2016 IL App (5th) 150531-U

NO. 5-15-0531

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MICHAEL CHATTERTON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 14-L-221
	)	
BEELMAN READY MIX, INC.,	)	Honorable
	)	Andrew J. Gleeson,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's ruling that the plaintiff's retaliatory discharge complaint must be dismissed because the issues raised therein were decided in a previous grievance arbitration is reversed and this cause is remanded; moreover, the plaintiff's complaint is sufficient to allege a cause of action for the narrow and limited tort of retaliatory discharge.

¶ 2 The plaintiff, Michael Chatterton, appeals the ruling of the circuit court of St. Clair County that dismissed, at the pleading stage, his retaliatory discharge claim against the defendant, Beelman Ready Mix, Inc. For the reasons that follow, we reverse and remand for further proceedings.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. For approximately 10 years prior to the commencement of this litigation, the plaintiff worked for the defendant as a truck driver. On March 13, 2014, the plaintiff filed, in the circuit court of St. Clair County, a one-count complaint for retaliatory discharge, wherein he alleged, *inter alia*, that he was discharged by the defendant on October 1, 2013, after he advised the defendant that the dump truck the plaintiff was scheduled to drive was unsafe to operate on public roadways, and that he would not drive it. Specifically, he alleged that the dump truck "lacked proper mirrors" and that the defendant had attempted, unsuccessfully, to remedy the problem with the mirrors by trying "to duct tape mirrors in place on the truck." He acknowledged that he backed the truck in question into a parked vehicle on the defendant's property, damaging the truck, and accordingly was told he was being discharged for negligence, insubordination, and incompetence; however, he alleged the reasons given for his discharge were pretextual.

¶ 5 On April 24, 2014, the defendant filed an answer and affirmative defenses. The defendant denied that the plaintiff was discharged for improper reasons, contending instead that he was discharged "for legitimate and non-retaliatory reasons unconnected to any alleged protected activity by" the plaintiff. The defendant also asserted various affirmative defenses. On April 28, 2014, the plaintiff filed a response to the affirmative defenses, denying them. On May 14, 2014, the defendant filed an amended answer, affirmative defenses, and a counterclaim for damages of $6,872.22, for costs the

defendant alleged were incurred to repair the damaged dump truck. Each party filed additional documents not relevant to this appeal.

¶ 6 Thereafter, on October 24, 2014, the defendant filed a motion for leave to file its third amended answer and to file a supporting memorandum, which subsequently was granted, over the objection of the plaintiff, by the trial court. In the third amended answer, the defendant alleged, *inter alia*, that the doctrines of *res judicata* and collateral estoppel barred the plaintiff's claim, "because the cause of action presented in [the plaintiff's complaint] was presented, fully litigated by the parties to this lawsuit or their privies[,] and finally ruled upon in favor of [the defendant] in a final and binding arbitration heard by Arbitrator Suardi."

¶ 7 On March 6, 2015, the defendant filed a motion for summary judgment and a supporting memorandum, wherein it alleged that it was entitled to judgment as a matter of law because the doctrines of *res judicata* and collateral estoppel barred the plaintiff's complaint, for the reasons alleged above. Therewith, the defendant filed a number of exhibits, including, *inter alia*, copies of: (1) the grievance form filed by the plaintiff following his discharge; (2) the collective bargaining agreement (CBA) between the plaintiff's union (styled in the CBA as "Teamsters Local Union No. 50") and the defendant; and (3) the transcript of an arbitration held pursuant to the CBA on May 2, 2014 (the transcript).

¶ 8 Because it is relevant to the issues as framed by the plaintiff on appeal, we will discuss in some detail the contents of the transcript. Prior to hearing witnesses, the assigned arbitrator, attorney Mark Suardi, stated that the parties had informed him that

the issue before him was "whether there was just cause for the discharge of [the plaintiff]," and if there was not, what remedy was appropriate. The parties then gave opening statements, after which witnesses were called.

¶ 9 The first witness to testify was Michael Atchison, plant manager of the defendant's Sandoval, Illinois, facility. Atchison testified that on the morning in question, September 30, 2013, the plaintiff never said anything to him about "mirrors, tape, or unsafe conditions." Atchison testified that had the plaintiff done so, "[w]e would have looked at it and fixed it." He testified with regard to the damage caused to dump truck D2–the dump truck the plaintiff backed into a parked vehicle, a cement mixer, on September 30, 2013–and to the condition of D2 prior to the accident. When shown a photo of the truck, he testified that there was "a piece of tape" on a mirror, but that he could still see out of the mirror.

¶ 10 Atchison testified that when he arrived at work on September 30, 2013, he began dispatching trucks for the day. There were three employees present: the plaintiff, Robert Smith, and Jack McHenry. Atchison testified that of the three, the plaintiff had the least seniority, and that he advised the plaintiff, "when he clocked in, to get in a tandem and go to Mt. Vernon." The plaintiff did not say anything to Atchison, but after clocking in, the plaintiff "jumped up, and started screaming at Kevin." Atchison testified that "Kevin" was Kevin Whipple, the assistant general manager. Atchison testified that the plaintiff screamed at Whipple that "it was discrimination that he had to drive the dump truck." According to Atchison, Whipple told the plaintiff "to get in the dump truck and go to Mt. Vernon. And Mike said, 'I'll play your game,' and he stormed out the–into the shop area."

Atchison testified that the plaintiff did not say anything about mirrors or tape to Whipple either. He testified that it was "starting to light up a little" outside the plant, and that a mixer truck was parked outside. According to Atchison, the plaintiff left the building, and then Atchison "heard the engine fire up on the tandem and went just a few seconds and I heard it barreling out of the shop." He testified that he could not tell the rate of speed of the truck, but that he heard the truck hit a speed bump leading out of the garage very loudly, and that he then heard a bang. He then left the building and saw that the plaintiff "had hit the mixer truck that was sitting out there."

¶ 11 Atchison next testified to safety briefings he had given employees of the defendant, including the plaintiff, and verified a sign-in sheet from a training the plaintiff had attended. He testified that if employees such as the plaintiff had an issue with the safety of a vehicle, the employees were to fill out the inspection book in the vehicle in question. He testified that the plaintiff did not do that with regard to the dump truck. In response to a series of questions from counsel, Atchison testified that even if the mirror in question–the right, or passenger, side mirror–had the problems alleged by the plaintiff, it would not have been a factor in the plaintiff's accident with the parked mixer truck, based upon the position of the dump truck and the mixer at the point of impact. He testified with regard to the extensive damage done to the dump truck, which led him to believe that the plaintiff was traveling "fast" when he hit the mixer, and that had the plaintiff been backing slowly, the accident would not have occurred.

¶ 12 On cross-examination, Atchison acknowledged that on the accident form he filled out at the time of the accident, he did not list "excessive speed" as the reason for the

accident, instead writing that the plaintiff "turned too early and totaled the hood." He also agreed that he only heard, and did not see, the accident. With regard to the placement of the duct tape on the mirror and whether that would have affected the plaintiff seeing the mixer, Atchison testified that "[t]here's 85 percent of the mirror there. He should have seen it." He also denied that because of the tape, the mirror could not be adjusted. He testified that an employee named Bill Williams had taped the mirror, but not pursuant to instruction from Atchison, and that Atchison was not aware the mirror had been taped until after the accident happened.

¶ 13 When asked by counsel for the plaintiff "if the taped mirror was D.O.T., Department of Transportation, compliant," Atchison testified that he had "looked into it and you can–as long as there's so much percent of it, it's legal." He could not recall where he learned this information. He acknowledged that the dump truck did not have a smaller, concave mirror (referred to by the parties as a "sight mirror") on the right side, although it did on the driver's side, and that the truck did not have a backup camera or any other safety equipment or devices to aid a driver in backing it up. He reiterated his direct examination testimony that the plaintiff never mentioned safety issues when complaining to Whipple "that it was discrimination that he had to drive the truck." He testified that "it was probably a total of five minutes" between the time the plaintiff complained to Whipple and the accident. He testified that he had parked the mixer earlier that morning in the position where it was when the accident occurred. He then testified about previous accidents he and other employees of the defendant had been involved in, and whether, and what kind of, discipline had resulted from the accidents.

¶ 14 The next witness to testify was Kevin Whipple. He testified that on the morning of September 30, 2013, he was in the office of the defendant's Sandoval plant when Atchison told the plaintiff to drive the tandem dump truck to Mt. Vernon. Whipple testified that the plaintiff "sat there for a couple of minutes until it was his clock-in time," and then, after clocking in, "got up, and started yelling, instigating an argument with myself that we are discriminating, making him drive the tandem and making him go to Mt. Vernon, suggesting that he would have rather stayed local and ran a mixer." Whipple testified that after "a few minutes" of the plaintiff "screaming and yelling," Whipple told the plaintiff, "numerous times, 'Mike, we just need you to take the tandem and go to Mt. Vernon.' He said, 'I will play your game today.' So he stormed out the door, slammed it, went to the tandem." Whipple testified that the plaintiff was "probably four feet" from Whipple when screaming at Whipple, that the plaintiff's face was "really red, angry red," and that a vein on the plaintiff's neck was sticking out. Whipple testified that while screaming, the plaintiff never mentioned "mirrors or safety or the condition of the truck." He testified that the plaintiff had complained in the past about having to drive a tandem dump truck because the plaintiff "did not want to go to another plant and work."

¶ 15 Whipple testified that after the plaintiff left the building, Whipple "heard the dump truck rev up. And there's a little bump when you come in the door. And I heard the tandems hit that really quick, 'Boom! Boom!' and then we heard a big crash." He testified that although he could not tell the truck's rate of speed, "[i]t was too fast. I couldn't tell specific miles per hour. I could tell that it was a lot faster than anyone should be exiting a building." Whipple testified that when he went outside, he saw that

the tandem had hit the mixer. He testified that ultimately, he was the one who made the decision to discharge the plaintiff, for incompetence. He testified about previous drivers who had been discharged for the same offense. He also testified that after the accident, the plaintiff again yelled at Whipple, asking why the mixer had been parked where it was. Whipple testified that the plaintiff still did not mention the mirrors or the safety of the tandem dump truck.

¶ 16 On cross-examination, Whipple testified that another driver employed by the defendant, Bill Williams, had called him prior to September 30, 2013, to ask permission to "put some tape along the bottom" of the mirror in question because "the mirror was vibrating." Whipple testified that he granted permission, and that after Williams made the repair, Williams told Whipple the truck was " 'in good order, good to drive.' " Whipple testified that Williams told him only that the mirror was vibrating, and did not say it was loose or out of position. He agreed that he only heard, and did not see, the accident, and that the plaintiff passed a postaccident drug screening. He then testified in detail about previous accidents involving other employees of the defendant, and what the consequences of those accidents were. On re-direct examination, Whipple testified that if an employee causes significant damage to a company vehicle, the employee is discharged. Following Whipple's testimony, the defendant rested its case.

¶ 17 The plaintiff then testified on his own behalf. He testified that on the morning of September 30, 2013, he arrived at the Sandoval plant at around 5:35 or 5:40 a.m., as he was scheduled to begin his shift at 6 a.m. He testified that it was dark outside the building, and that "there was no lighting outside on the building." The plaintiff testified

that after Atchison informed the plaintiff that the plaintiff was going to be driving the dump truck that day, the plaintiff went outside and "did a pretrip inspection on D2, and it–the mirrors were–there was [*sic*] no sight mirrors and part of the passenger mirror was taped up." He denied that there was a sight mirror on the driver's side. He testified that he determined that the passenger side mirror could not be adjusted "because it was taped to the frame."

¶ 18 The plaintiff testified that when Whipple told him he had to drive the truck to Mt. Vernon, he told Whipple that it was not safe to do so, but that Whipple ordered him to do it anyway. He testified that he told Whipple that he would drive it if Whipple got parts for it and they installed a new mirror on it. He testified that Whipple responded by telling him to get in the truck and drive it to Mt. Vernon. The plaintiff testified that he again refused, and that Whipple then told him to go move it out of the way, "because it was blocking everybody's point of view to use their trucks." He testified that he then went to the shop area and "looked out the door" to see what was out there. He testified that normally, trucks are backed into the shop area, but the dump truck was parked so that he had to back it out of the shop.

¶ 19 The plaintiff testified that he had to "rev up the truck because it had transmission problems so it wouldn't build air." He testified that because of the problems, he had to back out in "granny low." He testified that he used the passenger side mirror as well as possible, but that "the front clip of the truck caught on the metal mixer bumper." He testified that it was just before 6 a.m., and that it was "pitch dark outside." Using a website weather printout provided by his counsel, the defendant then verified that sunrise

on September 30, 2013, was at 6:55 a.m. Upon further questioning from counsel, he testified that in "granny low" gear in reverse, he could only go "[o]ne, two miles an hour."

¶ 20 The plaintiff testified that after he hit the mixer, Atchison came outside and said that Atchison had moved the mixer, and that Whipple came outside and told the plaintiff "to go shovel rock," which he explained was "the consequences [*sic*] for not doing what Kevin says." He denied that he screamed at Whipple, or was aggressive toward him. He testified about other accidents involving employees of the defendant, and what the consequences of those accidents were.

¶ 21 On cross-examination, the plaintiff maintained that the problems with the passenger side mirror were the cause of the accident with the mixer, and that although light came from the shop outdoors, it was still too dark to see anything where he had to back up. He reiterated that once he backed out, he could not see the mixer, despite its large size. He disputed the idea that because it was the hood of his truck that made contact with the mixer, he could have seen the mixer without the mirror, simply by looking out the passenger side window or front window, testifying that he was not looking that direction, but was instead using his driver side mirror, and that he was turning while backing, not backing straight up. The plaintiff testified that he did not note the problem with the mirror in his truck's inspection book because he usually did his inspection book at the end of the day, not the beginning, and that waiting until the end of the day to do the inspection book was the acceptable practice within the company. He

acknowledged that he had signed a safety briefing sheet that explicitly stated that employees were to "[r]epair any problem before taking the vehicle on the road."

¶ 22 Counsel for the defendant then asked the plaintiff about the present retaliatory discharge suit filed against the defendant. Counsel for the plaintiff objected, noting that the attorneys present for the plaintiff for the arbitration were "not his litigation counsel" and that the plaintiff should not be "questioned about a lawsuit without his litigation counsel present." The arbitrator allowed the lawsuit into evidence, but did not allow additional questions about it. Subsequently, as cross-examination continued, the plaintiff was asked what difference it made if the passenger side mirror was not functional, if it was too dark for him to see what was behind him anyway. He did not provide a direct answer, but maintained over the course of several answers that the mirror was related to the accident. The arbitrator eventually instructed the parties to move on. On re-direct examination, the plaintiff testified that Atchison had not told him prior to the accident that Atchison had parked the mixer where it was parked.

¶ 23 The next witness to testify on behalf of the plaintiff was Bill Williams, another driver employed by the defendant. He testified that he had observed previous problems with the passenger side mirror on dump truck D2, in that the mirror "would blow out of position," and that he had used duct tape to repair the mirror. He testified that Kevin Whipple had given him permission to tape the mirror. When asked if the tape blocked part of the mirror, Williams testified, "[i]t's going to block some of it, but not to a great extent." He testified that one could not adjust the mirror "for height" with the tape on it. He noted that although he only taped the mirror once, when he did so he had to remove

tape that was already there, and testified that he did not know when the original tape was placed on the mirror.

¶ 24 On cross-examination, Williams testified that when he arrives at the defendant's plant to work at 6 a.m., there are lights on the outside of the building, and that light spills out of the garage to the outdoors. He agreed it would be "fair" to say that the previous tape had been on the mirror for at least a month, based upon the stickiness it had lost. He testified that dump truck D2 had a transmission problem that prevented one from shifting into low gear in reverse, instead requiring the truck to be in high gear in reverse. He testified that the problem increased the speed at which the truck could be backed up, rather than limited the speed, and agreed that dump truck D2 could back up faster than two or three miles an hour. He testified that after placing the duct tape on the mirror, he continued to drive the dump truck because he believed it was safe to do so. He testified that if he had not believed it was safe, he would not have driven it, adding "[i]f I couldn't see on my passenger side, I would not drive that truck." When shown a photograph of the mirror with the tape on it, he agreed that one could still see out of "most" of the mirror.

¶ 25 On re-direct examination, Williams testified that on the day he placed the tape on the mirror, he taped it "on the way to Mt. Vernon," then drove the truck in Mt. Vernon the rest of that day without any problems. He testified that because the truck had a toggle shift transmission, if one were backing it up in high gear, one could "back out of that garage in about any speed you wanted from first to fourth." He testified that it was his

opinion that "the light spilled out of the doorway, but I wouldn't say that it necessarily reached where the trucks were parked."

¶ 26 The next witness to testify for the plaintiff was Jack McHenry, another driver employed by the defendant. McHenry testified that he was present at the Sandoval plant on the date of the accident, and that he did not hear the plaintiff tell Whipple, prior to the accident, that the truck was unsafe. On cross-examination, McHenry testified that when Atchison told the plaintiff to take the dump truck to Mt. Vernon, the plaintiff "was aggravated about it" and "told them that that was discrimination." McHenry testified that the plaintiff "got kind of loud." McHenry was unsure how long after the plaintiff left the office the accident occurred. He testified that the mixer truck was parked where he could see it when he arrived that day, and that it was not pitch dark outside, but instead was "fairly daylight."

¶ 27 Following McHenry's testimony, the plaintiff rested. Arbitrator Suardi took the matter under advisement. Also attached, as an exhibit, to the motion for summary judgment filed by the defendant on March 6, 2015, was a copy of the arbitrator's decision, which was rendered on July 24, 2014. Therein, the arbitrator referenced the transcript, noting the conflicting testimony adduced at the arbitration hearing, and reiterated that the questions before him were: (1) was the plaintiff discharged for just cause, and (2) if not, what remedy was proper?

¶ 28 With regard to the conflicting testimony, the arbitrator found that Atchison, Whipple, and McHenry "*all* stated (credibly) that the [plaintiff] angrily claimed he was being discriminated against when instructed to drive to Mt. Vernon, and that he was

enraged at the time." (Emphasis in original.) The arbitrator also found that the plaintiff's testimony that he attempted to raise safety issues with Whipple "simply is not credible" and was contradicted by Atchison and Whipple "in all respects." With regard to tape on the mirror contributing to the collision between the dump truck and the mixer, the arbitrator found that "[u]nion witness Williams offered solid contradictory testimony that he had no problem with the passenger side mirror, had driven D2 in that condition without incident, and that if he *had* had a problem, he would not have driven D2." (Emphasis in original.) The arbitrator concluded that in his opinion, "D2 was safe to drive on September 30 and [the plaintiff] knew so."

¶ 29 With regard to the facts related to the collision itself, the arbitrator found, *inter alia*, that "[t]he transmission toggle switch on D2 would have allowed [the plaintiff] to back out of the garage at any rate he wished," and that ultimately, viewed in the context of the evidence presented, the plaintiff "acted incompetently when he exited the garage at an excessive rate of speed, a speed sufficient to pose an extreme risk of serious injury to himself or others and to cause the extensive damage and loss of use that happened to D2." He concluded that he was "unconvinced that [the plaintiff] suffered disparate treatment at the hands of" the defendant, and that "there is nothing to suggest, much less prove, that the [defendant's] discharge decision was arbitrary, capricious, unreasonable or discriminatory." Accordingly, the arbitrator denied the plaintiff's grievance.

¶ 30 The plaintiff subsequently responded to the defendant's motion for summary judgment, and a hearing on the motion followed. After the hearing, on June 30, 2015, the trial court entered a written order wherein the court "convert[ed]" the motion for

summary judgment into a "motion to dismiss pursuant to section 2-615," and granted the converted motion. Thereafter, on July 31, 2015, the plaintiff filed a first amended complaint, again alleging retaliatory discharge and alleging that "[t]he arbitration proceeding that resulted from plaintiff's discharge did not determine the motive of defendant in firing plaintiff and the arbitrator did not have the authority to do so under the collective bargaining agreement that governed that proceeding."

¶ 31 On August 31, 2015, the defendant filed a motion to dismiss, pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2014)), the first amended complaint (the complaint) with prejudice. The motion to dismiss alleged that the complaint was barred by the doctrines of *res judicata* and collateral estoppel. On October 9, 2015, the plaintiff filed a response to the motion to dismiss, and on November 25, 2015, a hearing was held on the motion and the response. No testimony was taken at the hearing, but argument was given briefly by each party. Also on November 25, 2015, the trial judge entered a written order that stated, in its entirety, "[d]efendant's 2-619 motion to dismiss is granted. The court further finds there is no just reason to delay enforcement or appeal pursuant to SCR 304(a)." This timely appeal followed.

¶ 32 ANALYSIS

¶ 33 Perhaps anticipating that the defendant, as appellee, would ask this court to affirm the trial court, *inter alia*, on any basis found in the record (see, *e.g.*, *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 418 (2007)), the plaintiff, as appellant, raises as a threshold issue in his brief on appeal the propriety of the complaint with regard to stating a cause of action for the tort of retaliatory discharge. Specifically, the plaintiff contends

on appeal that the complaint is sufficient because the plaintiff's discharge, as alleged in the complaint, "violates a clear mandate of public policy." Developing this argument in more detail, the plaintiff contends that his claim "is a classic public policy, retaliatory discharge claim" because "refusing to operate a truck that a professional truck driver feels to be dangerous to others on the roadway fits squarely within" a matter that strikes "at the heart of a citizen's social rights, duties, and responsibilities" and accordingly is protected by law.

¶ 34 The defendant counters that the Supreme Court of Illinois has repeatedly held that retaliatory discharge is a very "narrow and limited" tort, and that the allegations in the complaint, even when taken as true, are not sufficient to support a cause of action for retaliatory discharge. In particular, the defendant notes that the Supreme Court of Illinois has found to be improper those retaliatory discharge claims that allege "overly broad or general policies" rather than "clearly mandated public policies." Moreover, the defendant contends that, as a factual matter, the truck in question was not "demonstrably unsafe" and was not in violation of any state or federal safety regulation.

¶ 35 In a number of cases, the Supreme Court of Illinois has laid out, in detail, the parameters of the Illinois common law tort of retaliatory discharge. In *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 500 (2009), the court briefly set out the history of the tort, and then reiterated that to state a valid retaliatory discharge claim, "an employee must allege that (1) the employer discharged the employee, (2) in retaliation for the employee's activities, and (3) that the discharge violates a clear mandate of public policy." With regard to what constitutes a clearly mandated public policy, the court

reiterated its previous ruling that " '[t]here is no precise definition of the term,' " but that as a general proposition, " 'public policy concerns what is right and just and what affects the citizens of the State collectively.' " *Id.* (quoting *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130 (1981)). The court noted that public policy " 'is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions.' " *Id.* (quoting *Palmateer*, 85 Ill. 2d at 130). The court also noted that while " 'there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.' " *Id.* at 501 (quoting *Palmateer*, 85 Ill. 2d at 130). That is the case because "numerous decisions of this court have maintained the narrow scope of the retaliatory discharge action." *Id.* As the court pointed out, "the ascertainment of public policy is a question for the courts," and "the existence of a public policy, as well as the issue whether that policy is undermined by the employee's discharge, presents questions of law for the court to resolve." *Id.*

¶ 36 The *Turner* court held that when no clearly mandated public policy is involved, an employer in Illinois necessarily " 'retains the right to fire workers at will.' " *Id.* at 502 (quoting *Palmateer*, 85 Ill. 2d at 130). The court also held that "[a] broad, general statement of policy is inadequate to justify finding an exception to the general rule of at-will employment" in this state, because " '[a]ny 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.' " *Id.* at 502-03 (quoting *Fitzgerald v. Salsbury Chemical, Inc.*,

613 N.W.2d 275, 283 (Iowa 2000)). The court was also concerned that "generalized expressions of public policy fail to provide essential notice to employers" and that a clearly mandated public policy "will be recognizable simply because it is clear." *Id.* at 503. The court noted that " '[a]n employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations.' " *Id.* (quoting *Birthisel v. Tri-Cities Health Services Corp.*, 424 S.E.2d 606, 612 (W. Va. 1992)). As a result, the court held that to avoid being discharged with or without cause, an employee at will must identify "a 'specific' expression of public policy" that has been violated. *Id.* A reviewing court is limited to the well-pled allegations in the complaint when deciding if a complaint is sufficient. *Id.* at 503-04.

¶ 37 The *Turner* court then turned to the complaint at issue in that case, and noted that the complaint alleged two specific sources of clearly mandated public policy: Joint Commission standards (the standards) and the Medical Patient Rights Act (the Act). *Id.* at 504. With regard to the standards, the court held that because the plaintiff's complaint did not "recite or even refer to a specific" standard in support of the plaintiff's allegation, the allegation failed "to set forth a specific public policy" and therefore did "not support a cause of action for retaliatory discharge." *Id.* at 505. With regard to the Act, the court noted that the plaintiff's complaint alleged, very generally, that the Act " 'recognizes Illinois public policy establishing "[t]he right of each patient to care consistent with sound nursing and medical practices." ' " *Id.* The court held that "the mere citation of a constitutional or statutory provision in a complaint will not, by itself, be sufficient to state

a cause of action for retaliatory discharge," because the requirement is that "an employee must show that the discharge violated the public policy that the cited provision clearly mandates." *Id*. The plaintiff's complaint failed to do so. *Id*. at 505-06. To the extent counsel on appeal relied upon a statute not cited in the plaintiff's complaint, argument concerning that statute was deemed forfeited. *Id*. at 506. The *Turner* court concluded that "[b]ased on the narrow scope of a retaliatory discharge action, the general concept of 'patient safety,' by itself, is simply inadequate to justify finding an exception to the general rule of at-will employment" in Illinois. *Id*. at 508.

¶ 38 Against the backdrop of the principles established by the Supreme Court of Illinois in *Turner*, we now consider the plaintiff's complaint. With regard to the clearly mandated public policy allegedly violated by the defendant, paragraph 16 of the complaint alleges that the termination of the plaintiff "was in violation of Illinois Public Policy in that the termination was in retaliation for plaintiff's refusal to operate a dangerous truck on the roadways of Illinois." In paragraph 6 of the complaint, the plaintiff alleges that on the date in question, the plaintiff was assigned to drive a dump truck "that was lacking the requisite mirrors and was in a condition that was dangerous both to persons and property ***." In paragraph 7 of the complaint, the plaintiff alleges that "[t]he mirrors on the dump truck were in violation of the requirements of the State of Illinois Department of Motor Vehicles and in such a condition that it could not be operated on public roadways safely or legally."

¶ 39 In support of these allegations, in paragraph 17, the plaintiff lists, as expressive of the Illinois public policy violated in this case, *inter alia*, the following statutory

provisions that we find relevant to our analysis of whether the complaint sufficiently alleges the tort of retaliatory discharge: (1) "[t]he finding under 625 ILCS 5/12-101 that it is unlawful to drive or permit to be driven a vehicle which is in unsafe condition and a danger to persons and property which does not have the equipment required by chapter 12 of the Illinois Vehicle Code"; (2) "625 ILCS 5/12-502 requiring all motor vehicles to be equipped with rear view mirrors"; and (3) "49 CFR 393.80 requiring trucks and truck tractors to be equipped with two (2) rear vision mirrors."

¶ 40 We note as well that in paragraph 16, the plaintiff alleges that "[a] cause of action for termination of this type has been recognized in *Gaines v. K-Five Construction Corporation*, 742 F.3d 256, 269 [(7th Cir. 2014)]," and quotes a provision of the federal Surface Transportation Assistance Act which prohibits an employer from terminating an employee who "refuses to operate a vehicle because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." See 49 U.S.C. § 31105(a)(1)(B)(ii).

¶ 41 Unlike *Turner*, where the complaint alleged two specific sources of clearly mandated public policy, but with regard to one (the Joint Commission standards) did not "recite or even refer to a specific" standard in support of the plaintiff's allegation, and with regard to the other (the Medical Patient Rights Act) did not show that the discharge violated the public policy that the cited provision clearly mandated, in the case at bar, the plaintiff has cited specific statutory provisions regarding safety and mirrors, and made factual allegations with regard to the violations of those specific statutory provisions and the interplay between those violations and a clearly mandated public policy. Like the

Turner court, we are limited to the well-pled allegations in the complaint when deciding if a complaint is sufficient, and thus must assume these allegations are true. See 233 Ill. 2d at 503-04. Accordingly, we conclude that the complaint sufficiently states a claim for retaliatory discharge, and that the question of the sufficiency of the plaintiff's complaint therefore does not provide an independent ground to affirm the judgment of the circuit court. However, we take no position with regard to whether the plaintiff will ultimately be able to prove his retaliatory discharge claim.

¶ 42 We turn, then, to the question of whether the circuit court erred when it ruled that the plaintiff's retaliatory discharge complaint must be dismissed because the issues raised therein were decided in a previous grievance arbitration. On appeal, the defendant claims, as it did in the circuit court, that the doctrines of *res judicata* and collateral estoppel bar the plaintiff's claim. The plaintiff, on the other hand, points to a case from the Supreme Court of Illinois that the plaintiff claims stands for the proposition–or at the very least the principle–that *res judicata* and collateral estoppel do not bar the plaintiff's claim: *Ryherd v. General Cable Co.*, 124 Ill. 2d 418 (1988).

¶ 43 In *Ryherd*, the Supreme Court of Illinois began its opinion by noting that the case before it raised two questions: (1) whether it should overrule its previous decision holding that federal law does not preempt an employee's retaliatory discharge claim, even if the employee in question is covered by a collective bargaining agreement that would have allowed the employee to grieve the discharge to arbitration; and (2) "whether an employee who actually grieves his discharge claim to arbitration is thereby precluded from seeking to recover in court for retaliatory discharge." *Id.* at 421. For reasons it

would explain in detail, the court stated, "[w]e answer both questions in the negative." *Id*. With regard to the first question, the court pointed out that although a judge and an arbitrator would both have to answer a similar factual question–why the employer discharged the employee–the legal questions to be answered "are entirely different." *Id*. at 428. The court noted that "[o]nce the employer's motive has been determined," a trial judge deciding a retaliatory discharge claim would then have to determine whether the discharge was in contravention of Illinois public policy, whereas an arbitrator would focus on the collective bargaining agreement and the "law of the shop" to ascertain whether the employer's motive constituted the requisite "just cause." *Id*.

¶ 44 With regard to the second question, the court continued to use the language of "preemption," noting that it rejected the idea that an employee could not raise in court a retaliatory discharge claim merely because the employee had already raised the claim in arbitration. *Id*. at 431-34. The court noted that while an arbitrator was certainly competent to determine factual issues underlying a retaliatory discharge claim, an arbitrator nevertheless would have "no competence and, indeed, no mandate to determine whether the motives for the discharge contravene a clearly mandated public policy." *Id*. at 431. The court rejected any approach under which "the ultimate determination of Illinois public policy would be delegated to privately appointed arbitrators," noting that "[t]he danger of such inconsistent and unreviewable private law" militated against what it again termed "preemption." *Id*. at 432. The court recognized the potential criticism "that an employee who subsequently litigates his retaliatory discharge claim is getting a 'second bite of the apple,' " but noted that a grievance and a claim of retaliatory discharge

"are simply not the same 'apple,' " but are instead "different, and fundamentally unrelated, claims." *Id.* The court then noted that the appellee had "not invoked the doctrines of *res judicata* or collateral estoppel." *Id.* The court next reviewed cases from outside of Illinois in which courts considered the issue of collateral estoppel in similar, although not identical, contexts. *Id.* at 432-33. The court reasoned from these cases that because "the right to be free from retaliatory discharge also cannot be waived, it follows that a prior arbitration proceeding can have no collateral estoppel effect." *Id.* at 433. The court noted that a "final consideration" in the court's rejection of "preemption" was that it "would subject the employee seeking to contest his discharge to an invidious and intolerable choice" between grieving the claim to arbitration and litigating the claim. *Id.* at 433-34. In the final paragraph of its opinion, the court stated, "[w]e therefore hold that an employee's prior litigation of a discharge before an arbitrator does not preempt a subsequent claim of retaliatory discharge in a State court." *Id.* at 434.

¶ 45 In this case, the defendant argues that *Ryherd* is not applicable to its contention that the doctrines of *res judicata* and collateral estoppel bar the plaintiff's claim. The defendant posits that another Supreme Court of Illinois case, *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 153-56 (2006), demonstrates that the court believes that arbitration, under certain circumstances, can be an appropriate forum for retaliatory discharge claims. This is certainly true; however, the issue in *Melena* was whether the mandatory arbitration provisions of a dispute resolution program unilaterally implemented by an employer constituted an enforceable contract, binding on the employee (*id.* at 140-41), such that the employee gave up her right to pursue a retaliatory discharge claim in court,

but instead had to pursue it through arbitration. *Id*. at 153-54. Although the *Melena* court referenced *Ryherd*, it specifically noted "that *Ryherd* did not involve the issue of the enforceability of an agreement to arbitrate a statutory claim"–the actual issue before the *Melena* court. *Id*. at 154. Moreover, the *Melena* court's opinion contains no other language that repudiates the *Ryherd* court's analysis of why, as a general proposition, arbitrating a grievance should not preclude bringing a retaliatory discharge claim in court. *Id*. at 153-56. Instead, *Melena* focuses on the issue of whether one may make a valid waiver of a judicial forum for a retaliatory discharge claim. *Id*. at 154. Accordingly, we find *Melena* to be so factually different from the present case that it is not very relevant, or helpful, to our analysis. Nevertheless, we note that the *Melena* court specifically reiterated the holding of *Ryherd*, stating that therein the court had "found that a 'just cause' arbitration hearing could not substitute for a hearing on the question of whether the employee's common law right to be free from retaliatory discharge was violated." *Id*.

¶ 46 Moreover, with regard to *res judicata*, the plaintiff notes that pursuant to *Ryherd*, there can be no *res judicata* preclusive effect in a case such as this one, because one of the requirements of *res judicata*–an identity of causes of action–cannot be found in light of the *Ryherd* court's pronouncement that a grievance and a claim of retaliatory discharge "are simply not the same 'apple,' " but are instead "different, and fundamentally unrelated, claims." See *Ryherd v. General Cable Co.*, 124 Ill. 2d 418, 432 (1988). We agree, and also note that in *Beckman v. Freeman United Coal Mining Co.*, 123 Ill. 2d 281, 286 (1988)–decided just three months prior to *Ryherd*–the Illinois Supreme Court specifically

held that *res judicata* does not prevent an employee from raising a retaliatory discharge claim in court after grieving a discharge to arbitration.

¶ 47 We conclude, therefore, that pursuant to the aforementioned cases of the Supreme Court of Illinois, the doctrines of *res judicata* and collateral estoppel do not bar the plaintiff's claim in this case, and that the circuit court erred when it granted the defendant's motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2014)). We take no position with regard to whether the plaintiff will ultimately be able to prove his retaliatory discharge claim.

¶ 48 CONCLUSION

¶ 49 For the foregoing reasons, we reverse the judgment of the circuit court of St. Clair County, and remand for further proceedings not inconsistent with this order.

¶ 50 Reversed and remanded.