

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. WADE and	:	CIVIL ACTION
PATRICIA A. WADE	:	
	:	
v.	:	
	:	
METROPOLITAN LIFE INSURANCE	:	
COMPANY	:	NO. 96-5420

MEMORANDUM AND ORDER

Yohn, J.

August , 1997

Plaintiff has filed this suit alleging that his employer wrongfully discharged him for failing to participate in an illegal insurance sales scheme. Defendant has filed a motion for summary judgment. Because plaintiff has failed to rebut the defendant's substantial evidence that Wade was never actually discharged from his employment with the defendant, the defendant's motion will be granted.

**STANDARD OF REVIEW**

Upon motion of any party, summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A factual dispute is material if the evidence is such that a reasonable factfinder could find in favor

of the nonmoving party." United States v. CDMG Realty Co., 96 F.3d 706, 720 (3d Cir. 1996). Where, as here, the nonmovant bears the burden of persuasion at trial, the moving party may meet its burden "by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

When a court evaluates a motion for summary judgment, "the evidence of the nonmovant is to be believed." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Furthermore, "in reviewing the record, the court must give the nonmoving party the benefit of all reasonable inferences." Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir. 1995), cert. denied, 115 S. Ct. 2611 (1995). However, plaintiff "must present affirmative evidence to defeat a properly supported motion for summary judgment," Liberty Lobby, 477 U.S. at 257, and "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." Id. at 252. Thus, "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The court will, therefore, evaluate the record presented in the light most favorable to Wade to determine whether a genuine issue of material fact remains.

## FACTS

Defendant, Metropolitan Life Insurance Company ("MetLife") is a large, New York based life insurance company which employed Plaintiff, Joseph Wade ("Wade") in its Blue Bell, Pennsylvania office as a Branch Manager. According to plaintiff's complaint, three fraudulent schemes were formulated by employees at MetLife's Tampa, Florida and Pittsburgh, Pennsylvania offices, which were designed to mislead and defraud the defendant's customers. See Amended Complaint at 7-20. Plaintiff's complaint further alleges that MetLife's senior employees forced MetLife's sales force, including plaintiff, to engage in these fraudulent sales practices. See, e.g., id. at ¶ 22. Plaintiff claims that he was discharged when he refused to engage in these fraudulent sales practices. See id. at ¶ 13.

The circumstances of plaintiff's "discharge" are of the utmost importance to the disposition of this motion. The plaintiff's complaint is unclear as to what exactly constituted plaintiff's "termination." On February 7, 1994, Wade voluntarily left MetLife on disability leave due to stress he was suffering as a result of his refusal to participate in the alleged fraudulent schemes. See Def.'s Statement of Uncontested Facts at ¶ 3; Pl.'s Resp. to Def.'s Statement of Uncontested Facts at ¶ 3. It is uncontested that Wade continues to receive disability payments of \$4,000 per month and all of his normal employee benefits from MetLife to this date. See id. ("It is undisputed that Wade has been on disability since February 7, 1994 and that

he has received benefits for the same since that time."); Colagero Decl. at exh. A (plaintiff's W-2 forms through and including 1996 showing receipt of benefits). At oral argument the parties agreed that Wade would be entitled to these same payments and benefits even if he were terminated. Defendant has also introduced uncontradicted evidence that Wade remains on the defendant's payroll and is currently categorized as an employee on long-term disability. See Lonergan Decl. Plaintiff admits that he has never resigned from MetLife, has never requested any form of early retirement, and has never told anyone at MetLife that he would not be returning to MetLife in the future. See J. Wade Dep. at 738-39. Plaintiff also admits that no one at MetLife ever directly informed him that he had been terminated or discharged. See id. at 746 ("Q: Did any officer in charge ever tell you you were discharged or fired or terminated? A: No."). Nevertheless, plaintiff alleges that a series of events led him to reasonably believe that he had been terminated by MetLife.

On July 7, 1994, while Wade was out on disability leave, Elizabeth Haley, MetLife's Blue Bell branch administrator, sent Wade a letter informing him that the locks on his office door had been changed. See Haley Dec. at exh. 1. The letter stated that the locks were being changed because of a recent theft in the office, and that if Wade wanted access to the office, he should call Haley. See id. William Clark, a co-employee and friend of Wade, testified that when Wade told him of the incident Wade sounded "panicky." Clark Dep. at 45. Clark asked Robert Refice,

MetLife's vice-president of the Philadelphia region, why the locks had been changed. Clark testified that Refice informed him that he was "working on getting rid of [Wade]." Id. at 46. Clark then called Wade to inform him of Refice's statement. See id.; P. Wade Dep. at 37 (noting that Wade thought this was a sign he was terminated or was going to be terminated).

On or about October 21, 1994, Wade's office furniture was shipped from his Blue Bell office to his home. See Haley Dec. at ¶ 10. MetLife claims that the furniture was sent to Wade pending his return to work because they needed the office space in the meantime. See id. Wade, however, took this as evidence that his employment with MetLife had been, or would be, terminated. See Wade Dep. at 735.

Wade argues that these two events were precursors to his "actual termination" on October 12, 1995. See Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summ. J. at 8 (arguing that it was not until October 12, 1995 that Wade was actually terminated).<sup>1</sup> On that date, MetLife terminated Wade's NASD registration. Marc Cohn, MetLife's Assistant Compliance Director in the SEC/NASD

---

<sup>1</sup> Plaintiff must take the position that his termination was not effective before August 2, 1994 in order to avoid the bar of the two year statute of limitations.

Nevertheless, Wade's claim that he believed his termination (if one actually occurred) did not occur until October 12, 1995 is suspect in light of the fact that the plaintiff had prepared a draft complaint for wrongful discharge ten months earlier in February, 1995. See Clark Dep. at exh. 2. Thus, even if the court were to conclude that a wrongful discharge claim would lie upon a reasonable belief of termination, rather than actual termination, it appears likely that the plaintiff would be faced with significant statute of limitations problems.

Compliance Unit, stated that the license was terminated because Wade had been on disability for a long period of time, and he therefore could not meet the requirements of holding the license, including supervision by MetLife and attendance at annual compliance meetings. See Cohn Decl. at ¶ 14. He further testified that such action is not unusual, see id., and that Wade would be eligible to regain his NASD license once he returned to work at MetLife. See id. at ¶ 18. The parties agree that Wade could easily get his license back if he returned to work within two years of its termination. If he were to be absent from work for over two years after its termination, he would be eligible to regain his license after taking a test. See Oral Argument of Aug. 21, 1997.

MetLife's procedure for terminating NASD registrations begins by compiling a "Form 14799." A branch manager in MetLife's Blue Bell Office filled out a Form 14799 for Wade on September 27, 1995. That form explained the reason for the termination of Wade's license as follows: "Mr. Wade has been on disability since 2-7-94. He is now on Long-Term Disability. We have been advised to submit this form to you. **Mr. Wade has Not been Terminated** by the Company." Cohn Decl. at exh. 2 (emphasis in original). This form was forwarded to MetLife's Tampa, Florida Office for processing. See Oral Argument of Aug. 21, 1997. Wade did not receive a copy of the Form 14799. See id.

As per MetLife procedure, the Form 14799 was then processed into a "Form U-5" by clerks in the Tampa Office which was, in

turn, forwarded to the NASD. See id. Although the information in the Form 14799 is supposed to be transferred directly to the Form U-5, the language of Wade's Form U-5 differs somewhat from the language used in the Form 14799. The Form U-5 says that the license was being terminated because Wade "failed to report to work after disability period ended 2-7-94, therefore, effective date of termination is 2-7-94." Cohn Decl. at exh. 1. The record does not reveal the reason for this differing language. The Form U-5 was then sent to the NASD on October 12, 1995 and a copy was also sent to the plaintiff. See id. When lawyers for MetLife discovered the discrepancy in the language between the U-5 and the Form 14799 during the pendency of this litigation, they caused an amended Form U-5 to be filed with the NASD in March of 1997, clarifying that Wade was still on disability leave and had not been terminated from his employment. See id. at exh. 4.<sup>2</sup>

Although the clear import of the original Form U-5 is that only Wade's NASD registration had been terminated effective February 7, 1994, Wade claims that the receipt of this form reasonably led him to believe that his employment had been terminated. His belief was buttressed by the fact that he had informed his friend and co-worker Clark about the termination of his NASD license. See Clark Dep. at 47. Clark, in turn, questioned Refice about the reason for the termination of Wade's

---

<sup>2</sup> Plaintiff had claimed that he never received a copy of this amended U-5. An additional copy was provided to him after his deposition. See Oral Argument of Aug. 21, 1997.

license. See id. According to Clark, Refice informed him that by canceling Wade's license he had "finally got rid of him." Id. When Clark told Wade what Refice had said, Clark said that he "basically thought [Wade] was going to have a heart attack." Id. at 48-49. Wade testified that he believed that the cancellation of his NASD license meant that MetLife had terminated him. See J. Wade Dep. at 746. Apparently, however, Wade never asked anyone at MetLife whether he had, in fact, been terminated. See id. at 467. Whether or not plaintiff asked anyone at MetLife whether he had been fired, plaintiff clearly testified that no one at MetLife ever told him he was, in fact, fired. See id. at 746.

From the testimony of Wade and Clark, and the actions taken by MetLife, plaintiff contends that a jury might conclude that Wade subjectively believed he had been terminated upon the cancellation of his NASD registration. He states that Clark's relaying of his conversation with Refice could have led Wade to believe that MetLife had in fact terminated him by canceling his NASD membership. There is no evidence, however, that MetLife did in fact terminate Wade's employment. Despite the fact that Wade's employment contract requires termination in writing, see Roffer Decl. at exh. 4, Wade testified that no one at MetLife, including Refice, ever directly told him, even orally, that he had been terminated. See J. Wade Dep. at 745-46. Indeed, it is undisputed that Wade continues to receive disability payments from MetLife, see Colagero Dep. at exh. A, that MetLife maintains

Wade on its payroll on long term disability, see Lonergan Decl., and that Wade continues to receive health care benefits through MetLife. See J. Wade Dep. at 737; P. Wade Dep. at 88. MetLife has informed Wade that he "has never been terminated and . . . is expected to resume working at MetLife if and when his claimed disability permits." Roffer Dep. at exh. 5 (letter from Michael H. Roffer to Sidney L. Gold, dated June 25, 1997).<sup>3</sup> Despite all of this information, Wade has never sought to return to work at MetLife. See J. Wade Dep. at 734-35.

In sum, Wade has offered no evidence to rebut MetLife's extensive evidence showing that he is still actually employed with the company.<sup>4</sup> Indeed, plaintiff's counsel admitted at oral

---

<sup>3</sup> Plaintiff argues that this letter was prepared in anticipation of litigation and should not be given any weight by the court. Were there some other evidence that plaintiff had previously been fired and this letter was prepared solely in order to rebut that fact, the court would agree. This letter is consistent, however, with the other evidence offered by the defendant that, whatever Wade may have thought, MetLife never took any action to actually terminate his employment.

<sup>4</sup> It appears to the court that the only direct evidence which could support a conclusion that MetLife actually terminated Wade is Clark's testimony that Refice said "I finally got rid of him." Clark Dep. at 47. Assuming this evidence is admissible, see Fed. R. Evid. 801(d)(2)(C)-(D), it does not conclusively show that MetLife made a decision to terminate the plaintiff. See Hanson v. Commonwealth of Pa., 568 A.2d 991, 994 (Pa. Cmwlth. 1990) ("For a 'discharge' to occur, the employer's language or actions must possess the immediacy and finality of a firing."). In any event, whatever Refice said to Clark, Wade testified that Refice never told him (Wade) that he had been fired. See J. Wade Dep. at 745 ("Q: Mr. Refice, correct me if I'm wrong, he never told you that you were fired, Mr. Wade? A: No."). Indeed, given that Wade's employment contract stated that any termination must be in writing, see Roffer Decl. at exh. 4, even if Refice had told Wade personally that he was fired, such a statement could not have legally constituted a termination of Wade's employment. See Dieter v.

argument that plaintiff cannot prevail in the case if the law of Pennsylvania requires that the employer actually fire the employee in order to prove a "discharge." See Oral Argument of Aug. 21, 1997. Wade argues, however, that a "discharge" must be measured from the reasonable perceptions of the employee, not the actual intent of the employer. Plaintiff's argument fails for two reasons. First, the court concludes that Pennsylvania requires an objective showing that the employment relationship was actually terminated by the employer before a wrongful discharge suit may be brought. Second, even if the law would consider the reasonable beliefs of the employee, plaintiff's belief that he has been terminated is unreasonable as a matter of law.

#### **ANALYSIS**

I. A Subjective Belief of Discharge Is Insufficient to Constitute a Discharge Under Pennsylvania's Wrongful Discharge Tort

"The sine qua non of a discharge case is, of course, a discharge." Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 838 (3d ed. 1996). Surprisingly, however, the law as to what constitutes a "discharge" is remarkably unclear. Citing NLRB v. Champ Corp., 933 F.2d 688 (9th Cir. 1990), cert. denied, 502 U.S. 957 (1991), plaintiff argues that "[t]he test of

---

Fidelcor, Inc., 657 A.2d 27, 29 (Pa. Super. 1995) (where contract for employment is present, parties must abide by the terms of the contract).

whether an employee has been discharged depends on the reasonable inferences that that employee could draw from the statements or conduct of the employer." Id. at 692; see also Chertkova v. Connecticut General Life Ins. Co., 92 F.3d 81, 88 (2d Cir. 1996) ("An actual discharge, in the context of Title VII as in other contexts, occurs when the employer uses language or engages in conduct that 'would logically lead a prudent person to believe his tenure has been terminated.'" (citations omitted) (citing cases involving the National Labor Relations Act)). Under this proposed formulation of the "discharge" test, "[i]nquiry focuses on the reasonable perceptions of the employee, not on whether formal words were in fact spoken." Id. For the reasons which follow, however, the court does not believe that this subjective standard should apply to the instant case. Rather, the court concludes that for purposes of a wrongful discharge claim under Pennsylvania law,<sup>5</sup> an "actual discharge" does not occur unless the employer in fact ends the employment relationship.<sup>6</sup>

---

<sup>5</sup> The parties agree that Pennsylvania law governs this diversity case.

<sup>6</sup> Plaintiff has explicitly declined to rely on a "constructive discharge" theory. See Pl.'s Mem. of L. in Opp. to Def.'s Mot. for Summ. J. at 22 ("At no time in the course of this litigation has Wade ever claimed that he was constructively discharged."). Under a constructive discharge theory, plaintiff may show that he was "discharged" if "the employer has made working conditions so intolerable that an employee has been forced to resign." Highhouse v. Avery Transp., 660 A.2d 1374, 1376 (Pa. Super. 1995). While "actual discharge" cases deal with cases in which the employer has terminated the employment relationship, "constructive discharge" cases deal with situations in which the employee has terminated the relationship. In both types of cases, however, the employment relationship has been terminated.

A. Pennsylvania Case Law on the Definition of "Discharge"

There is little case law in Pennsylvania to aid the court in deciding the meaning of "actual discharge." Plaintiff has cited no Pennsylvania cases in any context to support his theory that a "discharge" may occur simply on the basis of the plaintiff's reasonable subjective belief that he has been terminated.<sup>7</sup> Rather, Pennsylvania law appears to look to the actions and intentions of the employer in determining whether an actual discharge has occurred.

In Hanson v. Commonwealth of Pa., 568 A.2d 991 (Pa. Cmwlth. 1990), the Commonwealth Court interpreted the term "discharge" in the context of the Pennsylvania Human Relations Act:

The Act does not define the term "discharge." However, section 1903(a) of the Statutory Construction Act states that "[w]ords and phrases shall be construed according to . . . their common and approved usage. . . . The term "discharge" is generally defined as "to release, to dismiss, or to terminate the employment of a person." Black's Law Dictionary 416 (5th ed. 1979). This court has similarly interpreted the terms "discharge" and "voluntary resignation" in the context of unemployment compensation law. For a "discharge" to occur, the employer's language or actions must possess the immediacy and finality of a firing.

Id. at 505 (footnote omitted); see also Chinn v. Commonwealth of Pa., 426 A.2d 1250, 1252 (Pa. Cmwlth. 1981). ("[F]or an employee

---

Plaintiff has pointed to no case in which a court has upheld a wrongful discharge claim when neither party affirmatively ended the employment relationship.

<sup>7</sup> Chinn v. Commonwealth of Pa., 426 A.2d 1250 (Pa. Cmwlth. 1981), cited by plaintiff at oral argument, does not support such a proposition.

to be fired or discharged, the employer need not use those exact words in speaking to the employees. . . . The language used by the employer in addressing the employee must, however, exhibit both immediacy and finality."); Restatement (Second) of Agency § 118 (1958) (noting that principal-agent relationship is terminated when one party "manifests to the other dissent to its continuance." (emphasis added)).

Although not entirely free from doubt, it appears that the Hanson court focused on the words and actions of the employer in order to determine whether the actions of the employer possessed the requisite immediacy and finality to infer that the employer intended to fire the employee.

That the court must focus on the intention of the employer is also suggested by Pennsylvania Labor Relations Bd. v. Sand's Restaurant Corp., 240 A.2d 801 (Pa. 1968). In that case, a lower level employee of the defendant company had told two other employees that they were fired. Both parties then met with an agent of the employer who was authorized to terminate employment relationships. The first employee made it clear to the authorized agent that he was leaving because the lower level employee had told him that he was fired. See id. at 484. The court found this to be a discharge because the authorized agent was aware that the employee believed she was fired. See id. In the second case, however, there was "nothing in the record to demonstrate that as to [the second employee, the authorized agent] knew of the statement [by the lower employee which

purported to fire her].” Id. at 485. Because the authorized agent did not know that the plaintiff was leaving because she believed she was fired, the court ruled that the second employee was not discharged. See id. The focus of the court’s inquiry was, therefore, on the employer’s perceptions as to the termination of the employment relationship, not on the employee’s. See also Alexander v. Red Star Express Lines of Auburn, 646 F. Supp. 672, 683 (E.D. Pa. 1986) (granting new trial where jury’s finding of “discharge” was against the weight of the evidence, focusing on the objective indications of whether an employment relationship existed between the parties, not on the plaintiff’s perceptions), aff'd, 813 F.2d 396 (3d Cir. 1987).<sup>8</sup>

Although the Pennsylvania case law on “discharge” is not

---

<sup>8</sup> This court, in applying federal law, has also stated:

To discharge an employee is to remove him temporarily or permanently from employment. . . . In order that there be a discharge by the employer, there must be some affirmative action taken by the employer. There must be some conduct on the part of the employer, indicating that he will no longer be bound by the contract of employment. . . . There must also be an intention on the part of the employer to abrogate the contract, and there must be some communication of that intent by word or act to the employee.

Bonham v. Dresser Indus., 424 F. Supp. 891, 896 (E.D. Pa. 1976) (quoting In re Public Ledger, 63 F. Supp. 1008, 1015 (E.D. Pa. 1945), rev'd on other grounds, 161 F.2d 762 (3d Cir. 1947)), aff'd in part and rev'd on part on other grounds, 569 F.2d 187, 192 (3d Cir. 1977) (agreeing with the district court that the test for discharge for purposes of beginning the 180-day filing period with the EEOC is “not subjective” but does depend on the employee knowing “that the employer has made a final decision to terminate him.”), cert. denied, 439 U.S. 821 (1978).

entirely clear, I am convinced that the Pennsylvania Supreme Court would require an actual termination of the employment relationship, rather than a perceived termination, because such an interpretation would be in accord with the purpose of the wrongful discharge tort and the public policy of Pennsylvania.

B. "Discharge" in the Context of Pennsylvania's Wrongful Discharge Tort

Reliance on cases interpreting "discharge" in the context of the National Labor Relations Act ("NLRA") is misplaced. The relevant question in this case is the meaning of "discharge" as it applies to the limited exception to the doctrine of employment at will embodied in the wrongful discharge tort, not the meaning of "discharge" under the federal NLRA. NLRB v. Champ, 933 F.2d 688 (9th Cir. 1990), cert. denied, 502 U.S. 957 (1991), and other cases relied upon by the plaintiff, interpret the term "discharge" as it is used in defining an unfair labor practice under sections 8(a)(1) and 8(a)(3) of the NLRA. See 29 U.S.C. §§ 158(a)(1) & 158(a)(3). Under those sections, it is an unfair labor practice to discharge an employee in order "to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3). The purpose of prohibiting discharges in the context of the NLRA is to prevent employers from intimidating employees regarding their participation in labor organizations. See, e.g., Meco Corp. v. NLRB, 986 F.2d 1434, 1436 (D.C. Cir. 1993). If the goal of these discharge provisions is to prevent

intimidation of employees, the most important factor for the court to consider is, of course, the effect of the employer's statements on the employees, not whether the employer actually intended to discharge the employee. It therefore makes sense in these cases to focus on the words used by the employer and the likely effect those words will have on the employee's subjective perceptions. If the words are sufficient to lead a reasonable employee to believe that he has been fired, they are sufficient to discourage union activity, regardless of whether the employer actually intended to fire the employee.

While the employee's subjective perceptions may be relevant in determining whether an employer has committed an unfair labor practice, the same reasoning does not apply to a wrongful discharge claim under Pennsylvania law.<sup>9</sup> In Pennsylvania the common law tort of wrongful discharge "has been recognized in only the most limited circumstances, where discharges of at-will employees would threaten clear mandates of public policy." Clay v. Advanced Computer Applications, 559 A.2d 917, 918 (Pa. 1989); see Geary v. United States Steel Corp., 319 A.2d 174, 176 (Pa. 1974) (noting that terminations of at-will employees that violate public policy might be actionable). Terminating an employee for

---

<sup>9</sup> To the extent the Second Circuit applied the NLRA definition of "discharge" to Title VII in Chertkova v. Connecticut General Life Ins. Co., 92 F.3d 81, 88 (2d Cir. 1996), its application here is questionable. Chertkova dealt with Title VII, which is a federal law with different purposes and policies than Pennsylvania's narrow exception to the employment at will doctrine. Thus, Chertkova does not necessarily affect the disposition of the instant motion.

refusing to violate the law would constitute a violation of a clear mandate of public policy. See Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1344 (3d Cir. 1990), cert. denied, 499 U.S. 966 (1991).

If the purpose of the public policy exception were to protect employees who report violations of the law by their employers, as §§ 8(a)(1) & 8(a)(3) of the NLRA are designed to protect employees' participation in labor organizations, the perceptions of the employee regarding his discharge might be the most relevant consideration for a court. Such an interpretation of the public policy exception is, however, inconsistent with the Third Circuit's interpretation of Pennsylvania law in Clark v. Modern Group Ltd., 9 F.3d 321, 331-32 (3d Cir. 1993). In that case, plaintiff had argued that he should be entitled to take advantage of the public policy exception to the employment at will doctrine if he showed a "reasonable belief in the illegality" of activity his employer required him to engage in. Id. at 328. Plaintiff's claim was based on the policy argument that "employees should be protected when they attempt to expose the wrongdoing of their employer . . . ." Id. The Third Circuit, however, adopted a purely objective standard and held that "Pennsylvania will not recognize a wrongful discharge claim when an at-will employee's discharge is based on a disagreement with management about the legality of a proposed course of action unless the action the employer wants to take actually violates the law." Id.

Importantly for our purposes, the court reasoned that “[t]he public policy exception to the doctrine of employment at-will does not exist . . . to protect the employee.” Id. at 331-32.

The employee’s good intentions are not enough to create a cause of action for wrongful discharge, as Geary clearly demonstrates. If an employee can avoid discipline whenever he reasonably believes his employer is acting unlawfully, it is the employee, not the public, who is protected by the good intentions. A company acting within the law is presumed to pose no threat to the public at large.

Id. at 332.

Thus, in the Clark court’s view, the public policy exception to the employment at will doctrine (unlike §§ 801(a)(1) & 801(a)(3) of the NLRA) is designed to sanction the employer for engaging in illegal conduct, thereby vindicating the public interest, not to protect employees or affect the behavior of employees.<sup>10</sup> See Clark, 9 F.3d at 331-32 (“The public policy exception to the doctrine of employment at-will does not exist . . . to protect the employee.”).

If the wrongful discharge claim is designed to protect society from an employer’s violation of the law, rather than to protect employees, the focus of the discharge inquiry must be an

---

<sup>10</sup> This conclusion is supported by Pennsylvania’s refusal to recognize a “whistle blower” exception to the employment at will doctrine. See Krajsa v. Keypunch, Inc., 622 A.2d 355 (Pa. Super. 1993) (noting that whistle blower statute does not protect private employees because the statute explicitly applies only to public employees, which in turn indicates the legislature’s refusal to protect private employee whistle blowers). If Pennsylvania wanted to encourage employees to police their employers, it would certainly have adopted such an exception.

objective one--just as the focus of the illegality of the employer's actions must be an objective one. Just as an employer is not liable for firing an employee for refusal to violate the law unless the requested actions actually violate the law, an employer should not be liable for wrongful discharge unless he has actually discharged the employee for his refusal to violate the law. The employer's liability should depend on its actions, not on the perception of the employee. If an employee may bring a wrongful discharge claim "whenever he reasonably believes his employer" has discharged him, "it is the employee, not the public, who is protected . . . ." Id. at 332. Thus, the employee's subjective perceptions are not enough to find a "discharge" under the wrongful discharge tort in Pennsylvania--the employer must have in fact discharged the plaintiff.<sup>11</sup>

C. The Exclusivity Provisions of the Workers' Compensation Act

The court's conclusion is supported by Pennsylvania's strict application of the exclusivity provision in the Workers' Compensation Act ("WCA"), 77 P.S. 481(a). See, e.g., Kuney v. PMA Ins. Co., 578 A.2d 1285 (Pa. 1990); Lewis v. School Dist. of Philadelphia, 538 A.2d 862, 867 (Pa. 1988) ("So strong is the

---

<sup>11</sup> As noted, the plaintiff does not claim that he was constructively discharged. Where the employer has made working conditions so unbearable that a reasonable person would resign, it might be reasonable to hold the employer responsible in the same sense as where he has actually discharged the employee. But the same reasoning does not apply where neither the employer nor the employee has actually severed the employment relationship.

principle of exclusivity we have held that it is a nonwaivable defense, even when not timely raised."); Kline v. Arden H. Verner Co., 469 A.2d 158, 159 (Pa. 1983) ("The Workmen's Compensation Act provides the exclusive means by which a covered employee can recover against an employer for injury in the course of his employment."). While wrongful discharge claims are outside the scope of the WCA, see Burns v. United Parcel Serv., Inc., 757 F. Supp. 518, 526 (E.D. Pa. 1991), any harm suffered during the course and scope of employment, including the type of harm alleged in this case, would be within the scope of the WCA's exclusivity provision. See Poyser v. Newman & Co, Inc., 522 A.2d 548, 550-51 (Pa. 1987).<sup>12</sup> Employees should not be able to avoid the exclusivity provision of the WCA merely upon allegations that they believed they have been fired. Unless the employment relationship has actually been severed, the Workers' Compensation Act must be the employee's exclusive remedy.

II. Wade's Subjective Belief That He Has Been Terminated is Unreasonable As a Matter of Law

Even if the court had concluded that the plaintiff's subjective belief was sufficient to constitute a discharge, the plaintiff's subjective belief in this case is unreasonable as a matter of law. In order to show that his belief that he was terminated was reasonable, plaintiff relies on three pieces of

---

<sup>12</sup> Plaintiff agreed at oral argument that any injuries he suffered prior to October 12, 1995 would be compensable only under the WCA. See Oral Argument of Aug. 21, 1997.

evidence. First, plaintiff claims that the U-5 form dated October 12, 1995 led him to believe that he was discharged. Plaintiff also relies on two statements Refice allegedly made to Clark. First, on July 7, 1994, when Wade's locks were changed, Clark claims that Refice told him that he was "working on getting rid of [Wade]." Clark Dep. at 46. Second, after Wade received the U-5 form terminating his NASD registration, Refice allegedly told Clark that he had "finally got rid of [Wade]." Id. at 47.

As already discussed, the U-5 Form did not state that plaintiff's employment was terminated--it stated only that Wade's NASD registration had been terminated. Aside from the ambiguous U-5 Form, Wade received nothing whatsoever from the company which could reasonably have led him to believe that he was fired. Although Wade stated that he might have called someone at MetLife about the U-5, he could not remember if he in fact had or whom he had spoken to. See J. Wade Dep. at 467. Plaintiff did testify, however, as follows:

Q: Mr. Refice, correct me if I'm wrong, he never told you that you were fired, Mr. Wade?

A: No.

Q: He never told you that you were discharged?

A: No.

Q: He never told you that you were terminated?

A: No.

Q: Mr. Vitiello never told you any of those things, either?

A: No.

. . .

Q: Was there anyone at the home office that ever told you that you were terminated?

A: It's in that letter, that letter that you have from NASD that says, you're terminated.

Q: The NASD letter was not from the home office, so we'll just leave that aside.

A: Okay.

Q: Did any regional executive ever tell you that you were terminated or discharged?

A: No.

Q: Did any territorial executive?

A: No.

Q: Did any officer in charge ever tell you you were discharged or fired or terminated?

A: No.

Id. at 745-46.

It is, therefore, quite clear that no one at MetLife ever told Wade that he was fired. Plaintiff conceded as much at oral argument. See Oral Argument of Aug. 21, 1997. Wade cannot simply rely on an ambiguous U-5 form, which clearly terminated his NASD registration, not his employment, and the second hand recollection of a fellow employee as to what Refice had said--a fellow employee who has also filed suit against MetLife. Wade had an obligation to query someone at MetLife as to the status of his employment and obtain a definitive statement as to the condition of his employment. Without a direct statement from someone in a position of authority at MetLife that his employment

had been terminated, Wade's subjective belief that he had been terminated is unreasonable as a matter of law.

Because MetLife never actually terminated the plaintiff's employment, and any belief Wade may have had that he was terminated is unreasonable as a matter of law, summary judgment is appropriately entered in favor of MetLife.<sup>13</sup>

---

<sup>13</sup> Patricia Wade's claim for loss of consortium must fail as that claim is derivative of Mr. Wade's claim.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. WADE and	:	CIVIL ACTION
PATRICIA A. WADE	:	
	:	
v.	:	
	:	
METROPOLITAN LIFE INSURANCE	:	
COMPANY	:	NO. 96-5420

ORDER

AND NOW, this        day of August, 1997, after consideration of the defendant's motion and memorandum in support of summary judgment, the plaintiffs' response thereto, the defendant's reply, the plaintiffs' sur-reply, and oral argument, IT IS HEREBY ORDERED that defendant's motion is GRANTED and JUDGMENT IS ENTERED in favor of defendant and against plaintiff.

---

William H. Yohn, Jr., Judge