2013 IL App (5th) 120435-U

NO. 5-12-0435

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WILLIAM J. KILQUIST, Plaintiff-Appellant, v. KURT FRIEDENAUER, Individually as Director of Juvenile Justice, Defendant-Appellee (The State of Illinois and Its Department of Juvenile Justice, Defendants).	)	Appeal from the Circuit Court of Jackson County. No. 10-L-56 Honorable Christy Solverson, Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justice Welch concurred in the judgment.
Justice Goldenhersh specially concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed count I of the plaintiff's complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)) for failure to state a claim upon which relief can be granted pursuant to the whistleblower protection provisions of the State Officials and Employees Ethics Act (5 ILCS 430/15-5 to 15-40 (West 2010)).

¶ 2 The plaintiff, William J. Kilquist, appeals the order of the circuit court of Jackson County, which granted a motion to dismiss filed by the defendants, the State of Illinois Department of Juvenile Justice (the Department) and Kurt Friedenauer (Friedenauer). In count I of his complaint, filed on July 7, 2010, the plaintiff alleged a violation of section 15-10 of the whistleblower protection provisions of the Illinois State Officials and Employees Ethics Act (the Act) (5 ILCS 430/15-10 (West 2010)) against Friedenauer,

individually. In count II, the plaintiff alleged a violation of the Illinois Whistleblower Act (740 ILCS 174/1 to 40 (West 2010)) against the Department. In count III of his complaint, the plaintiff alleged a common law retaliatory discharge claim against the Department.

¶ 3 The defendants moved for a dismissal pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)). On September 5, 2012, the circuit court granted their motion, dismissing the plaintiff's complaint in its entirety, finding that all three counts failed to state a claim upon which relief could be granted, and also that counts II and III were barred by the doctrine of sovereign immunity. The plaintiff's appeal raises questions on the pleadings only as to count I of his complaint against Friedenauer and whether it was sufficient to state a cause of action for violation of the Act, specifically the whistleblower protection provisions (5 ILCS 430/15-5 to 15-40 (West 2010)). For reasons discussed herein, we affirm the decision of the circuit court.

¶ 4 BACKGROUND

¶ 5 The following allegations are taken from the plaintiff William J. Kilquist's complaint. The plaintiff was employed as the superintendent of the Illinois Youth Center (IYC), located in Murphysboro, which is a facility of the State of Illinois and its Department of Juvenile Justice (Department). The remaining defendant, Kurt Friedenauer, is the director of the Department and served as the plaintiff's supervisor.

¶ 6 On April 1, 2008, an incident occurred at the IYC involving youth supervisor Gerald L. Hysom and a resident juvenile cadet. As a result, the Department launched a disciplinary investigation into the incident, focusing on Hysom. Kerry Camp, an employee of the Illinois Department of Corrections, was put in charge of conducting the investigation regarding the allegations made against Hysom and subsequently conducting an employee review hearing. Before the investigation was complete or the employee review hearing conducted, Friedenauer allegedly told the plaintiff to contact Camp "and make sure that the outcome of

the investigation hearing was that *** Hysom would be terminated from his employment."

¶ 7 On June 3, 2008, Camp completed Hysom's investigation and employee review hearing. This information was relayed to the plaintiff in a memorandum, dated July 3, 2008. In this memorandum, Camp recommended that Hysom receive a 15-day suspension from work. The same information was also relayed to Friedenauer.

¶ 8 On July 8, 2008, Friedenauer telephoned the plaintiff and instructed him to fire Hysom, despite Camp's recommendation of a 15-day suspension. In response, the plaintiff told Friedenauer he believed it was wrong to fire Hysom, "that it was not legal and the manner in which *** Friedenauer had proceeded was in violation of the law denying Hysom due process of the law." Nevertheless, Friedenauer told the plaintiff to write up Hysom's dismissal. The plaintiff refused. He then told Friedenauer that he had never been fired from a job and rather than being fired for refusing to fire Hysom, he was forced to resign his position as superintendent.

¶ 9 ANALYSIS

¶ 10 The sole issue on appeal is whether the circuit court erred when it dismissed count I of the plaintiff's complaint against Friedenauer for failure to state a claim upon which relief can be granted. 735 ILCS 5/2-615 (West 2010). Specifically, the circuit court concluded that the plaintiff's alleged action of "refusing to assist in the activity of firing Hysom" did not constitute a protected activity under the Act. 5 ILCS 430/15-10 (West 2010). Further, the circuit court found that the plaintiff's allegations failed to establish that Friedenauer took "retaliatory action" against him, as defined under the provisions of the Act. *Id*. As such, the circuit court held that the Act was inapplicable to the facts of the case and that the plaintiff was barred from seeking recovery under it.

¶ 11 A motion to dismiss filed under section 2-615 of the Illinois Code of Civil Procedure challenges the legal sufficiency of a complaint based on defects apparent on its face. *Turner*

v. Memorial Medical Center, 233 Ill. 2d 494, 499 (2009) (citing 735 ILCS 5/2-615 (West 2006)). A circuit court's order dismissing a complaint pursuant to section 2-615 is reviewed *de novo*. *Id*. Upon review, we must construe the allegations of the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id*.; see also *Beacham v. Walker*, 231 Ill. 2d 51, 57-58 (2008). Thus, a complaint or cause of action should not be dismissed pursuant to section 2-615 unless it is clear that no set of facts can be proved that would entitle the plaintiff to relief. *Turner*, 233 Ill. 2d at 494.

¶ 12 We need not determine the issue of whether the plaintiff's claims amounted to a "protected activity," as enumerated in subparagraph 1 of section 15-10 (5 ILCS 430/15-10 (West 2010)), because we find that the plaintiff failed to sufficiently allege that any retaliatory action was taken against him. Section 15-5 of the Act defines "retaliatory action" as:

> "the reprimand, discharge, suspension, demotion, denial of promotion or transfer, or change in the terms or conditions of employment of any State employee, that is taken in retaliation for a State employee's involvement in protected activity, as set forth in Section 15-10." 5 ILCS 430/15-5 (West 2010).

¶ 13 The plaintiff claims the circuit court erred by finding that his allegations failed to establish that the defendant took "retaliatory action" against him as defined in section 15-5 of the Act. 5 ILCS 430/15-5 (West 2010). The circuit court found that neither a resignation nor a "forced resignation" of one's employment fell within the Act's definition of "retaliatory action," and, moreover, that the plaintiff failed to allege facts supporting his conclusory allegation that he had been forced to resign. On appeal, the plaintiff argues that simply because section 15-5 does not specifically list "resignation" or "forced resignation" in the definition of "retaliatory action" does not mean that either concept is excluded from the

definition's scope. As such, the plaintiff asserts that being forced to fire Hysom–an act which he believed to be illegal–constituted a "change in the terms or conditions of his employment" in that he felt forced to resign or else the defendant would have fired him.

¶ 14 As the parties agree, there are few cases in Illinois involving the whistleblower protection provisions of the State Officials and Employees Ethics Act (5 ILCS 430/15-5 to 15-40 (West 2010)), and none deals with the issue of whether a "forced resignation" is considered "retaliatory action" under section 15-5 or discusses the scope of the phrase "change in the terms or conditions of employment." 5 ILCS 430/15-5 (West 2010).

¶ 15 In *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526, 529-32 (1988), the Illinois Supreme Court examined the issue of whether the plaintiff properly pleaded a cause of action for retaliatory discharge. *Id.* at 528. Though the plaintiff brought her cause of action pursuant to common law, what is germane to the case at hand is that *Hinthorn* discusses the concept of sufficiently pleading actual discharge via a coerced resignation. *Id*. In *Hinthorn*, the plaintiff suffered a back injury at work and reported this to her supervisor, seeking medical attention. *Id*. Because she had suffered two previous work-related injuries during the past year, for which she sought medical attention and filed claims under the Illinois Workers' Compensation Act (Ill. Rev. Stat. 1985, ch. 48, ¶¶ 138.1 to 138.30), her supervisor told her to meet with the company's vice-president. *Id*. The vice-president first said to the plaintiff that "she should seek other employment" and further told her "that she had been 'getting hurt too much [and] costing the company too much money.' " *Id*. at 528-29. He then directed her to sign a "Voluntary Resignation" form and informed her that by signing it, "[she] would be able to leave her employment *** under her own free will." *Id*. at 529. The plaintiff therefore signed the form, believing if she did not sign it, she would have lost her job anyway. *Id*.

¶ 16 While acknowledging that they were clearly "not now endorsing the constructive

discharge concept," the supreme court distinguished the plaintiff's case in that she "did not claim that she was driven by the employer's actions to voluntarily resign, but that she resigned *involuntarily* only because she was explicitly directed to do so by her employer." (Emphasis in original.) *Id*. at 530-31. The plaintiff offers *Hinthorn* in support of his forced or coerced resignation theory, citing this specific passage:

> "There are no magic words required to discharge an employee: an employer cannot escape responsibility for an improper discharge simply because he never uttered the words 'you're fired.' So long as the employer's message that the employee has been involuntarily terminated is clearly and unequivocally communicated to the employee, there has been an actual discharge, regardless of the form such discharge takes." *Id*. at 531.

¶ 17 Examining count I of the plaintiff's complaint against Friedenauer, the pertinent allegations are as follows:

> "10. On July 8, 2008, Kurt Friedenauer as Director of the State of Illinois, Department of Juvenile Justice contacted plaintiff Kilquist via telephone. ***
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> 11. In the July 8, 2008, telephone conversation, Friedenauer tells Kilquist he has to fire Gerald L. Hysom despite what the Camp memorandum recommends.
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> 12. Plaintiff Kilquist discloses to defendant Friedenauer that it was wrong to discharge Hysom from his job and that it was not legal and the manner in which defendant Friedenauer had proceeded was in violation of the law denying Hysom due process of the law.
>
> 13. Defendant Kurt Friedenauer, despite plaintiff Kilquist's disclosure that Kilquist reasonably believed what Friedenauer was ordering was wrong, illegal, and in violation of the law denying Hysom due process of the law, persisted and told Kilquist to write up the dismissal of Hysom. Kilquist refused to do so.

14. On July 8, 2008, in the telephone conversation with Friedenauer, plaintiff Kilquist after refusing to participate in the activity of firing Hysom tells defendant Friedenauer rather than being discharged by Friedenauer, he resigns his position as Superintendent.

15. Kilquist explained to defendant Friedenauer that he had never been fired from a job and his forced resignation is in lieu of being discharged by defendant Friedenauer."

¶ 18 Using *Hinthorn* as a guide, we find that the plaintiff in this case has not sufficiently pleaded his actual discharge via being forced to resign. Unlike in *Hinthorn*, the plaintiff fails to allege that Friedenauer explicitly directed him to resign. There are also no allegations evincing either a special relationship or past history between the plaintiff and Friedenauer that would reasonably support the plaintiff's belief that had he not fired Hysom, his employment would have been terminated. In other words, there has to be a basis for the plaintiff's belief. Without this, it amounts to mere speculation or anxiety on the plaintiff's part. Further, threats of termination or other harassment leading to a plaintiff's resignation will not suffice to show forced or coerced resignation. See, *e.g.*, *Melton v. Central Illinois Public Service Co.*, 220 Ill. App. 3d 1052, 1056 (1991) (where appellate court viewed the plaintiff's "*threatened* retaliatory discharge theory as further removed from the tort of retaliatory discharge than the constructive discharge theory," holding that "a plaintiff must allege a coerced resignation or actual discharge–and not merely a threat to discharge or discipline short of discharge–in order to state a valid claim for retaliatory discharge" (emphasis in original)); *Farlin v. The Library Store, Inc.*, No. 08-CV-1194, 2010 WL 1433378, at *3 (C.D. Ill. 2010) (applying Illinois common law of retaliatory discharge, the district court found that the plaintiff's allegations of her employer's severe harassment leading to her resignation did not amount to an " 'explicit direction' for her to resign, unlike ***

Hinthorn").

¶ 19 The plaintiff's allegations make it clear that Friedenauer said nothing at all regarding the plaintiff's employment, termination, or resignation; rather, it was the plaintiff himself who first mentioned resigning his employment, making this case more akin to *Addis v. Exelon Generation Co., L.L.C.*, 378 Ill. App. 3d 781 (2007). In *Addis*, the First District was also not persuaded by the plaintiff's reliance on *Hinthorn*. *Id*. at 788. There was no evidence that the plaintiff was forced to resign where she "was the first to mention resigning" and did so shortly thereafter.[1] *Id*. at 789.

¶ 20 Despite the plaintiff's argument that he need not plead evidence of the circumstances in which Friedenauer actually forced the plaintiff to resign because evidence is for trial, we find that merely alleging a "forced resignation" is not sufficient under the Illinois fact-pleading requirements. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 499 (1996) (explaining that Illinois is a fact pleading state); see also *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 26 ("While [Illinois fact-pleading requirements do] not require the plaintiff to set forth evidence in the complaint, it does demand that the plaintiff allege facts sufficient to bring a claim within a legally recognized cause of action."). Again, the plaintiff points to *Hinthorn*, where the supreme court found that although the complaint was " 'less specific than it could be,' it informed the defendant of the crux of the claim and thus [was] sufficient." *Hinthorn*, 119 Ill. 2d at 532 (citing *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 134 (1981); Ill. Rev. Stat. 1985, ch. 110, ¶ 2-612(b) ("No pleading is bad in

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[1]We recognize that *Addis* involved an appeal of a jury verdict, as opposed to a dismissal of the plaintiff's complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)). However, we still believe the facts and analysis of *Addis* are telling regarding the viability of the plaintiff's forced resignation claim based on the facts alleged in his complaint.

substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet.")). Yet, given our state's fact-pleading requirements, even a liberal construction of the pleadings does not allow for mere conclusory allegations, as explained by our supreme court:

> "Applying simple logic to the question, if a motion to dismiss admits only facts well pleaded and not conclusions, then, in considering the motion, if after deleting the conclusions that are pleaded there are not sufficient allegations of fact which state a cause of action against the defendant, the motion must be granted regardless of how many conclusions the count may contain and regardless of whether or not they inform the defendant in a general way of the nature of the claim against him." *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 426 (1981).

¶ 21 Accordingly, we find that even construing the plaintiff's allegations in a light most favorable to the plaintiff, he has insufficiently pleaded that his resignation was forced or coerced.

¶ 22 The plaintiff also asserts that the retaliation he suffered was "a change in the terms or conditions of his employment," as stated under section 15-5 of the Act. First, we note that in his complaint, the plaintiff does not specifically allege that the retaliatory action he suffered was a change in the terms or conditions of his employment, which does not comport with Illinois fact-pleading requirements. See *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997) ("A plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted."). Second, the plaintiff failed to assert the argument that he suffered retaliatory action in the form of a change in the terms or conditions of his employment during the lower court proceedings. This argument is absent from his response to the defendants' motion to dismiss, and also no mention was made of this by the plaintiff's counsel during the circuit court's hearing on the motion. The only retaliatory action the plaintiff asserted that

he suffered was a forced resignation. As such, the argument regarding a change in the terms or conditions of the plaintiff's employment is essentially raised for the first time on appeal, and we can properly treat it as waived. *Eagan v. Chicago Transit Authority*, 158 Ill. 2d 527, 534 (1994) ("[I]ssues not raised in the trial court may not be raised for the first time on appeal."). However, because the waiver rule is a limitation on parties and not the court's jurisdiction, we can also choose to address the issue on the merits. *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 11 (1996)

¶ 23 The plaintiff argues that if he was forced to do an illegal act, that would represent a change in the terms of his employment. He also argues that he suffered a change in the terms or conditions of his employment in that "he felt as though he had to leave or suffer a discharge by Friedenauer." Without case law for support, the plaintiff argues that the principle *ejusdem generis* suggests that the phrase "change in the terms or conditions of employment" should be interpreted as a catchall phrase following the previous enumerated list defining "retaliatory action" in section 15-5 of the Act: "the reprimand, discharge, suspension, demotion, denial of promotion or transfer." 5 ILCS 430/15-5 (West 2010). Further, the plaintiff posits that because the definition does not impose the requirement that the retaliatory action "be official or documented," "[f]orcing an employee out by making it clear that they must deny a staff member legal rights or either resign or be fired themself is similar [enough] in character to the enumerated [actions listed in section 15-5 that] the principle of *ejusdem generis* *** requires that it be included as a matter of law [as a part of the phrase] 'a change in the terms or conditions of employment.' "

¶ 24 The phrase "change in the terms or conditions of employment" is not specifically defined within the statutory provisions of the Act, and because no relevant case law exists dealing with the scope of this phrase in the context of the Act, we must "assume that the legislature intended for the term to possess its ordinary and popularly understood meaning."

People v. Sheehan, 168 Ill. 2d 298, 306 (1995). Therefore, we may consult a dictionary to determine the plain meaning of terms used in the statute. *In re Marriage of Mathis*, 2012 IL 113496, ¶ 23.

¶ 25 A "term" is defined as: (1) "A word or phrase; esp., an expression that has a fixed meaning in some field;" (2) "A contractual stipulation;" (3) "Provisions that define an agreement's scope; conditions or stipulations;" or (4) "A fixed period of time." Black's Law Dictionary (9th ed. 2009). A "condition" is defined as: (1) "A future and uncertain event on which the existence or extent of an obligation or liability depends;" (2) "A stipulation or prerequisite in a contract, will, or other instrument, constituting the essence of the instrument;" (3) "Loosely, a term, provision, or clause in a contract;" (4) "A qualification attached to the conveyance of property providing that if a particular event does or does not take place, the estate will be created, enlarged, defeated, or transferred;" or (5) "A state of being; an essential quality or status." Black's Law Dictionary (9th ed. 2009).

¶ 26 We disagree with the plaintiff's proffered statutory interpretation. Rather, we believe that the meaning of the phrase "terms and conditions," as used by the Act, bears more similarity to how the phrase is used in the context of labor law. See, *e.g.*, *Vienna School District No. 55 v. Illinois Educational Labor Relations Board*, 162 Ill. App. 3d 503, 507 (1987) (Explaining that a "term or condition of employment is something provided by an employer which intimately and directly affects the work and welfare of the employees ***. [Citation.] Typical terms and conditions include: wages [citation], health insurance, pension contributions [citation], life insurance, medical insurance [citation], and hours [citation]."). Therefore, we find that to allow a cause of action under the Act for an employee's beliefs or anxiety about a perceived threat to her employment would present too subjective a standard, which we are disinclined to impose within the plain language meaning of the words "terms" and "conditions" without precedential authority mandating that we do so. Accordingly, we

find that the plaintiff has failed to sufficiently plead that he suffered retaliatory action under the Act via a change in the terms or conditions of his employment.

¶ 27 In sum, we find that the plaintiff has failed to sufficiently plead a cause of action against Friedenauer under section 15-10 of the Act (5 ILCS 430/15-10 (West 2010)), and therefore, the circuit court did not err in dismissing count I of the plaintiff's complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)).

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Jackson County is affirmed.

¶ 30 Affirmed.

¶ 31 JUSTICE GOLDENHERSH specially concurring:

¶ 32 I concur with the essence of the majority's disposition as to "the issue of whether a 'forced resignation' is considered 'retaliatory action' under section 15-5 or *** 'change in the terms or conditions of employment.' 5 ILCS 430/15-5 (West 2010)." *Supra* ¶ 14. At the present time, a forced resignation is not covered by statute.

¶ 33 A forced or coerced resignation is a real and not imagined phenomenon in today's world. While the credibility of such a charge can be subject to discovery and adversarial scrutiny by a trier of fact, a sufficiently pleaded allegation of forced resignation should be covered by the statute. In the interest of basic justice, I urge the General Assembly to amend the statute to specifically cover forced or coerced resignation.