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Court of Appeals Majority Holds That Expiration of a Definite Term Employment Contract Does not Preclude a Whistle Blower Protection Act Claim

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In the case of *Wurtz v. Beecher Metropolitan District,* Richard Wurtz worked as a district administrator for the Beecher Metropolitan District, a water and sewage service provider near Flint. During the course of his employment, Wurtz developed a poor relationship with three of the five elected board members for the district. In May of 2008, Wurtz sent a letter to the Genesee County Prosecutor, among others, alleging the board members violated the Open Meetings Act because they met privately with an attorney to discuss public business. In January of 2009, Wurtz sent a memorandum to one of the board members proposing an extension and alteration of his employment contract. The board's majority declined to have Wurtz draft a new employment contract, leaving his existing 10-year contract in full force. The contract expired and was not renewed.

Wurtz subsequently filed a lawsuit, claiming the decision to not renew his employment contract violated the Whistleblower Protection Act (WPA).

In this case of first impression, the appellate court imparted a broad interpretation of the second element of a WPA claim and held that non-renewal of an employment contract qualifies as an "adverse employment action."

The district argued that Wurtz was a contract employee and the failure to renew his contract could not be an "adverse employment action" because he had no expectation of employment after his contract expired. Rejecting this contention, the majority first considered the meaning of the term "adverse employment action."

The court observed that the WPA and the Michigan Civil Rights Act (CRA) use an identical definition for the term "adverse employment action." The definition derives from the federal courts' interpretation of the term in federal discrimination laws. Thus, the court relied on Michigan cases, interpreting the term in the CRA context, as well as the federal courts' interpretation of the term.

The majority noted that Michigan courts, in the CRA context, suggest that "the non-renewal of an employment contract may amount to an adverse discrimination action." Furthermore, the court cited to a federal case, which held that non-renewal of a university employee's five-year employment contract was an "adverse employment action" under Title VII and the ADEA. The majority agreed with this reasoning and noted that to hold otherwise, would create "an arbitrary distinction between contracted and at-will employees (who have no expectation of further employment from day to day)."

In her dissent, Judge Marilyn Kelly rejected the majority's analysis and first considered the definition of the term "employee" because in order to suffer an "adverse employment action" one must necessarily enjoy the status of "employee." Based on the plain language of the WPA, its protections can only extend to an "employee." Judge Kelly stated that Wurtz was no longer an employee because his contract was fulfilled and terminated by its express terms. Therefore, he could not have suffered an "adverse employment action."

Judge Kelly further noted that an "adverse employment action" must be considered within the four corners of Wutz's employment contract. Wurtz argued that although there was no renewal clause in his contract, he had a "continued employment relationship" similar to that of an at-will employee. Judge Kelly rejected this theory and stated that an at-will employment relationship is "radically different" from a contract employment relationship. An at-will employer must take affirmative steps to change an employee's status, whereas the status of a contract employee simply expires under the terms of the contract. To accept Wurtz's theory would mean accepting that his employment continued past the expiration, rendering "the termination date and modification clause in his contract nugatory."

Furthermore, it would mean accepting that "implied in every written contract, there is an obligation or duty to the parties to renew or continue the employment if desired by the employee." Judge Kelly noted that the contract expressly covered duration of employment and required that any modifications be mutually agreed upon in writing. Because his contract terminated, Wurtz was "merely a *candidate* for future employment" and had nothing more than a "unilateral hope of being reemployed."

Finally, Judge Kelly rejected the majority's reliance on cases in the CRA context and federal court decisions. She noted that treating the case as a "failure to renew" conflates the WPA with the CRA. While an "adverse employment action" can be pre-employment or failure to renew conduct in the CRA context, the same cannot be said under the WPA where "employee" is specifically defined. With respect to the federal court decisions, Judge Kelly noted that the cases were not binding. However, even if the cases were applicable, the case relied on by the majority was distinguishable because the contract in that case contained a renewal clause. Judge Kelly concluded that "because no adverse employment action was taken during his ten years of employment, Wurtz's claims failed as a matter of law."

Despite this robust dissent position, under the majority's holding in *Wurtz,* a new obligation or duty is imposed on employers to consider an extension or renewal of an employment contract, where a contract employee finishes a fixed term contract. This interpretation of the WPA may represent a significant departure of the scope of the protections originally afforded by the Act because, as noted by the dissent, the majority's holding not only re-writes employment contracts, but also creates a new cause of action where one "simply does not exist."

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