

No. 4-16-0492

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

BRADLEY L. SWEENEY,
Plaintiff-Appellant,

v.

CITY OF DECATUR,
Defendant-Appellee.

) Appeal from the Circuit Court of the
) Sixth Judicial Circuit, Macon County,
) Illinois
)
) No. 2016-L-18
)
) Honorable A. G. Webber,
) Judge Presiding
)

BRIEF OF THE DEFENDANT-APPELLEE CITY OF DECATUR

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ISSUES PRESENTED

- I. Whether Count II of the First Amended Complaint States a Cause of Action Under the Illinois Whistleblower Act [740 ILCS 174/1]. (the Act)
 - I.A. Whether Sweeney, as a Participant in the Alleged Improper Activity by Gleason, is Protected Under the Act.
 - I.B. Whether Sweeney Made a Qualifying Disclosure under the Act.
- II. Whether Sweeney States a Cause of Action for Common Law Retaliatory Discharge for Whistleblowing.
- III. Whether Count I of the First Amended Complaint States a Cause of Action for Discharge in Retaliation for the Exercise of Free Speech Rights
- IV. Whether Sweeney's Allegations Defeat the Element of Causation.
- V. Conclusion

STATUTES INVOLVED

65 ILCS 5/11-1-2(a),(c). Duties and Powers of Police Officers

Sec. 11-1-2. Duties and powers of police officers.

(a) Police officers in municipalities shall be conservators of the peace. They shall have the power (i) to arrest or cause to be arrested, with or without process, all persons who break the peace or are found violating any municipal ordinance or any criminal law of the State, (ii) to commit arrested persons for examination, (iii) if necessary, to detain arrested persons in custody over night or Sunday in any safe place or until they can be brought before the proper court, and (iv) to exercise all other powers as conservators of the peace prescribed by the corporate authorities.

(c) The corporate authorities of each municipality may prescribe any additional duties and powers of the police officers.

DECATUR, ILL., CITY (MUNICIPAL) CODE Ch. 13, ¶ 4 (2006)

4. DEPARTMENT DUTIES AND RESPONSIBILITIES. The police department shall, under the direction and control of the City Manager, have the following duties and responsibilities:

- (a) To preserve the peace, order, safety and cleanliness of the City;
- (b) To enforce the laws of the State and the ordinances of the City;
- (c) To protect the rights of persons and property;
- (d) To take notice of all nuisances and to cause steps to be taken for the abatement thereof;
- (e) To control traffic on the streets and public ways and encourage the safety thereof;
- (f) To serve process in actions for violation of ordinances; and
- (g) To perform such other functions and duties as may be assigned from time to time by the City Manager.

DECATUR POLICE DEPARTMENT GENERAL ORDER 16-09

PURPOSE

The purpose of this General Order is to set forth the rules of conduct for members of the Decatur Police Department.

I. DEFINITION OF LAWFUL ORDER

- A. A lawful order shall be construed to be an order keeping with the performance of any duty prescribed by law, rule, or regulation for the Department; or for the preservation of order, efficiency, and proper discipline.

II. OBEDIENCE TO ORDERS

A. Orders of Superior Officers

1. Officers and civilians of the department shall obey and properly execute any lawful order emanating from any senior ranking officer.

* * *

F. Overruling Departmental Rules Prohibited

1. No command or supervisory officer shall knowingly issue an order which is unjust or tends to nullify a law, departmental rule or regulation, general or special order, or command issued by the Chief of Police or a superior officer.

* * *

H. Reporting Unlawful, Unjust or Improper Orders

1. Any officer or civilian who is given any unlawful, unjust, or improper order shall report in writing all facts concerning the incident, together with whatever action he has taken, to the Chief of Police through proper channels.

I.. Reporting Known Misconduct

1. Just as officers and civilians are required to report unlawful, unjust, or improper orders, they are also bound by ethics, morals and pride in themselves and the Department to immediately report any [perceived] misconduct on the part of fellow employees or officers that they become aware of. Employees who knowingly fail to immediately report such misconduct discredit themselves and the Department.

* * *

IV. PERSONAL CONDUCT

A. Duty to Abide by All Statutes, Laws and Ordinances.

1. All Department personnel shall obey and follow all statutes, laws, and ordinances. Any alleged violation may be cause for an administrative inquiry. Sanctions, up to and including termination, may result irrespective of any criminal proceedings.

V. PERFORMANCE

A. Duties of Officers

1. Officers of the department shall be charged with the enforcement of all federal, state, and local laws and ordinances; the preservation of the public peace; the protection of life and property; the prevention of crime; and the detection, apprehension, and prosecution of violators of the law.

**DECATUR POLICE DEPARTMENT
GENERAL ORDER 11-03**

POLICY

It shall be the general policy of The Decatur Police Department that no police vehicles; marked or unmarked, shall be driven outside the city limits. It is recognized that in the course of a work day or nature of assignment, there may occur certain circumstances that require or allow an employee to drive a departmental vehicle beyond the city limits. It is further recognized that due to the nature of an assignment or position, a vehicle may be assigned exclusively to a Law Enforcement Officer; referred to as "Take Home Vehicle".

PROCEDURE

**I. EXCEPTIONS ALLOWING OPERATION OF DEPARTMENTAL VEHICLES
OUTSIDE CITY LIMITS**

A. Employees shall not drive or utilize departmental vehicles outside the city limits of Decatur, Illinois unless:

1. They are actively engaged in assisting another officer, whether it is of this department or an outside agency and then, only with the express prior permission of a supervisory officer;
2. They are engaged in a foot or vehicular pursuit normally referred to as "hot pursuit", or responding to an emergency situation based on mutual aid agreements.
3. They are going to or from authorized training that has received prior approval of the Chief of Police and City Manager, and for necessary travel during the course of that training;
4. Under the guidelines of City of Decatur Administrative Policy E-510, a department director may authorize an employee to take a vehicle home if the nature of his/her duties and responsibilities require the availability of a vehicle full time during and after normal work schedules.
 - a. The Chief of Police is the only authority to officially determine, and authorize a take home vehicle for an employee of the Decatur

Police Department. The Chief will notify the City of Decatur Fleet Supervisor of individuals assigned and authorized to take vehicles home.

- b. A take home vehicle will only be officially authorized for, used, and operated by a full-time Law Enforcement Officer; a paid city employee-MSF Fleet Technician is authorized to operate a marked or unmarked vehicle for the sole purpose of maintenance-repair issues.
 - c. In accordance with IRS Treasury regulations, full-time law enforcement officers authorized a take home vehicle; marked or unmarked, must utilize the vehicle incident to law enforcement functions, such as being able to report directly from home to a stakeout or surveillance site, or to an emergency situation. Use of an unmarked or marked vehicle for vacation, recreation trips or personal use is not a qualified use under the IRS Treasury regulations and shall be a prohibited practice by any employee of the Agency authorized a take home vehicle.
- 5. They are subpoenaed to court or assigned to an investigation for which travel outside the city limits has been authorized by the Division Deputy Chief and the Chief of Police,
 - 6. They are attending a business related meeting with approval of the Chief of Police;
 - 7. They have been granted permission by their commanding officer in advance to leave the city. Any time permission is granted (outside the restrictions articulated below), the commanding officer shall so notify his Division's Deputy Chief and/or Chief of Police as soon as practical, or
 - 8. They are going to or from a location no further than 3.0 miles outside the city limits for the sole purpose of taking their authorized meal break.

II. FURTHER RESTRICTIONS

- A. Beyond the exceptions listed in I., A., 6., above, under no circumstances, shall a departmental vehicle be used outside the city limits for personal errands or business.

- B. Employees shall not be permitted to add attachments, or make alterations to city vehicles.
- C. All existing rules and regulations governing the operation of departmental vehicles shall also apply when operating the vehicles outside the city limits.

ADDITIONAL STATEMENT OF FACTS

The Appellant's substantive Statements of Facts does not include all of the pertinent facts. Appellant, City of Decatur (City) provides this supplemental Statement of Facts.

On or about May 4, 2015, Decatur City Manager, Tim Gleason told Sweeney to provide a police car and driver to drive Gleason to the St. Louis Airport so he could catch a plane after the City of Decatur "State of the City" breakfast, which was held on May 7, 2015. (Vol. V, C 933-964; A-10) After Sweeney's conversation with City Manager Gleason, Sweeney discussed this matter with Deputy Chief Jim Getz. (Vol. V, C 933-964; A-10) Chief Deputy Getz, after discussing the matter with Sweeney, volunteered to drive Gleason to the airport. (Vol. V, C 933-964; A-10) The Verified Amended Complaint alleges that Sweeney involuntarily allowed, but did not order Gleason's personal use of the police resources. (Vol. V, C 933-964; A-10)

Plaintiff states that the pertinent substantive facts are outlined in Sweeney's Amended Complaint filed on April 22, 2016 and in Sweeney's Affidavit that was filed eleven (11) days before the Amended Complaint. Sweeney's Amended Affidavit was filed in response to an Affidavit filed by Tim Gleason on the 25th day of February 2016. The Brief filed by Plaintiff fails to attach the Defendants' Combined Motion to Dismiss Verified Complaint. Defendant, City of Decatur, supplements the Appendix filed herein to include the Defendants' Combined Motion to Dismiss Pursuant to 735 ILCS 5/-619.1 which includes the Tim Gleason Affidavit that was filed on February 25, 2016 and the Defendants' Combined Motion to Dismiss Verified Amended Complaint Pursuant to 735 ILCS 5/2-619.1 filed May 5, 2016.

ARGUMENT

I. Count II of the First Amended Complaint Does not State a Cause of Action Under the Illinois Whistleblower Act [740 ILCS 174/1]

Sweeney's claim, simply stated, is that Sweeney "disclosed" to Gleason that Gleason acted "improperly" and that Sweeney "involuntarily allowed" the "improper" act by Gleason to take place. For the reasons that follow, the ultimate facts alleged do not offer Sweeney protection under the Illinois Whistleblower Act, [740 ILCS 174/1] (hereinafter: the Act).

I.A. Sweeney, as a Participant in the Alleged Improper Activity by Gleason, is not Protected Under the Act

Pursuant to 740 ILCS 174/15(b) 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)] As Chief of Police, Sweeney had the power to arrest, or cause to be arrested, all persons who are found violating any municipal ordinance or any criminal law of the state. 65 ILCS 5/11-1-2.¹ A necessary ultimate fact to sustain a cause of action is that Sweeney had to have reasonable cause to believe that a violation of state or federal law had occurred or would occur. 740 ILCS 174/15 and 20. Assuming Sweeney formed such belief, then his obligation as a police officer required him to act. Sweeney did not act to prevent the alleged improper act.

Sweeney, the Chief of Police for the City of Decatur, had authority to determine the circumstances under which a City police vehicle was used. [C. 947-948].² Notwithstanding his

¹ City Police Department General Order obligated Sweeney to disregard unlawful orders, to report improper conduct immediately and subjected Sweeney to termination for failure to do so [C. 87-88]; also see FN 2, *infra*.

² In ruling on Section 2-615 Motion, only those facts apparent from the face of the pleadings, matters of which the Court can take judicial notice, and judicial admissions in the record may be considered. *K. Miller Const. Co., Inc. v. McGinnis*, 238 Ill. 2d 284, 291 (2010). While outside of the record, a court may take judicial notice of the ordinances of the municipality. *Island Lake Water Co., Inc. v. LaSalle Development Corp.*, 143 Ill. App. 3d 310, 317

actual knowledge that the vehicle would be used, Sweeney took no action to prevent the use of the vehicle. As such, Sweeney was a participant in the alleged improper act upon which he bases his claim. In all respects, Sweeney had the authority and duty to prevent the use of the City vehicle if he thought it was improper. Sweeney's failure to do so removes him from the scope of protection under the Act.

The purpose of the Act is to encourage employees to report violations of law to the appropriate authorities and to protect those employees making qualifying disclosure under the Act. *Sardiga v. Northern Trust Co.*, 409 Ill. App. 3d 56 (1st 2011). The Act should not be applied in a manner that protects employees that allow the very violations of law for which the employee makes complaint. See: *Sardiga*, 409 Ill. App. 3d at 64. Additionally, the legislative intent behind the Act is that the whistleblower must refuse to participate in the alleged unlawful act.³ 740 ILCS 174/20; *Sardiga*, 409 Ill. App. 3d at 64. Established principles of public policy state that no court should lend its aid to a person who finds his or her cause of action based upon his participation in the alleged unlawful act. *Hubert v. Consolidated Medical Laboratories*, 306 Ill. App. 3d 1118, 1125 (2nd 1999) This refusal to aid derives not from the consideration of the Defendant, but from a desire to see that those who transgress the moral or Criminal Code shall not receive aid from the judicial branch of Government. *Id* at 1125. The underlying policies of the Act are offended if the complicit are protected.

Contrary to Sweeney's argument, the proscription against participation in the alleged unlawful act, should not be limited to a cause of action based on Section 20 of the Act and

(2d Dist. 1986)(citing 736 ILCS 5/8-1001) ("every court of original jurisdiction...shall take judicial notice of...[a]ll general ordinances of every municipal corporation within the State.")

³ It is significant that Sweeney alleges an "improper" act, as opposed to "unlawful" act. Sweeney never alleges that he disclosed any state law that was violated to Gleason.

ignored for a claim based on Section 15 of the Act. The Court should consider the Act, in its entirety, keeping the subject it addresses and the legislature's apparent objective in enacting it in mind. *Andrews v. Kowa Printing Corp.*, 217 Ill. 2d. 101, 106 (2005); *Sardiga v. Northern Trust Co.*, 409 Ill. App. 3d 56, 61 (1st, 2011). Accepting the conflicting construction between §15 and §20 of the Act that Sweeney urges would invite the whistleblower to allow the unlawful act to occur, then profit from the fact he knows a violation occurred. Further, the Sweeney construction would not tolerate participation in the unlawful act under §20 and protect the participant in the unlawful act under §15. Effectively, a participant would be able to enjoy protection based on the participant's choice to delay the disclosure. Thus, the applicability of the Act would be a function of when the whistleblower decides to act. Such construction is non-sense.

Sweeney has a unique status as a consequence of his position as Chief of Police. Upon forming a reasonable belief that a violation of law has occurred (a required ultimate fact) Sweeney had a legal obligation to enforce the law or ordinance. 65 ILCS 5/11-1-2; see FN 1, *infra*. Extending status to Sweeney as a party protected under the Act rewards Sweeney for Sweeney's disregard of his independently existing duties to enforce the law. Necessarily, recognition of the cause of action requires the Court to subordinate the Police Chief's statutory duty to enforce the law to the Act. The intent of the Act is to protect those who seek to enforce the law. Sweeney failed to enforce the law by "allowing" the alleged violation to occur. Sweeney's allegations cannot be harmonized with the underlying intent of the Act. For these reasons, Sweeney cannot fall within the protections of the Act because he failed to take that action to prevent or enforce the alleged violation of law.

I.B. Sweeney Failed to Make a Qualifying Disclosure Under the Act

The employee must disclose information to a government or a law enforcement agency where the employee has a reasonable cause to believe that the information discloses a violation of a state or federal law, rule or regulation. 740 ILCS 174/15(b). Case law is split as to whether a report to one's own employer qualifies as a disclosure for purposes of the Act.⁴ Here, the employer is a governmental agency. However, the factual circumstance specific to this case is that the report is to the individual alleged violator which is a circumstance no reported case previously has addressed.

Sweeney relies on the decision in *Brame v. City of North Chicago*, 2011 IL.App.(2d) 100760. The holding by the Second District in *Brame* was that if the employer was a governmental or law enforcement agency, then the report could qualify as a disclosure under the Act. However, in *Brame*, the report was not to the violator, rather, the report was to the violator's superior, to wit: the Mayor of the defendant employer. [2011 IL.App(2d) 100760 ¶8]. Thus, *Brame* does not control.

Further, this Court is not bound by the holding in *Brame* that the employee's report to his employer compliant with the Act. While Appellate Courts from other Districts may reach a different conclusion on the question, this Court is not bound by their decision. *State Farm and Casualty Co., v. Yapejain*, 152 Ill. 2d 533, 539 (1992). 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. See: *Reidlinger v. Hudson Respiratory Care, Inc.*, 478 F. Supp. 2d 1051 (ND IL, 2007). The facts of this case illustrate the mischief presented by a

⁴ See: *Reidlinger v. Hudson Respiratory Care, Inc.*, 478 F.Supp.2d 1051 (N.D. IL, 2007).

statutory construction that considers an employee to employer report as qualifying. The facts of this case present no indicia of Sweeney's intent to report information which Sweeney in good faith believed constituted a violation of law to validate the existence of a disclosure under the Act. Without validating the whistleblower's intent, every termination decision by an employer now becomes ripe for litigation. A requirement that a report of information sufficient to qualify as a disclosure under the Act to a disinterested governmental or law enforcement agency offers sufficient validation of the whistleblower's intent and protects against employees exploiting the Act to leverage protection from adverse employment decisions concurrent with the unlawful act or reserved for an unknown time and place in the future. Here, the public is not served if a government employee (the Police Chief) can intimidate or extort continued employment by the governmental entity because he holds a card over the City Manager.

Logic dictates that a report to the violator is not the reporting of information constituting a qualifying disclosure under the Act. Merely telling the violator that you are aware of the unlawful act does nothing to cause or otherwise trigger investigation by a governmental or law enforcement authority. Also, how can one distinguish a report for disclosure purposes under the Act from an implied threat for purposes of criminal intimidation and/or extortion? Under the specific circumstances of the instant case, Sweeney held the position empowered to act upon a report of any unlawful activity and, nevertheless, allowed the activity to take place. Recognizing Sweeney's alleged report to Gleason that Gleason's act was "improper" equivalency to a protected disclosure under the Act would lead to absurd results offensive to the policy underlying the Act. The Act should not be construed in a manner that yields unjust, absurd or unreasonable consequences. *Mulligan v. Joliet Regional Airport*, 123 Ill. 2d. 303, 312-13 (1988).

A report of information to the violator is not a disclosure because it does not reveal or impart any information the violator did not previously know. Disclosure is defined as... “Act of disclosing. Revelation; the impartation of that which is secret or not fully understood.” *Black’s Law Dictionary*, 531 (9th Ed. 2009). Sweeney provided no information that was secret or otherwise unknown to Gleason. Further, as set forth above, when only the violator is told, the alleged violation of law remains a secret and the report cannot be designed to stop or eliminate the alleged wrongful act.

The discussion in *Sardiga v. Northern Trust Co.*, 409 Ill.App.3d 56 (1st 2011) supports the assertion that report to the violator, only, is not a qualifying disclosure. Sardiga reported his complaint to the violator, Hines, and accepted the assurances of Hines that the conduct was not unlawful. 409 Ill.App.3d at 65. Sardiga argued that he was not refusing to participate in the purportedly illegal activities because Hines had assured him that the activities were proper, notwithstanding, Sardiga’s continuing lingering doubts about the legality. [409 Ill.App.3d at 65]. The Court noted that Sardiga had not adequately explained how Hines’ assurances prevented Sardiga from ascertaining the legality of the complained of activities through other methods, for instance, seeking guidance from the employer’s legal or compliance department. *Sardiga v. Northern Trust Co.*, 409 Ill.App.3d at 65.

Interpreting the Act to require that the information be reported to a non-employer governmental or law enforcement agency is a sound public policy that does not offend the legislative intent disclosed by the legislative history. The construction protects against abuses of the Act leading to absurd results and injury to the public. In fact, such requirement would protect both employer and employee. Such construction serves transparency and deflects frivolous claims raised following a remote termination. Sweeney had ample avenues for the

communication of any reasonable belief he had formed regarding an unlawful act. Sweeney was Chief of Police and could have acted on his own accord. Sweeney could have reported to the mayor as did the Plaintiff in *Brame*. Sweeney could have reported the information to the City Corporate Counsel, Macon County State's Attorney, Macon County Sheriff, the City Council, or the Illinois State Police and enjoyed the protection of the Act because there would have been validation of his intent to bring an unlawful act to the attention of governmental or law enforcement agencies.

II. To the Extent that Whistleblowing Forms the Basis for the Common Law Retaliatory Discharge Claim in Count I, Sweeney Fails to State a Cause of Action

The content of Sweeney's Brief does not appear to raise issue on the dismissal of Count I of the First Amended Complaint based on common law retaliatory discharge arising from whistleblower activity. Accordingly, Sweeney has forfeited any issue in said regard, IL. S. Ct. R 341(h)(7) (*effective February 6, 2013*). Alternatively, for the reasons set forth in part I above, and hereinafter stated, a common law retaliatory discharge claim based upon alleged whistleblower activity fails to state a cause of action.

A balancing of competing interests in public policy is required before recognizing any common law remedy for retaliatory discharge. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 501-02 (2009). The alleged whistleblowing activity was in the nature of alleged official misconduct by Gleason. Illinois law already rejects recognition of a retaliatory discharge claim under such circumstance. See: *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 507 (1991). As stated above, recognizing a cause of action in favor of Sweeney undermines clearly mandated policies Sweeney was obligated to protect as Chief of Police. In Illinois, the importance of giving employers the ability to decide who will work for them and the preservation of the rule in Illinois

that an at-will employee can be fired for any reason or no reason are strong public policies.

Fellhauer v. City of Geneva, 142 Ill. 2d 509 (1991); *Turner v. Memorial Medical Center*, 233 Ill. 2d 500 (2009). On balance, expansion of the retaliatory discharge remedy should be denied.

III. Count I of the First Amended Complaint Fails to State a Cause of Action for Discharge in Retaliation for the Exercise of Free Speech Rights

Sweeney claims retaliation in response to an alleged refusal to make a statement at a City Council meeting regarding a motor fuel tax and a statement in opposition to increasing taxes made by Sweeney at a meeting of City Department Heads. The allegations are applicable to Count I, only. Assuming that the allegations are true for purposes of the Motion, only, Sweeney fails to state a cause of action.

The City of Decatur Department Head meeting was not a meeting open to the public. Sweeney's job as the Chief of Police for the City of Decatur required his attendance. The occasion for the "speech" was an internal meeting of City management where discussions regarding revenue that funds, in whole or part, city services, including police, were related to Sweeney's job. The allegation regarding Sweeney's "non-speech" to the City Council only infers that Sweeney was asked to speak as the Chief of Police in support of the policy of City staff, including his boss, the City Manager.⁵

In Illinois, an employee who serves at the employer's will may be discharged for any reason or no reason. *Fellhauer v. City of Geneva*, 142 Ill. 2d 505 (1991). An exception to the general rule of at-will employment arises only in a limited and narrow range for the tort of retaliatory discharge. *Fellhauer v. City of Geneva*, 142 Ill. 2d 505 (1991). The tort of retaliatory

⁵ A duty Gleason was empowered to assign to the Chief of Police. City Code Ch 13 § 4(g)[C. 78]

discharge seeks to achieve a proper balance between the employer's interest in operating a business efficiently and profitably, its employee's interest in earning a livelihood and society's interest in seeing its public policies carried out. *Turner v. Memorial Medical Center*, 233 Ill.2d 494, 502 (2009). Any effort to evaluate the public policy exception with generalized concepts of fairness and justice will result in an elimination of the at-will doctrine itself. *Turner v. Memorial Medical Center*, 233 Ill. 2d at 503. The determination of a clearly mandated public policy is a question of law. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494 (2009). The mere citation of a constitutional or statutory provision in a Complaint will not be sufficient to state a cause of action for retaliatory discharge. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 505 (2009). In no instance has the Supreme Court expanded the tort of retaliatory discharge to encompass discharge for the exercise of the right of free speech. *Sutherland v. Norfolk Southern RY. Co.*, 356 Ill. App. 3d 620, 625 (1st, 2005) [citing: *Barr v. Kelso-Barnett*, 106 Ill. 2d 520 (1985)].

When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. *Garcetti v. Ceballos*, 547 U.S. 410, 421; 126 S. Ct. 1951, 1960 (2006). "Restricting Speech that owes its existence to a public employee's professional responsibility does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti v. Ceballos*, 547 U.S. 421-22.

Government employers are afforded sufficient discretion to manage their operations. *Garcetti v. Ceballos*, 547 U.S. at 422. "Employers have heightened interest in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must insure

that their employee's official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Garcetti v. Ceballos*, 547 U.S. 422-23. For purposes of balancing interests in determining whether to recognize the tort of retaliatory discharge for an employee's speech on an occasion related to the employee's duties or the employer's mission, the Court should refrain from an intrusive role resulting in judicial oversight of communications between and among government employees and their superiors in the course of official business. *Garcetti v. Ceballos*, 547 U.S. 423. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analog to speech by citizens who are not government employees. *Garcetti v. Ceballos*, 547 U.S. 424.

Sweeney's reliance upon *Lane v. Franks*, 134 S. Ct. 2369 (2014) is not persuasive in the context of this litigation. *Lane v. Franks* related to sworn testimony of an employee compelled by subpoena. An employer's interest in thwarting judicial process to block an employee's sworn testimony compelled by subpoena is not analogous to the occasion of internal Department Head meetings where the employees discuss the mission of the employer. The occasion is different. *Lane v. Franks* is simply not applicable to the situation presented.

Sweeney invites this Court to recognize a new basis supporting the common law tort of retaliatory discharge. The invitation to expand the common law cause of action should be rejected. Nothing in the Complaint alleges any interference by the City with any citizen free speech separate from the duties and occasion arising from Sweeney's employment as the Chief of Police.

IV. Sweeney's Allegations Defeat the Element of Causation.

The judgment below may be sustained on any basis, including grounds the trial Court did not rely upon in entering judgment. *Jandenska v. Prairie International*, 383 Ill.App.3d 396, 98 (4th, 2008). With regard to the common law retaliatory discharge claim, the element of causation is not met if the employer has a valid basis, which is not pretextual, for discharging the employee. *Collins v. Bartlett Park District*, 213 IL.App.(2d) 130006 ¶31. Effectively, the protected conduct must be the sole (or direct) cause for the retaliation. Sweeney's own factual construct, that is, allowing what he claims was improper conduct, is, in and of itself, a dischargeable act⁶. Stated differently, if the Chief of Police knowingly allowed the law to be violated, then the Chief of Police could be terminated, as well. In a nutshell, that is exactly the crux of Sweeney's Complaint. Thus, the ultimate facts claimed by Sweeney plead Sweeney out of court because Sweeney admits a basis for termination which is not protected.

The Complaint alleges the last whistleblowing activity as May 11, 2015 and the retaliatory discharge nine months thereafter following interim employment. . As a matter of law, the termination is too remote from the alleged whistleblowing activity to establish legal causation. see: *Young v. Bryco Arms*, 213 Ill.2d 433 (2004).

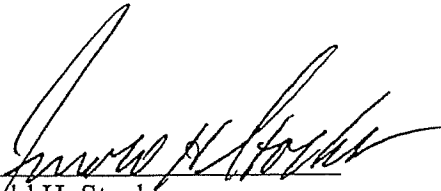
V. Conclusion

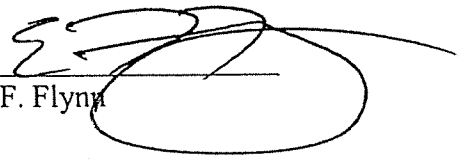
For one or more of the reasons stated herein, the judgment of the trial Court dismissal of the First Amended Complaint with prejudice should be affirmed.

CITY OF DECATUR,
Defendant-Appellee

By: Featherstun, Gaumer, Postlewait,
Stocks, Flynn & Hubbard
Its Attorneys

⁶ Refer to footnote 1, infra

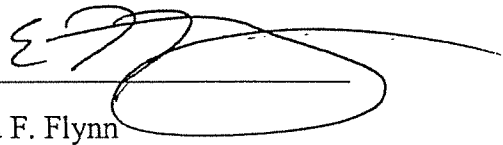
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RULE 341(C) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms with the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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 14 pages.


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STATE OF ILLINOIS)
)
COUNTY OF MACON)

SS.

PROOF OF SERVICE

I certify that the original and eight copies of the foregoing **Brief of the Defendant-Appellee City of Decatur** along with a CD-ROM disk containing five electronic copies of the same, were mailed to the Fourth District Appellate Court, Springfield, Illinois; and three copies of the same were mailed to each of the following persons at the addresses shown by enclosing the same in an envelope addressed to them and depositing the same in the U.S. Mail at 225 N. Water Street, Decatur, Illinois 62523, before 5:00 p.m. on November 10, 2016, in an envelope bearing sufficient postage.

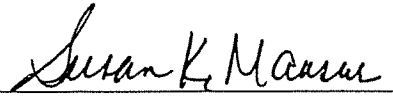
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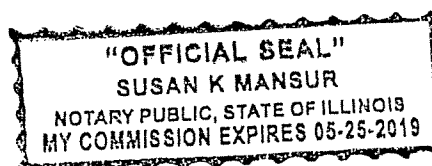
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SUBSCRIBED and SWORN to
before me on November 10, 2016,



Notary Public



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

SUPPLEMENTAL APPENDIX

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FILED

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT FEB 25 2016
MACON COUNTY, ILLINOIS

LOIS A. DURBIN
CIRCUIT CLERK

BRADLEY L. SWEENEY,

Plaintiff,

v.

CITY OF DECATUR, and TIM GLEASON,
City Manager,

Defendants.

No. 2016-L-18

DEFENDANTS' COMBINED MOTION TO DISMISS
PURSUANT TO 735 ILCS 5/2-619.1

Now come the Defendants, City of Decatur and Tim Gleason, by their attorneys,
Featherstun, Gaumer, Postlewait, Stocks, Flynn & Hubbard, and for their Combined
Motion to Dismiss Pursuant to 735 ILCS 5/2-619.1, state:

I. 2-615 MOTION

1. The verified factual allegations of the Sweeney Complaint [Sweeney
Story] are accepted by the court as true for purposes of the Motion only. A 2-615 Motion
limits the court to considering facts from the pleading, matters subject to judicial notice
and judicial admissions in the record. *Reynolds v. Jimmy John's Ent., LLC, 2013*
Ill.App.(4th) 120139.

2. Count I of the Complaint seeks to state a claim for common law retaliatory
discharge. To state a cause of action for retaliatory discharge, a Plaintiff must plead that
he or she has been discharged, in retaliation for his or her activities, and that the
discharge violated a clear mandate of public policy. *Krum v. Chicago National League*
Ball Club, Inc., 365 Ill.App.3d 785, 788 (1st, 2006).

3. Count II of the Complaint is an attempt to state a cause of action pursuant

to 740 ILCS 174/15(b) et. seq. [Whistleblower Act]. To state a cause of action under the Whistleblower Act, the employee must allege an employer's retaliation against the employee for the employer's disclosure of information to a government or a law enforcement agency under circumstances where the employee had reasonable cause to believe that the information discloses a violation of state or federal law, rule, or regulation. 740 ILCS 174/15(b).

4. The tort of retaliatory discharge is a very narrow exception to the general rule that at will employees may be terminated for any or no reason. *Turner v. Memorial Medical Center*, 233 Ill.2d 494 (2009). If the employer has a valid, non-pretextual basis for discharging the employee, the element of causation in a retaliatory discharge claim is not met. *Collins v. Bartlett Park District*, 2013 Ill.App.(2d) 130006, ¶31.

5. The issue of whether a clearly mandated public policy exists, and the related issue of whether the employee's discharge undermines the stated public policy, are questions of law for the Court to decide. *Turner*, 233 Ill.2d at 501.

6. Count I of the Complaint should be dismissed because Plaintiff cannot establish a retaliatory discharge violating a clearly mandated public policy in one or more of the following ways:

A. The Sweeney Story, assumed as true for purposes of the instant Motion, only, conclusively establishes Plaintiff *in pari delicto* with Defendants. In the Sweeney Story, Sweeney committed a Class 3 felony pursuant to 720 ILCS 5/33-3(a)(3). As Chief of Police, Sweeney was empowered to arrest or cause to be arrested all persons who are found violating any municipal ordinance or any criminal law of the state. 65 ILCS 5/11-1-2. In the Sweeney Story, Sweeney claims he acted with the intent to obtain a personal

advantage for "another" (Gleason) and said acts were in excess of Sweeney's lawful authority.

B. "It is the public policy of the State of Illinois that no Court will lend its aid to a person who finds his or her cause of action upon an immoral or illegal act. This refusal to aid drives not from the consideration of the Defendant, but, from a desire to see that those who transgress the moral or Criminal Code shall not receive aid from the judicial branch of government." *Hubert v. Consolidated Medical Laboratories*, 306 Ill.App.3d 1118, 25-26 (2d, 1999).

It would be contrary to public policy for courts to relieve a citizen of the consequences of his act in violating the law or his duty to society, and it cannot be any defense that some one else either assisted in the offense or commanded him to do it.

Id at 1126.

Moreover, a public employee convicted of violating the official misconduct statute forfeits his public employment. 720 ILCS 5/33-3(c). Thus, if the Sweeney Story is true, the public policy of the State of Illinois mandates Sweeney's removal from public employment as Police Chief. Accordingly, based on the four corners of the Complaint, the Sweeney Story pleads Plaintiff out of his job and Court. Dismissal is required.

C. The Illinois Supreme Court has held that recognition of a claim for retaliatory discharge is not necessary to vindicate the public policy underlying section 33-3 of the Criminal Code [720 ILCS 5/33-3]. *Fellhauer v. City of Geneva*, 142 Ill.2d 495, 507 (1991). The official misconduct statute contains strong deterrence to violations such that when a public officer or an employee is approached with a request to commit an act that would constitute official misconduct, the officer's fear that he will be discharged for refusing to accommodate the illegal request will be tempered by the potential

consequences of his own activity. *Id. at 508*. Common sense weighs against recognizing retaliatory discharge under the specific circumstances alleged in the instant case.

According to the Sweeney Story, Sweeney, the top law enforcement official of the City of Decatur, participated in a Class 3 felony, and failed to take action to enforce the Criminal Code against Gleason or himself. Now, Sweeney asks the judicial branch to support a circumstance where he could keep his "belief" that a felony had been committed between the two violators and available for Sweeney's personal use at times when Sweeney needed to leverage Gleason with a threatened report. A greater mischief follows from allowing a retaliatory discharge action to stand when a law enforcement official fails to pursue official misconduct reserving said knowledge for his own personal use at a future unknown time and date. Some could characterize the Complaint as seeking the tacit enablement of extortion.

D. While the Sweeney Story, if true, establishes a mandatory basis for Sweeney's termination which defeats the claim, the Sweeney Story also includes allegations that Sweeney was retaliated against in violation of First Amendment rights of speech related to non-support or opposition to a motor fuel tax recommendation by City staff to the City Council. Sweeney expressed opposition to the motor fuel tax at a City of Decatur staff meeting with the respective City Department Heads. Sweeney declined the request of the City Manager that Sweeney, as Police Chief, support the City Manager's recommendation for a motor fuel tax to the City Council. No claim is alleged based on a civil rights violation. [No Section §1981 or §1983 claim.] The Illinois Supreme Court declined to expand the common law employment retaliatory discharge tort to encompass discharge for alleged free speech. *Barr v. Kelso-Burnett Co., 106 Ill.2d 520 (1985)*.

Notwithstanding, the First Amendment does not protect statements made as part of one's job. *Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir., 2009). Public employees who speak pursuant to their official duties are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Milwaukee Deputy Sheriff's Association v. Clarke*, 574 F.3d 370 (7th Cir., 2009). The communications at issue were in internal Department Head staff meetings regarding the business of the City of Decatur and related to revenue options available to finance city operations, including, directly or indirectly, the operations of the police department. Government employers need sufficient discretion to manage their operations and, as such, have heightened interest in controlling speech made by an employee in his or her professional capacity. *Garcetti v. Ceballos*, 547 U.S. at 422. "Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Id.* at 422-423. The subject matter, the forum and circumstances were directly related to Sweeney's position as the Police Chief. A clearly mandated public policy is not presented in the circumstances set forth in the Complaint nor do the facts present any basis to expand the scope of the retaliatory discharge tort.

E. The discharge of the Police Chief is not a matter of state-wide concern. *Madarino v. Village of Lombard*, 92 Ill.App.3d 78, 81 (2nd, 1980). Thus, a clearly mandated public policy affecting the citizens of Illinois, collectively, is not present. See: *Turner*, 233 Ill.2d at 500 (*affect citizens of the state collectively to support tort.*)

7. Count II of the Complaint should be dismissed for one or more of the

reasons set forth in the preceding paragraph applicable to Count I. A construction of the Whistleblower Act hostile to the public policy that the Courts cannot aid a Plaintiff conspiring to the same criminal end would be an absurd and unreasonable construction. As a matter of law, the Whistleblower Act claim must fail.

8. Count II of the Complaint fails to allege the violation of a state or federal law, regulation or rule which is the subject of violation other than the official misconduct statute.

9. Counts I and II of the Complaint should be dismissed for failure to allege facts to support "whistleblowing" activity. The Whistleblower Act requires a disclosure to a government agency or law enforcement agency. There is no allegation that Sweeney ever reported his belief that there was a criminal violation to anyone (other than Gleason) until after Sweeney was terminated. "Where an employee has revealed this information only to his or her employer, there is no cause of action in Illinois for retaliatory discharge. *Riedlinger v. Hudson Respiratory Care, Inc.*, 478 F.Supp.2d 1051, 1055 (ND. IL, 2007). In the absence of a third party report, there is no whistleblowing. Mere communication between the two persons involved in the "criminal act" forming the basis of the Sweeney Story is not a disclosure or whistleblowing report. It presents an absurd construction of the Whistleblower Act to conclude that the element of disclosure is satisfied on the basis of self-report or disclosure between the subject matter for the disclosure. Here, the Sweeney Story alleges that Sweeney threatened to disclose information to third parties regarding conduct in which Sweeney was complicit and for which Sweeney had the statutory duty to enforce. The Sweeney Story is a tale of extortion, not one of whistleblowing.

10. Counts I and II of the Complaint should be dismissed because the Sweeney Story alleges a non-pretextual basis for his termination, to wit: the Police Chief's participation in an act the Police Chief considered criminal.

11. Count I of the Complaint against Defendant, Tim Gleason, should be dismissed because Tim Gleason is not the employer. Common law retaliatory discharge claims may be asserted against the employer and not the employee or agent of the employer who effects the discharge on behalf of the employer. *Smith v. Waukegan Park District*, 231 Ill.2d 111, 116 (2008); *Buckner v. Atlanta Plant Maintenance, Inc.*, 182 Ill.2d 12 (1998).

II. 2-619 MOTION

12. Pursuant to 735 ILCS 5/2-619(a)(9), a Complaint may be dismissed upon the consideration of affirmative matter establishing a defense that defeats a claim.

13. In the alternative, if the Court concludes that the holding in *Hubert v. Consolidated Medical Laboratories*, 306 Ill.App.3d 1118 (2d, 1999) presents an affirmative defense subject to resolution pursuant to Subsection (a)(9), then the Defendants restate and incorporate herein the matters set forth at Paragraphs 6 and 7 above. More particularly, the Sweeney Story is premised upon a Verified Complaint (affirmative matter) barring the claim under an unclean hands doctrine.¹

14. Attached as Exhibit "A" is the Affidavit of Decatur City Manager, Tim Gleason, asserting affirmative matter [Gleason Facts] establishing that Sweeney was an at will employee subject to termination for no reason at all pursuant to Illinois law. Notwithstanding, the Gleason Facts establish the reason Sweeney was terminated. As a

¹ It ultimately will be the position of Defendants that the Sweeney Story is untrue. However, for purposes of the instant Motion, the case is evaluated by the Court accepting the Sweeney Story as true.

matter of law, the termination of the at-will employee was authorized and supported by non-pretextual reasons. *Hartlein v. Illinois Power*, 151 Ill.2d 142, 160 (1992) (causation fails.) The affirmative matter establishes that the Defendants would have taken the same action against Sweeney regardless of any purported expression of speech. *Schlicher v. Board of Fire and Police Commissioners*, 363 Ill.App.3d 869, 880-82 (2d, 2006).

Sweeney only states speculative conclusions as to the reason he was terminated – not facts based on any reason given by Gleason. Thus, the conclusions are not sufficient to sustain claim if discharge supported by non-pretextual reasons.

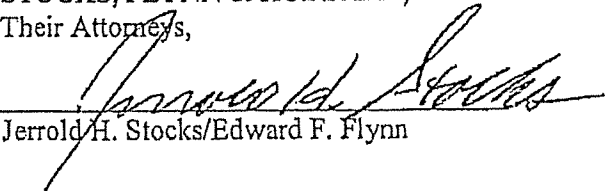
15. Paragraph 29 of Counts I and II and the *ad damnum* of Count I should be stricken because the Defendants are immune from liability for punitive or exemplary damages pursuant to 745 ILCS 10/2-102; *Boyles v. Greater Peoria Mass Transit District*, 113 Ill.2d 545, 554 (1986). [735 ILCS 5/2-619(a)(9) – Immunity Defense]

WHEREFORE, the Defendants respectfully request that Counts I and II of the Complaint be dismissed, with prejudice, without leave to reinstate, for costs and such other relief the Court deems just and proper.

CITY OF DECATUR and TIM GLEASON,
Defendants,

BY: FEATHERSTUN, GAUMER, POSTLEWAIT,
STOCKS, FLYNN & HUBBARD,
Their Attorneys,

BY:


Jerrold H. Stocks/Edward F. Flynn

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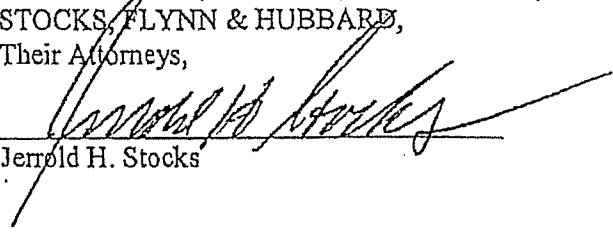
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JURY DEMAND

The Defendants hereby demand a trial by a jury of twelve (12) on all issues.

CITY OF DECATUR and TIM GLEASON,
Defendants,

BY: FEATHERSTUN, GAUMER, POSTLEWAIT,
STOCKS, FLYNN & HUBBARD,
Their Attorneys,

BY: 

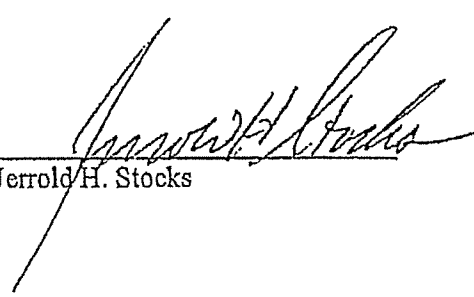
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CERTIFICATE OF SERVICE

I certify that on the 25 day of February, 2016, at ^{9:30}~~5:00~~ o'clock ^{AM}~~PM~~, I deposited a copy of the foregoing in a U. S. Post Office Box at 225 North Water Street, Decatur, Illinois, enclosed in an envelope with proper postage prepaid, addressed to the following in the manner set forth: I also sent the same via electronic mail to the following:

E-Mail: jrobinson@brelaw.com
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Bolen, Robinson & Ellis, LLP
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Jerrold H. Stocks

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duties as may be assigned by the City Manager.

4. On February 2nd, 2016, I conducted the weekly senior staff meeting that included all of the City Department Heads. The specific function of this meeting was to review goals suggested and discussed by the City Council. During this senior staff meeting, Mr. Sweeney did not focus on the City Council's goals, but rather chose to bring up a subject that had already been discussed between him and me, and decisions that had already been made by me and clearly communicated to Mr. Sweeney. Mr. Sweeney's behavior at this staff meeting was inappropriate, rude, disrespectful, and insubordinate, and appeared to be done in an effort to undermine my decision, and embarrass me. I excused Mr. Sweeney from the meeting, and directed him to wait for me in my office. After the staff meeting, I met with Mr. Sweeney in my office, in the presence of a witness. Mr. Sweeney remained confrontational, and unreasonable, so I concluded our meeting by suggesting he reconsider his behavior, and report back to me at 4:00 P.M. When the meeting reconvened at 4:00 P.M., Mr. Sweeney was even more confrontational, so I terminated the meeting.

5. On Feb. 3, 2016, in the presence of a witness, Mr. Sweeney offered on three separate occasions to resign. I told him I would meet with him at 10:00 A.M. on February 4, to discuss the matter further.

6. On February 4, 2016, I terminated Mr. Sweeney's employment with the City of Decatur.

7. The termination was communicated to Mr. Sweeney on February 4, 2016 in my office, in the presence of a witness, where I discussed my concerns with him. Although I anticipated his resignation on February 4, 2016 because of his offers the day

before; Mr. Sweeney stated he would not resign.

8. When I terminated Mr. Sweeney, I did not communicate to Mr. Sweeney that my decision was influenced by any position he had on the motor fuel tax as a revenue source to fund City of Decatur operations. I was unaware at that time that Mr. Sweeney even opposed the Motor Fuel Tax. Further, the fact that Mr. Sweeney opposed the motor fuel tax was not a basis for the decision to terminate him, because I first learned of his opposition from a Herald & Review reporter on February 10, 2016.

9. I was scheduled for a departing plane for travel on May 7, 2015 to attend an event involving my son's service in the United States Army. The trip was planned prior to the date I was hired as City Manager. I offered to cancel this trip to attend the first State of the City Address that would occur during my tenure as City Manager. Mayor McElroy wanted to accommodate both my trip and my attendance at the State of the City Address scheduled for May 7, 2015. Thus, on April 18, 2015, I changed a departing flight from Peoria (departing earlier in the morning on May 7, 2015) to secure a departing flight from St. Louis that would allow me to attend the State of the City Address. The change in plans cost me \$386.00. Despite Mayor McElroy's request that I submit the additional cost to accommodate attendance at the State of the City Address as an expense reimbursement, I did not do so. Because my returning flight would arrive in Peoria days later, if I drove to St. Louis, a car would have been stranded at the St. Louis Airport. Mayor McElroy told me to make arrangements for an unmarked City vehicle, with driver, to transport me to my departing flight to eliminate the stranded vehicle problem. All of the foregoing arrangements were made so as to enable me to be present at the State of the City Address. I willingly incurred the cost to change the flight. I did not

consider then, nor do I now, that the accommodation between the City and me was a violation of any law, policy, or regulation. At no time prior to his termination did Mr. Sweeney state to me that he thought the accommodation was a violation of any law, policy or regulation. I did not order Mr. Sweeney to drive me. In fact, Mr. Sweeney volunteered to do so, before delegating the transport to another under his command, so he could remain for the entire State of the City Address.

10. My decision to terminate Mr. Sweeney was not influenced, in any way, by any fact or circumstance related to transportation to the airport in St. Louis occurring on May 7, 2015. Mr. Sweeney never mentioned any concern about the matter to me, and never discussed it with me at any time prior to the State of the City address on May 7, 2015. Mr. Sweeney never mentioned any concern about the matter to me, and never discussed it with me at any time after May 7, 2015. Mr. Sweeney did not mention any concern to me and did not discuss it with me on February 3, 2016, when he offered his resignation. Mr. Sweeney did not mention any concern to me and did not discuss it with me on February 4, 2016, when he was being terminated. In fact, I had no knowledge that Mr. Sweeney ever considered the fact of transportation to St. Louis as objectionable, improper, or not otherwise authorized.

11. Many reasons informed my decision to terminate Mr. Sweeney from his position as Police Chief for the City of Decatur. I lost confidence in Mr. Sweeney's abilities to communicate professionally with me, staff, and third parties. I lost confidence in Mr. Sweeney's trustworthiness and credibility. I was displeased with Mr. Sweeney's insubordinate behavior at meetings commencing January 21, 2016, and continuing through the date he was terminated. I learned that Mr. Sweeney failed to follow asset

forfeiture fund purchase requirements established by the City Council. Mr. Sweeney behaved defensively in several meetings commencing January 21, 2016, and continuing through the date he was terminated.

12. More specifically, reasons for termination included:

a. I learned on January 13, 2016, that Mr. Sweeney failed to report to me circumstances related to an April, 2015 incident allegedly involving his wife which prompted me to request an independent investigation by the Illinois State Police regarding any involvement of members of the Decatur Police Department. On January 21, 2016, Mr. Sweeney objected to my initiation of the Illinois State Police investigation of the April, 2015 incident. Mr. Sweeney objected to my not consulting him prior to initiating the investigation. Mr. Sweeney objected to my requiring him not to be involved in the investigation. On several occasions, I had to remind Mr. Sweeney that the integrity of the investigation and the protection to the City it would afford, were my main priorities, and that he should not interfere with, impede, influence, or become involved in any way, in the investigation. Mr. Sweeney responded by continuing to challenge my actions and decisions.

b. Mr. Sweeney was not truthful regarding communications he had with a third party regarding his desires related to the communication (dispatch) center and admitted to me, in the presence of a witness, that he was untruthful. Mr. Sweeney's admission that he was untruthful occurred on February 3, 2016, and again on Feb. 4, 2016;

c. Mr. Sweeney allowed personal animus between himself, individually, and a contractor used by the landlord of Police Headquarters to negatively impact the City's relationship with the landlord;

d. Mr. Sweeney was rude and disrespectful to the Federal Mediator at a mediation session related to current labor negotiations with the Decatur Police Union;

e. Mr. Sweeney failed to follow detailed requirements established by the City Council governing asset forfeiture fund purchases, which requirements were enacted to assure the lawful administration of the fund. I discovered this failure shortly before terminating Mr. Sweeney.

f. Mr. Sweeney made statements regarding a subordinate law enforcement officer suggesting that he intended to retaliate against that officer because that officer was discovered to be following Sweeney's daughter's Instagram account. I considered such statements unprofessional and suggestive of a willingness to abuse his position as Police Chief.

g. Commencing January 21, 2016, Mr. Sweeney exhibited increased insubordinate behavior at meetings which behavior continued and increased through the date I terminated his employment.

13. Each of the matters identified in the preceding paragraph was discussed, before a witness, with Mr. Sweeney on February 4, 2016 preceding his termination. At that meeting, Mr. Sweeney acknowledged the truthfulness and accuracy of the reasons for which he was terminated, admitted he had handled matters poorly, and apologized for his poor choices.

Further affiant sayeth not.



Tim Gleason

CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.



CHAPTER 07

OFFICERS AND EMPLOYEES GENERALLY

1. EFFECT OF CHAPTER. The provisions of this Chapter shall apply alike to all officers and employees of the City, regardless of the time of the creation of the office or of the time of the appointment of the officers, including officers and members of the Police and Fire Departments of the City.

2. APPOINTMENT AND REMOVAL. The City Manager shall have the power and authority to appoint and remove at will the Assistant City Managers, all directors of departments, all deputy and assistant department directors, fire marshals, battalion chiefs, police personnel above the rank of sergeant, division managers, administrative secretaries, administrative assistant, members of the Legal Department, Personnel Specialists, Training Officer, Human Rights Officer, Systems Administrator, Senior Systems Analyst, Systems Analyst, Budget and Revenue Officer, Risk Management Assistant, Water Customer Service Manager, Street and Sewer Maintenance Supervisor, Civil Engineer I, Civil Engineer II, Assistant City Engineer, GIS Specialist, Fleet Supervisor, Water Production Maintenance Supervisor, Water Production Operations Supervisor, Engineering Services Coordinator, Supervisor of Technical Services, CAD System Coordinator, Police Records Supervisor, Water Distribution Supervisor, Water Metering Supervisor, Traffic and Parking Supervisor, City Forester, Foreman, Economic Development Officer, Building Inspections Manager, Senior Planner, Planners, Planning and Development Manager, Senior Crime Analyst, Crime Analyst, Emergency Communications Manager, Emergency Communications Supervisors, Neighborhood Inspections Administrator, Neighborhood Program Specialist, Enterprise Zone Administrator, and temporary and seasonal employees.

Revised 1/20/2015

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(Amended, Ordinance 2015-03, January 20, 2015), (Amended, Ordinance 2014-74, December 15, 2014) (Amended, Ordinance 2014-68, December 1, 2014) (Amended, Ordinance No. 2013-99, December 2, 2013) (Amended, Ordinance No. 2013-77, September 16, 2013) (Amended, Ordinance No. 2009-55, July 20, 2009) (Amended, Ordinance No. 2009-50, July 6, 2009) (Amended, Ordinance No. 2009-39, May 18, 2009) (Amended, Ordinance No. 2006-59, June 19, 2006) (Amended, Ordinance No. 2006-40, May 1, 2006) (Amended, Ordinance No. 2006-05, February 6, 2006) (Amended, Ordinance No. 2005-23, March 21, 2005) (Amended, Ordinance No. 2004-102, December 20, 2004) (Amended, Ordinance No. 2003-12, March 3, 2003) (Amended, Ordinance No. 2002-98, November 4, 2002) (Amended, Ordinance No. 2000-52, June 19, 2000) (Amended, Ordinance No. 2000-08, February 21, 2000)

3. **OATH.** Every officer of the City and every member of a Board or Commission of the City, shall, before entering upon his duties, take the oath prescribed by law.

4. **MONEY RECEIVED.** Every officer or employee of the City, or other person who receives money on behalf of the City, shall turn the same over to the City Treasurer at the end of the day in which the same is received. Such officers or employees shall keep a true and accurate account of such receipts with the name of the party paying same, the amount thereof, date of payment, and the purpose or reason for payment. Such officers or employees shall, on the first day of each month, render a report under oath to the Director of the Department to which they are assigned, of all such receipts.

5. **BOND.** Every officer and employee shall, if required by statute or ordinance, upon entering upon the duties of the office, give a bond in such amount and with such sureties as may be provided by ordinance, conditioned upon the faithful performance of the duties of the office or position.

6. **SALARIES.** All officers and employees of the City shall receive such salaries as may be provided from time to time by ordinance, unless otherwise fixed by law, and shall be paid at such periods as directed by the City Manager.

7. PAY PLAN.

A. Classified employees other than those designated as management employees by the City Manager shall be paid bi-weekly according to a pay plan established and modified from time to time by the City Council and upon approval of payrolls submitted to the Council. Said pay plan shall assign a grade or range to each position classification, and each employee shall be paid according to the step in that grade or range said employee has achieved, beginning with Step A at entry into grade unless otherwise directed by the City Manager.

B. Advancement from a lower step to a higher step within the pay plan established by the Council shall be as authorized and directed by the City Manager, but such advancement shall not be made more than once in any 6 month period as to steps A to B and B to C and not more than once annually as to all other steps.

8. PAYROLL DEDUCTIONS.

A. On an employee's starting date, the employee shall supply the Finance Department with the following information:

(1) A statement indicating the number of dependents to be used in computing the amount required to be withheld from the employee's paycheck under state and federal tax laws;

(2) A statement authorizing deductions and designating beneficiaries for the appropriate state pension fund; and,

(3) A statement of information as required for coverage under the City's employee performance bond.

B. An employee may, at any time, make arrangements in writing with the Finance Department regarding the following deductions, as approved by the City Manager: employee

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insurance, credit union shares or loan repayment, union dues, United Way, Police Benevolent Association or other similar purposes.

9. **VETERAN'S DAY.** Veteran's Day shall be celebrated for all City purposes on the 11th day of November of each year, as provided by administrative regulation and by collective bargaining agreement.

10. **VACATION.** At the discretion of the City Manager, vacation time may be prorated based on continuous service and granted to employees who resign in good standing.

11. **PART TIME, TEMPORARY AND SEASONAL EMPLOYEES.**

A. Permanent part-time employees who work at least 20 hours but fewer than 40 hours per week shall accrue the following:

(1) After completion of one year continuous service uninterrupted by resignation or discharge, one (1) week of vacation per year, which must be taken within twelve (12) months from the date that the same accrues;

(2) One half (1/2) day of sick leave for each month of continuous and uninterrupted service, to a maximum of sixty seven (67) days.

B. Temporary and seasonal full-time employees shall be paid for overtime at the same rate as other employees in the same department that are not designated as management by the City Manager.

12. **ARRESTS.** The members of the City Council, the City Manager, the members of the Fire and Police Departments, the officers and employees designated as inspectors in the Planning and Building Services Department, the Neighborhood Service Officers and members of the Millikin University Police are hereby declared to be conservators of the peace with such powers to make arrests as are given to the conservators of the peace by Statute. (Amended, Ordinance

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No. 2010-03, February 1, 2010) (Amended, Ordinance No. 2009-39, May 18, 2009) (Amended, Ordinance No. 94-70, September 19, 1994) (Amended, Ordinance 2014-38, August 4, 2014)

13. **TERMINATION OF OFFICE.** Every officer or employee of the City, upon the termination of his office or employment, for any cause whatsoever, shall deliver to the Director of his department all property, books, and records which may be the property of the City. Upon such termination of the office of a Director of a department of the City, such property, books and records shall be delivered to the City Manager.

14. **IMPERSONATION.** It shall be unlawful for any person to falsely represent himself or herself to be an officer or employee of the City, or, without being duly authorized by the City, exercise or attempt to exercise any of the duties, functions or powers of a City officer or employee, or to wear in public any uniform, or any badge, patch, device or other insignia, identical with or substantially similar in appearance to those worn by the officers or employees of any department of the City as their official uniform or insignia. Any person violating this section shall be fined not less than Two Hundred Fifty Dollars (\$250.00) nor more than Five Hundred Dollars (\$500.00) for each offense. (Amended, Ordinance No. 2011-66, October 31)

15. **INTERFERENCE.** It shall be unlawful to interfere with or hinder any officer or employee of the City while he is engaged in the duties of his office or employment. Any person, firm or corporation violating any of the provisions of this section shall be fined not less than Two Hundred Fifty Dollars (\$250.00) nor more than Five Hundred Dollars (\$500.00) for each offense. (Amended, Ordinance No. 2011-66, October 31, 2011)

16. **RETIREMENT AGE.** The retirement age of all members of the Police and Fire departments is hereby fixed at 63 years. Mandatory retirement for additional twelve-month

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periods may be extended by the City Manager where he deems the convenience and necessity of the public service requires such additional service of an individual employee.

17. **WORKER'S COMPENSATION.** All officers and employees of the City, including all members of the Police and Fire Departments of the City, shall be covered by the provisions of the Acts of the General Assembly entitled, "The Workers' Compensation Act" and "Workers' Occupational Diseases Act."

18. **DEMOTION FOR CAUSE.** In addition to the power and authority to discharge or remove or suspend an officer or employee in the classified civil service of the City, the Civil Service Commission shall be, and it is hereby, empowered and authorized to demote, except that no officer or employee in such service who is appointed under the rules and after examination may be demoted except for cause upon written charges and after an opportunity to be heard in his own defense and otherwise in the same manner as is provided for discharge or removal or suspension for a period of more than thirty days.

19. **VOLUNTARY DEMOTION.** In addition to the power and authority to demote for cause as provided in Section 18 hereof, said Commission shall be, and it is hereby, empowered and authorized to demote upon request of the officer or employee in the classified service concurred in by the City Manager. Such request and concurrence shall be in writing filed with the Commission and shall each specify the position to which demotion is requested and concurred in. The request shall be supported by appearance before the Commission wherein the same is personally acknowledged by such officer or employee.

20. **PLACEMENT ON DEMOTION.** Demotion, whether voluntary or involuntary as provided herein, may be to any rank in the promotional order below the position demoted from, if there is such an identifiable order. In the absence of such identifiable promotional order,

demotion shall be to a position of suitable activity and responsibility as may be determined by the Commission upon consultation with the City Manager, provided that no demotion shall result in a transfer between departments except upon the concurrence in writing by the City Manager.

21. POSITION AVAILABILITY. If an employee or officer in the classified service is demoted to a position wherein a vacancy exists in the authorized numbers of such position on the effective date of such demotion, such vacancy shall be filled thereby before certification and appointment from any eligibility register for such position. If such an employee or officer is demoted to a position wherein no vacancy exists in the then authorized number thereof on the effective date of such demotion, said authorized number shall be without further action increased by one until the next succeeding vacancy occurs therein whereupon without further action said authorized number shall be reduced by one, unless otherwise authorized by the City Manager.

22. PROMOTION TO UNCLASSIFIED POSITION.

A. An employee who has been appointed in accordance with the provisions of statute, ordinance and rule to a position in the classified service and who, after expiration of the probationary period attached to said position, if any, is subsequently appointed as authorized by and pursuant to the provisions of law or ordinance, to an unclassified position or office, except Foreman, shall continue to occupy said classified position with the duties of said unclassified position being substituted for those of such classified position. Such person shall remain a member of, and said classified position shall continue to be classified in, the department, force or service in which the same was classified at the time of such subsequent appointment. Seniority and pension rights and civil service status shall not be affected by appointment to an unclassified position and the time served therein shall constitute creditable service in said classified position. In lieu of the compensation and benefits authorized for said classified position and attached

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thereto, the benefits of said unclassified position shall be substituted, whereupon the same shall be considered to be authorized for and attached to that particular classified position continued to be occupied as aforesaid. In the event of such an appointment, the authorized number of the affected classified position, upon the direction of the City Manager, may be increased by one, in which case the vacancy resulting therefrom shall be filled as provided by law or ordinance. Upon resignation or removal from an unclassified position before the termination of occupancy of a classified position the substitution of duties, and of compensation and benefits, shall cease. If at the time such substitution of duties ceases there is a vacancy in the authorized number of the affected classified position or if none is then existent upon the occurrence of the first vacancy thereafter, at the direction of the City Manager the authorized number thereof may be reduced by one and such vacancy eliminated without appointment from any eligibility register. During the continuance of substitution of duties as aforesaid, said classified position may be modified, eliminated or otherwise affected the same, and in the same manner, as if such substitution had not occurred, and an employee or officer may be suspended, demoted, or removed or discharged for cause from the classified service the same, and in the same manner, as if said substitution had not occurred whether the basis thereof arises out of or is connected with the substituted duties or otherwise. (Amended, Ordinance No. 94-70, September 19, 1994)

B. Subparagraph (A) hereof shall be inapplicable to any such employee who remains in an unclassified position in excess of three (3) months, at which time such employee will no longer be entitled to any rights or privileges specified therein nor to any rights arising out of civil service law generally. (Amended, Ordinance No. 95-54, October 30, 1995)

23. APPOINTMENTS FROM ELIGIBLE REGISTERS.

A. Department directors, as appointing officers, are authorized to appoint any candidate for any non-promotional classified position with the City who is placed on the eligible register for such position by the Civil Service Commission, without regard to the rank of said person on such register.

B. With regard to the register of candidates for original appointment to the Police Department, the Civil Service Commission shall strike off names of candidates from said register after they have remained thereon for one (1) year. (Amended, Ordinance No. 2002-03, January 4, 2002)

24. COMMISSION RULES. Except as the provisions of Sections 18 through 23, inclusive, are applicable to the City Manager, the power and authority of the Civil Service Commission to make rules shall apply thereto to carry out the purpose and intent thereof, but no rule contrary to or in conflict with said provisions shall be made.

25. DEFENSE AND INDEMNITY. Except for gross negligence, willful and wanton conduct or criminal misconduct, if any claim or action is instituted against an officer, employee or member of a board, commission or committee of the City, or a former officer, employee or member, based upon an injury allegedly arising out of an act or omission occurring within the performance of the duties on behalf of the City of such officer, employee or member, provided notice of such claim or action is given to the City Clerk within a reasonable time, the City, at it's option, shall do or cause to be done, one or more of the following:

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- (a) Appear and defend against said claim;
- (b) Indemnify such officer, employee or member for the cost and expense of defending against such claim or action;
- (c) Pay any judgment, or indemnify such employee or member for any judgment, based on such claim or action; or,
- (d) Pay, or so indemnify for, the compromise or settlement of such claim or action.

26. **AUTHORIZATION.** The City Manager, and those employees designated by said officer, are authorized to expend Twenty Thousand Dollars (\$20,000.00) or less for single items of personal property, parcels of real property, contracts for professional, technical or expert services or construction contracts, or for matters deemed in the best interests of the City as determined by the City Manager, without further approval of Council, but only if the Council has appropriated sufficient funds for said expenditures. (Amended, Ordinance No. 2012-13; Ordinance No. 2003-47)

CHAPTER 10

CITY MANAGER

1. APPOINTMENT. The City Manager shall be appointed for an indefinite term, and shall be so appointed, or removed, by the Council by ordinance and shall take oath of office as provided by law.

2. ABSENCE OF MANAGER. During the temporary absence of the City Manager from the City, or the temporary inability of said manager to fulfill the duties of said office, the same shall be performed by such administrative officer of the City as may be designated by said manager.

3. AUTHORITY AND RESPONSIBILITY. The City Manager shall be the administrative head of the municipal government and shall be responsible for the administration of all departments thereof, and shall have and exercise all powers and duties of said office as may be provided by law or ordinance, and shall cause the enforcement of all laws and ordinances within the City, and otherwise administer the policies of the City as the same are determined by the Council.

4. ORGANIZATION AND RULES. In order to implement and carry out the powers and duties of said office, the City Manager may cause the various departments of the City to be organized and administered as he may from time to time deem appropriate, and may promulgate and cause to be enforced reasonable rules and regulations, not contrary to law or ordinance.

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5. **COUNCIL MEETINGS.** The City Manager shall attend all meetings of the Council and keep it informed as to the affairs of the City and recommend to it from time to time such action as may be deemed necessary or desirable for the better welfare and interest of the City.

6. **BUDGET AND APPROPRIATION.** The City Manager shall annually cause a budget to be prepared and submitted to the Council and shall cause the annual appropriation ordinance to be so prepared and submitted in time for consideration and enactment by the Council as provided by law. Upon approval by the Council of said budget and appropriation ordinance, and without further action by Council, the City Manager is authorized to approve expenditures in accordance therewith, and also to approve transfers of funds within departments, provided that such transfers do not result in any department or fund expending funds in excess of those approved therefor by Council.

(AMENDED BY ORDINANCE NO. 89-37, April 28, 1989)

7. **LICENSES.** Without prior approval or consent of the Council as to individual licenses, the City Manager may cause the issuance of all City licenses authorized or required by law or ordinance, except local liquor licenses, and except as otherwise provided in this Code or other ordinance, if said manager is, in the manager's discretion, satisfied that such issuance complies with the provisions of law, ordinance, regulation or rule applicable thereto.

8. **ASSISTANT CITY MANAGERS.** There is hereby created the office of Assistant City Manager, the occupants whereof shall be appointed, and may be removed, by the City Manager at will. The Assistant City Managers shall have such duties and responsibilities, and direct and administer such departments, as are assigned by the City Manager and this Code.

(AMENDED, Ordinance No. 2009-39, May 18, 2009)

(AMENDED, Ordinance No. 2000-08, February 21, 2000)

CHAPTER 13
POLICE DEPARTMENT

1. ESTABLISHED. There is hereby created and established the Police Department which shall be so organized and administered as the City Manager shall from time to time direct, and which shall consist of the Police Chief and such other officers and employees as the Council may from time to time authorize.

2. CHIEF. There is hereby created the office of Police Chief, the occupant whereof shall be appointed, and may be removed, by the City Manager at will.

3. APPOINTMENTS AND RULES. The Police Chief shall be the Director of the Police Department and shall be the appointing officer of the occupants of all classified positions assigned to said Department, and 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 thereof, subject to the direction and control of the City Manager.

4. DEPARTMENT DUTIES AND RESPONSIBILITIES. The Police Department shall, under the direction and control of the City Manager, have the following duties and responsibilities:

- (a) To preserve the peace, order, safety and cleanliness of the City;
- (b) To enforce the laws of the State and the ordinances of the City;
- (c) To protect the rights of persons and property;

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(d) To take notice of all nuisances and to cause steps to be taken for the abatement thereof;

(e) To control traffic on the streets and public ways and encourage the safety thereof;

(f) To serve process in actions for violation of ordinances; and,

(g) To perform such other functions and duties as may be assigned from time to time by the City Manager.

5. **AUXILIARIES.** Under the direction and control of the City Manager, auxiliary police, in number from time to time authorized by the Council, may be appointed by the Police Chief, and such appointees may be removed by said Chief at will.

6. **APPOINTMENT.** Before any such auxiliary policeman is so appointed an investigation of the character and reputation of the candidate for appointment of such depth and scope as shall be deemed sufficient by the Police Chief shall be made. Prior to such appointment of any auxiliary policeman his fingerprints shall be taken and no person shall be appointed as such auxiliary policeman if he has been convicted of a felony or other crime involving moral turpitude.

7. **QUALIFICATIONS AND LIMITATIONS ON DUTIES.** Such auxiliary policemen shall not be members of the regular police department of the City and shall not supplement members of the regular police department in the performance of their assigned and normal duties except as otherwise provided in this chapter or as provided by applicable statute. Auxiliary policemen shall reside within the corporate limits of Macon County and within fifteen (15) miles of the corporate limits of the City of Decatur. The uniforms and identification symbols worn by such auxiliary policemen shall be different and distinct from those worn and used by members of the regular police department which uniforms and symbols shall be selected by the Police Chief. Auxiliary policemen shall at all times during the performance of their duties

FILED

MAY 06 2016

LOIS A. DURBIN
CIRCUIT CLERK

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

BRADLEY L. SWEENEY,
Plaintiff,

v.

CITY OF DECATUR,
Defendant.

No. 2016-L-18

DEFENDANT'S COMBINED MOTION TO DISMISS VERIFIED AMENDED
COMPLAINT PURSUANT TO 735 ILCS 5/2-619.1

Now comes the Defendant, City of Decatur, by its attorneys, Featherstun,
Gaumer, Postlewait, Stocks, Flynn & Hubbard, and for its Combined Motion to Dismiss
Verified Amended Complaint Pursuant to 735 ILCS 5/2-619.1, states:

I. 2-615 MOTION

A. Count I of the Verified Amended Complaint should be dismissed for failure to state a clear mandate of public policy undermined by the discharge of the at-will employee. The determination whether (a) a clearly mandated policy exists and (b) whether the discharge undermines that policy, are questions of law for the Court to decide. *Turner v. Memorial Medical Center*, 233 Ill.2d 494, 501 (2009). Plaintiff raises issue with three (3) alleged acts by Defendant [Para. 29] violating policies alleged at Paragraph 30 of the Complaint. The clearly mandated policy element to the common law claim fails for one or more of the following reasons:

1. The alleged Paragraph 29(a) disclosure by Plaintiff is alleged to have been in furtherance of three (3) policies to wit: (a) enforcing the State's Criminal Code and Ethics Regulations; (b) furthering investigation of a crime within a Police Department; (c) preventing private use of public resources under the Illinois Constitution.

(i) The policy set forth in the Illinois Criminal Code at 720 ILCS 5/33-3(c) does not support a retaliatory discharge claim. *Fellhauer v. City of Geneva*, 142 Ill.2d 495, 507 (1991). Plaintiff's anticipatory memorandum seeks to distinguish *Fellhauer*. However, the distinctions are not dispositive. The holding that recognition of a claim for retaliatory discharge is not necessary to vindicate the public policy underlying §33-3 of the Criminal Code was not dependent upon the subsequent review of the discharge by the mayor. *Fellhauer*, 142 Ill.2d at 507. The Court in *Fellhauer* found that compelling circumstances to recognize retaliatory discharge were absent prior to any consideration of the distinguishing factors argued by Sweeney in his memorandum. See: *Fellhauer*, 142 Ill.2d at 508. The strongest indication that the portions of the *Fellhauer* opinion upon which Sweeney relies were not necessary or dispositive is that the discussion was prefaced with the term, "moreover . . ." which indicates that the discussion was merely additional and not necessary to the determination. See: *Fellhauer*, 142 Ill.2d at 508. Finally, distinguishing *Fellhauer* on the basis of the subsequently enacted Whistleblower Act does not operate to expand the scope of the common law tort. See: *Sardiga v. Northern Trust Co.*, 409 Ill.App.3d 56, (1st, 2011). (Act does not interfere with the common law regarding retaliatory discharge.)¹

(ii) The allegations regarding the State Officials and Employee's Ethics Act [Para. 10(d) and Para. 30] are nonspecific [*Turner*, 233 Ill.2d at 505 (mere citation to statute insufficient)] and inapplicable to the City Manager as an enforceable state law.

¹ The sponsor of the Whistleblower Act in the Illinois House of Representatives explained that the intent of the statute was to codify the common law of retaliatory discharge. See: *Riedlinger v. Hudson Respiratory Care, Inc.*, 478 F.Supp.2d 1051, 1055 (N.D. IL, 2007); also see: *Sutherland v. Norfolk Southern Ry. Co.*, 356 Ill.App.3d 620, 624 (1st, 2005) (FN 4).

For example, 5 ILCS 430/10-10, Gift Ban, is applicable only to state employees. The prohibitions of 5 ILCS 430/5-15 are applicable only to state employees and no facts indicative of prohibited political activity are alleged.

(iii) The alleged policy to further investigation of a crime *within* a police department is not applicable to Gleason. Gleason is not a member of the Decatur Police Department. Moreover, Sweeney does not allege that he disclosed information for purposes of initiating an investigation against himself or any investigation against an officer subject to the Police Department policies. Also, Sweeney had the pre-existing duty to conduct investigations within the Department. There is no valid policy reason to incentivize one to do what he already is obligated to do.

(iv) The determination whether an expenditure is private or public does not invoke clearly mandated policy of statewide concern. Recognition of local public spending disputes as clearly mandated policy of statewide concern triggers judicial encroachment into local legislative/executive functions regarding the expenditure of public funds. Exhibit #2 to the Amended Complaint reposes the Police Chief with the power to authorize the use of Police Department vehicles outside city limits. [See: Ex. 2, §I.A.6 and §II.A.] The Complaint alleges that Sweeney allowed the transport and is nothing less than the tacit authorization of the vehicle's use under Exhibit 2.

(v) The Court is required to balance competing interests and public policies. *Turner v. Memorial Medical Center*, 233 Ill.2d at 502. Plaintiff concedes that he allowed the use of the police car for the transportation of the City Manager from an event directly related to the City Manager's duties (a public purpose) to an airport for purposes of

attending a pre-arranged personal event.² If the Court assumes, for purposes of this Motion only, that Sweeney, in good faith, believed that the transportation was a violation of law or policy, then the fact that Sweeney allowed the transportation makes him accessory to the conduct for which he complains. Sweeney was obligated under state law to enforce state law and city ordinances. 65 ILCS 5/11-1-2. City of Decatur Departmental Regulations mandated that Sweeney refuse to follow an unlawful order and reposed Sweeney with the discretion to approve or disapprove the transportation [Police Department General Order(s) 16-09, II.A.1, H, I, IV.A; Am Complaint Ex. 2, §§ I.A.6 and II.A.] The policies related to the Chief of Police are designed specifically for the enforcement of laws and should not be subordinated to policies allegedly supporting his cause of action. Public policy cannot embrace circumstances where a Chief of Police can cast a blind eye to the laws, which he is charged to enforce, for his own benefit, or the benefit of another.³

The legal question presented is whether by recognizing a cause of action in favor of Sweeney does the Court undermine clearly mandated policy Sweeney was obligated to protect in his unique position as the Police Chief. Here, accepting Sweeney's allegations, the Court is presented with a choice that public policy is undermined by whatever ruling the Court makes. Thus, the cause of action should not be recognized. In this respect, "it

² Public official attendance at non-government meeting serves public purpose which is not defeated because personal benefit also received. *Webb v. Rock*, 80 Ill.App.3d 89, 897 (4th, 1980). If the expenditure has a public purpose, then the fact that there are benefits to private interests does not cause the expenditure to offend IL CONST. ART. 8, §1. *In Re: Marriage of Lappe*, 176 Ill.2d 414, 36-37 (1997).

³ Sweeney only could have "involuntarily allowed" the violation of law or policy for the benefit of Gleason or, his own benefit. A fair reading of the Complaint shows that Sweeney placed his concern in his own job/relationship with the City Manager above his professional obligations as Chief of Police. Sweeney's self-serving decision to allow the transportation is not consistent with the public policy manifest in recognition of the retaliatory discharge tort and/or whistleblower legislation. The party who discloses, placing their job at risk, is protected for making the disclosure or preventing an act wholly within their control to prevent.

would be contrary to public policy for Courts to relieve a citizen of the consequences of his act in violating the law or his duty to society, and it cannot be any defense that someone else either assisted in the offense or commanded him to do it. *Hubert v. Consolidated Medical Laboratories*, 306 Ill.App.3d 1118, 1126 (2d, 1999).⁴ The refusal to aid a Plaintiff derives not from the consideration of the Defendant, but, from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of government. *Id.* at 1125-26. The foregoing public policy reflects society's interest in preserving integrity of courts and heavily tips the balance in support of dismissal.

Another clearly mandated policy in Illinois is the importance of giving employers the ability to decide who will work for them. *Fellhauer*, 142 Ill.2d at 509. The general rule in Illinois is that an at-will employee can be fired for any reason or no reason. *Turner v. Memorial Medical Center*, 233 Ill.2d 494, 500 (2009). The policy in the State of Illinois is that these interests also are considered in the balancing performed by the Court in determining whether a clearly mandated policy is undermined by the discharge. *Collins v. Bartlett Park District*, 2013 Ill.App.(2d) 130006 ¶40. In this case, the proper balance, after considering all of the policies and interests at issue, supports dismissal of the Verified Amended Complaint.

⁴ Sweeney's anticipatory memorandum seeks to distinguish *Hubert* on the contention that the policy therein expressed is applicable only to cases in equity. First, *Hubert* is a retaliatory discharge action. Secondly, the policy in *Hubert* existed even though it was not pleaded as a defense. "Courts will take judicial notice that the cause of action is based on whole or in part upon an immoral or illegal transaction regardless of the fact that such defense is not pleaded." *Hubert*, 306 Ill.App.3d at 1126. Finally, *Hubert* states policy for consideration in the Court's balancing of interests and evaluation whether discharge undermined a clear mandate.

B. Counts I and II of the Verified Amended Complaint should be dismissed because there is no whistleblowing activity alleged.

1. The content of the "disclosure" is insufficient to state a claim. Plaintiff's alleged content for the "disclosure" was to say: "... use of a police car and driver for his personal purposes was improper." [Para. 16, Counts I and II] Sweeney does not allege that he ever disclosed any state law, city policy or other information that identified the violation.⁵ Absent the disclosure of the law or rule violated, the concept of whistleblowing is expanded into an ill-defined duty of further inquiry on the part of the individual receiving the opinion of "improper" use. Accordingly, the alleged content of the disclosure was insufficient to satisfy the requirement that the information *disclose* a violation of state or federal law (Count II) or a clearly mandated public policy (Count I). Plaintiff's Complaint seeks to expand the scope of the statutory language and extend the recognized limits for the common law claim. However, the tort is a very narrow exception to the general rule that at-will employees may be terminated for any or no reason. *Turner v. Memorial Medical Center*, 233 Ill.2d 494 (2009).

2. The recipient for the "information" (Gleason) does not qualify for a disclosure under the Act. §15 of the Whistleblower Act requires the disclosure of information showing a violation of state or federal law. No case or reported decision addresses, specifically, a situation where the disclosure is made to the alleged violator,

⁵ Close scrutiny of the Verified Amended Complaint is replete with nonspecific reference to the content of any disclosure. At Paragraph 37, the information is conclusorily identified as "certain information." At Paragraphs 28 and 39, the content of the information is not defined. The only inference to be drawn in favor of Sweeney is that he claims actual knowledge of the state law violations (he alleges a good faith belief at the time) but he withheld the disclosure of that information from Gleason. Again, the withholding of information from the disclosure is not consistent with the policy for which the tort or statutory remedy exists.

who happens to be a government official.⁶ However, disclosure to the violator does not satisfy the definition for "disclosure." Disclosure is defined as: "Act of disclosing. Revelation; the impartation of that which is secret or not fully understood." Black's Law Dictionary, 531 (9th Ed. 2009); *Williams v. OSF Healthcare Systems*, 2015 Ill.App.(3d) 120450 ¶13. Here, there has been no revelation. Here, there has been no impartation of that which is secret or not fully understood.

There is compelling rationale for excluding an individual violator from the class of recipients for a qualified whistleblowing disclosure. When the claimed whistleblower tells only the violator, the disclosure is indistinguishable from a threat or act of intimidation. When only the violator is told, the violation of law remains a secret. The "disclosure" then exists as a tool for the claimed whistleblower to use against or to leverage the violator. The claimed whistleblower's decision not to disclose to a person or entity other than the violator does not support the whistleblower's intent to call the conduct to the attention of authorities for purposes of taking action or addressing the alleged violation of law. The purposes of the statute are not served when a claimed whistleblower is insulated from accountability for a greater or, minimally equal, mischief of intimidation, coercion or other misconduct or as a permanent employment insurance policy. Societal interests are not well-served in such circumstances. The whistleblower statute should not be construed in a manner that yields unjust, absurd or unreasonable consequences. See: *Mulligan v. Joliet Regional Airport*, 123 Ill.2d 303, 312-13 (1988).

⁶ In *Brame v. City of North Chicago*, 2011 Ill.App.(2d) 100760, the Court held that if the whistleblower's employer was a government official/law enforcement agency, the report to the whistleblower's employer would meet the requirements of the statute. However, the sole recipient of the disclosure was not the violator. In *Riedlinger v. Hudson Respiratory Care*, 478 F.Supp.2d 1051 (N.D. IL, 2007), the disclosure to an employer who was not a government employer/law enforcement agency did not satisfy the Whistleblower Act.

Construing the Act to allow the violator to be the qualifying recipient for the disclosure enables absurd, unjust and unreasonable consequences offensive to the Act.

3. Sweeney is not entitled to protection under the Whistleblower Act because he allowed the very conduct for which he complains. *Sardiga v. Northern Trust*, 409 Ill.App.3d 56 (1st, 2011). The intent of the Act is to protect those who act in a manner to bring attention to the violation. The alleged May 4, 2015 "disclosure" was in the nature of a §20 refusal to participate in a future violation. However, Sweeney alleges he allowed the transport to occur thereafter. §15 of the Whistleblower Act cannot be applicable to a violation which has not occurred. The violation of state law, if any, [only improper conduct was alleged] could not have taken place until May 7, 2015. Only the May 11, 2015 alleged whistleblowing disclosure could fall under §15. Similarly, the participation in the alleged unlawful act is not protected by the Whistleblowing Act for one or more of the reasons set forth above. [See Part A above]

C. Allegations regarding First Amendment Rights fail to state a claim.

At Paragraph 29(b) and (c), Sweeney alleges retaliation in response to (a) a refusal to make a statement at the City Council meeting regarding the motor fuel tax, [Para 19]; and, (b) statement in opposition to increasing taxes when he believed other sources of "income" were available to the City at a meeting of City Department Heads at the Civic Center [Para. 22]. The foregoing allegations are applicable to Count I, only, and do not support a remedy under the Whistleblower Act (Count II). The allegations fail to state a claim for one or more of the following reasons:

1. The facts alleged show that Sweeney was not speaking as a citizen at the City of Decatur Department Head meeting – a meeting not open to the public. The

occasion for the speech was an internal meeting of city management. As such, the First Amendment does not insulate the communication from employer discipline. *Garcetti v. Ceballos*, 547 US 410, 418-23 (2006).

2. The alleged assignment to speak in support of City staff recommendations at the City council meeting would be a request for support promoting his employer's mission in the employee's professional capacity. Supervisors have an interest in promoting the employer's mission. *Garcetti v. Ceballos*, 547 US 410, 418-23 (2006). An employer has heightened interest in controlling speech made by an employee in his professional capacity. *Id.* Official communications have official circumstances creating a need for substantive consistency and clarity. *Id.* The alleged request was an assignment from City Manager to the Police Chief regarding revenue sources for the funding of City operations, a duty of the Police Chief under the City Code, Chapter 13, §4(g). [See attachment 3, Gleason Affidavit – supports Judicial Notice of City Ordinance].⁷ Sweeney's alleged refusal to speak is not protected under the factual circumstances alleged.

3. Consistently, the Supreme Court has sought to restrict the common law tort of retaliatory discharge. *Sutherland v. Norfolk Southern Ry. Co.*, 356 Ill.App.3d 620, 625 (1st, 2005). In no instance has the Supreme Court expanded the tort to encompass discharge for the exercise of the right of free speech. *Id.* at 625, FN 5 [citing: *Barr v. Kelso-Burnett*, 106 Ill.2d 520 (1985).]

⁷At Paragraph 22 of the Verified Amended Complaint, Sweeney acknowledges that the issue of City revenue was appropriate for his input at the department head meeting. On the other hand, he suggests that city revenues have no connection with his public duties. The City Code identifies the Police Chief's duties as . . . (g) to perform such other functions and duties as may be assigned from time to time by the City Manager. Chapter 13 City Code, §4(g). Moreover, the Police Department does require City revenue.

D. Causation is defeated by the allegations of the Amended Verified Complaint.

1. The element of causation is not met if the employer has a valid basis, which is not pretextual, for discharging the employee. *Hartlein v. Illinois Power*, 151 Ill.2d 142, 160 (1992). *Collins v. Bartlett Park Dist.*, 2013 Ill.App. (2d) 130006 ¶31. Effectively, the protected conduct must be the sole (or direct) cause for the retaliation. Here, Sweeney alleges First Amendment grounds for termination and a whistleblower basis for termination. If either fails to state a cause of action, then the legally deficient basis stands as a non-pretextual (non-protected) cause for termination which defeats a retaliatory discharge claim, common law or statutory. If any one or more of the activities alleged by Sweeney are not protected, then causation fails.

2. Sweeney's own factual construct, that is, following what he thought was an unlawful order, is a dischargeable act. See: Defendants' Supplement to Combined Motion to Dismiss pursuant to 735 ILCS 5/2-619.1, Police Department General Order(s), 16-09. Thus, the City would have a valid, non-pretextual basis to discharge under the facts alleged in the Verified Amended Complaint.

3. The last alleged whistleblowing activity was May 11, 2015 and discharge nine (9) months thereafter. The intervening employment renders the alleged whistleblow too remote to satisfy causation. The remedy effectively requires direct causation. The discharge, as a matter of law, fails to satisfy principles of cause in fact or legal causation given the remoteness of the discharge to the underlying basis for the alleged retaliation.

E. In the alternative to dismissal of action, the following should be stricken:

1. Paragraph 27 of Counts I and II of the Verified Amended Complaint and Exhibit 6 should be stricken. IDES Determination Letter is a confidential document and inadmissible in a civil proceeding. 820 ILCS 405/1900(A) and (B); *Clemons v. Mechanical Devices Co.*, 292 Ill.App.3d 242, 53-54 (4th, 1997); *Lowrance v. Marion Pepsi – Cola Bottling Co.*, 221 Ill.App.3d 623 (5th, 1991). In fact, a violation of the statutory confidentiality is a Class B misdemeanor. See: 820 ILCS 405/1900(C).

2. Paragraph 25 of Counts I and II of the Verified Amended Complaint and Exhibit 5 should be stricken because the allegation and exhibit do not constitute ultimate facts necessary to state the cause of action. The allegations are surplusage and the pleading of irrelevant matter. Exhibit 5 is remote and unrelated to the Plaintiff's position as Police Chief.

3. Paragraph 22 of Counts I and II of the Verified Amended Complaint should be stricken because said communication at the meeting of department heads is not protected speech. [See this Motion, Part C. above.] Further, the allegation is immaterial to Count II.

4. Subparagraph 29(a) of Counts I and II of the Verified Amended Complaint should be stricken for the reasons stated at Part A and B above.

5. Subparagraph 29(b) of Counts I and II of the Verified Amended Complaint should be stricken for the reasons stated at Part A and C above.

6. Subparagraph 29(c) of Counts I and II of the Verified Amended Complaint should be stricken for the reasons stated at Part A and C above.

7. Paragraph 13, including more particularly, the second sentence and thereafter should be stricken as irrelevant surplusage. Gleason's belief is not the ultimate

fact at issue. The proper inquiry is Sweeney's good faith belief. Further, the content of Exhibit 2 is misstated. When the allegations of a Complaint conflict with the content of an exhibit, the content of the exhibit prevails. *Gagnon v. Schickel*, 2012 Ill.App. (1st) 120645 ¶18. In this respect, Exhibit 2 provides that the Police Chief is reposed with the discretion to determine when an out-of-city use of vehicle has an allowable business use. [Ex. 2. I.A.6 and II.A] The Exhibit is inconsistent with the allegation that "under no circumstances" will a vehicle be used outside City limits. The allegations of the Complaint are that Sweeney allowed the use of the vehicle outside City limits.

8. Paragraph 14 of Counts I and II of the Verified Amended Complaint should be stricken as surplusage, the pleading of evidence and not ultimate facts related to the alleged cause of action.

9. Paragraph 15 of Counts I and II of the Verified Amended Complaint should be stricken as surplusage, the pleading of evidence and not ultimate facts related to the alleged cause of action.

10. Paragraph 11 of Counts I and II of the Verified Amended Complaint should be stricken as immaterial pleading of conclusions and not ultimate fact to support the cause of action. More particularly, the relevant knowledge of Gleason arises from the "information disclosed" by Sweeney to Gleason. Scrutiny of the pleading shows that Sweeney never disclosed to Gleason that Sweeney believed that Gleason's actions violated state law or any policy. The relevant inquiry is what did Sweeney disclose, not what Gleason may have concluded upon a duty of further inquiry based upon information obtained from sources other than the whistleblower's disclosure.

11. Portions of Paragraph 12 of Counts I and II of the Verified Amended

Complaint should be stricken to the extent the allegations plead a legal conclusion that the use of the City vehicle was an unlawful personal use of public resources. The allegations of the Complaint are limited to an opinion that the use was improper but no facts are alleged that the use exceeded the lawful authority of Gleason, Sweeney or Getz. [See: FN 2, infra.]

12. Subparagraph 10(a) of Counts I and II of the Verified Amended Complaint should be stricken for one or more of the reasons set forth at Paragraphs I.A.1.(i) above.

13. Subparagraph 10(b) of Counts I and II of the Verified Amended Complaint should be stricken for one or more of the reasons set forth at Paragraphs I.A.1.(iii) of this Motion above and to the extent that the allegations misstates the content of Exhibit 2. [See Para. I.A.1.(iv) of this Motion above]

14. Subparagraph 10(c) of Counts I and II of the Verified Amended Complaint should be stricken for the reasons set forth at Paragraphs I.A.1(ii) above.

15. Subparagraph 10(d) of Counts I and II of the Verified Amended Complaint should be stricken because the allegation is non-specific and the provisions of the alleged statute are not applicable to the City Manager, a non-state employee.

16. Subparagraph 10(e) of Counts I and II of the Verified Amended Complaint should be stricken for the reasons set forth at Paragraphs I.A.1(iv) and FN 2 above.

17. That portion of Paragraph 7 of Counts I and II of the Verified Amended Complaint relating to the May 4 alleged communication by Sweeney to Gleason should be stricken because the alleged conduct does not relate to the disclosure of an act that

violated (past tense) state law or policy. Further, construed most liberally in favor of Sweeney, the communication only could implicate participation in a future act that allegedly violated state law or policy. Sweeney's allegation that he participated, voluntarily or involuntarily, does not satisfy the requirement that Sweeney refused to act. Further, those portions of Paragraph 7 related to the May 11, 2015 communication to Gleason should be stricken for one or more of the reasons set forth in Part of this Motion above.

18. Paragraph 16 of Counts I and II of the Verified Amended Complaint should be stricken.

19. Paragraph 26 of Counts I and II of the Verified Amended Complaint should be stricken as it represents the pleading evidence and not the pleading of ultimate fact.

20. Paragraph 31 of Counts I and II of the Verified Amended Complaint should be stricken because the allegations constitute the pleading of surplusage immaterial to the ultimate facts related to Plaintiff's cause of action.

21. Paragraph 37 of Count II of the Verified Amended Complaint should be stricken in that the Paragraph is non-specific. "Certain information" is not defined, nor does the allegation identify which communications made when are the basis for Count II. A §15 allegation only relates to disclosure of laws violated and not to a refusal to participate in future action.

22. Paragraph 38 of Count II of the Verified Amended Complaint should be stricken because said allegation is non-specific.

23. Paragraph 39 of Count II of the Verified Amended Complaint should be

stricken because the information is not defined. Further, the only alleged disclosure occurred approximately nine (9) months prior to the alleged retaliation. As such, the termination constituting the alleged retaliation is remote and does not support causation.

24. Paragraph 20 of Counts I and II of the Verified Amended Complaint should be stricken because it misstates Chapter 13 of the City Code and constitutes an unsupported legal conclusion. §4(g) of said Chapter 13 includes duties as assigned by the City Manager.

II. 2-619 MOTION

1. Defendant restates and incorporates herein the grounds reserved in its original 2-619 Motion directed against the original Complaint and the supplement thereto as and for a part of its 2-619 Motion against the Verified Amended Complaint.

2. The allegation that Plaintiff allowed the use of City vehicle for the St. Louis transportation provides additional support not set forth in the original 2-619 Motion.

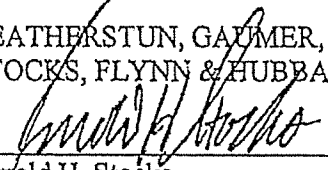
3. The allegations of the Verified Amended Complaint and the unrebutted portions of the Gleason Affidavit establish a cause, other than a retaliatory cause, for the termination of Sweeney's at will employment as Police Chief which defeats the cause of action stated in the Amended Complaint.

4. The discharge was remote from the date of alleged whistleblower and causation fails. Also see Paragraph I.D.3 above.

WHEREFORE, the Defendant respectfully requests that the Court dismiss Counts I and II of the Verified Amended Complaint for one or more of the reasons set forth herein without leave to replead.

CITY OF DECATUR, Defendant,

BY: FEATHERSTUN, GAUMER, POSTLEWAIT,
STOCKS, FLYNN & HUBBARD,

By: 

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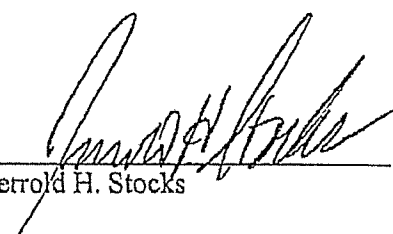
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CERTIFICATE OF SERVICE

I certify that on the 6th day of May, 2016, at 4:00 o'clock p. m., I deposited a copy of the foregoing in a U. S. Post Office Box at 225 North Water Street, Decatur, Illinois, enclosed in an envelope with proper postage prepaid, addressed to the following in the manner set forth: I also sent the same via electronic mail to the following:

E-Mail: jrobinson@brelaw.com
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IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

FILED

MAY 06 2016

BRADLEY L. SWEENEY,
Plaintiff,

v.

CITY OF DECATUR, and TIM GLEASON,
City Manager,
Defendants.

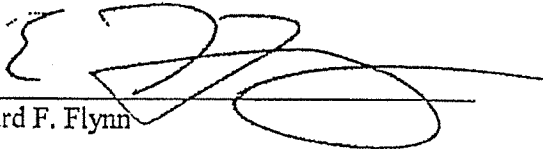
No. 2016-L-18

LOIS A. DUBBIN
CIRCUIT CLERK

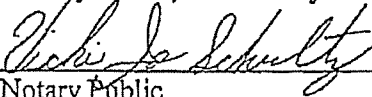
CERTIFICATE OF FILING

Edward F. Flynn hereby certifies that on May 6, 2016, he served a copy of Defendants' Answers to Plaintiff's First Set of Interrogatories and Response to Plaintiff's Request for Production on the following attorneys at their respective addresses, by hand delivering copies of same in an envelope addressed to each at the following addresses:

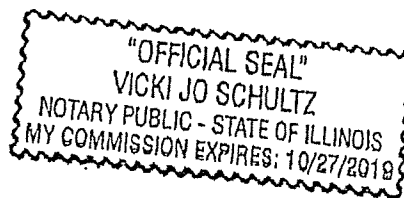
Jon Robinson
Bolin Robinson & Ellis
202 South Franklin St., #2
Decatur, IL 62523
Via hand delivery


Edward F. Flynn

Subscribed and sworn to before me, a Notary Public, this 6th day of May, 2016.


Notary Public

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