

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

KATHERINE M. ERNSTING,

Plaintiff,

v.

Case No. 04-989-CD

Hon. Timothy P. Connors

AVE MARIA COLLEGE, a Michigan non-profit  
Corporation,

Defendant.

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**BRIEF IN OPPOSITION TO DEFENDANT'S**  
**MOTION FOR SUMMARY DISPOSITION**

**AND**

**PROOF OF SERVICE**

This case arises out of the employment and subsequent termination of the Plaintiff Katherine Ernsting by the Defendant, Ave Maria College, on July 2, 2004. Ernsting had been employed by the Defendant since September 2001. Initially employed as the director of public relations, Plaintiff held several positions with the Defendant, including interim director of financial aid. At the time of her termination, Ernsting was employed as the development director.

In her complaint, Plaintiff has alleged that she was terminated in retaliation for reporting Defendant's suspected violations of the law to the Department of Education (DOE) in violation of Michigan's Whistleblower's Protection Act (WPA) MCL 15.361, *et seq.* After this case was remanded from the Court of Appeals in December 2007, the parties conducted additional discovery. Defendant now brings a motion for summary disposition pursuant to MCR 2.116 (C)(10) alleging that Plaintiff cannot establish a prima facie case because she was not a whistleblower and that she cannot demonstrate a causal link between her protected activity and her termination. A detailed review of the complete record and the applicable law, however, demonstrates that Plaintiff's claim is legally and factually supported. Therefore, Defendant's motion should be denied in its entirety.

### **STATEMENT OF FACTS**

#### **I. PLAINTIFF'S WORK HISTORY WITH DEFENDANT**

Katherine Ernsting commenced her employment with the Defendant, Ave Maria College, (AMC) on September 10, 2001 as the Director of Public Relations. In November 2002, her title changed to Coordinator of Public Relations and Marketing although she maintained the same duties.

In September 2003, Plaintiff accepted a position as special assistant to the President of the college, Robert Muller.<sup>1</sup> Her duties included communications between Muller and other departments in the school, outside media and the administrators of Ave Maria University in Florida. (Ernsting

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<sup>1</sup> Prior to this time, Plaintiff's development activities were for both the Ave Maria University which was being established in Florida and AMC. As much of the development activity relocated to Florida, Plaintiff assumed a new position here in Michigan as she did not plan to relocate to Florida until 2006. (Ernsting dep, (10/08) p 40)

(3/05) dep, p 35).<sup>2</sup> Plaintiff was also responsible for attending budget meetings and serving as liaison to the admissions office and the faculty. (Id, at 36). In addition, Plaintiff's duties included academic writing, public relations and graduation. (Id at 37). As Muller described it, Ernsting wore a number of hats in the short time that she worked for him, had made a positive contribution to the school and had the type of versatility that was very helpful to the college. (Id, p 38, 93).

In January 2004, Plaintiff was asked to take over responsibility for the Financial Aid department. This assignment was in response to the Department of Education's mandate that (REDACTED: AMU Financial Aid Director), the financial aid director for Ave Maria University in Florida, discontinue all duties and activities associated with AMC's financial aid program.<sup>3</sup> The DOE did not want Hickey involved because he was a full-time employee of Ave Maria University, not the college.<sup>4</sup> Muller selected Plaintiff to replace Hickey. Plaintiff's work in this position entailed communications with the government as well as for reporting and distributing aid to students.<sup>5</sup> (Ernsting dep, p 50-1 (10/08)). After a short tenure in this position, Plaintiff was promoted to Director of Development Support. (Exh 2 ).<sup>6</sup> This is the position Plaintiff held at the time of her termination.

## **II. AVE MARIA COLLEGE DECIDES TO OPEN A CAMPUS IN FLORIDA**

During the Plaintiff's tenure, the Defendant began plans to open a campus in Florida. Ave Maria College was originally incorporated in May 1998 as the Ave Maria Institute. (Exh 1) Ron Muller had been initially contacted in 1997 by Thomas Monaghan to start the college and was appointed to be the founding provost. (Muller dep, p 8-9) When Nick Healy was brought in as

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<sup>2</sup> Excerpts from Ernsting's deposition are attached as Exh 5.

<sup>3</sup> The Department of Education had gotten involved because it had been reported to them that (AMU Financial Aid Director- REDACATED) had attempted to illegally admit eleven students to the college. (Ernsting (10/08) pp 50, 52).

<sup>4</sup> At this time, Ave Maria College (AMC) was an accredited college, eligible to distribute financial aid. Defendant was trying to start up a campus in Florida, incorporated as Ave Maria University (AMU).

<sup>5</sup> The government requested that Defendant hire an independent agency to oversee financial aid because neither Plaintiff nor Muller had the necessary training. (Id, p 50).

<sup>6</sup> Plaintiff requested removal from the financial aid position because Defendant did not want her speaking to the DOE, which was a requirement of the position.

President, Muller returned to teaching until the Board asked him to assume the Presidency of the College in July 2003. He held that position for two years pursuant to a contract. (Muller dep, 12).<sup>7</sup>

During its early years, the Board was looking for larger permanent space for the college. In 2002, the Defendant learned that Ann Arbor was unwilling to rezone Domino Farms for an educational facility. As a result, Monaghan began looking for a more suitable location in Florida.(Monaghan dep p. 16) As reported to the Board of Trustees in April 2002, licensing of the new location was a “challenging and complex” process which would take several years. At that time no decisions were made about the future of the Michigan campus. (Exh 3, 4/24/02 board minutes).<sup>8</sup> As part of the process, Nick Healy relocated to Florida to manage the project for the new and interim facilities. (Id)

As planning progressed, Defendant decided to open the facility in Florida as a separate stand alone entity rather than a second campus of AMC.<sup>9</sup> In its fundraising, Defendant acknowledged that the Florida campus would be operating as AMC while it sought certification. (Exh 7). This inconsistency caused the Defendant to engage in illegal activities regarding certification and fundraising which were reported to the Department of Education by Plaintiff and others, resulting in fines, negative publicity and legal difficulties for the university.

### **III. STAFF AND FACULTY TO BE RELOCATED TO FLORIDA**

While planning for the Florida campus, Defendant promised all faculty and staff in good standing that they would be offered the opportunity for a position in Florida. (Ernsting (10/08) p 37;

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<sup>7</sup> Although Muller was ostensibly the President and responsible for running the college, the reality was that he functioned in the “Monaghan universe”, decision-making was actually under the control of Monaghan, Paul Roney and Nick Healy. (Muller dep pp 32-33)

<sup>8</sup> In November 2003 and February 2004, the Board of Trustees was looking at options for keeping an academic presence in Michigan. (Exh 6 and 7 Board of Trustees Minutes 11/18/03 and 2/17/04). In fact, Defendant did not make the final decision to close operations in Michigan until June 2004 in retaliation for the reports of illegal conduct made by Michigan employees to the Department of Education.

<sup>9</sup> Contrary to Defendant’s argument, it had not decided to abandon the Michigan campus as late as April 2004. Several proposals were under consideration to maintain the Ave Maria’s presence in Michigan. (See Exh 6) The decision to reject any continuation of an educational facility in Michigan was made in June 2004, in retaliation for the complaints to the DOE.

Muller dep p 84). A survey was then taken by Defendant to gauge employees' interest in relocating to Florida. As part of that survey, Plaintiff indicated that her desire would be to relocate in 2006 when her daughter graduated. (Id, p 39).

In April 2003, Plaintiff was working with David Kelly, the Vice president of Institutional Advancement. Kelly indicated that he wanted Plaintiff to relocate to Florida but that she did not need to go immediately. (Id, p 40). Nick Healy was also agreeable to Plaintiff's move to Florida in 2006 in a conversation with Plaintiff in the Fall of 2003.(Id, p 41). Plaintiff wanted to be sure that her acceptance of a position working with Muller, the President of AMC, in September 2003 would not be considered a refusal of a position in Florida. (Id, p 43). In a follow-up survey conducted by Plaintiff at Muller's request again indicated her intention and desire to relocate to Florida when the permanent campus was scheduled to open in 2006 (Exh 10; Muller dep 85). Thus it was understood by all that the Plaintiff's employment was not dependent on decisions regarding the future of the Michigan campus.

**IV. PLAINTIFF REPORTS POTENTIALLY ILLEGAL CONDUCT TO THE DEPARTMENT OF EDUCATION**

When assigned to temporarily oversee the financial aid department, beginning in January 2004, Plaintiff started reporting improprieties and illegalities to the Department of Education. In January, Plaintiff and others including Maria Herbel, the AMC registrar, and Suzanne Abdella, the AMC Admissions Director, learned that (REDACTED: AMU Financial Aid Director), the AMU Financial Aid Director in Florida was attempting to change student codes for 11 students in Florida so that they could obtain financial aid under the guise of being students enrolled in the college. The recoding was necessary because federal financial aid was not available to AMU students until AMU became certified. (Exh 9)

Plaintiff had a conversation with Joe Hajek from the DOE about these students for which Defendant was receiving financial aid but who were not enrolled in the college and provided documentation regarding the agreements reached with the DOE. These agreements included that the contract with AMU for financial aid be terminated, the incorrectly awarded money be returned and (REDACTED: AMU Financial Aid Director) be denied access to financial aid documents for AMC since he was a full-time employee of AMU. (Exh 11).<sup>10</sup>

Plaintiff also reported the merger of the two institutions – Ave Maria College in Michigan and Ave Maria University in Florida.<sup>11</sup> Additionally, Plaintiff discussed with Joe Hajek that Hickey was illegally handling financial aid for the college while a full-time employee of the university. Plaintiff and Hajek also discussed that Defendant had an “ineligible institution” in Florida. (Ernsting dep, pp 49-51 (3/05)). Following the conversation with Hajek, Plaintiff sent him some of Nick Healy’s memorandum regarding the transfer of accreditation which was potentially illegal. (Id at 52-3).

Plaintiff continued to communicate with Joe Hajek and provide him with what she believed was improper and illegal conduct committed by the Defendant. On February 7, 2005, Plaintiff sent Hajek a memo outlining Hickey’s continuing involvement in financial aid. (Exh 12). She also responded to Hajek’s requests for information regarding the accreditations and licensing for AMU. Hajek told Plaintiff that there were problems with the documentation because the accreditation was for a degree site where all classes would be taught by AMC faculty and services offered by AMC personnel, not a course site. He also told Plaintiff that accreditation is not an asset that can be transferred in a merger. According to Hajek, any transfer of assets would trigger a change in ownership and cause a loss of accreditation and funding. (Exh 13).

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<sup>10</sup> The removal of (AMU Financial Aid Director-REDACTED) from this position resulted in Plaintiff’s assignment as interim director of Financial Aid.

<sup>11</sup> In its motion, Defendant suggests that the issue of the 11 student’s improper receipt of financial aid was the only report of improprieties made by Plaintiff. This is untrue. Plaintiff made ongoing reports from January through June 2004.

Plaintiff was concerned that the Defendant “had a board and a president, but the board and the president were not really running the institution, the institution had really come under the power and control of another institution.” (Ernsting dep, pp 112-3). Feeling that this was illegal, Plaintiff “collected every document she could find” and reported to Joe Hajek. (Id) She reported to the DOE that Defendant was trying to switch accreditors and transfer accreditations. (Id at 116). She also reported to the DOE that the Defendant did not have any academic supervision in violation of the contract. (Id at 117-8). Additional illegalities reported by Plaintiff was the attempt of the Defendant to merge the college into the university which was an ineligible institution under Title IV and the common ownership of the two schools. (Ernsting dep (10/08) pp 52-61). In addition to sharing her findings with Hajek, Plaintiff summarized the issues in a memo to Ron Muller. (Id at 115).<sup>12</sup>

Plaintiff also reported to Joe Hajak that there was no license for the operation of Ave Maria College in May 2004. The closing of the license was also reported to Tom Utz of the DOE’s Inspector General’s Office. Plaintiff had filed a license in March and when she inquired about that license, she was told that it had been closed the previous August. (Ernsting dep, p 87). After Hajak told Plaintiff that Defendant’s actions “look like fraud”, she followed up with Tom Utz. (Id, p 89) The license for the college was closed when one for the university was issued. The Department of Education had granted permission to draw down aid on the closed license because that was the entity that was accredited as a degree site. So Plaintiff then reported to the Department of Education the failure to report the closing of the license for the college and opening of a license for the university at the time of its occurrence. (Id at 97).

Plaintiff’s contacts with DOE continued even after she gave up her financial aid responsibilities. After learning that Healy had fraudulently cancelled the Florida license for AMC’s

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<sup>12</sup> Muller even recognized that illegalities had been reported to the DOE. In a memo to AMC Trustees including Nick Healy, Tom Monaghan, Paul Roney and Father Fessio, Muller related that financial aid practices employed by AMC in awarding aid to Florida students has been reported to the DOE and may be illegal. (Exh 14).

Naples course site, Plaintiff reported this new revelation to Tom Utz of the DOE's Inspector General's Office. (Ernsting dep (3/05), pp 85-7). Shortly thereafter, on May 11, 2004, Plaintiff joined with other faculty and staff members and sent a report entitled "fraud, waste and abuse by the President of Ave Maria University" to the Inspector General's office. (Exh 20). Contacts with DOE continued to the end of May 2004. The attacks on Plaintiff and other whistleblowers accelerated at this point. In a published article, they were described as confused, intemperate and creating a fiasco (Exh 21).

**V. THE REPORTS OF ILLEGALITIES LEAD TO DOE ACTION AGAINST DEFENDANT**

On June 15, 2004, Muller received a report from the DOE that AMC needed a Florida license authorizing the college to conduct a course site in order to provide financial aid to students in Florida. (Exh 25) If the original license could not be reinstated, Muller estimated the financial aid to be repaid was about one million dollars. (Id).

Then on June 21, 2004, the DOE issued a "Heightened Case Monitoring 2 (HCM2) Notification" which restricted AMC's authority to disburse financial aid. (Exh 26) The notice stated that due to institutional deficiencies and irregularities, including the relinquishment of the Naples Florida State license without notifying the DOE. The DOE concluded that AMC "is expected to incur a substantial liability" payable to the DOE as a result. (Id).<sup>13</sup>

**VI. THE REPORTS BY PLAINTIFF AND OTHERS TO THE DOE ANGER DEFENDANT AND LEADS TO RETALIATION**

The reaction of Defendant's executive committee to the reports made to the DOE was immediate and extremely negative. Rather than take the information in a constructive manner and attempt to correct the deficiencies, the attacks on the reporting employees began. Healy sent a memo on February 3, 2004 to Muller criticizing him because his staff reported irregularities to the

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<sup>13</sup> On September 15, 2004, the DOE finally issued its reporting finding that AMC Florida was not "legally authorized to disburse Title 4 HEA program funds to students after August 14, 2003" and ordered repayment of \$259,620.00 to the DOE. (Exh 27)

Department of Education and wasted money by requiring a duplication of effort since (REDACTED: AMU Financial Aid Director) was removed from the process. (Exh 15). Muller testified that this memo made it clear that Healy was not pleased with those who went to the DOE. (Muller dep, p 61).

On February 12, 2003, Plaintiff was also summoned to the office of the AMC's Vice president of accreditation and assessment, Rudy Garcia, who stated that he knew what Plaintiff, Herbel and Abdalla were doing and warned that, "Florida knows it, too."<sup>14</sup> (Ernsting dep (3/05)p 100). Also, after Plaintiff sent a memo to Muller updating him on her conversations with Hajek, she was instructed by Muller to stop talking to the DOE despite the fact that her job required the interactions.(Id, p 103-4)<sup>15</sup>

In March 2004, Muller reported to several people that Nick Healy had threatened that he would withdraw all support for the Michigan college and everyone would be out of a job if "anyone else talked to the DOE, contacted the media or the board for any reason." (Exh 16; Ernsting dep (10/08) p 118). Muller also told Plaintiff that Healy and Father Fessio were mad because they had to go to a core site from degree site due to things Plaintiff had reported to the DOE. Muller stated that Plaintiff was "caught in the crossfire." (Id, pp 120-1).

Muller also shared with Suzanne Abdalla that "council members were also increasingly upset with Kate Ernsting for conversing with the DOE, even though it was part of her job." (Exh 17). Abdalla also attended a meeting in June 2004 with Jack Stiles, AMU provost, who stated that "the AMC faculty and staff had ruined AMC's chances for survival in large part because of the calls made to the DOE." Within days of that meeting, Plaintiff, along with Abdalla and Jay McNally, who also had contact with the DOE were terminated. Muller affirmed that Florida felt that anyone who

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<sup>14</sup> Witnesses have clarified that "Florida" refers to Healy, Monaghan and Roney who were de facto running the school. (Muller dep p 18)

<sup>15</sup> To comply this request, Plaintiff asked to be removed from the financial aid position and remove her access to the federal database. Otherwise, she would be required to continue to speak with the Department of Education. (Id, pp 103-4). She was finally placed in a new position as Director of Development Services on March 30, 2004 In addition, Muller insisted that Plaintiff tell him whenever she had contact with the DOE (Id, p 140).

talked to the DOE was an “enemy” of Ave Maria University. They looked on “discussions with the DOE as disloyal.” (Muller dep , pp 18-20). Muller also told Abdalla that the people specifically mentioned by Monaghan, Healy and Father Fessio with whom they were upset were Abdalla, Herbel and Plaintiff. (Id, p 22).

Muller also confirmed that Healy did not hide his displeasure. He told Jay McNally that “Tom and Nick were very angry” and that Healy indicated that he was going to fire the people who talked to the DOE. (Muller dep, pp 63-4). Muller reiterated this point several times. (Id). Tom Monaghan shared his deep anger with those employees who reported to the DOE describing their actions as “erroneous, slanderous and probably malicious.” (Monaghan dep, p 51)<sup>16</sup> He went so far as to describe these individuals as “academic terrorists” who he would not want around his institution. (Id at 91).

The anger of the executive committee responsible for ruining the Defendant which included Paul Roney, Father Fessio, Nick Healy and Tom Monaghan, was not limited to words. Eventually it led to the termination of the Plaintiffs and other whistleblowers, Jay McNally and Suzanne Abdalla. These termination decisions occurred despite the continuation of Plaintiff’s functions and the recent commitment to her, the position and the campus<sup>17</sup> and only a week after receipt of the DOE deficiency notification. (Exh 26).

**VII. DESPITE A COMMITMENT TO CONTINUE THE MICHIGAN CAMPUS THROUGH 2007, PLAINTIFF WAS TERMINATED**

On June 17, 2004 Plaintiff received a letter from the Defendant thanking her for the prior year of service and informing her that her “salary will be increased to \$46,000 for the 2004-5 fiscal year effective July 1, 2004.” (Exh 19). Muller fully intended that Plaintiff would be employed for the 2004-5 academic year based on the organizational needs of the college. (Muller dep, p 37). When he

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<sup>16</sup> Excerpts from Tom Monaghan’s deposition are attached as Exh 18.

<sup>17</sup> Muller told Plaintiff as early as December 2003 that she might not have a job in Florida and would likely not be welcome there. (Muller dep pp 87-88)

prepared this letter, Muller had no idea that Plaintiff would be terminated two weeks later. (Id, p 47). Muller felt that Plaintiff made such a valuable contribution to the Defendant that it was obvious that her employment should continue. (ID, p 95).

AMC was not in wind-down mode. The school was to continue to function as AMC until accreditation was obtained for AMU and students could graduate. The school was given \$25 million to continue through 2007 (Ernsting dep (10/08) p 105). The plan was to stay open until 2007 and until that point, the college was going to be admitting students and maintaining a degree program. (Id, p 106).

Muller, who was the college president, testified that there was no plan to wind down the operations before the summer of 2004. A plan was being developed to evolve from Ave Maria to a new institution maintaining the same faculty. That summer, a decision was made to close the campus in June 2007. To effectuate that decision, Muller had already formulated a plan to wind down the campus by determining what was needed in the subsequent years as well as the budget for the remainder of the time that the campus would be open. (Muller dep, p 53).

On June 28, 2004, the Board of Trustee scheduled a meeting to discuss the possible termination of Muller for extending faculty contracts without proper authorization. The Board did not take that action. Instead, they passed a resolution to terminate the admissions, development and public relations department. (Exh 20). As a result of this resolution, Muller was forced to terminate the employees in these departments which included all the individuals who had complained to the DOE about the Defendant's activities and included all those employees about whom Monaghan, Father Fessio and Healy expressed anger due to their whistleblowing activities. (Muller dep, p 60).

Based on this planning, Muller did not anticipate cuts in admissions, development or public relations. (Id, p 55). The Board's resolution which required the termination of these departments went further than what Muller envisioned as necessary. (id p 56) Curiously in the same resolution,

Defendant's Board established a committee to determine the personnel level and budget requirements for the college but took unilateral and immediate action with regard to these three departments in which the whistleblowers all worked without awaiting the committee's recommendation. (Id, p 59-60)

Plaintiff was notified of her termination on July 2, 2004. (Exh 21) The reasons given were organizational changes. (Id). Yet, Plaintiff's duties continued after termination. The public relations work for which Plaintiff has responsibility continued, including graduation, preparation of student publications and the academic catalog. The phon-a-thon also still was used to raise funds. (Ernsting dep (10/08) pp. 45-49). Muller also reported that there was an ongoing need for Plaintiff's fundraising work. (Muller dep p. 77)

**VIII. IN VIOLATION OF POLICY AND DESPITE OPEN POSITIONS, PLAINTIFF WAS NOT REHIRED**

After her termination on July 2, 2004, Plaintiff sought another position with Defendant. She was considered an employee in good standing and eligible for rehire. (Muller dep, p 74) Yet she was not offered a position despite the policy requiring priority to be given to former employees.(Muller dep p 93) She applied for a position in the Financial Aid office through Ron Muller. Instead [Name redacted] was transferred from the Registrar's office despite the fact that she had no prior experience and had refused training. (Ernsting dep (10/08) pp 63-5; 108-115).<sup>18</sup> In addition, Christopher Beiting, the Dean of Students, tried to get Plaintiff a position working on the student handbook or as facilities manager. (Beiting aff, Exh 24). This request was also rejected.

Although several employees, including Chris Beiting, Maria Herbel and Suzanne Abdalla, came to Muller seeking to rehire Plaintiff in open positions including the financial assistance position, facilities managers, and a contract position managing the academic catalog and

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<sup>18</sup> Muller told Plaintiff that the decision have been given to Jack Stiles which was the provost for AMU and had no authority with regard to the college. (Ernsting dep (10/08) pp 108-115).

commencement, Muller would not approve rehiring Plaintiff stating that upper management would not allow her rehire because she had been branded a trouble maker for her reports to the DOE. (Exh 24, Beiting aff). Muller told Herbel that Plaintiff could not be rehired because Paul Roney did not want Plaintiff around. According to Muller, it was very clear that Plaintiff was very unpopular with Roney, Nick Healy, Jack Sites and Tom Monaghan (Muller dep, pp 67-8). Muller also admitted that despite her qualifications, Plaintiff could not be hired for the financial aid position because of the “animosity towards her” due to her contact with the DOE . (Id at 71-2).

### **STANDARD OF REVIEW**

The Defendant brings this motion for summary disposition pursuant to MCR 2.116 (C )(10). This motion tests the factual sufficiency of the claim. *Maiden v Rozwood*, 461 Mich 109, 120(1999). “When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Meyer v Center Line*, 242 Mich App 560, 574(2000). A trial court may only grant a motion for summary disposition under MCR 2.116(C)(10) if the evidence shows there is no genuine issue with respect to any material fact. *Sprague v Farmer’s Ins Exch*, 251 Mich App 260, 264 (2002). A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ. *West v. GMC*, 469 Mich. 177, 183 (2003).

### **ARGUMENT**

#### **I. PLAINTIFF SATISFIES EACH ELEMENT REQUIRED TO ESTABLISH A WPA CLAIM**

The Plaintiff has alleged that Defendant violated the Whistleblower’s Protection Act when it terminated her employment. Pursuant to the Whistleblowers’ Protection Act, MCL § 15.362,

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in 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, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

MCL § 15.362 [emphasis added].

The purpose of the Whistleblower's Protection Act is to alleviate the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses. The act was intended to protect the public and promote public health and safety by removing barriers that may interfere with employee efforts to report violations of the law. *Trepanier v National Amusements, Inc*, 250 Mich App 578, 584 (2002); *Anzaldua v Band*, 457 Mich 530, 533, 578 NW2d 306, 308 (1998). Because the WPA is a remedial statute, it is to be liberally construed to favor the persons the Legislature intended to benefit. *O'Neill v Home IV Care, Inc.*, 249 Mich App 606, 614, 643 NW2d 600, 604 (2002).

To establish a claim, Plaintiff must demonstrate that 1) she was engaged in protected activity; 2) she suffered an adverse action; and 3) there is a causal connection between the adverse action and the protected activity. *West, supra*; *Roulston v Tendercare, Inc*, 239 Mich App 270 (2000); *Terzano v Wayne Co*, 216 Mich App 522 (1996). Pursuant to the statute, protected activity includes 1) reporting a violation of law, rule or regulation to a public body; 2) being about to report a violation to a public body; or 3) being requested by a public body to assist in an investigation. MCL 15.362. Ernsting has met the burden of making her prima facie case under the WPA.<sup>19</sup>

**A. PLAINTIFF ENGAGED IN PROTECTED ACTIVITY**

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<sup>19</sup> In its prior motion for summary disposition, the Defendant argued that Plaintiff's reports to the Department of Education were not protected activity because the DOE was not covered by the definition of protected activity in the statute. That argument was rejected by the Court of Appeals and therefore has not been raised at this time.

Plaintiff engaged in protected activity when she reported Defendant's illegal conduct to the Department of Education on repeated occasions between January and June 2004. She was terminated on July 2, 2004. There is also a clear casual connection between the two since Defendant's executive team expressed their anger and outright hostility toward Plaintiff and others for their reports and communications with the DOE, including threats to terminate their employment. Despite the ongoing need for the services Plaintiff provided, the decision to terminate her employment was made only a week after the DOE issued its report based on the information Plaintiff provided that Defendant had violated the law in the manner it distributed financial aid and therefore would likely be subject to a large financial penalty. Thus Plaintiff easily establishes a *prima facie* case.

Despite this evidence, Defendant argues that Plaintiff did not engage in protected activity because her contacts with the DOE were done as part of her job duties. This argument is without merit and has been explicitly rejected by Michigan Supreme Court. Nothing in the plain language of the statute nor its legislative history support the exception that Defendant is attempting to create in this case. The statute does not exempt from protected activities reports made in course of an employee's job responsibilities. Pursuant to MCL 15.362 all reports by employees to public bodies constitute protected activity. The only exception is for those reports known to be false. Thus in *Terzano, supra*, an electrical inspector for Wayne County was protected by the WPA for actions taken within the scope of his employment. *Id* at 523.

In *Brown v Mayor of Detroit*, 478 Mich 589 (2007)<sup>20</sup> the plaintiff was a detective in the executive protection unit of the Detroit Police Department who reported misconduct by his fellow officers and the mayor to the police department's Professional Accountability Bureau. His co-plaintiff took the allegations and authorized a preliminary investigation and prepared a memo which

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<sup>20</sup> Curiously, Defendant failed to acknowledge this recent decision of the Michigan Supreme Court which by its unambiguous language defeats Defendant's argument.

was submitted to the mayor and chief of police. In addition to holding that a whistleblower is not required to report illegal conduct to an outside agency to come under the purview of the WPA, the court concluded that the WPA protects individuals who blow the whistle as part of their job duties.

The Supreme Court unequivocally stated:

Finally, there is also no language in the statute that limits the protection of the WPA to employees who report violations or suspected violations only if this reporting is outside the employee's job duties. The statute provides that an employee is protected if he reports a "violation or a suspected violation of a law or regulation or rule..." MCL 15.362. There is no limiting language that requires that the employee be acting outside the regular scope of his employment. The WPA protects an employee who reports or is about to report a violation or suspected violation of a law or regulation to a public body. The statutory language renders irrelevant whether the reporting is part of the employee's assigned or regular job duties. *Brown, supra* at 596.

See also *Dunleavy v Wayne County Commission*, 2006 WL 891450 (ED Mich 2006) in which Judge Friedman found that the protections of the WPA still applied to the plaintiff even if he "was simply doing his job" as an auditor. *Id* at \*7.

Ignoring the *Brown* decision, Defendant instead relies on two decisions which in light of *Brown* are not longer valid for the principle for which Defendant cites them. Moreover, the cases are factually distinguishable. In *Deneau v Manor Care, Inc*, 219 F Supp 2d 855 (ED Mich 2002) the plaintiff, who was a minimum data set coordinator, merely filed a report which indicated that residents were losing weight. She did nothing more than report objective data. In this case, Plaintiff reported to DOE and its inspector general activities that she perceived to be illegal including the lack of license for the Florida campus, the improper access to financial aid files at the AMC by the financial aid director of AMU, the improper common board membership between AMU and AMC and the impermissible attempted transfer of assets between AMC and AMU. None of these were reports prepared and presented as part of her job duties.

In *Bush v Detroit School District*, 2006 WL 2685088 (Mich App 2006) the plaintiff based her WPA claim on a request for a financial audit. The court rejected her claim because the request was

part of her job duties. Moreover this was not a report of wrongdoing but request for an investigation. *Bush* is no longer valid in light of the *Brown* decision. Moreover, the request for an audit pales in comparison to the many reports of wrongdoing made by Plaintiff both while she was interim director of Financial Aid and afterward. Thus Plaintiff's reports constitute protected activity under the WPA and Defendant is not entitled to summary disposition.

Defendant also argues that Plaintiff is not a real whistleblower because she did not initiate the complaint and her motivation was not to report illegal conduct in an attempt to remedy the situation. This argument is based on a misreading of the record. First Defendant contends that Abdalla, not Plaintiff, was the whistleblower because she spoke to the DOE first. Abdalla spoke to the DOE only about one issue and only had one contact. That information regarding the miscoding of eleven students was resolved without any fines or penalties assessed to the Defendant. However, Plaintiff reported many other irregularities and illegalities to the DOE and its Inspector General which were not part of Abdalla's limited report. Plaintiff, not Abdalla, told the DOE that Defendant had closed its license for operating in Florida, that the campus lacked academic supervision, that Defendant was improperly trying to transfer assets and that two institutions, AMC and AMU improperly had common board membership. The DOE was not on notice of these matters based on anything learned from Abdalla. Therefore Plaintiff was a whistleblower with regard to these reports of suspected illegal activity.<sup>21</sup>

Further while Plaintiff stated that initially her reports to the DOE were intended to protect Robert Muller, AMC's President and her boss, she continued to provide reports of suspected violations to remedy the situation and bring the Defendant in compliance with the law. In fact, she continued to report to the DOE even after she was removed from the financial aid position and

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<sup>21</sup> In addition, Plaintiff is also covered by the WPA because she participated in an investigation being conducted by a public body. By responding to the DOE's request for information regarding accreditation and licensing, Plaintiff's activities are covered by the WPA. *Henry v City of Detroit*, 234 Mich App 405, 410 (1999).

Muller told her to stop talking to the DOE. She was trying to stop the illegal activities by the Defendant. (Ernsting (3/05) pp 65, 112-20, 139). Thus Plaintiff is clearly a whistleblower whose activities in reporting suspected improper and illegal conduct from January until June 2004 is protected by the WPA.

**B. PLAINTIFF PRESENTS EVIDENCE OF A CAUSAL CONNECTION**

The Defendant also argues that Plaintiff cannot establish a causal connection between her protected activity and the discharge.<sup>22</sup> Many witnesses testified to the anger and hostility expressed by members of the Defendant's executive committee toward those employees who reported illegal conduct to the DOE. Muller, Abdalla and Herbel all heard Nick Healy, Jack Stiles, Father Fessio, Paul Roney and Tom Monaghan express their anger toward the whistleblowers and threaten that they would be out of a job. The terminations then occurred with a week of Defendant receiving notice that it would have to make a substantial payment to the DOE for improperly obtaining financial aid for students attending a school lacking a license.

This is exactly the evidence found to satisfy the causal connection requirement in *Roulston v Tendercare*, 250 Mich App 270 (2000). In *Roulston*, the employer argued that Plaintiff could not establish the causal connection based solely on the proximity in time despite the fact that Roulston was terminated within hours after defendant learned of her protected activity. The court found that the timing combined the extent of the anger expressed by the administrator who fired her suffices to establish the causal connection. *Id* at 280.<sup>23</sup> In this case, there is a record of the animosity and anger

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<sup>22</sup> In support of its argument, Defendant relies on *Shively v Battle Creek Schools*, an unpublished case of the Michigan Court of Appeals. That case is easily distinguishable. The Court of Appeals found that Shively could not establish a causal connection because the change in his job duties began before the protected activity and the job elimination was suggested by someone unaware of the protected activity. Here Plaintiff's job was secure until her communications with the DOE began. Moreover, the decision to terminate her employment through the closure of the departments which employed the whistleblowers was done by the Board members aware of and angry due to the whistleblowing activities of Plaintiff and others who were also terminated.

<sup>23</sup> Additionally, unlike *Taylor v Modern Engineering*, 252 Mich App 655 (2002) on which Defendant places heavy reliance, a legitimate workforce reduction would not have ended Plaintiff's employment. By the time the campus was to close in 2007, Plaintiff would have relocated to Florida, a point Defendant has conveniently ignored.

toward Plaintiff for her whistleblowing activity captured in memos and corroborated by Defendant's own president Robert Muller is sufficient to establish the necessary causal connection.<sup>24</sup>

**II. PLAINTIFF HAS DEMONSTRATED A GENUINE ISSUE OF FACT THAT DEFENDANT'S EXPLANATION FOR HER TERMINATION WAS PRETEXTUAL.**

Once the Plaintiff presents a *prima facie* case, the "burden shifts to the Defendant to articulate a legitimate business reason for the discharge. If the Defendant produces evidence establishing the existence of a legitimate reason for the discharge, the plaintiff must have an opportunity to prove that the legitimate reason offered by the defendant was not the true reason but only a pretext for the discharge." *Roulston, supra*, at 280-1. "A plaintiff can prove pretext either directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (Id at 281).

Although the Defendant did not address the issue of pretext directly, it infers that Plaintiff cannot meet this burden, claiming that Plaintiff was terminated for a legitimate reason, i.e. elimination of her department. This explanation is easily demonstrated to be unworthy of credence through overwhelming evidence set forth above. Despite its assertion that Abdalla was the only whistleblower, Defendant knew that Ernsting made numerous reports to the DOE and responded to requests for information as part of its ongoing investigation into Defendant's illegal conduct. Muller

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<sup>24</sup> Attaching a long "timetable" the Defendant argues that there was a long lapse in time between the protected activity and the termination. See Defendant's Brief pp 15-6. The Defendant however has left many critical events off its chart. First while pointing out the times that Defendant recommitted to its plan to open a campus in Florida, it fails to note that those same minutes also committed time and resources to a plan to maintain a presence in Michigan. No final decision was made until June 2004 to permanently close the Michigan campus in 2007 and that was done in anger after the DOE issued a "heightened cash monitoring notification" with a warning of Defendant's potential substantial liability. It also ignored the Defendant's offer and Plaintiff's acceptance of a position in Florida which it was anticipated she would move in 2006. Also missing from its chart is the fact that President Muller did not indeed to eliminate Plaintiff or the departments identified by the Board for elimination and that the positions continued after Plaintiff's termination. The Defendant also ignores all the Plaintiff's whistleblowing activity as late as Memorial Day weekend about the closing of the Florida license which resulted in the financial liability of the Defendant. Finally Defendant did not include all Plaintiff's attempts at rehire which were rejected by the executive team of the Defendant. Without including these critical events, the Defendant's chart is not an accurate reflection of the events leading to the Plaintiff's termination.

and Garcia made Plaintiff aware that the Executive Committee<sup>25</sup> were well aware of Plaintiff's many reports to the DOE and their animosity toward her for those activities.

This animosity has been established by many witnesses. Healy himself issued memo disparaging those individuals who reported to the DOE. Muller shared with Herbel, McNally, Plaintiff and Abdalla that the Florida group which included Monaghan, Healy, Father Fessio and Roney all felt that the whistleblowers be fired.

Moreover, the evidence is clear that Defendant did not intend to shut down the departments which were allegedly eliminated on June 28, 2004 until the whistleblowing activity of the Plaintiff and others. On February 17, 2004 the Board resolved to allow AMC administration to plan a Michigan continuation college. Notably, support for a continued presence in Michigan was only withdrawn by Nick Healy on May 12, 2004 – one day after Plaintiff and other whistleblowers issued a lengthy report to the DOE. (Exh 28).

The immediate need to eliminate the Admissions, Public Relations and Development department on June 28, 2004 is also unworthy of credence. The decision was made in a Board meeting with no agenda called to consider the termination of the President, not reorganization or reduction plan for AMC. Defendant's own President, Robert Muller, did not support the plan of shutting down the departments and felt that those employees were needed even if the campus was in a wind-down mode since there was a commitment to keep the campus functioning until 2007. In making this spontaneous decision, Defendant did not investigate or analyze which department should be shut down. Although Muller was working on a wind-down plan, the Board never discussed or developed strategies for the wind-down including how much overhead must be cut or

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<sup>25</sup> The Defendant also argues that Plaintiff's claim fails because Tom Monaghan testified that he was not aware of contact between Plaintiff and the DOE. (Defendant's Brief, p 17). Actually Monaghan testified that he could not recall if he was aware of who had contacted the DOE. In addition, other witnesses testified that he was aware and quite upset that Plaintiff had made reports to the DOE. Thus, an issue of fact is created as to Monaghan's knowledge. Moreover, Monaghan did not act alone although he did exercise a lot of control over the Defendant's operations. Also involved in the Executive Committee and the Board were Nick Healy, Paul Roney and Father Fessio. Defendant does not claim that they were unaware of Plaintiff's protected activities.

what functions would be required for the remaining three years. In fact, Defendant's Board voted to create a committee to complete such an evaluation at the same time it voted to close the three departments. If this was a reasonable business decision, surely Defendant could have waited for the committee to do its work. Only its animosity toward the whistleblower's required such hasty, ill-conceived action.

Moreover, Defendant continued to perform the activities previously handled by the eliminated departments. The Phonathon continued for several years (Exh ). In addition, Defendant requested that Plaintiff meet with employees of her old department to answer questions about the phonathon and gift fulfillment. The elimination of the department, even if true, is still pretext. Plaintiff was scheduled to go to Florida so the elimination of the Michigan campus and/or the development department would not have caused her termination, only her relocation.

In addition, there were open available positions in Michigan for which Plaintiff was qualified and sought placement. Despite the Defendant's policy requiring preference for former employees, Defendant refused to consider her for a financial aid job and other positions handling the catalog and other publications. Plaintiff was told that she could not be considered due to the animosity toward her for her reports to the DOE. <sup>26</sup> Based on all this evidence, it is clear that Plaintiff has demonstrated that Defendant's explanation is mere pretext for its true retaliatory motive.

### **CONCLUSION**

Plaintiff has introduced sufficient evidence to establish a genuine issue of material fact that she was terminated in retaliation for her reports to the DOE. Therefore, Defendant's motion should be denied and this case submitted to the jury for a resolution on the merits.

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<sup>26</sup> Defendant attempts to point to the rehire of Suzanne Abdalla for the argument that there was no retaliation toward Plaintiff for her whistleblowing activities. Abdalla however was a lower level employee whose rehire could be approved by Muller and Christopher Beiting without input from the executive committee. Moreover, Abdalla only spoke to the DOE once about a single issue which was resolved easily without any financial consequences to the Defendant. To the contrary, Plaintiff spoke with the DOE and its Inspector General's office many times about many illegalities and her contacts resulted in bad publicity as well as a heavy financial cost to the Defendant.

Respectfully submitted,

PITT, McGEHEE, PALMER, RIVERS & GOLDEN, P.C.

By:

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DATED: February 9, 2009

**PROOF OF SERVICE**

The undersigned certifies that the foregoing was served upon all parties to the above cause to each of the attorneys/parties of record herein at their respective addresses disclosed on the pleadings on **February 9, 2009**.

BY:       U.S. Mail               Facsimile  
  
             Hand Delivered       Overnight Courier