

Argonne researcher suing to get job back

By Andrew Fegelman

There are certain precise rules that science researchers must live by if their work is going to carry any credibility.

James Stebbings maintains he came to realize there is another unspoken rule for researchers: if the experiment goes drastically awry, sometimes it's better just to keep your mouth shut.

Stebbing contends he didn't and as a result, was fired as an epidemiologist at Argonne National Laboratory.

The allegations surfaced in a lawsuit Stebbings filed against Argonne and the University of Chicago, which operates the research facility near Lemont, to get his job back. He says he was axed when he exposed how one of the experiments had gone wrong, prompting federal authorities to shut the experiment down.

Officials at Argonne said Monday that Stebbings was fired for botching the project, not because he blew the whistle on anyone.

On Monday, attorneys for the university asked that the case be dismissed. But Cook County Circuit Judge Willard Lassers refused, ruling that there was sufficient merit to the complaint for the case to proceed.

"Argonne operates like a corporation, it doesn't need an embarrassment like this," said Jeffrey Wagner, Stebbings' attorney.

The roots of the case date to 1988, to a project Stebbings helped supervise that was to study the interaction between exposure to cigarette smoke and radon gas, which is produced as uranium in soil and rock decomposes.

Smoking has been linked to lung cancer. So has prolonged contact with radon. Stebbings and his colleagues wanted to explore whether there is a heightened risk in exposure to both.

The study had called for a dozen volunteers to be exposed to 20 to 40 picocuries of radon per liter of air for up to four hours on five different occasions. By comparison, the U.S. Environmental Protection Agency says 4 picocuries is the maximum safe level, though that assumes a constant exposure to the radon over long periods of time. A picocurie is a measurement of radioactivity.

The volunteers all worked at Argonne and included Stebbings.

On one occasion, the volunteers were subjected to radon levels far above the level they had agreed to and what was dictated by the experiment.

Officials at Argonne said the exposure far exceeded what was called for, though there is some dispute about the exact level. Stebbings claimed it was 10 to 15 times what was called for by the experiment. David Baurac, an Argonne spokesman, said it was 3 to 3½ times higher.

"At these levels, there is no concern for the safety of the individuals," Baurac said, adding that even at the highest level of exposure, the amount of radon the volunteers received was equal to .01 of what an individual would get by living in a home at the maximum safe level set by the federal government.

Still, Stebbings was uneasy about what had happened. He contends he did not become aware of the overexposure until he reviewed some data. He reported his finding in April 1990 to officials at Argonne who, fulfilling legal requirements, notified the U.S. Department of Energy.

In July 1990, the federal government ordered that the study be halted as well as similar experiments around the country involving

human subjects. Officials at Argonne investigated what went wrong, but they never restarted the experiment.

A month later, Stebbings was fired. He says he was fired in retaliation for blowing the whistle, and being responsible for Argonne losing a project.

Wagner, Stebbings' attorney, says Stebbings has essentially been blackballed by his profession and is having difficulty finding another job. He said Stebbings' superiors are saying it was Stebbings who personally exposed the volunteers to the high levels of radon.

"He was terminated for poor performance, and the handling of this research project was what constituted that poor performance," Baurac said Monday. "The project simply never got off the ground, and it is the manager's job to ensure that it moves along smoothly."

REPOSITORY: CHICAGO OPERATIONS
OFFICE, DIRECTOR OF
COMMUNICATIONS

COLLECTION: UNUSUAL OCCURRENCE
REPORTING SYSTEM, AEC/ANL
NATIONAL LABORATORY (AN
ARGONNE, IL

Box #: N/A

FIELD # : A-4-1 PLUTONIUM INJECTION
HUMAN EXPERIMENTATION

0029787



ARGONNE NATIONAL LABORATORY
UNUSUAL OCCURRENCE REPORT

(SEE REVERSE SIDE FOR INSTRUCTIONS)

1. UOR NO. ANL 90-23 BIM 90-1
2. REPORT - DATE <input checked="" type="checkbox"/> INITIAL 07/11/90 <input type="checkbox"/> INTERIM _____ <input checked="" type="checkbox"/> FINAL 9/28/90

3. DIVISION OR PROJECT Biological and Medical Research Division		
4. FACILITY, SYSTEM OR EQUIPMENT Bldg. 203, Calibration Facility	5. DATE OF OCCURRENCE 04/08/90-10/10/89	6. TIME OF OCCURRENCE
7. SUBJECT OF OCCURRENCE Volunteer subjects were exposed to radon and its daughter products at concentrations (not cumulative doses) that exceeded the consent protocol.		

8. APPARENT CAUSE: DESIGN MATERIAL PERSONNEL PROCEDURE OTHER
(Explain in item 14)

9. DESCRIPTION OF OCCURRENCE

During the conduct of a study supported by the National Institutes of Health, 12 volunteer ANL employees were to receive a series of exposures to radon at levels similar to the higher concentrations measured in some Pennsylvania households. The consent protocol approved by the Laboratory's Internal Review Board for Research Involving Human Subjects stated that the subjects would be exposed to air containing radon daughters at a concentration in the range of 20-40 pCi/L, with the daughter products at about 50% equilibrium (i.e., a concentration of 0.1-0.2 Working-Level). Exposures of up to 10 hours were approved.

Volunteers received up to four one hour exposures to radon during the study. One of these exposures did not involve any inhalation of radon.

(See page 3, Continuation Sheet)

10. OPERATING CONDITIONS OF THE FACILITY AT TIME OF OCCURRENCE

Normal

11. IMMEDIATE EVALUATION

The experimental data indicate that in one of the exposure series, the radon daughter concentrations reached up to 15 times the proposed exposure rate; in the two other exposures, the concentrations were about 40% above the approved protocol. However, only the dose rates were in excess of the consent protocol. The cumulative doses were well within the limits approved by the ANL Internal Review Board and the ANL Environment, Safety and Health Division.

(NOTE: Please use Form ANL-307B to complete this form.)

0029100



ARGONNE NATIONAL LABORATORY

UNUSUAL OCCURRENCE REPORT

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UOR NO. ANL 90-23/BIM 90-1

(SEE REVERSE SIDE FOR INSTRUCTIONS)

UOR DATE 07/11/90

12. IMMEDIATE ACTION TAKEN AND RESULTS

Notification of the Chairman of the Internal Review Board for Research Involving Human Subjects to conduct an investigation of the incident and an independent review of the data collected during the study to confirm that the exposures did not conform with consent protocol.

13. IS FURTHER EVALUATION REQUIRED? [] YES [X] NO

a. IF YES: Before Further Operation? N/A [] YES [] NO

b. IF YES: By Whom? _____

When? _____

14. FINAL EVALUATION AND LESSONS LEARNED (enter final evaluation and lessons learned only in the final UOR)

Please see attached sheet.

15. CORRECTIVE ACTION:

Please see attached sheet.

[X] TAKEN [] RECOMMENDED [] TO BE SUPPLIED

16. PROGRAMMATIC IMPACT

None

17. IMPACT UPON CODES AND STANDARDS

Experimental procedures did not conform to consent protocol

18. SIMILAR UNUSUAL OCCURRENCE REPORT NUMBERS

None

APPROVALS			
	D. D. Grube	Assistant Director-QAR/BIM	9/28/90
<small>SIGNATURE OF ORIGINATOR</small>	<small>TYPED NAME</small>	<small>TITLE (typed)</small>	<small>DATE</small>
	E.M. Westbrook	Chairman, IRB/ANL	9/28/90
<small>SIGNATURE OF FACILITY SUPERVISOR</small>	<small>TYPED NAME</small>	<small>TITLE (typed)</small>	<small>DATE</small>
	E. Huberman	Director, BIM	9/28/90
<small>SIGNATURE OF DIVISION DIRECTOR</small>	<small>TYPED NAME</small>	<small>TITLE (typed)</small>	<small>DATE</small>
	D. C. Parzyck	Director, QA, Environment and Safety	10/1/90
<small>SIGNATURE OF DIVISION DIRECTOR</small>	<small>TYPED NAME</small>	<small>TITLE (typed)</small>	<small>DATE</small>



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UNUSUAL OCCURRENCE REPORT

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CONTINUATION SHEET

9. Continued

Upon review of the experimental data for the preparation of final report, it was determined that the volunteers have been exposed to radon daughter dose rates that exceeded the consent protocols, although the cumulative doses were well within the limits approved by the ANL Internal Review Board and the ANL Environment, Safety, and Health Division. In three exposures where radon was inhaled, the average radon concentration was estimated to be 243 pCi/L (range 186-235 pCi/L.) In two of the three exposures, the estimated concentrations of the short-lived daughter products appeared similar (average 0.253 Working Level, range 0.201-0.279). In the third exposure series, the average radon concentration was 236 pCi/L (range 186-235), but the average concentration of radon daughter products was estimated at 1.49 Working Level (range 1.10-2.17). The dose equivalent exposure was calculated to be up to 100 mrem to the bronchial epithelium. The actual absorbed dose (body burden) cannot be measured and can only be calculated.

14. The investigation conducted by the Institutional Review Board for Research Involving Human Subjects determined: (a) the health of the human subjects had not been threatened or affected to any significant extent by the elevated concentrations used in the study, (b) the incident occurred as a result of "managerial flaws" in the research section that was responsible for the conduct of the research project. The investigation also identified inadequacies in the reporting and review procedures, used for studies involving human subjects, which resulted in the implementation of a new policy on the protection of Human Subjects.
15. Recommendations provided by the Laboratory Internal Review Board for Research Involving Human Subjects have been implemented: (a) all participants in the study have received a memorandum, informing them of the incident; (b) management changes have been made with the Human Radiobiology Section; and (c) new policies and procedures on reporting and review requirements have been established for studies involving human subjects, in accordance with the recommendations of the Internal Review Board and the new DOE Order 1300.3.

NOTE: Please use this form when there is insufficient space for providing complete information on pages 1 or 2. Enter "Page No." Enter "UOR No." and "UOR Date" as they appear on Form 307A. Enter the item number and title for each item carried over from pages 1 or 2.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JAMES H. STEBBINGS,

Plaintiff,

v.

THE UNIVERSITY OF CHICAGO,
and ARGONNE NATIONAL LABORATORY,

Defendants.

No. 92 L 00821

Hon. Willard J. Lassers

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT
UNIVERSITY OF CHICAGO'S MOTION TO DISMISS

Defendant University of Chicago respectfully
submits this memorandum in support of its motion to dis-
miss, and in reply to plaintiff Stebbings's memorandum in
response ("Response" or "Rspns.>").

Stebbing's Response offers compelling grounds
in favor of dismissing his complaint ("Complaint" or
"Cmplt.") with prejudice. Notably, in this Response,
Stebbing engages in the unauthorized practice of supple-
menting ambiguous or deficient averments in the Complaint
with information not found in that pleading.

The most significant example of this conduct is
Stebbing's recharacterization of the University's role
in his termination. According to the Complaint, the
University was principally, if not solely, responsible
for this decision. See Cmplt. at ¶ 3 ("Upon information

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CIRCUIT COURT OF COOK COUNTY
LAW DIVISION
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and belief, the University was responsible, at all material times, for implementing and executing personnel policy with respect to the hiring, compensation, supervision and termination of Argonne employees, including but not limited to, Stebbings.") (emphasis added).

However, according to Stebbings's Response, it was the federal government, and not the University, that made this determination. The Response characterizes the University as, at best, a passive channel through which the government imposed its employment decisions. See Rspns. at 11 ("Stebbing worked for and was terminated by Argonne, unquestionably a governmental actor."); id. ("UC . . . carried out Stebbings' firing for Argonne"); id. at 14 ("This is not a case of governmental 'acquiescence' in Stebbings' termination. . . .Stebbing squarely alleges that Argonne and other DOE officials participated in, approved and ordered the decision to fire Stebbings."); id. at 15 ("these allegations sufficiently demonstrate that Stebbings' termination 'must be fairly considered as the disciplinary act of the government'").¹

¹ These mischaracterizations also improperly portray Argonne as a distinct, federal entity. As discussed below, the actions of "Argonne" are by definition those of the University. See Part I infra.

Such post hoc amendments are improper and should be disregarded. See In re Estate of Hopkins, 166 Ill. App. 3d 652, 655, 520 N.E.2d 415, 417 (2d Dist. 1988) (a motion to dismiss only concerns "matters appearing on the face of the pleadings"); Westland v. Sero of New Haven, Inc., 601 F. Supp. 163, 166 (N.D. Ill. 1985) ("Assertions made in a party's brief . . . simply cannot substitute for allegations that should have been pled in that party's complaint."). However, though extraneous, such reformulations are probative of the Hobson's choice which Stebbings now faces.

On the one hand, Stebbings seeks to sue the University as a private entity for the tort of retaliatory discharge. One of the public policies allegedly violated by this discharge is the constitutional right to free speech. This right, however, only applies to public actors. Thus, on the other hand, Stebbings in his Response attempts to recast the University as a public body. Stebbings, obviously, cannot have it both ways: the University cannot be a private actor for purposes of the tort but a federal actor for purposes of the free speech policies on which the tort is predicated.

This distinction, moreover, carries jurisdictional consequences. Were the post hoc revisions of the

Response read into the Complaint, Stebbings's tort claim against the University, as a federal entity, would be barred by the doctrine of sovereign immunity.

As the Complaint makes clear, however, it was the University, and not the government, that made the employment decisions concerning Argonne employees; and it was the University, not the government, that was ultimately responsible for terminating Stebbings.

This termination, however, was not tortious. As was demonstrated in the University's first memorandum in support of its motion to dismiss, and as further discussed below, Stebbings has failed to articulate a clearly mandated public policy which his discharge violates. Accordingly, this suit should be dismissed with prejudice.

I. Argonne Is Not A Separate Legal Entity

As explained in the University's Motion to Dismiss, at 1 n.1, Argonne National Laboratory ("Argonne") is not a proper defendant because it is not a distinct legal entity. Rather, Argonne is simply the name of a facility owned by the United States. See Cmpl't. at ¶ 2. It is operated by the University of Chicago pursuant to a contract with the United States. Id. Moreover, workers at Argonne are employed by the Univer-

sity, not by the United States. See Cmpplt. at ¶ 3. In his Complaint, Stebbings challenges actions taken by the University as the operator of Argonne. Id. Accordingly, the University, as the operator of the facility, as opposed to Argonne, the facility itself, is liable for any alleged wrongs.

Moreover, even if, arguendo, Argonne could be viewed as a separate legal entity, it could not be sued in state court under the characterizations provided in the Complaint. According to the Complaint, Argonne is property owned by the United States. As such, a tort suit against it would be barred in state court under the doctrine of sovereign immunity. Such a claim would be cognizable, if at all, in federal court under the aegis of federal statutes such as the Federal Tort Claims Act. See 28 U.S.C. §§ 1346(b) and 2671 (the United States district courts have exclusive jurisdiction over tort claims brought against the federal government) (Exhibit A).

Furthermore, the fact that Argonne filed an appearance in this case does not waive this jurisdictional bar. "It has long been established that the United States is a sovereign and cannot be sued without its consent. Consent to be sued must be given by Congress,

and neither the Attorney General nor his representatives can confer this jurisdiction by consent or appearance." Sissman v. Chicago Title & Trust Co., 375 Ill. 514, 517-18, 32 N.E.2d 132, 133 (1941) (emphasis added and citations omitted). Therefore, even if Argonne could be viewed as a distinct federal entity, a tort suit against it would not lie in this Court.

II. The Response's Recharacterizations Are Improper

Despite statements to the contrary in his Complaint, see Cmplt. at ¶ 3, Stebbings asserts in his Response, without equivocation, that the federal government, and not the University of Chicago, ordered his termination.

In the case at bar, Stebbings' allegations of government involvement are patent. Stebbings worked for and was terminated by Argonne, unquestionably a government actor. At all times material to the Complaint, Stebbings was working on a government financed (and controlled) study at Argonne.

Rspns. at 11.

This reformulation is improper. Most significantly, it is based on supposed "terms" of a contract which are not identified or enumerated in the Complaint. Writes Stebbings: "The contract between Argonne and the UC (Cmplt., ¶ 2) provides for detailed oversight by the government." Rspns. at 13. Nowhere in the Complaint is

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this "detailed oversight" explicated, or for that matter, even mentioned. Furthermore, the contract in question is not between the University and Argonne; rather, it is between the University and the United States, and involves the operation of Argonne, a government-owned facility. See Cmpl. at ¶ 2.

Moreover, if the Complaint could be construed as bringing a tort claim against the federal government, this action would be barred by the doctrine of sovereign immunity. It is well-recognized that the federal government may only be sued on the grounds, and in the forums, that it so designates by statute.

[N]o suit may be brought against the United States, as sovereign, unless Congress, by Federal statute, has consented to such suit. When the United States has relinquished its sovereign immunity and consents to be sued, suit may be brought, limited by the terms of the consent set forth in the legislation and only in the courts designated.

Marshall v. Elward, 78 Ill. 2d 366, 370, 399 N.E.2d 1329, 1331 (1980).

It follows, of course, that none of the cases cited by Stebbings to show "state action" involve a tort claim against the federal government in state court. See Milo v. Cushing Municipal Hospital, 861 F.2d 1194 (10th Cir. 1988) (civil rights suit brought in federal court against state entity); Jatoi v. Hurst-Eules-Bedford

Hosp. Auth., 807 F.2d 1214 (5th Cir. 1987) (same); Dobyns v. E-Systems, Inc., 667 F.2d 1219 (5th Cir. 1982) (civil rights suit brought in federal court against federal entity); Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589 (3d Cir. 1979) (civil rights action in federal court); Croushorn v. Board of Trustees of Univ. of Tenn., 518 F. Supp. 9 (M.D. Tenn. 1980) (same); Zientra v. Long Creek Township, 211 Ill. App. 3d 226, 569 N.E.2d 1299 (4th Dist. 1991) (tort claim in state court against municipal entity); Temple v. Board of Education of School Dist. 94, 192 Ill. App. 3d 182, 548 N.E.2d 640 (1st Dist. 1989) (same).

Moreover, if the Response's recharacterizations were to be given credence, the fact that Stebbings named the University of Chicago as defendant, as opposed to the United States, would not remove the jurisdictional bar of sovereign immunity. See Berkman v. United States, 957 F.2d 108, 113 (4th Cir. 1992) ("The test for whether an alleged tortfeasor is an employee rather than an independent contractor of the United States [for purposes of the FTCA] is whether the contractor's detailed physical performance is subject to governmental supervision.") (Exhibit B). Therefore, although Stebbings has not alleged facts that would allow him to sue the federal government,

such a claim, if it could be brought, would not be cognizable in this Court.

III. Stebbing's Has Failed To State
A Claim For Wrongful Discharge

If the reformulations in Stebbings's Response are put to one side, and the Complaint is viewed as a tort claim brought against the University, as a private actor, the suit fails on the merits.

Stebbing's has not, and cannot, satisfy a fundamental requirement of the wrongful discharge cause of action: that the public policies invoked apply to the situation at hand. The constitutional provisions, and their underlying policies, are inapplicable because the University, in this setting, is a private entity. Section 5851 of 42 U.S.C., and its policies, do not apply because the University was not a contractor for the Nuclear Regulatory Commission. And the Illinois statutes cited in Stebbings's Response (but not in his Complaint),² are inapposite because they do not govern the activities enumerated in the Complaint.

² See Ill. Rev. Stat. ch. 111 1/2 § 210-1 et seq. (Radiation Protection Act of 1990) and Ill. Rev. Stat. ch. 111 1/2 § 243-1 et seq. (Radon Mitigation Act).

A. Retaliatory Discharge Is a Limited Doctrine.

It bears repeating that the law in Illinois is that an employer may discharge an at-will employee for any reason or for no reason. See Fellhauer v. City of Geneva, 142 Ill. 2d 495, 505, 568 N.E.2d 870, 875 (1991). This general rule is limited only by the narrow exception that the termination may not violate a clearly mandated public policy. See id.; Palmateer v. International Harvester Co., 85 Ill. 2d 124, 128, 421 N.E.2d 876, 878 (1981); see also Lambert v. City of Lake Forest, 186 Ill. App. 3d 937, 941, 542 N.E.2d 1216, 1218 (2d Dist. 1989) ("Our supreme court has expressed a narrow interpretation of the tort of retaliatory discharge, and this court does not support the expansion of this tort.").

Clearly mandated public policies are to be found in the State's constitution, statutes, and judicial decisions. Palmateer, 85 Ill. 2d at 130, 421 N.E.2d at 878. However, while the State's enactments and judicial opinions may articulate a public policy, mere recitation of such authorities, without more, is insufficient to state a claim for wrongful discharge.

[T]he mere citation of a constitutional or statutory provision in a complaint will not by itself be sufficient to state a cause of action for retaliatory discharge. Rather, a plaintiff must demonstrate that the public policy mandated by the cited provision is violated by his discharge.

Fellhauer, 142 Ill. 2d at 505, 568 N.E.2d at 875 (emphasis added).

The prescription that the stated public policy be "violated" necessarily requires that the policy apply to the circumstances at issue. In other words, merely establishing the existence of a public policy is insufficient; rather, a plaintiff must also demonstrate that this policy is applicable and has been contravened.

For example, the policy of protecting one's right to free speech, though it exists, is inapplicable to situations in which the employer is a private entity. See Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 527-28, 478 N.E.2d 1354, 1357 (1985) ("[The federal and state free speech] provisions mandate nothing concerning the relationship of private individuals, including private individuals in the employer-employee relationship."). Thus, the freedoms and policies of free speech, however salutary, simply do not apply, and therefore are not violated, when a private employer discharges an employee.

It is on this "applicability" requirement that Stebbings's claim against the University stumbles. As is demonstrated below, none of the public policies embodied in the First Amendment to the United States Constitution, Article I, Section 4 of the Illinois Constitution, 42 U.S.C. § 5851, or the additional provisions cited in the Response, apply to the situation here. Accordingly, Stebbings's Complaint fails to state a claim for wrongful discharge.

B. Stebbing's Fails to Allege an Applicable Public Policy.

1. Free Speech Protections. As mentioned above, in Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 527-28, 478 N.E.2d 1354, 1357 (1985), the Illinois Supreme Court squarely held that a private employer may not be sued for wrongful discharge based on the public policies underlying the free speech clauses of the federal and state constitutions. See also Rozier v. St. Mary's Hospital, 88 Ill. App. 3d 994, 1000, 411 N.E.2d 50, 55 (5th Dist. 1980) (no action for wrongful discharge against private employer because free speech policies are "limited to the acts and actions of congress and the States."). Thus, Stebbings's assertion that "Article 1, Section 4 of the Illinois Constitution declares the existence of Illinois' public policy, and Stebbings properly

invokes it for that purpose," Rspns. at 10 n.7, is incorrect. The plaintiffs in Barr made a similar argument, and the Illinois Supreme Court flatly rejected it.

Plaintiffs concede that the constitutional and statutory provisions cited in their complaint are limitations only on the power of government. They contend, however, that these provisions are indicators of public policy and thus a violation of these provisions by anyone is a violation of public policy. We disagree.

Barr, 106 Ill. 2d at 527, 478 N.E.2d at 1357.

Accordingly, Stebbings's claim against the University, as a private actor, cannot be based on the public policies emanating from the First Amendment of the United States Constitution or Article I, Section 4 of the Illinois Constitution. Moreover, as discussed in Part II, supra, a suit in tort against the University as a federal actor (if that is what Stebbings means to allege), must be brought, if at all, in federal court under federal statute.

2. 42 U.S.C. § 5851 and the Illinois Statutes.

Stebbing's contention that the public policies embodied in § 5851 (§ 210 of the Energy Reorganization Act) are operative here is equally misplaced. Stebbings does not dispute, nor can he, that § 5851 does not apply to contractors working for the Department of Energy ("DOE") or the National Institute of Health ("NIH"). Indeed, the

Court of Appeals for the Fourth Circuit explicitly held that § 5851 is available only to licensees of the Nuclear Regulatory Commission ("NRC"), a governmental agency not involved here. See Adams v. Dole, 927 F.2d 771, 778 (4th Cir.), cert. denied 112 S. Ct. 122 (1991) ("§ 210 protects only employees of NRC licensees and their contractors and not employees of DOE contractors").

Accordingly, § 5851 has no bearing on the situation at hand. Thus, as Barr demonstrates, the public policies underlying § 5851, though they indeed exist, do not apply to the present case. Therefore, these policies are incapable of being violated under the circumstances alleged.

By contrast, these same policies did apply to the allegations involved in Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 485 N.E.2d 372 (1985). There, the defendant was a licensee of the Nuclear Regulatory Commission, and plaintiff alleged that he was required to work under conditions which violated certain regulations promulgated pursuant to § 5851. "[T]he complaint alleged that plaintiff was discharged in retaliation for his refusal to work in the handling of cobalt 60 while the operations were being conducted in violation of regulations promulgated by the Nuclear Regulatory Commission

and published in the Federal Register." Id. at 509-10, 485 N.E.2d at 376.

Thus, as Wheeler illustrates, in cases in which a statute provides the clearly mandated public policy, that statute must apply to the alleged conduct of the defendant. To be sure, as plaintiff points out, see Rspns. at 7, a violation of such statute need not be established. However, it is a prerequisite that the enactment be applicable to the conduct at issue.

The case law bears out this requirement. In Prince v. Rescorp Realty, 940 F.2d 1104 (7th Cir. 1991), the operative statute was the State Fire Marshal Act, and it, as well as the regulations issued under it, applied to defendant's alleged failure to install a proper fire suppression system. See id. at 1109 n.7 ("In the present case . . . state law mandated that fire suppression systems be installed and maintained."). In Balla v. Gambro, 145 Ill. 2d 492, 584 N.E.2d 104 (1991), the pertinent provisions were FDA regulations, and they applied to defendant's shipment of malfunctional dialyzers. In Shores v. Senior Manor Nursing Center, Inc., 164 Ill. App. 3d 503, 518 N.E.2d 471 (5th Dist. 1988), the governing law was the Nursing Home Care Reform Act, and it applied to an administrator's violations of it. And in

Witt v. Forest Hospital, Inc., 115 Ill. App. 3d 481, 450 N.E.2d 811 (1st Dist. 1983), the underlying statute was the Guardianship and Advocacy Act, and it applied to defendant's alleged violation of it. See also Russ v. Pension Consultants Co., Inc., 182 Ill. App. 3d 769, 538 N.E.2d 693 (1st Dist. 1989) (federal tax laws supply the public policy and apply to defendant's alleged wrongful conduct); Johnson v. World Color Press, Inc., 147 Ill. App. 3d 746, 498 N.E.2d 575 (5th Dist. 1986) (federal securities laws provide the public policy and apply to defendant, even though privately owned, because a publicly-traded company owns defendant and defendant's misdeeds will affect the financial statements of the publicly-traded company).

Furthermore, neither the Radon Mitigation Act, Ill. Rev. Stat. ch. 111 1/2 ¶ 243-1 et seq., the Radiation Protection Act of 1990, Ill. Rev. Stat. ch. 111 1/2 ¶ 210-1 et seq., or the policies they embody, apply to the facts of this case. The Radon Mitigation Act seeks to determine the extent to which radon is present in dwellings and other buildings. Ill. Rev. Stat. ch. 111 1/2 ¶ 243-2. It does not apply to the NIH experiment nor does it indicate whether the exposures at issue constitute a "hazard" for purposes of public policy. Similar-

ly, the Radiation Protection Act is concerned with establishing licensing and other state regulatory procedures; it does not apply to the activity involved in the NIH experiment. Accordingly, neither of these statutes, or their underlying policies, apply to the facts of this case.

Moreover, the case law further demonstrates that where, as here, the statute invoked is designed to protect the public, the plaintiff, when reporting, must believe that a violation has occurred. See Johnson 147 Ill. App. 3d at 752-53, 498 N.E.2d at 579 ("plaintiff should not be charged with knowing conclusively whether the securities laws have been violated, but rather an allegation that he reasonably believed the complained of practices might be illegal was sufficient"). This is especially the case where the policy involved is the protection of the lives and property of the citizenry from a particular hazard. In these cases, the alleged statutory violation is what constitutes the hazard itself.

Thus, in Wheeler, 108 Ill. 2d 502, 485 N.E. 2d 372, the hazard was exposure to radioactive material at levels above those specified in applicable NRC regulations. In Prince v. Rescorp Realty, 940 F.2d 1104, 1110

(7th Cir. 1991), the hazard was fire destruction and the violated public enactments were the State Fire Marshal Act and the Oak Park Building Code. In Balla v. Gambro, 145 Ill. 2d 492, 584 N.E.2d 104 (1991), the hazard was malfunctional dialyzers which failed to meet safety standards promulgated in applicable FDA regulations. In Shores v. Senior Manor Nursing Center, Inc., 164 Ill. App. 3d 503, 518 N.E.2d 471 (5th Dist. 1988), the hazard was abuse and neglect violations against nursing home residents and the applicable public enactment was the Nursing Home Care Reform Act. And in Palmateer, 85 Ill. 2d at 132, 421 N.E.2d at 880, the hazard was possible criminal violations and the public enactment was Illinois's criminal code.

Thus, in each of these cases, the hazard at issue was publicly defined, and the defining provisions applied to the alleged improper conduct reported.

In this case, by contrast, the hazard is defined only by the internal protocols of the study. The Complaint does not point to any public enactments applicable to, or violated by, the pertinent exposure levels. Moreover, Stebbings's post hoc statements in his Response that the experiment's exposure levels were "specifically defined" do not cure this deficiency. First, nowhere in

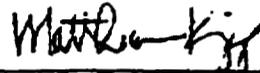
the Complaint does Stebbings allege that these levels were delineated in a specific safety code. Rather, the Complaint only avers that the exposure levels were "approved" by the NIH. See Cmpl't. at ¶¶ 5, 12, 13, 19, and 23. And second, nothing in the Complaint suggests that the actual exposures contravened any public safety regulations.

Accordingly, because the public policies of the provisions cited by Stebbings do not apply to the facts alleged, he has failed to state a claim for wrongful discharge, and this suit should be dismissed.

CONCLUSION

For the reasons stated herein, defendant University of Chicago respectfully requests this Court to grant its motion to dismiss plaintiff's action for retaliatory discharge.

Dated: June 24, 1992
Chicago, Illinois



Susan Getzendanner
Matthew R. Kipp
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
333 W. Wacker Drive
Suite 2100
Chicago, Illinois 60606

Attorneys for Defendant
University of Chicago

Charles



Department of Energy
Chicago Operations Office
9800 South Cass Avenue
Argonne, Illinois 60439

August 7, 1990

Distribution

SUBJECT: HUMAN SUBJECTS PROTECTION MEETING

Attached is the agenda for the Human Subjects Protection meeting to be held Friday, August 10, in Building 201, Conference Room 368-369 from 8:30 a.m. to 12:30 p.m.

A handwritten signature in cursive script, appearing to read "Charles E. Pietri".

Charles E. Pietri
Science Administrator
Office of AMLM

Enclosure:
Agenda

Distribution: (w/encl.)
S. Rose, EH-73, GTN
H. Drucker, ANL
E. Huberman, ANL
E. Westbrook, ANL
M. Lachman, AAO
M. Grace, AAO
R. Dalton, AAO
A. Taboas, AAO
M. Flannigan, ESHD
P. Neeson, ESHD
D. Goldman, AMLM

0029811

Human Subjects Protection Meeting
Chicago Operations Office
August 10, 1990
Building 201, Room 368-369
8:30 a.m. - 12:30 p.m.

Agenda

- o Overview of general processing of Human Subjects Protection projects or activities by ANL

- o Details of radon incident
 - o What happened?
 - o Actions to be taken to remedy the situation

- o Break (Susan Rose, Harvey Drucker, and E. Huberman to discuss Jim Stubbings Epidemiology project--what happened and how to remedy.)

- o ANL plan to address Human Subjects Protection issues

- o OHER comments

- o Concluding remarks

0029812

JUL 20 1990

Dr. Alzo Schriesheim, Director
Argonne National Laboratory
9700 South Cass Avenue
Argonne, Illinois 60439

AAO
Dalton/at
7/20/90

Dear Dr. Schriesheim:

AMDS
Goldman

SUBJECT: STOP WORK ORDER FOR ALL HUMAN SUBJECTS RESEARCH

7/ /90

You are hereby directed to suspend all work on the following projects:

AAO

DOE supported work:

Buchar

1. RP-03-01, WAS No. 53300/000302, "Effects of Internally Deposited Alpha Emitters"

7/ /90

Work-for-Others:

1. ANL No. P-8612, Army No. 36PP6321, "Lead Exposures and Biological Responses in Military Weapons Systems"
2. ANL No. P-8447, VA Order Nos. various, "Body Potassium Evaluation"

This order shall remain in effect pending a determination by DOE Headquarters, Office of Health and Environmental Research, of the adequacy of laboratory assurance procedures for the protection of human subjects.

Sincerely,

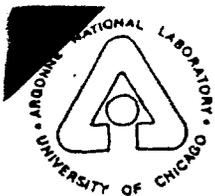
James A. Bucher, Chief
Operations Branch
Contracting Officer

cc: E. Drucker, ANL
J. Asbury, ANL

bc: D. Goldman, AMLM
C. Pietri, AMLM
D. Gallis, DOE/HQ

Record Note: Per 7/20/90 conference call among CH staff, E. Cumesty, D. Goldman, and R. Dalton, and ER staff, D. Gallis, S. Rose, I. Adler, and D. Nelson.

0029813



ARGONNE NATIONAL LABORATORY
UNUSUAL OCCURRENCE REPORT

1. UOR NO. ANL 90-23 BIM 90-1
2. REPORT - DATE <input checked="" type="checkbox"/> INITIAL 07/11/90 <input type="checkbox"/> INTERIM _____ <input type="checkbox"/> FINAL _____

(SEE REVERSE SIDE FOR INSTRUCTIONS)

3. DIVISION OR PROJECT Biological and Medical Research Division
--

4. FACILITY, SYSTEM OR EQUIPMENT Building 203, Calibration Facility	5. DATE OF OCCURRENCE 04/03/89-10/10/89	6. TIME OF OCCURRENCE
--	--	-----------------------

7. SUBJECT OF OCCURRENCE Volunteer subjects were exposed to radon and its daughter products at concentrations (not cumulative doses) that exceeded the consent protocol.

8. APPARENT CAUSE: <input type="checkbox"/> DESIGN <input type="checkbox"/> MATERIAL <input checked="" type="checkbox"/> PERSONNEL <input checked="" type="checkbox"/> PROCEDURE <input type="checkbox"/> OTHER <small>(Explain in Item 14)</small>
--

9. DESCRIPTION OF OCCURRENCE During the conduct of a study supported by the National Institutes of Health, 12 volunteer ANL employees were to receive a series of exposures to radon at levels similar to the higher concentrations measured in some Pennsylvania households. The consent protocol approved by the Laboratory's Internal Review Board for Research Involving Human Subjects stated that the subjects would be exposed to air containing radon daughters at a concentration in the range of 20-40 pCi/L, with the daughter products at about 50% equilibrium (i.e., a concentration of 0.1-0.2 Working-Level). Exposures of up to 10 hours were approved. Volunteers received up to four one hour exposures to radon during the study. One of these exposures did not involve any inhalation of radon.

(See p. 3, Continuation Sheet)

10. OPERATING CONDITIONS OF THE FACILITY AT TIME OF OCCURRENCE Typical

11. IMMEDIATE EVALUATION The experimental data indicate that in one of the exposure series, the radon daughter concentrations reached up to 15 times the proposed exposure rate; in the two other exposures, the concentrations were about 40% above the approved protocol. However, only the dose rates were in excess of the consent protocol. The cumulative doses were well within the limits approved by the ANL Internal Review Board and the ANL Environmental, Safety and Health Division. (NOTE: Please use Form ANL-307B to complete this form.)
--



ARGONNE NATIONAL LABORATORY

UNUSUAL OCCURRENCE REPORT

PAGE 2 OF 3

UOR NO. ANL 90-23/BIM 90-1

(SEE REVERSE SIDE FOR INSTRUCTIONS)

UOR DATE 07/11/90

12. IMMEDIATE ACTION TAKEN AND RESULTS

Notification of the Chairman of the Internal Review Board for Research Involving Human Subjects to conduct an investigation of the incident and an independent review of the data collected during the study to confirm that the exposures did not conform with consent protocol.

13. IS FURTHER EVALUATION REQUIRED? [X] YES [] NO

- a. IF YES: Before Further Operation? [] YES [] NO No additional exposures will be conducted.
b. IF YES: By Whom? ANL Internal Review Board for Research Involving Human Subjects When? Ongoing

14. FINAL EVALUATION AND LESSONS LEARNED (enter final evaluation and lessons learned only in the final UOR)

15. CORRECTIVE ACTION:

Recommendations will be provided by ANL Internal Review Board for Research Involving Human Subjects, which is investigating the incident. All participants of the study will be informed of the event and will be requested to sign a revised consent form.

[] TAKEN [] RECOMMENDED [X] TO BE SUPPLIED

16. PROGRAMMATIC IMPACT

None

17. IMPACT UPON CODES AND STANDARDS

Experimental procedures did not conform to consent protocol

18. SIMILAR UNUSUAL OCCURRENCE REPORT NUMBERS

None

APPROVALS

Approval table with columns for Signature of Originator, Signature of Facility Supervisor, Signature of Division Director, Typed Name, Title (typed), and Date. Includes entries for D. D. Grube, E. M. Westbrook, E. Huberman, and D. Parzyck.



ARGONNE NATIONAL LABORATORY
UNUSUAL OCCURRENCE REPORT

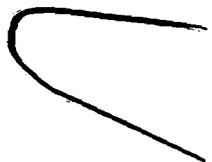
PAGE 3 OF 3
UOR NO. ANL 90-23/BIM 90-1
UOR DATE 07/11/90

CONTINUATION SHEET

9. Continued

Upon review of the experimental data for the preparation of a final report, it was determined that the volunteers had been exposed to radon daughter concentrations exceeding the consent protocol. In the three exposures where radon was inhaled, the average radon concentration was estimated to be 243 pCi/L (range 186-325 pCi/L). In two of the three exposures, the estimated concentrations of the short-lived daughter products appeared similar (average 0.253 Working Level, range 0.201-0.279). In the third exposure series, the average radon concentration was 236 pCi/L (range 186-325), but the average concentration of radon daughter products was estimated at 1.49 Working Level (range 1.10-2.17). The dose equivalent exposure was calculated to be up to 100 mrem to the bronchial epithelium. The actual absorbed dose (body burden) cannot be measured and can only be calculated.

The factors causing the increased concentrations have not yet been determined.



NOTE: Please use this form when there is insufficient space for providing complete information on pages 1 or 2. Enter "Page No." Enter "UOR No." and "UOR Date" as they appear on Form 307A. Enter the item number and title for each item carried over from pages 1 or 2.

0029816

ARGONNE NATIONAL LABORATORY
9700 South Cass Avenue
Argonne, Illinois 60439

Arthur Zilberstein
General Counsel

Phone: (708) 252-3040
FAX: (708) 252-5966

June 25, 1992

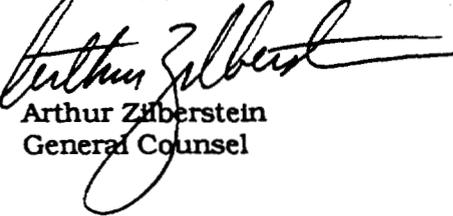
Mr. A. L. Taboas
Area Manager
Argonne Area Office
U.S. Department of Energy
9800 South Cass Avenue
Argonne, Illinois 60439

RE: James Stebbings v U of C and ANL
Case No.: 92 L 00821

Dear Mr. Taboas:

Here is a photocopy of the Reply Memorandum in Support of the University's Motion to Dismiss the captioned case. This memorandum was filed yesterday. The oral argument on our Motion is scheduled to occur on June 29, 1992 before Judge Lassers in Room 2208 of the Daley Civic Center at 10:55 AM.

Very truly yours,



Arthur Zilberstein
General Counsel

AZ:lll
Enclosure

ct w/enc: S. Silbergleid
G. Wojciechowski

0029817

Operated by The University of Chicago for The United States Department of Energy

ANL
224
7.21.90

July 6, 1990
1154-1770

Reference:

CH daily report, Argonne National Lab-East, July 5, 1990.
"Argonne-East, Building 203, Calibration Facility".

Issue:

ANL employees exposed to radon daughters at dose rates exceeding consent protocol. Committed dose for each employee is within protocol and guidelines for occupational exposure.

Background:

National Institutes of Health (NIH) Grant: "Dose Interactions of Passive Smoking with Domestic Radon" involved a series of exposures to test subjects for one hour to levels of radon daughters at the high end of continuous household exposures in Pennsylvania and within guidelines for continuous occupational exposure for purposes of evaluating the results of mitigations of radon (i.e. showering, clothing changes, etc.).

The "work for others" project started in 1984. Experiment is completed pending submission of final report.

Protocol:

- o Informed consent per NIH certification. (Health and Human Services Assurance #S-5834-01)
- o Volunteers were 12 ANL employees, including health physics personnel, exposed to radon daughters (and radon gas) in a controlled room.
- o The approved protocol stated that the subjects would be exposed to air containing radon daughters at a concentration in the range of 20-40 pCi/L, with the daughter products at about 50% of equilibrium. Exposures of up to 10 hours were approved.

Analysis:

The experimental data for preparation of the final report indicated that one one-hour exposure reached up to 15 times the proposed exposure rate, two others were about 50% above proposed. However, cumulative doses were well within those approved both by the ANL Internal Review Board for Experiments for Research Involving Human Subjects and the ANL Environment, Safety and Health Division. Only dose rates were in excess.

The dose equivalent exposure is calculated to be up to 100

mrem to the bronchial epithelium. The actual absorbed dose (body burden) cannot be measured and can only be calculated.

Impact on Subjects:

Volunteers were exposed up to 4 times, for an interval of 1 hour per exposure. Two of these exposures in each case were within the limits agreed to by the volunteers in their consent form. Between July 5 and October 3, 1989, the 12 subjects were exposed, once each, to rates of exposure up to 15 times those authorized in the study although total cumulative doses were not exceeded.

No health effects are expected.

Next Steps:

Preliminary indications are that a possible cause was an unanticipated increase in room temperature resulting in higher levels of radon emission. Final probable cause will be identified in the UOR.

ANL Internal Review Board for Experiments for Research Involving Human Subjects is investigating this event.

All participants of the study will be informed of this event and will be requested to sign a revised consent form. No additional exposures will be conducted.

NIH will be informed.