

# community watch

MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

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## Not A Matter Of Public Concern? No Recovery Under The Whistleblower's Protection Act

By Shannon Ozga

An individual cannot recover damages under the Michigan Whistleblower's Protection Act ("WPA") where the pursuit of the matter was not to inform the public on a matter of public concern, but instead was to advance the individual's own financial interests. This is what a majority of a panel of the Court of Appeals recently found in *Whitman v City of Burton*, \_\_\_ Mich App \_\_\_ (issued July 5, 2011).

Prior to 2003, the City of Burton had adopted Ordinance 68-C, which allowed administrative officers to accumulate unused sick and personal days to be paid, at the officer's option, in January of the year following the accumulation. In 2003, because of the City's significant budget problems, the City administrative officers agreed by way of a "gentlemen's agreement" to use their sick and personal time throughout the year in lieu of accumulating it for a payout. Shortly thereafter, the Plaintiff, who was the City's police chief, sent the Mayor a letter indicating the Plaintiff's belief that the "agreement" was an unfair elimination of benefits. After the Plaintiff failed to use his sick and personal time in 2003, despite the gentlemen's agreement, the Plaintiff demanded a payout for his time in January 2004. The Plaintiff complained to the City Attorney and also threatened to inform the City Council of the matter and to pursue the matter as a violation of Ordinance 68-C. In the end, the City paid the Plaintiff for the accumulated time in January 2004. Over three years later, after the Mayor was reelected in November 2007, he declined to reappoint the Plaintiff as the Police Chief for a number of reasons.

Following his non-appointment, the Plaintiff filed the instant lawsuit alleging that the Mayor's failure to reappoint him as Police Chief violated the WPA because the Plaintiff's threat about the ordinance violation was causally connected to the Mayor's decision not to reappoint the Plaintiff as Chief of Police. The Defendants argued that the

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In the case of *Whitman v City of Burton*, a majority of the Court of Appeals ruled that an employee of the City could not recover damages against the City under the Michigan Whistleblower's Protection Act because the pursuit of the matter was to advance the employee's own financial interests rather than to inform the public on a matter of public concern. This case presents an interesting analysis of an employee's motives for suing under the WPA and of the public interests that are at stake. Where an employee threatens to expose a perceived ordinance violation in order to receive personal financial benefit, such action is not of a public nature such that it would invoke protection under the WPA.

## CONTINUED...

Mayor was dissatisfied with many aspects of the Plaintiff's performance as Chief of Police, including his failure to appropriately discipline officers and his use of his City computer to send illicit sexual emails. Following a four-day trial, the jury returned a verdict in favor of the Plaintiff, and the trial court denied the Defendants' motion for judgment notwithstanding the verdict or for new trial.

On appeal, in a published opinion written by Judge Saad and joined by Judge O'Connell, a majority of the Court of Appeals' panel reversed the trial court's denial of the Defendants' motion for JNOV (Judge Beckering dissented). In the decision, the Court found that, as a matter of law, the Plaintiff could not recover damages under the WPA because the Plaintiff's threats to inform the City Council or prosecute the Mayor for an ordinance violation, amounted to an intent to advance the Plaintiff's own financial interests, rather than a desire to inform the public on a matter of public interest. According to the Court, the purpose of the WPA is to protect the public. In that vein, the Plaintiff's demand of payment under the ordinance for his sick and personal hours was decidedly not acting in the public interest, but instead was thoroughly personal in nature and a private interest of securing a monetary benefit in order to maintain his own personal "life style." The Court found this to be particularly true in light of the fact that the City was struggling financially, and the administrative officers were attempting to act in the interest of the public when they "agreed" to forego payouts of their unused sick and personal time. Based on those facts, the Court found that no reasonable jury could conclude that the Plaintiff threatened to prosecute the Defendants "out of an altruistic motive of protecting the public." Furthermore, the Court found that the Plaintiff was not afforded protection under the WPA because he acted in bad faith when he waited until he had accumulated all of his sick and personal time and the payments became due before he raised the legal issue of the ordinance violation.

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