# Hope Is Not Lost For Defending Mich. Whistleblower Claims

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For almost 20 years, courts recognized that Michigan whistleblower law required that a whistleblower have the primary motivation of desiring to inform the public on matters of public concern and not personal vindictiveness. On May 1, 2013, however, the Michigan Supreme Court held that whistleblower motivation was irrelevant to the issue of whether a whistleblower engaged in protected activity, and proof of the whistleblower's specific motivation was not a prerequisite to a Michigan Whistleblowers' Protection Act (WPA) claim.

Through that holding in the decision of *Whitman v. City of Burton*, 493 Mich. 303, 321 (2013), the Michigan Supreme Court clarified and disavowed *Shallal v. Catholic Social Services*, 455 Mich. 604 (1997). "To the extent that *Shallal* has been interpreted to mandate a specific motive, any language to that effect is disavowed as dicta unrelated to the essential holding of the case regarding the causal connection between the protected activity and the adverse employment decision." Id.

According to *Whitman*, the plain language of the WPA contains no such primary requirement.

> Nothing in the statutory language of the WPA addresses the employee's motivation for engaging in protected conduct, nor does any language in the act mandate that the employee's primary motivation be a desire to inform the public of matters of public concern. Rather, the plain language of MCL 15.362 controls, and we clarify that a plaintiff's motivation is not relevant to the issue whether a plaintiff has engaged in protected activity and that proof of primary motivation is not a prerequisite to bringing a claim.

493 Mich. at 306.

Ruling otherwise, according to the Michigan Supreme Court, "would violate the fundamental rule of statutory construction that precludes judicial construction or interpretation where, as here, the statute is clear and unambiguous." 493 Mich. at 312.

For years before *Whitman*, however, both state courts and federal courts, and even the Michigan Supreme Court itself in its decision in *Shallal*, recognized that Michigan WPA law required whistleblower primary motivation to be a desire to inform the public on matters of public concern, and not personal vindictiveness.

> However, proving plaintiff was engaged in protected activity does not end the inquiry. We hold that plaintiff failed to establish a causal connection between her actions and her firing. Many courts have held that a plaintiff is precluded from recovering under a whistleblower statute when the employee acts in bad faith. See, e.g., *Melchi v. Burns Int'l Security Services, Inc.,* 597 F.Supp. 575 (E.D. Mich., 1984), *Wolcott v. Champion Int'l Corp*., 691 F.Supp. 1052 (W.D. Mich., 1987). The primary motivation of an employee pursuing a whistleblower claim "must be a desire to inform the public on matters of public concern, and not personal vindictiveness." Id. at 1065.

*Shallal*, supra at 621 (quoting *Wolcott v. Champion Int'l Corp*., 691 F.Supp. 1052, 1065 (W.D. Mich.1987)).

As those courts then recognized, Michigan demanded that primary whistleblower motivation. See e.g., *David v. ANA Television Network*, 208 F.3d 213, *6 (6th Cir. 2000) (quoting *Shallal*, supra); *Robinson v. Radian* (E.D. Mich 2008); *Cooney v. Bob Evans Farms Inc.,* 645 F.Supp.2d 620, 629 (E.D. Mich. 2009); *Tackett v. Group Five Management Co.* (Mich.App. 2011).

**Does *Whitman* Leave Defendants Defenseless and Blowing in the Wind?**

So, in Michigan, is a defendant helpless against a whistleblower's mentality? Not at all. In fact, the plain, clear WPA statutory language addresses whistleblower mentality.

> 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.

The WPA statute itself, therefore, mandates that the employee cannot know that the report is false. So, it cannot be mistaken that the WPA specifically does not apply to a whistleblower who knows that the report is false. The devil, of course, is in the details of proving that knowledge.

Additionally, despite *Whitman*, a whistleblower still has to prove a *prima facie* case that he or she was engaged in activity protected by the WPA and suffered an adverse employment action, and there was a causal connection between the WPA-protected activity and the adverse employment action. 493 Mich. at 313. The employer still need only articulate a legitimate reason for its action. 493 Mich. at 313 at fn. 40 (citing *Debano-Griffin v. Lake County*, 493 Mich. 167 (2013)).

The whistleblower still has to prove pretext that the reason had no basis in fact; if it had a basis in fact, it was not the actual factor motivating the decision; or if it was, that the reason was insufficient to justify the adverse employment action.

Employers, therefore, are not left defenseless because there is a plethora of factually dependent and available defenses, including those generated by asking practical questions. Here are some of the practical questions that I have considered in analyzing and/or defending whistleblower matters.

- Did the whistleblower file timely?
- Was the activity protected by the WPA?
- Did the whistleblower report to a public body a violation of law, regulation or rule?
- Was the whistleblower about to report such a violation to a public body?
- Was the whistleblower being asked by a public body to participate in an investigation, hearing or inquiry held by that public body or in a court action?
- Was the whistleblower on the verge of reporting?
- Is there clear and convincing evidence that the whistleblower was about to report a violation?
- Before reporting or being about to report, did the whistleblower know that the adverse employment action was going to occur?
- Was the adverse employment action a materially adverse action or simply a *de minimis* employment action?
- Was the adverse employment action more than just disruptive and an inconvenience?
- Was the adverse employment action a nondisciplinary counseling, reprimand or write-up without time off, suspension, demotion, loss of pay or benefits or significantly diminished material responsibilities?
- Did the individuals charged with taking the adverse employment action know of the WPA-protected activity?
- Was the adverse employment action even related to the WPA-protected activity?
- Was the WPA-protected activity a factor in the adverse employment action?
- Was the WPA-protected activity a “motivating factor” in the adverse employment action?
- Was the adverse action more likely than not based on the consideration of impermissible factors?
- Is there something other than temporal proximity connecting the WPA-protected activity and the adverse employment action?
- Was the legitimate reason for the adverse employment action factual?
- Was the legitimate reason for the adverse employment action sufficient to justify it?
- Did the employer reasonably rely on particularized facts?

Of course, there are many more questions, and the above list is not exhaustive but instead is a peek into questions that can be used by cost-conscious and practical outside and in-house counsel.

**Conclusion**

Although *Whitman* disavowed and clarified *Shallal's* primary motivation requirement, employers are not defenseless against whistleblower mentality. Also, putting whistleblower mentality aside, there are other equally strong and successfully defenses that I have used to analyze and/or defend whistleblower matters.

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