Whistleblowers' Protection Act

Shield and Weapon

By Robert C. Ludolph and Mary K. Deon

Employers are increasingly confronting lawsuits filed by former employees claiming to be whistleblowers or victims of retaliation for reporting violations of the law. Whistleblowers have become celebrities and have created considerable problems for those whom they accuse. Employers discover that the standards required of the whistleblower are simply not very onerous. As claims of retaliation are often fact-intensive, the courts are reluctant to resolve such cases short of trial. In Michigan, individuals who believe that they have been terminated for reporting misconduct often pursue actions under the Whistleblowers' Protection Act (WPA)[1] or the common-law claim for wrongful discharge in violation of public policy.

The WPA is designed to afford protections for employees who report in good faith violations or suspected violations of the law. Since whistleblower claims are analogous to the anti-retaliation provisions of other employment statutes, Michigan courts have adapted the analytic tools developed under Michigan's civil rights laws.[2] First, a plaintiff must establish a prima facie case by demonstrating that (1) he or she was engaged in a protected activity as defined by the WPA, (2) he or she was subsequently discharged or discriminated against, and (3) a causal connection existed between the protected activity and the adverse employment action.[3] If a plaintiff successfully proves a prima facie case under the WPA, the burden shifts to the employer to articulate a legitimate business reason for the adverse employment action. If the employer produces evidence establishing a legitimate reason for the adverse employment action, the individual has the opportunity to prove that the legitimate reason offered by the employer was not the true reason, but was only a pretext for retaliatory action.

Protected Activity under the WPA

Under the WPA, a "protected activity" is defined as (a) reporting to a public body a violation of a law, regulation, or rule, (b) being about to report such a violation to a public body, or (c) being asked by a public body to participate in an investigation.[4] An employer is entitled to objective notice of the report or threat to report by the whistleblower.[5] Thus, the employer or the person who fired or disciplined the employee must have had prior knowledge of the protected activity in which the employee engaged.[6] When an employee has made a report to a public body, the case will often turn on the employer's knowledge of the employee's alleged protected activity.

A whistleblower does not have to demonstrate an actual violation of the law as long as the employee suspects in good faith that a violation of the law has occurred or will occur in the future. The whistleblower bears the burden of establishing that he or she was justified in believing that a report to a public body was necessary.[7] Accordingly, an individual does not engage in a protected activity when (1) that individual has no evidence of a violation of the law or (2) the individual's suspicions were not reasonable at the time he or she reported or made a threat to report.[8]

The employer's intent is irrelevant to an employee's burden of proving that he or she engaged in a protected activity by reporting or threatening to report a violation of the law:

> There is no sliding scale in the WPA based on the employer's intent. Regardless of the quantum of proof of the employer's ill will, the act requires an employee to prove he was engaged in protected activity. The statute does not provide that the more obvious the employer's bad behavior, the less the plaintiff is required to do. In fact, almost the opposite is true.[9]

Fast Facts:

- Courts have rejected claims when the individual's sole motive was a purely self-serving attempt to retain employment or as an offensive weapon in response to criticism.
- An employee cannot sustain a WPA claim solely by internal complaints to a private employer.
- Unlike claims under the more expansive WPA, claims for retaliatory discharge in violation of public policy have been treated as narrowly defined exceptions to Michigan's at-will employment doctrine.

A plaintiff must demonstrate that his or her engagement in a protected activity was causally related to an adverse employment action. A plaintiff must come forward with more than just a mere temporal relationship.[10]

An individual acting in good faith should have the intent "'to inform the public on matters of public concern, and not personal vindictiveness.'"[11] Courts have rejected claims when the individual's sole motive was a purely self-serving attempt to retain employment or an offensive weapon in response to criticism.[12] If the employee lacks a good-faith basis for reporting, courts generally will not find the required causal connection.

A plaintiff can establish that he or she engaged in protected activity by demonstrating that he or she was "about to report" a suspected violation. Because of the tenuous nature of such a claim, the WPA requires that a plaintiff prove "by clear and convincing evidence that he or she was about to report" an actual or suspected violation.[13] An employee who is "about to report" must be on the verge of doing so. The person who initiated the adverse employment action must have been aware that the individual was about to report the violation. In cases in which a plaintiff actually threatened to report his or her employer, courts have considered that act to be sufficient.[14] An individual, however, may not be able to establish the requisite causal connection if the employer considered the threat inconsequential.[15]

Public Bodies as Defined by the WPA

An employee cannot sustain a WPA claim solely by internal complaints to a private employer.[16] The WPA requires that an employee's report or imminent report be to a "public body" as defined under the WPA.[17] When an individual is employed by a public body, the individual's complaints to his or her supervisor and others within that public body can serve as the basis for a claim under the WPA.[18]

Although the WPA generally defines public bodies as agencies of state or local government, the definition also includes a "law enforcement agency or any member or employee of a law enforcement agency."[19] Courts have wrestled with the issue of whether federal agencies can be considered law enforcement agencies and, in turn, public bodies.

In *Lewandowski v Nuclear Mgt Co,* a panel of the Court of Appeals held that the federal Nuclear Regulatory Commission is not a "law enforcement agency" because it is not involved in the "prevention of criminal activities."[20] The NRC is a "regulatory agency" lacking independent criminal enforcement powers.[21]

In *Ernsting v Ave Maria College,* a divided panel concluded that the United States Department of Education (DOE) is a "law enforcement agency" and, thus, a "public body" for the purposes of the WPA. The *Ernsting* majority concluded that the DOE as an executive department was a law enforcement agency with the power to enforce the laws within its purview.[22] The *Ernsting* majority attempted to distinguish *Lewandowski* on the basis of the DOE's authority to conduct criminal and civil investigations.[23]

Under a broad interpretation of the *Ernsting* decision, any federal executive department that has enforcement powers arguably would be a public body. Under the reasoning of *Lewandowski,* federal law enforcement agencies should be limited to those governmental units having the independent ability to enforce laws that have criminal penalties. These contrasting definitions of "law enforcement agency" may require further judicial clarification.[24]

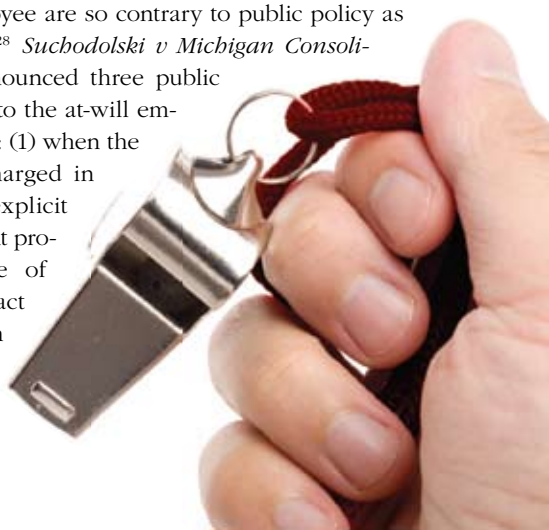
Remedies Available to Whistleblowers

Under the WPA, an individual who has been the victim of retaliation must act quickly to preserve the claim and to prevent further alleged wrongdoing. Unlike most other employment-related causes of actions that allow an employee to wait years to bring a claim, a whistleblower must bring his or her cause of action within 90 days of the occurrence of the alleged violation of the WPA.[25] The employee cannot avoid this short limitations period by using another theory of liability based on the same facts since the WPA is a plaintiff's exclusive remedy.[26]

The WPA can be a powerful shield for employees who attempt to expose their employers' wrongdoing. The remedies to which a successful whistleblower may be entitled include a full range of damages, such as back pay and front pay, damages for emotional distress, legal costs, and reasonable attorney fees.[27]

Public Policy Exceptions to the At-Will Employment Doctrine

Claims of retaliatory discharge in violation of public policy are frequently joined with whistleblower claims. Although an at-will employee generally cannot sustain an action for wrongful termination, Michigan law recognizes that "some grounds for discharging an employee are so contrary to public policy as to be actionable."[28] *Suchodolski v Michigan Consolidated Gas Co* announced three public policy exceptions to the at-will employment doctrine: (1) when the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right



or duty, (2) when the employee is discharged for failing or refusing to violate the law in the course of employment, and (3) when the employee is discharged for exercising a right conferred by a well-established legislative enactment.[29] "A public policy claim is sustainable, then, only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue."[30] While WPA claims may arguably be brought for adverse employment actions other than termination, these public policy exceptions are common-law exceptions to the at-will employment doctrine and should not be applied to circumstances other than terminations from employment.[31]

Termination for reporting poor management decisions cannot be the basis of a claim of violation of public policy.[32] Accordingly, an employee's failure to support questionable business decisions will not immunize the employee from termination.

Importantly, if the individual's conduct would fall within the protections of the WPA or another statute prohibiting retaliatory discharge, a public policy claim cannot survive. An individual, however, is not automatically entitled to redress of a public policy claim merely because the individual cannot prevail on his or her WPA claim either as a matter of law or factually. In *Lewandowski,* the Court dismissed the public policy claim even after noting that the individual arguably was refusing to violate the statute when he notified the NRC of the purported violations.[33] In rejecting the claim, the Court explained that the plaintiff "did not cite any case in which a public-policy wrongful discharge claim…was then found viable under the second or third prong of *Suchodolski*."[34]

Unlike claims under the more expansive WPA, claims for retaliatory discharge in violation of public policy have been treated as narrowly defined exceptions to Michigan's at-will employment doctrine. Individuals who act out of a good-faith belief that their employers are engaging in misconduct will find more significant protection from retaliation under the Whistleblowers' Protection Act. ■

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FOOTNOTES

1. MCL 15.361 *et seq.*
2. See *Shallal v Catholic Social Services,* 455 Mich 604, 617; 566 NW2d 571 (1997).
3. *West v Gen Motors Corp,* 469 Mich 177, 184–185; 665 NW2d 468 (2003); *Roulston v Tendercare (Michigan), Inc,* 239 Mich App 270, 280–281; 608 NW2d 525 (2000).
4. MCL 15.362.
5. *Roberson v Occupational Health Ctrs of America, Inc,* 220 Mich App 322; 559 NW2d 86 (1996).
6. See *Kaufman & Payton, PC v Nikkila,* 200 Mich App 250, 257–258; 503 NW2d 728 (1993).
7. *Shallal,* 455 Mich at 615.
8. See *DeMaagd v City of Southfield,* unpublished opinion per curiam of the Court of Appeals, issued August 10, 2006 (Docket No. 267291); 2006 Mich App LEXIS 2489, *9.
9. *Chandler v Dowell Schlumberger Inc,* 456 Mich 395, 400; 572 NW2d 210 (1998).
10. *Taylor v Modern Engineering Inc,* 252 Mich App 655, 662; 653 NW2d 625 (2002).
11. *Shallal,* 455 Mich at 621–622.
12. *Id.* at 615.
13. MCL 15.363(4).
14. *Shallal,* 455 Mich at 616.
15. See *West,* 469 Mich at 187.
16. See *Pasquale v Allied Waste Services,* unpublished opinion per curiam of the Court of Appeals issued November 9, 2004 (Docket No. 249110); 2004 Mich App LEXIS 3065, *4 ("Plaintiff's retaliatory discharge claim is based only on his internal complaint about violations, and thus are not covered by the Whistleblower's Protection Act.").
17. MCL 15.361(d).
18. *Brown v Detroit Mayor,* 478 Mich 589; 734 NW2d 514 (2007) (holding that the WPA does not require that the public body be an outside agency or higher authority and that a public body may also be the employee's employer).
19. MCL 15.361(d)(*v*).
20. *Lewandowski v Nuclear Mgt Co,* 272 Mich App 120, 126; 724 NW2d 718 (2006).
21. *Id.* at 126.
22. *Ernsting v Ave Maria College,* 274 Mich App 506, 518; 736 NW2d 574 (2007).
23. *Id.* at 518–519.
24. The Michigan Supreme Court did, however, suggest its support for the *Ernsting* interpretation. See *Ernsting v Ava Maria College,* 480 Mich 985 (2007) (denying leave to appeal the Court of Appeals decision, the Supreme Court noted that it "generally agree[d] with the approach in the Court of Appeals majority opinion").
25. MCL 15.363(1).
26. *Dolan v Continental Airlines,* 454 Mich 373, 383; 563 NW2d 23 (1997).
27. MCL 15.364.
28. *Suchodolski v Michigan Consolidated Gas Co,* 412 Mich 692, 695; 316 NW2d 710 (1982).
29. *Id.* at 695–696.
30. *Dudewicz v Norris-Schmid, Inc,* 443 Mich 68, 80; 503 NW2d 645 (1993).
31. See, e.g., *id.* at 79–80; see also *Weingrad v Lampert,* unpublished opinion per curiam of the Court of Appeals, issued January 13, 2005 (Docket No. 250714); 2005 Mich App LEXIS 66, *16.
32. *Suchodolski,* 412 Mich at 696.
33. *Lewandowski,* 272 Mich App at 128 n 4.
34. *Id.* at 129; but see *McNeil v Charlevoix County,* 484 Mich 69; 772 NW2d 18 (2009) (holding that a regulation providing that an employer cannot discharge an employee for exercising a regulatory right to a smoke-free environment is consistent with the exceptions to the at-will employment doctrine set forth in *Suchodolski* and not in violation of public policy).