ORIGINAL

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals

Jansen, J., Whitbeck, P.J., Frank Kelly, J.

RICHARD WURTZ,

Plaintiff-Appellee,

v

BEECHER METROPOLITAN DISTRICT, LEO MCCLAIN, JACQUELIN CORLEW, and SHEILA THORN

Defendants-Appellants.

Supreme Court No. 146157

Court of Appeals No. 301752

Wayne Circuit Case No: 11-008466-CK
Hon. Judith A. Fullerton

MICHIGAN ASSOCIATION FOR JUSTICE AMICUS CURIAE BRIEF ON APPEAL

Respectfully Submitted by:

Eugenie B. Eardley (P48615)
Nicholas F.X. Gumina (P74203)
Eardley Law Offices, P.C.
Attorney for Amicus Curiae
Michigan Association of Justice
P.O. Box 830
Cannonsburg, MI 49317
(616) 874-2647

TABLE OF CONTENTS

INDEX OF AUTHORITIES

MICHGAN SUPREME COURT CASES

MICHIGAN COURT OF APPEALS CASES

FEDERAL CASES

MICHIGAN STATUTES AND COURT RULES

OTHER AUTHORITIES

STATEMENT OF QUESTIONS PRESENTED

I. DID THE PLAINTIFF SUFFER AN ADVERSE EMPLOYMENT ACTION UNDER THE WHISTLEBLOWER PROTECTION ACT (WPA), MCL 15.361 *ET SEQ.*, WHEN THE DEFENDANTS DECLINED TO RENEW OR EXTEND THE PLAINTIFF'S EMPLOYMENT CONTRACT, WHICH DID NOT CONTAIN A RENEWAL CLAUSE BEYOND THE EXPIRATION OF ITS TEN-YEAR TERM?

a. Trial Court's Answer: No
b. Court of Appeals Answer: Yes
c. Appellants' Answer: No
d. Appellee's Answer: Yes
e. Amicus Curiae Answer: Yes

II. WAS THERE WAS A FAIR LIKELIHOOD THAT ADDITIONAL DISCOVERY WOULD HAVE PRODUCED EVIDENCE CREATING A GENUINE ISSUE OF MATERIAL FACT, MCR 2.116(C)(1), IF THE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION HAD NOT BEEN GRANTED?

a. Trial Court's Answer: No
b. Court of Appeals Answer: Yes
c. Appellants' Answer: No
d. Appellee's Answer: Yes
e. Amicus Curiae Answer: Yes

INTRODUCTION AND STATEMENT OF AMICUS INTEREST

The Michigan Association of Justice is a state wide organization of plaintiff's attorneys and legal paraprofessionals who seek to protect the rights and safety of the injured, employees and workers, and ensure the protection of the fundamental right to a trial by jury trial. The issues herein are of vital interest to our organization and the clients we represent.

Plaintiff Richard Wurtz was employed as the Administrator of the Beecher Metropolitan District, a sewer and water district in Genesee County. Defendants, The Beecher Metropolitan District, retaliated against Plaintiff's employment after he reported the corruption of the District's five Board members. Defendants did so by terminating Plaintiff's employment. Defendants insist that they took no action against Plaintiff's employment whatsoever and just simply let Plaintiff's employment contract expire around that time. The trial court agreed with Defendants and granted summary disposition in favor of Defendants, concluding that Plaintiff suffered no adverse employment action under the Whistleblower Protection Act ("WPA"). The Court of Appeals reversed the trial court, concluding that nonrenewal of an employment contract was an adverse employment action for the purpose of the WPA.

Amicus, Michigan Association for Justice, states that the nonrenewal of an employment contract is an adverse employment action and falls within the WPA's prohibition against discharging, threatening, or *otherwise discriminating* against an employee for engaging in a protected activity. Plaintiff was clearly discharged. Nonrenewal of an employment contract is the function equivalent to discharge; it produces the same result: loss of employment, benefits and income. A contrary interpretation creates an arbitrary distinction between at-will employees and employees under fixed term contracts and, by application of simple reason, a large loophole in the WPA that can never be patched. Employers wishing to avoid the WPA could simply hire

all employees on short—monthly or weekly—contracts that do not automatically renew. This is sort of corporate gamesmanship is certainly not what the Legislature intended when the WPA was adopted.

Further, the nonrenewal of an employment contract under the circumstance of this case *is* discrimination under the WPA. Where no reasonable distinction can be found among employees under fixed-term contracts, the nonrenewal of one employee's contract does amount to actionable discrimination under the WPA. Finally, the WPA protects employees from even any threats against employment. Thus, it is not necessary that an employer actually discharge or discriminate against any employee for a worker to be protected by the Act. Even a threat of a change in the terms, conditions, or privileges of an employee's employment by the employer violates the WPA. Defendants voted not to extend Plaintiff's contract. A reasonable jury could interpret Defendants' actions as a threat against Plaintiff's employment. At a minimum, a question of fact exists concerning whether Defendants threated the terms, conditions, or privileged of Plaintiff's employment. Thus, this Court should affirm the Court of Appeals and remand the case back to the trial court.

STATEMENT OF FACTS AND PROCEEDINGS

Amicus Michigan Association for Justice relies on Plaintiff-Appellee's the Statement of Facts and Procedural History and supporting exhibits to its brief.

ARGUMENT

I. PLAINTIFF SUFFERED AN ADVERSE EMPLOYMENT ACTION UNDER THE WHISTLEBLOWER PROTECTION ACT, MCL 15.361 *ET SEQ.*, WHEN THE DEFENDANTS DECLINED TO RENEW OR EXTEND THE PLAINTIFF'S EMPLOYMENT CONTRACT.

Issue Preservation

Generally, an issue is not properly preserved for appeal if it has not been raised in, and addressed and decided by the lower court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). This issue was raised by way of summary disposition, was ruled upon by the trial court, the Court of Appeals, and was included in this Court's order granting leave to appeal. The issue is preserved.

Standard of Review

This Court "review[s] de novo motions for summary disposition brought under MCR 2.116(C)(10)." *Johnson v Recca*, 492 Mich 169, 173; 821 NWd 520 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Courts are liberal in finding a genuine issue of material fact. *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and

other documentary evidence submitted in the light most favorable to the nonmoving party. *Joseph*, 491 Mich at 206.

This Court also reviews *de novo* questions of statutory interpretation. *Johnson*, 492 Mich at 173. The primary goal of judicial interpretation f statutes is to ascertain and give effect to the intent of the Legislature. *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 217; 801 NW2d 35 (2011). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012). The Court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010); *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994). But '"nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself."' *Mich Ed Ass'n*, 489 Mich at 218 (citation omitted).

Discussion

The Court of Appeals should be affirmed because plaintiff suffered an adverse employment action under the Whistleblower Protection Act (WPA), MCL 15.361 *et seq*, when the defendants decided to not renew or extend plaintiff's employment contract. Put another way, when he was fired they broke the law.

"Michigan's Whistleblowers' Protection Act was first enacted in 1981," *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378; 563 NW2d 23 (1997) (footnote omitted), and was designed to "combat corruption or criminally irresponsible behavior in the conduct of government or large businesses." *Dudewicz v Norris-Schmid*, 443 Mich 68, 77l 503 NW2d 543 (1993) (citing House Legislative Analysis, HB 5088, 5089 (February 5, 1981)). The

WPA recognizes that "'[t]he people best placed to observe and report violations are the employees of government and business, but employees are naturally reluctant to inform on an employer *or a colleague.*'" *Id.* (quoting House Legislative Analysis, HB 5088, 5089 (February 5, 1981) (emphasis in original)). Thus, "the act 'encourage[s] employees to assist in law enforcement and . . . protect[s] those employees who engage in whistleblowing activities.'" *Dolan*, 454 Mich at 378 (footnote omitted). Specifically, MCL 15.362, provides that:

> 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.

The WPA is remedial in nature, and should "be liberally construed to favor the persons the Legislature intended to benefit." *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 406, 572 NW2d 210 (1998). To further its underlying purpose, the WPA establishes "a cause of action for an employee who has suffered an adverse employment action for reporting or being about to report a violation or suspected violation of the law." *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223 (2013).

> To establish a prima facie case under this statute, a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. [*West*, 469 Mich at 183.]

"If a plaintiff is successful in establishing a *prima facie* case under the WPA, the burden shifts to the defendant to establish a legitimate business reason for the claimed adverse employment action. Once the defendant produces such evidence, the plaintiff has the burden to establish that

the employer's proffered reasons were a mere pretext for the adverse employment action" *Shaw v City of Ecorse*, 283 Mich App, 8; 770 NW2d 31 (2009).

"[W]histleblower claims are analogous to other anti-retaliation employment claims brought under employment discrimination statutes prohibiting various discriminatory animuses (sic) . . . ." *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634 (2013). Therefore, when interpreting the WPA, Michigan Courts look to other employment discrimination statutes. See E.g. *id* (applying the burden-shifting analysis used in retaliatory discharge claims under the Elliot-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq* to the WPA); *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002) (same). "Our courts have defined an 'adverse employment action' in both Civil Rights Act and WPA claims as an employment decision that is materially adverse in that it is more than a mere inconvenience or an alteration of job responsibilities. . . ." *Brown v Detroit Mayor*, 271 Mich App 692, 706; 723 NW2d 464 (2006), aff'd in relevant part, 478 Mich 589 (2007) (citations and quotations marks omitted).

Defendants argue that plaintiff did not suffer any adverse employment action because defendants complied with all the terms of plaintiff's employment contract. Defendants say that plaintiff's employment contract simply expired, and plaintiff had no expectation to future employment beyond the period of his contract. Therefore, defendants assert, plaintiff suffered no adverse employment action. Defendants' argument is more than unpersuasive, it rings hollow.

The WPA protects all employees under a "contract for hire, written or oral, express or otherwise." MCL 15.361(a). Nothing within the WPA limits its protections to the terms of an employee's "employment contract." Defendants' interpretation draws an arbitrary distinction between different subsets of employees that can be found nowhere in the words of the statute

itself. Under defendants' interpretation, employees employed under a fixed-term contract would receive *less* protection than at-will employees. There is no basis in the law for such an obvious discriminatory distinction. Of course it is axiomatic that here in Michigan at-will employees have no expectation to continued future employment; they can generally be terminated at any time, and for any reason. *McNeil v Charlevoix County*, 484 Mich 69, 79; 772 NW2d 18 (2009). Michigan Courts have nonetheless held that the protections of the WPA apply to at-will employees. *Suchodolski v Mich Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982); *Franzel v Kerr Mfg Co*, 234 Mich App 600, 606; 600 NW2d 66 (1999). Employees under a fixed-term contract have an expectation to continued employment during the period provided in the contract *but not thereafter*. Therefore, the fact that plaintiff did not have an expectation to employment beyond the period of his employment contract should be seen for what it is: irrelevant to the proper application of the statute. The question is whether plaintiff was engaged in a protected activity, and if yes, whether plaintiff was discharged, threatened, or otherwise discriminated against because of that activity. MCL 15.362.

This Court addressed a similar situation *Whitman*, 493 Mich 303. In *Whitman*, the plaintiff was employed by the "city of Burton as the chief of police from the time of his appointment in March 2002 until November 2007 when . . . the mayor of Burton (the Mayor), declined to reappoint him." *Id.* at 306. The plaintiff filed a complaint against the city and the Mayor under the WPA, asserting that the Mayor's decision to not reappoint him was prompted by the plaintiff's "repeated complaints to the Mayor and the city attorney that the refusal to pay [the plaintiff's] previously accumulated unused sick and personal leave time would violate a Burton ordinance." *Id.*

The precise issue presented in the present case was not before the Court in *Whitman*; however, the Court suggested that the decision to not reappoint the plaintiff was an adverse employment action within the meaning of the WPA: "as long as a plaintiff demonstrates a causal connection between the protected activity and the adverse employment action [the decision not to reappoint the plaintiff], the plaintiff's subjective motivation for engaging in the protected activity in the first instance is not relevant to whether the plaintiff may recover under the act." 493 Mich at 319. The plaintiff in *Whitman* did not have an expectation to future employment beyond the term of his appointment. Nonetheless, this Court suggested that the plaintiff suffered an adverse employment action for the purposes of the WPA. The Court of Appeals has likewise suggested that the nonrenewal of an employment contract may amount to an adverse employment action in the context of the CRA. See *Barrett v Kirtland Community College*, 245 Mich App 306, 313-324; 628 NW2d 63 (2001). See also *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 541-543; 470 NW2 678 (1991) (rejecting the nonrenewal defense in the context of the CRA).

Additionally, the WPA extends beyond just natural individuals. The WPA defines "employee" as "a person who performs a service for wages or other remuneration under a contract of hire . . . ." MCL 15.361(a). The WPA further defines a "person" to include not only a natural individual, but also a "sole proprietorship, partnership, corporation, association, or any other legal entity." MCL 15.361(c). Thus, by the text of the WPA itself, it affords protections to more than just a person employee. It protects legal entities who work under a "contract of hire" such as sole proprietors, partnerships, corporations, etc. If these entities are protected under the umbrella of the WPA, then the cancellation of or refusal to renew a contract must necessarily be covered by the act as well. In other words, the text of the WPA clearly extends its protections to

entities whose interest with the employer lies in contract. It would thus frustrate the text, and therefore the intent of the WPA, to hold that those protected entities who are supposed to be protected by the act, cannot be protected against the nonrenewal or cancellation of their contracts for engaging in protected activity.

Federal precedent is also instructive on this issue. "Though not binding . . ., federal precedent is generally considered highly persuasive when it addresses analogous issues." *Wilcoxon v Minnesota Mining and Mfg Co*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999). See also, *Radtke v Everett*, 442 Mich 368, 381-382 162; 501 NW2d 155 (1993) ("While this Court is not compelled to follow federal precedent or guidelines in interpreting Michigan law, this Court may, 'as we have done in the past in discrimination cases, turn to federal precedent for guidance in reaching our decision.'" (citation omitted). Federal precedent is particularly persuasive in the context of this case because the definition of adverse employment action initially arose in federal courts, see, e.g., *Crady v Liberty Nat'l Bank & Trust Co of Indiana*, 993 F2d 132, 136 (CA 7, 1993), and that definition was subsequently adopted by Michigan Courts for the purposes of the CRA and WPA. *Wilcoxon*, 235 Mich App 362-366; *Brown*, 271 Mich App at 706. The great weight of federal authority supports the proposition that the failure to renew an employee's contract may constitute "adverse employment action."

The United State Supreme Court rejected the nonrenewal defense in *Perry v Sindermann*, 408 US 593; 92 S Ct 2694; 33 L Ed2d 570 (1972). In *Perry*, the respondent was teacher employed in the state college system in Texas from 1959 to 1969. *Id.* at 594. In May 1969, the respondent's one-year employment contract expired, and the Board of Regents voted not to offer him a new contract. *Id.* at 595. The respondent filed suit, alleging that the decision not to rehire him was "based on his public criticism of the policies of the college administration and thus

infringed his right to freedom of speech." *Id.* The Board of Regents defended on the basis that the respondent had no contractual right to continued employment. *Id.* at 596. The Supreme Court held that the respondent's lack of a contractual or tenured right to continued employment did not defeat his claim that nonrenewal of his employment contract violated the First and Fourteenth Amendments:

> [T]he respondent's lack of a contractual or tenure 'right' to re-employment for the 1969—1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. [*Id.* at 597-598.]

In *Mangieri v DCH Healthcare Authority*, 304 F3d 1072, 1075 (CA 11, 2002) the Eleventh Circuit reviewed a state agency's nonrenewal of a contract with a physician. The plaintiff entered into a three-year contract with a state hospital for the exclusive right to provide anesthesia services. *Id.* at 1073. During the contract period, the plaintiff criticized the hospital for hospital's efforts to move inpatient medical and surgical cases to another hospital. *Id.* Near the end of the plaintiff's contract, the hospital began soliciting bids for the anesthesia services from other providers. *Id.* at 1074. The plaintiff was awarded a one year contract with no renewal provision. *Id.* The plaintiff continued to criticize the hospital during this period. *Id.* The hospital authority opted not to renew the plaintiff's contract, and the plaintiff filed a complaint against the hospital, asserting that the nonrenewal of his contract was in retaliation for exercising his First Amendment free speech rights. *Id.* The district court granted summary judgment on the plaintiff's claims, relying on the absence of an automatic renewal provision in the plaintiff's contract. *Id.* The Eleventh Circuit reversed, however, concluding that the absence of a renewal provision was immaterial. *Id.* at 1075. The court concluded that "by rejecting [the plaintiff's] bid in 1999 and not renewing his contract, the Authority terminated—that is, caused

to end—a commercial relationship with [the plaintiff] which had been ongoing since at least 1995." *Id.* at 1075.

The Third Circuit recently took up the analysis of the nature of nonrenewal of an employment contract in the context of Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.* In *Wilkerson v New Media Tech Charter Sch Inc*, 522 F3d 315, 320 (CA 3, 2008), the district court dismissed the plaintiff's Title VII complaint because it concluded that the defendant did not terminate the plaintiff, it '"simply did not renew her contract."' The Third Circuit reversed, stating:

> Inherent in the District Court's decision is its view that the proscription of discrimination does not apply to an at-will employment arrangement or an employment agreement with a fixed termination date. That is an erroneous view of the law. The failure to renew an employment arrangement, whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII, such as religious discrimination. [*Id.*]

The Second Circuit reached the same conclusion in *Leibowitz v Cornell University*, 584 F3d 487 (CA 2, 2009). In *Leibowitz* the plaintiff, a non-tenured professor, accepted an early retirement package after her employer declined to renew her employment contract. *Id.* at 492-496. The plaintiff filed a complaint in federal court under Title VII, the Age Discrimination and Employment Act (ADEA), and various state law claims. *Id.* at 496. The Second Circuit specifically rejected the nonrenewal defense and stated: "where an employee seeks renewal of an employment contract, nonrenewal of an employment contract constitutes adverse employment action for the purposes of the Title VII and the ADEA." *Id.* at 501. In reaching this conclusion, the court made plain that it joined the majority of federal circuit courts to address the issue:

> We note that, in reaching this decision, we join other circuit courts that have, either implicitly or explicitly, held that non-renewal of a contract may constitute an adverse employment action for purposes of the discrimination laws. *See, e.g., Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 320 (3d

> Cir.2008) ("The failure to renew an employment arrangement, whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII...."); *Carter v. Univ. of Toledo,* 349 F.3d 269, 270–71 (6th Cir.2003) (reversing district court's grant of summary judgment in employer's favor on plaintiff's race discrimination claim under Title VII in connection with employer's failure to renew her contract as a visiting professor); *Minshall v. McGraw Hill Broad. Co.,* 323 F.3d 1273,1279–82 (10th Cir.2003) (sufficient evidence existed for jury to reasonably conclude that employer unlawfully discriminated against employee based on age under the ADEA in deciding not to renew his contract); *Mateu–Anderegg v. Sch. Dist. of Whitefish Bay,* 304 F.3d 618, 625 (7th Cir.2002) (noting, where teacher claimed non-renewal of contract was discriminatory under Title VII, that "[i]t is undisputed ... that [plaintiff] suffered an adverse employment action"); *Kassaye v. Bryant Coll.,* 999 F.2d 603, 607 (1st Cir.1993) (noting that "act of refusing to renew appellant's employment at Bryant College" may provide grounds for discrimination claim). [*Leibowitz*, 584 F3d at 501.]

The Court of Appeal's dissent attempts to distinguish the Federal cases on the basis that the WPA, unlike Title VII or ADEA, does not protect prospective employees. This argument holds no sway because the decision not to renew plaintiff's employment contract was made while plaintiff was an employee. Moreover, the above cases are clear in their holdings; the failure to renew an employment contract is *an employment action in itself.* Nonrenewal of an employment contract produces the adverse result of discharging or terminating employment. By rejecting plaintiff's bid and not renewing his contract, the defendants terminated a business relationship with plaintiff that had been ongoing since at least 1999. See *Mangieri*, 304 F3d at 1075.

Other state courts have reached this same conclusion. In *Johnson v Trustees of Durham Tech Community College*, 139 NC App 676, 679-681; 535 SE2d 357 (NC App, 2000), the plaintiff filed suit under the North Carolina Retaliatory Employment Discrimination Act (REDA), NCGSA § 95-241, after her employer elected to not renew her fixed term employment contract. The REDA is similar to the WPA, and provides in relevant part: "No person shall discriminate or take any retaliatory action against an *employee* because the employee in good

faith does or threatens to do any of the following" enumerated actions. NCGSA § 95-241 (emphasis added). The court concluded that nonrenewal of an employment contract amounted retaliatory action in violation of the REDA:

> As a preliminary matter, we must address the issue of whether the failure to renew an employment contract may qualify as a retaliatory action in violation of REDA. As stated above, in enacting REDA, the General Assembly broadly defined retaliatory action as "the discharge, suspension, demotion, retaliatory relocation of an employee, or *other adverse employment action* . . . ." N.C.G.S. § 95–240(2) (emphasis added). As the failure to renew an employee's contract produces the adverse result of terminating her employment, the plain language of the statute suggests that nonrenewal of an employment contract falls within the scope of REDA. [*Johnson*, 139 NC App at 682.]

Significantly, North Carolina's REDA protects employees, not prospective employees.

A similar conclusion was reached in *Daly v Exxon Corp*, 55 Cal App 4th 39; 63 Cal Rptr2d 727 (1997). In that case, the plaintiff's one-year employment contract was not renewed after the plaintiff complained of unsafe work conditions. *Id.* at 42. The court concluded that the plaintiff could state a cause of action under the Section 6310(a) of the California Occupational Safety and Health Act,[1] which protects only employees. *Id.* at 43-44. The court rejected the employer's argument that it simply let the plaintiff's contract expire on its own terms, stating:

> Exxon's construction of when section 6310 applies would allow an employer to unlawfully discriminate against an employee by not renewing a contract because the employee was seeking to advance bona fide safety concerns for other workers. This would violate the spirit, if not the letter of California public policy as embodied in section 6310 subdivision (b). The complaints were

[1] Section 6310(a) of the California Occupational Safety and Health Act provides in relevant part:

> Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to ... his or her employer, . . . of unsafe working conditions, or work practices, . . . shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.

> tendered during the period of employment and the decision not to renew the contract was also made during the period of employment. [*Id.* at 44.]

The court further concluded that the word "discriminated" in Section 6310(a) was "broad enough to apply to an employer's decision not to renew a fixed-term employment contract." *Id.*

The above cases, though not binding on this Court, are persuasive in their reasoning. The plain language of the WPA suggest that the nonrenewal of an employment contract falls within the scope of the WPA's prohibition against adverse employment actions of any kind. The phrase "adverse employment action" is a judicially created phrase used to refer to the prohibitions contained in the WPA. MCL 15.362, provides in part: "An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment. . . ." The nonrenewal of plaintiff's employment contract was the functional equivalent to discharge or termination. See *Whiting v Jackson State University*, 616 F2d 116, 123 n 6 (CA 5, 1980). As the court explained in *Johnson*, 139 NC App at 682, "the failure to renew an employee's contract produces the adverse result of terminating her employment. . . ." By not renewing plaintiff's contract, defendants terminated—that is, caused to end—defendants' business relationship with plaintiff. See *Mangieri* 304 F3d at 1075. There is little question that the nonrenewal of plaintiff's employment contract adversely affected his employment Beecher Metropolitan District. Therefore, plaintiff in this case suffered an adverse employment action under the WPA.

The nonrenewal of plaintiff's employment contract also amounts to discrimination under the WPA. It is well settled that the WPA is not limited to discharge or termination. Rather, the WPA specifically provides that "[a]n employer shall not discharge, threaten, or *otherwise discriminate against an employee* regarding the employee's compensation, terms, conditions, location, or privileges of employment. . . ." MCL 15.362. This Court may consider a dictionary

to ascertain the meaning of discriminate. *Cain v Waste Mgt, Inc* (*After Remand*), 472 Mich 236, 247; 697 NW2d 130 (2005). Webster's New World Dictionary defines "discriminate" as "to distinguish; to make distinctions in treatment; show partiality or prejudice." Merriam-Webster's Dictionary defines "discriminate" as "to unfairly treat a person or group of people differently from other people or groups." Black's Law Dictionary defines "discriminate" as "[a] failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."

As evidenced by the definitions above, "discriminate" has an extremely broad meaning, and it is further broadened by the use of the adverb "otherwise." Otherwise means "in a different way or manner." Webster's Third New Int'l Dictionary (1981). Black's Law Dictionary defines "otherwise" as "[i]n a different manner, in another way, or in other ways." Thus, under the WPA, MCL 15.362, an employer cannot not discharge, threaten, or in any way or manner fail to treat an employee equally among other employees where no reasonable distinction can be found among employees because the employee is engaged in a protected activity. The nonrenewal of plaintiff's employment contract clearly falls within this prohibition. The *Daly* court reach this same conclusion. *Daly*, 55 Cal App 4th at 44. See also *Saridakis v South Florida Broward Hosp Dist*, 681 FSupp2d 1338 (SD Fl, 2009) (nonrenewal of employment contract was adverse employment action for purpose of a discrimination claim under Title VII). Where no reasonable distinction can be found among employees under fixed term contracts, the nonrenewal of one employee's contract does amount to actionable discrimination under the WPA. If plaintiff can prove that his contract was not renewed because he reported a violation or suspected violation of the law, then plaintiff has a cause of action under the WPA. At a minimum, a question of fact

exists concerning whether plaintiff was treated differently from other employees under fixed-term contracts when defendants decided to not renew his contract.

Additionally, the WPA protects against threats, "regarding the employee's compensation, terms, conditions, location, or privileges of employment. . . ." MCL 15.362. Thus, it is not necessary that an employer actually discharge or discriminate against any employee. Even a threat of a change in the terms, conditions, or privileges of an employee's employment—whether the act happens or not—violates the WPA. "Threaten" means "to give signs or warning of," "to announce as intended or possible," and "to cause to feel insecure or anxious." Merriam-Webster's Dictionary. Thus, an employer violates the WPA if an employer gives signs or warning or announces an intent to discharge or otherwise discriminate against an employee because the employee is engage in a protected activity.

In the present case, plaintiff submitted a written proposal for a new employment contract, and on March 11, 2009, board member Miller moved to have plaintiff draw up a new employment contract; that motion was defeated by a 3 to 2 vote (Appellee Brief, p 6). Plaintiff continued to seek renewal of his employment contract, and on November 11, 2009, the Board voted "not to extend Wurtz's contract, and to instead start the process to find a new administrator." (Appellee brief, p 13). A reasonable juror could construe the Board's action as a threat against plaintiff's employment. That is, the Board gave a "sign or warning" or announced that it intended to not renew plaintiff's employment contract. The Board's actions would certainly make plaintiff feel insecure or anxious regarding his future employment. If plaintiff can prove that defendants threatened to not renew his contract, then plaintiff has a cause of action under the WPA. At a minimum, a question of fact exists concerning whether defendants threated the terms, conditions, or privileged of plaintiff's employment. MCL 15.362

A contrary interpretation, as urged defendants, would violate the purpose of the WPA. "Michigan was the first state to grant statutory protection to employees who reported an employer's illegal activity." *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 82; 503 NW2d 645 (1993) (Boyle, J., dissenting). It was the Legislature's response to an accidental chemical contamination of livestock feed. *Id.* "Employees of the chemical company that had mistakenly substituted poisonous fire retardant for nutritional supplements 'were warned not to volunteer information about the . . . accident to investigators or else they would be fired.'" *Id.* The Legislature recognized that "'[t]he people best placed to observe and report violations are the employees of government and business, but employees are naturally reluctant to inform on an employer *or a colleague.*'" *Id.* At 74 (quoting House Legislative Analysis, HB 5088, 5089 (February 5, 1981) (emphasis in original)). "[T]he act 'encourage[s] employees to assist in law enforcement and . . . protect[s] those employees who engage in whistleblowing activities.'" *Dolan*, 454 Mich at 378 (footnote omitted).

The WPA should therefore be liberally construed to promote whistleblowing by protecting all employees, not just at-will employees. There is simple no basis in the statute for distinguishing between at-will employees and employees employed under fixed-term contracts. The WPA, by its very terms, was intended to benefit all individuals under a contract for hire. See MCL 15.361(a) (defining employee). If the Legislature had intended such a distinction, it would have included it within the plain language of the act. The Legislature did not. Rather, the Legislature worded the WPA broadly, so that it applies all employees under a contract for hire.

Defendants' interpretation would seriously undermine the purpose of the WPA and invite corruption and criminally irresponsible behavior in the conduct of government and large businesses, thereby putting the public at risk. "The underlying purpose of the [WPA] is

protection of the public. The act meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law. *Dolan*, 454 Mich at 378-379 (footnotes omitted). If defendants' interpretation is adopted, employees under a fixed-term contract will have little if any incentive to report violations or suspected violations of law. Additionally, employers will have little incentive to hire employees on an at-will basis. Rather, employers could avoid the WPA altogether by simply hiring employees under short duration fixed-term contracts. For example, an employer could hire all its employees under one-week or one-day contracts and renew those contracts on a weekly or daily basis. If an employee engages in a protected activity, the employer could simply decide to not renew the contract; there would be no legal recourse for the employee, thus creating an obtuse legally sanctioned disincentive for whistleblowing.

This is sort of corporate gamesmanship is certainly not what the Legislature intended when it enacted WPA. The Legislature enacted the WPA to remove barriers to whistleblowing. *Dolan*, 454 Mich at 378-379. "Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public [will] remain unaware of large-scale and potentially dangerous abuses." *Id.* at 379. Corruption and criminally irresponsible behavior in the conduct of government and large businesses will run rampant.

Defendant further contend that they took no employment action; they simply let plaintiff's contract expire. This argument is highly disingenuous. The record is clear that the defendants took affirmative action to not renew plaintiff's contract after he made his complaints. In early 2009, plaintiff proposed a new employment contract to the Board (Appellee Brief, pp 5-6). During a January 14, 2009 public hearing, plaintiff offered to reduce his salary if the Board would extend his employment contract. Plaintiff then submitted a written proposal to the Board

on January 30, 2009 (Appellee Brief, p 5). The Board permitted plaintiff to present his proposal, with a proposed amended contract, during the next public meeting on February 11, 2009 (Appellee Brief, p 6). Thereafter, the Board took action to not renew plaintiff's employment contract. On March 11, 2009, board member Miller moved to have plaintiff draw up a new employment contract; that motion was defeated by a 3 to 2 vote (Appellee Brief, p 6). Plaintiff continued to seek renewal of his employment contract, and on November 11, 2009, the Board voted "not to extend Wurtz's contract, and to instead start the process to find a new administrator." (Appellee brief, p 13).

These defendants took affirmative action to "not" renew plaintiff's employment contract. Like the plaintiff in *Leibowitz*, 584 F3d 487, plaintiff was seeking renewal his employment contract, and the defendants refused to renew it. The cases above are clear and consistent in their logic: "The failure to renew an employment arrangement, whether at-will or for a limited period of time, *is an employment action* . . . ." *Wilkerson*, 522 F3d at 320; see also *Leibowitz*, 584 F3d 487, *Johnson*, 139 NC App at 682, and *Daly*, 55 Cal App 4th at 44. This Court suggested as much in *Whitman*, 493 Mich 303.

Further, courts have generally recognized that some form of inaction can amount to adverse employment action. In *Hopkins v City of Midland*, 158 Mich App 361; 404 NW 2d 744 (1987), the Court of Appeals identified failure to promote as an example of adverse employment action under the WPA. The United State Supreme Court likewise identified failure to promote as an adverse employment action in *National Railroad Passenger Corp v Morgan,* 536 US 101, 113; 112 SCt 2061 (2002). Failure to promote is, by its definition, an "inaction." Nonetheless, courts have concluded that it can be an adverse employment action. Thus, assuming defendants simply let plaintiff's contract expire—as urged by defendant—that fact alone is not dispositive

on the issue of whether plaintiff suffered an adverse employment actions. Inaction or failure to act can be adverse employment action. Therefore, this Court should affirm the Court of Appeals.

II. THERE WAS A FAIR LIKELIHOOD THAT ADDITIONAL DISCOVERY WOULD HAVE PRODUCED EVIDENCE CREATING A GENUINE ISSUE OF MATERIAL FACT, MCR 2.116(C)(1), IF THE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION HAD NOT BEEN GRANTED PRIOR TO THE COMPLETION OF DISCOVERY.

Issue Preservation

Generally, an issue is not properly preserved for appeal if it has not been raised in, and addressed and decided by the lower court. *Polkton Charter Twp*, 265 Mich App at 95. This issue was raised by way of summary disposition, was ruled upon by the trial court, the Court of Appeals, and was included in this Court's order granting leave to appeal. The issue is preserved.

Standard of Review

This Court "review[s] de novo motions for summary disposition brought under MCR 2.116(C)(10)." *Johnson*, 492 Mich at 173. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph*, 491 Mich at 206. Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. Courts are liberal in finding a genuine issue of material fact. *Jimkoski*, 282 Mich App at 5.

Discussion

Summary disposition was inappropriate because discovery on disputed factual issues was ongoing. Generally, a motion for summary disposition based on the lack of a material factual dispute may be raised at any time. *Kemerko Clawson, LLC v RXIV Inc*, 269 Mich App 347, 350; 711 NW2d 801 (2005). However, summary disposition is premature if granted before discovery on a disputed issue is complete, *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009), unless further discovery does not present a fair likelihood of uncovering factual support for the opposing party's position. *Liparoto Constr Co v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). "'If a party opposes a motion for summary disposition on the ground that discover is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence.'" *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2006) (citation omitted).

Defendants argue that plaintiff did not suffer an adverse employment action; therefore, no amount of additional discovery would assist plaintiff in developing his case. Defendants' argument is untenable. As discussed in issue I, plaintiff suffered an adverse employment action when defendants decided not to renew his employment contract. Nonrenewal of an employment contract is the functional equivalent to discharge or termination. *Whiting*, 616 F2d at 123 n 6. It produces the same thing: loss of one's livelihood, career, and often sense of self and identity.

Further, at a minimum, a question of fact exists concerning whether plaintiff was treated differently from other employees under fixed term contracts when defendants decided to not renew his contract. MCL 15.362 provides that "[a]n employer shall not discharge, threaten, or *otherwise discriminate* against an employee regarding the employee's compensation, terms,

conditions, location, or privileges of employment. . . ." (Emphasis added). As discussed in Issue I, "discriminate" has an extremely broad meaning. Within the context of the WPA, "discriminate" means that an employer cannot, in any way or manner, fail to treat an employee equally among other employees where no reasonable distinction can be found among employees because the employee is engaged in a protected activity. Thus, further discovery is necessary to determine whether plaintiff was treated unfairly and differently than other fix-term contract employees. Further discovery will allow plaintiff the opportunity to prove that defendants historically treated other contract employees differently. That is, defendants allowed other employees to continue employment beyond the expiration of their contract if desired by the employee. Further discovery is necessary concerning defendants' past employment practices, specifically defendants' employment practices as to fixed-term employees.

A question of fact also exists concerning whether defendants threatened plaintiff's "employee's compensation, terms, conditions, location, or privileges of employment. . . ." MCL 15.362. As discussed in issued I, "threaten" means "to give signs or warning of," "to announce as intended or possible," and "to cause to feel insecure or anxious." Merriam-Webster's Dictionary. A reasonable juror could construe defendants' actions as a threat against plaintiff's employment. That is, the Board gave a "sign or warning" or announced that it intended to not renew plaintiff's employment contract. If plaintiff can prove that defendants threatened to not renew his contract because plaintiff was engaged in a protected activity, then plaintiff has a cause of action under the WPA. This necessarily involves a question the individual defendants' motive and intent, which, as discussed below, is necessarily a question of fact for the jury.

Defendants' motivation for not renewing plaintiff's employment contract is a central issue is this case. "If a plaintiff is successful in establishing a prima facie case under the WPA,

the burden shifts to the defendant to establish a legitimate business reason for the adverse employment action." *Shaw v City of Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009). Thus, an employer's motivation or intent for the adverse employment action is a crucial issue in a WPA action. See *Debano-Griffin*, 493 Mich at 176. Summary disposition is rarely appropriate where questions of motive, intention, or other conditions of the mind are material issues. *In re Handelsman*, 266 Mich App 433, 438; 702 NW2d 641 (2005); see also *Foreman v Foreman*, 266 Mich App 132, 135; 701 NW2d 167 (2003).

This case, in many ways, comes down to credibility contest between plaintiff and the individual defendants. It is a basic and fundamental rubric of Michigan jurisprudence that "court[s] [are] not permitted to assess credibility, or to determine facts on a motion for summary judgment." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). In deciding a motion for summary disposition under MCR 2.116(C)(10), a court may not accept one party's testimony or documentary evidence as true while rejecting another's. *Zamler v Smith,* 375 Mich 675, 678-679, 135 NW2d 349 (1965). Rather, the court must give the benefit of the doubt to, and draw all reasonable inferences in favor of, the nonmoving party. *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211, lv den 488 Mich 853 (2010); *Houdek v Centerville Twp*, 276 Mich App 568, 572–573, 741 NW2d 587 (2007). "[W]here the truth of a material factual assertion of a moving party depends upon a deponent's credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted." *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276, 514 NW2d 525 (1994) (citations omitted).

This is true even in the absence of conflicting documentary evidence. *White v Taylor Distributing Co*, 275 Mich App 615, 625-626, 628; 739 NW2d 132 (2007). In *White*, the Court of Appeals explained that "there may be situations in which summary disposition is

inappropriate even if the adverse party fails to submit documentary evidence sufficient to show a genuine issue of fact for trial when responding to a properly supported C(10) motion." *Id.* at 626. In reaching this conclusion, the Court cited MCR 2.116(G)(4), which provides:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, *if appropriate,* shall be entered against him or her. [Emphasis added.]

As the Court of Appeals correctly recognized, the words "if appropriate" clearly demonstrate that there are certain situations were summary disposition may be inappropriate, even of the party does not respond with documentary evidence demonstrating the existence of an issue of material fact. *White*, 275 Mich App at 626. Issues of credibility are among these circumstances. Where the truth of a material factual assertion depends on credibility, a genuine issue of material fact exists and summary disposition in in appropriate. *Id.*; *Vanguard Ins Co*, 204 Mich App at 276.

As applied to the present case, summary disposition was inappropriate. Motive and intent are critical in WPA cases. See *Debano-Griffin*, 493 Mich at 176.

> If a plaintiff is successful in establishing a prima facie case under the WPA, the burden shifts to the defendant to establish a legitimate business reason for the adverse employment action. Once the defendant produces such evidence, the plaintiff has the burden to establish that the employer's proffered reasons were a mere pretext for the adverse employment action. *Shaw*, 283 Mich App at 8.

Thus, defendants' motive for not renewing plaintiff's employment is the issue. In November 2009, defendants' labor attorney wrote to plaintiff, stating that defendants had no intention of changing their decision to not renew plaintiff's contract, citing personality clashes, disagreement, and that the position was going to be full-time again. The individual defendants' credibility is

essential to evaluating the proffered reasons for not renewing plaintiff's contract, and credibility is an issue that must be decided by a jury, not a judge. Therefore, summary disposition is not only premature, it is improper.

Finally, the Court of Appeal majority recognized, a genuine issue of fact material existed regarding when defendants decision to not renew plaintiff's contract occurred. *Wurtz v Beecher Metropolitan Dist*, 298 Mich App 75, 90; 825 NW2d 651 (2013). Defendants contend that the decision not to renew plaintiff's contract occurred in March 2009, before plaintiff reported the alleged improper travel reimbursements. Defendants' argument ignores the fact that plaintiff raised alleged Open Meeting Act violations in May 2008. Additionally, defendants' argument is blind to the obvious fact that defendants voted not to renew plaintiff's employment contract on November 11, 2009, after plaintiff reported the alleged improper travel reimbursements. As detailed in defendants' brief, plaintiff proposed a new employment contract in early 2009 (Appellee brief, p 5). On March 11, 2009, board member Miller moved to have plaintiff draw up a new employment contract; that motion was defeated by a 3 to 2 vote (Appellee Brief, p 6). Plaintiff continued to seek renewal of his employment contract, and on November 11, 2009, the Board voted "not to extend Wurtz's contract, and to instead start the process to find a new administrator." (Appellee brief, p 13). Therefore, the trial court erred when it granted summary disposition in favor of defendants. A genuine issue of material fact exists concerning when the decision to not renew plaintiff's employment contract occurred, March 2009 or November 2009.

CONCLUSION

This Court should affirm the Court of Appeals. The nonrenewal of an employment contract is an adverse employment action for the purposes of the WPA. This Court has suggested as much in *Whitman*, and the majority for federal case law further supports the

proposition that nonrenewal of an employment contract is an adverse employment action. It is the function equivalent to termination; it produces the same adverse result: loss of employment, benefits, and income. A contrary interpretation would create an arbitrary distinction between at-will employees and employees under a fixed term contract. There is no such distinction within the plain language of the WPA. The WPA applies to all employees under a contract for hire, at-will or otherwise. Defendants' interpretation violates the fundamental principles of statutory interpretation by attempting to interject an extra-statutory exception to the WPA. Such must be avoided.

Further, defendants' interpretation would completely undo and undermine the purpose of the WPA. The Legislature enacted the WPA to protect the public from corruption and criminally irresponsible behavior in the conduct of government and large businesses. The act meets this objective by protecting the whistleblowing employee and by removing barriers that discourage employees from reporting violations or suspected violations of the law. If defendants' interpretation is adopted, employees under fixed term contracts will have little if any incentive to report violations or suspected violations of law. Defendants' interpretation would also promote creative corporate solutions to evade the law. Employers could avoid the WPA altogether by simply hiring employees under short duration—one-week or one-day—contracts. If an employee engages in a protected activity, the employer could simply decide to not renew the contract; there would be no legal recourse for the employee, thus creating an obtuse judicial exception to the WPA with the potential to undermine the entire act.

Finally, summary disposition was premature because genuine issues of material fact existed concerning when defendants made the decision to not renew plaintiff's employment contract and defendants' motivation for the adverse employment actions. The defendants'

motive for not renewing plaintiff's employment is directly at issue. Summary disposition is rarely appropriate where questions of motive, intention, or other conditions of the mind are material issues. Alternatively, if this Court concludes that Plaintiff did not suffer an adverse employment action under the WPA, then this Court need not address whether summary disposition was premature.

RESPECTFULLY SUBMITTED,

EARDLEY LAW OFFICES, P.C.

Counsel for Amicus Curiae, Michigan Association for Justice

November 25, 2013

Eugene B. Eardley (P48615)
Nicholas F.X. Gumina (P74203)
P.O. Box 830
Cannonsburg, MI 49317
(616) 874-2647 voice
(616) 874-2654 fax
genieb@eardleylaw.com
nickg@eardleylaw.com
Attorney for Amicus Curiae
Michigan Association for Justice