

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT E. BIRNSCHEIN,

Plaintiff,

v.

ANDERSON MACHINING SERVICE, INC.,  
HARLEY-DAVIDSON, INC. and  
SUSAN ANDERSON,

Defendants.  
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OPINION and ORDER

09-cv-706-bbc

This is a proposed civil action for monetary relief in which plaintiff Robert Birnschein, a resident of Sun Prairie, Wisconsin, alleges that he was wrongfully terminated from his employment at Anderson Machining Service, Inc. on or around May 26, 2009 in retaliation for complaining about his employer's improper disposal of wastewater. Plaintiff has asked for leave to proceed in forma pauperis and has supported his request with an affidavit of indigency. The standard for determining whether plaintiff qualifies for indigent status is the following:

- From plaintiff's annual gross income, the court subtracts \$3700 for each dependent excluding the plaintiff.

- If the balance is less than \$16,000, the plaintiff may proceed without any prepayment of fees and costs.
- If the balance is greater than \$16,000 but less than \$32,000, the plaintiff must prepay half the fees and costs.
- If the balance is greater than \$32,000, the plaintiff must prepay all fees and costs.
- Substantial assets or debts require individual consideration.

In this case, plaintiff has two dependents. His monthly income is \$1,681, which makes his annual income \$20,172. Plaintiff's balance comes to \$12,772 after subtracting \$3,700 for each dependent. Because plaintiff's income is less than \$16,000, he can proceed without any prepayment of fees or costs.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, because plaintiff is requesting leave to proceed without prepayment of costs, his complaint must be dismissed if it is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B). Having reviewed the proposed complaint, I conclude that it must be dismissed for lack of subject matter jurisdiction. As an employee of a private company, plaintiff cannot state a claim for relief in this court under federal whistleblower law.

From the proposed complaint, I find that plaintiff has fairly alleged the following facts.

### ALLEGATIONS OF FACT

On December 1, 2008, plaintiff was hired as the plant operations manager for defendant Anderson Machining Service's satellite facility in Whitewater, Wisconsin. Anderson Machining Service is a Wisconsin corporation. Defendant Susan Anderson is the company's president. The company supplies several machined parts to defendant Harley-Davidson, Inc., a Wisconsin corporation. Harley-Davidson has published environmental responsibility guidelines and expectations for its suppliers.

Starting in January 2009, plaintiff became concerned about the way his plant was disposing of wastewater. Although the wastewater was supposed to be disposed of through the plant's sewer line, plaintiff learned of a pipe at the rear of the plant discharging wastewater onto the lawn and nearby parking lot. He also observed oil and coolant contaminated wastewater pooling around a floor drain in the plant. Because proper filters were not installed, sediment and particulate were being pumped away with the wastewater. Between January and May 2009, plaintiff reported his concerns to defendant Anderson and other company officials. Anderson expressed resistance and seemed displeased with plaintiff's complaints. On May 26, 2009, human resources personnel informed plaintiff that

he was not a good fit for the company and terminated him, although plaintiff had received nothing but positive performance reviews while working for the company.

In July 2009, plaintiff reported his concerns to the Environmental Protection Agency, which referred him to the Wisconsin Department of Natural Resources.

## DISCUSSION

Federal courts can hear only those cases that Congress empowers them to hear. Generally, federal courts may hear two types of cases: those involving questions of federal law and those involving disputes between citizens of different states when the amount of money at stake is more than \$75,000. 28 U.S.C. §§ 1331 and 1332. Because all of the parties in this case are citizens of Wisconsin, plaintiff cannot assert jurisdiction under the diversity statute, 28 U.S.C. § 1332. Therefore, although plaintiff may have recourse against his employer under Wisconsin state law, this court cannot exercise jurisdiction over his case unless his claims arise under federal law.

I understand plaintiff to be alleging that he was terminated in retaliation for complaining about his employer's allegedly illegal practices in disposing of wastewater. Numerous federal statutes protect employees of private companies who choose to report the alleged illegal environmental practices of their employers. Bobreski v. United States Equal Protection Agency, 284 F. Supp. 2d 67, 70 n. (D.D.C. 2003); Rhode Island Dept. of

Environmental Management v. United States, 304 F.3d 31, 37-38 (1st Cir. 2002). For example, the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); the Solid Waste Disposal Act, 42 U.S.C. § 6971(a); the Water Pollution Control Act, 33 U.S.C. § 1367(a); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610; and the Toxic Substances Control Act, 15 U.S.C. § 2622(a) and (b), all contain whistleblower provisions that prohibit an employer from firing or otherwise discriminating against an employee who initiates or testifies in a proceeding brought pursuant to the act. Id. Although some or all of these statutes may apply in this case, plaintiff has failed to exhaust the administrative remedies set forth in these statutes.

The environmental statutes all establish a specific procedure that an employee must follow in seeking review of an employer's adverse employment decision. Rhode Island Dept. of Environmental Protection, 304 F.3d at 37. Within 30 days of the alleged retaliation, the employee must apply to the Secretary of Labor for a review of the firing or alleged discrimination. Id. Upon receiving such an application, the Secretary may institute an investigation. Federal regulations dictate the conduct of the investigation and any resulting administrative hearing. 29 C.F.R. Pt. 24. Although the Secretary has final decision making authority under the whistleblower provisions, an employee may enforce or seek review of that decision in the appropriate United States Court of Appeals. Id. at Subpart C.

From the complaint, it does not appear that plaintiff ever initiated proceedings with

the Secretary of the Department of Labor. However, even if he had followed the proscribed procedure, he would have no recourse in this court for challenging his termination under any of the federal whistleblower provisions. The only judicial review provided for by statute is by the federal courts of appeals. Rhode v. City of West Lafayette, 21 F.3d 430 (7th Cir. 1994) (original jurisdiction for review of Secretary's final decision under Clean Water and Solid Waste Disposal Acts vested exclusively in federal appellate court) (unpublished opinion with no precedential value); Anael v. Interstate Brands Corp., 2002 WL 31109451, \*5-6 (N.D. Ill. 2002) (finding no private right of action under Toxic Substances Control Act and noting jurisdiction to review the Secretary's orders is vested solely in federal courts of appeal).

Because plaintiff has not stated a claim for which he would be entitled to any relief under federal law, I must deny his request to proceed in forma pauperis and dismiss his case for lack of subject matter jurisdiction.

#### ORDER

IT IS ORDERED that plaintiff Robert Birnschein's request to proceed in forma

pauperis is DENIED and his complaint is dismissed for lack of subject matter jurisdiction.

Entered this 18<sup>th</sup> day of December, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge