

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1482

DONGEREL PRICE

VERSUS

B & B TRANSPORT SERVICES, INC.

Judgment Rendered: May 4, 2007

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 527,398

Honorable Kay Bates, Judge

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Plaintiff – Appellant
Dongerel Price

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B&B Transport Services, Inc.

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

This is an appeal by the plaintiff, Dongerel Price, from a judgment, granting defendant's exception of no cause of action and dismissing Price's action based on his failure to allege a violation of state law as the basis for his claim, as required by Louisiana's Whistleblower Statute, La. R.S. 23:967. After a review of the record and the applicable law, we affirm.

BACKGROUND FACTS

The plaintiff, Dongerel Price, was employed by B&B Transport Services, Inc. as a commercial truck driver from May 2003, until his termination on or about May 16, 2004. On that date, Mr. Price drove from Baton Rouge to Lake Charles and waited there until his truck was unloaded, approximately five hours later. He was then instructed to drive to Houston, pick up a load, and return to Baton Rouge. Mr. Price objected to driving to Houston and back without being furnished overnight accommodations because doing so would force him to exceed the maximum fifteen-hour driving/on-duty provisions of the Federal Motor Carrier Safety Regulations (which disallows any drive time after an on-duty period of fifteen hours.) After objecting to driving to Houston, Mr. Price was instructed to return to the Baton Rouge terminal. Upon arrival to the Baton Rouge terminal, Mr. Price was fired for refusing to make the trip to Houston. According to the allegations in Mr. Price's petition, "the terminal manager told plaintiff that he was tired of drivers telling him what they would and would not do."

PROCEDURAL HISTORY

Mr. Price initiated this action by filing a petition for damages alleging his termination was in violation of La. R.S. 23:967, the Louisiana Whistleblower Statute, which prohibits an employer from taking reprisal against an employee who in good faith, and after advising the employer of violation of law, objects to or refuses to participate in an employment practice that is in violation of law. Mr.

Price sought damages for unlawful termination including compensatory damages, back pay, benefits, reinstatement, reasonable attorneys fees, and court costs. Defendant, B&B Transport, filed a peremptory exception raising the objection of no cause of action alleging the plaintiff failed to allege that it (the employer) violated *state* law, as required for recovery under La. R.S. 23:967.

The trial court agreed with the defendant that the Whistleblower Statute affords a remedy only for violations of *state* law, and sustained the exception, granting the plaintiff fifteen days to amend the petition to cure any deficiencies and state a cause of action. Plaintiff filed a supplemental and amending petition with the only change being a more specific allegation regarding the law which his employer allegedly violated “the Federal Motor Carrier Safety Regulations, Section 395.3 in particular, which disallows any drive time after an on-duty period of 14 hours.” Defendant filed a second peremptory exception re-urging the objection of no cause of action on the same basis: plaintiff’s failure to allege a violation of *state* law. The trial court again sustained defendant’s exception, but granted plaintiff an additional fifteen days in which to file an amending petition to cure the deficiency. Plaintiff filed a second supplemental and amending petition alleging that “[t]he Federal Motor Carrier Safety Regulations are applicable to and enforceable by the State of Louisiana.” Because the petition again failed to allege a violation of *state* law, a third exception of no cause of action was sustained and plaintiff’s case was dismissed without prejudice.

LOUISIANA’S “WHISTLEBLOWER” STATUTE

Louisiana Revised Statute 23:967 provides, in pertinent part:

A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:

(1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.

(2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.

(3) Objects to or refuses to participate in an employment act or practice that is in violation of law.

(Emphasis added.) The applicable provision to plaintiff's claims is (A)(3), in that he objected to making the continued trip to Houston and back on the basis that this would require him driving in excess of the maximum driving hours mandated by federal law.

ANALYSIS

The salient issue on appeal is whether a plaintiff must allege a violation of *state* law as a prerequisite for the remedy provided by La. R.S. 23:967.

Plaintiff argues that because this particular provision, unlike subsections (1), states "violation of law" and does not specify "state" law, a violation of Federal law is sufficient to state a cause of action under this subsection, and that the trial court erred in holding otherwise. Plaintiff's argument relies solely on the express language of the statutory provisions, but neither explains the lack of rationale for this very limited and technical interpretation, nor does it address the absurd consequences that such interpretation would yield. As argued by the defendant, there is simply no rational connection for giving only limited protection (*i.e.* applicable only for state law violations) to an employee who discloses or threatens to expose an illegal activity of his employer under subsection (1), but granting much broader protections (*i.e.*, encompassing violations of any law) to employees who object to or refuse to participate in unlawful conduct, or who testify in a public hearing or investigation, under subsections (2) and (3). The differences in the protected activities provide no reasonable basis for the foregoing disparity that would result under plaintiff's asserted interpretation, and plaintiff's argument presents none.

Moreover, the issue, although in a slightly different context, has been recently decided by this court in the affirmative in **Accardo v. Louisiana Health Services and Indemnity Company**, 2005-2377 (La. App. 1st Cir. 6/21/06), 943 So.2d 381. In **Accardo**, the plaintiff brought an action under La. R.S. 23:967, urging as a basis for her claim that she, in *good faith* believed that the employer's practice was in violation of the Louisiana Employment Discrimination Act. Although the plaintiff was unable to show that she would be able to prove an *actual violation of state law*, the trial court denied the employer's motion for summary judgment, finding that the plaintiff's *good faith belief* that her employer violated state law was sufficient. On appeal, this court considered the issue *res nova*: "whether a plaintiff must prove an actual violation of state law to establish a Louisiana Whistleblower claim." *Id.* at p. 383. After reviewing cases from other Louisiana circuits which had answered the question in the affirmative,¹ applying the statutory principles of statutory construction and tracing the legislative history to discern the legislative intent, this court squarely held that an actual violation of state law by the employer is a prerequisite and essential element of a plaintiff's claim: "we are compelled to conclude that the Louisiana Whistleblower Statute, La. R.C. 23:967, requires an employee to prove an actual violation of state law in order to prevail on the merits of the case." *Id.*, at p. 387. The ruling and the analysis upon which it was based in **Accardo** are squarely applicable herein and

¹ See **Hale v. Touro Infirmary**, 2004-0003 (La. App. 4th Cir. 11/3/04), 886 So.2d 1210, writ denied, 2005-0103 (La. 3/24/05), 896 So.2d 1036 (where the plaintiff alleged both violations of OSHA provisions (federal law) as well as violation of the Louisiana Social Work Practice Act (La. R.S. 37:2701), the Fourth Circuit held that the language of the statute requires an actual violation of law must be established by a plaintiff in order to state a claim under the whistleblower statute, and further held, "that the violation of law in question must be that of a state statute. *Id.* at p. 1216 (emphasis added); **Puig v. Greater New Orleans Expressway Comm'n**, 2000-924 (La. App. 5th Cir. 10/31/00), 772 So.2d 842, writ denied, 2000-3531 (La. 3/9/01), 786 So.2d 731 (where the fifth circuit, in comparing this whistleblower statute with another [La. R.S. 42:1169] concluded that the clear distinction in La. R.S. 23:967 is that the employer must have committed a violation of state law for an employee to be protected from reprisal under that statute; under La. R.S. 42:1169, a reasonable belief by the employee that the employers acts or practices are unlawful is sufficient to state a cause of action.) See also **Nolan v. Jefferson Parish Hosp. Service Dist. No. 2**, 2001-175 (La. App. 5th Cir. 6/27/01), 790 So.2d 725.

we are bound by that decision. For all those same reasons, we are constrained to find the trial court in this case did not err in dismissing the plaintiff's action for failing to allege a violation of state law.²

Accordingly, the judgment of the trial court dismissing the plaintiff's action is affirmed; all costs of this appeal are assessed to the plaintiff.

AFFIRMED.

² As we noted in **Accardo**, we are compelled to reach this result yielded by the statutory construction. Although we find the result to be somewhat inequitable, it is not our province to legislate, but rather to apply the law as enacted by the legislature. We are also cognizant that notwithstanding the seeming inequity under Louisiana state law, plaintiffs in circumstances similar to Mr. Price's can pursue a remedy under federal law in federal court.