

No. 1-13-1804

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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|                      |   |                                 |
|----------------------|---|---------------------------------|
| DAVID SHAKBOUA,      | ) | Appeal from the                 |
|                      | ) | Circuit Court of Cook County    |
| Plaintiff-Appellant, | ) |                                 |
|                      | ) |                                 |
| v.                   | ) | No. 12 L 12377                  |
|                      | ) |                                 |
| CITY OF CHICAGO,     | ) |                                 |
|                      | ) | Honorable Margaret Ann Brennan, |
| Defendant-Appellee.  | ) | Judge Presiding.                |

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PRESIDING JUSTICE SIMON delivered the judgment of the court.  
Justices Neville and Lius concurred in the judgment.

**ORDER**

¶1 *Held:* Dismissal of plaintiff's claims of retaliatory discharge under the Illinois Workers' Compensation Act related to his brother's filing for workers' compensation benefits and whistleblowing was proper where plaintiff did not file a workers' compensation claim, there are no allegations that plaintiff: participated in any workers' compensation proceedings; reported any illegal or improper conduct by defendant; was discharged in retaliation for any reporting of improper conduct, or that plaintiff's discharge violated clearly mandated public policy.

¶2 Plaintiff David Shakboua filed the underlying complaint sounding in two counts for retaliatory discharge under the Illinois Workers' Compensation Act, (820 ILCS 305/1 *et seq.* (West 2010)) (Act), against defendant City of Chicago. The circuit court dismissed the complaint

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on May 7, 2013, with prejudice. Plaintiff appeals, arguing that a brother and coemployee of a workers' compensation complainant who is involved in the investigation should be allowed to file a retaliatory discharge complaint and that plaintiff's failure to participate in a cover-up investigation supports a claim for common law whistle blowing. For the following reasons we affirm the judgment of the circuit court.

¶3

### I. BACKGROUND

¶4 The facts of this case are taken from plaintiff's complaint at law. Plaintiff was hired by defendant in April 2012 as a plumber for the department of water management. Plaintiff's brother, Omar Shakbou, was also employed by defendant as a plumber. However, plaintiff's employment was terminated on July 31, 2012, despite good evaluations from his supervisors.

¶5 On July 2, 2012, Omar and plaintiff were working on a jobsite located at 825 West 50th Street, Chicago, Illinois. At approximately 1:00 p.m. on that day, Timothy Dowdy, the foreman of Omar's crew, was operating a JCB crawler when a slab of concrete fell from the crawler onto Omar. The impact resulted in severe breaks of Omar's leg and ankle.

¶6 Dowdy, who was not authorized or certified to operate that piece of equipment, jumped down to Omar and told him " 'don't say anything about me being in the machine, a lot of people are going to get in trouble for this and that he might lose his job because of it.' " Dowdy continued to implore Omar to say he tripped over concrete and that Dowdy was not in the crawler, but Omar stated " 'I don't want to hurt your career but I'm not saying that I wasn't hit by a piece of concrete.' " Dowdy rode with Omar in the ambulance and was present when Omar was informed he would need surgery.

¶7 No drug tests, accident reports, or witness statements were taken and no supervisor came to see Omar at the hospital. Omar was subsequently contacted by the orthopedic surgeon's office

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advising that if they needed his workers' compensation claim information before he could receive treatment; however, when he contacted the water department office, Omar was told it was unaware of his injury. He was informed that the office did not have a claim on him, but did have a report that Omar had tripped over a piece of asphalt and sprained his knee.

¶8 Omar spoke with defendant's safety department and gave a verbal report. When his report was read back to him, Omar's statement that Dowdy was involved had been removed and the employee told Omar that Dowdy's name was not important to the report. However, several days later, Thoms McMann, superintendent for the operating engineers union, asked plaintiff who was operating the machine when Omar was hurt. Plaintiff responded " 'I don't know who was on the machine, I know as much as you do.' "

¶9 When Omar later contacted the water management office about having plaintiff pick up his paycheck for him, a supervisor asked him why no one had taken his statement. The supervisor told Omar that his foreman, Dowdy, was supposed to take a report. Omar told the supervisor that Dowdy was involved and he responded that this situation had never arisen before and would call Omar back; however, he never returned a call to Omar.

¶10 Hours later, another supervisor, Mulbe Dillard, Jr., called to tell Omar that he would deliver Omar's paycheck to him. Dillard came to Omar's house to deliver the paycheck and discuss the accident. Omar told Dillard what had happened and Dillard became upset and told Omar not tell anyone that Dowdy was involved and there was someone that would say that he was operating the equipment so that the department could take care of everything internally. Omar responded that he would not lie because he did not want to lose his job.

¶11 Dillard left a written report form with Omar and told Omar to fill it out and return it to Dillard. Approximately an hour later, Omar received a telephone call from Dillard who told

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Omar that he spoke with other supervisors and that Omar should not put any names in the incident report as it was not important information for Omar's injury and treatment. Dillard informed Omar that he needed the report on the next Monday, but Omar had surgery scheduled for that day and said he was unsure when he could get Dillard the report.

¶12 On July 9, 2012, Omar had surgery on his leg. That day Omar received five calls on his cellular phone from a supervisor looking for Omar's accident report. Also on that day, plaintiff's supervisor informed plaintiff that he was being relocated to a different crew and job site far from his current location and home. Plaintiff requested to stay at his current location to be close to home so he could assist Omar who was having surgery. The supervisor indicated that the department office made the decision and there was no choice.

¶13 On July 10, 2012, plaintiff reported to his new job location. Dillard was at the location and asked plaintiff if Omar had filled out the accident report. Plaintiff stated that he did not know and that Omar had surgery the day before and was not in condition to complete any report. Dillard told plaintiff to get Omar to complete the report and for plaintiff to bring Dillard the completed report. Plaintiff responded that he did not want to get involved and Dillard again told him to get Omar to complete the form and for plaintiff to bring it to Dillard. Later that day, a superintendent delivered materials to the jobsite and then approached plaintiff with a video camera and interviewed plaintiff about Omar's accident.

¶14 On July 12, 2012, Dillard called Omar five times to ask about the safety report. Omar informed Dillard that he had hired an attorney to handle his workers' compensation claim who was assisting Omar in completing the form. Dillard became upset and asked Omar why he got an attorney before telling Omar that he could not talk to him anymore and another supervisor would

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contact him, which never occurred. Omar never filed an accident report with the water department, but his attorney filed his workers' compensation claim on July 12, 2012.

¶15 On July 26, 2012, plaintiff's fellow crew members asked him what he had done wrong because they had heard he was going to be laid off. Plaintiff was shocked as he had heard nothing about this, but on July 31, 2012, he was told that he was being terminated because he had three bad reviews and was to turn in his identification badge and tools. Plaintiff disputed that he had ever received a poor evaluation, stating that he had reviewed his evaluations with his supervisors and they were all positive. Plaintiff's request to see the poor evaluations was rebuffed. Plaintiff indicated that he was told by his supervisors that he had to sign his evaluations, but plaintiff did not see or sign the affidavits and received no response when he inquired why this did not happen. Plaintiff alleged that standard protocol was not followed for his termination.

¶16 Plaintiff filed the instant complaint alleging two counts of retaliatory discharge under the Act related to his brother's exercise of his rights under the Act and the other for whistle-blowing activities. The trial court dismissed plaintiff's complaint for failure to state a claim because plaintiff had not filed his own workers' compensation claim and made no allegations of advancing any complaints about improper or illegal activity before his termination. This appeal followed.

¶17

## II. ANALYSIS

¶18 Plaintiff argues on appeal that the trial court erred in dismissing both counts for failure to state a claim under section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2010). A motion to dismiss under section 2-615 challenges the legal sufficiency of a complaint based on facial defects of the complaint. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 413 (2004).

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Illinois is a fact-pleading jurisdiction; therefore a plaintiff must allege sufficient facts to bring his claim within the scope of the claims asserted. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009). This court conducts a *de novo* review of a trial court's ruling on the sufficiency of a motion to dismiss. *U.S. Bank National Ass'n v. Clark*, 216 Ill. 2d 334, 342 (2005). While allegations in the complaint are viewed in a light most favorable to the plaintiff, the decision to dismiss a case may be affirmed on any basis contained in the record. *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 196 (1999). This court must determine whether a material issue of fact should have precluded dismissal or, absent a question of fact, whether the dismissal was proper as a matter of law. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-117 (1993).

¶19 Plaintiff advanced two counts for retaliatory discharge in in his complaint under the Act, one related to his brother's exercise of his rights under the Act and the other for whistleblowing activities. Plaintiff notes that a valid claim for retaliatory discharge includes allegations that the plaintiff was (1) discharged, (2) in retaliation for his activities, and (3) the discharge violates a clear mandate of public policy. *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526, 529 (1988). Plaintiff argues that a person who is not the actual workers' compensation claimant may bring a claim where he participates or assists in the claim. *Hester v. Gilster-Mary Lee Corp.*, 386 Ill. App. 3d 1104 (2008); *Pietruszynski v. McClier Corporation, Architects and Engineers, Inc.*, 338 Ill. App. 3d 58 (2003). He adds that the public policy considerations supporting these claims were announced by our supreme court when it recognized the action for retaliatory discharge. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (1978). Plaintiff also argues that these same public policy reasons support his claim for whistleblower retaliation because he refused to participate in what he believed was a violation of the law.

¶20 The *Kelsay* court recognized that the Act was enacted as a comprehensive scheme to provide for efficient and expeditious remedies for injured workers that would be undermined by allowing employers the power to threaten discharge of employees that seek compensation under the Act. *Id.* at 181-82. Therefore, public policy supported a limited exception to the general rule in Illinois that an at-will employee may be discharged at any time; namely, that an employee may file a retaliatory discharge claim if he was fired for seeking workers' compensation benefits. *Id.* at 181-85. Following *Kelsay*, our supreme court applied the tort of retaliatory discharge to a second situation, that of the whistleblower employee. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124 (1981). In doing so, the court noted that "[t]he cause of action is allowed where the public policy is clear, but is denied where it is equally clear that only private interests are at stake." *Id.* at 141. Following this, Illinois courts have consistently and repeatedly affirmed these limited exceptions to the general rule of at-will employment and refused to expand the tort into private and individual grievances, instead confining the scope of retaliatory discharge to the class of cases identified in *Kelsay* and *Palmateer*. See *Pietruszynski*, 338 Ill. App. 3d at 63; *Sutherland v. Norfolk Southern Ry. Co.*, 356 Ill. App. 3d 620, 626 (2005).

¶21 In this case, plaintiff seeks to expand the tort of retaliatory discharge to recognize a claim where the plaintiff was allegedly discharged in retaliation for a third party's exercise of protected conduct under the Act. Plaintiff did not file a workers' compensation claim, his brother Omar filed a claim. Plaintiff did not participate in Omar's claim and was not anticipated to be a witness in any workers' compensation proceeding. In fact, plaintiff's complaint includes allegations that plaintiff did not witness the accident and did not know who was operating the JCB crawler that dropped the concrete on Omar. Plaintiff reported this to the investigating supervisors and denied a request to get an accident report from Omar because he did not want to get involved.

¶22 Unlike this case, where plaintiff has stated he did not witness the accident or have any knowledge of the accident and did not take part in any proceedings under Omar's workers' compensation claims, the plaintiffs in the cases plaintiff relies on for support actually testified on behalf of the injured party. *Pietruszynski* and *Hester* did expand the tort of retaliatory discharge to a third party to the action; however, as defendant notes, both of these cases involved the scenario where the third party actually witnessed the accident, cooperated in the investigation and testified. Quoting *Palmateer*, the *Hester* court noted that "[t]he law would be 'feeble indeed' if it allowed an employer to fire an employee in retaliation for exercising her right and obligation to testify in another employee's workers' compensation case. *Hester*, 386 Ill. App. 3d at 1112 quoting *Palmateer*, 85 Ill. 2d at 133-34.

¶23 We do not disagree that the law would be feeble indeed if retaliatory discharge claims were not extended to protect those that testify in workers' compensation hearings. The fact remains that is not what occurred here and plaintiff did not supply, and cannot supply, any allegations to come within that exception to the clearly stated rule in Illinois that the nature of the retaliatory discharge tort is limited and narrow. Plaintiff failed to allege any facts that would bring his claim within this limited and narrow exception to the general rule of at-will employment and the trial court properly dismissed his claim for retaliatory discharge under the Act.

¶24 Plaintiff's whistleblower claim also fails. Under *Sutherland*, "to be considered a whistleblower, it is essential that during the course of his employment, the employee had actively complained of some aspect of the employer's or coworker's conduct, with such complaints having been made to an outside law enforcement or regulatory authority or to internal company management." *Sutherland*, 356 Ill. App. 3d at 626-27. Plaintiff's complaint contains no

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allegations that plaintiff was dismissed for blowing the whistle on defendant's conduct. In fact, plaintiff failed to allege that he reported any improper conduct to anyone. Plaintiff's complaint only alleges that plaintiff did not witness the accident and, when asked what had happened to Omar, responded that he did not know. Accordingly, plaintiff's admission that he did not witness the accident, did not know anything about the accident, did not refuse to engage in illegal conduct and did not report any illegal conduct supports the trial court's dismissal with prejudice of his whistleblower claim.

¶25

### III. CONCLUSION

¶26 For the reasons stated, we affirm the judgment of the circuit court.

¶27 Affirmed.