

IN THE CIRCUIT COURT OF THE 20th
JUDICIAL CIRCUIT IN AND FOR
COLLIER COUNTY, FLORIDA

Case No. 11-2020-CA-001791-0001

PAMELA VICKARYOUS, an individual,

Plaintiff,

vs.

MASON CLASSICAL ACADEMY, INC.,
A Florida not for profit corporation,

Defendant.

DEFENDANT'S MOTION TO DISMISS COMPLAINT

Defendant, MASON CLASSICAL ACADEMY, INC. ("MCA"), a Florida not-for profit corporation, by and through its undersigned counsel and pursuant to Fla.R.Civ.P. 1.140(b)(6), hereby files its Motion to Dismiss the Complaint of Plaintiff, PAMELA VICKARYOUS ("Vickaryous"), and in support states as follows:

I. **KEY FACTUAL ALLEGATIONS IN COMPLAINT**

1. Plaintiff has brought this suit for alleged wrongful termination based on purported retaliatory conduct by MCA.
2. MCA is a private, not for profit corporation registered and formed in the State of Florida in July, 2012. See Compl. at para. 5.
3. MCA has operated a charter school under the same name pursuant to a contract with the School Board of Collier County since 2014. Id.
4. Pursuant to an employment contract, Plaintiff was hired as MCA's school principal on or about October 10, 2019. Id. at para. 7-8.

5. On March 23, 2020, MCA's board of directors allegedly approved switching the school's health insurance to a new provider, Captivated Health. Id. at para. 10.

6. On March 26, 2020, a community member brought to the attention of MCA's board that David Bolduc, a director, had recently begun managing Captivated Health's Tampa-based team on March 25, 2020, which was not yet publicly disclosed. Id. at para. 11.

7. Captivated Health is a nationwide partially self-insured healthcare captive arrangement for charter schools.

8. On March 27, 2020, MCA's compliance officer, Scott Moore ("Moore") prepared and sent a signed, written complaint to MCA's board of directors, which specifically objected to the alleged illegal activity stated in paragraphs 5-6 above. Id. at para. 12.

9. MCA's board scheduled a meeting on April 14, 2020 to discuss this complaint from Moore alleging a conflict of interest between Bolduc's roles with MCA and Captivated Health. Id. at para. 13.

10. During the April 14, 2020 meeting, the board determined that no conflict existed and voted to terminate Moore. Id. at para. 14-15.

11. Plaintiff objected to the termination of Moore and prepared complaints against MCA's board president, Kelly Lichter, with the Florida Commission on Ethics, Florida Department of Education, Florida Office of the Inspector General and the Collier County School Board on April 20, 2020. Id. at para. 16.

12. On April 21, 2020, Plaintiff sent correspondence to Lichter, advising her of the filing of these complaints. Id. at para. 17.

13. At an emergency board meeting on April 28, 2020, MCA retained the law firm of Tripp, Scott to investigate the allegations raised by Plaintiff. Id. at para. 18.

14. On June 5, 2020, at another emergency board meeting, MCA voted unanimously to terminate Plaintiff for cause. Id. at para. 20.

15. Plaintiff contends that her termination was as a result of her complaints regarding MCA's alleged board violations. Id. at para. 22.

16. Plaintiff has brought causes of action for violation of Florida's Private Whistleblower Act (Fla. Stat. section 448.102) and Florida's Public Whistleblower Act (Fla. Stat. section 112.3187).

II. **PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION FOR VIOLATION OF FLORIDA'S PUBLIC WHISTLEBLOWER ACT**

17. The public employee's Whistleblower's Act (Fla. Stat. sections 112.3187-112.31895) is "a remedial statute designed to encourage the elimination of public corruption by protecting public employees who 'blow the whistle'". Irven v. Dept. of Health & Rehab. Svcs., 790 So. 2d 403, 405 (Fla. 2001); O'Neill v. St. John River Water Mgmt. Dst., 341 F.Supp. 3d 1292, 1302 (S.D. Fla. 2018) (Act is intended to prevent government agencies from taking retaliatory action against employees who report "government wrongdoing to the appropriate officials").

18. The legislative intent of the Act is specifically stated in section 112.3187(2), which is "to prevent agencies or independent contractors from taking retaliatory action against an employee who reports to an appropriate agency violations of law on the part of a public employer or independent contractor that create a substantial and specific danger to the public's health, safety, or welfare." See also 112.3187(5)(a).

19. "The Act sets forth several specific requirements regarding the types of disclosures protected, to whom those disclosures must be made, who is protected, and the manner in which a remedy must be sought." O'Neill, at 1302-1303.

20. Section 112.3187(4) makes clear that the Act is for the protection of public employees from adverse personnel action because of the disclosure of information pursuant to this section.

21. Section 112.3187(5) lists the nature of the information which must be disclosed for public whistleblower protection.

22. Section 112.3187(6) addresses to whom the information must be disclosed for public whistleblower protection.

23. Additionally, a plaintiff must exhaust “all available contractual or administrative remedies” before it may bring a civil action. See section 112.3187(8)(c).

24. Fla.R.Civ.P. 1.130 provides that all documents on which an action may be brought must be incorporated in or attached to the pleading. See Safeco Ins. Co. of Am. v. Ware, 401 So. 2d 1129, 1130 (Fla. 4th DCA 1981). Plaintiff has failed to attach a copy of the charter contract between MCA and the School Board to the Complaint (see ¶5), as well as any of the alleged complaints that Plaintiff filed with the Florida Commission on Ethics, Florida Dept. of Education, Florida Office of the Inspector General and the Collier County School Board to purportedly “blow the whistle” on MCA and/or some of its board members. (see ¶16). This alone prevents Plaintiff from raising a viable cause of action against MCA.

25. Further, even though MCA may be considered an “independent contractor” of the School Board, Plaintiff has failed to raise a cause of action under Florida’s Public Whistleblower Act for multiple reasons.

26. First, Plaintiff’s alleged disclosure is not a specific danger to the public’s health, safety and welfare. See §112.3187(2), (5).

27. Since Plaintiff's complaints to the various state and local agencies were not attached, the only allegations incorporated in the Complaint concern disclosure of an alleged conflict of interest with board member Bolduc. See Compl at para. 10-17.

28. However, this same alleged disclosure was already made by a community member at a MCA board meeting on March 26, 2020, and by the School's compliance officer in a written complaint on March 27. See Compl. at para. 11-12.

29. Even if it can be said that Plaintiff made a disclosure of some type, allegations of an alleged conflict of interest concerning a school's health insurance plan did not impact the public's interests.

30. Second, Plaintiff did not make a disclosure to a required recipient under section 112.3187(6).

31. Disclosures concerning a local governmental entity must be made to a chief executive officer as defined in section 447.203(9) or other appropriate local official. Chief executive officer under that statute for public employees refers to the "person, whether elected or appointed, who is responsible to the legislative body of the public employer for the administration of the governmental affairs of the public employer." There has been no allegation that Plaintiff made a disclosure to a chief executive officer or other appropriate local official, such as MCA's board of directors, with the authority to investigate and take action on the alleged violations.

32. If an employee does not make the disclosure to the proper individual, his claim must be dismissed. Cummins v. Lake Cty. Bd. Of Cty. Com'rs, 671 So. 2d 893 (Fla. 5th DCA 1996).

33. Third, Plaintiff has not alleged that he exhausted all available contractual or administrative remedies, which is a condition precedent to bringing a civil action. Seeking an administrative remedy pursuant to section 112.3187(8) is a mandatory pre-suit requirement. Univ. of Cent. Fla. Bd. Of Trustees v. Turkiewicz, 21 So. 3d 141, 145 (Fla. 5th DCA 2009); City of Miami v. Del Rio, 723 So. 2d 299, 301 (Fla. 3d DCA 1998); Dinehart v. City of Palm Beach, 728 So. 2d 360, 362 (Fla. 4th DCA 1999) (trial court lacks jurisdiction until plaintiff has exhausted all available administrative remedies).

34. Plaintiff has failed to allege the nature of additional avenues to remedy her conflict of interest concerns, such as whether there is an ordinance from the local government entity establishing an administrative procedure for handling such complaints, or whether the entity has contracted with the Division of Administrative Hearings for same. See 112.3187(8)(b). The failure to attach the charter contract between MCA and the School Board and the MCA Policies Manual is relevant in this context.

35. In sum, Plaintiff's submission of complaints to the Florida Commission on Ethics and other state agencies does not state a cause of action pursuant to Florida's Public Whistleblower Act.

III. **PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION FOR VIOLATION OF FLORIDA'S PRIVATE WHISTLEBLOWER ACT**

36. The private sector employee Whistleblower's Act (Fla. Stat. sections 448.101-448.105) ("FWA") was established "to protect private employees who report or refuse to assist employers who violate laws enacted to protect the public." Pinder v. Bahamasair Holdings Ltd., Inc., 661 F.Supp. 2d 1348, 1351 (S.D. Fla. 2009).

37. The FWA is admittedly broader than the Public Whistleblower's Act, and it does not have the same specific disclosure requirements.

38. To establish a prima facie case under the FWA, the plaintiff must show that (1) that there was a statutorily protected expression; (2) that an adverse employment action occurred; and (3) that there was a causal link between the participation and the adverse employment action. Id.; Bell v. Georgia-Pacific Corp., 390 F.Supp. 2d 1182, 1187-88 (M.D. Fla. 2005).

39. Plaintiff alleges that she complied with the first element of the FWA by objecting to or refusing to participate in MCA's illegal practices pursuant to section 448.102(3). However, Plaintiff has failed to attach a copy of her written complaints, in violation of Fla.R.Civ.P. 1.130(a). See Winn-Dixie Stores, Inc. v. Sams, 281 So. 2d 47 (Fla. 3d DCA 1973) (it is plaintiff's responsibility to provide any documents upon which his alleged cause of action is based).

40. The purpose of this rule "is to apprise the defendant of the nature and extent of the cause of action so that he may plead with greater certainty." Diaz v. Bell Micro Products-Future Tech, Inc., 43 So. 3d 138, 140 (Fla. 3d DCA 2010).

41. The failure to attach appropriate documents is problematic because "[a] complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated in the complaint." Walters v. Ocean Gate Phase I Condo., 925 So. 2d 440 (Fla. 5th DCA 2006).

42. Without reading the alleged complaints that Plaintiff made, both Defendant and the Court cannot determine if Plaintiff has made a statutorily protected expression.

WHEREFORE, Mason Classical Academy, Inc. respectfully requests that this Court enter an order dismissing Plaintiff's complaint, along with such other and further relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via E-Portal this 9th day of September, 2020, to Benjamin H. Yormak, Esq., Yormak Employment & Disability Law, 9990 Coconut Road, Bonita Springs, FL 34135 (byormak@yormaklaw.com).

By: s/ Jonathan E. Kanov