

ASHLEY FRANCE,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 00-01,539
	:	
FAMILIES UNITED NETWORK, INC.,	:	
	:	
Defendant	:	PRELIMINARY OBJECTIONS

**Date: June 28, 2001**

**OPINION AND ORDER**

This action asserts claims for a wrongful termination of employment by Plaintiff under the Pennsylvania Whistleblower Act, 43 P.S. §1421, *et seq.* and for wrongful discharge under common-law principles. Before the Court are Defendant’s Preliminary Objections to Plaintiff’s Complaint by which Defendant raises a demurrer to being sued under the Whistleblower Act, as follows: (1) Defendant is not a public body as defined by 43 P.S. §1422 of the Whistleblower Act; (2) Defendant committed no wrongdoing as defined by the Act; (3) Plaintiff acted inconsistently in that she was going to report the wrongdoings to Defendant’s Board of Directors, yet this is the same entity that she is suing; (4) similarly because Plaintiff reported directly to the Board of Directors, her threat to report her supervisors to them was meaningless, and (5) Plaintiff did not attach relevant writings to the original complaint. Defendant also demurs to the wrongful discharge cause of action because Plaintiff is an at-will employee. Defendant further objects the Complaint does not specify the supervisors to whom Plaintiff was going to report the violations nor the identity of the appropriate authority to which she was to report. For the reasons to be discussed in the following opinion, Defendant’s

demurrer must be denied; however, the preliminary objection concerning more specific pleadings will be sustained.

**Facts**

Plaintiff's Complaint alleges the following facts. Beginning on or about August 1998, Plaintiff was employed by Defendant as its Controller. Plaintiff's responsibilities included, but were not limited to, insuring compliance with applicable laws and regulations; supervising and directing agency administrative functions including human resources and payroll; supervising agency accounting; creating and maintaining financial schedules, preparing financial statements, reports, and budgets; reviewing and negotiating county contracts, supervising capital expenses, and assisting the CEO in strategic planning.

According to the Complaint, during the course of her employment Plaintiff noticed certain irregularities with regard to timekeeping. Specifically, Plaintiff avers that certain "non-exempt employees" were working hours that entitled them to overtime, but were not receiving the overtime pay. Plaintiff also avers that certain "non-exempt employees" were being directed to fill out records indicating they had worked when they had not done so.

In the Complaint, Plaintiff maintains she reported her payroll concerns to her superiors in writing on February 1, 2000. Plaintiff further avers she reported her findings to her superiors on March 22, 2000, orally and in writing, and on April 4, 2000, she, again in writing, reported her concerns to her superiors and requested immediate corrective action or she would formally report the matter to Defendant's Board of Directors. On April 5, 2000, Plaintiff was terminated from her position without any prior warning. Plaintiff's Complaint states that

Defendant told Plaintiff that the basis for the termination was poor performance. This suit followed.<sup>1</sup>

### **Discussion**

When ruling upon a preliminary objection in the nature of a demurrer, the Court must resolve all doubts in favor of the pleader and sustain a demurrer only in cases which are clear and free from doubt, *Bower v. Bower*, 611 A.2d 181 (1992). Furthermore, defendants must be able to state, with certainty, that plaintiffs will be unable to prove facts legally sufficient to establish their right to relief. *Hazleton Area School District v. Bozak*, 671 A.2d 277 (Pa. Cmwh. Ct. 1996). Because it is not clear and free from doubt, Plaintiff cannot prove facts to a satisfactory degree of legal sufficiency necessary to establish her right to relief, Defendant's demurrer must be overruled.

### **Count I – Defendant is not Public Body**

Perhaps the most contentious issue in this case is whether or not Defendant qualifies as a public body as defined by the Whistleblower Act. There seems to be no clear answer to this question. The Whistleblower Act declares that “[a]ny other body which is created by Commonwealth or political subdivision authority or which is funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of

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<sup>1</sup> This case was initiated by a Praecipe for Writ of Summons filed on October 2, 2000. On October 24, 2000, Defendant filed a Praecipe for Rule to File Complaint. On November 13, 2000, Plaintiff filed her Complaint. On November 20, 2000, Defendant filed Preliminary Objections. On December 8, 2000, Plaintiff filed an Answer to the Preliminary Objections. Defendant filed a Brief on February 27, 2001; Plaintiff's brief was filed on March 1, 2001. Argument was held on March 2, 2001.

that body” is defined as a public body. 43 P.S. §1422. The intention of this provision was to bring even private business entities that obtain payment for their services from government entities within the ambit of the Whistleblower statute. A typical example is a private health care facility that is reimbursed by Medicaid. *Denton v. Silver Stream Nursing and Rehabilitation Center*, 739 A.2d 571 (Pa.Super. 1999); *Riggio v. Burns*, 711 A.2d 497 (Pa. Super. 1998). The language in the *Denton* ruling explains:

The statute plainly and unequivocally makes any body “funded in any amount by or through Commonwealth...authority” a public body for purposes of the Whistleblower Law, 43 P.S. §1422. Where the statute is unambiguous on its face, we are bound to give effect to that language

The plain meaning of the language of the statute makes it clear that it was intended to apply to all agencies that receive public monies under the administration of the Commonwealth. We do not find that legislatively appropriated funds are the only monies that will create “public body” status under the Whistleblower Law. The statutory language differentiates between appropriated and “pass-through” funds and extends the law to cover both types: “[a]ny other body which is ... funded in any amount by or through Commonwealth ....” 43 P.S. § 1422. The Law clearly indicates that it is intended to be applied to bodies that receive not only money appropriated by the Commonwealth, but also public money that passes through the Commonwealth.

*Denton*, 739 A.2d at 576.

Defendant argues it is not a public body because it contracts with the county for a specific, limited service, and once that service is rendered and payment made, the relationship between the two ends. Defendant analogizes this position to that of a contractor who is hired by the county to repair a road. Once the repairs are completed, the contractor is paid and the relationship ends. Defendant argues the fact that the county pays the road contractor from the public coffers is not enough to transform the contractor into a public body, otherwise any

business dealings with a government entity in the Commonwealth could be considered a public body.

The Court observes that authority exists to support Defendant's argument. In *Cohen v. Salick Health Care, Inc.*, 772 F.Supp. 1521, 1527 (E.D.Pa. 1991), the Court wrote:

In the Whistleblower Law, the use of the words "funded by or through" suggests a specifically appropriated amount of State funds to a public body. The language "funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of that body" was intended by the legislature for the purpose of aiding "public bodies" in pursuit of their public goals. This language was obviously not intended to make an individual or corporation a "public body" solely on the basis that monies were received by it from the state as reimbursement for services rendered.

This Court finds the foregoing federal case decision to be non-persuasive due to the explicit holding of our Superior Court in *Denton*.

Plaintiff correctly points to the language in *Denton* and argues that Defendant's posture in this case is exactly the same as the defendant rehabilitation center's position in that case in the sense that both received "pass-through" funding. This Court finds there is no distinction ascertainable for the facts pleaded in Plaintiff's Complaint between the Defendant's position with Lycoming County from the position of the defendant in *Denton*. Defendant's demurrer must be denied.

## **Count II – Alleged Acts do not Constitute Wrongdoing**

Plaintiff avers that the refusal to pay overtime on compensation time and falsification of time records results in unnecessary expenditures of public funds. Defendant raises an objection to the alleged acts being characterized as a wrongdoing as defined by the

Whistleblower Act. Defendant argues the alleged over and underpayment of employees only allege violations of a contract but not a violation of a federal or state statute.

In *Podgurski v. The Pennsylvania State University*, 722 A.2d 730, 732 (Pa. Super. 1998) the court held that the expenditure of unnecessary funds and false reporting of hours worked “if proven, falls well within the ambit of the statute defining wrongdoing, as these actions would relate to the employer’s duty to enforce administrative policies protecting their interest.” The Court also notes the statute protects employees reporting an instance of wrongdoing or waste. The statute defines waste as “ an employer’s conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from Commonwealth or political subdivision sources.” 43 P.S. § 1422. If proven, the alleged acts of improper payment are a waste under the statute. Consequently, this demurrer must also be denied.

### **Count III – Plaintiff Did Not Report to the Proper Authorities**

Defendant argues that Plaintiff acted inconsistently in that she denies she was going to report the wrongful acts to unspecified superiors, yet also attended monthly meetings of the Board of Directors to whom she was also threatening to make a report, and reported no wrongdoing. Plaintiff’s Complaint clearly states that: on February 1, 2000, Plaintiff made a written report to her superiors; on March 22, 2000, Plaintiff made both written and oral reports to her superiors; on April 4, 2000, Plaintiff again made a written report to her superiors seeking corrective measures or she would formally report the matter to the Board of Directors. The Court is not sure where inconsistency lies. From the Complaint, it appears that Plaintiff was attempting to utilize the chain of command. The Court views the issues Defendant has raised

to the Complaint's "inconsistency" to be a matter potentially affecting Plaintiff's credibility but not a matter that affects her pleading.

**Count IV – Writings were not Attached to the Pleadings**

Pennsylvania Rule of Civil Procedure 1019(i) clearly directs that the pleader shall attach a copy when any claim or defense is based on a writing. The Complaint states two separate occasions when Plaintiff made a written report to her superiors. The Complaint did not include a copy nor was there any explanation as to why the writing was inaccessible.<sup>2</sup> However, the cause of action is not dependent upon the existence of these writings. The Whistleblower Act permits a cause of action to be premised upon an employee being terminated for making verbal or written reports of improprieties. 43 P.S. 1423, 1424. Therefore, the writings may be relevant evidence but they are not required to be attached to the complaint as the cause of action arises from the alleged improper acts of Defendant and is not based upon a written undertaking by the Defendant.

**Count V – Plaintiff is an At-Will Employee and as Such Cannot Maintain A Wrongful Discharge Lawsuit.**

Plaintiff admits to being an at-will employee. Defendant argues, "The at-will employment can be terminated unless it violates public policy." (Defendant's Brief, filed 2/27/01 at p. 7.) Defendant's brief at page 8 also acknowledges that Plaintiff's Complaint does allege she was discharged for ". . . refusing to perform unlawful acts, i.e., continued the unlawful practices and breaches of contract described above." Defendant's argument then continues, "Neither of these fell within a public policy doctrine, which prevents the discharge of an employee." *Ibid.*

It is not clear and free from doubt to this Court that Plaintiff's allegations do not fit within the public policy exceptions to the at-will employment doctrine. The allegation may be interpreted to allege that she was fired either because she refused to take part in the criminal act of theft or a fraud with criminal conduct implications, or at the least she refused to willfully violate the applicable payroll laws. If the acts of Defendant, which Plaintiff refused to participate in, were criminal in nature or constitute a violation of the payroll statutes, Plaintiff has stated a viable cause of action. Defendant concedes a public policy exception to the at-will employment doctrine does exist when an employer requires an employee to commit a crime, or prevents the employee from complying with a statutory duty, or for the employee in direct contravention of a specific statutory prohibition.

This Court also finds persuasive the arguments of Plaintiff's counsel on this issue as set forth in Plaintiff's Brief filed 3/1/01 at (unnumbered) pages 6-10, under heading "C." More specifically, the Court finds the following to be appropriate reasoning:

In the instant case, France has alleged that she was terminated for reporting unlawful payroll procedures and practices (refusal to pay overtime/comp. Time and falsification of time records) and breach of contracts with certain counties which would result in unnecessary expenditures by those counties of public funds. The cases on wrongful discharge do not require that the unlawful conduct involved be criminal as opposed to being violative of law. The refusal to pay overtime or grant comp. Time where an employee is entitled to the same violates Pennsylvania statutory laws regarding wages and hours, and, similarly, breach of contract and fraud toward the counties FUN contracted with violates Pennsylvania law and common law. Because France was directly responsible for payroll, and had substantial responsibilities regarding contracts, she was reporting unlawful conduct for which she could face personal liability.

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<sup>2</sup> Plaintiff's Brief, filed 3/1/01, represents the writings are attached to the Brief.



*Id.*, at (unnumbered) page 10. This demurrer must also be denied.

**Count V -- Failure to Specifically Identify the Supervisors and Authority to Whom the Wrongful Acts Were to be Reported.**

The Whistleblowers Act requires an employee “to share by a preponderance of the evidence that, prior to the alleged reprisal, the employee . . . had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority.” 43 P.S. §1424(b). Plaintiff’s Complaint asserts in paragraphs 11, 13, 14, 15 and 16 she had reported the violations and her concerns about the improprieties to “her supervisors.” In paragraph 16 Plaintiff asserts a report was going to be made to Defendant’s Board of Directors but in paragraph 27 only referring to an “appropriate authority” in order to prepare an answer, Defendant needs to have a clearer understanding as to the identity of the superiors. These persons may or may not include the “Board of Directors” referred to in paragraph 16 as an authority to which Plaintiff intended in the future to make a report. The Plaintiff must plead a more specific complaint in this regard.

For the reasons discussed in the preceding opinion, the Court issues the following order.

**ORDER**

As to Defendant's Preliminary Objections filed November 20, 2000,

- 1) The motions of demurrer, paragraphs one through five, are denied.
- 2) The motion for a more specific complaint, paragraphs 6 and 7, is granted.

Plaintiff shall have twenty days from notice of this Order to file an amended complaint consistent with this order.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator  
Jeffrey Dohrmann, Esquire  
Allen E. Ertel, Esquire  
Suzanne Lovecchio, Law Clerk  
Judges  
Gary L. Weber, Esquire (Lycoming Reporter)