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

SCOTT MOORE, an individual, Plaintiff, v. **MASON CLASSICAL ACADEMY, INC.**, a Florida not for profit corporation, Defendant.	**CIVIL ACTION** **Case No. 20-CA-1471** **Judge: Elizabeth Krier**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY REINSTATEMENT UNDER F.S. §112.3187(9)(f)

NOW COMES the Plaintiff, **SCOTT MOORE** ("Plaintiff' or "Moore"), by and through undersigned counsel, and files this Memorandum of Law in Support of Plaintiff's Motion for Temporary Reinstatement Under F.S. §3186(9)(f) (PWA), and states as follows:

SUMMARY OF MATERIAL FACTS

Plaintiff Scott Moore was hired by Defendant Mason Classical Academy as its compliance officer on September 2, 2019. The Defendant is a private company that operates a charter school and has a contract with Collier County Public Schools to provide elementary, middle and secondary school education to students in Collier County, Florida, and it has done so since 2014. (*See* Ex. 1 – Charter Contract). Pursuant to F.S. §1002.33(7), the charter school contract sets forth the terms and conditions for the Defendant's operation.

Moore's hiring as a compliance officer came on the heels of a June 3, 2019 report by Collier County Public Schools' General Counsel, Jonathan Fishbane, Esq., whose investigation into the Defendant found the Defendant's Board of Directors violated the law, Defendant's policy, and

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Defendant's board norms and values, as well as engaged in improper social media and email communications and breached the terms of the Charter Agreement by their actions. The report also concluded the Defendant's then-principal violated federal and state law, Defendant's policy, the Code of Professional Conduct, and mismanaged the Best and Brightest Program. (*See* Ex. 2 - Fishbane Report).

In his position as compliance officer, Mr. Moore was responsible for "development of policies and procedures, maintenance of records, advisement to administration and board of directors on statues and revisions, management of public records requests, [and] completion of all documentation for local school district and the Florida Department of Education." (*See* Ex. 3 - Compliance Officer Job Posting).

On March 23, 2020, the Defendant conducted a board meeting to approve a contract with a company named Captivated Health to supply the Defendant's employees with health insurance. (*See* Ex. 4 - Agenda for March 23, 2020 Board Meeting). On the Defendant's meeting agenda, the action item was placed under "unfinished business" to be brought forward for approval by Defendant's Board Member, David Bolduc. (*Id.*). However, at 7:20 A.M. on March 23rd, Mr. Bolduc sent the Defendant's Board President an email indicating he could no longer attend the March 23rd meeting, offering no substantive explanation as to why. (*See* Ex. 5 - Bolduc's March 23, 2020 Email to Lichter). The Defendant's March 23rd Board Meeting began at 8:29 A.M. and the Board heard a lengthy presentation from a Captivated Health representative. Afterwards, the Board voted 4-0 to approve the contract with Captivated Health. (*See* Ex. 6 - Defendant's March 23, 2020 Meeting Minutes).

No board member asked about Mr. Bolduc's relationship with Captivated Health. (*Id.*). Nor was any formal disclosure made to the Board that Mr. Bolduc had been working for at least five

months with MCA staff to get the contract for his company. (*Id.*). Mr. Bolduc never sought to recuse himself. (*Id.*).

Just two days after the vote – March 25, 2020 – Captivated Health released the following to the media:

> Managing Captivated Health's Tampa-based team will be David Bolduc, who will serve as Director for the Southeast Region. David has deep experience in underwriting (American International Group), risk analysis and captive management (Strategic Risk Solutions) and reinsurance. David holds a Bachelor of Arts in Business Economics from Brown University. He also holds an Associate in Risk Management (ARM), Associate in Reinsurance (ARe) and is a Chartered Financial Analyst (CFA). David also brings first-hand experience with educational institutions, having served as a member of the Gulfview Middle School Advisory Committee, and Board Member of Mason Classical Academy.

(*See* Ex. 7 - Captivated Health Press Release).[1]

Accordingly, not only was Mr. Bolduc publicly disclosed to be Captivated Health's Director for the Southeast Region, Captivated Health's press release explicitly noted that he is a Board Member of the Defendant. Mr. Bolduc hid this from the Defendant's Board and never disclosed it prior to the Board's vote approving the Captivated Health contract. (*See* Ex. 6 - Defendant's March 23, 2020 Meeting Minutes). Additionally, Mr. Bolduc still failed to disclose to the Board his now publicly announced relationship with Captivated Health, despite there being a March 26, 2020 Board Meeting that he attended and notwithstanding the fact that a community member broached the subject during that public meeting. (*See* Ex. 8 - Defendant's March 26, 2020 Meeting Minutes; Ex. 9 - Moore's March 27, 2020 Whistleblower Letter).

This caused Mr. Moore as the Compliance Officer to investigate Bolduc's ties to Captivated Health, and it did not take him long to locate Captivated Health's March 25, 2020 Press Release. Accordingly, Mr. Moore sent the Defendant's Board a whistleblower letter on March 27, 2020

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[1] Also available at https://www.globenewswire.com/news-release/2020/03/25/2006149/0/en/Captivated-Health-Continues-Growth-Enters-Florida-Market.html; last visited August 18, 2020).

alerting them to Mr. Bolduc's apparent conflict of interest and that "[t]here was no disclosure of the possible conflict before the board voted and no discussion by the board on if it was a conflict." (Ex. 9 - Moore's March 27, 2020 Whistleblower Letter). Mr. Moore sent his whistleblower letter to all Board members at 3:42 P.M. on March 27, 2020. (*See* Ex. 10 - Moore's Email Enclosing Whistleblower Letter).

On April 1, 2020, most of Mr. Moore's concerns over Bolduc's conflict of interest were borne out. On that date, Mr. Bolduc sent the Board a response to Mr. Moore's March 27th Whistleblower Letter. In it, he makes a number of startling admissions:

- He knew at least as of February 6, 2020 there was "a high likelihood I will become affiliated with Captivated Health, and a high likelihood that Captivated Health will come before the MCA Board."
- He was instructed by Defendant's counsel "to disclose any potential conflict, and recuse myself from any vote, if Captivated Health ever came before the MCA Board."
- He "became formally associated with Captivated Health" on February 18, 2020.
- He requested that the Board add his "potential conflict as an agenda item at the next scheduled Board Meeting."

(*See* Ex. 11 - Bolduc's April 1, 2020 Response).

At 4:30 P.M. that same day, the Defendant's Board President sent an email to the school's Executive Director that states in pertinent part:

> I think you may want to take a closer look at some of the Principal's closest allies at the school and the competence level. The job market will likely be saturated with highly competent people that will work hard and do their jobs… Is there a job posting for compliance officer?

(*See* Ex. 12 - Lichter's April 1, 2020 Email).

Just 5-days later, the Defendant restricted Mr. Moore's access to the Defendant's email server. (*See* Ex. 13 - April 6, 2020 Email Chain). The next day – April 7, 2020 – the Defendant's Board

President sent another email to the school's Executive Director, this time writing "Could you please send Mr. Moore's contract to me please?" (*See* Ex. 14 - Lichter's April 7, 2020 Email).

The Defendant's Board had scheduled a meeting at 4:30 P.M. on April 14, 2020. (*See* Ex. 15 - Agenda for 4-14-20 Meeting). However, at 1:30 P.M. on April 14, 2020, the Defendant's Board President sent the school's IT Manager an email that states in pertinent part: "I spoke to our legal counsel and Mr. Moore's email access off. I don't mean to get you involved but it needs to happen immediately." (*See* Ex. 16 - Lichter's April 14, 2020 Email).

During the Defendant's April 14th Board Meeting, Mr. Bolduc launched into an attack on Mr. Moore, during which Mr. Bolduc (i) acknowledged "well of course there was no disclosure of the possible conflict before the board voted, <u>as I did not attend the meeting when the board voted</u> to approve Captivated Health," and (ii) accused Mr. Moore of "working to undermine Mason Classical Academy" and acting "in opposition to MCA's Pillars of Virtue the entire time." (*See* Ex. 17 - Defendant's April 14, 2020 Meeting Minutes)(Emphasis in original). Also of note is that one Board Member "said that since Mr. Moore is MCA's compliance officer, he is there to support and protect the school, and she felt that his handling of the situation by alleging a violation and publishing the notice (without advice of counsel) was very inappropriate, to say the least." (*<u>Id.</u>*). The Defendant's Board President even acknowledged that there was a duty to disclose the conflict on interest. (*<u>Id.</u>*).

One Board Member, Mr. Conrad Willkomm, Esq., brought a motion to find that Mr. Bolduc did in fact have a conflict of interest;[2] however, no board member seconded the motion and it

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[2] Of note are the remarks of Defendant's then-Board member, Mr. Conrad Willkolm, Esq. at the April 14th meeting. Mr. Willkomm pointed out that, even though Bolduc had known about the conflict of interest for months, the matter was first brought to the board's attention by a parent—and not by Bolduc. Even up to that very meeting Willkomm reminded Bolduc that Bolduc had still failed to provide any explanation for his behavior in the Captivated Health transaction. Willkomm told Bolduc that, if one were to look up a conflict of interest in a textbook, "you would see a picture of this transaction."

failed. (Id.). He then made a motion to rescind the approval of the contract with Captivated Health, which passed by a 3-1 vote, the lone dissenter being the Defendant's Board President. (*Id.*). The Defendant's Board president then brought a motion to terminate Mr. Moore, stating "it has been determined that there are serious 'red flags' with the way Mr. Moore has been operating." (*Id.*). While Mr. Willkomm dissented, the motion passed by a 4-1 vote, with Mr. Bolduc voting in favor of terminating Mr. Moore.

Against this clear factual record, the PWA mandates that Mr. Moore be temporarily reinstated.

MEMORANDUM OF LAW[3]

I. What Does the Plain Text of the PWA Say?

Amongst the relief available to a PWA plaintiff is mandatory temporary reinstatement. The entirety of (9)(f) reads:

> Temporary reinstatement to the employee's former position or to an equivalent position, pending the final outcome on the complaint, if an employee complains of being discharged in retaliation for a protected disclosure and if a court of competent jurisdiction or the Florida Commission on Human Relations, as applicable under s. 112.31895, determines that the disclosure was not made in bad faith or for a wrongful purpose or occurred after an agency's initiation of a personnel action against the employee which includes documentation of the employee's violation of a disciplinary standard or performance deficiency. This paragraph does not apply to an employee of a municipality.

"The public-sector act specifically prevents independent contractors as well as agencies from taking retaliatory action against employees who report violations of law on the part of the agency or independent contractors of the agency," *Dahl v. Eckerd Family Youth Alternatives, Inc.*, 843 So. 2d 956, 958 (Fla. 2d DCA 2003) (*citing* F.S. §112.3187(2)), or who disclose information

[3] Disclaimer: This Document may contain hyperlinks to other documents or websites. These hyperlinks are provided only for users' convenience. Users are cautioned that hyperlinked documents, such as links to cases, may charge fees. By allowing hyperlinks to other websites, the Plaintiff does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their websites. Likewise, the Plaintiff has no agreements with any of these third parties or their websites.

"alleging improper use of governmental office, gross waste of funds, or any other abuse or neglect of duty on the part of an agency, public officer, or employee," F.S. § 112.3187(2); *see also Sussan v. Nova Southeastern Univ.*, 723 So. 2d 933, 934 (Fla. 4th DCA 1999). Moreover, under F.S. § 1002.33, charter schools are public schools. And while the Legislature drafted (9)(f) to exclude municipalities, that was the only kind of employer it chose to exclude from the remedy of temporary reinstatement.

In order to fully understand the PWA and what its practical effects are, a brief look at how the law was born and how it has matured is in order.

II. Historical Context & Legislative Intent.

The PWA is a remedial statute, and remedial laws will be read to favor the remedy. *The Golf Channel v. Jenkins*, 752 So. 2d 561, 565-66 (Fla. 2000); *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994); *Irven v. Dep't of Health and Rehab. Svcs.*, 790 So. 2d 403, 405–406 (Fla. 2001)(*quoting Martin County v. Edenfield*, 609 So. 2d 27, 29 (Fla. 1992)). The PWA should be liberally interpreted to accomplish its intended purpose. *Martin County v. Edenfield*, 609 So. 2d 27, 29 (Fla. 1992); *Hutchison v. Prudential Ins. Co. of America, Inc.*, 645 So. 2d 1047 (Fla. 3d DCA 1994).

When the PWA was first passed in 1986, if an employee–whistleblower moved for temporary reinstatement prior to trial, they had to do so by obtaining a temporary injunction under Fla. R. Civ. P. 1.610 ("Rule 1.610"). However, in 1992, the Florida Legislature amended the PWA to include the mandatory remedy of temporary reinstatement in §(9)(f), thus removing Rule 1.610 as the standard for temporary reinstatement. The law provides that if a public employee engages in protected activity in good faith and not for a wrongful purpose and if it occurred prior to the

initiation of termination, then per §(9)(f) the employee must be reinstated pending resolution of their complaint.

Under such circumstances, the legislative history regarding 1992 Amendment states at p. 2: the "employee is protected from the agency's adverse personnel action." *Id.* (emphasis added). This relief of temporary reinstatement is mandatory. *See* Laws 1992, c. 92-316 § 12 (replacing "may" with "must" to read "[i]n any action brought under this section the relief must include . . . temporary reinstatement"). In fact, the very purpose of temporary reinstatement under §(9)(f) "is to keep a whistle-blower on the job during the pendency of the lawsuit unless the statutory requirements for termination are met." *Marchetti v. School Bd. of Broward Co.*, 117 So. 811, 813 (Fla. 4th DCA 2013).

The Legislature not only intended for the relief to be mandatory, it was intended to be immediate, as well. *See* Legislative History regarding 1992 Amendment at p. 7 (describing that whistleblower would "apply for an expedited order from the appropriate agency of circuit court for the immediate reinstatement of the discharged employee pending the issuance of the final order in the case")(emphasis added).

III. Temporary Reinstatement is a Low Burden.

§(9)(f) explicitly provides for "[t]emporary reinstatement to the employee's former position or to an equivalent position, pending the final outcome on the complaint." This pre-trial relief is available to a plaintiff so long as: (1) the disclosure was not made in bad faith or for a wrongful purpose, or (2) the disclosure did not occur after an agency's initiation of a personnel action against the employee. Absent these two conditions, an employee who complains of being discharged in retaliation for a protected disclosure is entitled to pre-trial reinstatement as a matter of law.

The courts that have had occasion to delve into this issue all agree that in order to qualify for the remedy of temporary reinstatement under Florida's PWA, an employee must show only that "1) [p]rior to termination [they] made a disclosure protected by the statute; 2) [they were] discharged; and 3) the disclosure was not made in bad faith or for a wrongful purpose, and did not occur after an agency's personnel action." *State of Florida Dep't of Transp. v. Florida Com'n on Human Relations*, 842 So.2d 253, 255 (1st DCA 2003) (*citing Lindamood v. Office of State Attorney, Ninth Judicial Circuit of Florida*, 731 So. 2d 829, 831 (5th DCA 1999)).

a. Statutorily Protected Activity Under the PWA.

To establish that the employee engaged in protected activity under the PWA, an employee must show that he disclosed (1) protected information (2) to a protected recipient (3) in a protected manner. *See* id. § 112.3187(5)-(7).

i. Moore Disclosed What Were Actual Violations of Florida Law.

First, the information disclosed must fall within one of two protected categories:

> (a) Any violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or welfare.
>
> (b) Any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency or independent contractor.

Id. § 112.3187(5).

The Charter Agreement between the Defendant and CCPS incorporated Florida ethics statutes pertinent to public officials. F.S. §1002.33(26)(a) and (b) provide the following:

(26) STANDARDS OF CONDUCT AND FINANCIAL DISCLOSURE.—

(a) A member of a governing board of a charter school, including a charter school operated by a private entity, is subject to ss. 112.313(2), (3), (7), and (12) and 112.3143(3).

(b) A member of a governing board of a charter school operated by a municipality or other public entity is subject to s. 112.3145, which relates to the disclosure of financial interests.

In this context, F.S. §112.313(3) provides in pertinent part the following:

> (3) DOING BUSINESS WITH ONE'S AGENCY.—No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision.

And F.S. §112.313(7) provides in pertinent part:

> (7) CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—
>
> (a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

Finally, F.S. §112.3143, which pertains to voting conflicts, provides in pertinent part the following:

> (3)(a) No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary

> of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

It is undisputed that on March 23, 2020, the Defendant conducted a board meeting to approve a contract with a company named Captivated Health. On the Defendant's meeting agenda, the action item was placed under "unfinished business" to be brought forward for approval by Defendant's Board Member, David Bolduc. However, the record is crystal clear that Bolduc enjoyed a financial interest in Captivated Health, which he failed to disclose. He also did not disclose that Captivated Health was entering into the Florida market and doing so under Bolduc's directorship. Mr. Bolduc had the inside track and knowledge, and which inured to his personal and private benefit. All this time, Mr. Bolduc was employed by Captivated Health. At the last minute, Mr. Bolduc did not attend the March 23rd meeting. The agenda posted for that meeting noted he would be bringing that matter forward for approval. Nevertheless, the Board heard a lengthy presentation from a Captivated Health representative. No board member asked about Mr. Bolduc's relationship to Captivated Health. Nor was any formal disclosure made to the board that Mr. Bolduc had been working for months with the Defendant's staff to get the contract for his company. Mr. Bolduc never sought to recuse himself.

On March 25, 2020, Captivated Health issued its press release to the media. Accordingly, not only is Mr. Bolduc Captivated Health's Director for the Southeast Region, it is expressly noted that he is a Board Member of the Defendant. Mr. Bolduc hid this from the Defendant's Board when he moved to approve and voted on approval of the Captivated Health contract. Without much

doubt, Mr. Bolduc's actions were a violation of F.S. §1002.33(26), §112.313(3) and (7), and §112.3143(3)(9). In so doing, he also violated Defendant's own Policy 6.0, which prohibits conflicts of interests and which addresses many of the statutory violations noted herein. Mr. Bolduc's actions plainly qualify as gross mismanagement, malfeasance and/or misfeasance under (5)(b) of the PWA.

During the Defendant's March 26, 2020 meeting, a community member brought to the attention of the Board that as of March 25, 2020 David Bolduc began managing Captivated Health's Tampa- based team and that this was never publicly disclosed. Mr. Moore then investigated the matter and located Captivated Health's March 25th press release. On March 27, 2020, Mr. Moore authored a signed, written complaint regarding Mr. Bolduc's conflict of interest. As explained above, there is little doubt that Mr. Bolduc's actions were an actual violation of Florida law, in addition to being gross mismanagement, malfeasance and/or misfeasance. And there can be no doubt whatsoever that his actions were – at a bare minimum – cause to suspect a violation of Florida law. But that question need not be resolved on this Motion because either easily qualifies as statutorily protected expression by Mr. Moore.

ii. Moore Made His Disclosure to the Defendant's Chief Executive Officer.

Second, the information must be disclosed to a person or entity falling within one of two protected categories:

> [1] [A]ny agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act, including, but not limited to, the Office of the Chief Inspector General, an agency inspector general or the employee designated as agency inspector general under s. 112.3189(1) or inspectors general under s. 20.055, the Florida Commission on Human Relations, and the whistle-blower's hotline created under s. 112.3189 [or]
>
> [2] [F]or disclosures concerning a local governmental entity, including any regional, county, or municipal entity, special district, community college district, or school district or any political subdivision of any of the foregoing, the

> information must be disclosed to a chief executive officer as defined in s. 447.203(9) or other appropriate local official.

Id. § 112.3187(6). Under F.S. § 1002.33, charter schools are public schools. Florida courts construe the term "other appropriate local official" broadly to include a variety of entities "empowered to investigate complaints and make reports or recommend corrective action." *See Rustowicz v. N. Broward Hosp. Dist.*, 174 So.3d 414, 423-25 (Fla. Dist. Ct. App. 2015) (reviewing other Florida decisions and opinions issued by the Florida Attorney General). The state appellate court in *Rustowicz* concluded that an internal audit department at a municipal hospital constituted an "appropriate local official" within the meaning of the PWA. *Id.* at 416, 425. The key is that the protected disclosure must have been made to someone sufficiently empowered to investigate complaints and make reports or recommend corrective action.

Here, Mr. Moore made his disclosure to the Defendant's Board, which was the only group of persons empowered to remedy Mr. Bolduc's conflict of interest.[4] To be sure, Mr. Moore must have properly directed his complaint to the Defendant's Board because on April 14, 2020, the Defendant's Board decided to "rescind" its prior approval of the contract with Captivated Health. No other entity or person could have taken such an action.

iii. Moore Made His Disclosure In a Signed, Written Complaint.

Third, the employee's disclosures must have been made in a protected manner. This can occur in one of two ways. The PWA provides that it protects, inter alia, employees (1) "who disclose information on their own initiative in a written and signed complaint" or (2) "who file any written complaint to their supervisory officials." F.S. § 112.3187(7).

[4] It is also submitted that the Defendant's Board is properly deemed to be "chief executive officer" of the Defendant.

Here, there is no debating that Mr. Moore's March 27, 2020 letter meets either standard. All three elements are necessary to establish statutorily protected activity under the PWA. Once that is met, the inquiry then turns to the timing of the adverse employment action.

b. The Employee Must Have Been Discharged.

The plain text of the PWA mandates temporary reinstatement where the employee has been discharged. Here, there is zero doubt that the Defendant terminated Mr. Moore.

c. The Defendant Took Adverse Employment Action Against Mr. Moore After He Engaged in Statutorily Protected Activity.

There is no question that the Defendant involuntarily separated Mr. Moore from his employment. And the timing of the adverse employment action occurred after Mr. Moore engaged in statutorily protected activity under the PWA. Indeed, the timeline is unmistakable: Mr. Moore engaged in statutorily protected activity on March 27, 2020 and was then terminated on April 14, 2020. At no time prior to March 27th was Mr. Moore the target of any kind of discipline or investigation, nor was he ever even placed on any administrative leave at any point. Thus, this element under §(9)(f) is easily met.

d. Mr. Moore's Disclosures Were Not Made in Bad Faith or For a Wrongful Purpose.

Finally, there is not a scintilla of evidence that Mr. Moore made his disclosures in bad faith or for any wrongful purpose. Indeed, his complaint bespeaks a positive motive to bring about change and compliance with the law, which is hardly the kind of disclosure that smacks of bad faith or a wrongful purpose. This final element is easily met by Mr. Moore, and his Motion is due to be granted.

IV. Common Arguments Encountered From Defendants are Unavailing.

Often, defendants confuse the issue by making any number of erroneous and misguided arguments. Some of the more common ones are addressed below.

a. The Relief is Not Discretionary.

First, defendants sometimes try to convince the court that it somehow has discretion to punt on the issue and "exercise discretion." But the court enjoys no such discretion. Indeed, §112.3187(9), entitled "RELIEF," provides that the court "must" grant temporary reinstatement, *Lindamood* at 832, and thus when an employee meets the above elements, the "statute mandates temporary reinstatement." *Marchetti* at 813 (*quoting State, Dep't of Transp*. at 255).

It is important to emphasize that the statutory language of the PWA is not ambiguous and the plain meaning of the statute must prevail. *Metropolitan Dade County v. Milton*, 707 So. 2d 913 (Fla. 3d DCA 1998). In interpreting a statute, the court looks first to "the plain meaning of the actual language" contained in the statutory text. *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 367 (Fla. 2013). If that language is unambiguous, there is no need for further construction; the plain meaning of the statute controls. *See Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984).

b. The Relief is Not an Injunction and It Is a "Case Within a Case."

No reported case has ever held that the equitable relief of temporary reinstatement under §(9)(f) is an injunction subject to Rule 1.610.

The legislative history of the PWA is fatal to any such argument. As explained above, the PWA was originally passed in 1986. Laws 1986, c. 86–233, §§ 1 to 80. The initial version of the Act included a right to "[r]einstatement of the employee to the same position held before the retaliatory action, or to an equivalent position" as well as "[r]einstatement of full fringe benefits and seniority

rights." Id. Interestingly, at that point in time, however, if an employee–whistleblower moved for temporary reinstatement prior to trial, they had to do so by obtaining a temporary injunction per Rule 1.610. However, and of particular significance here, in 1992, the Florida Legislature amended the Act to include the mandatory remedy of temporary reinstatement in §(9)(f) and removing any requirement that it is subject to Rule 1.610. Laws 1992, c. 92-316 § 12.

F.S. §112.3187(9) clearly sets forth the required relief in actions brought under the PWA and the case law interpreting it has been consistently opposite to defendants' positions. Importantly, the statute separates "temporary reinstatement" in §(9)(f) from the "[i]ssuance of an injunction, if appropriate" in subsection (9)(e), where the concept of "appropriateness" specifically incorporates the requirements of Rule 1.610. Conversely, to qualify for relief under §(9)(f), a plaintiff is required only to make the showing required under the statute and not under Rule 1.610. *Marchetti* at 814. The Fourth Circuit Court of Appeals in *Marchetti* specifically held:

> The trial judge erred in importing the requirements of Rule 1.610 into the "temporary reinstatement" authorized by section 112.3187(9)(f). The statute differentiates between the remedies of injunctive relief and temporary reinstatement. To require the elevated level of proof necessary for injunctive relief would undermine the purpose of temporary reinstatement, which is to keep a whistle-blower on the job during the pendency of the lawsuit unless the statutory requirements for termination are met.

Id. at 813.

In fact, even where a plaintiff "inartfully titled [her] motion as a motion for temporary injunction" when seeking reinstatement under §(9)(f), the Fifth District Court of Appeals nevertheless "declin[ed] to elevate form over substance," and held that Rule 1.610 did not apply since "its substance concerned only temporary reinstatement under §112.3187." *Lindamood* at 830. Reviewing the motion as one for temporary reinstatement, the appellate court reversed by holding "[t]he relief spelled out in the statute mandates temporary reinstatement" where the

plaintiff meets all of the statutory requirements. Id. at 833; *see also State, Dep't of Transp. v. Fla. Comm'n on Human Relations*, 842 So. 2d 253, 255 (Fla. 1st DCA 2003).

Temporary reinstatement under (9)(f) has nothing to do with the ultimate merits of the case or the outcome of trial: "Any proceedings on the underlying whistle-blower's complaint will be separate and distinct from the reinstatement case and will be conducted in the manner provided by section 112.31895(3) and (4), Florida Statutes." *State, Dep't of Transp. v. Fla. Comm'n on Human Relations*, 842 So. 2d 253, 255 (Fla. 1st DCA 2003); *see also Competelli v. City of Belleair Bluffs*, 113 So. 3d 92, 94 (Fla. Dist. Ct. App. 2d Dist. 2013). Simply put, this means that where temporary reinstatement is sought under §(9)(f), there is to be a case within a case and thus an award of temporary reinstatement under §(9)(f) is "separate and distinct" from the other proceedings within the PWA case. Nowhere in the PWA is there even any remote suggestion that the results of a trial bear any relationship to a pre-trial award of temporary reinstatement under §(9)(f). *See Lee Cty. v. Ward*, 197 So. 3d 48 (Fla. Dist. Ct. App. 2016)(affirming Krier, J.).

c. There is No "Manager Rule" Under the PWA.

Defendants sometimes try to suggest that there can be no protected activity if the employee is required to make such reports. That argument has been consistently rejected.

In *Rustowicz*, the plaintiff was an audit associate employed by a governmental entity. As part of her job duties, Rustowicz uncovered a $35,000 relocation payment and other questionable expense items by the CEO. As an audit associate, she then reported the same to her director, who instructed her "to investigate the expenditures further and to determine if there were additional irregularities." *Rustowicz*, at 417. Undeniably, investigating and determining if there were additional irregularities were part of her job functions. Nevertheless, Florida's 4th DCA squarely

held that *Rustowicz* engaged in statutorily protected activity under the PWA, notwithstanding the fact that conducting the investigation and making reports were part of her job duties. *Id.*, at 425.

And if *Rustowicz* was not enough, the decision of Florida's 3rd DCA in *Igwe v. City of Miami*, 208 So. 3d 150 (Fla. Dist. Ct. App. 2016) completely closes the door on this kind of argument. In *Igwe*, the defendant made the argument that Igwe's disclosures consisted of things that the job obligated him to report, and that his cooperation with outside agencies like the SEC and the FBI were also a part of his job. But the 3rd DCA flatly rejected that argument and held: "the trial court erred in its determination that Igwe was precluded from whistle-blower protection on the ground that he reported the City's misconduct while carrying out his duties as the Independent Auditor General ("IAG") for the City." *Igwe*, at 151. The 3rd DCA made very clear that the PWA covers managers because "[t]he phrase 'any person' clearly encompasses those who make disclosures because it is their job to do so, and those who make disclosures even though they have no employment obligation to do so." *Id.*, at 155. As the 3rd DCA further explained:

> Second, the Florida Supreme Court has unequivocally stated that the Act is a remedial statute, and should be liberally construed in favor of granting access to protection from retaliatory actions. *Irven v. Dep't of Health & Rehabilitative Servs.*, 790 So. 2d 403, 406 (Fla. 2001) (stating that "[section 112.3187(2)] could not have been more broadly worded"); *Martin Cnty. v. Edenfield*, 609 So. 2d 27, 29 (Fla. 1992); *Hutchison v. Prudential Ins. Co. of Am.*, 645 So. 2d 1047, 1049 (Fla. 3d DCA 1994). Contrary to these authorities, the City's interpretation of "on their own initiative" as a prerequisite rather than as an option, would be a very strict and narrow reading of the Act, which would foreclose the possibility of whistle-blower protection for a large segment of the population, and be in contravention of section 112.3187(2), which affords statutory protection against retaliatory action against "any person" who properly discloses the improper conduct to the appropriate agency.
>
> For example, the City's interpretation would foreclose the possibility of whistle-blower protection for those whose job it is, in whole or in part, to manage, report, or supervise governmental misconduct. Consider a manager, a foreman, or an administrator of a public or governmental agency who is tasked with supervising the employees of that entity. If such a person reports to his boss that the governmental entity is placing its employees at a substantial risk of injury due to

> the failure to provide these employees with the required safety equipment, then under the City's interpretation of "on their own initiative," he would not be protected by the Act if he was fired in retaliation for reporting the misconduct. This interpretation would be unreasonable and contrary to the express intent of the Legislature.
>
> In summary, the City's interpretation of the statute runs contrary to the plain meaning of the language contained in the Act and the express intent of the Legislature to protect "any person" who discloses such misconduct. It also contradicts the requirement that the remedial statute be liberally construed to favor access to the statutory remedy, and significantly limits the number of people who may seek whistle-blower protection after disclosing governmental misconduct. We therefore reject the City's interpretation and hold that section 112.3187(7) protects those who make disclosures regarding "improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee," even if they do so in the course of carrying out their job duties.

Igwe, at 155-56. Thus, under the PWA, the employee's job duties are irrelevant when determining if there is statutorily protected activity. *See Vickaryous v. Sch. Bd. Of Collier Cty.*, No. 2:18-cv-315-FtM-99MRM, 2019 U.S. Dist. LEXIS 30824, at *5-6 (M.D. Fla. Feb. 27, 2019). Florida's appellate and federal courts have considered and rejected the manager rule.

d. Plaintiffs Do Not Need to Prove a *Prima Facie* Case And Affirmative Defenses Do Not Come Into Play.

Nowhere in the text of (9)(f) or in the case law interpreting it is there any suggestion that the elements of a prima facie case must be proven, or that an affirmative defense can thwart the mandatory relief of temporary reinstatement. *See Lee Cty. v. Ward*, 197 So. 3d 48 (Fla. Dist. Ct. App. 2016)(affirming Krier, J.). Indeed, (9)(f) makes no mention of causal connections or affirmative defenses. Of note is that F.S. §112.3187(10) specifically contemplates affirmative defenses. Thus, the Legislature's inclusion of such a section elsewhere in the statute, but not in (9)(f), is further confirmation that temporary reinstatement is mandatory where the plaintiff meets the requisite three elements, irrespective of any affirmative defenses. More simply stated, the Legislature could have required consideration of affirmative defenses in (9)(f), but it chose not to.

"When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded." *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995); *Beach v. Great W. Bank*, 692 So. 2d 146, 152 (Fla), cert. granted on other grounds, 118 S. Ct. 294 (1997); *see also Moonlit Waters Apartments, Inc.*, 666 So. 2d at 900; *Montes de Oca v. Orkin Exterminating Co.*, 692 So. 2d 257 (Fla. 3d DCA), review denied, 699 So. 2d 1374 (Fla. 1997); *National Airlines, Inc. v. Division of Employment Sec. of Fla. Dept. of Commerce*, 379 So. 2d 1033 (Fla. 3d DCA 1980). Thus, consideration of affirmative defenses cannot be implied into subsection (9)(f). *See Holly*, 450 So. 2d at 219.

CONCLUSION

Mr. Moore has shown that (1) prior to termination he made a disclosure protected by the statute; (2) he was discharged; and (3) the disclosure was not made in bad faith or for a wrongful purpose, and did not occur after adverse personnel action. *State of Florida Dep't of Transp. v. Florida Com'n on Human Relations*, 842 So.2d 253, 255 (1st DCA 2003) (*citing Lindamood v. Office of State Attorney, Ninth Judicial Circuit of Florida*, 731 So. 2d 829, 831 (5th DCA 1999)). This is all that is required for temporary reinstatement under the PWA, and Mr. Moore checks each and every box with ease. *Marchetti v. Sch. Bd. of Broward Cty.*, 117 So. 3d 811, 814 (Fla. Dist. Ct. App. 2013)(*quoting Lindamood*, at 833 ("[t]he relief spelled out in the statute mandates temporary reinstatement" where the plaintiff meets all of the statutory requirements.")). Consequently, the Defendant is due to temporarily reinstate Mr. Moore.

WHEREFORE the Plaintiff respectfully requests the Court GRANT the Plaintiff's Motion for Temporary Reinstatement filed on May 5, 2020, order him reinstated under §(9)(f) of the PWA (retroactive to the date of termination), and award all other relief deemed just.

Respectfully submitted,

Dated: August 19, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2020, I e-filed the foregoing document using the Portal, which caused delivery by Electronic Mail to all counsel of record.

s/ Benjamin H. Yormak
Benjamin H. Yormak