

What to do When you Hear the Whistle

MLGMA Summer Workshop 2015

Presented by

Audrey J. Forbush

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Whistleblower's Protection Act

Employees are Whistling
While They Work

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Popular Song

- Government entities were targets for defendants in high verdicts rendered in employment practices cases from 2004 through 2010, according to *Employment Practice Liability: Jury Award Trends and Statistics 2011 Edition*.

Costly Tune

- Government entities paid highest verdicts with median award being \$236,000
- Followed by manufacturing/industrial companies
- Then service/retail entities
- Then transportation companies

Continued

Jurors Sing Along

- Extraordinary rise in claims and awards
- Fallout from economic recession
- “Juries know how hard it is to find a job, and may put a heavier burden on employers because the cost of being let go or harassed is greater when other options aren’t as available. Until the economy improves, you’re going to see more claims and higher verdicts,” Segal from SHRM online.

The Law

- Whistleblowers' Protection Act (WPA):
 - Employer shall not discharge, threaten or otherwise discriminate against employee
 - Because employee reports, or is about to report, verbally or in writing, violation or suspected violation of law or regulation or rule promulgated pursuant to state, local or federal laws
 - To a public body

Continued

The Law

- Unless employee knows that report is false,
- Or because employee is requested by public body to participate in an investigation, hearing or inquiry held by that public body or a court action.
MCLA 15.361 *et seq.*

Purpose of Law

- WPA's main purpose is to alleviate inability to combat corruption or criminally irresponsible behavior in conduct of government or large businesses. ***Shallal v Catholic Social Serv.*, 455 Mich 604, 612; 566 NW2d 571 (1997)**
- Underlying purpose of WPA is the protection of the public.

Primary Motivation – Former Law

- “The primary motivation of an employee pursuing a whistleblower claim must be a desire to inform the public on matters of public concern ...” ***Shallal* at 621**
- “... rather than personal vindictiveness, one’s own private or personal needs.” ***Id.***

Continued

Primary Motivation – Current Law

- *Whitman v City of Burton*, 493 Mich 303 (2013), vacating 2011 Mich. Ct. of Appeals decision
- Nothing in statutory language in WPA regarding motivation.
- Proof of primary motivation is not a prerequisite to bringing a claim.
- *Shallal* disavowed in this regard.

Whitman v City of Burton

- History
- Most recent ruling by appellate court – July 9, 2015
 - Plaintiff was not an employee (*Wurtz v Beecher*, 495 Mich 253 (2014))
 - Objectively, plaintiff's conduct did not advance public interest; rather it was contrary to public interest
 - Plaintiff's misconduct was reason for decision to not re-appoint (lack of causation and temporal proximity)

Elements of WPA Claim

- To establish *prima facie* case under WPA, plaintiff must prove:
 - he was engaged in protected activity as defined by the act
 - he was subsequently discharged, threatened or otherwise discriminated against
 - causal connection existed between protected activity and discharge or adverse employment action

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Elements of WPA Claim

- ***Heckman v Detroit Chief of Police*, 267 Mich App 480, 705 NW2d 689 (2005); *West v General Motors Corp.*, 469 Mich 117, 665 NW2d 468, 471-472 (2003)**
- Plaintiff must additionally show that employer had objective notice of protected activity. ***Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257 (1983); *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 279; 608 NW2d 525 (2000)**

Statute of Limitations

- WPA has 90-day statute of limitations.
See MCL 15.363 *et seq.*

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Statute of Limitations

- WPA is exclusive remedy
- WPA does not apply to contract employee whose contract has not been reviewed.
- WPA only applies to individuals who currently have status of employee, not prospective employees.
- *Wurtz v Beecher Metro. Dist.*, 495 Mich. 242, (2014)

Suspected Violation of Law

- Plaintiff must produce evidence of suspected violation of a law or regulation or rule “promulgated” pursuant to laws of state. WPA does not protect employee who reports or is about to report “suspected violation of a suspected law.”

Continued

Suspected Violation of Law

- Underlying purpose of WPA is protection of the public. However, public does not benefit from providing protection to those whistleblowers who report “activities or suspected activities that they subjectively believe violate nonexistent laws, rules or regulations.”
- ***Debano-Griffin v Lake Co.*, WL No. 282921, Oct. 15, 2009**

Debano-Griffin v Lake County

- *Debano-Griffin v Lake County*
(MI Sup Ct, Feb. 8, 2013)
- Business Judgment Rule
- Question of fact regarding whether facially legitimate budgetary grounds for eliminating position – or pretext?
- Decision: Genuine issue of material fact regarding causation

Public Body Defined

- “Public body” means all of the following:
 - State officer, employee, agency, department, division, bureau, board, commission, council, authority or other body in executive branch of state government
 - Agency, board, commission, council, member or employee of legislative branch of state government

Continued

Public Body Defined

- County, city, township, village, intercounty, intercity or regional governing body, a council, school district, special district or municipal corporation, or board, department, commission, council, agency or any member or employee thereof
- Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body

Continued

Public Body Defined

- Law enforcement agency or any member or employee of a law enforcement agency
- Judiciary and any member or employee of judiciary
- Not a federal agency

Brown v Mayor of Detroit

- Language of WPA does not provide that this public body must be an outside agency or higher authority.
- There is no condition in statute that employee must report wrongdoing to outside agency or higher authority to be protected by WPA.
- It does not matter if public body to which suspected violations were reported was also employee's employer. ***Brown v Mayor of Detroit, 478 Mich 589, 734 NW2d 514 (2007)***

Burden Shifts to Employer

- Once *prima facie* case has been established, burden then shifts to employer to present evidence that demonstrates that plaintiff's termination was for a legitimate non-retaliatory reason.
- If employer states legitimate non-retaliatory reason, employee may still prevail if he or she demonstrates that proffered reason was a mere pretext. ***Eckstein v Kuhn*, 160 Mich App 240, 246, 408 NW2d 131 (1997)**

Adverse Employment Action

- Michigan courts look to the law regarding what constitutes an “adverse employment action” in civil rights actions to determine whether plaintiff in WPA claim has satisfied the second element of the *prima facie* case. **See, *Heckman v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005) quoting *Pena v Ingham Co Rd Comm*, 255 Mich App 299 (2003)**

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Adverse Employment Action

- “Termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indices that might be unique to a particular situation.” ***Pena, supra*** (quoting ***White v Burlington N & Santa Fe Co***, 310 F3d 443, 450 (CA 6, 2002))

Significant Factor

- To establish causation, plaintiff must show that his participation in protected activity was “significant factor” in employer’s adverse employment action, not just that there was causal link between the two.

Jury Instructions

- **M Civ JI 107.01 Whistleblowers' Protection Act: Explanation**
 - We have a state law known as the Whistleblowers' Protection Act which provides that an employer shall not [discharge / or / threaten / or / discriminate against] an employee regarding employment, compensation, or a term, condition, location or privilege of employment *because of* protected activity.

Protected Activity Definition

- [an employee / a person acting on behalf of an employee] [reports / or / is about to report] (verbally or in writing) a violation or a suspected violation of a law or regulation (or rule promulgated pursuant to the law of the state, a political subdivision of the state, or the United States) by [his or her employer / a third party / a co-employee] to a public body, unless the employee knows that the report is false;
(or)

Continued

Protected Activity Definition

- employee [participates at the request of a public body / has been requested by a public body to participate] in [an investigation / or / a hearing / or / an inquiry held by that public body / or / a court action].

Continued

Protected Activity Definition

- “Employee’s motive does not matter and you should not consider it in determining whether employee engaged in “protected activity.”
 - Paragraph should be used if there is any evidence, argument or implication regarding employee’s motive.

Continued

Protected Activity Definition

- Request for employee to participate in investigations / hearings / inquiries / court actions is considered protected activity, even though employee does not actually participate in investigations / hearings / inquiries / court actions
 - Paragraph should be used only if employee does not participate in investigation, hearing, inquiry or court action.

MCL 15.362

- If plaintiff did not engage in protected activity, plaintiff may not recover even if defendant mistakenly believed that plaintiff engaged in such activity.

Chandler v Dowell Schlumberger, Inc,
456 Mich 395; 572 NW2d 210 (1998)

Jury Instructions

- **M CIV JI 107.03 – CAUSATION** states as follows:
 - When I use term ‘because of’ I mean that protected activity must be one of the motives or reasons defendant [discharged / or / threatened / or / discriminated against] the plaintiff. Protected activity does not have to be the only reason, or even main reason, but it does have to be one of the reasons **that made a difference** in defendant’s decision to [discharged / or / threatened / or / discriminated against] the plaintiff. (Emphasis added).

Good Faith Belief

- **M Civ JI 107.04 Whistleblowers' Protection Act: Good Faith Belief**
 - Plaintiff must reasonably believe that a violation of law or a regulation has occurred. It is not necessary that an actual violation of law or a regulation has occurred, but the employee can not have a reasonable belief if [he / she] knows [his / her] report is false.

Retaliation Claims on Rise

- Retaliation claims have nearly doubled since 1992.
- Per EEOC in 2006 = 22,555.
- Per EEOC in 2013 = 38,539.
- Eighth year of steady growth of retaliation claims.
- Most commonly reported form of discrimination over race discrimination.

What is Retaliation?

- In general, employers cannot retaliate against employee for bringing a lawful claim against it or for asserting legal right for participating in a protected activity.

Protected Activity

- Protected activity under Michigan Civil Rights Law consists of :
 - Opposing violation of law
 - Making charges
 - Filing complaints
 - Testifying, assisting or participating in investigations, proceeding or hearing under law

Pearce v Radio Shack, 2012 WL 2402021 (2012) * unpublished

Examples

- Employees can't be retaliated against for:
 - Filing a Workers' Compensation claim
 - Taking leave under Family & Medical Leave Act (FMLA)
 - Whistleblowing
 - Bringing discrimination claims against employer or reporting Title VII violation

Continued

Examples

- Opposing harassment or discrimination in workplace (ELCRA, MPWDCRA etc.) * must clearly oppose boss' alleged actions
- Making claims under ADA or Age Discrimination in Employment Act
- Reporting OSHA violations
- Participating in an internal investigation
- Testifying in deposition or at trial or arbitration hearing

When Filing Suit

- Employee must show:
 - Engaged in protected activity
 - Employer knew about protected activity
 - Employer took adverse employment action
 - Causal connection between protected activity and adverse employment action
(*Nguyen v City of Cleveland*, 229 F. 3d 559 (6th Cir. 2000); *DeFlavis v Lord & Taylor, Inc.*, 223 Mich App 432 (1997))

Continued

When Filing Suit

- If employee proves those four elements, then burden shifts to employer to set forth **legitimate**, nonretaliatory **reason** for adverse employment action.
- If employer does so, then employee has opportunity to show that employer's reasons are just **pretext** for retaliation.

What is Adverse Employment Action?

- Either **material changes** in employment status (firing, demotion, change in pay/benefits or responsibilities/duties) or of such nature likely to deter victims of discrimination from complaining.

Burlington v Northern & Santa Fe Ry.. Co.,
126 S. Ct. 2405 (2006)

Causal Connection

- Causal connection = Significant factor test

Why Retaliation Claims are Difficult to Defend?

- Many employers assume they are not liable for retaliation if the underlying claim is without merit
- **NOT TRUE**
- Retaliation claims are often hard to defeat at summary judgment stage
 - **Timing** is often an issue and can be enough to create factual dispute

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Why Retaliation Claims are Difficult to Defend?

- Retaliation claims can be difficult to defend to jury
- Many people think that once you have “**rocked the boat**” with your boss or higher ups at work, your days are numbered.

Best Practices to Prevent or Defend Retaliation Claims

- Have **POLICIES** in place that prohibit discrimination and harassment
 - Those policies should specifically **PROHIBIT** retaliating against those who complain of harassment or discrimination or who participated in an investigation.
 - **TRAIN** / publish policy regularly

Continued

Best Practices to Prevent or Defend Retaliation Claims

- Have a **COMPLAINT PROCESS** (usually contained in the policy)
- Conduct thorough, objective **INVESTIGATION**
- **DOCUMENT** complaint and investigation and results
- **MAINTAIN** and update **PERSONNEL FILES**

Continued

Best Practices to Prevent or Defend Retaliation Claims

- **DOCUMENT DISCIPLINE**, poor work performance, issues, evaluations
- Monitor/**SUPERVISE** department heads to ensure employee has not been unfairly targeted due to protected activity
- Pay attention to **TIMING**
- **CONSULT WITH LEGAL COUNSEL**
- Proceed only after thoughtful consideration

Bullard-Plawecki Employee Right to Know Act – Plaintiff’s Tool

- Bullard-Plawecki Employee Right to Know Act, MCL 423.501 et seq., is a document statute.
- It is applicable to all Michigan employers (including state and political subdivisions) that have four or more employees and to agents of an employer. MCL 423.501(2)(b).

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Right to Know Act – Plaintiff's Tool

- Bullard-Plawecki Act provides employees with right to review, copy and file response to any personnel record. MCL 423.502 et seq. (Primary purpose of act was to allow both public and private sector employees with the right to request a review of his/her personnel file.)

Continued

Right to Know Act – Plaintiff's Tool

- Act defines “personnel record” broadly to include any record that identifies employee and is related in some way to employee’s employment, including promotion, transfer, additional compensation or disciplinary action. This includes any record in possession of a person, corporation, partnership or other association who has a contractual agreement with employer to keep or supply a personnel record. MCL 423.501(2)(c).

Attorney Fees Add Up

- Prevailing plaintiffs in these claims are entitled to costs and award of reasonable attorney fees
- Attorney fees can end up higher than jury award

The Trend

- Whistle while they work...
- Hi Ho, Hi Ho, it's off to court they go...



Question & Answers



Thank You!



Audrey J. Forbush

(810) 342-7014

aforbush@plunkettcooney.com