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BE WARY OF WHISTLEBLOWERS

Claim Revived for the Second Time in Three Years

*By: **Karen L. Piper**, Member,*
Workplace Law Practice Group

The Whistleblower Protection Act (WPA) protects employees against adverse employment actions in retaliation for reporting a violation or suspected violation of law, regulation or rule to a public body. To establish a WPA claim, an employee must show:

1. S/he was engaged in protected whistleblowing activity;
2. The employer took an adverse employment action against the employee; and
3. A causal connection between the protected activity and adverse action.

Kevin Smith was employed as a police officer in the Flint Police Department. He was assigned full time to act as the Union President from February 2011 until April 2012 when Flint's Emergency Manager eliminated the position. Smith continued to act as Union President through the end of 2012. As Union President, Smith worked 8:00 a.m. to 4:00 p.m. handling work-related grievances.

In November 2012, Flint voters approved a millage for public safety. Smith complained publicly that the money the voters approved was not being spent properly (i.e., on hiring as many police officers as possible). In March 2013, Smith was reassigned to the night shift in the most dangerous area of the city.

Smith filed a whistleblower claim asserting he was reassigned in retaliation for his public complaints about how the millage funds were being spent. The trial court dismissed the claim, ruling that his reassignment was not an adverse employment action. The court of appeals declined to hear Smith's appeal. The Michigan Supreme Court directed the court of appeals to review the dismissal. In a 2-to-1 split

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decision, the court of appeals agreed that the reassignment was not an adverse employment action. The appeals court also ruled that Smith had not engaged in protected whistleblowing activity.

[The Michigan Supreme Court found] that Smith had presented sufficient facts . . . to support his claim that reassignment was more than an inconvenience; it involved a materials change in his responsibilities and could be an adverse employment action under the WPA.

On February 3, 2017, the Michigan Supreme Court reversed the court of appeals' decision. It agreed with the dissenting judge that Smith had presented sufficient facts (changed hours and work location) to support his claim that his reassignment was more than an inconvenience; it involved a material change in his responsibilities and could be an adverse employment action under the WPA.

This case will be sent back to the Court of Appeals for further action, presumably a return to the trial court to decide whether Smith's public criticism of how millage funds were being spent was protected whistleblowing activity, or to go through an actual trial.

Smith's case has been pending for more than three years. It has been to the Michigan Supreme Court twice. In many circumstances, whistleblower claims do not have to be this prolonged or painful. It is unknown whether the Emergency Manager consulted experienced employment counsel before reassigning Officer Smith. If not, he should have. (Case: *Smith v. City of Flint*, SC No. 152844 Mich. S. Ct., Feb. 3, 2017).)

About the Author. *Karen L. Piper represents and counsels employers on both contemporary and traditional employment law issues. She has conducted a number of employment investigations and training seminars for a variety of clients and has also successfully defended numerous discrimination and wrongful discharge cases at the administrative, trial, and appellate levels. Karen is a frequent speaker and writer for national and local industry associations.*

Bodman's Workplace Law Practice Group:

Maureen Rouse-Ayoub
Co-chair, Workplace Law
313.392.1058

Aaron D. Graves
Co-chair, Workplace Law
313.392.1075

Rhonda H. Armstrong
248.743.6048
rarmstrong@bodmanlaw.com

John C. Cashen
248.743.6077
jcashen@bodmanlaw.com

Steven J. Fishman
248.743.6070
sfishman@bodmanlaw.com

Jason E. LaBelle
313.393.7578
jlabelle@bodmanlaw.com

Danielle C. Lester
248.743.6078
dlester@bodmanlaw.com

Christopher P. Mazzoli
248.743.6066
cmazzoli@bodmanlaw.com

Karen L. Piper
248.743.6025
kipper@bodmanlaw.com

Charles M. Russman
248.743.6039
crussman@bodmanlaw.com

Donald H. Scharg
248.743.6024
dscharg@bodmanlaw.com

David B. Walters
248.743.6052
dwalters@bodmanlaw.com

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