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TRACKING DEVELOPMENTS IN EMPLOYMENT LAW

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## Blowing The Whistle On Direct Evidence

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The Whistleblower Protection Act (WPA) was enacted to protect employees from adverse employment actions resulting from an employee engaging in a protected activity. A *prima facie* case under the WPA may be established by showing that a causal connection exists between the protected activity and an adverse employment action. The WPA comes under the burden-shifting framework set forth in the landmark case *McDonnell Douglas Corp v Green*, 411 US 792 (1973), which held that, absent direct evidence of retaliation, a plaintiff can rely on indirect evidence of an employer's unlawful motivation to show that a causal link exists between the whistleblowing act and the employer's adverse employment action. This establishes a rebuttable presumption that the employer's adverse action was "more likely than not based on the consideration of impermissible factors," such as an activity protected under the WPA.

Once a rebuttable presumption of retaliation is established, the employer has the opportunity to offer a legitimate reason for its action and may show that a reasonable fact-finder could still conclude that plaintiff's protected activity was not a "motivating factor" for the adverse action. If an employer relies on the business-judgment rule as a defense to a claim under the WPA, the court must determine whether the decision to take adverse action against the employee was an "unwise" business decision, or whether the employer's stated justification was false or had no basis in fact. If plaintiff's allegations are based on the latter, the business-judgment rule does not insulate the employer from liability under the WPA.

In *Debano-Griffin v Lake County, et al*, Plaintiff was employed as the director of the Lake County 911 Department. A millage had been passed for the purpose of operating the 911 Department, and Lake County contracted with Life EMS to provide ambulance services to the County. In 2002, Plaintiff discovered that Life EMS was using one of its ambulances to transport residents of other counties in nonemergency situations, and she informed the Lake County Board of Commissioners that Life EMS was in breach of its contract. Further, in 2004, Plaintiff publicly objected to the transfer of \$50,000 (authorized by the Board), from the ambulance account to another account designated for a "mapping project". Plaintiff claimed that the transfer violated the millage proposal, and the Board later voted to return the funds to the ambulance account. The Board also voted to merge two county employment positions, resulting in the elimination of Plaintiff's position and stated the rationale were "budget problems" and "cost cutting measures". Plaintiff filed a claim under the WPA, alleging that she was terminated as a result of her complaints regarding the transfer of funds and the breach of the Life EMS contract.

At the trial court level, Defendants' motion for summary disposition was denied, and the jury returned a verdict in Plaintiff's favor. After a series of appeals and remands, the Court of Appeals held that Plaintiff failed to establish a genuine issue of material fact on the causation element of her claim and again reversed the trial court's denial of Defendants' motion for summary disposition. The Supreme Court then granted Plaintiff's leave to appeal.

### SECRET WARDLE NOTES:

WPA claims are on the rise. Employers must carefully evaluate the elimination of an employee's position when made close in time to a legitimate complaint. Before terminating a Whistleblower employee the employer should have sufficient evidence to support that the reason to terminate was due to performance or cause, not retaliation. *Debano-Griffin* reasserts the burden-shifting framework set forth in the landmark case *McDonnell Douglas Corp v Green*.

## CONTINUED...

Plaintiff presented evidence of a causal link that showed more than just a “coincidence in time” between the protected activity and the adverse action. During a twelve day period when Plaintiff engaged in the protected activity, making various complaints regarding the funds transfer and improper use of ambulance services, Plaintiff’s position went from fully funded to nonexistent. The Court held that:

A reasonable juror could infer that the Board had already decided to fund Plaintiff’s position until she publicly voiced her complaints. It found further impermissible motivation because the same entity that made the decision to eliminate Plaintiff’s position (the Board) was also the recipient of Plaintiff’s complaints. The more an employer is affected by a plaintiff’s whistleblowing activity, the stronger the causal link becomes between the activity and the adverse action. It found that the Board was forced to do something that it would not have otherwise done (i.e., return the funds), and a reasonable inference may be drawn that the Board was motivated to eliminate Plaintiff’s position because of her complaints. It was also found that there was a reasonable inference that Plaintiff was the victim of unlawful retaliation, which established a *prima facie* case and gave rise to a rebuttable presumption that Defendants had unlawfully retaliated against Plaintiff by eliminating her position.

The Court then turned to the application of the business-judgment rule to the WPA.

Defendants argued that Plaintiff could not challenge the budgetary justification because this would impermissibly question their “business judgment,” or unconstitutionally require judicial review of a legislative body’s policy decision. As to the business-judgment argument, the Court found that Plaintiff provided evidence to show that Defendants’ budgetary justification was not the actual factor motivating the decision to eliminate her position. This “additional evidence” included testimony from a Lake County employee that Defendants had hired several full-time employees during 2005 and 2006, and that the budget worksheet for Lake County in 2005 indicated that many 911 dispatchers would receive pay increases. This evidence, coupled with the assertion that Plaintiff had not challenged whether the decision to eliminate her position was “sound” business judgment, but rather that the proffered justification had no basis in fact, led the Court to conclude that Plaintiff successfully rebutted Defendants’ budgetary justification for the adverse action. The Court held that reasonable minds could differ regarding the employer’s true motivation for eliminating Plaintiff’s position, and that a genuine issue of material fact existed. Defendants were not entitled to summary disposition, and the Court reinstated the trial court’s judgment in favor of Plaintiff.

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