

Whistleblower Claims Cannot be Based on Future or Planned Acts in Michigan

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On February 1, the Michigan Supreme Court ruled that an employee cannot bring a claim under the Michigan Whistleblowers' Protection Act (WPA) if the employee only reported or threatened to report future, planned or anticipated unlawful conduct by the employer.

The WPA provides that an employer cannot discharge, threaten or otherwise discriminate against an employee who "reports or is about to report" to a public body, "verbally or in writing, a violation or a suspected violation of a law or regulation or rule."

In *Pace v Edel-Harrelson*, the plaintiff, Barbara Pace, brought suit against her former employer, a nonprofit entity that provides services to survivors of domestic violence and the homeless, claiming that she was wrongfully terminated in violation of the WPA. Ms. Pace alleged that the operations manager said that she intended to use grant money to purchase a stove for her daughter and implied that she should cover up the unauthorized purchase by documenting it in the name of a client. Ms. Pace testified that she reported the operations manager's plan to the executive director and was terminated.

The Michigan Supreme Court held that while an employee need not report an actual violation of the law to receive protection under the WPA, the employee must at least suspect that the violation of law has already occurred or is ongoing. It is not enough for the employee to have a good faith and reasonable belief that a violation of the law is being actively planned. The statute "contains no language indicating that future, planned, or anticipated acts amounting to a violation or a suspected violation of a law are included within the scope of the WPA." Reporting a suspected *future* violation of a law, not a suspected *existing* violation, is not "protected activity" for purposes of the WPA.

What Does this Mean For Employers?

Despite this ruling, employers still need to be very careful when making decisions about a person's employment if that person has recently complained about an alleged violation of law. Often the line between a suspected future violation and a suspected existing violation will be blurry and whether or not a complaint is protected by law is not always clear. Although employment is presumed to be at-will in most states, including Michigan, employers should always have a strong non-discriminatory and non-retaliatory reason for any termination or other adverse employment decision. If you have any questions about a termination or disciplinary decision, please contact me or your other Miller Canfield employment and labor attorney.

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