Illinois Official Reports

Appellate Court

***Dichiarro v. Woodland Maintenance Group, LLC*, 2021 IL App (2d) 210418**

Appellate Court Caption	LISA DICHIARRO, Plaintiff-Appellant, v. WOODLAND MAINTENANCE GROUP, LLC; DANIEL HUBER; and BRIAN McSHANE, Defendants-Appellees.
District & No.	Second District No. 2-21-0418
Filed	December 23, 2021
Decision Under Review	Appeal from the Circuit Court of Kane County, No. 19-L-307; the Hon. Kevin T. Busch, Judge, presiding.
Judgment	Certified question answered; cause remanded.
Counsel on Appeal	Ted A. Meyers, of Meyers & Flowers, LLC, of St. Charles, for appellant. Michael R. Luchsinger and Faredin Ameti, of Doherty & Progar, LLC, of Chicago, for appellees.
Panel	JUSTICE HUDSON delivered the judgment of the court, with opinion. Justices Zenoff and Schostok concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Lisa Dichiarro, filed a multiple-count complaint against defendants, Woodland Maintenance Group, LLC (Woodland), Daniel Huber, and Brian McShane, alleging violations of the Wage Payment and Collection Act (Act) (820 ILCS 115/1 *et seq.* (West 2018)). Relevant here, count III of plaintiff's first amended complaint sought damages from Woodland for retaliatory discharge, arising from plaintiff's claim that she was terminated because of "her repeated demands for payment of the [u]npaid [w]ages due and owing to [her] under the terms and conditions of her [e]mployment [a]greement." Relying on *McGrath v. CCC Information Service, Inc.*, 314 Ill. App. 3d 431 (2000), the circuit court of Kane County granted Woodland's motion to dismiss count III, reasoning that the Act does not manifest a clear public policy that would allow an employee who was denied past-due wages the right to bring a common law retaliatory-discharge claim against his or her employer. The trial court subsequently denied plaintiff's motion to reconsider the dismissal of count III.

¶ 2 Thereafter, plaintiff informed the trial court that the legislature amended section 14(c) of the Act 10 years after *McGrath* was decided. See Pub. Act 96-1407 (eff. Jan. 1, 2011) (amending 820 ILCS 115/14(c)) (hereinafter, the 2011 amendment).[1] Plaintiff averred that the 2011 amendment empowered an employee wrongfully terminated for requesting past-due wages to seek all available legal and equitable remedies, including a common law retaliatory-discharge claim. The trial court declined to revisit its ruling on the basis that there was no appellate precedent establishing that *McGrath* is no longer controlling on the issue. Nevertheless, the court certified the following question for review pursuant to Illinois Supreme Court Rule 308(a) (eff. Oct. 1, 2019):

> "Whether the [2011] amendment to Section 14(c) of the Wage Payment and Collection Act abrogated the ruling in *McGrath* *** and establishes a clear public policy which allows an employee who has been terminated for exercising her rights under the Act to pursue a common law and/or statutory remedy for retaliatory discharge against her employer."

We granted plaintiff's application for leave to appeal. We hold that the 2011 amendment to section 14(c) of the Act created a statutory cause of action for retaliatory discharge for an employee who has been terminated for exercising his or her rights under the Act. However, the 2011 amendment did not abrogate the holding in *McGrath*, in that the amendment did not provide or set forth a clearly mandated public policy upon which employees could base a common law retaliatory-discharge claim. Accordingly, we answer the certified question affirmatively in part and negatively in part and remand the matter to the trial court for further proceedings.

¶ 3 ### I. BACKGROUND

¶ 4 The following facts are taken from plaintiff's first amended complaint as well as other supporting documents included in the record submitted on appeal. See *Wisnasky v. CSX Transportation, Inc.*, 2020 IL App (5th) 170418, ¶ 4. Woodland operates a landscaping

[1]The parties and the trial court refer to this amendment as the "2010 amendment." However, because the effective date of the legislation was January 1, 2011, it is more accurately termed the 2011 amendment.

business. Plaintiff worked as a salesperson for Woodland. Pursuant to a written employment agreement, plaintiff earned compensation in the form of a base salary with the possibility of additional compensation based on the landscaping sales she procured. In April 2019, plaintiff informed Woodland's management that she was owed over $33,000 in compensation plus accrued and unpaid vacation that she earned in 2018 and 2019. Plaintiff had several meetings with Woodland's management in May and June 2019 to resolve the issue of the compensation due her under the employment agreement. At a meeting on June 4, 2019, Huber and McShane, both of whom served as Woodland's executive management team, met with plaintiff and refused to pay her the alleged past-due compensation. At that time, Huber also ripped up plaintiff's employment agreement, declaring that it was no longer in effect. On June 7, 2019, Huber and McShane scheduled a meeting with plaintiff at which plaintiff's employment was terminated effective immediately.

¶ 5 On July 3, 2019, plaintiff instituted the instant action, alleging violations of the Act based upon the failure to tender proper wages and wrongful termination, as well as common law retaliatory discharge.[2] On September 19, 2019, the parties executed a "Release and Settlement Agreement," pursuant to which defendants tendered to plaintiff the past-due wages plus the statutory interest and attorney fees assessed under the Act. As part of the settlement agreement, defendants acknowledged that "[a]ny common law or statutory claim for wrongful termination and/or retaliatory discharge (or other claim relating to the termination of employment)" were not released and could be pursued by plaintiff.

¶ 6 On October 16, 2019, plaintiff filed a three-count, first amended complaint against defendants. Both count I, naming Woodland as defendant, and count II, naming Huber and McShane as defendants, sought statutory damages for violations of section 14(c) of the Act (820 ILCS 115/14(c) (West 2018)). Count III, naming Woodland as defendant, sought damages for retaliatory discharge under the common law arising from plaintiff's claim that she was terminated because of her "repeated demands for payment of the [u]npaid [w]ages due and owing to [her] under the terms and conditions of her [e]mployment [a]greement." Woodland moved to dismiss counts I and III of plaintiff's first amended complaint. The court denied Woodland's motion to dismiss count I but took under advisement whether plaintiff could maintain an action for retaliatory discharge based upon a violation of the Act.

¶ 7 On March 3, 2020, the trial court granted Woodland's motion to dismiss count III. The court noted that, to establish a claim for retaliatory discharge, an employee must show that the discharge violates a clear mandate of public policy. See *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 129 (1981). Relying on *McGrath*, 314 Ill. App. 3d 431, the court held that the dismissal of count III was required because the Act did not manifest a clear public policy that would allow an employee who was denied past-due wages the right to bring a common law retaliatory-discharge claim against his or her employer. The trial court subsequently denied plaintiff's motion to reconsider the dismissal.

¶ 8 Sometime later, plaintiff informed the trial court that, 10 years after *McGrath* was decided, the legislature amended section 14(c) of the Act to add, *inter alia*, the following two sentences to the end of the provision:

> "An employee who has been unlawfully retaliated against shall be entitled to recover through a claim filed with the Department of Labor or in a civil action, but not both, all

[2]A copy of the initial complaint is not included in the supporting record filed on appeal.

> legal and equitable relief as may be appropriate. In a civil action, such employee shall also recover costs and all reasonable attorney's fees." Pub. Act 96-1407 (eff. Jan. 1, 2011) (amending 820 ILCS 115/14(c)).

In response, the trial court told the parties that it would not revisit its ruling, as there was no appellate precedent that established that *McGrath* was no longer controlling on the issue.[3]

¶ 9 Plaintiff subsequently filed a motion for certification pursuant to Illinois Supreme Court Rule 308(a) (eff. Oct. 1, 2019) to obtain appellate guidance on the issue. On July 9, 2021, the trial court granted plaintiff's motion and certified the following question in accordance with Rule 308(a):

> "Whether the [2011] amendment to Section 14(c) of the Wage Payment and Collection Act abrogated the ruling in *McGrath* *** and establishes a clear public policy which allows an employee who has been terminated for exercising her rights under the Act to pursue a common law and/or statutory remedy of retaliatory discharge against her employer."

On July 28, 2021, plaintiff filed with this court an application for leave to appeal pursuant to Rule 308(a). On September 1, 2021, defendants filed a response in opposition to plaintiff's application for leave to appeal. On September 14, 2021, we granted plaintiff's petition for leave to appeal.

¶ 10 II. ANALYSIS

¶ 11 Under Illinois common law, an employer may discharge an employee at will, at any time, with or without cause. *Roberts v. Board of Trustees of Community College District No. 508*, 2019 IL 123594, ¶ 22; *Palmateer*, 85 Ill. 2d at 128. Illinois courts, however, have recognized the tort of retaliatory discharge as a limited and narrow exception to the at-will employment doctrine. *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 505 (1991). The retaliatory-discharge-action exception to the at-will employment doctrine is an outgrowth of the recognition that "a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out." *Palmateer*, 85 Ill. 2d at 129; see also *Roberts*, 2019 IL 123594, ¶ 22.

¶ 12 To state a claim for retaliatory discharge, an employee must plead that (1) the employer discharged the employee, (2) the discharge was in retaliation for the employee's activities, and (3) the discharge violated a clearly mandated public policy. *Roberts*, 2019 IL 123594, ¶ 23. Regarding the third element, we note that there is no precise definition of what constitutes a clearly mandated public policy. *Chicago Commons Ass'n v. Hancock*, 346 Ill. App. 3d 326, 328 (2004). However, our supreme court has advised:

> "[P]ublic 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

[3]Although the trial court's comments were purportedly made on the record, we note that a transcript of the hearing was not made part of the supporting record filed on appeal.

a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed." *Palmateer*, 85 Ill. 2d at 130.

To date, the supreme court has allowed a retaliatory-discharge action in only two settings—when an employee has been discharged for the filing of, or in anticipation of the filing of, a claim under the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2018)) (*Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 180-85 (1978)) and when an employee has been discharged for reporting illegal or improper conduct by the employer, *i.e.*, whistleblowing (*Palmateer*, 85 Ill. 2d at 127-35). See *Michael v. Precision Alliance Group, LLC*, 2014 IL 117376, ¶¶ 28-29; *Jacobson v. Knepper & Moga, P.C.*, 185 Ill. 2d 372, 376 (1998). This court has also recognized an implied right of action for retaliatory discharge where an employee alleged that she was terminated for seeking benefits under the Unemployment Insurance Act (820 ILCS 405/100 *et seq.* (West 1996)). *Fiumetto v. Garrett Enterprises, Inc.*, 321 Ill. App. 3d 946, 948-56 (2001).

¶ 13 The certified question presented concerns whether the tort of retaliatory discharge should be expanded to cases in which an employee has been discharged for exercising his or her rights under the Act. In particular, the question focuses on section 14(c) of the Act (820 ILCS 115/14(c) (West 2018)). That provision states as follows:

> "Any employer, or agent of an employer, who discharges or in any other manner discriminates against any employee because that employee has made a complaint to his employer, to the Director of Labor or his authorized representative, in a public hearing, or to a community organization that he or she has not been paid in accordance with the provisions of this Act, or because that employee has caused to be instituted any proceeding under or related to this Act, or because that employee has testified or is about to testify in an investigation or proceeding under this Act, is guilty, upon conviction, of a Class C misdemeanor. An employee who has been unlawfully retaliated against shall be entitled to recover through a claim filed with the Department of Labor or in a civil action, but not both, all legal and equitable relief as may be appropriate. In a civil action, such employee shall also recover costs and all reasonable attorney's fees." 820 ILCS 115/14(c) (West 2018).

We note that the addition of the last two sentences to section 14(c) were among several changes the legislature made to the statute by the 2011 amendment. Pub. Act 96-1407 (eff. Jan. 1, 2011) (amending 820 ILCS 115/14(c)).

¶ 14 In granting Woodland's motion to dismiss count III of plaintiff's first amended complaint, the trial court relied on *McGrath*, 314 Ill. App. 3d 431, a case decided prior to the adoption of the 2011 amendment. In *McGrath*, the employee filed a lawsuit against his employer, alleging that he had been discharged for exercising his rights under the Act. The employer moved to dismiss the retaliatory-discharge claim, contending that the count failed to state a cause of action because Illinois courts had not extended the tort of retaliatory discharge to the type of claim made by the employee. The trial court agreed and granted the employer's motion to dismiss. On appeal, the employee argued that the version of section 14(c) of the Act in effect at that time (820 ILCS 115/14(c) (West 1996)) "reflects a clearly mandated expression of public policy that employers may not force employees to choose between exercising their rights under the [Act] and keeping their jobs." *McGrath*, 314 Ill. App. 3d at 440. In addressing this argument, the *McGrath* court noted that the Act is concerned with employees receiving proper compensation for their work and that section 14(c) makes it a misdemeanor to

knowingly discharge an employee because he or she has exercised the rights provided thereunder. *McGrath*, 314 Ill. App. 3d at 439. Nonetheless, the court found that the Act did not provide a clearly mandated public policy upon which employees could base a common law retaliatory-discharge claim. *McGrath*, 314 Ill. App. 3d at 440. The court explained:

> "The policy concerns underlying the [Act], including section 14(c), are economic.Public policies associated with social and economic regulation are less likely to be held sufficient to support claims of retaliatory discharge. *Leweling v. Schnadig Corp.*, 276 Ill. App. 3d 890, 894 (1995); *Fowler v. Great American Insurance Cos.*, 653 F. Supp. 692, 697 (N.D. Ill. 1987). We find that the dispute over [the employee's] conditional stock options and calculation of a bonus is economic in nature and does not 'strike at the heart' of [the employee's] social rights, duties, and responsibilities as is required to maintain a retaliatory discharge action. Further, the effect of [the employee's] dispute and subsequent termination on the citizenry collectively is incidental at best. Rather, [the employee's] claim is more in the nature of a private and individual grievance insufficient to justify a claim of wrongful discharge." *McGrath*, 314 Ill. App. 3d at 440.

In support of its ruling, the *McGrath* court also relied upon the Illinois Supreme Court's "historic reluctance to expand the tort" of retaliatory discharge and its hesitation "to imply rights of action without explicit legislative authority." *McGrath*, 314 Ill. App. 3d at 443 (citing *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 467-68 (1999)).

¶ 15 Following the *McGrath* decision, courts interpreting Illinois law have consistently declined to extend the tort of retaliatory discharge to claims based upon wage disputes. See, *e.g.*, *Wilke v. Salamone*, 404 F. Supp. 2d 1040, 1049-50 (N.D. Ill. 2005) (holding that the plaintiffs could not state a claim for common law retaliatory discharge based upon a violation of the Minimum Wage Law (820 ILCS 105/1 *et seq.* (West 2004))); *Chicago Commons Ass'n*, 346 Ill. App. 3d at 328-30 (holding that the employee's discharge for complying with a summons in a wage dispute lawsuit would not support a claim for retaliatory discharge); *Geary v. Telular Corp.*, 341 Ill. App. 3d 694, 700-02 (2003) (holding that the employee could not state a claim for retaliatory discharge based upon a demand for payment of commissions under the Act); but see *Brazinski v. Transport Service Co.*, 159 Ill. App. 3d 1061, 1067 (1987) (stating that, by promulgating the Act, the General Assembly had "clearly indicated that it is the public policy of the State to ensure the proper payment of wages to employees by employers"). Our research, however, has not discovered any case from an Illinois reviewing court deciding how the 2011 amendment impacted the holdings of *McGrath* and its progeny. But see *Parise v. Integrated Shipping Solutions, Inc.*, 292 F. Supp. 3d 801, 808-09 (N.D. Ill. 2017) (interpreting the amended version of section 14(c) and denying the employer's motion to dismiss on summary judgment grounds the employee's retaliatory discharge claim under the Act).

¶ 16 In this appeal, plaintiff does not dispute that the *McGrath* decision was correct when it was issued because it interpreted the language of section 14(c) of the Act as it existed prior to the 2011 amendment. At that time, plaintiff notes, section 14(c) provided for only criminal sanctions against employers and their agents who retaliate against employees who attempt to enforce their rights under the Act. *McGrath*, 314 Ill. App. 3d at 439 (citing 820 ILCS 115/14(c) (West 1996) (the version of the statute then in effect)). However, plaintiff observes, 10 years after *McGrath* was decided, the legislature enacted the 2011 amendment, which expressly empowers employees who have been "unlawfully retaliated against" for exercising their rights

under the Act "to recover through a claim filed *** in a civil action *** all legal and equitable relief as may be appropriate." 820 ILCS 115/14(c) (West 2018). According to plaintiff, a reading of the plain language of the amended version of section 14(c) abrogates *McGrath* and provides clarity that an employer who discharges an employee for exercising his or her rights under the Act violates a clearly mandated public policy of this state.

¶ 17 Defendants dispute plaintiff's position, citing *McGrath* and other cases decided prior to the 2011 amendment. See *Chicago Commons Ass'n*, 346 Ill. App. 3d at 328-30 (rejecting request to allow an at-will employee discharged for complying with a summons in a wage dispute lawsuit to bring a retaliatory-discharge claim against his employer); *Abrams v. Echlin Corp.*, 174 Ill. App. 3d 434, 438-43 (1988) (holding that discharge of an employee after he wrote a letter to the company's president regarding a wage dispute constituted "a purely personal and private dispute" that did not support a claim for retaliatory discharge); *Kavanagh v. KLM Royal Dutch Airlines*, 566 F. Supp. 242, 244-45 (N.D. Ill. 1987) (holding that an at-will employee who was terminated after he retained an attorney to represent him in a wage dispute with his employer did not prove that his discharge was in violation of a clearly mandated public policy). Defendants contend that nothing in the 2011 amendment expresses Illinois's public policy with respect to the remedies available to employees terminated for exercising their rights under the Act, including the right to bring a retaliatory-discharge claim.

¶ 18 A certified question under Rule 308 presents a question of law, which we review *de novo*. *Prinova Solutions, LLC v. Process Technology Corp.*, 2018 IL App (2d) 170666, ¶ 10. The certified question presented is primarily one of statutory construction. Statutory construction is also a question of law, subject to *de novo* review. *People v. Manning*, 2018 IL 122081, ¶ 16. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Village of Lake in the Hills v. Niklaus*, 2014 IL App (2d) 130654, ¶ 15. The most reliable indicator of legislative intent is the language of the statute itself, which should be given its plain and ordinary meaning. *Village of Lake in the Hills*, 2014 IL App (2d) 130654, ¶ 15. If possible, a statute should be construed so that no part is rendered superfluous or meaningless. *In re Application of the County Collector*, 356 Ill. App. 3d 668, 670 (2005). Only where the language of the statute is ambiguous, or where a literal interpretation of the statute would either lead to absurd results or thwart the goals of the statutory scheme, may a court look beyond the express language of the statute and consider extrinsic aids of construction. *Lansing v. Southwest Airlines Co.*, 2012 IL App (1st) 101164, ¶ 30; *NDC LLC v. Topinka*, 374 Ill. App. 3d 341, 359 (2007). Moreover, where a statute is amended, it will be presumed that the legislature intended to effect some change in the law as it formerly existed. *People ex rel. Gibson v. Cannon*, 65 Ill. 2d 366, 373 (1976).

¶ 19 Applying these rules of construction, we conclude that the plain language of section 14(c) of the Act, as modified by the 2011 amendment, clearly evinces an intent by the legislature to allow employees who allege that they were discharged for exercising their rights under the Act to file a retaliatory-discharge claim against their employers. As noted, the Act expressly states that "[a]n employee who has been unlawfully retaliated against shall be entitled to recover *** in a civil action *** all legal and equitable relief as may be appropriate." 820 ILCS 115/14(c) (West 2018). This language constitutes "explicit legislative authority" allowing a retaliatory-discharge action. And while the common law tort of retaliatory discharge requires an employee to plead that the discharge violated a clearly mandated public policy, the legislature did not require that the statutory retaliation claim found in section 14(c) of the Act be based on a

violation of public policy. Rather, the statute requires only that the employee complain that he or she has not been paid in accordance with the provisions of the Act and that the employee was discharged or otherwise discriminated against by his or her employer. 820 ILCS 115/14(c) (West 2018). The cases that defendants cite to the contrary are inapposite for the simple reason that they predate the version of section 14(c) modified by the 2011 amendment.[4] Further, defendants offer no interpretation as to the meaning of the language added by the legislature with the 2011 amendment. As noted, where a statute is amended, it will be presumed that the legislature intended to effect some change in the law as it formerly existed. *People ex rel. Gibson*, 65 Ill. 2d at 373. In essence, defendants would have us ignore the language added by the 2011 amendment so as to render it meaningless. *In re Application of the County Collector*, 356 Ill. App. 3d at 670. Consequently, we hold that the 2011 amendment to section 14(c) of the Act allows an employee who has been terminated for exercising his or her rights under the Act to pursue a statutory retaliatory-discharge action against his or her employer. However, the 2011 amendment did not abrogate the holding in *McGrath*, in that the amendment did not provide or set forth a clearly mandated public policy upon which employees could base a common law retaliatory-discharge claim.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we answer the question certified by the circuit court of Kane County affirmatively in part and negatively in part and remand the matter for further proceedings.

¶ 22 Certified question answered; cause remanded.

[4] Defendants do cite a case from 2015, *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C.*, 2015 IL App (1st) 132839-U. However, that case is unpublished and therefore has no precedential value. See *Sexton v. Brach*, 124 Ill. App. 3d 202, 206 (1984); see also Ill. S. Ct. R. 23(e)(1) (eff. Jan. 1, 2021) (prohibiting the citation of unpublished orders filed prior to January 1, 2021, except to support a claim of "double jeopardy, *res judicata*, collateral estoppel, or law of the case"). Moreover, the events in *Bilow* took place well before 2011, and the disposition does not discuss the effect of the 2011 amendment.