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.	)	

DEFENDANT'S REPLY IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

After filing an incredibly vague complaint and forcing UL to spend significant time guessing at what causes of action are alleged, Plaintiff fails to clarify his complaint ("Complaint") in his response to UL's motion to dismiss ("Response" or "Pl. Resp."). Worse yet, Plaintiff, represented by three different law firms, argues that he is not required in his Complaint to identify a legal theory and, in fact, implies that he may be claiming a theory of which he himself is not yet aware.[1] The crux of his argument is that this Court should indulge his nearly impossible-to-decipher Complaint because it might, at some point in the unforeseeable future, give rise to a still unidentified claim.

While it may be true that federal courts are particularly liberal in their review of *pro se* complaints, *see Mallett v. Wisconsin Div. of Vocational Rehab.*, 130 F.3d 1245, 1248 (7th Cir.

[1] For support, Plaintiff cites *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984). *See* Pl. Resp. at 2, 29. As this Court has already noted, however, *Sutliff* has since been abrogated. *See Adair v. Sabharwal*, No. IP 02-0284-C-T/K, 2002 WL 31243019, at *2–3 (S.D. Ind. Aug. 16, 2002) (Tinder, J.) ("*Sutliff* was abrogated by *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994) . . . .").

1997), Plaintiff here is not a *pro se* litigant. In fact, he is represented by no less than three well respected attorneys from three different Indianapolis law firms. Despite his high level of legal representation, however, Plaintiff's Response to UL's motion to dismiss is replete with factual inconsistencies, *see, e.g.*, Pl. Resp. at 4 (decrying UL's use of the term "conspiracy theories" but stating that "of course the fact that there was a 'conspiracy' of some kind . . . has been accepted by all"), and legal inaccuracies. *See, e.g.*, Parts I, III, VII below.

The bottom line, however, is that even with Plaintiff's "additional detail," Pl. Resp. at 20, the claims Plaintiff is attempting to assert fail as a matter of law. Notwithstanding his extensive quotation of various provisions of federal and state constitutions and laws, block quotation and string citation of legal precedent, and repetition of large portions of the Complaint, Plaintiff has done nothing to make his claims any clearer or more legally cognizable. Accordingly, and for the many reasons discussed below, all of Plaintiff's claims should be dismissed with prejudice.

I. Plaintiff's § 1983 claims should be dismissed because the cause of action has accrued, the statute of limitations has run, and Plaintiff admits that he cannot show state action.[2]

Plaintiff's argument that his First Amendment cause of action has not accrued and the statute of limitations has not begun to run because he is "unaware of facts that would establish the required State action," *see* Pl. Resp. at 10–12, is simply absurd. The Seventh Circuit has been absolutely clear that "[s]ection 1983 claims accrue when the plaintiff knows or should know that his or her constitutional rights have been [allegedly] violated." *Lawshe v. Simpson*, 16 F.3d 1475, 1478 (7th Cir. 1994); *Monger v. Purdue Univ.*, 953 F. Supp. 260, 264 (S.D. Ind. 1997). Plaintiff here has alleged that his federal First Amendment and state free speech rights were violated, Compl. ¶ 37, and thus there is no doubt that he is actually aware of any

[2] Although Plaintiff claims that he has not yet asserted a § 1983 claim, *see* Pl. Resp. at 11–12, he attempts to leave open the possibility of adding such a claim at a later stage of litigation. *See id*. UL, therefore, addresses this claim.

constitutional claim he might have. His § 1983 claim, therefore, has most certainly accrued and the statute of limitations has most definitely run.[3]

Plaintiff's extensive quotations and citations regarding Indiana's discovery rule are inapposite. While federal courts do look to state law to determine the length of the statute of limitations, "federal law determines when a federal cause of action accrues, and thus when the limitations period begins." *Lawshe*, 16 F.3d at 1478; *Brademas v. Indiana Hous. Fin. Auth.*, 354 F.3d 681, 686 (7th Cir. 2004) ("The accrual of a cause of action under § 1983 is a question of federal law, not state law."); *Monger*, 953 F. Supp. at 264. Therefore, the two year Indiana statute of limitations for personal injury torts governs the *length* of the limitations period, *see Hogland v. Town of Clear Lake, Indiana*, 415 F.3d 693, 699 (7th Cir. 2005), but the *accrual* of his 1983 action is a matter of federal law.

Any constitutional violations Plaintiff believes he has suffered would have stemmed from his discharge from UL employment on November 16, 2004. Compl. ¶ 25. Under federal law, it was at that time that Plaintiff knew or should have known of any purported constitutional violation, and thus it was on November 16, 2004 that his cause of action accrued. Plaintiff then had two years under Indiana law in which to file any and all 1983 claims deriving from that incident or they would be barred by the statute of limitations.[4] Given that Plaintiff now acknowledges that he (1) "is unaware of facts that would establish the required State action in regard to his discharge," Pl. Resp. at 10; (2) "is unaware of facts that would establish the requirement that Defendant Underwriters Laboratories acted under color of state or federal law

[3] Free speech claims based on the Indiana Constitution would be analyzed similarly under § 1983. *Thompson v. Huntington*, 69 F. Supp. 2d 1071, 1075 (S.D. Ind. 1999).

[4] Plaintiff filed his Complaint two years to the day after he was terminated from his employment. Given that the Indiana statute of limitations is two years, it seems highly unlikely that Plaintiff was unaware that the statute of limitations had nearly run on his cause of action and by sheer coincidence, happened to file his complaint on the last day before the statute expired.

in discharging him," Pl. Resp. at 10; and (3) "concedes that he has no facts that the government acted to cause his discharge or that UL acted under color of law in discharging him," Pl. Resp. at 12, and because the statute of limitations expired on November 16, 2006, any § 1983 claim that he might have otherwise pursued are time-barred. Accordingly, his First Amendment and other state and federal constitutional claims, to the extent based on § 1983, should be dismissed.

II. Plaintiff's remaining claims should be dismissed for failure to comply with the pleading requirements.

While the federal pleading requirements are liberal, "there [still] must be sufficient facts pleaded to allow the court and the defendants to understand the gravamen of the plaintiff's complaint." *Kilchrist v. Eli Lilly & Co.*, No. 1:03-CV-02009-JDT-TAB, 2004 WL 1490411, at *5 (S.D. Ind. June 30, 2004) (quoting *Doherty v. City of Chicago*, 75 F.3d 318, 326 (7th Cir. 1996) (internal quotation marks omitted); *see also* BLACK'S LAW DICTIONARY 721 (8th ed. 2004) (defining "gravamen" as "[t]he substantial point or essence of a claim, grievance, or complaint").

The Complaint in this case lacks sufficient facts to convey the substantial point of the claims being asserted against UL. Plaintiff has finally revealed in his Response that his only claims are an Indiana common law claim for wrongful discharge and an Indiana statutory claim. *See* Pl. Resp. at 12. There is, however, absolutely no indication in Plaintiff's Complaint that he is asserting that statutory claim. Additionally, although Plaintiff uses language in the Complaint hinting at a common-law wrongful discharge claim, that claim requires allegation of the underlying public polices that were allegedly violated. *See Bricker v. Federal-Mogul, Corp.*, 29 F. Supp. 2d 508, 512 (S.D. Ind. 1998) (finding plaintiff "has not stated a claim upon which relief may be granted" where plaintiff "[did] not allege facts sufficient to give notice to [the defendant] that the public policy exception applies, such as which statute or statutes [plaintiff] would have violated"); *see also* Defendant's Memorandum of Law in Support of Motion to Dismiss ("Def.

Memo.") at 10–11 (discussing *Bricker*). Plaintiff here fails to allege facts sufficient to give notice to UL of the public policies he is invoking so that UL can adequately respond to the allegations being asserted against it. *See Bricker*, 29 F. Supp. 2d at 512–13 (dismissing common-law wrongful discharge claims). Even the "additional detail" provided by Plaintiff in his Response fails to clarify the Complaint since the sources identified do not provide a legal basis for asserting such a common law claim. *See* Part III below. And to the extent that Plaintiff is attempting to correct his Complaint in his Response to UL's motion to dismiss, he cannot "amend by brief." *See Car Carriers v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss."); *see also Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989); *Dreyer v. City of Kokomo*, No. IP00-1914-C-M/S, 2002 WL 392923, at *3 (S.D. Ind. Jan. 17, 2002); *Murray v. Murphy*, No. 91 C 5200, 1991 WL 268658, at *4 (N.D. Ill. Dec. 4, 1991).

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

As set out in *Bricker*, Plaintiff must identify which public policies are alleged to have been violated in order to survive UL's motion to dismiss his common-law wrongful discharge claim. *See Bricker*, 29 F. Supp. 2d at 512. None of the sources identified by Plaintiff in his Response could support such a claim and therefore, Plaintiff's common-law wrongful discharge claim fails as a matter of law and should be dismissed.

A. Plaintiff concedes that OSHA cannot provide the basis for his common law claim.

Plaintiff states that "he no longer asserts OSHA as a statutory basis of public policy underlying his common law claim." Pl. Resp. at 23. Accordingly, paragraphs 38 and 42 of the Complaint based on OSHA should be dismissed with prejudice.

B. The oath taken by new citizens does not apply to natural born citizens.

Plaintiff states, without any support, that the oath required of new citizens also imposes a duty on all natural-born citizens to defend the United States Constitution. *See* Pl. Resp. at 24. However, another district court has already found that "none of the statutory requirements for naturalization need concern the natural-born citizen. Consequently, the statutory requirements for naturalization cannot be construed by analogy to the legal duties of the natural-born citizen." *In re Matz*, 296 F. Supp. 927, 930 (E.D. Cal. 1969). Accordingly, paragraph 41 of the Complaint, allegedly basing the Indiana common law claim on a duty of natural-born citizens to defend the U.S. Constitution, should be dismissed with prejudice.

C. The Declaration of Independence is not a statute and therefore does not provide a basis for bringing a state common law claim.

Plaintiff cites the Declaration of Independence as providing a basis for his common-law wrongful discharge claim. *See* Pl. Resp. at 21, ¶ 2. Not only do district courts "have no jurisdiction over claims allegedly arising under the Declaration of Independence," *Bowler v. Welsh*, 719 F. Supp. 25, 26 (D. Me. 1989), but this document does not express a statutory right or duty upon which an Indiana common law claim can be based. *See Shuttlesworth v. Hous. Opportunities Made Equal*, 873 F. Supp. 1069, 1079 (S.D. Ohio 1994) (describing Declaration of Independence as "non-statutory"); *see also Borzych v. Frank*, No. 06-C-475-C, 2006 WL 3254497, at *8 (W.D. Wis. Nov. 9, 2006) (stating that "the Declaration of Independence is not binding law"). Accordingly, paragraphs 36 and 40 of the Complaint, allegedly basing the Indiana common law claim on the Declaration of Independence, should be dismissed with prejudice. *See id.*

D. There is no federal constitutional right to "reform the government" and neither the Ninth nor the Tenth Amendments provide individual rights or duties.

The "right of all citizens to reform the government" does not appear in the United States Constitution, despite Plaintiff's citation to and quotation of that document. *See* Pl. Resp. at 21, ¶ 2. Furthermore, the Ninth and Tenth Amendments (also quoted in paragraph 21) do not provide for individual rights or duties. *See Clynch v. Chapman*, 285 F. Supp. 2d 213, 219 (D. Conn. 2003) (dismissing Ninth Amendment claim because "the great weight of authority has held that the Ninth Amendment is not an independent source of rights"); *Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999) (stating that Tenth Amendment limits the power of the federal government and acts neither as "a source of federal authority nor [as] a fount of individual constitutional rights"). Accordingly, to the extent that Plaintiff is basing his Indiana common law claim in paragraphs 36 and 40 of the Complaint on a right to "reform the government," or on a right or duty allegedly contained in the Ninth or Tenth Amendments, the claim should be dismissed with prejudice.

E. 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 Article I of the Indiana Constitution provides a right to reform the government. Pl. Resp. at 22, ¶ 4. 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 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 36 and 40 of the Complaint on a state "right to reform the government," the claim should be dismissed with prejudice.

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

Despite his lengthy quotations from various sections of the federal and state constitutions, it is still unclear precisely what rights and duties are supposedly contained therein. For example, Plaintiff alleges a "right and duty as a citizen of the State of Indiana to defend the Constitution of the State of Indiana" and cites to the Preamble and Article I of the Indiana Constitution. *See* Pl. Resp. at 25, ¶ 14. Those quoted selections, however, do not bestow any such right or impose any such duty. Plaintiff also states that he had a "duty to disclose material facts in a government investigation of an occupational safety related incident" deriving from the First Amendment and Indiana's free speech and right to petition clauses, *see id.* at 23, ¶ 9, as well as a "duty to disclose material facts in a government investigation of a public safety related incident" deriving from the First Amendment and Indiana's free speech and right to petition clauses. *See id.* at 23, ¶ 10. UL is unaware of any such duty in either of these constitutions. Because the excerpted sections do not clarify the vague Complaint, the Indiana common law claim in the Complaint allegedly based on constitutional rights or duties to defend the state constitution, *see* Compl. ¶ 41, or duties of citizens to disclose material facts in investigations, *see* Compl. ¶¶ 38, 42, should be dismissed with prejudice.

G. Plaintiff fails to identify any New York law as supplying a public policy.

Although Plaintiff refers generally to "laws of the . . . State of New York" throughout his Complaint, *see* Compl. ¶¶ 38, 39, 42, 43, he does not point to any law of the state of New York in his Response as supporting a public policy exception. Accordingly, paragraphs 38, 39, 42, and 43 of the Complaint, allegedly basing the Indiana common law claim on unidentified New York law, should be dismissed with prejudice.

H. The Misprison Statute does not provide rights to Plaintiff, and he has not alleged that he had a duty under the statute to report alleged crimes.

Plaintiff now claims that he had a right and a duty under the federal misprision statute, 18 U.S.C. § 4, to report potential felonies, *see* Pl. Resp. at 24, ¶ 11, and to report potential terrorist activity. *See id.* at 24, ¶ 12. 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 v. Remington Freight Lines*, 517 N.E.2d 390, 393 (Ind. 1988). 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 alleges that he has a "competing theory worthy of investigation"; namely "that a controlled implosion via the engineered use of explosives caused the collapse of the three WTC

buildings on 9/11." Pl. Resp. at 5. 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* Pl. Resp. at 24, ¶¶ 11, 12. Because these allegations would never support liability under the federal misprision statute, *see, e.g.*, *Weekley*, 389 F. Supp. 2d at 1297–98, the statute cannot serve as the underlying public policy for Plaintiff's common law claim. 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.

I. Plaintiff still refuses to divulge part of his legal theory.

In paragraph eleven of page 24, Plaintiff still implies that he is referring to additional, unnamed laws in asserting that he had "right and duty under federal and state laws to report potential felonies . . . ." *See* Pl. Resp. at 24, ¶ 11 (stating the claims "referred to in the Complaint ¶¶ 39, 43 is based upon, *inter alia*" the federal misprison statute). This is an insufficient response to a defendant's challenge to a complaint. *Kirksey v. R.J. Reynolds Tobacco Co.*, 168

F.3d 1039, 1041–42 (7th Cir. 1999).[5] In addition, in paragraph twelve of that same page, Plaintiff mentions the "PATRIOT Act" as creating a right or duty "to report potential terrorist activity." *See* Pl. Resp. at 24, ¶ 12. 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 or duty of a private citizen "to report potential terrorist activity" in this mammoth piece of legislation. Thus, the claim in paragraphs 39 and 43 of the Complaint relying on other "federal or state laws" that Plaintiff still refuses to identify or on unspecified provisions of the lengthy and sprawling PATRIOT Act should be dismissed.

IV. Plaintiff's statutory claim under Indiana Code § 22-5-3-3 should be dismissed.

A complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *see also Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002). In his Complaint, Plaintiff makes a single claim for Wrongful Discharge. Compl. at 3. Throughout every paragraph in which he purports to explain the basis for his claim, he repeatedly uses the phrase "wrongfully terminated" for "fulfill[ing] his duty" or "exercise[ing] his right." *See* Compl. ¶¶ 36–43. While this language arguably hints at Indiana's public policy exception to at-will employment, there is nothing in the Complaint even

[5] In *Kirksey*, the Seventh Circuit explained why the plaintiff erred in her argument that "what Plaintiff is required to do at the initial pleading stage, and what the Plaintiff has done, is to assert a colorable claim that has some factual support." *Id*. at 1041 (internal quotation marks omitted).

> Where the plaintiff has gone astray is in supposing that a complaint which complies with Rule 8(a)(2) is immune from a motion to dismiss. This confuses form with substance. Rule 8(a)(2) specifies the conditions of the formal adequacy of a pleading. It does not specify the conditions of its substantive adequacy, that is, its legal merit. . . . [Where a defendant files a motion to dismiss,] it would not be responsive of the plaintiff to say that she was not "required at this stage of the litigation to specifically characterize or identify the legal basis of the claims in the complaint."

Kirksey, 168 F.3d at 1041.

remotely "giv[ing] the defendant fair notice" that Plaintiff is asserting a statutory claim and it certainly does not "give the defendant fair notice of . . . the grounds upon which [this claim] rests." *See Conley*, 355 U.S. at 47; *see also* IND. CODE. ANN. § 22-5-3-3 (the "Indiana Statute"). The Indiana statute under which Plaintiff now says he is proceeding comes in a Chapter of the Indiana Code entitled "Blacklisting" yet Plaintiff does not refer to blacklisting at any point in the Complaint. Neither, as Plaintiff admits, did he "specifically reference this whistleblower statute right of action in his complaint." Pl. Resp. at 28. Most importantly and despite his assertions to the contrary, the facts Plaintiff plead in his Complaint do not provide fair notice of his intent to base his claim on the statute. The letters Plaintiff wrote to UL and NIST (described very generally in his Complaint) hardly suggest that he was bringing attention to "a violation of a federal law or regulation," "a violation of a state law or rule," or the "misuse of public funds" that he attributed to a "public contract."[6] Even with his explanation of how the facts in the Complaint allegedly "cover each element of a claim under the statute," Pl. Resp. at 28, the Complaint is still woefully inadequate to assert that statutory claim.

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

Even assuming that the Complaint in this case sufficiently alludes to the Indiana statute, Plaintiff's statutory claim should still be dismissed. 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. 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

[6] Plaintiff also states that UL "admits in its motion . . . that UL has at least one government agency, NIST, with which it contracts to perform services" and "admits . . . that UL was contracted by NIST to perform fire resistance tests on models and/or components [*sic*] the WTC floor assemblies." Pl. Resp. at 28. UL admitted no such thing. Indeed, UL specifically noted that it was assuming the truth of the Plaintiff's allegations as required in a motion to

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.*[7] 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.[8]

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

Moreover, even if Plaintiff has a private cause of action, the very vague allegations in his Complaint would not support a claim under the statute. *See Bricker*, 29 F. 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). 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 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. As he explains in his Response, Plaintiff's "internal reports to UL clearly alleged that there was substantial evidence that the WTC building collapsed due to the commission of a crime." Pl. Resp. at 28. He does not allege that the alleged crime was in any way related to UL's execution of a public contract. And despite his reference to sundry sections of the Complaint, Plaintiff also does not suggest in his Complaint *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

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dismiss and explicitly "reserve[d] the right to contest the truth of all facts asserted by Plaintiff in subsequent proceedings." Def. Memo. at 2 n.1.

[7] Besides *Logan*, there is only one other opinion 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.

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 here is 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 which laws were being violated or how those alleged improprieties 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 crimes or 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.

V. Assuming that the Indiana statute does provide a private cause of action, Plaintiff's common-law wrongful discharge claim should be dismissed.

If Plaintiff's Indiana statutory claim is not dismissed, his remaining wrongful discharge claim brought under Indiana's common law should be dismissed. In *Davenport v. Indiana Masonic Home Foundation Inc.*, No. IP00-1047-C-H/G, 2004 WL 2278754 (S.D. Ind. Sept. 30, 2004), 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.

[8] The paucity of case law regarding the Indiana statute suggests that the *Logan* court was correct in doubting

If this Court concludes that the Indiana statute provides Plaintiff with a cause of action for his discharge, 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 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*, 193 F.3d at 503; *Kodera v. City of Kokomo*, No. 1:04-CV-1843-LJM-WTL, 2006 WL 1750071, at *16 (S.D. Ind. June 22, 2006), and given the fact that Plaintiff is alleging that he has a remedy under the 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.

VI. Plaintiff's common-law claim, to the extent based on the exercise or fulfillment of *constitutional* rights or duties, should also be dismissed.

Alternatively, Plaintiff's common-law claim should be dismissed to the extent based on the exercise of *constitutional* rights. The public policy exception to the at-will employment doctrine 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 exercising her

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whether the statute permits private suits.

First Amendment right of freedom of association and constitutional right to privacy. *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 has based his common-law wrongful discharge claim on various federal and state *constitutional* rights that he claims to have exercised. *See* Pl. Resp. at 20–25, ¶¶ 1, 2, 3, 4, 5, 6, 8, 9, 10, 14. Because courts have never approved the use of the Indiana public policy exception where a plaintiff claims wrongful discharge for the exercise or fulfillment of constitutional rights or duties, those claims fail as a matter of law.[9] Accordingly, the Court should dismiss Plaintiff's common law claim in paragraphs 36, 37, 38, 40, and 41 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).

VII. Plaintiff erroneously concludes that UL's motion is one for summary judgment and requests improper relief.

Finally, Plaintiff is wrong in his argument that UL's motion to dismiss is actually a summary judgment motion. The only case he cites in support, *Alexander v. State of Oklahoma*, is a Tenth Circuit case standing for the proposition that documents and other materials not contained in the pleadings may not be proffered or considered in the context of a 12(b)(6) motion. *See Alexander v. State of Oklahoma*, 382 F.3d 1206, 1213–14 (10th Cir. 2004) (discussing this issue and finding that the district court had relied on a hearing, expert testimony,

[9] 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

and supplemental briefs on whether a book provided plaintiffs' with notice). Here, UL did not submit any document or material outside the scope of the Complaint, and therefore, the very general principle enunciated in *Alexander* is inapplicable.

Moreover, even assuming that UL had presented the court with such items, the proper remedy is *not*, as Plaintiff contends, for the motion to be stricken or summarily denied. *See* Pl. Resp. at 10, 30. Rather, and again as explained in *Alexander*, the case cited by Plaintiff, this Court would be required only to "exclude the material or treat the motion as one for summary judgment." *Alexander*, 382 F.3d at 1214 (internal quotation marks and citations omitted); *see also* Charles Alan Wright & Arthur R. Miller, 5C FED. PRAC. & PROC. CIV. § 1366 (3d ed.) (stating that district court has discretion in whether to accept and consider additional materials—thereby converting the motion into one for summary judgment—or reject them).

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

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

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 16th day of February, 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 16th day of February, 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