2019 IL App (2d) 180190-U
No. 2-18-0190
Order filed June 12, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JEANETTE RUNGE,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14-L-513
	)	
BOARD OF EDUCATION FOR	)	
COMMUNITY UNIT SCHOOL DISTRICT	)	
No. 300 and COMMUNITY SCHOOL	)	
DISTRICT No. 300,	)	Honorable
	)	Susan Clancy Boles,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The record reveals a genuine issue of material fact precluding summary judgment on plaintiff's whistleblowing claim, and both the board and district may be sued for a violation of the Whistleblower Act. Plaintiff's claim of promissory estoppel was dismissed both for failure to state a claim and because it was defeated by an affirmative matter; on appeal plaintiff did not challenge the latter ground thereby forfeiting it and the dismissal stands. Finally, the trial court did not abuse its discretion in refusing plaintiff leave to amend her complaint to reinstate a breach of contract claim in light of the fact that plaintiff abandoned the claim after the initial amended complaint.

¶ 2 Plaintiff, Jeanette Runge, appeals the judgment of the circuit court of Kane County granting the motion for summary judgment of defendants, the Board of Education of the

Community Unit School District No. 300 and the Community Unit School District No. 300. Prior to this action, plaintiff was a probationary third-year first-grade teacher at Dundee Highlands Elementary School in the district. She was dismissed after her third year, ostensibly because of performance deficiencies. Plaintiff filed suit, claiming that defendants' decision to terminate her employment was retaliation because she had raised issues that defendants were violating special education requirements with regard to two of plaintiff's students. On appeal, plaintiff argues that the trial court erred in ultimately granting summary judgment in favor of defendants on the whistleblowing count, contending that she adequately disclosed her claims of violation to defendants through the persons of the district's superintendent, assistant superintendent, and chief legal counsel and, at the very least, the record shows a genuine issue of material fact on that issue. Plaintiff also contends that the trial court erred by including the school district in the summary judgment where it was only the board that produced evidence that it did not receive knowledge of the violations of special education requirements. Plaintiff also contends that the trial court erroneously dismissed her claim of promissory estoppel based on the District's policies, and that the trial court abused its discretion in denying her request to amend her complaint to allege a breach of the collective bargaining agreement. We reverse the entry of summary judgment on the whistleblowing claim and affirm the remaining challenged judgments.

¶ 3 I. BACKGROUND

¶ 4 We summarize the pertinent facts appearing in the record. In 2006, plaintiff graduated from Jacobs High School, a school within District No. 300, as class valedictorian. Plaintiff then attended Judson University, graduating with a degree in elementary education. Plaintiff student-taught at Dundee Highlands; Patricia Schmidt was the principal at that time.

¶ 5 In 2011, Schmidt recommended that plaintiff be hired as a full-time teacher, and plaintiff

began her career as a probationary third-grade teacher at Dundee Highlands, and she was subject to yearly review for her first four years of teaching. Schmidt, as principal, was responsible for reviewing plaintiff's teaching performance. In her summative evaluation of plaintiff's first-year performance, Schmidt noted that plaintiff's classroom-management skills improved during the course of the year, there were no concerns regarding plaintiff's professionalism, and Schmidt recommended that plaintiff be retained. The board approved rehiring plaintiff for her second year as a probationary teacher.

¶ 6 In the 2012-2013 academic year, plaintiff again was assigned to teach third grade. Plaintiff again received a generally favorable summative review. Schmidt rated plaintiff as proficient in two of the four domains that were identified in the district's review rubric. Specifically, plaintiff was proficient in planning and preparation (domain I) and in classroom environment (domain II). Schmidt noted that plaintiff "needs improvement" in the category of "using questioning and discussion techniques" in the instruction category (domain III); Schmidt elaborated, however, that plaintiff's "overall instruction [was] proficient" at the time of the summative evaluation. Schmidt also noted that, with regard to professionalism (domain IV), plaintiff was "not always accurate on her assessment" of her own performance, and that she needed to work on her overall professionalism. Still, in the written commentary, Schmidt noted that plaintiff had demonstrated improvement in professionalism (domain IV).

¶ 7 Schmidt again recommended that plaintiff be retained for the next school year. The board approved the recommendation and retained plaintiff. For the 2013-2014 academic year, plaintiff was assigned to teach first grade. Plaintiff testified that she believed that she was assigned to first grade because Schmidt wanted her to be a leader among the first-grade teachers following the retirement of one of the first-grade teachers. Schmidt, by contrast, testified that

she was trying to find a good fit for plaintiff, and she believed that the rest of the first-grade teachers at Dundee Highlands had strong complementary skills, particularly in classroom management, that would support and fit well with plaintiff's skills.

¶ 8 During the early part of the 2013-2014 academic year, plaintiff became concerned that two of her students were not receiving the special education services they needed. Plaintiff averred that, on September 20, 2013, and on October 3, 2013, she informed Schmidt of her specific concerns about the children. In particular, plaintiff averred that she voiced concerns about Logan, whose behavior was becoming worse and was affecting the other students in her classroom and was beyond her capability to handle. Plaintiff also averred that she informed Schmidt that Logan had not been evaluated to determine his eligibility for special education and related services; rather, the district had implemented an illegal behavior intervention plan in the absence of a formal eligibility determination or a functional behavior assessment. Logan's plan, however, was ineffective, and Logan's behavior disrupted class and, on multiple occasions, had damaged plaintiff's classroom and injured other students. Plaintiff also requested training in crisis intervention techniques, but Schmidt refused the request. Plaintiff also communicated to Schmidt that another student, Josh, had in place an individual education plan, but social work services for him had been reduced or eliminated in violation of Joshua's plan. In addition, plaintiff believed that the district was otherwise not addressing Joshua's behaviors as required by his plan. Finally, plaintiff believed that, on October 9, 2013, Schmidt had illegally made a video recording of Logan and other students.

¶ 9 The result of plaintiff's September and October meetings with Schmidt were unsuccessful and she did not persuade Schmidt to address the concerns she raised. Plaintiff averred that, instead, Schmidt became hostile towards her, to the extent that plaintiff believed

that Schmidt barred plaintiff's sister from serving in the district as a substitute teacher.

¶ 10 Following plaintiff's original reporting, the situation with her students continued and worsened. In November 2013, plaintiff had her second observational meeting in which Schmidt and Kristen Corriveau, the district's Assistant Superintendent for Elementary Education, participated. Plaintiff averred that she again raised the issues of special education violations. Plaintiff testified that the conversation was "mostly about [the] issues with [the] two students, and it got to the point where [Schmidt] got very upset *** and left the room." Plaintiff testified that Schmidt told her, apparently during the observational meeting, that the parents of the students were "paying a lot of money for the social worker," so the teaching staff needed "to do exactly what they're saying, even though it was endangering the rest of [plaintiff's] class."

¶ 11 Plaintiff testified that, after she again raised the issues to Schmidt in the presence of Corriveau, Schmidt began to retaliate against her. Plaintiff testified that, initially, the retaliation consisted of poor treatment, including speaking to plaintiff as if she were a child and an overall unfriendly demeanor. Plaintiff also believed that Schmidt fabricated poor evaluations in retaliation for speaking about the special education violations. Plaintiff specifically noted that an observational evaluation based on an October 29, 2013, classroom observation severely downgraded her marks in classroom environment (domain II) even while it praised her specific abilities. Plaintiff further noted that Schmidt's evaluation tasked her for the behavior of one of the students plaintiff had identified as being a disruptive influence on her overall class.

¶ 12 Plaintiff testified that, after receiving the negative observational evaluation, she sought assistance from her union. On December 6, 2013, plaintiff, her union representative, Pamela Johnson, and the district's chief legal counsel, Colleen O'Keefe, attended a meeting to address plaintiff's concerns. O'Keefe did not take notes or record the meeting. According to plaintiff,

during the meeting, she mentioned the special education violations along with the perceived bullying and harassment plaintiff experienced from Schmidt. According to plaintiff, she specifically informed O'Keefe that Schmidt kept Logan in a conference room, which was inconsistent with Logan's behavior intervention plan. Plaintiff also recounted to O'Keefe Schmidt's specific harassment, including speaking very little to plaintiff, short and curt emails, not addressing issues raised by plaintiff including those concerning Logan, forcing plaintiff to publicly apologize to Logan, and making derogatory statements both privately and publicly. Plaintiff related that O'Keefe stated that she would have a meeting with Schmidt and Corriveau later in the month. Plaintiff asked O'Keefe to involve the district's superintendent, Michael Bregy, and O'Keefe responded that she would make him aware of the discussion.

¶ 13 O'Keefe, by contrast, remembered that, at the meeting, plaintiff focused on the negative evaluations. O'Keefe specifically denied that plaintiff had mentioned the special education violations. However, O'Keefe acknowledged that plaintiff discussed the two disruptive students in her class and that plaintiff conveyed that she believed she was unfairly given the two disruptive students.

¶ 14 On December 18, 2013, the follow-up meeting was held, this time plaintiff, Schmidt, Corriveau, and the union representative, Johnson, were in attendance. Plaintiff testified that she had been led to believe that the purpose of the meeting was to address the special education violations and to fix the problems that had arisen between her and Schmidt. As the meeting actually transpired, however, Schmidt only discussed plaintiff's professional shortcomings and gave plaintiff a document outlining the areas in which plaintiff needed improvement. Plaintiff testified that she was not allowed to discuss the special education violation issues. Likewise, Schmidt testified in her deposition that the December 18 meeting concerned the steps plaintiff

needed to take in order to remedy the performance issues Schmidt had observed.

¶ 15 Thereafter, on January 30, 2014, Schmidt produced a summative evaluation for the 2013-2014 academic year that was substantially more negative than those of the two preceding years. Plaintiff's ratings were generally negative, even in the categories in which plaintiff had previously done well (planning and preparation (domain I) and classroom environment (domain II)). Schmidt recommended that plaintiff's employment not be renewed for a fourth year.

¶ 16 On February 23, 2014, plaintiff emailed Bregy and the board in an apparent attempt to alert them of her maltreatment. Plaintiff informed Bregy and the board that she was being harassed by Schmidt, who was being "abrasive" and "fabricating performance evaluations" along with recommending that plaintiff not be offered employment in the next year. Plaintiff further stated that Schmidt's actions "violate[d] our contract as well as Federal and State whistleblower laws." Plaintiff concluded by asking the board and Bregy to investigate the matters she identified and to retain her as a teacher in the next year. In her deposition, plaintiff admitted that the email did not expressly mention the special education violations, but explained that, based on O'Keefe's promise to inform Bregy, she believed that Bregy was already aware of her complaints of special education violations.

¶ 17 In a February 25, 2014 email, Bregy accepted plaintiff's complaint on behalf of the board, and specifically acknowledged that each board member had received a copy of plaintiff's email complaint. In the response email, Bregy advised plaintiff either to file a formal complaint with O'Keefe or his associate superintendent, Sarah Kedroski, or to formally initiate a grievance through her union. Bregy testified in his deposition that he discussed plaintiff's complaint with Kedroski, but Kedroski would not initiate an investigation until plaintiff filed a formal complaint. Plaintiff concludes from this that the board would not consider this issues she raised

in her February email complaint against Schmidt when the issue of plaintiff's retention was formally in front of the board for official action (because she did not make a formal complaint until the date of the board meeting in which her retention was to be considered).

¶ 18 Bregy further testified that lodging a formal complaint would not have influenced the results of plaintiff's 2013-2014 summative evaluation, and it would not have appeared to affect Schmidt's recommendation for nonrenewal. In fact, for the regularly scheduled March 10, 2014 board meeting, the retention and nonretention of probationary teachers was on the board's agenda. Plaintiff, pursuant to Schmidt's recommendation, was on the nonrenewal list.

¶ 19 The board's president, Anne Miller, testified that she read plaintiff's complaint in this matter and knew that plaintiff was alleging that Schmidt retaliated against her for whistleblowing. Miller testified that she believed that she would have verbally instructed Bregy to follow up the claims using the district's normal procedures, and she believed that she and the board would have been kept abreast of anything significant developing, but she was unable to recall anything specific about the substance of plaintiff's allegations relating to her February email complaint. Miller testified that the board generally let the administration handle employment issues, beyond determining whether any reductions were due to an overall shortfall of funding or a decrease in enrollment curtailing staffing requirements. Miller explained that the board did not involve itself in the individualized needs of the district's schools or look at individual teachers and their evaluations. Miller elaborated that, during her time on the board, including the time before she became president, she did not recall that the board ever scrutinized the reason for the nonrenewal of a probationary teacher. Bregy corroborated Miller's testimony, noting that the board did not discuss the individual recommendations for nonrenewal; rather, it adopted the administration's recommendations as to who should be retained and who should not

be retained. Bregy further noted that the general procedure was specifically followed in plaintiff's case: the board, without discussion, adopted the recommendation and voted not to renew plaintiff's employment for the succeeding academic year. On March 11, plaintiff was informed of the board's decision.

¶ 20 Plaintiff then filed her formal complaint within the district's process. Kedroski undertook the district's formal investigation of plaintiff's complaint. While several teachers identified as possible witnesses did not participate in the investigation and there were comments that Schmidt did not like plaintiff, Kedroski's investigation did not identify any specific instances of retaliatory conduct. Kedroski concluded that plaintiff's formal complaint was unfounded. Pursuant to this conclusion, O'Keefe sent a letter to plaintiff informing her that the investigation had been completed. O'Keefe wrote that the actual results of the investigation could not be shared with plaintiff, but assured plaintiff that "appropriate action ha[d] been taken to ensure that such alleged conduct does not reoccur." The parties debated this gnomic pronouncement during discovery with defendants insisting that it did not mean that the district had concluded that there was any wrongdoing and that it was a sop to plaintiff's hard feelings; plaintiff insisted that she understood that she had been vindicated and that the sentence was evidence that the district had substantiated her allegations.

¶ 21 On May 26, 2014, plaintiff purported to file a level 3 grievance pursuant to the district and union's collective bargaining agreement. The agreement set forth a grievance procedure comprising four stages, with the final stage pursued by the union and not the employee. On May 28, 2014, Bregy informed plaintiff that the board had accepted her earlier formal individual complaint to constitute a level 2 grievance in light of the unusual circumstances of this matter. Bregy indicated that the board had reviewed plaintiff's grievance and declined to grant her a

level 3 grievance hearing.

¶ 22 On October 20, 2014, plaintiff filed this action against defendants. In the original complaint, plaintiff alleged that the district terminated her employment in retaliation for her reporting Schmidt's violations of special education laws. Following a February 4, 2015, dismissal of the complaint without prejudice, plaintiff, on March 5, 2015, filed a first amended complaint alleging violations of the Illinois Whistleblower Act (Act) (740 ILCS 174/1 *et seq.* (2014)) (count I), retaliatory discharge (count II), and breach of contract based on the district's policies (count III). Defendants' motion to dismiss the amended complaint was granted: with respect to count I, the violation of the Act, the trial court dismissed the count without prejudice; counts II and III were dismissed with prejudice.

¶ 23 On August 31, 2015, plaintiff filed her second amended complaint which underlies the instant appeal. In the second amended complaint, plaintiff alleged a violation of the Act based on retaliation due to her complaints to the administration about special education violations regarding two of her students (count I); and promissory estoppel (count II) based on her reliance on the prohibitions on retaliation contained in the collective bargaining agreement and defendants' stated policies and procedures. On September 24, 2015, defendants filed their motion to dismiss the second amended complaint. On January 4, 2016, the trial court denied defendants' motion with respect to count I and granted it with respect to count II, dismissing count II (promissory estoppel) with prejudice.

¶ 24 The parties engaged in discovery directed at the remaining count. On November 22, 2016, plaintiff filed a motion for leave to file a third amended complaint, to once again add a claim for breach of contract. Plaintiff argued that discovery had revealed new information supporting the breach-of-contract claim and acknowledged that the trial court had dismissed the

claim earlier in the proceedings before discovery had occurred. Additionally, while plaintiff purported to attach the proposed third amended complaint to the motion, it does not appear in the record. On December 22, 2016, the trial court denied plaintiff's motion for leave to file her third amended complaint.

¶ 25 On March 20, 2017, defendants filed a motion for summary judgment. Following briefing and argument, on June 21, 2017, the trial court denied the motion for summary judgment, holding that, under the Act, plaintiff "raised an issue of fact" because she had made a complaint directly to the board "regardless [whether] the [formal] complaint alleged special education violations." On July 21, 2017, defendants filed a motion to reconsider the trial court's denial of their motion for summary judgment. On September 19, 2017, at the hearing on the motion to reconsider, defendants complained that plaintiff's deposition testimony did not support her claim that she had revealed special education violations for which defendants had retaliated. Plaintiff countered that the entirety of the record, as it stood at that point, supported the trial court's judgment not to grant summary judgment to defendants. Plaintiff further pointed out that, if defendants were dissatisfied with the record as it stood following written and particularly oral discovery, defendants could have requested leave to take another deposition of plaintiff. The trial court orally denied the motion to reconsider, reiterating that the Act did not require a whistleblower to specifically delineate a violation of a particular law. The trial court then set the matter for trial. During that colloquy, defendants requested leave to again depose plaintiff and, when plaintiff did not object, the trial court granted defendants leave to do so.

¶ 26 At plaintiff's second deposition, she specifically testified that she believed the board terminated her employment in retaliation for disclosing special education violations. Plaintiff agreed that she believed that she had been terminated by defendants in retaliation for her

complaints about special education violations; she also was unable to give any other reasons for her termination. Plaintiff also testified, again, that she made complaints about special education violations to Schmidt, Corriveau, and O'Keefe, particularly that two of her students' special education resources were not being provided according to their established plans, improper recording of the students, refusal to provide her training to deal with the two students' behavior, and a lack of help in her classroom. Plaintiff also explained that, in her email to Bregy and the board that she did not specifically mention the special education violations because she had already disclosed them to O'Keefe and believed that the board and Bregy had already been apprised of those particular concerns.

¶ 27 Following plaintiff's second deposition, defendants renewed their motion for summary judgment. In the renewed motion, defendants contended that, because plaintiff's "**only**" reason for her termination was her complaints about special education violations (emphasis in original), yet in her initial deposition she admitted that she never complained directly to the board about the violations, the board, at the time of the termination was uninformed about plaintiff's whistleblowing activities and could not, according to the evidence in the record, have terminated plaintiff in retaliation for whistleblowing.

¶ 28 The trial court accepted defendants' argument in the renewed motion for summary judgment. The trial court ruled:

> "It is evident from the plaintiff's testimonies [in her two depositions], even when read in their entirety, that she believes that she was fired for the sole reason of reporting special education violations.
>
> ***
>
> The deposition statements being analyzed in *Hansen* [*v. Ruby Construction*, 155

> Ill. App. 3d 475, 480 (1987),] involved the plaintiff's belief that he knew that he had tripped over a rubber bumper, thereby causing his injury. It was uncontroverted that the defendant had no control over the rubber bumper, and the trial court had therefore granted summary judgment in favor of the defendant. On appeal, the court held that the plaintiff was bound by his deposition statements, as they were unequivocal judicial admissions, even though they were based upon what turned out to be [the] plaintiff's mistaken belief.
>
> Like the plaintiff in *Hansen* in testifying to the cause of his fall, [plaintiff] has testified to the cause of her firing. She is bound by that testimony. There has been no evidence that the Board knew of any of these alleged special education violations reported by the plaintiff prior to their vote for her termination. Plaintiff's binding admission that she believed her firing was due to her reporting of special education violations and no evidence that the Board knew of these alleged reports or violations prior to their termination vote make summary judgment appropriate in this case."

The trial court granted defendants' renewed motion for summary judgment in favor of defendants.

¶ 29 Plaintiff's motion to reconsider was denied. Plaintiff timely appeals.

¶ 30 II. ANALYSIS

¶ 31 On appeal, plaintiff contends that summary judgment on her whistleblowing claim was improperly granted. Plaintiff also contends that the trial court erred in dismissing her claim for promissory estoppel, as well as abused its discretion in refusing her leave to amend her complaint to reinstate her breach of contract claim. We consider plaintiff's contentions in turn.

¶ 32 Before addressing plaintiff's substantive contentions, we note that plaintiff contends that defendants' statement of facts is replete with material omissions and argument. After review of defendants' statement, we are struck by the one-sided presentation of facts and the wholesale disregard of evidence favorable to plaintiff's position in attempting to explicate the record. Defendants are equally subject to the requirements of Rule 341(h)(6) as plaintiff when providing a statement of facts and are mandated to provide a fair and accurate statement without argument or comment. Ill. S. Ct. R. 341(h)(6) (eff. May 25, 2018). We agree that the sole focus on the evidence in the record supporting defendants' position detracts from the fairness of the presentation of the statement of facts, and that, at times, defendants strayed into the realm of argument. Where, therefore, defendants' statement of facts does not comply with Rule 341(h)(6), we will ignore any noncompliant portions.

¶ 33 A. Summary Judgment and the Whistleblowing Claim

¶ 34 As an initial matter, we consider our standard of review applicable to plaintiff's claim. A motion for summary judgment is properly granted where the pleadings, depositions, admissions, and affidavits establish that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). Even though summary judgment has been deemed a drastic measure, it is nevertheless an appropriate tool to swiftly and efficiently dispose of a litigation in which the right of the moving party to judgment is clear and free from doubt. *In re County Treasurer and ex officio County Treasurer of Kane County, Illinois*, 2018 IL App (2d) 170418, ¶ 22. We review *de novo* the trial court's judgment to grant summary judgment. *Id.*

¶ 35 Next, as plaintiff's whistleblower claim was the sole subject of defendants' motion for summary judgment, we consider the Act and the standards required to claim a violation of the

Act. The purpose of the Act is to protect an employee from adverse employment action undertaken by their employer in retaliation for reporting or refusing to participate in the employer's unlawful conduct. *Larsen v. Provena Hospitals*, 2015 IL App (4th) 140255, ¶ 47. At issue in this case is section 15(b) of the Act, which provides that "[a]n employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, 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(b) (West 2016). Thus, in order to establish a claim under section 15(b) of the Act, the employee must show: "(1) an adverse employment action by his or her employer, (2) which was in retaliation (3) for the employee's disclosure to a government or law enforcement agency (4) of a suspected violation of an Illinois or federal law, rule, or regulation." *Sweeney v. City of Decatur*, 2017 IL App (4th) 160492, ¶ 15.

¶ 36 Plaintiff first argues that the trial court erred in granting defendants' motion for summary judgment. In support of this argument, plaintiff contends that she adequately disclosed her complaints that defendants had violated special education requirements to Bregy, Corriveau, and O'Keefe; alternately, plaintiff maintains that the record demonstrates that there exists a genuine issue of material fact on this point. Plaintiff also contends that the trial court misconstrued her deposition testimony and deemed it to be a judicial admission in order to support its judgment granting the motion for summary judgment. Finally, plaintiff contends that, even if summary judgment were properly granted in favor of the board, the judgment should not have been extended to cover the district because, at best, the record showed only that the board members were not themselves aware of plaintiff's complaints of special education violations. We will address each contention as necessary.

¶ 37 1. Sufficient Disclosure

¶ 38 Plaintiff focuses on the third element of the section 15(b) claim outlined above, whether she made a sufficient disclosure to a government agency. Plaintiff argues that her complaints of special education violations to O'Keefe and Corriveau, along with their promises to pass the information along to Bregy, coupled with Bregy's acknowledgment both personally and on behalf of the board of receiving plaintiff's email in which she mentioned that she was being retaliated against as a whistleblower, were sufficient to satisfy the disclosure-to-government element.

¶ 39 There is a wrinkle to plaintiff's disclosure, namely that she made it to the administration. Specifically, plaintiff avers that she repeatedly informed Schmidt that Dundee Highlands was violating the special education needs and requirements of Josh and Logan. Plainly, under the Act, this would be insufficient disclosure standing alone. *Sweeney*, 2017 IL App (4th) 160492, ¶ 19. For disclosure to be cognizable under the Act, it must not be solely to the alleged wrongdoer. *Id.* Informing the alleged wrongdoer about the impropriety of her actions does not expose, make known, or report the wrongful conduct; the fact that the alleged wrongdoer is the whistleblower's boss does not change the analysis, because the information has not been disclosed for purposes of the Act. *Id.* Specifically, in *Sweeney*, the plaintiff, the city's police chief, discussed with the city manager, and only the city manager, the improper use of police vehicles for the city manager's personal use after which their relationship fractured. *Id.* ¶ 5. As *Sweeney* makes clear, the disclosure of the wrongdoing to the wrongdoer him- or herself is insufficient to expose, to make known, or to report the wrongful conduct, even if the wrongdoer happens to be the employee's boss and the head of a government agency. *Id.* ¶ 19. Plaintiff's allegations here, that she discussed with Schmidt her concerns that Dundee Highlands was

violating the special education needs and requirements of the two students would have been insufficient under *Sweeney*.

¶ 40 Plaintiff, however, also alleged that she discussed the same issues with both O'Keefe and Corriveau. O'Keefe was the district's chief legal counsel, and Corriveau was the assistant superintendent tasked with overseeing elementary education in the district. Plaintiff alleged that both O'Keefe and Corriveau stated that they would pass the information along to Bregy, the district's superintendent. Additionally, Bregy acknowledged the receipt, both personally and on behalf of the board, of plaintiff's email in which she complained that she was experiencing retaliation due to whistleblowing activities, although those activities were never specified in plaintiff's written communications to Bregy, the board, or others of the administration.

¶ 41 In *Brame v. City of North Chicago*, 2011 IL App (2d) 100760, ¶ 1, the plaintiff, a police lieutenant, brought an action pursuant to section 15(b) based on allegations that he informed the city's mayor about suspected criminal actions committed by the lieutenant's boss, the police chief, and the chief retaliated against him. This court held that, when he complained to the mayor, the plaintiff had made a sufficient disclosure to the head of the responsible government agency by informing his boss's boss, the mayor. *Id.* ¶ 8. We considered and distinguished those cases in which informing the wrongdoer's superior within the company was insufficient because a report to the superior was not a report to a government or law-enforcement agency. *Id.* ¶ 9. Instead, we reasoned that:

> "It is not that a municipal employee *** could not have reported to his own governmental employer or that a municipal employee must report to an outside source; the [Act] requires an employee only to report to a government or law-enforcement agency, and no exceptions apply if a government or law-enforcement agency is also the employer. Had

> the legislature intended that the Act not apply to reports made to an employee's own government or law-enforcement agency employer, it certainly would have included such a limitation. It is difficult to perceive that the legislature did not intend the Act to protect a police officer from retaliation for reporting the illegal conduct of fellow officers to his superiors in the department." *Id.* ¶ 12.

Thus, in *Brame*, we held that, with regard to government employees, disclosure to superiors in the government agency is sufficient under the Act to trigger its protections.

¶ 42 Under *Brame*, then, plaintiff's disclosure appears to be sufficient. In the posture of this case, we view the record in the light most favorable to plaintiff. *Hiatt v. Illinois Tool Works*, 2018 IL App (2d) 170554, ¶ 52. Using that standard, plaintiff alleged that she informed O'Keefe and Corriveau about the special education violations attributable to Schmidt. Both O'Keefe and Corriveau, according to plaintiff, stated that they would pass the information along to Bregy. All three of the administration members, Bregy, O'Keefe, and Corriveau, denied that plaintiff informed them specifically about the special education violations. This sets up a factual issue on the issue of disclosure. Additionally, plaintiff's email to Bregy and the board references retaliation for whistleblowing, which, under *Brame*, appears sufficient for purposes of disclosure. Thus, we conclude, on this record, there is a genuine issue of material fact on the issue of plaintiff's disclosure of the alleged wrongful conduct.

¶ 43 2. Defendants' Arguments

¶ 44 Defendants argue that plaintiff's disclosure contention simply misses the point. Defendants instead argue that plaintiff cannot prove the element of retaliation because, when the board terminated plaintiff, it was unaware of the whistleblowing complaints raised by plaintiff.

Defendants conclude that, because the board was plaintiff's employer, the fact that it was unaware of plaintiff's alleged whistleblowing means that there could have been no retaliation.

¶ 45 In support of their contention, defendants cite *Sweeney*, 2017 IL App (4th) 160492, ¶ 16, for the proposition that a claim under the Act "requires that the *relevant decision-maker* know that the employee engaged in statutory protected conduct, then *retaliated* against the employee for engaging in the statutory protected conduct." (Emphasis in original.) Two problems are immediately apparent with defendants' contention based on *Sweeney*. First, the court in *Sweeney* defined the issue in the case to be "whether [the] plaintiff made a disclosure to a government or law enforcement agency." *Id.* ¶ 15. Defendants' claim that *Sweeney* discussed the requirement of retaliation is belied by the case itself. Second, paragraph 16 does not discuss whether the relevant decision-maker was aware of the whistleblowing and then retaliated; rather, it discusses *Brame* in the context of sufficient disclosure, not retaliation. Indeed, implicit within *Sweeney*'s discussion is the concept that the plaintiff was retaliated against for, among other things, accusing his boss of wrongdoing. The claim was not cognizable, however, because it did not qualify as a disclosure. *Id.* ¶¶ 19-20. The court further declined to address any other arguments related to the Act based on its resolution of the disclosure issue.

¶ 46 With that said, in setting forth the elements of a claim under the Act, *Sweeney* does parse section 15(b) to require an adverse employment action by the employer which was in retaliation for the whistleblowing. *Id.* ¶ 15. Defendants' contention, therefore, may simply suffer from a mistaken citation. Again, though, *Sweeney* does not support the proposition for which it was advanced because it was focused only on the element of disclosure, not the element of retaliation.

¶ 47 Defendants also cite *McCoppin v. State*, 53 Ill. Ct. Cl. 153, 159 (2001), for the same proposition that the relevant decision-maker's adverse employment decision was in retaliation for the whistleblowing. In that case, the claimant was laid off from his position for budgetary reasons after he had made complaints of misconduct by his direct supervisor. *Id.* at 154. The court held that the decision-maker, who had neither knowledge of the complaints of misconduct nor acquaintance with the claimant's direct supervisor, had acted in response to a budget shortfall and no evidence supported the claimant's allegation of retaliation. *Id.* at 159. This case, at least, directly supports defendants' proposition, but there is again at least one obvious problem with relying on it. It is well settled that opinions of the Court of Claims are not precedential. *Board of Library Trustees of the Village of Westmont v. Cinco Construction, Inc.*, 276 Ill. App. 3d 417, 424 (1995). By not providing any cognizable authority directly supporting the proposition, defendants are flirting with forfeiture pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. May 25, 2018).

¶ 48 Defendants' contention about retaliation is considerably weakened because the cases cited to illustrate the proposition either are unrelated (or only tangentially, at best) or are not cognizable as precedential authority. Further, defendants' factual analysis is flawed because it does not take into account evidence favoring plaintiff's position (contrary to our standard of review). Defendants represent that only the board was the relevant decision-maker in this case. As a result, any disclosure to the administration without disclosure to the board would have been insufficient. Defendants reason that, because the board was unaware of plaintiff's alleged whistleblowing, it could not have been guilty of retaliation. Without retaliation, no whistleblowing action may be maintained under section 15(b). This overlooks any and all evidence that cuts in plaintiff's favor.

¶ 49 As an initial point, plaintiff alleged that she informed both O'Keefe and Corriveau of her complaints that Schmidt had violated special education requirements for Josh and Logan. Plaintiff also averred that they both assured plaintiff that they would pass her concerns along to Bregy. Thus, the evidence, viewed most favorably toward plaintiff, gives rise to the inference that O'Keefe and Corriveau passed the concerns along to Bregy, as promised. Moreover, plaintiff, in her email to the board and Bregy, mentioned that she had come under retaliation for whistleblowing. Bregy, in a responsive email, accepted plaintiff's communication personally and behalf of all of the board members. Thus, the board was aware of plaintiff's allegation that her whistleblowing had led to retaliation, at least as plaintiff might have colloquially characterized it. This awareness is not necessarily incompatible with Miller's testimony that she did not know that plaintiff had specifically complained that Schmidt was violating her students' special education needs and regulations. Plaintiff admits that she made the complaints directly to O'Keefe and Corriveau, and was promised that the complaints would be forwarded along the chain. Plaintiff also admits that she did not specify to the board what misconduct she was complaining about, so Miller's testimony that she was unaware of the alleged special education violations is not incompatible with the board's general awareness that plaintiff was claiming that she had experienced retaliation over her whistleblowing.

¶ 50 O'Keefe, Corriveau, and Bregy all testified that they were not informed about plaintiff's complaints about Schmidt's special education violations. Plaintiff testified that she specifically informed O'Keefe and Corriveau, and they promised to inform Bregy. Thus, there is a factual issue created by the conflicting testimony. At this stage in the proceedings, this is sufficient to preclude entry of summary judgment.

¶ 51 Defendants argue that the board's lack of knowledge means that plaintiff cannot establish retaliation because the board simply terminated a probationary teacher who was not living up to expectations, in line with *McCoppin*, where the claimant was terminated for non-retaliatory reasons. While defendants characterize the termination as solely performance based, plaintiff did allege and provide evidence that she had complained of special education violations after which she was subjected to an adverse employment action. While defendants' position is supported in the record, so is plaintiff's. That sets up a factual issue that cannot be resolved on summary judgment. Moreover, the reality of defendants' termination procedure was that the board itself did not become involved in personnel issues, instead leaving those to the administration. Bregy also testified he did not get into the details of personnel matter in each school, leaving those to the school administration. Thus, the school principal had, according to the testimony included in the record, *de facto* unfettered discretion over the employment decisions of the probationary and nontenured staff. The resolution would be drawn up and presented to the board, and the board never investigated. This, after the board was placed on notice of a potential violation of the Act in plaintiff's email to the board. We do not believe that the responsible decision-maker can bury its head in the sand when presented with such a claim. The fact that the administration's investigation determined the charges to be unfounded does not discredit plaintiff's allegation at this stage in the proceedings. There is conflicting evidence, and this establishes a factual issue sufficient to preclude summary judgment. Accordingly, we reject defendants' contention that plaintiff could not establish the element of retaliation.

¶ 52 Defendants also attack the disclosure element. Defendants contend that plaintiff's admission that she did not directly inform the board that she had leveled charges of wrongdoing against Schmidt insulate the board from any knowledge of a potential violation of the Act in the

time leading up to plaintiff's termination. As noted above, however, plaintiff informed O'Keefe and Schmidt of the precise allegations and was promised they would be conveyed to Bregy. Additionally, plaintiff invoked retaliation for whistleblowing in her email to Bregy and the board, and the email was acknowledged by Bregy both personally and on behalf of the board. The email was delivered to the board before it took its final action on plaintiff's retention. Thus, the evidence sets up the existence of an issue of fact on this point sufficient to preclude summary judgment.

¶ 53 Defendants also ascribe overwhelming weight to plaintiff's acknowledged belief that she was terminated in retaliation for reporting Schmidt's special education violations, even though plaintiff "has no evidence" that the board knew of her whistleblowing. We note that plaintiff's testimony constitutes evidence and, when viewed in the light most favorable to plaintiff, as explained above, it leads to an inference that the board was aware that plaintiff was claiming retaliation for whistleblowing at the time it determined to terminate plaintiff's employment. Accordingly, we reject defendants' contention on this point.

¶ 54 Defendants argue that the district was properly granted summary judgment. We disagree. Section 10-2 of the School Code (105 ILCS 5/10-2 (West 2016)) authorizes only the school board to sue and be sued. This has been interpreted to mean that only the board, not the school district, may prosecute and defend suits unless the district is expressly authorized to do so in a companion statute. *Veazey v. Board of Education of Rich Township School District No. 227*, 2016 IL App (1st) 151795, ¶ 27; *Board of Education of Bremen High School District No. 228 v. Mitchell*, 387 Ill. App. 3d 117, 124 (2008). Here, neither party bothers to look at the provistions of the Act to see if there is an authorization within it to empower the district to defend against a suit.

¶ 55 Section 5 defines "employer" to include "a school district." 740 ILCS 174/5 (West 2016). Section 30 provides: "If an employer takes any action against an employee in violation of Section 15 ***, the employee may bring a civil action against the employer." 740 ILCS 174/30 (West 2016). In construing a statute, we must ascertain and give effect to the legislature's intent, and the best evidence of that intent is the language used in the statute given its plain and ordinary meaning. *Brame*, 2011 IL App (2d) 100760, ¶ 5. Here, section 30 empowers the employee to initiate a civil action against his or her employer, and employer expressly includes a school district. Thus, the Act clearly and unambiguously provides the authorization to the school district to defend an action brought under the auspices of the Act. Accordingly, the district remains a viable defendant in this action.

¶ 56 We note that defendants represent that only the board has appeared through counsel notwithstanding counsel's representation on the front of defendants' response brief that it is representing both the board and the district. If, in fact, the district has not responded as a defendant in this matter, then we trust that, on remand, plaintiff will seek the appropriate remedy. However, as the issue is not squarely before us, we offer no further commentary beyond rejecting defendants' argument that judgment was properly entered in favor of the district on the basis that the district was not empowered to defend this action in its own capacity.

¶ 57 In light of our discussion above, we need not address plaintiff's remaining contentions regarding the grant of summary judgment. Summing up, we hold that the record demonstrates the existence of factual issues sufficient to preclude the grant of summary judgment on plaintiff's whistleblowing claim pursuant to section 15(b) of the Act. Accordingly, we reverse the trial court's judgment on that issue and remand the cause for further proceedings.

¶ 58 B. Promissory Estoppel

¶ 59 Plaintiff next contends that the trial court erred in dismissing with prejudice count II of the second amended complaint, in which plaintiff alleged that defendants' written policies created a promise that defendants would not retaliate if an employee reported harassment or misconduct of other employees or administration. On August 31, 2015, plaintiff filed her second amended complaint. On September 24, 2015, defendants filed a combined motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)) and section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)). On January 4, 2016, the trial court granted with prejudice defendants' motion to dismiss, and we reproduce the trial court's order in full:

> "Matter coming on Defendant's [*sic*] 2-615 and 2-619(a)(9) motion to dismiss plaintiff's second amended complaint, following oral arguments it is hereby ordered:
>
> (1) Defendant's [*sic*] 2-615 & 2-619(a)(9) motion to dismiss COUNT (1) whistleblower is denied;
>
> (2) Defendant's [*sic*] 2-615 & 2-619(a)(9) motion to dismiss COUNT II, promissory estoppel is dismissed [*sic*] with prejudice;
>
> (3) Defendant[s] to answer Count I of the 2nd Amended Complaint by February 1, 2016;
>
> (4) Parties to serve written discovery by February 18, 2016;
>
> (5) Parties to answer written discovery by March 18, 2016; and
>
> (6) CASE MGT conference to be held on MARCH 29, 2016[,] at 9:00 A.M. at which time parties to have issued Notices of deposition(s)."

¶ 60 The parties dispute the effect of this order. Plaintiff argues that, in point 2 of the order, the phrase, "Defendant's [*sic*] 2-615 & 2-619(a)(9) motion to dismiss COUNT II, promissory

estoppel is dismissed [*sic*] with prejudice," simply repeats the title of defendants' motion to dismiss as an identifier. Plaintiff points out that, as the ground for section 2-619, defendants relied on federal preemption, but in their reply, defendants conceded that the ground of federal preemption was not applicable. Plaintiff reasons that, after defendants' concession, there was only the remaining ground of failure to plead a claim pursuant to section 2-615 for the trial court to consider. Plaintiff concludes that, as the motion to dismiss pursuant to section 2-615 was all that remained to be resolved following defendants' concession, it was all the trial court's January 4, 2016, order did resolve, so the language in point 2 of the order was nothing more than an identifier of defendants' motion to dismiss.

¶ 61 By contrast, defendants argue that the phrase refers to each ground of their motion to dismiss, meaning that that count II was dismissed pursuant to section 2-615 of the Code as well as pursuant to section 2-619(a)(9). We note that, in both their memorandum in support of their motion to dismiss and their reply, defendants argue that plaintiff previously presented promissory estoppel as a theory of recovery raised to give the trial court a reason to not dismiss the breach of contract count of the amended complaint. In both the memorandum in support of their motion to dismiss and their reply, defendants argue that plaintiff's earlier invocation of promissory estoppel in connection with her defense of the breach of contract count of the amended complaint serves to preclude plaintiff from specifically alleging the promissory estoppel cause of action in her second amended complaint. In other words, defendants argue that plaintiff was estopped from pursuing this theory. See *Kyoung Suk Kim v. St. Elizabeth's Hospital of the Hospital Sisters of the Third Order of St. Francis*, 395 Ill. App. 3d 1086, 1092 (2009) (estoppel is properly considered in conjunction with a section 2-619 motion to dismiss). Defendants tenuously bootstrap their arguments raised against count III of the first amended

complaint by referring to plaintiff's response to defendant's motion to dismiss the first amended complaint and excerpting the portion of that response that purports to argue promissory estoppel. According to defendants, because plaintiff argued promissory estoppel in her response to defendant's motion to dismiss, the trial court, in dismissing with prejudice count III, also somehow passed judgment on the promissory estoppel allegations later raised in count II of the second amended complaint.

¶ 62 We can climb out of this rabbit hole by making two observations. First, the structure of the order unambiguously demonstrates that point 2 was the trial court's judgment on the grounds offered by defendants. We say this because the order identified defendant's pleading in the introductory sentence: "Matter coming on Defendant's [*sic*] 2-615 and 2-619(a)(9) motion to dismiss plaintiff's second amended complaint, following oral arguments it is hereby ordered." In this sentence, the reference to defendant's motion to dismiss plaintiff's second amended complaint is clearly for the purpose of identifying the pertinent pleading. In point 1, the trial court rejected the grounds proffered by defendants: "(1) Defendant's [*sic*] 2-615 & 2-619(a)(9) motion to dismiss COUNT (1) whistleblower is denied." In point 2, the trial court accepted the grounds proffered by defendants: "(2) Defendant's [*sic*] 2-615 & 2-619(a)(9) motion to dismiss COUNT II, promissory estoppel is dismissed [*sic*] with prejudice." In the remaining points 3-6 of the order, the trial court directs the parties to accomplish various things in order to move the case forward. It is therefore clear, in light of points 3-6, that points 1 and 2 are also the judgment of the trial court: each time on the specific grounds of the motion under consideration, while the introductory sentence is used to identify the precise pleading. Thus, the trial court unequivocally ordered that count II be dismissed with prejudice pursuant to defendants' arguments presented under sections 2-615 and 2-619.

¶ 63 Second, we interpret a trial court's order in the same fashion as other written instruments, by ascertaining the court's intention as reflected in all parts of the judgment itself. *LB Steel, LLC v. Carlo Steel Corp.*, 2018 IL App (1st) 153501, ¶ 28. If the order is unambiguous, it is given effect as drafted. *Id.* Here, the order is unambiguous.

¶ 64 Plaintiff disputes the unambiguous nature of the order as noted above, by contending that defendants' concession on federal preemption took the affirmative matter off the table and, we suppose, renders the reference to section 2-619(a)(9) a scrivener's error. We note, however, that defendants also contended that plaintiff was estopped from promulgating her theory of promissory estoppel. Further, in conjunction with the promissory estoppel argument raised in conjunction with count III of the first amended complaint (but not repeated in conjunction with their motion to dismiss the second amended complaint), defendants had raised an argument that any claim was untimely pursuant to section 8-101 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/8-101 (West 2016) (one-year statute of limitations)). Thus, affirmative matters purportedly defeating plaintiff's cause of action were before the trial court, undercutting plaintiff's claim of ambiguity caused by defendants' concession.

¶ 65 Next, we note that it is fairly axiomatic that the trial court's oral pronouncement stands as the judgment of the court, while the written order serves as evidence of that judgment. *Barnes v. Lolling*, 2017 IL App (3d) 150157, ¶ 23 n.8. Here, plaintiff has not supplied the transcripts of the hearing on defendants' motion to dismiss the second amended complaint, so we cannot, apart from the unambiguous written order, ascertain what the trial court's (oral) judgment was. Noting that there were affirmative matters tending to defeat the effect of plaintiff's promissory estoppel claim before the trial court during that hearing, we must, therefore presume that the judgment

was entered in conformity with the law and had a sufficient factual basis. *Id.* ¶ 23; see also *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 66 This conclusion is sufficient to resolve the issue on appeal. Nevertheless, while the affirmative matters (the estoppel claim and the tort immunity limitations period) are well established in the record, and while we may affirm the trial court's judgment on any grounds appearing in the record regardless of whether the trial court relied on those grounds (*First Mortgage Co. v. Dina*, 2017 IL App (2d) 170043, ¶ 39), we will address the sufficiency of count II of the second amended complaint in light of the section 2-615 motion to dismiss.

¶ 67 A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint based on its facial defects. *In re Marriage of Fisher*, 2018 IL App (2d) 170384, ¶ 21. The court accepts as true all well-pleaded facts as well as the reasonable inferences that may be drawn from those facts. *Id.* We review *de novo* the trial court's judgment on a motion to dismiss. *Id.* We reiterate that we may sustain the trial court's judgment on any grounds apparent in the record without regard to whether the trial court actually relied on those grounds. *Dina*, 2017 IL App (2d) 170043, ¶ 39.

¶ 68 Plaintiff argues that the trial court erred granting the motion to dismiss count II because she adequately alleged all of the elements of promissory estoppel. In order to state a claim for promissory estoppel, a plaintiff must prove that: (1) the defendant made an unambiguous promise to the plaintiff; (2) the plaintiff relied on the promise; (3) the plaintiff's reliance was expected and foreseeable by the defendant; and (4) the plaintiff relied on the promise to his or her detriment. *Janda v. U.S. Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 86. The doctrine of promissory estoppel exists to enforce promises that do not satisfy the contractual requirement of consideration; it is not intended to give a party to a negotiated contract a second bite at the apple

in the case breach of contract is not proved. *Prentice v. UDC Advisory Services, Inc.*, 271 Ill. App. 3d 505, 512 (1995). In other words, promissory estoppel may be applied only in the absence of an express agreement; where there is a contract, a party may no longer recover under a theory of promissory estoppel. *First Mercury Insurance Co. v. Ciolino*, 2018 IL App (1st) 171532, ¶ 50.

¶ 69 Here, plaintiff attached to the second amended complaint pertinent portions of the collective bargaining agreement between the district and the union—in other words, she attached her employment agreement to her complaint. Where an exhibit is attached to the complaint, it becomes a part of the complaint and the exhibit trumps the allegations of the complaint if there are any conflicts between the factual matters embodied in the exhibit and the allegations of the complaint. *Hampton v. Chicago Transit Authority*, 2018 IL App (1st) 172074, ¶ 20. Thus, because plaintiff has attached her employment agreement to the complaint, she is precluded from recovering under the theory of promissory estoppel. *Ciolino*, 2018 IL App (1st) 171532, ¶ 50. Accordingly, the trial court properly dismissed count II for failure to state a claim.

¶ 70 To the extent plaintiff can proceed under a theory of promissory estoppel, we are persuaded by defendant's invocation of foreign authority that the anti-retaliation provisions cited in defendants' policy and in the collective bargaining agreement only summarized defendants' obligations under state and federal laws, and were not cognizable promises upon which plaintiff could rely. See *Talanda v. KFC National Management Co.*, 863 F. Supp. 664, 669-70 (1994) (purported promise in employee handbook was insufficiently clear to allow reasonable and justifiable reliance by the employee); *Wexler v. Morrison Knudsen Corp.*, 2000 WL 1720344, *6 (statements in the company's handbook "reflect summaries of existing laws, not promises to employees about their work conditions"); *Svigos v. Petry Television, Inc.*, 1996 WL 388416, *3

(the company's harassment policy "concerning an employee's right to work in an environment free of discrimination and harassing conduct merely summarizes the existing state of the law" and "does not create a duty separate from those already imposed on the employer by statute"). Here, the anti-retaliation provisions attached to the complaint summarize defendants' duty under section 15(b) of the Act (740 ILCS 174/15(b) (West 2016)) not to retaliate for the whistleblowing actions alleged by plaintiff. We believe that the recapitulation of a statutory obligation is not the sort of promise that a plaintiff may reasonably rely upon for purposes of promissory estoppel. *Talanda*, 863 F. Supp. at 669-70; *Wexler*, 2000 WL 1720344, *6; *Svigos*, 1996 WL 388416, *3.

¶ 71 Plaintiff attempts to distinguish the three foreign cases by correctly noting that the employer's purported promises in those cases were drawn from employee handbooks, which factored in each court's determination that the purported promises were neither clear and unequivocal nor reasonably relied upon. While true, it seems that defendants' alleged promise here is nothing more than a pledge to conform their actions to the requirements of the law, and this "promise" is nothing but illusory. As such, it is not a clear and unequivocal promise for purposes of promissory estoppel and it is not of such character that a plaintiff may reasonably rely upon it.

¶ 72 Plaintiff also argues that she is "relying on a binding obligation," namely, the collective bargaining agreement. This admission undercuts her position, as she is saying that the contractual provision in the collective bargaining agreement provides the basis of the promise for purposes of promissory estoppel, an argument that cannot stand. *Ciolino*, 2018 IL App (1st) 171532, ¶ 50.

¶ 73 Plaintiff also argues that, apart from the policies and employment agreement, O'Keefe's May 19, 2014, letter expressly promised that she would not experience "adverse action" (retaliation) for bringing matters to the attention of the administration. The problem here is that the letter postdates all of plaintiff's complaints. Thus, she could not have relied upon that letter at the time of notifying the administration of Schmidt's alleged conduct for purposes of promissory estoppel. Plaintiff rejoins that it "strains credulity to suggest that [May 19, 2014,] was the first time O'Keefe or anybody else made those assurances to employees including Plaintiff." We note, however, that we are reviewing the dismissal of count 2 pursuant to section 2-615, which requires that we take only the complaint's well-pleaded allegations as true. *Marriage of Fisher*, 2018 IL App (2d) 170384, ¶ 21. Plaintiff offers only argument—there are no allegations supporting the argument anywhere in plaintiff's second amended complaint; moreover, the argument is speculative in addition to being unsupported in the complaint. Thus, regardless of whether O'Keefe's letter reflected defendants' general policy regarding retaliation, it is clear that plaintiff could not actually rely on the letter itself, as it postdated her whistleblowing, and so it cannot support her claim of promissory estoppel because plaintiff could not have relied upon an after-the-fact letter, defendants could not have foreseen that plaintiff would have relied on an after-the-fact letter, and plaintiff undertook no actions in reliance on the letter and could have suffered no detriment.

¶ 74 For the reasons expressed above, then, the trial court properly dismissed plaintiff's promissory estoppel claim.

¶ 75 C. Amendment of Complaint

¶ 76 Plaintiff last argues that the trial court abused its discretion in denying her leave to amend her complaint to reinstate an earlier claim for breach of contract. On March 5, 2015, plaintiff

filed her amended complaint, count I of which alleged a violation of the Act, count II of which alleged retaliatory discharge, and count III of which alleged breach of contract based on district policies expressed in writing. Defendants filed a motion to dismiss the amended complaint. Pertinently, on August 4, 2015, the trial court dismissed with prejudice count III of the amended complaint pursuant to sections 2-615 and 2-619 of the Code. On August 31, 2015, plaintiff filed her second amended complaint. In this complaint, plaintiff abandoned count III altogether, instead repleading in count I a violation of the Act and adding a new count II, alleging promissory estoppel.

¶ 77 On November 22, 2016, plaintiff filed a motion requesting leave to file a third amended complaint in order to reinstate, based on discovery that had occurred, the breach-of-contract claim from the amended complaint. On December 13, 2016, defendants filed their brief opposing plaintiff's motion for leave to amend. Defendants argued that, among other things, *res judicata* barred the reinstatement of the earlier-dismissed breach-of-contract claim. On December 27, 2016, the trial court denied plaintiff's motion for leave to amend.

¶ 78 Plaintiff argues that the trial court abused its discretion in denying the motion for leave to amend. Section 2-616 of the Code provides that a complaint may be amended at any time before final judgment on just and reasonable terms. 735 ILCS 5/2-616 (West 2016). In considering whether to allow leave to amend, the trial court considers: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. *Goodwin v. Matthews*, 2018 IL App (1st) 172141, ¶ 29. The plaintiff must satisfy all four of the factors considered by the trial court. *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill.

App. 3d 211, 220 (2010). The trial court's determination will not be disturbed absent an abuse of discretion. *Goodwin*, 2018 IL App (1st) 172141, ¶ 29.

¶ 79 Here, plaintiff included the breach-of-contract count in her amended complaint. When it was dismissed, plaintiff abandoned the count altogether, and it was not included in the second amended complaint. When a party files an amended complaint that does not refer to the earlier pleading, the party is deemed to have abandoned and withdrawn the earlier pleading. *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 154 (1983). Thus, by failing to include count III in the second amended complaint (simply to preserve the issue), plaintiff effectively withdrew and abandoned it.

¶ 80 Looking at the factors considered by the trial court in light of this abandonment and withdrawal, we conclude that the trial court did not abuse its discretion. The two most important factors in light of plaintiff's abandonment and withdrawal are timeliness and opportunity to amend. Obviously, trial was not imminent, but plaintiff had not attempted to preserve the issue presented by the breach-of-contract claim after the August 2015 dismissal with prejudice. More than a year later, although after more discovery had been completed, plaintiff requested leave to amend. In light of the abandonment (and considering that plaintiff needed only to refer to the previously dismissed count to preserve it (*Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 11 (minimal effort, such as a footnote referring to a desire to preserve the dismissed claim suffices)), we believe that the proposed amendment was untimely. Likewise, plaintiff had already attempted to raise the claim, so there had been ample opportunity for the amendment; also considered in light of the abandonment, plaintiff apparently did not believe it necessary to further raise or preserve the breach-of-contract claim.

¶ 81 We also note that plaintiff did not include in her motion for leave to amend a copy of the proposed pleading attempting to reinstate the breach-of-contract claim. This, too, cuts heavily against plaintiff because, while plaintiff summarily described what she might think about including in a new breach-of-contract count, we cannot fully assess how it might have cured any earlier defects. With that said we do not believe that there is much in the way of surprise or prejudice accruing from the request, although the precise contents of the contemplated count cannot be ascertained and measured for surprise or prejudice. On balance then, we conclude that the factors the court considered when entertaining plaintiff's motion for leave to amend weigh firmly against the amendment. Accordingly, we hold that the trial court did not abuse its discretion in denying plaintiff's motion for leave to amend.

¶ 82 III. CONCLUSION

¶ 83 For the foregoing reasons, we reverse the judgment of the circuit court of Kane County granting summary judgment in favor of defendants and remand for further proceedings consistent with this order. We affirm the circuit court's judgment in all other respects.

¶ 84 Affirmed in part and reversed in part; cause remanded.