2019 IL App (1st) 172590-U

No. 1-17-2590

Third Division
March 20, 2019



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| DEMETRIA BROWN, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Cook County. |
| | ) | |
| v. | ) | No. 2016 L 006823 |
| | ) | |
| ELEMENTARY SCHOOL DISTRICT 159, | ) | Honorable |
| | ) | Patrick J. Sherlock, |
| Defendant-Appellee. | ) | Judge, presiding. |

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

**O R D E R**

¶ 1 *Held*: The circuit court properly dismissed plaintiff's complaint where defendant did not terminate plaintiff's employment in violation of the Illinois Whistleblower Act. 740 ILCS 174/1 *et seq* (West 2016).

¶ 2 Plaintiff-Appellant, Demetria Brown, appeals the circuit court's order granting Defendant-Appellee's, Elementary School District 159 (the District), motion to dismiss plaintiff's complaint pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (the Code). 735 ILCS 5/2-619.1 (West 2016). On appeal, plaintiff argues that she sufficiently pled facts demonstrating that defendant terminated her employment in violation of sections 15 and

20 of the Illinois Whistleblower Act (the Act). 740 ILCS 174/15, 20 (West 2016). For the reasons discussed below, we affirm the circuit court's judgment.

¶ 3 I. BACKGROUND

¶ 4 Brown was employed by the District as the "Chief School Business Official, Business Manager." In this capacity, she was responsible for drafting bid specification and language for the District's vendor contracts and monitoring contract compliance with the Illinois School Code. Brown's employment agreement with the District provided that her contract would be valid from July 1, 2014 to June 30, 2015. The agreement further provided that her contract would automatically renew for an additional year unless the District notified Brown of its intent to not extend the contract by the first day of April of the final year of the agreement.

¶ 5 Brown's employment agreement automatically extended from July 1, 2015 to June 30, 2016. However, on March 22, 2016, the District sent Brown notice that her employment agreement for the 2016-2017 school year would not be renewed. Brown then filed suit in the circuit court, alleging that the District terminated her employment due to her opinion and actions with respect to a contract with Energy Systems Group, LLC (ESG).

¶ 6 A. ESG Contracts

¶ 7 In June 2015, the District contracted with ESG to provide the District with "energy savings" for $2.9 million dollars. Prior to the contract's finalization, Brown raised concerns in a memo submitted on May 21, 2015 to her supervisor and the School Board (the Board) providing that she was "NOT in support of the draft contract as submitted by ESG." Brown alleged that in her review of the contract's compliance with the Illinois School Code, she believed it was a violation for ESG to require the Board to "stipulate" to purported "energy

savings" without basing that stipulation on any actual measurement. Brown alleged that on July 7, 2015, she was issued a written reprimand for raising her concerns.

¶ 8 Brown further alleged that contract amendments in July 2015 and January 2016, which expanded the scope of work, were made "in violation of Illinois law, including the Illinois School Code, and possibly the Illinois Antitrust Act and the Illinois Criminal Code." Brown voiced her concerns that the District had allowed ESG to review a competitor's confidential bidding information regarding the additional scope of work in order to make amendments.

¶ 9 Brown alleged that she engaged in whistleblowing activities from January 2016 through March 2016 when she continually reported to the District that the ESG contract was illegal and refused to take part in the contract. Additionally, Brown alleged that her beliefs in the contract's non-compliance with the Illinois School Code were confirmed by an evaluation that an architect firm retained by the District had completed. She provided her immediate supervisor and the Board's members with the evaluation. Brown further alleged that she was subsequently removed from participation in the ESG contracts for her actions.

¶ 10 On March 8, 2016, the Board voted against renewing Brown's employment contract. On March 22, 2016, the District sent Brown notice of its decision to not extend her employment agreement for the following school year. The notice provided that due to the Board's decision against extending her contract, Brown's employment agreement would not be automatically renewed and would expire no later than June 30, 2016. On April 4, 2016, Brown sent correspondence to the Board's President confirming receipt of the notice.

¶ 11 B. First Amended Complaint and Combined Motion to Dismiss

¶ 12 On July 11, 2016, Brown filed a two-count complaint alleging that the District had illegally fired her as a retaliatory discharge and committed violations under the Illinois

Whistleblower Act, 740 ILCS 174/15, 20 (West 2016). On October 14, 2016, the District filed a combined motion to dismiss pursuant to section 2-619.1. 735 ILCS 5/2-619.1 (West 2016). The circuit court dismissed the charge of retaliatory discharge claim with prejudice and the alleged whistleblower violations without prejudice on December 12, 2016. The court granted Brown leave to file an amended complaint.

¶ 13 On January 11, 2017, Brown filed an amended complaint solely alleging violations of the Illinois Whistleblower Act. 740 ILCS 174/1 *et seq*. The District again filed a section 2-619.1 combined motion asserting separate and distinct bases for dismissal pursuant to section 2-615 and 2-619. (35 ILCS 5/2-615, 2-619 (West 2016). In its motion, the District asserted that Brown's amended complaint suffered the same deficiencies as the original complaint. Specifically, the District argued, *inter alia*, that the amended complaint should be dismissed pursuant to section 2-615 because Brown failed to plead sufficient facts showing that she was asked to participate in an illegal activity and that she refused to participate in such activity. The District further argued that dismissal under 2-619(a)(9) would also be proper because, as an affirmative matter, Brown could not show that she refused to participate in an illegal activity.

¶ 14 C. April 14, 2017 Order

¶ 15 On April 14, 2017, the circuit court granted the District's combined motion to dismiss without prejudice and allowed Brown to file another amended complaint. The court held that with respect to the District's motion to dismiss pursuant to section 2-615, Brown sufficiently pled her essential involvement in the contracting process, her refusal to participate in the contract, and perceived wrongdoing. However, the court noted that although Brown alleged potential violations of the law, the complaint did not "clearly allege what activity would

result in a violation of a State or federal law, rule, or regulation and what the law, rule or regulation is." The court deferred its ruling on the 2-619 portion of the complaint until Brown "adequately alleged facts that would state a claim upon which relief could be granted."

¶ 16 D. Second Amended Complaint and Combined Motion to Dismiss

¶ 17 On May 11, 2017, Brown filed a second amended complaint alleging violation of sections 15(a) and 20 of the Act. Brown alleged that the District violated these provisions of the Act by retaliating against her based upon her disclosure of information and refusal to participate in activities that would have resulted in violations of various laws and regulations, such as but not limited to, the Illinois School Code, the Illinois Antitrust Act, and the Illinois Criminal Code.

¶ 18 Brown further alleged that as a direct and proximate result of the District's retaliatory actions in violation of the Act, she suffered damages, including but not limited to, the loss of wages and benefits as well as emotional distress. Accordingly, Brown claimed that pursuant to section 30 of the Act, she is entitled to: "(1) reinstatement with the same seniority status that she would have had, but for the District's violation of the Act; (2) back pay, with interest; and (3) compensation for any damages she sustained as a result of the District's violations of the Act, including her litigation costs, expert witness fees, and reasonable attorney's fees."

¶ 19 On June 19, 2017, the District filed a combined motion to dismiss Brown's second amended complaint. The District sought dismissal of Brown's action under sections 2-615 and 2-619 of the Code in a combined motion filed pursuant to section 2-619.1. The District argued that the second amended complaint failed to plead sufficient facts establishing a violation of section 15(a) of the Act. Specifically, the second amended complaint failed to

plead any facts establishing that Brown disclosed information in an administrative hearing, court proceeding, or before a legislative commission or any other proceeding. As such, the District argued that the second amended complaint should be dismissed with prejudice because Brown failed to state a cause of action for violation of section 15(a) of the Act.

¶ 20 The District further argued that Brown did not state a cause of action for violation of section 20 of the Act because Brown was not asked to participate in an illegal activity, Brown could not have entered into the ESG contract because only the Board has authority to enter into the contract, and Brown was not responsible for ensuring contract compliance with Illinois Law. Additionally, the District argued, *inter alia*, that Brown failed to plead sufficient facts to show that she refused to participate in any illegal activity as required by section 20 of the Act.

¶ 21 On September 27, 2017, the circuit court dismissed Brown's second amended complaint with prejudice. This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, Brown contends that the circuit court erred in granting the District's motion to dismiss. Brown argues that she pled sufficient facts to show that the District violated both sections 15(a) and 20 of the Act. With respect to section 15(a) of the Act, Brown argues that: (1) she sufficiently alleged facts establishing that she disclosed information reasonably believed to pertain to a violation of law; (2) disclosure to Board's members for the purpose of a Board meeting falls under "any proceeding"; and (3) disclosure to an employer qualifies as the type of disclosure protected under the Illinois Whistleblower Act.

¶ 24 With respect to section 20 of the Act, Brown argues that she pled with sufficient specificity the laws, rules or regulations that were violated by the District's actions. Lastly,

Brown argues that the circuit court erred in granting the District's motion to dismiss when it held that the District's action was not retaliation in violation of the Act because she was not discharged.

¶ 25 A. Standard of Review

¶ 26 Before we address the merits of this appeal, we note that the District filed a combined motion to dismiss under section 2-619 which permits a party to combine a section 2-615 motion to dismiss (735 ILCS 5/2-615) (West 2016)) with a section 2-619 motion to dismiss (735 ILCS 5/2-619)(West 2016)). Under section 2-615, the motion challenges the legal sufficiency of a complaint based on defects appearing on the face of the complaint and does not raise affirmative factual defenses. *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 484 (1994); *Sandolm v. Kuecker*¸ 2012 IL 111443, ¶ 54. "At this pleading stage, a plaintiff is not required to prove her case and need only allege sufficient facts to state all the elements of her cause of action." *Peraica v. Riverside-Brookfield High School Dist. No. 208*, 2013 IL App (1st) 122351, ¶ 9 (citing *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (2008)). In contrast, a section 2-619 motion admits the legal sufficiency of the complaint, but asserts an affirmative matter that acts to defeat the plaintiff's claim. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

¶ 27 When ruling on a motion to dismiss under either section 2-615 or section 2-619, it is proper for a court to accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Edelman, Combs & Latturner v. Hinshaw Culbertson*, 338 Ill. App. 3d 156, 164 (2003). We review a combined section 2-619.1 motion to dismiss *de novo. Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10.

¶ 28 B. Sections 15(a) of the Act

¶ 29 Under section 15(a), an employer may not retaliate against an employee "who discloses information in a court, an administrative hearing, or before a legislative commission or committee, or in any other proceeding, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule or regulation." 740 ILCS 174/15(a). The District argues that dismissal of Brown's claims under section 15(a) was proper because Brown failed to allege any facts establishing that she had disclosed information in any proceeding. The circuit court agreed with the District, finding that "disclosure to the Board members for purposes of a Board meeting does not fall under the auspices of 'any proceeding'" and that "[d]isclosure to an employer does not qualify as the type of disclosure protected under the [Act]."

¶ 30 Brown contends that although "the School Board was her employer, it was also a governmental body responsible for the actions of the District and capable of preventing illegal activities." Further, she asserts that the "[s]chool boards—although elected locally—are state agencies carrying out a state function, and they are subject to numerous state laws and regulations." Brown's contentions are misplaced as the issue is not whether the Board is a state agency subject to the Act. Unlike section 15(b) of the Act, section 15(a) does not require disclosure to certain entities such as a "government or law enforcement agency." See 740 ILCS 174/15(b) (West 2016). Rather, section 15(a) sets forth that a qualifying disclosure must be made in a "court, an administrative hearing, or before a legislative commission or committee, or in any other proceeding." 740 ILCS 174/15(a) (West 2016). Therefore, our analysis turns on whether Brown disclosed information in a proceeding.

¶ 31 The Illinois Whistleblower Act does not define the term "proceeding." As such, we may look to the dictionary meaning of the term. *In re Ryan B.*, 212 Ill. 2d 226, 232 (2004) (stating that "in the absence of a statutory definition indicating legislative intent, an undefined word must be given its ordinary and popularly understood meaning"). Proceeding refers to "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment**"** or **"**[a]ny procedural means for seeking redress from a tribunal or agency. *"* *Black's Law Dictionary* (10th ed. 2014). Although the complaint states that Brown raised her concerns in a memo to her immediate supervisor and the Board, it fails to allege that Brown disclosed this information in an actual hearing, meeting or any proceeding. The memo itself is not part of the progression of a lawsuit or a means for seeking redress from a tribunal or agency and Brown does not argue otherwise. Instead, Brown argues that she submitted the memo to the "Board members with the purpose of a board meeting." The facts alleged in the complaint do not state that a board meeting was actually held to address the concerns or information provided by Brown in her memo. A possibility that the information may have been brought up in a future board meeting does not suffice to bring the action within the ordinary meaning of a "proceeding." Accordingly, we find that the circuit court was correct in ruling that Brown failed to allege sufficient facts to demonstrate any violation of section 15(a) of the Act.

¶ 32 2. Section 20 of the Act

¶ 33 Section 20 of the Act provides that an employer may not retaliate against an employee "for refusing to participate in an activity that would result in a violation of a State or federal law, rule, or regulation." 740 ILCS 174/20 (West 2016). To sustain a cause of action under section 20, "a plaintiff must establish that (1) he refused to participate in an activity that

would result in a violation of a state or federal law, rule, or regulation, and (2) his employer retaliated against him because of that refusal." *Sardiga v. Northern Trust Co.*, 409 Ill. App. 3d 56, 61 (2011); 740 ILCS 174/20. Brown alleged that the District retaliated against her based on her refusal to participate in the ESG contract. In the circuit court, it appears that the standard for dismissal under 2-615 was applied to determine whether Brown had alleged sufficient facts to show her refusal to participate in illegal activity whereas the standard under 2-619 was applied to determine whether the District's actions constituted retaliation.

¶ 34 With respect to Brown's refusal, the circuit court had ruled in its April 14, 2017 order that the complaint sufficiently alleged Brown's refusal to participate in the contract and reiterated that holding in the order which is the subject of the present appeal. Taking Brown's pleaded facts as true, we agree with the circuit court's finding. Brown, in her capacity as a Chief School Business Official, Business Manager, was responsible for reviewing and monitoring contract compliance with the Illinois School Code. After reviewing the contract, Brown sent a memo to her superiors outlining her concerns and indicating that she did not support the drafted ESG contract. Furthermore, Brown indicated that even after the Board amended the contract, she continually expressed her lack of support. We find these actions sufficiently show a refusal to participate in the ESG contracts.

¶ 35 Although we find that Brown has sufficiently pled her refusal to participate in the ESG contracts, she failed to plead "an activity that would result in violation of state or federal law, rule, or regulation." Brown's complaint includes allegations that the District's actions violated the "Illinois School Code, the Illinois Antitrust Act, and the Illinois Criminal Code" with limited citations to a specific section alleged to have been violated. Where the complaint does cite to specific sections, it is mainly in support of Brown's allegation that the School

Code was violated. Specifically, Brown cites, *inter alia*¸ to sections 19b-1.4, 19b-3, and 19b-4 of the School Code to show: (1) the ESG contract was not part of a competitive bid process; and (2) violations by the District's contract stipulation to "energy savings" without basing it on any actual measurement. See 105 ILCS 5/19b-1.4, 19b-3, 19b-4 (West 2016). Additionally, Brown alleges that the District engaged in a bid-rigging scheme.

¶ 36 First, Brown cites to section 19b-1.4 to argue that "[g]uaranteed energy savings contracts must be awarded by way of a 'competitive' selective process." Section 19b-1.4 of the Code, however, governs the request for proposals and not the award of contracts. To the extent that it addresses "competitive selection," it simply defines "[r]equests for proposals" as "a competitive selection achieved by negotiated procurement." 105 ILCS 5/19b-1.4. Here, Brown does not argue that the District awarded the contract to ESG in the absence of a negotiated procurement. Importantly, Brown does not even allege facts regarding whether the District submitted a request for proposals and whether that request failed to include the necessary information, including notice that the District was seeking providers, and ultimately whether there was negotiated procurement. *Id.* (providing that request for proposal shall include, *inter alia*¸ "notice indicating that the school or area vocation center is requesting qualified providers to propose energy conservation measures through a guaranteed energy savings contract").

¶ 37 Similarly, Brown's reliance on section 19b-3 and 19b-4 of the Code is misplaced and the facts alleged in the complaint are insufficient to support the finding of a violation. Brown argues that the District violated section 19b-3 because "bid for the awards of such contracts must be made by way of sealed bids, i.e., unknown to the other competitor's bidding." Although section 19b-3 provides language pertaining to "sealed proposals," the section

mainly deals with the manner and procedure in awarding guaranteed energy savings contract. Specifically, it provides, *inter alia*, that a member or employee of the board must disclose the contents of the sealed proposal at a public opening and that the school district shall provide notice of the meeting at which it proposes to award the contract. See 105 ILCS 5/19b-3 (West 2016). Here, Brown's complaint fails to allege sufficient facts to show that the District's award to ESG was improper pursuant to the requirements set forth by section 19b-3. Brown fails to allege that the sealed proposals were not disclosed at a public opening, the competitors did not have notice of the opening if one existed, and the District did not provide notice of the meeting at which it proposed to award the contract.

¶ 38 Lastly, we find that Brown has also failed to state a cause of action for violation of section 19b-4 of the Code. In her complaint, Brown argues that "ESG was not agreeing to provide and was not providing real, actual energy savings, but instead was entering into a contract whereby the parties would pretend that such savings were being realized." Section 19b-4 provides that the guaranteed savings contract shall "include a written guarantee of the qualified provider that either the energy or operation savings, or both, will meet or exceed within the 20 years the costs of the energy conservation measure." 105 ILCS 5/19b-4 (West 2016). We first note that Brown stated in her memo that "ESG has confirmed that it reached its operational cost savings for the roofing projects and other non-energy savings related projects by dividing the total cost of project by 20 years." As such, the issue is not whether there was "real" or "actual" savings but whether a written guarantee of savings cost was included in the guaranteed energy savings contract. Brown fails to allege that the contract did not include a written guarantee but instead, complains that the District stipulated to the cost savings. As such, we find that Brown has failed to state a cause of action.

¶ 39 Additionally, Brown alleges that the bid-rigging scheme involved the District providing competitors' bidding information to ESG so that it could undercut or reduce and modify its bid. Brown contends that this is a criminal felony offense under 720 ILCS 5/33E-3. Generally bid-rigging requires, *inter alia*, an agreement between a person and its competitors to ensure the awarding of a contract to that person or another. 720 ILCS 5/33E-3 (West 2016). Here, Brown's allegations show no indication of any agreement between ESG and other competitors which would bring the matter under section 33E-3. Although we recognize that Brown is alluding to some form of impropriety in the bidding process due to the District's alleged actions, her complaint fails to state a proper claim under the cited statue. Even more damaging to her complaint, Brown fails to allege any facts showing the existence of an agreement. While Brown does not need to provide evidence at the pleading stage, a complaint must be factually sufficient to state a cause of action. See *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981). To be factually sufficient, a complaint must allege facts, not conclusions that support a legally recognized cause of action. *Id.* We further note that Brown's antitrust claim appears to center on this bid-rigging scheme and therefore is also insufficient to survive a motion to dismiss.

¶ 40 Having found that the circuit court properly granted the District's motion to dismiss pursuant to section 2-615, we need not address Brown's remaining arguments that the circuit court erred in finding she was not discharged under *Krum v. Chi. National League Ball Club, Inc.*, 365 Ill. App.3d 785 (2006) and therefore the District's actions did not constitute retaliation under the Act.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 43 Affirmed.