99677-6

Case No. 3726267-III

COURT OF APPEALS OF THE
STATE OF WASHINGTON DIVISION III

BURTON DEZIHAN,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Burton Dezihan, appellant and cross-appellee, asks this Court to accept review of the Court of Appeals' decision designated in Part II of this petition. This case raises important issues regarding when a plaintiff in a retaliatory failure to hire employment case is aware enough of the facts giving rise to his or her claim to trigger the discovery rule. This case also raises the important issue of whether a person who volunteers for an agency of the State of Washington is entitled to whistleblower protection under the auspices of RCW 42.40.

As our State's Supreme Court recognizes, "Washington's whistle-blower provisions are intended to encourage those with knowledge of institutional wrongs to come forward in order to safeguard the public. *See, e.g.,* RCW 42.40.010, .020(2)" and that "[s]uch protection is based on, among other things, the commonsense notion that employers should abide by the law and the intrinsic importance of fairness and justice in protecting individuals trying to "do the right thing." *Karstetter v. King Cty. Corr. Guild*, 193 Wn.2d 672, 685 (2019). Yet the Court of Appeals decision is not only contrary to Supreme Court statute of limitations jurisprudence and RCW 42.40's terms but also jeopardizes the concepts of "fairness and justice" inuring to those citizens brave enough to call out governmental wrongdoing.

II. COURT OF APPEALS DECISION

Mr. Dezihan seeks review of Division Three's decision in *Dezihan v. State of Washington,* No. 37-2626 (March 23, 2021).

III. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals erroneously hold that an anonymous person's telephonic statement to Mr. Dezihan that Mr. Dezihan was not hired by the Department of Human and Health Services (DSHS) because he was a whistleblower trigger the discovery rule for the purposes of statute of limitation tolling?

B. Did the Court of Appeals erroneously hold that Mr. Dezihan's multiple years of service as a member of the Washington State Department of Fish and Wildlife (WDFW) Executive Advisory Committee on the WDFW's Commission for Persons with Disabilities - - - a position for which he received pay for days he worked and travel reimbursements - - - was not a whistleblower eligible for RCW 42.40's protections because Mr. Dezihan was not a full-time employee of the State of Washington?

C. Did the Court of Appeals erroneously hold that estoppel did not apply to this case because the State Auditor's Office's representation to Mr. Dezihan that he was protected under RCW 42.40 was a legal issue even though the issue of a person's employee status is an issue of fact?

IV. STATEMENT OF THE CASE

Procedural History

On January 11, 2018, Mr. Dezihan sued the State of Washington for violation of RCW 42.40 (whistleblower retaliation), blacklisting, invasion of privacy, and negligence. CP 3 - 9. The State of Washington answered on June 22, 2018, and pled, as an affirmative defense, that "Plaintiff was not an employee of the State of Washington and therefore privy to the rights and protections as such." CP 15. Thereafter (a) the State moved to dismiss Mr. Dezihan's complaint because Mr. Dezihan was, in the State's revised opinion, not a State-employee; (b) Mr. Dezihan responded to the motion arguing that the State was estopped from asserting that Mr. Dezihan was not a State-employee; and, (c) on October 19, 2018, the trial court denied the State's CR 12(b)(6) motion to dismiss Mr. Dezihan's lawsuit and, in doing so, ruled:

> Here, if the Court grant equitable estoppel against the government, there wouldn't be any specific governmental functions impaired estoppel because we're dealing with one instance here, not an ongoing problem. It's not something where people are out drilling wells or engaging in conduct that may be harmful to the environment or others. It's something that happened years ago and it's one individual asserting his rights under the statute. Additionally, it appears that there would be a manifest injustice if the State is able, for years, to assert that Mr. Dezihan possesses the protections under the whistleblower statutes and then later, when a problem arises, all of a sudden allege he was never covered. For purposes of the motion here, the Court finds there is an issue of fact as to whether Mr. Dezihan was an employee. It's not an issue of law simply because it's not clearly defined in the statute. Mr. Dezihan had been informed by way of letters from the auditor that he is an employee. In addition,

> if the Court were to enforce the strict reading of RCW 42.40.020, it would result in manifest injustice. The State has previously made an admission that Mr. Dezihan was an employee, Mr. Dezihan appeared to have relied on that admission, and now shifting course would cause a manifest injustice. For these reasons, the Court concludes that whether or not Mr. Dezihan was an employee is a factual question for a jury to decide, not a legal question for the court to decide, meaning that the State's motion will be denied. RP 39-40.

The parties thereafter filed cross motions for summary judgment, which were heard on November 15, 2019. CP 139-154, 335-345; RP 46. On December 4, 2019, the Court granted the State's motion in full, denied Mr. Dezihan's motion in full. CP 350. On December 19, 2019, Mr. Dezihan filed his Notice of Appeal and amended that Notice of Appeal on December 30, 2019. CP 351, 360. On March 23, 2021, Division III issued its opinion terminating review of Mr. Dezihan's case.

Factual Background

On May 6, 2008, Mr. Dezihan filed a whistleblower complaint with the SAO. CP 43. The whistleblower complaint focused on improper use of government time by a State employee, Jack Nannery. CP 42, 88. Accompanying Mr. Dezihan to the SAO's office on May 6, 2008 was Don Gillespie, another State employee. CP 43, 88-89. At the SAO office, whistleblower investigators/employees Sandra "Sandy" Miller and LaRene Barlin questioned Mr. Dezihan about his work for the State. CP 43. Mr. Dezihan explained that since 2006 he had worked as a member of the Executive Advisory Committee to the WDFW Commission for Persons with Disabilities. CP 43-46. The Advisory Committee for Persons With Disabilities "represents the

interests of hunters and fishers with disabilities", is a four year commitment, and mandates attendance at meetings. CP 413. "Advisory Committee members are dedicated volunteers who donate thousands of hours to improve access to fishing, hunting, and wildlife opportunities; not only for persons with disabilities, but for all Washington citizens." CP 402. Mr. Dezihan further explained that as a member of the WDFW committee the State (a) reimbursed his expenses including mileage, travel costs, and lodging; and, (b) that he also received "Work Days" pay which served as a wage for work performed in completing his official duties. CP 43-46, 55-69. Those duties included meeting with the Governor, meeting with legislators, attending legislative meetings and other official business. CP 43, 44, 57. Utilizing State forms, Mr. Dezihan reported his hours, mileage, expenses, dates and meeting locations, and per RCW 77.04.150, Mr. Dezihan was also immune from civil liability. CP 43-46, 55 – 60, 64 – 67. Mr. Dezihan ended his conversation with Ms. Miller and Ms. Barlin by providing them the names of the individuals he worked with as well as his supervisor. CP 46. That same day and in that same meeting, Ms. Miller informed Mr. Dezihan that he met the requirements of a State employee who could file a confidential whistleblower complaint under the state's whistleblower law. CP 46. Ms. Miller told Mr. Dezihan: "Under our rules, you are a state employee." *Id.* Defendant admits that Ms. Miller and Ms. Barlin had the authority to determine whether a person making

a whistleblower complaint was an employee as defined under the whistleblower statute. CP 225.

Accordingly, Mr. Dezihan assembled the materials necessary to submit his whistleblower complaint; however, before submitting the whistleblower complaint, Mr. Dezihan re-confirmed that his identity, name, address, and any other personal information would be confidential. CP 47-48. Ms. Miller assured Mr. Dezihan that his name, identity, and all other personal information would be absolutely confidential and that only the SAO (the office conducting the whistleblower investigation) would know who filed the Whistleblower Complaint. CP 47. It was only after Mr. Dezihan confirmed and was provided this assurance of confidentiality, that he submitted the whistleblower complaint form and materials. CP 47.

The whistleblower complaint form itself included language stating his name would be kept confidential: "If you choose to provide your name, we will keep it confidential." CP 71. Mr. Dezihan relied on the SAO's verbal and written assurance on May 6, 2008 that his personal information as an RCW 42.40 whistleblower would remain confidential. CP 47. If Mr. Dezihan had not received the assurance of confidentiality on May 6, 2008, or the assurance that he was a protected RCW 42.40 whistleblower, then he would not have filed the whistleblower complaint form on May 6, 2008. CP 47.

In the late-summer/early fall of 2012 Mr. Dezihan applied for a position with the Washington State Department of Social and Health Services (DSHS). CP 444. During that process an unidentified DSHS employee told Mr. Dezihan that he did not get the job because he was a whistleblower and that if ever asked this unidentified DSHS employee would deny having told Mr. Dezihan that he was not hired on account of his whistleblowing activity. CP 442, 518-519. In explaining why he took no further action at that time Mr. Dezihan testified "Legally, how do I prove or disprove a phone call? Was it recorded? Nobody sent me anything in writing, and nobody identified themselves by names." CP 443. Mr. Dezihan did not know the direct phone number to the unidentified person who told him about the non-hire reason. CP 444.

Mr. Dezihan attended the *Chaussee v. State of Washington* trial. CP 184. During the trial the State's attorney, Joseph Diaz admitted that Mr. Dezihan's fully unredacted whistleblower complaint had been released. CP 184. Mr. Dezihan subsequently sued the State for (a) violating RCW 42.40, (b) blacklisting, (c) invasion of privacy and (d) negligence. CP 3-9.

V. ARGUMENT

A. The Washington State Supreme Court should accept review because Division III's decision time barring Petitioner's claims on statute of limitations grounds conflicts with Washington State Supreme Court precedence.

The Court of Appeals held that Mr. Dezihan's negligence, invasion of privacy, and blacklisting claims were barred under the three year statute of limitations, cited

EPIC v. CliftonLawsonAllen LLP, 199 Wn. App. 257, 276 (2017) and *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 450 (2000), in support, and found that since an unnamed hiring manager from the DSHS told him, in 2012, that he did not get a job because he was a whistleblower then his entire lawsuit was barred under the three year statute of limitations. (Opinion, p. 13, 14)

The Washington State Supreme Court should accept review of this decision for the following reasons.

First, Division III's holding that a single unnamed DSHS manager's statement that Mr. Dezihan did not get the job because he was a whistleblower triggers the statute of limitations for the purpose of the discovery rule conflicts with Washington State Supreme Court precedent. (Opinion P. 14) In denying the State's summary judgment motion on the statute of limitations issue, the trial court cited *Winbun v. Moore*, 143 Wn.2d 206, 213 (2001) which holds "[t]he determination of when a plaintiff discovered or through the exercise of due diligence should have discovered the basis for a cause of action is a factual question for the jury." (CP 355)

Second, Division III erred by relying on the factually distinguishable *EPIC* decision. *EPIC* is factually distinguishable because it involved a business suing its accountant for failing to advise its client that the business could not spend one year's grant money in another year. *EPIC,* 199 Wn. App. at 274. In *EPIC* not only did a paper trail exist probative of the accounting firm's failure but also in existence was a letter

from the federal government telling the business that it was misusing federal funds. *Id.* Crucially, in holding that the plaintiff knew of the facts giving rise to its claims the *EPIC* court noted that the plaintiff "does not identify any material fact which it knew when it filed the lawsuit in December 2015 that it did not know by February 2012." *EPIC,* 199 Wn. App. at 276. But here Mr. Dezihan identified two material facts it did not know in 2012 but knew when he filed his lawsuit: the party opponent admissions of attorney Diaz (witnessed in open court by both Mr. Dezihan and Mr. Gillespie) *and* the trial judge in the *Chaussee* case listing Mr. Dezihan's name as a witness in the case even though his name should have remained confidential. (CP 182, 184, 279)

EPIC is legally distinguishable because it is a commercial litigation case. Paper trails upon which a plaintiff can prove his or her case usually abound in such matters whereas such paper trails rarely, if ever, exist in employment retaliation/discrimination cases like this. Courts note, "[p]articularly because employers now know better, direct evidence of employment discrimination is rare." *See Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 662–63 (9th Cir. 2002)(*citing Davis v. Chevron, U.S.A., Inc.,* 14 F.3d 1082, 1085 (5th Cir. 1994)). "[P]laintiffs often face a paradox. 'Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree.'" *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985), *abrogated on other grounds, St. Mary's Honor Center v. Hicks,* 509

U.S. 502 (1993). This is because employers of "even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it." *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987). So to chip away at that paradox, "[c]ourts today must be increasingly vigilant" because "[t]he sophisticated would-be violator has made our job a little more difficult." *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3rd Cir. 1996). Accordingly, the inquiry of whether Mr. Dezihan acted reasonably following the 2012 conversation for the purposes of tolling the discovery rule should be viewed in the context of employment cases where no documented admissions of wrongdoing happen.

Third, reasonable minds could differ as to when Mr. Dezihan discovered, or should have discovered, that his identity was released and that release caused harm. Indeed, the trial court concluded as much. CP 355-356. Again, on summary judgment reasonable inferences are made in favor of the non-moving party and reasonable minds could reach different conclusions on what Mr. Dezihan did or should have done. Or, put differently, whether his conduct was reasonable. For example some jurors could determine that Mr. Dezihan should have made a public record request to DSHS to learn more whereas others could argue otherwise given the fact that the DSHS person refused to provide his identity and stated that he would deny telling Mr. Dezihan what he told him on the phone if asked. CP 518. Some jurors could conclude that what Mr. Dezihan learned in 2012 was enough whereas other could conclude that it wasn't until

2015 when Mr. Dezihan, with a witness, heard the State's attorney admit that the whistleblower complaint was disclosed and hear the trial judge, in a case that would not have existed but for the whistleblower complaint Mr. Dezihan signed, name Mr. Dezihan as a witness. CP 182, 184, 279. For in order to "invoke the discovery rule, the plaintiff must show that he or she could not have discovered the relevant facts earlier," and a jury could reasonably conclude that Mr. Dezihan could not have discovered the whistleblower complaint's disclosure until one of the State's attorneys allegedly admitted to it in 2015. *See Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 449 (2000).

For those reasons, Mr. Dezihan respectfully requests that the State Supreme Court exercise discretion and accept review of this case.

B. The Washington State Supreme Court should accept review because whether a citizen, who volunteers to serve with a State agency, receives protections under RCW 42.40 is an issue of substantial public interest.

The Court of Appeals reasoned that Mr. Dezihan was not an "employee" under RCW 42.40 because of RCW 42.40.020(2)'s language, cited *Doty v. Town of S. Prairie,* 155 Wn.2d 527, 522 (2005), and found that since Mr. Dezihan was not paid for work performed he was not an "employee." (Opinion p. 6) The State Supreme Court should accept review of this issue for the following reasons.

First, Division III incorrectly assumed that Mr. Dezihan was trying to "expand the definition of employee." (Opinion p. 9) He is not. Employee means "individual

employed or holding office in any department of agency of state government" and Mr. Dezihan met the definition of being "employed." The actual word, "employed," is not defined in RCW 42.40.020. Accordingly, courts look to the dictionary definitions. *Burton v. Lehman*, 153 Wn.2d 416, 423 (2005)("If the undefined statutory term is not technical, the court may refer to the dictionary to establish the meaning of the word."). Black's Law Dictionary definition of "employ," of which "employed" is its past tense, contains nary a reference to being paid nor any reference to the frequency in which an individual must show up for work. Black's Law Dictionary, p. 428 (7th Ed. 2000)("Employ, *vb.* **1.** To make use of. **2.** To hire. **3.** To use as an agent or substitute in transacting business. **4.** To commission and entrust with the performance of certain acts or functions or with the management of one's affairs.") Nor does the Black's Law Dictionary definition of "employee." *Id.* at 428. The record makes clear that the WDFW made use of Mr. Dezihan and his Advisory Committee members - - - members who the State concedes "donate thousands of hours to improve access to fishing, hunting, and wildlife viewing opportunities…for all Washington citizens." CP 402. In that capacity Mr. Dezihan and his fellow Committee members, for example, proposed amendments to state laws and regulations. CP 408. In doing that work WDFW "entrusted" Mr. Dezihan with assisting WDFW in ensuring disabled citizens had equal access to the outdoors. CP 406-410. In doing that work Mr. Dezihan relieved other WDFW employees from doing the things Mr. Dezihan did like recommending

regulatory changes, analyzing data, and assessing disability related access issues. CP 408-409 The WDFW paid Mr. Dezihan's expenses associated with that work. CP 411. Presumably Mr. Dezihan had to account for those commuting expenses when it came time to file his tax return. 26 C.F.R. §1.132-6. Further, the WDFW "hired" Advisory Committee members into that position as shown by the job application it introduced into the record at the trial court level. CP 412 – 413, 416-417. And the WDFW issued Mr. Dezihan a "Supervisors Guide to the Employee Assistance Program" given his election to the Chair of the Advisory Committee. CP 45. Clearly, the record reflects that Mr. Dezihan was an "employee" of WDFW given the common definition of that word.

Second, Division III's conclusion that RCW 42.40.020 protects only those who show up to work each day and collect a regular paycheck from a State agency is inconsistent with RCW 42.40.050's "remedies" provision. For RCW 42.40.050(1)(a) bars both "workplace reprisal *or* retaliatory action" and defines such "reprisal or retaliatory action" as "dismissal" - - - an act that would cover a current employee - - - and "denial of employment" - - - meaning a failure to hire action that would encompass a volunteer, like Dezihan, who might later look for work with a State agency. Put differently: had our State's legislature only intended that RCW 42.40 protect traditional paid workers then why broaden the statute's protections beyond "workplace reprisal" to "or retaliatory action"?

Third, clarifying that RCW 42.40's definition of "employee" applies to volunteers, like Mr. Dezihan, is an issue of substantial public interest. We as a state should encourage citizens to volunteer their time to serve our State, especially in the capacity as Mr. Dezihan did as an advocate for the disable who seek to enjoy the outdoors.

C. The Washington State Supreme Court should accept review because Division III's decision not applying estoppel to this case is contrary to this Court's precedence holding that mixed fact and law issues require jury resolution.

The Court of Appeals found that Mr. Dezihan's estoppel argument failed because the issue of whether Mr. Dezihan was (or was not) an employee was a question of law. (Opinion, p. 9-10) However, when factual disputes exist "[t]he question of employment or agency should have been left to the jury." *Graves v. P. J. Taggares Co.*, 94 Wn.2d 298, 303 (1980). Here the State and Mr. Dezihan disputed whether he was an employee which, in turn, gave rise to a mixed issue of fact and law: was Dezihan an employee (the fact issue) and was Mr. Dezihan a RCW 42.40 protected whistleblower (the legal issue). When mixed issues of fact and law exist estoppel applies with the court addressing the question of law after the trier of fact resolves the factual dispute. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441 (2008).

The cases relied upon by the Court of Appeals do not call for an opposite conclusion. The Court of Appeals cited *Newton v. State*, 192 Wn. App. 931, 936 (2016), for the unremarkable proposition that "[s]tatutory interpretation is a matter of law that we review de novo" but there is no evidence that the SAO conducted any statutory interpretation the day Mr. Dezihan and Mr. Gillespie visited the SAO office to file the whistleblower complaint. *Theodoratus* involved whether the government could issue a water right certificate on grounds other than beneficial use (an issue of law) whereas the issue in Mr. Dezihan's case was whether he was an employee which, in turn, "should have been left to the jury." *Graves*, 94 Wn.2d at 303. Lastly, *Doty* which addressed whether a person was a volunteer under the Industrial Insurance Act, did not involve the issue of estoppel. Further, the IAA is narrowly construed whereas the statue upon which RCW 42.40's anti-retaliation provision rests, RCW 49.60.210(2), is broadly construed. *Warnek v. ABB Combustion Eng'g Servs., Inc.*, 137 Wn.2d 450, 460 (1999).

Lastly, the Court of Appeals' narrow application of the estoppel doctrine causes practical problems suitable for Supreme Court review. ***First***, the current application of the doctrine in this case creates inconsistent results: the SAO found Mr. Dezihan's whistleblower complaint viable and used that complaint to ultimately hold Mr. Nannery to account for his fraud. CP 78. Yet in its administrative prosecution of Mr. Nannery the SAO did not inform Mr. Nannery that the whistleblower complaint

was signed by a "non-employee" which, in turn, deprived Mr. Nannery of the ability to contest the technical basis upon which the SAO (successfully) sought to hold him accountable, here the argument that "the State can't administratively prosecute me based on an invalid whistleblower complaint and the complaint is invalid because it wasn't made by a 'state employee.'" Yet, when Mr Dezihan sought to hold the SAO responsible for its admitted disclosure of the whistleblower complaint the Court of Appeals allowed the SAO to engage in the flip-flopping conduct estoppel jurisprudence is designed to stop: the employee status of the whistleblower is not an issue when the State wants to prosecute someone (Nannery) but is an issue when the State is then held to account. ***Second,*** the State Auditors Office (SAO) ostensibly uses whistleblower complaints (like the one signed by Mr. Dezihan) to investigate fraud and refer certain findings for criminal prosecution. RCW 43.09.050(4). In referring the whistleblower complaint for criminal prosecution the State should, at the time the whistleblower complaint is filed, be held to the determination it makes at the time as to the whistleblower's employee status so as to avoid the above-scenario.

VI. CONCLUSION

Mr. Dezihan respectfully requests that his petition be granted.

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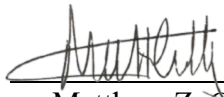
RESPECTFULLY SUBMITTED this 16th day of April 2021.

CROTTY & SON LAW FIRM, PLLC

By: 

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

BURTON A. DEZIHAN, Appellant, v. STATE OF WASHINGTON, Respondent.	)	No. 37262-6-III UNPUBLISHED OPINION

STAAB, J. — Burton Dezihan sued the State of Washington alleging four causes of action: whistleblower damages, negligence, invasion of privacy, and blacklisting. Mr. Dezihan claims that he has been unable to obtain government employment since the State wrongfully released his identity on a whistleblower complaint.

The trial court dismissed Mr. Dezihan's whistleblower complaint on summary judgment, finding that Mr. Dezihan does not qualify for whistleblower protection because he was not a state employee at the time he filed his complaint. Although the court denied the State's statute of limitations motion, the court nevertheless dismissed Mr. Dezihan's remaining three causes of action, concluding that they were based on his whistleblower status. Mr. Dezihan appealed. The State cross-appealed on the statute of limitations issue.

We affirm dismissal, although on alternative grounds. We agree that Mr. Dezihan does not qualify for protection under the "State Employees Whistleblower Act", chapter 42.40 RCW. In addition, we hold that the three-year statute of limitations bars his other claims.

FACTS

1. Factual history

Washington has adopted a public policy of protecting state employees who disclose improper governmental actions. RCW 42.40.010. In 2008, Burton Dezihan and Don Gillespie filed a whistleblower complaint with the state auditor's office (Auditor). The complaint alleged that an employee of the Washington State Department of Transportation—Ferries (Washington Ferries) was using state resources and time to conduct personal activities.

At the time they filed their complaint, Mr. Gillespie was an employee of the Washington Ferries. Mr. Dezihan, the plaintiff in this case, was not a state employee. He was, however, a volunteer for the "Fish and Wildlife Commission Americans with Disabilities Act Advisory Committee."

Mr. Gillespie apparently filled out the complaint form, and both he and Mr. Dezihan signed it. The complaint form indicates on its face that being an employee of the state of Washington is a requirement for whistleblower status. Mr. Dezihan claims that while he was at the Auditor's office to file the complaint, he spoke with an

investigator, Sandra Miller, and explained his status as a volunteer for the Fish and Wildlife Advisory Committee. Ms. Miller allegedly assured Mr. Dezihan that his volunteer work qualified him for whistleblower protection.

Over the next several months, Mr. Dezihan received several letters from the Auditor's Office advising him of the progress of the complaint. Each letter assured Mr. Dezihan that his identity was protected. Ultimately, the Auditor and the State Ferries substantiated the whistleblower complaint.

Meanwhile, from 2008 to 2013, Mr. Dezihan applied for numerous and varied state, local, and federal government jobs. He was not hired for any of these jobs. There is no evidence in the record as to why Mr. Dezihan was not hired. The State suggests that Mr. Dezihan would not allow potential employers to contact his prior employer.

Mr. Dezihan claims that he was not hired because he was retaliated against and blacklisted for his whistleblower complaint. In support of this claim, Mr. Dezihan testified that in 2012, an unidentified hiring manager from the Department of Social and Health Services (DSHS) told Mr. Dezihan that he did not get the job he applied for because he (Mr. Dezihan) was a whistleblower.[1]

[1] The superior court did not consider this hearsay statement as evidence that Mr. Dezihan was actually being blacklisted. It did consider the statement to establish notice to Mr. Dezihan for purposes of the statute of limitations issue.

Mr. Dezihan's whistleblower complaint apparently caused significant problems for Washington Ferries. In 2015, Mr. Dezihan and Mr. Gillispie attended the trial of a third Washington Ferries employee, who sued the state, claiming that he was being retaliated against as the perceived whistleblower. Mr. Dezihan claims that during a break in the trial, he and Mr. Gillespie overheard a conversation in which an assistant attorney general admitted receiving a completely unredacted copy of the whistleblower complaint. The assistant attorney general also allegedly commented that an unredacted copy of the complaint had been released on a statewide "interlink" system and was available to all state agencies.[2]

2. Procedural History

In January 2018, Mr. Dezihan filed this lawsuit against the State of Washington, raising four causes of action: 1) violation of the whistleblower statute, 2) violation of the anti-blacklisting statute, 3) invasion of privacy, and 4) negligence. The State filed a motion to dismiss under CR 12(b)(6) for failure to state a claim upon which relief can be

[2] Similar to the 2012 statement, the Superior Court would not consider this hearsay statement as proof of the matter asserted, but would consider it for purposes of notice to Mr. Dezihan on the statute of limitations issue. Later, during a deposition in Mr. Dezihan's case, this particular assistant attorney general denied ever making this comment or ever receiving an unredacted copy of Mr. Dezihan's whistleblower complaint. There is no evidence of a statewide interlink system, and no evidence that a fully unredacted version of the complaint was made available to state agencies.

granted. The trial court denied the motion because there were factual issues that needed to be developed as to whether Mr. Dezihan qualified as an employee for purposes of the Whistleblower Act.

Following discovery, the State filed for dismissal on summary judgment. The court granted the State's motion, dismissing Mr. Dezihan's whistleblower claim because he was not a state employee. The court dismissed Mr. Dezihan's other three claims, finding that they were based on his whistleblower status.

ANALYSIS

1. Standard of Review.

We apply a de novo standard when reviewing the trial court's decision on summary judgment. *Wash. Imaging Servs., LLC v. Dep't of Revenue*, 171 Wn.2d 548, 554-55, 252 P.3d 555 (2011). Summary judgment is appropriate only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Malnar v. Carlson*, 128 Wn.2d 521, 534-35, 910 P.2d 455 (1996). The facts are examined in the light most favorable to the nonmoving party. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). If a reasonable person could come to only one conclusion, the court grants the motion. *Id.*

As the moving party, the State has the initial burden to show that there are no genuine issues of material fact. CR 56(c). Once that initial burden is satisfied, the burden shifts to Mr. Dezihan, the nonmoving party, to thwart summary judgment by

presenting evidence that demonstrates a dispute of material fact. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Mr. Dezihan's burden requires him to produce more than mere allegations or denials; it requires specific admissible facts showing a genuine dispute. CR 56(e).

Like the trial court below, we only consider admissible evidence in deciding whether summary judgment is proper. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006). A party cannot rely on hearsay to defeat a motion for summary judgment. *Id*.

2. Does Mr. Dezihan qualify for protection under the State Whistleblower Act?

In 2008, when he filed his whistleblower complaint with the State Auditor's Office, Mr. Dezihan admits that he was not an employee as that term is commonly used. He asserts nonetheless that his work on the Fish and Wildlife Commission Americans with Disabilities Act Advisory Committee qualifies him as a state employee for purposes of the State Whistleblower Act because he was receiving $100 per day that he worked for the committee. Alternatively, he argues that we should interpret the term "employee" liberally to include those who volunteer for state committees. Finally, he argues that the State should be estopped from claiming that Mr. Dezihan does not qualify as a whistleblower because it repeatedly assured him that he qualified.

We apply rules of statutory construction to determine if Mr. Dezihan qualifies as an employee under the State Whistleblower Act. "[A]s with all issues of statutory interpretation, our primary goal is to carry out legislative intent, and give meaningful effect to the language our legislature enacted." *Doty v. Town of S. Prairie*, 155 Wn. 2d 527, 533, 120 P.3d 941 (2005). "When the statutory language is unambiguous, we derive this intent from the language used in the statute and related statutes, giving effect to every provision." *Id.*

The State Employee Whistleblower Protection Act, chapter 42.40 RCW sets forth the policies and protections afforded state employees. As noted above, Washington State's policy is to protect state employees who disclose improper governmental action. RCW 42.40.010. To qualify as a "whistleblower," a person must be an employee of the state. RCW 42.40.020(10). The Act defines an "employee" as "any individual employed or holding office in any department or agency of state government." RCW 42.40.020(2). This language is clear and unambiguous.

Mr. Dezihan's work on the Advisory Committee does not qualify him as a state employee. By statute, Advisory Committee members serve without compensation, though they may be reimbursed for expenses. RCW 77.04.150(5). Because he was not compensated for his time, Mr. Dezihan was a volunteer for the Advisory Committee. As the Supreme Court has noted, it is a "common sense notion that volunteers and

employees are mutually exclusive categories with juxtaposed definitions." *Doty*, 155 Wn.2d 540-41.

Despite the clear language set forth in the statute, Mr. Dezihan argues that we should apply the definitions of employee and employer used in the Washington Administrative Code for purposes of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. This Act applies to employers who employ eight or more employees. RCW 49.60.040(11). In determining which employers are subject to the WLAD, the code specifically includes unpaid persons who are generally treated in the same manner that an employee would be treated, i.e., selection, discipline, work assignments. WAC 162-16-220. Mr. Dezihan's reliance on this definition is misplaced.

Since the Whistleblower Act already contains an unambiguous definition of employee, there is no need to go beyond the Act for further clarification. *See State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005) ("If the language is unambiguous, a reviewing court is to rely solely on the statutory language."). Even if we were to consider the WACs' definition, this code does not define an employee; it defines an employer.

Contrary to Mr. Dezihan's argument, the legislature's use of different definitions in different statutes suggests that they intended a different meaning. *Woodbury v. City of Seattle*, 172 Wn. App. 747, 753, 292 P.3d 134 (2013). In *Woodbury*, the plaintiff was a deputy chief for a city fire department and filed a whistleblower complaint in superior

court under the Act protecting local government employees, chapter 42.41 RCW. As provided by statute, the city had promulgated procedures for processing a whistleblower complaint through administrative hearings. In holding that the Local Government Whistleblower Protection Act did not provide a cause of action in superior court, the court compared the Local Act to the State Act, which does provide for a cause of action in superior court. The Woodbury court recognized, "[i]t is well settled that where the legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed." *Id*. at 753.

We also reject Mr. Dezihan's invitation to expand the definition of "employee" beyond its plain and ordinary meaning. Mr. Dezihan argues that the law should be broadly interpreted to include volunteers because they are less financially reliant on the people they report. This argument, however, works against him. An employee's financial dependence on his employer is precisely why the Whistleblower Act protects employees. Presumably, those who are not financially dependent on the state as an employer will feel free to report without reprisal.

Finally, Mr. Dezihan argues that the State should be estopped from arguing that Mr. Dezihan is not an employee because the State repeatedly assured Mr. Dezihan that he was protected as a whistleblower and induced Mr. Dezihan to rely on this assurance. Whether or not this is true, courts do not apply equitable estoppel "where the representations allegedly relied upon are matters of law, rather than fact." *Dept. of*

Ecology v. Theodoratus, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998). Whether Mr. Dezihan qualifies as an employee for the purpose of protection under the Whistleblower Act is a question of law. *See Newton v. State*, 192 Wn. App. 931, 936, 369 P.3d 511 (2016) (statutory interpretation is a question of law reviewed de novo); *Doty*, 155 Wn.2d at 533 (holding as a matter of law that plaintiff was a volunteer, not an employee for purposes of the Industrial Insurance Act). Consequently, estoppel does not apply to this issue.

Viewing the evidence in a light most favorable to Mr. Dezihan, we conclude that Mr. Dezihan was not a state employee at the time he filed a whistleblower complaint, and therefore does not qualify for protection under the State Employee Whistleblower Protection Act, chapter 42.40 RCW.

3. Statute of Limitations

The State cross-appeals the trial court's denial of its motion to dismiss Mr. Dezihan's claims as barred by the statute of limitations. The statute of limitations is an affirmative defense, and the defendant carries the burden of proving that it applies. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008). The discovery rule is an exception to the general rule. *Brown v. Dep't of Corr.*, 198 Wn. App. 1, 12, 392 P.3d 1081 (2016). The discovery rule applies to "claims in which plaintiffs could not have immediately known of their injuries." *In re the Estates of Hibbard*, 118 Wn.2d 737,

749, 826 P.2d 690 (1992). When a plaintiff claims the statute of limitations was tolled by the discovery rule, the burden shifts to the plaintiff to prove "that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period." *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465 (2005). Whether a party exercised due diligence is generally a question of fact unless reasonable minds could reach only one conclusion, in which case, the issue can be decided as a matter of law. *Id*.

In this case, the parties agree that all of Mr. Dezihan's causes of action are subject to the three-year statute of limitations. At the earliest, the statute of limitations would have started to run in 2008, when Mr. Dezihan filed his whistleblower complaint. However, Mr. Dezihan claims that he did not discover the facts supporting his causes of action until 2015 when he allegedly overheard an assistant attorney general admit to receiving an unredacted copy of the complaint. The State points to Mr. Dezihan's own deposition testimony where he testified that in 2012 a State employee told him that he was not being hired because of his status as a whistleblower.

Mr. Dezihan's remaining three causes of action are negligence, invasion of privacy, and blacklisting. To determine if a DSHS hiring manager's statement provided Mr. Dezihan with enough facts to put him on notice under the discovery rule, we must consider the necessary elements of each remaining cause of action.

The essential elements of a cause of action for negligence are (1) the existence of a duty owed to the plaintiff, (2) breach of that duty, (3) resulting injury, and (4) a proximate cause between the alleged breach and resulting injury. *Brown*, 198 Wn. App. at 12. Mr. Dezihan claims that even if he is not a whistleblower under the statute, the State owed him a duty under the special relationship doctrine. This doctrine applies when the defendant has induced justifiable reliance by the plaintiff that the defendant will use reasonable care to prevent injury to the plaintiff. 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE §1.11, at 18 (3d ed. 2006).

Mr. Dezihan's common law claim for invasion of privacy requires proof that a person or entity publicized information about another's private life that would be highly offensive to a reasonable person and had no legitimate concern to the public. *White v. Twp. of Winthrop*, 128 Wn. App. 588, 593-94, 116 P.3d 1034 (2005).

Mr. Dezihan's blacklisting cause of action requires proof that the defendant "wilfully and maliciously ma[de] or issue[d] any statement or paper that will tend to influence or prejudice the mind of any employer against the person of such person seeking employment." *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 515, 278 P.3d 197 (2012) (citing RCW 49.44.010).

In applying the discovery rule to these three causes of action, we must determine when Mr. Dezihan became aware of facts sufficient to put him on notice that (1) the State had released the whistleblower complaint and his identity as the complainant, and (2) that Mr. Dezihan suffered damages as a result of this release.

In his deposition for this case, Mr. Dezihan testified: "During the 2012 timeframe, an unidentified hiring manager from the DSHS told me that I did not get the DSHS job that I applied and interviewed for because I was a whistleblower." Clerk's Papers at654. This information provided sufficient facts to put Mr. Dezihan on notice of his claims. If true, the statement acknowledges that the State had released Mr. Dezihan's identity as a whistleblower and that he was being denied jobs because of it.

"When a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm." *EPIC v. CliftonLarsonAllen LLP*, 199 Wn. App. 257, 276, 402 P.3d 320 (2017). The statute of limitations will not continue to toll under these circumstances, even if more serious harm may continue to flow from the wrongful conduct. *Id*. "A claimant who knows of the harm and the immediate cause of the harm, but fails to make any meaningful inquiry, has breached the due diligence duty." *Saberhagen Holdings, Inc.*, 129 Wn. App. at 604.

Mr. Dezihan suggests that the 2012 statement did not trigger the statute of limitations because he did not consult an attorney at the time. Even if he had, the

attorney might not take the case given that the statement's source is unknown. The discovery rule is based on facts, not on the law. It tolls the statute of limitations until the plaintiff becomes aware of sufficient facts, even if the plaintiff does not know if the facts are legally sufficient. *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992).

Had Mr. Dezihan met with an attorney within three years of the 2012 statement, the attorney could have conducted further investigation, just as Mr. Dezihan's attorneys did in this case. But the 2012 statement placed Mr. Dezihan on notice that he was not being hired because the State had released his name as a whistleblower and due diligence required him to make further inquiry to ascertain the scope of that harm. *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 450, 6 P.3d 104 (2000). "[T]he law does not require a smoking gun in order for the statute of limitations to commence. A prospective plaintiff who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken." *Id*. at 450-51 (internal citation omitted).

We hold that reasonable minds could not differ. Considering the facts in a light most favorable to the plaintiff, based on his statement, Mr. Dezihan knew or should have known in 2012 that the State had identified him as a whistleblower and that as a result, Mr. Dezihan was not being hired for any government jobs. We also recognize, however, that our holding does not preclude subsequent causes of action. In this case, Mr. Dezihan's last job application was in 2013. He filed this action in January 2018, more than three years after his last application.

Because we resolve this case on these two issues, we decline to address the remaining issues raised by the State and Mr. Dezihan.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Fearing, J.

Siddoway, A.C.J.

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CASE # 372626
Burton A. Dezihan v. State of Washington
SPOKANE COUNTY SUPERIOR COURT No. 182001468

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. John O. Cooney

CROTTY & SON LAW FIRM

April 16, 2021 - 10:28 AM

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