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A claim under Michigan's Whistleblower Protection Act must further the public interest.

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The Michigan Court of Appeals held that an employee's claim under the Whistleblower Protection Act (WPA), Mich. Comp. Laws 15.362, must objectively further the public interest in order for the employee's actions to be protected. *Whitman v. City of Burton*, 2014 WL 1646489, decided April 24, 2014.

Plaintiff, Bruce Whitman, was the chief of police for Burton, Michigan from March 2002 through November 2007. Charles Smiley, Mayor of Burton, declined to reappoint him in 2007. Whitman then brought a Whistleblower Protection Act (WPA) claim against the City of Burton and its mayor, the Defendants. Whitman claimed that the mayor denied his reappointment because Whitman threatened to sue for a violation of a Burton city ordinance, which allowed him to be compensated for unused sick, personal, and vacation time.

A Burton ordinance allowed for Whitman to be compensated for unused sick, personal, or vacation time. However, in 2003, when the City was facing a dire financial situation, Mayor Smiley and other department leaders agreed to forego the payments of unused time. Whitman repeatedly objected to the agreement. Whitman threatened to sue the mayor and City for violating the unused time ordinance. Whitman claimed that the issue surrounding compensation for unused time was the reason he was not reappointed by Mayor Smiley in 2007. The City and Mayor Smiley denied that their motivation for declining reappointment to Whitman had anything to do with the unused time debacle. Rather, the Defendants contended that it was Whitman's substandard performance that led to his ouster.

The whistleblower case went to trial. The jury returned a verdict for Whitman and found that Whitman engaged in protected conduct and that it was his protected conduct that led to the mayor's decision not to reappoint Whitman as chief of police. The jury awarded Whitman $232,500 in damages. The Michigan Court of Appeals reversed the decision, holding that Whitman did not engage in protected activity under WPA because he was motivated solely by his own financial interests. "He did not pursue the matter to inform the public on a matter of public concern." *Whitman v. City of Burton*, 293 Mich. App. 220, 229 (2011).

The Michigan Supreme Court disagreed with the Court of Appeal's interpretation of one of its previous decisions, and held that the motivation of an employee for bringing a WPA claim is irrelevant to determining whether he or she was engaged in protected activity. *Whitman v. City of Burton*, 493 Mich. 303 (2013). The Defendants argued that the employee must have "altruistic motives," or a desire to prevent further injury to the public, in order for the activity to be protected under WPA. The Court held

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It appears that after the *Whitman* line of cases, an employee's complaint must further the public interest in some way in order for it to be protected under the Whistleblower Protection Act. This may not be the law for long if the Supreme Court considers the issue again. Regardless, under current law, it is clear that there needs to be a connection between employee protected activity and employer retaliation for there to be a WPA violation.

Since connection between activity and retaliation is required, employers should take care not to make assumptions when faced with a complaint of illegality by an employee. It may appear to an employer that an employee is complaining of a violation for personal gain or that a violation would not affect the public interest. However, the employer should still avoid any action that could be viewed as retaliation against the employee in response to the employee's complaint. The employer's actions could later be construed as a violation of the Whistleblower Protection Act, depending on the lower court's interpretation of the latest *Whitman* decision.

that it does not matter, in determining whether an employee is protected, that the employee is motivated by personal and self-interested reasons, like Whitman, or by an "altruistic" desire to inform the public of matters of public concern.

Ultimately, the Supreme Court determined that Whitman's conduct was protected under WPA because he threatened to file a lawsuit against the City and its mayor for violating a city ordinance. Additionally, the Court remanded the case for further proceedings in order for the Court of Appeals to consider whether there was a causal connection between Whitman's protected activity and Mayor Smiley's decision not to reappoint Whitman as chief of police.

On remand, the Court of Appeals in *Whitman v. City of Burton*, 2014 WL 1646489 (April 24, 2014) determined that Whitman was "not a whistleblower," notwithstanding the Supreme Court's holding that Whitman engaged in protected activity. Although the Supreme Court was not interested in Whitman's motivation in finding that he engaged in protected activity, the Court of Appeals held that an employee must objectively advance the public interest in order to be protected under the WPA. The court stated that "WPA is designed to ferret out violations of the law that injure the public."

Judge Saad, writing for a 2-1 court, reasoned that the alleged violation at issue in this case did not have anything to do with the public, and a violation of the unused time ordinance would not harm the public. "This is an insistence by an employee, plain and simple, to get his perks – not an uncovering of corruption or illegality." The Court also determined that Whitman's failure to receive reappointment was much more likely attributable to his poor performance as opposed to any protected activity. Therefore, Whitman was not entitled to whistleblower protection because the effect of his complaint did not further the public interest.

Judge Beckering, writing in dissent, stated that the majority sidestepped the Supreme Court's decision to find that Whitman was not a whistleblower because the Supreme Court had already determined that Whitman was engaged in protected activity. Beckering reasoned that even if an employee's actions must objectively further the public interest to be protected under WPA, the "issue was necessary to the [Supreme] Court's determination that [Whitman] engaged in protected activity under the WPA." Beckering also would have held that there was a causal connection between Whitman's protected activity and the mayor's decision not to reappoint him.

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