2017 IL App (2d) 160333-U
No. 2-16-0333
Order filed March 24, 2017



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| MONEY MANAGEMENT, INC., | ) | Appeal from the Circuit Court |
| | ) | of Stephenson County. |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | No. 13-LM-392 |
| | ) | |
| HOPE R. THOMAS, | ) | Honorable |
| | ) | David L. Jeffrey, |
| Defendant-Appellant. | ) | Judge, Presiding. |

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held*: The circuit court did not err in granting summary judgment in favor of Money Management, Inc., on Thomas' counterclaim. Thomas was not an employee as defined by the Whistleblower Act at the relevant time, and she did not refuse to participate in an illegal activity. Therefore, we affirmed.

¶ 2 This case presents a question of statutory interpretation. Plaintiff, Hope R. Thomas, worked as a broker for Money Management, Inc. (MMI), during which time she turned over her commissions to MMI on a bi-monthly basis pursuant to the parties' Employment Agreement (Agreement). On or around May 7, 2013, Thomas requested a raise from MMI, and MMI declined her request. She resigned and told MMI that their contract was illegal. She did not turn over her commissions owing from May 2013.

¶ 3 MMI subsequently demanded that she turn over her commissions owing from May 2013, and Thomas refused. MMI sued for the commissions, and Thomas filed a counterclaim alleging violations of the Whistleblower Act (Whistleblower Act or Act) (740 ILCS 174/20, 20.2 (West 2012)). On cross-motions for summary judgment, the court granted summary judgment in favor of MMI on Thomas' counterclaim. Thomas appeals, arguing that she met the definition of "employee" under the Act and that MMI retaliated against her for refusing to participate in an illegal activity. For the reasons stated herein, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Thomas was employed by MMI as a broker from December 1, 2006 through May 7, 2013. MMI was an Illinois corporation that provided financial services to its clients, but it was not registered with the State of Illinois or the United States Securities and Exchange Commission as a broker-dealer or an investment advisory firm. Thomas was licensed and registered as an investment advisor and securities salesperson in the State of Illinois, and her duties at MMI included selling stock for clients and making investment recommendations for client portfolios. She signed her Agreement with MMI on December 7, 2006, defining the terms and conditions of her employment. The Agreement included obligations that persisted beyond her term of employment with MMI, including a duty to keep proprietary information confidential; to refrain from competition with MMI and from soliciting its customers for one year; and to provide reasonable assistance to MMI in connection with litigation in which MMI was, or may become, a party.

¶ 6 Thomas was also registered as a broker with INVEST Financial Corporation (INVEST), a securities broker-dealer firm, which paid her commissions on the 1st and 15th of each month.

Per the Agreement, the commissions Thomas received from INVEST on the 1st and 15th of each month were to be "swept" into MMI's checking account the same day.

¶ 7 From December 2006 up to May 1, 2013, Thomas complied with the Agreement, delivering cashier's checks in the amount of her commissions to Barbara Groves, an officer at MMI, for deposit in MMI's checking account. Barbara Groves was also an officer with Groves Tax & Financial, Inc. (Groves Tax). MMI provided financial services to clients of Groves Tax.

¶ 8 In 2010, a compliance officer at INVEST told Thomas that she should not be transferring her commissions to MMI without a lease agreement with Groves Tax. Accordingly, Thomas entered into a commercial lease agreement with Groves Tax on March 28, 2011, and entered into a subsequent lease agreement in 2013. The lease agreements with Grove Tax contained, among other provisions, a monthly rent requirement. She described the commercial leases as "smoke and mirrors" implemented at the behest of INVEST, in order to properly transfer her commissions to MMI by designating the money as lease payments. She continued to send a cashier's check to Barbara Groves in the amount of her commissions received on the 1st and 15th of each month.

¶ 9 In late April and early May 2013, Thomas shared concerns with her supervisors at INVEST about the legality of forwarding her commissions to MMI. Her supervisors, Michael Cox and Edna Buys, agreed with her that she should not be transferring commission payments to MMI because it was not a registered broker. She brought up the topic of the contract's illegality because "things were starting to come to light," that the contract might be illegal and she "had a feeling deep down that it was not right." Specifically, her husband had been conducting independent research into her agreement to transfer commissions to MMI.

¶ 10 On May 1, 2013, Thomas received a $12,382.20 commission from INVEST, but she did not deposit the commission payment with MMI. Instead, she delivered a letter to Groves on May 7, 2013, in which she requested a raise in the form of receiving 15% of the commissions on top of her current salary. The letter did not mention anything about their contract being illegal. Thomas also told Groves that MMI had 24 hours to meet her demands or she would quit her position, and if she quit, she intended to keep her most recent commission payment. Later that day, Groves informed Thomas that MMI would not increase her compensation at the time, and Thomas resigned.

¶ 11 While leaving MMI, Thomas told Groves and Jeffrey Framer, another MMI agent, that their commission arrangement under the Agreement was illegal. This was the first time she told someone at MMI that her Agreement was illegal. After leaving, Thomas received another commission payment from INVEST for $12,958.82 for commissions earned while employed at MMI. She likewise did not turn this commission payment over to MMI.

¶ 12 On or around May 28, 2013, she received a letter from Hinshaw and Culbertson LLP, on behalf of MMI. The letter demanded that she turn over her commissions due under the Agreement from May 2013. The letter also stated that retaining the commissions constituted criminal conduct. Thomas did not turn over the commissions to MMI.

¶ 13 MMI filed suit against Thomas on December 19, 2013, alleging counts for breach of contract, conversion, replevin, and unjust enrichment. MMI sought the return of the approximately $25,000 in commissions Thomas received in May 2013, earned while employed at MMI. Thomas filed counterclaims against MMI, alleging two counts for violations of the Whistleblower Act. The first count alleged retaliation by MMI against her for refusing to violate securities laws, and the second count alleged that MMI threatened to retaliate for the same.

¶ 14 Both MMI and Thomas moved for summary judgment. On April 4, 2016, the circuit court entered an order resolving both motions; it granted summary judgment in MMI's favor on Thomas' counterclaims, and it granted summary judgment in Thomas' favor on MMI's complaint. The court explained its order as follows. The facts were undisputed, and "[i]n this case, neither party had clean hands." The court found that the Agreement was illegal, and therefore MMI could not prevail on its complaint against Thomas. However, rather than refuse to participate in an illegal activity, Thomas had sought to continue the illegal activity on more favorable terms. In addition, the court explained that because Thomas resigned her position at MMI, she was no longer an employee and was not protected by the Whistleblower Act. Accordingly, neither party was entitled to the relief they sought.

¶ 15 Thomas timely appealed.

¶ 16 II. ANALYSIS

¶ 17 Thomas appeals from an entry of summary judgment in favor of MMI and against her on her counterclaims. We review *de novo* the entry of summary judgment. *Eakins v. Hanna Cylinders, LLC*, 2015 IL App (2d) 140944, ¶ 13. Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 725 ILCS 5/2-1005(c) (West 2012). Here, the relevant facts are undisputed; the issue is whether MMI was entitled to judgment as a matter of law on Thomas' counterclaims.

¶ 18 Thomas argues that we should reverse because: (1) she was an "employee" of MMI for purposes of the Whistleblower Act at the time MMI retaliated against her; and (2) MMI retaliated against her because she refused to participate in an illegal activity. We address each argument in turn.

¶ 19 A. Whether Thomas was an Employee

¶ 20 Thomas argues that she was an employee under the Whistleblower Act because the Act provides that an employee is one with a contractual relationship with an employer. To wit, section 5 of the Whistleblower Act (740 ILCS 174/5 (West 2012)) defines "employee," in part as "any individual who is employed on a full-time, part-time, *or contractual basis* by an employer." (Emphasis added.) Here, Thomas was an employee on a contractual basis in the form of the Agreement. While Thomas acknowledges that her active employment ended by the time MMI retaliated against her—that is, her active employment ended before she received the May 28, 2013, letter on behalf of MMI and before MMI filed suit against her in December 2013—she asserts that MMI still exercised sufficient control over her to satisfy the Act's definition of employee. She contends that the definition of employee is ambiguous because it "begs the question: when does an individual begin and end the 'contractual basis' with her employer?" Therefore, she argues that it is unclear whether "employee" refers to the "active period of employment or the length of the employment relationship."

¶ 21 Thomas argues that the proper test here is not when she resigned—she characterizes her resignation date as but one factor—but whether MMI had the right to control her under the law of agency. While her active employment ended on or around May 7, 2013, she argues that MMI retained control over her under the Agreement in various ways. MMI's control included its effort to enforce her contractual obligation to turn over commissions; her obligation not to reveal confidential information or trade secrets; her obligation to not compete with MMI or solicit its clients for one year post-employment; and finally, her obligation to assist MMI in litigation. She argues that these continuing obligations demonstrate that she was an employee on a contractual

basis at the time MMI demanded her commissions in May 2013 and filed suit against her in December 2013.

¶ 22 Furthermore, Thomas argues that the Act's structure supports her position that the definition of employee is not limited to persons actively employed at the time of retaliation. She advances two reasons why the Act supports her position. First, she argues that the legislature's use of "an" in the Act's definitions of employer and employee is significant because it evinces an intention to "require only that the employee and employer have established an employment relationship," and does not utilize terms such as "his" or "current," which would indicate a temporal aspect of employment. Second, she argues that the Act was amended in 2009 to expand its protections. In particular, she points to section 20.1, which provides that "[a]ny other act or omission not otherwise set forth in this Act, *whether within or without the workplace*, also constitutes retaliation *** if the act or omission would be materially adverse to a reasonable employee and is because of the employee disclosing or attempting to disclose public corruption or wrongdoing." (Emphasis added.) 740 ILCS 174/20.1 (West 2012). Further, Section 20.2 provides that an "employer may not threaten any employee with any act or omission" that would constitute retaliation. 740 ILCS 174/20.2 (West 2012). She argues that these sections expanded protections for employees against retaliation and demonstrated the legislature's intent to protect employees beyond the period of active-employment with their retaliating employer. Furthermore, Thomas cautions against an absurd result where she would have standing to sue if she were employed by a third-party employer but not if she were unemployed.

¶ 23 MMI responds that the plain language of the Whistleblower Act defeats Thomas' arguments. MMI contends that it is undisputed that Thomas resigned on May 7, 2013, and that both allegations of retaliation—MMI's May 28, 2013, letter and its December 2013 suit—

occurred after this date. Importantly, MMI argues that an employee is an "individual who *is employed* on a full-time, part-time, or contractual basis by an employer," (emphasis added) (740 ILCS 174/5 (West 2012)), and this definition is not ambiguous. The term "is employed" indicates current employment, not past or prospective employment. MMI cites several cases where courts refused to interpret "employ," "employee," or "employment," beyond those individuals who were actively employed. See *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶¶ 45-46 (retirees from public employment were not public employees entitled to collective bargaining); *Prazen v. Shoop*, 2013 IL 115035, ¶ 24 (Pension Code definition of employee was not ambiguous; retiree was not an employee); *Carnock v. City of Decatur*, 253 Ill App. 3d 892, 898-99 (1993) (construing "employee" in collective bargaining agreement between municipality and firefighter union to mean "active employee," not retiree).

¶ 24 MMI further contends that Thomas has forfeited her argument on appeal because she argues, for the first time, that post-employment contractual obligations extend the employment of the employee, for purposes of the Act. Even if not forfeited, MMI contends that post-employment obligations are just that: post employment. That is, Thomas' arguments fail to consider the difference between the existence of an employment relationship and the existence of contractual obligations that an employee agrees to perform after the employment relationship has ended.

¶ 25 We disagree that Thomas forfeited this issue by not raising her specific arguments below. She preserved the issue by arguing in the circuit court that her employment relationship with MMI did not end when she resigned in May 2013.

¶ 26 Nevertheless, we agree with MMI that Thomas was not an employee under the Whistleblower Act when the alleged retaliation occurred. Thomas raises an issue of statutory

construction, which is a question of law that we review *de novo*. *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 6 (2009). "The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature," and the best indicator of legislative intent is the language in the statute itself, accorded its plain and ordinary meaning. *Id.* The purpose of the Whistleblower Act is to protect statutorily defined employees who report violations of state or federal laws, rules, or regulations because the reported wrongful conduct or unsafe condition affects the health, safety, or welfare of Illinois residents as a whole. *Larsen v. Provena Hospital*, 2015 IL App (4th) 140255, ¶ 47. The Act defines "employee" to mean "any individual who is employed on a full-time, part-time, or contractual basis by an employer." 740 ILCS 174/5 (West 2012). In particular, the Whistleblower Act prohibits an employer from retaliating against an employee for refusing to participate in an activity that violates state or federal law. 740 ILCS 174/20 (West 2012).

¶ 27 The plain language of the statute defining employee is clear and unambiguous. Where statutory language is unambiguous, we will apply the statute as written without resort to extrinsic aids of statutory construction. *Landis*, 235 Ill. 2d at 6. While Thomas focuses on the language of "contractual basis" in the employee definition, we agree with MMI that the interpretation of this statute turns on the phrase "is employed." Importantly, an employee must be an individual who "is employed," and the legislature provides that such employment may be characterized as full-time, part-time, or contractual. "Is" is a present tense verb, and the general definition of "employ" in an employer-employee context is "to provide a job that pays wages or a salary." *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/employ (last visited March 1, 2017); see *Madison Mutual Ins. Co. v. Kessler*, 376 Ill. App. 3d 1121, 1128 (2007) ("When determining the plain and ordinary meaning of words, a court may look to the

dictionary."). The plain language therefore requires that an employee be in a state of employment, *i.e.*, working for the employer and receiving wages or salary for her work.

¶ 28 Here, Thomas admits that she ended her employment on or around May 7, 2013. After that day, she no longer provided services to MMI and no longer had an expectation of salary from MMI. That she had continuing contractual obligations to MMI makes no difference because those obligations did not establish that she continued to work at MMI or receive a salary.[1] The plain language in the Act requires that she *be employed* on a contractual basis. When she stopped working for MMI and stopped collecting a salary from MMI, she stopped being an employee of MMI for purposes of the Act.

¶ 29 We reject Thomas' argument that the use of the indefinite article "an" in the Act is significant. Whether designated as "an employee" or "the employee," an (or the) employee must be employed by her employer at the time of the alleged retaliation. Furthermore, the 2009 additions of sections 20.1 and 20.2 of the Act (740 ILCS 174/20.1, 20.2 (West 2012)) did not expand the definition of employee. The 2009 amendments prohibit an employer from threatening retaliation and from retaliating within or without the workplace. See 740 ILCS 174/20.1 (West 2012) (retaliation is not limited to defined acts but rather includes any act materially adverse to a reasonable employee, within or without the workplace); 740 ILCS 174/20.2 (West 2012) (prohibiting an employer from threatening retaliation against an

[1] In fact, some of her contractual obligations in the Agreement explicitly related to a post-employment context, including her non-compete clause entitled "Restriction on Post Employment Competition." That clause provided that she shall not work for a competitor of MMI or solicit MMI clients for one year after working for MMI.

employee). These new provisions expanded the scope of conduct that could give rise to a cause of action for an employee under the Act, but they did not expand the definition of an employee. Simply, the amendments expanded what employer conduct was actionable, not who could bring an action.

¶ 30 Thomas warns of an absurd result where an employee of a third-party employer can sue a former employer for retaliation but an unemployed individual could not. We agree that this would be an absurd result, and statutory language should not be interpreted to produce an absurd result. *People v. Hanna*, 207 Ill. 2d 486, 498 (2003). However, no absurd result occurs under our interpretation—an absurd result occurs only under Thomas' proposed interpretation. When we interpret "employee" as an individual currently working for her employer, neither an unemployed individual nor an individual employed elsewhere could sue for retaliation that occurred after active employment ended.

¶ 31 Our interpretation of the statute is consistent with related case law. MMI correctly argues that Illinois courts have found that "employee" in other contexts meant an individual currently employed, as opposed to formerly employed. *Matthews*, 2016 IL 117638, ¶¶ 45-46 (retirees from public employment were not employees under language of the Illinois Public Labor Relations Act defining a public employee as "any individual employed by a public employer"); *Prazen*, 2013 IL 115035, ¶ 24 (definition of "employee" under the Pension Code was not ambiguous and did not include the retired plaintiff, who was employed by a separate entity at the time); see also *Village of Oak Brook v. Sheahan*, 2015 IL App (2d) 140810, ¶ 36 (interpreting "active member" under the Pension Code by examining whether the plaintiff was currently employed by a public entity). In addition, the 7th Circuit rightly rejected an argument that the

Act's definition of "employee" included prospective employees, citing the plain language of the statute. *Volling v. Kurtz Paramedic Services, Inc.* 840 F. 3d 378, 386 (7th Cir. 2016).

¶ 32 Finally, our interpretation is consistent with the relief afforded under the Act. The Act expands upon the common-law relief available to employees retaliated against for disclosing illegal activity to a government or law enforcement agency or refusing to participate in illegal activity. See *Callahan v. Edgewater Care & Rehabilitation Center, Inc.*, 374 Ill. App. 3d 630, 634 (2007) (explaining that is was reasonable to conclude that the Whistleblower Act codified common-law retaliatory discharge claims, but this did not mean the legislature intended to repeal or preempt common-law rights). Importantly, the Act protects employees from adverse employment actions taken in retaliation for statutorily defined whistle blowing activities—including refusal to participate in an illegal activity—by allowing an employee to be reinstated with the same seniority status the employee would have had, but for the violation; to recover back pay; and to recover litigation costs and reasonable attorney's fees resulting from a violation of the Act. 740 ILCS 174/30 (West 2012). This relief protects an employee who refuses to take part in an illegal activity with her current employer and, as a result, loses her job, seniority status, or pay grade. On the other hand, it would not protect a former employee who had voluntarily resigned from her position because that employee would have no position to be reinstated or back pay due.

¶ 33 Accordingly, we hold that Thomas was not an employee under section 5 of the Whistleblower Act.

¶ 34 B. Whether Thomas Refused to Participate in an Illegal Activity

¶ 35 Thomas' second argument is that MMI retaliated against her because she refused to participate in an illegal activity, that is, to continue turning over commissions to MMI pursuant

to the Agreement. She argues that the circuit court misunderstood the conduct that she refused to participate in. In particular, she refused to comply with MMI's May 28, 2013, letter, which demanded that she turn over commissions and accused her of criminal conduct. When she refused to turn over her commissions, which would have been in violation of state and federal law, MMI filed suit against her. Thomas argues that the contract between her and MMI was illegal and therefore her refusal to turn over her commissions in response to MMI's letter constituted a refusal to participate in an illegal activity.

¶ 36 Thomas continues that MMI's letter accusing her of a crime threatened retaliation in violation of section 20.2 of the Act, and its subsequent lawsuit against her constituted actual retaliation in violation of section 20 of the Act. She contends that MMI's actions were materially adverse because any reasonable employee would be dissuaded from refusing to honor an illegal contract when subsequently threatened with criminal prosecution and a civil suit for damages.

¶ 37 MMI responds that Thomas did not refuse to participate in an illegal activity but, in fact, regularly participated in the allegedly illegal contract with MMI by turning over her commissions from December 2006 until May 2013. Furthermore, on May 7, 2013, Thomas wrote to MMI that she wanted an increase in compensation in return for her continuing to turn over her commissions. Only after MMI refused to increase her compensation did Thomas resign from her position at MMI. MMI argues that under these circumstances, the circuit court was correct to find that Thomas did not refuse to participate in an illegal activity. Not only did she participate for years, but she was willing to continue to participate for more money. MMI compares this case to *Sardiga v. Northern Trust Co.*, 409 Ill. App. 3d 56 (2011), where the court held that the statutory language "refusing to participate" was unambiguous and meant exactly

what it said: that a plaintiff who participates in an activity that would violate a state or federal law cannot claim recourse under the Whistleblower Act. *Id.* at 62. Finally, MMI argues that Thomas' attempt to separate pre- and post-resignation participation is misguided. Not only did Thomas cite facts in support of her counterclaim from before and after her resignation, but the circuit court rightly found that she could not attempt to benefit from the alleged illegal activity and at the same time claim she refused to participate in it.

¶ 38 We agree with MMI. In order for Thomas to prevail under the Act, she must show that she refused to participate in an activity that would result in a violation of state or federal law. 740 ILCS 14/20 (West 2012) ("Any employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of State or federal law ***."). Importantly, a plaintiff must allege that she actually refused to participate in an activity that would violate a law or regulation. *Collins v. Bartlett Park District*, 2013 IL App (2d) 130006, ¶ 27 (citing *Sardiga*, 409 Ill. App. 3d at 62). Under section 20 of the Act, "refusing" means refusing, not complaining or questioning. *Id.*

¶ 39 In this case, we reject Thomas' narrow interpretation of "refusing to participate." While Thomas did refuse to turn over commissions after she resigned from MMI, she cannot ignore that she voluntarily participated in the illegal activity for years by turning over her commissions pursuant to the Agreement from December 2006 until May 2013. She twice negotiated a lease agreement, once in 2011 and again in 2013, to transfer commissions to MMI—agreements that she referred to as "smoke and mirrors" to make the improper commission transfers appear proper.

¶ 40 Importantly, her May 7, 2013, letter to MMI belies her position that she refused to participate in an illegal activity. On the contrary, her letter to MMI explicitly provided that she

was willing to continue to turn over her commissions if she received increased compensation. She failed to turn over her commissions only after MMI denied her request for a raise and she resigned. Further, she had voluntarily participated in the Agreement for years. As the circuit court rightly stated, rather than refuse to participate in an illegal activity, Thomas sought to continue the activity on more favorable terms. At no time did she refuse to participate while actively employed by MMI. Accordingly, the circuit court was correct that Thomas did not refuse to participate in an illegal activity.[2]

¶ 41 III. CONCLUSION

¶ 42 Thomas was not an "employee" as defined by the Act, and she did not refuse to participate in an illegal activity. Therefore, we affirm the judgment of the Stephenson County circuit court granting summary judgment in MMI's favor on Thomas' counterclaims.

¶ 43 Affirmed.

[2] Our holding is on the specific facts of this case, and we do not address if or when an employee may state a cause of action under section 20 of the Act (740 ILCS 172/20 (West 2012)) for refusing to participate in an illegal activity after having previously participated in that same activity. We note that in this case, Thomas' argument is defeated regardless of her past participation in the illegal contract, because we have already determined that she was not an employee under the Act at the time she allegedly refused to participate in an illegal activity. See *supra* ¶¶ 24-31.