

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BRUCE WHITMAN,

Plaintiff-Appellee,

v

CITY OF BURTON and CHARLES SMILEY,

Defendants-Appellants.

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FOR PUBLICATION

July 5, 2011

9:00 a.m.

No. 294703

Genesee Circuit Court

LC No. 08-087993-CL

Advance Sheets Version

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

SAAD, J.

In this action under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, a jury returned a verdict in favor of plaintiff. For the reasons set forth below, we reverse the trial court's denial of defendants' motion for judgment notwithstanding the verdict (JNOV) and remand for further proceedings consistent with this opinion.

**I. FACTS AND PROCEEDINGS**

Plaintiff sued defendants under the WPA after defendant city of Burton Mayor Charles Smiley declined to reappoint plaintiff as the police chief for the city of Burton in November 2007. Plaintiff's complaint alleged that defendants terminated his employment because, in January 2004, plaintiff complained to the mayor and a city attorney that it would be a violation of Burton City Ordinance 68-25C (Ordinance 68-C) if defendants failed to pay plaintiff for unused sick and personal leave time plaintiff accumulated in 2003. Ordinance 68-C, § 8(I) provides, in relevant part:

Administrative Officers may accumulate unused sick/personal days until a 90 day accumulation has been created. Vacation days and unused holidays may also be credited for purposes of the accumulation. At the option of any administrative officer, any unused sick and/or personal, and/or vacation days may be paid in January in the year after which they are accumulated.

Defendants maintain that, when faced with significant budget problems in the city, plaintiff, along with other city administrators, agreed in March 2003 to forego any payout for accumulated sick and personal time and to instead use their sick or personal time throughout the year. Plaintiff did not use much of his sick and personal time in 2003 and, after he demanded payment under the ordinance in early 2004 and threatened to pursue criminal charges against the mayor,

defendants paid plaintiff \$6,984 for his unused time. Defendants deny that Mayor Smiley decided to appoint another police chief in 2007 because of plaintiff's complaint involving Ordinance 68-C. Rather, defendants contend that the mayor was dissatisfied with many aspects of plaintiff's performance as chief of police. Following a four-day trial, the jury returned a verdict in favor of plaintiff and, thereafter, the trial court denied defendants' motion for JNOV or a new trial.

## II. ANALYSIS

As discussed, plaintiff claims that defendants violated the WPA by terminating his employment three years after he threatened to pursue criminal charges if the city did not pay for his 2003 unused sick and vacation time. Plaintiff took the position at trial that his complaint about the Ordinance 68-C violation was a factor in the mayor's decision not to reappoint him as chief of police in 2007.

Defendants argue that the trial court should have granted their motion for JNOV because plaintiff did not establish a prima facie case under the WPA. "We review de novo a trial court's decision regarding a motion for JNOV." *Campbell v Dep't of Human Servs*, 286 Mich App 230, 241; 780 NW2d 586 (2009). "When reviewing the denial of a motion for JNOV, the appellate court views the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party to determine if a party was entitled to judgment as a matter of law." *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009).

By 2003, due in part to changes in revenue sharing, the general fund for the city of Burton had lost approximately \$50,000. Mayor Smiley testified that, in light of this significant budget shortfall, and to protect the jobs of city employees, he proposed that he and other city administrators agree to a wage freeze as well as a "use it or lose it" policy for sick and personal days, so that each administrator, including plaintiff, would not take a monetary payout for their unused time. At a meeting attended by plaintiff, but not the mayor, the administrators agreed to the mayor's proposal. Thereafter, the mayor announced the agreement in his state-of-the-city address, to the city council, and to the press.

Plaintiff maintained at trial that he did not agree to forfeit a payout for his sick and vacation hours. Shortly after the "agreement" was reached in March 2003, plaintiff sent a letter to the mayor complaining that it was an unfair elimination of one of his benefits. Plaintiff wrote:

Up to my appointment as Chief I was involved in the Police union and throughout my career attained benefits through collective bargaining as you well know. Historically we were given things in lieu of wage increases including additional holidays, vacation and sick and personal time as well as other fringe benefits. My current life style revolves around these very things that have been negotiated for me and in some cases protected several times over through binding arbitration (pension). My family looks forward to the financial benefits I receive by not missing time from work. I have always enjoyed my job and was raised with the ideal that hard work and dedication does come with rewards and although City Administrators across the board are underpaid, this compensation at the end of the year, to me, justifies it and rewards me for dedicated work.

Notwithstanding his dislike for the policy, plaintiff did not state in the letter that he would demand payment for his unused time and he did not state that the agreement to forego the annual payout would violate any Burton ordinance.

Nonetheless, and despite his apparent understanding of the agreement, plaintiff did not use many of his sick or vacation days during the remainder of 2003 and, on January 9, 2004, plaintiff sent a letter to Mayor Smiley demanding payment:

Please be advised that under section I of ordinance 68-25 "C" I am requesting to exercise my option as stated, that all of my unused sick/personal days and unused vacation days be paid to me in January as required in this ordinance.

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To ignore issues specified in that ordinance would be a direct overt violation of that ordinance and I fully intend to address the violation should it occur.

Plaintiff also sent a letter to city attorney Richard Hamilton on January 23, 2004, as a follow-up to a conversation they had earlier in the month. Plaintiff's letter provided, in relevant part:

Having this use it or lose it proposal thrown on me I resorted to the very document that the mayor refers to, 68-c. It is very clear in that ordinance that administrators are entitled to and can receive their unused days as specified by ordinance. Following the letter of the law, I made a formal written request for my unused days to be paid to me in January as specified by ordinance, (copy attached).

At a staff meeting with the Mayor on January 12, 2004 he referred to the fact that we "waived" our right to receive paid days. I completely disagree, this is wrong and I will not accept this as fact that the mayor can decide what I have waived when it comes to an ordinance protected benefit that is dictated by the council. Some will state they agreed to this and I find this quite interesting, especially in the manner it was delivered to us.

My position is this, this is a violation of the ordinance, I told the mayor on the 12<sup>th</sup> it was an ordinance violation and that I had talked to you about this and I expected it to be addressed. Living by the letter of this ordinance, I will wait until January passes to pursue this. If I need to re address through the council I will, if you have any input on resolving this I would appreciate it or I will be forced to pursue this as a violation of the law and will address it as such.

The city attorney advised Mayor Smiley that a failure to pay plaintiff would be contrary to Ordinance 68-C, and, shortly thereafter, plaintiff received a check for his unused sick and vacation hours.

Mayor Smiley testified that he was upset about plaintiff's demand for payment as he viewed this as plaintiff "going back on his word" because all the administrators had agreed to forego the payments, plaintiff did not abide by the agreement, and the mayor had already issued a press release about the agreement. Some other administrators were also angry with plaintiff because they had used their sick and vacation time during the year with the understanding that they would not receive any payment for it and they believed plaintiff "sandbagged" the city by making his claim only after the right to these payments ripened. Nonetheless, Mayor Smiley testified that he and plaintiff overcame their differences about the issue and he denied that this factored into his decision not to reappoint plaintiff in 2007. Rather, Mayor Smiley testified that there were numerous problems with plaintiff's performance as police chief over the next three years. In addition to various complaints from police officers about plaintiff and the low morale in the department, Mayor Smiley cited plaintiff's inadequate discipline of three officers who had followed the mayor's car in an unsuccessful attempt to arrest the mayor for a driving offense after he visited a local pub, a lack of communication from plaintiff about the police department's operations and activities, numerous sexually explicit e-mails plaintiff sent on his city computer in clear violation of city policy, plaintiff's failure to inform the mayor about the failure to discipline an intoxicated, off-duty police officer who shot someone in the chest with a Simunition non-lethal training gun, plaintiff's involvement in denying employment to a qualified police department applicant, his retention of an officer who was deemed unqualified by her supervising officers, his issuance of a retirement identification card that allowed an unqualified former police officer to carry a gun, plaintiff's failure to act on the complaint of a local business owner about harassment by Flint police officers, and a misleading budget report plaintiff made to the city council.

Mayor Smiley informed plaintiff that he did not intend to reappoint him as police chief on November 27, 2007. Plaintiff took the position at trial that his complaint about the Ordinance 68-C violation was causally connected to the mayor's decision because the mayor raised it as an example of his problems with plaintiff both before and after plaintiff's termination. Plaintiff specifically alleged that, by failing to reappoint him as the chief of police, defendants violated § 2 of the WPA, MCL 15.362, which states:

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.

"To establish a prima facie case under [the WPA], a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

We hold that, as a matter of law, plaintiff could not recover damages under the WPA for the mayor's decision not to reappoint him because, in threatening to inform the city council or prosecute the mayor for a violation of Ordinance 68-C, plaintiff clearly intended to advance his own financial interests. He did not pursue the matter to inform the public on a matter of public concern.

“[T]he purpose of the WPA is to protect the public.” *Henry v Detroit*, 234 Mich App 405, 413 n 1; 594 NW2d 107 (1999). As our Supreme Court explained in *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378-379; 563 NW2d 23 (1997):

Michigan's Whistleblowers' Protection Act was first enacted in 1981, largely in response to the accidental PBB-contamination of livestock feed. The act “encourage[s] employees to assist in law enforcement and . . . protect[s] those employees who engage in whistleblowing activities.” [*Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 83; 503 NW2d 645 (1993) (BOYLE, J., dissenting), overruled in part on other grounds *Brown v Detroit Mayor*, 478 Mich 589, 594 n 2; 734 NW2d 514 (2007).] It does so with an eye toward promoting public health and safety. The underlying purpose of the act is protection of the public. The act meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law. Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses.

Accordingly, by enacting the statute, the Legislature sought “to alleviate ‘the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses.’ ” *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 612; 566 NW2d 571 (1997), quoting *Dudewicz*, 443 Mich at 75. To encourage employees to expose corruption or criminal conduct, the WPA “prohibits future employer reprisals” when an employee reports or is about to report such conduct. *Shallal*, 455 Mich at 612.

In order to effectuate the purpose of the WPA, our courts have ruled that, when considering a retaliation claim under the act, a critical inquiry is whether the employee acted in good faith and with “ ‘a desire to inform the public on matters of public concern . . . .’ ” *Id.* at 621, quoting *Wolcott v Champion Int'l Corp*, 691 F Supp 1052, 1065 (WD Mich, 1987). To that end, it is well-settled that the Legislature did not intend “‘the Whistleblowers Act to be used as an offensive weapon by disgruntled employees.’” *Shallal*, 455 Mich at 622, quoting *Wolcott*, 691 F Supp at 1066.

The mayor of Burton agreed with his administrators to forego cash payouts to save money and to demonstrate to the public that the administration was taking fiscally responsible action to save public funds while retaining needed city services. There is no dispute that the decision and subsequent agreement by the administrators to avoid thousands of dollars in cash payouts was a strategy to counteract a severe budgetary shortfall that, without some corrective measure, would likely have resulted in the termination of other public-service employees. Thus, it was in the public interest for plaintiff and the other administrators to forego this administrative perk, in order to preserve essential public services.

In demanding payment under the ordinance for his sick and personal hours—a payment the cash-strapped city could ill-afford—plaintiff was decidedly *not* acting in the public interest, but in the thoroughly personal and private interest of securing a monetary benefit in order to maintain his “life style.” Plaintiff’s claim is not actionable under the WPA because his complaint amounted to a private dispute over plaintiff’s entitlement to a monetary employment benefit. Moreover, plaintiff acted entirely on his own behalf. Indeed, nowhere in the voluminous record “is there any indication that good faith or the interests of society as a whole played any part in plaintiff’s [threatened] decision to go to the authorities.” *Wolcott*, 691 F Supp at 1063. To the contrary, plaintiff asserted his own entitlement to payment and he dropped his threat of legal action when he received his money. Under these facts, no reasonable juror could conclude that plaintiff threatened to prosecute defendants “out of an altruistic motive of protecting the public.” *Shallal*, 455 Mich at 622.

Moreover, an employee also may not recover under the WPA when the employee acts in bad faith. *Id.* at 621. Here, as noted earlier in this opinion, plaintiff withheld his accusation of a legal violation until after he accumulated thousands of dollars worth of sick and vacation time. Once the mayor reported the agreement to the city council and the public, plaintiff spent the next several months stockpiling his hours and, when most personally advantageous, threatened legal action if defendants did not pay plaintiff for them. While this case differs factually from *Shallal* because the plaintiff in *Shallal* withheld her threat to report until her termination was imminent, we believe this case amounts to a similar, and prohibited, attempt to use the WPA “as an offensive weapon by [a] disgruntled employee[.]” *Id.* at 622, quoting *Wolcott*, 691 F Supp at 1066. Plaintiff expressed personal displeasure with the agreement to forego his lump-sum payment, he remained silent about the claimed wrong for months, and then raised it as a legal issue—not for the purpose of preventing injury to the public, but for personal reasons and only when most personally beneficial. There is no protection afforded under the WPA for such conduct. *Id.*; *Wolcott*, 691 F Supp at 1065.

Because no juror could legally find in favor of plaintiff on his claim under the WPA, we reverse the trial court’s denial of defendants’ motion for JNOV, and remand for further proceedings consistent with this opinion.<sup>1</sup> We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Peter D. O’Connell

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<sup>1</sup> In light of this ruling, we need not address defendants’ remaining arguments on appeal, but note on the causation issue that even if plaintiff could be viewed as stating a cause of action under the WPA, there is overwhelming evidence of plaintiff’s misconduct in office that more than justified the mayor’s decision not to reappoint plaintiff as police chief.