

Case No. 73751-1-I

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COURT OF APPEALS, DIVISION ONE,  
OF THE STATE OF WASHINGTON

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HENRY TANG, individually

Appellant/Cross-Respondent,

v.

CITY OF SEATTLE, a Washington Municipality;  
SEATTLE PUBLIC UTILITIES, a division of the City of Seattle

Respondents/Cross-Appellants

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APPELLANT'S REPLY BRIEF AND  
RESPONSE TO CROSS-APPELLANTS' OPENING BRIEF

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## I. REPLY TO RESPONSIVE BRIEF

### A. **Sufficient facts have been pled and evidence supports Tang's alternative claims, or material issues of fact remain that preclude summary judgment dismissal of Tang's claims.**

The following facts are undisputed, or issues of material fact exist precluding summary judgment dismissal of Tang's claims:

Tang's January 21, 2009 Employee Performance Review Form, as part of the "Dam Safety" Work Unit, indicated that Tang met all standards.<sup>1</sup> (CP 678-85.)

When Tang's employment was re-classified from "Civil Engr, Assoc" to "Civil Engineer, Senior (Job Code 53420)" in 2009, the position was identified as follows: "This position resides in the Dam Safety section of the Seattle Public Utilities (SPU). The purpose of this work section is to provide for the safe operation of the Cedar Moraine embankment and the dams that are owned by SPU. Work performed by the Dam Safety section is a requirement of both federal and state regulatory programs to reduce the consequences and likelihood of dam failure." (CP 449-50.) The summary of work is consistent: "This position performs project management and project engineering on a variety of technically complex and high priority projects in the area of dam safety, dam facilities and large reservoir operations...; and serves as the technical expert in the area of

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<sup>1</sup>This review indicated a goal of continuing to "acquire expertise in the area of dam safety, regulations and operations." (CP 684.)

dam safety issues and regulatory compliance...” (CP 450.) This description of Tang’s job re-classification is consistent with his testimony of having “a higher responsibility than an associate engineer—within the responsibility of a particular group”, then the “Dam Safety” section. (CP 169 [Tang Dep., 17:17-22]; CP 170 [Tang Dep., 21:3-24:17].)

Following re-classification of Tang’s employment to that of Senior Civil Engineer, Tang continued to receive positive performance reviews as part of the PMED Work unit. (CP 671-77 [February 4, 2010 Review]; CP 658-70 [January 11, 2011 Review].) It was not until Tang had joined Enrico’s group that he began to receive any negative employee reviews and came under increased micro-management and scrutiny by Enrico. (CP 213, ¶ 7; 222-23; 225-27; 229-37; 239-42; 244-45; 247-29.) But none of the multitude of things Enrico scrutinized were the “primary” reason for demotion of Tang, as set forth *infra*.

In April 2011, Tang raised the issue of his concern that the “Project Engineer” [on the Halladay project] will be responsible for the inter-discipline design integration.” (CP 474.)<sup>2</sup>

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<sup>2</sup> SPU points to the record for the proposition that there is no evidence that Tang gave the memo to Enrico or told him about its existence. (RB at 32.) However, SPU does not deny the memo’s existence, and there is no evidence in the record that Enrico did not receive this memo or see the April 2011 memo as it was part of the SPU Halladay project file since April 2011. In addition, SPU seeks to have the April 2011 memo disregarded, claiming contradictory testimony of Tang. (RB at 32.) SPU claims that Tang said *nothing* about the memo when asked when he raised safety concerns, but this is false. Rather, SPU never inquired in Tang’s deposition about when he first raised safety concerns, thus Tang said nothing about the April 2011 memo in his deposition because SPU did not ask.

By May 2012, the Halladay team, including Enrico, was well aware that methane was present and appropriate mitigation measures would be necessary for permitting under SMC 25.09.220(B)<sup>3</sup>. (RB at 37; CP 189-91, 218 ¶ 39.) SPU's own Utility Manager, Min Soon Yim testified that methane was flammable and "can cause a kaboom." (CP 445-46.) The report was in the Halladay file, thus, Tang did not repeatedly raise the issue of safety because it was known by all involved in the project that there was a "potential for explosions." (CP 726, Tang Dep. 82:4-15.)

On June 28, 2012, the SPU Geotechnical Engineering report came out and was included in the Halladay file indicating a concern for worker safety [due to methane presence]. (CP 495.)

On August 31, 2012, Enrico assigned the civil site design work on the Halladay Project, which Tang refused.<sup>4</sup> (CP 215.)

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Rather, SPU asked when Tang "verbally cited the WAC or the code of ethics." (CP 725-26, Tang Dep. 80:21-82:1.) Therefore, Tang's testimony is consistent with his declaration in response to SPU's summary judgment motion. (CP 396, ¶¶ 7 and 8.) Either sufficient evidence exists supporting Tang's contention that he communicated "concern about inter-discipline design integration" in April 2011, as the beginning of his protected activity, or a material issue of fact exists for a trier of fact.

<sup>3</sup>SMC 25.09.220 regulates the development of abandoned landfills, which provides in pertinent part: "Developments on abandoned landfills is subject to Seattle-King County Health Department requirements for the applicant to submit an excavation and development work plan, prepared by a licensed engineer *with experience in landfill construction and/or management...*" (*Emphasis added.*)

<sup>4</sup>Tang understood the civil design work to include multi-discipline design, including electrical, structural, and mechanical, as well as methane mitigation. (CP 726-27, Tang Dep. 84:16-85:15.) Enrico testified that civil design for Halladay included only grading, paving, soil removal, a water meter relocation, and installing a drainage system and a fence." An issue of material fact exists about what constitutes "civil design work" as it relates to the Halladay Decant Project.

On September 6, 2012, Tang expressed his concerns about performing the engineering design.<sup>5</sup> (CP 216, CP 251-57.) Rather than acknowledging Tang's concerns, Enrico pushed him to do the "civil site work", maintaining that "Tang [has] the capacity to perform this work and there is not good reason to hire a consultant". (CP 251-252, 259.) Other than Enrico's opinion, there is no evidence to support Enrico's stance.

On September 10, 2012, SPU recommended Tang for Disciplinary Action, "*primarily...related to Henry's repeated refusal...to perform design work on an engineering assignment*" for the Halladay Decant Project. (CP 330-31, *emphasis added*.)

On April 2, 2013, referencing only the September 10, 2012 suspension recommendation, SPU demoted Tang to Associate Civil Engineer and his pay was decreased. (CP 339-40.) In particular, SPU stated, "Effective April 10<sup>th</sup> 2013, you will be demoted to Associate Civil Engineer. Accordingly, your wage rate will be set at Step 5 of the Associate Civil Engineer pay range, which is \$40.86<sup>6</sup> per hour." (CP 340.)

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<sup>5</sup>Tang believed he lacked the background, knowledge, competence of technology of codes and regulations to perform the multi-discipline design work [as defined by Tang] he believed he was being assigned. (CP 251-52; CP 726-27, Tang Dep. 84:16-85:1.) Enrico believed Tang had the "background to perform the civil site work [as defined by Enrico]", an assignment he deemed reasonable." (CP 251-52; CP 215-16, Enrico Decl. ¶ 17.) Further, Enrico veils a threat of sanction for "insubordination for refusing what he has deemed a "reasonable" assignment. A material issue of fact remains as to whether the assignment was reasonable, and whether Tang's refusal of the assignment constituted insubordination.

<sup>6</sup>As of March 4, 2009, this pay rate would have been within the range of \$40.34-\$46.97 for a Civil Engineer, Senior. (CP 449.) At that time, the pay range for a Civil Engr, Assoc. was \$32.45-\$37.86. (Id.) However, it is clear that the pay ranges between March 2009,

**B. Tang pled claims severally and alternatively.**

Appellant Henry Tang's lawsuit does not allege a single claim; Tang has properly pled multiple claims, severally or alternatively, for "discrimination under RCW 49.17," "retaliation," and "failure to follow the law". (CP 5-6.) Plaintiff's Complaint alleged a "general factual background," which facts were further fleshed out through discovery and presented to the trial court on summary judgment. (CP 1-7, 365-392, 393-407, 408-687, 688-692.)

**C. Tang's claims for retaliation and failure to follow the law constitute a public policy tort claim, were properly pled, and the elements set forth in *Ellis* are applicable.**

Tang's Complaint is sufficient to put SPU on notice of his claim for retaliation. "Washington follows notice pleading rules and simply requires a 'concise statement of the claim and the relief sought.'" *Champagn v. Thurston County*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008), quoting *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006); see also CR 8(a). Here, Tang pled "discrimination under RCW 49.17; retaliation; failure to follow the law" (CP 5.) And, while Tang specifically pled that the lawsuit "centered" on the Methane Mitigation Plan, Tang clearly asserted sufficient facts to generally put SPU on notice of his claim for retaliation as it relates to his

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when Tang's employment status was promotionally re-classified, and April 2013, when Tang was demoted, increased in general. (CP 449, 340.)

assignment for “100% of the design package.” (CP 2, ¶3.1.) Indeed, SPU had the opportunity and did conduct discovery about this claim. (CP 174, Tang Dep 67:22-68:25.) Furthermore, the issue of retaliation for Tang’s refusal to perform multi-disciplinary design work, including the Methane Mitigation Plan, was raised by Tang on summary judgment. (CP 370, 377.)

Washington courts have expressed concern about expanding a cause of action for wrongful disciplinary action less than discharge. *White v. State*, 131 Wn.2d 1, 29-30, 929 P.2d 396 (1997). However, the Court also must be careful to balance the importance of allowing private employers the right to operate their businesses against the importance of prohibiting wrongful actions against employees, especially where there is a violation of public policy. *White*, 131 Wn.2d at 27-28, citing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). This Court must distinguish and consider the totality of circumstances of Tang’s case, where Tang was demoted resulting in a loss of pay, as well as consider the chilling effect of allowing an employer to demote in retaliation in an attempt to escape the effect of the law.<sup>7</sup>

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<sup>7</sup>See e.g., *White v. State*, 131 Wn.2d 1, 7, 29-30, 929 P.2d 396 (1997)(The Court declined to extend a public policy cause of action to a lateral job transfer that “would not result in the loss of any benefits or salary and would not affect the plaintiff’s employment classification”), citing *Zimmerman v. Bucheit of Sparta*, 164 Ill. 2d 29, 46, 645 N.E. 2d 877 (1994)(By declining to create a cause of action for retaliatory demotion, the court has “invited those who wish to discharge in retaliation to simply demote in retaliation, and thereby escape the effect of the law. This glaring loophole will create more problems than

Public policy is clearly at the forefront of Tang's claims. The purpose of WAC 196-27A-020 is to "safeguard life, health, and property and promote the welfare of the public. To that end, registrants have obligations to the public, their employers and clients, other registrants and the board." WAC 196-27A-020 (*emphasis added*). Under WAC 196-27A-020(1)(c), as to a registrants obligation to the public, "Registrants must inform their clients or employers of the harm that may come to life, health, property and welfare of the public at such time as their professional judgment is overruled or disregarded." This is exactly what Tang, as a registrant (professional engineer) did in refusing to do the multi-disciplinary civil design work Enrico was attempting to foist upon him, when Tang was not qualified in the specific multi-disciplinary fields of engineering. Under WAC 196-27A-020(2)(d) and (e), Tang had an obligation: "Registrants shall be competent in the technology and knowledgeable of the codes and regulations applicable to the services they perform" and "Registrants must be qualified by education or experience in the technical field of engineering...applicable to the services performed."

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it solves") (*See App. 3*); *also citing Ludwig v. C&A Wallcoverings*, 960 F.2d 40, 43 (7<sup>th</sup> Cir. 1992) (Plaintiff continued to receive the same salary she had earned as an administrative assistant to the manager) (*See App. 2*); *also citing Garcia v. Rockwell Internat. Corp.*, 187 Cal. App. 3d 1556, 1562, 232 Cal. Rptr. 490, 492 (Cal.App. 1986)(Holding that "an employee can maintain a tort claim against his or her employer where disciplinary action has been taken against the employee in retaliation for the employee's "whistle-blowing" activities, even though the ultimate sanction of discharge as not been imposed."). (*See App. 1*)

(*Emphasis added*) Here, Tang was faced with reports in the file of explosion potential and his entire prior SPU experience had been dam safety. SPU/Enrico placed Tang in the untenable situation.

The elements of a public policy tort claim are applicable in this case. *Ellis v. City of Seattle*, 142 Wn.2d 450, 459, 13 P.3d 1065 (2000) *citing Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 942, 913 P.2d 377 (1996). As sought in Tang’s opening brief, this court should reverse dismissal of Tang’s claims.

**D. Tang engaged in protected activity before his demotion, which was a substantial factor in motivating SPU’s adverse actions, and under the framework for a statutorily based claim for retaliation, Tang meets all of the elements.**

In its response, SPU asserts that Tang has the burden of establishing “*specific and material facts* to support each element of his prima facie case.” (SPU Responsive Brief (“RB”) at 25, *citing Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992) [Action for religious discrimination under WLAD, RCW 49.60 *et seq.*]) However, Washington courts reject the proposition that employees must prove that discrimination was the “determining factor” [or sole factor] in the employer’s decision. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014) (Age discrimination action under WLAD), *citing Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-10, 310 898 P.2d 284 (1995). “To hold otherwise would be contrary to Washington’s

‘resolve to eradicate discrimination’ and would warp this resolve into ‘mere rhetoric.’” *Id.* The Court refused to “erect the high barrier to recovery implicated by the ‘determining factor’ standard. *Scrivener*, 181 Wn.2d at 445, *citing Mackay*, 127 Wn.2d at 310-11.

To overcome summary judgment, a plaintiff needs to show only that a reasonable jury could find that the plaintiff’s protected trait was a *substantial factor* motivating the employer’s adverse actions. *Scrivener*, 181 Wn.2d at 445 (*emphasis added*), *citing Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 149, 144 P.3d 930 (2004); *also citing Sangster v. Albertson’s Inc.*, 99 Wn.App. 156, 160, 991 P.3d 674 (2000) (“Summary judgment should rarely be granted in employment discrimination cases.”).

“A ‘substantial factor’ means that the protected characteristic was a significant motivating factor bringing about the employer’s decision.” *Scrivener*, 181 Wn.2d at 444. “It does not mean that the characteristic was the sole factor in the decision.” *Id.* “When the record contains reasonable but competing inferences of both discrimination and nondiscrimination, the trier of fact must determine the true motivation.” *Scrivener*, 181 Wn.2d at 445, *citing Rice v. Offshore Sys., Inc.*, 167 Wn.App. 77, 90, 272 P.3d 865 (2012).

Here, the evidence shows that the recommendation for demotion is based upon the September 2012 notice to Tang, in which SPU stated that the *primary* reason for recommendation for suspension was Tang’s

“repeated refusals to accept a task as a Senior Civil Engineer.” (CP 330.) “Henry has repeatedly refused to perform design work on an engineering assignment for the Halladay Decant Project.” (Id.) Thus, Tang’s refusal to perform the multi-discipline engineering work, including the Methane Mitigation Plan, as set forth in the September 2012 email exchange with Enrico and the attached Scope of Work<sup>8</sup>, was a substantial motivating factor bringing about SPU’s decision to demote Tang and reduce his pay. (CP 251-257, 330-331, and 339-340.)

Moreover, there is no evidence of lack of competence of Tang as a Senior Civil Engineer prior to working in Enrico’s group or being assigned the Halladay design project; indeed his employee reviews as a Senior Civil Engineer prior to working in Enrico’s group indicated that he met SPU’s standards for the position. (CP 671-77, 658-70.) SPU did not remove Tang from the position because he was not competent to perform the work of a Senior Civil Engineer, rather SPU removed Tang from the position in retaliation for his refusal to perform specific design work that he understood was outside the scope of his knowledge of the technology and the codes and regulations applicable to the services he was being required to perform as governed by WAC 196-27A-020.

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<sup>8</sup> The Scope of Work (CP 253-57) cites to a Methane Mitigation Plan no less than eight (8) times).

Further, Tang clearly engaged in protected activity before his demotion.<sup>9</sup> The record specifically shows Tang's background and career path as a senior engineer in dam safety; that after dam safety, Tang had an opportunity to work with the hydraulic models group but instead was offered and accepted a project management role; and, that Tang did not experience work-related problems until he was part of Enrico's team. (CP 396 at ¶ 3; CP 678-85; CP 450; CP 169-70; CP 671-77; CP 658-70; CP 213, ¶ 7; 222-23; 225-27; 229-37; 239-42; 244-45; 247-29.) Tang raised issues of concern about competency of anyone in-house to perform the multi-disciplinary design work in April 2011. (CP 474) SPU had knowledge of the safety issues, as stated in their own Geotechnical Report. (RB at 37; CP 189-91, 218 ¶ 39; CP 496.) Tang raised issues of competency and compliance with code requirements in September 2012. (CP 216, 251-57.) Public and worker safety had been a concern all along and all this was raised prior to the *Loudermill* hearing on February 26, 2013. (CP 339.)

SPU's solution, through Enrico, was to 1) insist that he do the work; 2) to determine that he was competent; 3) and to expect Tang to do the work. (RB at 27.) Citing to the SPU Workplace Expectation for Partnership, as early as April 2012 Enrico made it clear that Henry was to:

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<sup>9</sup>SPU asserts that "Tang makes many misstatements of fact." (RB at 25.) SPU offers no reference to Tang's brief or the record to support this contention.

“Follow the direction of your supervisor and recognize that your input is an important factor, but that your supervisor’s decision is ultimately followed.”<sup>10</sup> (CP 239.) In other words, it was Enrico’s way or the highway.<sup>11</sup> (Id.)

Here, SPU simply railroaded Tang to choose between Tang’s statutory, code-enforced, and ethical obligations and keeping his position as a Senior Civil Engineer in Enrico’s department. While SPU acknowledges that the primary issue Tang was raising was with respect to his competency for the design work, SPU attempts to diminish the importance of Tang’s concerns about the design work in reliance of Enrico’s testimony. (CP 215, ¶¶ 16 and 17.) Tang understood the job to include the entire design, and not limited to the simple “civil site work” as later defined by Enrico. (Id.; CP 251-252.) Thus, while Enrico may have offered to “work side by side” with Tang to complete the design, an issue of material exists as to what specifically Enrico was offering to help Tang with when he was offering to work through the design. (Id.)

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<sup>10</sup>The SPU Workplace Expectation for Partnership is not part of the record.

<sup>11</sup>Once a plaintiff can establish that the employer’s actions violate an important mandate of public policy, no legitimate reason exists for excusing those actions. *Becker v. Cmty. Health Syst, Inc.*, 184 Wn.2d 252, 260 (2015 Wash. LEXIS 1046) In *Becker*, the plaintiff was forced to choose between the consequences of disobeying his employer and the consequences of disobeying criminal laws. *Becker*, at 261, citing *Becker v. Cmty. Health Sys., Inc.*, 182 Wn.App. 935, 952, 332 P.3d 1085 (2014).

In short, prior to being demoted, Tang engaged in consistent protected activity by his continual refusal to perform multi-disciplinary design work, including a Methane Mitigation Plan, in violation of WAC 196-27A-020. The protected activity was a substantial factor in motivating SPU's adverse action in demoting Tang and reducing his pay.

**E. There is a causal connection between Tang's protected activity and demotion.**

As argued, *infra*, Tang began voicing concerns about the necessity for competent design work as early as April 2011. Conversations about the requirement for a methane mitigation plan and the civil design were recurring, discussed at length, and Tang did not feel it was necessary to "go into a lecture about a methane mitigation plan every single time." (CP 725, Tang Dep. 81:1-19.) The issue that it was a multi-disciplinary design came up; sometimes methane mitigation came up, but it was not always mentioned because "that's always on the radar." (Id.) Moreover, the primary reason for demotion is stated by SPU as being Tang's refusal to perform the design services. (CP 330, 339.) Tang first notified SPU of his concerns in April of 2011, and his refusal to perform the multi-disciplinary design work, including the Methane Mitigation Plan, continued up to and through the date of his demotion on April 2, 2013.

SPU attempts to couch Tang's refusal to perform the design work as a lack of "evidence of satisfactory work performance." (RB at 34,) The

evidence SPU relies upon merely supports Tang's position that it was not until he worked in Enrico's group and refused to do the design work that he began to receive negative employee reviews and came under increased micro-management and scrutiny by Enrico. (CP 213, ¶ 7; 222-23; 225-27; 229-37; 239-42; 244-45; 247-29.) This fact is evidence of retaliation. SPU ignoring Tang's previous reviews where he meets the work performance for a Senior Civil Engineer on all other work other than the Halladay Project tends to prove the retaliation or at least constitutes an issue for the trier of fact.

**F. Tang satisfies the pretext prong because Tang's refusal to perform the multi-discipline engineering work was a substantial motivating factor in SPU's decision to demote Tang and reduce his pay.**

An employee does not need to disprove each of the employer's articulated reasons to satisfy the pretext burden of production. *Scrivener*, 181 Wn.2d at 445. "A plaintiff need only prove that discrimination was a substantial factor in an adverse employment action, not the only motivating factor." *Id.*, citing, *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 309-11, 898 P.2d 284 (1995). "An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable..." *Id.*

An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either that (1) the

defendant's reason is pretextual<sup>12</sup> or (2) that although the employer's stated reason is legitimate, *discrimination* nevertheless was the *substantial factor* motivating the employer. *Scrivener*, 181 Wn.2d at 447, *citing Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 643 n.32, 911 P.2d 1319 (1996)(discrimination against disabled person); *Wilmot v. Kaiser Alum. & Chem. Corp.* 118 Wn.2d 46, 73, 821 P.2d 128 (1991) (discrimination against injured workers); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 365, 753 P.2d 517 (1988) (age discrimination).

Here, Tang meets the burden of showing that discrimination was the substantial motivating factor. SPU's own demotion/pay-reduction determination establishes that Tang was demoted, and his pay was decreased, for his refusal to perform the design work on the Halladay project. Enrico's memo to Linda DeBoldt clearly states, "Primarily, this suspension is related to Henry's repeated refusals to accept a task as a Senior Civil Engineer." (CP 330.) The subsequent demotion determination states, "The purpose of this letter is to inform you of my decision regarding your management's recommendation that you be disciplined for insubordination and failure to meet performance standards. In September

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<sup>12</sup>The defendant's articulated reasons (1) had no basis in fact, (2) were not really motivating factors for its decision, (3) were not temporally connected to the adverse employment action, or (4) were not motivating factors in employment decisions for other employees in the same circumstances. *Scrivener*, 181 Wn.2d at 447-448.

2012 you were notified that a recommendation had been made for disciplinary suspension for these reasons...” (CP 339.)

In light of SPU’s “primary” reasoning for demotion of Tang, Tang satisfies the pretext prong and meets the burden of establishing that discrimination was a substantial factor in SPU’s decision to demote him and reduce his pay. SPU’s references to the March 2012 coaching and expectations memoranda and the April 2012 verbal reprimand for other reasons for demotion are red herrings, irrelevant to SPU’s stated *primary* reason for demotion, and must be disregarded.

**G. Tang should be awarded costs and attorneys’ fees on appeal.**

Tang sought recovery of costs and reasonable attorneys’ fees in his Complaint. (CP 6.) SPU had every opportunity to conduct discovery with respect to that request, but it made no request. Tang should be awarded costs and attorneys’ fees on appeal as also sought in his opening brief.

**II. RESPONSE TO CROSS-APPELLANTS’  
OPENING BRIEF**

**A. The Court should affirm the Order denying SPU’s motion for summary judgment related to Tang’s claims for emotional distress damages under RCW 49.17.160**

SPU relies on a recent case found in favor of the City of Seattle under RCW 42.41.040. *Woodbury v. City of Seattle*, 172 Wn.App. 747, 292 P.3d 134, *rev. denied*, 177 Wn.2d 1018, 304 P.3d 14 (2013). However, Tang’s statutory claim in this action was brought under the

Washington Industrial Health Safety Act (“WISHA”), RCW 49.17.160, and reliance on *Woodbury* for its analysis under statutory construction is also distinguishable.

A limited portion of the Whistleblower Statute (RCW 42.41) reviewed in *Woodbury* listed specific relief available to a Whistleblower plaintiff, and that plaintiff did not file under a different portion of the statute that permits emotional damages under (RCW 42.40 referring to RCW 49.60). However, under WISHA (RCW 49.17) the legislature gives the court authority to “order all appropriate relief including ....” and the statute continues to list some (but not all) of the possible relief. SPU relies on a limited portion of one statute which precludes the court from awarding certain remedies, however another portion of the statute permits the emotional damages specifically, and in this case the statute is inclusive and specifically includes “all appropriate relief.”

SPU’s reliance on *Woodbury* is misplaced. In *Woodbury*, the court determined that a statute that enumerates several forms of relief, but does not reference emotional distress damages, indicates intent not to provide emotional distress damages. *Id.* at 137, citing *Human Rights Comm’n v. Cheney Sch. Dist.*, 97 Wn.2d 118, 126, 641 P.2d 163 (1982). The ruling was limited to RCW 42.41.040 and the basis of the ruling was because that statute enumerated the available remedies. *Id.* The *Woodbury* court also distinguished a different portion of the Whistleblower statute, RCW 42.40,

because that portion of the statute incorporates relief under RCW 49.60, Washington's law against discrimination, which includes the ability to receive damages for mental suffering.

The statute limiting the relief sought is specific and did not preclude Tang from emotional distress damages in his case. RCW 49.17.160 does not list out remedies like RCW 42.41, which *Woodbury* was considering. Rather, the statute authorizes the court to award "all appropriate relief." RCW 49.17.160.

SPU further misstates the holding in *Wilson v. City of Monroe*, 88 Wn.App. 113, 125-26, 943 P.2d 1134 (1997). In *Wilson*, the court held that Wilson was not precluded from bringing emotional damages under a tort claim because RCW 49.17.160 was not an exclusive remedy. Wilson had failed in his complaint to plead sufficiently the allegations under the statute and instead brought his claim in tort. *Wilson* favors the plaintiff's position in this court by holding that the statutory remedies are not exclusive.

SPU's argument then stretches into the area of law where the court determines whether RCW 49.17.160 provides adequate protection of ensuring workplace safety protecting workers who report safety violations so as to preclude a separate claim by a terminated employee for wrongful discharge in violation of public policy. *Cudney v. AlSCO, Inc.* 172 Wn.2d 524, 527, 259 P.3d 244 (2011). Without evaluating the extent of the

damages available under the statute, the court found that there were adequate protections. Nothing in *Cudney* precludes emotional distress damages.

Moreover, Tang's claim for emotional distress damages is distinguishable from that of a plaintiff seeking emotional damages under Washington's Landlord Tenant Act. RCW 59.18.085. SPU relies upon *Segura v. Cabrera*, 179 Wn.App. 630, 319 P.3d 98 (2014), *aff'd* 184 Wn.2d 587 (2015 Wash. LEXIS 1198). In *Segura*, the plaintiff was a tenant seeking emotional distress damages under RCW 59.18.085. Specifically, the plaintiff relied upon RCW 59.18.085(3)(e), which allows a displaced tenant to recover any "actual damages sustained by them." *Segura*, 179 Wn.App. at 635, *citing Ellingson v. Spokane Mortg. Co.*, 19 Wn.App. 48, 573 P.2d 389 (1978). In *Ellingson*, the plaintiff brought action under RCW 49.60.030(2), the Washington Law Against Discrimination. *Id.* The trial court in *Ellingson* reasoned that "because 'actual damages' do not ordinarily exclude emotional distress damages compensating real injury," and held that the plaintiff could recover them under a liberal construction effectuating the statute's purpose. *Ellingson*, 19 Wn.App. at 57-68. In considering whether emotional distress damages were available to the plaintiff in the *Segura* case, the Court recognized that it has never adopted a single definition of the term "actual damages." *Segura*, 2015 Wash.LEXIS 1198, \*11. The Supreme Court looked at the

legislative intent of that particular statute, which was, in general “to establish a process by which displaced tenants would receive funds for relocation from landlords...” and “to provide enforcement mechanisms to cities, towns, counties, or municipal corporations...to remedy building code or health code violations and to later collect the full amounts of these relocation funds...from landlords.” *Segura*, 2015 Wash.LEXIS 1198, \*8-9. In the end, the *Segura* court determined that this particular statute, RCW 59.18.085, provides for the recovery of financial losses caused by displacement. *Segura*, 2015 Wash.LEXIS 1198, \*12. *Segura* is distinguishable from Tang’s case, because the statutory scheme relates solely to financial loss, where the purpose of WISHA is the welfare of the people of the state of Washington.

Here, the operable statutory mechanism related to Tang’s claims is WISHA, RCW 49.17, *et seq.* The purpose of WISHA is stated in RCW 49.17.010:

The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses, and payment of benefits under the industrial insurance act. Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose

by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).”  
*Emphasis added.*

In *Wilson v. City of Monroe*, the court examined the meaning of “all appropriate relief” under RCW 49.17.160. *Wilson v. City of Monroe*, 88 Wn.App. 113, 943 P.2d 1134 (1997) While the court analyzed factors related to remedies under RCW 49.17.160(2), and expressed doubt about the legislative intent of “all appropriate relief” under RCW 29.17.160(2), Wilson had withdrawn his claim for general damages in the early stages of his claim against the City. *Wilson*, 88 Wn.App. at 126. Nonetheless, the Court in *Wilson* held that RCW 49.17.160(2) provides for “neither mandatory nor exclusive remedies.” *Id.* Therefore, RCW 49.17.160(2) expresses no intent to provide an exclusive remedy. *Wilson*, at 125.

SPU simply fails to adequately address the statutory intent by providing statements where the legislature specifically excluded language for a result or used certain language which was all encompassing but wanted it limited. For example, here, the legislature grants the court the discretion to order “all appropriate relief”, and SPU argues that “all” does not mean “all.” SPU fails to cite any authority for such a position. There is nothing in any law cited that relates to WISHA questioning the legislature’s intent to allow a court to decide what remedies were appropriate and allow all appropriate relief, or that the relief is exclusive.

To deny such damages on summary judgment without authority is overreaching.

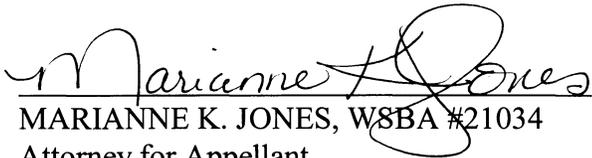
Therefore, the trial court properly denied SPU's first motion for summary judgment related to Tang's claims for emotional damages, and that order should be affirmed.

**B. Tang should be awarded costs and attorneys' fees on appeal.**

Tang should be awarded costs and attorneys' fees on this portion of the appeal as previously argued in Tang's opening brief.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of January, 2016.

JONES LAW OFFICE, PLLC

  
MARIANNE K. JONES, WSBA #21034  
Attorney for Appellant

## APPENDIX

1. *Garcia v. Rockwell Internat. Corp.*, 187 Cal. App. 3d 1556, 232 Cal. Rptr. 490, 492 (Cal.App. 1986)
2. *Ludwig v. C&A Wallcoverings*, 960 F.2d 40, (7<sup>th</sup> Cir. 1992)
3. *Zimmerman v. Bucheit of Sparta*, 164 Ill. 2d 29, 645 N.E. 2d 877 (1994)

## **Garcia v. Rockwell Internat. Corp.**

Court of Appeal of California, Fourth Appellate District, Division Three

December 18, 1986

No. G001933

### **Reporter**

187 Cal. App. 3d 1556; 232 Cal. Rptr. 490; 1986 Cal. App. LEXIS 2361; 106 Lab. Cas. (CCH) P55,694

JOE A. GARCIA, Plaintiff and Appellant, v. ROCKWELL INTERNATIONAL CORPORATION, Defendant and Respondent

**Subsequent History:** [\*\*\*1] A Petition for a Rehearing was Denied January 14, 1987, and Respondent's Petition for Review by the Supreme Court was Denied April 16, 1987. Kaufman, J., did not Participate therein.

**Prior History:** Superior Court of Orange County, No. 338332, Judith M. Ryan, Judge.

**Disposition:** The judgment is reversed.

### **Core Terms**

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mischarging, retaliatory, summary judgment, suspended, retaliation, discharged, inferences, triable

### **Case Summary**

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#### **Procedural Posture**

Appellant worker sought review of a decision from the Superior Court of Orange County (California) granting summary judgment in favor of respondent employer in appellant's claim for retaliatory suspension following whistleblowing activity.

#### **Overview**

Appellant employee claimed his supervisor ordered him to inflate work time on reports to clients' disadvantage, and told a governmental client about the incorrect charges. When respondent employer suspended him without pay, he filed suit for wrongful suspension. Appellant sought review after the lower court granted summary judgment in respondent's favor. Respondent argued that a wrongful termination claim arose only after retaliatory firing or employment termination and,

alternatively, that appellant was fired for falsifying time reports. The court noted that *Cal. Lab. Code § 1102.5(b)* evidenced public policy forbidding retaliatory acts by employees who disclosed employers' violations to government agencies. The court saw no distinction between employment termination and suspension because the same wrongful conduct was involved. The only distinction was the damage suffered. The court held that an employee could maintain a tort claim against an employer where disciplinary action was taken against employee in retaliation for employee's whistleblowing activities, regardless of whether employee was ultimately discharged. Because the facts were disputed, summary judgment was reversed.

#### **Outcome**

Summary judgment in respondent employer's favor in appellant employee's wrongful suspension claim was reversed. The court recognized a tort cause of action for any disciplinary action taken by an employer against an employee in retaliation for an employee's whistleblowing activity, even if the employee was not discharged. There were disputed fact issues as to respondent's reasons for suspending appellant.

### **LexisNexis® Headnotes**

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Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

**HN1** The matter to be determined by the trial court in considering a motion for summary judgment is whether defendant, or plaintiff, has presented any facts which give rise to a triable issue. The court may not pass upon the issue itself. Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue. In examining the sufficiency of affidavits filed in connection with the motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. Such summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

**HN2** When defendant is the party moving for summary judgment, his task is to negate completely an essential element of plaintiff's case or to establish a complete defense. This task is limited to addressing those issues or theories of liability raised in plaintiff's complaint. Defendant who files a summary judgment motion must bear the burden of negating every alternative theory of liability presented by the pleadings. On the other hand, plaintiff cannot rely on his pleadings, even if verified, but must make an independent showing that he has sufficient proof of matters alleged to raise material issues of fact.

Labor & Employment Law > Wrongful Termination > General Overview

Labor & Employment Law > Wrongful Termination > Public Policy

Labor & Employment Law > Wrongful Termination > Remedies > General Overview

**HN3** An employee discharged for refusing to engage in illegal conduct at his employer's request may bring a tort action for wrongful discharge. When an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions.

Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > General Overview

**HN4** See Cal. Lab. Code § 1102.5 (b).

Labor & Employment Law > Wrongful Termination > Remedies > General Overview

Labor & Employment Law > Wrongful Termination > Remedies > Reinstatement

Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > General Overview

**HN5** An employee can maintain a tort claim against his or her employer where disciplinary action has been taken against the employee in retaliation for the employee's whistleblowing activities, even though the ultimate sanction of discharge has not been imposed.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

**HN6** See Cal. Code Civ. Proc. § 437c(c).

## Headnotes/Syllabus

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### Summary

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted summary judgment to defendant employer, in an action by an employee alleging that the employer wrongfully suspended him without pay and demoted him as a retaliatory measure because he had revealed the employer's mischarging activities to a federal agency. The employer claimed that the employee was suspended for mischarging time, and not for "whistle-blowing," which claim was controverted by the employee's opposing affidavit. (Superior Court of Orange County, No. 338332, Judith M. Ryan, Judge.)

The Court of Appeal reversed. It held that employer retaliation for "whistle-blowing" by an employee is actionable tortious conduct, whether or not the retaliatory act amounts to discharge or some lesser form of discipline, such as suspension without pay. The court further held that a triable issue of fact existed as to whether the employee was suspended without pay as a retaliatory action or was based on his mischarging, and thus summary judgment was inappropriate. (Opinion by Trotter, P. J., with Wallin and Sonenshine, JJ., concurring.)

**Headnotes****CALIFORNIA OFFICIAL REPORTS HEADNOTES**

Classified to California Digest of Official Reports, 3d Series

**CA(1) (1)**

Summary Judgment § 11 > Affidavits > Sufficiency > Triable Issue.

--In a motion for summary judgment the matter to be determined is whether the parties have presented any facts which give rise to a triable issue. The court may not pass upon the issue itself. Summary judgment is proper only if the moving party's facts shown by affidavits would be sufficient to sustain a judgment, and the opponent does not by affidavit show facts sufficient to present a triable issue. In examining the sufficiency of affidavits, those of the moving party are strictly construed, and those of the opponent liberally construed. Doubts as to the propriety of granting the motion should be resolved in favor of the opposing party. Summary judgment procedure is drastic and should be used with caution so as not to become a substitute for trial.

**CA(2) (2)**

Summary Judgment § 11 > Affidavits > Sufficiency > Defendant's Motion.

--A defendant who moves for summary judgment must completely negate an essential element of the plaintiff's case, or else establish a complete defense. The defendant bears the burden of negating every alternative theory of liability presented by the pleadings. On the other hand, the plaintiff cannot rely on his pleadings even if verified, to oppose the motion, but must make an independent showing of proofs raising material issues of fact.

**(3a)(3b)**

Employer and Employee § 12 > Contracts of Employment > Actions for Wages > Wrongful Suspension > "Whistle Blowing" Activity.

--An employee may maintain a tort claim against his or her employer where disciplinary action has been taken against the employee in retaliation for the employee's "whistle-blowing" activities (disclosure of information to government agency regarding employer's violation of law), even though the ultimate sanction of discharge has not been imposed.

**CA(4) (4)**

Employer and Employee § 9 > Contracts of Employment > Actions for Wrongful Discharge > Retaliation > Disclosure of Employer Misconduct.

--Public policy forbids any retaliatory action taken by an employer against an employee who discloses information regarding the employer's violation of law to a government agency, and this policy is codified in Lab. Code, § 1102.5, subd. (b).

**CA(5) (5)**

Summary Judgment § 21 > Hearing and Determination > Issues Precluding Judgment > Wrongful Discipline.

--In an action by an employee against his employer, in which the employee alleged that he was suspended without pay as a retaliatory measure because he had revealed the employer's mischarging activities to a federal agency, the trial court erred in granting the employer's motion for summary judgment. Although the employer contended that the employee had been suspended without pay because he mischarged hours, there was a triable issue of fact regarding the reason the employee was disciplined. The affidavits for both sides lacked direct evidence for either conclusion; however, both were reasonable, albeit conflicting, inferences from the facts proved. Evidentiary conflicts as to why an employee has been disciplined by an employer are particularly suited to resolution by the trier of fact.

**Counsel:** Greene, O'Reilly, Broillet, Paul, Simon, McMillan, Wheeler & Rosenberg, Charles B. O'Reilly and Steven J. Wilson for Plaintiff and Appellant.

Gibson, Dunn & Crutcher, Robert S. Warren, Stephen E. Tallent, William E. Wegner, John J. Waller, Jr., and James R. Buckley for Defendant and Respondent.

**Judges:** Opinion by Trotter, P. J., with Wallin and Sonenshine, JJ., concurring.

**Opinion by:** TROTTER

**Opinion**

[\*1558] [\*\*490] Plaintiff, Joe A. Garcia, appeals from a summary judgment in favor of defendant, Rockwell International Corporation. Garcia brought suit alleging Rockwell, Garcia's employer, wrongfully suspended him without pay and demoted him as a retaliatory measure because Garcia revealed Rockwell's mischarging activities to NASA's Inspector General.

In support of its motion for summary judgment, Rockwell presented the following pertinent facts: Garcia had been an employee of [\*\*\*2] Rockwell since October 25, 1960. From October [\*\*491] 1977 to April 21, 1980, Garcia was a supervisor in manufacturing operations at the Rockwell facility in Seal Beach. As supervisor, Garcia kept the time records for employees in his department. Ordinarily each employee's time was charged to a particular "charge number" representing the project the employee was actually working on. Garcia mischarged the time of his employees to projects they were not working on.

In July 1979, Garcia spoke to a representative of the National Aeronautics and Space Administration (NASA) Inspector General's office. Garcia told the representative that he had been ordered to mischarge his employees' time by his supervisor, Ron Ciotta. Ciotta was the only person at Rockwell who told Garcia to mischarge his employees' time. Garcia never discussed or verified Ciotta's alleged order to mischarge with any other person in Rockwell's management. Ciotta denied that he gave any such instructions. Garcia knew mischarging was improper.

[\*1559] On November 6, 1979, Garcia met with Rockwell officials and told them he had spoken to an official from NASA in July 1979. Garcia did not tell Rockwell [\*\*\*3] officials about his own mischarging activities at the November meeting, but stated he had heard of mischarging on the Shuttle program by another supervisor, Delfino Ariaz, and had reported this to NASA.

On March 13, 1980, Garcia again met with Rockwell officials. At this meeting he signed a statement admitting he had personally engaged in mischarging. On March 17, Garcia was placed on leave with pay and then suspended without pay on April 28. On October 10, Rockwell offered to reinstate Garcia in a nonsupervisory position with no reduction in pay at Rockwell's Downey, California facility. Garcia returned to work on October 28, 1980.

Garcia submitted his own declaration in opposition, as well as the declaration of his attorney. Rockwell raised evidentiary objections to the two declarations which were sustained by the trial court. The evidence remaining showed that in 1977, Ciotta, Garcia's immediate supervisor, instructed Garcia to mischarge on Air Force contracts. He was told "to charge cost overruns from one 'fixed-price' contract, where an excess in allotted funds existed." He was told to

accomplish this "by giving inaccurate lead numbers to employees in the Manufacturing [\*\*\*4] Department." Garcia also stated, "That prior to these instructions from Ron Ciotta, I was aware of and had observed mischarging of the nature I had been instructed to engage in throughout my department." Garcia questioned Ciotta on several occasions in 1977 about "the propriety and purpose of the mischarging," but Ciotta ignored his questions and told him to follow orders. In July 1979, Garcia reported Rockwell's mischarging to NASA officials. He was suspended with pay on March 13, 1980, and was told the suspension would last one week. In late April or early May, Garcia phoned Rockwell to inquire about his status. He was told he had been suspended without pay on April 28, 1980. Garcia states, "In July of 1980 I contacted an attorney and filed the instant action for wrongful discharge . . . . [para. ] That the basis for my lawsuit against Rockwell is my belief that I was terminated for reporting the mischarging to NASA officials."

As was said by the California Supreme Court in *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842 at pages 851-852 [94 Cal.Rptr. 785, 484 P.2d 953]: "We have summarized on a number of occasions [\*\*\*5] the well-established rules governing summary judgment procedure. ( *Code Civ. Proc.*, § 437c.) **HN1** 'The matter to be determined by the [\*\*\*6] trial court in considering such a motion is whether the defendant (or the plaintiff) has presented any facts which give rise to a triable issue. The court may not pass upon the issue itself. Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue. The aim of the procedure is to discover, through the media of affidavits, whether [\*\*\*492] the parties possess evidence requiring the weighing procedures of a trial. In examining the sufficiency of affidavits filed in connection with the motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. Such summary procedure is drastic and should be used with caution so that it does [\*\*\*6] not become a substitute for the open trial method of determining facts.' [Citations.]" (Fn. omitted.) **HN2** "When the defendant is the moving party, his task is to negate completely an essential element of plaintiff's case or to establish a complete defense. [Citation.] This task is limited to

addressing those issues or theories of liability raised in plaintiff's complaint." (*Fireman's Fund Ins. Co. v. City of Turlock* (1985) 170 Cal.App.3d 988, 994 [216 Cal.Rptr. 796].) A defendant who files a summary judgment motion must bear the burden of negating every alternative theory of liability presented by the pleadings. (*Bell v. Industrial Vangas, Inc.* (1981) 30 Cal.3d 268, 271, fn. 1 [179 Cal.Rptr. 30, 637 P.2d 266].) On the other hand, plaintiff cannot rely on his pleadings, even if verified, "but must make an independent showing that he has sufficient proof of matters alleged to raise material issues of fact. [Citation.]" (*Reid v. State Farm Mut. Auto. Ins. Co.* (1985) 173 Cal.App.3d 557, 570 [218 Cal.Rptr. 913].)

In his complaint Garcia alleged retaliatory disciplinary action by his employer, [\*\*\*7] Rockwell. In support of the summary judgment, Rockwell contends a tort claim for damages under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167 [164 Cal.Rptr. 839, 610 P.2d 1330, 9 A.L.R.4th 314] cannot be based on such an allegation as a matter of law, because a *Tameny* cause of action arises only after a retaliatory firing or termination of employment. In the alternative, Rockwell argues that the undisputed facts show it fired Garcia for cause because he engaged in mischarging, not in retaliation for his revelations to NASA.

In *Tameny*, the plaintiff's former employer, Atlantic Richfield Co., fired him after 15 years of service because he refused to participate in an illegal scheme to fix retail gasoline prices. The California Supreme Court reversed a trial court order sustaining a demurrer to plaintiff's tort cause of action. The court held **HN3** an employee discharged for refusing to engage in illegal [\*\*\*1561] conduct at his employer's request may bring a tort action for wrongful discharge. The court stated, ". . . the relevant authorities both in California and throughout the country establish that when an employer's discharge of an employee [\*\*\*8] violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Id.*, at p. 170.)

Rockwell claims application of the *Tameny* rationale to a claim of retaliatory disciplinary action, falling short of an actual discharge, presents a case of first impression in California, and that appears to be correct. Neither counsel's nor our independent research has revealed a

case involving a suspension without pay or other disciplinary action, other than discharge. However, we see no reason why the rationale of *Tameny* should not be applicable in a case where an employee is wrongfully (tortiously) disciplined and suffers damage as a result of, not breach of a contract term, but rather, breach of a duty growing out of the contract.

The court in *Tameny* relied heavily on *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184 [344 P.2d 25]. In that case an employee was discharged because he refused to follow his employer's instructions to testify falsely under oath before a legislative committee. In *Tameny* the court stated, [\*\*\*9] "As the *Petermann* case indicates, an employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied "[promises] set forth in the [employment] contract" [citation], but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes." (*Tameny v. Atlantic Richfield Co.*, *supra*, 27 Cal.3d at p. 176.)

There is no question public policy forbids retaliatory action taken by an employer against an employee who discloses information regarding an employer's violation of law to a government agency. **HN4 Labor Code section 1102.5, subdivision (b)** provides, "No employer shall 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 state or federal statute, or violation or noncompliance with a state or federal regulation." <sup>1</sup>

[\*\*\*10] A duty imposed by law forbids retaliatory action similar to that alleged in Garcia's complaint, hence, the wrong alleged is "ex delicto," [\*\*\*1562] not "ex contractu." (See *Tameny v. Atlantic Richfield Co.*, *supra*, 27 Cal.3d at p. 175.) The same wrongful conduct is involved whether the retaliation inflicted is a six-month suspension without pay or a discharge. The only difference is the extent of the damage suffered. We also note that Rockwell did not offer to reinstate Garcia until after he filed this lawsuit. A ruling in favor of Rockwell on this issue would encourage employers to offer reinstatement after the imposition of retaliatory punitive measures to avoid a plaintiff's legitimate legal action.

<sup>1</sup> Labor Code section 1102.5 was enacted in 1984, after the retaliatory action alleged by plaintiff in this case. However, in our view, the Labor Code section merely enunciated already existing public policy.

Accordingly, we hold that **HN5** an employee can maintain a tort claim against his or her employer where disciplinary action has been taken against the employee in retaliation for the employee's "whistle-blowing" activities, even though the ultimate sanction of discharge has not been imposed.

**CA(5)** (5) We also conclude that a triable issue of fact exists regarding the reason Rockwell suspended Garcia without pay. The facts proved showed that Garcia [\*\*\*11] engaged in mischarging, that he did so under orders from his supervisor, Ron Ciotta, that Ciotta denied giving such orders, that Garcia reported the mischarging to NASA, that Garcia told Rockwell he had reported the mischarging to NASA, that Garcia admitted mischarging to Rockwell, and that Rockwell suspended Garcia without pay. There is no direct evidence either that Rockwell disciplined Garcia for cause because he mischarged, or that Rockwell disciplined Garcia in retaliation for revealing the mischarging at Rockwell to NASA. Both conclusions are, however, reasonable, albeit conflicting, inferences from the facts proved.

**HN6** Code of Civil Procedure section 437c, subdivision (c), provides in pertinent part as follows: "In determining whether the papers show that there is no triable issue

as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from such evidence, *except summary judgment shall not be granted by the court based on inferences reasonably deducible from such evidence, if contradicted by other [\*\*\*12] inferences or evidence, which raise a triable issue as to any material fact.*" (Italics added.) Here, there are conflicting inferences reasonably deducible from the facts, hence, summary judgment was inappropriate. As was said by the court in Khanna v. Microdata Corp. (1985) 170 Cal.App.3d 250, at page 263 [215 Cal.Rptr. 860], "The true reasons for an employee's dismissal, and whether they show bad faith rather than dissatisfaction with services and reflect intention to deprive the discharged employee of the benefits of the contract, are evidentiary questions most properly resolved by the trier of fact. [Citations.]" (See also Rulon-Miller v. International Business Machines Corp. (1984) 162 Cal.App.3d 241, 250 [208 Cal.Rptr. 524].)

[\*1563] The judgment is reversed.

## **Ludwig v. C & A Wallcoverings, Inc.**

United States Court of Appeals for the Seventh Circuit

December 13, 1991, Argued ; April 3, 1992, Decided

No. 90-3724

### **Reporter**

960 F.2d 40; 1992 U.S. App. LEXIS 6031; 121 Lab. Cas. (CCH) P56,876; 7 I.E.R. Cas. (BNA) 566

PAMELA LUDWIG, Plaintiff-Appellant, v. C & A WALLCOVERINGS, INCORPORATED, an Ohio Corporation d/b/a KINNEY WALLCOVERINGS, Defendant-Appellee.

**Prior History:** [**\*\*1**] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 90 C 887--Nicholas J. Bua, Judge.

**Disposition:** AFFIRMED. DENIED.

### **Core Terms**

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retaliatory discharge, demotion, terminated, summary judgment, district court, courts

### **Case Summary**

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#### **Procedural Posture**

Plaintiff employee appealed the order of the United States District Court for the Northern District of Illinois which granted summary judgment for defendant employer in plaintiff's retaliatory discharge claim. Plaintiff argue that there was sufficient evidence that she was constructively discharged and that Illinois law permitted a claim of "retaliatory demotion."

#### **Overview**

Plaintiff employee, an administrative assistant, alleged misconduct by her supervisor. Defendant employer investigated but found no basis for the charge. Plaintiff was then demoted to an order-taker. She applied for leave of absence and disability benefits. Defendant informed plaintiff that she could be eligible for the benefits only if she was examined by defendant's doctor. Plaintiff refused and considered herself terminated. She brought a retaliatory discharge action. The district court granted defendant summary judgment, finding no

evidence that plaintiff was coerced into quitting. Plaintiff appealed. The court affirmed, holding that Illinois narrowly interpreted the requirements of retaliatory discharge and such did not include constructive discharge or plaintiff's demotion; and there was no evidence plaintiff was terminated by defendant. The court declined plaintiff's request that the court certify to the Illinois Supreme Court under *7th Cir. R. 52* the issue of retaliatory demotion, as certification was only justified if there was no clear precedent, and Illinois courts had uniformly refused to expand the tort of retaliatory discharge.

#### **Outcome**

The court affirmed the grant of summary judgment for defendant employer in plaintiff employee's retaliatory discharge claim, holding that there was no evidence plaintiff was fired, and Illinois law did not permit a "retaliatory demotion" claim and thus certification to the Illinois Supreme Court on that issue was not necessary.

### **LexisNexis® Headnotes**

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Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

**HN1** The court reviews the district court's entry of summary judgment de novo, drawing all reasonable inferences in favor of the non-moving party. Summary judgment is appropriate if the court can determine that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Civil Procedure > ... > Jurisdiction > Diversity Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

**HN2** In exercising the court's obligation to provide meaningful appellate review in diversity cases, it must strive to parse state law and, if necessary, forecast its path of evolution.

Labor & Employment Law > Wrongful Termination

Labor & Employment Law > Wrongful Termination > Public Policy

**HN3** The Illinois tort of retaliatory discharge encompasses three distinct elements: first, an employee must establish that she has been discharged; second, she must demonstrate that her discharge was in retaliation for her activities; and finally, she must show that the discharge violates a clear mandate of public policy.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Healthcare Law > ... > Employment Issues > Wrongful Termination > General Overview

Healthcare Law > ... > Employment Issues > Wrongful Termination > Retaliatory Discharge

Labor & Employment Law > Wrongful Termination > Constructive Discharge > General Overview

**HN4** Constructive discharge is not an actionable concept in regard to retaliatory discharge.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Governments > Courts > Judicial Precedent

**HN5** A question of Illinois law will be certified only when (1) the question is determinative of the case and, (2) when there is no clear controlling precedent. *7th Cir. R. 52*.

**Counsel:** For PAMELA LUDWIG, Plaintiff - Appellant: George C. Pontikes, Suite 1300, PONTIKES & ASSOCIATES, 11 S. LaSalle Street, Chicago, IL 60603, USA.

For C&A WALLCOVERINGS, INCORPORATED, an Ohio Corporation dba Kinney Wallcoverings, Defendant - Appellee: George Vernon, 312/876-3400, Laurie A. Spieler, 312/876-3400, KECK, MAHIN & CATE, 233 S. Wacker Drive, 8300 Sears Tower, Chicago, IL 60606-6589, USA. Robert L. Thompson, 404/659-6700, J. Raymond Trapnell, 404/659-6700, Nancy F. Reynolds, 404/659-6700, ELARBEE, THOMPSON & TRAPNELL, 800 Peachtree-Cain Tower, 229 Peachtree Street, N.E., Atlanta, GA 30303, USA.

**Judges:** Before CUMMINGS, WOOD, JR., \* and KANNE, Circuit Judges.

**Opinion by:** KANNE

## Opinion

**[\*41]** KANNE, *Circuit Judge*. The question raised on this appeal is whether an employee can maintain an action for retaliatory discharge under Illinois law when she alleges that she was merely demoted--rather than terminated--from her former position. On a motion for **[\*\*2]** summary judgment, the district court ruled that such a claim was not actionable in Illinois. We affirm.

From September 1988 until March 1989, Pamela Ludwig was employed as administrative assistant to the manager of the Kinney Wallcoverings branch office in Hillside, Illinois.<sup>1</sup> In mid-March 1989, Ludwig contacted Kinney's management to report several incidents of misconduct allegedly committed by her supervisor, Carole Hoger. She claimed, *inter alia*, that Hoger had misappropriated several leather coats which had been mistakenly delivered to the branch office, and that she had instructed branch supervisors to place the letter "A" on job applications submitted by black applicants. On March 27, 1989, a Kinney official was sent to the Hillside branch to pursue Ludwig's complaints. However, when the day-long investigation failed to reveal evidence of any impropriety on the part of Hoger, the official informed Ludwig that she was being demoted to the position of order taker--a job which entailed lesser clerical duties but a salary commensurate with that which she was previously earning.

**[\*\*3]** The following morning on March 28, 1989, Ludwig returned to work, but within two hours she became ill

\* Judge Wood, Jr., assumed senior status on January 16, 1992, which was after oral argument in this case.

<sup>1</sup> Kinney is a subsidiary of C & A Wallcoverings, Inc., an Ohio corporation.

and left the office to visit her physician. After examining her, Ludwig's physician concluded that she was afflicted with a severe stress disorder and therefore advised her not to report to work for a week until he had an opportunity to reevaluate her condition; he also prepared a written note to that effect, which Ludwig's husband relayed to the Hillside store management. During the course of the ensuing two weeks, Ludwig saw her physician two more times, and on both occasions she received a written excuse stating that she was still unable to work. Throughout this same period she continued to receive paychecks from Kinney for sick leave.

On April 11, 1989, Ludwig applied for a leave of absence and disability benefits. The next day she received a letter from [\*42] Hoger indicating that the company doctor would need to examine her before she would be eligible for such benefits. Ludwig, however, refused to arrange an appointment with the company doctor, and instead wrote Hoger on April 18 to inform her that Kinney was to contact her only through her attorney. She also wrote that she deemed [\*\*4] herself "terminated" by Kinney Wallcoverings as of March 27, 1989. Ludwig subsequently filed suit charging Kinney with retaliatory discharge.

In a memorandum opinion issued on November 5, 1990, the district court granted summary judgment in favor of Kinney on all claims. Finding that Ludwig had not presented any evidence establishing that she was either directly terminated or otherwise coerced to quit, the court held that Ludwig was "essentially seeking relief for retaliatory *demotion*--a cause of action which had yet to be recognized by an Illinois court." The district court further explained that:

since Illinois courts have followed a narrow interpretation of retaliatory discharge, and have hesitated to expand its scope, this court declines Ludwig's invitation to extend state law by creating a cause of action for retaliatory demotion.

Ludwig now challenges the district court's entry of summary judgment on two grounds. She first contends that the district court erred as a matter of law in holding that her claim, as alleged, did not state a cause of action for retaliatory discharge under Illinois law. Alternatively, she argues there were genuine issues of material fact as to [\*\*5] whether she was actually terminated from her position as administrative assistant. But in the event that either of these challenges fail, she has hedged her

bets by raising the following back-up argument: if we are not convinced that Illinois courts would find claim for retaliatory discharge under the facts of this case, we should certify the question to the Supreme Court of Illinois in accordance with Circuit Rule 52 and Rule 20 of the Rules of the Supreme Court of Illinois. Each of these arguments is addressed in turn.

**HN1** We review the district court's entry of summary judgment *de novo*, drawing all reasonable inferences in favor of the non-moving party. Santella v. Chicago, 936 F.2d 328, 331 (7th Cir. 1991); First Wisconsin Trust Co. v. Schroud, 916 F.2d 394, 398 (7th Cir. 1990). Summary judgment is appropriate if we can determine that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); Schroud, 916 F.2d at 398. We likewise review *de novo* the district court's interpretation of state law. Salve Regina College v. Russell, 113 L. Ed. 2d 190, U.S. , 111 S. Ct. 1217 (1991). [\*\*6] **HN2** "In exercising our obligation to provide meaningful appellate review in diversity cases, we must strive to parse state law and, if necessary, forecast its path of evolution." Belline v. K-Mart Corp., 940 F.2d 184, 186 (7th Cir. 1991). Viewing Ludwig's claim in this light, we conclude that the district court properly entered summary judgment in favor of Kinney.

**HN3** The Illinois tort of retaliatory discharge encompasses three distinct elements: first, an employee must establish that she has been discharged; second, she must demonstrate that her discharge was in retaliation for her activities; and finally, she must show that the discharge violates a clear mandate of public policy. Hinthorn v. Roland's of Bloomington, Inc., 119 Ill. 2d 526, 519 N.E.2d 909, 911, 116 Ill. Dec. 694 (Ill. 1988); Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 478 N.E.2d 1354, 1358, 88 Ill. Dec. 628 (Ill. 1985). Although Ludwig apparently concedes that she was not actually discharged from Kinney's payroll--at least for purposes of her initial challenge--she claims that the same public policy considerations underlying the tort of retaliatory discharge should likewise support a claim even where an employee was simply demoted, [\*\*7] rather than severed from her employment. Hence, she concludes that the district court committed reversible error in holding that the Illinois courts would not favor expanding the tort for cases alleging facts similar to her's.

Ludwig faces a Sisyphean task. Illinois courts have repeatedly expressed their reluctance to expand the tort beyond its original confines, particularly with respect

[\*43] to the first element of discharge. See *Hinthorn*, 519 F.2d at 911 (stating that the Illinois Supreme Court does not "strongly support" expansion of the retaliatory discharge tort). On several occasions, plaintiffs have come forward stating claims for "constructive" discharge--i.e. their employers made the work environment so inhospitable for the targeted employee that he or she was effectively forced to resign. Each met with the same result: dismissal for failure to state a cause of action under Illinois law. See *Grey v. First National Bank of Chicago*, 169 Ill. App. 3d 936, 523 N.E.2d 1138, 1143, 120 Ill. Dec. 227 n.2 (Ill. App. 1st Dist. 1988) **HN4** ("Constructive discharge is not an actionable concept' in regard to retaliatory discharge."); *Scheller v. Health Care Service Corp.*, 138 Ill. App. 3d 219, 485 N.E.2d 26, 30, 92 Ill. Dec. 471 (Ill. 1985) [**\*\*8**] ("We conclude that adoption of the constructive discharge concept suggested by the plaintiff would contravene the plain language of our supreme court . . . and would result in a proliferation of cases.").

Given Illinois' narrow reading of the tort's first element, we cannot believe that a demotion would be any more actionable than a claim of constructive discharge. Recognizing a retaliation tort for actions short of termination could subject employers to torrents of unwarranted and vexatious suits filed by disgruntled employees at every juncture in the employment process. And why stop at demotions? If, as Ludwig argues, a demotion raises the same policy concerns as a termination, so too would transfers, alterations in job duties, and perhaps even disciplinary proceedings. The potential for expansion of this type of litigation is enormous. Surely, the Illinois Supreme Court would not have described retaliatory discharge in such bright-line

language had it intended the tort to be so all-encompassing.

Ludwig's second challenge fares no better. A review of the record makes it patently obvious that there were no genuine issues of material fact as to whether she was actually fired: she [**\*\*9**] was never formally discharged; her name was kept on a time-card; she continued to receive the same salary she had earned as administrative assistant to the manager; she was assigned a clerical task on the day following her demotion; she submitted three doctor's slips excusing her absences from work; and she continued to receive sick pay for two weeks after the date she unilaterally considered herself "terminated." In short, no reasonable jury could find that Ludwig's employment relationship with Kinney had been severed by the company.

We likewise reject Ludwig's invitation to certify to the Illinois Supreme Court her question about the validity of an action for retaliatory demotion. **HN5** A question of Illinois law will be certified only when (1) the question is determinative of the case and, (2) when there is no clear controlling precedent. *Collins Co., Ltd. v. Carboline Co.*, 837 F.2d 299, 303 (7th Cir. 1988). Ludwig's claim fails the second part of this conjunctive test. As we have already discussed above, the Illinois courts have uniformly refused any expansion of the tort of retaliatory discharge, particularly with regards to the element of actual termination. We [**\*\*10**] could receive no signal clearer than that.

The district court's grant of summary judgment in favor of the defendants is therefore AFFIRMED, and the plaintiff's motion for certification pursuant to Rule 52 is DENIED.

## **Zimmerman v. Buchheit of Sparta**

Supreme Court of Illinois  
November 23, 1994, Filed  
Docket No. 75793

### **Reporter**

164 Ill. 2d 29; 645 N.E.2d 877; 1994 Ill. LEXIS 153; 206 Ill. Dec. 625; 10 I.E.R. Cas. (BNA) 72

LINDA ZIMMERMAN, Appellee, v. BUCHHEIT OF SPARTA, INC., Appellant.

**Prior History:** [\*\*\*1] Appeal from the Appellate Court for the Fifth District; heard in that court on appeal from the Circuit Court of Randolph County, the Hon. William A. Schuwerk, Jr. Judge, presiding.

**Disposition:** Appellate court reversed; circuit court affirmed.

### **Core Terms**

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demotion, cause of action, retaliatory discharge, rights, retaliatory, workers' compensation, employees, plurality, injuries, discriminate, appellate court, retaliation, remedies, public policy, discharged, constructive discharge, termination, courts, allegations, retaliatory conduct, asserting, benefits, circuit court, civil remedy, instant case, circumstances, concurrence, at-will, workers' compensation benefits, work-related

### **Case Summary**

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#### **Procedural Posture**

After remand in a worker's compensation action, appellant employer sought review of a decision from the Appellate Court for the Fifth District (Illinois), which reversed its motion to dismiss and found that appellee employee's complaint was sufficient to state a cognizable cause of action based on retaliatory discharge.

#### **Overview**

An at-will employee filed action against her employer, alleging that the employer demoted and discriminated against her after she asserted her rights under the Illinois Workers' Compensation Act. The trial court

granted the employer's motion to dismiss and found that there was no cause of action for demotion in retaliation for the assertion of worker's compensation rights. The appellate court reversed and remanded, and the employer sought review. The court affirmed the trial court and reversed the appellate court's decision. It found that, in order to sustain a claim for retaliatory discharge, the employee was required to show that she was discharged in retaliation for her activities, and that the discharge violated a clear mandate of public policy. Because the employee was demoted and not discharged, her complaint was legally and factually insufficient to state a claim for retaliatory discharge.

#### **Outcome**

The court reversed the judgment of the appellate court in favor of the employee and affirmed the trial court's decision, finding that the employee's complaint was insufficient to sustain a claim of retaliatory discharge.

### **LexisNexis® Headnotes**

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Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Labor & Employment Law > ... > Exceptions > Tort Exceptions > Public Policy Violations

**HN1** A noncontracted employee is one who serves at the employer's will, and the employer may discharge such an employee for any reason or no reason.

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Retaliatory Discharge Actions

**HN2** See Ill. Rev. Stat. ch. 48, par. 138.4(h) (1991).

Labor & Employment Law > Wrongful Termination > Public Policy

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Retaliatory Discharge Actions

**HN3** A plaintiff states a valid claim for retaliatory discharge only if she alleges that she was (1) discharged; (2) in retaliation for her activities; and (3) that the discharge violates a clear mandate of public policy.

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

**HN4** An employer is not obligated to retain an at-will employee who is medically unable to return to his assigned position; nor is an employer obligated to reassign such an employee to another position rather than terminate the employment. Similarly, an employer may fire an employee for excess absenteeism, even if the absenteeism is caused by a compensable injury.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

**HN5** Litigants, particularly those who seek the creation of new forms of relief, must provide sufficient facts to enable a court to fully discern the nature of the harm alleged and sought to be redressed.

Governments > Legislation > Statutory Remedies & Rights  
Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

Workers' Compensation & SSDI > Compensability > Arising Out of Employment > Causation

**HN6** The Workers' Compensation Act reflects the legislative balancing of rights, remedies, and procedures that govern the disposition of employees' work-related injuries. This balance should not be lightly disturbed through the judicial creation of new causes of action, implied from the terms of particular provisions of the Act, unless a compelling case can be made for their necessity.

**Counsel:** David R. Smith, of Nehrt, Sachtleben, Fisher, Smith & Kerkhover Law Offices, of Chester, and John W. Grimm, of Limbaugh, Russell, Payne, & Howard, of Cape Girardeau, Missouri, for appellant.

Harriet H. Hamilton, of Cook, Shevlin, Ysura, Brauer & Bartholomew, Ltd., of Belleville, for appellee.

**Judges:** McMORROW, BILANDIC, HEIPLE, HARRISON, NICKELS

**Opinion by:** McMORROW

## Opinion

[\*31] [\*\*878] JUSTICE McMORROW delivered the judgment of the court:

In this appeal we are called upon to determine whether a cause of action should be recognized which is predicated on an employer's alleged retaliation against an employee who is not discharged from employment but rather is allegedly demoted or discriminated against for asserting employee rights under the Workers' Compensation Act.

Plaintiff, Linda Zimmerman, an at-will employee, filed a two-count complaint against defendant, Buchheit of Sparta, Inc., plaintiff's employer, claiming that defendant "demoted and discriminated against" her "by reason of her assertion of her rights under the Illinois Worker's Compensation Act." The circuit court granted defendant's motion to dismiss for failure to state a cause of action; the appellate court reversed and remanded the cause for further proceedings. (245 Ill. App. 3d 679, 615 N.E.2d 791, 185 Ill. Dec. 921.) [\*\*\*2] On appeal to this court, defendant contends that Illinois law does not recognize a cause of action based on retaliatory discrimination or demotion and that plaintiff's complaint was both legally and factually insufficient.

The operative portions of plaintiff's first amended complaint state as follows:

"2. That on or about December 30, 1990, [plaintiff] was an employee of [defendant] and then and there sustained injuries arising out of and in the course of her employment with [defendant].

3. That thereafter, [plaintiff] \* \* \* notified [defendant] of her intention to assert her rights pursuant to the Illinois Worker's Compensation Act.

4. That [defendant], on or about April 19, 1991, demoted and discriminated against [plaintiff], by reason of her assertion of her rights under the Illinois Worker's Compensation Act.

[\*32] 5. That as a direct and proximate result of the wrongful acts of [defendant], [plaintiff] has sustained injuries by her loss of income and benefits, she has sustained injuries to her reputation, and has sustained mental anguish, all to her damage in a substantial amount."

The other count of plaintiff's complaint is virtually

identical to the first, except for the addition [\*\*\*3] of the following paragraph:

"That the demotion and discrimination by [defendant] was wrongful and oppressive, and wilful and wanton, and in retaliation for the exercise by [plaintiff] of her legal rights pursuant to the Illinois Worker's Compensation Act, and was in violation of Section 4(h)."

Defendant argues primarily that the appellate court erred in expanding the tort of retaliatory discharge beyond its clear boundaries. Plaintiff, although conceding she does not state a cause of action for retaliatory discharge, nonetheless argues that "if the essential doctrine of Kelsay v. Motorola [(1978), 74 Ill. 2d 172, 23 Ill. Dec. 559, 384 N.E.2d 353] is to be implemented, there must be some comparable doctrine, to protect employees [\*\*879] from other distinct measures of retaliation, short of an actual discharge." According to plaintiff such a comparable doctrine in the instant case would preclude an employer's "retaliatory demotion" or "retaliatory discrimination" against an employee for asserting rights under the Workers' Compensation Act (the Act) (Ill. Rev. Stat. 1991, ch. 48, par. 138.1 *et seq.*).

At common law and in Illinois today, **HN1** a noncontracted employee is one who serves at [\*\*\*4] the employer's will, and the employer may discharge such an employee for any reason or no reason. (*E.g., Hartlein v. Illinois Power Co. (1992), 151 Ill. 2d 142, 176 Ill. Dec. 22, 601 N.E.2d 720.*) In Kelsay v. Motorola, Inc. (1978), 74 Ill. 2d 172, 23 Ill. Dec. 559, 384 N.E.2d 353, for reasons of public policy, a limitation on the employer's ability to freely discharge an at-will employee was created. In Kelsay, 74 Ill. 2d at 180, this court considered the "new system of rights, remedies, and procedure" created by the Workers' [\*\*\*3] Compensation Act, and observed that in exchange for the rights and benefits conferred on employees in the Act's statutory scheme of no-fault liability, employees gave up their common law rights to sue their employer in tort for their work-related injuries and employers gave up common law defenses. The court found that "this tradeoff between employer and employee promoted the fundamental purpose of the Act, which was to afford protection to employees by providing them with prompt and equitable compensation for their injuries." Kelsay, 74 Ill. 2d at 180-81.

The plaintiff in *Kelsay* filed suit upon being [\*\*\*5] discharged for pursuing her claim for workers'

compensation, after being warned that it was corporate policy to discharge employees who brought such claims against the company. The employer argued that plaintiff's action for retaliatory discharge was barred by the exclusivity provision of the Act, section 11, which provides that the compensation and other provisions of the Act "shall be the measure of the responsibility" of the employer. (Kelsay, 74 Ill. 2d at 184, quoting Ill. Rev. Stat. 1973, ch. 48, par. 138.11.) The court held that section 11 did not preclude the plaintiff from maintaining an independent tort action for retaliatory discharge because the exclusivity provision was designed to "limit recovery by employees to the extent provided by the Act in regard to work-related injuries." (Kelsay, 74 Ill. 2d at 184.) Without a remedy for retaliatory discharge, employees would be placed in the position of "choosing between their jobs and seeking their remedies under the Act." (Kelsay, 74 Ill. 2d at 184.) Therefore, to uphold and implement the fundamental purpose and public policy behind [\*\*\*6] the Act, the *Kelsay* court determined it was necessary to recognize a cause of action for retaliatory discharge. Kelsay, 74 Ill. 2d at 181.

[\*\*\*4] The *Kelsay* court rejected the employer's argument that the legislature did not intend for a civil remedy for retaliatory discharge to be available because the Act did not provide for such remedy. The court cited to section 4(h) of the Act and stated that "where a statute is enacted for the benefit of a particular class of individuals a violation of its terms may result in civil as well as criminal liability, even though the former remedy is not specifically mentioned." Kelsay, 74 Ill. 2d at 185.

**HN2** Section 4(h) of the Act, in its entirety, states as follows:

"It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him or her by this Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by [\*\*\*7] this Act.

It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies

granted to him or her by this [\*\*880] Act." Ill. Rev. Stat. 1991, ch. 48, par. 138.4(h).

In recognizing an independent tort action for retaliatory discharge, the court in *Kelsay* relied in part on the second paragraph of section 4(h), which makes unlawful an employer's *discharge* of an employee for asserting his or her rights under the Act. In contrast, the appellate court in the case at bar relied on language contained in the first paragraph of section 4(h), which prohibits an employer from *discriminating* against an employee who exercises his or her rights under the Act. It should be noted that nothing in section 4(h) expressly provides a remedy for an employee or imposes a sanction [\*\*35] upon an employer in the event that the terms of section 4(h) are violated.<sup>1</sup>

[\*\*8] Both parties to this appeal focus on the principles underlying the well-developed theory of retaliatory discharge. Accordingly, we first examine the doctrine of retaliatory discharge, and we then consider whether section 4(h) supports the implication of a cause of action for employees who allege that they have been demoted in retaliation for asserting their rights under the Act.

Following recognition of the tort of retaliatory discharge in *Kelsay*, this court has held that **HN3** "[a] plaintiff states a valid claim for retaliatory discharge only if she alleges that she was (1) discharged; (2) in retaliation for her activities; and (3) that the discharge violates a clear mandate of public policy." ( *Hinthorn v. Roland's of Bloomington, Inc.* (1988), 119 Ill. 2d 526, 529, 116 Ill. Dec. 694, 519 N.E.2d 909, citing *Barr v. Kelso-Burnett Co.* (1985), 106 Ill. 2d 520, 88 Ill. Dec. 628, 478 N.E.2d 1354.) In the instant case, plaintiff fails to satisfy the first element and she concedes in her brief that "obviously plaintiff does not have a claim of retaliatory discharge." Plaintiff asserts, nonetheless, that this court should implement a "comparable doctrine" of retaliatory discrimination or demotion, [\*\*9] to protect employees from employer retaliation that falls short of actual discharge. Plaintiff admits that the case law has not extended the existing doctrine [\*\*36] to include actions based on an employer's *constructive* discharge of an employee.

In *Hinthorn*, the injured plaintiff was forced to sign a "voluntary resignation" form after she sought medical attention for a back injury she received on the job, the third injury she had sustained at work. Plaintiff had filed workers' compensation claims for the other two injuries. The defendant's vice-president met with plaintiff the day she sought medical attention for her back injury and told her she was costing the company too much money. She was told to sign the resignation form, which would let her leave "under her own free will." She understood she would lose her job if she did not sign. In holding that plaintiff stated a cause of action for retaliatory discharge, this court stated:

"We agree that plaintiff has sufficiently alleged that she was discharged, but wish to make abundantly clear that we are not now endorsing the constructive discharge concept rejected by the appellate court in *Scheller v. Health Care Service Corp.* (1985), 138 Ill. App. 3d 219, 92 Ill. Dec. 471, 485 N.E.2d 26]. [\*\*10] " ( *Hinthorn*, 119 Ill. 2d at 530-31.)

In *Scheller*, the appellate court rejected a formulation of constructive discharge that was based on "whether the employer has deliberately caused or allowed the employee's working conditions to become so intolerable that a reasonable person in the employee's place would have felt compelled to resign." ( *Scheller*, 138 Ill. App. 3d at 224, quoting *Beye v. Bureau of National Affairs* (1984), 59 Md. App. 642, 653, 477 A.2d 1197, 1203. See also *Barr v. Kelso-Burnett* (1985), 106 Ill. 2d 520, 525, 88 Ill. Dec. 628, 478 N.E.2d 1354 (where this court clarified that its previous decisions had [\*\*881] not "rejected a narrow interpretation of the retaliatory discharge tort" and did "not 'strongly support' the expansion of the tort").

In *Hartlein v. Illinois Power Co.* (1992), 151 Ill. 2d 142, 176 Ill. Dec. 22, 601 N.E.2d 720, this court reviewed the propriety of the trial court's entry of a preliminary injunction that prevented an [\*\*37] employer from discharging an injured employee. Following a period in excess of two years during which the employer paid disability [\*\*11] benefits and provided the employee with rehabilitation services, the employer encouraged

<sup>1</sup> However, two other subsections of section 4 impose express sanctions on employers for certain conduct. Section 4(d) provides for the imposition of a civil penalty of \$ 500 per day if an employer fails to comply with the requirement of obtaining insurance coverage for his employees and section 4(g) subjects an employer to liability for a Class B misdemeanor for passing on the costs of the insurance premiums to the employees. (Ill. Rev. Stat. 1991, ch. 48, pars. 138.4(d), (g).) See also section 26 of the Act, which provides that "any wilful neglect, refusal or failure to do the things required to be done by any section, clause or provision of this Act \* \* \* is a petty offense." Ill. Rev. Stat. 1991, ch. 48, par. 138.26.

164 Ill. 2d 29, \*37; 645 N.E.2d 877, \*\*881; 1994 Ill. LEXIS 153, \*\*\*11

the plaintiff to search for employment with other employers. Plaintiff then filed suit requesting an injunction to prevent his termination.

After reviewing the law of retaliatory discharge and the elements of an injunction, the *Hartlein* court reversed the trial court's order granting plaintiff's petition for preliminary injunctive relief. The court acknowledged the "revolutionizing effect of *Kelsay*," but reiterated that Illinois retains the common law doctrine of at-will employment. The court stated:

"Thus, Illinois law does not obligate *HN4* an employer to retain an at-will employee who is medically unable to return to his assigned position [citation]; nor is an employer obligated to reassign such an employee to another position rather than terminate the employment [citation]. Similarly, an employer may fire an employee for excess absenteeism, even if the absenteeism is caused by a compensable injury. [Citation.]" *Hartlein*, 151 Ill. 2d at 159-60.

Although the plaintiff in *Hartlein* argued that his employer's request for him to contact other potential [\*\*\*12] employers should be construed as a threatened discharge, and therefore actionable, this court held that the facts did not support the plaintiff's theory that he had been effectively terminated or was in the "process" of being discharged in retaliation for his assertion of rights under the Act. The *Hartlein* court held, "With regard to the fact of discharge, we decline to expand the tort to encompass a retaliatory discharge 'process' as alleged by *Hartlein*." *Hartlein*, 151 Ill. 2d at 161.

In *Hinthorn*, *Barr*, and *Hartlein*, this court expressed its disinclination to expand the tort of retaliatory discharge. Appellate court decisions similarly have followed a narrow interpretation of the cause of action. (E.g., [\*\*\*38] *Scheller*, 138 Ill. App. 3d 219, 92 Ill. Dec. 471, 485 N.E.2d 26 (rejecting constructive discharge concept); *Dudycz v. City of Chicago* (1990), 206 Ill. App. 3d 128, 151 Ill. Dec. 16, 563 N.E.2d 1122; see also *Melton v. Central Illinois Public Service Co.* (1991), 220 Ill. App. 3d 1052, 1056, 163 Ill. Dec. 472, 581 N.E.2d 423 (rejecting plaintiff's claim that "a threat to discharge or discipline short of discharge" stated a valid cause of action).

In [\*\*\*13] *Hindo v. University of Health Sciences/Chicago Medical School* (1992), 237 Ill. App. 3d 453, 460, 178 Ill. Dec. 207, 604 N.E.2d 463, the court

expressly rejected retaliatory demotion as a cause of action. The plaintiff sought relief after he was demoted from his position as chairman of the department of radiology allegedly in retaliation for exposing a scheme involving falsified time cards. The *Hindo* court observed:

"Illinois courts do not recognize a cause of action for retaliatory demotion. (See *Ludwig v. C&A Wall-coverings, Inc.* (N.D. Ill. 1990), 750 F. Supp. 339 (where the district court found that Illinois courts follow a narrow interpretation of retaliatory discharge and have not yet recognized a cause of action for retaliatory demotion; thus, the district court would not extend State law to create a cause of action for retaliatory demotion).) Retaliatory discharge is considered a limited and narrow exception to the general rule of at-will employment. (See *Balla v. Gambro, Inc.* (1991), 145 Ill. 2d 492, 501, 164 Ill. Dec. 892, 584 N.E.2d 104.) \* \* \* We decline to extend it further." *Hindo*, 237 Ill. App. 3d at 460.

See [\*\*\*14] also *Bush v. Commonwealth Edison Co.* (N.D. 1991), 778 F. Supp. 1436, 1447-48 (where the court granted summary judgment to an employer on the plaintiff's complaint for retaliatory demotion or failure to promote, holding that "Illinois courts have not recognized a common law or statutory cause of action for retaliatory demotion or failure to promote").

[\*\*882] As demonstrated by the decisional law of this State, the element of discharge in violation of a clear public policy is essential to the tort created by this court in *Kelsay*. In the instant case we are asked to extend the [\*\*\*39] existing law to circumstances in which an employee suffers a loss of employment status or income or both, but is not terminated from her employment altogether. Such an expansion of current law would be significant, given the consistent refusal of the courts of this State to dilute the discharge requirement, even to the extent of refusing to accept a "constructive discharge" concept. E.g., *Hinthorn*, 119 Ill. 2d 526, 116 Ill. Dec. 694, 519 N.E.2d 909; *Scheller*, 138 Ill. App. 3d 219, 92 Ill. Dec. 471, 485 N.E.2d 26; *Dudycz*, 206 Ill. App. 3d 128, 151 Ill. Dec. 16, 563 N.E.2d 1122.

We decline plaintiff's [\*\*\*15] request to extrapolate from the rationale of *Kelsay* a cause of action predicated on retaliatory demotion. *Kelsay* created an exception to the employment-at-will doctrine. In our view, adoption of plaintiff's argument would replace the well-developed element of discharge with a new, ill-defined, and

164 Ill. 2d 29, \*39; 645 N.E.2d 877, \*\*882; 1994 Ill. LEXIS 153, \*\*\*15

potentially all-encompassing concept of retaliatory conduct or discrimination. The courts then would be called upon to become increasingly involved in the resolution of workplace disputes which center on employer conduct that heretofore has not been actionable at common law or by statute. Although the term "demotion" may appear amenable to clear definition, many questions arise: Is a demotion in title or status, but not salary, actionable? Could a transfer from one department to another be considered a demotion? Would it be fair to characterize as a demotion a significant increase in an employee's duties without an increase in salary? It is plaintiff's burden, in urging this court to create new rights of action or expand existing ones, to persuade the court of the need for such new or expanded rights.

In the instant case, plaintiff recites general principles of policy, found in [\*\*\*16] *Kelsay*, but fails to establish a compelling reason for expanding judicial oversight of the workplace to include review of demotions, transfers, or other adverse work conditions that are alleged to be retaliatory in nature. Plaintiff argues that if this court [\*40] accepts defendant's "narrow" interpretation of the doctrine first enunciated in *Kelsay*, "an employer could take extraordinary measures, e.g., demote a Vice President to a stock person, or reduce an employee's hours from 40 per week to 1 hour per week, with complete immunity from the civil justice system." We note that plaintiff's complaint offers no facts remotely comparable to her hypothetical examples. Indeed, plaintiff's complaint lacks specificity with respect to the circumstances of her employer's alleged discrimination and her resulting legal injury.

**HN5** Litigants, particularly those who seek the creation of new forms of relief, must provide sufficient facts to enable a court to fully discern the nature of the harm alleged and sought to be redressed. (See *Dudycz*, 206 Ill. App. 3d at 134 ("Even if the concept of constructive discharge were recognized in Illinois within the context of a common-law [\*\*\*17] tort of retaliatory discharge, plaintiff failed to set forth facts to establish a constructive discharge").) In the case at bar, plaintiff relies on conclusory statements that she "sustained injuries" while employed by defendant, notified defendant of her intention to "assert her rights" under the Act, and that, subsequently, defendant "demoted and discriminated against" plaintiff "by reason of her assertion of her rights" under the Act. She alleges that as a direct and proximate cause of defendant's unspecified conduct, she was injured in "her reputation, and has sustained

mental anguish" and a "loss of income and benefits." Plaintiff seeks compensatory and punitive damages.

Having declined to expand existing doctrine in the manner suggested in the instant case, we now address the distinct but interrelated ground on which the appellate court premised its ruling: the implication of a private right of action pursuant to section 4(h) of the Act.

[\*41] The appellate court reasoned that section 4(h) of the Act supports implication of a *statutory* remedy for persons in plaintiff's position, who allege discriminatory treatment arising out of their pursuit of claims for workers' compensation. [\*\*\*18] Such remedy is [\*\*883] premised on that language of section 4(h) which makes it unlawful for employers to "discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act." (Ill. Rev. Stat. 1991, ch. 48, par. 138.4(h).) The appellate court held that plaintiff had alleged a loss of income and reduction of hours because of her demotion and, if such allegations were taken as true, the employer had discriminated against plaintiff in violation of section 4(h):

"Under these circumstances, a cause of action could lie to ensure that the public policy behind the enactment of the Workers' Compensation Act is not frustrated. It would be a bitter irony if employers were allowed to circumvent the public policy recognized by the supreme court in *Kelsay* and adopted by the legislature by section 4(h) by performing retaliatory and 'discriminatory' actions short of termination. Public policy will not allow employers to frustrate an employee's rights under the Workers' Compensation Act and to avoid statutorily imposed duties by retaining the employee but demoting or reducing the employee's hours." 245 Ill. App. 3d at 683. [\*\*\*19]

The appellate court's approval of an action for retaliatory conduct short of termination is inherently inconsistent with the rationale of those cases which have disapproved the imposition of liability where the employee is not actually discharged or forced to resign. (E.g., *Hinthorn*, 119 Ill. 2d 526, 116 Ill. Dec. 694, 519 N.E.2d 909; *Hartlein*, 151 Ill. 2d 142, 176 Ill. Dec. 22, 601 N.E.2d 720; *Scheller*, 138 Ill. App. 3d 219, 92 Ill. Dec. 471, 485 N.E.2d 26; *Dudycz*, 206 Ill. App. 3d 128, 151 Ill. Dec. 16, 563 N.E.2d 1122; *Melton*, 220 Ill. App. 3d 1052, 163 Ill. Dec. 472, 581 N.E.2d 423; *Hindo*, 237 Ill. App. 3d 453, 178 Ill. Dec. 207, 604 N.E.2d 463; *Bush*,

164 Ill. 2d 29, \*41; 645 N.E.2d 877, \*\*883; 1994 Ill. LEXIS 153, \*\*\*19

778 F. Supp. 1436.) Apart from citation to *Kelsay*, the appellate court did not cite authorities to justify the implication of a section 4(h) cause of action [\*42] for employer "discrimination" or demotion based on an employee's assertion of rights under the Workers' Compensation Act. Plaintiff presents no analysis of this section beyond her apparent belief that her demotion or reduction in work hours, occasioned by her assertion of statutory rights, should be actionable pursuant to section 4(h).

Our research has revealed [\*\*\*20] a number of cases in which Illinois courts have considered whether the terms of section 4(h) of the Act support the implication of a statutory right of action for retaliatory conduct apart from actual discharge of the employee. See *Bryce v. Johnson & Johnson (1983)*, 115 Ill. App. 3d 913, 71 Ill. Dec. 356, 450 N.E.2d 1235 (plaintiff who was reassigned to a position at half his salary failed to state cause of action for violation of section 4(h) because he was not discharged); *Bragado v. Cherry Electrical Products Corp. (1989)*, 191 Ill. App. 3d 136, 138 Ill. Dec. 476, 547 N.E.2d 643 (plaintiff's claim for wrongful termination of temporary total disability benefits was a matter for the Industrial Commission and not the basis for an action pursuant to section 4(h)); *Cook v. Optimum/Ideal Managers Inc. (1984)*, 130 Ill. App. 3d 180, 84 Ill. Dec. 933, 473 N.E.2d 334 (holding that court would not imply a statutory cause of action for employer's "interference" in employee's assertion of claim for compensation); *Miranda v. Jewel Cos. (1989)*, 192 Ill. App. 3d 586, 139 Ill. Dec. 634, 548 N.E.2d 1348. Cf. *Motsch v. Pine Roofing Co. (1988)*, 178 Ill. App. 3d 169, 175, 127 Ill. Dec. 383, 533 N.E.2d 1 (where the court [\*\*\*21] held that a seasonal employee, a roofer, could maintain an action for his employer's retaliatory "refusal to rehire" him, noting that the same provision of the Act which makes unlawful an employer's discharge of an employee for asserting his rights under the Act also prohibits employers from "refusing to rehire or recall to active service" an employee for exercising his rights under the Act).

In *Cook v. Optimum/Ideal Managers Inc.*, an injured [\*43] employee attempted to maintain a cause of action, pursuant to section 4(h) of the Act, for his employer's alleged retaliatory conduct. Specifically, the plaintiff relied on the provision of section 4(h) that makes unlawful an employer's "interference" with an employee's assertion of rights under the Act. The plaintiff in *Cook* argued that his employer wrongfully terminated the plaintiff's workers' compensation payments and

refused to [\*\*\*884] furnish copies of the medical reports pertaining to his injuries, thereby thwarting the plaintiff's ability to assert his rights under the Act.

Although the court in *Cook* found that the employer's interference with plaintiff's rights under the Act was contrary to the public policy expressed in section [\*\*\*22] 4(h), the court stated, "The need under the statute for civil actions like the one brought by *Cook* is anything but clear." (*Cook*, 130 Ill. App. 3d at 186.) The court noted that various provisions of the Act provided remedies to employees whose compensation for injuries was unreasonably delayed or withheld by the employer. A specific provision of the Act allowed an employee to compel production of medical reports in the proceedings before the Industrial Commission. The *Cook* court concluded that the Act's provisions were the exclusive remedies for the employee's alleged economic losses and delays in payment for work-related injuries. Consequently, the court determined that implication of a cause of action from section 4(h) of the Act under the circumstances before the court was not justified: "Unlike retaliatory discharge, the alleged misconduct on the part of the insurance adjuster in this case would not 'effectively [relieve] the employer of the responsibility expressly placed upon him by the legislature \* \* \*.' [Citation.]" *Cook*, 130 Ill. App. 3d at 187.

Section 4(h) of the Act, in our view, does not support the implication [\*\*\*23] of a cause of action based solely on [\*44] plaintiff's argument that her demotion may be viewed as defendant's "discrimination" against her for asserting rights under the Act. The motivating factor in *Kelsay* for creating an independent tort action for retaliatory discharge was the express corporate policy of the employer in that case to discharge employees who filed workers' compensation claims; allowing the continuation of such a policy would frustrate the strong public policy expressed in the Act—the prompt compensation of employees for their injuries. In the instant case, plaintiff fails to explain the manner in which demotions, as distinct from terminations, relieve employers of their responsibility to compensate employees for their work-related injuries. We conclude that plaintiff has not established in her pleadings or arguments that section 4(h) of the Act supports, by implication, a cause of action for retaliatory demotion or discrimination.

The legislature can expressly amend the Act if it determines that a damages remedy should be available for persons who claim a diminution of their employment

based on a theory of retaliatory conduct. Accordingly, with the recognition that [\*\*\*24] the creation of new rights under the Act is properly a matter within the wisdom of the General Assembly, and in the interest of judicial restraint, we decline plaintiff's invitation to judicially create a cause of action for retaliatory demotion. Plaintiff has not presented this court with a compelling showing of the necessity to create such a cause of action. In light of the declination of the legislature and this court to adopt a legally enforceable tort of retaliatory demotion, it is unnecessary to reach the issues concerning the factual sufficiency of plaintiff's complaint.

**HN6** The Workers' Compensation Act reflects the legislative balancing of rights, remedies, and procedures that govern the disposition of employees' work-related injuries. This balance should not be lightly disturbed [\*\*45] through the judicial creation of new causes of action, implied from the terms of particular provisions of the Act, unless a compelling case can be made for their necessity.

The dissenting justices urge expansion of *Kelsay* to recognize a cause of action for retaliatory demotion; the concurring justices propose overruling *Kelsay* to eliminate the tort of retaliatory discharge altogether. These polar [\*\*\*25] opposite views take an all-or-nothing approach to the issue presented in the case at bar, apparently in the belief that the sole relevant authority for deciding this case is *Kelsay*. Neither the dissent nor the concurrence makes reference to the long line of cases, cited in this opinion, which trace the guarded development and narrow construction of the tort of retaliatory discharge. Nor do the dissenting and concurring justices consider the cases that have addressed, and rejected, proposed theories of retaliatory conduct resulting in something other than [\*\*885] discharge. The concurrence mistakenly assumes that the common law tort of retaliatory discharge is solely a statutory cause of action implied from section 4(h) of the Workers' Compensation Act. In light of that assumption, and perhaps in furtherance of a concern for symmetry in the law, the concurrence agrees with the dissent that there is no basis on which to distinguish retaliatory discharge from retaliatory demotion. The concurrence relies almost entirely on the reasoning of the sole dissenting justice in *Kelsay* and concludes that retaliatory discharge should never have been recognized, and that this court should therefore [\*\*\*26] "repudiate" *Kelsay*, an issue that was not presented to this court in the case at bar. Neither the

dissent nor the concurrence acknowledges that this court acts within its authority in reaffirming the well-settled and limited tort of retaliatory discharge, as an exception to the at-will employment doctrine, without being constrained to open [\*46] broad new avenues of litigation for other, less defined types of retaliatory conduct in the workplace.

The judgment of the appellate court is reversed; the judgment of the circuit court is affirmed.

*Appellate court reversed;*

*circuit court affirmed.*

**Concur by:** BILANDIC

## **Concur**

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CHIEF JUSTICE BILANDIC, concurring:

The plurality does not create a cause of action for retaliatory demotion but continues to recognize a cause of action for retaliatory discharge. The plurality's reasoning is flawed because, if we do not have a cause of action for retaliatory demotion, we, in effect, will not have a cause of action for retaliatory discharge. We have invited those who wish to discharge in retaliation to simply demote in retaliation, and thereby escape the effect of the law. This glaring loophole will create more problems than it solves.

I agree with the plurality's [\*\*\*27] conclusion that section 4(h) of the Workers' Compensation Act does not create an implied cause of action for retaliatory demotion. I also agree, however, with the dissenting justice's conclusion that recognition of a cause of action for retaliatory demotion is a logical and necessary extension of *Kelsay v. Motorola, Inc. (1978)*, 74 Ill. 2d 172, 23 Ill. Dec. 559, 384 N.E.2d 353.

Under the circumstances, it is my judgment that the only reasonable explanation for the apparent inconsistency between the plurality decision and the *Kelsay* decision is an outright acknowledgment that the *Kelsay* court erred when it recognized an "implied" cause of action for retaliatory discharge. As Justice Underwood pointed out in his dissenting opinion in *Kelsay*, recognition of a cause of action for retaliatory discharge was clearly a matter for the legislature and not the courts. In *Kelsay*, the court made an unwarranted intrusion into the legislative arena and amended the Workers' [\*47]

Compensation Act in a manner that the legislature had undoubtedly considered, but declined to adopt.

As Justice Underwood's dissent to *Kelsay* noted, the legislature amended the Workers' Compensation Act (Act) [\*\*\*28] in 1975 to make it a *criminal* offense for an employer to threaten or effect a discharge in retaliation for an employee's exercise of his rights under the Act (Ill. Rev. Stat. 1975, ch. 48, par. 138.4(h)). In adopting this 1975 amendment, the members of the General Assembly undoubtedly thought they were creating a remedy for retaliatory discharge and established what they considered to be a sufficient deterrent, namely, criminal prosecution. The amendment did not create a *civil* remedy for discharged employees against their employers. As Justice Underwood pointed out, it was unrealistic to suppose that those who drafted, sponsored and adopted the 1975 amendment simply ignored the question of civil remedies. (*Kelsay*, 74 Ill. 2d at 193 (Underwood, J., concurring in part and dissenting in part).) On the contrary, had the legislature thought that recognition of a civil cause of action for retaliatory discharge was desirable or necessary to effectuate the policies underlying the Act, it would have included such an remedy within the statute. The *Kelsay* majority ignored this deliberate omission and found that the policy against retaliatory discharge [\*\*\*29] could only be effectively implemented and enforced by allowing a civil remedy for damages. As the dissent aptly noted, however, the fact [\*886] that the *Kelsay* majority was convinced that such a cause of action was necessary was irrelevant, since the legislature was not so convinced.

In this appeal, we are asked again to assume the role of a legislative body and to enact a new rule of law simply because the proponents of that rule are unable to secure its passage in the legislature. (See *Alvis v. Ribar* (1981), 85 Ill. 2d 1, 38, 52 Ill. Dec. 23, 421 N.E.2d 886 (Ryan, J., dissenting).) The [\*48] plurality wisely exercises self-restraint and declines the invitation to create yet another "judge-made law." At the same time, the plurality decision is obviously inconsistent with the rationale adopted in *Kelsay*. The Act prohibits both discrimination against and the discharge of employees who exercise their rights under the Act. If, as the plurality holds, an implied civil remedy for retaliatory demotion is not necessary to effectuate that portion of the Act which prohibits *discrimination* against employees who seek workers' compensation benefits, why is an implied civil remedy necessary to effectuate [\*\*\*30] that portion of the Act which prohibits employers from *discharging* employees who seek workers' compensation benefits?

Instead of acknowledging this inconsistency and repudiating *Kelsay*, the plurality makes an unconvincing and disingenuous attempt to distinguish the holding in that case. In my judgment, if we hold that there is no cause of action for retaliatory demotion, we should also recognize that the *Kelsay* court erred in creating an implied cause of action for retaliatory discharge. In both instances, the legislature is in a manifestly better position to determine whether such a cause of action is necessary, appropriate or desirable. Policy questions such as those involved here and in *Kelsay* are best left to the judgment of a General Assembly.

For the reasons stated above, I concur with the plurality's holding that there is no implied cause of action for retaliatory demotion under section 4(h) of the Workers' Compensation Act.

JUSTICE HEIPLE joins in this concurrence.

Dissent by: HARRISON

## Dissent

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JUSTICE HARRISON, dissenting:

Although the plurality professes not to reach issues concerning the factual sufficiency of plaintiff's complaint (164 Ill. 2d at 44), it expressly holds that the [\*\*\*31] complaint [\*49] is conclusory (164 Ill. 2d at 40) and lacks the requisite specificity (164 Ill. 2d at 40). This is not so. The Code of Civil Procedure provides,

"No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." (Ill. Rev. Stat. 1991, ch. 110, par. 2-612(b).)

Zimmerman's complaint plainly meets this test. It avers that she was demoted and discriminated against by her employer because she wanted to claim workers' compensation benefits for injuries she sustained in the course of her employment. The complaint specifies the date she sustained her injuries, and the date the employer took retaliatory action against her. The complaint further specifies how the retaliation affected her employment. Her income fell, and her benefits were reduced.

To allege an action for retaliatory demotion, that is all Zimmerman needed to plead. Although the precise

nature of her demotion is not specified, it did not need to be. The salient point is that Zimmerman had her pay and benefits cut because she wanted to claim workers' compensation benefits. Whether the reductions were accompanied [\*\*\*32] by a change in job title or responsibilities or whether they resulted from a simple reduction in the hours she was allowed to work is irrelevant. Such details would not alter the basic nature of Zimmerman's claim or affect her employer's ability to defend against it.

Even if greater specificity were required, that would not provide an independent basis for dismissing Zimmerman's complaint with prejudice. A cause of action should not be dismissed with prejudice on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. (*Ogle v. Fuiten (1984)*, 102 Ill. 2d 356, 360-61, 80 Ill. Dec. 772, 466 N.E.2d 224.) [\*\*887] This is not such a case. There is no reason to believe that Zimmerman could not provide copious additional details regarding the circumstances of her demotion and her employer's [\*50] discrimination against her if only she were given leave to amend her complaint.

The plurality may protest that Zimmerman did not in fact seek such leave from the circuit court. Although this is true, it is also true that she had no need to do so. In the proceedings before the circuit court, the details of Zimmerman's demotion and her resulting injury [\*\*\*33] were not at issue. The dispute there turned solely on the narrow legal question of whether an employee has a cognizable claim under Illinois law where her employer demotes or discriminates against her based on her desire to claim workers' compensation benefits. To hold that Zimmerman should have looked beyond this and sought leave to amend even though no deficiency was raised would be manifestly unjust.

Even if the employer had challenged the sufficiency of the factual allegations in Zimmerman's complaint, the plurality's position would still fail. The question of whether a complaint absolutely fails to indicate any legally cognizable ground of liability can be raised at any time. Where, however, the complaint is claimed to be defective simply because its statement of a cause of action is incomplete or otherwise insufficient, the defects are subject to waiver. (*Wagner v. Kepler (1951)*, 411 Ill. 368, 371, 104 N.E.2d 231.) Waiver will be found when a defendant answers the complaint without objection (see *Pieszchalski v. Oslager (1984)*, 128 Ill. App. 3d 437, 444, 83 Ill. Dec. 663, 470 N.E.2d 1083), particularly if

the defect could have been remedied by amendment (see *Meadows v. State Farm Mutual Automobile Insurance Co. (1992)*, 237 Ill. App. 3d 240, 253, 177 Ill. Dec. 940, 603 N.E.2d 1314). [\*\*\*34]

These principles are applicable here. Although the plurality does not mention it, the record shows that the employer's motion to dismiss was not filed until after it had already obtained an order granting its motion to transfer, filed its answer and responded to discovery. In addition, as previously noted, there is no reason to doubt [\*51] that Zimmerman could have cured any insufficiency in her factual allegations had she known at the outset that she needed to. Once the employer proceeded past the pleading stage, the sufficiency of the factual allegations in Zimmerman's complaint was therefore no longer subject to challenge in a section 2-615 (Ill. Rev. Stat. 1991, ch. 110, par. 2615) motion. *Adcock v. Brakegate, Ltd. (1994)*, 163 Ill. 2d 54, 645 N.E.2d 888, 206 Ill. Dec. 636.

The plurality's criticism of the allegations in the complaint enables the court to shift blame to Zimmerman for the harsh result it reaches today. This is wholly uncalled for. If the law commands a certain result, that is the result this court should reach. We do not also need to find personal fault with the parties or establish some shortcoming on the part of their attorneys in order to justify our position.

The plurality's criticism of [\*\*\*35] Zimmerman's pleadings is also disconcerting because it is not necessary to the disposition. From consideration of the plurality's opinion as a whole, it is apparent that no set of facts would have persuaded the court to recognize her cause of action. No matter what Zimmerman may have pleaded, the plurality would have refused to allow her to proceed on a theory of retaliatory demotion.

The plurality's analysis conceptualizes retaliatory demotion as an expansion of the tort of retaliatory discharge, just as constructive discharge would be. Because no common law claim is allowed in constructive discharge situations, the plurality reasons that it would be inconsistent to allow a claim here. The basic flaw in this analysis is that the tort of retaliatory demotion is not a variant of retaliatory discharge, but rather a companion to it.

The case before us concerns adverse action taken against an employee who sought to assert her rights under the Workers' Compensation Act (Ill. Rev. Stat.

[\*52] 1991, ch. 48, par. 138.1 *et seq.*) In recognizing the tort of retaliatory discharge, this court relied, in part, on that portion of section 4(h) of the Act (Ill. Rev. Stat. 1991, ch. 48, par. 138.4(h)), [\*\*\*36] which makes it unlawful for an employer to discharge an employee who seeks to exercise [\*\*888] his rights under the Act. (See *Kelsay v. Motorola, Inc. (1978)*, 74 Ill. 2d 172, 182-85, 23 Ill. Dec. 559, 384 N.E.2d 353.) Discharge is not, however, the only prohibition contained in the statute. As the plurality here correctly points out, there is a parallel provision in section 4(h) which likewise makes it unlawful for an employer to discriminate against an employee who seeks to exercise his rights under the Act. Ill. Rev. Stat. 1991, ch. 48, par. 138.4(h).

Under the statute, these parallel provisions are of equal force. Accordingly, if the prohibition against discharge evinces a public policy whose violation can only be redressed through a civil action for damages, and we have clearly held that it does (*Kelsay*, 74 Ill. 2d at 185), how can we reach a different conclusion with respect to the prohibition against discrimination, which is the basis for Zimmerman's claim here? There is no principled way to distinguish the two situations. The "comprehensive scheme" enacted by the legislature "to provide for efficient and expeditious remedies for injured employees" (*Kelsay*, 74 Ill. 2d at 182) [\*\*\*37] would be no less undermined if employers were permitted to discriminate against employees for seeking compensation under the Act than it would be if they were permitted to discharge such employees.

The plurality frets that it might be too hard for courts to decide when actionable discrimination has taken place.

Such a concern scarcely merits comment. Courts in the United States are routinely called upon to pass on questions of workplace discrimination. (See, e.g., *45A Am. Jur. 2d Job Discrimination § 1 et seq.* (1993).) The task may not be an easy one, but it is surely no [\*53] more difficult than countless other issues that we, as judges, must resolve every day. I am confident that my colleagues on the bench would be able to meet the challenge.

In any event, whatever difficulties there might be with defining actionable discrimination, they do not exist in the particular case before us today. Unlike the examples given by the plurality (164 Ill. 2d at 39), Zimmerman does not allege that she was demoted only in the sense of suffering a loss of title or status or a transfer from one department to another. The demotion she alleges involved a loss of income and benefits. Injuries of that [\*\*\*38] kind would clearly be subject to redress under any standard.

If situations should arise which are more ambiguous, we can deal with them on a case-by-case basis. The court's fear of uncertainties which are not yet realized is no reason to impose an absolute bar to recovery. Accordingly, I would affirm the judgment of the appellate court, reverse the judgment of the circuit court, and remand so that Zimmerman's cause of action could proceed beyond the pleadings stage. I therefore dissent.

JUSTICE NICKELS joins in this dissent.

Case No. 73751-1-I

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COURT OF APPEALS, DIVISION ONE,  
OF THE STATE OF WASHINGTON

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HENRY TANG, individually

Appellant/Cross-Respondent,

v.

CITY OF SEATTLE, a Washington Municipality;  
SEATTLE PUBLIC UTILITIES, a division of the City of Seattle

Respondents/Cross-Appellants

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PROOF OF SERVICE OF APPELLANT'S REPLY BRIEF  
AND RESPONSE TO RESPONDENTS' OPENING BRIEF

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2015 JUN 15 11:11 AM  
CLERK OF COURT  
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I HEREBY CERTIFY, under penalty of perjury under the laws of the State of Washington, that on January 13, 2016, I caused to be served a true and correct copy of Appellant's Reply Brief and Response to Respondents' Opening Brief on counsel for the Respondents in this matter:

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by email pursuant to CR 5 e-service agreement.

DATED this 13<sup>th</sup> day of January, 2016.

  
MARIANNE K. JONES