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.

BEECHER METROPOLITAN DISTRICT,
A Michigan municipality, JACQUELIN CORLEW,
LEO McCLAIN, and SHEILA THORN, Jointly and Severally,

Defendants-Appellants

Supreme Court Docket No. 146157

COA No. 301752

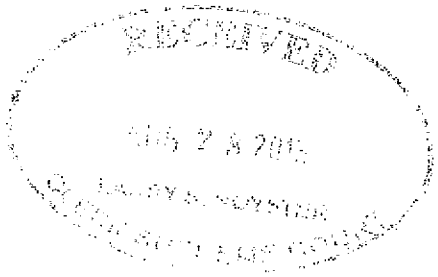
Lower Court No. 10-92901-CL

BRIEF ON APPEAL—PLAINTIFF-APPELLEE, RICHARD WURTZ

Oral Argument Requested

Respectfully submitted by

CHARLES A. GROSSMANN (P24522)
Attorney for Plaintiff-Appellee
452 S. Saginaw St. Ste. 302
Flint, MI 48502
(810) 232-0553



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STATEMENT OF JURISDICTION

The Plaintiff-Appellee agrees with the Statement of Jurisdiction as stated by Defendants-Appellants as it is complete and correct.

STATEMENT OF QUESTIONS PRESENTED

ISSUE 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?**

Plaintiff-Appellee says: Yes

Defendants-Appellants say: No

Trial Court said: No

Court of Appeals said:
Judges Whitbeck and Jansen: Could as a matter of law, reversed and remanded to complete discovery
Judge K. F. Kelly: No

ISSUE II **WAS THERE A FAIR LIKELIHOOD THAT ADDITIONAL DISCOVERY WOULD HAVE PRODUCED EVIDENCE CREATING A GENUINE ISSUE OF A MATERIAL FACT, MCR 2.116(C)(10), IF THE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION HAD NOT BEEN GRANTED PRIOR TO THE COMPLETION OF DISCOVERY?**

Plaintiff-Appellee says: Yes

Defendants-Appellants say: No

Trial Court said: No

Court of Appeals said:
Judges Whitbeck and Jansen: Yes, reversed and remanded
Judge K. F. Kelly: No

COUNTER-STATEMENT OF FACTS AND PROCEDINGS

Introduction

The Beecher Metropolitan District is a sewer and water district in Genesee County covering approximately one-half of Mt. Morris and Genesee Townships north of Flint. In 2009 Richard Wurtz, as the Administrator of the District, reported the corruption of the District's five Board members. His whistleblowing resulted in felony charges against the Board members. It also stopped their pilfering from the district of tens of thousands of dollars in cash, and charging the public for lavish personal parties of food and drink. They retaliated by terminating Mr. Wurtz's employment. Now the defendants insist they did nothing against his employment, they only let his contract run out. The trial court agreed, and would not let discovery be completed. The trial court denied the full protection of the Whistleblower Protection Act (WPA) to contract employees and dismissed Mr. Wurtz's case by granting the defendant's premature motion brought under MCR 2.116(C)(10).

Facts

In 2008 and 2009 Richard Wurtz, as the Administrator, was working under the last two years of a ten year contract [Apx 9a, Employment Contract]—but, not the last two years of his employment. Consistent with the historical practice of the Beecher District with other contract employees, [Apx 156a, Affidvit] Mr. Wurtz was in discussions for his continued employment after the contract terms expired February 1, 2010. He had never had a formal complaint filed against him, and the District Board minutes do not show that the Board, as a unit, ever made any formal censure, or other complaint of Mr. Wurtz's performance. There is no written record of Mr. Wurtz ever being reprimanded for failure to perform his duties. [Apx 119a, No. 51, Defendants' Response to Adm. Request]

In 2008, three of the Board members (the three individual defendants) started to take issue with Mr. Wurtz when he and two other members filed a complaint with the Genesee County Prosecutor because they believed the other three members had violated the Open Meetings Act [Apx 17a]. The Prosecutor did not think the violation was serious enough to proceed on criminally [Apx 19a]. Mr. Wurtz tried to move forward.

Mr. Wurtz and the Board continued to discuss his future employment with Beecher after the expiration of the contract. On March 11, 2009 the Board decided not to refer the matter to its attorney at that time, but they did not make any other decision about his employment, as the minutes of that meeting and subsequent meetings indicate.[1] [Apx 47a] Mr. Wurtz's employment discussions continued into September of 2009 [Apx 144a, Depo. Pg 90]

In May of 2009 Mr. Wurtz became aware the Board was planning to take a trip to San Diego and they were going to charge the District for the expenses of driving when they could fly for a fraction of the costs. That May, he wrote a letter and told them at a meeting not to do that. Regardless of whether they flew or drove, he told them that they should only be paid the cost of flying. [Apx 48a, 49a, 56a-57a, 116a]

In July of 2009 Mr. Wurtz discovered that four of the five members, with the complicity of the fifth, billed the District for driving to San Diego when in fact they flew. They took the

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[1]The defendants try to imply that the Board's actions in March were contrary to what the Board itself said in its approved minutes. [Apx 47a] They refer to Mr. Wurtz's nonsensical answer to a nonsensical question proposed by defendant's counsel in Mr. Wurtz's deposition. Mr. Wurtz had clearly said in his complaint [Apx 109a], and in Plaintiffs Supplemental Ans. to Adm. Request, in part [Apx 2b-3b No. 16 Docket Entry] that the Board first decided the issue on November 11, 2009. So when asked whether the Board voted to not renew his contract on "**July 11**, 2009" [Apx 140a pg 76 line 4-5] it did not make sense because the Board did not meet or take any action on anything on July 11th. He answered "yes" thinking the question was in reference to November 11th which would be consistent with his prior statements, as he explained in his affidavit [Apx 156a]; see also Wurtz's statement minutes later in his deposition [Apx 144, pg. 90, l. 20-25] where he said he did not know there had been a decision about his employment when he reported the Board to the police in August of 2009. Defendant Thorn who was part of the March vote did not think at a September meeting the issue had been previously decided. [Apx 5b] Lastly, the Board's own statement of what they did is memorialized in their own minutes as it must be pursuant to MCL 15.269 and MCL 15.270 of the Open Meetings Act. Neither Mr. Wurtz, the defendants, or anybody else can restate what happened contrary to the minutes of the action taken by the Board at that meeting. [Appellants brief 6-7]

extra money they received from the District and paid for friends and family to take a vacation with them. While there, they also had the District pay for their and their friends' exorbitant meals of filet mignon and drinks, and for visiting tourist sites. [Apx 144a, pg 92-93; Apx147a, pg 104-105] There never has been a travel policy that allowed the Board to bill the District for the cost of driving across the continent when they actually flew; nor to pay for their friends' meals. [Apx 50a-52a] They had falsely and corruptly taken public funds, which they clearly knew were above the $100.00 yearly pay authorized by the District's charter, and used those funds for themselves and their friends. [Apx 144a, pg 92]

In late July and August of 2009 Mr. Wurtz went to the police and to the press to stop the Board from further leaching off the public. [Apx 144a, pg 90-91]

On September 8, 2009 the Sheriff's Department executed a search warrant on the Beecher offices; the warrant was based on probable cause that the Board had corruptly taken in 2009 over $36,000 of public funds. The Board President, Mr. McClain, was at the offices during the search, and he was told by the police that Mr. Wurtz made the complaint to them. Mr. Wurtz thereafter continued to assist in the investigation [Apx 156a, Affidavit]. McClain gave a notice to have a closed meeting on September 25th to discuss the criminal investigation. [Apx 84a-85a] At that meeting, Mr. Wurtz pointed out that it would be a conflict to have the District's attorney discuss their criminal liability for taking District money; and a violation of the Open Meeting Act. [Apx 90a] So McClain then gave a notice that on September 30th the Board would have a closed session to: "Discuss terminating Mr. Wurtz's employment as of January 31, 2010 and the length of time if Administrator's Contract is to be extended or renewed" [Apx 86a]

After the September 25th meeting it was found that the tape recording and equipment that had recorded the meeting was missing and only the Board members had access to it. That theft was reported to the Board on September 30th [Apx 89a].

On November 11, 2009, with the full Board present, the defendants acted against Mr. Wurtz's employment. Without stating any reason, on November 11, 2009, the five Board members with a split vote of 3-2 voted to not extend Mr. Wurtz's employment past the last day on the contract, February 1, 2010, and to hire his replacement. The three votes against Mr. Wurtz are the three individual defendants. [Apx 95a-96a]. On November 25, 2009, in response to a letter from Mr. Wurtz's counsel, the Board attorney said the Board's decision, in reference to November 11, 2009 meeting, to not renew or extend his contract was because of his disagreements and "personality clashes" with Board members. [Apx 100a]

Further details to these facts are contained in the analysis of the issues.

Procedural History

On January 19, 2010 Mr. Wurtz sued. He claimed under the WPA and, in the alternative, a tort claim for violation of public policy tort. [Apx 103a-113a, Complaint]

The Board members were thereafter charged criminally.[2] While the criminal case was pending they asserted their 5th Amendment rights. That stopped discovery regarding the individual Board members and caused the discovery period to be extended to March 14, 2011. [Apx 3a, Docket entry 40] On October 18, 2010, the plaintiff served the District with a request for production of the Beecher employment contracts and records. [Apx 4a, Docket entry 45] The

[2] The Board members were charged in March of 2010. Four of the five Board members went to trial on felony charges. (Genesee County Cir. Ct. No. 10-27446-FH) Although it was established they knowingly spent public funds on themselves, they presented a jury nullification defense testifying and arguing that they are good people who did not know it was wrong. On October 29, 2009 they were acquitted. Presently, all five members originally involved, including the individual defendants in this case, have left the Board.

express purpose in the request was to establish the practice of continuing employment of contract employees past the terms of the contract. [Apx 152a] Instead of answering, on November 15, 2010 the defendants brought their motion for summary disposition under MCR 2.116(C)(10). [Apx 4a, Docket Entry 46]

The primary argument of the defendants was that it is undisputed that Mr. Wurtz worked to the end of his contract and was paid all that was due under the contract. Additional discovery was not going to change those facts [Apx 164a, TR pg 8]. Thus, they argued there was not any discrimination against Mr. Wurtz's employment [Apx 162a, TR Pg 6, L.16-22].

Mr. Wurtz's response, in general, was that the WPA and the employees it protects—including Mr. Wurtz—is not limited to the terms of an employment contract [Apx 167a-169a, TR 11-13]. The history at Beecher would show that contract employees have been allowed to continue their employment relationship despite the end of the duration of their contract. [Apx 156a, Affidavit]

The trial court agreed with the defendants that because it was undisputed that Mr. Wurtz worked to the end of his contract term and received full pay, it did not matter if the historical practice was to continue employment past the contract term, there was not a violation of the WPA. The trial court also dismissed the public policy tort count. [Apx 177a]

Mr. Wurtz appealed the trial court's dismissal of his WPA claim; but, not the public policy tort count. The Court of Appeals reversed with a dissent by Justice Kelly. [Apx 183a-199a]

This Court granted leave with directions to address the issues stated below. [Apx 200a]

ARGUMENT

ISSUE 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?

Standard of Review

In a case that involves the interpretation and application of the WPA, it is a question of law which this Court reviews de novo. *Whitman v City of Burton*, 493 Mich 303, 831 NW2d 223 (2013)

The WPA

Corruption in government not only robs the public of its limited resources but erodes the citizens' trust and increases social destabilization. The Whistleblowers Protection Act (WPA) was designed to alleviate the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large corporations. *Dudewicz v Norris-Schmid Inc.* 443 Mich 68, 75; 503 NW2d 645 (1993) quoting from House Legislative Analysis, HB 5088. 5089 (February 5, 1981). It does so by protecting an employee against an employer's retaliatory employment action when the employee is engaged in protected activity. "The WPA was first enacted by the Michigan Legislature in 1980 to '*provide protection to employees who report a violation* or suspected violation of state, local, or federal law'....The WPA furthers this objective by removing barriers that may interfere with employee efforts to report those violations or

suspected violations,..."(Emphasis added, internal cites omitted) *Whitman v City of Burton,* Supra at 312 (2013)

The core provisions of the WPA read:

> "§15.361. Definitions.
> Sec.1.As used in this act: (a) "Employee" means a person who performs a service for wages or other remuneration *under a contract of hire*, written or oral, express or implied. Employee includes a person employed by the state or a political subdivision of the state except state classified civil service". (Emphasis added)
> "§15.362. Discharging, threatening, or otherwise discriminating against employee reporting violation of law, regulation, or rule prohibited; exceptions.
> Sec. 2. 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." (Emphasis added)
> § 15.363 (1) A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.
> (3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney fees.

The elements of a prima facia claim under the WPA, are, "... a plaintiff need only show that (1) he or she was engaged in protected activity as defined by the act, (2) he or she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action." *Whitman v Burton, at 313*

Elements 1 and 3: Protected Activity and Causation

For the first element, there is not any dispute that the reporting to the police by Mr. Wurtz of the Board members taking of public funds for their own personal use was a protected activity. The Board was acting contrary to the public policies reflected in MCL 750.175, Embezzlement

by Public Official; MCL 750.174, MCL 750.181, MCL 750.182, Embezzlement; MCL 750.356 Larceny; MCL 750.218, Larceny by False Pretenses; 18 USC§1951(2) Hobbs Act, Extortion by Public Official; and in 2008 the violations of policies contained in the Open Meeting Act.

The third element, causation, is fact driven and is discussed in Issue II below in the context of the facts inferring causation and continued discovery.

Nonrenewal or Extension of Wurtz's Contract as an Adverse Employment Action

Beecher needed an Administrator. Mr Wurtz had the job of Administrator. Beecher had the *contractual* discretion of whether or not to continue Mr. Wurtz's employment. Mr. Wurtz requested to continue his employment, as other Beecher employees had. Beecher rejected his request. Mr. Wurtz therefore became unemployed. Literally speaking, Beecher's act of rejecting Mr. Wurtz's request was adverse to his employment—it stopped. But, the question here is whether the contractually discretionary rejection of employment can be a violation of the WPA if caused by protected conduct. The first part of that determination is a question of law and statutory interpretation that is discussed in this issue; the second part of the question regards what caused the rejection and that is discussed in Issue II below.

The statute is remedial and it is liberally construed to favor the persons the Legislature intended to benefit. *Chandler v Dowell Schlumberger, Inc.*, 456 Mich 395, 398; 572 NW2d 210 (1998). The most reliable evidence of the intent of the Legislature is the language of the WPA itself; and if the language is clear and unambiguous the statute must be enforced as written and no further judicial consideration is permitted, the plain language of MCL 15.362 controls *Whitman v City of Burton, at 311*.

If there is nothing in the statute that limits the protection, this Court has not inferred a limitation. *Whitman v City of Burton, at 320-321* ("Our review of the WPA, in particular MCL

15.362, reveals that nothing in the statutory language address an employee's motivation for engaging in protected conduct, nor does any language mandate that the employee's primary motive for pursuing a claim under the act be a desire to inform the public of matters of public concern. Accordingly, the plain language of MCL 15.362 controls, and we clarify that a plaintiff's motivation is not relevant...") *Brown v Mayor of Detroit*, 478 Mich 589, 596; 734 NW2d 514 (2007), ("[T]here is also no language in the statute that limits the protection of the WPA to employees who report violations or suspected violations only if this reporting is outside the employee's job duties")

The defendants' approach is opposite to this Court's precedent. The defendants do not liberally construe the WPA to favor the persons the Legislature was protecting, which are the employees who facilitate the protection of the public by reporting corruption. The defendants want to liberally construe the statute to protect corrupt employers. The defendants fail to recognize that the clear language of the WPA does not limit the scope of the "privileges of employment" that are to be protected for the employee. Instead the defendants turn it on its head and argue that the clear language does not limit the retaliation a corrupt employer may take against a contract employee's attempt to renew his employment. The defendants want to define the phrase "privileges of employment" to mean only the particular contract terms of that existing job with that corrupt employer, when there is not any language in the WPA to support such an interpretation. In essence the defendants are arguing that Legislature intended to limit restrictions on corruption by giving the corrupt free rein unless clearly stated to the contrary in the WPA. The defendants' logic is backwards.

The defendants reverse logic causes a large portion of the employment world to be ignored. Employment relationships often continue after a contract term expires. Teachers,

professors, executives, administrators and coaches are some examples. It is not unusual for their employment with that same employer to continue after the expiration date in the contract. It is common enough that has been settled law in those situations that absent a new agreement the terms of the original contract are presumed to continue. *Carter v Marvel Carburetor Co.*, 263 Mich 48, 54; 248 NW 545 (1933). Employment contracts are commonly renewed, renegotiated, extended, or become at-will and the employment relationships continue. The defendants' perverse position is that the Legislature did not intend for this vast group of employees to be protected by the WPA.

The correct analysis starts with construing the WPA liberally in favor of the employees, so to better protect the public. Then it is clear that there is nothing in the language of the WPA itself from which it could be inferred that corrupt employers are allowed to retaliate against whistleblowing employees' future employment by not renewing their contracts. Indeed, employees "under a contract of hire" by definition are protected by the WPA, MCL 15.361. Here we are asked to examine a subset of those contract employees to see if they are to be treated differently: those employees who do not have a renewal clause in their contract and whose employment then is not renewed as retaliation for revealing corruption. But again, the clear language of the WPA does not state that the protection given to employees under a contract of hire is limited to only those employees with a renewal clause in their contract.

Looking past the WPA language, a further examination of the treatment given the WPA and similar antiretaliation statutes in Michigan and in the federal courts, and the reasoning found in other states, all render the same conclusion—nonrenewal of the employment contract can be an adverse employment action under the WPA regardless of the contract terms.

The term "adverse employment action" is derived from the WPA's language that prohibits an employer's actions that "otherwise discriminate" against an employee regarding their "privileges of employment", MCL 15.562. Those are broad terms that include many types of actions against the employee. Demotion, decrease in wages or salary, a less distinguished title, loss of benefits, diminished responsibilities, and failure to promote, have been considered discrimination against the employee's privileges of employment if it was motivated by an intent to retaliate for the employees' protected activities. *Heckmann v Detroit Chief of Police et al*, 267 Mich App 480, 492; 705 NW2d 689 (2005). The term "privileges of employment" is not limited, as the defendants argue, to the parameters of the employee's contract. The privileges of employment include the full spectrum of the employees' future employment and employment opportunities. The defendants' view in this regard is unprecedentedly stifling.

The WPA statutorily creates individual rights that are separate in nature from contractual rights. *Alexander v Gardner-Denver Co.*, 415 US 36, 50; 39 L.Ed. 147 (1974) cited by *Florence v Dept. of Social Services*, 215 Mich App 211; 544 NW2d 723 (1996). That is further reflected in the language of the WPA where damages are not limited to contract damages, MCL 15. 15.363(3), and because a WPA claim is not a contract claim it will include mental anguish, *Phiney v Verbrugge*, 222 Mich App 513; 564 NW2d 532 (1997). This Court has explained that the WPA and other antiretaliation statutes are an exception to the contractual restrictions of an at-will agreement, *Dudewicz v Norris-Schmid, 443* Mich 68, 78-80; 503 NW2d 545 (1993); *Suchodolski v Michigan Consolidated Gas Co.*, 412 Mich 692, 695; 316 NW2d 710 (1982). Therefore, even though contractually an at-will employee has no expectation of future employment, *McNeil et al v Charlvoixx County et al*, 484 Mich 69, 86; 772 NW2d 18 (2009), he is still protected by the WPA. *Suchodolski, Supra.* The distinction between a cause of action for

a breach of contract and a WPA violation can be seen where this Court dismissed the plaintiff's breach of contract claim but allowed the plaintiff's WPA claim, *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 384-385; 563 NW2d 23 (1997). Recently in *Whitman v City of Burton, Supra*, the protected employee was a police chief who served at the appointment of the mayor when the mayor begins a new term of office; there was not a contractual requirement to continue the chief and he was not reappointed after the mayor was re-elected. The case dealt with police chief's motivation when he did his whistleblowing; motivation was held irrelevant and the case was remanded to determine causation despite the lack of a contractual obligation to continue his employment. *Id* at 321. It has been said, "*The statute does not require that a contract right be violated.* Even the denial of a 'subjective expectation' of promotion can be improper discrimination if done for the wrong reasons, such as retaliation for the employee engaging in conduct protected by the act." (Emphasis added) *Hopkins v Midland*, 158 Mich App 361, 377; 404 NW2d 744 (1987).

In applying the WPA, Michigan courts have often looked to comparable employment statutes that are to prevent retaliation. It has been noted that in Michigan the WPA and the Civil Rights Act (CRA), MCL 37.2101 et. seq, are substantially similar. Both use the shifting burdens framework and are directed at protecting employees from wrongful treatment by employers and involve similar factual questions of employer motivation. For that reason the CRA and the WPA, it has been held, should receive like treatment. *Debano-Griffin v Lake Co.*, 493 Mich. 167, 175; 828 N.W.2d 634 (2013). ("Because whistleblower claims are analogous to other antiretaliation employment claims brought under employment discrimination statutes prohibiting various discriminatory animus, they should received treatment under the standards of proof of those analogous [claims]" (citations and internal quotes omitted)); see also *Roulston v*

Tendercare (Michigan), Inc, 239 Mich App 270, 280; 608 NW2d 525 (2000); *Stewart v Fairlane Community Mental Health Centr*, 225 Mich App 410, 421; 521 NW2d 542 (1997).

The CRA precedent from the Michigan Court of Appeals is that the employee's lack of contract rights with the retaliating employer does not limit the employee's protection from that offending employer—even after the employment ends with that employer. The employee has a CRA claim if the offending employer retaliates by discriminating against the employee's future employment with a different employer. *DeFlaviis v Lord & Taylor, Inc.*, 223 Mich App 432, 440; 566 NW2d 661 (1997) ("...and hold that §701 of the Civil Rights Act protects former as well as current employees [from retaliation]") Further, the non-renewal defense was raised and rejected in a CRA case where the employer claimed a professor did not have a right to a renewal of her employment contract. *Riesman v Regents of Wayne State Univ.*, 188 Mich App. 526, 541-543; 470 NW2d 678 (1991). In both the CRA and the WPA the emphasis has been on the protection of the individual, and thereby the public, by giving rights that are not limited by contract.

Defendants argue that the CRA is unlike the WPA because the CRA protects people applying for work and the WPA protects people already at the job. That distinction is a non sequitur to this issue. Both statutes have the same overarching general purpose. The CRA and WPA both are to give protection from employers who retaliate against the person's employment after they performed a protected act or have protected status. The protected employment privileges have to be prospective inasmuch as the employee's past employment obviously cannot be retaliated against. The statutes employ similar language to effectuate that protection. The CRA prohibits discriminating "against an individual with respect to employment, compensation, or a term, condition, or privilege of employment", CRA, at MCL 37.2202(a); which is a phrase

very similar to the language of WPA at MCL 15.562 stating: "against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment." That is true whether it is at a job to which the person is applying, a job the person is already at, or a job the person took after leaving the offending employer. Both statues are broadly written and construed to protect public policy by liberally protecting a person from a retaliating employer adversely affecting their future employment conditions and opportunities.

There is not an inference anywhere in Michigan law to allow corrupt retaliating employers to insulate themselves from the WPA by bargaining away a contract employees' protection—and the publics' protection from corruption—by not including a renewal clause in their employment contract. There is not such an inference in the statutory language of the WPA, nor is it in the expressed intent of the Michigan Legislature, nor in other Michigan employment antiretaliation statutes like the CRA, nor in any other prior Michigan jurisprudence.

This Court has also looked to federal decisions construing parallel Federal legislation saying that although not binding it is persuasive. "[W]histleblowing statute[s] [are] analogous to antiretaliation provision of other employment statutes and ....policies underlying these similar statutes warrant parallel treatment...." *Shallal v Catholic Social Services of Wayne Co*, 455, 617; 566 NW2d 571 (1997) quoting *Rouse v Farmers State Bank of Jewell, Iowa*, 866 F. Supp. 1191,1204 (ND Iowa, 1994). See also *McCalla v Ellis*, 180 Mich App 372, 377-378; 446 NW2d 904 (1989) (Interpreting the CRA) *Hopkins v Midland*, 158 Mich App 361, 374; 404 NW2d 744 (1987) (Interpreting the WPA).

The overwhelming majority of the federal courts that have looked at this issue concluded that nonrenewal of an employment contract as retaliation for protected conduct is an adverse employment action. The United States Supreme Court addressed language similar to Michigan's

WPA in a Title VII sexual harassment case, saying, "We reject petitioner's view. First, the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment. (Citations omitted) *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64; 91 L Ed2d 49 (1986). The "adverse employment action" threshold is met when the employer's action impact[s] the 'terms, conditions, or privileges' of the plaintiffs job in a real and demonstrable way." *Davis v Town of Lake Park, Fla.* 245 F3d 1232, 1239 (11th Cir 2001) "The term 'adverse action' is drawn from employment case law; examples in that context include discharge, demotions, refusal to hire, *nonrenewal of contracts*, and failure to promote" (Emphasis added) *Thaddeus-X v Blatter*, 175 F3d 378, 396 (6th Cir. 1999)(en banc)) "[The Supreme] Court has specifically held that the nonrenewal of a nontenured public [employee's] one-year contract may not be predicated on his exercise of First and Fourteenth Amendments rights. *Branti v Finkel, 445 U.S. 507, 515, 100 S. Ct. 1287, 63 L.Ed 2d 574 (1980)" Shimkus v Hickner*, 417 F. Supp. 2d 884 (ED Mich 2007). The majority opinion of the Court of Appeals in this case was persuaded by *Leibowitze v Cornell Univ.*, 584 F3d 487 (2nd Cir 2009); *Leibowitze* said:

> "There is simply no reason that the discrimination laws should not apply with equal force to an employer's decision regarding a current employee who is denied a renewal of an employment contract. An employee seeking a renewal of an employment contract, just like a new applicant or a rehire after a layoff, suffers an adverse employment action when an employment opportunity is denied and is protected from discrimination in connection with such decisions under Title VII and the ADEA. The mere fact that the employer's decision not to renew is completely discretionary does not mean that it is not an "adverse" employment decision."

Leibowitz at 501 cited four other circuits and five other districts that agree with its view all of which could be summarized by *Hernandez-Mejias v. Gen. Elec.*, 428 F. Supp. 2d 4, 8

(D.P.R. 2005) ("As even at-will employees and job applicants are entitled to Title VII protection, *we agree with the overwhelming majority of courts that non-renewal of an employment contract constitutes an adverse employment action.*" (Citations omitted)) (Emphasis added)).

Three persuasive reasons for including the nonrenewal of an employment contract as an "adverse employment action" have also been espoused in states where retaliation for whistleblowing is a tort and, like in Michigan, at-will employees are protected. That reasoning is applicable here. First, the underlying purpose of a wrongful discharge action is to prevent an employer from conditioning future employment on the employee allowing a violation of public policy; in contrast to a contract action which enforces privately negotiated terms. Thus limiting wrongful discharge to at-will employment "rests implicitly on the incorrect assumption that the constitutional, statutory or regulatory interests at issue can be limited through private contracts." *Keveny v Missouri Military Academy*, 304 SW 98, 102 (2010) (citing *Smith v Bates Technical College*, 139 Wn2d 793, 991 P2d 1135, 1141 (Wash 2000); *Tameny v Alantic Richfield Co.*, 27 Cal.3d 167, 164 Cal. Rptr. 839, 610 P2d 1330,1335 (Cal. 1980)) Second, a breach of contract action satisfies private contractual interests but it fails to vindicate the public interest or to provide a deterrent against future violations. *Keveny* 102-103 (citing *Retherford v AT&T Communications of Mt. States, Inc.*, 844 P2d 949, 960 (Utah 1992)) Third, to grant at-will employees protection but not contract employees "illogically grants at-will employees greater protection from these tortious terminations due to an erroneous presumption that the contractual employee does not need such protection"; but allowing contract employees and at-will employees to be on the same footing encourages employers to refrain from coercing employees into a dilemma of choosing between their livelihoods and reporting serious misconduct in the workplace." (Citation omitted) *Keveny* at 103. Recently this specific reasoning by *Keveny* was

found persuasive by a federal court in *Vails v United Cmty Health Ctr., Inc.* 283 FRD 512 (N.D. Iowa 2012).

The defendants lament that if nonrenewal or extension of an employment contract can be an adverse employment action then "every written employment contract of finite duration must be renewed or continued if desired by an employee" (Appellant Brief, pg 25). That argument is not correct. It conflates a WPA action with contract claims—which it is not. If this were a contract action, the 10-year term would be relevant and may be an enforceable term. This situation is no different from when the employer can avail itself of the contract provisions of an at-will agreement in a breach of contract claim, but not in a CRA or WPA claim. A contract right does not have to be violated for there to be a WPA claim. *Dolan v Continental Airlines/Continental Express., Supra* This is a statutorily created cause of action independent of contract rights; it is designed to protect public policies by shielding employees from a corrupt employer's retaliation. The WPA is about corruption and corrupt employers. It will apply when employers, like the defendants, retaliate against any employment opportunity of a protected employee, like Mr. Wurtz, had regardless of the specific contract terms. Employers who do not embrace corruption do not have to worry about the enforcement of their contract terms.

Defendants want the nonrenewal of a fulfilled employment contract to never be a violation of the WPA. Defendants' position is not supported in the WPA statutory language or any other statement of the Legislature's intent, or in past construction of the WPA, or comparable state and federal antiretalitory statutes, and it is contrary to reason or common sense. The phrase "privileges of employment" in the WPA does not mandate or imply a limitation on the type of future employment opportunities, relationships, or conditions that are forbidden to be discriminated against. There is not any basis whatsoever to infer what the defendants advocate.

They want there to be a classic loophole, a loophole big enough to drive through a large reeking truckload of corruption. The defendants' position would allow crooked employers to hire with only nonrenewal contracts so they could then extort the employees to "play ball" if they wanted to continue to have a livelihood after the contract term. The defendants' interpretation would cause the employees who risk reporting the corruption to be injured by those employers retaliating against their employment opportunities, and the public to suffer from the stealing of resources and erosion of government and social trust. Only the corrupt would benefit by the defendants' argument.

If Mr. Wurtz's whistleblowing was a reason that his employment which he was seeking to continue after his contract expired was not renewed, even if Beecher was not contractually obligated to renew it, then that may be a violation of the WPA. Under the WPA Mr. Wurtz can, and in fact did, suffer an adverse employment action when Beecher did not renew his employment in retaliation for his protected activity irrespective of any contractual duties.

ISSUE II

WAS THERE A FAIR LIKELIHOOD THAT ADDITIONAL DISCOVERY WOULD HAVE PRODUCED EVIDENCE CREATING A GENUINE ISSUE OF A MATERIAL FACT, MCR 2.116(C)(10), IF THE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION HAD NOT BEEN GRANTED PRIOR TO THE COMPLETION OF DISCOVERY?

Standard of Review

The defendants brought a motion for summary disposition under MCR 2.116(C)(10). The standard of review is "whether a genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed would leave open an issue upon which reasonable minds might differ." *Debano-Griffin v Lake Co.*, 493 Mich. 167, 175; 828 N.W.2d 634 (2013). The defendants made their motion well before

discovery was completed and in lieu of providing discovery. A motion for summary disposition filed before the close of discovery is premature unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position. *Liparoto Constr, Inc v General Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009).

Genuine Issue of Material Fact /Causal Connection

The focus is on a genuine issue of a "material fact" which is the term used in MCR 2.116(C)(10)

A material fact is not the same as an evidentiary fact. "The material fact to which reference is made in the rule is the ultimate fact issue upon which a jury's verdict must be based." *Estate of Leamon Neal v Friendship Manor Nursing Home*, 113 Mich. App. 759,763; 318 N.W.2d 594 (1982) quoting *Partrich v Muscat*, 84 Mich App 724, 730-731; 270 NW2d 506 (1978) and citing *Simerka v Pridemore*, 380 Mich 250, 275; 156 NW2d 509 (1968).

"The Michigan Court Rules provide a precise description of the respective burdens that litigants must bear when a motion for summary judgment is filed pursuant to *MCR 2.116(C)(10)*. Specifically, *MCR 2.116(G)(4)* mandates that the party seeking summary judgment must specify the issues for which it claims there is no genuine factual dispute." *Skinner v Square D Co., 445 Mich. 153; 516 N.W.2d 475 (1994).*

The defendants' only claim of the material fact for which they say there is no genuine issue was , "that Defendants did not discharge, threaten, or otherwise discriminate against the Plaintiff regarding the terms, conditions, compensation, location or privileges of his employment by the District, but merely allowed his employment contract to expire without renewing the same.." because the plaintiff admitted the contract expired on February 1, 2010, there was not a contractual obligation to extend his contract, and that he worked to the end of his contract and

receiver full compensation. (Apx 7b; Apx 4a, Docket entry 47, Defendants Motion for Summary Disposition)

The foundation of the defendants' motion is the premise that as a matter of law the failure to extend or renew employment when the terms of an employment contract have been fully satisfied can never be an adverse employment action under the WPA. The defendants then deduce from that premise that because plaintiff admits to the satisfaction of the contract terms there is not a genuine issue of whether the plaintiff suffered an adverse employment action. But, that argument crumbles if the defendants' premise is false, as plaintiff has argued in Issue I above.

As plaintiff argued, the jury does not have to decide the terms of the contract to determine if there was an adverse employment action under the WPA. Those terms, and whether there was a breach of them might be in evidence, they might even be stipulated. Regardless of the contract terms and whether they were fulfilled, not renewing Mr. Wurtz's employment with Beecher can be a violation of the WPA if it was in retaliation for his whistleblowing. The ultimate fact the jury will have to decide therefore is the cause of the defendants' action which was to deny Mr. Wurtz's bid to continue his employment past the expiration date.

The defendants have not identified other facts that they are claiming demonstrate that there is not an issue of material fact other than the fulfillment of the contract terms. Because the defendants put all their eggs in the legal basket of whether nonrenewal of employment can be adverse action, they did not raise causation as the material fact which they claim there is not a genuine issue. The plaintiff should not have to respond to what was not raised.

Nonetheless plaintiff will examine if there is evidence from which a jury could reasonably infer that there was a causal connection between the protected act and the nonrenewal

of Mr. Wurtz's employment; and if there is a fair likelihood further discovery would produce more evidence of a genuine issue of a material fact. The trial court did not address this issue because it agreed with the defendants' legal premise that nonrenewal of a fulfilled employment contract could never be an adverse employment action.

McDonnell Douglas Framework

This Court has set out the standards for this analysis of causation in *Debano-Griffin v Lake Co., Supra*; using the McDonnell Douglas framework, stating:

> "Absent direct evidence of retaliation, a plaintiff must rely on indirect evidence of his or her employer's unlawful motivations to show that a causal link exists between the whistleblowing act and the employer's adverse employment action. A plaintiff may present a rebuttable prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful retaliation. Once a plaintiff establishes a prima facie case, a presumption of retaliation arises because an employer's adverse action is "more likely than not based on the consideration of impermissible factors"--for example, here, plaintiff's protected activity under the WPA--if the employer cannot otherwise justify the adverse employment action.
>
> The employer, however, may be entitled to summary disposition if it offers a legitimate reason for its action and the plaintiff fails to show that a reasonable fact-finder could still conclude that the plaintiff's protected activity was a motivating factor for the employer's adverse action. A plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for unlawful retaliation." (Citations and quotation marks omitted emphasis in original). *Id* at 176

Existing Evidence for Prima Facia Case

Applying the standards of *Debano-Griffin*, the following is the evidence presently available to establish Mr. Wurtz's prima facie case—without discovery completed.

1. Mr. Wurtz worked his first month as the Administrator at Beecher as an at-will employee without a contract. [Apx 150a; 156a] That indicates that historically Beecher had employed an Administrator without a contract and his employment could have continued after the expiration

of the contract term with a contract or without a contract and at-will. The full spectrum of options was available.

2. During the spring and summer of 2009 there were ongoing discussions about Mr. Wurtz's continued employment after the contract expired indicating it was a viable option that Mr. Wurtz was seeking. [Apx 144a, Depo. Pg 90]

3. The police raid took place on September 8, 2009. The Board President, defendant McClain, was present during the police raid and was told Mr. Wurtz's was the whistleblower. [Apx 156a, Affidavit] *"[T]he more knowledge the employer has of the plaintiff's protected activity, the greater the possibility of an impermissible motivation."* (Emphasis added) Debano-Griffin v Lake County, at 178.

4. The Board convened after the September 8, 2009 police raid when the President called for a special executive session on September 25, 2009 and it was put on the notice for the meeting and the agenda, "Preparation for Sheriff Department's Investigation of financial improprieties of Board Members in connection with their attendance to Conferences and trips taken pursuant to Conferences and real property improvement and repairs to Board Members residence by Beecher Metropolitan District Employees." [Apx 84a, 85a] The tape recording of the September 25, 2009 meeting was missing and the Board members were the only ones with access who could have taken it. [Apx 89a, 9-30-09 minutes] That inferred there were admissions adverse to the Board members that at least one of them wanted to cover it up.

5. Further in the minutes of the September 30th meeting it was explained that because it was questionable under the Open Meetings Act of whether the Board could make a decision about Mr. Wurtz in a closed meeting Mr Wurtz's continued employment was not decided at that time.

[Apx 90a][3] That demonstrates that on September 25th and 30th it was still an open question of continuing Mr. Wurtz's employment until the Board could properly vote. That is contrary to the defendants' argument that the issue was previously decided in March. It further infers that the three individual defendant Board members may have been trying to accomplish the adverse action against Mr. Wurtz's employment shortly after the raid.

6. The notice for the September 30, 2009 meeting of the Board stated on the agenda: "Discussion and decision to renew or extend Administrator's Contract beyond January 31, 2010 and length of time if Administrator's Contract is to be extended or renewed." [Apx 86a]; further, on the statement of the motions to consider at the meeting were:

> "4. Motion to renew or extend the Administrator's contract beyond January 31, 2010 and the length of time it is to be extended or renewed.
> IF MOTION 4 IS NOT PASSED:
> 5. Motion to determine process and procedure for advertising and notifying of vacancy in the position of Administrator at Beecher Metropolitan district" [Apx.6b]

The minutes for the September 30th meeting also indicate the attorney for the Board at the meeting, "...told Mr. Wurtz he had advanced his desire in the past to the Board to have his contract renewed or extended and he respectfully deserves an answer from the Board." [Apx 90a] Defendant Thorn, who had voted in March to not refer the matter to the Board's attorney, said on September 30th that she had not thought the employment issue had been previously decided. [Apx 5b] Those statements indicate that in September of 2009 Mr. Wurtz was seeking to continue as the Administrator, the position of Administrator was going to continue, the Board was considering it but had not made a previous decision regarding continuing his employment

[3] The defendants object to any reference to the minutes of the closed session on September 30, 2009 [Apx 4b-5b, redacted minutes] under MCL 15.267(2). But, any discussion regarding Mr. Wurtz during the closed meeting was not requested by Mr. Wurtz and is not authorized under MCL 15.268 and therefore not exempt from disclosure under MCL 15.267(2)

after the end of the 10-year period. Again, that is contrary to the defendants' claim that the Board decided the issue in March of 2009.

7. The Board's vote on November 11, 2009 to not continue Mr. Wurtz's employment was 3 to 2. [Apx 95a-96a] That indicates that if just one more of the defendant Board members had voted the other way, or if the Board quorum was comprised of the two pro-Wurtz Board members and only one of the anti-Wurtz members, then Mr. Wurtz's employment would have continued as Administrator. That further demonstrates that his continued employment was quite possible despite there not being a renewal option in the contract. It was definitely not merely a "woulda, coulda, shoulda" claim of "unilateral hope" by Mr. Wurtz, [Apx 197a, Judge Kelly's dissenting opinion] especially in light of Beecher's practice of continuing contract employees on after the contract term.

8. There is no record of the Beecher Board having reprimanded Mr. Wurtz for his job performance. [Apx 119a] Mr. Wurtz's contract did not designate any pay; nonetheless, he was always paid for his performance and received pay increases and never reductions for any reason, much less as a statement of dissatisfaction with his work. When the Board voted on November 11, 2009, there was no statement in the Board minutes of that meeting of any reason to not renew Mr. Wurtz's employment. [Apx 95a-96a] This indicates there was not a justification based on his job performance to treat Mr. Wurtz differently from other contract employees.

9. The Beecher Board did not passively let Mr. Wurtz's contract merely expire. The motion made on November 11, 2009, pursuant to the minutes, was made by one of the defendants, Thorn. The Board had the opportunity to discuss it and voted on the question of whether they should extend his contract or end his employment and start looking for a new Administrator. [Apx 95a-96a] That would infer that his continued employment was something they knew Mr.

Wurtz wanted and something that could have happened. Their being proactive on the matter further infers that Thorn and the other two defendants felt they had to do something affirmatively to make sure Mr. Wurtz's employment ended, perhaps before the defendant Board member lost the majority vote by a reduced quorum. A jury could reasonably find that was an indication of their motivation to retaliate for the protected activity and that Mr. Wurtz's "privileges of employment" did not end automatically by expiration of the contract.

10. The only reason ever stated for not renewing Mr. Wurtz's employment was a statement from the Board's attorney in a letter dated November 25, 2009 saying it was for "...personality clashes between the Board and Administrator..." [Apx 100a] That statement may infer that the personality clashes had to do with Mr. Wurtz's disagreement over their corrupt practices and their actions were retaliatory.

11. The Board meets only periodically. The vote on November 11, 2009, when Mr. Wurtz was not present, was the completion of the process that started with the notice for the September 25, 2009 meeting. That infers that the defendants' nonrenewal of Mr. Wurtz's continued employment was done as immediately as could be accomplished after the police raid, inferring that they were retaliating for the protected activity.

12. Although at the time of his termination Mr. Wurtz was the only Beecher employee not under a collective bargaining agreement, by Mr. Wurtz's personal knowledge there had been numerous other non-collective bargaining contract Beecher employees from recent history during his tenure going back 30 years. Mr. Wurtz knew historically that contract employees were always allowed to continue Beecher employment if they wanted after their contract term expired. From Mr. Wurtz's knowledge as Administrator, he is the only contract employee whose employment was not renewed in spite of his wishing to continue. [Apx 156a, Affidavit] This

indicates the defendants discriminated against his privileges of employment by treating him differently that all previous contract employees.

13. At the time of the vote on November 11, 2009 to not renew Mr. Wurtz's employment the Board members were the focus of a criminal investigation because of Mr. Wurtz's protected activity. The three Board members who voted to not continue Mr. Wurtz's employment were in danger of felony criminal charges under state and federal law and possible prison, restitution, fines, and public scorn. They could not have been more personally affected by Mr. Wurtz's reporting. "*It is reasonable to conclude that the more an employer is affected by the plaintiff's whistleblowing activity, the stronger the causal link becomes between the protected activity and the employer's adverse employment action.*" (Emphasis added) *Debano-Griffin v Lake County*, at 178

Using the McDonnell Douglas analysis, even without further discovery, the above facts, when viewed in a light most favorable to plaintiff, support a reasonable inference that plaintiff was the victim of unlawful retaliation regardless of the 10-year contract term when the defendants voted to not renew his employment. That establishes his prima facie case and gives rise to a rebuttable presumption of the same.

No Claimed Justification Offered as Rebuttal By Defendants

Continuing with the analysis, defendants could have attempted to rebut the presumption of retaliation if they could have offered a legitimate justification for not renewing plaintiff's employment, unless plaintiff could show that defendants' offered justification was a pretext for unlawful retaliation. *Debano-Griffin v Lake County*, at 179.

The defendants have only relied on their contractually based argument that nonrenewal can never be an adverse employment action. They have not offered any other justification to not

renew Mr. Wurtz's employment. Therefore there is nothing against which the plaintiff must argue that the defendants' hypothetically claimed justification was only a pretext.

The defendants did devote time in their Statement of Facts and Proceedings to the Mrs. Odom issue contained in the November 11, 2009 minutes. [Apx 92a-95a] But, they have not directly claimed that the issue of Ms Odom was the cause for not renewing Mr. Wurtz's employment, they just try to imply it because of the chronological order matters were discussed in the meeting. Not only would such a claim be baseless, the minutes of the Board on November 11th contradict it, and the defendants have not asserted it as an actual justification. Further the defendants have included in their Appendix the Beecher operating loss statement [Apx 12a]; again without stating in their pleadings but only possibly inferring that was their justification. If that were the defendants claim, it could be rebutted by showing it was caused by the Board's refusal to follow Wurtz's recommendations in the past and it was not stated as a reason in the minutes for not extending his employment. But, such a rebuttal is not necessary because it was not the basis for the defendants' motion for summary disposition.

The defendants' argument that the plaintiff has not shown he was treated differently then other similarly situated employees is misplaced for five reasons. First, because the defendants focus their argument on contract terms limits, all the other employees at Beecher that had employment contracts with limited terms are similarly situated for the purpose of determining if Wurtz was treated differently. Second, the defendants imply that other Administrators were treated the same but they have not been able to claim justification by actually showing the other Administrators were not allowed to continue their employment after their contract expired at Beecher. Third, not only have the defendants not shown that other similarly situated employees were treated the same, they cut off discovery before the records of other contract employees,

including other Administrators, were furnished to show they were allowed to continue employment. Fourth, Mr. Wurtz has specialized knowledge as the Administrator and he said in his affidavit that all the other employees, which would have to include the past Administrator, were treated differently from him. Five, even if hypothetically all the Beecher Administrators were retaliated against in the past for whistleblowing, treating Mr. Wurtz the same does not exonerate the defendants from violating the WPA.

The defendants' claim the issue of Mr. Wurtz's continued employment was decided in the March before reporting to the police in August is contrary to the minutes of the Board meetings, Mr. Wurtz's testimony, Mr. Wurtz's pleadings, and the statements and the actions of the defendants themselves. (See footnote 1)

Even without completing discovery, and viewing the known evidence in the light most favorable to plaintiff, it would be reasonable for a jury to conclude that the defendants' actions were retaliatory and caused by the protected activity; and whatever other reasons the defendants might have claimed for not renewing Mr. Wurtz's employment they would not be the defendants' "motivating factors" but only a pretext.

Discovery Not Completed

The defendants brought their motion well before discovery was completed and in lieu of providing discovery, and after taking advantage of obtaining discovery from Mr. Wurtz. A motion for summary disposition filed before the close of discovery is premature unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position. *Liparoto Constr, Inc v General Shale Brick, Inc, Supra.*

Even though there is presently sufficient evidence, that existing evidence also demonstrates there remains a fair likelihood further discovery in this matter would add support to

the plaintiff's evidence. None of the three individual defendants who voted against Mr. Wurtz or the other two Board members who voted in favor of Mr. Wurtz on November 11, 2009 has been put under oath to answer questions presented by the plaintiff. They were shielded by the 5th Amendment while the criminal proceeding was pending. Based on what has been cited above in the minutes, including that the two non-defendant Board members who voted in favor of Mr. Wurtz have not been deposed, there is a reasonable chance that there will be some information revealed from which it could be inferred that the three individual defendant Board members true motivations involved retaliation for Mr. Wurtz having subjected them to a criminal inquiry.

Further the defendants brought their motion for summary disposition in lieu of producing requested documents from Beecher. Those documents would likely detail and confirm Mr. Wurtz's knowledge stated in his affidavit of how Beecher had historically treated all the other contract employees differently, including past Administrators, by allowing them to have their employment continue after the contract term. In the plaintiff's Request for Production the intent of the request was made clear.[4] The defendants' brought the motion instead of answering the request or allowing discovery to continue. Their premature motion appears furtive and would indicate those records would likely show how Mr. Wurtz was treated differently from all the other contract employees, even prior Administrators. There is a fair likelihood then that those records would show that Mr. Wurtz was discriminated against by having his future employment rejected in retaliation for revealing the Board's corruption.

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[4] The introduction to the request said: "For guidance to understand the scope of requests 1,2 and 3 below—but not to limit your response—the purpose is to reveal records of instances on non-union employees of the District who had employment contracts but their employment relationship continued past the expiration of those contracts. That may have been because their contracts were renewed, extended, or a new contract was executed for the same or different job position, or they were otherwise continued as an employee." [Apx 152a]

There also has not been spin-off discovery from the defendants' depositions of other Beecher staff members, employees, or associates of the individual defendants who may have been privy to conversations, comments, or other information regarding the defendants' motivation. That is not merely speculation in light of what is already known from the minutes of the Board meetings, including the mysteriously missing tape recordings, and the defendants' other actions.

If discovery is allowed to continue now that the individual defendants do not have the protection of the 5th Amendment, and records are provided, there is a fair likelihood that additional discovery will produce addition evidence to create a genuine issue of a material fact and strengthen the plaintiffs' case.

CONCLUSION

The policy reasons behind the WPA are well known. Corruption in business destroys economies; the rule breakers steal unjust rewards at other's expense and that encourages more of the same. Corruption in government may be worse; when the rule makers themselves are corrupt we descend into a free-for-all with a loss of respect for the institutions that keep us civil, all because of the misdeeds of a few.

The WPA is a weapon against corruption. It encourages the disclosure of corruption by disarming crooked employers so they cannot hurt their employees by retaliating where they are the most vulnerable—right in their livelihoods. The defendants' position is not supported by the statutory language, law, or logic. The defendants would rearm the corrupt. Existing employees working under a contract of hire would be unprotected while those without contracts working at-will would still have protection. The devious employers will make sure future hires will have contracts without renewal clauses.

Mr. Wurtz stopped the Beecher Board from taking any more exorbitant vacations at the public's expense. One of his privileges of employment, regardless of his contract, was the opportunity to continue his employment relationship with Beecher after his contract expired. As his affidavit indicated, and which future discovery of Beecher's records would support, Beecher had always allowed its contract employees to continue employment with it. The defendants' different treatment of Mr. Wurtz by extinguishing his employment in retaliation for his protection of the public coffers is a violation of the WPA. It was an adverse employment action motivated as retaliation for, and caused by, his protected activity.

The defendants were able to depose Mr. Wurtz, but they prematurely cut off discovery of themselves. Yet Mr. Wurtz with his affidavit and the various minutes and other supplied documents has been able to demonstrate an unrebutted prima facia case that the defendants' adverse action against his employment was caused by his reporting of their criminal conduct. Further discovery will likely yield more evidence that Mr. Wurtz's protected activity caused the retaliation by the defendants' with their November 11, 2009 vote to not renew or otherwise extend his employment.

RELIEF REQUESTED

The Plaintiff-Appellee requests that this Court uphold the majority decision of the Court of Appeals in this matter and return the case to circuit court to continue.

Respectfully submitted,

Charles A. Grossmann (P24522)
Attorney for Plaintiff-Appellee