When is Whistleblowing Not a Protected Activity?

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Whistleblowing has received considerable attention recently. Not only has there been an explosion of lawsuits claiming violations of whistleblower protection laws, but whistleblowing is encouraged by the government as evidenced by the U.S. Senate's declaration of July 30, 2014 as "National Whistleblower Appreciation Day."

However, from an employer's standpoint, distinguishing bona fide whistleblower activity from inappropriate conduct by disgruntled employees is no easy task. Unfortunately, Michigan courts continue to wrestle with complicated legal issues under the Michigan Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* This article discusses what the courts have said, and have not said, with respect to whistleblowing activity in Michigan.

ESTABLISHING A LEGAL CLAIM

To establish a legal claim under the WPA, an employee must show that: (1) the employee was engaged in protected activity as defined by the WPA; (2) the employer took adverse employment action (e.g. discharge or discipline) against the employee; and (3) a causal connection exists between the protected activity and the adverse employment action.

"Protected activity" under the WPA consists of: (1) reporting to a public body a violation of a law, regulation, or rule; (2) being about to report such a violation to a public body; or (3) being asked by a public body to participate in an investigation.

PERCEIVED WHISTLEBLOWERS ARE NOT PROTECTED

In *Chandler v. Dowell Schlumberger Inc.,* Chandler claimed he was discharged because the employer believed he had reported violations of the law to the Michigan Department of Transportation. In fact, Chandler did not make the report, but nevertheless claimed that he was discharged because the employer believed he had done so. The Michigan Supreme Court, in rejecting the claim, held that the WPA was

inapplicable because Chandler had not actually engaged in activity protected under the WPA. In so doing, the court refused to extend coverage to employees who were incorrectly perceived to be whistleblowers.

MOTIVATION DOESN'T MATTER

The importance of an employee's motivation for complaining was a critical issue in *Whitman v. City of Burton*, which reached the Michigan Supreme Court twice. Whitman was employed by the City of Burton as the Chief of Police until November 2007, when the Mayor of Burton declined to reappoint him. The dispute between Whitman and the Mayor centered on a City ordinance that allowed unelected administrative officers to be compensated for unused sick, personal and vacation time. Due to significant budget constraints, the Mayor and City department heads entered into an agreement to forgo payments. However, Whitman raised objections with various city officials, claiming that the refusal to pay the accumulated leave time violated the ordinance, and threatened to pursue the matter "as far as it needs to go." Thereafter, upon advice of the City attorney, the City paid Whitman his accumulated leave.

When Whitman was not reappointed, he sued under the WPA. The City and Mayor defended, claiming the WPA did not provide protections where the primary motivation for the employee's conduct was personal vindictiveness rather than a desire to inform the public on matters of public concern. In other words, Whitman's complaints were, according to the City and Mayor, made out of concern only for his personal economic gain.

The Michigan Supreme Court, overturning a decision by the Court of Appeals, held that an employee's motivation for complaining was not relevant in determining whether the employee's conduct was protected under the WPA. Thus, the case was sent back to the Court of Appeals to determine whether Whitman was unlawfully denied renewal of his contract because he had made complaints protected under the WPA, without considering his motivation for complaining.

IMPORTANCE OF PUBLIC INTEREST

On April 24, 2014, the Court of Appeals issued its second decision in *Whitman.* Acknowledging that it could not consider Whitman's motivation for complaining about not receiving pay for unused leave, the Court of Appeals nevertheless determined that *Whitman's* conduct was not protected under the WPA because it did not objectively advance the public interest. Since the City was in a severe financial crisis, the Court of Appeals determined that the law Whitman was trying to enforce (the local ordinance) would actually harm, rather than advance, the public interest. Thus, the Court of Appeals determined that Whitman was not a whistleblower within the meaning of the WPA.

CONTRACT EMPLOYEES ARE NOT COVERED

On April 25, 2014, one day after the Court of Appeals issued its second decision in *Whitman,* the Michigan Supreme Court decided *Wurtz v. Beecher Metro. Dist.* Wurtz was employed on a contract basis as the district manager for Beecher Metropolitan District, which manages water and sewage for a portion of Genesee County. The contract was for a 10-year term, ending on February 1, 2010. However, tension between Wurtz and the

District's board developed in May 2008 when Wurtz reported an alleged violation of the Open Meeting Act (OMA).

Relations between Wurtz and the board further deteriorated in the spring of 2009 over concerns about the cost of a trip to attend a conference. After Wurtz complained to the Genesee County Sheriff's Department and *The Flint Journal,* three board members were criminally charged in connection with the trip. Although the board members were all acquitted of wrongdoing or had the charges against them dismissed, Wurtz warned during a board meeting in November 2009 that he would consider the board's failure to extend his contract, which was set to expire in a couple months, to be retaliation for the criminal investigation. Nevertheless, the board voted not to renew Wurtz's contract, but Wurtz was allowed to finish out his contract.

After his employment ended, Wurtz sued the district and three board members who voted not to renew his contract. The Supreme Court, overruling a decision of the Court of Appeals, found that the WPA did not provide Wurtz any recourse because the WPA does not apply to prospective employees (i.e. applicants) or contract employees seeking renewal of their employment contract.

IMPORTANCE OF THE PUBLIC INTEREST REMAINS UNRESOLVED

The Court of Appeals' second decision in *Whitman* was again appealed to the Michigan Supreme Court, but the Supreme Court declined to grant leave to appeal. Instead, the Supreme Court vacated the Court of Appeals' second decision and again sent the case back for reconsideration in light of the *Wurtz* decision.

Because Whitman was a contract employee who was permitted to finish his contract, the Court of Appeals likely will follow the *Wurtz* decision and determine that he is not protected under the WPA. If so, whether an employee's conduct must advance the public interest to be protected under the WPA will remain undecided.

CONCLUSION

Whistleblowing activity has caught the attention of both the legislature and the courts. However, although the legislature encourages whistleblowing to ensure that mismanagement, corruption and fraud become known, the Michigan courts have refused to expand WPA protections to perceived whistleblowers, applicants and contract employees.

With respect to complaints by regular employees, the court has now clearly stated that motivation for complaining is irrelevant. Thus, future WPA cases will focus on whether an employee has engaged in protected conduct within the meaning of the WPA and, if so, whether the employer has discharged or disciplined the employee because he or she has engaged in such protected activity. There remains a question whether the whistleblowing activity must objectively advance a public interest to be protected. If not, one must wonder how the primary purpose of the WPA, which is to ferret out violations of the law that injure the public, will be achieved.

As with most employment discrimination and retaliation cases, WPA cases are fact-sensitive and can involve complicated legal issues. The labor and employment attorneys at Foster Swift can assist in guiding employers through the maze.