IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GIL R. BOWER, **Plaintiff,** **v.** **DC CORPORATION,** **Defendant.**	**Case No. 3:05-CV-90991** **MEMORANDUM OF LAW BY DC CORPORATION IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff Gil R. Bower's ("Bower") claims against DC Corporation ("DC") of unlawful retaliatory discharge in violation of California law must fail as a matter of law. According to his First Amended Complaint, Bower contends that he was discharged on account of his alleged complaints about the presence of toxic mold in the DC facility threatened the health and safety of employees and customers of DC and that the Metropolitan Waste Commission ("MWC") would shut the plant down if it became aware of the mold. Bower's own admissions and other undisputed evidence clearly prove that his claims fail on multiple grounds.

At the most basic level, Bower cannot even establish he was actually discharged from employment, at the behest of DC. The undisputed facts clearly prove Bower resigned, rather than take personal responsibility for his poor job performance. After being presented with a Performance Improvement Program designed to assist him in meeting DC's legitimate performance expectations, Bower refused to cooperate and resigned by way of failing to communicate with DC. In so doing,

Bower seized an opportunity to resign and move out of a job with which he admitted he was unhappy. Bower is now looking to this Court to allow him to eat his cake and have it as well.

Even more dispositive is the missing center-piece of Bower's complaints against DC. Mr. Bower is not now, nor was he ever, a whistle-blower. DC brings the Court's attention to three key factual summaries, which cannot be disputed by the Plaintiff. One, Bower admits he did not engage in protected activity because he never filed a complaint with any regulatory agency. Bower provides no scrap of substantive evidence that he ever filed an actual complaint. He merely recalls a telephone conversation with an unnamed MWC telephone operator. Two, again by his own admission, Bower never informed DC Corp of his alleged complaint or that he intended to complain about the presence of mold or any alleged violation of federal, state or local law. Thus, DC was never placed on notice that Bower complained, or ever planned to complain, to any regulatory agency about anything. Three, because there is no legal standard for indoor airborne concentrations of mold, even if Bower had actually made a complaint, he did not have a good faith basis to contend that a violation of law had actually occurred.

Finally, it is clear this case is really about the Plaintiff's failure to come to terms with his own lackluster job performance and the Plaintiff's misguided attempt to profit from his anger and bitterness towards his former employer. This lawsuit is just another manifestation of the Plaintiff's lack of personal responsibility for his own actions and inactions. Bower cannot establish the requisite causation to maintain a retaliatory discharge claim. Even if Bower had been discharged by DC, he admits that the cause of his alleged termination was his failure to sign the Performance Improvement Program and not complaints about the mold. Because it is not unlawful for an employer to expect an at-will employee to acknowledge in writing that he will seek to improve his poor job performance and with no proof of unlawful motivation, Bower's claims fail as a matter of law. Accordingly, as set forth herein, the First

Amended Complaint should be dismissed.

II. LAW AND ARGUMENT

A. Retaliatory Discharge Under California Law

Because this case is before this Court based upon diversity jurisdiction, the substantive law of the State of California applies to Bower's claim. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

In California, an employment relationship may generally be terminated by either party "at will." <<<Insert Citations Here>>>. On occasion, employers have abused the at will relationship by discharging employees for reasons contrary to public policy as expressed in statutory or constitutional mandates. *Martin*, 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982) In response, courts have created an exception to, or qualification of, the at will employment principle. Martin at 596 The exception is this: An employer may not discharge an at will employee for a reason that violates fundamental public policy. Id. At 596 An at-will employee may maintain a tort cause of action for wrongful discharge if he can show that his "'employer's motivation for [a] discharge contravenes some substantial public policy principle.'" <<<Insert Citations Here>>>. This requirement can be met by proof that the plaintiff was discharged in retaliation for asserting his statutory right, or his refusal to perform an illegal act at the request of the employer, or because his employer directly violated a statute or public policy by dismissing him. Folev. Interactive Data, 47 Cal. 3d 654, 668-69, 765 P.2d 373, 379 (1988). A prima facie claim of retaliatory discharge requires Bower to show the existence of the following genuine issues: 1) he engaged in a protected activity; 2) thereafter, the employer took an employment action adverse to him; and 3) there was a causal connection between the protected activity and the adverse employment action. *Soukup at* 39 Cal. 4th 260, 287-288, 139 P.3d 30, 48 (2006); Mokler v. Cnty. of Orange, 157 Cal. App. 4th 121, 138, 68 Cal. Rptr. 3d 568, 580 (2007).

Analyzing and applying these standards to the facts of the present case, Bower's First Amended Complaint fails as a matter of law.

B. Bower Cannot Show the Requisite Causation for a Retaliatory Discharge Claim

Essential to an employee's establishing a causal link between his engaging in protected activity and an employer's retaliation through an adverse employment action is evidence that the employer was aware that the employee had engaged in the protected activity. Morgan v. Regents of Cal., 88 Cal. App. 4th 52, 70, 105 Cal. Rptr. 2d 652, 666 (2000). To establish causation in a retaliation case, Plaintiff must "make some showing sufficient for a reasonable trier of fact to infer that the defendant was aware that the plaintiff had engaged in protected activity." Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1197 (9th Cir. 2003) opinion amended on denial of reh'g, 00-35999, 2003 WL 21027351 (9th Cir. May 8, 2003)(citing Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982).

Bower did not inform any of his supervisors that he spoke with any federal, state or local regulatory agency, regarding the presence of mold at the DC Corp, Wilmington facility. (Plaintiff's Response to Requests for Admission No. 3.) Through Bower's own admissions, he cannot establish a prima facie case of retaliatory discharge. By his own testimony, he did not engage in the protected activity of reporting the presence of mold or any misconduct related to the mold. Because DC Corp could not have taken action against Bower based upon information DC Corp was never aware of, he cannot show causation as a matter of law.

Furthermore, Bower's own admissions preclude him from establishing causation. Bower considered himself to be terminated when he refused to sign the PIP on June 15, 2006. The PIP itself does not mention Bower's role in the mold abatement process. Thus, even if Bower actually had been terminated for refusing to sign the PIP, the cause for termination would be his failure to sign the PIP and not any unspoken complaints about the mold. (Deposition of Gil R. Bower ("Bower Dep.") 21:6 –

22:2.) Accordingly, since the "but for" cause of Bower's alleged termination was his decision not to sign the PIP, his retaliatory discharge claim must fail as a matter of law.

C. Bower Cannot Show that a Clearly Mandated Public Policy is Implicated

Bower has alleged that he was discharged in retaliation for reporting illegal conduct, often called "whistle-blowing". (First Amended Complaint ¶ 32.) The California "legislature provided "whistleblower" protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency." Green v. Ralee Eng'g Co., 19 Cal. 4th 66, 76-77, 960 P.2d 1046, 1052-1052 (1998). "[P]laintiff could state no claim for "whistleblowing" under Lab.Code, § 1102.5, which prohibits retaliation against employees who disclose violations of law to government or law enforcement agencies, where plaintiff made no complaints to any governmental agency." Harvey v. Sybase, Inc., 161 Cal. App. 4th 1547, 1565, 76 Cal. Rptr. 3d 54, 69 (2008) review granted and opinion superseded, 188 P.3d 579 (Cal. 2008)(citing Hejmadi v. Amfac, Inc., 202 Cal. App. 3d 525, 539, 249 Cal. Rptr. 5, 12 (Ct. App. 1988)). "Since plaintiff never went to a governmental agency concerning his complaints, the statute is clearly inapplicable to him and he has not stated a cause of action under the "whistleblowing" theory." Hejmadi, 202 Cal. App. 3d, 539.

Bower's claim must fail because he does not qualify as a "whistle-blower" as a matter of law, because he did not lodge a complaint with any governmental agency, as in Hejmadi, 202 Cal. App. 3d 525. The Plaintiff's First Amended Complaint alleges that Bower "was terminated on June 15, 2006 by the Defendant in retaliation for his reporting of mold contamination to the Metropolitan Waste Commission." (First Amended Complaint ¶ 32.)

Bower's own admission directly contradicts the First Amended Complaint's allegations. Bower admits he never submitted any sort of written complaint with the Metropolitan Waste Commission.

(Plaintiff's Response to Requests for Admission No. 1.) Bower provides no proof of any sort of report or complaint to a governmental agency, beyond his unsubstantiated recollection of a telephone call to the MWC. (Plaintiff's Response to Requests for Admission No. 1.) Bower further admits that he never specifically named DC Corp in any discussion with the MWC. (Plaintiff's Response to Interrogatory No. 7.) Furthermore, Bower did not inform any of his supervisors that he spoke with any federal, state or local regulatory agency, regarding the presence of mold at the DC Corp, Wilmington facility. (Plaintiff's Response to Requests for Admission No. 3; Plaintiff's Response to Interrogatory No. 7.) Through Bower's own admissions, he cannot establish a prima facie case of retaliatory discharge. By his own testimony, he did not engage in the protected activity of reporting the presence of mold or any misconduct related to the mold.

Even if Bower had reported concerns about mold to management, his actions were not in furtherance of the goals of any law which protects the health and safety of employees or the public. Bower does not have a good-faith basis upon which to contend that DC Corp violated any law or regulation because no local, state or federal agency has established a standard for mold content of indoor air, which is required to be followed. As he admits, Bower did not know of any specific local, state or federal statute or regulation actually violated by DC Corp with respect to the indoor air quality mold testing, at the time he was employed by DC Corp. (Plaintiff's Response to Requests for Admission No. 12.) Indeed, as Walter Evans, who was hired by DC Corp to conduct indoor air quality testing during the mold abatement process, testified, there is no federal standard for concentrations of mold. (Deposition of Walter Evans ("Evans Dep.") 32:16 – 32:25.) The state and local standards for concentrations of mold, which might apply to DC Corp, are permissive in nature and not standards imposing requirements, fines or punishment of any sort upon regulated entities.

(A)n employee need not prove an actual violation of law; it suffices if the employer fired him (the employee) for reporting his 'reasonably based suspicions' of illegal activity. Green, 19 Cal. 4th at 87. The most Bower can do is point to the existence of regulations that discuss health and safety concerns in general. In the present case, Bower may have reasonably believed regulations existing dealing with the subject matter, but he did not reasonably believe DC Corp was engaging in illegal activity. Without proof to support a good-faith belief that DC Corp was violating any local, state or federal regulation, Bower's retaliatory discharge claim must fail as a matter of law.

D. Bower's Claim Fails As He Was Not Subjected to Adverse Employment Action

A fundamental allegation of the Plaintiff's retaliatory discharge claim is that the Plaintiff was discharged from employment. (First Amended Complaint ¶ 32.) Termination or other adverse employment action, like demotion or suspension without pay, is required to give rise to a claim for retaliatory discharge. Tameny, 27 Cal. 3d, 176; Garcia v. Rockwell Internat. Corp., 187 Cal. App. 3d 1556, 1562, 232 Cal. Rptr. 490, 493 (Ct. App. 1986) abrogated by Gantt v. Sentry Ins., 1 Cal. 4th 1083, 824 P.2d 680 (1992); Andersen v. Pac. Bell, 204 Cal. App. 3d 277, 283, 251 Cal. Rptr. 66, 69 (Ct. App. 1988).

In this case, the plaintiff is clearly attempting to convolute the circumstances to make it appear as though he was terminated. The facts clearly demonstrate that not only was Bower not terminated, but he intended to resign. A full month before he was aware of the presence of mold at the Wilmington facility or was assigned to the mold abatement team, Bower was attempting to obtain new employment with another company. (Plaintiff's Response to Requests for Admission No. 7, Plaintiff's Response to Interrogatory No. 12.) Bower seized upon an opportunity to leave the company when he was presented with a Performance Improvement Program ("PIP") on June 15, 2006 and refused discuss the program with his supervisors, let alone sign the document. (Bower Dep. 20:24 – 23:3)

The PIP did not terminate Bower's employment as he alleges, as it contains no language related to termination. (Exh. 29.) To the contrary, it was a tool designed to raise his performance to a level that met DC Corp's expectations. (Exh. 29.) The PIP contained four specific job-related expectations. (Exh. 29.) Bower was given resources to assist him in meeting DC's expectations and his managers were invested in helping him raise his performance level over the next 60 days and beyond.

While Bower asserts that Plant Manager Sam Parker told him that he was terminated on June 15, when Bower informed Parker that he was refusing to sign the PIP, the plain truth was that he was not terminated that day. Both Sam Parker and Cynthia Roth testified that Parker only told Bower he would *recommend* him for termination if he did not sign the PIP. (Deposition of Sam Parker ("Parker Dep.") 16:7 – 13, Deposition of Cynthia Roth ("Roth Dep.") 18:22 – 19:4.) Upon returning to the Wilmington facility on June 16, 2006, Bower met with Parker and Human Resources Manager Sue Martine. (First Amended Complaint ¶ 24.) At that time, Bower was informed at least twice that he had not been terminated from DC Corp. (First Amended Complaint ¶ 24.) So as Bower expressly concedes, he was informed by DC Corp that his employment had not ended.

After discussing the terms of the PIP, Bower was given a long weekend to review the document and was to return to DC on June 20, 2006. (First Amended Complaint ¶ 25.)

In addition to being expressly informed that he was not terminated, Bower never lost a dollar of pay on June 15 or for any of the time-period through his resignation. Instead, he continued to receive payment of his salary from DC Corp for three weeks after June 15, 2006, the date of alleged termination. (Plaintiff's Response to Requests for Admission No. 13.)

Faced with his continued pay and express understanding that he was not terminated, Bower changed tactics. Rather than communicate with DC Corp, Bower instead consulted with counsel. (Plaintiff's Responses to Requests for Admission No. 14., Bower Dep. 8:2-3.) Bower returned to DC on

June 20, and once inside the facility, Bower informed Sue Martine: "I have been advised by my attorney to remove my personal items from my office and not to sign any documents or to discuss anything with anyone." (Plaintiff's Responses to Requests for Admission No. 15.) No one told Bower he was fired on June 20 and his pay continued.

After walking out on DC, Bower cut off all communication with the company. He ignored multiple phone messages under advice of counsel. Since he would not talk to anyone, DC sent Bower a letter on June 22 asking him to contact the company. (Exh. 22.) Because he was still employed and drawing a paycheck, DC also informed Bower that if he failed to contact Sue Martine by June 28, the company would assume he was voluntarily resigning his employment. (Exh. 22.) Cognizant that DC would consider him voluntarily resigned if he ignored the letter, Bower never attempted to contact anyone at DC Corp. (Plaintiff's Responses to Requests for Admission No. 16.)

As a matter of law, Bower cannot (1) declare himself terminated as of June 15, despite DC's multiple assurances that he was not fired; (2) continue cashing paychecks; (3) refuse to communicate with the company under the advice of counsel; and (4) still sue claiming that he was actually discharged. Indeed, the California courts have specifically rejected such attempts. In Ludwig v. C & A Wallcoverings, Inc., 960 F.2d 40, 43 (7th Cir. 1992). The plaintiff was demoted following the company's investigation of the plaintiff's allegations that her supervisor had misappropriated property and had engaged in racially discriminatory behavior. In upholding summary judgment of the plaintiff's Illinois retaliatory discharge claim, the Seventh Circuit held that the plaintiff was not actually discharged given the fact that her name was kept on a timecard, she continued to receive the same salary she had earned, she was assigned a clerical task on the day following her demotion and she continued to receive sick pay for two weeks "after the date she unilaterally considered herself 'terminated.'" As the court

concluded, "[i]n short, no reasonable jury could find that Ludwig's employment relationship with Kinney had been severed by the company." Id.

This case is even more compelling. Bower acknowledges that he was told on multiple occasions that he had not been terminated from DC Corp. Furthermore, he continued to receive and cash paychecks for several weeks after the June 15 date on which he received the PIP, and he consciously ignored every attempt by DC to get him to come back to work. Because Bower was not terminated from DC, Bower's First Amended Complaint fails as a matter of law on this ground alone.

III. CONCLUSION

For all the foregoing reasons, DC Corporation is entitled to judgment as a matter of law on Gil R. Bower's claims of retaliatory discharge. Accordingly, DC Corporation respectfully request the First Amended Complaint in this matter be dismissed.

March 3, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2008, a copy of the foregoing Memorandum Law by Defendant DC Corp in Support of its Motion for Summary Judgment was filed electronically. Notice of this filing will be sent to all parties and to the Court by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

A copy also was sent via regular United States mail, postage prepaid, to Andrea T. Cowens, counsel for Plaintiff, at Andrea Cowens & Associates, 555 Brett Avenue, San Jose, CA 94105.

s/ Preston A. McAvoy
Attorney for Defendant