

2012 IL App (2d) 120365-U
No. 2-12-0365
Order filed December 18, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

DONIAN ESTERLEN,)	Appeal from the Circuit Court
)	of Winnebago County.
Plaintiff-Appellant,)	
)	
v.)	No. 11-L-171
)	
JAMCO PRODUCTS, INC.,)	Honorable
)	Eugene G. Doherty,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶1 *Held:* The trial court properly dismissed plaintiff's complaint for retaliatory discharge: his threat to report defendant to OSHA, not because of any risk to public safety but only because of what he perceived to be his excessive workload, was not protected by any public policy.

¶2 After defendant, Jamco Products, Inc., fired plaintiff, Donian Esterlen, he sued, alleging that defendant fired him in retaliation for his threatening to report defendant's purportedly illegal conduct to the Occupational Safety and Health Administration (OSHA). The trial court dismissed the complaint and plaintiff appeals. He contends that his complaint stated a cause of action for retaliatory discharge under the "whistleblower" theory. We disagree and affirm.

¶ 3 As amended, plaintiff's complaint alleged that he worked for defendant as a welder. His immediate supervisor was Dennis Redman. From July 13 to August 2, 2010, plaintiff was off work with a back injury. When he returned to work on August 3, Dennis instructed plaintiff to redo the jigs and doors on certain cabinets that were being sold as fireproof but were not, telling plaintiff, "We don't want to have to lie anymore."

¶ 4 The complaint alleged that welding galvanized steel emits zinc vapor that can cause flu-like symptoms. Zinc-oxide fumes can be mitigated in various ways, including inexpensive masks. Plaintiff was required to weld inside the cabinets but was not provided with any safety equipment, even after complaining to Dennis about the fumes.

¶ 5 On August 10, 2010, Dennis told plaintiff that earlier that day the plant manager, Jason Redman, had seen plaintiff spending too much time talking to coworkers. Jason wanted to make sure that plaintiff was working and not fooling around. Plaintiff informed Dennis that plaintiff and some of the other employees were laughing about being "slammed" at work. He continued that, if Dennis and Jason continued pushing the production staff, "someone was likely to call OSHA or the Better Business Bureau." Dennis told plaintiff that he did not think plaintiff would do that, but that he would not want someone who would do so working for him.

¶ 6 The following day, Dennis and Jason came to plaintiff's work station. Jason told plaintiff that he had a "big problem" with the conversation plaintiff had with Dennis the day before and that plaintiff was being terminated. Plaintiff asked whether he was being fired for threatening to call OSHA and Jason said that he was being fired for insubordination. Plaintiff asked when he had ever been insubordinate and Jason said, "Never."

¶ 7 The complaint alleged that defendant fired plaintiff in retaliation for plaintiff's threatening to call OSHA. Plaintiff alleged that his threatening to report defendant to OSHA was a protected activity and that the stated reason for his discharge was merely a pretext for his retaliatory firing. Defendant moved to dismiss the complaint (see 735 ILCS 5/2-615(a) (West 2010)). The trial court granted the motion and plaintiff timely appeals.

¶ 8 Plaintiff contends that the trial court erred when it dismissed his complaint because he stated a cause of action for retaliatory discharge under the whistleblower theory. He points out that he was fired immediately after he threatened to call OSHA and argues that Jason Redman appeared to make a joke about the reason for his firing, implying that the reason was pretextual.

¶ 9 In general, "a noncontracted employee is one who serves at the employer's will, and the employer may discharge such an employee for any reason or no reason. [Citation.]" (Internal quotation marks omitted.) *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 500 (2009). Retaliatory discharge, a "limited and narrow" exception to the rule of at-will employment, exists where an employee is fired in violation of a clear public policy. *Id.* The elements of retaliatory discharge are (1) that an employer discharged an employee (2) in retaliation for the employee's activities and (3) in violation of a clear mandate of public policy. *Id.* Whether the plaintiff was discharged and whether the discharge was in retaliation for the employee's protected activities are questions of fact and, thus, are "generally more suitable for resolution by the trier of fact." *Id.* at 501 n.1. By contrast, "[i]t is widely recognized that the existence of a public policy, as well as the issue whether that policy is undermined by the employee's discharge, presents questions of law for the court to resolve." *Id.* at 501.

¶ 10 Retaliatory discharge generally exists in one of two situations: where an employee is discharged for filing, or in anticipation of the filing of, a claim under the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2010)), or where an employee is discharged in retaliation for the reporting of illegal or improper conduct, otherwise known as whistle blowing. *Rabin v. Karlin & Fleischer, LLC*, 409 Ill. App. 3d 182, 186 (2011).

¶ 11 The trial court granted defendant's motion to dismiss the amended complaint. A motion to dismiss under section 2-615 of the Code of Civil Procedure attacks the sufficiency of the complaint on the basis that, even assuming the truth of the complaint's allegations, the complaint does not state a cause of action entitling the plaintiff to relief. 735 ILCS 5/2-615 (West 2010); *Kolegas v. Hefstel Broadcasting Corp.*, 154 Ill. 2d 1, 8 (1992). In ruling on a section 2-615 motion, the trial court must accept as true all well-pleaded facts in the complaint and all reasonable inferences therefrom. *McGrath v. Fahey*, 126 Ill. 2d 78, 90 (1988). In addition, the court interprets the complaint's allegations in the light most favorable to the plaintiff. *Id.* A claim should not be dismissed on the pleadings unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recover. *Heinrich v. White*, 2012 IL App (2d) 110564 at ¶ 9. We review *de novo* the trial court's ruling on a motion to dismiss. *Simmons v. Homatas*, 236 Ill. 2d 459, 477 (2010).

¶ 12 Here, construing the complaint's allegations in plaintiff's favor, we conclude that the trial court properly dismissed it. The complaint simply did not allege that plaintiff was fired in retaliation for any protected activity. Instead, plaintiff alleged that he was reprimanded for talking too much and "fooling around" during work hours. When confronted about it, he complained about the amount of work he had to do, and threatened to call OSHA. Plaintiff identifies no clearly mandated public policy permitting an employee to threaten to call OSHA—or some other agency—as a

bargaining chip to obtain more favorable working conditions. Plaintiff does not suggest, for example, that the amount of work he was being asked to do violated some regulation in and of itself. We note that “public policy” in the whistleblowing context seems to refer to a condition affecting the public in general, not a condition affecting only a plaintiff. See *Buechele v. St. Mary’s Hospital Decatur*, 156 Ill. App. 3d 637, 642 (1987) (refusing to extend tort of retaliatory discharge to employee allegedly fired for filing libel and slander suit against her employer, because the action involved only individual rights and not any clearly mandated public policy). In any event, plaintiff identifies no specific illegal conduct that he intended to report.

¶ 13 Plaintiff makes much of the allegedly nonconforming cabinets in an attempt to link his threatened report to some illegal activity. However, according to the complaint, defendant wanted to fix the cabinets to make them conform, and it was plaintiff who seemed to balk at the extra work. Plaintiff also notes that he was required to weld galvanized steel cabinets, which exposed him to dangerous zinc-oxide fumes, without appropriate safety equipment. However, plaintiff never said that he intended to call OSHA about this issue. Rather, his comment came in the context of a discussion about the amount of work he was being asked to do.

¶ 14 Thus, the complaint alleged only that plaintiff made a veiled threat to call OSHA in an attempt to persuade defendant to lighten his workload, not to report any legitimate threat to public safety. Plaintiff argues that this is a mischaracterization of his comment, which he made “to caution the defendant that morale was low because of the amount of work that the production crew was doing and that continuing that work pace might cause someone to call one of those organizations.” However, plaintiff’s entire case is based on his being fired in retaliation for his intent to call OSHA. If we view plaintiff’s comment as merely speculation that plaintiff or some other employee might

call OSHA at some point in the future, then there was certainly no protected activity against which defendant could retaliate.

¶ 15 Plaintiff argues that Illinois has never required a direct report of wrongdoing. This may be true, but the intent to make a report must be communicated to the employer in some manner or the employer's action cannot be deemed in retaliation for it.

¶ 16 Plaintiff acknowledges the three elements of the tort prescribed by *Turner* and implicitly concedes that he cannot meet those elements here. He contends, however, "that the courts in Illinois have weighed too heavily in favor of the employer's interests and have, at times, largely ignored the interests of the employee and the society as a whole." This argument cannot succeed, for at least two reasons. First, as defendant points out, we are bound by the decisions of our supreme court. *Nationwide Mutual Fire Insurance Co. v. T & N Master Builder & Renovators*, 2011 IL App (2d) 101143, ¶ 14. Second, even if we had the ability to overrule *Turner*, plaintiff's conduct does not approach that of the plaintiff in *Turner*. There, a hospital employee complained to an accrediting organization that the hospital's respiratory department, contrary to the organization's standards, did not require charting immediately after care was provided to a patient, thereby jeopardizing patient safety. The plaintiff was fired soon after. The supreme court affirmed the dismissal of his complaint for retaliatory discharge. After noting that no law or regulation specifically required bedside charting, the court echoed the appellate court's observation that "for retaliatory discharge to reach the level of a violation of public policy, the 'matter must strike at the heart of a citizen's social rights, duties, and responsibilities.'" *Turner*, 233 Ill. 2d at 506 (quoting *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130 (1981)). Plaintiff's allegations here, which fail to identify any

specific unsafe practice about which he, or someone else, intended to complain, do not reach even the level of those in *Turner*. Accordingly, the trial court properly dismissed the complaint.

¶ 17 We affirm the judgment of the circuit court of Winnebago County.

¶ 18 Affirmed.