ANN. § 31-33-5-2 (West 2017); IOWA CODE ANN. § 232.73A (West 2013); KAN. STAT. ANN. § 38-2224 (West 2020); KY. REV. STAT. ANN. § 620.030 (West 2020); LA. CHILD. CODE ANN. art. 603 (2019); MASS. GEN. LAWS ANN. ch. 119, § 51A(h) (West 2020); MD. CODE ANN., FAM. LAW § 5-704(a)(1) (West 2019); ME. REV. STAT. ANN. tit. 22, § 4017 (2020); MICH. COMP. LAWS ANN. § 722.623 (West 2016); MINN. STAT. § 626.556 (2019); MISS. CODE ANN. § 43-21-353 (West 2019); MO. ANN. STAT. § 210.115(3) (West 2018); MONT. CODE ANN. § 41-3-201 (West 2019); N.C. GEN. STAT. ANN. § 7B-301 (West 2016); N.D. CENT. CODE ANN. § 50-25.1-09.1 (West 2020); NEB. REV. STAT. ANN. § 28-711 (West 2012); NEV. REV. STAT. ANN. § 432B.220 (West 2020); N.H. REV. STAT. ANN. § 169-C:29 (1979); N.J. STAT. ANN. § 9:6-8.13 (1987); N.M. STAT. ANN. § 32A-4-3 (West 2019); N.Y. SOC. SERV. LAW § 413(C) (McKinney 2010); OHIO REV. CODE ANN. § 2151.421 (West 2019); OKLA. STAT. ANN. tit. 10A, § 1-2-101(B)(5) (West 2019); OR. REV. STAT. ANN. § 419B.010 (West 2013); 23 PA. STAT. AND CONS. STAT. ANN. § 6320 (West 2014); P.R. LAWS ANN. tit. 8, § 450 (2003); 11 R.I. GEN. ANN. § 40-11-6 (West 2017); S.C. CODE ANN. § 63-7-315 (2014); S.D. CODIFIED LAWS § 26-8A-3

survey American Samoa or the Northern Mariana Islands.¹³⁰ Of the 54 jurisdictions surveyed (including Georgia), 32 did not have employment protection built into their mandated reporter statutes.¹³¹ Many of these jurisdictions, however, allow a broad public policy wrongful discharge or retaliatory discharge cause of action.¹³²

Twelve jurisdictions expressly authorize a private cause of action within the mandated reporter statute.¹³³ Within these twelve jurisdictions, two offer additional sanctions. Minnesota provides for a statutory civil fine in addition to standard civil remedies.¹³⁴ North Dakota provides for criminal sanctions for those who retaliate, in addition to a civil cause of action against the employer.¹³⁵

Four jurisdictions provide for criminal sanctions against those who retaliate and do not have a cause of action within the mandated reporter

(2020); TENN. CODE ANN. § 37-1-410(b) (West 2010); TEX. FAM. CODE ANN. § 261.110 (West 2019); UTAH CODE ANN. § 62A-4a-403 (2020); VT. STAT. ANN. tit. 33, § 4913(f)(2) (West 2015); V.I. CODE ANN. tit. 5, § 2533 (2019); VA. CODE ANN. § 63.2-1509 (West 2021); W. VA. CODE ANN. § 49-2-803 (West 2018); WASH. REV. CODE ANN. § 26.44.030 (West 2019); WIS. STAT. ANN. § 48.981(2)(e) (West 2020); WYO. STAT. ANN. § 14-3-205(c) (West 2020).

130. See sources cited *supra* note 129.

131. See ALASKA STAT. ANN. § 47.17.020 (West 2019); ARIZ. REV. STAT. ANN. § 13-3620 (2019); CAL. PENAL CODE § 11166 (West 2019); COLO. REV. STAT. ANN. § 19-3-304 (West 2020); DEL. CODE ANN. tit. 16, § 903 (West 2017); D.C. CODE ANN. § 4-1321.02 (West 2019); FLA. STAT. ANN. § 39.201 (2019); GA. CODE ANN. § 19-7-5 (West 2019); tit. 19 GUAM CODE ANN. § 13201 (2020); HAW. REV. STAT. ANN. § 350-1.1 (West 2020); IDAHO CODE ANN. § 16-1605 (West 2020); 325 ILL. COMP. STAT. ANN. 5/4 (West 2020); IND. CODE ANN. § 31-33-5-2 (West 2017); KY. REV. STAT. ANN. § 620.030 (West 2020); LA. CHILD. CODE ANN. art. 603 (2019); MD. CODE ANN., FAM. LAW § 5-704(a)(1) (West 2019); MICH. COMP. LAWS ANN. § 722.623 (West 2016); MISS. CODE ANN. § 43-21-353 (West 2019); MONT. CODE ANN. § 41-3-201 (West 2019); NEB. REV. STAT. ANN. § 28-711 (West 2012); NEV. REV. STAT. ANN. § 432B.220 (West 2020); N.H. REV. STAT. ANN. § 169-C:29 (1979); N.M. STAT. ANN. § 32A-4-3 (West 2019); N.C. GEN. STAT. ANN. § 7B-301 (West 2016); OHIO REV. CODE ANN. § 2151.421 (West 2019); OR. REV. STAT. ANN. § 419B.010 (West 2013); 11 R.I. GEN. LAWS § 40-11-6 (West 2017); S.D. CODIFIED LAWS § 26-8A-3 (2020); UTAH CODE ANN. § 62A-4a-403 (2020); V.I. CODE ANN. tit. 5, § 2533 (2019); VA. CODE ANN. § 63.2-1509 (West 2021); W. VA. CODE ANN. § 49-2-803 (West 2018); WASH. REV. CODE ANN. § 26.44.030 (West 2019).

132. Madelaine Cleghorn et al., *Employment Discrimination Against LGBT Persons*, 19 GEO. J. GENDER & L. 367, 389 n.155 (2018) (citing Paul H. Tobias, *State-By-State Compendium of Leading and Representative Decisions Concerning the Public Policy Tort Doctrine*, 1 LIT. WRONG. DISCHARGE CLAIMS app. 5A (Dec. 2017)).

133. IOWA CODE § 232.73A (West 2013); MASS. GEN. LAWS ANN. ch. 119, § 51A(h) (West 2020); MINN. STAT. ANN. § 626.556 (2019); N.J. STAT. ANN. § 9:6-8.13 (1987); N.D. CENT. CODE ANN. § 50-25.1-09.1 (West 2020); OKLA. STAT. ANN. tit. 10A, § 1-2-101(B)(5) (West 2019); 23 PA. STAT. AND CONS. STAT. ANN. § 6320 (West 2014); P.R. LAWS ANN. tit. 8, § 450 (2003); S.C. CODE ANN. § 63-7-315 (2014); TENN. CODE ANN. § 37-1-410(b) (West 2010); TEX. FAM. CODE ANN. § 261.110 (West 2019); VT. STAT. ANN. tit. 33, § 4913(f)(2) (West 2015).

134. MINN. STAT. § 626.556, Subdiv. 4a(b).

135. N.D. CENT. CODE ANN. § 50-25.1-09.1(1).

statute.¹³⁶ Connecticut stands alone in setting a civil fine without a private cause of action.¹³⁷ Four jurisdictions specifically prohibit retaliation against mandated reporters but are silent as to the enforcement mechanism.¹³⁸

In the spirit of being politically realistic (and keeping this article a manageable size), the paper will analyze the statutory language used by Georgia's three neighbors with protection built into their mandated reporter statutes: Alabama, Tennessee, and South Carolina.¹³⁹ The analysis will focus on what should happen if the Georgia General Assembly adopted the same or similar language.

Alabama Code Section 26-14-3(g) provides, “[c]ommencing on August 1, 2013, a public or private employer who discharges, suspends, disciplines, or penalizes an employee solely for reporting suspected child abuse or neglect pursuant to this section shall be guilty of a Class C misdemeanor.”¹⁴⁰ As an initial matter, Georgia does not have classes of misdemeanors, so “Class C misdemeanor” would be changed to “misdemeanor.”¹⁴¹ If Georgia adopted this language and did not specify a different punishment, a supervisor who terminates an employee in retaliation for reporting child abuse would face a potential fine of up to \$1,000, a prison sentence of up to twelve months, or both.¹⁴² No civil cause of action would be implied because Georgia does not allow implied private rights of action from penal statutes.¹⁴³

If Georgia imposed criminal sanctions for retaliation without a civil cause of action, there would still be a problem for mandated reporters who suffer retaliation: they would not have any true remedy.¹⁴⁴ If a teacher is terminated for reporting child abuse, the superintendent – and possibly some members of the school board – might face misdemeanor charges at the discretion of the district attorney, but there would be no way for the teacher to get their job back, no way to receive compensation for lost

136. ALA. CODE § 26-14-3(g) (1975); ARK. CODE ANN. § 12-18-204(b) (2013); KAN. STAT. ANN. § 38-2224(b) (West 2020); WYO. STAT. ANN. § 14-3-205(c) (West 2020).

137. CONN. GEN. STAT. ANN. § 17a-101e(a) (West 2018); *see also* Perez-Dickson v. City of Bridgeport, 43 A.3d 69, 90 (Conn. 2012).

138. ME. REV. STAT. ANN. tit. 22, § 4017 (2019); MO. ANN. STAT. § 210.115(3) (West 2018); N.Y. SOC. SERV. LAW § 413.1(c) (McKinney 2020); WIS. STAT. ANN. § 48.981(2)(e) (West 2020).

139. ALA. CODE § 26-14-3(g); TENN. CODE ANN. §37-1-410(b); S.C. CODE ANN. § 63-7-315.

140. ALA. CODE § 26-14-3(g).

141. *See* GA. CODE ANN. § 17-10-3(a) (West 2016).

142. *See id.* § 17-10-3(a)(1).

143. *See id.* § 9-2-8(a) (West 2010); *Somerville v. White*, 787 S.E.2d 350, 352 (Ga. Ct. App. 2016).

144. *See Somerville*, 787 S.E.2d at 352-53.

wages and benefits, and no way to clear the termination off their record.¹⁴⁵ Criminal sanctions might deter the retaliation, but they might not. And if they do not, the teacher has no means of obtaining relief.¹⁴⁶

Tennessee Code Section 37-1-410(b) provides, “[a]ny person reporting under this part shall have a civil cause of action against any person who causes a detrimental change in the employment status of the reporting party by reason of the report.”¹⁴⁷ To begin, there is no required edit that would need to happen in order for this language to be put into the Georgia Code. But “detrimental change” is not used regarding employment status anywhere in the Georgia Code.¹⁴⁸ Legislators might consider borrowing from the GWA definition of “retaliation,” which is:

“Retaliate” or “retaliation” refers to the discharge, suspension, or demotion by a public employer of a public employee or any other adverse employment action taken by a public employer against a public employee in the terms or conditions of employment for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or government agency.¹⁴⁹

Additionally, the phrase “any person” could be a problem, assuming the cause of action would not be against the supervisor specifically. Georgia’s labor code defines employer as “any person or entity that employs one or more employees and shall include the State of Georgia and its political subdivisions and instrumentalities.”¹⁵⁰

If legislators borrowed the appropriate language and placed it in the mandated reporter statute, the definition of “employer” would be placed in Section (b), and the anti-retaliation provision would read, “[a]ny person reporting under this part shall have a civil cause of action against an employer who causes the person to be discharged, suspended, demoted, or to suffer any other adverse employment action in the terms or

145. *Id.*

146. *See* GA. CODE ANN. § 9-2-8(a); *Somerville*, 787 S.E.2d at 352-53 (indicating the lack of a private right of action).

147. TENN. CODE ANN. § 37-1-410(b) (West 2010).

148. A Westlaw search of the Georgia Code for the phrase “detrimental change” returned two results. The first was in the Notes of Decisions for GA. CODE ANN. § 14-2-1501 (West 2003), which concerns registration of foreign businesses. The second was in the Notes of Decisions for GA. CODE ANN. § 24-14-29 (West 2013), which is Georgia’s equitable estoppel statute. The phrase “detrimental change” does not appear in the statutory text of the Georgia Code. *See also*, GA. CODE ANN. §§ 14-2-1501 (West 2003), 24-14-29 (West 2013).

149. *See* GA. CODE ANN. § 45-1-4(a)(5) (West 2012).

150. *Id.* § 34-1-7(a)(3) (West 2020).

conditions of the person's employment by reason of the report."¹⁵¹ This language would be more consistent with other portions of the Georgia Code that deal with employment.¹⁵² But it would still have one significant problem: it does not set forth remedies.¹⁵³

By failing to specify remedies, Tennessee's language would only operate against private employers in Georgia.¹⁵⁴ In a lawsuit against a private employer, the rule is "[f]or every right there shall be a remedy; every court having jurisdiction of the one may, if necessary, frame the other."¹⁵⁵ A court could craft a remedy, which may include reinstatement, back pay, front pay, compensatory damages, etc.¹⁵⁶ The author would be concerned about placing the decision of remedies into the hands of courts that are traditionally hostile to employment claims, but private employees would have a remedy.¹⁵⁷ Public employees, however, would not.¹⁵⁸

Public employers would claim sovereign immunity.¹⁵⁹ Immunity "can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver."¹⁶⁰ Without an express remedy provided by the legislature, sovereign immunity would not be waived.¹⁶¹ Unless the GWA was independently amended, public employees would be left without a remedy, and public employers would suffer no legal consequences for retaliation if Tennessee's approach was adopted in Georgia.¹⁶²

South Carolina Code Section 63-7-315 reads:

(A) An employer must not dismiss, demote, suspend, or otherwise discipline or discriminate against an employee who is required or permitted to report child abuse or neglect pursuant to Section 63-7-310 based on the fact that the employee has made a report of child abuse or neglect.

151. See TENN. CODE ANN. § 37-1-410(b) (West 2010); GA. CODE ANN. § 45-1-4(a)(5).

152. See, e.g., GA. CODE ANN. § 45-1-4(e)(1-2).

153. See *id.* § 19-7-5 (West 2019).

154. See *id.* §§ 9-2-3 (West 2020), 45-19-36 (West 2020).

155. *Id.* § 9-2-3.

156. See *id.* §§ 45-1-4(e-f), 45-19-38(c-d), 45-19-39(c).

157. *Id.* § 45-19-39(c).

158. See *id.* § 9-2-3; *Id.* § 9-2-8(a) (West 2010).

159. GA. CONST. art. I, § II, para. IX(e).

160. *Id.*

161. See *Colon v. Fulton Cnty.*, 751 S.E.2d 307, 310 (Ga. 2013).

162. Compare TENN. CODE ANN. § 37-1-410(b) (West 2010), with GA. CONST. art. I, § II, para. IX(e).

(B) An employee who is adversely affected by conduct that is in violation of subsection (A) may bring a civil action for reinstatement and back pay. An action brought pursuant to this subsection may be commenced against an employer, including the State, a political subdivision of the State, and an office, department, independent agency, authority, institution, association, or other body in state government. An action brought pursuant to this subsection must be commenced within three years of the date the adverse personnel action occurred.

(C) In an action brought pursuant to subsection (B), the court may award reasonable attorney's fees to the prevailing party; however, in order for the employer to receive reasonable attorney's fees pursuant to this subsection, the court must make a finding pursuant to Section 63-7-2000 that:

(1) the employee made a report of suspected child abuse or neglect maliciously or in bad faith; or

(2) the employee is guilty of making a false report of suspected child abuse or neglect pursuant to Section 63-7-440.¹⁶³

As an initial matter, the references to other portions of the mandated reporter statute would have to be changed before the text could be incorporated into the Georgia statute. Otherwise, the language in the South Carolina statute should result in all reporters – mandatory or permissive – receiving protection.¹⁶⁴ The one bit of language that could be changed is “political subdivision of the State” in subsection (B).¹⁶⁵ While this language is commonly understood to mean county and municipal governments, the Georgia General Assembly has shown a preference for different language in the past.¹⁶⁶

The GWA initially only covered members of the Executive Branch of the state, excluding the Governor's Office, but it was amended to cover all state and local government employees.¹⁶⁷ The language chosen was “or any local or regional governmental entity that receives any funds from the State of Georgia.”¹⁶⁸ This choice of language is unequivocal in

163. S.C. CODE ANN. § 63-7-315 (West 2014).

164. *See id.* (providing express remedies to public employees in the form of reinstatement and back pay, the statute prevents public employers from claiming sovereign immunity, and thereby permits all reporters to file retaliation lawsuits against employers).

165. *Id.* § 63-7-315(B).

166. *See infra* notes 167-169.

167. *See Eisenberg, supra* note 71, at 311-12.

168. GA. CODE ANN. § 45-1-4(a)(4) (West 2012).

covering local entities, which would be preferable given the hostility of Georgia courts.¹⁶⁹

The South Carolina statute limits remedies to reinstatement and backpay, with the possibility of attorney fees.¹⁷⁰ This is significantly less than the GWA, which allows injunctive relief, reinstatement, back pay and benefits, compensatory damages, and attorney fees.¹⁷¹ It is, however, still better than the FEPA, which grants reinstatement with back pay and benefits, but only allows attorney fees if a court is required to enforce the administrative order.¹⁷² One pro-employer edit that may be necessary would be to shorten the statute of limitations.¹⁷³ While the South Carolina statute has a three-year statute of limitations, the GWA has a one-year limit with a three-year statute of ultimate repose,¹⁷⁴ and the FEPA has a 180-day filing deadline.¹⁷⁵ Adopting the GWA statute of limitations and statute of ultimate repose would bring the South Carolina language more in line with other areas of Georgia law.¹⁷⁶

With the above edits, the South Carolina statute would protect anyone who makes a good faith report of suspected child abuse from employment retaliation, even permissive reporters.¹⁷⁷ A private right of action would allow employees to vindicate their own rights or settle matters without court involvement.¹⁷⁸ If the Georgia General Assembly

169. See *Forrester v. Ga. Dep't of Human Servs.*, 708 S.E.2d 660, 666-67 (Ga. Ct. App. 2011) ("public employer" requirement satisfied where agreed by parties); *but see Brathwaite v. Fulton-DeKalb Hosp. Auth.*, 729 S.E.2d 625, 630 (Ga. Ct. App. 2012) (placing burden on employee and showing default rule in favor of employer).

170. S.C. CODE ANN. § 63-7-315(B)-(C) (West 2014).

171. GA. CODE ANN. § 45-1-4(e)-(f).

172. *Id.* §§ 45-19-38(c)-(d) (West 2020), 45-19-39(c) (West 2020).

173. See S.C. CODE ANN. § 63-7-315(B) (West 2014); *but see* GA. CODE ANN. § 45-1-4(e)(1).

174. GA. CODE ANN. § 45-1-4(e)(1).

175. GA. CODE ANN. § 45-19-36(b).

176. See, e.g., *id.* § 34-5-5 (stating a one-year statute of limitations for instituting a civil action for the collection of unpaid wages); *id.* § 45-1-4(e)(1) (stating a one-year statute of limitations for instituting a civil action for retaliation following a whistleblower claim); *id.* § 45-19-36(b) (stating a 180-day statute of limitations for instituting a civil action after an alleged unlawful employment practice occurs).

177. See S.C. CODE ANN. § 63-7-315 (West 2014) (providing protections for public and private mandated reporters against retaliation from their employers).

178. See *generally* S.C. CODE ANN. § 63-7-315 (allowing employees who face retaliation from their employers after making a mandated child abuse report to bring a civil action for reinstatement and back pay); TENN. CODE § 37-1-410(b) (West 2010) (allowing employees who face retaliation to bring a civil action against those who make a detrimental change in the employee's employment status following the mandated report).

decided to protect those who protect children, the South Carolina language would provide a good start.¹⁷⁹

CONCLUSION

Mandated reporters in Georgia are in a tough spot. They are required to report potential child abuse, on pain of criminal sanctions.¹⁸⁰ However, there is virtually no protection for these reporters if their employer has some connection to the abuser and retaliates against them.¹⁸¹ This is a problem which should be addressed. Ideally, the General Assembly would take a stance that is protective of those who seek to protect children and amend the mandatory reporter statute to include a private right of action with broad civil remedies such as reinstatement with back pay and benefits, compensatory damages, attorney fees, costs, and expenses of litigation.¹⁸² If there is political resistance to this option, there are alternatives, including criminal sanctions for retaliation.¹⁸³

Other U.S. jurisdictions provide a myriad of inspirations for language to use in amending the mandated reporter statute.¹⁸⁴ But the Georgia General Assembly would not need to look far for inspiration. Alabama has a concise criminal statute penalizing retaliation that could be adopted with little editing.¹⁸⁵ South Carolina has a comprehensive option for creating a civil cause of action that would provide a good start, but it would need editing before being added to the Georgia mandated reporter statute.¹⁸⁶ Either of these states can provide Georgia legislators with a starting point to amend the mandated reporter statute and protect those who report child abuse or neglect.

179. See generally S.C. CODE ANN. § 63-7-315 (providing a civil cause of action for employees who face retaliation from employers after making a mandated child abuse report).

180. GA. CODE ANN. § 19-7-5(h) (West 2019).

181. Compare GA. CODE ANN. § 19-7-5, with ALA. CODE § 26-14-3(g) (West 2020), and S.C. CODE ANN. § 63-7-315.

182. See S.C. CODE ANN. § 63-7-315.

183. See ALA. CODE § 26-14-3(g).

184. See *supra* Part IV.B.

185. ALA. CODE § 26-14-3(g).

186. S.C. CODE ANN. § 63-7-315.