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AN EXPLOSION OF WHISTLEBLOWER CLAIMS

WPA cases increase 112 percent over a recent eight-year period

By Correy E. Stephenson

Employment law attorneys have noticed an uptick in whistleblower suits recently, but one attorney's number crunching revealed some startling statistics.

Southfield attorney Daniel D. Swanson recently attempted to document just how dramatic the rise in claims has been.


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Analyzing both published and unpublished decisions from the Court of Appeals, Michigan Supreme Court, the Eastern and Western federal district courts and Michigan-focused cases from the 6th U.S. Circuit Court of Appeals, he tracked the rise of the claims over roughly three decades of case law.

Since 1978, Swanson found a total of 79 decisions involving wrongful discharge in violation of public policy and 270 court decisions on Whistleblower Protection Act claims since 1982.

Digging deeper, he compared two eight-year periods — 1996 to 2004, and 2004 to 2012 — to get a sense of change.

In the first eight-year period, there were 75 WPA decisions and 25 public policy decisions. Over the next eight years, the courts issued 37 public policy decisions and 159 WPA-related decisions — a 48 percent rise for public policy claims and an increase of 112 percent for the WPA.

"We're looking at an explosion of litigation in this area of employment law," Swanson said.

Other employment law attorneys agreed they have experienced the increase.

"My overall impression is that these claims are increasing fairly dramatically, in particular in the public sector," said Robert C. Ludolph of Detroit.

In addition to stand-alone suits, Katherine S. Wood of Detroit said WPA claims are almost always included as an add-on to other employment discrimination litigation.

Tom R. Pabst, a Flint lawyer who represents whistleblowers, said he was not surprised by the statistics.

In his own practice, Pabst has noticed an exponential rise in "Type II" suits, where an employee participates in an "investigation, hearing, or inquiry" and suffers an adverse employment action. Many lawyers are unaware of this type of whistleblower claim, where the employee does not have to report a violation, he said, and "don't even see the case coming."

Greater awareness

In Michigan, two laws are in play with regard to whistleblowers.

The Michigan Whistleblower Protection Act was enacted in 1980 and a public policy exception to the general rule of employment at will was recognized by the Supreme Court in 1982.

The suits cut across all types of business, from governmental employees, the mortgage industry, health care and the automotive industry.

The rise in claims can be attributed to several factors, employment attorneys agreed, but the major reason is greater recognition of whistleblower rights.

"More and more people in the public are familiar with the statute and the protections it offers," said Michelle Bayer of Birmingham. Stories in the media about cases such as WikiLeaks, Enron and sizable recoveries against drug companies coupled with Internet research have led to greater sophistica-

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tion among clients, she explained.

The heavy publicity — and significant verdicts — in whistleblower suits surrounding the downfall of former Detroit Mayor Kwame Kilpatrick — also raised the profile of the suits, Ludolph added.

In addition, courts are more welcoming of the cases, Swanson said, and the employment bar is much more attuned to the claims.

A prima facie case under the WPA requires a plaintiff to show that she was engaged in protected activity as defined by the Act, was discharged or discriminated against, and that a causal connection exists between her engagement in the protected activity and the adverse employment action.

Whistleblower cases typically focus on causality, Ludolph said.

"Did the fact that the employee made a complaint lead to the adverse action that was suffered?" he asked. "Most employment issues are much more complicated than that and you can't draw a straight line between them," staging a battlefield for the parties.

In most cases, the employer will argue that a performance issue led to the demotion or termination, Swanson said.

Another issue: whether the issue being reported by the employee is something protected by statute or better characterized as a personal concern, Bayer said.

She recalled investigating a possible suit where an employee reported that the employer was violating a contract with a third party.

"But that's a private contract," Bayer explained, and not something covered by the WPA. In addition, if the employee reported the contract violation to the third party, he could have been the subject of litigation from the employer for claims such as a violation of confidentiality or tortious interference with contract.

"I've seen that issue come up more than once," she added, and employees are often upset and confused about being unable to pursue a whistleblower claim.

Short time limit, major hurdle for plaintiffs

Making the rise in numbers even more impressive is the biggest hurdle to a WPA suit: an exceedingly short statute of limitations, with plaintiffs required to bring their claims within 90 days of the adverse employment action.

"As a defense attorney, the very first thing I look at when I get a complaint is the time period," Wood said.

The time limit presents a major obstacle for plaintiffs' attorneys, making it "very hard to investigate an employee's case and in good faith plead sufficient facts for a case," Swanson said.

The statute of limitations is meant to encourage individuals to report problems more quickly, rather than let them fester, Ludolph explained.

For those potential plaintiffs that miss the 90-day boat, the public policy claim may provide an alternative with a three-year statute of limitations, Swanson said.

Because attorneys are cognizant of the WPA's short time limit, they refuse potential clients on day 91, Swanson said. "But many times those claims might be characterized as public policy claims and plaintiffs are turned away without sufficient attention."

A public policy claim offers less in potential damages, however — attorney's fees and costs are available to a successful plaintiff under the WPA — and is considered a tort, leaving governmental entities immune, Pabst said.

Ludolph said courts frown upon the use of a public policy argument as a fallback claim for a missed WPA deadline. Plaintiffs cannot use the common law to pursue what should be a statutory claim, he explained, although many times counsel will plead both in a complaint.

In crunching the numbers, Swanson noted that many of the decisions are more than just perfunctory motions and orders, with several major decisions analyzing the scope of the laws.

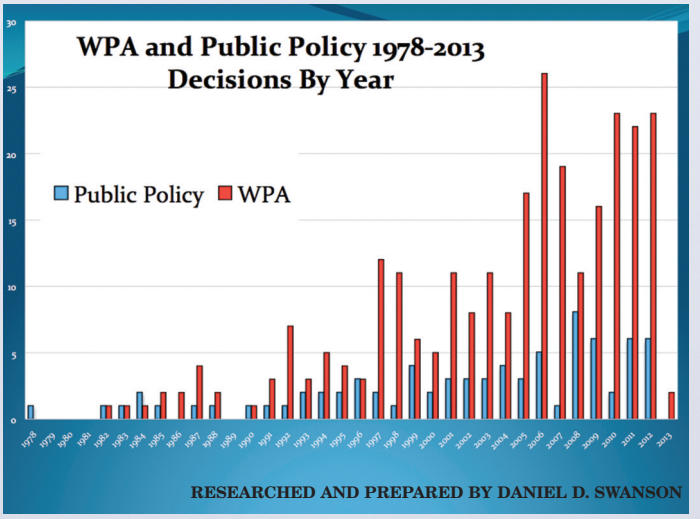
The Supreme Court upheld a $6 million verdict in a whistleblower suit involving Kilpatrick and the court recently addressed a major issue in the *Whitman v. City of Burton* decision (MiLW No. 06-81941, 20 pages), where the court said an employee's motivation for engaging in protected activity is irrelevant to a WPA claim.

The decision overturned "16 years of junk law" said Pabst, who represented the employee, and will "help a lot of whistleblowers in the future."

The popularity of the WPA may not wane until employers apply greater focus to prevention, Wood said. "A lot of employers aren't necessarily evaluating the risk in this area like they might with gender, age or race," she said, especially at smaller companies.

Swanson agreed that whistleblower claims will remain high with a continued focus on corruption and as cases such as Whitman open up new avenues for plaintiffs.

"This growth will continue," he predicted.



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