STATE OF MICHIGAN

COURT OF APPEALS

Estate of DONALD J HOUSEY, through its Personal Representative, MITCHELL HOUSEY, Plaintiff-Appellant, v MACOMB COUNTY, MARK S SWITALSKI, KATHRYN GEORGE, and MACOMB COUNTY PROBATE COURT, Defendants-Appellees.	UNPUBLISHED September 16, 2014 No. 313896 Macomb Circuit Court LC No. 2012-001692-CD

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

This action arises from the January 2010 firing of Donald J. Housey from his position as the administrator and register of the Macomb County Probate Court (hereinafter "the Probate Court"). After Housey's death in February 2012, Housey's estate, through its personal representative, Mitchell Housey (hereinafter "the Estate"), filed a two-count complaint against Macomb County, Judge Kathryn George, Judge Mark S. Switalski, and the Probate Court, alleging claims for wrongful discharge and violation of the Whistleblowers' Protection Act (WPA).[1] The trial court granted the motions for summary disposition filed by Macomb County, Judge George, Judge Switalski, and the Probate Court. The Estate appeals as of right. We affirm in part, reverse in part, and remand for further proceedings.

I. HOUSEY'S PRIOR LITIGATIONS

A. FEDERAL ACTION

On April 12, 2010, Housey filed a complaint in the United States District Court for the Eastern District of Michigan against Macomb County, Judge George, and Judge Switalski. The federal complaint contained counts alleging that Macomb County, Judge George, and Judge

[1] MCL 15.361 *et seq.* The WPA claim was alleged against Macomb County, Judge George, and Judge Switalski only.

Switalski violated Housey's due process and free speech rights entitling him to damages,[2] and that they wrongfully discharged Housey and violated the WPA in discharging him.[3] Because of the similar nature of the claims at issue and the facts underlying both the federal complaint and the complaint in this case, we reproduce the following undisputed facts found by the district court in its opinion granting summary judgment to Judge George and Judge Switalski and dismissing Macomb County as a party:

1.

> Housey served as the register for the Macomb County probate court from November 2002 until his termination in January 2010. Housey first joined the court in 1989 as a probate attorney/referee. Pamela Gilbert O'Sullivan (O'Sullivan) was the chief judge in 2002; she appointed Housey as the probate court register. O'Sullivan described Housey's service during her tenure as chief judge as "excellent."

2.

> In 2002, Housey ran in the primary election for the office of probate judge against five (5) opponents, including George. Housey did not garner enough votes to run in the general election. George won the primary and subsequently won the general election. George took the bench in January of 2003. Tension between Housey and George began shortly thereafter. The relationship soured permanently when Housey began to question George's appointment of a conservator group called ADDMS.

3.

> O'Sullivan enacted a policy in 2005 requiring rotational assignments from an approved list of guardians/conservators. Nevertheless, George appointed conservators from a personal list, which included ADDMS. Beginning in 2004, Housey sent in excess of twenty (20) reports to the State Court Administrative Office (SCAO) regarding George and ADDMS, fifteen (15) of which were in 2007. Housey reported that ADDMS overbilled estates and mismanaged the affairs of the clients they represented. SCAO did not take any action on Housey's verbal or written reports.

4.

---

[2] See 42 USC 1983.

[3] The federal court declined to exercise supplemental jurisdiction over the state law claims. *Estate of Housey v Macomb Co*, unpublished memorandum and order of the United States District Court for the Eastern District of Michigan, entered May 15, 2012 (Case No. 10-11445), p 2 n 2.

In 2005, SCAO commissioned the Whall Group (Whall) to complete a financial and forensic audit of the probate court's procedures and records. After its investigation, Whall issued a report outlining significant problems. Whall found procedures in conflict with statute; excessive and inaccurate billing of estates; lack of effective oversight of disbursements and conservator accountings; and mismanagement of real estate transactions. Whall made a comprehensive list of recommendations designed to improve procedure and oversight. The report also noted that personal animosity between the judges created a feeling of "awkwardness" in the court. Additionally, the report raised questions of ADDMS's practices as conservator. In response, O'Sullivan stopped assigning ADDMS as conservator to cases on her docket.

5.

George assumed the office of chief judge in January of 2008. George implemented changes that included reassignment of offices, restricting keys for the building and file cabinets, and requiring court employees to pass through security screening. George restricted the use of cell phones, use of court telephones, and forbade eating at a desk in view of the public. George directed Housey to complete a written daily report on his activities. During her tenure as chief judge, George issued written memoranda to Housey expressing her disapproval with his practice of whistling in court and forbade bringing donuts for some but not all court employees. George required Housey to obtain approval before delegating any of his assigned duties or attending professional development trainings.

6.

In January of 2008, SCAO commissioned Whall to complete another audit of the probate court. Whall reported low employee morale, that court procedure was not uniformly applied, and that the personal animosity between George and O'Sullivan rendered the court dysfunctional. Whall found that court employees manipulated the system of random judge assignment to cases. Whall noted that an inordinate number of cases that included a recommendation for ADDMS in the initial petition were sent to George. Whall's report speculated that clerks would set aside a file with an ADDMS recommendation until George's name came up as the assigned judge, thereby subverting the random judge assignment process.

7.

Whall found that sixteen percent (16%) of the audited files contained the appearance of financial mismanagement, up from ten percent (10%) in 2005. Whall found noncompliance with court rules and procedure in seventy-five percent (75%) of audited cases. Additionally, the 2008 Whall report found that a substantial number of cases handled by ADDMS lacked adequate accounting for assets and income.

8.

In May of 2008, George placed Housey on administrative leave pending an investigation of the issues identified by the 2008 Whall report, specifically the manipulation of the random judge assignment system. A [*Cleveland Bd of Ed v Loudermill*, 470 US 532; 105 S Ct 1487; 84 L Ed 2d 494 (1985),] hearing was scheduled and held for Housey.

9.

The Supreme Court reacted to the 2008 Whall report by removing George as chief judge and appointing Kenneth Sanborn (Sanborn). Sanborn served as a Macomb County probate judge and circuit court judge from 1972-1990. The day after his appointment, Sanborn rehired Housey as probate court register. Shortly thereafter, the Macomb County corporation counsel closed the file on disciplinary proceedings initiated by George against Housey.

10.

The Michigan Attorney General conducted an investigation into matters identified by the 2008 Whall report, in particular, the practices of ADDMS. The Attorney General concluded the probate court "is struggling to operate effectively and efficiently under the weight of discord with the court."

11.

In November 2009, the Michigan Supreme Court appointed Switalski as chief judge of the Macomb County circuit and probate courts effective January 1, 2010. In preparation, Switalski reviewed the findings of the 2008 Whall report. Switalski met with Sanborn, members of SCAO, attorneys who practiced before the probate court, George and O'Sullivan. He also met with Housey on four (4) occasions. During one of his meetings with Switalski, Housey disclosed that he sent letters to SCAO and cooperated with the JTC investigation.

12.

In November of 2009, the JTC issued a subpoena to Housey in his capacity as probate court register, for seventeen (17) probate court files. Housey contacted Switalski for guidance; Switalski ultimately assigned the task of responding to his secretary. As part of the JTC investigation, Housey met with a JTC investigator confidentially on three (3) occasions.

13.

Switalski terminated Housey on January 15, 2010. At the time, Switalski declined to outline the reasons for his decision. He did comment that it was a "coach's decision." Housey requested a *Loudermill* hearing pursuant to his understanding of his rights as outlined by the 2001/2004 personnel manuals.

Switalski declined his request on the basis that Housey was an at-will employee under the terms of the 2009 personnel manual.

14.

The 2001/2004 personnel manuals established a just-cause requirement for termination and provided for a *Loudermill* hearing. Additionally, the manuals stated in relevant part "[t]he manual shall not be construed as creating a contract between the County and any of its employees." Moreover, county employees "cannot rely upon custom or prior practice" with regard to County policy and procedure. Finally, the manual provided "personnel policies . . . may be added to, expanded, reduced, deleted, or otherwise modified by the County and such personnel policy modifications are solely within the discretion of the County Board of Commissioners."

15.

The county and probate court adopted a new personnel manual in 2009. The manual contained many of the same provisions as the 2001 and 2004 manuals. However, it removed the just-cause requirement and declared that all non-union personnel were at-will employees subject to termination at any time for any reason. The manual included a provision that continued employment with the county acknowledged the at-will nature of his/her position.

16.

In 2001 and 2004, the manual was distributed to each employee and required a signed acknowledgment of receipt. Housey received and signed for the 2001 and 2004 manuals. The 2009 manual, however, was not physically distributed to employees. It was posted on the county's intranet.[4]

The United States Court of Appeals for the Sixth Circuit affirmed the federal district court's grant of summary judgment and dismissal of Macomb County as a party.[5]

B. STATE ACTION

On April 15, 2010, Housey also filed an action in the Macomb Circuit Court against the Probate Court in LC No. 2010-001652-CD. This complaint raised only a WPA claim against the

[4] *Id*. at 3-8 (footnotes omitted).

[5] *Housey v Macomb Co*, 534 Fed Appx 316 (CA 6, 2013).

Probate Court. The trial court granted the Probate Court's motion for summary disposition. On April 8, 2014, this Court reversed that decision and remanded the case for further proceedings.[6]

II. PRESENT MOTIONS FOR SUMMARY DISPOSITION

In September 2012, Macomb County, Judge George, Judge Switalski, and the Probate Court filed motions for summary disposition in the present case.[7] The Estate filed an extensive response to the motions. At a hearing in November 2012, the trial court granted the motions. With respect to the Estate's WPA claim, the trial court ruled that its decision in the prior action against the Probate Court operated as res judicata to bar the Estate's WPA claim in this case. The trial court alternatively ruled that the Estate had failed to establish its WPA claim, emphasizing that it detected "no evidence of conspiracy or influence by Judge George on Judge Switalski," who discharged Housey in January 2010. Regarding the Estate's wrongful discharge claim, the trial court found that the federal court's ruling operated as res judicata to bar the Estate's present wrongful discharge claim. The trial court alternatively ruled that the federal court had correctly concluded that MCL 600.833, which invested the chief probate judge with discretion to discharge the probate register, trumped any asserted legitimate expectation of just-cause employment based on Macomb County policies.

III. CLAIM PRECLUSION ISSUES

The Estate contends that neither collateral estoppel nor res judicata compelled dismissal of its WPA and wrongful discharge claims. We conclude that the trial court reached the correct result in dismissing the Estate's wrongful discharge claim because collateral estoppel arose from the prior federal action. However, the trial court erred in finding that res judicata barred the Estate's WPA claim based on the dismissal of the WPA claim in Housey's prior state action because this Court reversed the trial court's grant of summary disposition with respect to that claim in *Housey I*.

The application of claim preclusion doctrines, such as collateral estoppel and res judicata, is a question of law subject to de novo review.[8] "This Court [also] reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law."[9] The reviewing court

---

[6] *Housey v Macomb Co Probate Court*, unpublished opinion per curiam of the Court of Appeals, issued April 8, 2014 (Docket No. 309060) ("*Housey I*"). The Probate Court's application for leave to appeal to the Michigan Supreme Court is pending.

[7] The motions were filed pursuant to MCR 2.116(C)(7) (prior judgment/claim preclusion) and (10) (no genuine issue of material fact). Although Macomb County, the Probate Court, and Judge George also moved for summary disposition pursuant to MCR 2.116(C)(8), there is no indication that the circuit court relied on this subrule in granting the motions for summary disposition.

[8] *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

[9] *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 518; 847 NW2d 657 (2014).

must consider the "affidavits, together with the pleadings, depositions, admissions, and documentary evidence . . . submitted by the parties."[10] "[W]e consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other documents presented specifically contradict it."[11]

A. PRIOR FEDERAL ACTION

The Estate contests the preclusive effect of the federal district court's ruling. We apply federal law in order to determine the preclusive effect of prior rulings by a federal court.[12] "Under the doctrine of collateral estoppel, which is also referred to as issue preclusion, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."[13] The doctrine of collateral estoppel applies when

> (1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation, (2) the issue was actually litigated and decided in the prior action, (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation, (4) the party to be estopped was a party to the prior litigation (or in privity with such a party), and (5) the party to be estopped had a full and fair opportunity to litigate the issue.[14]

The federal district court summarized as follows the nature of the question presented in the due process claim:

> *Housey's due process claim turns on whether or not his employment was at-will or just-cause.* The due process clause of the Fourteenth Amendment provides procedural due process to public employees with a protected property interest in continued employment. *A public employee has a property interest in continued employment when the existing rules, policies, or understandings from an independent source amount to an implied promise of continued employment.* The parties do not dispute that the 2001/2004 manuals provided for just-cause termination and a *Loudermill* hearing. Pursuant to the so-called handbook exception, a written just-cause policy can create an enforceable implied promise of continued employment. The parties do not dispute that the 2009 manual

[10] MCR 2.116(G)(5).

[11] *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010).

[12] *Beyer v Verizon North, Inc*, 270 Mich App 424, 428-429; 715 NW2d 328 (2006).

[13] *Hammer v INS*, 195 F3d 836, 840 (CA 6, 1999) (quotation marks and citation omitted).

[14] *Id*.

> provides that all non-union employees serve on an at-will basis. However, the parties disagree which manual governs their employment relationship.[15]

The federal district court found that the 2001 and 2004 county employment manuals gave rise to legitimate expectations of just-cause employment, and the Probate Court had failed to prove that it gave Housey adequate notice of the 2009 county employment manual describing county employment as at-will.[16] However, the federal court concluded that Housey did not possess a legitimate expectation of just-cause employment in light of MCL 600.833(1), which gave the chief probate judge unbridled discretion to discharge the probate register.[17]

The Sixth Circuit affirmed the federal district court's dismissal of Housey's due process claim, and explained, in relevant part:

> [W]e turn to the effect of [MCL 600.833] on Housey's otherwise cognizable property interest. That provision states in relevant part that "[t]he probate register shall hold office until his appointment is terminated by the . . . chief judge." The authority to hire and fire the probate register without cause is not qualified by any other provision. Given the clarity provided by statute, the dispositive question is whether Housey could develop a legitimate expectation of continued employment in spite of it. For Michigan courts, the answer is no. One state appellate court confronting a similar issue held that a "public employee cannot claim an implied contract where it violates the controlling body's statutory authority." Here, implying a just-cause term in the employment relationship would seem to infringe the broad discretion conferred by statute on chief probate judges just the same. And Housey cites no persuasive authority to the contrary. Thus, [MCL 600.833] defeats any protectable property interest Housey may have otherwise had in continued employment.
>
> Housey argues that his property interest survives the operation of [MCL 600.833] by virtue of Michigan Supreme Court Administrative Order 1998–5. Specifically, he argues that the chief judge and [the Probate Court] "fulfilled AO 1998–5's directive by wholly adopting" the County's personnel manuals, which contained a just-cause policy. Housey's theory is that the chief judge voluntarily agreed to exercise something less than totally unqualified hiring and firing power, giving rise to an enforceable implied promise of continued employment as a result. However, this theory finds little support in Michigan law. Questions of separation of powers notwithstanding, there is also no evidence that the Supreme Court intended to restrict the chief probate judges' statutory authority when it issued Administrative Order 1998–5. Moreover, such a restriction is not "consistent with the effective operation" of the probate courts given the critical

[15] *Estate of Housey*, unpub op at 14 (citations omitted; emphasis added).

[16] *Id*. at 14-15.

[17] *Id*. at 15-17.

> importance of the register position. The Michigan legislature understood this, and we have no occasion to upset its judgment by imposing new constraints on the administration of state probate courts. Because enforcing a just-cause policy would "violate" the chief judge's statutory authority with respect to the register position, Housey could not have developed a legitimate expectation of such. Without a cognizable property interest in continued employment, Housey's due process claim falls short.[18]

We conclude that federal collateral estoppel principles bar the relitigation of the issue central to the Estate's wrongful discharge claim in this case. In the context of Housey's federal due process claim, the federal courts decided an identical issue necessary to the maintenance of the Estate's wrongful discharge claim, specifically whether Housey had a legitimate expectation of just-cause employment in light of MCL 600.833.[19] Every indication exists that "the issue was actually litigated and decided" in the federal district court and the Sixth Circuit.[20] As reflected in the analysis of the federal district court and the Sixth Circuit, their decisions on Housey's due process claim necessarily depended on the issue whether Housey possessed a legitimate expectation of just-cause employment in light of MCL 600.833.[21] Lastly, the party to be estopped, the Estate, was a party to prior litigation and it had "a full and fair opportunity to litigate the issue" in the federal district court and the Sixth Circuit.[22] The trial court thus reached a correct result in dismissing the Estate's wrongful discharge claim.[23] Given that this claim was properly dismissed based on the doctrine of collateral estoppel, we need not consider whether summary disposition was proper on other grounds.

B. PRIOR STATE ACTION

The Estate also contests the propriety of the trial court's dismissal of the Estate's WPA claim against Macomb County, Judge George, and Judge Switalski based on the res judicata effect of the trial court's prior dismissal of Housey's WPA claim against the Probate Court. In Michigan, "[t]he doctrine of res judicata precludes relitigation of a claim when it is predicated on

---

[18] *Housey*, 534 Fed Appx at 324-325 (citations omitted).

[19] See *Hammer*, 195 F3d at 840.

[20] *Id*.

[21] See *id*.

[22] *Id*. The exception to the application of collateral estoppel noted by the Estate does not apply in this case because "the legal 'demands' of this litigation are closely aligned in time and subject matter to those in" the federal action. *Montana v United States*, 440 US 147, 163; 99 S Ct 970; 59 L Ed 2d 210 (1979).

[23] See *Janet Travis, Inc v Preka Holdings, LLC*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 315560, issued July 31, 2014); slip op at 13 (affirming the trial court's order where it reached the correct result, albeit through a different analysis).

the same underlying transaction that was litigated in a prior case."[24] For res judicata to apply, the following elements must exist:

> (1) the prior action was decided on the merits, (2) the prior decision resulted in a final judgment, (3) both actions involved the same parties or those in privity with the parties, and (4) the issues presented in the subsequent case were or could have been decided in the prior case.[25]

In *Housey I*, this Court reversed the trial court's grant of summary disposition to the Probate Court regarding Housey's WPA claim on the basis that genuine issues of material fact existed.[26] A review of this Court's prior decision reveals that it involved a WPA claim resting on the same allegations and factual support that the Estate offers in support of its present WPA claim against Macomb County, Judge George, and Judge Switalski. Because this Court reversed the decision on which the trial court premised its res judicata ruling regarding Housey's WPA claim, that decision did not result in a final judgment.[27] Accordingly, the trial court erred in concluding that res judicata barred the Estate's WPA claim in this case.

IV. PRESENT WPA CLAIM

The Estate additionally argues that the trial court erred in granting summary disposition on its WPA claim because genuine issues of material fact exist regarding all elements of this claim.[28] We consider de novo a motion brought pursuant to MCR 2.116(C)(10), which "tests the factual support of a plaintiff's claim."[29] "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial."[30] "Summary disposition is appropriate under

---

[24] *Duncan v Michigan*, 300 Mich App 176, 194; 832 NW2d 761 (2013).

[25] *Id*.

[26] *Housey I*, unpub op at 3.

[27] See *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006) ("A decision is final when all appeals have been exhausted or when the time available for an appeal has passed."). For this reason, collateral estoppel also does not apply. See *id*. ("Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding.").

[28] See MCR 2.116(C)(10).

[29] *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

[30] *Id.*

MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law."[31] "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ."[32]

The relevant provision of the WPA provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.[33]

A litigant can "establish a prima facie case under the WPA" by proving "that (1) he or she was engaged in a protected activity as defined by the act, (2) he or she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action."[34]

> When considering claims under the WPA, we apply the burden-shifting analysis used in retaliatory discharge claims under the Civil Rights Act, MCL 37.2101 *et seq*. If the plaintiff has successfully proved a prima facie case under the WPA, the burden shifts to the defendant to articulate a legitimate business reason for the plaintiff's discharge. If the defendant produces evidence establishing the existence of a legitimate reason for the discharge, the plaintiff then has the opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge.[35]

For a plaintiff to survive a defense motion for summary disposition, the plaintiff

> must demonstrate that the evidence in the case . . . is sufficient to permit a reasonable trier of fact to conclude that [plaintiff's protected activity] was a motivating factor in the adverse action taken by the employer . . . . In other

---

[31] *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[32] *Id*.

[33] MCL 15.362.

[34] *Whitman v City of Burton*, 493 Mich 303, 313; 831 NW2d 223 (2013).

[35] *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002) (citations omitted).

> words, a plaintiff must raise a triable issue that the employer's proffered reason . . . was a pretext for [retaliating against plaintiff's protected activity]. A plaintiff can prove pretext either directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.[36]

The common facts and averments comprising the WPA claims in both Housey's complaint in the prior action against the Probate Court and the complaint in this case against Macomb County, Judge George, and Judge Switalski, are the same. It is also apparent that the evidence relevant to an evaluation of the WPA claims is the same. The Estate raised similar arguments and relied on primarily the same evidence in its brief on appeal in *Housey I* as in its brief on appeal in this case. The Probate Court also raised similar arguments and relied on primarily the same evidence in its brief on appeal in *Housey I* as Macomb County, Judge George, and Judge Switalski raise in their briefs in this appeal. Because the parties' positions and supporting evidence appear strikingly similar in both cases, summary disposition was not proper in this case for the same reasons articulated by this Court in *Housey I*.[37] As this Court concluded in *Housey I*:

> At issue is whether plaintiff has established a genuine issue of material fact regarding the first and third requirements in establishing a prima facie case under the WPA, namely whether plaintiff had engaged in protected activity under the WPA and whether a causal connection existed between the protected activity and plaintiff's discharge. The second element of a prima facie case, that plaintiff was discharged, is not disputed.
>
> The first element can be established by showing that plaintiff reported a violation of law, regulation, or rule to a public body, that he was about to make such a report, or was asked to participate in an investigation by a public body. Defendant first argues that plaintiff's complaints to SCAO and cooperation with the JTC investigation involved the conduct of a judge who was not the decision maker regarding plaintiff's termination. But we are not aware of any requirement, nor does defendant point to any such authority, that the complaints or investigation must involve the decision maker. Similarly, defendant argues that cooperating with the JTC investigation cannot be deemed protected activity because plaintiff merely complied with subpoenas and had no knowledge about the reasons behind the JTC investigation. Again, however, defendant points us to no basis to conclude that plaintiff had to know the reason for the investigation,

---

[36] *Id*. at 660 (quotation marks and citations omitted).

[37] Judge George admits that, while she was not a defendant in the prior state action against the Probate Court, the same conduct is at issue in this case and that the claim against her could have been resolved in that case. Also, the WPA claim was essentially the same in the prior state action and this Court recognized Judge George's role and found that summary disposition was not proper.

nor that the decision maker had to know. It may be sufficient to a decision maker to terminate an employee merely because the employee cooperated with any investigation without regard to the purpose of the investigation.

Defendant also argues that plaintiff's reports to SCAO and cooperation with the JTC do [not] rise to the level of protected activity because they did not involve violations of law. But plaintiff's exhibits clearly established that his reports to SCAO did allege violations of law, rules or regulations. While it is not clear whether the JTC investigation involved violations of law, rules or regulations, it would seem likely that it would, inasmuch as that is its job. But, in any event, MCL 15.362 protects an employee who is asked by a public body to participate in an investigation, hearing, or inquiry and does not by its terms limit that protection to investigations of a violation of law. That is, it does not matter whether the investigation involves a violation of law, regulation or rule.

Finally, defendant argues that plaintiff's communications with SCAO and the JTC were part of his job duties and that it is "counter-intuitive" to call performing one's job as engaging in protected activity. Defendant suggests that to do so would unnecessarily insulate an employee from adverse consequences for performing his job duties. But defendant has it backwards. Where the performance of a job duty would require engaging in protected activity, the WPA protects the employee who performs that duty. The employee who fails to perform his job duty—i.e., fails to make such a report—and is fired for failing to perform his job duty would not have engaged in protected activity.

The real issue in this case goes to the third element, whether plaintiff can establish a causal connection between the protected activity and his discharge. Clearly, the evidence on this point is thin. Defendant offers strong evidence that Judge Switalski did not terminate plaintiff because of his protected activity, but that it was based upon the judge's perception of plaintiff's own responsibility regarding the problems faced by the Probate Court as well as his absenteeism. Plaintiff, however, does have some evidence, albeit minimal, regarding causation. Plaintiff can present evidence that Judge Switalski became upset and hostile towards him after learning of plaintiff's protected activity and that plaintiff had overheard a conversation which could be interpreted as the judge who had been the focus of the SCAO complaints and JTC investigation lobbying Judge Switalski to replace plaintiff and thanking Judge Switalski when he did so.

It is far from certain that a jury would reject the proffered legitimate reasons for plaintiff's discharge and accept plaintiff's evidence as being sufficient to establish that the true motivation was to retaliate against plaintiff for engaging in activity protected under the WPA. But that is a determination for a jury to make, not for this Court or the trial court to do so in a motion for summary disposition.

Finally, although it is not entirely clear whether the trial court based its ruling on defendant's argument that plaintiff's claim was not filed within the

> period of limitation, both parties address this issue on appeal. And, in any event, defendant's argument is without merit. MCL 15.363 requires that an action be brought within 90 days of the alleged violation of the act. It is undisputed that plaintiff filed his action within 90 days of his termination. Therefore, the action was timely filed.[38]
>
> For the above reasons, we conclude that plaintiff has established a genuine issue of material fact to establish a prima facie case under the WPA and to rebut defendant's claim of a valid reason for the termination. Accordingly, the trial court erred in granting summary disposition in favor of defendant.[39]

Accordingly, we reverse the trial court's grant of summary disposition on the WPA claim against Macomb County, Judge George, and Judge Switalski because disputed questions of fact exist.[40]

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

---

[38] We note that Judge George argues on appeal that she had no role in the termination and that the WPA claim against her must fail based on the statute of limitations. Judge George claims that even using the April 12, 2010 filing date of the federal action, no alleged retaliatory actions that she took before January 12, 2010, are actionable because they fall outside of the period of limitation. However, given this Court's conclusion that there is a question of fact regarding Judge George's role in the termination, her assertions on appeal cannot be taken as established. Therefore, we are unable to make a determination regarding the statute of limitations.

[39] *Housey I*, unpub op at 1-3 (citations omitted; footnote added).

[40] We note that while the parties disputed below whether Macomb County should be dismissed as a party, we will not address it on appeal as the trial court did not decide the issue and it was not raised on appeal.