



the common law claim for retaliatory discharge.<sup>1</sup>

Plaintiffs in their individual and ?joint? briefs clearly raise the issue of whether the complaint stated a claim for common law retaliatory discharge. The Trial Judge said:

The complaint[s] does not state a cause of action for retaliatory discharge as a matter of law, at least none that are not preempted by the Tennessee Human Rights Commission Act.

Thus, the issue on appeal is as stated by appellants.

Accepting the allegations of the complaint as true and in the most favorable light to the plaintiffs, defendants retaliated against plaintiffs for objecting to the alleged fraudulent practices, i.e., the scheme alleged was that where a patient ?had used up? her insurance benefits for psychiatric or psychological treatments but had remaining drug abuse coverage, the management would direct the employees ?to assess? the patients as being drug and/or alcohol abuse dependent in order to collect the additional insurance, although drug and alcohol abuse was not present.

The Tennessee Human Rights Act deals with discrimination on the basis of race, creed, color, religion, sex, age, or national origin. T. C. A. §4-21-101 would not preempt this claim

T. C. A. §50-1-304 reads in pertinent part:

(a) No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.

(b) As used in this section, ?illegal activities?

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<sup>1</sup>The issue framed in appellants' joint brief is: ?The Trial Court erred in ruling that the appellants' claims for common law retaliatory discharge failed to state a claim upon which relief could be granted.?

means activities which are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety, or welfare.

© Any employee terminated in violation of subsection (a) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled . . .

The Tennessee Supreme Court has determined that this statute does not preempt a similar action at common law.

*Hodges v. S. C. Toof, Inc.*, 833 S.W2d 896, 899 (Tenn. 1992) determined that the statutory remedy is cumulative because the common law tort of retaliatory discharge was recognized in the *Clanton v. Cain Sloan Co.*, 677 S.W 2d 441 (Tenn. 1984), before the 1986 amendment giving a remedy for discharge due to employee's jury service; *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W2d 822, 825 (Tenn. 1994) cited *Hodges* and found that the legislation itself stated that its remedy was not intended to be exclusive.

Any employee terminated in violation of subsection (a) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled." T. C. A. § 50-1-304(c). (Emphasis added).

Appellee's reliance on *England v. Fleetguard, Inc.*, 878 F. Supp. 1058 (M.D. Tenn. 1995), for the proposition that the charges of fraud would be preempted by the Tennessee Human Rights Act (THRA), is misplaced. *Fleetguard* held that the statutory remedies were the sole and exclusive remedies available to an employee claiming a retaliatory discharge on the basis of religious discrimination. The Act applies to discrimination on the on the basis of race, creed, color, religion, sex, age or national origin but would not apply to

retaliatory discharge for refusing to go along with fraud<sup>2</sup>.

The complaints allege that plaintiffs were concerned and believed that "criminal and civil sanctions" could be imposed upon them. *Chism v. Mid-South Milling Co., Inc., et al.*, 762 S.W2d 552 (Tenn. 1988) instructs that public policy warrants protection from retaliatory discharge where employees are discharged for refusing to falsify records or acquiesce in mislabeling of unsafe or defective products. The case emphasized the possibility of personal liability. *Id.* 556. I believe in the spirit of *Chism* that this case should not be dismissed on the basis that it fails to state a claim upon which relief may be granted.

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Herschel P. Franks, J.

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<sup>2</sup> Note that insurance fraud is criminalized in T.C.A. § 39-14-133:

**False or fraudulent insurance claims.** - Any person who intentionally presents or causes to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon any contract of insurance coverage, or automobile comprehensive or collision insurance, or certificate of such insurance or prepares, makes, or subscribes to a false or fraudulent account, certificate, affidavit or proof of loss, or other documents or writing, with intent that the same may be presented or used in support of such claim, is punished as in the case of theft.