

## **BE WARY OF WHISTLEBLOWERS**

### **Claim Revived for the Second Time in Three Years**

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**T**he 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

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.

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**[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.**

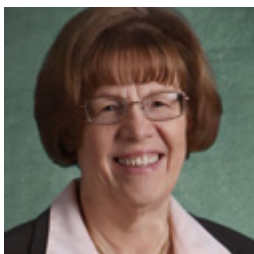
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On February 3, 2017, the Michigan Supreme Court reversed the court of appeals' decision. It agreed with the dissenting judge that Smith had presented sufficient facts (changed hours and work location) to support

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.*

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