NO. 99677-6

SUPREME COURT OF THE STATE OF WASHINGTON

BURTON DEZIHAN,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

STATE RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

After unsuccessfully applying for over 100 state, federal, and local government jobs between 2008 and 2013, Petitioner, Burton Dezihan, filed suit against the State of Washington in 2018, claiming the State did not hire him due to retaliation for a "whistleblower" complaint he filed in 2008. The trial court appropriately granted summary judgment on his claims because Mr. Dezihan was not a state employee at the time he filed the complaint and thus did not qualify as a "whistleblower" under the plain terms of the State Employee Whistleblower Protection Act. The Court of Appeals affirmed based on the clear language of the Act, and on the additional grounds that Mr. Dezihan's claims were barred by the applicable statute of limitations. These routine determinations raise no conflict of law or issues of substantial public importance. Accordingly, Mr. Dezihan is not entitled to review under RAP 13.4(b)(1) or (4).

II. COUNTER STATEMENT OF ISSUES

1. Did the Court of Appeals correctly determine that Mr. Dezihan may not bring suit under the State Employees Whistleblower Protection Act because as a volunteer, he is not a state employee pursuant to the clear and unambiguous language of the statute?

2. Did the Court of Appeals correctly determine that equitable estoppel does not apply to a legal determination that Mr. Dezihan did not

meet the statutory definition of a whistleblower under the State Employees Whistleblower Protection Act?

3. Did the Court of Appeals correctly determine that Mr. Dezihan's claims were barred by the statute of limitations when, by his own admission, he became aware of the necessary facts to support his claim six years before he filed his complaint?

III. COUNTER STATEMENT OF THE CASE

A. Factual Background

1. The Whistleblower Complaint

On May 6, 2008, Petitioner Burton Dezihan and his friend, Donald Gillespie, traveled to the State Auditor's Office in Olympia to file a whistleblower complaint against Jack Nannery, a Washington Department of Transportation – State Ferries employee. At the time, Mr. Gillespie was a state employee of State Ferries; Mr. Dezihan was not. CP 432, 425-26. Mr. Dezihan was unemployed at the time, but served as a volunteer on the Fish and Wildlife Commission Americans with Disabilities Act Advisory Committee. CP 431.

The whistleblower complaint form expressly states that being an employee of the State of Washington is a requirement for whistleblower status. CP 561. Mr. Dezihan alleges that, while at the Auditor's Office, an investigator assured him that as a volunteer, he qualified as a

whistleblower.[1] At the time, however, Mr. Gillespie told the investigators that "he was a full-time employee with Washington State Ferries." CP 432 (93:7-12).

Upon concluding the investigation, the Auditor's Office determined that Mr. Nannery had engaged in improper conduct. As part of its own internal investigation, State Ferries, through employees Kathleen Flynn Mahaffey and Stephen Chaussee, submitted public records requests related to the investigation. The Auditor's Office complied with the law and provided responsive records. CP 593–603. While the complaint form included some handwriting, the Auditor's Office redacted all of Mr. Dezihan's identifying information from the responsive records, including his name, address, and telephone number. *See, e.g.,* CP 602-03, CP 561. No one in State Ferries, other than Mr. Gillespie, Mr. Dezihan's associate who filed the complaint with Mr. Dezihan, was aware of Mr. Dezihan's involvement in filing the whistleblower complaint. *See* CP 528–46.

[1] Q. Okay. So Ms. Barlin asked if you were a volunteer or not?
A. I said I was a volunteer. I mean, I was very clear on that. I said I was a volunteer. CP 431 (92:9–12).

2. Dezihan Served as a Volunteer on an Advisory Committee

The Legislature created the Fish and Wildlife Commission Americans with Disabilities Act Advisory Committee "to generally represent the interests of hunters and fishers with disabilities . . . ." RCW 77.04.150(1). The Legislature specified that members of the advisory committee serve as volunteers: "Each member of the advisory committee **shall serve without compensation** but may be reimbursed for travel expenses . . . ." RCW 77.04.150(5) (emphasis added). Moreover, the Fish and Wildlife Commission treated committee members as volunteers. For instance, the Commission's Report on the ADA Advisory Committee noted, "the Legislature directed the Fish and Wildlife Commission to appoint seven **volunteers** with disabilities to serve on an advisory committee . . . ." CP 402-03 (emphasis added). Mr. Dezihan admits that his service on the committee was in a volunteer capacity. CP 479-80. As required by statute, WDFW reimbursed Mr. Dezihan for travel expenses he incurred, up to $100 per day. CP 411.

3. Dezihan's Fruitless Job Search

From 2008 to 2013, Mr. Dezihan applied for over 100 different jobs with local, state, and federal governments: 15 local, 69 state, and 17 federal.

CP 438-39 (135:24–136:5), 522-26, 481-515.[2] He did not apply for a single non-government job. CP 434-35 (129:25–130:25). The jobs were not concentrated in any particular profession and included positions as wide-ranging as a park ranger, medical support assistant, speechwriter for the Governor, animal control officer, and judicial assistant. *See, e.g.,* CP 486-90. For every job Mr. Dezihan was granted an interview, although he listed State Ferries on his application, he refused to allow the prospective employer to contact State Ferries. CP 441 (143:9-20).[3] Mr. Dezihan was not hired for any of these positions.

Mr. Dezihan alleges that the only reason he was not hired for every position he applied for at the state, federal, and local government level was due to his status as a whistleblower.[4] He alleges that an unredacted copy of the whistleblower complaint was distributed on a "state-wide computer interlink",[5] which he allegedly learned about in an unsolicited call by an unidentified person in 2012, after Mr. Dezihan unsuccessfully applied for a position with the Washington State Department of Social and Health

[2] Mr. Dezihan did not apply to any state jobs after 2013. CP 433-34.

[3] Over 16 years ago, Mr. Dezihan was employed with the Washington State Ferries, but his employment was terminated in October 2004 due to persistent disciplinary issues. CP 427.

[4] The State refers to Mr. Dezihan's alleged "whistleblower status" for ease of reference, but he does not meet that statutory definition of a whistleblower under RCW 42.40.

[5] "There is no evidence of a state-wide interlink system, and no evidence that a fully unredacted version of the complaint was made available to state agencies." *Dezihan,* slip op. at 4, n.2.

Services (DSHS). Mr. Dezihan claims the caller was "an unidentified hiring manager from the DSHS" who allegedly told him that he did not get the job "because [he] was a whistleblower."[6] CP 518-19. Mr. Dezihan claims this individual "refused to give his name and stated that he would deny telling [Mr. Dezihan] that [he] was a whistleblower if asked." *Id*. Mr. Dezihan states he "absolutely" knew to which whistleblower complaint the anonymous DSHS hiring manager was referring. CP 442 (148:18-23). Mr. Dezihan admits, however, that he took no action and did not tell anyone else about this alleged phone conversation at the time. CP 443-44 (149:17–150:2).

4. Trial Related to the Whistleblower Complaint

On August 26, 2011, Stephen Chaussee, a State Ferries employee, filed a whistleblower retaliation lawsuit against the State. He alleged that he was *perceived* as the whistleblower who submitted the complaint against Jack Nannery, even though he was not involved in submitting the whistleblower complaint. CP 5.

Several State Ferries and Auditor's Office employees testified both at the 2015 trial and in depositions for the *Chaussee* case, and their

[6] This alleged statement from 2012 is hearsay and, thus, inadmissible under ER 802. It is not being offered here for the truth of the matter asserted, but rather the effect that the statement had upon Mr. Dezihan's understanding of his alleged whistleblower status and the notice he received about that alleged status.

testimony was consistent: the whistleblower complaint received by State Ferries via a public records request had all names and other identifying information redacted. *See* CP 548-49, 549-50, 531 (116:7-10), 574-75, 541, 549, 561, 546. Similarly, the assistant attorney general that represented the State in the *Chaussee* litigation, Joseph Diaz, testified at his deposition that he never saw an unredacted whistleblower complaint and testified that he did not discuss an unredacted whistleblower complaint during any breaks at the trial. CP 475-76 (14:4–15:20). Mr. Dezihan claims, however, that he overheard Assistant Attorney General Joseph Diaz disclose during a recess in the *Chaussee* trial that an unredacted version of the whistleblower complaint had been released. CP 184.

B. Procedural History

Mr. Dezihan filed his Complaint in January 2018. CP 3. Following discovery, he and the State filed cross-motions for summary judgment, heard by the trial court on November 15, 2019.[7] The trial court granted the State's motion for summary judgment and dismissed Mr. Dezihan's whistleblower claim because he was not a state employee at the time of the complaint. It also dismissed Mr. Dezihan's other three claims, finding that

[7] In violation of RAP 9.12, Mr. Dezihan quotes the trial court's language from its October 2018 ruling denying the State's 12(b)(6) motion. Pet. for Review at 3-4. The trial court did not consider that order in November 2019 when it granted the State's motion for summary judgment – the underlying order for this appeal. CP 358-59. Accordingly, it is not properly before this Court.

they were reliant on his alleged whistleblower status. CP at 353-57. The trial court rejected the State's motion for summary judgment based on statute of limitations grounds.

Mr. Dezihan appealed, and the State cross-appealed the denial of the motion for summary judgment on the basis of the statute of limitations. On March 23, 2021, the Court of Appeals, Division III, issued its opinion unanimously affirming the dismissal of Mr. Dezihan's claims. The Court of Appeals held: "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." *Dezihan v. State*, slip op. at 2 (March 23, 2021).

Citing this Court's decision in *Doty v. Town of S. Prairie*, 155 Wn.2d 527, 533, 120 P.3d 941 (2005), and the rules of statutory construction, the Court of Appeals held: "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." *Dezihan*, slip op. at 7. It also held, 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." *Dezihan*, slip

op. at 7-8 (noting the "'common sense notion that volunteers and employees are mutually exclusive categories with juxtaposed definitions.'" *Doty*, 155 Wn.2d 540-41. The Court of Appeals explicitly "reject[ed] Mr. Dezihan's invitation to expand the definition of 'employee' beyond its plain and ordinary meaning." *Dezihan*, slip op. at 9. The Court of Appeals also rejected Mr. Dezihan's equitable estoppel argument, holding that whether Mr. Dezihan qualified for protection under the Act was a question of law,[8] and courts do not apply equitable estoppel "'where the representations allegedly relied upon are matters of law, rather than fact.'" *Dezihan*, slip op. at 9 (quoting *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998)).

The Court of Appeals also affirmed the dismissal on statute of limitations grounds. The Court of Appeals ruled,

> 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.

Dezihan, slip op. at 14 (emphasis added). This Petition followed.

[8] *Dezihan*, slip op. at 10 (citing *Newton v. State*, 192 Wn. App. 931, 936, 369 P.3d 511 (2016) and *Doty*, 155 Wn.2d at 533).

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

"Washington has adopted a public policy of protecting **state employees** who disclose improper governmental actions. RCW 42.40.010." *Dezihan*, slip op. at 2 (March 23, 2021) (emphasis added). Mr. Dezihan did not meet the statutory definition of a "whistleblower" under the State Employee Whistleblower Protection Act because he was not an employee of the State. Reasonable minds could not conclude otherwise because Mr. Dezihan admitted that he was a volunteer, and the Legislature specified by statute that the advisory committee on which he served was comprised of volunteers.

Mr. Dezihan's claims were also barred by the three-year statute of limitations because—again, by his own testimony—he was aware of relevant facts that would form the basis of his claim six years before he filed his lawsuit, thereby triggering the discovery rule. The lower court's ruling created no conflict with this Court's prior rulings, and there is no issue of substantial public interest implicated. Review is not warranted here.

A. Dezihan Did Not Meet the Statutory Definition of a Whistleblower

1. Equitable estoppel does not apply to the legal determination that Mr. Dezihan is not a whistleblower under the Whistleblower Act

Mr. Dezihan is not an employee as a matter of law under the clear terms of RCW 42.40, RCW 77.04.150(1), and this Court's precedent. *Doty*, 155 Wn.2d 540-41 ("volunteers and employees are mutually exclusive categories with juxtaposed definitions"). Mr. Dezihan cites the doctrine of equitable estoppel to try to convert this legal issue into a factual issue, but his argument is not supported by either the facts or the law.

First, Mr. Dezihan never contended that there was a factual dispute about whether he was an employee. *See* Pet. for Review at 14. Accordingly, there is no *factual* dispute on this issue to be left to a jury. He always admitted he was a volunteer; in fact, he was adamant on this point. CP 431 (92:9-12). What he disputed was whether, as a volunteer, he fits the statutory definition of a whistleblower—in part because he claims an investigator told him that his status as a volunteer was sufficient to meet the statutory definition.

Based on that alleged assurance, Mr. Dezihan asserted that the State should be equitably estopped from arguing he was not an employee. But his argument ignores the law. RCW 77.04.150(5) specifies that service on the

Advisory Committee is as an uncompensated volunteer. RCW 42.40.020 defines a protected whistleblower as an "employee." And, as the Court of Appeals noted, even assuming that an investigator told Mr. Dezihan that he qualified as a whistleblower, "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)." *Dezihan,* slip op. at 9-10 (also citing *Newton v. State*, 192 Wn. App. 931, 936, 369 P.3d 511 (2016), and *Doty*, 155 Wn.2d at 533).

Second, Mr. Dezihan criticizes the Court of Appeals for its "narrow application of the estoppel doctrine,"[9] but that is precisely what this Court has instructed should be done. "Equitable estoppel against the government is not favored." *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535, 538 (1993). *See also State Dep't of Ecology v. Theodoratus*, 135 Wn.2d at 599 (where the question is a matter of law, "equitable estoppel will not be applied."). *Laymon v. State Dep't of Nat. Res.*, 99 Wn. App. 518, 526, 994 P.2d 232 (2000); *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 20-21, 43 P.3d 4 (2002); *Williams Place, LLC v. State ex rel. Dep't of Transp.*, 187 Wn. App. 67, 103, 348 P.3d 797 (2015). In *Campbell*, this Court cautioned, "the issue of

[9] Pet. for Review at 15.

statutory construction . . . is a matter of law, rather than an issue of fact." *Campbell*, 146 Wn.2d at 20.

The Court of Appeals followed this Court's well-established precedent and Mr. Dezihan is not entitled to review. RAP 13.4(b)(1).

2. Mr. Dezihan's attempt to expand the statutory definition of a whistleblower does not implicate a substantial public interest

The definition of a whistleblower under the Whistleblower Act is a straightforward issue, readily answered by the statute itself and does not implicate an issue of substantial public interest warranting review. The Legislature has already determined the public interest involved in the passage of RCW 42.40 and limited the class of persons to whom it affords protection. Mr. Dezihan, as a volunteer committee member, does not fall within that group. The Legislature expressed its purpose unambiguously:

> It is the policy of the legislature that *employees* should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature *to protect the rights of state employees* making these disclosures, regardless of whether an investigation is initiated under RCW 42.40.040. It is also the policy of the legislature that *employees* should be encouraged to identify rules warranting review or provide information to the rules review committee, and it is the intent of the legislature to protect the rights of these *employees*.

RCW 42.40.020(10) (emphasis added). The Legislature took the added step of defining the Act's use of the terms "employee" and "whistleblower." It

explicitly defines "employee" as "any individual employed or holding office in any department or agency of state government." RCW 42.40.020(2). Further, each of the four categories of whistleblower requires the individual to be an employee. RCW 42.40.020(10).

In claiming that serving as a volunteer is the same thing as being an employee, Mr. Dezihan ignores the statutes and this Court's precedent regarding the distinction between employees and volunteers. He instead argues that the Court of Appeals' decision conflicts with Black's Law Dictionary's definition of employee. Pet. for Review at 12. As noted by the Court of Appeals, however, RCW 77.04.150(5) specifies that members of the Advisory Committee (of which Mr. Dezihan was a member) serve without compensation and are volunteers. *Dezihan,* slip. op. at 7. Further, relying on this Court's guidance, it emphasized "the common sense notion that volunteers and employees are mutually exclusive categories with juxtaposed definitions." *Dezihan,* slip. op. at 7-8 (quoting *Doty*, 155 Wn.2d at 540)[10].

Straining to find a public interest warranting review, Mr. Dezihan argues this Court should extend whistleblower protection to volunteers to "encourage citizens to volunteer their time to serve our State." Pet. for

[10] In *Doty*, 155 Wn.2d 527, this Court also rejected the notion that payment of a stipend converted a volunteer to an employee. *Id*. at 542 (noting the stipend did not vary based on the number of hours worked).

Review at 14. While volunteering is certainly a laudable thing to encourage, that was not the Legislature's stated purpose in passing the State Employees Whistleblower Protection Act. The plain language of RCW 42.40 limits the class of individuals protected by statute, and there is no issue of substantial public interest that should be determined by this Court. Mr. Dezihan is not entitled to review.

B. The Court of Appeals Statute of Limitations Ruling Applies Settled Law

In considering Mr. Dezihan's claim that the discovery rule tolled the statute of limitations, the Court of Appeals relied on Mr. Dezihan's own testimony to determine when he was aware of the operative facts to support his claims in 2012. According to Mr. Dezihan, an anonymous DSHS employee called and told him he would not be hired due to his whistleblower status. Accordingly, and contrary to his argument, there was no factual dispute for a jury to decide given his admission. *See* Pet. for Review at 8. Given that there is no conflict with this Court's prior decisions, Mr. Dezihan is not entitled to review.

The statute of limitations is a complete defense to a legal claim. *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 323, 300 P.3d 431 (2013). The discovery rule, however, operates to toll the date of accrual until the plaintiff knows or, should have known, all the facts necessary to

establish a legal claim. *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 449, 6 P.3d 104 (2000). The action accrues when the plaintiff knows or should know the relevant facts to establish the claim, whether or not the plaintiff also knows that the facts are enough to establish a legal cause of action. *Killian v. Seattle Pub. Sch.*, 189 Wn.2d 447, 403 P.3d 58 (2017). "Were the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney." *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992).

As the Court of Appeals explained, "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.'" *Dezihan,* slip op. at 11 (quoting *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465 (2005)). Further, the question of 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*. (emphasis supplied).

Here, the Court of Appeals concluded that reasonable minds could not differ on Mr. Dezihan's discovery of the facts constituting his claim based on his own unequivocal testimony. Mr. Dezihan's attempt to create a conflict to support review under RAP 13.4(b)(1) fails because he ignores

that unequivocal testimony. There are no conflicting facts for a jury to weigh. Mr. Dezihan testified that in 2012 he was told that he was not hired for a job because he was a whistleblower. Further, by his own admission, he "absolutely" knew to which whistleblower complaint the anonymous DSHS hiring manager was referring. CP 442 (148:18–23).[11] The Court of Appeals held, "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." *Dezihan,* slip op. at 14 (citing *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.* (quoting *Giraud*, 102 Wn. App. at 450-51).

While Mr. Dezihan now seeks to downplay this alleged phone call, this was one of his key pieces of alleged evidence—albeit inadmissible—that any retaliation occurred in the first instance. Based on Mr. Dezihan's

[11] The State does not concede that this conversation occurred. While the statement is clearly hearsay and inadmissible under ER 802, it was offered not for the truth of the matter asserted, but for the effect that it had upon Mr. Dezihan. Specifically, the effect it would have upon his knowledge of his alleged status as a blacklisted whistleblower and thus require action on his part to perfect his claim.

own admission, reasonable minds could not differ that he was told in 2012 he was not going to be hired because he was a whistleblower.

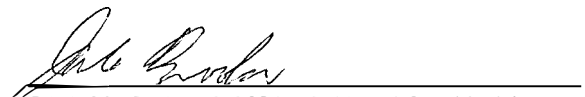
Finally, Mr. Dezihan spends considerable time arguing that *EPIC v. CliftonLawsonAllen LLP,* 199 Wn. App. 257, 402 P.3d 320 (2017), is "legally distinguishable because it is a commercial litigation case." Pet. for Review at 9. However, he has offered no authority for the proposition that the discovery rule changes based upon the subject matter of the litigation. The *EPIC* court's articulation of the discovery rule is consistent with all other Washington courts' articulation of the rule: "Under the discovery rule, a cause of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the salient facts underlying the cause of action's elements." *EPIC*, 199 Wn. App. at 274 (citing *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006)). The Court of Appeals decision does not conflict with this Court's prior decisions or a published decision of the Court of Appeals, and this Court should deny his petition for review. *See* RAP 13.4(b)(1).

V. CONCLUSION

For the foregoing reasons, Appellee State of Washington respectfully requests that this Court deny Burton Dezihan's petition for review.

RESPECTFULLY SUBMITTED this 17th day of May, 2021.

ROBERT W. FERGUSON
Attorney General



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DECLARATION OF FILING AND SERVICE

I declare under penalty of perjury in accordance with the laws of the State of Washington that on the below date the original of the preceding "ANSWER TO PETITION FOR REVIEW" was filed in the Supreme Court of the State of Washington, and electronically served on the following parties, according to the Court's protocols for electronic filing and service.

☒ Via the Court's electronic filing system to:

Matthew Z. Crotty matt@crottyandson.com

DATED this 17th day of May, 2021 at Spokane, Washington.

s/Jodi Gress
JODI GRESS

WASHINGTON ATTORNEY GENERAL SPOKANE TORTS

May 17, 2021 - 1:56 PM

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