

2014 IL App (2d) 130364-U
No. 2-13-0364
Order filed May 1, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

RICHARD SCOT NASON,)	Appeal from the Circuit Court
)	of Winnebago County.
Plaintiff-Appellee,)	
)	
v.)	No. 12-L-188
)	
ROCKFORD PARK DISTRICT,)	Honorable
)	J. Edward Prochaska,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* We determined that the concept of a “strong public policy favoring the investigation and prosecution of a crime” was a clearly mandated public policy sufficient to allege a retaliatory discharge. We also determined that *Smith v. Waukegan Park District*, 231, Ill. 2d 111 (2008), is the controlling precedent for the second certified question, and a retaliatory discharge claim should not be barred by discretionary immunity as codified through sections 2-109 and 2-201 of the Tort Immunity Act. This court answered the certified questions and remanded the case for proceedings consistent with this order.

¶ 2 Defendant, Rockford Park District, brought this interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010) after the trial court denied its motion to dismiss plaintiff’s, Richard Scot Nason, complaint and certified two questions for our consideration. Plaintiff’s complaint asserted two claims against defendant; the first claim was brought pursuant

to the Illinois Whistleblower Act (the Whistleblower Act) (740 ILCS 174/15 (West 2010)), and the second claim was brought under a common-law theory of retaliatory discharge. Defendant moved to dismiss plaintiff's complaint pursuant to section 2-619.1 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619.1 (West 2010)), alleging, *inter alia*, that the complaint failed to state a cause of action (735 ILCS 5/2-615 (West 2010)) and that it was immune from liability pursuant to the Local Government and Governmental Employees Tort Immunity Act (the Tort Immunity Act) (745 ILCS 10/2-109, 2-201 (West 2010)). The trial court denied defendant's motion to dismiss the complaint; however, it certified two questions for interlocutory appeal. We now answer the certified questions and remand for further proceedings.

¶ 3

I. BACKGROUND

¶ 4 As amended, the pleadings reflect that plaintiff was a 20-year veteran police officer for the Rockford Park District, where he held the rank of sergeant. As part of his duties, plaintiff was responsible for entering all officers' activity sheets into the time keeping software at the police department. On October 20, 2010, plaintiff met with Park District board member Tyler Smith, during which they discussed corruption and theft within the police department. At the meeting, plaintiff also reported to Smith that Sergeant Terry Vails had been turning in false time sheets.

¶ 5 Subsequently, on November 16, 2010, plaintiff was contacted by Debbie Gass of the Rockford Park District human resources department, where they discussed his allegations. On November 30, 2010, Gass scheduled meetings with Police Chief Veneable, Lieutenant Royster, and Sergeant Vails. Subsequently, Veneable and Royster were forced to retire, and Vails was suspended pending the outcome of an investigation.

¶ 6 On November, 30, 2010, an emergency meeting was held before police department employees where John Piccolin was named interim police chief. At this meeting, Piccolin stated, “If I find out who went to Human Resources they will be gone.”

¶ 7 In January 2011, the police department hired a private investigation firm to investigate the incidents. On February 2, 2011, plaintiff was informed that Officer Hodges would do whatever it took to get him fired or suspended, because she blamed him for Vails’ suspension. On February, 7, 2011, plaintiff spoke with Hodges about the incidents at the department. On February, 11, 2011, Hodges informed plaintiff that she had filed a complaint against him with Piccolin and the human resources department, alleging that he had threatened her during the February 7, 2011, conversation. Plaintiff was further informed that Hodges would report that she feared him and could not work with him.

¶ 8 On February 13, 2011, Piccolin order plaintiff to be tested for Vicodin, a substance which the police department knew he took as a prescription medication. Subsequently, on February 13, 2011, Piccolin suspended plaintiff and told him to turn in his badge and firearm. No further reason was given for his suspension.

¶ 9 On March 31, 2011, plaintiff’s disciplinary hearing was held. At the hearing, defendant presented the testimony of Hodges to substantiate her claims against plaintiff. Plaintiff presented a witness, Officer Maria Colletti, who was a friend of Hodges, and who testified as to Hodges’ reason for fabricating the story against plaintiff. Plaintiff remained on suspension until a decision was reached.

¶ 10 On April 21, 2011, plaintiff testified at the disciplinary hearing for Vails. On July 8, 2011, plaintiff received a letter from defendant, stating that it had found Hodges’ testimony more credible than his and Colletti’s. The letter also reflected defendant’s decision to terminate

plaintiff's employment, effective July 8, 2011. As a result of his termination, plaintiff sought relief through claims pursuant to the Whistleblower Act and common-law retaliatory discharge.

¶ 11 On August 30, 2012, defendant filed a combined motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2010)). Defendant argued that plaintiff's allegations were insufficient to establish a clear mandate of public policy to support a claim for retaliatory discharge; plaintiff, as a police officer, had a duty to report official misconduct; and plaintiff's claims were barred by the Tort Immunity Act.

¶ 12 On November 19, 2012, the trial court conducted a hearing on defendant's motion to dismiss, and on December 12, 2012, issued its memorandum of decision and order. With respect to the retaliatory discharge claim, the trial court found that there was a "strong public policy favoring the investigation and prosecution of crime," and plaintiff's complaint sufficiently alleged facts to raise this policy. The trial court further determined that plaintiff's disclosures could be the basis of his claims even if plaintiff believed he was duty-bound as a police officer to make the disclosures. In so finding, the trial court denied defendant's dismissal motion.

¶ 13 On January 8, 2013, plaintiff filed an amended complaint, and on the same date, defendant filed a motion for leave to seek an interlocutory appeal, asking the trial court to certify a number of questions for appeal. On March 28, 2013, the trial court agreed to certify two of the questions: (1) Whether the concept of a "strong public policy favoring the investigation and prosecution of a crime" is a clearly mandated public policy sufficient to allege a retaliatory discharge claim; and (2) whether a claim for common law retaliatory discharge and a claim under the Whistleblower Act (740 ILCS 174 *et seq.* (West 2010)) are barred based on the doctrine of discretionary immunity as codified in sections 2-201 and 2-109 of the Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2010)).

¶ 14 Defendant timely filed an application for leave to appeal in this court, and we granted the application.

¶ 15

II. ANALYSIS

¶ 16 An interlocutory appeal of a nonfinal order, under Illinois Supreme Court Rule 308(a) (eff. Feb. 26, 2010), provides that the order presents “a question of law as to which there is substantial ground for difference of opinion.” Also, if the trial court finds that the answer to the question “may materially advance the ultimate termination of the litigation,” the court must, in writing, identify the question of law involved. Because an interlocutory appeal under Rule 308 involves a question of law, and not of fact, our review is *de novo*. *Barbara’s Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 57-58 (2007).

¶ 17 This court’s examination in an interlocutory appeal is strictly limited to the questions certified by the trial court. *Thompson v. Gordon*, 221 Ill. 2d 414, 426 (2006) (citing *In re M.M.D.*, 213 Ill. 2d 105, 113 (2004)). Thus, our task is to answer the certified questions rather than to rule on the propriety of any underlying order. *P.J.’s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 998 (2004) (citing *Danner v. Norfolk & Western Ry. Co.*, 271 Ill. App. 3d 598, 601 (1995)).

¶ 18 The first certified question that the trial court raised is whether the concept of a “strong public policy favoring the investigation and prosecution of a crime” is a clearly mandated public policy sufficient to allege a retaliatory discharge. Normally, “ ‘a noncontracted employee is one who serves at the employer’s will, and the employer may discharge such an employee for any reason or no reason.’ ” *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 500 (2009) (quoting *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 32 (1994)). However, an exception exists when there has been a retaliatory discharge of the employee. *Turner*, 233 Ill. 2d at 500. To state

a cause of action for retaliatory discharge, plaintiff must allege that (1) the employer discharged plaintiff; (2) in retaliation for plaintiff's activities; and (3) that the discharge violates a clear mandate of public policy. See *id.* In *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124 (1981), our supreme court defined what constituted a "clearly mandated public policy":

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

¶ 19 Further, the *Palmateer* court went on to address the issue concerning public policy and the investigation and prosecution of a crime:

"No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters. 'Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. Persons acting in good faith who have probable cause to believe crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused.' " (*Joiner v. Benton Community Bank*, 82 Ill. 2d 40, 44 (1980)). Although *Joiner* involved actions for malicious prosecution, the same can be said for the citizen employee who fears discharge." *Palmateer*, 85 Ill. 2d at 132-33.

¶ 20 In the present case, defendant argues that the tort of retaliatory discharge should be narrowly construed, and a “citizen crime-fighter” theory does not fit into the narrow parameters of a retaliatory discharge. See *Palmateer*, 85 Ill. 2d at 132-33. Defendant argues that the tort of retaliatory discharge, when narrowly construed, does not allow for a public policy favoring the investigation and prosecution of a crime. See *Turner*, 233 Ill. 2d at 500. Defendant’s argument and reliance on *Turner* are unconvincing. In *Turner*, the plaintiff respiratory therapist alleged that he was fired in retaliation for complaining that his employer, a hospital, jeopardized patient safety by allowing medical professionals to electronically chart a patient’s file at the end of their shift rather than immediately after seeing the patient. *Id.* at 498. Without alleging a violation of any particular law or regulation, the employee stated that the practice violated “ ‘sound nursing and medical practices,’ ” and “ ‘was not consistent with sound medical practices.’ ” *Id.* at 498. Our supreme court held that the plaintiff’s allegation could not be the basis for a retaliatory discharge claim because the plaintiff “fail[ed] to recite or even refer to a specific” provision requiring immediate charting. *Id.* at 505. The court explained that the statutory provision cited by the plaintiff was “only concerned with record confidentiality, rather than record timeliness,” and thus did not speak directly to the particular recordkeeping practice about which the plaintiff had complained. *Id.* at 505-06. Our supreme court further noted that the public policy of “patient safety” was too “general” to support a retaliatory discharge claim. *Id.* at 508.

¶ 21 Contrary to the circumstances presented in *Turner*, in which the retaliatory discharge claim failed to cite violations of specific standards or regulations, plaintiff in the present case sufficiently alleged the clearly mandated public policy of enforcing the State’s criminal code. See *Palmateer*, 85 Ill. 2d at 132 (stating that there was no public policy more basic or more implicit in the concept of ordered liberty than the enforcement of a State’s criminal code) (citing

Hewitt v. Hewitt, 77 Ill. 2d 49, 61-62 (1979)). Plaintiff alleged that he reported to Smith that Vails had been turning in false time sheets; in other words, acts of theft allegedly committed by a public employee, constituting official misconduct and a violation of the State's criminal code (see 720 ILCS 5/33-3 (West 2010)). We conclude the allegations in plaintiff's complaint were sufficiently specific to withstand dismissal of his retaliatory discharge claim.

¶ 22 Defendant also relies on *Leweling v. Schnadig Corp.*, 276 Ill. App. 3d 890 (1995), in which the First District Appellate Court affirmed the dismissal of a plaintiff's retaliatory discharge claim based on the Interstate Commerce Act (the Commerce Act). The reviewing court held that the reporting of violations of the Commerce Act was not a clearly mandated public policy that could rise to the level of a retaliatory discharge because the Commerce Act was a social and economic regulation. *Id.* at 896. Defendant here argues that reporting falsified timesheets was a social and economic issue in the same way that reporting violations of the Commerce Act was a social and economic issue in *Leweling*.

¶ 23 We reject defendant's argument. The falsification of timesheets within a police department is unlike a violation of the Commerce Act. In *Leweling*, the crime that was reported was a violation of an economic regulation, whereas here the crime that was reported concerned corruption within a police department. The policy of furthering the prosecution and investigation of a crime within a police department "strike[s] at the heart of a citizen's social rights, duties, and responsibilities." *Palmateer*, 85 Ill. 2d at 130. Also, the *Palmateer* court directly expressed that "[p]ublic policy favors the exposure of crime," and in the present case, plaintiff was exposing the crime of theft. See *id.* at 132-33.

¶ 24 Defendant further argues that, because no citation to the specific provision from which the policy has been derived, it cannot be a clearly mandated public policy. In *Fellhauer v. City*

of *Geneva*, 142 Ill. 2d 495 (1991), the plaintiff, a city employee, brought a retaliatory discharge claim against the mayor and the City of Geneva when the mayor discharged him for protesting the delay of a favorable public contract. *Id.* at 499-501. Although the supreme court noted that the plaintiff did not specify a law that would have been violated as a result of the complained-of conduct, it refused to recognize the retaliatory discharge claim because the claim was outweighed by the mayor's absolute discretion under its municipal code to discharge appointed officers "whenever the mayor believed that discharge is in the municipality's best interest." *Id.* at 509. Here, defendant asserts that, even if an obligation to report official misconduct existed, plaintiff still did not sufficiently state a claim for retaliatory discharge because, as in *Fellhauer*, there was no specific law pleaded.

¶ 25 Defendant's argument is not persuasive. We first note that the parties at odds in *Fellhauer* are different from the parties at odds in the present case. The only parties to the *Fellhauer* appeal were the plaintiff and the defendant mayor; the issues concerned the pleadings only as they related to the mayor. In contrast, the parties at odds in the present case are plaintiff and the defendant governmental entity. Second, and unlike the circumstances in *Fellhauer*, where the circumstances concerned the reporting employee's refusal to partake in official misconduct, plaintiff here reported the official misconduct of another employee. See *Fellhauer*, 142 Ill. 2d at 506. Third, plaintiff here has pleaded acts of theft allegedly committed by a public employee, constituting official misconduct.

¶ 26 We conclude that the resolution of this question would materially advance the litigation because the case would proceed under a strong public policy favoring the investigation and prosecution of a crime. See *Palmateer*, 85 Ill. 2d at 130. Accordingly, we answer the first certified question in the affirmative.

¶ 27 The second certified question asks whether a claim for common-law retaliatory discharge and a claim under the Illinois Whistleblower Act (740 ILCS 174/1 *et seq.* (West 2010)), are barred based on doctrines of discretionary immunity as codified in sections 2-201 and 2-109 of the Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2010)).

¶ 28 Defendant argues that sections 2-109 and 2-201, when read in tandem, control to bar recovery under the Whistleblower Act. Section 2-109 of the Tort Immunity Act provides that “[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.” 745 ILCS 10/2-109 (West 2010). Section 2-201 provides, “[e]xcept as otherwise provided by Statute, a public employee serving in a position involving the determination of policy of the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.” 745 ILCS 10/2-201 (West 2010).

¶ 29 Defendant argues that *Smith v. Waukegan Park District*, 231 Ill. 2d 111 (2008), is not the controlling case. We disagree. In *Smith*, the plaintiff, after filing a workers’ compensation claim, returned to work at the Waukegan Park District where he was terminated after refusing to submit to a drug and alcohol test that he believed to be “retaliatory harassment.” *Id.* at 113. In its analysis, our supreme court held that the Waukegan Park District was not immune from a retaliatory discharge claim through the combined effect of sections 2-109 and 2-201. *Id.* at 118-22. The *Smith* court stated that the “argument fails because it incorrectly views the employee as the pertinent actor when it is the employer who ‘acts’ within the meaning of section 2-109 in a retaliatory discharge.” *Id.* at 118. Since it was the employer, not the employee, who discharged the plaintiff, a public entity does not have discretionary immunity in a retaliatory discharge claim.

¶ 30 Further, we reject defendant's claim that *Smith* was directed only at workers' compensation claims. See *Smith*, 231 Ill. 2d at 119. The *Smith* court first looked to the statutory language of the sections and determined that a combined reading did not allow for the same discretionary immunity as it did for an employee. The court explained how its reading affected the Workers' Compensation Act and stated, "[w]ithout expressing an opinion on firings in general by public entities, we declare, under established Illinois law, public entities possess no immunized discretion to discharge employees for exercising their workers' compensation rights." *Id.*

¶ 31 We conclude that the *Smith* court's subsequent analysis of the Workers' Compensation Act was done to strengthen the opinion, and not to limit its original analysis of the statutory texts. See *id.* at 118-19. In doing so, we also reject defendant's assertion that the judicial branch cannot limit the statutory immunity provided by the legislature in the Tort Immunity Act (*e.g.*, *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 50 (1998)), because the *Smith* court was only interpreting sections 2-109 and 2-201 and not limiting the provisions. See *Smith*, 231 Ill. 2d at 118-19. Therefore, *Smith* is the controlling precedent for this issue, and a retaliatory discharge claim should not be barred by discretionary immunity as codified through sections 2-109 and 2-201 of the Tort Immunity Act.

¶ 32 Defendant also asserts that the creation of the Whistleblower Act does not control the issues of statutory interpretation of the Tort Immunity Act in this case. However, in determining that sections 2-109 and 2-201 of the Tort Immunity Act do not allow for discretionary immunity under the circumstances presented here in plaintiff's retaliatory discharge claim, we need not address this issue. See *Smith*, 231 Ill. 2d at 118-19.

¶ 33 The resolution of this second certified question would materially advance this the litigation because the case should proceed without being barred by immunity. Accordingly, whether a claim for common-law retaliatory discharge and a claim under the Illinois Whistleblower Act, are barred based on doctrines of discretionary immunity as codified in sections 2-201 and 2-109 of the Tort Immunity Act, we answer in the negative and remand for further proceedings.

¶ 34

III. CONCLUSION

¶ 35 Certified questions answered; remanded.