# STATE OF MICHIGAN

# COURT OF APPEALS

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| BRUCE WHITMAN,<br><br>Plaintiff-Appellee, | FOR PUBLICATION<br>April 24, 2014 |
| v | No. 294703<br>Genesee Circuit Court |
| CITY OF BURTON and CHARLES SMILEY,<br><br>Defendants-Appellants. | LC No. 08-087993-CL |

ON REMAND

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

BECKERING, J. (*dissenting*).

I respectfully dissent. The appeal of defendants, the city of Burton and former mayor Charles Smiley, returns to this Court from the Michigan Supreme Court after the Supreme Court held that plaintiff, Bruce Whitman, engaged in conduct protected under the whistleblowers' protection act ("WPA"), MCL 15.361 *et seq*., and remanded to this Court to consider all remaining issues on which this Court did not formally rule, including the issue of causation. *Whitman v City of Burton*, 493 Mich 303, 319-321; 831 NW2d 223 (2013). On remand, the majority concludes that plaintiff is not a "whistleblower" under the WPA and that there was insufficient evidence at trial of causation to withstand defendants' motion for JNOV. I disagree and would affirm the trial court's denial of defendant's motion for JNOV.

## I. PROTECTED ACTIVITY

When this case was appealed to the Michigan Supreme Court, the Court held that plaintiff engaged in protected activity under the WPA:

> [I]t is undisputed that the Mayor decided to withhold payment of unused sick, personal, and vacation time in violation of Ordinance 68C, a decision to which Whitman objected. It is also undisputed that Whitman reported the Mayor's violation of Ordinance 68C to the Mayor himself, city administrator Lowthian, and the city attorney, and that following Whitman's reporting of this violation, he was discharged. Finally, Whitman did not knowingly make a false report given that the evidence reveals that the Mayor did in fact violate Ordinance 68C, nor is there any indication that a public body requested that Whitman participate in an

> investigation. *Accordingly, Whitman engaged in conduct protected under the WPA.* [*Whitman*, 493 Mich at 319-320 (emphasis added).]

Despite our Supreme Court's conclusion, the majority holds that plaintiff "is not a 'whistleblower' under the WPA . . . ." The majority reaches this conclusion by finding that "plaintiff's actions—as an objective matter—were undoubtedly against the public interest" because Ordinance 68C "harmed, not advanced, the public interest."[1] Aside from the fact that defendants did not raise this as an argument—it is instead the brainchild of the majority on remand—the majority's holding is erroneous for several reasons.

First, our Supreme Court's express conclusion that plaintiff engaged in protected activity under the WPA is the law of the case; this Court is bound by this conclusion. See *Lenawee Co v Wagley*, 301 Mich App 134, 149; 836 NW2d 193 (2013) ("The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue."). The majority's holding that plaintiff is not a whistleblower under the WPA directly conflicts with the Supreme Court's conclusion that plaintiff engaged in protected activity under the WPA. See, generally, *Henry v Detroit*, 234 Mich App 405, 409-410; 594 NW2d 107 (1999) (stating that a person who engages in "protected activity" under the WPA is a "whistleblower"); see also *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 379 n 10; 563 NW2d 23 (1997) (identifying various types of whistleblowers).

The majority attempts to sidestep the law of the case doctrine, opining that the Supreme Court remanded for consideration of "all remaining issues on which [the Court of Appeals] did not formally rule" and that this Court did not previously consider whether plaintiff's actions must

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[1] To the extent the majority argues that plaintiff's reporting of the ordinance violation was not whistleblowing because the issue at hand "simply involved a disagreement regarding the proper interpretation of defendant's labor laws," the majority ignores the evidence in this case. It was clear to all parties that plaintiff was pursuing the ordinance violation as a violation of the law. As noted in my previous dissent, on January 9, 2004, plaintiff sent a letter to Smiley indicating that "[t]o 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." (Emphasis added.) In his January 15, 2004 letter to Dennis Lowthian, an administrative officer for the city who had been acting as a spokesperson for all of the administrative officers, plaintiff stated: "I cannot allow them to violate the ordinance by 'forcing waivers' of ordinance[-]given rights. *I believe it is my job as a police officer to point the violation out* and I will pursue it as far as it needs to go." (Emphasis added.) In his January 23, 2004, letter to city attorney Richard Hamilton, plaintiff made clear as well: "My position is this, *this is a violation of the ordinance [and] I told the mayor on the 12th it was an ordinance violation*… I will be forced to pursue this as a *violation of the law and will address it as such*." (Emphasis added.) Smiley himself testified that when he conferred with the city's labor and employment attorney, Dennis Dubay, about the issue, Dubay said, "Chuck, you can't make a gentlemen's agreement to drive 55 [miles per hour] when the speed limit is posted at 45 . . . ." The parties were not debating "the proper interpretation" of labor laws; they were at odds over whether Ordinance 68C should be enforced.

have objectively advanced the public interest to be protected under the WPA. However, "[t]he law of the case doctrine applies . . . to questions actually decided in the prior decision *and to those questions necessary to the court's prior determination*." *Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 135; 580 NW2d 475 (1998) (emphasis added). Although neither this Court in its prior opinion nor our Supreme Court addressed whether plaintiff's actions must have objectively advanced the public interest to be protected under the WPA, the Supreme Court's conclusion that plaintiff engaged in protected activity under the WPA necessarily encompasses consideration of any issue that would be dispositive of whether plaintiff engaged in protected activity under the WPA. Assuming that plaintiff's actions must have objectively advanced the public interest to be protected under the WPA, this issue was necessary to the Court's determination that plaintiff engaged in protected activity under the WPA.

Second, the majority's conclusion is contrary to the plain language of the WPA. As our Supreme Court emphasized, "the plain language of MCL 15.362 controls" in this case. *Whitman*, 493 Mich at 321. Nothing in the plain language of MCL 15.362 can be taken as a requirement that the law that is the subject of a report must objectively advance the public interest. Further, nothing in its plain language provides that the employee's report must objectively advance the public interest. MCL 15.362 provides as follows:

> 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.

Neither the terms "public interest" nor any like terms are found in the statute. "It is a well-established rule of statutory construction that this Court will not read words into a statute." *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002). "If the statutory language is clear and unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed, and *further judicial construction is not permitted*." *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 493; 711 NW2d 795 (2006)(emphasis added).

As the basis for its holding that plaintiff's actions must have objectively furthered the public interest for plaintiff to be a whistleblower, the majority explains that the purpose of the WPA is the protection of the public. Although the majority correctly identifies the underlying purpose of the WPA, see *Dolan*, 454 Mich at 378-379, "the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case." *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999) (emphasis in original). Here, application of the plain language of MCL 15.362 dictates that plaintiff is a whistleblower; the majority reads words into MCL 15.362 that simply do not exist to reach a result that they believe is more consistent with the purpose of the WPA.

Third, the majority's conclusion is contrary to binding precedent. This Court has explained that "[t]he plain language of the [WPA] provides protection for two types of 'whistleblowers': (1) those who report, or are about to report, violations of law, regulation, or rule to a public body, and (2) those who are requested by a public body to participate in an investigation held by that public body or in a court action."[2] *Henry*, 234 Mich App at 409. "If a plaintiff falls under either category, then that plaintiff is engaged in a "protected activity" for purposes of presenting a prima facie case." *Id.* at 410. It is undisputed that plaintiff falls into the first category of "whistleblowers." The majority's conclusion that plaintiff is not a whistleblower conflicts with this Court's interpretation of the WPA.

Finally, even if plaintiff's actions must have objectively furthered the public interest for him to be a whistleblower under the WPA, I would conclude that this requirement is satisfied. The public interest is served when a violation of the law by a public official is reported. See *Dolan*, 454 Mich at 378 n 9 ("Violations of the law . . . by governments and by the men and women who have the power to manage them are among the greatest threats to the *public welfare.*"); see also *Gray v City of Galesburg*, 71 Mich App 161, 163; 247 NW2d 338, 339 (1976) ("On the part of the city there has been conceded the right to prosecute the Grays for an alleged violation of a city ordinance, clearly a public interest."). In this case, it is undisputed that plaintiff reported Smiley's violation of Ordinance 68C to a public body. Although it may have been necessary for the city to adjust its budget to preserve essential public services and avoid terminating its employees, balancing the budget through a "gentlemen's agreement"[3] in violation

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[2] Without referencing any previous interpretations of the WPA, our Supreme Court in *Whitman* stated that "MCL 15.362 makes plain that *protected conduct does not include* reports made by an employee that the employee knows are false, *or reports given because the employee is requested to participate in an investigation by a public body*." *Whitman*, 493 Mich at 313 (emphasis added), see also *id*. at 320 (". . . nor is there any indication that a public body requested that Whitman participate in an investigation."). This interpretation of MCL 15.362 by the Supreme Court is contrary to previous interpretations of the statute by both the Supreme Court and this Court. See *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998); *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011); *Truel v City of Dearborn*, 291 Mich App 125, 138-139; 804 NW2d 744 (2010); *Shaw v Ecorse*, 283 Mich App 1, 10-11; 770 NW2d 31 (2009); *Ernsting v Ave Maria College*, 274 Mich App 506, 510; 736 NW2d 574 (2007); *Manzo v Petrella*, 261 Mich App 705, 712-713; 683 NW2d 699 (2004); *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 583; 649 NW2d 754 (2002); and *Henry v City of Detroit*, 234 Mich App 405, 410-411; 594 NW2d 107 (1999). I believe this to be an inadvertent misstatement of the law, as it was not relevant to the analysis in *Whitman*. I urge the Supreme Court to clarify whether a proper interpretation of MCL 15.362 includes as protected activity a person's participation in an investigation as requested by a public body, including reports given in the process.

[3] In footnote 14 of the majority opinion, the majority describes as "cynical" my use of the phrase "gentlemen's agreement," as if it is my own derogatory spin on the facts. Meanwhile, the majority avoids the phrase like the plague, describing the agreement instead as a "decision to waive the ordinance." But the description, "gentlemen's agreement," was coined by Smiley

of one of its own ordinances hardly seems to serve the public interest. The public certainly has an interest in whether the city is conducting its business within the parameters of the law.[4] Plaintiff's report to a public body of Smiley's violation of the ordinance was in the public's interest.

Accordingly, I would conclude—as our Supreme Court did—that plaintiff engaged in protected activity under the WPA. In other words, plaintiff is a whistleblower.[5]

## II. CAUSAL CONNECTION

The majority also holds that "the evidence is overwhelming that plaintiff's supposed 'whistleblowing' had no connection to the mayor's decision to not reappoint him as police chief," and thus, defendants are entitled to a judgment notwithstanding the verdict (JNOV). I disagree.

With its repeated references to plaintiff's other alleged misdeeds, as "weighed against" his retaliation evidence, the majority opinion reads much like a factfinder's conclusions. But the task before us is not to weigh the evidence and decide who we believe after reviewing a cold

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himself. It was used extensively throughout the trial by the parties and the witnesses. Even our Supreme Court used it. *Whitman*, 493 Mich at 307. Smiley testified that when plaintiff raised the issue of payment for vacation days, Smiley responded "we had a gentlemen's agreement." An example of a spin on the facts might include the majority's description of plaintiff's acts as "selfish," or its effort to characterize Ordinance 68C as a "standard, garden-variety collective bargaining provision for wages and benefits," a "perk," and "not a law that protects a public interest."

[4] I also take issue with the majority's conclusion that seeking to enforce Ordinance 68C—which defendants never amended during the relevant time period—"harms the public interest." The public interest *is* furthered when a police chief chooses to work every day to protect and serve the public rather than taking unneeded sick, personal, and vacation time. The majority concludes that a public servant's "personal sacrifice" in waiving his or her rights under Ordinance 68C advances the public interest. While the city may save expenses that way, the public will literally not be served on the days those servants are absent from work, taking their allotted sick, personal, and vacation time, because here, they were repeatedly warned by the mayor that they had better "use it or lose it" after he foisted upon them a cost-saving method in the guise of a "gentleman's agreement." Saving taxpayer money is in the public interest, but it can be accomplished legally. Plaintiff undertook to enforce an ordinance, and as a result, nine employees were compensated for their unused vacation time pursuant to the ordinance, for a total cost of $17,762.93—not a vast, make-it-or-break-it amount of money in the city's budget.

[5] In brief response to Judge O'Connell's rather creative concurring opinion, this is not a contract action. The plain language of the WPA does not allow for Judge O'Connell's proposed injection of an extraneous theory of defense. And even if one considered a "gentlemen's agreement" foisted upon the city's non-union employees a contract, there was no consideration. Furthermore, a contractual provision to violate the law is not enforceable. *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005).

transcript. We are not jurors, and we were not at the trial. When determining whether the trial court should have granted a directed verdict or a motion for judgment notwithstanding the verdict (JNOV), our task is to "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted."[6] *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). "The trial court cannot substitute its judgment for that of the factfinder, and 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). Here, plaintiff presented competent evidence to support his theory of the case.

In its opinion, the Supreme Court appears to suggest, without deciding, that a question of fact exists concerning causation:

> To recover under the WPA, Whitman must therefore establish a causal connection between this protected conduct and the adverse employment decision by demonstrating that his employer took adverse employment action *because of* his protected activity. *At trial, Whitman presented evidence that his reporting of the Ordinance 68C violation made a difference in the Mayor's decision not to reappoint him and the Mayor, in turn, presented evidence to the contrary.* However, because the Court of Appeals did not address the issue of causation when it held that Whitman's WPA claim failed as a matter of law, this question must be resolved on remand for the purpose of determining whether the circuit court's denial of defendants' motion for JNOV was proper. [*Whitman*, 493 Mich at 320 (emphasis added).]

Under the WPA, a plaintiff must establish that "a causal connection exists between the protected activity and the adverse employment action." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (quotation omitted). "A plaintiff may establish a causal connection through either direct evidence or indirect and circumstantial evidence. Direct evidence is that which, if believed, requires the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions." *Shaw v Ecorse*, 283 Mich App 1, 14; 770 NW2d 31 (2009).

> Absent direct evidence of retaliation, a plaintiff must rely on indirect evidence of his or her employer's unlawful motivations to show that a causal link exists between the whistleblowing act and the employer's adverse employment action. A plaintiff may "'present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful [retaliation].'" Once a plaintiff establishes a prima facie case, "a presumption of [retaliation] arises" because an employer's adverse action is "more likely than not based on the consideration of impermissible factors" . . . .

[6] We review de novo a trial court's denial of a motion for directed verdict or JNOV. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000).

> The employer, however, may be entitled to summary disposition if it offers a legitimate reason for its action and the plaintiff fails to show that a reasonable fact-finder could still conclude that the plaintiff's protected activity was a "motivating factor" for the employer's adverse action. "[A] plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful retaliation]." [*Debano-Griffin*, 493 Mich at 176 (internal citations omitted).]

Viewing the evidence presented at trial in the light most favorable to plaintiff, there was sufficient evidence for a reasonable juror to conclude that plaintiff's reporting of Smiley's violation of Ordinance 68C was a motivating factor in Smiley's decision not to reappoint plaintiff. See *id.*; see also *Shaw*, 283 Mich App at 14. As discussed in my previous dissenting opinion in this case, the following evidence of causation was presented at trial:

> First, there was evidence that Smiley was aware plaintiff reported the ordinance violation as such. In his January 9, 2004, letter to Smiley, plaintiff stated: "I do not feel that issuing a confidential memo that affects one's wages and benefits that are set by ordinance can supersede that very ordinance. 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." At the January 12, 2004, staff meeting, plaintiff told Smiley that he had talked to the city attorney about the payout issue, that refusing to pay employees for unused days was an ordinance violation, and that he expected the violation to be addressed. There was also testimony that Smiley was aware of plaintiff's January 23, 2004, letter to Hamilton, wherein plaintiff reported the violation. Although Smiley testified that he did not discuss the letter with Hamilton, Hamilton testified that he did, in fact, tell Smiley about the letter. It is the fact-finder's responsibility to determine the credibility and weight of the testimony. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).
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> Further, although there was evidence that there may have been a variety of reasons for Smiley's decision not to reappoint plaintiff, such as plaintiff's allegedly inadequate discipline of the officers who stopped Smiley after his visit to the local bar, sexually explicit emails sent by plaintiff, and other reasons described by the majority, there was also evidence that plaintiff's reporting of the ordinance violation was another reason that made a difference in Smiley's decision. On June 7, 2004, Smiley sent plaintiff a letter stating that he was considering removing plaintiff as police chief. Plaintiff testified that at their meeting later that day, Smiley angrily pointed at his face and yelled, "You threatened to have me prosecuted over the 68C vacation pay issue." Udell's meeting notes stated: "Mayor – no trust – 68-C (vacation) – lack of communication . . . ." While Smiley did not immediately fire plaintiff as threatened, and plaintiff remained police chief through November 2007, a reasonable juror could have concluded that the 68C ordinance issue was still on Smiley's mind when he decided not to reappoint plaintiff. The incident when plaintiff allegedly failed to adequately discipline the police officers who stopped Smiley outside the bar, which was one of Smiley's purported reasons for not

> reappointing plaintiff, occurred in March 2004. Thus, by Smiley's own admission, there were incidents going back as far as 2004 that made a difference in his decision-making in 2007.[7] Moreover, at the December 2007 meeting of city lieutenants and sergeants, just after plaintiff's discharge, Smiley mentioned that he and plaintiff "got off on the wrong foot" because of the 68C ordinance issue. Plaintiff testified that after the meeting, which he had not attended, he asked two sergeants and a lieutenant whether the reason for his discharge had been discussed. They all said that the reason had been discussed and that "it all goes back to" the ordinance 68C issue. Sergeant Odette testified that Smiley said he had not been happy with plaintiff since early after his appointment, citing the payout issue. [*Whitman v City of Burton*, 293 Mich App 220, 240-242; 810 NW2d 71 (2011) (BECKERING, J., dissenting).]

The majority lists a variety of reasons why there is no causal connection between plaintiff's reporting of the ordinance violation and Smiley's decision not to reappoint him. However, none of the reasons offered by the majority justifies the conclusion that there is no causal connection as a matter of law.

First, the majority opines that there is no causal connection because Smiley "viewed the 68-C issue . . . as an example of how plaintiff was untrustworthy." The majority references the notes that Udell took at the June 2004 meeting, which state, "Mayor – no trust – 68-C (vacation) – lack of communication . . . ." According to the majority, this evidence establishes that Smiley decided not to reappoint plaintiff because he did not trust plaintiff, not because plaintiff was a whistleblower. The majority views the evidence of the June 2004 meeting in a light most favorable to defendants, the moving parties, which is improper when reviewing a motion for JNOV. See *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009). There was evidence presented that at the June 2004 meeting, Smiley yelled at plaintiff, "You threatened to have me prosecuted over the 68C vacation pay issue." Even assuming on the basis of this evidence that Smiley decided not to reappoint plaintiff because he did not trust plaintiff, it can be reasonably inferred that Smiley's distrust of plaintiff was predicated on plaintiff's reporting of Smiley's violation of Ordinance 68C. Thus, even when the matter is framed in terms of trust as opposed to whistleblowing, it remains that Smiley decided not to reappoint plaintiff "because of his protected activity." *Whitman*, 493 Mich at 320.

Second, the majority concludes that the temporal gap between plaintiff's reporting of the ordinance violation and Smiley's decision not to reappoint him "belies any causal connection between the two." In support of their conclusion, the majority cites cases from other

[7] The majority contends that Smiley terminated plaintiff "almost *immediately* after learning about these numerous, other valid reasons in late 2007." This was Smiley's testimony, but there was substantial evidence to the contrary, casting doubt on his credibility. For example, Smiley himself testified that he learned about the email issue a year earlier in the fall of 2006, and there was evidence that he knew years earlier (spring of 2004) about plaintiff's discipline of the officers who pulled his car over after he left a bar.

jurisdictions for the proposition that large temporal gaps between protected activity and alleged retaliatory acts have been fatal to retaliation claims. However, it is well established in many jurisdictions that "[t]he mere passage of time is not legally conclusive proof against retaliation." *Robinson v Se Pennsylvania Transp Auth, Red Arrow Div*, 982 F2d 892, 894 (CA3, 1993); see also, e.g., *Shirley v Chrysler First, Inc*, 970 F2d 39, 44 (CA 5, 1992) (stating that temporal proximity "is part of our analysis, but not in itself conclusive of our determinations of retaliation"); *Castillo v Dominguez*, 120 Fed Appx 54, 57 (CA 9, 2005) (stating that a lack of temporal proximity may make it more difficult to show causation, but circumstantial evidence of a pattern of antagonism following the protected conduct can also give rise to the inference of causation). Indeed, the United States Court of Appeals for the Sixth Circuit has stated, "We have never suggested that a lack of temporal proximity dooms a retaliation claim." *Gibson v Shelly Co*, 314 Fed Appx 760, 773 (CA 6, 2008). "Temporal proximity is but one method of proving retaliation." *Che v Massachusetts Bay Transp Auth*, 342 F3d 31, 38 (CA 1, 2003). For example, where there is a lack of temporal proximity between protected activity and the adverse employment action, "circumstantial evidence of a 'pattern of antagonism' following the protected conduct can also give rise to the inference" of causation. *Kachmar v SunGard Data Sys, Inc*, 109 F3d 173, 177 (CA 3, 1997). Some courts have found causation to exist where years have passed between the protected activity and the adverse employment action. See, e.g., *Robinson*, 982 F2d at 894.

In this case, the lack of temporal proximity between plaintiff's reporting of the ordinance violation and Smiley's decision not to reappoint him is but one factor to consider when determining whether a causal connection exists. It is not conclusive. As previously discussed, although Smiley did not immediately fire plaintiff as threatened and plaintiff remained the police chief through November 2007, a reasonable juror could conclude that the Ordinance 68C issue was still on Smiley's mind when he decided not to reappoint plaintiff. By Smiley's own admission, there were incidents going back as far as 2004 that made a difference in his decision-making in 2007. And there was evidence in this case illustrating that Smiley's antagonism toward plaintiff arising from the ordinance issue continued through the date when Smiley declined to reappoint plaintiff and was a motivating factor in Smiley's decision.

Finally, the majority cites various "breaks in the causal chain" and misconduct committed by plaintiff that they believe is fatal to plaintiff's claim. Particularly, in addition to referencing the temporal gap during which plaintiff remained the police chief, the majority opines that plaintiff's initial complaints about the ordinance did not upset Smiley and that Smiley enforced the ordinance after plaintiff complained. The majority also opines that plaintiff inadequately disciplined subordinates, sent sexually explicit email messages on a city computer, discriminated against a female officer, and forged a signature on a budget memorandum.[8] By citing these

[8] The majority contends that "plaintiff has provided no evidence to refute the mayor's stated and compelling reasons for not reappointing him." In fact, plaintiff testified at trial regarding the alleged incidents and either explained or defended his conduct, and plaintiff's counsel cross-examined defendants' witnesses regarding the issues and their significance. It was up to the jury to weigh the credibility of the witnesses and determine whether, in light of everything, the ordinance issue was a motivating factor in Smiley's termination decision. As the trial court aptly

facts, the majority attempts to paint a picture of a situation where Smiley simply addressed plaintiff's objection to the vacation-payout issue without harboring any animosity toward plaintiff concerning the issue and, thus, could not have refused to reappoint plaintiff as the chief of police for any reason other than plaintiff's misconduct. However, the evidence at trial, when properly viewed in a light most favorable to plaintiff, paints a different picture.

While there was evidence that there may have been a variety of reasons for Smiley's decision not to reappoint plaintiff, there was ample evidence that plaintiff's reporting of the ordinance violation was a motivating factor for the adverse employment action. Although plaintiff initially objected in March 2003 to the lack of vacation payout, plaintiff did not couch his objection in terms of an ordinance violation until January 2004; therefore, the absence of any animosity by Smiley toward plaintiff in 2003 is understandable. There was certainly evidence at trial that Smiley was upset with plaintiff over the ordinance issue after plaintiff reported Smiley's violation of the ordinance and threatened to "pursue [it] as a violation of the law" in January 2004. In particular, there was evidence that within a few months, Smiley was demonstrating an antipathetic attitude toward plaintiff. On June 7, Smiley issued a memorandum to plaintiff that requested a meeting with him for the same day; in the memorandum, Smiley stated that plaintiff would either have to resign or be fired. Significantly, plaintiff testified that when he met with Smiley that day, Smiley angrily pointed his finger in plaintiff's face and yelled, "You threatened to have me prosecuted over the 68C vacation pay issue." Udell's notes of the meeting reference "68-C (vacation)." And, as previously discussed, evidence was admitted at trial of statements that Smiley made to various lieutenants and sergeants after plaintiff's discharge; the lieutenants and sergeants testified that Smiley explained that he had been unhappy with plaintiff because plaintiff had threatened to have him brought up on charges of violating a city ordinance, and that the reason for plaintiff's discharge "all goes back to" the Ordinance 68C issue.[9] Portions of Smiley's own deposition testimony were admitted at trial, wherein he admitted that he was "very upset," "extremely upset," and "wasn't happy at all" with plaintiff's conduct concerning the ordinance issue. On the basis of this evidence, a reasonable juror could certainly find that plaintiff's complaints about the violation of Ordinance 68C displeased Smiley, Smiley continued to be displeased about plaintiff's complaints even when plaintiff remained the police chief, and plaintiff's protected activity was *a motivating factor* in Smiley's decision not to reappoint plaintiff as the police chief. See *Debano-Griffin*, 493 Mich at 176.

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told the defense when denying their motion for a directed verdict, "when it comes to those credibility issues, that gets taken care of by that jury over there, so your motion's denied."

[9] The majority downplays the evidence of these statements by Smiley, opining that "[i]t is difficult to see how a statement the mayor allegedly made *after* he had already declined to reappoint Whitman would influence his decision not to reappoint Whitman." But the majority is familiar with the concept of a confession or admission. The statements that Smiley made to the lieutenants and sergeants obviously shed light on the reason why he declined to reappoint plaintiff as the police chief. Reasonable minds could (and did) find that the ordinance issue was *one of the reasons that made a difference* in Smiley's decision not to reappoint plaintiff. Notably, the jury found in plaintiff's favor even after hearing all of defendants' evidence about plaintiff that the majority found so disturbing.

Accordingly, because plaintiff engaged in a protected activity and there was sufficient evidence of a causal connection between the protected activity and plaintiff's subsequent discharge to create a question of fact for the jury, I would affirm the trial court's denial of defendants' motion for JNOV.

/s/ Jane M. Beckering