

One of Top 25 is One of Our Own

By Roberta J.F. Wray

Congratulations to Tom R. Pabst, GCBA member, named one of the Top 25 "Leaders in the Law 2011," by *Michigan Lawyers Weekly*. Criteria for the selection include: possessing the ability to achieve success in one's practice; being passionate and aggressive on behalf of both clients and the legal community; a record of winning cases, solving problems, or coming to judicial conclusions that reflect the utmost integrity. The article in *Michigan Lawyers Weekly* cited Pabst's decision, following combat injury in the Vietnam War, to return home and "fight for the American dream." His path took him to Wayne State University Law School and then to a career specializing in Whistle Blower Protection Act, sexual harassment, reverse discrimination, and labor and employment litigation.

Pabst recorded 14 wins out of 17 cases starting in 2004 with a jury award against a local bank. In that case, an employee was fired for being discourteous to bank customers and using bank phones for his personal repossession business. The plaintiff, who was white, claimed he was fired for complaining that the bank treated black and white clients differently. The jury found against the bank.

"I just love fighting for those people"

After that case, Pabst also successfully sued several units of government for wrongful discharge of employees, including two police chiefs and a deputy chief, based on the Whistle Blowers Act; a school district for passing over a male administrator while making positions available at higher pay for female administrators; a doctor who left half of a woman's

diseased appendix behind resulting in the need for a second operation to correct the first; a female reporter for a local broadcaster who reported security concerns to corporate headquarters, going over the head of her immediate supervisor; and a former county employee who "was fired in retaliation for voicing concerns over a method the county was using to replace insulation in older homes." The method being used was blowing in insulation, thus displacing asbestos and creating a health hazard.

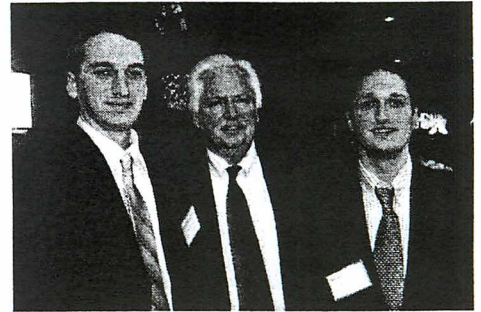
Report of the Genesee County Bar Foundation

By Walter P. Griffin,
President, Genesee County Bar Foundation

The Genesee County Bar Foundation Board of Trustees met on March 10, 2011. Among the requests for financial support to promote legal education within Genesee County, Barbara Menear, court administrator, requested assistance for the Genesee County Law Library. As you are already aware, the county has made significant cutbacks. For the law library to continue functioning at a high level and enable attorneys to educate themselves, Barbara Menear requested a \$20,040 donation to be used toward the maintenance of a second computer terminal for legal research.

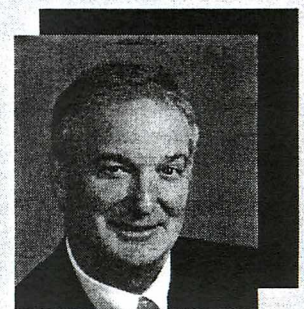
In response to this request, the following resolution was supported and adopted by the Board:

RESOLVED: The Genesee County Bar Foundation shall pay the sum of



Tom Pabst (middle) with sons Jarrett (left) and Justin

Tom Pabst says he likes taking on people, companies, and government agencies when they abuse their power. He likes fighting for the underdog and standing up for people who try to do the right thing and get pounded for it by their bully bosses. "I just love fighting for those people," he said.



Walter P. Griffin

\$6,680.00 annually, for the next three years, for a total of \$20,040.00, to support legal research and education via a computer terminal in the Genesee County Law Library. Said sums will be paid from the McGregor Funds.

The Genesee County Bar Foundation is able to support such causes because of contributions to the Foundation. I would suggest to all members of the Genesee County Bar Association that any contribution made to the Foundation will be used in a prudent and worthy manner by the Board of Directors.

A contribution in any amount is appreciated.

Increased Protection for Whistleblowers in Michigan

By Tom R. Pabst

Suppose a cheapskate business dumps hazardous waste into our fields, streams or school playgrounds during the night because it doesn't want to pay the expenses of properly disposing of the waste. Or suppose a male shareholder of a corporate employer rapes a woman employee at night, after work, on a date, and he is prosecuted for the rape. Now suppose that a male employee of the corporate employer reports the illegal dumping and/or testifies as a witness for the prosecution against the rapist shareholder, and the employer fires him for it. The plain language of the Whistleblower Protection Act ("WPA") passed in 1981, MCLA 15.361, *et. seq.*, says the fired plaintiff employee is "engaged in protected activity" and is therefore protected from retaliation for having the courage to do the right thing.

Courageous whistleblowers in Michigan were not always protected the way the plain language of the WPA intended. For example, early appellate court decisions declared that the employee had to report or be about to report violations of law by his or her employer, **only**, to be afforded protection, despite the plain wording of the Act that did not limit its applicability to violations of law by the employer or to investigations involving the employer.¹

Fortunately for employees who have the courage to risk their jobs by reporting violations of any laws, or telling the truth when involved in an investigation by a public body, these early appellate decisions have, *sub silentio*, been eroded by important Supreme Court and Court of Appeals decisions over the last two decades.

Specifically, in *Dudewicz v Norris-Schmid, Inc.*, 443 Mich 68, 74-75 (1993), the Supreme Court held that the WPA protects reports made against a co-worker, not only an employer. In other words, an employee's reporting of an assault and battery by a co-worker to the prosecuting attorney's office was found to be "protected activity," even though the employer itself did nothing *per se* illegal.

Courageous whistleblowers in Michigan were not always protected the way the plain language of the WPA intended.

Next, in *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378 (1997), the Michigan Supreme Court further applied and extended the Act to protect an employee who was fired for reporting the names of two passengers who fit a "suspect profile" to the DEA. As the Supreme Court in *Dolan, supra*, explained:

... Frequently, a close connection exists between the reported violation and the employment setting, although no such limitation is found in the statute. *Id. at p. 384.*

In other words, the Supreme Court in *Dolan, supra*, protected an employee from retaliation by an employer even if his report of illegal activities was not based on illegal activities by the employer itself.

Then, in an important WPA case right out of Genesee County, *Trepanier v National Amusements, Inc.*, 250 Mich App 578, 583-588 (2002), the employee's obtaining of a personal



Tom R. Pabst

protection order against another employee allegedly concerning a personal relationship outside the workplace was "protected activity" under the WPA. Local attorney Glen Lenhoff represented the plaintiff in this important published case in which the employee's protection under the WPA extended even farther away from the workplace setting.

Recently, in the case of *Kimmelman v Heather Down Mgmt, Ltd.*, 278 Mich App 569 (2008), the Court of Appeals came out and stated what should have been obvious from the beginning:

There is absolutely nothing express or implied, in the plain wording of the statute that *limits* its applicability to violations of law by the employer or to investigations involving the employer. 278 Mich at p. 575.

In other words, after more than 20 years of case law interpreting the WPA, whistleblowers have finally received the protection the legislature originally intended. It is now crystal clear that a plaintiff employee is protected from retaliation under the WPA whenever he (1) reports a violation, or suspected violation of law, or (2) participates in a protected proceeding/court proceeding, even if the protected proceeding/court proceeding does not involve the employer itself, and even though the employer itself did not commit the violation of law being reported.

Endnotes

¹ See, for example, *Dickson v Oakland University*, 171 Mich App 68, 70 (1988).