IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| CHRISTINE D. TOMEI, | § | |
| | § | No. 329, 2006 |
| Plaintiff Below- | § | |
| Appellant, | § | Court Below: Superior Court |
| | § | of the State of Delaware in and |
| | § | for New Castle County |
| v. | § | |
| | § | |
| THOMAS SHARP, | § | C.A. No. 05C-10-104 |
| individually and in his official | § | |
| capacity; ROBERT STRONG, | § | |
| individually and in his official | § | |
| capacity; and STATE OF | § | |
| DELAWARE, | § | |
| DEPARTMENT OF LABOR | § | |
| | § | |
| Defendant Below- | § | |
| Appellee. | § | |

Submitted: November 14, 2006
Decided: January 30, 2007

Before **BERGER, JACOBS,** and **RIDGELY**, Justices.

***O R D E R***

(1) Appellant Christine Tomei appeals the Superior Court's dismissal of her claims against Defendants Thomas Sharp, Robert Strong, the Department of Labor and the State of Delaware, for alleged violations of the Delaware Whistleblowers' Protection Act[1] and breach of the covenant of good faith and fair

[1] Delaware Whistleblowers' Protection Act, 19 *Del. C.* §§ 1701-08.

dealing. Tomei argues on appeal that the trial court's interpretation of the term "employer" within the Delaware Whistleblowers' Protection Act is erroneous and inconsistent with the purpose of the Act. We find no error by the Superior Court. Accordingly, we affirm.

(2) Prior to October 2000, Tomei worked for the United States Department of Education ("DOE"). Upon becoming aware of allegedly fraudulent activities within the Department, she reported those activities to the DOE Inspector General in October 2000. In February 2001, she separated employment with DOE.

(3) In November 2004, Tomei applied for a Trainer/Educator II with the State of Delaware, Department of Labor, Division of Employment and Training. Plaintiff informed those conducting the interview process of her prior whistle blowing activity and was told that it would not be a factor in determining her employment. Tomei was ultimately hired for the position and began employment on May 16, 2005. On May 18, Tomei was accused of offending a co-worker. On June 6, 2005, Tomei met with the Director of the Division, Defendant Robert Strong and another supervisor. Strong advised Tomei that there were complaints about her work and that it was inappropriate for her to discuss her past whistle blowing activity with her co-workers.

(4) On June 16, 2005, approximately one month after she began her new job with the State, Tomei was fired for "failure to satisfactorily perform the duties

of [her] position." Tomei promptly filed an appeal of her termination with the State Personnel Office ("SPO") and the Merit Employee Relations Board ("MERB"). A grievance hearing with the SPO was scheduled for July 22, 2005. On July 18, 2005, the SPO cancelled the meeting because "her job classification fell under the Union's collective bargaining unit, but . . . her job was not union-eligible, nor was she a member of the union." Tomei then filed a complaint in the Superior Court alleging violations of the Delaware Whistleblowers' Protection Act as well as the covenant of good faith and fair dealing. In her complaint, Tomei alleged that she was fired from her State job for blowing the whistle at a federal agency as a federal employee.

(5) The Superior Court dismissed Tomei's complaint on May 25, 2006. In doing so, the court held (1) that the enactment of the Whistleblowers' Protection Act is an express waiver of the State's immunity, but that waiver did not apply to the individual Defendants in this case; (2) the absence of insurance coverage did not bar Tomei's suit; (3) Tomei was not protected under the Act because her whistle blowing activities occurred during her employment for the DOE, not the State of Delaware; and (4) Tomei's claim for breach of the covenant of good faith and fair dealing was barred because of the State's lack of insurance coverage.[2]

[2] *Tomei v. Sharp*, 902 A.2d 757, 769 (Del. Super 2006).

Tomei appeals only the Superior Court's ruling that she is not protected under the Act because her whistle blowing activities occurred before she was employed by the State of Delaware.

(6) The Superior Court found that because Tomei's whistle blowing did not relate to the State of Delaware in any way, the State could not be liable under the Delaware Whistleblowers' Protection Act. Specifically, the trial court construed the term "employer," as used in the Act,[3] to mean the employee's actual or current employer, not a past employer. In making this finding, the trial court reviewed House Amendment 3, a 2004 amendment to the Act had the following synopsis: "[t]his amendment specifies that whistle blowing protection under Senate Bill No. 173 is granted to employees with regard to reports of participation in investigations of acts or omissions of *their* employer."[4] Based on the legislative history, the Superior Court reasoned that the Delaware Whistleblowers' Protection Act protects only those who blow the whistle on, and are fired from, the same employer.

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[3] 19 *Del. C.* § 1702(2) ("'Employer' means any person, partnership, association, sole proprietorship, corporation or other business entity, including any department, agency, commission, committee, board, council, bureau, or authority or any subdivision of them in state, county or municipal government. One shall employ another if services are performed for wages or under any contract of hire, written or oral, express or implied.").

[4] Del. H.A. 3 syn., 142d Gen. Assem. (2004).

(7) Tomei makes two related arguments on appeal. First, she contends that the Superior Court misinterpreted the term "employer" under the Act, and that the court's interpretation frustrates the broader purpose of the Act. Second, Tomei claims that the Superior Court's conclusion that her proposed construction of the term would "permanently cloak a whistle blowing employee with protection from termination or other employment sanctions" is without rational or practical foundation and contrary to the application of similar statutes in other states. We review the Superior Court's grant of the Defendants' motion to dismiss *de novo*.[5]

(8) This Court gives full effect to the Legislature's intent when construing a statute.[6] "Where the language of the statute is unambiguous, no interpretation is required and the plain meaning of the words controls."[7] If the statute, however, is ambiguous, it "must be construed as a whole in a manner that avoids absurd results."[8] A statute is ambiguous if it "is reasonably susceptible of different conclusions or interpretations."[9] A statute may also be ambiguous if "a literal interpretation to words of the statute would lead to such unreasonable or absurd

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[5] *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001); *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998) ("A motion to dismiss a complaint presents the trial court with a question of law and is subject to *de novo* review by this Court on appeal.").
[6] *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000).
[7] *Id.* (citing *Spielberg v. State*, 558 A.2d 291 (Del. 1989)).
[8] *Id.*
[9] *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985).

consequences . . . [that] could not have been intended by the legislature."[10] This statute is ambiguous in the sense that it is unclear whether the term "employer" applies only to current employers or includes prior or subsequent employers as well.

(9) The Superior Court recognized this ambiguity and undertook the next step in statutory construction. That is, it looked to the legislative intent to determine the meaning of the term employer. In doing so, the court properly focused on the legislative history of the Act. As the Superior Court explained, House Amendment 3 expanded the scope of the Act to include both public and private employers. In addition, the synopsis reveals that the "Amendment specifies that whistleblower protection under Senate Bill No. 173 is granted to employees with regard to reports of or participation in investigations of acts or omissions of *their employer*, or an agent thereof . . . ."[11] By modifying the term employer with the pronoun "their," it is plain that the legislature intended the Act to protect an employee only from retaliation from the employer that committed the violation as defined by § 1703.[12] The Superior Court gave full effect to the Legislature's intent

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[10] *Id.*
[11] Del. H.A. 3 syn., 142d Gen. Assem. (2004).
[12] 11 *Del. C.* § 1703 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:

and found the Delaware Whistleblowers' Protection Act inapplicable because Tomei has not alleged a "violation" as defined by Section 1702(6).

(10) Section 1702(6) defines a violation as "an act or omission by an *employer*, or an agent thereof, that is" either:

> a. Materially inconsistent with, and a serious deviation from, standards implemented pursuant to a law, rule, or regulation promulgated under the laws of this State, a political subdivision of this State, or the United States, to protect employees or other persons health, safety, or environmental hazards while on the employer's premises or elsewhere; or
> b. Materially inconsistent with, and a serious deviation from, financial management or accounting standards implemented pursuant to a rule or regulation promulgated by the employer or a law, rule, or regulation promulgated under the States, to protect any person from fraud, deceit, or misappropriation of public or private funds or assets under the control of the employer.

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(1) Because the employee, or a person acting on behalf of the employee, reports or is about to report to a public body, verbally or in writing, a violation which the employee knows or reasonably believes has occurred or is about to occur, unless the employee knows or has reason to know that the report is false; or
(2) Because an employee participates or is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action, in connection with a violation as defined in this chapter; or
(3) Because an employee refuses to commit or assist in the commission of a violation, as defined in this chapter; or
(4) Because the employee reports verbally or in writing to the employer or to the employee's supervisor a violation, which the employee knows or reasonably believes has occurred or is about to occur, unless the employee knows or has reason to know that the report is false. Provided, however that if the report is verbally made, the employee must establish by clear and convincing evidence that such report was made.

The complaint does not allege that any of the Defendants in this action committed either of the above acts.

(11) Tomei argues for a different interpretation. She cites to numerous cases from other jurisdictions, both federal and state, involving different whistleblower statutes and relies heavily upon *Robinson v. Shell Oil Co.*[13] In *Robinson*, the United States Supreme Court addressed the same issue but in the context of Title VII of the Civil Rights Act of 1964. It ultimately found the term "employer" "ambiguous as to whether it excludes former employers."[14] The rationale for the Superior Court's decision was that there was "no temporal qualifier in the statute such as would make it plain that § 704(a) protects only persons still employed at the time of the retaliation."[15] The *Robinson* court recognized, however, that some statutes *do* make this type of distinction.[16] The Delaware Whistleblowers' Protection Act is one such statute. While it does not make the distinction directly in the language of the statute, the Legislative history makes the distinction clear. We find that Tomei's reliance on *Robinson* is misplaced.

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[13] 519 U.S. 337 (1997).
[14] *Id.* at 341.
[15] *Id.*
[16] *Id.* at 341-42 ("Similarly, other statutes have been more specific in their coverage of "employees" and "former employees," proves only that Congress *can* use the unqualified term "employees" to refer only to current employees, not that it did so in this particular statute.").

(12) Tomei also suggests that the Superior Court's interpretation of the term "employer" is inconsistent with the statutory scheme and purpose. It is not. Tomei's interpretation of the Act is simply too broad and would lead to a result contrary to the intent of the General Assembly as shown by the legislative history of the Act. We conclude The Superior Court did not err in dismissing the complaint in this case.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/Henry duPont Ridgely
Justice