EXHIBIT 1

STATE OF MICHIGAN

IN THE COURT OF APPEALS

HARRY COVELL,

Plaintiff/Appellant,

v.

BARRY SPENGLER, CLARENCE WASSON, and KWIK CAR WASH, INC., jointly and severally,

Defendants/Appellees.

Court of Appeals No. 75868

L.C. No. 83-50582-CK

Judge Robert Holmes Bell

PLAINTIFF/APPELLANT'S BRIEF IN SUPPORT OF CLAIM OF APPEAL

Oral Argument Requested.

DATED:
8-29-84

Submitted by:
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   Plaintiff/Appellant says "YES"

   Defendant/Appellee says "NO"

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   Plaintiff/Appellant says "YES"

   Defendant/Appellee says "NO"

STATEMENT OF FACTS

This lawsuit arose out of the termination of Plaintiff/Appellant from Kwik Car Wash, Inc., after almost twelve years of employment there. On or about October 8, 1982, an accident occurred at the car wash involving a pick up truck. Harry Covell got into a shouting match with Defendant Clarence Wasson over this, and Harry Covell was suspended from work for a week because of that argument.

Plaintiff/Appellant Covell then went to the Labor Board and complained about not receiving time-and-a-half pay for over 40 hours of work per week. When Plaintiff/Appellant returned to the car wash on October 12, 1982, to ask when he was to report back to work, he was told by Clarence Wasson that "they didn't like people that went to the Labor Board" and that he was "laid off for lack of work, since he could not be fired." He was told he would be called back when he was suspended on October 8, 1982.

This matter was heard in 54-A District Court originally. At that time, it was dismissed by the district court for lack of subject matter jurisdiction in its interpretation of the Whistle Blower's Act, MSA 17.428(1) et seq. This matter was subsequently refiled in the Circuit Court for the County of Ingham, where Defendants brought motions for accelerated and summary judgment, which were granted by the circuit court.

The lower court dismissed Count I under the Whistle Blower's Protection Act, page 18 of transcript, in that it found that the language contained in the act set out a 90-day statute of limitations, which had expired. Counts II, III and IV were

dismissed on the finding that Plaintiff had failed to state a cause of action under the law in the State of Michigan upon which relief can be granted, page 19 of transcript. Plaintiff appeals said decisions.

ARGUMENT

1. IS THE WHISTLEBLOWERS' PROTECTION ACT, MCLA 15.363(1) TO BE CONSTRUED AS CONTAINING A STATUTE OF LIMITATIONS?

Plaintiff/Appellant says "NO"

Defendant/Appellee says "YES"

Defendants, in their argument against Count I of Plaintiff's Complaint, based on a section of the Whistleblowers' Protection Act, MCLA 15.363(1), which reads:

> "A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act."

The first question to be answered by the court is whether this is a statute of limitations for the Whistleblowers' Act at all. If one looks at the typical language of a statute of limitations and compares it with the statute in question, the differences are obvious. For example, MCLA 600.5805 states:

> "No person may bring or maintain any action to recover damages for injury to persons or property unless, after the claim is first accrued to him or to someone through whom he claims, he commences the action within the periods of time perscribed by this section."

This section then goes on to state various periods of time for different types of torts. The language of the example clearly sets the limits to the maintenance of an action beyond which the parties cannot go. The action must be commenced within the period of time, or be subject to bar. Our act states that bringing an action outside of this will not be allowed.

The statute in question, however, does not specify any of these matters. The statute simply states that an action for injunctive relief or actual damages or both may be started within

90 days of the occurrence. The statute, however, does not prohibit bringing an action beyond the 90-day period. Since there is not a penalty spelled out within the statute or any other manifestation of legislative intent, the court should avoid reading more into this section than what is there; that is, that one is allowed to start such an action within 90 days of the occurrence complained of and is not prohibited from starting the suit thereafter.

The court, in People v McFarland, 389 Mich 577, has stated ably the general rules that are to be followed in the interpretation of statutes; at 563 it stated:

> "This court has said that where 'language is of doubtful meaning, a reasonable construction must be given, looking to the purpose observed thereby. Occasion and necessity are matters of judicial concern, and its purpose should be effected if possible. Its spirit and purpose should prevail over its strict letter. Injustice and its application should be prevented, and absurd consequences should be avoided.' (citations omitted) Webster v Rotary Electric Steel Co, 321 Mich 526, 531 (1948)."

It is the intention of the appellant that a reading of this statute to imply a 90-day statute of limitations must fall upon two points. First, the statute is unduly short. Secondly, that as it is interpreted, it tends to frustrate the purpose of the legislature in attempting to give relief to those employees penalized by their employers for reporting wrong doing.

It is therefore the contention of appellant that the statute in question is not a statute of limitations and that the lower court should be reversed in its finding that it was such a statute.

2. IF MCLA 15.363(1) IS A STATUTE OF LIMITATION, IS IT A COMPLETE BAR TO ANY SUIT BASED ON IT?

Plaintiff/Appellant says "NO"

Defendant/Appellee says "YES"

If this court finds that the statute in question is a statute of limitation, it is brought to the attention of the court that the limit would apply to:

> "appropriate injunctive relief or actual damages or both".

This would be a complete bar to actions commenced under this act if they were the only damages which could be sued for; they are not. In Section 4 of the Whistleblowers' Act, it states:

> "The court, in rendering a judgment in an action pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award complainant all or a portion of the costs of of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate." (emphasis added)

Not only are actual damages and injunctive relief allowed, but also payment of back wages, full reinstatement of fringe benefits and seniority rights. A person could also conceivably ask for exemplary damages. None of the above-mentioned remedies, except actual damages and injunctive relief, are mentioned in the 90-day clause. If the clause is to be construed as a statute of limitation at all, it should apply only to limiting the time one has for suing for those two forms of relief but not to limit any of the others.

If the court is to believe that this is a statute of

limitation, the court should look at it with an eye toward the intent of the statute. The statute is designed to keep employees from being pressed upon by their employers to fear economic retaliation into keeping hidden various wrongdoings by these employers or others with whom the employer deals. To allow such a short time for the statute of limitation to run under the defendants' interpretation of the statute would be to thwart this laudable plan by the legislature to an overly-broad construction of this section of the statute.

Therefore, Plaintiff/Appellant asks this court that if it finds MCLA 15.363(1) to be a statute of limitation, that it does not cover all the remedies which are listed in the statute but is restricted to only those remedies of injunctive relief or actual damages.

3. IS MCLA 15.363(1) IF A STATUTE OF LIMITATION, SO HARSH AS TO DIVEST PLAINTIFF OF THE ACCESS TO THE COURT INTENDED BY THE GRANT OF SUBSTANTIVE RIGHT THAT THE LEGISLATURE BESTOWED UPON PLAINTIFF?

Plaintiff/Appellant says "YES"

Defendant/Appellee says "NO"

The courts in this state have generally upheld the statutes of limitation, e.g. Forest v Parmalee, 402 Mich 348 (1978). There were, however, indications in Forest, supra, that statutes of limitation may be struck down by the court if they are harsh and unreasonable in their consequences. At 359 the court stated:

> "Statutes of limitation are generally considered to be procedural requirements. Buscaino v Rhodes, 385 Mich 474; 189 NW2d 202 (1971). We submit that as procedural requirements these statutes of limitation are to be upheld by courts unless it can be demonstrated that they are so harsh and unreasonable in their consequences that they effectively divest

plaintiffs of the access to the courts intended by the grant of substantive right."

We submit that such a harsh result can be demonstrated in the present case in that it is a non-union, non-federal, non-governmental worker who is in most need of protection afforded by this statute. These are people who, like the plaintiff herein, are relatively naive about the law, working at arduous tasks for low pay, and, in general, being unsophisticated about their rights. The 90-day limits would be in line with the sort of person to whom the 30-day limit for challenging elections was aimed or the 30-day day limit for a refund action involving a drain tax. These are relatively short statutes aimed at groups of people who are generally as a class to be considered legally astute and able to protect their rights in a timely fashion.

Plaintiff, and others like him, are not in that position and to impose such a short statute of limitation on them is an injustice. It tends to deny them the very rights which the statute fought to grant. Plaintiff/Appellant therefore submits to this court that the statute effectively divests Plaintiff of access to the court intended by the grant of the substantive right and therefore asks this court to find such statute of limitations to be unduly and unconstitutionally short.

4. ARE THE REMEDIES ENUNCIATED UNDER THE WHISTLEBLOWERS' ACT CUMULATIVE RATHER THAN EXCLUSIVE?

Plaintiff/Appellant says "YES"

Defendant/Appellee says "NO"

The general rule in Michigan is cited in Pompey v General Motors Corp., 385 Mich 537 (1971), at 552:

"The general rule, in which Michigan is aligned with a strong majority of jurisdictions, is that where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and non-performance is exclusive."

Pompey, supra, goes on to state, at 552:

"Correlatively, a statutory remedy for enforcement of a common-law right is deemed only cumulative."

Immediately thereafter, Pompey states:

"But courts have forged exceptions to these general rules when the statutory rights infringed were civil rights. Although there is some authority to the contrary most decisions have held that a person is entitled to pursue a remedy which will effectively reimburse him for or relieve him from violation of the statute, notwithstanding the statute did not expressly give him such right or remedy."

In 1978 in Trombetta v Detroit, T & I R Co, 81 Mich 489, at 495, the court stated:

"This Court has recognized exceptions to the well established rule that at will employment contracts are terminable at any time for any reason by either party. These exceptions were created to prevent individuals from contravening the public policy of this state.
"It is without question that the public policy of this state does not condone attempts to violate its duly enacted laws."

It is Plaintiff's contention that this statute is to be construed under Pompey, supra, as involving a cumulative rather than exclusive remedy afforded to Plaintiff in such matter. In the first instance under Pompey, there is, as cited in Trombetta, a prior recognition by this court of a common law right to keep one's employment in the face of reports of wrongdoing. That is, violations of its duly enacted laws. In Trombetta, the Plaintiff

was terminated for refusing to alter pollution control reports to benefit the corporation. In this matter, the Plaintiff/Appellant was terminated for reporting the illegal wage arrangements of Defendants to the Labor Board. There was therefore a common law right which the Whistleblowers' Act, enacted in 1981, effective March 31, 1981, was simply a codification of that common law right. Under Pompey, supra, it is to be deemed only cumulative.

This also could be considered a civil rights matter of the most fundamental type; that is, the ability to seek protection of the law without fear of economic reprisals on the part of one's employer especially when one seeks them against the employer. It is undoubtedly a civil right of citizens of this state to be free from harrassment and retribution when they attempt to do their duty and report wrongdoings. Any such threat, coersion attacks the entire system of laws upon which our government and society is based.

Therefore, Plaintiff/Appellant urges this court to find that the Whistleblowers' Protection Act is merely cumulative and not exclusive in the remedies afforded Plaintiff/Appellant in the matters covered thereunder.

5. DOES COUNT II OF PLAINTIFF'S COMPLAINT STATE A VALID CAUSE OF ACTION IN THAT IT ALLEGES A CAUSE OF ACTION FOR WRONGFUL DISCHARGE?

Plaintiff/Appellant says "YES"

Defendant/Appellee says "NO"

Count II of Plaintiff/Appellant's Complaint states a valid cause of action in that it alleges a breach of contract

based on an implied covenant of fair dealing. In contracts, it is fundamental that there is an implied covenant of fair dealing between the parties. This means that fraudulent, unconscionable, oppressive or over-reaching behavior will not be tolerated. This type of rule comes into play most often with contracts which are for the performance to be rendered to the satisfaction of the other party. The other party must in good faith be satisfied and cannot get out of said contract by refusing to be satisfied, no matter what the Plaintiff does. That refusal to be satisfied is unreasonable.

One of the matters which contravenes the covenant of good faith is that of discharging an employee for actions protected by public policy. That such behavior will not be tolerated is evident from the opinion of this court in Sventko v Kroger, 60 Mich App 644 (1976) at 647, when the court said:

> "Likewise, the better view is that an employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state."

Such a course would otherwise defeat the public policy and therefore would definitely not be dealing in good faith. This is so because the employee, who could otherwise expect to rely implicitly on the laws of this state as affording certain protections, right and duties on the part of the contractors to be in effect, would have to become a master of contracts. If they are not in effect, then these matters would have to be covered explicitly by the contract, and thus they would tend to abbrogate the protections afforded by said laws.

As such, the discharge for reasons that are against public policy

would be considered a breach of the terms of the contract and a cause of action would accrue to the employee. But the activity of reporting wrong-doing to the Labor Board for the mis-payment of wages is an activity protected by public policy. The purpose of such public policy is to encourage the use of the Labor Board and to protect the rights of employees with regard to the wage hour laws.

Discharge, because of the exercise of such a right, is a breach of the implied covenant of fair dealing in employment relation. Wherefore, Plaintiff/Appellant prays that this court find that there is a cause of action well-pleaded in Count II of Plaintiff/Appellant's Complaint.

6. DOES COUNT III OF PLAINTIFF'S COMPLAINT STATE A VALID CAUSE OF ACTION IN THAT IT ALLEGES A CAUSE OF ACTION FOR WRONGFUL DISCHARGE?

Plaintiff/Appellant says "YES"

Defendant/Appellee says "NO"

Count III of Plaintiff's complaint states a valid cause of action in that it alleges the cause of action for wrongful discharge under the facts as pleaded. This has been an action recognized in a number of states, including New Hampshire; see Monge v Bebe Rubber Company, 114 NH 130, 316 A2d 549 (Sup Ct NH 1974). This is a tort and not merely a contract breach because of the ramifications of the employer's action in the working society and the chilling effect of such a discharge go far beyond the damages that would normally be accorded in contract. There is, because of such actions on the part of the employers, a chilling effect upon the fundamental rights which the employees would

normally possess. Even though in such employment relations where the term of employment is "at will", public policy considerations have imposed many restrictions on the "at will" part of why a person may be discharged. One cannot be discharged for voting, jury duty, union activities, race, sex, color, religion, age and Whistleblowing, among others.

The courts in Michigan have recognized such a cause of action in both Trombetta, supra, and Sventko, supra.

In Sventko, supra, at 646, the court stated:

> "The decision below should be reversed. It is apparently true that the employment relationship present in this case was an employment at will. And, while it is generally true that either party may terminate an employment at will for any reason or for no reason, that rule is not absolute. It is too well-settled to require citation that an employer at will may not suddenly terminate the employment of persons because of their sex, race, or religion. Likewise, the better view is that an employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state."

It is therefore the contention of Plaintiff/Appellant that the law of this state certainly upholds the tort of wrongful discharge under the facts as plead by Plaintiff/Appellant in his Complaint.

7. DOES COUNT IV OF PLAINTIFF'S COMPLAINT STATE A VALID CAUSE OF ACTION AGAINST THE INDIVIDUAL DEFENDANTS WHEN IT ALLEGES INTERFERENCE WITH CONTRACTUAL RELATIONS?

Plaintiff/Appellant says "YES"

Defendant/Appellee says "NO"

In Tash v Houston, 74 Mich App 566 (1977) the court cited Prosser as stating, at 569:

"'[T]he overwhelming majority of the cases have held that interference with employments or other contracts terminable at will is actionable, since until it is terminated the contract is a subsisting relationship, of value to the plaintiff, and presumably to continue in effect.' Prosser, Law of Torts (4th ed) Sec. 129, pp 932-933."

It is the contention that the individual defendants acted in such a manner as to induce the plaintiff to be fired from his position by the defendant corporation. Tash, supra, is directly on point. It is a matter in which allegedly a plaintiff was fired from her job as a secretary for a union because she spurned the sexual advances of the president of the local. Her employment was "at will". The court relied in its decision for finding that there was an employment "at will", a tort for interference with contractual relations in employment at will situations, not only on the cite from Prosser but also on a 19th century case, Morgans v Andrews, 107 Mich 33, which was the first case to recognize the tort of contractual interference.

In this case, the plaintiff was an inventor and defendant was a stockholder in the corporation. Defendant interfered with the purchase of a machine that plaintiff had invented.

The court, in Tash, supra, at 574 stated:

"We think defendant here, as a union official, should have no greater privilege to interfere with the contractual relations of the union than that accorded corporate officials with regard to corporate contracts."

The corollary is also true; that corporate officials do not have a greater ability to interfere or privilege to interfere with contractual relations of the corporation than those accorded this union official.

Wherefore, Plaintiff/Appellant believes that this court should find that there is a valid cause of action pled in his complaint against the individual defendants in this matter.

RELIEF

WHEREFORE, Plaintiff/Appellant requests that this court reverse and remand the decision of the lower court in granting summary and/or accelerated judgment on all four counts and remand this matter to the lower court for further proceedings.

DATED: 8/27/84

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