STATE OF MICHIGAN

COURT OF APPEALS

BRUCE WHITMAN, Plaintiff-Appellee,	FOR PUBLICATION April 24, 2014 9:00 a.m.
v	No. 294703 Genesee Circuit Court
CITY OF BURTON and CHARLES SMILEY, Defendants-Appellants.	LC No. 08-087993-CL

ON REMAND

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

SAAD, J.

I. PLAINTIFF IS NOT ENTITLED TO WPA PROTECTION[1]

In this alleged Whistleblower Protection Act (WPA)[2] claim, our 2011 opinion[3] reversed the jury award in plaintiff's favor. We held that the Michigan Supreme Court's *Shallal*[4] decision barred plaintiff from claiming protection under the WPA, because he admitted that his motivation for asserting entitlement to accumulated, unused sick-leave pay under a city ordinance was entirely personal and selfish.[5] We reasoned that, under *Shallal*, plaintiff's private

[1] A trial court's ruling on a motion for JNOV is reviewed de novo on appeal. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646 (2005). "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).

[2] MCL 15.361, *et seq*.

[3] *Whitman v City of Burton*, 293 Mich App 220; 810 NW2d 71 (2011).

[4] *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604; 566 NW2d 571 (1997).

[5] Specifically, plaintiff first voiced his opposition to the city ordinance at issue by stating that "my current life style revolves around these very things [i.e., additional payments] that have been negotiated for me." See *Whitman*, 293 Mich App at 225.

motivations for asserting defendant's non-compliance with the city ordinance disqualified him from WPA protections, because he did not act as a "whistleblower" under the meaning of the WPA.

The Michigan Supreme Court reversed, and "disavowed" what we thought was the principle articulated in *Shallal* on the relevance of plaintiff's private motivations.[6] Instead, it held that plaintiff's private motivations for "blowing the whistle" are irrelevant,[7] and stated that plaintiff's conduct constituted protected activity under the WPA.[8] What we and the Michigan Supreme Court did not address—and what we must now analyze[9]—is whether plaintiff's actions or conduct, as an objective matter, must advance the public interest in order to entitle plaintiff to the protection of the WPA.[10] Because the WPA protects those who protect the public interest by blowing the whistle on illegality, and laws in general are an expression of public policy for the benefit of the public, there is typically no question that reporting a violation of law advances the public interest. But this is not always true, and is certainly not true here.

In this case, plaintiff's actions are unquestionably and objectively contrary to the public interest. That is, regardless of his personal motivation (now irrelevant), his "whistleblowing" effort sought enforcement of a law that harmed, not advanced, the public interest.

The law in question, Burton ordinance 68-C, is not a law that protects the public interest, but rather an ordinance that reads much like a standard, garden-variety collective-bargaining

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[6] *Whitman v City of Burton*, 493 Mich 303, 306; 831 NW2d 223 (2013). A summary of the facts relevant to this opinion can be found at *Whitman*, 493 Mich at 306–311, and at *Whitman*, 293 Mich App at 222–228.

[7] *Whitman*, 493 Mich at 306.

[8] *Id*. at 320.

[9] Our understanding of the Supreme Court's statement that plaintiff "engaged in conduct protected under the WPA" is that it is predicated on a narrow reading of the WPA: namely, one that only analyzes the relevancy of a plaintiff's personal motivations for "blowing the whistle." Our earlier, reversed opinion only addressed this discrete aspect of the WPA. Because we did not analyze the overriding issue in our earlier opinion—namely, whether the WPA only protects conduct that *objectively* advances the public interest—the Supreme Court did not address this issue on appeal. Because the Supreme Court instructed us on remand to consider "all remaining issues on which [we] did not formally rule," we will now discuss this aspect of the WPA. *Whitman*, 493 Mich at 321.

[10] Our Court has noted the distinction between an employee's personal motives in reporting legal violations, and whether that reporting actually advanced the public interest. See *Phinney v Perlmutter*, 222 Mich App 513, 554; 564 NW2d 532 (1997) ("[i]n addition, whether plaintiff sought personal gain in making her reports, rather than the public good, is legally irrelevant and need not be addressed *except to note that the reporting of misconduct in an agency receiving money is in the public interest*") (emphasis added). *Phinney*'s holdings on unrelated matters have likely been abrogated by *Garg*, 472 Mich at 290.

provision for wages and benefits.[11] It is simply a recitation that sets forth the wages and benefits for administrative, non-unionized employees of the City of Burton. Normally, an employee must use sick days or vacation days, or lose them. But under some collective-bargaining agreements and employment policies, employees may "accumulate" these days and then get paid for all such days not used. This perk is generally found in collective-bargaining agreements for unionized employees. But here, this benefit—along with a statement of wages and matters like dental insurance—were codified in 68-C.

The waiver of the benefits contained in 68-C—which plaintiff characterizes as a "violation of law"—has its origins in a severe financial crisis that afflicted the city of Burton in the earlier 2000s.[12] During this time period, the city's department heads—who obviously benefited from 68-C—voted as a group, not only to take a wage freeze, but to forgo this perk to avoid harmful layoffs and reduced services to the public.[13] In other words, the administrative team's waiver of the perks contained in the ordinance was an illustration of shared sacrifice by the non-unionized department heads to advance the public interest of the citizens of Burton at their own expense.[14]

Only one department head objected to this waiver of perks: plaintiff, the then–chief of police.[15] He demanded his money as set forth in the ordinance,[16] which he received after the mayor acted on the advice of outside legal counsel. This is the "law" plaintiff uses to assert a claim under the WPA.

The WPA is designed to ferret out violations of the law that injure the public, especially when applied to public-sector defendants.[17] If government officials, who are bound to serve the

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[11] See Burton Ordinances 68-25C, § 8(I) ("68-C"). As noted by the Supreme Court, Burton's ordinance numbering and policy regarding unused leave time have changed since the time of trial. *Whitman*, 493 Mich at 306, n 3. "Because those changes are not relevant to our analysis, this opinion refers to the ordinance numbering and language as it was introduced during trial." *Id*.

[12] *Whitman*, 293 Mich App at 224.

[13] *Whitman*, 493 Mich at 307.

[14] The dissent cynically refers to this action as a "cost-saving method in the guise of a 'gentleman's agreement.'"

[15] *Whitman*, 493 Mich at 307. It appears that Whitman attended the March 2003 meeting when the department heads decided to waive 68-C, but it is unclear whether Whitman voiced an opinion on the waiver at the meeting.

[16] *Id*.

[17] "[The WPA encourages employees to assist in law enforcement] with an eye toward promoting public health and safety. *The underlying purpose of the [WPA] is the 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

public, violate laws designed to protect the public from corruption, pollution and the like, then employees who, at their own risk, blow the whistle on such illegality necessarily serve the public interest—which is precisely why the WPA grants such employees protection from reprisal. Yet, where the law in question, as here, is not a law to protect the public, but rather a simple listing of wages, benefits, and various perks—and the very public servants who benefit financially from the ordinance make a personal sacrifice, and waive their right to these perks to save the public badly needed funds, and to prevent layoffs and reduced public services—then any action contrary to the waiver is contrary to the public interest. Again: the waiver of the perks set forth in the ordinance at issue advances the public interest. Opposition to that waiver—on which plaintiff bases his suit—harms the public interest.

In addition, whistleblowing assumes that an employee takes a risk of retaliation for uncovering the public employer's misconduct. Here, there simply was no misconduct or illegality. The only conduct of the city employees that implicated 68-C was the department heads' decision to waive the ordinance, and plaintiff's refusal to honor that waiver. This is an insistence by an employee, plain and simple, to get his perks—not an uncovering of corruption or illegality. And this disagreement about the legal effects of the waiver was satisfied, in plaintiff's favor, after the city sought legal counsel. Accordingly, plaintiff's citation of the ordinance was not whistleblowing. It simply involved a disagreement regarding the proper interpretation of defendant's labor laws: whether the administrative team could waive the perks under 68-C, and whether plaintiff was bound by the group's waiver. It has nothing to do with whistleblowing whatsoever.

This is why this is not the usual case, where a report of a violation of law normally constitutes conduct in the public interest.[18] Here, to the contrary, plaintiff's actions—as an objective matter—were undoubtedly against the public interest. And defendant did not actually "violate" any law in the sense that "violations of law" have been traditionally understood in

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." *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378–379; 563 NW2d 23 (1997) (emphasis added).

[18] Cases from our sister states interpreting their whistleblower statutes and jurisprudence recognize the distinction between reported legal violations that affect the public interest (which are protected) and reported legal violations that affect solely private interests (which are not). Though these cases involve internal corporate disputes—as opposed to reports of violated municipal statutes—we think that the reasoning is equally relevant to this case, where the violated statute did not advance the public interest. See *Garrity v Overland Sheepskin Co of Taos*, 917 P2d 1382, 1387 (NM, 1996) ("[w]hen an employee is discharged for whistleblowing, the employee must also demonstrate that his or her actions furthered the public interest rather than served primarily a private interest"); and *Darrow v Integris Health, Inc*, 176 P3d 1204, 1214 (Okla, 2008) ("to distinguish whistleblowing claims that would support a viable common-law tort claim from those that would not, the public policy breached must truly impact public rather than the employer's private or simply proprietary interests"). Cases from foreign jurisdictions are not binding, but can be persuasive authority. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010).

whistleblowing lawsuits—i.e., revealing public corruption or malfeasance. It simply refused (at first) to grant plaintiff a monetary perk that he demanded. Plaintiff may or may not have been entitled to his perks, but he most certainly is not entitled to claim the protection of the WPA, when his conduct objectively serves his interest, but harms the public's.

Because he is not a "whistleblower" under the WPA, no juror could legally find in favor of plaintiff on his WPA retaliation claim. The trial court's denial of defendant's request for JNOV is accordingly reversed.

II. CAUSATION[19]

We also held in our earlier opinion that plaintiff's alleged whistleblower activity from late 2003 to early 2004 was not the legal cause of the mayor's decision to not reappoint plaintiff as police chief in late 2007.[20] Upon closer examination of the facts pertinent to the causation issue, we are more convinced that plaintiff's alleged whistleblower activity lacks a causal link to the mayor's decision. We so hold for several reasons.

A. TRUST, NOT WHISTLEBLOWING

As noted, in 2003, the mayor's administrative team voted to voluntarily take a wage freeze and forego the perk of accumulated sick days to save taxpayer's money, and avoid layoffs

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[19] To prevail under the WPA, plaintiff must "establish a causal connection between [the] protected conduct and the adverse employment decision by demonstrating that his employer took adverse employment action *because of* his protected activity." *Whitman*, 493 Mich at 320 (emphasis original). In the absence of direct evidence of retaliation (which Whitman does not present), he must show indirect evidence to "show that a causal link exists between the whistleblowing act and the employer's adverse employment action." *Debano-Griffin v Lake Co*, 493 Mich 167, 176; 828 NW2d 634 (2013). A plaintiff's presentation of indirect evidence is analyzed under "the burden-shifting framework set forth in *McDonnell Douglas* [*v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)]." *Id*. Applying this standard to retaliation claims, a plaintiff must show that his "protected activity" under the WPA was "one of the reasons *which made a difference* in determining whether or not to discharge the plaintiff." *Matras v Amoco Oil Co*, 424 Mich 675, 682; 385 NW2d 586 (1986) (emphasis added; citations omitted). In other words, "[t]o establish causation, the plaintiff must show that his participation in a [protected activity] was a significant factor in the employer's adverse employment action, not just that there was a causal link between the two." *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004) (citations omitted). Because *Debano-Griffin* uses the *McDonnell Douglas* framework, originally designed for employment discrimination claims, it is appropriate for the Court to use federal cases interpreting *McDonnell Douglas* as persuasive authority. See *Radtke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993) (stating that Michigan courts "turn to federal precedent for guidance in reaching [their] decision" on whether plaintiff has established a valid discrimination claim).

[20] *Whitman*, 293 Mich App at 232, n 1.

and reduced services.[21] This sacrifice spoke well of the mayor and his department heads. Plaintiff's refusal to abide by the department heads' agreement, and subject himself to the same sacrifice, raised issues of trust and caused the mayor to rightly be disappointed in plaintiff. Indeed, plaintiff's "evidence" of a causal connection between his "whistleblowing" and the mayor's decision to not reappoint him, many years later, frames the issue in exactly this context.

A third party who attended plaintiff's June 2004 meeting with the mayor made handwritten notes of the discussion, which state: "*Mayor* = No Trust—68-C (vacation)—lack of communication[.]"[22] And the mayor's alleged December 2007 statement to other senior police officers that he and plaintiff "got off on the wrong foot"[23]—a statement that, if made, occurred *after* the mayor decided not to reappoint plaintiff[24]—supposedly emphasized plaintiff's 68-C complaints as an issue of trust, in that plaintiff's failure to adhere to a voluntary agreement with his colleagues betrayed that trust. In sum, it appears the mayor viewed the 68-C issue not in the context of whistleblowing, or anger at plaintiff's supposed whistleblowing, but instead as an example of how plaintiff was untrustworthy. As noted, this is not even a case where a "violation of law" was even remotely an issue. And it is, at best, extremely unlikely that even this "lack of trust" over plaintiff's failure to honor an agreement on this specific occasion had anything to do with his subsequent dismissal, for the numerous reasons discussed below.

B. ALLEGED RETALIATION IS TEMPORALLY REMOTE FROM ALLEGED WHISTLEBLOWING

Plaintiff's claim has a serious temporal problem: he alleges that he was not reappointed in late 2007 for events that took place in late 2003 and early 2004. Our courts have taken pains to stress that the length of time between an alleged whistleblowing and an adverse employment action are not dispositive of retaliation—when those two events are *close in time* (i.e., days, weeks, or a few months apart).[25] If whistleblowing and retaliation that occur close in time are not sufficient to find causation under the WPA, whistleblowing and retaliation that occur *far apart* in time are certainly not sufficient to support causation—and, in fact, weigh against finding

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[21] *Whitman*, 293 Mich App at 230.

[22] *Whitman*, 303 Mich at 309 (emphasis original).

[23] *Id*.

[24] It 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.

[25] See, for example, *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003) (to satisfy causation requirement under WPA, plaintiff must show "something more than merely a coincidence in time between protected activity and adverse employment action"); *Tuttle v Metro Govt of Nashville*, 474 F3d 307, 321 (CA 6, 2007) ("[t]he law is clear that temporal proximity, standing alone, is insufficient to establish a causal connection for a retaliation claim"); *Shaw v Ecorse*, 283 Mich App 1, 15; 770 NW2d 31 (2009) ("[a] temporal connection between protected activity and an adverse employment action does not, in and of itself, establish a casual connection").

causation. See *Fuhr v Hazel Park School Dist*, 710 F3d 668, 675 (CA 6, 2013) (holding in the context of a Title VII retaliation claim that a two-year gap between plaintiff's protected activity and the claimed retaliatory act "proves fatal to [plaintiff's] assertion that there is a causal connection").[26]

Here, there is an enormous temporal gap between plaintiff's alleged whistleblowing and the supposed retaliation, which belies any causal connection between the two. As noted, plaintiff's demands to receive compensation under 68-C took place in 2003 and early 2004. The mayor declined to reappoint him police chief in November 2007—almost four years after the supposed whistleblowing. Of course, the mayor, as the top executive officer of the city of Burton, *could terminate plaintiff at any time*.[27] He could have done so in March 2003, when plaintiff first voiced opposition to the waiver of 68-C, or in early 2004, when plaintiff insisted on his compensation pursuant to the ordinance. In fact, the evidence demonstrates the mayor was not concerned about plaintiff's 68-C demands at all: he reappointed plaintiff as police chief in November 2003—six months after Whitman's initial complaint regarding 68-C. And, again, the expiration of plaintiff's term took place in November 2007, almost *four years* after those complaints. It strains credulity to the breaking point to suggest, as plaintiff and the dissent do, that the mayor—who had the power to dismiss plaintiff at any time, for any reason or no reason—was so upset with plaintiff's alleged "whistleblowing" in late 2003 and early 2004 that he allowed plaintiff to continue as police chief for all of 2004, 2005, 2006 and into late 2007, and only then decide to "retaliate" against plaintiff. Indeed, when viewed in the context of the typically close working relationship between a mayor and his chief of police, and the fact that the chief of police, as a member of the mayor's executive team, serves at the *pleasure of the mayor*, plaintiff's allegations take leave of reality and enter the theatre of the absurd.

C. BREAKS IN PLAINTIFF'S SUPPOSED CAUSAL CHAIN

The long period of time between plaintiff's supposed whistleblowing and the mayor's decision not to reappoint him involves another aspect that is fatal to plaintiff's claim: numerous breaks in the causal chain. Plaintiff's first complaints regarding the administrative team's waiver of 68-C in March 2003 clearly did not cause the mayor to retaliate. Indeed, the mayor

[26] In its opinion, the Sixth Circuit noted that "our review of the law shows that multiyear gaps between the protected conduct and the first retaliatory act have been insufficient to establish the requisite causal connection." *Fuhr*, 710 F3d at 676. This observation is correct; interpretations of our sister states' whistleblower laws and jurisprudence have made similar observations on how a long time span between the alleged whistleblowing and supposed retaliation weigh against finding causation. See *Blake United American Ins Co*, 37 F Supp 2d 997, 1002 (SD Ohio, 1998) (holding that alleged whistleblowing action that took place five years before plaintiff's termination was not "close enough in time . . . to support a claim of retaliation"); *Anderson v Meyer Broadcasting Co*, 630 NW2d 46, 55 (ND, 2001) (holding that a "lengthy" delay of approximately a year "between [plaintiff's] reports and her termination does not support an inference she was fired because of the protected activity").

[27] Burton Ordinance 6.2(b) states that the chief of police serves "at the pleasure of the mayor."

reappointed him chief in November of that same year. His further attempts to secure compensation in January 2004 were addressed by the mayor—who sought the advice of city counsel and then outside labor counsel—and complied with that legal advice by paying him almost $7,000 in additional compensation. And his 2004 dispute with the mayor ended amicably—he remained chief for over three years following that meeting, and, by his own admission, plaintiff never heard mention of the 68-C dispute from the mayor and never was retaliated against during that time period. These intervening events—all positive developments for Whitman—raise serious doubts that his 68-C whistleblowing was a "determining factor" or "caus[e] in fact" of the mayor's decision to not reappoint him. *Matras*, 424 Mich at 682.

D. PLAINTIFF'S MISCONDUCT LED TO ADVERSE EMPLOYMENT ACTION

In any event, plaintiff has provided no evidence to refute the mayor's stated and compelling reasons for not reappointing him: plaintiff engaged in serious misconduct and misused his office. After his reelection in November 2007, the mayor reevaluated his entire administrative team. During this period, he was advised of plaintiff's serious misconduct in office by officers in plaintiff's department. Among other things, these included allegations that Whitman: (1) meted out inadequate discipline of subordinates who abused their power; (2) misused a city computer to exchange sexually explicit email messages with a woman who is not his wife; (3) discriminated against a female officer; and (4) forged a signature on a budget memo.[28] Command officers within the police department warned the mayor of serious morale problems created by plaintiff's abuse of power.[29] In the face of these troubling revelations, the mayor understandably did not reappoint plaintiff to this important position of public trust—and these are the reasons the mayor gave for declining to reappoint plaintiff as police chief in November 2007. To suggest that a mayor, whose chief works at his pleasure, would make a reappointment decision due to an old, stale issue instead of very recent, more disturbing revelations, is simply fanciful.

Plaintiff made no specific effort before this Court to deny these allegations against him, other than to state, self-servingly and without support, that they are "merely a pretext," and to assert "that his personnel file demonstrates that his performance as police chief was good, that he had received numerous awards, and that there were never any disciplinary actions against him." *Whitman*, 393 Mich at 309–310. His only proffered "evidence" of a causal connection between his supposed "whistleblowing" and the mayor's decision to not reappoint him is the aforementioned statement made by the mayor in December 2007—after the mayor already made his decision, but before its public announcement—in which the mayor supposedly told senior police officers that he lacked trust in plaintiff, and cited as one example plaintiff's refusal to keep

[28] See *Whitman*, 493 Mich at 309. Whitman admitted at trial that he used a city computer to exchange sexually explicit messages with a woman who is not his wife. Plaintiff makes no specific effort to deny these other allegations, but states that they are "merely a pretext." *Id*. at 310.

[29] *Whitman*, 293 Mich App at 227.

his word, along with the entire administrative team, and waive his unused sick-day compensation under 68-C.

When this assertion is weighed against the other factors in this case—(1) the mayor's view of plaintiff's 68-C demands as a trust, not retaliation, (and certainly not "whistleblowing") issue; (2) the almost four-year interval between plaintiff's alleged whistleblowing and the purported retaliation; (3) the causal breaks in plaintiff's claim; and (4) allegations of plaintiff's extensive misconduct—the evidence is overwhelming that plaintiff's so-called "whistleblowing" had no connection to the mayor's decision to not reappoint him as police chief. There is simply no way that a reasonable factfinder, even when "view[ing] the evidence and all legitimate inferences . . . in the light most favorable to the nonmoving party," could find that retaliation was "one of the reasons *which made a difference* in determining whether or not to discharge the plaintiff." *Matras*, 424 Mich at 682 (emphasis added).

III. REPLY TO THE DISSENT

A. INTRODUCTION

While we respect and join in the dissent's insistence on adhering to the strict letter of the law, we strongly disagree with the dissent's interpretations and conclusions. In our judgment, the dissent ignores the reality that plaintiff's conduct has nothing to do with "whistleblowing" in the sense envisioned by MCL 15.361, *et seq*. Indeed, plaintiff's conduct represents the antithesis of the WPA's purpose.

As an objective reality, plaintiff's conduct harmed, not helped, the public interest, just the opposite of what the WPA was intended to do. Any observer of the economic crisis must conclude that the administrative team's waiver of the benefits contained in 68-C advanced the interest of the taxpayers in the financially distressed city of Burton. It is not possible to both accept this reality and yet conclude that one who opposed the waiver and demanded his perk somehow serves the public interest—the two concepts are polar opposites of one another. To do so turns the WPA and reality on its head, and makes a mockery of the law and the context in which this case arises.

The same lack of realism permeates the dissent's causation analysis. Despite the fact that in the city of Burton, as in most cities, the chief of police, by law, serves "at the pleasure" of the mayor, the dissent suspends common sense and actually claims that the mayor, who was upset with what he regarded as plaintiff's untrustworthiness in 2003/2004, would wait almost four full years before terminating plaintiff for these old disputes. Reaching this conclusion ignores the reality that the mayor reappointed plaintiff in 2003, after this disagreement surfaced, and worked closely with him for almost four subsequent years. It also ignores the admission of plaintiff himself that the mayor never retaliated against him after the 2004 disagreement, and that even after heated words in June 2004, they patched up their differences and worked together for almost four years without any incident. And it ignores numerous revelations of serious misconduct that the mayor learned of in November 2007—the month that the mayor decided not to reappoint plaintiff.

What is the evidence that a stale, minor incident from early 2004 allegedly loomed so large after all these years in late 2007? Not any direct evidence, and indeed no evidence of any kind, oral or written, that this was even a factor at the time the mayor made his decision. Rather, we are supposed to believe that during a discussion by the mayor with the commanders of the police department—a discussion that took place after the decision was made, but before the public announcement of the appointment of a new chief—a comment was made that trust is an important quality in a chief, and that the chief and the mayor got off on the wrong foot due to a lack of trust in 2003/2004.

This is a fact, but a fact that has nothing to do with "whistleblowing," and nothing to do with the reasons for nonappointment. It is a fact of life that when an entire administrative team shares in financial sacrifice in times of economic crisis, and one key member of that team either backs out of the agreement or breaks ranks with those who make the sacrifice, that there will be issues of trust and disappointment. But to elevate this incident to be the cause of a nonappointment four years later, in the face of new revelations of serious misconduct, and the reality that the chief serves at the pleasure of the mayor, simply defies logic, common sense, and the reality of city management.

B. LAW OF THE CASE & OBJECTIVE ADVANCEMENT OF THE PUBLIC INTEREST

We and the dissent both cite the law of the case doctrine, but disagree on the interpretation of the Supreme Court's remand instructions.

As we noted, there is a distinction between a plaintiff's private motivations (now irrelevant) for reporting a violation of the law, and the more fundamental question of whether the alleged reporting objectively advances the public interest. Though the Supreme Court addressed (and disavowed) the former analysis in its opinion, it said nothing and thus obviously did not rule on the latter, nor did we in our reversed opinion. Because the Supreme Court instructed us to address "all remaining issues on which [we] did not formally rule," we see it as a correct application of the law of the case for our opinion to analyze whether plaintiff's conduct objectively advances the public interest, and thus determine whether he is entitled to the protections of the WPA. Such analysis, heretofore unaddressed, is essential because the WPA, at its core, is intended to advance the public interest by protecting individuals who report violations of law, where those violations of law harm the public interest. See *Dolan*, 454 Mich at 378–379. Had the Michigan Supreme Court ruled on this important issue, we think it would have analyzed the matter as our holding does, because there are rare instances where reporting a violation of the law will not advance or harm the public interest.

We fundamentally disagree with the dissent's assertion that reporting a violation of *any* law advances the public interest, because this observation is inaccurate and ignores the reality of this case. In rare instances—such as this one—reporting violation of a law will not advance the public interest, and will in fact be contrary to the public interest.[30] Again, the law in question,

[30] See, for example, MCL 287.277 (mandating that upon receiving notice of the presence of unlicensed dogs in the county from the county treasurer, the prosecuting attorney "shall

68-C, involved a monetary perk for a small number of senior administrative personnel. When Burton faced a financial crisis, the city's department heads admirably tried to advance the public interest by refusing to accept this perk—in other words, by waiving the financial benefits of the ordinance—benefits which were theirs to waive. And it is his disagreement with the waiver of this perk by which plaintiff claims his whistleblower status—an ordinance that, if enforced (as it was to him), benefited only plaintiff, and actually harmed the broader public.

For these reasons, we disagree with the dissent's observations on the law of the case, and think that we have an obligation, under the WPA, to hold that not all reports of legal violations are whistleblowing, because not all reports of legal violations objectively advance the public interest.

C. CAUSATION

We also take issue with the dissent's causation analysis because it again ignores the reality of this public-sector setting.

Whitman admitted at trial that he used a city computer to exchange sexually explicit emails with a woman who is not his wife, which violated city policy. In addition, as noted, the trial court heard extensive testimony that Whitman: (1) meted out inadequate discipline of subordinates who abused their power; (2) discriminated against a female officer; and (3) forged a signature on a budget memo. Again, plaintiff makes no specific effort to deny these allegations

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commence proceedings against the owner[s] of the dog[s]"); MCL 750.542 (barring bands from playing the national anthem "as a part or selection of a medley of any kind" or with any "embellishments of national or other melodies" and the anthem's use "for dancing or as an exit march"); and MCL 750.102 (stating that "any person who shall willfully blaspheme the holy name of God, by cursing or contumeliously reproaching God" is guilty of a misdemeanor).

We cite these examples not to mock these laws or the sentiments they express, but to demonstrate that not all individuals who report violations of laws are whistleblowers, because reporting a violation of law in and of itself does not always objectively advance the public interest. For instance, many dog-owning Michiganders do not get licenses for their pets. Under the dissent's definition of "whistleblowing" and interpretation of the WPA, an individual who complains that the local prosecuting attorney is not enforcing MCL 287.277 because he is not "commenc[ing] proceedings against" the owners of "all unlicensed dogs" is a "whistleblower" worthy of WPA protections—that individual has reported a violation of the law, and is hence a whistleblower. We think such a result would be absurd because it plainly does not advance the public interest, which, as noted, is the WPA's raison d'ętre. See *Detroit Intern Bridge Co v Commodities Export Co*, 279 Mich App 662, 675; 760 NW2d 565 (2008) ("[t]herefore, to paraphrase Justice MARKMAN in *Cameron* [*v Auto Club Ins Ass'n*, 476 Mich 55, 80; 718 NW2d 784 (2006)], a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result"). Again: not all individuals who report violations of law are whistleblowers worthy of WPA protection, because enforcement of some laws can be detrimental to the public interest. The fact that these instances are rare does not make this distinction any less vital.

against him, other than to state that they were "merely a pretext" to dismiss him, and provide a recitation of awards and positive performance reviews.

These stated reasons for declining to reappoint Whitman, of which the mayor learned in November 2007, undermine plaintiff's claim that he was terminated for whistleblowing when two additional factors are added as context. As noted, the mayor could terminate Whitman at any time. Despite plaintiff's consistent demands that he receive compensation under 68-C in 2003 and 2004 (which he did) the mayor only declined to reappoint him in late 2007—again, an almost four year gap between the alleged whistleblowing activity and the adverse employment action.

The dissent wrongly implies that we give this temporal gap undue weight in our analysis, and that it is the sole factor motivating our holding. Rather, the temporal gap is of enormous importance when viewed in conjunction with the other aspects of this case, namely: (1) the mayor's ability to terminate Whitman at any time; (2) the numerous other, valid reasons the mayor gave to not reappoint plaintiff; and (3) the fact that the mayor terminated Whitman almost *immediately* after learning about these numerous, other valid reasons in late 2007.

The ultimate problem with the dissent's analysis of causation is that it ignores this context. Its would-be holding is based on a supposedly acrimonious 2004 meeting (which took place well over three years before the adverse employment action, and which, by plaintiff's own account, ended amicably), and an alleged statement made by the mayor in December 2007 (after he had decided to not reappoint plaintiff) that mentioned plaintiff's demands for additional compensation under 68-C in the context of not trusting plaintiff to keep his word. As noted, when these assertions are weighed against the other factors in this case, there is simply no way that a reasonable fact finder could conclude that retaliation was "one of the reasons *which made a difference* in determining whether or not to discharge the plaintiff." *Matras*, 424 Mich at 682 (emphasis added).

IV. CONCLUSION

Because no reasonable factfinder 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. We do not retain jurisdiction.

/s/ Henry William Saad