ROLF E. KROLL, ESQUIRE
Pa. Supreme Court I.D. No. 47243
MICHAEL A. PIPA, ESQUIRE
Pa. Supreme Court I.D. No. 331491
MARGOLIS EDELSTEIN
214 Senate Avenue, Suite 402
Camp Hill, PA 17011
Telephone: (717) 760-7502 / (717) 915-3410
Facsimile: (717) 975-8124
E-mail: rkroll@margolisedelstein.com
mpipa@margolisedelstein.com

Counsel for Defendant,
Tullytown Borough

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PA	
MICHAEL MARTIN, Plaintiff v. TULLYTOWN BOROUGH, Defendant	DOCKET NO. 2024-00693 CIVIL ACTION - LAW JURY TRIAL DEMANDED
DEFENDANT'S BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT	

I. INTRODUCTION

Complaints brought under the Pennsylvania Whistleblower Law ("WBL") must plead, at a minimum, non-conclusory facts which, if accepted, show that the making of a good faith report alleging wrongdoing or waste caused retaliatory action. Plaintiff's Complaint fails to plead sufficient facts to support any of these elements. Accordingly, based upon the narrative set forth in the Report, Complaint, Exhibits, and Brief, the law says with certainty that no recovery is possible, warranting dismissal of the Complaint in its entirety and with prejudice.

II. FACTUAL BACKGROUND

On May 4, 2023, the Borough appointed Plaintiff to be the interim Chief of Police subject to a six-month period of probation. (*See* Exhibit 1, Section 1-C). Plaintiff's interim

status would, by operation of contract, become permanent unless the Borough Council either "notified [him] in writing prior to the expiration of the probationary period" that he would not be made permanent or "dismissed [him] for cause" pursuant to 8 Pa.C.S. § § 1170-1194.[1] (*Id.*). Ultimately, the Borough Council notified Plaintiff before his probationary period expired that he was not going to become the permanent Chief.

As Plaintiff describes, in exacting detail, there was immediate tension between him and the Borough Council over budgetary and personnel matters. Part of this tension had to do with monthly reports he submitted to the Borough Council and to the Mayor. These reports were designed to update the Council about the police department's revenues and expenses and could be used to request more resources. However, although Plaintiff could make such requests, the Borough Council had exclusive power to "approve or deny same." (*Id.*, Section V). Naturally, Plaintiff used these reports to request additional resources almost immediately. In his first report filed in June 2023, for example, he wanted more resources so he could hire two full-time officers. (Complaint at ¶ 13). The Borough Council partly acceded to this request and dispensed funds for the hiring of one full-time officer—Officer Brenton, who began working before July 2023. (*Id.* at ¶ 16).

Unfortunately, Plaintiff relates that the disputes about budgetary and personnel matters continued to increase the friction with the Borough Council and within his own police force. At a private gathering with three council members on June 6, 2023, for

[1] These statutes provide that "[d]uring the probationary period an appointee may be dismissed only for a cause specified in Section 1183." 8 Pa. C.S. § 1186(a). Section 1183(a)(1-6) sets forth those bases. *See id.* Section 1183(b)(1-5) creates a hearing process for an "applicant" who is "aggrieved" by a decision not to be certified/made permanent to challenge that decision. *Id.* After the hearing, the commission's ruling is deemed "final." *Id.* at (b)(5). Because Plaintiff was not "dismissed for cause" under 8 Pa. C.S. §§ 1170-1194, but was notified in writing prior to the expiration of his probationary period, these statutes are presently immaterial.

instance, Plaintiff claims he was told to fire Officer Dilanni, who at the time was only working part-time due to an injury. (*Id.* at ¶ 15). Plaintiff refused to do so because he knew Officer Dilanni "had a doctor's note." (*Id.*). When a council member apparently asked to see this doctor's note, Plaintiff did not disclose it because he thought it "would be a HIPPA violation." (*Id.*).

Officer Dilanni, Plaintiff claims, came up again at another private gathering with three Council members in July of 2023. At this gathering, a Council member allegedly "blurted out" that he wanted Officer Dilanni to be terminated as soon as possible because Officer Dilanni had "investigated" the Council member's friend. (*Id.* at ¶ 23). To the extent this was a request to terminate Officer Dilani, Plaintiff states that he declined to do so because he believed that would be an improper basis to terminate an officer. (*See id.*).

Officer Brenton resigned on July 31, 2023. In his letter of resignation, Officer Brenton cited low morale and long working hours as contributing factors but wrote that the "main reason" he was resigning was "because for the past two weeks, there have been multiple rumors about [Plaintiff] getting fired." (Exhibit 2, pg. 2).

Internal divisions and infighting within the police force, Plaintiff explains, bled into the public eye at a public Council meeting in August when, Plaintiff states, the wife of one of his subordinate police officers stood up and told the council that Plaintiff had been "talking about each and every one of the employees/staff in a negative manner." (Complaint at ¶ 30). Plaintiff insists that this allegation was untrue. (*See id.* at ¶ 31).

In his September report, Plaintiff reiterated his request for greater resources and suggested that the Borough create a "designation list" pursuant to 8 Pa. C.S. § 1184(a)

to fill vacancies.[2] (*Id.* at ¶ 34). On September 18, 2023, having not secured the resources he wanted, and after disputes with the Council and within his force, Plaintiff emailed the Mayor, the Council, and the Solicitor a document he titled "Chief of Police's Whistleblower Complaint regarding improper actions of Borough Council" (Exhibit 3). In this "Complaint," Plaintiff claimed he was "blowing the whistle" about illegal governmental conduct, including alleged violations of the Sunshine Act and improper requests by some Council members involving Officer Dilani. Further, Plaintiff opined: "Over the past few months, I've heard rumors that the Borough will be firing me. This is ridiculous. I am trying to do my job as the Chief of Police to the best of my ability and keep our community safe." (*Id.*). Plaintiff concluded: "Submitting this complaint was not easy. I was hesitant to formally raise these issues due to my probationary status and fear of being retailed against. However, I believe it's important that everyone knows what's happening." (*Id.*).

On October 16, 2023, Special Labor Counsel Neil Morris responded to Plaintiff's "Complaint." Reasoning that Plaintiff's claims, one-by-one, lacked merit, Attorney Morris expressed his opinion that the "Complaint" was an attempt "to manufacture a baseless retaliation claim in the event that" Plaintiff did "not receive a permanent appointment to the Chief of Police position at the conclusion of [his] probationary period." (Exhibit 4).

Plaintiff remained the interim Chief for two more months. Nevertheless, he explains, infighting in the police force persisted. He notes that Sgt. Bunda tried to get every officer to file a grievance against the Borough for "extreme short staffing," but several officers refused, as they "believed the main issue with the police department" was

[2] An eligibility list ranks candidates applying to a borough police force or a paid fire apparatus based on how the candidates score on various tests such as "physical agility or other examination[s]" and creates a procedure to fill open positions. 8 Pa. C.S. § 1184(a)(1), (b)(1-5).

Plaintiff's "supervision and managerial decision making." (Complaint at ¶ 40-41). Finally, on November 1, 2023 (three days before the end of his probationary period), the Borough Council voted not to make him the permanent Chief, bringing his brief but tumultuous time with the Borough to a close. (Complaint at ¶ 45).

On February 2, 2024, Plaintiff filed suit, raising two claims: A violation of the WBL and "public policy wrongful discharge." (*See id.* at ¶¶ 58, 62). He argues he is a "whistleblower who made repeated good faith reports of conduct he reasonably believed constituted wrongdoing or waste within the meaning of the [WBL]." (*Id.* at ¶ 52). As to reports of "wrongdoing," Plaintiff points to the Borough's failure to properly staff the police force; certain demands by council members to disclose Officer Dilanni's medical information about Officer Dilanni; a request by a council member to terminate Officer Dilanni for improper reasons; the Borough's failure to maintain an eligibility list; and various violations of the Sunshine Act. (*Id.* at ¶ 53). Further, he asserts that the Borough's failure to staff the department and failure to maintain an eligibility list constitutes reports of "waste." (*Id.* at ¶ 54). Therefore, Plaintiff avers: "Borough violated the [WBL] by terminating [him] in retaliation for his whistleblower complaints." (*Id.* at ¶ 58).

Borough filed Preliminary Objections to Plaintiff's Complaint in the nature of a demurrer for failing to state a claim. Plaintiff responded, and this Brief follows.

III. STATEMENT OF QUESTIONS PRESENTED

A. WHETHER PLAINTIFF HAS FAILED TO STATE A CLAIM BY PLEADING INSUFFICENT FACTS TO SHOW HE MADE HIS REPORTS IN GOOD FAITH AND NOT IN CONSIDERATION OF PERSONAL BENEFIT?

(Suggested Answer in the Affirmative.)

B. WHETHER PLAINTIFF HAS FAILED TO STATE A CLAIM BY FAILING TO DEMONSTRATE THAT HE ALLEGED INSTANCES OF WRONGDOING OR WASTE WITHIN THE STATUTORY DEFINITION?

(Suggested Answer in the Affirmative.)

C. WHETHER PLAINTIFF HAS FAILED TO STATE A CLAIM BY FAILING TO PLEAD FACTS TO SHOW HE WAS NOT MADE PERMANENT CHIEF BECAUSE HE MADE REPORTS OF WRONGDOING OR WASTE?

(Suggested Answer in the Affirmative.)

D. WHETHER PLAINTIFF HAS FAILED TO PLEAD FACTS SUFFICENT TO MEET THE STRINGENT AND LIMITED PUBLIC POLICY EXCEPTION APPLICABLE TO AT-WILL EMPLOYEES?

(Suggested Answer in the Affirmative.)

IV. ARGUMENT

1. Standard of Review.

Pa. R.C.P. 1028(a)(4) permits preliminary objections where a complaint is legally insufficient. In general, a complaint is legally insufficient if it does not allege sufficient facts to support each element of the legal cause of action. *See Frey v. Douqherty*, 132 A. 717, 719 (Pa. 1926) ("While it is not necessary to set forth in a pleading the evidence by which facts are to be proved, it is essential that such facts as the pleader depends upon to show the liability sought to be enforced [are] averred.").

In ruling on a demurrer, a Court accepts all "properly pleaded material facts," disregards "all pleaded conclusions of law," and, if it is clear that "under no circumstances will the law permit recovery on the complaint," sustains the objections.[3] *Bleday v. OUM*

[3] In his brief, Plaintiff cites *Massaro* for the proposition that a "lower court has a positive duty to provide the plaintiff with a chance to amend and abuses its discretion in most instances if amendment is not permitted." (*See* Plaintiff's Brief at 4). This is not a statement of law; it is a

Group, 645 A.2d 1358, 1360 (Pa. Super. 1994) (citation omitted). Moreover, when exhibits are attached to the complaint, as they are here, then the Court is "not bound to accept as true any averments in the complaint which are in conflict with" those in the exhibits. *Philmar Mid-Atlantic, Inc., v. York Street Associates II*, 566 A.2d 1253, 1254 (Pa. Super. 1989); *see Lawerence v. Dep't of Corr.,* 941 A.2d 70, 77 (Pa. Cmwlth. 2007) (listing cases and noting "in the context of a demurrer it is not necessary to accept as true averments in the complaint that conflict with exhibits attached to it").

Pennsylvania Courts at nearly every level have sustained demurrers and withheld permission to amend WBL claims. *See Al-Saleem v. Health Network Labs.,* L.P., 2023 LEXIS at *7 (Pa. Super. 2023) (upholding trial court's sustaining of a demurrer for failure to discuss in detail laws violated); *Rohner v. Atkinson*, 41 Pa. D. & C. 311, 316-320 (Mon. Cty. C.P. 2014) (sustaining demurrer and denying leave to amend because plaintiff merely disagreed with zoning board's decisions); *Sea v. Seif*, 831 A.2d 1288 (Pa. Cmwlth. 2003) (sustaining demurrer and denying leave to amend due to no nexus between employer's performance of its public duty and the report); *Lutz v. Springettsburg Township*, 667 A.2d 251, 254 (Pa. Cmwlth. 1995) (sustaining demurrer and denying leave to amend because of failure to plead causation); *but see Gray v. Hafer*, 651 A.2d 221 (Pa. Cmwlth. 1994) (sustaining demurrer but granting leave to amend).[4] These stringent pleading standards developed, in part, because a cause of action under the WBL is

---

verbatim quotation by the Court of one of the issues the Appellant in *Massaro* presented for review.

[4] In *Ingram v. Pa. House Republican Caucus*, 2024 LEXIS 136 (Pa. Commw. Ct. Mar. 12, 2024), the Commonwealth Court stated that there was a "lack of clear authority sustaining a demurrer" in the WBL context. *Id.* at *8. While perhaps due to a lack of focused advocacy by the parties in that case, this statement is simply inaccurate. See the cases cited above for illustrations.

statutory, remedial, and non-common law based (hence Plaintiff has no right to a jury trial, *see Bensinger v. Univ. of Pittsburgh Med. Ctr.,* 98 A.3d 672, 677 (Pa. Super. 2014)).

2. Elements of a WBL claim.

Like most of our sister states, Pennsylvania's WBL provides legal protection to government employees who "blow the whistle" about serious, unlawful governmental activity. *See Bailets v. Pa. Tpk. Comm'n.*, 123 A.3d 300, 307 (Pa. 2015). This legal umbrella furthers the General Assembly's desire to promote openness and transparency in governmental affairs. *See id*. The WBL is not, however, "insurance against discharge or discipline for an employee who informs on every peccadillo of his fellow employees." *Golaschevsky v. Dep't of Env't Res.,* 683 A.2d 1299, 1304 (Pa. Cmwlth. 1996).

Section 4(b) of the WBL sets forth the elements of a *prima facie* claim. *See O'Rourke v. Dep't of Corr.,* 778 A.2d 1194, 1200 (Pa. 2001). This Section provides:

> (b) Necessary showing of evidence. --An employee alleging a violation of this act must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee or a person acting on behalf of 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.

42 P.S. § 1424(b). Here, Plaintiff's Complaint fails to establish three threshold elements: 1) That he made his complaints in good faith; 2) That he reported wrongdoing or waste; and 3) That his making of such complaints caused the adverse employment action.

A. PLAINTIFF HAS FAILED TO PLEAD SUFFICENT FACTS TO SHOW HE FILED HIS REPORT IN GOOD FAITH AND THE FACTS HE HAS PLED SHOW HE MADE HIS REPORT IN CONSIDERATION OF PERSONAL BENEFIT.

Beginning with the element that "the employee . . . reported in good faith," 42 P.S. § 1424(b), the WBL defines a "good faith report" as:

> A report of conduct defined in this act as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true. An employer is not barred from taking disciplinary action against the employee who completed the report if the employee's report was submitted in bad faith.

42 P.S. § 1422.[5] The "good faith" modifier is designed to weed out lawsuits based on frivolous reports early in the litigation process, as such lawsuits waste judicial resources and neither "enhance openness in government" nor "compel the government's compliance with the law." *O'Rourke*, 778 A.2d at 1205 n.12 ("Employers are protected from employee harassment by the requirement . . . [of] good faith in the first instance.") (citing Stefan Rutzel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 Temp. Envt. L & Tech. 1, 48-49 (Spring 1995) (advocating a model statute which prevents frivolous complaints and employee harassment by protecting only 'good faith whistleblowing'))").

Outside of explanatory *dicta* in *O'Rourke*, *Golaschevsky*, and others, there are not many Pennsylvania decisions interpreting "a good faith report," let alone cases giving effect to the recently added "bad faith" sentence.[6] It remains unsettled if a putative whistleblower can survive a demurrer by simply alleging, as Plaintiff does here, that the

---

[5] The General Assembly revisited the WBL in 2014. While leaving the bulk of the statute unchanged, it amended this definition to add the second sentence referring to bad faith.

[6] Other jurisdictions have applied good faith in similar state-level whistleblower statutes. Texas Courts have said, for example, that its good faith element has "both subjective and objective components." While interesting, the Texas cases seem of minor value because the Texas good faith provision applies to every component of the law instead of representing a specific element of the claim as in Pennsylvania. The Fifth Circuit, recognizing a dearth of caselaw on the meaning of "good faith" in Louisiana's Environmental WBL, certified a question to the Louisiana Supreme Court for clarification, *see Borcik v. Crosby Tugs, L.L.C.,* 856 F.3d 936, 937 (5th Cir. 2017), and the Louisiana high Court opted for a "broad" definition. *See id.* This rationale, however, was mainly rooted in unique provisions in the Louisiana Constitution that are not material here.

reports were made in good faith. It is also uncertain if asserting the converse, that the reports were not filed in bad faith, is sufficient. (*See* Plaintiff's Brief at 5).

In ordinary circumstances, a Plaintiff must plead sufficient facts to establish each element of the cause of action. *See e.g., Frey*, 132 A. at 719. Applied to a WBL claim, then, Plaintiff must plead facts sufficient to show that he filed his report in good faith. He has not done so. In fact, and to the contrary, the Report, Brief, Complaint, and Exhibits, read in their totality and in context, tend to show that Plaintiff made his reports and initiated this lawsuit "in consideration of personal benefit." 42 P.S. § 1422. By necessary implication, this forecloses any argument Plaintiff could make, even through amendment, that he made his report in good faith, and dismissal of the Complaint is in order.

Facts, as pled by Plaintiff, that reveal the personal nature of this lawsuit include:

- The assertion that Officer Brenton knew of "rumors" swirling one-month into Plaintiff's appointment that the Borough Council intended to vote against making him the permanent Chief at the end of his probationary term. (*See* Exhibit 2).

- The language Plaintiff himself used in the "Complaint," (*see* Exhibit 3 ("This is ridiculous")), that, without any implication needed, evinces if not maliciousness, then certainly self-interested and personal motivations in making the "Complaint."

- Further editorializing by Plaintiff that he "was hesitant to formally raise these issues due to my probationary status and fear of being retailed against," (*id.*), which is facially suggestive of a report made in "consideration of personal benefit."

- Averments about infighting with members of his police force having nothing to do with budgetary matters. (*See* Complaint ¶¶ 30-31 (Officer Wallace's wife criticizing Plaintiff for wrongfully treating employees which Plaintiff states was false); ¶¶ 40-41 (Officer Aldworth's statement that the "problem with" the police department was Plaintiff's "supervision and managerial decision making," not staffing issues)).

Plaintiff posits, in response, that "[i]f an employee being hesitant to complain due to the fear of being retaliated against means that when they do have the courage to complain they are considered to simply be acting in consideration of personal benefit,

then nearly every workplace whistleblower's retaliation claim will be doomed." (Plaintiff's Brief at pages 5-6). Plaintiff appears to be suggesting that if a putative whistleblower says, as here, that their reports are being made "in fear of retaliation," it is thereby established, as a matter of law, that the report is not "made in consideration of personal benefit." This interpretation would devolve the WBL into a game of magic words and improperly preclude courts from placing such claims in their overall context.[7]

Additionally, and along these lines, to the extent Plaintiff asserts the motivation of a putative whistleblower is irrelevant, Plaintiff does not explain why, then, there is a good faith requirement at all. "Good faith" speaks directly to subjective motivations, and the phrase "reasonable cause to believe is true" cannot be read outside of the conjunctive clause preceding it: "without malice or consideration of personal benefit." 42 Pa. C.S. § 1422. Merely because a person "has reasonable cause to believe" the allegations are true does not, *ipso facto*, establish that the report was "made without malice or consideration of personal benefit." Instead, a Plaintiff must plead facts sufficient to establish both clauses contained in the definition, which Plaintiff has failed to do here.

Again, Plaintiff states he heard rumors he was not going to be made permanent; he filed his self-titled "Complaint" in response to these "ridiculous" rumors while writing he was hesitant to do so in "fear of retaliation." By admission, Plaintiff knew (or strongly suspected) that he was going to lose the vote and not be made the permanent Chief of police. Perhaps understandably, he had very strong feelings about this. Faced with what appeared to him to be the inevitable, he filed his "Complaint," either to use as leverage in

[7] Indeed, while asserting that the Borough is viewing Plaintiff's "report" too myopically, Plaintiff is at the same time advancing a type of analysis that forecloses consideration of context.

the upcoming vote, or, if that failed, to initiate this lawsuit and attach the "Complaint" as an exhibit. What does "in consideration of personal benefit" mean if not precisely this?

In all, the well-pled facts in the Complaint establish that Plaintiff's motivations in raising his whistleblower reports were personal in nature. As is this entire drama; he is reporting to the Court "every peccadillo of his fellow employees." *Golaschevsky*, 683 A.2d at 1304. The WBL, and the judicial department, are vehicles to validate serious unlawful government activity, not to harass governmental employers or flood the courts with lawsuits waxing over petty disagreements. *See O'Rourke*, 778 A.2d at 1205 n.12.

B. PLAINTIFF HAS FAILED TO PLEAD FACTS SUFFICENT TO DEMONSTRATE HE REPORTED WRONGDOING OR WASTE.

The next relevant element of a WBL claim requires the putative whistleblower demonstrate palpable allegations of "wrongdoing" or "waste." Wrongdoing is defined as:

> A violation which is not of a merely technical or minimal nature of a Federal or State statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer.

42 P.S. § 1422 (definitions). As reflected, the definition refers to "*a violation*" with no additional modifiers; it does not say "a suspected," or "reasonably believed," or "good faith hunch" violation. Appropriately, Pennsylvania Courts have routinely given it a "narrow" meaning. *Greco v. Myers Coach Lines Inc.,* 199 A.3d 426, 434 (Pa. Super. 2018).

Excluded from this definition are several categories of claims. These include "potential or contemplated" violations, *Greco*, 199 A.3d at 434; "vague or subjectively wrong conduct," *Sukenik v. Twp. of Elizabeth*, 131 A.3d 550, 555 (Pa. Cmwlth. 2016); "well-founded" beliefs, *Kimes v. Univ. of Scranton*, 126 F.Supp. 477, 505 (M.D. Pa. 2015); and "attempt[s]," *Rodriguez v. Sullivan Cty. Victim Servs.,* 2006 U.S. Dist. LEXIS 22143,

at *8 (M.D. Pa. 2006). Under the plain text of the WBL, the dispositive factor with respect to "wrongdoing" is whether "*a violation*" has occurred and has been reported.

Plaintiff appears to suggest the controlling inquiry is not "a violation," but if the putative whistleblower has "'reasonable cause to believe' that wrongdoing would or did take place." (Plaintiff's Brief at 8). The lead case Plaintiff relies on is a decision authored by then-President-Judge Brobson. *See Bjorhus v. Aston Twp.,* 977 C.D. 2020 (Pa. Cmwlth. Ct. Aug. 3, 2021). Admittedly, *Bjorhus* lends some credence to Plaintiff's position. However, it is unpublished, is in tension with most of the reported decisions, and rests on an inappropriate judicial insertion of a phrase into the WBL the General Assembly omitted.

In the paragraph immediately preceding the one Plaintiff block-quotes in his brief, *Bjorhus* quoted a sentence from *Greco*, which stated a putative whistleblower may establish wrongdoing by reporting an action that "*if proven,* would constitute a violation of a law or regulation." *Bjorhus* at *31 (quoting *Greco,* 199 A.3d at 434) (emphasis added). The *Greco* Court pulled the "if proven" *not* from the statute but from its interpretation of judicial decisions. *See Greco*, 199 A.3d at 434 ("From these decisions, we can discern that . . ."). *Bjorhus* then mistakenly stated that "if proven" is an element of the statutory definition of "wrongdoing" itself; just as Plaintiff does here. (*See* Plaintiff's Brief at 9).

Again, the General Assembly did not use the phrase "if proven" in the WBL, either in the definition of wrongdoing or anywhere else in the statute. Inserting this phrase into a statute which does not include it is not only an inappropriate exercise of judicial power, but it undermines the will of the General Assembly. Contrary to Plaintiff's argument, the reports of wrongdoing cannot be entirely theoretical; as noted, there needs to be "*a violation*" of law. "Violation" is the past tense and past participle of violate. It permits no

future-looking hypothetical nor backward-based belief. It requires a patent, and past, demonstration of unlawful activity. This is the majority position in the cases ("an actual violation") and is one reason WBL suits are routinely dismissed at the pleading stage.[8]

Here, Plaintiff makes no real attempt to cite the elements of the statutes he claims were violated. Rather, the thrust of his argument is that his "reasonable belief" that laws were being violated is sufficient. This is wrong; his belief is irrelevant. Moreover, even applying the "if proven" interpretation, Plaintiff's claims still fail, and no amendment can change this. As outlined by Attorney Morris and described at length in Borough's Preliminary Objections, most of the allegations turn on Plaintiff's opinion of the law. These fail because opinions do not matter; again, "a violation" must be proved. Other reports are "attempted" violations of law. These fail because Plaintiff admits they never came to pass. And still others report acts that are "merely technical" in nature. These fail because they do not fall under the definition of "wrongdoing." Thus, even "if proved," and even if "reasonably believed," Plaintiff has not, and cannot, as a matter of law, allege wrongdoing.

First, Plaintiff states he reported violations of the Sunshine Act because the Borough Council conducted official business in private. Although he does not explain what official business was so conducted, he avers that, at each such meeting, three Council members were present. (*See* Complaint at ¶ 23). Seven members sit on the Council. The Sunshine Act mandates official action to take place in public when there is a quorum of Council members. *See* 65 Pa. C.S. § 704 ("Official action and deliberations

[8] Admittedly, this arguably means that a punitive whistleblower must prove, on the merits and in the first instance, they reported a violation of law. Borough appreciates that, in practice, many whistleblower reports may be made by governmental staffers who are not lawyers. Whatever sound policy bases there may be to justify inserting an "if proved" clause, so as to expand the law's coverage, the appropriate way to achieve this lies with the legislature, not the Courts.

by a quorum of the members of an agency shall take place at a meeting open to the public."). According to Plaintiff, none of the gatherings attained a quorum, so this provision of the Sunshine Act did not apply, and this is not a report of a violation of law.

Second, to the extent Plaintiff reported "unjustifiably unfair or retaliatory actions against certain police officers," particularly Officer Dilanni, (see Complaint at ¶¶ 36(b), 48, 49), Plaintiff lacked authority over any personnel matters and had no power over the employment decisions pertaining to Officer Dilanni or any of the other officers. *See* 8 Pa. C.S. § 1121(a)(2)(i-ii). Regardless, Plaintiff avers that he rebuffed all these alleged requests and does not aver that Officer Dilanni was fired or disarmed, either by Plaintiff or the Borough Council. Accordingly, this is not a report of a violation of law.

Third, the claim related to Officer Deliani's doctor's note was not a violation of law because Plaintiff states he never disclosed it. (*See* Complaint at ¶ 15).[9] For the same reason, Plaintiff's allegation that he purportedly reported a violation of 18 Pa. C.S. § 4703 in as much as he was directed to terminate Officer Dilanni because of an investigation into one of the Council member's friends, fails. (*See* Complaint at ¶ 24). This statute provides that "[a] person commits a misdemeanor of the second degree if he harms another by any unlawful act in retaliation for anything lawfully done by the latter in the

[9] Plaintiff did not respond to the fact that neither he nor the Borough are "covered entit[ies]" under HIPPA. *See* 45 C.F.R. § 164.502(a) ("A covered entity or business associate may not use or disclose protected health information."); *id.* at § 164.502(a)(3) ("covered entities" are health plans, health plan clearinghouses, and health care providers"); *Murphy v. Dulay*, 768 F.3d 1360, 1368-69 (11th Cir. 2014) ("Only health care plans, health care clearinghouses, and certain health care providers are 'covered entities.'"). With respect to Plaintiff's newly developed "ADA" claim, this patently fails. The *Downs* case Plaintiff relies on had nothing to do with "overbroad" inquiries into medical history in a way that would have any bearing on the instant case. *Downs* concerned the appropriateness of an employer inquiring, in the *pre-offer* employment context, if the prospective employee "had ever received workers compensation or had ever experienced joint pains" and the downstream viability of a discriminatory discharge claim. *See Downs*, 13 F.Supp. 2d at 138-142.

capacity of public servant." 18 Pa. C.S. § 4703. Because Officer Dilanni was not terminated at that time, either by Plaintiff or the Borough Council, there was no "act" and Officer Dilanni was not "harm[ed]" in a way that would qualify as a criminal offense.

Fourth, Plaintiff's allegation that he reported a violation of 8 Pa.C.S. § 1184, a statute that, as noted, creates a certain procedure for the hiring of Borough employees, is Plaintiff's attempt to bootstrap a statute onto a claim that has little if anything to do with the alleged "wrongdoing" in question; which was to increase the budget to secure more police. In any event, according to Exhibit B, the Borough has a rigorous collective bargaining agreement with the police department that provides substantial and significant protections and benefits. Accordingly, any allegation related to the eligibility list is of a "merely technical or minimal" nature outside the definition of "wrongdoing."

Finally, Plaintiff alleges that statements made at a July 12, 2023 official Council meeting constituted "wrongdoing" because one member "wrongly stated" the Borough lacked the resources to hire another police officer. (*See* Complaint at ¶ 27). It is not obvious what law an allegedly "wrong statement" would violate, nor does Plaintiff indicate as much. The WBL requires a putative whistleblower to designate the law at issue and allege sufficient facts to explain the violation. Because Plaintiff does not point to what law he is saying was violated, this allegation cannot by law amount to "wrongdoing."

Plaintiff's attempt to establish he reported "waste" fares no better. Waste is defined 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." 42 P.S. § 1422. Plaintiff alleges the Borough committed "waste," by failing to staff the police department and failing to maintain an eligibility list.

(*See* Complaint at ¶ 54). This resulted, Plaintiff claims, "in the Borough paying needless additional wages to officers working excessive overtime instead of hiring additional officers who could have worked those excessive overtime hours." (*Id*).

Apart from this conclusory allegation, Plaintiff does not elaborate about how the Borough Council's decision to pay overtime instead of hiring additional officers constituted "substantial abuse, misuse, destruction, or loss of funds" as contemplated by the statute. He does not, for example, compare the amount that may have been spent on overtime versus what would have been spent on hiring new officers in a way that could qualify as "substantial." 42 P.S. § 1422; *contra Bailets*, 123 A.3d at 310. The dispute is one of allocation, not "waste" within the statutory definition.

In all, Plaintiff reported no actual violation of law or regulation or any waste and, as such, sets forth no qualifying WBL reports. His assertion, moreover, that he "reasonably believed" he reported such violations is of no moment because the WBL requires the punitive whistleblower report "a violation." As the law says, with certainty, that Plaintiff cannot show he reported wrongdoing or waste, amendment would be futile.

C. PLAINTIFF HAS FAILED TO STATE A CLAIM BY FAILING TO PLEAD FACTS SUFFICENT TO DEMONSTRATE THAT THE BOROUGH DID NOT APPOINT HIM PERMANENT CHIEF OF POLICE BECAUSE HE MADE ALLEGATIONS OF WRONGDOING OR WASTE.

Even if this Court were to find that Plaintiff made his reports in good faith and reported instances of wrongdoing or waste, Plaintiff's Complaint still must be dismissed with prejudice. Fatally, neither in his Complaint nor Brief does he offer any facts tending to prove an essential element of every WBL: that the "reports" caused the retaliation. *See Gray,* 651 A.2d 221 (Pa. Commw. 1994) (employee "must show by concrete facts or surrounding circumstances that the report of the wrongdoing led to the dismissal, such as

that there was specific direction or information received not to file the report or that there would be adverse consequences because the report was filed"). In fact, Plaintiff pleads facts that establish the contrary is true.

Causation is important in WBL claims for two reasons. First, if a government employee makes a formal or informal report about actual misconduct, but the employer takes corrective action without at the same time retaliating against the employee, there is no WBL claim. That is how government should work, in theory. But as government is not administered by angels[10]—if there is governmental misconduct, and the government tries to cover it up, in this context by taking retaliatory action against the whistleblower, the employee has a viable WBL claim. The instant Complaint not only fails to show any actual governmental misconduct, as explained above, but even if it did, it is woefully insufficient in linking the reports, in a casual way, to the "retaliatory" reaction. As discussed below, based on the timeline of events here, it is impossible for Plaintiff to show causation.

The second, and perhaps more significant reason, is tied to the burden-shifting regime in the law. *See* 42 P.S. § 1424(c) ("It shall be a defense to an action under this section if the defendant proves by a preponderance of the evidence that the action by the employer occurred for separate and legitimate reasons, which are not merely pretextual."). It is not possible for Borough to adequately ready a defense without knowing what facts the Plaintiff intends to rely upon to show the basis for the adverse employment action. Plaintiffs cannot plead conclusory allegations just to get to expensive and burdensome discovery and slow-walk their theory. Similarly, to require defendants in WBL actions to essentially "go first" with respect to causation and explain to the Court

[10] *See* Federalist Papers, No. 51 ("If angels were to govern men, neither external nor internal controls on government would be necessary.").

why the adverse employment was taken, as Plaintiff appears to be asking the Court to do here, would improperly accelerate the analytical framework of a burden-shifting regime.

As noted in Borough's preliminary objections, the Complaint contains a total of one averment related to causation, and it is altogether conclusory: "Borough violated the [WBL] by terminating [Plaintiff] in retaliation for his whistleblower complaints." (Complaint at ¶ 58). Even if the Brief could be treated as an effective amendment to the Complaint, Plaintiff still offers no facts in the way of showing that his reports caused the Borough not to vote to make him permanent Chief of Police; he merely pads paragraph 58 with a couple commas. (*See* Plaintiff's Brief at 11) ("Martin has plead [sic] he made repeated complaints over nearly his entire employment tenure that Borough was engaging in wrongdoing or waste, Borough officials told him that they could fire him, and Borough did fire him, two days before his probationary period was complete.")).

Borough is not asking Plaintiff "prove his case," only, as every Plaintiff must do, that he set forth facts to support every element upon which he intends to prove his case. He does not seriously attempt to detail why he thinks he was terminated *because* of his "reports" and not because of the many personal conflicts he goes to great lengths to tell the Court about. (*See e.g.,* Complaint ¶¶ 30, 31, 40, 41; Exhibit 2; Exhibit B). He pleads, in short, not even an "innuendo of any nexus" between the making of these reports and the Borough's decision not to make him permanent Chief. *Lutz* 667 A.2d at 254. Moreover, Plaintiff was terminated nearly two months after submitting his "complaint." In addition, as noted in Exhibit 2 (Officer Brenton's resignation letter), there were "rumors" swirling mere weeks into his appointment as interim Chief that the Council did not intend

to make him permanent Chief. This timeline forecloses any establishment of a causal link, unless, again, Plaintiff diametrically alters the facts he has already pled.

D. PLAINTIFF HAS FAILED TO PLEAD FACTS SUFFICENT TO MEET THE STRINGENT AND LIMITED PUBLIC POLICY EXCEPTION APPLICABLE TO AT-WILL EMPLOYEES.

Finally, to the extent Plaintiff asserts that being directed to "terminate Officer Dilanni and remove his firearm" satisfies the stringent public policy exception that applies to at-will employees, these laws were not violated as Plaintiff concedes. Additionally, he does not explain in any way how these are related to the Borough's decision not to appoint him permanent Chief. Moreover, and again even treating his Brief as an effective amendment to the Complaint, Plaintiff's new argument that he was terminated because he alleged a violation of the WBL fails because, as discussed at length above, Plaintiff has not successfully pleaded a violation of the WBL. Plaintiff's claim for wrongful termination due to public policy must, therefore, also be dismissed with prejudice.

V. CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiff's Complaint in its entirety and with prejudice.

Respectfully submitted,

MARGOLIS EDELSTEIN

Date: May 21, 2024 By: _____

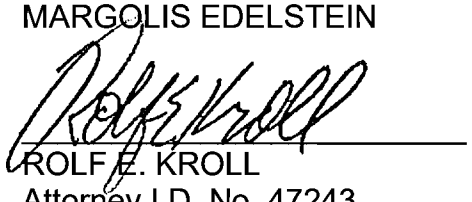
ROLF E. KROLL, ESQUIRE
Pa. Supreme Court I.D. No. 47243
MICHAEL A. PIPA, ESQUIRE
Pa. Supreme Court I.D. No. 331491
214 Senate Avenue, Suite 402
Camp Hill, PA 17011
Phone: (717) 760-7502 / (717) 915-3410
E-mail: rkroll@margolisedelstein.com
mpipa@margolisedelstein.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

MARGOLIS EDELSTEIN

Date: May 21, 2024

By: 

ROLF E. KROLL
Attorney I.D. No. 47243
214 Senate Avenue, Suite 402
Camp Hill, PA 17011
PHONE: (717) 760-7502
FAX: (717) 975-8124
EMAIL: rkroll@margolisedelstein.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the foregoing on all counsel of record by ECF, on this 21st day of May, 2024, and addressed as follows:

Scott M. Pollins
Pollins Law
303 W. Lancaster Avenue, Suite 1C
Wayne, PA 19087
Counsel for Plaintiff

MARGOLIS EDELSTEIN

By: Jill D. Hamme
Jill D. Hamme, Legal Assistant to
Rolf E. Kroll, Esquire

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PA	
MICHAEL MARTIN, Plaintiff v. TULLYTOWN BOROUGH, Defendant	DOCKET NO. 2024-00693 CIVIL ACTION - LAW JURY TRIAL DEMANDED
ORDER	

AND NOW, this _____ day of _____, 2024, upon consideration of Defendant's Preliminary Objections to Plaintiff's Complaint, IT IS HEREBY ORDERED AND DECREED that Plaintiff's Complaint is DISMISSED, with prejudice.

BY THE COURT:

_____

J.

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PA	
MICHAEL MARTIN, Plaintiff v. TULLYTOWN BOROUGH, Defendant	DOCKET NO. 2024-00693 CIVIL ACTION - LAW JURY TRIAL DEMANDED
PRAECIPE UNDER BUCKS COUNTY RULE OF CIVIL PROCEDURE 208.3(b)	

TO THE PROTHONOTARY:

Please refer the above-captioned matter to the assigned judge for disposition.

Oral argument is requested.

Matter for Disposition:

Preliminary Objections filed by Defendant, Tullytown Borough to Plaintiff's Complaint.

Date: May 21, 2024

By: _____

ROLF E. KROLL, ESQUIRE
Pa. Supreme Court I.D. No. 47243

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

MARGOLIS EDELSTEIN

Date: May 21, 2024

By: _____

ROLF E. KROLL
Attorney I.D. No. 47243
214 Senate Avenue, Suite 402
Camp Hill, PA 17011
PHONE: (717) 760-7502
FAX: (717) 975-8124
EMAIL: rkroll@margolisedelstein.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the foregoing on all counsel of record by ECF, on this 21st day of May, 2024, and addressed as follows:

Scott M. Pollins
Pollins Law
303 W. Lancaster Avenue, Suite 1C
Wayne, PA 19087
Counsel for Plaintiff

MARGOLIS EDELSTEIN

By: Jill D. Hamme

Jill D. Hamme, Legal Assistant to
Rolf E. Kroll, Esquire