STATE OF MICHIGAN

COURT OF APPEALS

CHERYL DEBANO-GRIFFIN, Plaintiff-Appellee,	UNPUBLISHED October 15, 2009
v	No. 282921 Lake Circuit Court
LAKE COUNTY and LAKE COUNTY BOARD OF COMMISSIONERS, Defendants-Appellants.	LC No. 05-006469-CZ

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ.

WHITBECK, J. (*concurring*).

I concur in the result that the lead opinion reaches. I write separately to set out my understanding of the question that this case presents and to explain what I believe to be the correct answer to that question. I believe the question before us is: with what degree of specificity must an employee describe a violation—whether known or merely suspected—of an actually and contemporaneously existing law in order to be engaged in a protected activity under the Whistleblowers' Protection Act?[1] I believe the answer to that question to be that an employee must provide a description of the connection between the known or suspected violation that the employee reports and an actually and contemporaneously existing law that would give notice to an *objectively reasonable* employer of both the known or suspected violation *and* the actually and contemporaneously existing law.

To reach the ultimate question and the ultimate answer, however, it is necessary to clarify two matters that cause at least some confusion about the appropriate analysis in this case. The first is legal, the second factual.

I. Actual Versus Suspected Violations Of Law

Section 2 of the Whistleblowers' Protection Act 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

[1] MCL 15.361 *et seq.*

> writing, a *violation or a suspected violation of a law or regulation or rule* promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body.[2]

The parties have sparred, both before the trial court and before this Court, regarding the meaning of this section. One thing is absolutely clear, however. Under the plain language of the statute, an employee is engaged in a protected activity under the Act if the employee reports or is about to report either an *actual* violation of law or a *suspected* violation of law.[3] (Section 2 refers to a "law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States." I recognize that there are significant differences between laws, regulations, and rules. For simplicity sake, however, in the balance of this concurrence I use the term "law" to include laws, regulations, and rules).

The Act does not require that an employee report an *actual* violation of law. It is sufficient for the employee to report a violation of law that the employee *suspects* has occurred. And the Act most certainly does not require that an employee *prove* the existence of such a violation. The dissent is therefore correct when it asserts that "an employee is still protected even if he or she turns out to be mistaken about whether the reported activities actually violated a promulgated law, regulation[,] or rule."[4]

The lead opinion is, however, correct that the word "suspected" in § 2 modifies only the word "violation" and not the word "law."[5] The lead opinion asserts, "[T]he WPA does not protect an employee who reports or is about to report a suspected violation of a suspected law."[6] I would take this statement one step further. The Act does not protect an employee who reports or is about to report a violation, whether suspected or actual, of a law that the employee *suspects* may exists. Put differently, in order to engage in a protected activity under the Act, an employee must report or be about to report an actual or suspected violation of a law that *actually and contemporaneously exists*. The Act does not contemplate a wish list; it is not sufficient for the reporting employee to *suspect* that a law covering the conduct in question exists, or *hope* that such a law exists, or even to *believe* that such a law exists. The law (or laws) covering the conduct in question must actually and contemporaneously exist.

Thus, I believe the dissent to be only partially correct when it asserts that, "[T]he employee would be protected even if it turns out that the employee was mistaken about whether there was a promulgated law, regulation[,] or rule that applied to the facts that he or she reported."[7] The employee *would* be protected if that employee were mistaken about the

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[2] MCL 15.362 (emphasis added).

[3] See *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 583; 649 NW2d 754 (2002).

[4] *Post* at ___.

[5] *Ante* at ___.

[6] *Id.*

[7] *Post* at ___.

application of the facts to an actually and contemporaneously existing law; this falls reasonably within the ambit of a "suspected violation" of law. But the employee would *not* be protected if, in fact, there was no law that applied to the conduct in question; the law must be actually and contemporaneously in effect at the time that the employee reports, or is about to report, the actual or suspected violation.

II. The Conduct In Question

Defendants Lake County and Lake County Board of Commissioners assert, correctly, that plaintiff Cheryl Debano-Griffin reported two separate categories of conduct that later became the subject matter of her whistleblower suit in this case. The first category related to ambulance services provided to Lake County under a contract with LIFE EMS. The second category related to the alleged diversion of ambulance millage funds.

With respect to the first category, in her Second Amended Complaint, Debano-Griffin asserted that she reported that, "Lake County ambulances were being re-directed to other counties or for transport of non-emergency patients, thereby depriving Lake County of timely ambulance services for residents in need of emergency service." It is clear, however, that in making such reports, Debano-Griffin was not engaged in a protected activity under the Act. At her deposition, Debano-Griffin acknowledged that her claim related to alleged contractual violations only:

> *Q*. My question is, are you claiming that the redirection of ambulance services, as alleged in paragraph 26 [of the Second Amended Complaint] was in violation of anything else besides the contract between Lake County and Life EMS?
>
> * * *
>
> *A*. No.

Later in her deposition, counsel for Lake County asked Debano-Griffin about the laws she claimed were violated with respect to the LIFE EMS contract:

> *Q*. What laws are you claiming they violated?
>
> *A*. The governing rules for ambulances with relationship to 911 having to basically provide immediate police, fire and ambulance services.
>
> *Q*. Can you be any more specific than saying that they're the "governing rules"?
>
> *A*. No.
>
> *Q*. Where would I find these governing rules?
>
> *A*. I don't know.
>
> *Q*. Where did you find them?

A. It's what we've learned about over the last several years throughout the State of Michigan.

Q. How have you learned them?

A. Through other 911 directors.

Q. And you've been told that these are governing rules?

A. These are good rules to follow, governing rules to follow, whatever.

Q. Okay. Have you been told that they are the laws of the State of Michigan?

A. Not specifically.

Q. Have you been told that they are the laws of the United States of America?

A. No.

Two things are clear from these exchanges. The first is that, at best, Debano-Griffin was reporting what she believed to be contractual breaches by LIFE EMS. The second is that in reporting these alleged breaches, she was not reporting actual or suspected violations of law. The reporting of alleged violations of "good rules to follow, governing rules to follow, whatever" is simply not the reporting of a violation of actually and contemporaneously existing law.

Debano-Griffin's reporting of the alleged diversion of ambulance millage funds, if I understand it correctly, is quite a different matter and is related to two distinct instances. The first was the transfer of $50,000 from an ambulance fund into a 911 fund that she administered. In her deposition, Debano-Griffin claimed that this was improper because the voters voted specific millage money for ambulance service and that was separate from the money they voted for 911 funding. The second instance related to the use of ambulance fund monies to pay for LEIN encryption. In her deposition, Debano-Griffin claimed that this was improper because ambulance services do not require use of the LEIN machine and also because this was "not what the voters voted on."

At this point, it is important to note that throughout her deposition, Debano-Griffin referred to "improper" transfers from the ambulance fund, presumably on the basis that such transfers were not in accordance with what the voters voted on. She also stated that she talked about these allegedly improper transfers with the finance committee, apparently of the Lake County Board of Commissioners, and with the Board of Commissioners itself. And in a memorandum of November 10, 2004, she notified the Board of Commissioners that she had moved the first meeting of the Compliance Review Committee to a higher priority because of "some possible accounting irregularities." Otherwise, the record below is barren—at least in my review—of any more particularized description of how these transfers violated the law. Thus, the question before us is actually this: with what degree of specificity must an employee describe a violation—whether known or merely suspected—of an actually and contemporaneously existing law in order to be engaged in a protected activity under the Act?

Once we establish a threshold standard, we can then determine whether Debano-Griffin's reports of improper transfers and of possible accounting irregularities met that standard.

III. Establishing The Standard

At the outset, I must agree with the dissent that there are a "dizzying array of laws, regulations[,] and rules promulgated by a multiplicity of government units at every level within the United States."[8] I further agree that few, if any, employees will know about these laws or their specific provisions. Thus, we cannot establish a standard that would require an employee to make a specific reference, by title or section number, to the law or laws that the employee knows or suspects is being violated. To do so would be to deny the protections of the Act to all but the most technically knowledgeable laypersons and lawyers.

But it is also evident, as I outlined above, that referring to "good rules to follow," "governing rules to follow," or "whatever" will not suffice. In order for an employee to engage in protected activity under the Act, there must be some recognizable, and articulated, connection between the known or suspected violation that the employee reports and an actually and contemporaneously existing law.

But how should we describe the specificity with which the employee must describe that connection? The concept of notice gives us some direction. This Court has held that an employer is entitled to *notice* of a report or threat to report of a whistleblower.[9] And that notice must be *objective*.[10] Using this notice concept, we can reason that, to be protected under the Act, an employee must provide a description of the connection between the known or suspected violation that the employee reports and an actually and contemporaneously existing law that would give notice to an *objectively reasonable* employer of both the known or suspected violation *and* the actually and contemporaneously existing law.

Using this standard, can we say that the reports Debano-Griffin gave concerning the transfers of ambulance fund money were sufficient to give notice to an objectively reasonable employer of the connection between the known or suspected violations and an actually and contemporaneously existing law? The answer must be no.

Giving every possible benefit of the doubt to Debano-Griffin, an objectively reasonable employer might conclude that her reports of "improper' transfers" and "possible accounting irregularities" rose to the level of known or suspected violations. But there is nothing in the record to substantiate that Debano-Griffin went any further. While Debano-Griffin's Second Amended Complaint asserted that she reported and complained that the re-direction of ambulance millage funds was "illegal," in her deposition she was at a loss to describe what

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[8] *Post* at ___.

[9] See *Roultson v Tendercare, Inc*, 239 Mich App 270, 279; 608 NW2d 525 (2000); *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 326; 559 NW2d 86 (1996); *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1989).

[10] *Roultson*, *supra* at 279; *Roberson*, *supra* at 326; *Kaufman & Payton*, *supra* at 257.

illegality occurred, other than to assert that the transfer was "not what the voters voted on." An assertion at this level of generality is simply not sufficient to put an objectively reasonable employer on notice of a violation of an actually and contemporaneously existing law.

On appeal, Debano-Griffin asserts that there are several laws that the transfers may have violated. In particular, she points to MCL 750.490 (providing for the "safe keeping of public monies" and stating that no public officer "shall, under any pretext, use or allow to be used, any such monies for any purpose other than in accordance with the provisions of law"), MCL 750.489 (pertaining to "false statements of public finance and transfer of same" and making it a misdemeanor for any agent of any county "who shall transfer or juggle the funds of the state or any municipal division thereof"), and MCL 141.439 (providing that counties may only spend money that have budgeted pursuant to that act).

While the lead opinion declines to consider these statutes because Debano-Griffin has raised them for the first time on appeal,[11] I do not see this as dispositive. Rather, as I see it, the dispositive factor is that Debano-Griffin gave not a hint in the proceedings below as to how the conduct that she reported had *any* connection, whether known or suspected, to *any* law. Thus, while the Act does not require Debano-Griffin to prove an actual violation of law, it did require her to give some description, even if expressed in the most basic terms, of an actual law that she knew or suspected that Lake County and its Board of Commissioners had violated. Under an objective standard, this she has failed to do.

Thus, I would conclude that, because Debano-Griffin, under an objective standard, failed to establish that she was engaged in a protected activity under the Act, the trial court erred when it denied summary disposition. I, therefore, concur with the lead opinion that this case be reversed and remanded for an entry of an order granting the motion for summary disposition of Lake County and its Board of Commissioners on Debano-Griffin's claim under the Act.

/s/ William C. Whitbeck

[11] *Ante* at ___.