

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Paul J. Fischer,

Plaintiff,

Case No. 16- -CD

vs

State of Michigan and
The Judicial Tenure Commission,

Defendants.

16-016259-CD
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There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this Complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a Judge.

Michael L. Pitt

Michael L. Pitt P24429

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Paul J. Fischer, files his Complaint for wrongful discharge under the Whistleblower's Protection Act, MCL § 15.361 *et seq.* ("WPA") against Defendants and states as follows:

PARTIES JURISDICTION AND VENUE

1. Plaintiff, Paul J. Fischer ("Fischer"), is an individual residing in the City of Southfield, County of Oakland, Michigan.

2. Defendant State of Michigan is responsible for the creation and operation of the Judicial Tenure JTC ("JTC"), pursuant to Const 1963, Art 6, §30 and is located in Wayne County.

3. The JTC is an independent state agency.

4. The amount in controversy in this civil action is in excess of \$25,000.00 and jurisdiction is proper in this judicial circuit pursuant to the WPA. MCL § 15.363.

5. Venue is proper in this judicial circuit pursuant to MCL §15.363(2) because the JTC has its principal place of business in Wayne County and all events in controversy occurred in Wayne County.

STATEMENT OF FACTS

6. The JTC is an independent state agency created by Const 1963 art 6 § 30 and is authorized to investigate allegations of judicial misconduct or disability and to make recommendations to the Michigan Supreme Court as warranted.

7. The JTC operates through nine Commissioners, an Executive Director and General Counsel, attorneys and supporting staff.

8. The Executive Director and General Counsel, among other things, carries out the directives, policies and decisions of the JTC, provides legal advice to the Commission, supervises staff and attorneys and oversees investigations undertaken at the Commission's direction.

9. Fischer began his employment as Executive Director and General Counsel for the JTC in January 2001 and worked continuously in that capacity until September 12, 2016 when he was without valid reason involuntarily terminated from his position.

10. The General Counsel also acts as the Examiner after the issuance of a formal complaint under MCR 9.210(C).

11. As Examiner, Fischer was required to act as prosecutor in judicial misconduct hearings before the Master and Commission. After the Master makes a finding of judicial misconduct, the Examiner is required by law to evaluate the finding of judicial misconduct and the surrounding facts and circumstances and to make a recommendation to the Commission and Supreme Court for the appropriate discipline in accordance with the Supreme Court's *Brown* factors.

12. As Examiner, Fischer was legally required to zealously pursue the allegations of judicial misconduct and discharge his duties impartially even if doing so was "unpopular."

13. On June 24, 2015, Judge Lisa Gorcyca of the Oakland County Circuit Court, while presiding over a domestic relations case assigned to her, found the three minor children (then-aged 13, 10 and 9) of the parties in contempt of court and sent them to a juvenile detention facility for refusing to "have a healthy relationship with [their] father."

14. Judge Gorcyca incarcerated the minor children in the juvenile detention facility for a period of 17 days, during which time Judge Gorcyca specifically ordered that the children were not permitted to have contact with one another or their mother.

15. The actions of Judge Gorcyca received worldwide attention, including a video of the June 24, 2015 hearing going viral, exposing Judge Gorcyca's egregious behavior on a national scale and leading many media commentators to characterize her conduct as highly abusive toward the minor children.

16. The action taken by Judge Gorcyca on June 24, 2015, violated the Code of Judicial Conduct, as well as the due process and statutory rights of the minor children.

17. On July 10, 2015, Fischer sent an email to all members of the JTC requesting authority to proceed with an informal investigation into Judge Gorcyca's conduct.

18. Shortly after receiving Fischer's July 10th email, Commissioner 2 recused from the matter.

19. Shortly thereafter, Commissioners 3 and 4 also recused themselves.

20. The JTC approved the recommendation via e-mail vote, thus authorizing Fischer to proceed with the preliminary investigation into Judge Gorcyca's judicial conduct. Fischer and his staff commenced an official investigation into Gorcyca's alleged judicial misconduct.

21. In the latter part of August, 2015, and in anticipation of the August 31, 2015, JTC regularly scheduled meeting, Fischer and his staff recommended issuing a "28-day letter" pursuant to MCR 9.207(D)(1). The 28-day letter is the necessary pre-requisite to filing a formal complaint.

22. On August 26, 2015, JTC Commissioner 1 advised Fischer that “I have a real reservation about bringing a formal complaint but don’t see any harm to least sending out a 28 day letter to see what her side of this whole story is. Therefore I approve.”

23. At the August 31, 2015 Commission Meeting, Commissioner 2 , despite being recused, sought out Fischer in Fischer’s private office (away from the JTC and their meeting room) to discuss the Gorcyca matter.

24. Among other things, Commissioner 2 emphatically advised Fischer on at least two occasions that a public censure was the most severe sanction that Judge Gorcyca should face, and that Commissioner 2 had even expressed that opinion to Judge Gorcyca in one of their many discussions of the matter.

25. In November, 2015, after receiving Judge Gorcyca’s response to the 28-day letter and in anticipation of the JTC’s regularly scheduled December 14, 2015 meeting, Fischer and the JTC staff sent another report to the six Commissioners considering the matter, recommending that a formal complaint be issued.

26. At the December 14, 2015, the JTC went into “executive session.” Fischer and the recused Commissioners were excused so that the remaining Commissioners could deliberate on the question of whether a formal complaint should issue against Judge Gorcyca.

27. Upon returning to the meeting room, the Commissioners informed Fischer (and the three recused Commissioners) that it had authorized the issuance of Formal Complaint No. 98 against Judge Gorcyca.

28. Commissioner 2 immediately demonstrated a visible hostility toward Fischer and his staff.

29. Commissioner 2 later questioned Fischer's objectivity and judgment in the manner in which he was handling the Gorcyca matter.

30. Fischer assured Commissioner 2 that he was impartial and carrying out his duties in a proper and lawful manner.

31. From December 14, 2015, until his termination, Commissioner 2 was no longer friendly toward Fischer and did everything possible to avoid eye contact or interaction with Fischer.

32. Immediately following the decision to issue a formal complaint, the Commission adjourned its official business and greeted staff for a Holiday Celebration at the JTC office.

33. At the Holiday Celebration, a Commissioner made a speech recognizing the JTC as the "watchdog" in protecting the public from judicial misconduct. Commissioner 4 was overheard by JTC staff to say "sometimes they [the JTC] gets it wrong."

34. The formal complaint was sent to Judge Gorcyca's attorneys.

35. The formal complaint re-activated the pervasive and massive media attention to the manner in which Judge Gorcyca treated the children who appeared before her.

36. On or about January 6, 2016, some 50 or so citizens who identified themselves as lawyers were signatories to a document and a press release in support of Judge Gorcyca.

37. At the JTC's next meeting (January 11, 2016), the Commissioners were all discussing the letter by the lawyers in support of Judge Gorcyca. The Commissioners

articulated and seemed to adopt the construct argued by the supporting lawyers: that Judge Gorcyca was a “good judge who had a bad day.”

38. The lawyers’ letter was followed by media coverage of the outpouring of lawyer support of Judge Gorcyca with the media now asserting the same construct as articulated by the lawyer signatories to the letter.

39. Fischer viewed the Commissioners’ discussion of the letter and media support of Gorcyca as a signal that he was expected to view Judge Gorcyca as a good judge who made a mistake.

40. The Commissioners then went into “executive session,” as the first order of business, excusing Fischer from the room while the JTC engaged in 30 minutes or so of private discussion.

41. Prior to the January 11, 2016 executive session, the JTC only went into executive session to discuss (a) whether to issue a formal complaint; (b) how to rule on a formal complaint after the matter had been argued before them in a public session (akin to “jury deliberations;” and (c) salary-related matters for Fischer.

42. When Fischer inquired about the subject matter of the executive session, the Commissioners declined to answer his inquiry.

43. On January 22, 2016, the Michigan Supreme Court appointed retired Wayne County Circuit Court Judge Daniel Ryan to serve as the Hearing Master.

44. At the next regular meeting of the JTC held on February 8, 2016, the JTC continued its unprecedented executive sessions, by conducting an executive session at the beginning of the meeting. Fischer’s request for information about the subject matter of the meeting was denied.

45. Commissioners 2, 3 and 4 (the three who were recused in the Gorcyca matter) were in attendance at those sessions whenever they were attending a regular meeting.

46. On at least two occasions in February, 2016 and mid-June, 2016, (once by phone and once in person), Fischer told Commissioner 1 that the JTC had to stop treating the Gorcyca matter differently than it treated other cases; that the JTC should let the process run its regular course and let the procedures as set forth in the court rules govern and that the JTC should stop talking about the case, especially when the recused members were present.

47. Commissioner 1 responded both times with a “Yeah, well . . .” and nothing more, and shrugged his shoulders at the same time in the face-to-face encounter. No action was taken by Commissioner 1 to discontinue the improper executive sessions.

48. The hearing on the allegations in the formal complaint was held before Hearing Master Ryan on May 31 and June 1, 2016.

49. Within days of the hearing, Commissioner 1 asked Fischer to send copies of the hearing transcript to all Commissioners.

50. Sending the hearing transcript to all Commissioners was unusual. The usual practice was to assign one member to read the transcript and report his or her conclusions to the other Commissioners. This function is now performed by the JTC’s adjunct counsel, who assists the JTC in drafting its written recommendation.

51. In a one on one meeting held in June, 2016, Fischer again advised Commissioner 1 that the JTC should not treat the Gorcyca case any differently than any other case, that it should let the process proceed, and that the JTC should stop engaging

in *ex parte* communications with any of the recused Commissioners, who continued to be part of those extraordinary executive sessions every month.

52. Commission 1 shrugged and said, "Yeah, well..." No corrective action was taken as a result of Fischer's complaint.

53. At the June 20, 2016 regularly-scheduled meeting, the JTC again went into an irregular executive session as its first order of business. Again, the JTC declined to advise Fischer of anything that had transpired.

54. On July 1, 2016, Hearing Master Ryan concluded that Judge Gorcyca engaged in judicial misconduct and issued a 34-page Master's Hearing Report ("Report") documenting his findings and conclusions of law.

55. Shortly after the issuance of the Report, Commissioner 4 revoked his recusal without stating a reason for reversing his position. No such "un-recusal" has ever occurred in the 16 years Fischer worked for the JTC.

56. On August 26, 2016, Fischer, as part of his job responsibilities, filed with the Commission a detailed analysis of Judge Gorcyca's conduct rejecting the construct favored by many of the Commissioners. Fischer vociferously urged JTC to affirm the Report of judicial misconduct.

57. Further, as part of his job responsibilities, Fischer analyzed the *Brown* factors and recommended that the JTC recommend to the Supreme Court that Judge Gorcyca be suspended for nine months without pay and assessed costs of more than \$12,000.

58. At the regularly scheduled meeting on September 12, 2016, Fischer was present in the Commissioner's meeting room, ready to start the meeting. When the last

Commissioner arrived, and Fischer was preparing for the meeting to be called to order, Commissioner 1 announced that the JTC was going into executive session. Fischer was asked to leave the meeting. Fischer left the room as instructed.

59. Approximately 45 minutes later, and Commissioner 1 and Commissioner 3 came into Fischer's office and notified him that effective immediately he was terminated as the JTC's Executive Director and General Counsel.

60. Fischer was told to leave the premises that very day. Commissioners 1 and 3 told Fischer to let Commissioner 1 know by Friday, September 16, 2016, whether he (Fischer) wanted to treat the termination as a voluntary resignation or as a firing. Fischer refused to resign and was terminated on September 16, 2016.

61. When Fischer asked Commissioners 1 and 3 for an explanation, Commissioner 1 said that he did not think that the reason was important.

62. When Fischer continued to press for an explanation, Commissioner 3 told Fischer that (1) "we told you not to speak against the JTC" and (2) "we don't like the twists some of the investigations have taken."

63. On October 10, 2016, the JTC held oral argument on the Judge Gorcyca's Objections.

64. On November 14, 2016, the JTC found Gorcyca guilty of judicial misconduct and ordered her suspended without pay for 30 days plus payment of costs.

COUNT I
Violation of Michigan Whistleblower Protection Act ("WPA")

65. Fischer incorporates the above Statement of Facts as though stated in full herein.

66. The JTC, as an arm of the state, is an employer under the WPA. MCL 15.361(b).

67. The Commissioner's and the JTC are "public bodies" as defined in the WPA. MCL §15.361(d).

68. Judge Gorcyca's conduct toward the minor children before her constituted a violation of law.

69. The JTC conduct of permitting recused Commissioners to participate or to influence the deliberation process of the Gorcyca matter constitutes a violation of law.

70. It was unlawful for the JTC to retaliate against Fischer because he engaged in activity protected by the WPA.

71. Fischer engaged in protected activities when he brought charges against Judge Gorcyca and rejected the Commissioner's construct and instead recommended to the JTC a level of discipline which he judged to be appropriate in light of the *Brown* factors.

72. Fischer's recommendation to the Commission of a nine month unpaid suspension was a "report of violation of law" and was protected activity under the WPA.

73. Fischer also engaged in protected activity when he reported a violation of law to Commissioner 1 occurring when recused Commissioners were permitted to express their views to the other Commissioners deliberating the Gorcyca matter or were otherwise permitted to influence the decision making process concerning Judge Gorcyca.

74. Fischer was terminated because he engaged in the protected activity alleged above.

75. As a direct violation of his rights under the WPA, Fischer has and will continue to experience a loss of salary and benefits into the future; Fischer has and will experience non-economic damages including embarrassment, humiliation, loss of reputation, emotional distress and outrage.

Accordingly, Fischer requests the following relief from the court:

- a. An Order awarding him compensatory damages;
- b. An Order awarding him cost of litigation and actual attorney fees; and
- c. An Order granting him such other relief as the Court may deem appropriate.

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Dated: December 9, 2016

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JURY DEMAND

Plaintiff demands a trial by jury of all issues to the within cause of action.

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Dated: December 9, 2016