

Claim lacked government reporting requirement

Today's case deals with a claim for retaliatory discharge by a former employee based upon the Illinois Whistleblower Act, 740 ILCS 174/1-174/35. It discusses the elements of a cause of action under the Whistleblower Act; and, in particular, the requirement that an employee must report what the employee believes to be a violation of law to some government or law enforcement agency in order to acquire a cause of action for violation of the Act. *Riedlinger v. Hudson Respiratory Care Inc.*, 478 F.Supp.2d 1051 (N.D.Ill. 2007).

Plaintiff Emil Riedlinger was hired by defendant Hudson Respiratory Care Inc. as a Senior Plastics Engineer at Hudson's Arlington Heights facility in October of 2004. Hudson manufactures respiratory health care products, including sterile bottled water, humidifiers and nebulizer adapters and Addipak products.

Riedlinger sues defendant Hudson for wrongful discharge, retaliatory discharge based upon an alleged violation of the Illinois Whistleblower Act (740 ILCS 174/1-174/35).

Riedlinger pleads that several months after being hired he became aware of mold in the production areas of the Hudson facility. He reported the problem and Hudson hired an outside certified mold remediator for advice on mold abatement and undertook the mold abatement with Hudson employees.

When additional testing revealed mold remained in production and warehousing areas, Riedlinger told other members of the plant management that the Food and Drug Administration would, in his opinion, shut down the facility if it discovered the mold in the facility. But, he never reported the mold problem to the FDA or any government agency.

The abatement began in April of 2005. In June 2005, Riedlinger received an unfavorable Performance Evaluation, refused to sign it and was terminated on June 20, 2005. He sued Hudson contending he was discharged for whistleblowing.

Hudson moved for summary judgment contending Riedlinger was not a "whistleblower" because he never complained to any government or law enforcement agency. The U.S. District Judge Charles R. Norgle granted Hudson's motion for summary judgment, holding that without a complaint (whistleblowing) to a government agency, Riedlinger had no cause of action for retaliatory discharge.

Norgle began discussion of Hudson's motion for summary judgment setting out the two grounds for a retaliatory discharge cause of action in Illinois.

"In Illinois," Norgle wrote, "the general rule is that an employer may discharge an employee for any reason, or no reason at all. *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 176 Ill.Dec. 22, 601 N.E.2d 720, 728 (1992). The



Federal Courts

By Jay S. Judge

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tort of retaliatory discharge, however, is an exception to the employment-at-will doctrine. *Palmateer v. Int'l Harvester Co.*, 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876, 878 (1981). In order to establish a valid claim for retaliatory discharge, an employee must show that he or she 'has been (1) discharged; (2) in retaliation for the employee's activities; and (3) that the discharge violates a clear mandate of public policy.' *Hartlein*, 176 Ill.Dec. 22, 601 N.E.2d at 728; *Lanning v. Morris Mobile Meals Inc.*, 308 Ill.App.3d 490, 720 N.E.2d 1128, 1130 (1999). Illinois courts have indicated that there are only two situations in which a cause of action for retaliatory discharge arises: where an employee makes a workman's compensation claim, which leads to his or her termination, *Kelsay v. Motorola Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 357 (1978), and where an employee's termination results from his or her 'whistleblowing' activities."

Noting that Riedlinger's action was based upon the Whistleblower Act, the court set out the parameters of a cause of action under the Act.

Norgle wrote: "On January 1, 2004, the Whistleblower Act, 740 Ill. Comp. Stat. 174/1-174/35, became effective in Illinois. Pursuant to this Act, '[a]n employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation.' 740 Ill. Comp. Stat. 174/15. This statute has not received a great deal of attention from either Illinois courts or federal courts in the state of Illinois. The courts that have dealt with this statute, however, have determined that the Whistleblower Act has codified the common law tort of retaliatory discharge in Illinois. *Sutherland v. Norfolk S. Ry.*, 356 Ill.App.3d 620, 826 N.E.2d 1021, 1026 n. 4 (2005) ("The 'whistleblower' cause of action has since been codified in the Whistleblower Act."). These courts have interpreted this statute to provide that an individual qualifies as a whistleblower only if he or she reports

allegedly unlawful activity to some governmental authority or agency. *Smith v. Madison Mutual Ins. Co.*, 05 CV 142DRH, 2005 WL 1460301 at 1 (S.D.Ill. June 21, 2005); *Jones v. Dew*, 06 C 3577, 2006 WL 3718053 at 4, 2006 U.S. Dist. LEXIS 90740 at 10-11 (N.D.Ill. Dec. 13, 2006)."

Norgle held that no cause of action arises unless the employee has complained to a government or law enforcement agency and cited the legislative history revealing such:

"In other words, where an employee alleges that he or she was terminated in retaliation for revealing information only to his or her employer, there is no cause of action for retaliatory discharge in Illinois.

"The legislative history of the Whistleblower Act confirms that the *Smith* and *Jones* courts have correctly interpreted this statute. Representative [John A. Fritchey IV], sponsor of the Act in the Illinois House of Representatives, explained that the intent of the statute was to codify the common law tort of retaliatory discharge. '[Y]ou do not have a cause of action for retaliatory discharge today stemming from going to the authorities to disclose a violation of law.... Common sense would tell you that you should have that protection and this law would codify that.' Ill. H.R. Trans. 2003 Reg. Sess. No. 63. Fritchey then very clearly explained that this tort applied only to those individuals who brought their concerns regarding illegal activities at work to some government agency.

"What this [bill] does is prohibit an employer from taking any actions to prevent an employee from disclosing information to the government, if the employee has reasonable cause to believe that there was a violation of law.... [W]hat we're saying is that a boss cannot fire an employee for going to the authorities and saying, something is going on that's a violation of the law.... [Y]ou can't terminate them solely for going, in good faith, to the authorities to let the authorities know that there's been a violation of law occurring."

Quoting the synopsis of the Whistleblower Act provided to the Illinois Senate and relying upon the case law (*Smith* and *Jones* cases), Norgle concluded that absent a complaint about a real or perceived violation of law by the employer by the employee to a government agency, no Whistleblower Act cause of action existed:

"[The Whistleblower Act] [p]rovides that an employer may not: make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency if the employee has reasonable cause to believe that the information discloses a violation of a

State or federal law, rule, or regulation; retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation.... Ill. S.B. Stat. 2003-2004 Reg. Sess. S.B. 1872.

"Taking the persuasive reasoning of the *Smith* and *Jones* courts into account, and following the clear legislative history of the Whistleblower Act, this court therefore interprets Illinois law to provide that an employee has a cause of action for retaliatory discharge in Illinois only if he or she has revealed information he or she reasonably believes discloses a violation of a law or regulation to some government or law enforcement agency. Where an employee has revealed this information only to his or her employer, there is no cause of action in Illinois for retaliatory discharge."

The court found that the record clearly revealed that Riedlinger never reported his belief that the mold may have violated the law to any government agency:

"In his First Amended Complaint, Riedlinger alleges that he advised plant management about the presence of mold in the facility. Riedlinger also alleges that he held a good faith belief that the mold contamination in the facility was a violation of federal law. However, as the court has noted, Riedlinger does not allege that he disclosed this information to the FDA or any other outside authority. Likewise, Riedlinger's Local Rule 56.1(b) Statement of Material Facts indicates that he apprised company management of the mold problem, but there is no indication in this Statement that Riedlinger ever went to the FDA. Most importantly, Riedlinger admitted during deposition testimony that he never approached the FDA with his concerns.

"Q. Now, with respect to the testing results, you never went to the FDA to complain about or to report testing results; right?

A. No, because I was afraid I would lose my job....

Q. And you didn't go to the FDA to report anything related to the testing results or any concerns about the health and welfare of the employees; correct?

A. That's correct."

"Riedlinger thus cannot be considered a Whistleblower in Illinois as a matter of law."

Therefore, the court granted defendant Hudson's motion for summary judgment.

