



michigan municipal league

Law Enforcement Action Forum Newsletter



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Whistleblowers: When Employees Become Plaintiffs!

By Gene King, LEAF Coordinator



The Jury Verdict Research, a national database of verdicts and settlements in their latest version of *Employment Practice Liability: Jury Award Trends and Statistics 2009 Edition* published the following statistics:

- Government entities were defendants most often in verdicts rendered from 2002 through 2008 at 43 percent,
- Government entities paid the high awards, with a median of \$228,750,
- This number **does not include attorney fees**, which can run much higher!
- In 2008, the median award for all types of U.S. employment related claims rose 60 percent from \$204,000 to \$326,640, and discrimination verdicts rose 16 percent, from \$208,000 to \$241,119,
- In 2008 U.S. employment related claims 60%,
- Retaliation awards were at their highest with a median award of \$225,000,
- The median award for wrongful termination was \$201,500, for whistleblowers \$200,500, and for discrimination \$200,000.

The bottom line is that the median jury award for employment related claims has increased significantly during the period studied (2002-2008). And that is why LEAF felt that it should bring this information to the attention of municipal leaders.

Experts believe employment practice litigation will be a popular avenue for employees to score big monetarily if they think they are at risk of losing their jobs or believe that their employer terminated them unjustly. Another driver of such litigation is the awareness that juries tend to sympathize with plaintiffs during the tough economic conditions we are currently experiencing. Most of us know, or have heard of, people who have lost their jobs or their homes. Some have had no choice but to move out of state in search of employment, so they can support themselves and their families.

Past editions of the LEAF Newsletters (www.mml.org under the Insurance tab) have focused on issues involving employment practices and discussed strategies for reducing risks of litigation. This edition of the LEAF Newsletter will outline current employment trends that employers must be aware of if they wish to avoid pitfalls that can cause expensive litigation in the areas of whistleblowers and retaliation.

One of the reoccurring themes promoted in LEAF Newsletters is that top management has to hold their mid-level management and supervisory staff accountable across a broad spectrum of activities, the most important of which is staff meeting management's expectations in the application of the department's rules, policies and procedures while they and their subordinates are engaged in their job duties. LEAF again builds upon the premise that top-level management is responsible for ensuring their employees work in an environment that is free from inappropriate or offense behavior. Employees have an expectation that they can be in the workplace without harassment, discrimination or disparate treatment. They also have an expectation that they can report wrongdoing to management without the risk of being intimidated or retaliated against. These are the tenets of Title VII of the Federal Civil Rights Act and in Michigan, the Elliott-Larsen Civil Rights Act, MCL 37.2102.

Legal Advisor Encourages Review of Past Newsletters

In light of its awareness of employee expectations and the laws that support them, LEAF asked its legal advisor, Audrey Forbush, for help in sorting out the issues that top management should prioritize to avoid claims that fall within the purview of either of the acts. Audrey immediately knew what the focus of this newsletter should be. First, she felt we should direct readers to previous issues of the LEAF Newsletter that have discussed employment practices and to the Civil Rights Acts, so she could focus on an area that is most popular in today's litigation environment. She encourages all employers to audit their operation to ensure they meet the criteria for training, reporting, and disciplining violators as outlined by the various civil rights acts and court decisions.

Audrey felt it is important for readers to go to past LEAF Newsletters to review the topics that are relevant and frequently intertwined with employment practice litigation. You can find these along with other Risk Management Resources at

www.mml.org under the Insurance tab, Pool or Fund and look to the left side of the page. The first newsletter to review is the June 2004 edition that discusses risk management issues and how to become a successful organization by using the *Risk Management is Good Management Self Assessment Program* to identify risk exposures in the workplace. The September of 2004 edition outlined how to implement drug testing without violating employees' rights. In September of 2005, the newsletter outlined management's responsibilities in addressing harassment, discrimination and a hostile work environment. December 2005 brought information concerning management's ability to perform searches in the workplace. Hiring and background investigations were the topic in March of 2006. June 2006 was discipline and discharge guidance. The September 2008 edition discussed the issue of horseplay focusing on a case in which management's failure to stop the activity lead to litigation for harassment. The subjects of the October 2009 issue were regulating employee use of social networking sites and obtaining employment information from them. LEAF also discussed the issue of managements' responsibility to ensure compliance with regulations and the law in the December 2009 newsletter. It dealt with many issues, especially exculpatory evidence, using an analogy of a machine operating at peak efficiency because management was paying attention to the action of the employees.

Whistleblowers

The right of employees to expect whistleblower protection under the law is an area that has seen increased litigation over the past couple of years. The MML's risk management division and Audrey Forbush felt it was important for LEAF to provide members with an understanding of the act and to provide strategies for preventing occurrences.

The Whistleblowers' Protection Act (WPA), (MCLA 15.361 et seq), provides that an employer shall not discharge, threaten, or otherwise discriminate against an employee because the employee reports, or is about to report, verbally or in writing,

a violation or a suspected violation of a law or regulation or rule promulgated pursuant to state, local or federal laws to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry.

They Only Left Out Reporting In Prayer Or In Their Dreams!

A public body means a state officer, employee, agency, department, division, bureau, board, commission, council, authority or other body in the executive branch of state government. It includes an agency, board, commission, council, member or employee of the legislative branch of state government, county, city, township, village, intercounty, intercity or regional governing body, a council, school district, special district or municipal corporation, or a board, department, commission, council, agency or any member or employee thereof. To make sure the law is sufficiently inclusive regulators also added any other body which state or local authority created that receives most of its funds by or through state or local authority, or any member or employee of that body. The law also covers a law enforcement agency or any member or employee of a law enforcement agency or the judiciary and any member or employee of the judiciary.

The language of the WPA does not provide that this public body must be an outside agency or higher authority. There is no condition in the statute that an employee must report wrongdoing to an outside agency or higher authority to be protected. It does not matter if the public body to which the suspected violations were reported was also the employee's employer. *Brown v Mayor of Detroit, 478 Mich 589, 734 NW2d 514 (2007).*

The WPA's main purpose is to alleviate the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses. *Shallal v Catholic Social Services, 455 Mich 604, 612; 566 NW2d 571 (1997).*

Moreover, "the primary motivation of an employee pursuing a whistleblower claim must be a desire to inform the public on matters of public concern..." *Id. at 621.*

Examples of recognized protected activities under the WPA include: a report of suspected patient abuse in a nursing home to state investigators; a report of unsanitary conditions in a school cafeteria; the cooperation of an employee in an investigation of alleged violations of Title IV student financial aid assistance by her employer with the United States Department of Education; and, a report of the alleged misconduct by a mayor's security staff in covering up a crime and a rumored party at the mayor's residence. In all these cases, the common theme was that the whistleblowers were trying to disclose what they knew or perceived to be a violation of the law or some regulation.

Audrey explained that it has been her experience that most municipal entities do not intentionally violate the law. However, municipal entities comprise of people that might commit law violations, intentionally or unintentionally, that, if unreported, remain unknown to the employer. The inappropriate behavior can be the mishandling of funds, theft, taking bribes, favoritism, being abusive, assaultive or callous to the rights of employees or the public. It also includes employee complaints against employers who, through carelessness or neglect, do not comply with MIOSHA's safety regulations. When employees know or suspect a violation of a law or regulation and report this to a public body, no matter to whom or in what context, they are whistleblowers and as long as the complaint is not false, have certain protections by law. The WPA also extends protections to employees if a public body requests that they participate in an investigation, hearing or inquiry held by that public body or a court action.

The whole point of WPA is to provide legal protection to employees when they report violations or participate in investigations with the intention of righting a wrong and improving the work environment. If a whistleblower incident

occurs, an employer may feel embarrassed and/or frustrated. Often employers will comment that they feel they are victims because the employee did not give them the opportunity to address the issue and find a resolution before going to a regulatory agency or the public. However, during the investigation of the complaint, it is common to discover that the employee did complain to a supervisor or someone else in the organization and they did nothing to address the problem and/or they chastised or punished the employee some way for pushing the issue.

This is an area where mid-level managers and supervisors have responsibility for and must be diligent about the activity of the organization and their employees. Some times employees either complain or cue managers/supervisors into the fact that there is a wrong or unsafe condition in the work environment. Usually, the level of management an employee reports such problems to is the one in the work environment where the condition exists. Therefore, it is critical for mid-level managers and supervisors to act by either addressing the issue themselves, if possible, or by reporting it to those who can. If top management holds their mid-level managers/supervisors accountable for fixing what they can and/or reporting incidents that require further action, the organization will resolve the matter thus eliminating the need for employees to be whistleblowers. In all cases, mid-level managers or supervisors should report any action they take in writing up the chain of command.

Retaliation

An allegation that often accompanies whistleblowers' claim is that after reporting the incident or condition to the organization or an outside agency, the employee was the subject of some form of adverse action in retaliation for reporting the issue. Adverse actions include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indices that might be unique to a particular

situation." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, supra, (quoting *White v Burlington N & Santa Fe Co*, 310 F3d 443, 450 [CA 6, 2002]).

To establish a *prima facie* case under the WPA, plaintiffs must prove: (1) that they were engaged in a protected activity under the act; (2) that their employers subsequently discharged, threatened, or otherwise discriminated against them; and (3) that a causal connection existed between the protected activity and the discharge or adverse employment action. *Heckman v Detroit Chief of Police*, 267 Mich App 480, 705 NW2d 689 (2005); *West v General Motors Corp.*, 469 Mich 117, 665 NW2d 468, 471-472 (2003). If an employee feels that they meet these criteria, they have ninety days from the adverse action to make a claim (*MCL 15.363 et seq*).

The plaintiff must also show that the employer had objective notice of the protected activity. *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257 (1983); *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 279; 608 NW2d 525 (2000). Employees will often produce a multitude of documents and records to show that they told different members of the organization of the complaint. They will have notes of dates, times and places. They may even produce some form of document that demonstrates they were about to report the complaint to a public body.

Keep in mind that the employees must produce evidence of a suspected violation of a law or regulation or rule "promulgated" pursuant to the laws of the state. The WPA does not protect employees who report or are about to report a "suspected violation of a suspected law." In other words, they cannot make up the complaint and have it accepted as valid. Since the goal of WPA is to protect the public, "the public does not benefit from providing protection to those whistleblowers who report activities or suspected activities that they subjectively believe violate nonexistent laws, rules or regulations." *Debano-Griffin v Lake Co.*, WL No. 282921, Oct. 15, 2009.

Employees cannot recover under a whistleblower statute when the employee acts in bad faith. The primary motivation of an employee pursuing a whistleblower claim must be the desire to inform the public on matters of public concern, and not personal vindictiveness. Employees may not keep a matter quiet and then eventually reveal it to others, not to prevent public injury, but rather for some limited or private purpose at a time best suited to the advancement of their own interests. *Shallal v Catholic Social Services of Wayne Co.*, 455 Mich 604, 621; 566 NW2d 571 (1997); *Wolcott v Champion Intern Corp*, 691 F Supp 1052, 1065-66 (WD Mich 1987).

This often occurs in situations when employees know or suspect that they are under suspicion or investigation for some wrong doing that may adversely affect their employment. Employees will try to deflect the eventual outcome of termination or significant discipline by claiming that they have blown the whistle on some activity of the organization and the employer is retaliating against them. Their goal is to intimidate the employer into inaction or to capitalize on an opportunity to prevail as the plaintiff in a civil action because of the adverse employment action.

If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to present evidence that demonstrates that any employment action taken against the employee was for a legitimate, non-retaliatory reason. If the employer states a legitimate non-retaliatory reason, the employee may still prevail if he or she demonstrates that the proffered reason was a mere pretext. *Eckstein v Kuhn*, 160 Mich App 240, 246, 408 NW2d 131 (1997).

Loose Lips Sink Ships!

Michigan courts look to the law regarding what constitutes an “adverse employment action” in civil rights actions to determine whether the plaintiff in a WPA claim has satisfied the second element of the *prima facie* case. *Heckman v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005).

This is why documentation of the employees’ behavior and actions that led to a disciplinary action is extremely important. Other documentation of past disciplinary actions or inappropriate employee behavior that led to management’s intervention should be available as support for the current claim. Unless the behavior for the current discipline is so egregious that the best option is termination, there may be little evidence to support that the action taken was not retaliatory for employees blowing the whistle.

This is why it is critical that top management require accountability of their managers and supervisors for upholding the responsibilities of their jobs. These include developing job descriptions, documenting employee evaluations with specific details and descriptions of areas of performance that need improvement along with a documented action plan to guide employees in correcting deficient performance. It also includes historical documentation of problems with employees. Managers and supervisors should forward such documentation, no matter how minor, upward so management is aware of the problem and can officially take action if necessary.

Employees that feel their managers or supervisors have retaliated against them will likely have notes or other records of comments made or punishment for bringing problems to the attention of supervisors or management. If, in fact, managers or supervisors are upset with employees for revealing the complaint, they may have recordings of being harassed or evidence of a hostile work environment due to assignments or actions that management has taken against them or statements made about them. This is another reason why it is essential for managers and supervisors to maintain accurate and specific documentation on all actions taken involving employees. The documentation may be in the form of existing labor agreements, rules, policies, practices, procedures or disciplinary actions. The employee may even try to create conflict in order to procure evidence of retaliation. Appropriate action should be taken for bad or disruptive behavior regardless of any threats or claims made by the employee. In addressing this

behavior, management at all levels has to be on guard to ensure any actions taken are legitimate and a business necessity.

It also becomes very important for management to discuss issues with employees only with persons that are “need to know”. Although the situation may be frustrating or down right exasperating, management must keep an even temperament and be careful about spontaneous utterances that may be detrimental to the case. In other words, as Mom used to say, “Watch your mouth!” Do not allow emotions and anger to over-ride good judgment and discretion. Even with truth and justice on their side, many opportunities are lost in litigation because of the defendant’s own angry or careless words!

Suggestions from LEAF’S Legal Advisor:

- ☞ Have a policy for Harassment, Discrimination, Workplace Violence and Whistleblowers. (LEAF Manual Chapter 15)
- ☞ Train all employees to the policies every year, stressing the components of each subject and outlining what retaliation is.
- ☞ During training, clearly outline management’s expectations to all levels of employees in the application of the policies and establish a low tolerance for inappropriate behavior or failure to meet their responsibilities.
- ☞ Be sure to train those whose duties include investigations and dispositions.
- ☞ The policies should have clear reporting lines that allow for employees to report above a supervisor or manager.
- ☞ Try to protect the confidentiality of the employee but do not guarantee that it can be maintained.
- ☞ Require all reported incidents to be forwarded to a designated person of

authority for investigation and disposition.

- ☞ Require a tracking method for all incidents with the disposition approved by the top level of management for the department.
- ☞ The complaining employee should be told what the disposition of the complaint is and offered a rationale for that decision.
- ☞ Ensure all levels of management understand their duties in observing, addressing and reporting incidents.
- ☞ Always follow the rules, policies, procedures and labor contracts during the investigative and disposition stages of the incident.
- ☞ Take action on inappropriate behavior by an employee regardless of their status.
- ☞ Address unsafe working conditions.
- ☞ Take every complaint seriously.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League’s, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader’s are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

*Sponsored by the Michigan Municipal League Liability & Property Pool and Workers' Compensation Fund
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