

COA Opinion: Under the Whistleblowers' Protection Act the statutory definition of 'public body' does not include a private body whose implementation, action or reporting is directed by the government.

13. January 2011 By Layla Kuhl

In *Denney v. Dow Chemical Co.*, the Michigan Court of Appeals affirmed the trial court's grant of summary disposition to defendant The Dow Chemical Company on plaintiff's employment claims (1) for violating the Whistleblowers' Protection Act (WPA), (2) for breach of implied contract, and (3) for sex discrimination. Notably the Court of Appeals concluded that the WPA's statutory definition of "public body" does not include a private body whose implementation, action or reporting is directed by the government.

Plaintiff claims that she was "demoted" because she reported concerns about an external data-validation process to a Dow employee who the Plaintiff believed was Dow's compliance coordinator. At the close of discovery, the trial court granted summary disposition in favor of defendant specifically finding that plaintiff's WPA claim failed because she "did not report her concerns to any public body as defined in the Act; nor did she claim that she was about to make a report to any public body." The Court of Appeals similarly concluded that plaintiff's argument that the WPA "covers reports to a private body when the government sets forth directions regarding the private body's implementation, action or reporting" is inconsistent with the plain language of the statutory definition of "public body."

The Court of Appeals further determined that plaintiff could not establish a breach of implied contract based on defendant's non-retaliation policy in its "Code of Business Conduct" because plaintiff signed an employment application that stated that "any other Dow documents are not contracts of employment" and because defendant's "Code of Business Conduct" disclaimed the intent to form a contract with the employee. Finally, the Court of Appeals agreed with the trial court's conclusion that plaintiff's change in job duties did not arise to the level of an adverse employment action. The Court of Appeals went on to state that even if it were to assume that plaintiff suffered an adverse employment action, it could not conclude that the circumstances in this case create an inference that defendant's actions were motivated by gender animus.

Disclaimer: WNJ represented the prevailing defendant-appellee, The Dow Chemical Company, in this case.