

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

<p>HS CONSTRUCTION III, INC.,</p> <p style="padding-left: 100px;">Plaintiff,</p> <p>v.</p> <p>DAY AND ZIMMERMAN, INCORPORATED,</p> <p style="padding-left: 100px;">Defendant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No. 1:13CV00032</p> <p>OPINION AND ORDER</p> <p>By: James P. Jones United States District Judge</p>
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Joseph B. Lyle and Kenneth D. Hale, Hale, Lyle & Russell, Bristol, Tennessee, for Plaintiff; Robert L. Arrington and Melanie M. Lamb, Wilson Worley Moore Gamble and Stout, PC, Kingsport, Tennessee, Mark S. Hanor, Hanor Law Firm, Kingsport, Tennessee, and Aaron Krauss, Cozen O'Connor, Philadelphia, Pennsylvania, for Defendant.

The plaintiff has filed a Motion to Dismiss, contending that the defendant’s Fourth Counterclaim fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In that counterclaim, the defendant seeks costs and attorneys’ fees as provided by Tennessee Code section 50-1-304(f).¹ The defendant has responded to the Motion to Dismiss and it is ripe for decision.

¹ That statute provides as follows:

(1) This section shall not be used for frivolous lawsuits, and anyone trying to do so is subject to sanction as provided in subdivision (f)(2).

(2) If any employee files a cause of action for retaliatory discharge for any improper purpose, such as to harass or to cause needless increase in

The motion will be granted. In its motion, the plaintiff renounces any claim under section 50-1-304. It instead seeks relief under a common law theory of retaliatory discharge, a separate cause of action. *See Mason v. Seaton*, 942 S.W.2d 470, 475 (Tenn. 1997). At this point in the case, at least, the statutory sanctions are inapplicable.

For these reasons, it is **ORDERED** that the Motion to Dismiss is GRANTED and the Fourth Counterclaim is dismissed.

ENTER: June 17, 2013

/s/ James P. Jones
United States District Judge

costs to the employer, the court, upon motion or upon its own initiative, shall impose upon the employee an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred, including reasonable attorney's fees.

Tenn. Code Ann. § 50-1-304(f) (West 2011).