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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

BRADLEY L. SWEENEY,

Plaintiff,

vs.

CITY OF DECATUR, and TIM
GLEASON, City Manager,

Defendants.

No. 2016-L-18

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

BRADLEY L. SWEENEY, Plaintiff, by BOLEN ROBINSON & ELLIS, LLP, makes this his response to Defendants' Combined 2-615 and 2-619 Motions, Defendants' Supplement, and the Affidavits of Tim Gleason and Jim Getz filed by Defendants on February 25 and April 4, 2016. Each numbered paragraph or section below corresponds to the numbered sections of Defendants' Motions. Most of Plaintiff Sweeney's response to Defendants' Supplement to the Combined Motion is contained in paragraph 6(B) below.

I. Plaintiff Sweeney's Response to the 2-615 Motion

1. As acknowledged by Defendants, Plaintiff Sweeney agrees that the allegations in his Complaint must be accepted as true for purposes of both motions filed by Defendants. Plaintiff's Affidavit in response to the Gleason and Getz affidavits filed by Defendants is attached. This affidavit contradicts many of the claims and statements made in the Gleason and Getz affidavits, thus creating further fact issues which must be resolved by a jury.

2. The requirements for common law retaliatory discharge claims are: (a) discharge from employment; (b) in retaliation for Plaintiff's activities; and (c) the discharge violated a clear

mandate of public policy. *Collins v. Bartlett Park Dist.*, 2013 Ill.App.2d 130006 (2013) is the most recent decision on point.

3. Plaintiff Sweeney agrees that Count II of his Complaint asserts a statutory whistleblower claim under 740 ILCS 174/15b.

4. The common law tort of retaliatory discharge is an exception to the general rule that “at will” employees legally can be terminated with or without cause. The tort provides a remedy where a termination is in retaliation for employee conduct that is protected as a matter of public policy. If the employer’s explanation for the termination is shown to be pretext, a retaliatory discharge claim can succeed. However, the issues of pretext and the cause of termination are fact questions for a jury. *Collins, supra*. In this case, Gleason claims the termination was caused by Sweeney’s failure to communicate and insubordination, but Sweeney’s complaint and affidavit created contested issues of fact regarding the cause of the termination. Only where there are no disputed issues of material facts, can a complaint be dismissed as a matter of law.

5. Whether the discharge violates clear public policy is a question of law for the Court. Here, Plaintiff Sweeney’s allegations of public policy violations are contained in paragraph 26 of his Complaint. Section 15 of the Whistleblower Act (740 ILCS 174/15) provides that an 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 state or federal law. *Collins, supra*. citing *Wheeler v. Caterpillar Tractor Co.*, 108 Ill.2d 502 (1985).

6. Paragraph 10 of Plaintiff’s complaint alleges several state statutes, including the Illinois “official misconduct” criminal statute, the Illinois Employee Ethics Act, and the Illinois Constitution, provides that public funds and property shall only be used for public purposes.

Sweeney alleges his termination was caused in whole or in part by his reporting of the City Manager's misconduct in violation of one or more of these state laws; by his speech opposing the additional taxes proposed by Gleason; and by his refusal to speak in support of taxes at a City Council meeting.

Count I for common law retaliatory discharge should not be dismissed.

A. Plaintiff Sweeney did not voluntarily "participate" for his or for Gleason's benefit. Defendants claim Sweeney has alleged facts indicating "he acted with the intent to obtain a personal advantage for another!" Defendants cite no reference to Plaintiff's complaint because there is no such allegation in his complaint. To the contrary, paragraph 8 of the Sweeney Complaint alleges he told City Manager Gleason that Gleason's personal use of a police car and personnel would be improper, and Gleason immediately "ordered" him to provide a police car and driver anyway.

Defendant Gleason now claims the deceased Mayor McElroy told him "to make arrangements for an unmarked City vehicle, with driver to transport me to my departing flight." (Gleason Affidavit at paragraph 9.) Sweeney denies he ever heard from Mayor McElroy about a police car and driver for Gleason. (Sweeney Complaint, para. 12.) Defendants do not explain how Sweeney benefitted from Gleason's improper, and perhaps illegal, conduct. Whether or not Mayor McElroy suggested that Gleason could use a Decatur police vehicle and driver for his personal benefit, as a retired police lieutenant and a member of the Illinois Law Enforcement Training and Standards Board, Gleason knows or should know it is improper and unethical for a public official to benefit personally from his personal use of public property and personnel. Gleason did benefit personally, and Sweeney did not voluntarily participate according to his

Complaint. He was ordered to provide a police car and driver by Gleason, who as City Manager, ultimately controls the police department according to Chapters 7, 10 and 13 of the City Code.

Sweeney was empowered, but not required, to arrest Gleason. Sweeney enforced the law by warning Gleason; and by making it clear that Gleason could never again be allowed personal use and benefit of a Decatur police vehicle and driver. Police officers in Illinois have discretion on whether or not to make an arrest, unless a governing statute requires it. The statutes and ordinances violated by Gleason's conduct do not mandate arrest in every case.

Defendants claim Sweeney's complaint should be dismissed because he supposedly violated state law by not arresting Gleason for his criminal act. Defendants argue that "Sweeney claims he acted with intent to obtain a personal advantage for Gleason," but once again Defendants do not point to any such statement in Sweeney's complaint, because there is no such statement. To the contrary, Sweeney's Complaint alleges he objected to providing the public resources for Gleason's private use and benefit.

Plaintiff does acknowledge that another command officer provided his Decatur police car and his on-duty services as driver for Gleason. (See paragraphs 8 and 9 of Sweeney's Complaint.) Sweeney did not consent to, agree to, or promote Gleason's use of the police resources; and Sweeney received no personal benefit from Gleason's personal use of the government resources.

For purposes of Defendants' Motions, Sweeney's allegations must be considered true. Intent to violate and personal benefit are elements of the ethical and official misconduct violations. Gleason's affidavit admits he used public property and personnel for his personal purposes and benefit. Gleason, of course, claims Mayor McElroy told him to do this; but this alleged direction from the Mayor would not make Gleason's action less improper in view of the

clear prohibition against such use by government officials, especially when Gleason knew or should have known it was improper, and perhaps illegal.

B. **Plaintiff Sweeney's hands were "tied and clean."** Defendants next argue "unclean hands" and claim that Sweeney voluntarily participated in what appeared to be an improper and perhaps illegal act. Defendants argue Sweeney cannot use the civil justice system if his case is based on immoral or illegal acts by him. Defendants cite *Hubert v. Consolidated Med. Labs*, 306 Ill.App.3d 1118 (1999). Unlike the plaintiff in the *Hubert* case, Sweeney did not voluntarily or willingly participate in Gleason's personal use of City property. Hubert initially participated in a fraud at the request of a co-worker who was not her boss.

Here, Sweeney's pleading and affidavit state that he objected to providing a police car and driver for Gleason. Gleason's affidavit acknowledges that he requested a police vehicle and driver for his May 7, 2015 trip to St. Louis airport to catch a flight for his personal vacation trip; but Gleason claims Sweeney did not object to providing the car and driver; and this creates a fact question for a jury. Defendants have just filed an affidavit by Jim Getz claiming Sweeney ordered him to drive Gleason to the St. Louis airport; and Sweeney's affidavit contradicts this claim by Getz. There are several material questions of fact in this case. There is a dispute about whether Sweeney participated in Gleason's use of the police car and driver. Whether Sweeney approved, objected to, or ordered the police car for Gleason are all disputed material facts to be determined by a jury.

Defendants now argue equitable estoppel and claim Sweeney voluntarily allowed Gleason's use of the police vehicle and driver. Defendants claim Sweeney's pre-suit conduct is inconsistent with his claims in this lawsuit. Defendants argue that Sweeney should be barred (estopped) from claiming wrongful termination even though he objected to and reported his

objection to the City Manager who controls the Police Department according to the Decatur City Code.

Defendants cite three cases to support their estoppel argument; but these decision do not support Defendants' arguments here. The federal court decision in *Thomas v. Cassidy*, 892 F.2d 637 (7th Cir. 1990) is not on point because it involves Cassidy's two clearly inconsistent claims in two separate legal proceedings. The issue was judicial estoppel. In *Sweeney v. Gleason, et al*, there is no prior litigation, so "judicial estoppel" does not apply.

The Illinois Supreme Court decision in *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill.2d 302 (2001) cited by Defendants is far more relevant and instructive here. The *Geddes* case involved prior out-of-court conduct by the plaintiff which was totally inconsistent with his claim in court. Plaintiff Geddes made litigation claims that contradicted his own written agreement with defendants, and they also contradicted his own public statements before a local government agency. In *Geddes*, the Illinois Supreme Court said:

The general rule is that where a person by his or her statements and conduct leads a party to do something that the party would not have done but for such statements and conduct, that person will not be allowed to deny his or her words or acts to the damage of the other party. *Dill v. Widman*, 413 Ill. 448, 455, 109 N.E.2d 765 (1952); *Bondy v. Samuels*, 333 Ill. 535, 545, 165 N.E. 181 (1929). Equitable estoppel may be defined as the effect of the person's conduct whereby the person is barred from asserting rights that might otherwise have existed against the other party who, in good faith, relied upon such conduct and has been thereby led to change his or her position for the worse. *M.J. Oldenstedt Plumbing Co. v. K mart Corp.*, 257 Ill.App.3d 759, 764, 195 Ill.Dec. 906, 629 N.E.2d 214 (1994); *Byron Community Unit School District No. 226 v. Dunham-Bush, Inc.*, 215 Ill.App.3d 343, 348, 158 Ill.Dec. 990, 574 N.E.2d 1383 (1991); 18 Ill. L. & Prac. *Estoppel* § 22 (1956).

In the case at bar, Brad Sweeney's complaint and his affidavit state that he objected to providing a police car and driver, but was overruled and ordered to do so by City Manager Gleason. It is undisputed that as City Manager, Gleason ultimately controls the police

department according to the Decatur City Code. (Chs. 10 and 13.) Chapter 13 of the Decatur City Code states:

The police chief shall be the Director of the Police Department. . . may make reasonable rules, regulations and directives not in conflict with law or ordinance to govern and administer the activities and carry out the duties and responsibilities, subject to the direction and control of the City Manager. *Id.* (Emphasis added.)

Unlike the plaintiff in *Geddes*, here Sweeney's pre-suit conduct is not inconsistent with his complaint, and he did not lead Gleason to do something he would not have done otherwise. Gleason wanted to use the police car and driver, and he admits approaching Sweeney about a car and driver.

The third case cited by Defendants is another decision illustrating that courts will rule against a party where their litigation position is clearly contradicted by their own prior conduct. *See Dertz v. City of Chicago*, 912 F.Supp. 319 (1995). Plaintiff Dertz was repeatedly considered disabled by Defendant, and the court refused to allow the city to reverse its prior position. This decision, and the *Geddes* decision, actually support Plaintiff Sweeney's position that Gleason cannot now argue he did not receive personal benefit from his use of the City vehicle and driver where he has admitted personal use of the city resources in an affidavit and during a recorded radio interview.¹

Defendants now claim that Chief Sweeney did not follow departmental policies contained in police department General Orders attached to the Getz' affidavit. Defendants argue

¹ Gleason claims, and Defendants argue, that his use of the police car and driver was only to benefit the City by his attendance at the May 7, 2015 City breakfast. However, Gleason's deposition testimony indicates he had ample time before May 7 to change travel arrangements to avoid using a police car and driver, but did not do so. (Gleason Dep. at 28-32.) He chose not to avoid using the police car and driver for convenience of his traveling companion. (Gleason Dep. at 32.)

Sweeney should be estopped from claiming wrongful discharge, implying that he must, therefore, have agreed with the rules violation by Gleason.

Defendants' "supplemental" estoppel argument is creative, but it does not apply to this case where there are factual disputes about whether Sweeney objected to and opposed Gleason's use of the police car and driver. There also are material fact questions whether as Police Chief Sweeney had to do more than he did in reporting to Gleason what he believed was improper or illegal conduct, i.e. Sweeney reported his objections and opposition to the department's ultimate authority—City Manager Gleason.²

Defendants argue that if Sweeney had reasonable cause to believe a crime was involved and he did not follow police department rules and orders, he should be estopped from bringing this lawsuit because his pre-suit conduct is inconsistent with his litigation claims. Like Defendants' earlier argument that Sweeney "participated in wrongdoing" by Gleason, this estoppel argument is without merit.

Under the circumstances of this case, there are many material questions of fact. Whether Sweeney voluntarily participated as alleged by Defendants is disputed. Whether Sweeney opposed and objected to Gleason's personal use and benefit of a city police vehicle and driver is disputed. Whether Sweeney reported his objection and opposition to City Manager Gleason is disputed. Whether Sweeney ordered, or simply allowed, Officer Jim Getz to drive Gleason in his police car to the St. Louis Airport on May 7, 2015 is disputed.

² It was City Manager Gleason who chose not to call for an investigation into whether it was improper or illegal for a person to benefit from the use of the police vehicle and driver. (Gleason Dep. at 144.) Gleason testified, "I have not ordered an investigation into the trip on May 7th because it wasn't a criminal offense. (Gleason Dep. at 144.)

One thing in this case is not disputed—that City Manager Gleason did request and use the city vehicle and driver for his trip to the St. Louis Airport in order to catch a plane for a trip that was personal and for his benefit. Sweeney says he reported what he believed was improper or illegal to Gleason who was the person authorized by the City Code to direct and control the police department. As police chief, Sweeney's reporting authority was Gleason as City Manager. The fact that Gleason did not pursue an investigation or further reporting of his own personal use of government resources should not prejudice Sweeney's claims in this case.

Chief Sweeney did not report Jim Getz for taking his police vehicle outside Decatur because City Manager Gleason ordered the car and driver. Gleason now claims the Decatur City Code allows the city manager to direct and control anything and everything within the Decatur Police Department, and to overrule police policies and general orders. (Gleason Dep. at 146-147.) There are questions about whose version of facts is true, but based on Plaintiff Sweeney's version of the facts, his pre-suit conduct is not inconsistent with his claims in this case. Therefore, he is not estopped from pursuing his claims in this case.

Taken as true for purposes of Defendants' motion, in paragraph 14 of his Complaint Sweeney says he made sure Gleason understood that he could not ever again expect to use police department resources for his own personal benefit. Taken as true, Sweeney alleges he was "ordered by Gleason" to provide the car and driver. However, even if Sweeney had willingly participated in Gleason's personal use of city resources, how could Gleason, as sole beneficiary of the improper use escape investigation and potential loss of his job?

Ultimately, Defendants' estoppel argument also falls short because it does not at all address Sweeney's allegation that he was wrongfully terminated for refusing to speak in favor of additional taxes and for speaking in opposition to additional taxes.

C. As Police Chief, Sweeney was under the absolute control of City Manager

Gleason.³ Defendants cite *Fellhauer v. City of Geneva*, 142 Ill.2d 495, 507 (1991) in support of their argument that Sweeney's firing by the City manager does not contravene a clearly mandated public policy. *Fellhauer* predates the Illinois Whistleblower Act which overrules it. However, in any event, the *Fellhauer* facts are quite different from Sweeney's case. Defendants do not mention that the *Fellhauer* court's ultimate reasoning for rejecting a retaliatory discharge claim; i.e. there was a mandatory review of the mayor's action which eliminated a claim that public policy required further review in a civil court action for retaliatory discharge.

In *Fellhauer*, the court did observe that the Illinois "official misconduct" statute could deter misconduct by public officials. Ultimately, however, the *Fellhauer* decision relied on the Illinois Municipal Code provision which provides added protection from "wrongful termination" by a city mayor, to-wit: the Illinois Municipal Code requires immediate city council review of all employment terminations by a mayor.

In the case at bar, according to the Decatur City Code, the City Manager has control of all City departments and the exclusive right to terminate the police chief and other department heads without any review by the mayor or city council. In Decatur, there is no City Council review of any actions taken by the city manager. Unlike the review required in *Fellhauer*, Decatur department heads like Sweeney are at the complete mercy of the City Manager, and there is no provision for review which could check and balance a city manager. Here, a jury must ultimately determine if Police Chief Sweeney was wrongfully terminated by City Manager Gleason.

³ City Manager Gleason's position is that he has a right to ultimately determine whether use of these resources violate state or local laws; and he has the right to overrule police department policies, rules and general orders.

Ultimately, the Illinois Whistleblower Act and more recent decisions on the Illinois common law retaliatory discharge claim, trump Defendants' argument here. Sweeney's Count I (the common law retaliatory discharge claim) is also legally supported by his allegations of a free speech violation, with or without his reported opposition to Gleason's wrongful personal use of government property and personnel.

D. Sweeney's free speech rights are an independent basis for his Count I claims.

Defendants argue that the Illinois Supreme Court's decision in *Barr v. Kelso-Burnett Co.*, 106 Ill.2d 520 (1985), totally eliminates free speech under the United States and Illinois Constitutions as a public policy basis for the retaliatory discharge. This argument is disingenuous because, as the Court pointed out in *Barr*, free speech is a clearly mandated public policy which can be violated by retaliatory termination of "public employees." The *Barr* case involved a non-governmental, private employer; and we acknowledge that protection of free speech cannot be the basis for a retaliatory discharge claim brought by a private-sector employee, however, Sweeney is a government employee whose speech may be protected.

Apparently acknowledging that free speech protections do apply to public/governmental employees, Defendants shift their argument under paragraph 6(D) of their motion from no public policy protection to a claim that Sweeney was speaking only in his capacity as a public official when he objected to Gleason and others about the City Manager's plan to increase taxes on February 2, 2016. Significantly, Defendants do not address Sweeney's "constructive speech" when he refused to make statements to the public and City Council in support of additional taxes.

Defendants argue that because Sweeney's speech opposing tax increases was made at a staff meeting, this could only be speech made in his capacity as Police Chief. This claim by

Defendants contradicts common sense and Mayor Moore-Wolfe's own public statements that commenting on the motor fuel tax is outside the scope of Sweeney's job duties as Police Chief. Mayor Moore-Wolfe stated to the Herald and Review, "It would be very unusual for a city manager to call upon a police chief to make public statements to support a motor fuel tax...It's not like he's the public works director."⁴ Sweeney's speech in opposition was made as a citizen, for himself and others who are opposed to more city taxes and tax increases. Mayor Moore-Wolfe's characterization of Sweeney's speech as not being related to his job as Police Chief is understandable because the subject matter of his speech was not related to his job duties as Police Chief. Moreover, Defendants have not claimed that Sweeney's spoken personal opposition to tax increases interfered with the city government such that interference could even be balanced against Sweeney's right to free speech.

In *Connick v. Myers*, 461 U.S. 138 (1983), the U. S. Supreme Court held that at will public employees cannot generally be discharged for speech on matters of public concern. Whether a public employee like Sweeney "spoke as a citizen on a matter of public concern, the Court examines the content, form, and context of a given statement as revealed by the whole record." *Shefcik v. Village of Calumet Park*, 532 F.Supp.2d 965, 974 (N.D. Ill. 2007). Whether tax increases are a matter of "public concern" is a question of law for the Court. *Rankin v. McPherson*, 483 U.S. 378 (1987).

Defendants cite *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), and argue that government employers like City Manager Gleason need to control the speech of their employees. However, the *Garcetti* decision does not support Defendants' argument here because *Garcetti*'s speech was directly related to the plaintiff's work and workplace. The narrow *Garcetti* decision

⁴ Huey Freeman, *Sweeney reveals details of firing; city says story is a lie*, Herald & Review, February 10, 2016.

in 2014 was expanded and illuminated significantly by the Supreme Court's unanimous decision in *Lane v. Franks*, 57 U.S. slip op. (2014). In *Lane*, the Supreme Court clarified that speech by government employees on matters of public concern is protected if the speech itself is outside the scope of the employee's ordinary job responsibilities, even if it is speech made while acting as a public employee. *Id.* at 8 and 10. The Court said:

The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. *Id.* at 13.

The *Lane* decision illustrates that if the public employee's speech was on a matter of public concern and otherwise constitutionally protected, the ultimate question is whether the government had adequate justification for terminating the employee based on interference with the operation of the government. *Id.* at 15-16.

Here, the speech at issue concerns taxation, a topic outside the scope of Sweeney's job duties. On February 2, 2016, Gleason ejected Sweeney from a staff meeting immediately after Sweeney spoke out against a further tax. Two days later, Sweeney was fired when Gleason handed him a letter which said only: "Effective immediately your employment with the City of Decatur is terminated."

Gleason now claims Sweeney was insubordinate, but there is no support for this in his personnel record. Despite Gleason's current claim, there is no allegation or evidence in the record that Sweeney's refusal to make public statements, or his speech opposing further taxes, interfered with the operation of city government.

Tax increases are of grave concern to all citizens, and under the *Lane* decision, this "clearly mandated public interest" requires Defendants to make a "stronger showing of government interests" to overcome free speech protection for Sweeney. *Id.* at 16. Here

Defendants have not alleged that Sweeney's conduct offended or interfered with government interests.

Defendants fail to address Sweeney's additional claim that he was terminated in retaliation for his refusal to make a public statement at the City Council meeting supporting Gleason's proposed motor fuel tax. (Complaint, paragraph 25 (c)). Gleason's demand that Sweeney engage in political speech in support of a tax increase was a demand that fell squarely outside of the scope of Sweeney's job duties as Police Chief. A City Council meeting is a public forum. Sweeney had a first amendment right to refuse to engage in political speech in a public forum in support of a political position he personally opposed.

A disputed question of fact exists as to whether Gleason demanded Sweeney speak in support of a tax increase at a City Council meeting. For the purposes of Defendants' motion, Sweeney's factual allegations are to be accepted by the court as true. It is well settled that First Amendment rights of employees is a sufficient public policy interest to support a retaliatory discharge claim when the employer is a governmental entity.

E. Reporting possible misconduct and right to free speech for government employees are of state-wide concern. Defendants claim the discharge of a police chief is not of state-wide concern. This misses the point completely because the public policies offended by Sweeney's termination are the reporting of improper/illegal conduct by a public official and the protection of free speech which are matters of concern to citizens everywhere.

7. Referring to their arguments for dismissal of Count I discussed above, Defendants claim Sweeney's Whistleblower Act claim (Count II) should be dismissed for some of the same reasons. (See paragraph 6 of Defendants' Motion.) For the reasons above as to Count I of Sweeney's Complaint, Defendants' Motion to Dismiss Count II should be denied.

8. Defendants argue that Count II fails to allege a violation of state or federal law; but this completely ignores Sweeney's pleading. Paragraphs 8, 9 and 10 of Count I specifically identify state law violations by City Manager Gleason. These paragraphs are incorporated into Count II. Sweeney's specific allegations of the state laws violated include the statutory "official misconduct" law and the Illinois Constitution's prohibition against private use and benefit from public funds, property or credit. (See Article VIII, Sec. 1(a) of Ill. Const.)

9. Defendants argue that *Riedlinger v. Hudson Respiratory Care, Inc.*, 478 F.Supp.2d 1051, 1055(N.D. Ill. 2007) holds there is no claim in Illinois for retaliatory discharge where a private-sector employee reveals or reports suspected law violations only to his employer. This 2007 federal court decision has been clarified (or overruled) by the Illinois state court decision in *Brame v City of North Chicago*, 2011 Ill.App.2d, 100760 (2011). In *Brame*, the Illinois Appellate Court held that the Illinois Whistleblower Act (Section 15(b)), supports a cause of action for "disclosing suspected unlawful activity only to one's own employer who also happens to be a government or law-enforcement agency." *Id.* at 3.

The fact allegations in Sweeney's Complaint, which must be accepted as true for purposes of Defendants' Motion, establish that Sweeney objected to City Manager Gleason's use of the police vehicle as improper, but Sweeney was overruled by Gleason. Later, after he was ordered by Gleason to provide transportation anyway, Sweeney advised Gleason that this could never happen again. (Sweeney Complaint at paragraphs 8 and 14.) Under the *Brame* decision, Sweeney's report to the person who ultimately controls the Decatur Police Department, satisfies the reporting requirement of the Illinois Whistleblower Act. Chapter 13 of the Decatur City Code makes it clear that the Police Chief is "subject to the direction and control of the City Manager." (See Attachment 3 to Defendants' Motions.)

Curiously, Defendants claim that Sweeney's Complaint "alleges that Sweeney threatened to disclose information to third parties" (Paragraph 9 of Defendants' Motions.) Defendants do not point to any such allegation in the Complaint because there is no such allegation in the Complaint. Sweeney objected to the City Manager's use of public resources for his personal benefit; and he made it clear Gleason could never again use police resources for his own personal benefit. Gleason acknowledged this, but obviously he did not like having a subordinate question him. Where there is no administrative review of his decisions, City Manager Gleason apparently believed he was free to rid himself of Sweeney, even if this hasty decision was imprudent and the basis for a cognizable wrongful discharge claim.

10. Counts I and II will present questions of fact regarding retaliation if Defendants' answer pleads a non-pretextual basis for Sweeney's termination. See *Collins v. Bartlett Park District*, *supra* at 50. Based on Gleason's affidavit, Defendants will claim Sweeney's firing was for reasons other than retaliation. Ultimately, the parties must produce evidence at trial to resolve the fact questions.

11. Defendant Gleason is named a defendant in his official capacity, not as an individual (See Sweeney's Complaint, paragraph 3.) As such, Gleason is an appropriate defendant in this case.

II. Plaintiff's Response to Defendants' 2-619 Motion.

12. Plaintiff acknowledges that a clearly established affirmative matter can defeat a claim. However, here there is no affirmative matter which could defeat Sweeney's claim considering the facts in his Complaint, Gleason's affidavit, and the required presumption that Plaintiff's fact allegations are considered true for purposes of Defendants' motions. Sweeney alleges he opposed what he believed was wrongful conduct by City Manager Gleason, who was his sole boss under the Decatur City Code. Sweeney also alleges that he reported to the City Manager his objection,

and his belief that the conduct was improper and probably illegal. For reporting purposes under the Whistleblower Act, Gleason is not only the chief administrator of Decatur city government, he is also a part of Decatur "law enforcement." The Decatur City Code puts the city manager in control of the administration of the police department. (Decatur City Code, Ch. 10.)

13. Defendants argue that the private employment case of *Hubert v. Consolidated Medical Laboratories, supra*, is an "affirmative matter" which defeats Sweeney's claims; but the *Hubert* decision does not control here where facts are significantly different than in *Hubert*. First, Sweeney reported wrongful conduct to the City Manager who is the ultimate authority of City of Decatur departments, including the Decatur Police Department. Hubert did not report to any "government" or "law enforcement" entity as required by the Illinois Whistleblower Act. Second, Hubert voluntarily participated in the wrongful conduct. Sweeney did not voluntarily participate. He objected, but then allowed the car to be used by Gleason after Gleason ordered him to provide the police car and driver on May 7, 2015.

The *Collins* decision is cited by Defendants as authority for the creation of a triable question of fact where the employer claims a non-pretextual basis for the termination. However, *Collins* also illustrates that in a private employment termination case, the employee must not only oppose conduct, but also refuse to participate in the conduct that he believes to be improper. Because Collins did not refuse to participate, and because he did not report to a government or law enforcement entity, Collins did not meet the requirements of the Illinois Whistleblower Act. *Collins, supra* at 27-28.

In *Collins*, the Appellate Court found no cause of action under the Illinois Whistleblower Act because the private-sector employee did not report to government or law enforcement, and he did not refuse to participate. The *Collins* court did find that the employee had a triable common

law retaliatory discharge claim because he alleged termination in retaliation for his opposition to the employer's violations of the Illinois Safety Act. In the case at bar, Sweeney not only opposed the improper conduct, he also reported it to the government representative who ultimately controlled the police department according to the Decatur City Code. In short, Sweeney has preserved both common law and Whistleblower Act claims here.

14. Defendants argue that Gleason's affidavit by itself, without a trial and fact finding, is "affirmative matter" justifying a Rule 2-619 dismissal. This is not true, and even the *Collins* and *Turner* decisions clearly state "the issue of retaliation is a question of fact for the trier of fact to resolve." *Collins, supra.* at para. 32, citing *Turner v. Memorial Medical Center*, 233 Ill.2d 494 at 501 n.1. The Gleason affidavit only raises a question of fact as to whether Sweeney was fired in retaliation for protected activity. Gleason's affidavit does not resolve whether Sweeney was wrongfully terminated in retaliation for protected activity, especially where it is contradicted by Sweeney's own affidavit in response. Gleason's affidavit only creates a question of fact for the jury in this case. Once again, as indicated in the *Turner* decision, "the element of retaliation, which involves causation and motive, is factual in nature and generally more suitable for resolution by the trier of fact." *Turner, supra.* at 501. n.1

Defendants cite two cases where the pleadings themselves revealed undisputed facts which allowed the cases to be decided as a matter of law. In *Hartlein v. Illinois Power*, 151 Ill.2d 142 (1992), the plaintiff's complaint revealed clearly that plaintiff Hartlein was physically unable to perform his job for medical reasons. The pleadings also indicated that Hartlein was still receiving TTD benefits in lieu of wages so he could not be considered terminated from his employment. For these reasons, the Supreme Court found it impossible for Illinois Power to have "discharged" Hartlein in retaliation for his filing of a Worker's Compensation claim. The pleadings revealed

unequivocally that plaintiff Hartlein was not discharged, and therefore, that he could not plead a retaliatory discharge claim. Even assuming Hartlein's alleged facts were true, he could not possibly make a claim as a matter of law.

Similarly, undisputed facts controlled the Appellate Court's decision in *Schlicher v. Board of Fire and Police Commissioners of the Village of Westmont*, 363 Ill.App.3d 869 (2006). This decision was also cited by Defendants in their argument for summary dismissal under Rule 2-619. In *Schlicher*, the pleadings themselves revealed that plaintiff could never state a claim that the police commissioner wrongfully denied him a promotion. Based on the undisputed allegation of facts, Schlicher had no legal right to a claim because an Illinois Municipal Code provision allows the promotion of any of the top three rated candidates, not necessarily the highest rated candidate. Schlicher complained he was the highest rated candidate, and that he should have been promoted because he claimed the police commissioners had a history policy of promoting the highest ranked candidate. *Id.* 845 N.E.2d 55, 61. Ultimately, the Appellate Court held that the undisputed facts in the pleadings, coupled with the applicable Illinois Municipal Code provisions (745 ILCS 10/1-101.1(a) and 10/2-205), provided immunity from suit as a matter of law for claims that a public entity caused damage by enforcing a law. *Id.* at 845 N.E.2d 55, 63.

Finally, Sweeney's allegations of facts are not "conclusions" as argued by Defendants. His Complaint specifically alleges: (1) Gleason's wrongdoing and his reaction (paragraphs 8 – 15); (2) Gleason's demands for public statements from Sweeney (paragraphs 17 and 18); and (3) Gleason's reaction to Sweeney's February 2, 2016 comments in opposition to Gleason's tax increases (paragraphs 19-21).

15. Plaintiff Sweeney will concede that Defendants, as named in his Complaint, are immune from liability for punitive damages under current law.

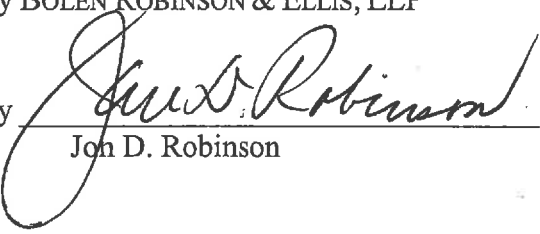
WHEREFORE, for the reasons discussed above, Counts I and II of Plaintiff's Complaint state proper claims for common law retaliatory discharge and for a violation of the Illinois Whistleblower Act. Accordingly, Defendants' 2-615 and 2-619 Motions should be denied, with leave for Plaintiff to strike the prayer for punitive damages.

Respectfully submitted,

BRADLEY L. SWEENEY, Plaintiff

By BOLEN ROBINSON & ELLIS, LLP

By


Jon D. Robinson

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I mailed a true and exact copy of the above and foregoing document by depositing same in the United States Mail at 5:00 p.m. properly addressed to the following this 11th day of April, 2016.

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