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

BRADLEY L. SWEENEY,

Plaintiff,

vs.

CITY OF DECATUR,

Defendants.

No. 2016-L-18

PLAINTIFF'S RESPONSE TO DEFENDANTS' COMBINED MOTION TO DISMISS THE AMENDED COMPLAINT

BRADLEY L. SWEENEY, Plaintiff, by BOLEN ROBINSON & ELLIS, LLP, makes this his response to Defendants' Combined 2-615 and 2-619 Motions to Dismiss his Amended Complaint. Defendant's Motion should be denied for the following reasons:

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

Once again, it is undisputed that for purposes of both the 2-615 and 2-619 aspects of Defendant's Motion to Dismiss, Plaintiff's allegations must be taken as true and be viewed in the light most favorable to Plaintiff as the non-moving party. *Turner v. Memorial Medical* Center, 911 N.E. 2d 369, 373 (2009).

A. The Count I common law claim for retaliatory discharge does allege "a clearly mandated public policy."

Defendant again argues that Sweeney's Amended Complaint fails to allege a clearly mandated policy element. Defendant argues that enforcing state criminal statutes and the Illinois Constitution as alleged by Sweeney are not sufficient to satisfy the public policy requirement, however, Defendant's arguments do not follow the decisional authority. The *Turner* decision cited by both parties says this about the definition of "public policy:"

> There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions. [Citation.] Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed." *Palmateer*, 85 Ill.2d at 130, 52 Ill. Dec. 13, 421 N.E.2d 876.

Turner, 911 N.E.2d at 374.

1. First, Defendant apparently suggests the *Fellhauer* decision in 1991 overruled the Supreme Court's 1981 decision in *Palmateer v. International Harvester Co.*, 85 Ill.2d 124 (1981). In *Palmateer,* the Court held that supplying information to local law enforcement authorities about possible criminal activity by a co-employee alleged facts sufficient to state a cause of action for retaliatory discharge. *Id.* at 132. The Supreme Court held that public policy favors reporting of violations of the Criminal Code. *Id.* 132-33. The *Palmateer* decision indicates that "an employer could effectively frustrate a significant public policy by using the power of dismissal in a coercive manner," according to the Court in *Fellhauer v. City of Geneva.* 142 Ill.2d 495, 508 (1991). *Fellhauer* did not overrule the *Palmateer* decision, rather it reaffirmed "the obvious public policy favoring the investigation and prosecution of crime . . . ." *Id.*

The factual and pleading distinction between *Fellhauer* and *Sweeney* have already been briefed in Sweeney's Memorandum in support of the Amended Complaint. Most significant is that the *Fellhauer* decision left untouched the plaintiff's common law retaliatory discharge claim against the City as employer. Fellhauer's pre-Whistleblower Act claim against the City of Geneva contained an allegation that he was discharged for his refusal to commit misconduct. *Id.* at 501-02. The *Fellhauer* decision did not at all involve Fellhauer's retaliatory discharge claim

against the City. *Id.* at 504. And, Fellhauer refused a "request" to commit a wrongful act, in contrast to Gleason's order requiring the suspected misconduct.

Unlike *Fellhauer,* Sweeney has precisely alleged the statutory, local regulatory, and Constitutional basis to support his allegation that his discharge violates a clear public policy. Sweeney's complaint cites specific facts regarding the City Manager's improper use of government property and personnel for his personal benefit. Similar conduct by public officials has been found to be a criminal offense equating to official misconduct. (*See People v. Mehelic,* 152 Ill.App.3d 843 (1987)(township highway commission diverted other public employees to repair his personal automobile during working hours); and *People v. Howard*, 228 Ill.App.2d 428 (2008)(mayor using city credit card for personal benefit was violation of Illinois Constitution which could be a predicate for official misconduct charges).

Finally, as observed in Defendant's Motion to Dismiss (p.2, fn. 1), the Illinois Whistleblower Act adopted years after the *Fellhauer* decision does not eliminate or expand the common law retaliation tort but it codifies the common law. Reporting suspected criminal activity clearly can be the basis for a retaliatory discharge claim. The Whistleblower Act itself speaks to the clear public policy of promoting the reporting of suspected improper or criminal conduct.

2. Defendant ignores the detailed facts alleged in paragraphs 7-9 of Count I of Sweeney's Amended Complaint as they relate to the allegations of paragraph 10(d) of Count I, *i.e.* the suspected violation of the State Officials and Employee's Ethics Act. The Amended Complaint includes specific facts and not just broad allegations of suspected violations of an ordinance, statute or Constitutional provision.

Defendant also claims the State Official and Employee Ethics Act "is inapplicable to the City Manager." This is a simplistic and false statement given that, as required by Illinois municipal law, the Decatur City Code (Ch. 8, Ethics) specifically incorporates these provisions of the statute. (*See* Ex. 3 to the Amended Complaint). Further, the State Official and Employee Ethics Act does apply to Gleason by virtue of his appointment to the Illinois Law Enforcement Training and Standards Board. The State Official and Employee Ethics Act explicitly includes appointees to state boards as employees for the purposes of the Act. 5 ILCS 430/1-5 (*See* definitions of "Appointee" and "Employee", both of which apply to Gleason).

3. Despite Gleason's deposition testimony, Defendant now argues that "Gleason is not a member of the Decatur Police Department." Defendant claims Gleason's personal use of police resources, therefore, would not be a violation "within the police department."

This argument ignores Chapter 13 of the Decatur City Code which makes the City Manager the ultimate director of the Decatur Police Department. Moreover, Gleason has testified already that he believes he can overrule internal police department regulations, policies and rules. Gleason dep. at 146-47. Gleason's own testimony as City Manager and agent for Defendant City certainly suggests that Sweeney had little, if any, ability to conduct an internal departmental investigation of the person who claims to have authority to violate or change existing police policies, rules and regulations! (*See* Ch. 13, Decatur City Code.)

4. Defendant next argues that Gleason's personal use of public resources is not of "statewide concern." (*See* Def. Motion, p. 3, ¶ (iv).) A similar unsupportable argument was made in the first Motion to Dismiss when it was said "discharge of the police chief is not a matter of state-wide concern." (*See* Def. Motion, p. 5, ¶ 6(E).) Clearly, since the *Palmateer* decision in 1981, the reporting (whistleblowing) of illegal or improper conduct has been

recognized as supporting a retaliatory discharge claim. *Palmateer,* supra, and *Stebbings v. Univ. of Chicago*, 312 Ill.App.3d 360, 370 (2000). Indeed, it is not necessary that the conduct reported be illegal – it is sufficient if the conduct is deemed "improper." *Id.* at 369.

Paragraph 28 of Sweeney's Amended Complaint alleges that he believed Gleason's personal use of public resources violated both the Decatur City Code and Illinois law. This allegation must be assumed true here.

5. Gleason's use of the police car and police officer driver was obviously for his personal benefit. He has admitted it was used to transport him to St. Louis for a flight for a short personal vacation and family-related trip to California. Gleason Affidavit ¶ 9. This is especially true when Gleason did nothing to avoid using the public resources. Gleason has testified that he did not even try to schedule a flight at a time and from an airport that would not require his use of the police department property and personnel. Gleason dep. at 31-32, 40. Gleason's St. Louis flight plans were made so he could better accommodate a friend who was traveling with him to California. Gleason dep. at 31-33. And, Gleason knew, or should have known, that a city mayor has no authority to grant an exemption from criminal laws prohibiting use of government property for personal benefit.

Gleason did not even bother scheduling a later flight from St. Louis or Peoria even though he knew of both the City breakfast and his California trip before he started work for the City of Decatur on March 23, 2015. Gleason dep. at 28-30. It is disingenuous, if not ludicrous, for Defendant to argue that Gleason's use of the police resources was necessary or for his attendance at the City breakfast on May 7, 2015.

Defendant again argues that Chief Sweeney was an accessory to Gleason's crime if he believed Gleason's use of the police resources was a violation of law or policy. Def. Motion, p.

4. Defendant claims Sweeney was "obligated under state law to enforce state law and city ordinances," but arrest and incarceration are not required in every circumstance.

Sweeney has alleged that he confronted Gleason before and after his use of police resources on May 7, 2015. Sweeney alleges that he objected and disclosed to Gleason his belief that Gleason's conduct was improper or illegal. The Amended Complaint alleges that Jim Getz actually volunteered to drive Gleason to the airport on May 7, 2015. Am. Compl., ¶ 8. Considering the allegations of Sweeney's Amended Complaint as true and in a light most favorable to Sweeney, the Amended Complaint alleges facts indicating that Sweeney was not a willing participant who could be considered an "accessory" to Gleason's alleged misconduct.

Defendant argues that Sweeney considered his employment above his job duties, however, it is not a fair reading of the Amended Complaint to conclude that Sweeney placed his concern above his obligations as police chief. Under the circumstances, Sweeney did all he could reasonably do considering Gleason's position that he totally controls the police department. However, this position merely presents a question of fact for a jury.

Defendant, in effect, claims that allowing Sweeney's Amended Complaint to go forward undermines a policy requiring police officers to report illegal or improper orders to their superiors. But, Sweeney did just that – he reported Gleason's improper order to his only superior who happened to be Gleason.

B. **Counts I and II should not be dismissed because "Whistleblowing activity" is alleged.**

Defendant now argues that Sweeney has failed to allege sufficient facts to show that he "disclosed" to Gleason a violation of state law or city policy. Def. Motion, p. 6. In response, we submit there is no requirement that the whistleblower cite to specific policies or law when

reporting a suspected violation of the law. Defendant has not cited any authority for its argument. The "disclosure" requirement of the Whistleblower Act only applies to Count II in any event.

Next, Defendant argues that Sweeney should not be allowed to report (disclose) his suspicion of improper conduct to Gleason because Gleason was the alleged wrongdoer. The *Brame v. City of North Chicago* case controls here, and the Court has already acknowledged this. *Brame v. City of North Chicago,* 2011 Ill.App. 2d 100760. Once again, Sweeney's disclosure of misconduct by Gleason as his only supervisor/superior had to be made to "the superior" according to department policies. (*See* DPD General Order 16-09 attached to Getz Affidavit previously filed herein.)

As a former police command officer in Pekin, Illinois, and as a member of the state board for standards and ethics among law enforcement, a choice by Gleason to keep Sweeney's disclosure a secret is a further self-serving action by Gleason.

Absurdly, Defendant also asserts that Sweeney's Amended Complaint alleges a violation of Section 20 of the Whistleblower Act, when paragraph 36 and 40 of Count II plainly state a claim under Section 15 of the Act. Sweeney's "disclosures" to Gleason occurred both before and after Gleason's personal use of police resources on May 7, 2015. Nothing further need be said.

C. **Sweeney's allegations of First Amendment Rights do support a claim for retaliatory discharge.**

1. Defendant first erroneously argues that *Garcetti v. Ceballos*, 547 U.S. 410, 418-23 (2006) holds the location of the speech controls whether the public employee was speaking within the scope of his duties as a government employee or as a citizen. The location and context of the speech is only one factor to be considered. Sweeney's speech opposing further

taxes for Decatur was made at a staff meeting, but as Gleason's own affidavit states, "Mr. Sweeney did not focus on the City Council's goals," which was the stated purpose of the meeting. Gleason Aff. ¶ 4. Mayor Moore-Wolfe observed that the motor fuel tax is outside the scope of Sweeney's duties as Police Chief: "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." (Huey Freeman, *Sweeney reveals details of firing; city says story is a lie*, Herald & Review, February 10, 2016).

Moreover, the protected speech described in the *Garcetti* decision has been significantly expanded by the SCOTUS decision in *Lane v. Franks, et al.*, 134 S.Ct. 2369 (2014). In a unanimous decision, the Supreme Court in *Lane* held that the *Garcetti* decision, "did not turn on the fact that the memo at issue 'concerned the subject matter of [the prosecutor's] employment,' because the First Amendment protects some expressions related to the speaker's job." *Id.* at 2379. The Court went on to say: "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.*

Sweeney's speech opposing more taxes and his refusal to discuss street conditions in support of additional taxes are topics outside his ordinary duties as police chief. The statements in Gleason's affidavit and Mayor Moore-Wolf's public comment acknowledge this. The only connections between Sweeney's protected speech and his public employment are locations where he spoke and refused to speak, *i.e.*, on the City employer's property. Because neither street conditions nor city taxes are "ordinarily within the scope" of Sweeney's duties as police chief, Sweeney was exercising a citizen's right to free speech under the First Amendment.

Sweeney's speech should be protected against retaliation by his government employer because as SCOTUS observed in the *Lane* decision, "public employees are uniquely qualified to comment on matters of interest to the public at large." *Id.* at 2380. Finally, the recent *Lane* decision declares: "Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social or other concern to the community." *Id.* Additional taxes are a significant concern to all taxpayer citizens in a community.

2. Defendant's new claim of interference from Sweeney's speech is disingenuous. For the first time, Defendant is now claiming some non-descript interference in city operations. This new claim is mysterious because Gleason and the Defendant City have previously denied that Sweeney was ever asked to speak publicly on street conditions, and they have denied Sweeney made any speaking objections to additional taxes at the February 2 staff meeting. The bottom line is there was no interference from Sweeney's activities, except the personal affront and interference Gleason perceived when Sweeney reported his misconduct, and later when he spoke out against additional taxes.

3. Defendant's claim that *Barr v. Kelso-Burnett*, 106 Ill.2d 520 (1985) controls this case is totally false. The *Barr* decision, as Defendant knows, involved a private employer, unlike Sweeney's government employer here. Nothing in the *Barr* decision supports an argument that the Illinois Supreme Court would not recognize a retaliatory discharge claim based on the government Defendant's alleged abridgement of Sweeney's right to free speech.

D. **Causation for Plaintiff Sweeney's discharge is a jury question.**

Defendant reargues a claim that the cause of Sweeney's discharge can be determined by the Court as a matter of law. For the reasons stated in Sweeney's previous briefs and at oral argument, the Amended Complaint, at the very least, presents disputed fact questions and these

must be determined by a jury. Only if the facts alleged by the plaintiff cannot ever support a plausible claim, as in the *Hartlein* and *Collins* cases, could the Court determine causation summarily as a matter of law.

Unlike the *Hartlein* and *Collins* cases, here Sweeney's complaint alleges both whistleblowing, First Amendment speaking activities, and public policy grounds for his discharge. In response, the City and Gleason deny there was a retaliatory discharge, and they claim insubordination as the alleged "cause" for Sweeney's discharge. However, there are no undisputed facts establishing a non-pretextual cause as in *Hartlein* and *Collins*. Here, the alleged circumstances clearly support Sweeney's claim that Gleason's motive for discharging Sweeney was, in fact, pretextual. Sweeney was never warned of any claimed insubordination, and his personnel file contains no documentation of insubordination. Sweeney's personnel file shows he was an outstanding employee. Sweeney objected to and reported Gleason's use of government resources for his personal benefit, and Sweeney opposed Gleason's requests for additional taxes prior to his discharge.

E. **With one exception, all of Defendant's 24 requests to strike portions of Sweeney's Amended Complaint should be denied**. Plaintiff concedes that paragraph 27 and Exhibit 6 to Sweeney's Amended Complaint could be stricken inasmuch as 820 ILCS 405/1900(A) and (B) provide that the Exhibit 6 IDES determination letter is not admissible as evidence in this case.[1] To avoid further delay and deflection from the core issues, Plaintiff hereby requests leave to strike instanter paragraph 27 and to remove Exhibit 6 from the Amended Complaint.

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[1] Defendant represents that violation of the confidentiality provision of 820 ILCS 405/1900(C) is a Class B misdemeanor, however, only a state employee, such as an IDES employee is subject to the misdemeanor provision.

Defendant variously argues that Exhibit 5 and certain other paragraphs of the Amended Complaint should be stricken, but as to each such claim, the Plaintiff's allegations are factual and relevant to his claims. For example, Exhibit 5 is Sweeney's most recent performance evaluation because Gleason failed to prepare the annual evaluation which was due in 2015. Clearly, Sweeney's Exhibit 5 evaluation and paragraph 25 are relevant to his claims of retaliatory discharge where Gleason's claimed justification is pretextual.

Another example of a misstated claim to strike is Defendant's request as to paragraph 13 of the Amended Complaint where it is alleged that Gleason believes he has authority to overrule the police chief and established police department policies. This allegation is clearly relevant to illustrate City Manager Gleason's motivation for his use of the department resources; and it is relevant to his motivation for termination of Sweeney. Contrary to Defendant's representation, the police chief does not have authority to allow anyone to take a police vehicle outside the City limits beyond three miles for personal use and benefit. *See* DPD Gen. Order 15-25 attached to Getz Affidavit previously filed herein.

As to paragraph 11 of Sweeney's Amended Complaint, Gleason's knowledge of standard police department policies and ethical standards for public employees is relevant to show his probable motivation for discharging Sweeney was his anger at being confronted with misuse of public resources given his own background and work experience.

Motions to strike portions of a complaint are allowed only if some part(s) of the pleading are "immaterial." 735 ILCS 5/2-615(a). Immaterial facts are those facts not necessary or essential to the cause of action. The remaining requests by Defendant to strike portions of the Amended Complaint are based on claimed defenses to the form of Plaintiff Sweeney's Amended Complaint, i.e., Defendant claims paragraphs should be dismissed because of various arguments

it made in Parts A, B, and C of its 2-615 motion to dismiss. This is not a proper basis for striking any portion of a complaint.

II. **The 2-619 Motion to Dismiss**

Defendant relies on "the grounds reserved in its original 2-619 Motion filed February 25, 2016. In its original filing, Defendant relied on *Hubert v. Consolidated Medical Laboratories*, 306 Ill.App.3d 118 (1999). In response, Plaintiff Sweeney incorporates herein by this reference his response to the original 2-619 Motion and his Memorandum Supporting Plaintiff's Amended Complaint filed on April 27, 2016.

As indicated in Plaintiff's earlier responses, the *Hubert* decision does not apply to the circumstances here. In *Hubert*, the plaintiff voluntarily participated in wrongful conduct and did not report it to a government agency. Sweeney not only immediately objected to Gleason's use of a police car and driver, he reported the objections to his government supervisor and did not personally or voluntarily participate in Gleason's use of public property and personnel. Gleason's affidavit denies some of Sweeney's allegations. However, the Gleason affidavit only creates issues of fact, primarily concerning Gleason's motive for discharging Sweeney. Because Sweeney's allegations must be considered true and viewed most favorable to him at this stage, Defendant's motion should be denied because there are material questions of fact to be resolved by a jury.

Defendant's refiled Motion implies that Sweeney alleged he voluntarily allowed Gleason's use of the City vehicle, when the Sweeney Amended Complaint alleges that he objected, was overruled by Gleason and "involuntarily allowed" Gleason's use of car and driver.

Defendant reasserts an argument at Paragraph II(3) that an at-will employee can be properly terminated even if in retaliation for protected activity in violation of recognized public

policy. This argument flies in the face of both Illinois common law on retaliatory discharge and the Whistleblower Act.

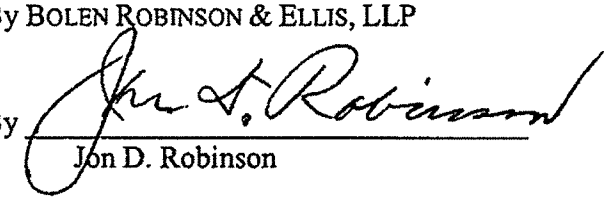
Finally, Defendant argues that Sweeney cannot prove retaliatory discharge because the discharge occurred several months after Sweeney's last whistleblowing activity when he advised Gleason that his improper use of police department resources could not happen again. However, once again, the causation (motivation) for Sweeney's discharge is a question of fact for a jury, and not a question of law. A jury can consider many other facts in deciding these questions, such as Sweeney's three month absence while at the FBI Academy; the deterioration of Sweeney's relationship with Gleason; Sweeney's excellent employment record; and other circumstances which support a verdict for Sweeney.

In summary, for the reasons stated above and in Plaintiff Sweeney's previous Response filed April 11 and the Memorandum filed April 27, Defendant's Combined Motion should be denied. Plaintiff does hereby agree to strike instanter by interlineation paragraph 27 and Exhibit 6 of the Amended Complaint.

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 24th day of May, 2016.

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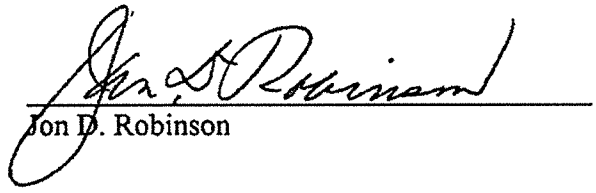

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