STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE CIRCUIT COURT FOR THE COUNTY OF GENESEE AND THE MICHIGAN COURT OF APPEALS)

BRUCE WHITMAN, former Police Chief for the City of Burton,

Plaintiff-Appellant/Cross-Appellee,

v

CITY OF BURTON, a municipal entity and CHARLES SMILEY, individually,

Defendants-Appellees/Cross-Appellants.
_____/

Supreme Court
Case No. 143475

Court of Appeals
Case No. 294703

Genesee Circuit Court
Case No. 08-87993-CL

BRIEF OF AMICI CURIAE MICHIGAN MUNICIPAL LEAGUE, MICHIGAN TOWNSHIPS ASSOCIATION, AND THE PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN

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STATEMENT OF INTEREST

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

This brief amici curiae is authorized by the Legal Defense Fund's Board of Directors whose membership includes: the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Randall L. Brown, city attorney, Portage; Lori Grigg Bluhm, city attorney, Troy; Stephen K. Postema, city attorney, Ann Arbor; Eric D. Williams, city attorney, Big Rapids; Clyde J. Robinson, city attorney, Kalamazoo; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, City of Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; John C. Schrier, city attorney, Muskegon; Thomas R. Schultz, city attorney, Farmington and Novi; and William C. Mathewson, general counsel, Michigan Municipal League.

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan (including both general law and charter townships), joined together for the purpose of providing education, exchange of information and guidance to and among township

officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statutes of the State of Michigan. This brief amici curiae is authorized by the Board of Directors of the Michigan Townships Association.

The Public Corporation Law Section of the State Bar of Michigan (PCLS) provides information, education, and analysis about issues of concern to the State Bar, through meetings, seminars, public service programs, and the like.[1] The Section Council of the State Bar of Michigan Public Corporation Law Section consists of 21 elected members who approved the filing of an amicus brief in this case on June 22, 2012.

[1] The Public Corporation Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interests. The position expressed is that the Public Corporation Law Section only and is not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

STATEMENT OF THE ISSUES

Amici Curiae, the Michigan Municipal League, Michigan Townships Association, and Public Corporation Law Section of the State Bar of Michigan, accept the Counter-Statement of Questions Presented as set forth in the Appellee Brief filed on behalf of City of Burton and Charles Smiley.

STATEMENT OF FACTS

Amici Curiae, the Michigan Municipal League, Michigan Townships Association, and Public Corporation Law Section of the State Bar of Michigan, rely on the Statement of Facts as set forth in the Appellee Brief filed on behalf of City of Burton and Charles Smiley.

ARGUMENT

THE PROTECTIONS AFFORDED BY THE WHISTLEBLOWERS PROTECTION ACT, MCL 15.362, DO NOT EXTEND TO THOSE WHO REPORT, OR THREATEN TO REPORT, A VIOLATION OR SUSPECTED VIOLATION OF LAW, WHEN THE PRIMARY MOTIVE OF THE REPORTING EMPLOYEE IS TO ADVANCE PERSONAL INTERESTS, RATHER THAN TO ADVANCE THE PUBLIC INTEREST.

Pursuant to §4.5(g) of the City Charter of the City of Burton, the Mayor of the City has the authority and responsibility to appoint all of the administrative officers of the City (with two exceptions not here relevant), subject to the approval of the City Council. Moreover, pursuant to §6.2(b), these appointees "serve at the pleasure of the Mayor for indefinite terms" subject to the requirement that the appointments be reaffirmed, or new appointments made, by the Mayor following an election. Plaintiff, Bruce Whitman, was appointed to the position of Chief of Police by Defendant Charles Smiley following Smiley's election as Mayor in 2002, and he served in that position until November of 2007 when, following Smiley's re-election, he was not reappointed to that position. Notwithstanding the mayor's right at the beginning of a term to choose who he wished to perform the duties of the chief of police, Plaintiff commenced suit, alleging that the mayor's actions were prohibited by the provisions of Michigan's Whistleblower Protection Act (WPA), MCL 15.362. He complained that he was not reappointed because of a position he had taken almost four years earlier regarding the ability of the City of Burton to lawfully deny him payment for accumulated vacation pay, and his threat to "pursue this as a violation of the law." (Cross-Appellant's Appendix, 1041A) The questions before this Court concern, *inter alia*, the parameters of the WPA and whether

its protections extend to the Plaintiff's conduct in this case and, if so, whether the adverse employment action (the failure of the mayor to reappoint him as police chief) was causally related to that conduct.

It is the position of amici that Plaintiff did not engage in protected activity and/or that there could be no legally cognizable causal relationship between that activity and the mayor's decision to exercise his authority to appoint someone else to the position of police chief at the beginning of a new term in office. Regardless of which element of the cause of action is considered to be the relevant one, the WPA does not protect conduct, including threats to report suspected violations of law, which is intended to extort or compel employers to adopt policies favorable to the personal interests of the employee, or to avoid employment decisions adverse to the employee's personal interests. This conclusion is consistent with the analysis of this Court in *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604 (1997), which opinion should be re-affirmed.

It is well understood in this State that an employer has the right to terminate the employment of an at-will employee for any reason, or no reason, with only limited exceptions. As explained in *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695 (1982):

> In general, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason. See generally *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980). However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable. Most often these proscriptions are found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty. [footnote omitted]

Thus, for example, an at-will employee may not be terminated, *inter alia*, on the basis of religion, race, color, national origin, age, sex, height, weight or marital status, as prohibited by the Michigan Elliot-Larsen Civil Rights Act, MCL 37.2202, *et seq,* or on the basis of disability, as prohibited by the Persons With Disabilities Civil Rights Act, MCL 37.1102. Nor can an at-will employee be terminated because he opposed a violation of these acts, or filed a claim thereunder, as such retaliation is separately prohibited by MCL 37.2701 and MCL 37.1602.[2] Accordingly, even an employee who unsuccessfully complains that he was discriminated against on the basis of race, for example, may still possess an independent claim that the adverse employment action was taken against him because he had complained of discrimination (even though it is found that there had been none). See, e.g., *Garg v Macomb County Community Mental Health Services*, 472 Mich 263 (2005).

In the case at bar, Plaintiff has no underlying claim of discrimination. Rather, he rests his claim on the provisions of the WPA, which provides as follows:

> 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

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[2] MCL 37.2701, as part of the Elliott-Larsen Act, prohibits retaliation and discrimination "against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." Similarly, MCL 37.1602, as part of the Persons With Disabilities Act, prohibits retaliation and discrimination "against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." See also, MCL 408.1065 which prohibits discrimination against a person who has, *inter alia*, filed a workers compensation claim.

> 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 was enacted to encourage employees to assist in law enforcement and to protect those who participate in "whistleblowing" activity. Its underlying policy rationale is understood to be "to protect the public and to promote public health and safety by removing barriers that may interfere with employee efforts to report violations or suspected violations of the law." *Trepanier v National Amusements, Inc*, 250 Mich App 578, 584 (2002). See also *Shallal, supra*, 455 Mich, 613, 621, and *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378 (1997). While the WPA provides a more generalized protection against retaliation than that provided for by either the Elliot-Larsen Act or Persons With Disabilities Act, quoted *supra*, at note 2, it can readily be seen that this provision significantly differs from those provisions as it exempts from its protection an employee who knows that the report or threatened report of a violation or suspected violation is false.

Thus, notwithstanding some grammatical awkwardness in the statutory language, there can be dispute that the Legislature did not intend to extend the benefits of the WPA to those who have falsely reported a violation or suspected violation, or those who have falsely threatened to report a violation or suspected violation. Case precedent has properly construed and understood this language as a "bad faith" exception to the protections otherwise afforded. The question on this appeal is whether this exception extends to other instances where either the report itself, or the threat of a report, has been

used to manipulate the employer for personal advantage. It is respectfully suggested that, as in *Shallal, supra*, the answer to this inquiry is yes. To the extent that a report or threat to report a suspected violation is intended to advance the employee's interest, and not to serve the purpose of "whistleblowing", it is a "false" report and does not constitute authentic "whistleblowing." In other words, the purpose of the false report exception is to stop employees from creating a cause of action which will insulate them from adverse employment actions that the employer would otherwise have a right to institute.[3]

This position, which recognizes the import of the motivation of the employee who reports, or is about to report, a violation or suspected violation of the law, is consistent with the statutory language, as well as with both this Court's proper analysis in *Shallal, supra*, and the analysis of the Michigan Court of Appeals in *Trepanier, supra*. In *Shallal, supra*, the plaintiff did not report, and was not about to report, the violation she had known about or suspected for a long time, until it was in her financial interest to do so – when it appeared that she was about to be terminated and chose, then, to threaten to report the violation. Although this Court found the evidence sufficient to support a finding that the plaintiff was about to report the violation, it concluded that a prima facie case under the WPA had not been established because the plaintiff had "used the information she had about the defendant's illegal activities as a guise to force the defendant to allow her to keep her job." (455 Mich, 615) It found that this motivation [whether affirmatively

[3] How else could there be a false report of a suspected violation? The Court should not interpret a statute in a way that renders part of it nugatory or mere surplusage. *Grimes v Dep't of Transp*, 475 Mich 72, 89 (2006).

considered as either "bad faith," personal vindictiveness, or as an effort to extort defendant, or merely as the absence of a primary motive to inform the public on matters of public concern] was inconsistent with the purpose of the WPA. "Plaintiff cannot use the whistleblowers' act as a shield against being fired where she knew she was going to be fired before threatening to report her supervisor. To hold otherwise 'would encourage other employees to hold off blowing the whistle until it becomes most advantageous for them to do so.'" (455 Mich, 622) Thus, not only was this holding consistent with the WPA, but any other ruling would have subverted its purpose.

In *Trepanier v National Amusements, Inc, supra*, the Court of Appeals considered a claim of a violation under the WPA when the plaintiff alleged that he had been discharged because he had sought a PPO against a co-employee. Recognizing that the outer limits of the statute had been left to a case-by-case analysis, the *Trepanier* Court rejected the defendant's contention that the protections of the WPA were restricted to activities that had a close connection to the work environment or to the employer's business practices. The court also rejected defendant's contention that the case did not involve protected activity because it had been taken for personal reasons and not out of concern for the public, distinguishing the circumstances presented from those in *Shallal, supra*:

> Although plaintiff's decision in this case to obtain a PPO may have been motivated by personal reasons, plaintiff did not use his protected activity to extort his employer, as did the plaintiff in *Shallal*. Further, although plaintiff's primary purpose may have been to protect himself and his girlfriend from harassment, reasonable jurors could conclude that plaintiff was acting in the public's interest, in addition to his own. Assuming the truth of plaintiff's assertions, Heathcoat's threatening phone calls could constitute aggravated stalking, a felony and a serious

> public safety issue. * * * Moreover, in this case there is evidence of a causal connection between plaintiff's protected activity and his termination, namely, Montgomery's admission that plaintiff was discharged because of circumstances surrounding Heathcoat's harassment.
>
> (250 Mich App, 587-588)

Thus, both the *Shallal* and *Trepanier* opinions recognize that the purpose of the WPA is not advanced when its protections are used as leverage to extort the actor's employer. Indeed, it may be said that the purpose of the WPA may be affirmatively defeated in those circumstances. Where the employee did not intend to be a whistleblower, which term implies a primary purpose to inform the public on matters of public concern, his report is, or would have been, "false" and not entitled to the protections of the act. The employee would not have engaged in protected activity because he did not possess the requisite intent to blow the whistle.

It is also noteworthy that this important issue is presented on this appeal in the context of an employment decision made by a governmental entity, where special considerations for protecting the public interest are at play. Indeed, this issue arises in the specific context of a mayoral decision not to reappoint one of his administrative officers who, according to the City Charter, must be appointed by the mayor, serve at the pleasure of the mayor, and be affirmatively reappointed at the beginning of a new term of office. These provisions recognize the importance of the relationship which must exist between the mayor and the city's administrative officers in order to promote the public good. Plaintiff herein was appointed as Chief of Police in 2002, he was unhappy with a policy decision made in 2003 which he ignored without complaining of its allegedly illegal

nature until its implementation would have adversely affected his financial remuneration in 2004, and he thereafter continued to serve at the mayor's pleasure until 2007, when the mayor was re-elected and exercised his authority to appoint someone else to the position of Chief of Police.

This is assuredly not the paradigm of what the WPA was intended to protect, yet plaintiff contends that he falls within its protection. This case, then, provides an opportunity to address the particular concerns of governmental entities when considering the interpretation of the WPA, advanced by Plaintiff, which would allow the imposition of liability in circumstances where it is impossible to discern the public interest from a private interest, or principled opposition to an illegal policy from an internal management dispute about the proper interpretation and application of rules, regulations and ordinances. Unless there was an intent to act as a whistleblower, and not just as a disgruntled or manipulative employee, no protected activity is present.

If Plaintiff's interpretation of the WPA is accepted, then the statute would apply to insulate an employee from any adverse employment decision after he suggested that his policy choice should be accepted, and that (in his opinion) any other choice was violative of the law and that he would report this suspected and anticipated violation if his position did not prevail. Likewise, it would apply to insulate an employee from any adverse employment action when he disagreed with his governmental employer's position about the proper interpretation of the law and threatened to go public with what the entity intended to do so as to obtain public pressure to do otherwise. Any adverse employment action taken even years after this threat would, according to Plaintiff's theory, give rise to

a potential claim under the WPA. In other words, once such a threat was made, the potential for a whistleblowers claim could forever hang over the employer when making employment decisions, including a mayor when deciding on his appointments for a new term of office.

While the WPA offers protection to both private and public employees, as noted *supra*, the expansive interpretation suggested by Plaintiff presents particular concerns in the context of public employment. In *Garcetti v Ceballos*, 547 U.S. 410 (2006), the Plaintiff complained that adverse employment action had been taken against him by his governmental employer because of positions he had taken regarding the decision to proceed with a particular prosecution based on what he perceived to be a search premised on an improperly obtained warrant. He alleged that he had been retaliated against because of his exercise of his First Amendment Rights, thereby giving rise to an inquiry concerning the constitutional protections accorded to public employee speech. The specific question before the Court was whether, when public employees make statements pursuant to their official duties, the First Amendment protects them from potential discipline which would otherwise result from those statements.

Although, the *Garcetti* Court considered the parameters of the First Amendment rather than the parameters of Michigan's WPA, its consideration of the balance between the need for governmental employers to efficiently provide public services through its employees, and the interest of the employee in speaking out about matters of public concern, is pertinent to the considerations now before this Court. When considering its prior case law, for example, the Court noted: "Underlying our cases has been the premise

that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" (547 U.S., 420) Similarly, while the WPA has provided certain protections to public employees who have complaints about their public employers' policies, it does not empower them to use those protections as a sword to get their own way (in this case, additional compensation) without regard to the public interest.

Noting that legislative enactments, such as whistle-blower protection laws, are available to protect employees who seek to expose wrong doing, the Supreme Court held that the First Amendment did not apply to protect employees from discipline for statements made pursuant to their professional duties. "Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job." (547 U.S., 426) Likewise, when a public employee, such as the Chief of Police, is not seeking to expose wrong doing in government but is, rather, using his position to obtain financial advantage for himself by subverting a policy which is not inherently wrongful[4] and is deemed necessary to protect the public interest in obtaining the efficient administration of public services, his conduct is not protected by the WPA.

[4] There is no question that even if the policy of denying payment for accumulated vacation pay was in technical violation of a city ordinance, that ordinance was amendable and, in the case at bar, could have been timely amended if the Plaintiff's concerns about illegality had been brought to the attention of the others when it was first suggested. This approach, which would have served the public interest, was not, however, in the financial interest of the Plaintiff.

By exempting false reports from the protections of the WPA, the Legislature expressed its intent to obtain a proper balance between the protection of employees who seek to expose wrong doing and the needs of an employer to run its company, or provide government services, without concern that an employee can effectively manipulate its policy decisions through a threat to report suspected violations of law when that report is intended to achieve the personal ends of the employee. This is an especially important balance when governmental employees are considered and the expansive interpretation advocated by Plaintiff in the case at bar would subvert the important purposes which were intended to be advanced by the WPA. Moreover, it is contrary to the statutory language which provides that the protections afforded by the WPA are not available when "the employee knows that the report is false." As discussed above, in context, a "false report" of a violation or suspected violation exists when the primary motive of the reporting employee was not to advance the public interest, but only the employee's private interest. As noted in *Sucholdolski*, *supra* the legislative provisions which prohibit retaliatory employment decisions, such as the WPA, are rooted in public policy, intended to avoid employer actions that violate public policy. They were not, however, intended to prohibit employment decisions that are consistent with public policy or to provide protection for activity which is, itself, contrary to public policy.

RELIEF REQUESTED

WHEREFORE, Amici Curiae, the Michigan Municipal League, Michigan Townships Association, and Public Corporation Law Section of the State Bar of Michigan, respectfully request that this Court affirm the holding of the Michigan Court of Appeals.

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Dated: July 23, 2012.
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PROOF OF SERVICE

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Date of Service: July 23, 2012

Signature: /s/ Enis J. Blizman
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