Increased Protection for the Whistleblowers of Michigan

BY TOM R. PABST

Suppose a cheapskate business dumps hazardous waste into our fields, streams, or school playgrounds during the night because it doesn't want to pay the expenses of properly disposing of the waste. Or suppose a male shareholder of a corporate employer rapes a female employee at night, after work on a date, and is prosecuted for the rape. Now suppose that an employee of the corporate employer reports the illegal dumping or testifies as a witness for the prosecution against the rapist shareholder, and the employer fires him for it. The plain language of the Whistleblowers' Protection Act (WPA),[1] passed in 1981, says that the fired plaintiff employee was engaged in protected activity and is therefore protected from retaliation for having the courage to do the right thing.

However, courageous whistleblowers in Michigan were not always protected the way the plain language of the WPA intended. For example, early appellate court decisions declared that the employee had to report or be about to report violations of law *by his or her employer,* only, to be afforded protection, despite the plain wording of the act that did not limit its applicability to violations of law by the employer or to investigations involving the employer.[2]

Fortunately for employees who have the courage to risk their jobs by reporting violations of *any* laws, or tell the truth when

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involved in an investigation by a public body, these early appellate decisions have, *sub silentio,* been eroded by important Supreme Court and Court of Appeals decisions over the last two decades.

Specifically, in *Dudewicz v Norris-Schmid, Inc,*[3] the Supreme Court held that the WPA protects reports made against a *coworker,* not just an employer. In other words, an employee's reporting to the prosecuting attorney's office of an assault and battery by a coworker was found to be protected activity even though the employer itself did nothing illegal per se.

Next, in *Dolan v Continental Airlines/Continental Express,*[4] the Michigan Supreme Court further applied and extended the act to protect an employee who was fired for reporting to the Drug Enforcement Administration the names of two passengers who fit a "suspect profile." As the Supreme Court explained in *Dolan,* "Frequently, a close connection exists between the reported violation and the employment setting, although no such limitation is found in the statute."[5] In other words, the Supreme Court in *Dolan* protected an employee from retaliation by an employer even if his or her report of illegal activities was not based on illegal activities by the employer itself.

Then, in an important WPA case out of Genesee County, *Trepanier v Nat'l Amusements, Inc,*[6] the employee's obtaining of a personal protection order against another employee in connection with a personal relationship, outside the workplace, was protected activity under the WPA. Attorney Glen Lenhoff represented the plaintiff in this important published case in which the employee's protection under the WPA was recognized as extending even further away from the workplace setting.

Recently, in the case of *Kimmelman v Heather Downs Mgt Ltd,*[7] the Court of Appeals came out and stated what should have been obvious from the beginning:

> There is absolutely nothing express or implied, in the plain wording of the statute that limits its applicability to violations of law *by the employer* or to investigations *involving the employer*.[8]

In other words, after more than 20 years of caselaw interpreting the WPA, whistleblowers have finally received the protection the legislature originally intended.

It is now crystal clear that a plaintiff employee is protected from retaliation under the WPA whenever he or she (1) reports a violation or suspected violation of a law, rule, or regulation or (2) is requested by a public body to participate in a proceeding—that is, an investigation, hearing, or inquiry held by the public body or a court action—protected under the act even if the proceeding does not involve the employer itself and even though the employer itself did not commit the violation of law being reported. ■

Fast Facts:

After 30 tortuous years, the Whistleblowers' Protection Act is finally being applied as actually written and intended.

Reporting any violation of law by *anyone* to a public body is protected activity.

Participating or testifying in *any* investigation *by any public body* is protected activity.

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FOOTNOTES

1. MCL 15.361 *et seq.*
2. See, e.g., *Dickson v Oakland Univ,* 171 Mich App 68, 70; 429 NW2d 640 (1988).
3. *Dudewicz v Norris-Schmid, Inc,* 443 Mich 68, 74–75; 503 NW2d 645 (1993).
4. *Dolan v Continental Airlines/Continental Express,* 454 Mich 373, 378; 563 NW2d 23 (1997).
5. *Id.* at 381.
6. *Trepanier v Nat'l Amusements, Inc,* 250 Mich App 578, 583–588; 649 NW2d 754 (2002).
7. *Kimmelman v Heather Downs Mgt Ltd,* 278 Mich App 569; 753 NW2d 265 (2008).
8. *Id.* at 575.