

COA Opinion: The Whistleblower Protection Act only protects employees whose whistleblowing is primarily motivated by concern for public interests, rather than personal pecuniary gain.

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On July 5, 2011, the Michigan Court of Appeals issued a split opinion in *Whitman v. City of Burton*, No. 294703, with the majority concluding that no reasonable jury could find the City of Burton and its mayor liable under the Whistleblower Protection Act (“WPA”) for terminating the plaintiff police chief, even if the termination was based in part on plaintiff’s threat to sue for violation of city ordinance if the city did not pay him for unused sick or vacation pay. The Court of Appeals held that in threatening to inform the City council or prosecute the mayor for violation of the ordinance 68(C), the police chief clearly intended to advance his own financial interest, and was not acting in the public interest. For that reason, the police chief failed to make out a prima facie case of protected activity under the WPA and defendants were entitled to JNOV. Judge Beckering, in a lengthy [dissent](#), disagreed with the majority’s view that the plaintiff had to be primarily motivated by concern for public interests to enjoy protection under the WPA. This strong disagreement over how a Michigan statute should be interpreted and applied, and the fact that the majority’s view resulted in dismissal of the plaintiff’s claim, makes this case particularly prone to review by the Michigan Supreme Court.

The police chief’s dispute with the City over the payment of his unused sick or vacation days dated back to early 2003. In March 2003, at the mayor’s behest, city administrators agreed to shift from a policy of receiving reimbursement for their unused sick or vacation days to one of “use it or lose it,” in order to address the City’s budgetary shortfall. At the time, ordinance 68(C) required this reimbursement. The City never amended the ordinance.

Shortly after the agreement was reached, the police chief expressed his displeasure in a complaining letter to the mayor. He did not assert in that letter that the non-payment was a violation of law. The police chief then proceeded to accumulate more unused sick and vacation days throughout the remainder of 2003 and then demanded payment on January of 2004, claiming that failure to do so would violate ordinance 68(C). Ultimately, on advice of the city’s attorney, the mayor paid the police chief for his unused sick or vacation days. In 2007, the mayor informed plaintiff that he did not intend to reappoint him as police chief. The police chief filed a retaliation claim under the WPA and ultimately a jury returned a verdict in the plaintiff’s favor. The judge denied the defendants’ motion for JNOV for failure to make out a prima facie case of a WPA violation, and defendants appealed.

The court of appeals reversed. According to the majority opinion, when considering a retaliation claim under the WPA, the trial court must inquire whether the employee acted in good faith and with “a desire to inform the public on matters of public concern.” The majority believed no reasonable jury could conclude that the police chief satisfied that standard. It was in the public interest for plaintiff and the other administrators to forgo their payment of unused sick and vacation days to preserve the city’s financial resources for public services. In demanding payment, the police chief was decidedly not acting in the public interest, but rather for personal and private

interest of maintaining his lifestyle. Thus, the plaintiff's claim amounted to nothing but a private dispute over entitlement to monetary benefit, as demonstrated by the fact that he dropped his threat of legal action when he received his money. Moreover, the court held that no reasonable jury could conclude he acted in good faith when he withheld his accusation of legal violations until after he had accumulated thousands of dollars in sick and vacation time. After remaining silent for months, the plaintiff then raised the legal issue only for personal and pecuniary reasons, not for preventing injury to the public. Though it did not reach the question of whether there was sufficient evidence to support a causal connection between the termination and the 68(C) dispute, the majority added in a footnote that there was overwhelming evidence of plaintiff's misconduct in office that more than justified the mayor's decision not to reappoint plaintiff as police chief.

In dissent, Judge Beckering disagreed with the majority's conclusion that the WPA required the plaintiff to act primarily in the public interest. At the same time, she also contended there was sufficient evidence to support a finding that the police chief did act in the public interest. Finally, Judge Beckering disagreed with the majority's suggestion that there was insufficient evidence for the jury to find a causal connection between the mayor's refusal to reappoint the plaintiff in 2007 and the plaintiff's threat of legal action against the mayor in early 2004.