IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

ALEX KORNISCHUK,)	
)	
Plaintiff,)	
)	CIVIL NO. 1-03-CV-10013
VS.)	
)	
CON-WAY CENTRAL EXPRESS)	ORDER
a/k/a CON-WAY TRANSPORTATION)	
SERVICES, INC.,)	
)	
Defendant.)	

The Court has before it defendant's motion to dismiss, filed March 14, 2003. Plaintiff resisted the motion April 16, 2003, and defendant filed a reply on April 30, 2003. The motion is now considered fully submitted.¹

I. BACKGROUND

The following facts are construed as true as set forth in plaintiff's petition. Defendant, Con-Way Central Express a/k/a Con-Way Transportation Services, Inc. ("Con-way") is an Iowa corporation that provides transport services. Plaintiff, Alex Kornischuk, is a resident of Harlan, Shelby County, Iowa, and was formerly employed by Con-way as a semi-truck driver.

Because of a snow storm, plaintiff believed it was unsafe for the company truck, its cargo and himself to drive on the road in January of an unknown year. When plaintiff notified defendant that he

¹ The Court notes plaintiff has requested oral argument on the motion. After reviewing the pleadings and applicable legal authority, however, the Court finds oral argument unnecessary.

refused to drive in the storm, defendant terminated him.

Plaintiff filed the present action for wrongful discharge in the Iowa District Court for Shelby County on February 14, 2003. Defendant removed the matter to this Court on March 14, 2003.

Plaintiff alleges in his petition that defendant's conduct violated established Iowa public policy that: 1) prevents the retaliatory discharge of an employee who refuses to work under hazardous conditions; and 2) encourages highway safety over commercial gain. Defendant now moves to dismiss, arguing that although both Chapter 88 of the Iowa Code, entitled "Occupational Safety and Health", and § 392.14 of the Federal Motor Carrier Safety Administration Regulations contain public policy in favor of exercising caution on the road, both statutes contain administrative enforcement procedures when a claim arises, thus barring any private right of action.

II. APPLICABLE LAW AND DISCUSSION

A. Governing Law

A complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure where it appears beyond doubt from the face of the complaint that the plaintiff can prove no set of facts in support of the claim that would entitle him or her to relief. FED. R. CIV. P. 12(b)(6); Rosenburg v. Crandell, 56 F.3d 35, 37 (8th Cir. 1995) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)). Where the action is "the unusual case in which the plaintiff presents allegations that show on the face of the complaint that there is some insuperable bar to relief," the complaint should be dismissed. Alexander v. Peffer, 993 F.2d 1348, 1349 (8th Cir. 1993) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974)); Frey v. City of Herculaneum, 44

F.3d 667, 671 (8th Cir. 1995).

B. Whether Summary Judgment is Appropriate in the Present Case

Initially, the Court notes there is no dispute that plaintiff was an at-will employee. Under Iowa law, an employer generally may discharge an at-will employee at any time for any reason. *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 219 (Iowa 1996); *Borschel v. City of Perry*, 512 N.W.2d 565, 566 (Iowa 1994). The Iowa Supreme Court has recognized two exceptions to this rule: (1) if the discharge violates a "well-recognized and defined public policy of the state": and (2) if a contract has been created by an employee handbook or manual, and the contract is somehow breached. *Borschel*, 512 N.W.2d at 566 (quoting *Springer v. Weeks and Leo Co.*, 429 N.W.2d 558, 560 (Iowa 1988)). The public policy exception is at issue in the present case.

To recover damages under the public policy exception to the employment at-will doctrine, "a plaintiff must establish (1) engagement in a protected activity, (2) adverse employment action, and (3) a causal connection between the two." *Teachout v. Forest City Community School Dist.*, 584 N.W. 296, 299 (Iowa 1998). In the present case, there is no dispute plaintiff suffered an adverse employment action – in this case, termination – as a result of his refusal to drive defendant's semi-truck during a winter storm. Con-way contends, however, that plaintiff's public policy claims under both the Iowa Occupational Safety and Health Act, and the Federal Motor Carrier Safety Regulations are barred since both statutes provide an administrative enforcement scheme in the event of a violation.

Defendant also contends that plaintiff's attempt to rely upon the Iowa speed limit statute, Iowa Code § 321.285, is equally futile.

1. Plaintiff's Claim under IOSHA

The Iowa Occupational Safety and Health Act prohibits employers from discharging or discriminating against an employee if the employee "with no reasonable alternative, refuses in good faith to expose the employee's self to a dangerous condition of a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury." Iowa Code § 88.9(3). The statute further incorporates an appeal procedure for employees who believe they have been terminated in violation of the statute. Specifically, § 88.9(3) provides that, within thirty (30) days after the alleged wrongful action, an employee may file a complaint with the Iowa Division of Labor Service ("the Commissioner"). Following an investigation, if the Commissioner determines that the termination or other alleged wrongful act violated the statute, the Commissioner will bring an action for relief on behalf of the employee in state court. *Id.* The statute does not provide for a private right of action, however.

Courts interpreting Iowa law have declined to extend the public policy exception to the at-will employee doctrine to situations in which an enforcement scheme is built into the legislation that sets forth the policy itself. *Thompto v. Coborn's, Inc.* 871 F. Supp. 1097, 1113 (N.D. Iowa 1994) (citing *Borschel v. City of Perry*, 512 N.W.2d 565, 567-68 (Iowa 1994)) (noting that Iowa Civil Rights Act preempts separate claim for wrongful discharge in violation of public policy when "the claim is premised on discriminatory acts"); *see also Grahek v. Voluntary Hosp. Cooperative Ass'n*, 473 N.W.2d 31, 34-35 (Iowa 1991) (same). Following *Thompto, Borschel* and *Grahek*, and in view of IOSHA's detailed administrative enforcement scheme, this Court finds that because plaintiff failed to file a timely claim with the Iowa Division of Labor Services, he is barred from bringing a private right of action for wrongful discharge based on the public policy espoused in IOSHA.

2.. Plaintiff's Claim Under Federal Motor Carrier Safety Regulations

Defendant also contends that plaintiff's public policy claim under the Federal Motor Carrier Safety Regulations² should also be barred for two reasons. First, defendant claims there is no legal authority which suggests that federal regulations can be used to support a public policy wrongful discharge claim under Iowa Law. Second, § 405 of the Surface Transportation Assistance Act, ("STAA") 49 U.S.C. § 31105, contains an administrative enforcement scheme in place for any violation of the Federal Motor Carrier Safety Regulations. This Court agrees.

Section 405 of the STAA provides in relevant part:

A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because . . . (B) the employee refuses to operate a vehicle because (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a). An employee who believes his employer acted in violation of the STAA must file a complaint with the Secretary of Labor, who will then investigate the matter and issue formal findings. *Id.* § 31105(b). Similar to IOSHA, the STAA does not provide for a private right of action.

Again, based on the reasoning set forth in *Thompto*, *Borschel* and *Grahek*, this Court finds that because a detailed statutory procedure exists by which an aggrieved employee may administratively

² Specifically, plaintiff relies on 49 C.F.R. § 392.14, which states states:

Extreme caution in the operation of motor vehicle shall be exercised on hazardous conditions such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke adversely affect visibility or traction. Speed shall reduce when such conditions exist. If conditions become sufficiently dangerous the operation of the motor vehicle shall be discontinued..."

enforce the public policy embodied in 49 C.F.R. 392.14, he may not now pursue a common law wrongful discharge claim based on the same policy.

3. Plaintiff's Claim Based on Iowa Code § 321.285

Plaintiff's final contention is that the Iowa speed limit statute³ constitutes a "well-recognized" public policy, and should thus entitle him to relief. Defendant contends, and the Court agrees, that plaintiff's reliance on this statute as embodying public policy is unconvincing at best. Defendant did not terminate plaintiff because he refused to speed, he was terminated because he refused to drive in hazardous conditions. Accordingly, application of this statute to the present situation is misplaced.

Even assuming § 321.285 was relevant to the facts surrounding plaintiff's termination, plaintiff has failed to identify any legal authority suggesting the statute articulates a "well-recognized public policy" of the magnitute necessary to support a wrongful discharge claim. Accordingly, plaintiff's claim cannot proceed on this basis. *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 280 (Iowa 2000).

Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit the person to bring it to a stop within the assured clear distance ahead, such driver having the right to assume, however, that all persons using said highway will observe the law.

³ Iowa Code § 321.285 provides in part that:

III. CONCLUSION

For the reasons set forth above, defendant's motion to dismiss is granted. The Clerk of Court is directed to enter judgment in favor of defendant and against plaintiff.

IT IS ORDERED

ROMALDE TONGSTAFF,

United States District Court