STATE OF MICHIGAN

IN THE SUPREME COURT

CLEVELAND STEGALL,

Plaintiff-Appellant,

v.

RESOURCE TECHNOLOGY CORPORATION d/b/a BRIGHTWING and FCA US LLC,

Defendants-Appellees.

MSC: 165450
COA Docket No.: 341197
LC No.: 2016-155043-CD

BRIEF FOR AMICUS CURIAE MICHIGAN CHAMBER OF COMMERCE IN SUPPORT OF AFFIRMANCE

Date: January 12, 2024

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that OSHA and MiOSHA pre-empt Appellant's public policy claims under *Dudewicz v. Norris-Schmid, Inc.*, which is still a binding Michigan Supreme Court decision.

   Amicus curiae's answer: Yes.

   Appellant's answer: No.

   Appellees' answers: Yes.

   Court of Appeals' answer: Yes.

2. Whether OSHA and MiOSHA pre-empt public policy claims because they provide adequate remedies.

   Amicus curiae's answer: Yes.

   Appellant's answer: No.

   Appellees' answers: Yes.

   Court of Appeals' answer: Yes.

INTEREST OF AMICI CURIAE[1]

The Michigan Chamber of Commerce (the "Michigan Chamber") submits this amicus curiae brief to the Court in *Stegall v. Resource Technology Corporation, et al.*, SC No. 165450. The Michigan Chamber is Michigan's leading state-wide business advocacy organization. For over 60 years, the Michigan Chamber has worked to support efforts to make Michigan an attractive destination for world-class employers and talent.

Using its voice to advance member priorities through legislative, legal, and political action, the Michigan Chamber's ultimate goal is to achieve policies that benefit members, their employees, and in turn the people of the State of Michigan. Along with its advocacy efforts, the Michigan Chamber helps its members address business challenges by providing effective solutions and promoting sustained economic prosperity in Michigan. Its membership of more than 4,000 includes businesses big and small, trade associations, and local chambers of commerce representing all 83 Michigan counties. In total, the members of the Michigan Chamber employ over a million Michiganders.

The Court took under consideration Plaintiff-Appellant Cleveland Stegall's application for leave to appeal in *Stegall v. Resource Technology Corporation, et al.*, SC No. 165450. In that Order, the Court outlined two issues for the parties to address

[1] Counsel for a party did not author this brief in whole or in part and did not make a monetary contribution intended to fund the preparation or submission of the brief. No person other than the amici curiae and their members made such a monetary contribution. MCR. 7.312(H)(4).

in supplemental briefing. These included (1) whether a public policy claim for retaliation based on a statute that has an anti-retaliation provision still exists under *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695 & n 2 (1982), after this Court's decision in *Dudewicz v Norris Schmid, Inc*, 443 Mich 68 (1993), overruled in part on other grounds by *Brown v Detroit Mayor*, 478 Mich 589, 594 n 2 (2007); and (2) whether the Court of Appeals correctly held that the plaintiff's public-policy claim was preempted by the Occupational Safety and Health Act, *see* 29 USC 651 *et seq*., and the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq*., or whether the claim was not preempted because the remedy provided by the statutes is inadequate. However, in doing so, the Court also invited groups interested in the outcome of the case to file briefs amicus curiae.

The Michigan Chamber submits this brief addressing the issues delineated by the Court in the interest of protecting the policies embraced by the Legislature in the statutes at issue, which already provide comprehensive remedies. The Michigan Chamber believes that the lower courts correctly determined that OSHA and MiOSHA pre-empt whistleblower claims based on public policy. The Court should affirm the ruling of the Court of Appeals and Court of Claims.

ARGUMENT

I. *Dudewicz v. Norris-Schmid, Inc.* Bars Appellant's Public Policy Claims.

Either employee or employer may normally terminate an employment relationship in the State of Michigan at any time for any reason. *See generally*

Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579 (1980). While there is a limited exception when the "grounds for discharging an employee are so contrary to public policy as to be actionable," as stated in *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 695 (1982), the exception does not apply here. Indeed, according to this Court's precedent, public policy claims for retaliation based upon a statute that has an anti-retaliation provision are pre-empted. *Dudewicz v. Norris-Schmid, Inc.* 443 Mich. 68 (1993). *Dudewicz* addressed when the alleged "public policy" is based on a well-established legislative enactment and is therefore pre-empted as a matter of law. In particular, the Michigan Supreme Court found that a public policy claim is sustainable "*only* where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue." *Id.*, at 79-80 (emphasis added). Based on this, the Court declined to recognize a public-policy based retaliation claim because Michigan already had an existing statutory scheme (the Whistleblower Protection Act) applicable to the employee's circumstances. So too here.

Both OSHA and MiOSHA supply a comprehensive statutory framework (as examined further below) prohibiting wrongful discharge in retaliation of applicable employee complaints that relate to workplace safety. The gravamen of Plaintiff's complaint here is that he made a workplace safety complaint that resulted in his allegedly wrongful termination. This case is no different from *Dudewicz*, and, therefore, its outcome should be the same as well.

In this regard, the lower court correctly decided that both MiOSHA and OSHA pre-empt Plaintiff's public policy claim. *Stegall v. Res. Tech. Corp.*, No. 341197, 2023 WL 1485667, *5 (Mich. Ct. App. Feb. 2, 2023). It held that the decision was consistent with not only *Dudewicz*, but also *Suchodolski v Mich Consol Gas Co*, 412 Mich 692 (1982). In doing so, the court relied on *Ohlsen v DST Indus., Inc.* 111 Mich App 580, 584-586 (1981), which found that the plaintiff-employee there could not pursue a common law tort action regarding his alleged retaliatory discharge because MiOSHA prohibited retaliatory discharges and provided an exclusive remedy.

Notwithstanding insinuations to the contrary, *Suchodolski v Mich Consol Gas Co*, *supra*, did not create or even acknowledge a public policy claim for retaliation based upon a statute that has an anti-retaliation provision. Any argument in support of that assertion is based upon nothing more than that Court's citation to the Elliott-Larsen Civil Rights Act, Handicappers' Civil Rights Act, MiOSHA, and the Whistleblower's Protection act in footnote 2 of that decision. *Id.* at 695 n. 2. However, in doing so, the Court did not cite to those statutes as examples of when a public policy claim could be pursued. Rather, it merely cited to them as examples of when the legislature had made an "explicit legislative statement prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty." *Id.* at 695. Such a reference is less than dicta. As such, any effort to cite to the Court's reference to those statutes as somehow creating a public policy claim for retaliation based upon a statute that has an anti-retaliation provision misconstrues the context of the Court's footnote.

Dudewicz remains the law of the land in Michigan—*to wit*, a public policy claim for retaliation based upon a statute that has an anti-retaliation provision does not exist. This has been so for more than 30 years. There is no justifiable reason to depart from it now. *See Stegall v. Res. Tech. Corp.*, No. 341197, 2023 WL 1485667 (Mich. Ct. App. Feb. 2, 2023); *Anzaldua v. Neogen Corp.*, 292 Mich. App. 626, 631 (2011); *Kimmelman v. Heather Downs Mgmt. Ltd.*, 278 Mich. App. 569, 575 (2008). As this Court recognizes, *stare decisis* is generally "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson v. City of Detroit*, 462 Mich. 439, 463 (2000). Plaintiff has not shown that *Dudewicz* is so "unworkable" or "badly reasoned" as to require reconsideration. *Id.* at 464. One of the most important factors to consider is the effects of overruling precedent, including the effect on reliance interests and whether overruling would work an undue hardship because of that reliance. *Id.* at 466.

Failing to adhere to *Dudewicz* would disrupt the reliance Michigan employers and lower courts have placed on this precedent for the last 30-years. Doing so would only discourage existing and potential employers from investing in Michigan and creating employment opportunities due to uncertainty in jurisprudence and heightened risks of litigation. For reasons such as this, this Court has repeatedly refrained from fashioning new judicial remedies where, as here, there is existing statutory framework.

Recently, in *Bauserman v. Unemployment Ins. Agency*, 509 Mich. 673 (2022), the Court found that (while the Legislature cannot trump the Constitution itself), the Legislature "may implement a remedial scheme that provides a means of vindicating the constitutional right at a level equal to a remedy this Court could afford. ***In those circumstances, we would be unlikely to duplicate the Legislature's efforts.***" *Id.* at 687 (emphasis added). Similarly, in *Lash v. City of Traverse,* 479 Mich. 180 (2007), this Court refused to recognize a private cause of action for monetary damages for the City of Traverse's violation of the relevant statute's residency requirement (MCL 15.602(2)). The state residency law did not provide monetary relief via a private right of action, but allowed for injunctive relief and declaratory relief. *Id.* at 196. In response to the plaintiff-employee's argument that these existing remedies were illusory because they appeared to be costly, this Court held that it could not fashion a new remedy "simply because other available remedies are less economically advantageous to plaintiff." *Id.* at 197. Pointedly, the Court observed that it is not within the authority of the judiciary "to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy. Rather, the relief that plaintiff seeks must be provided by the Legislature." *Id.* at 197.

Even in cases where this Court did recognize a public policy claim, this resulted in splintered decisions. For instance, this Court recognized a public policy retaliation claim separate from the Michigan's Whistleblower Protection Act in *Janetsky v. County of Saginaw*, 982 N.W.2d 374 (2022) (Clement, C.J., Viviano, J., and Zahra, J. concurring in part and dissenting in part; Welch, J. dissenting in part). In that case,

the Court found the basis for a public policy claim because the plaintiff's conduct at issue there (refusing to violate law) was not covered by WPA, which only governs reports of violations or suspected violations of the law. *Id.* at 376. Of note, Justice Welch disagreed with the holding that the plaintiff could assert a public policy claim because WPA already provides "the exclusive remedy for an employee whose employment is terminated in retaliation for reporting an employer's violation of the law." *Id.* at 384. In doing so, Justice Welch expressly embraced the holding in *Dudewicz* barring public policy claims unless no applicable statutory prohibition exists for the conduct at issue. *Id.* at 385.

II. OSHA And MiOSHA Pre-empt Public Policy Claims Because They Already Provide Adequate Remedies.

In this case, Plaintiff bases his public policy claim on the workplace safety concerns covered by OSHA and MiOSHA, which expressly provide protection against—and remedy for—the conduct at issue in his claims. As MiOSHA and OSHA are the state and federal statutes that govern the relevant workplace safety allegations, there should be little doubt that Plaintiff's claim was appropriately pre-empted by OSHA and MiOSHA. In fact, Plaintiff undisputedly and correctly sought to pursue a claim with MiOSHA. While his preferred action may not have been taken on his behalf, it does not change the coverage of those statutes or the anti-retaliation provisions applicable to his claim, much less the remedies that would have been available had MiOSHA found the complaint worthy of pursuit.

Contrary to the assertions of Plaintiff, this Court has already confirmed that the adequacy of a statutory remedy is not determinative of whether that remedy is deemed to be exclusive. *See Lash,* 479 Mich. at 192 n. 19 (finding that the Court could not fashion a new remedy "simply because other available remedies are less economically advantageous to plaintiff."). In doing so, this Court confirmed that the language of *Ponmey v. Gen. Motors Corp,* 285 Mich. 537, 552 n. 14 (1971), indicating that is a "statutory remedy is not deemed exclusive if such remedy is plainly inadequate," was dictum and inconsistent with subsequent case law. *Lash* at 192 n. 19. As such, the adequacy of any remedy provided by OSHA or MiOSHA should not be a relevant factor to any determination of preemption in the case at hand.

Nevertheless, even if this Court determines that the adequacy of the available remedies is a determinative factor, it still does not change the result. Contrary to what Plaintiff or others might contend, each statute provides more than adequate remedies to support preemption. For instance, MiOSHA provides as follows:

> An employee who believes that he or she was discharged or otherwise discriminated against by a person in violation of this section may file a complaint with the department of labor alleging the discrimination within 30 days after the violation occurs. Upon receipt of the complaint, the department of labor shall cause an investigation to be made as it considers appropriate. ***If, upon the investigation, the department determines that this section was violated, the department shall order all appropriate relief, including rehiring or reinstatement of an employee to his or her former position with back pay***.

MCL 408.1065(2) (emphasis added). Similar to MiOSHA, OSHA allows rewarding "all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay." 29 USC 660(c) (2). Indeed, the plain language of both

statutes provides for "all appropriate relief," and does not limit the potential remedies, but provides further illustrations of what such relief may include. These remedies are more than adequate to address any potential violation.

A review of the administrative decisions made by the Michigan State Administrative Board (the "Board") regarding MiOSHA violations confirms that "all appropriate relief" has in fact been awarded under the statute. For instance, in *Goodloe v. Ford Motor Company*, MI-DI 79-22 (1982) the Board awarded attorney's fees to an employee who it found had been terminated for refusing to perform dangerous work, in violation of MiOSHA. Similarly, in *Spurlock v. American International Airways*, MI-DI 92-234 (1993), the Board awarded attorney's fees along with reinstatement and back pay for violations of MiOSHA. The Board has even gone so far as to order an employer to pay medical expenses and 401k contributions to an employee who it found was terminated for refusing to complete his assignment in dangerous working conditions in violation of MiOSHA. *Groeneveld v. Cemex*, MI-DI 2003-364 (2003). While there are other examples, these decisions more than confirm that the statutory remedy provided is sufficient to address wrongdoing that might occur. As such, there should be little doubt that the remedies provided for are more than adequate to support preemption in this instance.

Indeed, any criticisms of the adequacy of remedies under either OSHA or MiOSHA are not so much criticisms of the available remedies as much as criticism of the statutory enforcement plans established by the Legislature. For instance, in the case at hand, Plaintiff alleges that he has no remedy because MiOSHA decided not

to take any action on his behalf. However, in doing so, Plaintiff fails to appreciate the difference between the statutory enforcement process (which determined his claim was not worth pursuing) and the remedies that would have been available had his claim been pursued and a violation found. In reality, his complaint is not about the available remedies but that the agency decided his claim was not worth pursuing. However, the lack of a valid claim does not change that fact that the remedies available for valid claims are more than adequate.

A similarly flawed analysis has been applied by those courts criticizing the adequacy of remedies under OSHA. For example, in *Flanker v Willamette Indus, Inc.* 266 Kan. 198, 205 (1998) (cited by Plaintiff), the court criticized the adequacy of OSHA remedies based upon the fact that the Secretary of Labor determines whether to bring an action and because of the time in which a claim must be pursued. However, neither of these criticism have anything to do with the available remedies. Again, the complaint regarding inadequacy of the remedy was really nothing more than a criticism of the statutory framework established by the Legislature. Either way, it was not a legitimate criticism of the adequacy of the *remedies* provided and is inapposite here.

While members of this Court may prefer OSHA and MiOSHA provide for remedies outside of those established by the Legislature, it must appreciate that it simply cannot substitute its own judgment for that of the Legislature. After all, "[i]t is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court prefers." *Mays v. Governor of Michigan,*

506 Mich. 157 (2020) (quoting *South Haven v. Van Buren Co Bd of Comm'rs,* 478 Mich 518, 528-29 (2007). Accordingly, even if this Court might be inclined to seek additional remedies to those provided by the legislature, it should not change the fact that those provided are adequate.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the Michigan Chamber of Commerce respectfully asks this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

Date: January 12, 2024

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PROOF OF SERVICE

I hereby certify that on January 12, 2024, I electronically filed the above documents and this Proof of Service with the Clerk of the Court using the Court's eFiling system, which will send notification of such filing to those who are currently on the list to receive e-mail notices for this case.

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