

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT ELWELL,)
)
 Appellant, Plaintiff -below) C. A. No. 237, 2014
)
 v.)
)
 THRIFT DRUG, INC. d/b/a)
 RITE AID,)
)
 Appellee, Defendant-below.)

APPEAL FROM ORDER ENTERED IN
THE SUPERIOR COURT OF THE STATE OF DELAWARE
AT C. A. No. N12C-05-013 (JAP)

APPELLANT ROBERT ELWELL'S OPENING BRIEF

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Dated: August 6, 2014

TABLE OF CONTENTS

	<u>Page Number</u>
NATURE OF THE PROCEEDINGS.....	1
SUMMARY OF ARGUMENT.....	2
STATEMENT OF FACTS.....	3
ARGUMENT.....	8
A. Question Presented.....	8
B. Scope of Review.....	8
C. Merits of Argument.....	9
1. Status as Whistleblower.....	9
2. Report of Violation to Supervisor.....	10
3. Primary Reason for Discharge.....	11
4. Identity of Decision-Maker.....	13
5. Plaintiff's Termination Contrary to WPA.....	14
CONCLUSION.....	17

TABLE OF CITATIONS

CASES

Page Number

<u>Alexander Indus., Inc. v. Hill</u> , 211 A.2d 917 (Del. 1965).....	9
<u>Brunswick Corp. v. Bowl-Mor Co.</u> , 297 A.2d 67, 69 (Del. 1972).....	9
<u>Delmarva Power & Light Co. v. City of Seaford</u> , 575 A.2d 1089 (Del. 1990).....	9
<u>Dutra de Amorim v. Norment</u> , 460 A.2d 511 (Del. 1983).....	9
<u>Fiduciary Trust Co. v. Fiduciary Trust Co.</u> , 445 A.2d 927 (Del. 1982).....	9
<u>Gilbert v. El Paso Co.</u> , 575 A.2d 1131 (Del. 1990).....	9
<u>Pike Creek Chiropractic Ctr. v. Robinson</u> , 637 A.2d 418 (Del. 1994).....	8

STATUTES

19 <u>Del. C.</u> §§1701 <i>et. seq.</i>	9
19 <u>Del. C.</u> §1702 (4).....	11
19 <u>Del. C.</u> §1702 (6)(a).....	10, 11
19 <u>Del. C.</u> §1703.....	11
19 <u>Del. C.</u> §1703 (4).....	9, 14
19 <u>Del. C.</u> §1708.....	11

I. NATURE OF THE PROCEEDINGS

Plaintiff Robert Elwell filed this action against his former employer, Rite Aid, claiming violations of the Delaware Whistleblowers Protection Act.

Defendant sought summary judgment that was granted below against Plaintiff.

Plaintiff filed a Motion for Reconsideration but subsequently mistakenly believed that the lower court denied this motion by Order dated April 9, 2014 when the lower court granted Defendant's Motion for Summary Judgment. Plaintiff then timely filed this appeal to this Court on May 8, 2014.

After filing the appeal to this Court, Plaintiff's undersigned counsel subsequently learned that the Motion for Reconsideration filed in Superior Court had not been ruled upon by the Hon. John A. Parkins, Jr. Plaintiff thereupon sought leave of Court to remand the matter to Superior Court in order to obtain a disposition on his Motion for Reconsideration. After the remand was granted, Plaintiff withdrew the Motion for Reconsideration and the Superior Court docket was closed.

This matter was returned to this Court on or about June 19, 2014. Plaintiff's appeal seeks a reversal of the lower court's entry of summary judgment in favor of Defendant.

II. SUMMARY OF ARGUMENT

The trial court ruled that Plaintiff had not shown that his protected activity of whistleblowing as provided for by Delaware statute was the primary cause of Plaintiff's termination of employment with Defendant. However, the court below ruled that Plaintiff was a "whistleblower" under the Delaware Whistleblower's Protection Act.

Appellant produced sufficient evidence to prove that his report of violation to his supervisor was protected by the Whistleblower Protection Act and was the primary reason for his discharge from employment. In the alternative, there are genuine issues of material fact regarding Plaintiff's primary reason for termination.

III. STATEMENT OF FACTS

Plaintiff Robert Elwell ("Plaintiff") was employed by Defendant Rite Aid as a pharmacist in 2010. He had been employed by Rite Aid as a pharmacist in the Milford, Delaware store since 2008. A-008, A-014.

In late January 2010, the Milford store began to experience severe heating problems which resulted in cold temperatures throughout the store to include the pharmacy. *Id.* The temperatures in the store ranged from 40° to 50° and continued into the month of February 2010. *Id.*

Plaintiff sent an e-mail in late January 2010 to his first-line supervisor, District Manager Percy Dhamodiwala ("Percy"), advising Percy of the cold temperatures. A-171, A-206. Mr. Elwell advised Percy that because the store temperatures were so low, the store was not compliant with drug storage temperature mandates. A-207. Most drugs stocked in the pharmacy are required to be stored at controlled room temperatures between 68° and 77°. A-171, A-206.

Having no response from Percy to this late January e-mail, Plaintiff e-mailed Percy again on February 1, 2010 reiterating the same concerns. A-206. Plaintiff further advised Percy it was 58° in the middle the store but it is, "colder in the pharmacy department." *Id.* Plaintiff also informed Percy that in addition to the employees complaining about the cold, the customers were also complaining about the cold. A-206, A-207.

Having no response from Percy, Plaintiff sent another e-mail to Percy on February 7, 2010 advising him that the temperature in the pharmacy department had dropped further to 43°. A-207. Plaintiff advised Percy that the conditions were “very uncomfortable and unhealthy.” *Id.* Percy did not respond to any of Plaintiff’s reports of cold temperatures at the Milford store. A-173. The only complaints to Percy about the heat loss at the Milford store came from Mr. Elwell. A-176. No other employees from the store complained to Percy. *Id.*

On February 9, 2010, Plaintiff was aware that a major snowstorm was forecast for the following day, February 10, and that he was scheduled to work at the Milford store. A-009, A-015. Plaintiff resided approximately 50 miles from the Milford store and therefore made several phone calls to area hotels and motels hoping to spend the evening of February 9 there in order to get to work on February 10. A-139. All local accommodations were fully booked and reservations were not available. *Id.*

Delaware received a major snowstorm on February 10 with a high accumulation of snow such that the Delaware governor declared a State of Emergency restricting access to the roadways to “emergency personnel only.” A-009, A-179. Plaintiff did not have a designation of emergency personnel and was not permitted to travel on state roadways. A-009.

Plaintiff called Percy on the morning of February 10 after 7 AM and left a message for Percy advising him that he would not be able to travel to work that day in Milford due to the snow emergency. A-009, A-015. Percy returned the call and lectured Plaintiff urging Plaintiff to drive to work. A-139. Plaintiff explained to Percy that he made attempts the previous day to book a hotel in the Milford area but was unsuccessful. A-009, A-010, A-015.¹

At the insistence of Percy, Plaintiff attempted to brush the snow from his car in order to drive to Milford in violation of the State of Emergency. A-010, A-140. Plaintiff's efforts to clean off his car were futile as the snow was coming down at a rapid pace. *Id.* In the process of shoveling the snow, Plaintiff hurt his back. *Id.*

Plaintiff was angered by the circumstances and called Percy to advise him that he would not be able to drive to Milford. A-010, A-015, A-139. In his conversation with Percy, Plaintiff used an expletive to describe the snowstorm. A-140. Percy testified by deposition that Plaintiff used a series of expletives that referred to Percy. A-182, A-188. Plaintiff denied this in his deposition. A-139, A-140.

¹ Defendant's attempt to broaden Percy's accusations of insubordination to Plaintiff's failure to get a hotel room the night before the snowstorm, are misplaced. During his deposition, Percy testified that Plaintiff had exercised "good faith" in his efforts to find a hotel room. A-181. Despite Percy's testimony to the contrary, defense counsel denied same to the trial court. A-114.

Later that morning, Percy wrote an e-mail to his direct supervisor, Dennis Yoney, regional vice president for Defendant. A-243, A-244. In the e-mail to Yoney, Percy criticized Plaintiff for not advising him until the morning of February 10 that he would not be able to go to work in Milford and advised Yoney that Plaintiff used “very brutal” words including expletives toward Percy, his supervisor. *Id.* Percy further reported to Yoney that Plaintiff threatened that: "I will call Riteaid [sic] corporate and will talk with Mary Sammons [CEO] and all the HR people, and I will make sure you are in Big trouble and I mean it." *Id.* Plaintiff was referring to Percy’s insistence that he drive to Milford in a State of Emergency and that Percy failed to respond to Plaintiff regarding his reports of cold temperature at the Milford store. A-144, A-145.

Percy left a message for Plaintiff that Plaintiff was suspended from work without pay until further notice. A-010, A-016. Plaintiff was never further contacted by Percy nor anyone from Human Resources (“HR”) at Rite Aid. A-141, A-142. In the meantime, Percy contacted and spoke with both the head of HR, Sandra Biss, and HR associate, Keith Carr, to advise them of Plaintiff’s inappropriate actions on the morning of February 10. A-185, A-244. Dennis Yoney testified that he was not part of the investigation nor was he involved in the termination process of Plaintiff. A-225, A-226. Yoney expressed surprise that

Plaintiff was not interviewed during the investigation in accordance with Defendant's policies. A-226.

Percy testified that he was aware of the loss of temperature at the Milford store, and that the temperature loss was severe and lasted over a week. A-141. Moreover, Percy's supervisor, Dennis Yoney, testified that the Delaware Board of Pharmacy became involved when another Delaware pharmacy sustained heat loss. A-227. No such report was made to the Delaware Board of Pharmacy nor was any report regarding the Milford heat loss made by Percy to his supervisor, Dennis Yoney. A-175, A-227.

Mr. Yoney testified that the temperature conditions in the Milford store should have been reported to him by Percy and that further action should have been taken, including disciplinary action against Percy. A-227. Dennis Yoney also testified that at the time of Percy's reporting to him on February 10 regarding the alleged inappropriate actions of Plaintiff, that he was not aware either that the store had a significant reportable temperature issues nor that Plaintiff had made a report of same to his supervisor (Percy). A-224.

IV. ARGUMENT

APPELLANT PRODUCED SUFFICIENT EVIDENCE, PURSUANT TO THE DELAWARE WHISTLEBLOWER PROTECTION ACT, TO PROVE THAT HIS REPORTING OF DEFENDANT'S VIOLATION WAS THE PRIMARY REASON FOR HIS DISCHARGE FROM EMPLOYMENT. IN THE ALTERNATIVE, THERE ARE GENUINE ISSUES OF MATERIAL FACT WITH REGARD TO THE DETERMINATION OF THE PRIMARY REASON FOR PLAINTIFF'S DISCHARGE FROM EMPLOYMENT.

A. Question Presented

Did the Superior Court err in finding that Plaintiff's reports of violations to his supervisor were not the primary reason for his termination?

This issue was preserved by the lower court's ruling granting summary judgment to Appellee, Defendant-below. This is the ruling from which Appellant, Plaintiff- below files this appeal.

B. Scope of Review

The scope of review on appeal of a decision on summary judgment is *de novo* consideration, pursuant to which the Supreme Court may review the entire record, as well as the trial court's order and opinion. Pike Creek Chiropractic Ctr. v. Robinson, 637 A.2d 418 (Del. 1994). From this review, the Court is free to draw its own conclusions with respect to the facts if the findings below are clearly

wrong and if justice so requires, particularly where the findings arise from deductions, processes of reasoning or logical inferences. Dutra de Amorim v. Norment, 460 A.2d 511 (Del. 1983); Fiduciary Trust Co. v. Fiduciary Trust Co., 445 A.2d 927 (Del. 1982). Nonetheless, the Supreme Court will view the acts in a light most favorable to the nonmoving party. Alexander Indus., Inc. v. Hill, 211 A.2d 917 (Del. 1965). The appellate court then determines whether there is an issue of fact for trial which, if resolved in favor of the nonmoving party, would entitle the nonmoving party to judgment. *Id.* Stated another way, the Court determines whether under all the circumstances, the moving party is entitled to summary judgment. Brunswick Corp. v. Bowl-Mor Co., 297 A.2d 67, 69 (Del. 1972). See also Delmarva Power & Light Co. v. City of Seaford, 575 A.2d 1089 (Del. 1990); Gilbert v. El Paso Co., 575 A.2d 1131 (Del. 1990).

C. Merits of Argument

1. Status as Whistleblower

The Delaware Whistleblower's Protection Act ("WPA"), 19 Del. C. §§1701 *et. seq.*, provides an employee with protection from discharge if he or she reports a "violation" to the employee's supervisor or employer. 19 Del. C. §1703(4). A "violation" is described under the WPA as follows:

Act or omission by an employer... that is: Materially inconsistent with, and a serious deviation from, standards implemented pursuant to a law, rule or regulation promulgated under the laws of this State... to protect

employees or other persons from health, safety, or environmental hazards while on the employer's premises or elsewhere. 19 Del. C. §1702 (6)(a).

The court below found that Plaintiff Robert Elwell, the pharmacist who reported the lack of heat in his store to a supervisor, was a "Whistleblower" within the meaning of the WPA. A-126. There is no question that Plaintiff's report of the heating deficiencies was a report of a "violation" within the meaning of the WPA allowing him to potentially qualify for job protection under this enactment. A-123.

2. Report of Violation to Supervisor

The record is replete with references to Plaintiff's report of a violation to his supervisor, Percy. There are two e-mails from Plaintiff to Percy dated February 1 and February 7, 2010 that advise Plaintiff's supervisor of the deteriorating heating conditions in the store which had an impact on the drugs that were being stored at the Milford pharmacy. A-171, A-206, A-207. Plaintiff's February 1 e-mail references a prior communication with his supervisor, Percy, in which he advised Percy of the problem with the heat deficiency in the store during the month of January 2010. A-206.

Defendant has acknowledged receipt of Plaintiff's e-mails regarding the heating deficiencies that were sent by Plaintiff to his supervisor, Percy, in early February 2010. A-171.

Further, there is no question that the reports from Plaintiff to his supervisor constituted reports of a "violation." Both Percy and his supervisor, Dennis Yoney, acknowledged that the loss of heat in the store was a serious condition that was reportable to the Delaware Board of Pharmacy and may have resulted in the closing of the store until the heating was restored. A-175. It does not appear to be in dispute that the heat deficiency was "materially inconsistent with, and a serious deviation from, standards implemented pursuant to a law rule or regulation." 19 Del. C. §1702 (6)(a). In addition to the impact on drug stability (A-227) or drug efficacy (A-123), Plaintiff reported to his supervisor that the heat loss had a harmful impact on the store customers and employees. A-207. It is not disputed that these laws rules or regulations were established "to protect employees or other persons from health, safety, or environmental hazards while on the employer's premises." 19 Del. C. §1702 (6)(a).

3. Primary Reason for Discharge

As part of the *prima facie* case under the WPA, Plaintiff must show that, "the **primary basis** for the discharge... alleged to be in violation of this chapter was that the employee undertook an act protected pursuant to §1703 of this title." 19 Del. C. §1708 (emphasis supplied). The trial court found that, "there is no genuine dispute of material fact that his [Plaintiff's] status as a whistleblower was not the primary reason for his discharge." A-126. The court explained this finding

by determining that, "there is absolutely no evidence in the record that the persons making the decision to discharge the Plaintiff -- and, that is, Mr. Yoney and Ms. Biss -- were even aware of the complaint that had been made by the Plaintiff about the heat at the pharmacy in Milford or the lack of heat at the pharmacy in Milford." A-126, A-127.

The trial court's finding was in error because there was no factual record as to who made the decision to discharge Plaintiff. It is clear from Mr. Yoney's testimony that he did not make the decision to terminate Plaintiff. A-225, A-226. The evidence that Ms. Biss, in her capacity as head of Human Resources made this decision, is mere speculation, in the absence of supportive record evidence. A-225, A-226.

Further, and perhaps most telling, the lower court drew these conclusions after its wrongful finding that the e-mail from Percy to his supervisor, Yoney, did not "mention whatsoever... the alleged whistleblowing activity by the Plaintiff." A-126. Indeed, Percy's memo to his supervisor did mention that Plaintiff had threatened to contact Defendant's CEO because Percy was "in Big trouble." A-243. Percy testified that he did not know what was meant by that threat. A-184. Plaintiff testified, however, that the threat to go to the CEO was based upon both Percy's conduct on the morning of February 10 insisting that he violate the State of Emergency and travel to Milford as well as Percy's utter failure to respond to

Plaintiff's repeated calls for help because of the loss of heat at the Milford store. A-145, A-146.

4. Identity of Decision-Maker

Defendant argued in its Opening Brief that Dennis Yoney had the ultimate authority to terminate Plaintiff and then advised the lower court in argument that both Yoney and Human Resources had the authority to fire Plaintiff. A-021, A-097. Plaintiff respectfully submits that neither statement by Defendant's counsel was correct. Mr. Yoney testified that he did not terminate Plaintiff and there is no record evidence demonstrating that Human Resources terminated him. A-225, A-226. To the contrary, **record evidence** was provided by Mr. Yoney who testified that following the investigation by Human Resources, "the termination recommendation was given to Percy Dhamodiwala." A-225.

Therefore, we must disregard Defendant's argument in its briefing to the lower court: "it is beyond dispute that not a single person connected with the decision to terminate Plaintiff was aware of the heating issues at the Milford store prior to Plaintiff's termination." A-022.

What is indeed "beyond dispute," however, is that Percy knew of the heating deficiencies, and their extent and duration. A-141. Percy was Mr. Elwell's first-line supervisor to whom the reports of the "violation" were made. A-206, A-207.

As a result of Defendant's representations to the Court as set forth *supra*, the Court wrongfully determined that both the decision-makers were Biss and Yoney and that neither had knowledge of the reports made by Plaintiff to his supervisor. A-126, A-127.

5. Plaintiff's Termination Contrary to WPA

Plaintiff respectfully submits that the lower court's reliance upon the identity and the knowledge of the "ultimate decision-makers" is misplaced. Instead, the WPA applies to an employee who, "reports verbally or in writing to the employer or to the employee's **supervisor** a violation..." 19 Del. C. §1703(4) (emphasis supplied).²

While the identities of the "ultimate decision-makers," referring to the person or persons who terminated Plaintiff's employment, are in dispute or are not properly part of the record below, the WPA statute does not require that the whistleblowing employee prove that the decision-makers had knowledge of the report of the violation. That level of proof may be difficult if not impossible to attain.

² Plaintiff's counsel misspoke during oral argument by attempting to agree with the trial court that the knowledge of the ultimate decision-makers was part of Plaintiff's proofs. A-109. This issue was not briefed prior to oral argument.

Plaintiff argues that the construction of the statute requiring knowledge of the ultimate decision-makers as was done by the lower court would likely eviscerate the purpose of the whistleblowing statute. What is relevant to an employee's status as a potential whistleblower is what the employee has reported to his supervisor (or, in some cases, a higher management authority). An employee who is retaliated against for protected whistleblowing activity should not have to prove the knowledge of a manager making the termination decision who is, by definition, higher in the company management hierarchy than the employee reporting the violation. The enactment of the Delaware WPA is consistent with the need to put the public interest in protecting the "health or safety" of the public ahead of an employer's self-interest to avoid fines or penalties as a result of actions threatening the health and safety of the public. Requiring that a decision-maker further up the hierarchy know of the report of violation may effectively thwart this process as can be seen by Defendant's arguments and the lower court's ruling.

In the instant case, Plaintiff's supervisor not only knew of the heating loss but also understood the financial ramifications for his company if this were reported to the Delaware Board of Pharmacy. Instead of sharing this information with Mr. Yoney and/or the Delaware Board of Pharmacy, Percy was able to eliminate the source of the complaint (Plaintiff) and therefore sweep these issues

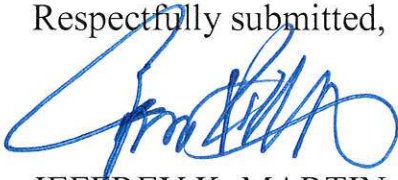
under the rug undoubtedly with his implicit understanding that the heating problem would be addressed and become a non-issue.

For these reasons, Plaintiff respectfully requests that this matter be remanded to Superior Court and presented to a jury so that a jury can determine, based upon the ample evidence elicited from Defendant during discovery, that Plaintiff's reports to Percy were the primary cause of his termination from Rite Aid.

V. CONCLUSION

Appellant, Plaintiff-below respectfully requests that for the reasons set forth in this Opening Brief, this matter be remanded to Superior Court for Trial.

Respectfully submitted,



JEFFREY K. MARTIN

CERTIFICATION

I, Jeffrey K. Martin, hereby certify that on this 6th day of August, 2014, the attached Opening Brief of Appellant Robert Elwell was electronically filed in the LexisNexis File and Serve System, and copies were provided to:

Sean J. Bellew (#4072)
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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROBERT ELWELL,)
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 Plaintiff,)
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 v.)
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 THRIFT DRUG, INC., d/b/a)
 RITE AID,)
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 Defendant.)

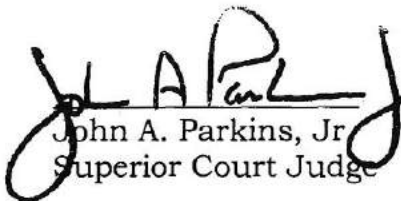
C.A. No. N12C-05-013 JAP

ORDER

The court's order granting Defendant's motion for summary judgment dated March 4, 2014 is hereby **VACATED** and **REINSTATED** as of today, April 9, 2014. The court deems Plaintiff's Motion for Reconsideration and Defendant's response thereto filed as of today.

IT IS SO ORDERED.

Date: April 9, 2014


John A. Parkins, Jr.
Superior Court Judge

oc: Prothonotary
cc: All counsel via e-file

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ROBERT ELWELL,) C.A. # N12C-05-013 JAP
)
Plaintiff,)
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v.)
)
THRIFT DRUG, INC., d/b/a)
RITE AID,)
)
Defendant.)

- - - -
BEFORE: THE HONORABLE JOHN A. PARKINS, JR.

APPEARANCES:

MARTIN & ASSOCIATES
BY: JEFFREY K. MARTIN, ESQ.
For the Plaintiff

BALLARD, SPAHR, LLP
BY: SEAN J. BELLEW, ESQ.
JESSICA CASE, ESQ.
For the Defendant

- - - -
MOTION TRANSCRIPT
TUESDAY, MARCH 4, 2014

DENNEL J. NIEZGODA, RMR, CRR
SUPERIOR COURT OFFICIAL REPORTERS
500 N. King Street - Wilmington, Delaware 19801
(302) 255-0560

1 Tuesday, March 4, 2014
2 Courtroom No. 8B
3 11:00 a.m.

4 PRESENT:

5 As noted.

6 - - - - -

7 THE COURT: Good morning.

8 MR. BELLEW: Good morning, Your Honor. Sean
9 Bellew from Ballard, Spahr on behalf of defendant
10 Rite Aid. And with me is my colleague Jessica
11 Case, who is newly minted into the Delaware Bar as
12 of late last year.

13 THE COURT: Congratulations. I believe
14 we've met before.

15 MS. CASE: Yes, we have, Your Honor.

16 THE COURT: It's your motion.

17 MR. BELLEW: Your Honor, this is the time
18 set aside for oral argument on Rite Aid's Motion
19 For Summary Judgment.

20 The issue here today, Your Honor, is very
21 concise. As a matter of law, the plaintiff,
22 Mr. Elwell, cannot establish that his purported
23 reporting of a violation was the, quote, primary
basis for his discharge.

1 THE COURT: Let's get a little more basic
2 first. Was the plaintiff an employee at will?

3 MR. BELLEW: Yes.

4 THE COURT: So, the argument is that -- by
5 the plaintiff is that even though he was an
6 employee at will, you couldn't fire him because he
7 was a whistleblower?

8 MR. BELLEW: That's the allegation, yes.
9 And, Your Honor, we believe that as a matter of
10 law, despite those allegations in the Complaint,
11 we're entitled to summary judgment because the
12 plaintiff cannot establish as a matter of law that
13 the primary basis of his discharge was this
14 purported effort to report these violations.

15 Your Honor, the standard is very well-known
16 to the Court. We come forward, we make an argument
17 that there's no genuine issue as to a material
18 fact, and that because of that absence of an issue,
19 a genuine issue as to that material fact, that
20 we're entitled to judgment as a matter of law.

21 THE COURT: Well, am I correct that the
22 ultimate material fact here is whether the people
23 who made the decision to let Mr. Elwell go knew

1 about his alleged efforts at whistleblowing?

2 MR. BELLEW: That's correct, Your Honor.
3 And there's nothing in the four or five-page
4 response that was submitted to you that creates
5 that genuine issue as a material fact.

6 THE COURT: Guide me through a little bit
7 here. Who were the people to whom Mr. Elwell
8 complained about the heating?

9 MR. BELLEW: Of record, the complaints
10 consisted of two e-mails that were sent to his
11 immediate supervisor. We call him Percy "D"
12 because his last name is very difficult to
13 pronounce.

14 THE COURT: Now, is there any evidence in
15 the record that the supervisor relayed those
16 complaints to anyone else?

17 MR. BELLEW: Not only is there no evidence
18 to that effect; the only record evidence is that he
19 did not communicate those issues to Mr. Yoney and
20 others in Human Resources that were in charge of
21 the ultimate decision to terminate him.

22 THE COURT: And that's based on the
23 supervisor's deposition testimony?

1 MR. BELLEW: Yes.

2 THE COURT: So, they were sent to the
3 supervisor. And my recollection is that the
4 supervisor said something like "we put portable
5 heaters in," and the plaintiff has adduced evidence
6 that that's not true. But, frankly, that's of
7 little concern to me. I don't much care what was
8 done to heat up the building.

9 In this context I want to know -- the
10 supervisor kept these to himself. Now, did the
11 supervisor play a role in the decision to fire the
12 plaintiff?

13 MR. BELLEW: No, Your Honor. And that's the
14 standard procedure that would be followed within
15 Rite Aid. It gets elevated to the supervisor's
16 supervisor, who then interfaces with Human
17 Resources and a decision is made.

18 THE COURT: Who is the supervisor's
19 supervisor?

20 MR. BELLEW: That's Dennis Yoney.

21 And just to give you a center, Your Honor,
22 Rite Aid is, I believe, in 35 states, it has a
23 120,000 employees. They have a very stratified

1 reporting structure based on, you know, the
2 footprint that they cover the United States with.
3 So, whereas Mr. Percy "D" would be a regional
4 supervisor; his supervisor was a much larger
5 territory.

6 THE COURT: So, he reported to Yoney. Who,
7 then, did Yoney take this up with?

8 MR. BELLEW: Yoney would have went to Sandy
9 Biss, B-I-S-S, and others in Human Resources, would
10 have communicated what the nature of the
11 conversation was between Mr. Elwell and Percy "D",
12 and they would have made a decision based on what
13 was reported to them whether that served as the
14 basis to terminate. And that's what happened here.

15 And, Your Honor, there's no dispute as to
16 several key facts here that ultimately were
17 communicated to Human Resources.

18 Number one, on the 9th of February 2010 it's
19 not disputed that there was a snowstorm predicted
20 and that Mr. Elwell, despite being instructed to do
21 so, despite knowing the policy that he was required
22 to, did not obtain a hotel room. Now, he says he
23 couldn't.

1 Even if we take him for his word on that, at
2 that point he had an obligation to call his
3 supervisor and say: Look, I did not get a hotel
4 room, I live 50 miles away from this location, you
5 know, we may need coverage tomorrow. He didn't do
6 that.

7 The next day the snow comes. At 7:20 he
8 calls, reports that he can't report to work because
9 of the snow.

10 He admits that there was this discussion
11 with Percy "D." In his Complaint at Paragraph 19
12 he concedes -- he actually states: Plaintiff
13 returned to his home angry.

14 He was angry when he placed this call and he
15 spoke to his supervisor. He testified -- you know,
16 some of the more egregious language he denied
17 stating. But he did not deny at all that he used
18 profanity and cursed during that telephone
19 conference.

20 THE COURT: I hate to interrupt you, but was
21 it Rite Aid's policy to reimburse pharmacists for
22 the cost of the motel room?

23 MR. BELLEW: Yes. And, as a matter of fact,

1 the testimony here, which is not disputed, is that
2 Percy called Mr. Elwell the day before and
3 affirmatively said: Hey, look, there's a storm
4 predicted for our area; take steps to get a hotel
5 room. So, that's not disputed, Your Honor.

6 So, Your Honor, we go through those facts,
7 it was elevated to Human Resources, he was
8 terminated on that basis. And we have established
9 in our affirmative filing in our brief, our motion
10 that no one that actually came to the conclusion
11 that he should be terminated based on this conduct
12 was even aware of the hearing issues.

13 So, it would follow, Your Honor -- the
14 statute is not a very old statute, it's not a very
15 long statute. It's about four or five pages in our
16 quote here and can be reduced to one page
17 through --

18 THE COURT: Why don't you put it on the
19 ELMO.

20 MR. BELLEW: I'm not going to put this one
21 on the ELMO because it's very small to see. I
22 think what would be helpful is to put the actual
23 code section there because I think this is

1 pertinent for our review.

2 Your Honor, what this really boils down to
3 at this stage is an issue of burden of proof.

4 THE COURT: Okay.

5 MR. BELLEW: This is the operative word
6 here, Your Honor, "primary." So he -- Mr. Elwell
7 has the burden of establishing that the primary
8 basis for his discharge was the reporting of these
9 violations. And, as a matter of law, Your Honor,
10 he cannot establish that if he cannot create a
11 genuine issue as to material fact as to the
12 decision maker's knowledge base regarding these
13 violations, reported violations. So, that's really
14 where we are with our argument.

15 Now, Your Honor -- so, my usual starting
16 place for argument on a motion for summary judgment
17 is with the nonmoving party's papers. And I think
18 if you look at their papers, Your Honor -- I can't
19 glean anything from the papers that would create
20 any material -- any genuine issue of material fact.
21 And I think it fails on its face, Your Honor,
22 because there's not even a direct citation to any
23 record evidence that would create a genuine issue

1 of material fact as to the issue of what the
2 primary basis of the discharge was.

3 So, for those reasons, Your Honor, we
4 believe that Rite Aid is entitled to summary
5 judgment.

6 Now, Your Honor, again, it's a very new
7 statute. There's one case in preparing for
8 argument that I thought might be instructive. We
9 didn't cite this in our moving papers because it
10 was actually a case that was reversed on appeal.
11 But looking at it more closely -- this is a Vice
12 Chancellor Lamb decision, *Garrison v. Red Clay*.
13 It's 2009 Delaware Chancery Lexis 147.

14 This case, Your Honor, gives exceptional
15 guidance to what you have before you today. In
16 that case it was a situation where a teacher did
17 not go through certain hoops that they needed to do
18 to gain their licensure to continue teaching in the
19 State of Delaware and was terminated, brought a
20 lawsuit, and in the lawsuit they brought a wrongful
21 termination claim and a whistleblower claim. And
22 Vice Chancellor Lamb, like I believe this Court
23 should hold, looked at that and said: Hey, look,

1 there was another reason why he was being
2 terminated and because of these other issues -- the
3 fact that there was this purported whistleblowing
4 cannot establish that that was the primary basis.

5 So, similar to this situation, Your Honor,
6 the reason why this individual was discharged was
7 because of his conduct on that date and the people
8 that made the decision to terminate him -- and this
9 is not refuted as far as I can see -- had no
10 knowledge that there was any existence of
11 these claims.

12 THE COURT: Let me ask you: Is this both a
13 wrongful termination and a whistleblower claim, or
14 is this simply a whistleblower claim?

15 MR. BELLEW: This is a one-count Complaint
16 and it's captioned: Violations of the
17 Whistleblower's Protection Act.

18 THE COURT: So I don't need to worry about
19 whether this was an employee at will or not?

20 MR. BELLEW: Exactly, Your Honor.

21 And, Your Honor, we will spot just two other
22 issues to put in context really plaintiff's -- I
23 mean, this is about plaintiff's efforts to create

1 his case. There's two other issues.

2 The first is, there's no evidence that this
3 even amounts to a violation, whatever he reported
4 in these e-mails. Now, we're going to save that
5 for another day. But I think it's important for
6 the Court to understand -- you know, summary
7 judgment is not something that's taken lightly.
8 But the plaintiff hasn't even gotten an expert to
9 establish that this is -- that the diminished
10 temperatures -- storing pharmaceuticals in these
11 temperatures would even amount to a violation,
12 which is a very specifically defined term in this
13 statute.

14 The other thing, Your Honor, that's very
15 telling is now we're here -- we have the pretrial
16 next week. And this is an issue you and I have
17 dealt with in other cases that, you know, really
18 brings to the floor a plaintiff's efforts to
19 establish their entitlement to recover. When asked
20 what his damages are -- first and foremost, they
21 asked for punitive damages in the Complaint. Well,
22 the statute doesn't allow for punitive damages.
23 That's number one.

1 Number two, there's no expert report on what
2 this gentleman's damages are. When he was asked,
3 you know, "what are your damages" -- he was asked
4 that question in his deposition, and he
5 responded -- "Question: Mr. Elwell, are you
6 familiar with the amount or type of damages that
7 you are seeking in this litigation?"

8 "Answer: I'm a little unclear on that
9 amount or type."

10 So, here we are on the verge of trial and
11 they have never articulated what the damages are,
12 which I don't think -- I think they ultimately need
13 an expert on that.

14 One other point. He had made reference to
15 the fact that he hurt his back because he was
16 trying to shovel out his car to get to work that
17 day. He said -- "Question: Are you seeking any
18 damages based on your back injury?"

19 "Answer: That would be wonderful, yes."

20 So, Your Honor, this is about the plaintiff
21 trying to create -- the plaintiffs are entitled to
22 their day in court, but they have to push their
23 cases forward with a level of diligence in keeping

1 with what they need to establish to get to trial.
2 They haven't done that, first and foremost, with
3 the critical issue we put forward, together in our
4 motion for summary judgment, and that is this issue
5 of the primary basis for termination.

6 And in the grander scheme of things, Your
7 Honor, plaintiff has not brought forward even the
8 most simple calculations as to what he would be
9 entitled to if he should prevail.

10 THE COURT: Well, does the whistleblower
11 statute limit damages to economic loss?

12 MR. BELLEW: Your Honor, from my reading of
13 it, you would have a wide range of damages that you
14 could order.

15 THE COURT: How about anguish because he got
16 fired?

17 MR. BELLEW: That's not one of them because
18 it's actual damages. The statute says: The Court
19 shall order, as the Court considers appropriate,
20 reinstatement, payment of back wages, full
21 reinstatement of fringe benefits and seniority
22 rights, expungement of records, actual damages, or
23 any combination of these remedies.

1 THE COURT: Well, for example, he wouldn't
2 need an expert witness, would he, to calculate his
3 lost wages?

4 MR. BELLEW: I don't think he would. But
5 when you ask him what his damages are, aren't we
6 entitled to an answer where -- you know, I've done
7 that. We've asked the question.

8 THE COURT: Did you ask that by way of
9 interrogatory?

10 MR. BELLEW: I would have to go back and
11 check. But it's a standard interrogatory that we
12 would have asked.

13 So, I guess the point of it, Your Honor, is,
14 they have an obligation to present their case.
15 They have an obligation here to provide you a brief
16 that puts forward that piece of evidence that
17 either the jury could review and say that that
18 wasn't the primary basis -- they haven't done that.

19 THE COURT: Let me hear from the plaintiff.

20 MR. BELLEW: Thank you, Your Honor.

21 MR. MARTIN: May I please the Court. Good
22 morning, Your Honor.

23 THE COURT: Good morning, Mr. Martin.

1 MR. MARTIN: Your Honor, I respectfully
2 disagree with my colleague. I think we have put
3 forth the necessary diligence to go forward at
4 trial.

5 I think the Court was right on in spotting
6 the issue. And, that is -- I think in order to
7 prevail under the whistleblower's statute, as we
8 seek to do, we have to be able to show that the
9 decision makers were aware of the protected
10 activity in the reports.

11 THE COURT: Well, no. You have to show that
12 it was the primary reason.

13 MR. MARTIN: That's one.

14 THE COURT: And as I understand what the
15 defendant's argument is, you can't show it was any
16 reason because the people who made this decision --
17 there's no evidence they were aware of the heat
18 issue.

19 MR. MARTIN: Your Honor, I respectfully
20 disagree inasmuch as the main actor here for the
21 defendant is Percy Dhamodiwala or Percy "D."

22 THE COURT: The supervisor.

23 MR. MARTIN: Yes, Your Honor.

1 He was so intimately involved in the whole
2 process -- he's the one who took the reports from
3 my client, Mr. Elwell.

4 THE COURT: Took the reports about the heat?

5 MR. MARTIN: Yes, sir.

6 And in deposition he responded -- he agreed,
7 he acknowledged he had no reason to disbelieve that
8 there was not a heating issue. And that whole
9 issue -- the suggestion, you know, that's not a
10 violation -- it most certainly is. I mean, through
11 the mouths of the defense witnesses. They
12 acknowledge that a prolonged heating loss like
13 that --

14 THE COURT: All right. But tell me -- what
15 I want to focus on -- first of all, I want to look
16 at Yoney Exhibit 1 for a second.

17 MR. MARTIN: Yes, sir. You can find that at
18 my Tab 4, Exhibit 4. That's the first tab.

19 THE COURT: What evidence is there that your
20 client communicated his concerns about the heat
21 issue to anyone other than Percy, the supervisor?

22 MR. MARTIN: None, sir.

23 THE COURT: And what evidence is there in

1 the record that the supervisor communicated this
2 complaint to Mr. Yoney or Ms. Biss?

3 MR. MARTIN: Your Honor, I believe that he
4 did not because he was trying to sweep this under
5 the rug and, instead, made this issue out of whole
6 cloth. The issue is, Mr. Elwell has to be
7 terminated because of insubordination. Well,
8 Mr. Elwell --

9 THE COURT: Time out. Do you allege
10 anything other than this is a whistleblower?

11 Do you allege that there was a requirement
12 that he be terminated for cause?

13 MR. MARTIN: No, sir. This is not an
14 employment-at-will situation. This is strictly
15 governed by the whistleblower statute; no question
16 about it.

17 But my point is that Mr. Dhamodiwala, the
18 supervisor, was the one who drove this whole
19 situation, Your Honor. He is the supervisor who
20 accepted the information from my client knowing
21 full well -- in retrospect, he's acknowledged by
22 way of deposition that you cannot have a
23 non-heating situation in a pharmacy for a prolonged

1 period of time. In fact, that's a violation that
2 should have been reported not only to a supervisor,
3 but also to the Board of Pharmacy, who could have
4 and probably should have shut down the pharmacy.

5 So, Mr. Dhamodiwala knew all of this and,
6 for reasons I don't understand, it appears that
7 only Mr. Elwell was the squeaky wheel. There was
8 no one else from the pharmacy who complained to
9 Mr. Dhamodiwala.

10 THE COURT: I'll assume for the moment that
11 your client was a whistleblower. But what I don't
12 understand is, how did the people -- what is the
13 evidence that this was the primary reason he was
14 terminated?

15 MR. MARTIN: Your Honor, it is the reason
16 that -- a jury will believe that Mr. Dhamodiwala
17 pushed this issue and wanted termination for this
18 man. Mr. Dhamodiwala participated with Human
19 Resources in the post-incident investigation.
20 Ms. Biss, Sandra Biss -- unfortunately, I put her
21 as "Bliss" a couple times. But Ms. Biss was the HR
22 head. And he also spoke with Keith Carr from Human
23 Resources.

1 I asked Mr. Yoney, the supervisor's boss,
2 who is the regional vice president of pharmacy -- I
3 said: When you do an investigation to determine
4 whether somebody, like a pharmacist, should be
5 terminated, don't you talk to the pharmacist?

6 Absolutely.

7 Are you surprised to hear that Mr. Elwell
8 was never counselled, never -- there was no
9 statement, no interaction whatsoever?

10 Yes, definitely.

11 So, this was a -- this whole fabrication was
12 done by Mr. Dhamodiwala. There is ample evidence
13 for a jury to sit there and say: Yes, this was the
14 primary reason that Bob Elwell lost his position as
15 a pharmacist, because Percy Dhamodiwala knew he had
16 a problem but failed to take the proper steps in
17 reporting it to his supervision and also reporting
18 it to the Board of Pharmacy.

19 THE COURT: Well, is there any evidence to
20 dispute that it was the policy at this pharmacy to
21 have pharmacists rent a motel room if there was bad
22 weather pending?

23 MR. MARTIN: Your Honor, that's a non-issue.

1 If I may --

2 THE COURT: But tell me, is there any
3 dispute in the record?

4 MR. MARTIN: No, sir. There is not --

5 THE COURT: Let me finish.

6 And is there any dispute in the record that
7 your client was aware that there was -- on
8 February 10th, 2010 that there was a predicted
9 heavy snowstorm?

10 MR. MARTIN: Yes, he knew that on
11 February 9th and he made the efforts to get a hotel
12 room, as Mr. Dhamodiwala acknowledged in his
13 deposition. He acknowledged his good faith effort
14 to try to find that.

15 THE COURT: The supervisor conceded that the
16 plaintiff made a good faith effort?

17 MR. MARTIN: Yes, sir.

18 THE COURT: Is that true?

19 MR. BELLEW: No, Your Honor. There is some
20 argument to that, but -- I'm not saying that's
21 factually incorrect. I think he acknowledged that
22 if he made an effort, he couldn't get a hotel room,
23 there's nothing he could do about that. His

1 response to that was: Well, why didn't you call me
2 when you realized you couldn't get a hotel room?
3 It wasn't as Mr. Martin characterized.

4 THE COURT: Well, is there any evidence in
5 the record to dispute that your client, having
6 found out that he couldn't get a hotel room, did
7 not call his supervisor?

8 MR. MARTIN: No, Your Honor. There's no --
9 he did not call until the next -- the following
10 morning, on February 10th. It was his experience,
11 as I think all of us -- sometimes when a big storm
12 is predicted, it doesn't materialize, as we've just
13 seen as recently as yesterday.

14 THE COURT: That's true.

15 MR. MARTIN: And, Your Honor, he called his
16 supervisor right then. It was his intention to get
17 in the car and get down -- he lives in Middletown.
18 So, it's about a 50-mile hike from Milford. He had
19 every intention of getting in that car.
20 Unfortunately, Governor Markell called a State of
21 Emergency.

22 And I don't know if Your Honor will recall,
23 but the State of Emergency law was different back

1 in February 2010. In fact, it was revised shortly
2 thereafter. Now we have a Level I, Level II, Level
3 III. Back then when the State of Emergency was
4 called by Governor Markell, no one could get out on
5 the road unless you had some kind of emergency
6 certification, a certification that Mr. Elwell did
7 not have.

8 So, he made his good faith effort. And
9 Percy acknowledged his good faith effort to find a
10 hotel room, and also acknowledged that under the
11 circumstances he could not get to work that day
12 because the snow was so intense and so bad.

13 But, Your Honor, the real issue is the fact
14 that this heating problem had persisted. It was
15 duly reported by my client to his supervisor. Per
16 the supervisor's deposition, he took no action on
17 it in terms of further reporting. And eventually
18 the problem went away a few weeks later when they
19 got the proper parts for the heating system.

20 But during that time, Your Honor, it was a
21 situation that was very serious. And both the
22 supervisor, as well as his supervisor, Mr. Yoney,
23 acknowledged that you cannot store drugs in

1 temperatures that are in the mid 50s or below. And
2 here we had temperatures in the low to mid 40s for
3 an extended period of time.

4 So, I ask the Court to allow the jury to
5 hear the testimony of the supervisor and to
6 understand his role, which was so key. It was the
7 most important -- it was the primary reason for his
8 termination. It was -- the way he reported things,
9 but knowing full well, Your Honor, that he swept
10 the other stuff under the rug very, very
11 conveniently. It would be a real misjustice, in my
12 mind, Your Honor, to allow Percy to get away with
13 his failure to report and yet at the same time to
14 eliminate the squeaky wheel based upon a statement
15 which is inconsistent in terms of what he said that
16 my client said. And my client denied everything.

17 And let me just, if I may very quickly --
18 Mr. Bellew suggested my client cursed. He used the
19 term "son-of-a-bitch" with regard to the snowstorm.
20 And that is so reported. He testified to that.
21 But he did not use that towards Percy.

22 So, there are so many factual problems --

23 THE COURT: Does it matter what he said on

1 the phone?

2 MR. MARTIN: Does it matter? It matters,
3 Your Honor, because if, in fact, a jury could
4 believe that he was grossly insubordinate, then
5 that might be a case-ending issue. But my client
6 insists that he, you know, while angry -- and the
7 reason he was angry was because after he had this
8 telephone conversation, he went out and tried to
9 shovel off his car and -- he said the snow was
10 coming down as fast as he was shoveling it off and
11 he twisted his back. That's a non-issue in the
12 case. But he came back and left a message for the
13 supervisor.

14 THE COURT: What evidence of any
15 communication is there between the supervisor and
16 the higher-ups, other than what is on Yoney 1?

17 MR. MARTIN: That's right. That's the only
18 written. The other evidence, Your Honor, is the
19 post-incident contact that Percy, the supervisor,
20 had with HR, both the head of HR, Ms. Biss, and
21 also with Keith Carr.

22 THE COURT: Is that attached to one of the
23 appendicis?

1 MR. MARTIN: No, sir. That was never
2 produced in discovery. But I think it's sufficient
3 to -- for the Court to understand that my client
4 was not examined. They never sought his side of
5 the story. And, in fact, it was just Percy --

6 THE COURT: Were they obligated to?

7 MR. MARTIN: I'm sorry?

8 THE COURT: Was Rite Aid obligated to?

9 MR. MARTIN: Per their own policy, Your
10 Honor. Their own policy, according to the regional
11 vice president, was that they should have spoken
12 with Mr. Elwell.

13 THE COURT: But under the law was it
14 obligated to?

15 MR. MARTIN: Well, Your Honor, then that
16 falls under the realm of "employment at will."

17 THE COURT: He was an employee at will, was
18 he not?

19 MR. MARTIN: He was an employee at will.

20 THE COURT: So they could fire him for any
21 reason or no reason whatsoever?

22 MR. MARTIN: Except, Your Honor, he could
23 not be fired for a bad reason. And the

1 Whistleblower Protection Act sets forth --

2 THE COURT: I agree with that. But assuming
3 for the moment that he doesn't fall within the
4 Whistleblower Act, the "employee at will" status
5 did not obligate Rite Aid to talk to him or give
6 him any sort of due process or anything like that?

7 MR. MARTIN: That's correct.

8 THE COURT: They could have simply fired him
9 because -- for any reason.

10 MR. MARTIN: They could have, Your Honor.
11 But this, again, would be such a miscarriage of
12 justice to allow this supervisor, who was later
13 disciplined by -- in fact, was on a performance
14 improvement plan by Rite Aid in the year 2012, so
15 he testified. But it would be such a shame to
16 allow him to have gotten away with this issue of
17 promoting the termination by using facts and
18 figures that did not occur.

19 THE COURT: Well, how does an award of
20 damages -- you say "allow the supervisor to get
21 away." But it's Rite Aid that is the defendant,
22 not the supervisor.

23 MR. MARTIN: That's correct, Your Honor.

1 But this was on the supervisor's watch. I mean, he
2 was already disciplined. I don't have any reason
3 to believe he was disciplined for this. I'm not
4 suggesting that. But later on he did have some
5 performance issues as a supervisor with Rite Aid.

6 But Rite Aid needs to step up to the plate
7 and take care of him. This whole issue of damages
8 is -- as Your Honor suggested, with back pay that's
9 not something that we need to get an expert for,
10 and that's exactly what Mr. Elwell is seeking.

11 THE COURT: Has your client gotten
12 employment since then?

13 MR. MARTIN: Sir, he just got -- in the last
14 four or five months he got part-time employment
15 after constantly seeking this. He got employment
16 at Meadowood Hospital as a part-time pharmacist.

17 THE COURT: All right. I'll hear any
18 rebuttal.

19 MR. BELLEW: Just briefly, Your Honor.

20 If you do look at Yoney 1, you have Percy
21 communicating his version of events to his
22 supervisor and to two individuals in Human
23 Resources. His version of events is barely even

1 disputed. There's no dispute that the plaintiff
2 was instructed to get a hotel room the night
3 before, was unable to, but didn't communicate that
4 in real time. He waited till the next day. He
5 took a chance and thought, Well, maybe I'll be able
6 to drive. Well, he can't drive the next day and he
7 doesn't get there.

8 So, Your Honor, that in and of itself -- in
9 an at-will employment circumstance they could have
10 fired him for nothing at all. Well, he was unable
11 to be at work that day. That in and of itself
12 could have been grounds for termination.

13 But they didn't terminate him for that. As
14 a matter of fact, as the e-mail goes on, Percy just
15 asked him: You know, confirm that you're going to
16 be at work tomorrow, at least do that for me.

17 And then later that morning Mr. Elwell
18 calls. He admits that he calls. He admits that he
19 used some profanity. And then that was escalated
20 to Human Resources, who made the decision that
21 based on that conduct, that they were going to
22 terminate him. That doesn't provide any basis for
23 any claim.

1 Now, it's their burden to prove that there
2 was something other than this that was the primary
3 basis. And, Your Honor, based on their argument
4 today and the submissions to the Court, they have
5 failed to carry that burden.

6 THE COURT: Thank you.

7 Presently before the Court is the
8 defendant's Motion For Summary Judgment. The
9 undisputed facts show the following:

10 The plaintiff was a pharmacist at the Rite
11 Aid located in Milford, Delaware. And apparently,
12 although the Court does not so find, but for
13 purposes of summary judgment will find, the
14 plaintiff reported heating conditions or, more
15 properly, the lack of heating in the pharmacy which
16 endangered or caused concerns about the efficacy of
17 the drugs being stored at the pharmacy. The
18 undisputed evidence is that the plaintiff reported
19 this condition to his supervisor at Rite Aid and
20 only the supervisor at Rite Aid.

21 On February 10th of 2010 there was a massive
22 snowstorm in Delaware. That snowstorm was
23 predicted for several days in advance and was

1 predicted to be a massive snowstorm. It is
2 undisputed that the policy of Rite Aid is for a
3 pharmacist working -- scheduled to work that day to
4 obtain a motel room near the pharmacy so that the
5 pharmacist could make it to work irrespective of
6 the road conditions. And it is also undisputed
7 that the pharmacy, Rite Aid, would reimburse the
8 pharmacist for the cost of that motel room.

9 There is a genuine dispute of material fact
10 as to whether the plaintiff in this case attempted
11 to get a motel room, so the Court will assume for
12 purposes of this motion that the plaintiff
13 unsuccessfully sought to obtain a motel room in the
14 Milford area the night before the storm. As a
15 result, the pharmacist went home to Middletown, a
16 distance of about 50 miles from the pharmacy.

17 The undisputed evidence shows that the
18 pharmacist plaintiff did not contact his supervisor
19 the night before the storm when he was unable to
20 obtain a motel room but, rather, waited until
21 roughly 7:00 in the morning on February 10th to
22 notify his supervisor, at which time it was
23 difficult, if not impossible, for the supervisor to

1 get a fill-in pharmacist.

2 The facts show that this was one of the
3 reasons why the defendant -- why the plaintiff was
4 terminated. It is undisputed that the only written
5 communication between the supervisor and those
6 empowered to terminate the plaintiff was a
7 February 10, 2010 e-mail, which has been marked as
8 Yoney Exhibit 1. In that e-mail, which is from the
9 supervisor to Dennis Yoney, who is a higher-up at
10 Rite Aid, the supervisor set forth several
11 indications of what happened.

12 One of the issues was -- according to the
13 supervisor, quote, My question was, then, why he
14 did not inform me that he could not get any motel
15 room.

16 In Item 4 he says -- I'm sorry. In Item 3,
17 according to the supervisor in this e-mail, he
18 says: I reminded him, meaning the plaintiff, that
19 since he was also scheduled on Thursday, 2/11/10,
20 he needs to inform me about his status by afternoon
21 today. I asked him because it becomes very
22 difficult when somebody calls out at the last
23 minute -- strike that. That has nothing to do with

1 missing on February 10th.

2 But the most salient part of this e-mail is
3 that there is no mention whatsoever of the alleged
4 whistleblowing activity by the plaintiff.

5 The law provides -- well, it is conceded
6 tacitly, if not expressly, that the plaintiff in
7 this case is an employee at will, who, generally
8 speaking, can be discharged for any reason or no
9 reason at all. The plaintiff correctly points out,
10 though, that his status as a whistleblower, if
11 proven, would preclude his termination or
12 punishment even if he were an employee at will.

13 The issue, therefore, is whether the
14 plaintiff was a whistleblower within the meaning of
15 the statute and, number two, whether that was the
16 primary reason for his discharge.

17 The Court concludes that there is no genuine
18 dispute of material fact that his status as a
19 whistleblower was not the primary reason for his
20 discharge. In particular, there is absolutely no
21 evidence in the record that the persons making the
22 decision to discharge the plaintiff -- and, that
23 is, Mr. Yoney and Ms. Biss -- were even aware of

1 the complaint that had been made by the plaintiff
2 about the heat at the pharmacy in Milford or the
3 lack of heat at the pharmacy in Milford. And,
4 therefore, there is no reason to believe that this
5 played any role whatsoever in their decision to
6 terminate the plaintiff.

7 Supporting this, although unnecessary for
8 the defendant to prove, is the idea that it is
9 undisputed that once the plaintiff was unable to
10 obtain a motel room in the area, he failed to
11 promptly notify his supervisor of his inability to
12 obtain a motel room and only contacted his
13 supervisor roughly two hours before he was due at
14 work during the height of a wicked snowstorm.

15 The Court, therefore, finds that there is,
16 as a matter of law, no evidence that the alleged
17 whistleblowing activity by the plaintiff played any
18 role, let alone the primary role in the decision to
19 terminate him. Accordingly, the Court grants the
20 Motion For Summary Judgment.

21 Thank you, counsel.

22 (Whereupon, the proceedings concluded at
23 11:50 a.m.)

STATE OF DELAWARE:

NEW CASTLE COUNTY:

I, DENNEL J. NIEZGODA, Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me in the Superior Court of the State of Delaware, in and for New Castle County, in the case therein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware, and that I am neither counsel nor kin to any party or participant in said action nor interested in the outcome thereof.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

WITNESS my hand this 10th day of March, 2014.

/s/ Denneł J. Niezgoda
DENNEL J. NIEZGODA, RMR, CRR
DE CSR NO. 176-RPR