

Court Limits Damages for Employer Violation of the Bullard-Plawecki Right to Know Act

by Donald A. Gilbert

A recent case decided by the Michigan Court of Appeals made several significant determinations regarding the Bullard-Plawecki Employee Right to Know Act. The case concerned whether an employer improperly disclosed certain disciplinary information concerning an employee in violation of the Act. This article will briefly review the case and its importance to employers.

The Bullard-Plawecki Act concerns the employer=s responsibility regarding the employee=s personnel record. One of the requirements imposed upon an employer is a limitation upon the disclosure of disciplinary information concerning employees to third parties outside the employment relationship. In pertinent part, Section Six of the Act provides:

- (1) An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer=s organization, or to a party who is not a part of a labor organization representing the employee, without written notice as provided in this section.
- (2) The written notice to the employee shall be by first class mail to the employee=s last known address, and shall be mailed on or before the date the information is divulged from the personnel records [MCL 423.506]

In the case of *Daniel P. McManamon v. Redford Charter Township*, the plaintiff was a former employee of the Township. The plaintiff submitted evidence at trial that the Township Supervisor informed the local newspaper that the plaintiff had been suspended from employment for performance reasons. The Supervisor also discussed the fact that the plaintiff had been charged with embezzlement. This information was published in the local newspaper. The plaintiff was later terminated by the Township. Of interest, the plaintiff was later acquitted of the embezzlement charges.

The plaintiff filed suit, claiming that the employer violated the Bullard-Plawecki Act, by disclosing information without notifying the employee as required by Section Six of the Act. At trial, the plaintiff argued that the disclosure by the Township Supervisor kept him from receiving a position he applied for with another employer. The plaintiff further maintained that he sustained emotional upset, humiliation and embarrassment as a result of the information that appeared in the newspaper. The employer argued that it did not violate the Act, since the information was otherwise available to the public as a result of the criminal proceedings.

The jury found that the employer violated the notice provision of the Act. The jury awarded damages to the plaintiff in the amount of \$100,000. The employer appealed to the Michigan Court of Appeals. There were two issues evaluated by the appellate court. The first concerned whether the employer actually violated the Act. The second concerned whether the damages awarded by the jury were reasonably related to the employer=s conduct.

The Michigan Court of Appeals held that the employer clearly violated the statute. This finding was based on the fact that the employer failed to undertake any effort to provide the employee with a written notice of disclosure to a third party. The court observed that the employer need not provide notice to the employee *in advance* of the disclosure to a third party. The Act simply provides that written notice occur *on the date of or before* the information is divulged to the third party. The Court further observed that the purpose of such a written notice is to simply provide the employee with an ability to counter adverse information that would be provided to a third party in the event of a disagreement.

The court found that there was a difference in the disclosure of disciplinary information (suspension) as opposed to the fact that the employee had been charged by authorities for embezzlement. The court held that the embezzlement charge and the circumstances relating to the criminal prosecution did not constitute an adverse employment action and, therefore, does not require disclosure to the employee under the Act.

The appellate court then evaluated whether the damages awarded by the jury were reasonably related to the employer's conduct. The court noted that it was the employee's burden to show a reasonable relationship between damages that would flow from failure to provide notice to the employee. The court held that a great deal of evidence and argument concerned the embezzlement charge, and the damages assessed by the jury did not reasonably relate to the employer's failure to provide written notice to the employee. The court therefore reversed the jury's verdict in the amount of \$100,000 and remanded the case to the trial court for a second trial.

It is important to recognize that the statute provides three situations when a disclosure can be made without written notice to the employee. The exceptions include the following: (1) the employee has waived notice on a written, signed employment application with another employer; (2) the disclosure is ordered in a legal action or arbitration; and (3) the information is requested by governmental agencies as a result of a claim or complaint by an employee.

The *McManamon* decision makes clear that employers must carefully consider their obligations under Bullard-Plawecki. Penalties that apply are actual damages, costs and an additional \$250 fine where violations are willful. An employee successfully claiming a violation may also receive attorney fees. Given these considerations, any question or concerns pertaining to the administration of employee personnel files should be reviewed with experienced employment counsel.