May/June 2013

BAR BEAT

Genesee County Bar Association

First Place Winners, 2012 Golf Scramble – Dr. Robert Leach, Jill Leach, Bruce Leach, and Dr. Brian Beissell

"Motive Counts in WPA Cases"—Court Of Appeals (2011)
"No It Doesn't"—Michigan Supreme Court (2013)

By Tom R. Pabst, Michael A. Kowalko, Jarrett M. Pabst

Thus ends the unlawful reign of *Shallal v Catholic Social Services*, 455 Mich 604 (1997), a legal weapon of mass destruction for many victims of unlawful discrimination in Michigan. As it turns out, our own Judge Geoffrey Neithercut was correct all along in his approach to interpreting Michigan's Whistleblower Protection Act, MCLA 15.361, *et. seq.*

In the case of *Chief of Police Bruce Whitman*, who sued both the City of Burton, and Mayor Smiley for violation of our WPA, Judge Neithercut was being exhorted by defense counsel to engraft and/or write into the statute a disqualifying exception if the plaintiff was "vindictive," had a "personal motive," and/or was acting in bad faith, so that Chief Bruce Whitman should not be considered a Whistleblower. However, Judge Neithercut declined to so rule. Instead, he looked for the intent of the statute by examining the actual text of the statute, which he found to be clear and unambiguous. He then applied the clear and unambiguous law that he found the WPA to be. In fact, he opined during the trial on the record:

> "THE COURT: Now, here defendant is arguing today the *Shallal* case, and they're arguing the theory that where the primary motivation of an employee is personal gain or vindictiveness, the employee necessarily fails to establish the requisite protected activity element and is precluding from recovering under a whistleblower statute. And we've all looked at *Shallal*. I think it's decided on a different basis. I don't see where it makes any mention of personal gain or financial reasons as impediments to bringing a whistleblower claim. **I don't know that the statute says that, either, and in this age of textual reading, I read the statute exactly, it doesn't talk about that.**" (emphasis added)

How right he was!

How Judge Neithercut interpreted the WPA was *exactly* what the Supreme Court said judges should do in interpreting that law. No longer are judges to "judicially legislate" a so-called "public concern," "personal motive," "vindictiveness," etc., type of exception into the text of the statute so as to prevent people from being whistleblowers. If people are reporting a violation of the law, motive doesn't matter whatsoever—period. That is what Judge Neithercut ruled, and the Supreme Court said he was exactly right.

Jarrett M. Pabst, Tom R. Pabst, Michael Kowalko (standing)
Chief Bruce Whitman (seated)

On a personal note, it was exciting to argue in front of the Michigan Supreme Court on November 15, 2012. I was particularly impressed with Justices Markman and Young. It was obvious that all of the Justices were thoroughly prepared, but in my opinion, Justice Markman's knowledge of civil rights law is second to none. I also felt that Justice Young was engaging, involved in this matter, very interested in the issues, and actually excited to be deciding the issues involved in this case. I thoroughly enjoyed the opportunity to argue this case to the Justices, which was a humbling experience. The actual text of the Supreme Court's Opinion can be found at http://goo.gl/HJ7VP. There is a *Michigan Lawyer's Weekly* article at http://milawyersweekly.com/news/2013/05/07/motive-doesnt-matter-in-whistleblower-suits/.