No. 4-16-0492

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

BRADLEY L. SWEENEY,

Plaintiff-Appellant,

vs.

CITY OF DECATUR,

Defendant-Appellee.

Appeal from the Circuit Court of Macon County, Illinois
Sixth Judicial Circuit, Case No. 2016-L-18

The Honorable A. G. Webber, Judge Presiding

REPLY BRIEF OF PLAINTIFF-APPELLANT

JON D. ROBINSON, ARDC # 2356678
BOLEN ROBINSON & ELLIS, LLP
202 South Franklin, 2nd Floor
Decatur, Illinois 62523
Telephone: 217-429-4296
Fax: 217-329-0034
Email: jrobinson@brelaw.com

Attorney for Plaintiff-Appellant

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

INTRODUCTION

The standard of review for this appeal is *de novo*, and therefore, no deference is given to the circuit court's decisions. The circuit court promised it would view Plaintiff Sweeney's allegations as true and not decide questions of fact, however, the order dismissing Sweeney's complaint with prejudice shows that Sweeney's allegations were not considered as true, and in a light most favorable to him.

The order below also shows that the circuit court apparently decided for itself that Sweeney was fired for insubordination based on a non-existent allegation that Sweeney "forcefully disagreed" with City Manager Gleason. (A-7, C-12.) There is no such allegation in Sweeney's complaint. The circuit court misread Sweeney's complaint when it ignored specific allegations of his free speech claim as a basis for a common law retaliation claim. (A-7, C-12.) The court below also ignored Sweeney's allegations that made his whistleblower disclosures part of his common law claim. (*See* Sweeney Br. at 27-28, and A-7, C-12.)

Defendant City did not respond to Sweeney's issues regarding the circuit court's misreading of his complaint; and it did not respond to his assertions that the trial court did not actually accept Sweeney's allegations as true. Sweeney assumes, therefore, that the City does not contest Sweeney's Issue III and its subparts.

ARGUMENT

Sweeney responds here to the arguments made by the City's brief as Appellee.

I. Count II of Sweeney's complaint states a cause of action under the Illinois Whistleblower Act.

The City argues that Sweeney's complaint failed to allege words and phrases to meet the pleading requirements of the Illinois statute; but Sweeney alleged everything required by the Whistleblower Act.

A. Sweeney was not a willing participant in City Manager Gleason's illegal or improper conduct.

The City argues that Sweeney should have arrested his boss, or prevented the City Manager from personal use of police department resources to be protected by Section 15(b) of the Whistleblower Act. The circuit court did not mention the City's failure-to-arrest argument in its final decision and order. However, the lower court's order erroneously finds that Sweeney's claim under Section 15 of the Act required both a disclosure of information and a refusal to participate. The failure-to-arrest argument is contrary to common sense and the legal precedent in *Brame v. City of North Chicago,* 2011 Ill.App. 2d 100760 (2d Dist.).

Brame validated a police officer's stated statutory claim to his city employer where he did not arrest the fellow employee who was also his supervisor. *Id.* In *Brame*, the Appellate Court followed the plain meaning of

Sections 15 and 20 of the Whistleblower Act. It found no exceptions to the straightforward language and held that a report/disclosure to a government or law enforcement agency is sufficient, even if the employer is the government or law enforcement agency to which the report is made. *Id*. at ¶ 8.

There is nothing in Section 15(b) of the Act which would require Sweeney to arrest Gleason. Sweeney disclosed facts and reported his opinion that Gleason's personal use of the police car and driver was improper and probably unlawful. Sweeney was required by the Decatur City Code to report to City Manager Gleason. According to the plain language of Section 15(b), Sweeney has alleged facts which satisfy a "disclosure" of information to his government employer. *Brame* supports this conclusion on the facts alleged here where there is no other protection for Sweeney. *Id*. at ¶¶ 8, 11-13.

The City's estoppel argument was discussed by the court below at a hearing on an earlier motion to dismiss. (RP. 4/12/2016 at 57.) At that time, the circuit court indicated that judicial or collateral estoppel would not apply because there is no prior judicial proceeding. And, because Sweeney did not benefit from Gleason's personal misuse of city resources, equitable estoppel does not apply.

Sweeney alleged that City Manager Gleason believes he has authority to overrule the police chief because he was in charge of the police department under the Decatur City Code. (A-12, C-936, ¶13.) Apparently, Gleason

claims he has authority to use city resources for his own personal benefit, regardless of rules, regulations, and misconduct statutes and the Illinois Constitution which prohibit it.

The City argues that *Hubert v. Consolidated Med. Lab.,* 306 Ill. App. 3d 1118 (2d Dist. 1999), which predates the Whistleblower Act by five years, is pertinent to a ruling on Sweeney's statutory claims. This conflates the City's common law estoppel argument with its argument that Section 15(b) of the Whistleblower Act required Sweeney to both report (disclose information to government) and to refuse to participate and prevent Gleason's actions. Even if the Act required both disclosure and refusal to participate, whether Sweeney participated or not would be a fact question ultimately to be decided by a jury. Sweeney's complaint, which is to be considered true here, alleges that he did not voluntarily "participate" in City Manager Gleason's use of the police car and driver. (A-12; ¶13.) The cause of Sweeney's termination is a fact issue for a jury.

The City's argument that Section 15(b) of the Whistleblower Act should be read to include a refusal to participate requirement is already addressed in Sweeney's initial brief at pages 18-21.

The City also argues that Sweeney alleged disclosure of "improper" actions by the city manager is insufficient. (See City's Br. at p. 3, Fn 3.) This argument is not supported by the Section 15(b) language which requires only

disclosure of information the employee believes is a violation of law, rule or regulation. Section 15(b) says only:

> "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 a State or federal law, rule, or regulation." 740 ILCS 174/15(b).

The statute does not require arrest, indictment or a statement of the employee's opinion that a law violation is involved. Section 15(b) only requires "disclosing information." There is no statutory requirement to do more than disclosure of information which the employee reasonably believes reveals a violation of state or federal law, rule or regulation. Paragraphs 7, 8, 10, 28, 29, 36, 38 and 39 of Sweeney's Complaint contain information which more than satisfies the Section 15(b) pleading requirements.

The City now cites *Andrews v. Kowa Printing Corp.*, 217 Ill. 2d 101 (2005), and argues that this decision supports its claim that the circuit court was correct in holding Sweeney was required to refuse to participate under Section 15(b). However, the *Kowa* case involved two conflicting sections of the Illinois Wage Act, where the Supreme Court considered the entire Act in construing the meaning of "employer." Because there was an obvious conflict in the two sections, the Illinois Supreme Court found that the Wage Act provisions were ambiguous.

Unlike the conflicting Wage Act provisions in *Andrews v. Kowa Printing Corp.,* Sections 15 and 20 of the Illinois Whistleblower Act are

independent provisions and not in conflict. This is the clear holding of the Appellate Court in *Sardiga v. Northern Trust Co.,* 409 Ill. App.3d 56, 62 (1st Dist. 2011). *Sardiga* is binding on the circuit court below. *See State Farm Fire & Casualty Co. v. Yapejian,* 152 Ill. 2d 533, 539 (1992) (where the Illinois Supreme Court criticized the circuit court for failing to adhere to the established Appellate Court precedent.) As in the *State Farm* case, there are no Appellate Court decisions which conflict with the *Sardiga* precedent.

The City again inserts an equitable estoppel argument at page 4 of its Brief, claiming that estoppel should bar both Sweeney's common law and Section 15(b) statutory claims.

The City argues that Sweeney was obligated to arrest City Manager Gleason and to stop the suspected law violation. This was not a stated basis for the circuit court's decision. And the Whistleblower Act clearly does not require that an employee prevent the act he believes to be a violation of law. In *Brame,* the plaintiff was a police officer who reported, but did not arrest, his boss who was the police chief. *Brame's* statutory claim was upheld even though he did not arrest or prevent his boss from the suspected law violations. Section 15(b) of the Act is designed to protect employees who "disclose" to government or law enforcement "information" involving suspected law violations, whether they refuse to participate or not. Section 20 of the Act protects employees who "refuse to participate" in activities they

suspect are violations of law, even if they do not disclose information about the suspicions to government or law enforcement.

B. Sweeney made a qualifying disclosure.

The City misrepresents that there is a split in the Appellate Court as to whether a report or disclosure to one's own employer satisfies Section 15(b) of the Whistleblower Act. (City Br. at p. 5.) This is wrong for two reasons. First, the *Riedlinger* decision is not from the Illinois Appellate Court. 478 F.Supp.2d 1051 (N.D. Ill. 2007). Second, in *Riedlinger,* the plaintiff's employer did not happen to be a government or law enforcement agency such that the employee's disclosure of information would satisfy Section 15(b). In other words, the *Riedlinger* decision is not factually relevant here. It also predates the Appellate Court's *Brame* decision by four years. As usual, the federal district court in *Riedlinger* discussed and relied upon the then-previous Illinois court decisions in interpreting the Illinois Whistleblower statute.

If *Brame* had been decided before *Riedlinger,* it would no doubt have been considered by the federal district court. However, nothing in the *Brame* decision is inconsistent with *Riedlinger*. In *Brame*, the plaintiff employee "disclosed information" to the governmental unit which also happened to be his employer. In *Riedlinger*, the plaintiff employee did not report to a law enforcement or government agency as required by Section 15(b) of the Act. Both decisions interpret the Whistleblower Act according to the plain

language of Section 15(b), which requires a report or disclosure of information about suspected law violations to a government or law enforcement agency.

The City argues that the circuit court below was correct in holding that Sweeney's Section 15(b) claim should fail because Sweeney reported to his government boss, and not some other city officer. This argument is already addressed in Sweeney's initial brief at pages 16-18. Summarizing here, there is nothing in the Whistleblower Act or in *Brame* that requires a government employee to disclose information only to a government employee who was not his boss. Like *Sardiga, Brame* is binding on the circuit court here.

The City argues that where an employee has revealed the information only to his or her employer, "there is no cause of action in Illinois for retaliatory discharge, at common law or under the Act." (City Br. at p. 5.) This misrepresents the current law. *Riedlinger* is a federal district court decision, and it is not binding on this Court as the law of Illinois. Even if *Riedlinger* applied to the facts here, that decision does not overrule the subsequent Illinois Appellate Court decision in *Brame*. The Appellate Court in *Brame* established that if the employer is a government or law enforcement agency, a disclosure to that employer satisfies Section 15(b) of the Act. *Brame*, *supra* at ¶¶ 3 and 12.

At pages 5 of 6 of its brief, the City argues that there are no facts supporting Sweeney's good faith belief that a violation of law was occurring or had occurred. This ignores paragraphs 7, 10, 16, 17, 28-30, 38 and 39

containing allegations of fact which are to be considered true for purposes of the City's 2-615 motion to dismiss. Ultimately, whether Sweeney's disclosure of information was fact is a question for the jury.

The City asserts "logic dictates that a report to the violator is not reporting of information" under the Act. (City Br. at p. 6.) But, based on the *Brame* decision which was binding on the circuit court, there is nothing in Section 15(b) which mandates a report to a non-suspected government employee/supervisor. There are no exceptions to the plain meaning of the Act, according to *Brame*. *Id.* at ¶ 3. The primary purposes of the Act are protection of employees who disclose wrongdoing and promotion of this reporting.

As stated in Sweeney's opening brief, a report of suspected wrongdoing to any agent of an employer could lead to a cover-up and reduced chances of investigation. However, the reporting employee still needs to be protected. Here, the established facts show that City Manager Gleason did, in fact, use city resources for his own personal benefit, so there is no inherent unfairness, intimidation or extortion as argued by the City. An employee who alleges a disclosure to his government employer under Section 15(b) is no less credible than an employee who alleges that he refused to participate under Section 20 of the Act where nothing more is required. Sections 15(b) and 20 only require allegations of disclosure of information or refusal to act, respectively. At the

pleading stage, Section 2-615 motions to dismiss should not be granted where plaintiff's allegations are legally sufficient as here.

The City next argues that Sweeney's disclosures to City Manager Gleason could not qualify as a Section 15(b) disclosure because it would not reveal anything new to Gleason, the alleged violator. This is a novel argument, where Gleason has claimed his actions did not violate any law, rule or regulation because he was in ultimate control of the police department as city manager. To Gleason, this authority includes overruling police department policies and rules. (*See* Sweeney Complaint, A-12, ¶ 13.) Given City Manager Gleason's attitude, Sweeney's disclosure and objection to Gleason's use of city resources for his personal use, apparently "was news" to the city manager.

The City claims the *Sardiga* decision supports its argument that disclosing information to an ultimate government authority, who is also the suspected violator, does not qualify under Section 15(b). This is not a reasonable interpretation of *Sardiga*, where the plaintiff employee was a non-government employee who disclosed his beliefs about company law violations to his supervisor. Plaintiff Sardiga did not ever disclose information to a government or law enforcement agency as required by Section 15(b). The holding in *Sardiga*, contrary to the City's argument, is that Section 15(b) and 20 are separate sections with distinct requirements. Section 15(b) requires a disclosure of information to a government or law enforcement agency, which

could include an employer according to the *Brame* decision. Section 20 simply requires a refusal to participate in the suspected illegal activity.

The City's final argument under its Section I.B. claims the *Brame* decision is wrong because public policy would be best served if the Whistleblower Act were interpreted to require that an employee must disclose information only to a non-employer governmental or law enforcement agency. The City suggests this interpretation would promote more investigations. But, considering the Act as a whole, this interpretation would be inconsistent with Section 20 of the Act which only requires an employee to allege that he refused to participate in suspected law violations. Section 20 does not require some additional act that would promote investigation.

Sections 15 and 20 of the Whistleblower Act do not conflict, and they are not ambiguous when considered together. The City argues that frivolous claims could be made if reports or disclosures of information to a government employer satisfy Section 15(b) per *Brame*. Under Section 20, an employee must only "refuse to participate" in suspected unlawful activity whether the employer is a private or government entity. Presumably the alleged refusal to participate would become known to the employer, but nothing more than an alleged refusal is required under Section 20. The City does not explain how claims made under Section 15(b) to a government employer are more susceptible to abuse than claims made under Section 20 where the employee must allege and prove only that he or she refused to participate. If the

employee's complaint contains the necessary allegations to satisfy the statute, the case should not be dismissed, and the facts will be sorted out at trial later.

II. **Sweeney's common law claim is based on his whistleblowing allegations and/or his free speech claims as alleged in Count I of his complaint.**

The City now claims that Sweeney's initial brief as Appellant does not contest the circuit court's dismissal of his common law whistleblower allegations. This claim patently ignores Section III(C) of Sweeney's brief. As pointed out in his Appellant's Brief, the circuit court's order did not even discuss Sweeney's whistleblower allegations as part of his common law claim in Count I.

Because the court below did not rule on Sweeney's common law whistleblower allegations, whether *Fellhauer* controls here was not discussed in his Appellant's Brief. However, in response to the City's current argument, the short answer is: the *Fellhauer* facts are different and that decision was made 13 years before the Illinois Whistleblower Act codified public policy favoring the protection of employees who disclose suspected unlawful conduct. In 1991, the *Fellhauer* decision held that the existence of an official misconduct criminal charge would suffice to protect an employee where a mandatory independent review of employment termination was in place for employees who reported suspected criminal activity. The *Fellhauer*

facts are distinct from those in *Palmateer v. International Harvester Co*., 85 Ill.2d 124 (1981), where the Illinois Supreme Court first recognizes a common law cause of action for an employee who alleged he was fired for reporting suspected unlawful activity by a co-worker. The *Fellhauer* facts are also quite different than Sweeney's situation.

In *Fellhauer*, the Supreme Court noted that the public policy favoring protection for employees who disclose unlawful activity was satisfied where the employee's termination was required to be reviewed by an independent group, i.e., review of the termination by the mayor and city council per the Illinois Municipal Code. *Fellhauer,* at 508. This decision followed eight years after the Supreme Court's *Palmateer* decision, but did not overrule it, because the facts are distinct. It does appear that the *Fellhauer* decision has since been further clarified and distinguished by the Illinois Whistleblower Act and the decisions interpreting it.

Sweeney's facts are also different from *Fellhauer*. Sweeney had no right to a review of his termination by the Decatur mayor or city council. Decatur's City Code allows its city manager absolute authority over all city employees, including the police and fire chiefs. In short, Sweeney had no protection to balance a wrongful termination that he alleges was in retaliation for his protected activities.

The City argues Sweeney's firing should be allowed as a matter of law because he was an at-will employee, and because the City claims there is no

clear public policy supporting his protected whistleblowing activity. This completely ignores the precedent found in *Palmateer*, *Brame*, and the Whistleblower Act. The state's public policy is found by courts in its Constitution and statutes which establish the citizen's social rights, duties and responsibilities. *Turner v. Memorial Medical Center,* 233 Ill.2d 494 (2009), citing *Palmateer,* 85 Ill.2d at 130 (1981).

III. **Count I of Sweeney's Complaint also states a valid common law claim based on his exercise of free speech in government employment.**

The City's argument here claims that Sweeney's speech and non-speech (refusal to speak) do not qualify as the basis for a common law retaliatory discharge claim. Sweeney's response to this claim is included in his opening brief at Section III (B) at pages 24-17. Sweeney's speaking objection to more city taxes and his refusal to speak in support of more taxes is speech outside his scope of employment as police chief. Increased taxes, however, are of interest to him as a citizen, as they are to all Illinois citizens.

Illinois courts have recognized that government employees have a right to have their speech as citizen-employees protected from interference by their government employers. Retaliation for First Amendment speech has been recognized in Illinois as a basis for retaliatory discharge claims by government employees. *Daniel v. Village of Hoffman Estates*, 165 Ill.App.3d 772 (1st Dist. 1987), cited by *Toronyi v. Barrington Cmty. Unit Sch. Dist. 220*,

No. 03 C 3949, 2005 U.S. Dist. LEXIS 3065 at 30-32 (N.D. Ill. Feb. 10, 2005). *Barr v. Kelso-Burnett Co.,* 106 Ill.2d 520 (1985), does not eliminate a government employee's right to protection from interference with free speech by his government employer. Free speech rights have always only protected citizens against government interference with their First Amendment speech.

The City now argues that Sweeney's speech interfered with its operation. There is no evidence or allegation of interference in the record on appeal. Moreover, the circuit court did not formally discuss "interference" apparently because it said Sweeney had not even alleged retaliation due to his exercise of a right to free speech. (Vol. I, C-12; A-7, and Sweeney Br. at 24.) Public policy favoring the protection of speech from government interference is well documented in our state and federal Constitutions. Sweeney's complaint alleges a recognized cause of action for retaliatory discharge where his government employment was terminated in retaliation for the employee's exercise of his right to free speech. Pursuant to the *Daniel* decision, his claim should be permitted to stand for trial because Sweeney's speech addressed a matter of public concern and was made for the public interest and not just for his own interest. *Daniel, supra* at 774.

The balance of the City's argument against free speech for government employees is already addressed in Sweeney's initial brief at pages 24-27. Once again, Sweeney's allegations should be deemed true, and viewed most favorable to him on this appeal.

IV. **The cause of Sweeney's termination is a jury question.**

The City again argues that Sweeney should be barred from a cause of action for retaliatory discharge because his pleading shows he did not arrest his boss or otherwise prevent him from using city resources for his personal benefit. This is one final attempt to urge that estoppel defeats Sweeney's claim. However, once again, there is no basis for affirming the circuit court where Sweeney's complaint clearly alleges the three required elements of common law retaliatory discharge, i.e., (1) the employer discharged the plaintiff employee, (2) in retaliation for the employee's activities, and (3) the discharge violates a clear mandate of public policy. *Turner v. Memorial Medical Center,* 233 Ill.2d 494 (2009) citing the *Fellhauer, Barr* and *Palmateer* decisions, *supra.* The *Brame* decision and the Whistleblower Act show there is no public policy or other requirement that a terminated police officer make an arrest to prevent the suspected wrongdoing in order to claim retaliatory discharge.

There is no factually established non-pretextual reason in the record as of the Section 2-615 motion stage. The City claims generally that Sweeney was fired for insubordination without a record to support it, but a determination of the cause for Sweeney's termination is a fact question for the jury. The case at bar is factually similar to *Collins v. Bartlett Park District*, 213 Ill.App.2d 13006 (2d Dist. 2013) where the Appellate Court confirmed that whether an employee was discharged for insubordination, as

claimed by the employer, is a fact question for the fact finder. *Id.* at ¶ 50, citing *Turner*, 233 Ill.2d at 501 n.1.

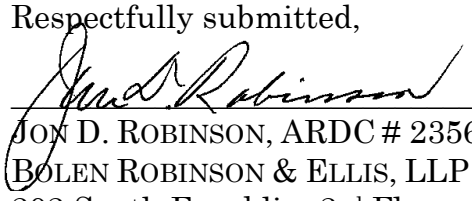
The City's argument criticizing Sweeney for not arresting City Manager Gleason is absurd because it suggests Gleason would have fired Sweeney for not arresting him. This defies common sense. Nothing in the record supports such an argument.

Finally, the *Young v. Bryco Arms* decision cited by the City at page 12 of its brief is not relevant here. This decision does not hold that remoteness in time bars a claim for retaliatory discharge. The *Young* decision deals with intentional and independent intervening causes which were found to prevent injury claims against gun manufacturers.

CONCLUSION

For the reasons stated above and in Appellant Sweeney's initial brief, the circuit court's decision and order should be reversed.

Respectfully submitted,

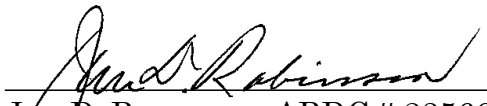


JON D. ROBINSON, ARDC # 2356678
BOLEN ROBINSON & ELLIS, LLP
202 South Franklin, 2nd Floor
Decatur, Illinois 62523
Telephone: 217-429-4296
Fax: 217-329-0034
Email: jrobinson@brelaw.com

Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 17 pages.



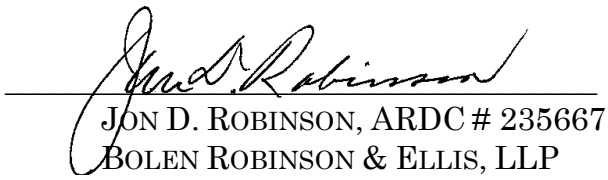
JON D. ROBINSON, ARDC # 2356678
BOLEN ROBINSON & ELLIS, LLP
202 South Franklin, 2nd Floor
Decatur, Illinois 62523
Telephone: 217-429-4296
Fax: 217-329-0034
Email: jrobinson@brelaw.com

Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I, Jon D. Robinson, an attorney, hereby certify that I caused three copies of the Brief of Plaintiff-Appellant to be hand-delivered to counsel for the Defendant-Appellee at the address shown below before 5:00 pm on November 28, 2016.

Jerrold H. Stocks
Edward F. Flynn
Featherstun Gaumer Postlewait et al
225 North Water Street, Suite 200
Decatur, IL 62525



JON D. ROBINSON, ARDC # 2356678
BOLEN ROBINSON & ELLIS, LLP
202 South Franklin, 2nd Floor
Decatur, Illinois 62523
Telephone: 217-429-4296
Fax: 217-329-0034
Email: jrobinson@brelaw.com