State of Michigan
In the Supreme Court

Appeal from the Court of Appeals
Jansen, J., Whitbeck, P.J., Frank Kelly, J.

RICHARD L. WURTZ Plaintiff-**Appellee**, v.	Supreme Court Docket No. **146157** Court of Appeals No. 301752
BEECHER METROPOLITAN DISTRICT, a Michigan municipality, LEO McCLAIN, JACQUELIN CORLEW and SHEILA THORN, Jointly and Severally, Defendants-**Appellants**.	Genesee County Case No: 10-92901-CL Hon. Judith A. Fullerton

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DEFENDANTS-APPELLANTS
BEECHER METROPOLITAN DISTRICT, LEO MCCLAIN,
JACQUELIN CORLEW, AND SHEILA THORN'S
REPLY BRIEF

ORAL ARGUMENT REQUESTED

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REPLY TO PLAINTIFF-APPELLEE'S ARGUMENTS

I. Introduction

Plaintiff-Appellee Wurtz was employed by the Beecher Metropolitan District (BMD) under an individual, just cause, ten-year employment agreement that he drafted. He admits that his employment agreement did not provide for his employment beyond its ten-year expiration date, and that Defendants-Appellants fully honored the terms of his employment agreement through the time of its expiration on February 1, 2010. [Apx 9a, Apx 122a-124a, 129a-130a]. Despite this, Wurtz claims that he suffered an adverse employment action for purposes of the Whistleblowers' Protection Act (WPA), MCL 15.362. He argues that when Defendants-Appellants declined to continue his employment or to re-employ him beyond the expiration of his employment agreement, he became unemployed, which was adverse to his employment. [Appellee Brief, p8].

As a matter of law, the WPA was not violated because there was no *adverse action* that occurred caused Wurtz to become unemployed. He became unemployed because his employment agreement expired and there was no term, condition, or privilege of his employment that provided for his continued employment or re-employment. As noted by the dissenting Court of Appeals Judge in this matter, "Unlike an at-will employer, who must take affirmative steps to alter the course of an at-will employee's status, the employment relationship under a contract of employment for a specified period simply expires, requiring no action on behalf of the employer." *Wurtz v Beecher Metro Dist*, 298 Mich App 75, 98-99 (2012) (Kelly, J., dissenting). Rather, Defendants-Appellants would have had to *agree to take action* for Wurtz to become re-hired. Therefore, as a matter of law, where a pre-defined duration of employment has expired, and the employment agreement contains no renewal term, it does not bring about a materially adverse change in the compensation, terms,

conditions, location or privileges of the employee's employment under MCL 15.362.

Moreover, federal civil rights cases holding that non-renewal of an employment contract may be an adverse employment action are distinguishable. Those cases analogize a non-renewal of an employment contract to a failure or refusal to hire, noting that the federal civil rights act contain express statutory language that covers an employer's "fail[ure] or refus[al] to hire ... any individual." *See, e.g., Leibowitz v Cornell Univ*, 584 F.3d 487, 499-501 (CA 2, 2009), citing 42 USC §2000e-2(a)(1) [Title VII]; and 29 USC §623(a) [ADEA].[1] Unlike the federal civil rights acts, however, the WPA contains no similar language prohibiting a "fail[ure] or refus[al] to hire ... any individual." This Court's "primary obligation when interpreting Michigan law is always 'to ascertain and give effect to the intent of the Legislature, ... as gathered from the act itself.'" *Elezovic v Ford Motor Co*, 472 Mich 408, 422 (2005), quoting *Chambers v Trettco, Inc*, 463 Mich 297, 313-314 (2000). Because the WPA does not expressly address pre-employment conduct, it is distinguishable from the federal civil rights acts, and this Court should decline the invitation to effectively "piggyback on the rationale federal courts have used with [federal civil rights acts]." *Elezovic*, 472 Mich at 421-422.

Because Wurtz did not suffer an adverse employment action under the WPA when his ten-year employment agreement expired and Defendants-Appellants declined to renew it or re-hire him, and where there was no promise or obligation to renew it or re-hire him, the trial court's grant of summary disposition in Defendants-Appellants' favor was appropriate, and Defendants-Appellants respectfully request that this Court reverse the Court of Appeals opinion holding otherwise.

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[1]Michigan's Elliott-Larsen Civil Rights Act contains similar language prohibiting failure or refusal to hire situations. See, MCL 37.2202(1)(a).

II. Defendants-Appellants honored Wurtz's employment agreement, and took no action that altered the compensation, terms, conditions, location, or privileges of his employment; no adverse employment action occurred.

Wurtz and the BMD entered into an employment contract, where they agreed that the BMD would employ him for "a period of ten (10) years commencing as of February 1, 2000 ... and expiring on February 1, 2010 ..." [Apx 9a]. Wurtz admits that his employment agreement does not obligate the BMD to continue his employment beyond its February 1, 2010 expiration term. [Apx 129a-130a]. As such, Defendants-Appellants did not need to take any action whatsoever for Wurtz to become unemployed, rather, he became unemployed because the terms of his employment agreement with the BMD expired after ten years, and did not provide for his continued employment beyond February 1, 2010.[2] That Defendants-Appellants' declined to agree to *different or additional* terms for his continued employment or re-hire after the expiration of his employment agreement is not an adverse employment action that is actionable under the WPA.

The WPA provides in relevant part 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 ... reports ... a violation or suspected violation of a law ... to a public body ... ." MCL 15.362 (emphasis added).

To establish a prima facie case under the WPA, an employee must show that he was engaged in protected activity defined by the WPA, he was discharged or otherwise discriminated against, and that a causal connection exists between the protected activity and the discharge or adverse

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[2]Wurtz argues that "corrupt" employers should not be permitted to insulate themselves from the WPA by not including a renewal clause in their employee's employment contract. [Appellee Brief, p14]. This argument does not apply to Wurtz. Wurtz is a lawyer and he drafted his own individual employment agreement with the BMD that did not include a renewal clause. [Apx 112a-124a].

employment action. *West v General Motors Corp*, 469 Mich 177, 183-184 (2003). "[A]n exhaustive list of adverse employment actions does not exist," but some actions that have been considered adverse employment actions under the WPA include "a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices that might be unique to a particular situation." *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 492 (2005), overruled on other grounds by *Brown v Mayor of Detroit*, 478 Mich 589, 594, n2 (2007), quoting *Pena v Ingham Co Rd Comm'n*, 255 Mich App 299, 312 (2003).

Here, the BMD honored Wurtz's employment agreement, and Wurtz was not terminated or demoted. He was not given a less distinguished title, a material loss of benefits, or any significantly diminished responsibilities. His employment agreement provided for a ten year term of employment, and on February 1, 2010, that term expired; thus, his employment ended. No adverse action was taken by the BMD to end Wurtz's employment. Rather, the BMD would have had to take *affirmative action* to re-hired Wurtz, or to modify or agree to additional terms for his employment to continue.

Moreover, as the dissenting Court of Appeals Judge in this action recognized, it is inaccurate to characterize to his situation as a "failure to renew" because Wurtz's employment agreement did not provide for renewal, and Defendants-Appellants were under no duty or obligation to renew it. *Wurtz*, 298 Mich App at 100 (Kelly, J., dissenting).

The plain language of the WPA states that it prohibits discrimination "regarding the employee's compensation, terms, conditions, location, or privileges of employment," MCL 15.362. For Wurtz's argument to be viable, additional language would need to be added to prohibit discrimination regarding the employee's proposed, modified, or additional compensation, terms,

conditions, ... or privileges of employment, or the prospective or former employee's compensation, terms, conditions, ... or privileges of re-employment. This Court has declined to read words into a statute that are not present in the plain language of the statute itself, and it should refrain from doing so in this case. *See, e.g., Lash v City of Traverse City*,479 Mich 180, 189 (2007) ("We presume that the Legislature intended the common meaning of the words used in the statute, and we may not substitute alternative language for that used by the Legislature. [footnote omitted].").

Wurtz has likened his situation to that of an at-will employee, who case law holds has no reasonable expectation of continued employment. *See, e.g., Franzel v Kerr Mfg Co*, 234 Mich App 600, 606 (1999). This is a poor analogy because in an at-will employment situation, the term of employment is indefinite and is "presumptively terminable at the will of either party for any reason or for no reason at all." *Rood v General Dynamics Corp*, 444 Mich 107, 116 (1993). "Terminating an at-will employee necessarily affects the compensation, terms, conditions, location, or privileges of employment." *Wurtz*, 298 Mich App at 99 (Kelly, J., dissenting). Wurtz, however, had an employment agreement that expressly provided for only a ten-year term of employment. Thus, "[i]n contrast [to an at-will employment situation], the written employment contract at issue here was very specific as to the terms of employment, including its duration, which had been agreed to in writing by both parties." *Id.*

The WPA does not define what the "terms, conditions, ... or privileges" of an employee's employment are. Non-WPA case law has recognized that provisions or terms of employment may arise by "express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements." *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 598 (1980). Here, there were express terms, conditions, or privileges of Wurtz's

employment stated in his employment agreement, such as termination only for just or reasonable cause, and being employed for a ten-year term that expired February 1, 2010. [Apx 9a]. Wurtz admits that his employment agreement did not create an obligation for Defendants-Appellants to continue his employment with the BMD beyond February 1, 2010, and that the BMD never promised him any other employment duration beyond February 1, 2010. [Apx 129a-130a]. Instead, Wurtz argues that because employment relationships can *potentially* continue after a contract term expires, continuing to be employed, or be re-employed, was a "privilege of his employment" with the BMD. But the premise of Wurtz's position is faulty because he enjoyed no such privileges or terms of employment. He and the BMD specifically agreed in writing that his employment would expire on February 1, 2010, and no additional duration for his employment was ever promised or agreed upon.

Wurtz has also testified that *he thought* Defendants-Appellants were under an obligation to continue his employment beyond February 1, 2010 "for the fact that I had done an exemplary job during my time as administrator ..." [Apx 129a-130a]. Wurtz's self-serving belief is not evidence that one of his "terms, conditions, ... or privileges" of employment included being employed beyond February 1, 2010. Indeed, such a belief is unreasonable in that it is directly contrary the agreed upon ten-year term of employment contained in his employment agreement.

Wurtz cites to a passage in *Hopkins v Midland*, 158 Mich App 361, 377 (1987), stating that, "Even the denial of a 'subjective expectation' of promotion can be improper discrimination if done for the wrong reasons ..." [Appellee Brief, p12]. However, *Hopkins* does not cite to any authority for that proposition, and it is contrary to subsequent case law holding that "there must be some objective bass for demonstrating that [a] change is adverse because a plaintiff's subjective impressions ... are not controlling." *Heckmann*, 267 Mich App at 492, quoting *Pena*, 255 Mich App

at 311, citing *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 264 (1999).

Wurtz's appellee brief also cites to *Whitman v City of Burton*, 493 Mich 303 (2013), as an example of a case where there was no contractual obligation to continue the plaintiff/employee's appointment as the defendant/employer's police chief. However, *Whitman* did not address whether or not the plaintiff/employee sustained an adverse employment action. The issue before the *Whitman* Court was whether a plaintiff/employee's motivation was relevant to the issue of whether he engaged in a protective activity under the WPA. *Id* at 305-306.

Defendants-Appellants fully honored Wurtz's employment agreement and did not adversely alter Wurtz's "compensation, terms, conditions, location, or privileges of employment" by declining to re-employ him, or modify or agree to additional or different terms of his employment; thus, Wurtz cannot make out a prima facie case under the WPA.

III. Unlike the civil rights acts, the language of the WPA does not contain failure or refusal to hire language, and case law interpreting nonrenewal of an employment contract under the civil rights act, analogizing it to a failure or refusal to hire, is distinguishable.

This Court should not accept the invitation to be guided by federal civil rights cases holding that nonrenewal of an employment contract may be an adverse employment action, because those holdings are based on language found in the federal civil rights acts, but not found in the WPA, involving failing or refusing to hire an individual.

For example, in the *Leibowitz* case relied on by Wurtz, the federal court of appeals held that nonrenewal of an employee's contract was akin to failing or refusing to hire an individual, and be cause Title VII and the ADEA expressly covered the act of failing or refusing to hire, such conduct could constitute an adverse employment action under those federal laws. *Leibowitz*, 584 F.3d at 499-

501.[3]

First, as the dissenting Court of Appeals Judge noted, "[T]his Court is not bound to follow federal caselaw interpreting federal law, even when similar in language to our state law." *Wurtz*, 298 Mich App at 102 (Kelly, J., dissenting), citing *36th District Court v Michigan AFSCME Council 25, Local 917*, 295 Mich App 502, 511 (2012). Second, the text of a statute must prevail over policy interpretations of it. *See, e.g, Elezovic*, 472 Mich at 421-422 (declining to interpret Michigan's Civil Rights Act in accordance with federal civil rights case law, where the pertinent language of the acts are distinguishable); *Hamed v Wayne County*, 490 Mich 1, 23 (2011), cert denied, 132 S.Ct 1014, 181 L.Ed.2d 736 (2012) (same).

The text of the WPA differs in a significant manner from that of Title VII and the ADEA (and the Elliott-Larsen Civil Rights Act[4]) because the WPA does not contain any similar language stating that it prohibits failing or refusing to hire an individual. Rather, the WPA states that it an 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. Further, the WPA does not include statutory language covering a prospective or future employee, it only speaks to an "employee," which is defined in the present tense[5] as "a person who

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[3]Also, notably, the employment contract in *Leibowitz* contained a renewal clause providing for reappointment on the basis of recommendations, while no such clause is found in the instant case. *See, Leibowitz*, 584 F.3d at 492-493.

[4]See, MCL 37.2202(1)(a)(1): "An employer shall not do any of the following: (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual ... ."

[5]Where words of a statute are expressed in present tense rather than past tense, the tense is considered and "construction must be accorded them." *DesJardin v Lynn*, 6 Mich App 439, 442 (1967).

performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied." MCL 15.361(a). Thus, it does not appear from the plain language of the WPA that the Legislature intended to include preemployment conduct concerning applicants for hire, or former employees for re-hire, as Congress has done in Title VII and the ADEA, and as Michigan has done in the Elliott-Larsen Civil Rights Act. "If the Legislature intended to include preemployment or failure to rehire conduct as actionable under the WPA - as it has done in the CRA - it would have." *Wurtz*, 298 Mich App at 103 (Kelly, J., dissenting).

Case law interpreting the federal civil rights acts, which equate nonrenewal of an employment contract to a failure or refusal to hire, is distinguishable because the plain language of the WPA differs in relevant part from that of the federal civil rights acts. While the federal civil rights acts expressly cover pre-employment situations, the WPA does not. Therefore, federal civil rights case law addressing nonrenewal of an employment contract is not persuasive, and should not be adopted in interpreting the issue presently before this Court.

IV. Conclusion and Relief Requested

Plaintiff-Appellee Wurtz did not suffer an adverse employment action under the WPA when his employment agreement expired and was not extended or renewed, and he was not otherwise re-hired, and where Defendants-Appellants were under no obligation to do so. Because Wurtz did not suffer an adverse employment action, no amount of additional discovery would have produced evidence creating a genuine issue of material fact.

Defendants-Appellants Beecher Metropolitan District, Leo McClain, Jacquelin Corlew, and Sheila Thorn, pray that this Honorable Court reverse the October 2, 2012 Court of Appeals Opinion, and reinstate the December 6, 2010 dismissal order of the trial court, or grant such other relief as this

Court deems proper and just.

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