

STATE OF MICHIGAN  
COURT OF APPEALS

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ERIC HECKMANN,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant/Cross-  
Appellee,

and

DETROIT CHIEF OF POLICE, MAYOR OF  
DETROIT, DETROIT DEPUTY CHIEF OF  
POLICE, MARLENE HOBBS and HASUMATI  
PATEL,

Defendants.

UNPUBLISHED

July 10, 2007

No. 267391

Wayne Circuit Court

LC No. 03-321385-NZ

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Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendant City of Detroit appeals as of right the trial court's denial of its motions for directed verdict, judgment notwithstanding the verdict, new trial or remittitur, and several other rulings, in this case brought under the Whistleblowers Protection Act (WPA), MCL 15.361 *et seq.* Plaintiff Eric Heckmann cross-appeals the trial court's denial of attorney fees. We affirm in both the principal appeal and the cross-appeal.

Plaintiff Eric Heckmann, a principal accountant (CPA and MBA) in the Fiscal Operations division of defendant City of Detroit's Police Department, brought suit against various individuals and the City alleging violation of the WPA, and intentional infliction of emotional distress. On defendants' motion for summary disposition, the trial court dismissed both claims.

Plaintiff appealed. This Court reversed the dismissal of the WPA claim, and affirmed the dismissal of the intentional infliction of emotional distress claim. *Heckmann v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005). On remand to the circuit court, plaintiff's WPA claim was tried to a jury. On the first day of trial, the trial court granted defendants' motion to dismiss the individual defendants on governmental immunity grounds. Plaintiff does

not appeal that ruling.<sup>1</sup> Trial proceeded against the City of Detroit alone. The jury found for plaintiff and awarded him \$600,000. The trial court entered judgment in plaintiff's favor in the amount of \$600,000 plus prejudgment interest of \$62,363.10.

## I

Defendant argues that the trial court abused its discretion by denying its motion to adjourn trial where a necessary and material witness, Hasumati Patel (plaintiff's immediate supervisor), was unavailable to testify due to an unexpected emergency. We disagree.

This Court reviews the trial court's denial of defendant's motion to adjourn trial for an abuse of discretion. *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991). MCR 2.503(C) governs adjournments due to absence of a witness:

### **(C) Absence of Witness or Evidence.**

(1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.

(2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

(3) If the testimony or the evidence would be admissible in the proceeding, and the adverse party stipulates in writing or on the record that it is to be considered as actually given in the proceeding, there may be no adjournment unless the court deems an adjournment necessary.

Defendant's motions to adjourn and arguments at the two pertinent hearings nowhere stated that Patel's surgery was emergency surgery or unexpected, or that the City could not have learned of her surgery earlier than 5 days before trial (September 21, the date of Patel's surgery and the date defendant filed its emergency motion). The letter from Patel's doctor, which defense counsel provided to the trial court belatedly (during trial), also does not state that the surgery was emergency surgery or performed on short-notice. The letter simply states that the surgery was "non-elective." Non-elective surgery is often planned at the patient's convenience.

The record does not otherwise support diligence on defendant City's part in ascertaining Patel's availability to testify as trial approached, either, even though Patel was a named defendant (until the first day of trial, when defendants moved and were granted summary

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<sup>1</sup> Plaintiff's appellate brief states in a footnote that the court erred in dismissing the individual defendants because immunity is not a defense to WPA claims, citing *Ballard v Ypsilanti Twp*, 457 Mich 564, 574; 577 NW2d 890 (1998). However, other than this footnote, plaintiff did not brief the governmental immunity issue, and it is not stated in plaintiff's statement of questions presented.

disposition of the individual defendants on governmental immunity grounds). On this record, we are unable to conclude that the City exercised due diligence in investigating and securing Patel's availability for trial. MCR 2.503(C). It is reasonable to conclude that had the City contacted Patel as trial neared, it would have learned of Patel's impending surgery and Patel could have been deposed de bene esse and videotaped.

Under these circumstances, we conclude that the trial court did not abuse its discretion in denying defendant's motion to adjourn trial because the defense made no showing that it had made diligent efforts to produce Patel. Contrary to defendant's representations in its appellate brief, the defense produced no evidence that Patel's surgery was unexpected or done on an emergency basis, and thus did not show that it could not have made alternative arrangements for her to be deposed in lieu of testifying at trial. Further, defendant did not attempt to depose Patel or obtain an affidavit from her after her surgery, nor did defendant make an offer of proof at trial. In addition, we are not persuaded by defendant's argument that Patel's testimony would have convinced the jury where Deputy Chief Brenda Goss-Andrews' did not. Andrews testified that she oversaw both Patel and plaintiff, that she called the April 2003 meeting at which Patel was present and plaintiff was allegedly threatened, that she and Patel discussed in advance the memo Patel prepared and Andrews distributed, which reduced plaintiff's duties, and that the reason for calling the meeting with plaintiff was that Patel had problems with plaintiff's performance in several areas. Andrews testified that she and Patel both received copies of plaintiff's whistleblowing letter. Thus, it is far from apparent that Patel, had she testified at trial, would have given testimony different from, or more persuasive than, Andrews'. Moreover, defendant could have called Marlene Hobbs to testify at trial but did not. Hobbs was present at the April 2003 meeting, along with Andrews, Patel and plaintiff.

We conclude the denial of defendant's motion to adjourn was not an abuse of discretion, and that defendant was not prejudiced by the denial.

## II

Defendant also challenges to the trial court's denial of its motions for directed verdict, judgment notwithstanding the verdict, and new trial.

The WPA, MCL 15.362, provides that an employer may not discharge, threaten, or otherwise discriminate against an employee because the employee reports or is about to report a violation or suspected violation of a federal or state statute or regulation to a public body.

The WPA, as a remedial statute, is to be liberally construed to favor the persons the Legislature intended to benefit . . . those employees engaged in "protected activity" as defined by the act. The act protects those who report or are about to report violations of a law, regulation, or rule to a public body. . . . [*Chandler v Dowell Schlumberger*, 456 Mich 395, 406; 572 NW2d 210 (1998). Citation omitted.]

To establish a prima facie case under the WPA, a plaintiff must show that 1) he was engaged in protected activity as defined by the act, 2) he was discharged, threatened, or discriminated against, and 3) a causal connection existed between the protected activity and the discharge.

*Shallal v Catholic Social Services*, 455 Mich 604, 610; 566 NW2d 571 (1997); *Heckmann, supra*, 267 Mich App at 491.

We review a trial court's decision to grant or deny a directed verdict de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). "If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). We also review the trial court's decision on a motion for judgment notwithstanding the verdict de novo. *Sniecinski, supra* at 131. This Court must view the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party. *Id.* If reasonable jurors could have reached different conclusions, the jury verdict must stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). We review a trial court's denial of a motion for new trial for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). A new trial may be granted on some or all issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990), *aff'd* 438 Mich 347 (1991). The jury's verdict should not be set aside if there is competent evidence to support it. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). This Court gives deference to the trial court's opportunity to hear the witnesses and its consequent qualification to assess credibility. *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988).

Plaintiff testified at trial that he worked for defendant City of Detroit for 35 years (1970-2005) and was in the process of retiring. When he transferred to the Detroit Police Department's Fiscal Operations division from the Auditor General's office in 1992, he was a principal accountant (a civilian employee), and a member of the Association of Professional and Technical Employees Union (APTE). Plaintiff testified that in mid- to late August, 2002, he wrote Deputy Chief Andrews, plaintiff's superior and head of the Fiscal Operations division, and requested a confidential meeting to discuss ongoing problems in the division, placed it in a sealed envelope and gave it to Andrews' secretary. When Andrews did not respond, plaintiff wrote the September 11, 2002 letter addressed to Chief of Police Oliver, and carbon copied Mayor Kilpatrick. The September 11, 2002 letter (whistleblowing letter) was admitted into evidence and portions read into the record.

Plaintiff testified that on April 18, 2003, he was called into a meeting, without notice, at which Deputy Chief Andrews, Hobbs and Patel were present, and that each of them had a copy of his September 11, 2002 letter in hand. Plaintiff testified that during the meeting, which lasted approximately thirty minutes, Deputy Chief Andrews told him that his letter to the Mayor and Chief of Police was "the last straw," that he better start looking for another job, and that there was nothing he could do to save his job. Plaintiff testified that Hobbs and Patel expressed their displeasure with him at this meeting as well.

On appeal, defendant does not dispute that plaintiff established that he engaged in protected activity under the WPA. Regarding an adverse employment action and a causal connection between protected activity and an adverse employment action, plaintiff testified that at the April 8, 2003 meeting in Deputy Chief Andrews' office, to which he was called without prior notice, Andrews, Patel and Hobbs each held a copy of his September 2002 letter, and that Andrews told him his letter was the last straw, that he should start looking for another job, and that there was nothing he could do to keep his job. This testimony, if believed by the jury is

sufficient to establish both that Deputy Chief Andrews threatened to terminate plaintiff and a causal connection between Andrews' threat and plaintiff's whistleblowing letter. Plaintiff also testified that at this meeting, Patel told him he was not "part of the team" and Hobbs, who was named in the letter several times, told him she was extremely displeased that he forwarded the letter to the Mayor and Oliver.

Plaintiff testified that after the April 2003 meeting his duties were significantly reduced, as set forth in a letter Andrews distributed at a staff meeting that was prepared by Patel. Plaintiff testified that the morning after this staff meeting, Patel told him to get out of her office, would not speak to him, and told him to email her if he wanted anything. Plaintiff testified that Patel routinely received documents plaintiff needed for his projects, and that after the April 2003 meeting, she would not respond to his emails requesting the documents.

Defendant presented one witness, Deputy Chief Andrews. Andrews testified that she called the meeting in April 2003 to discuss problems that Patel had with plaintiff's performance. Andrews acknowledged that she received a copy of plaintiff's whistleblowing letter, and that Patel did as well. She denied raising her voice in the meeting, and denied threatening plaintiff. Andrews testified that she and Patel conferred before Patel prepared the memo that diminished plaintiff's responsibilities. Andrews acknowledged that plaintiff's responsibilities were reduced, although she denied that it was in retaliation for plaintiff's whistleblowing letter.

There was thus testimony from which the jury could have concluded that plaintiff engaged in protected activity, that defendant's agent Deputy Chief Andrews threatened to discharge him and reduced his duties, and that the causal connection between those factors was plaintiff's whistleblowing letter. We conclude that because evidence presented at trial established a genuine issue of fact regarding each of the elements of plaintiff's WPA claim, the trial court properly denied defendant's motion for directed verdict and JNOV.

Defendant's motion for new trial was also properly denied. As the above discussion indicates, there was competent evidence to support the jury's verdict. *Ellsworth, supra* at 194. The trial court thus did not abuse its discretion in denying defendant's motion for new trial to the extent it argued that the verdict was against the weight of the evidence. *Allard, supra*.

### III

Defendant also contends that the record evidence does not support the jury award of \$600,000, and the trial court should have granted its motion for remittitur. We disagree.

This Court reviews a trial court's decision regarding remittitur for an abuse of discretion, *Palenkas v Beaumont Hospital*, 432 Mich 527, 533; 443 NW2d 354 (1989), viewing the evidence in the light most favorable to the nonmoving party. *Wiley, supra* at 499. A new trial may be granted when excessive or inadequate damages were awarded as apparently influenced by passion or prejudice. MCR 2.611(A)(1)(c) and (d), see also MCL 600.6098(2)(b)(iv) and (v); *McManamon v Redford Twp*, 273 Mich App 131, 139; 730 NW2d 757 (2006). If the court finds that the only trial error is the inadequacy of the verdict, it may deny a motion for new trial on the condition that, within 14 days, the nonmoving party consent in writing to the entry of judgment in the amount found by the court to be the highest amount the evidence will support. MCR 2.611 (E)(1); *Burtka v Allied Integrated Diagnostic Services, Inc*, 175 Mich App 777, 780; 438 NW2d

342 (1989). In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence. *Diamond v Witherspoon*, 265 Mich App 673, 692-693; 696 NW2d 770 (2005). The power of remittitur should be exercised with restraint. *Hines v Grand Trunk Western R Co*, 151 Mich App 585, 595; 391 NW2d 750 (1985).

Plaintiff argued below that the City's own trial exhibits established that plaintiff's salary was over \$51,000. Defendant does not dispute that its exhibits showed plaintiff's salary, but notes that plaintiff did not testify regarding his wages, or benefits, or present evidence regarding his economic losses. Defendant did not ensure that its trial exhibits are before this Court, in violation of MCR 7.210(C). Nonetheless, the record supports that defendant's trial exhibits addressed plaintiff's wages, sick time benefits, and other fringe benefits, as plaintiff's counsel referred to those figures in closing argument while discussing a defense trial exhibit.

Plaintiff testified at trial that he was 58 years old and had worked for defendant City for 35 years. Plaintiff testified that he took a medical leave of approximately one year, from May or June 2004 until May or June 2005, during which he received full (sick) pay. Plaintiff testified at trial (held in September & October 2005) that he had recently applied to retire from defendant City, but that his retirement was not yet official.

Dr. Edward Herman, plaintiff's treating psychiatrist, testified by videotaped deposition that he recommended that plaintiff take a medical leave from work in May of 2004. He felt that plaintiff was distraught and developing suicidal ideation. He also recommended that plaintiff extend that sick leave in October of 2004. Dr. Herman testified that he had treated plaintiff since October 8, 2003, and had seen him thirty times. Dr. Herman testified that after conducting a psychiatric evaluation of plaintiff, he determined that plaintiff suffered from major depression of the recurrent type, and generalized anxiety disorder. Dr. Herman found that plaintiff had symptoms of a major depression diagnosis – a depressed mood, sleep disturbance, difficulty concentrating, and some psychomotor agitation. Dr. Herman testified that he found plaintiff to be under work-related stress that had started in 2002; with a letter plaintiff sent to the Mayor and Police Chief Oliver about overtime cheating in the Detroit Police Department. Dr Herman testified that depression and anxiety could have caused the worsening of plaintiff's diabetes.

Dr. Herman also testified that plaintiff was already on the antidepressant Lexapro (prescribed by his family doctor) when he first saw plaintiff in October 2003, and that he prescribed Xanax to help with plaintiff's severe anxiety. After that, Paxil was added in December of 2003 for the depression. The Paxil was increased in April of 2004 and Restoril was added as a sleep aid. Lexapro was switched to Wellbutrin in January of 2005 for the depression. At the time of Dr. Herman's deposition, plaintiff was still taking all these medications as well as Risperdal for anger and anxiety.

In closing argument, plaintiff's counsel referred to "the sick time that Mr. Heckmann had to use, and we're also looking at the wages that he would have made, until the time that he was going to retire at sixty-five years old. We're looking at his lost fringe benefits. And . . . we're looking at non-economic damages. We're looking at the humiliation, the stress, the anxiety." In rebuttal, plaintiff's counsel asked the jury to award plaintiff damages in the amount of \$1,869,600. The jury was instructed regarding damages under the WPA (with both counsel's approval and no challenge on appeal). Defendant prepared the verdict form used at trial. The verdict form was general, did not separate economic from non-economic damages, nor did it

separate past from future damages. The jury answered the lone verdict form question regarding damages, “State the amount of damages you find the Plaintiff is entitled to”, with “\$600,000.00.”

We conclude that the damage award was supported by the evidence, and that the trial court thus did not abuse its discretion in denying defendant’s motion for remittitur. Although plaintiff himself did not present evidence regarding his earnings or his fringe benefits, the record supports that defendant’s trial exhibits did so. The jury instructions regarding damages were approved by both counsel. The verdict form was drafted by defendant and did not separate economic from non-economic damages, or past from future damages. Defense counsel argued in closing argument that plaintiff should receive no damages. Plaintiff’s counsel requested \$1,869,600 in damages. The jury awarded less than 1/3 of that amount. The jury could have concluded that plaintiff intended to work for defendant City until age 65 (seven years past the instant trial), that plaintiff’s work record was impeccable both in terms of performance and otherwise (plaintiff took no sick days in 33 years with the City), and that as a result of the retaliation plaintiff suffered from having sent the whistleblowing letter, he was forced to leave work on a medical leave for one year, was prescribed numerous anti-depressant and other medications, and that the emotional and physical effects on plaintiff of the work stressors and humiliation suffered by being threatened with job loss were ongoing as of the time of trial.<sup>2</sup>

Plaintiff is correct that this Court in *Henry v Detroit*, 234 Mich App 405, 415; 594 NW2d 107 (1999), deferred to the trial court’s decision to deny remittitur where the defendants-appellants “simply challenge[d] the size of the noneconomic damages award and ma[de] no specific arguments.” In the instant case, defendant does not claim the jury’s verdict was excessive with regard to non-economic damages, but rather maintains that the award is unsupported because plaintiff offered no evidence of *economic* loss. As discussed above, defendant’s own trial exhibits set forth plaintiff’s wage and fringe benefit information, so this argument must fail. Beyond this, defendant’s argument is simply a generalized one, as was the case in *Henry, supra*. Further, defendant cites no authority to support that a \$600,000 verdict in a WPA case such as the instant one is per se excessive, and has thus abandoned this issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004); *Yee v Shiawassee County Bd of Comm’rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). In light of defendant’s having submitted a general verdict form that asked for one damage figure alone, and given that this Court must not disturb the jury’s award if it falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, *Frohman v Detroit*, 181 Mich App 400, 415; 450 NW2d 59 (1989), we conclude the trial court did not abuse its discretion in denying defendant’s motion for remittitur.

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<sup>2</sup> Defendant complains that plaintiff did not testify that he had received a job offer from the City of Hazel Park, but the record reflects that defendant did not ask plaintiff about his plans for the future or whether he had sought other employment.

#### IV

Defendant's appellate brief raises three issues not set forth in its statements of questions presented. These issues are thus waived, *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298; 618 NW2d 98 (2000), but we address them nonetheless. Defendant asserts that the trial court abused its discretion in admitting into evidence the video deposition of plaintiff's expert witness, Dr. Edward Herman. We conclude that any error in admitting Dr. Herman's deposition was harmless.

After plaintiff testified, plaintiff's treating psychiatrist, Dr. Edward Herman, testified by videotaped deposition. Contrary to defendant's representation of the facts, plaintiff's witness list, filed on December 23, 2003 (nearly two years before the instant trial began on September 27, 2005), listed Dr. Herman as follows:

28. Edward Herman, M.D.

29. Medical Expert for the Plaintiff (yet to be determined).

Although it is true that plaintiff's witness list did not list Dr. Herman as an expert, defendant has not established that it was prejudiced by the admission at trial of his videotaped deposition, given that: 1) Dr. Herman was plaintiff's *treating* psychiatrist, as defendant City was well aware because Dr. Herman had corresponded with defendant City throughout plaintiff's medical leave regarding plaintiff's condition, in letters stating that "Eric Heckmann is [or continues to be] under my care for the treatment of Major Depression . . ." (and defense counsel cross-examined Dr. Herman regarding these letters during his videotaped deposition),<sup>3</sup> 2) Dr. Herman's testimony was entirely based on his observations and interaction with plaintiff, not on hypothetical facts, and thus properly admissible as lay opinion testimony under MRE 701, and 3) even though the court qualified Dr. Herman as an expert, it was not necessary to do so under MRE 701. Under these circumstances, we conclude that error, if any, in the trial court's admission of Dr. Herman's videotaped deposition was harmless.

#### V

Defendant also contends that the trial court erred by failing to address plaintiff's counsel's misconduct, specifically that staff of plaintiff's counsel's firm sat in the spectator's gallery and passed note(s) to plaintiff's counsel or each other in the presence of potential jurors.

The record establishes that the trial court did not ignore defense counsel's objection, rather, the trial court addressed it by noting that the sequestration order did not apply to employees of plaintiff's firm. Defendant does not argue that the sequestration order did apply to

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<sup>3</sup> Letters to defendant City from Dr. Herman are appended to Dr. Herman's deposition, and are dated October 4, 2004, January 4, 2005, March 15, 2005, April 21, 2005, May 16, 2005, and May 31, 2005.

plaintiff's employees. In any event, the fact that an employee of plaintiff's firm was seated in the spectator's gallery does not in any way support that plaintiff's counsel committed misconduct, nor does a note being passed from the employee to plaintiff's counsel (if this did in fact occur). We therefore conclude defendant's argument lacks merit.

## VI

Defendant's final argument is that the trial court failed to follow the law of the case, and improperly denied defendant's motion for the trial to conform to the law of the case, i.e., to this Court's decision in *Heckmann*. Specifically, defendant argued that *Heckmann* held that plaintiff's allegation as to social isolation failed as a matter of law and fact, yet the trial court permitted plaintiff to testify to his social isolation.

Whether a trial court violated the law of the case doctrine is a question of law this Court reviews de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). A trial court may not take any action on remand that is inconsistent with the judgment of the appellate court. *VanderWall v Midkiff*, 186 Mich App 191, 196; 463 NW2d 219 (1990). However, the law of the case doctrine applies only to questions actually decided in the prior appeal, and to those questions necessary to the prior appeal's determination. *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 546; 481 NW2d 762 (1992).

Defendant's appellate brief cites only the following portion of plaintiff's trial testimony:

Q. Okay. Now, after this [April 8, 2003] meeting, were there any instances where your relationship with Ms. Patel changed?

A. I don't understand relationship.

Q. Is there—after this April eighth meeting, did Ms. Patel's attitude toward you change?

A. Oh, yes.

Q. Okay. How so?

A. Well, when she would come in in the morning, she would routinely say hello to each person in the room, except me. She would also, basically, not respond to my questions. And finally she told me to—

MR. JARVIS [*defendant's counsel*]: Objection, Your Honor, relevance. I believe the Court of Appeals has ruled on that issue. Restrict any testimony with respect to that. It's irrelevant. There's nothing in the Whistle Blower's Act. I believe the Court of Appeals--. It's not contained in the complaint. It's not actual. There are personal interactions in the workplace that are certainly not triable, are not a matter of Whistle Blower's Protection Act.

THE COURT: Well, I think the surrounding circumstances is [sic] relevant, and it's, I think this area is relevant to the Whistle Blower claim, the environment of work, etc. So the objection is overruled. You can answer the question.

Q. (By Mr. Rivers continuing:) Mr. Heckmann?

A. Yes, I'll start over, I guess. Basically, right off the first next morning, she wouldn't even talk to me. And then, she made a point of saying hello to each person with a special comment, but she walked right by me and didn't say a word. Later on that morning, I needed some information from her, and she yelled, get out of my office. She said, if you need to talk to me, send me an e-mail.

Q. Were there any ways that Ms. Patel affected your ability to do your job?

A. Yes. In fact, there were many documents that would come first, either into her possession or the Deputy Chief's Office Possession [sic], that needed to be given to me to get my work done . . . .

In *Heckmann, supra*, 267 Mich App at 493, this Court concluded that plaintiff's claim that his being socially isolated in the office created a material question of fact regarding an adverse employment action was legally and factually deficient. However, *Heckmann* decided the issue whether plaintiff's alleged social isolation in the workplace, *standing alone*, could create a material issue of fact regarding an adverse employment action, and answered that question in the negative. We do not interpret the *Heckmann* Court's holding--that plaintiff's isolation claim was legally and factually deficient--as precluding testimony on remand that plaintiff's superiors isolated him, particularly in connection with his allegations that, after the April 8, 2003 meeting at which Andrews threatened him with losing his job in Patel's presence, his superiors did not provide him with documents and information he required to complete his work projects.

Given that the holding in *Heckmann, supra*, did not preclude such testimony on remand, the paucity of testimony challenged, and that this scant testimony did not go unrefuted, we conclude any error was harmless.<sup>4</sup>

## VII

On cross-appeal, plaintiff asserts that the trial court in deciding whether to award plaintiff attorney fees under the WPA abused its discretion by not considering the proper factors, i.e., those set forth in *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982).

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<sup>4</sup> There was testimony from which the jury could have concluded that Patel did not retaliate against or ostracize plaintiff after the April 8, 2003 meeting. This evidence included plaintiff's testimony on cross-examination, when presented with an email Patel sent him in June 2003, that Patel approved plaintiff's paid attendance at a CPA seminar, and Deputy Chief Andrews' testimony that both before and after the April 8, 2003 meeting, Patel and plaintiff had a good working relationship. The jury also heard testimony from which it could have concluded that plaintiff himself brought on any social isolation he experienced from Patel, as plaintiff admitted sending Patel an email stating that she lacked command of the English language.

This Court reviews for an abuse of discretion the trial court's determination to award or deny attorney fees, and the determination of the reasonableness of the fees requested. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). The factual findings underlying an award of attorney fees are reviewed for clear error. *Solution Source, Inc v LPR Associates Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002), and underlying questions of law are reviewed de novo, *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Solution Source, supra* at 381-382.

The WPA is a remedial statute and is to be liberally construed to favor the persons the Legislature intended to benefit. *O'Neill v Home IV Care, Inc*, 249 Mich App 606, 614; 643 NW2d 600 (2002). "The WPA was enacted to remove barriers to an employee who seeks to report violations of the law, thereby protecting the integrity of the law and the public at large." *Id.*, citing *Hopkins v City of Midland*, 158 Mich App 361, 375; 404 NW2d 744 (1987). Generally, attorney fees are not recoverable unless expressly authorized by statute, court rule, judicial exception or contract. *Haliw v Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005). The WPA provides that attorney fees may be awarded to a successful plaintiff:

A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate. MCL 15.364.

When assessing the reasonableness of requested attorney fees, the court should consider the following nonexclusive list of factors:

(1) the professional standing and experience of the attorney; 2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expense incurred; and (6) the nature and length of the professional relationship with the client. [*Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).]

Although plaintiff asserts that the court improperly considered only one of the *Wood* factors, the contingency fee arrangement, that is not the case—the court referred to both the contingency fee arrangement and the verdict, i.e., the result obtained:

THE COURT: It's totally discretionary with the Court [whether to award attorney fees under the WPA.] Well in this case the Plaintiff, Mr. Heckman [sic], sued the City of Detroit, he was a 35 year employee, he was a CPA with the City of Detroit. He applied for a promotion to department head, in a letter he sent to the mayor and some other individuals who would be responsible for the promotion. A letter indicating that many individuals in the department he didn't believe were doing their jobs, that were not working all day long, et cetera. Basically, disparaging some other employees in the department and in that letter asking for the promotion. He was not chosen for the promotion, he then sued, there were a number of counts in the original complaint. The case –this Court granted Summary Disposition on all counts. The case evaluation award was \$5,000.00. The Court of Appeals affirmed –

MR. STEFANI: It was \$6,000.00.

THE COURT: Don't interrupt, counselor.

MR. STEFANI: I'm sorry. I just wanted to – I thought you made a mistake, your Honor, I wanted the record to be clear, I'm sorry.

THE COURT: Okay.

So the case evaluation was \$6,000.00 and then the Court of Appeals sent it back on one count, the whistle-blower count. The case went to trial and the jury awarded \$600,000.00. The Plaintiff has a contingent fee arrangement with his attorneys so the attorney award is going to be the – at least, \$200,000.00 the current judgment is for \$660,000.00 with interest. The Court does not -- that is more than adequate award for this case. The Court does not feel that it is appropriate to award additional attorneys fees so, the motion is denied

In determining whether to award plaintiff attorney fees, the trial court could properly consider plaintiff's contingency fee agreement with his counsel as long as that was not the sole factor considered. See *Phinney v Perlmutter*, 222 Mich App 513, 561; 564 NW2d 532 (1997), citing *Wilson v General Motors Corp*, 183 Mich App 21, 42; 454 NW2d 405 (1990). In this case, the contingency fee agreement was not the only factor the court considered. See *Phinney, supra* at 561.

Plaintiff also argues that the trial court abused its discretion by not addressing additional *Wood* factors. We conclude that the trial court was aware of the *Wood* factors because both parties' briefs set forth the list of factors, and counsel mentioned several of them at the hearing. Under these circumstances, the court's failure to mention more than two of the *Wood* factors does not constitute error.

Problematic, however, are several of the factual findings underlying the court's denial of attorney fees, specifically:

[Plaintiff] applied for a promotion to department head, *in a letter he sent to the mayor and some other individuals who would be responsible for the promotion*. A letter indicating that many individuals in the department he didn't believe were doing their jobs, that were not working all day long, et cetera. Basically, disparaging some other employees in the department *and in that letter asking for the promotion*. He was not chosen for the promotion, he then sued . . . [Emphasis added.]

There is no support for the trial court's finding that plaintiff's whistleblowing letter requested or referred to a promotion. However there is record support for the trial court's finding that plaintiff brought suit after not being chosen for promotion. Although it is not clear which

particular promotion the court meant, there are several possibilities, including Patel's position, and the Head of the Fiscal Operations Division position.<sup>5</sup> Since both of these promotions occurred before plaintiff filed suit on July 1, 2003, the trial court could have been referring to either of them, although the record is not clear whether the position of Head of Fiscal Operations was *filled* before plaintiff filed suit.

Given that the trial court's award of attorney fees under the WPA is discretionary, MCL 15.364, and that in denying plaintiff attorney fees the court referred to two of the *Wood* factors, neither of which is related to its erroneous factual findings that plaintiff's whistleblowing letter requested a promotion, we conclude that the trial court did not abuse its discretion in denying plaintiff attorney fees under the WPA. See *Phinney, supra* at 560-561.

We affirm both in the principal appeal and the cross-appeal.

/s/ Helene N. White  
/s/ Henry William Saad  
/s/ Christopher M. Murray

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<sup>5</sup> Regarding Patel's position, on cross-examination, plaintiff testified that when Patel was promoted to be his immediate supervisor, apparently in or around April 2003, the position had not been posted, and the union, of which he was a member, filed a grievance because of the City's failure to follow proper hiring procedure. Apparently, plaintiff was the named grievant. Plaintiff testified that he did not apply for the position because it was never posted—he could not have applied for it. Had it been posted, he would have applied. Regarding the position of Head of the Fiscal Operations division, there was testimony that after the April 8, 2003 staff meeting at which Deputy Chief Andrews allegedly told plaintiff he better start looking for another job, plaintiff e-mailed Andrews on May 23, 2003 that he was interested in being promoted to Head of the Fiscal Operations division.