IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KEVIN C. RYAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Cause No. 1:06-cv-1770-JDT-TAB**
	)	**Judge John D. Tinder**
	)	**Magistrate Judge Tim A. Baker**
	)	
UNDERWRITERS LABORATORIES, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

INTRODUCTION

In his First Amended Complaint ("Complaint") and just as in his original complaint, Plaintiff Kevin Ryan ("Plaintiff") fails to satisfy any of the legal requirements for bringing a retaliatory discharge claim under Indiana law. His continued inability to plead facts establishing each element is easily explained by the fact that Defendant Underwriters Laboratories, Inc. ("UL"), Plaintiff's former employer, did not terminate Plaintiff in retaliation for any statement protected by law.

Plaintiff's string of outrageous comments regarding the terrorist attacks of September 11, 2001 began in 2003 when he informed UL's Chief Executive Officer of his "competing explanation[]" as to why the World Trade Center ("WTC") buildings had collapsed. Most significantly, Plaintiff wrote to the CEO that the three WTC towers in New York City had been intentionally blown up by explosive devices placed inside the buildings. Later, Plaintiff sent a letter containing further bizarre and baseless assertions about September 11th to the National

Institute of Standards and Technology ("NIST"), a former and current client of UL. In this letter, Plaintiff commented on the inadequacy of the NIST report and stated that the report contained both "[s]ignificant flaws" and internal inconsistencies. Moreover, Plaintiff represented that UL had tested and certified the steel used in the WTC towers and insinuated that he had proof that the building had not collapsed because of the impact of the hijacked airplanes. His letter implied that the collapse was actually the result of something more sinister, a belief he made clearer by sending the letter to a group claiming that the United States government had intentionally plotted to destroy the WTC buildings, killing thousands of Americans in the process. To further highlight the connections Plaintiff tried to make between UL, September 11th, and outrageous conspiracy theories, the organization to whom Plaintiff sent his letter posted it on the Internet where it could be viewed by the public at large. UL then terminated Plaintiff's employment because his letter (1) clearly created the impression that the outrageous opinions contained therein were those of the company and (2) commented on testing performed by UL for a client, thereby harming the company's relationship with that client.

As explained in greater detail below, neither of Plaintiff's claims have any merit and his allegations fall far short of satisfying the legal requirements for asserting a cause of action for retaliatory discharge. Plaintiff Complaint, therefore, should be dismissed in its entirety and with prejudice.

STATEMENT OF FACTS[1]

Plaintiff Kevin C. Ryan ("Plaintiff") is a resident of Monroe County, Indiana. Compl. at 1, ¶ 3. He was hired by Environmental Health Laboratories, Inc located in South Bend, Indiana

[1] As is required under the Federal Rules of Civil Procedure, all facts in this Statement of Facts are taken from the Complaint and are assumed to be true for the purposes of this motion. *See Brown v. Budz*, 398 F.3d 904, 908–09, 912 (7th Cir. 2005). Defendant reserves the right to contest the truth of all facts asserted by Plaintiff in subsequent proceedings.

and was employed there when that corporation was acquired by UL. Compl. at 1–2, ¶ 4. Plaintiff continued to work at UL until November 16, 2004. *Id*.

UL is a not-for-profit corporation with a division office and headquarters in Northbrook, Illinois. Compl. at 2, ¶ 8. UL conducts safety testing of products and construction materials and issues certificates in conjunction with such testing. Compl. at 2, ¶ 10.

On November 19, 2003 and again on December 2, 2003, Plaintiff made various unsubstantiated statements to UL's Chief Executive Officer regarding the terrorist attacks of September 11, 2001, including that "[t]he official government explanation of the WTC building collapses was flawed," Compl. at 4, ¶ 18(b); "[s]ubstantial evidence supported the conclusion" that the three WTC towers in New York City had been deliberately brought down by a "well-engineered controlled implosion resulting from the use of explosive devices placed in the buildings," Compl. at 4, ¶ 18(c); and "[a] scientific analysis of the remains of the collapsed WTC buildings would almost certainly provide a definitive answer to the question of which of these two competing explanations for the WTC buildings . . . was the truth." Compl. at 4, ¶ 18(d). On November 11, 2004, Plaintiff composed a letter to NIST, Compl. at 5–6, ¶ 21, containing many of the same false or unsubstantiated assertions appearing in Plaintiff's letter to the UL CEO, including that that "[s]ignificant flaws exist[ed] in the official explanation of these WTC building collapses," Compl. at 6, ¶ 21(b); a "scientific analysis of the evidence" proved that the building had not collapsed from the jet fuel that burned following the impact of the hijacked airplanes, Compl. at 6, ¶ 21(e); and UL had tested and certified the steel used in the WTC towers. Compl. at 6, ¶ 21(c).

On November 11, 2004, Plaintiff also "made . . . available" his letter containing all of his baseless assertions to an organization that believed the 2001 collapse of the WTC towers may

have been caused by "*the intentional use of explosives placed within those buildings by criminal elements within the United States government*." Compl. at 7, ¶ 23 (emphasis added). That organization posted Plaintiff's letter on the Internet on that very same day. Compl. at 7, ¶ 24

After learning of Plaintiff's letter and the fact that it was publicly accessible on the Internet, UL ended its employment relationship with Plaintiff. Compl. at 8, ¶ 28. UL explained to Plaintiff that he had misrepresented the opinions contained in his letter as being those of the company. *See* Compl. at 8, ¶ 32. Furthermore, UL indicated that it considered Plaintiff's actions to have been inappropriate because they involved testing that UL had done for a client, Compl. at 8, ¶ 30, and Plaintiff had harmed UL's relationship with that client. Compl. at 8, ¶ 31.

Almost exactly two years later, on November 16, 2006, Plaintiff filed his original complaint. On May 14, 2007, Plaintiff filed his First Amended Complaint.

ARGUMENT[2]

Plaintiff's Complaint now alleges two causes of actions.[3] Count I purports to set forth a claim for retaliatory discharge under the Indiana common-law and Count II attempts to state a statutory claim under IND. CODE. ANN. § 22-5-3-3 (the "Indiana statute"). Plaintiff cannot make out a claim under either of these theories. Accordingly, and for the many reasons discussed below, both of Plaintiff's claims should be dismissed with prejudice.

I. Plaintiff's common law claim for retaliatory discharge must be dismissed for failure to state a claim upon which relief can be granted.

Plaintiff attempts to bring a claim under Indiana's public policy exception to the at-will employment doctrine. The Indiana Supreme Court, however, recently reiterated that this

[2] "A motion under Rule 12(b)(6) challenges the [legal] sufficiency of the complaint," *Cler v. Ill. Educ. Ass'n*, 423 F.3d 726, 729 (7th Cir. 2005), and such a motion may be granted by a district court "if 'it is beyond doubt that the non-movant can plead no facts that would support his claim for relief.'" *Palda v. Gen. Dynamics Corp*., 47 F.3d 872, 874 (7th Cir. 1995) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

exception is exceptionally narrow and refused to recognize an expansion of it. Moreover, even assuming that Plaintiff could bring his claim under the Indiana common law, the sources he cites do not, as a matter of law, support such a claim. Accordingly, and for the reasons enumerated below, Plaintiff does not state a claim for retaliatory discharge under the Indiana common law, and thus Count I should be dismissed with prejudice.

A. Plaintiff's attempted retaliatory discharge claim under the narrow common law "public policy" exception fails as a matter of law.

Indiana law generally recognizes that an at-will employee can be terminated at any time and for any reason. *See Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054, 1060 (Ind. App. Ct. 1980), *transfer denied*, 421 N.E.2d 1099 (Ind. 1981). While there is a narrow exception to this rule called the public policy exception, it applies *only* if the employee is terminated for exercising a statutory right, fulfilling a statutory duty, or refusing to commit an illegal act. *See Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973); *see also McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 393 (Ind. 1988); *Campbell*, 413 N.E.2d at 1061. Moreover, the public policy exception is "narrowly construed." *See, e.g.*, *Dale v. J.G. Bowers, Inc.*, 709 N.E.2d 366, 368 (Ind. App. Ct. 1999); *Smith v. Elec. Sys. Div. of Bristol Corp.*, 557 N.E.2d 711, 712 (Ind. App. Ct. 1990); *see also Groce v. Eli Lilly & Co.*, 193 F.3d 496, 502–03 (7th Cir. 1999); *Kodera v. City of Kokomo*, 458 F. Supp. 2d 857, 875 (S.D. Ind. 2006).

The narrowness of the public policy exception was reaffirmed just three months ago by the Indiana Supreme Court. *Meyers v. Meyers*, 861 N.E.2d 704, 706 (Ind. 2007) (stating that "[o]n rare occasions, narrow exceptions have been recognized" to the generally followed at-will employment doctrine). In *Meyers*, the plaintiff employee, like Plaintiff in this case, sued his employer for, *inter alia*, wrongful termination on the basis of the Indiana common-law public

[3] As explained in UL's opposition to Plaintiff's Motion for Leave to File a First Amended Complaint, this

policy exception. *Meyers*, 861 N.E.2d at 705. Also similar to Plaintiff here, the employee in *Meyers* argued that "[a]n at will employee may maintain a cause of action for a retaliatory discharge if the employee has been terminated from his employment for exercising a statutory right or refusing to violate a statutory duty." *Id*. at 706. The Indiana Supreme Court affirmed the trial court's order dismissing the retaliatory discharge claim and refused to recognize a further expansion of the exception. *Id*. at 705–07. The Indiana court noted that case law has interpreted the exception narrowly, *see id*. at 706–07, and over the years the exception has been applied by Indiana courts to two types of cases: those involving worker's compensation and those relating to alleged "refus[als] to violate a legal obligation that carried penal consequences." *Id*. at 707. In light of this precedent and citing many cases refusing to extend the public policy exception, the Indiana Supreme Court found that the trial court had properly dismissed the common-law retaliatory discharge claim. *Id*.

In this case, Plaintiff—like the employee in *Meyers*—is attempting to greatly expand the public policy exception. He does not argue that he was terminated for exercising his rights under the state worker's compensation statute or for "refusing to violate a legal obligation that carried penal consequences." *See Meyers*, 861 N.E.2d at 707. Rather, he asks this court to expand the limited exception to the at-will employment doctrine by suggesting that various constitutional provisions, statutory sections, and unnamed laws adequately reflect public policy. The Indiana Supreme Court, however, clearly counseled against any such expansion in *Meyers* and instead emphasized the narrowness of the exception. This Court, therefore, should resist Plaintiff's invitation to expand the public policy exception and should dismiss Plaintiff's claim.

B. Plaintiff's common-law claim should be dismissed because the sources he cites do not provide rights or duties.

Complaint does not, in fact, correct any of the legal insufficiencies in Plaintiff's original complaint.

Even assuming that the Indiana Supreme Court would expand the public policy exception to accommodate Plaintiff's allegations here—highly unlikely given its recent discussion of the issue in *Meyers*—Plaintiff has not identified any source in his Complaint that could support a common law retaliatory discharge claim. As a result, Count I fails as a matter of law and should, accordingly, be dismissed. *See Bricker v. Federal-Mogul Corp.*, 29 F. Supp. 2d 508, 512 (S.D. Ind. 1998).

1. OSHA cannot provide the basis for his common law claim because it provides its own remedial system.

Indiana law does not permit a plaintiff to seek shelter under the public policy exception to the at-will doctrine where the statute allegedly expressing the public policy also contains its own remedial system, as does OSHA.[4] *See Patterson v. Toyota Motor Mfg., Indiana, Inc.*, No. 3:05-CV-003 RLY-WGH, 2005 WL 1355479, at *1 (S.D. Ind. June 6, 2005) (dismissing complaint and stating that "the [public policy] exception only applies—that is, a state law cause of action only arises—when the statute that creates the right does not also create a remedy"); *see also Groce*, 193 F.3d at 503–04 (finding that the plaintiff's failure to avail himself of the Indiana OSHA statutory remedy for retaliatory discharge barred a state claim based on IOSHA public policy); *Jennings v. Warren County Comm'rs*, No. 4:04-CV-94, 2006 WL 694742, at * 8 (N.D. Ind. Mar. 14, 2006) (finding public policy exception inapplicable where statute provided its own remedy); *Kodera*, 458 F. Supp. 2d at 875 (same); *Carver v. Elec. Data Sys., Corp.*, No. 1:03-CV-1033-DFH-VSS, 2005 WL 552466, at *8 (S.D. Ind. Feb. 11, 2005) (same); *Davenport v. Ind. Masonic Home Found. Inc.*, No. IP00-1047-C-H/G, 2004 WL 2278754, at *7 (S.D. Ind. Sept. 30, 2004) (same).

[4] OSHA includes its own explicit provision for a retaliatory discharge action, which is to be initiated by a complaint to the Secretary of Labor within thirty days of termination. *See* 29 U.S.C. § 660(c)(1), (2). The Complaint does not allege that Plaintiff ever made such a filing with the Secretary of Labor.

Plaintiff cannot state a public policy claim based on a statute that, like OSHA, provides its own remedial system. As a result, Plaintiff's claim in paragraph 45 of the Complaint fails and should be dismissed.

2. There is no federal constitutional right to "reform the government."

The right "to reform his government" does not appear in the United States Constitution, despite Plaintiff's citation to that document. *See* Compl. at 10–11, ¶¶ 43, 47. Accordingly, to the extent that Plaintiff is basing his Indiana common law claim in paragraphs 43 and 47 of the Complaint on a federal right to reform the government, the claim should be dismissed with prejudice.

3 The state "right to reform the government" refers to the right of the populace to adopt a new constitution, not an individual's right to reform the government.

Plaintiff asserts that the Indiana Constitution provides a right to reform the government. Compl. at 11–12, ¶¶ 43, 47. It is doubtful whether article I, section I of the state constitution provides independently enforceable substantive rights. *See Morrison v. Sadler*, 821 N.E.2d 15, 31 (Ind. App. Ct. 2005) (citing *Doe v. O'Connor*, 790 N.E.2d 985 (Ind. 2003)). Moreover, the Indiana Supreme Court has characterized the right to reform the government as referring "only to the inherent and indefeasible power of the people to alter and reform their government *by the adoption of a new Constitution*." *Wright v. House*, 121 N.E. 433, 438 (Ind. 1919) (emphasis added); *see also Bennett v. Jackson*, 116 N.E. 921, 923 (Ind. 1917) ("The people being the repository of the right to alter or reform its government, its will and wishes must be consulted before the Legislature can proceed to call a [constitutional] convention."). Thus, even assuming that article I, section I of the state constitution provides a privately enforceable right, Plaintiff has not alleged that he was terminated for exercising his right, along with the rest of the Indiana

population, to adopt a new state constitution. Accordingly, to the extent Plaintiff is basing his common law claim in paragraphs 43 and 47 of the Complaint on a state right to reform the government, the claim should be dismissed with prejudice.

4. The First Amendment does not apply to private employers.

In a number of paragraphs, Plaintiff avers that UL has violated his First Amendment Rights. *See* Compl. at 10–11, ¶¶ 43, 44, 47. UL, however, is a private employer, *see* Compl. at 13, ¶ 59, and as the Seventh Circuit has previously noted, "[t]he First Amendment retaliation concept applies only to public employment, since private employers are not subject to the amendment." *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 420 (7th Cir. 1988). Accordingly, Plaintiff's common law claim in paragraphs 43, 44, and 47, to the extent based on violations of the First Amendment, should be dismissed with prejudice.

5. The federal misprision statute does not provide rights to Plaintiff, and he cannot satisfy the statutory elements.

Plaintiff claims that he had a right and a duty under the federal misprision statute, 18 U.S.C. § 4, to report potential felonies and terrorist activity. *See* Compl. at 24, ¶¶ 46, 49. First, this statute does not provide Plaintiff with any rights. *See Dugar v. Coughlin*, 613 F. Supp. 849, 852 n.1 (S.D.N.Y. 1985). Moreover, Plaintiff could never be criminally liable under the statute, a requisite to using a criminal statute as the underlying public policy in an Indiana common-law wrongful discharge claim. *See McClanahan*, 517 N.E.2d at 393. The misprision statute has four elements: "(1) commission and completion of a felony offense by a principal; (2) actual knowledge by defendant of the commission of such a felony; (3) failure by defendant to notify authorities; and (4) an affirmative act by defendant to conceal the crime." *United States v. Weekley*, 389 F. Supp. 2d 1293, 1297 (S.D. Ala. 2005) (citing cases from the Second, Third, and Fifth Circuits). Even allowing for Plaintiff's leaps in logic and assuming that a felony was

actually committed and completed by the unnamed principal (a fairly large assumption), Plaintiff does not satisfy the second element, actual knowledge of the commission of a felony. Instead, he merely suggests that he had a "competing explanation[]" for the collapse of the WTC buildings, namely that "a well-engineered controlled implosion resulting from the use of explosive devices placed in the buildings" brought down the towers. Compl. at 4, ¶ 18 (c), (d). Without "actual knowledge," the misprision statute could not be applied to Plaintiff and, therefore, could not support his common-law wrongful discharge claim.

Additionally, Plaintiff fails to satisfy the fourth element, "some positive act designed to conceal from authorities the fact that a felony has been committed." *Weekley*, 389 F. Supp. 2d at 1297–98 (quoting *United States v. Davila*, 698 F.2d 715, 717 (5th Cir. 1983); *United States v. Ciambrone*, 750 F.2d 1416, 1418 (9th Cir. 1984)). A "mere failure to report a known felony would not violate 18 U.S.C. § 4." *See id.* at 1297 (quoting *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002)). Nowhere has Plaintiff alleged that he committed any affirmative act to conceal a felony; the closest he comes is *implying* that his failure to report potential felonies and terrorist activity—"mere silence"—could have resulted in criminal liability under the statute. *See* Compl. at 12, ¶ 49. Because these allegations would never support liability under the federal misprision statute, the statute cannot serve as the underlying public policy for Plaintiff's common law claim. *See Bricker*, 29 F. Supp. 2d at 511–12 (finding after analysis of elements that plaintiff could not be held liable under the criminal statute and thus could not base his common-law claim on that statute). Accordingly, to the extent Plaintiff is basing his common law claim in paragraphs 39 and 43 of his Complaint on the federal misprision statute, 18 U.S.C. § 4, the claim should be dismissed with prejudice.

6. The PATRIOT Act does not state a right to report felonies or terrorist activity.

Plaintiff mentions the "PATRIOT Act" in his Complaint and suggests that this statute creates a right "to report potential felonies and terrorist activity." *See* Compl. at 11, ¶ 46. The PATRIOT Act is a sprawling statute filling hundreds of pages and located in twenty-one sections of eight different Titles of the United States Code. Plaintiff has failed to cite any section in these hundreds of pages supposedly applying to his claims, and UL has not been able to locate any right of a private citizen "to report potential felonies and terrorist activity" in this mammoth piece of legislation. Thus, the claim in paragraph 46 relying on unspecified provisions of the lengthy and sprawling PATRIOT Act should be dismissed.

7. Plaintiff's cannot base his common-law claim on the exercise or fulfillment of *constitutional* rights or duties.

Plaintiff cannot base his common-law claim on the exercise of *constitutional* rights because the public policy exception to the at-will employment doctrine—to the extent it applies here at all—is intended to vindicate employees fired for exercising *statutory* rights or fulfilling *statutory* duties. In the two cases in which a plaintiff has attempted to invoke the public policy exception on the basis of the exercise of a *constitutional* right, the court refused to recognize the applicability of the exception. In *Woodall v. AES Corp.*, No. IP-02-575-C-B/S, 2002 WL 1461718 (S.D. Ind. July 5, 2002), the plaintiff claimed wrongful discharge for, *inter alia*, exercising her First Amendment rights. *See id.* at *1. The defendant moved to dismiss, and the district court granted the motion, concluding that the asserted constitutional right could not provide a basis for the public policy exception. *See id.* at *3. *See also Morgan Drive Away, Inc. v. Brant*, 489 N.E.2d 933, 934 (Ind. 1986) (stating that in *McQueeney v. Glenn*, the Indiana Appellate Court had rejected a claim that termination for exercising a constitutional right constituted retaliatory discharge).

Here, Plaintiff cites numerous provisions of federal and state *constitutions* and claims to have exercised rights or fulfilled duties enunciated in those documents. *See* Compl. at 8, ¶¶ 32, 43, 44, 47. Even assuming that these constitutions bestow individual rights or impose duties on individuals, *see* Part I.B.2–4, courts have never approved the use of the Indiana public policy exception where a plaintiff claims retaliatory discharge for the exercise or fulfillment of constitutional rights or duties.[5] Accordingly, the Court should dismiss Plaintiff's common law claim in paragraphs 32, 43, 44, 47 of the Complaint. *See, e.g.*, *Woodall*, 2002 WL 1461718, at *4 (dismissing common law claims based on alleged exercise of First Amendment and privacy rights).

8. Plaintiff still fails to identify many of the rights and duties he allegedly exercised or fulfilled.

Despite his amendments to clarify his original complaint, *see* Pl. Motion for Leave to File a First Amended Complaint ¶ 1, it is still unclear precisely what rights and duties are supposedly contained therein. For example, Plaintiff alleges a "duty as a United States citizen and citizen of the State of Indiana to defend the United States Constitution and the Constitution of the State of Indiana." *See* Compl. at 11–12, ¶¶ 45, 48. These constitutions, however, do not impose any such duty. Plaintiff also states that he had a right "to report safety hazards and to disclose material facts in a government investigation of an occupational safety related incident" deriving from "the laws of the United States, the State of Indiana, and the State of New York", *see* Compl. at 11–12, ¶ 48, as well as a "duty under the laws of the United States, the State of Indiana, and the State of New York to report potential felonies and terrorist activity . . . ." *See* Compl. at 12, ¶ 49. UL is unaware of any such right or duty under federal, Indiana, or New York

[5] While there are four cases mentioning in *dicta* and in passing the applicability of the Indiana public policy exception to the exercise of constitutional rights, the plaintiffs in those cases never even brought common-law

law.[6] Because there is no general duty to defend the U.S. or Indiana State Constitutions, *see* Compl. 11–12, ¶ 48, nor are any rights or duties imposed on citizens to disclose material facts in investigations, *see* Compl. 11–12, ¶¶ 48, 49, the common law claim, to the extent based on these alleged sources of public policy, should be dismissed with prejudice.

9. Plaintiff's vague references to other "laws" cannot support a common law claim under the public policy exception.

Plaintiff repeatedly states that he was "wrongfully terminated" because he "exercised his right" or "fulfill[ed] his duty" under various, unnamed federal or state laws. *See* Compl. at 11–12, ¶¶ 45, 46, 49. He does not, however identify the specific statutory source of the right he has allegedly exercised or the statutorily imposed duty that he has allegedly fulfilled. Indeed, in these paragraphs and with limited exceptions,[7] he simply makes vague references to the federal, Indiana, and New York "laws."

Because Plaintiff has not alleged the specific statutory source of the right or duty that he has exercised or fulfilled, his Complaint must be dismissed for failure to state a claim. *See Bricker*, 29 F. Supp. 2d at 512 (finding allegations in complaint that defendant's actions "violates state common law" insufficient "to support [the plaintiff's] claim even under the liberal notice pleading standards in federal court" and concluding that plaintiff "has not stated a claim upon which relief may be granted"); *Hostettler v. Pioneer Hi-Bred Int'l, Inc.*, 624 F. Supp. 169, 172 (S.D. Ind. 1985) (holding that plaintiff "fails to fall within the exception to the employment at will rule" because he did not point to a specific "statutory source for the alleged right he claims

---

wrongful discharge claims under the public policy exception on the basis of *statutory* rights, let alone *constitutional* rights.

[6] See above for a discussion of why Plaintiff did not have a duty to report such activity under the federal Misprision statute.

[7] Plaintiff mentions OSHA, *see* Compl. at 11, ¶ 45, the federal misprision statute, *see* Compl. at 11–12, ¶¶ 46, 49, and the PATRIOT Act. *See* Compl. at 11, ¶ 46, As explained above, however none of these statutes can supply a basis on which to assert a common law claim. See Part I.B.1, 5, 6.

to have exercised . . . [or] the duty he claims to have fulfilled"); *Campbell*, 413 N.E.2d at 1061 (same).

C. If the Indiana statutory claim is not dismissed, Plaintiff's common-law wrongful discharge claim should be dismissed.

If this Court does not dismiss Plaintiff's Indiana statutory claim, *see* Part II below, there is yet another reason for dismissing his common-law wrongful discharge claim. In *Davenport*, 2004 WL 2278754, the court found that the plaintiff could not assert a common law claim for wrongful termination where she could have pursued remedies under other statutes. *Id.* at *5, 7. In coming to this conclusion, the court noted that "[t]he lack of any other effective remedy was an important factor motivating the Indiana court to provide discharged employees with a common law cause of action." *Id.* at *5. Where there exists a statute that "provides a comprehensive remedial scheme, including a remedy for retaliatory discharge," the court found "no need to expand the public policy exception to create a broader common law remedy." *Id.* at *7.

If this Court concludes that Plaintiff has sated a claim under the Indiana statute, then he is not without a remedy. Because the Indiana common-law right of action has been narrowly construed, *see, e.g.*, *Sullen v. Midwest ISO*, No. 1:04-cv-0914-JDT-TAB, 2005 WL 4889257, at *5 (S.D. Ind. July 27, 2005) (Tinder, J.) (dismissing common law claims where plaintiff based claim on violations of federal employment laws because Indiana Supreme Court has narrowly construed the public policy exception); *see also Meyers*, 861 N.E.2d at 706; *Dale*, 709 N.E.2d at 368; *Smith*, 557 N.E.2d at 712; *Groce*, 193 F.3d at 503; *Kodera*, 458 F. Supp. 2d at 875, and given the fact that Plaintiff is alleging that he has a remedy under the Indiana statute (namely, a private cause of action), "there is no need to expand the public policy exception" in this case. *Davenport*, 2004 WL 2278754, at *7. Accordingly, if Plaintiff's statutory claim is permitted to

proceed, his common-law claim under the public policy exception should be dismissed with prejudice. *See Sullen*, 2005 WL 4889257, at *5.

II. Plaintiff's statutory claim for retaliatory discharge must be dismissed because the statute either does not provide a private cause of action or Plaintiff has failed to satisfy the statutory elements.

Plaintiff purports to bring his second claim under the Indiana statute. *See* IND. CODE. APP. § 22-5-3-3. This statute, however, does not provide Plaintiff with a private cause of action. Moreover, even assuming that Plaintiff could bring a claim under the Indiana statute, the Complaint fails to allege facts sufficient to satisfy the elements of the statute. Count II of Plaintiff's Complaint, therefore, should be dismissed with prejudice.

A. Plaintiff's statutory claim should be dismissed because the Indiana statute does not provide a private cause of action.

Plaintiff cannot bring a claim under the Indiana statute because it does not provide him with a private cause of action.

1. An examination of the Indiana Code shows that the Indiana statute does not provide a private cause of action.

The statute is located in a chapter of the Indiana Code entitled "Blacklisting" and is one of three sections in that chapter. The other two sections clearly provide for a private cause of actions. *See* IND. CODE. APP. § 22-5-3-1 (stating that a person who violates that section "commits a Class C infraction *and* is liable in penal damages to the discharged employee to be recovered by civil action") (emphasis added); IND. CODE. APP. § 22-5-3-2 (stating that a company violating the section "*shall be liable to such employee* in such sum as will fully compensate him, to which may be added exemplary damages") (emphasis added). The fact that the legislature expressly provided for private causes of actions and individual remedies in the two sections preceding the Indiana statute is strong evidence that the state legislature knew how

to create private rights of actions and intentionally decided not to give private citizens such a right under the Indiana statute. *See, e.g.*, *Hull v. Cent. Transp., Inc*., 628 F. Supp. 784, 793 n.4 (N.D. Ind. 1986) (finding the "legislative intent not to create a private cause of action" under one Indiana law buttressed by looking at a different Indiana statute: "The legislature obviously knows how to indicate that a Class C misdemeanor may be pursued by a private action, and the absence of similar language in I.C. 22-6-3-1 negates the implication of a private cause of action under that statute"); *see also Montgomery v. Bd. of Trs. of Purdue Univ*., 849 N.E.2d 1120, 1130 (Ind. 2006) (finding that where the Indiana Civil Rights Law "expressly authorizes civil suits by private litigants," the silence of the Indiana Age Discrimination Act "as to civil remedies, in contrast with the ICRL, reflects the General Assembly's intentional decision to provide a separate scheme for age discrimination"); *Horseman v. Keller*, 841 N.E.2d 164, 168 (Ind. 2006) ("Provisions of the Indiana Code do not stand alone; the statutes complement each other and must be applied harmoniously.").

2. At least one court in this district has questioned whether the Indiana statute provides a private cause of action.

In *Logan v. Indiana Dep't of Corrections*, No. 1:04-CV-0797-SEB-JPG, 2005 WL 3003077 (S.D. Ind. Nov. 8, 2005), the plaintiff brought a claim under the Indiana statute. *See id*. at *4.[8] Before turning to the merits of the claim, the *Logan* court expressed doubt as to whether this statute even provides a plaintiff with a cause of action: "[The statute's] protection is quite limited, and whether it actually provides a private cause of action has yet to be determined by Indiana courts." *Id*.; *see also id*. (finding plaintiff's allegations "not actionable under Ind. Code §

[8] Besides *Logan*, there is only one other case where a plaintiff brought suit under the Indiana statute. In *Coutee*, the Indiana Appellate Court affirmed the trial court's grant of summary judgment to the defendant employer. *Coutee v. Lafayette Neighborhood Hous. Servs., Inc*., 792 N.E.2d. 907, 914 (Ind. App. Ct. 2003). That court focused its discussion on the statute's term "misuse of public resources" and never considered whether the statute actually provides a private cause of action. *Id*. at 912–14. Notably, *Coutee* was decided two years before *Logan*, so

22-5-3-3, assuming that statute provides a private right of action which is a question we are spared from deciding under these facts"). Accordingly, this Court should dismiss Plaintiff's claim to the extent it is brought under the Indiana statute because it is unclear whether the statute in fact permits Plaintiff's suit.[9]

3. Even assuming that subsection (c) provides a private cause of action, Plaintiff has affirmatively pleaded facts showing that he does not fall under that subsection.

While it is true that the Indiana statute permits "any employee disciplined *under this subsection* . . . to process an appeal *of the disciplinary action* as a civil action in a court of general jurisdiction," *see* IND. CODE. APP. § 22-5-3-3(c) (emphasis added), that remedy is limited by its terms to subsection (c).[10] Subsection (c) of the Indiana statute states that "[n]otwithstanding subsections (a) through (b)" an employee can be subjected to "disciplinary actions for knowingly furnishing false information." *See* IND. CODE. APP. § 22-5-3-3(c). The right to pursue an appeal by way of a civil action, therefore, is limited to employees who have faced disciplinary action for having knowingly furnished false information.

Here, Plaintiff apparently attempts to avail himself of the remedy of "process[ing] an appeal of the disciplinary action [described in subsection (c)] as a civil action in a court of general jurisdiction." *See* Compl. at 13, ¶ 62. Not only does he not allege facts that would show UL terminated him for "knowingly furnishing false information," *see* IND. CODE. APP. § 22-5-3-3(c), but he, in fact, alleges that the UL's bases for terminating his employment were not related

---

presumably the court in *Logan* was aware of *Coutee* when it questioned whether the Indiana statute provided a private cause of action.

[9] The paucity of case law regarding the Indiana statute suggests that the *Logan* court was correct in doubting whether the statute permits private suits.

[10] It is to subsection (c) that the court was referring in *Kodera*, 458 F. Supp. 2d at 874–75 when it stated the statute provided a "civil remedy" (a term that is undefined). As discussed here, Plaintiff does not fit within subsection (c) and thus cannot avail himself of the "civil remedy." In addition, the scope of the civil remedy was not at issue in *Kodera*, which cited to the Indiana statute as a means of interpreting a different Code section. And to the extent that

to the veracity of his statements. *See* Compl. at 8, ¶¶ 30–31. In citing the letter of termination sent by UL, Plaintiff acknowledges UL's reasons for discharging him were (1) its "belie[f] that it was inappropriate for Mr. Ryan to have commented on UL's tests conducted for its client NIST"; and (2) it's belief that Plaintiff's letter to NIST "caused harm to UL's relationship with NIST." *See* Compl. at 8, ¶¶ 30–31. Because Plaintiff acknowledges UL's reasons for termination were the "inappropriate[ness]" of commenting on client testing and causation of harm to a client relationship, he clearly does not show what is required under subsection (c) to "process an appeal of the disciplinary action as a civil action in a court of general jurisdiction." Accordingly, even assuming that subsection (c) would provide him with a private cause of action, Plaintiff has clearly admitted that UL's reasons for terminating his employment do not meet the requirements under subsection (c).

B. Plaintiff's statutory claim should be dismissed because his factual allegations do not support a claim.

Even assuming that the Indiana statute provides Plaintiff with a private cause of action, the allegations contained in his Complaint do not support a claim under the statute. The statute requires, at a minimum, that (1) the plaintiff is an employee; (2) the employer is a private employer (3) the employer is under public contract; (4) the employee makes a report to the employer and "any person, agency, or organization" in writing alleging one of the enumerated acts; (5) the specified act concerns the execution of the public contract. *See* IND. CODE. ANN. § 22-5-3-3. Plaintiff, however, has not alleged facts sufficient to show that that he reported in writing "apparent violations of law and misuses of public resources," *see* Compl. at 12, ¶ 53, and furthermore, he fails to show how either of his "reports" were related to any misuse of public resources. For these reasons, Count II should be dismissed with prejudice. *See Bricker*, 29 F.

Kodera cited *Coutee* for the proposition that the Indiana courts had recognized a private cause of action under the

Supp. 2d at 512 ("A Complaint must state either direct or inferential allegations concerning all of the material elements necessary for recovery under the relevant legal theory.") (internal quotation marks omitted).

1. Plaintiff does not allege that he reported a violation of law to UL or NIST.

Plaintiff alleges in his Complaint that "he made written whistleblowing reports in writing regarding apparent violations of law and misuses of public resources concerning the execution of public contracts by NIST contractors and NIST officials, and UL itself." Compl. at 12, ¶ 53. In fact, Plaintiff's factual allegations do not show that he reported to the UL CEO any violation of law. *See* Compl. at 3–4, ¶ 18. At best he *infers* that a "well-engineered controlled implosion resulting from the use of explosive devices placed in the buildings," *see* Compl. at 4, ¶ 18(c), was one of "two competing explanations for the WTC buildings collapses." *See* Compl. at 4, ¶ 18(d). Nor did Plaintiff report a violation of law in his letter to NIST, as he suggested only that "[o]ne or more safety related failures *may* have caused the majority of fatalities in this tragic September 11, 2001," Compl. at 6, ¶ 21(d) (emphasis added), and that NIST's report was internally inconsistent. *See* Compl. at 6, ¶ 21(f).[11] *See Logan*, 2005 WL 3003077, at *5 (finding that plaintiff did not satisfy Indiana statute elements where, *inter alia*, she did not claim in her "reports" that a law or rule was being violated).

2. Even assuming Plaintiff did allege that he reported a violation of law to UL and NIST, he did not report that UL was at all implicated in the alleged violation.

Assuming, *arguendo*, that Plaintiff sufficiently reported a violation of law, he does not allege that UL was the party that orchestrated the hypothesized "well-engineered controlled

---

statute, it is worth noting that the court in *Coutee* never addressed the issue at all.

[11] Indeed, Plaintiff appears to recognize that his letter to the NIST does not satisfy the statutory requirement of "submit[ing] a written report of the incident to any person, agency, or organization" when he states that "his letter to NIST was somewhat less explicit than his internal reports to UL . . . ." *See* Compl. at 6, ¶ 57.

implosion resulting from the use of explosive devices placed in the buildings." It is simply illogical to assume that the Indiana General Assembly sought to hold private employers responsible for acting on employee allegations that anonymous and unaffiliated third parties had committed unidentified criminal activities. *See City of Carmel v. Steele*, 865 N.E.2d 612 (Ind. May 2, 2007 ("[W]e do not presume that the Legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result.").[12]

3. Plaintiff does not allege that any purported violation of law concerned the execution of a public contract.

Even if Plaintiff alleged a violation of law (which he did not), nowhere in his nearly page long summary of his communication to the UL CEO does Plaintiff even remotely imply that such violations were "concerning the execution of public contract." *See* IND. CODE. ANN. § 22-5-3-3. Accordingly, he cannot satisfy the statutory elements and Count II should be dismissed. *See Logan*, 2005 WL 3003077, at *5 (finding that generalized complaints did not satisfy statutory requirement that plaintiff report violations "concerning the execution of a public contract").

4. Plaintiff does not allege that he reported a misuse of public resources related to the execution of a public contract and therefore his statutory claim fails.

Plaintiff is also apparently alleging that he satisfies the statutory elements by claiming that "he made written whistleblowing reports in writing regarding . . . misuses of public resources concerning the execution of public resources." *See* Compl. at 12, ¶ 53, Nowhere, however, in his lengthy summary of his "report" to the CEO, *see* Compl. at 4, ¶ 18, does Plaintiff allege that there was *any* misuse of public resources, much less a direct expenditure of resources in contravention of a public contract. *See Coutee*, 792 N.E.2d at 914 (holding that "'misuse of

[12] Because the *City of Carmel* opinion was just recently issued, Westlaw does not provide page numbers for the Northeast Reporter.

public resources . . . contemplates a direct expenditure or use of public funds, property, or resources for a purpose other than that contemplated by the contract in question"). Rather, and like the plaintiff in *Logan*, Plaintiff is at best alleging that he reported "conduct that amounted to" violations of laws and a misuse of public resources without identifying in his written report to UL any misuse of public resources or how that alleged impropriety related to the execution of a public contract. *See Logan*, 2005 WL 3003077, at *5. Accordingly, and as in *Logan*, Plaintiff has not satisfied the elements of the statute because he has not alleged that his "written report" also identified the relationship between the alleged misuse of public resources and the execution of a public contract. *See id.* As a result, even if the statute provides Plaintiff with a cause of action, his statutory claim fails as a matter of law and should be dismissed with prejudice.

CONCLUSION

For all of the foregoing reasons, Defendant Underwriters Laboratories, Inc. respectfully requests that the Court dismiss Plaintiff's Complaint in its entirety with prejudice.

Respectfully submitted,

Defendant Underwriters Laboratories, Inc.

s/Michael P. Roche
By One of Its Attorneys

Michael P. Roche (admitted *pro hac vice*)
Aviva Grumet-Morris (admitted *pro hac vice*)
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
Tel: (312) 558-5600
Fax: (312) 558-5600
mroche@winston.com
agmorris@winston.com

Thomas E. Deer
Locke Reynolds LLP

201 North Illinois Street, Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961
Tel: (317) 237-3800
Fax: (317) 237-3900
tdeer@locke.com

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 2007, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Rudolph William Savich – rsavich@aol.com
Mick G. Harrison – mickharrisonesq@earthlink.net

I hereby further certify that service of the foregoing was made by placing a copy of the same into the United States Mail, first class postage prepaid, this 1st day of June, 2007, addressed to:

Kara L. Reagan, Esq.
Stafford Law Office, LLC
714 West Kirkwood Ave.
P.O. Box 2358
Bloomington, IN 47402

s/Michael P. Roche
Michael P. Roche