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

INTRODUCTION

Plaintiff in this case, a former employee of Defendant Underwriters Laboratories, Inc., ("Defendant" or "UL") made outrageous comments regarding his conspiracy theories about the terrorist attacks of September 11, 2001, and created the impression that those outrageous comments were the opinions of his employer, UL. Plaintiff initially made various statements to UL's Chief Executive Officer that the three World Trade Center ("WTC") towers in New York City had been intentionally blown up by explosive devices placed inside the buildings. Later, using his UL e-mail account, Plaintiff sent a letter containing further bizarre and baseless assertions about September 11th, including that a former UL client, the National Institute of Standards and Technology ("NIST"), had somehow "failed to tell the truth" about what "really" happened on September 11, that UL had tested and certified the steel used in the WTC towers, and 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 clear by sending the letter to a group claiming that the United States government itself 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. The letter sent by Plaintiff and posted on the Internet included no indication that it was merely his personal opinion being expressed. Instead, the letter clearly bore his company title and was from UL's e-mail system, thus identifying the author of the offensive letter as a UL employee. UL then terminated Plaintiff's employment because his letter clearly created the impression that the outrageous opinions contained therein were those of the company.

As set out below, the law is clear that UL could terminate Plaintiff's employment for his conduct. None of Plaintiff's claims have any merit whatsoever and his Complaint should be dismissed in its entirety.

STATEMENT OF FACTS[1]

Plaintiff Kevin C. Ryan ("Plaintiff") is a resident of Monroe County, Indiana. Compl. ¶ 2. He was hired by Environmental Health Laboratories, Inc located in South Bend, Indiana and was employed there when that corporation was acquired by UL Compl. ¶ 3. Plaintiff continued to work at UL until November 16, 2004. Compl. ¶ 6.

UL is a not-for-profit corporation with a division office and headquarters in Northbrook, Illinois. Compl. ¶ 7, 13. UL conducts safety testing of products and construction materials and issues certificates in conjunction with such testing. Compl. ¶ 10.

[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.

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 "[s]ubstantial evidence supported the conclusion" that the three World Trade Center towers in New York City had been deliberately brought down by "well-engineered controlled implosion[s] resulting from the use of explosive devices placed in the buildings." Compl. ¶ 16(c). On November 11, 2004, Plaintiff composed a letter to NIST, Compl. ¶ 19, and sent the correspondence from his UL e-mail account. Compl. ¶ 30. As a result, the letter contained Plaintiff's official company title. Compl. ¶ 30. This letter contained many false or unsubstantiated assertions by Plaintiff, including that UL had tested and certified the steel used in the WTC towers, Compl. ¶ 19(c), and that 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. ¶ 19(e).

On November 11, 2004, Plaintiff sent a copy of 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. ¶ 21 (emphasis added). That organization posted Plaintiff's letter on the Internet on that very same day. Compl. ¶ 22

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. ¶ 25. UL explained to Plaintiff that the letter had misrepresented the opinions contained therein as being those of the company. Compl. ¶ 30. Furthermore, UL indicated that it considered Plaintiff's actions to have been inappropriate because they involved testing that UL had done for a client (NIST), Compl. ¶

28, and Plaintiff had harmed UL's relationship with that client. Compl. ¶ 29. Almost exactly two years later, on November 16, 2006, Plaintiff filed this complaint ("Complaint").

ARGUMENT[2]

Plaintiff's Complaint is very unclear as to which legal causes of action he is actually asserting. As a result, Defendant in part has been forced to guess at the precise legal causes of action being raised by the Complaint. As set out below, however, none of the claims possibly being asserted by Plaintiff state a claim and the Complaint should be dismissed as a matter of law.

I. The Complaint Fails to State a Claim for Abridgment of Plaintiff's First Amendment Rights or Violation of State Constitutional Rights.

While it is not entirely clear, Plaintiff appears to be alleging wrongful termination based on his letter, in which he claims to have "exercised his right to freedom of speech under the First Amendment of the United States Constitution and under the Constitution of the State of Indiana to speak publicly on matters of public importance." Compl. ¶ 37. For the many reasons discussed below, this claim fails as a matter of law and should be dismissed.[3]

A. Plaintiff Has No Claim Under the First Amendment.

As an initial matter, it must be noted that there is no freestanding legal claim for wrongful discharge based on the exercise of First Amendment rights. *See, e.g.*, *Stancle v. Chicago Hous. Auth.*, 2004 WL 444560, at *1 (N.D. Ill. Mar. 10, 2004); *Williams v. Parkland Health & Hosp. Sys.*, 2004 WL 1630212, at *5 (N.D. Tex. July 19, 2004). For this reason alone, to the extent Plaintiff has asserted such a claim, it should be dismissed.

[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)).

B. Plaintiff Has No Valid Claim Under § 1983.

Plaintiff may intend to assert a claim under 42 U.S.C. § 1983, but he has failed to plead that statute and his claim should be dismissed. Assuming, however, that the court gives Plaintiff the benefit of the doubt and considers Plaintiff's claim even under a § 1983 framework, that claim still fails.

There are two requirements to state a claim under § 1983. First, the alleged violation must have been committed by a person acting "under color of state law." *See Brown*, 398 F.3d at 908. Second, the violation claimed by a plaintiff must have infringed one of his or her constitutional rights. *See id*. In this case, Plaintiff has not satisfied either of these pleading requirements and thus his claims of First Amendment violations under § 1983 must be dismissed.

1. Plaintiff has not alleged the "under color of state law" requirement of § 1983 and thus the claim must be dismissed.

Plaintiff does not, as a matter of law, satisfy the first element of a § 1983 action because he has not alleged that UL is "a person acting under color of state law." Although Plaintiff acknowledges that UL is a "not for profit corporation with headquarters in Northbrook, Illinois," *see* Compl. ¶ 7, he does not allege that UL is a public employer nor does he allege that he was a government employee. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996) ("The First Amendment's guarantee of freedom of speech protects *government* employees from termination *because of* their speech on matters of public concern.") (first emphasis added). In fact, UL is a private, not-for-profit company and Plaintiff was a private employee. *See* Compl. ¶ 7. The claim, therefore, should be dismissed. *Doublas v. B.I. Inc.*, No. 3:05-CV-470 RM, 2005 U.S. Dist. LEXIS 16612, at *3 (N.D. Ind. Aug. 10, 2005) (dismissing a § 1983 claim because,

[3] This analysis applies equally to Plaintiff's apparent claims under both the Federal and Indiana State Constitutions.

inter alia, defendant was a private company "and nothing in the complaint suggests that they 'acted under color of State law'"); *Woodall v. AES Corp.*, No. IP-02-575-C-B/S, 2002 WL 1461718, at *3 (S.D. Ind. July 5, 2002) (dismissing plaintiff's First Amendment and Indiana Constitution free speech claims because plaintiff had failed to show any state action); *Kentner v. Timothy R. Downey Ins., Inc.*, No. 1:03-cv-435-RLY-WTL, 2006 U.S. Dist. LEXIS 69431, at *22 (S.D. Ind. Sept. 18, 2006) (noting that because defendant was "a private, not-for-profit entity," it was "not a state actor, [and thus] there is no basis for holding [defendants] liable for any alleged constitutional violations.").

Plaintiff has also failed to allege that UL's actions can be attributed to any state governmental entity. His statement that "UL does substantial work under contract with the United States government," Compl. ¶ 11, not only fails to show state action but also does not suffice to transform a private company's actions into government actions. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) ("Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.").[4] Similarly, even assuming the truth of Plaintiff's allegation that UL "does substantial work under contract with the United States government," *see* Compl. ¶ 11, this is still insufficient under Supreme Court precedent to show state action. *See Rendell-Baker*, 457 U.S. at 841. Accordingly, Plaintiff has not satisfied the "under color of state law" requirement of § 1983 and therefore, this claim should be dismissed. *See Woodall*, 2002 WL 1461718, at *2–3.

2. Plaintiff fails to state a claim under § 1983 because he represented that the statements in the letter constituted UL's company position.

See Klunk v. County of St. Joseph, 170 F.3d 772, 777–78 (7th Cir. 1999).

[4] Plaintiff's claim is analyzed in the same manner—and fails for the same reasons—whether he is claiming the Defendant is acting under color of either state or federal law. *See Hartman v. Moore*, 126 S. Ct. 1695, 1700 n.2 (2006).

Even assuming that UL were a state actor, which it is not, Plaintiff could still be lawfully terminated for his letter because he represented that it constituted the Company's position. As set out above, in his letter, Plaintiff made numerous incredible and unsupported claims regarding the events of September 11, 2001 and sent it to an organization that posted it on the Internet. *see* Compl. ¶ 19, 21, 22. Because the letter was sent by Plaintiff using UL's e-mail system, it bore his company title and thus clearly identified Plaintiff as a UL employee. Compl. ¶ 30.

Under these circumstances, UL could discharge Plaintiff because he had misrepresented that the letter stated the Company's opinion. In a very similar case, the Seventh Circuit held that where an employee speaks as a representative of an employer without the employer's consent or authority, the employee does not have a claim for wrongful termination on First Amendment grounds—even when that employer is also a state actor. In *Youker v. Schoenenberger*, 22 F.3d 163, 166 (7th Cir. 1994), the plaintiff (a deputy tax assessor) sent an unauthorized letter using official stationary as well as the signature stamp of the township's tax assessor. *Id.* at 165. In the letter, the plaintiff purported to give an opinion as to the validity of tax exemptions claimed by an individual in the neighboring township. *Id.* When he was discharged for, *inter alia*, sending such a letter, the employee brought a § 1983 action claiming violation of his First Amendment rights. *Id*. at 164–65. In affirming the trial court's grant of summary judgment to the defendant, the Court of Appeals stated that "the speech in the present case is not protected because it was not speech as a citizen because [the plaintiff] represented, without authority, that it was [the defendant Assessor's] official speech." *Id*. at 166.

Youker is analogous to this case. Similar to the employee in *Youker* who used the Assessor's official stationary and the Assessor's stamped signature, Plaintiff here sent his letter using UL's company e-mail system and included his official company title in the letter. Compl.

¶ 30. Also like the deputy tax assessor, Plaintiff used his letter to express opinions that, based on the nature of his employment and subject matter of the opinions, could be reasonably construed as being those of his employer. Given that he also wrote that "UL had tested and certified the steel components used to construct the WTC tower," Compl. ¶ 19(c), Plaintiff clearly implied that he was writing as a UL employee. Nowhere in the letter is it stated or even suggested that the opinions expressed were merely his personal opinions. As in *Youker*, the letter here was sent without the authority, consent, or knowledge of the employer to outside parties. Compl. ¶¶ 19, 21–22. As a result, like the speech in *Youker*, Plaintiff appeared to be expressing not his own, private opinions but the Company's position. Consequently, even if UL were a state actor (which it is not), it was still permitted to discharge Plaintiff, and Plaintiff cannot state a § 1983 claim.

III. Plaintiff's Remaining State Tort Claims for Wrongful Discharge Must be Dismissed for Failure to State a Claim Upon Which Relief Can be Granted.

Plaintiff apparently attempts to state several claims for wrongful discharge under Indiana state law. For the reasons enumerated below, however, none of these allegations state a claim upon which relief can be granted and thus all should be dismissed.

A. Plaintiff's attempted wrongful 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), *aff'd*, *Campbell v. Eli Lilly & Co.*, 421 N.E.2d 1099 (Ind. 1981). While there is a narrow exception to this rule called the public policy exception, *see Groce v. Eli Lilly & Co.*, 193 F.3d 496, 502 (7th Cir. 1999), the exception 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); *Campbell*, 413 N.E.2d at 1061; *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 393 (Ind. 1988).

This public policy exception must be "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) (stating that "Indiana courts have *narrowly construed* the public policy exception" and that a plaintiff must show "that his or her discharge was *solely* in retaliation for the exercise of a statutory right or the fulfillment of a statutorily imposed duty") (emphasis added); *see also Groce*, 193 F.3d at 503 (observing that "the vast body of Indiana law consistently has upheld the vitality of the employment-at-will doctrine, [and] the *narrowness* of any public policy exception") (emphasis added); *Kodera v. City of Kokomo*, No. 1:04-CV-1843-LJM-WTL, 2006 WL 1750071, at *16 (S.D. Ind. June 22, 2006) (same).

Accordingly, a plaintiff claiming wrongful discharge under the public policy exception must point to a specific statutory right or duty in order to state a claim. Where a plaintiff "fail[s] to demonstrate a statutory source for the alleged right he claims to have exercised, [and does not] demonstrate[] a statutory source for the duty he claims to have fulfilled," the claim fails. *Hostettler v. Pioneer Hi-Bred Int'l, Inc.*, 624 F. Supp. 169, 172 (S.D. Ind. 1985); *Campbell*, 413 N.E.2d at 1061 (same).

Here, while the Complaint is very vague, Plaintiff appears to be attempting to create an Indiana state wrongful discharge claim pursuant to the public policy exception to the at-will doctrine. Plaintiff repeatedly states that he was "wrongfully terminated" because he "exercised his right" or "fulfill[ed] his duty" under various federal or state laws. *See* Compl. ¶¶ 36, 38–43. Nowhere, however, does he identify the specific statutory source of the right he has allegedly exercised or the statutorily imposed duty that he has allegedly fulfilled. Indeed, with one

exception, he does not even mention a specific statute by name.[5] Rather, he simply makes vague references to the U.S. and Indiana state constitutions and U.S., Indiana, and New York "laws." *See* Compl. ¶¶ 36, 38–43.

Because Plaintiff has not alleged the specific statutory source of the right or duty that he has exercised or fulfilled, his claims for wrongful termination must be dismissed for failure to state a claim. *See Bricker v. Federal-Mogul Corp.*, 29 F. Supp. 2d 508 (S.D. Ind. 1998) (dismissing complaint where "Plaintiff failed to identify the source of any statutory right or duty that Defendant's termination of Plaintiff contravened"); *Hostettler*, 624 F. Supp. at 172 (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 to have exercised . . . [or] the duty he claims to have fulfilled"); *Campbell*, 413 N.E.2d at 1061 (same).

In *Bricker*, the court considered a complaint similar to the one in this case. There, the plaintiff, a former at-will employee of the defendant, claimed he had been wrongfully terminated because he had refused to perform a task he believed to be illegal or tortious or both. *See Bricker*, 29 F. Supp. 2d at 509–10. In his complaint, he claimed the public policy exception applied because his discharge "violate[d] state common law, was intentional and willful, and was done in reckless disregard of [plaintiff's] common law rights." *Id*. at 510. The court found "that [plaintiff] has not stated a claim upon which relief may be granted" because the allegations in the complaint that the termination had "violate[d] state common law" and "was done in reckless disregard of [plaintiff's] common law rights" neither met the minimal notice pleading standards nor provided sufficient notice to the defendant that the public policy exception was being

[5] Plaintiff mentions the Occupational Safety and Health Act (OSHA) only twice, Compl. ¶¶ 36, 42, but even there his allegation is too cursory to state a claim. *See* below for further discussion.

invoked. *See id*. at 512. Accordingly, the court granted the defendant's motion to dismiss the complaint. *Id*.

Like the Plaintiff in *Bricker,* Plaintiff here has claimed that his termination was wrongful because he "exercised his rights" and "fulfilled his dut[ies]" under various, unnamed federal and state laws and constitutions. He has not, however, stated what rights or duties he exercised and fulfilled, nor what laws or constitutional provisions provided the basis for those rights and duties. As in *Bricker*, this complaint does not satisfy even the minimal pleading requirements of the federal courts as it does not sufficiently provide notice to UL of the nature of the public policies being invoked to support the exception to the at-will doctrine. Consequently, and as in *Bricker*, these claims should be dismissed.

IV. Plaintiff's Claim Based on OSHA Must Be Dismissed Because Where a Statute Provides Its Own Remedy, Indiana State Law Finds That Remedy to be Exclusive.

In paragraphs 38 and 42, Plaintiff mentions the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–51 (OSHA). Compl. ¶¶ 38, 42. He appears to do so in an effort to state a statutory source for the right or duty that he claims to have exercised or fulfilled. For the reasons discussed below, his claim fails as a matter of law and must be dismissed.

Assuming that Plaintiff is citing OSHA as providing the statutory basis for his public policy exception, he fails as a matter of law to state a claim. 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.[6] *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

[6] 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 30 days of termination. 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 at any time.

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*, 2006 WL 1750071, at *16 (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. Indiana Masonic Home Found. Inc*., No. IP00-1047-C-H/G, 2004 WL 2278754, at *7 (S.D. Ind. Sept. 30, 2004) (same).

Plaintiff cannot state a public policy claim based on a statute that, like OSHA, provides its own remedial system. As a result, Plaintiff's claims in paragraphs 38 and 42 of the Complaint fail and should be dismissed.

V. Plaintiff's Claim Must Be Dismissed Because Indiana Does Not Recognize a General Welfare Policy as Supporting the Public Policy Exception.

To the extent that Plaintiff is trying to claim that there is a "general welfare policy" which his actions have vindicated, Indiana courts have already rejected that argument as a basis for finding a public policy exception. In *Campbell*, the discharged employee of a pharmaceutical company claimed that he had been discharged in retaliation for having reported to his employer alleged acts of misconduct by a supervisor as well as safety concerns regarding some of the drugs being produced. *See Campbell*, 413 N.E.2d at 1057. The plaintiff based his claim on the general public policy embodied in the U.S. Food and Drug Administration regulatory scheme, which he argued was designed to safeguard the sale by manufacturers and consumption by consumers of pharmaceutical drugs. *Id*. at 1059–60. The Indiana Appellate Court held that the plaintiff had failed to identify a specific statutory right or duty, the exercise or fulfillment of

which had precipitated his discharge, and further stated that "[w]e do not recognize the general public policy exception urged by Campbell to the venerable at will employment doctrine we reconfirm today." *Id*. at 1060.

Similar to *Campbell*, Plaintiff here appears to be trying to base his claim on some sort of very general public welfare policy. As noted by the *Campbell* court, however, a general public welfare policy does not support a public policy exception to the at-will employment doctrine. *Id.* at 1060. Accordingly, Plaintiff's claims must be dismissed.

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 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.

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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 16th day of January, 2007, addressed to:

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