IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2020-007339-CA-01
SECTION: CA25
JUDGE: Valerie R. Manno Schurr

David Fintan Garavan (DR)

Plaintiff(s)

vs.

Miami-Dade County Florida

Defendant(s)

_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT IV OF SECOND AMENDED COMPLAINT

THIS MATTER came before the Court on Plaintiff's Motion for Summary Judgment on Count IV of Second Amended Complaint, filed July 21, 2023 and heard by the Court on October 26, 2023. For the reasons stated herein and on the record at the hearing, Plaintiff's Motion for Summary Judgment is HEREBY GRANTED as to the termination claim at Count IV of the Second Amended Complaint.

Factual and Procedural Background

As an initial matter, the Court notes that Defendant failed to timely file a response to Plaintiff's Motion for Summary Judgment, which is mandatory under Fla. R. Civ. P. 1.510(c)(5), as amended, which states that "the non-movant must serve a response." See, e.g., Meisels v. Dobrofsky, 341 So. 3d 1131 (Fla. 4th DCA 2022) ("There is no wiggle room in the word 'must.' That word makes the filing of the response mandatory. On a motion for summary judgment, by requiring the nonmoving party to take a definite, detailed position, the rule promotes deliberative consideration of the motion").

Instead of filing a timely response and statement of facts no later than 20 days prior to the

hearing, Defendant's counsel filed a four-page Response to Plaintiff's Motion for Summary Judgment at 10:16 p.m. on October 25, 2023, with no accompanying statement of facts, which was less than 24 hours before the hearing scheduled for 10:00 a.m. on October 26, 2023. The Court declines to consider Defendant's untimely submission under Rule 1.510 and because Defendant failed to timely file a response or any statement of facts 20 days prior to the hearing, the Court is permitted to consider the facts set forth by Dr. Garavan as "undisputed for purposes of the motion," Fla. R. Civ. P. 1.510(e)(2), and "grant summary judgment if the motion and supporting materials-including the facts considered undisputed -- show that the movant is entitled to it." Fla. R. Civ. P. 1.510(e)(3). In addition, as the Court stated during the hearing, a non-movant who fails to file the mandatory response and statement of material facts under Rule 1.510(c)(5) waives any right to appeal issues that were not properly raised in a timely-filed response. See Walls v. Roadway, Inc., Case No. 3D22-915 (Fla. 3d DCA September 20, 2023)(citation omitted).

The legal standards applicable to claims under the FWPA

The Florida Public Sector Whistle Blower Protection Act, § 112.3187, Fla. Stat. (FWPA) was enacted to prevent retaliatory action against employees and persons who disclose certain types of government wrongdoing to appropriate officials. See § 112.3187, Fla. Stat.; Rice–Lamar v. City of Fort Lauderdale, 853 So.2d 1125, 1131–32 (Fla. 4th DCA 2003). The Florida Supreme Court has explained that the Whistle-blower's Act is remedial and should be given a liberal construction. Irven v. Department of Health and Rehab. Servs., 790 So.2d 403, 405-06 (Fla. 2001). "The act is remedial in nature and should be construed liberally in favor of granting access to the remedy so as not to frustrate the legislative intent." Rice–Lamar, 853 So.2d at 1132 (citations omitted).

Before filing a civil lawsuit, § 112.3187(8)(b), Fla. Stat., requires parties to "file a complaint with the appropriate local governmental authority, if that authority has established by ordinance an administrative procedure for handling such complaints." To comply with the statute, the "administrative procedure created by ordinance must provide for the complaint to be heard by a

panel of impartial persons appointed by the appropriate local governmental authority." After hearing the complaint, the decisionmaker "must make findings of fact and conclusions of law for a final decision by the local governmental authority." Id. Once administrative remedies are exhausted, an employee may pursue a civil action to enforce his rights under § 112.3187(8)(b): "Within 180 days after entry of a final decision by the local governmental authority, the public employee who filed the complaint may bring a civil action in any court of competent jurisdiction."

If an employee elects to file a civil action, a prima facie case can be established under the FWPA by showing that (1) prior to his termination, he made a disclosure protected by the Act; (2) he or she suffered an adverse employment action; and (3) some causal connection exists between the first two elements. Nazzal v. Fla. Dept. of Corrections, 267 So.3d 1094, 1096 (Fla. 1st DCA 2019). To demonstrate a causal connection, a plaintiff must show that the decision maker was aware of the protected activity and that the protected activity and the adverse action were not wholly unrelated. Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1457 (11th Cir. 1998). Rice–Lamar v. City of Fort Lauderdale, 853 So.2d at 1132–33 ("The causal link element is construed broadly so that "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated") (quoting Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir.1998).

Florida courts apply the procedure established by federal Title VII case law to claims under the FWPA. Rustowicz v. N. Broward Hosp. Dist., 174 So.3d 414, 419 (Fla. 4th DCA 2015); Rice-Lamar, 853 So.2d at 1132. The burden shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), therefore applies. Under the McDonnell Douglas framework, the plaintiff must first establish, by a preponderance of the evidence, a prima facie case of unlawful discrimination. McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. 1817. If the plaintiff successfully presents a prima facie case, the defendant must produce evidence of some "legitimate, nondiscriminatory reason" for the adverse employment action. Id. at 802, 93 S.Ct. 1817. To meet

this burden under McDonnell Douglas, ". . . the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for its decision. The explanation must "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext," and be legally sufficient to justify a judgment for the defendant." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094-95, 67 L.Ed.2d 207 (1981). If the defendant proffers a legitimate nondiscriminatory reason, the plaintiff has an opportunity to prove that the proffered reason was merely a pretext for the defendant's actions, while retaining the ultimate burden of proving intentional discrimination. See Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); Byrd v. BT Foods, Inc., 948 So.2d 921, 927 (Fla. 4th DCA 2007).

Why Plaintiff is entitled to summary judgment as to Count IV

There is no dispute in this case that the County has an administrative procedure for processing FWPA claims. See Miami-Dade County Code § 2-56.28.17 (describing the County's administrative procedure for handling whistleblower complaints); Thomas v. Miami-Dade Pub. Health Trust, 369 F. App'x 19, 24 (11th Cir. 2010) ("Miami-Dade County [has] adopted an ordinance establishing an administrative procedure to handle whistle-blower's claims against county agencies"); Pintado v. Miami-Dade County Housing Agency, 20 So.2d 929, 931 (Fla. 3d DCA 2009) ("Pintado appealed [his termination], and a hearing was conducted pursuant to Miami-Dade County's civil service ordinance and the whistle-blower's ordinance").

Nor is there any dispute that Dr. Garavan fully exhausted his administrative remedies by timely submitting an administrative complaint the day after his termination on September 1, 2023, participating in an arbitration hearing on April 4, 2022 after which the panel of three hearing examiners determined on June 15, 2022 that he was terminated in violation of the County Ordinance. See Plaintiff's Statement of Facts, Paragraphs 5-20 (summarizing key events of administrative process); Plaintiff's Notice of Filing Evidence in Support of Motion for Summary Judgment, filed July 23, 2023, Exhibit 2 (administrative termination complaint dated September 1,

2021); Exhibit 5 (County acknowledgment of administrative hearing request dated October 9, 2021 and hearing notices AAA Case Number: 01-21-0017-443; Exhibit 6 (Panel's Findings of Fact, Conclusions and Recommendations in American Arbitration Case No. 01-21-0017-4431 issued June 15, 2022; Exhibit 7 (Hearing transcript AAA Case Number: 01-21-0017-443); Exhibit 8 (Final decision of Hon. Mayor Daniella Levine-Cava dated January 18, 2023, sustaining Findings of Fact, Conclusions and Recommendations in AAA Case Number: 01-21-0017-443).

After Mayor Daniella-Levine Cava issued her decision on January 18, 2023 adopting the panel decision, Plaintiff was not required to do anything further to exhaust his administrative remedies under the FWPA and, thereafter, he timely amended his complaint on February 15, 2023, which conferred jurisdiction upon this Court under § 112.3187(8)(b) to adjudicate the termination claim under the FWPA. See Plaintiff's Statement of Facts, Paragraphs 5-20.

At the summary judgment hearing, Defendant's counsel argued that Plaintiff was a civil service employee whose only avenue of appeal from the final decision by Mayor Levine-Cava was to seek review by the Appellate Division of the Circuit Court. The Court rejects this argument because it was never raised in a timely and properly supported response under Rule 1.510, or in any of Defendant's pleadings in this case, and even if it was, it contradicts the plain language of the FWPA as well as Dr. Garavan's termination letter from Dr. Emma Lew which states that he is an "Exempt Service employee" with no appeal rights. See Plaintiff's Notice of Filing, Exhibit 1 (termination letter from Dr. Emma Lew dated August 31, 2021).

Having determined that Plaintiff fully exhausted his administrative remedies as to Count IV, the Court finds that Dr. Garavan has further demonstrated that there is no genuine dispute as to any material fact regarding the merits of his termination claim under the FWPA and is therefore entitled to judgment as a matter of law under Rule 1.510.

Under the newly amended rule, summary judgment is appropriate when "the evidence is

such that a reasonable jury could not return a verdict for the nonmoving party." In re Amends. To Fla. R. Civ. P. 1.510 , 317 So.3d 72, 75 (Fla. 2021) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). When seeking summary judgment under Fla. R. Civ. P. 1.510, the moving party must identify "each claim or defense--or the part of each claim or defense--on which summary judgment is sought." Fla. R. Civ. P. 1.510(a). If the party moving for summary judgment satisfies this initial burden, the burden then shifts to the nonmoving party to come forward with evidence demonstrating that a genuine dispute of material fact exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (noting that the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial'" (quoting Fed.R.Civ.P. 56)). In addition, Fla. R. Civ. P. 1.510(c)(1) now requires both parties to support their assertions that a material fact cannot be or is genuinely disputed, by either citing to particular parts of materials in the record, including depositions, documents, affidavits or declarations, admissions, interrogatory answers, or other materials; or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

In this case, after failing to file a timely response or statement of facts under Rule 1.510(c)(1), the only element of the prima facie case that was disputed by Defendant at the summary judgment hearing was the causal connection between Plaintiff's protected activity and his termination. Based on the undisputed material facts, the Court rejects Defendant's arguments and finds that there is sufficient temporal proximity between Dr. Garavan's ongoing protected activity and his dismissal to satisfy the requirement of a causal link. See Rice–Lamar v. City of Fort Lauderdale, 853 So.2d at 1132–33 ("The causal link element is construed broadly so that "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated") (quoting Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir.1998).

For purposes of the termination claim, Dr. Garavan's protected activity includes his complaint to the OIG in March 2018 and his subsequent participation as a witness in the three-year OIG investigation that concluded on March 9, 2021, when the OIG's final report, critical of Dr. Lew's performance as the Department's Director, was issued. The protected activity also extended beyond the date of the OIG Report, since Dr. Lew was ordered to respond to OIG report by June 9, 2021 and implement remedial measures to prevent future violations of the outside employment policy. Approximately one month later, on July 12, 2021, Dr. Lew was required to sit for a six-hour deposition and answer the allegations in this case and on August 30, 2021, the day before Dr. Garavan's termination, counsel for the parties attended a calendar call where the case was set for trial on the initial claims in October 2021. See Plaintiff's Statement of Facts, Paragraph 14 and Notice of Filing, Exhibit 11 (OIG Final Report of Investigation Re: Outside Employment Issues, Reporting Discrepancies and the Lack of Oversight by the Medical Examiner's Office; Ref. IG18-0018-I, dated March 9, 2021) and Exhibit 12 (deposition of Dr. Emma Lew, taken July 12, 2021).

Given this undisputed evidence, there is considerably greater temporal proximity between Dr. Garavan's ongoing protected activity and his dismissal than the three years that Defendant suggests and since Dr. Garavan's termination meets the requirement for an adverse action, he has established a prima facie case of retaliation under the FWPA.

Once a prima facie claim is established under the FWPA, the burden shifts to Defendant to produce a legitimate nondiscriminatory reason for its employment action. Despite having notice, ample opportunity and more than two years to do so under the McDonnell Douglas framework, at the summary judgment hearing, Miami-Dade County declined to offer any legitimate non-retaliatory reasons for the decision to terminate Dr. Garavan's employment as an Associate Medical Examiner. See Plaintiff's Statement of Facts, at Paragraphs 16-20.

When viewed against the undisputed material facts and evidence supporting Dr. Garavan's prima facie retaliation claim under the FWPA, Defendant's failure to timely file a mandatory response under Fla. R. Civ. P. 1.510(c)(5) or provide any legitimate reason whatsoever for Dr. Lew's termination decision mandates the entry of summary final judgment on Count IV. If an employer is simply unwilling to identify for more than two years why the plaintiff was selected for termination, and then fails to meet its burden of production on summary judgment to introduce any evidence which, if taken as true, would create a disputed issue of fact as to whether there a nondiscriminatory reason for the adverse action, it is the equivalent of providing no legitimate, non-discriminatory reason at all under the McDonnell-Douglas paradigm. The presumption of unlawful retaliation raised by the prima facie case therefore remains intact and the plaintiff is entitled to summary judgment as to liability. See IMPACT v. Firestone, 893 F.2d 1189, 1193-1194 (11th Cir. 1990); Bates v. Greyhound Lines, Inc., 81 F. Supp. 2d 1292, 1302-1303 (N.D. Fla. 2000).

Based on the foregoing and the additional reasons stated on the record at the summary judgment hearing, Plaintiff's Motion for Summary Judgment on Count IV of Second Amended Complaint is HEREBY GRANTED. As the prevailing party under § 112.3187, Fla. Stat., Plaintiff is entitled to the mandatory legal and equitable relief available to him under § 112.3187(9)(a)-(e), Fla. Stat. The Court therefore reserves jurisdiction to issue a final judgment on Count IV after further proceedings on Counts I, II and III of the Second Amended Complaint – which remain pending for trial -- and consideration of Plaintiff's damages.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 30th day of October, 2023.

2020-007339-CA-01 10-30-2023 10:29 AM
Hon. Valerie R. Manno Schurr

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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