

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

MICHAEL FEWLESS

Plaintiff,

v.

CASE NO.: 2020-CA-1268

CITY OF MOUNT DORA,

Defendant.

**PLAINTIFF'S PETITION FOR TEMPORARY REINSTATEMENT
PURSUANT TO SECTION 112.3187(9)(f), FLORIDA STATUTES**

COMES NOW, Plaintiff, Michael Fewless, (hereinafter "Plaintiff"), by and through undersigned counsel, and files *Plaintiff's Petition for Temporary Reinstatement* under the Florida Public Whistle-blowers' Act (hereinafter the "Act"), pursuant to Section 112.3187(9)(f), Florida Statutes, against the City of Mount Dora (hereinafter "Mount Dora" or "Defendant") and states as follows:

1. Plaintiff was terminated by Defendant, Mount Dora, in retaliation for engaging in protected activity in violation of the Act.
2. Section 112.3187(9), Florida Statutes provides that, "[i]n any action brought under this section, the relief must include:

(f) 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 [*Emphasis added*].

Fla. Stat. § 112.3187(9). It is well settled in Florida that, in order to receive the remedy of temporary reinstatement under the Act, a plaintiff employee must demonstrate the following:

- a) prior to termination he made a disclosure protected by the statute;
- b) he was discharged; and
- c) the disclosure was not made in bad faith or for a wrongful purpose, and did not occur after an agency's personnel action against the employee.

Fla. Stat. § 112.3187(9), see also *DOT v. Fla. Comm'n on Human Rels.*, 842 So. 2d 253 (Fla. Dist. Ct. App. 1st Dist. 2003) citing *Lindamood v. Office of the State Attorney, Ninth Judicial Circuit of Florida*, 731 So. 2d 829, 831 (Fla. 5th DCA 1999).

3. Defendant is an agency/municipality Mount Dora, Lake County, Florida.

4. On June 26, 2020, prior to filing this Action and within sixty (60) days of Plaintiff's actual termination, Plaintiff submitted a written memorandum that satisfied his obligations under Florida Law, including the Public Whistleblowers' Statutes, and the City of Mount Dora.

5. As outlined *infra*, prior to termination, Plaintiff made protected disclosures and engaged in protected activity as defined by the Act. Further, at all times material hereto, Defendant had not initiated personnel action against Plaintiff, which includes documentation of a disciplinary standard or performance deficiency. Finally, Plaintiff's protected activity and protected disclosures were not made in bad faith or for a wrongful purpose.

DISCLOSURES AND ACTIVITIES PROTECTED BY THE ACT

A. Nature of Information Disclosed:

6. Section 112.3187(5), Florida Statutes, titled “*Nature of information disclosed*,” provides that, “[t]he information disclosed under this section must include:

(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 ***[Emphasis added]***.

Fla. Stat. § 112.3187(5).

7. As outlined *supra*, “the Act provides that an employee may bring an action when the whistle-blowing concerns ‘[a]ny ... ***suspected*** violation of any ... law, rule, or regulation committed by an employee or agent of an agency,’ or with respect to ‘[a]ny . . . ***suspected*** act of . . . ***misfeasance*** . . . or gross neglect of duty committed by an employee or agent of an agency ***[Emphasis Added]***.” *Irven v. Dep’t of Health and Rehabilitative Servs.*, 790 So. 2d 403, 406 (Fla. 2001); *see also King v. Florida*, 650 F. Supp. 2d 1157, 1163 (N.D. Fla. 2009)(holding that “a potential complainant is not required to use formal legalistic language in order to lodge a complaint that invokes whistle-blower protection”).

8. In *Irven*, the issue before the Supreme Court of Florida was whether the Whistle-Blower’s Act should be strictly or liberally construed. In overturning the circuit court’s ruling, the Florida Supreme Court in *Irven* found that “the broad language in the Act . . . establishes a wide scope of activity that may give rise to its protections,” and that the protections afforded under the Act “could not have been more broadly worded.” *Id.* at 406. Further, the Florida Supreme Court goes on to explain in *Irven* that:

“[i]f the plain meaning of this section leaves any doubt as to the inclusiveness of this right of action and the broad protections afforded, the Legislature also provided that it is ‘the intent of the Legislature to prevent agencies . . . from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office . . . or any other abuse . . . on the part of an agency, public officer, or employee.’”

Id. (quoting § 112.3187(2), Fla. Stat.); see also, *DOT v. Fla. Comm’n on Human Rels.*, 842 So. 2d 253 (Fla. Dist. Ct. App. 1st Dist. 2003)(finding that “[t]he legislative intent of the Whistleblower’s Act is to prevent retaliatory action against employees who disclose misconduct on the part of public officials”). Furthermore, the Supreme Court of Florida noted in *Irven* that “[m]isfeasance is defined as the ‘improper doing of an act which a person might lawfully do; and ‘malfeasance’ is the doing of an act which a person ought not do at all.’” *Id.* at 407 n.3 (quoting Black’s Law Dictionary 1000 (6th ed. 1990)); see also *Kimmons v. Crawford*, 92 Fla. 652, 109 So. 585, 587 (Fla. 1926)(defining misfeasance as “the performance of an act in a unlawful, injurious, or negligent manner”).

9. Finally, in *Rosa v. Dep’t of Children & Families*, the First District Court of Appeals, in considering the rulings from the Florida Supreme Court, found that “*misfeasance*” includes “*negligent acts committed by an employee of an agency.*” *Rosa v. Dep’t of Children & Families*, 915 So. 2d 210, 212 (Fla. Dist. Ct. App. 1st Dist. 2005) [*Emphasis Added*].

B. To Whom Information Disclosed:

10. Section 112.3187(6), Florida Statutes, titled “*To whom information disclosed,*” provides in pertinent part as follows:

[t]he information disclosed under this section must be disclosed to any 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 § 112.3189(1) or inspectors general under § 20.055, the Florida Commission on Human Relations, and the whistle-blower's hotline created under § 112.3189. . .

Fla. Stat. § 112.3187(6).

C. Employees and Persons Protected:

11. Finally, Section 112.3187(7), Florida Statutes, titled "*Employees and persons protected,*" provides in pertinent part as follows:

[t]his section protects employees and persons who disclose information on their own initiative in a written and signed complaint; *who are requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entity*; who refuse to participate in any adverse action prohibited by this section; or who initiate a complaint through the whistle-blower's hotline or the hotline of the Medicaid Fraud Control Unit of the Department of Legal Affairs; or *employees who file any written complaint to their supervisory officials* or employees who submit a complaint to the Chief Inspector General in the Executive Office of the Governor, *to the employee designated as agency inspector general under § 112.3189(1)*, or to the Florida Commission on Human Relations. . . [*Emphasis added*]

Fla. Stat. § 112.3187(7).

PLAINTIFF'S DISCLOSURES AND ACTIVITIES PROTECTED BY THE ACT

12. Plaintiff filed his written whistle-blowers' complaint on June 26, 2020.

13. The complaint included allegations of hostile work environment, favoritism for one specific employee which may also be described as nepotism, lack of truthfulness and candor, and derogatory comments towards and about City Staff and the City Manager.

DEFENDANT'S ADVERSE PERSONNEL ACTION IS RETALIATION FOR PLAINTIFF'S PROTECTED ACTIVITY

14. Plaintiff was terminated for engaging in his protected activity. Indeed, Plaintiff was terminated within thirty (30) days of his protected activity.

15. Plaintiff's protected disclosures and protected activities, as described *supra*, were the but-for cause for Defendant's decision to engage in adverse personnel action against Plaintiff and for the ultimate termination of Plaintiff in July of 2020.

Plaintiff's Protected Activity Was Not Done in Bad Faith or for a Wrongful Purpose

16. As outlined *supra*, Plaintiff engaged in protected activity and was terminated. At the time of Plaintiff's protected activity, Defendant had not initiated any personnel action against Plaintiff, which includes documentation of a violation of a disciplinary standard or performance deficiency. Further, the various activities and conduct of City employees which prompted Plaintiff to blow the whistle included violations of laws, rules, or regulations and/or acts of malfeasance, misfeasance, or gross mismanagement, which were actually occurring or which Plaintiff reasonably suspected to be occurring. Therefore, for the reasons outlined *supra*, there is no evidence that any of Plaintiff's protected activity was done in bad faith or for a wrongful purpose.

17. Finally, at this time, Plaintiff requests the relief of temporary reinstatement to Plaintiff's former position or to an equivalent position, pending the final outcome on Plaintiff's complaint, pursuant to Section 112.3187(9)(f), Florida Statutes, including reinstatement of Plaintiff's full fringe benefits and seniority rights; compensation for Plaintiff's lost wages, benefits, emotional pain and suffering, compensatory damages, and any other lost remuneration caused by Defendant's wrongful termination of Plaintiff; as well as payment of attorneys' fees and reasonable costs pursuant to Section 112.3187(9)(d), Florida Statutes.

WHEREFORE, Plaintiff respectfully requests that this Court enter an order granting Plaintiff's Petition for Temporary Reinstatement, reinstating Plaintiff to the same position or to an equivalent position held before the adverse action was commenced, including reinstatement of

Plaintiff's full fringe benefits and seniority rights, lost wages and benefits, emotional pain and suffering, compensatory damages, and any other lost remuneration caused by the adverse employment action, as well as payment of attorneys' fees and reasonable costs.

DEMAND FOR JURY TRIAL

Plaintiff, Michael Fewless, demands a trial by jury on all issues so triable.

DATED this 10th day of August, 2020.

Respectfully submitted,

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