IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIVIL DIVISION

NEAL CUEVAS,

Plaintiff,

v.

CITY OF NORTH MIAMI,

Defendant.
_____/

CASE NO.: 2018-011899-CA-01

CITY'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendant, City of North Miami ("City"), hereby moves to dismiss the Amended Complaint filed by Plaintiff, Neal Cuevas. In support of its Motion, the City states as follows:

INTRODUCTION

In his Amended Complaint, Cuevas alleges that the City violated the Florida Whistle-blower's Act, Section 112.3187, Florida Statutes ("Whistle-blower's Act"), when it demoted him from the position of Assistant Police Chief to the position of Sergeant. In particular, Cuevas claims that he was demoted in retaliation for issuing a memorandum dated June 2, 2017 in which he communicated his disagreement with the conclusion of a City Internal Affairs Disposition Panel finding that sufficient evidence existed to terminate another employee—Emile Hollant—in the wake of a police-involved shooting.

On June 29, 2018, the Court granted the City's motion to dismiss Cuevas' initial Complaint because Cuevas failed to: (1) identify any statutorily protected expression in his June 2, 2017 memorandum that could give rise to a claim under the Act; and (2) allege a causal connection between his alleged statutorily protected expression (his June 2, 2017 memorandum) and his

subsequent demotion. In particular, Cuevas' claim failed (and continues to fail) because Cuevas' June 2, 2017 memorandum does not contain an allegation that the City violated any law, rule, or regulation. Moreover, even if Cuevas could demonstrate that he engaged in a statutorily protected activity (which he cannot), his claim still fails because his demotion occurred nine months after any such alleged activity and, therefore, there is no causal connection between the two acts. As such, the Amended Complaint must be dismissed.[1]

I. Standard of Review

"Whether a complaint is sufficient to state a cause of action is an issue of law" to be addressed on a motion to dismiss. *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001) (affirming dismissal with prejudice where facts alleged in complaint could not constitute a legally actionable claim); *see also Extraordinary Title Servs., LLC v. Fla. Power & Light Co.*, 1 So.3d 400, 402 (Fla. 3d DCA 2009) (quoting *Susan Fixel, Inc. v. Rosenthal & Rosenthal Inc.*, 842 So.2d 204, 206 (Fla. 3d DCA 2003)). "The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal." *Sobi v. Fairfield Resorts, Inc.*, 846 So. 2d 1204, 1206 (Fla. 5th DCA 2003) (quoting *Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022 (Fla. 4th DCA 1996)).

"In Florida, every cause of action, whether derived from statute or common law, is comprised of necessary elements which must be proven for the plaintiff to prevail. *Barrett v. City of Margate*, 743 So.2d 1160, 1162 (Fla. 4th DCA 1999). "The complaint must set out the elements

[1] During oral argument on the City's previous motion to dismiss, the City urged the Court to dismiss Cuevas' claim with prejudice because Cuevas' June 2, 2017 memorandum did not allege a statutorily protected expression as a matter of law. Cuevas' counsel argued that the Court should not consider his memorandum because it was not attached to the initial Complaint as an exhibit. Cuevas' Amended Complaint now attaches the memorandum as an exhibit and the Amended Complaint should accordingly be dismissed with prejudice.

and the facts that support them so that the court and the defendant can clearly determine what is being alleged." *Id.* (citation omitted; emphasis added). "The complaint, whether filed by an attorney or pro se litigant, must set forth factual assertions that can be supported by evidence which gives rise to legal liability." *Id.* at 1162-63. "It is insufficient to plead opinions, theories, legal conclusions or argument." *Id.* at 1163. *See, also, see also Doyle v. Flex*, 210 So. 2d 493 (Fla. 4th DCA 1968) (mere legal conclusions are insufficient to state cause of action unless substantiated by allegations of ultimate fact).

II. Cuevas Fails to State a Claim Under the Whistle-blower's Act Because he Does Not Allege a Protected Disclosure or a Causal Connection Between his Disclosure and his Demotion.

To state a claim under the Whistle-blower's Act, a plaintiff must allege that: "(1) she engaged in **statutorily protected** expression, (2) she suffered a materially adverse action of a type that would dissuade a reasonable employee from engaging in statutorily protected activity, and (3) there was some causal relation between the events." *Rutledge v. SunTrust Bank*, 262 Fed. Appx. 956, 958 (11th Cir. 2008) (citations omitted; emphasis added). Here, Cuevas' Whistle-blower's Act claim should be dismissed because: (A) Cuevas' memorandum does not contain any disclosures protected by the Whistle-blower's Act; and (B) he fails to allege any facts indicating a causal connection between his unprotected disclosure and his demotion nine months later.

A. Cuevas' Memo Is Not A Statutorily Protected Expression.

The Whistle-blower's Act protects disclosures regarding:

> (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 any agency or independent contractor.

Fla. Stat. §112.3187(5). Cuevas' Whistle-blower's Act claim must be dismissed because the June 2, 2017 memorandum in which he purports to blow the whistle obviously does not contain a protected disclosure.

Cuevas' Amended Complaint references the following statements from his June 2, 2017 memorandum:

> The Disposition Panel [that recommended termination of Hollant's employment] did not prove any preponderance of evidence [sic] to support its findings. In fact, its findings are replete with misinformation, half-truths and blatant inconsistencies.
>
> Based on a thorough review of this file, I cannot endorse the findings of the panel. The allegation of "Obstruction of a Law Enforcement Investigation by way of False Statements" made against Commander Hollant is unequivocally NOT sustainable.
>
> It is glaringly obvious that the NMPD Internal Affairs Disposition Panel has inexplicably ignored the findings of the State Attorney's Office in order to back up the erroneous assumptions of those unnamed North Miami police investigators who were intent on proving that Commander Hollant was responsible for the shooting and that he lied about his involvement. And that:
>
> That the panel found the allegations against Commander Hollant sustainable is an unmitigated miscarriage of justice.

Amended Complaint, ¶¶ 25-27.[2] Cuevas' Amended Complaint attempts to avoid a second dismissal by mischaracterizing these statements from his June 2, 2017 memorandum as "blowing the whistle" on illegal conduct.

Cuevas' memo obviously does not identify any allegedly illegal conduct, which requires

[2] Cuevas also vaguely alleges that he "refused to participate" in unspecified "corruption within the Police Department." Amended Complaint, ¶ 19. However, Cuevas does not offer any specific factual allegations about such activity except for his June 2, 2017 memorandum. To the extent Cuevas might seek Whistle-blower's Act protection based on something other than his June 2, 2017 memorandum, Cuevas must plead factual allegations supporting that claim.

an allegation of some specific violation of law. As is readily apparent, Cuevas' statements above are simply his opinions about the City's investigation of Hollant and proposed discipline. It is no violation of law for the City or it agents to weigh evidence and reach a conclusion in an investigation. There is no requirement that the panel or the City accept the findings of any outside agency. The City is entitled to conduct its own investigation and reach its own conclusions, which is exactly what Cuevas alleged it did. Cuevas disagrees with the conclusions, but that blows no whistle on illegal conduct.

Moreover, the conduct Cuevas identifies as somehow supporting his claim does not do so. Specifically, Cuevas claims that he "blew the whistle" on "the wrongful framing of a senior police officer" (¶ 28); a "miscarriage of justice" (¶ 29); and the "cherry picking [of] evidence" (¶ 30). However, Cuevas' memorandum does not raise any of the purportedly illegal conduct he alleges in the Amended Complaint. Nowhere in his memorandum (or elsewhere) does Cuevas accuse any witness of perjury as the Amended Complaint asserts. "Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control and may be the basis for a motion to dismiss." *Blue Supply Corp. v. Novos Electro Mech., Inc.*, 990 So. 2d 1157, 1159 (Fla. 3d DCA 2008) (citing *Harry Pepper & Assocs., Inc. v. Lasseter*, 247 So.2d 736, 736 (Fla. 3d DCA 1971) (additional citations omitted)).

Simply put, Cuevas' memo does not allege that the City or its Disposition Panel violated any "federal, state, or local law, rule, or regulation," and it certainly does not implicate a "substantial and specific danger to the public's health, safety, or welfare." *Id.* Neither does Cuevas' memo assert that the Disposition Panel's conclusion constituted "gross mismanagement," which is defined by the Whistleblower's Act as "a continuous pattern of managerial abuses, wrongful or arbitrary and capricious actions, or fraudulent or criminal conduct which may have a