

19<sup>TH</sup> JUDICIAL DISTRICT COURT  
PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

NUMBER 665,201 DIVISION "23"

CATHY DERBONNE

VERSUS

STATE POLICE COMMISSION

\*\*\*\*\*  
MEMORANDUM IN OPPOSITION TO DEFENDANT'S EXCEPTION  
OF NO CAUSE OF ACTION

MAY IT PLEASE THE COURT:

Following the hearing, Plaintiff filed her Supplemental, Amending, and Restated Petition, setting forth additional allegations which demonstrate she reported violations of law by her employer, defendant, curing any defect in the original Petition. Defendant's now second No Cause of Action Exception only challenges Plaintiff's alleged protected activity of violations of law by defendant. Defendant does not challenge the other elements of Plaintiff's claim, including that she suffered reprisal. As a result, Plaintiff addresses only defendant's lone argument that Plaintiff did not engage in protected activity.

**I. FACTS**

The State Police Commission serves as the "civil service" for all regularly commissioned full-time law enforcement officers employed by the Department of Public Safety and Corrections, office of state police, or its successor, who are graduates of the state police training academy course of instruction and are vested with full state police powers, as provided by law, and persons in training to become such officers.<sup>1</sup> In that regard, the State Police Commission is responsible for ensuring the Louisiana State Police abides by all applicable pay plans, disciplinary rules and regulations, and applicable law. Specifically, pursuant to the Louisiana Constitution Article X, Part IV, §46, §48, and §50, the State Police Commission is charged with the obligation to make rules, investigate, issue charges, subpoena witnesses and/or documents, conduct and decide appeals/hearings where violations of the Louisiana Constitution and State Police Commission Rules occur by its members and "civil servants". State Police Commission Rule 2.9 mandates that the Commission "enforce its rules and regulations." Hence, the Commission is required to ensure the Louisiana State Police and its members abide by all applicable pay plans, discipline rules and

---

<sup>1</sup> Para. ¶ 2.

regulations, and applicable laws. To do so, State Police Commission Rule 2.4 and 2.9 charges the Commission with the mandatory duties to investigate allegations of misconduct, hold hearings, and render orders when violations of its Rules occur. The State Police Commission's failure to do so violates the Louisiana Constitution, its own Rules, and the law.

State Police Commission members must follow La. Const. Article X §42 and §45, and State Police Commission Rules 8.1-8.11, which prohibit the creation and filling of classified positions of state police officers where the State Police Commission did not act and where the Executive Director does not make an appointment and engage in the "competitive process".<sup>2</sup> Additionally, pursuant to La. Const. Article X §48, the State Police Commission must approve all pay raises to State Police officers.

On December 18, 2015, Plaintiff was notified that active classified members of the Louisiana State Police, through the Louisiana State Troopers Association (LSTA) were making political contributions and engaging in "political activities" and, further, that members of the State Police Commission were making political contributions while sitting as active members and officers of the State Police Commission.<sup>3</sup> Pursuant to La. Const. Art. X, §47, "[N]o member of the commission and no state police officer in the classified service shall participate or engage in political activity; . . . make or solicit contributions for any political party, faction, candidate, or any political campaign. . . ." "[N]o person shall solicit contributions for political purposes from any classified state police officer or use or attempt to use his position to punish or coerce the political action of a classified state police officer." Pursuant to §47C, "political activity" "means an effort to support or oppose the election of a candidate for political office or to support a particular political party in an election."

In addition to the prohibitions contained in the Louisiana Constitution, State Police Commission Rule 14.2 prohibits all members of the State Police Commission and classified members of the State Police Service from the following: "1. Participate or engage in political activity, including, but not limited to, any effort to support or oppose the election of a candidate for political office or support or oppose a particular party in an election . . . 4. Make or solicit contributions for any political purpose, party, faction or candidate; . . . 6. Take active part in the management of the affairs of a political party, faction, candidate, or any political campaign. . . 8.

---

<sup>2</sup> Para. ¶ 3a.

<sup>3</sup> Para. ¶ 4.

Directly or indirectly, pay or promise to pay any assessment, subscription, or contribution for any political party, faction, or candidate, nor solicit or take part in soliciting any such assessment, subscription or contribution, and no person shall solicit any such assessment, subscription or contribution of any classified employee in the State Police Service".<sup>4</sup>

Upon receipt of that information in December, 2015, Plaintiff began an investigation of the prohibited political activities of current, active and classified members of the State Police Service and brought the matters to the attention of the State Police Commission.<sup>5</sup> As a result, it was determined that numerous State Police Commission members, including then-Commissioner Kyle, Member Goldring, and Member Pitcher, engaged in political campaign violations, pursuant to La. Const. Art. X, §47 and State Police Commission Rule 14.2. While Plaintiff reported the members' violations of law to the State Police Commission, the Commission deliberately failed to take any action against the members as required by law and as a result of the Commission acted in derogation of the law.

Contrary to the Commission's obligations under the law, on January 13, 2016, then State Police Commission Chairman sent an email to Plaintiff ordering that she was not to take any steps regarding political activities of the LSTA and, further, that the State Police Commission has no jurisdiction over the LSTA – only its classified employees/members.<sup>6</sup> On January 14, 2016, Plaintiff was advised that since 2003, LSTA Executive Director David Young made approximately \$45,000 of political campaign contributions which were reimbursed by the LSTA from dues collected by LSTA from its members, including current, active members of the State Police classified service in violation of the Louisiana Constitution and State Police Commission Rules. She was also made aware of a classified State Police trooper facilitating a vote to each Troop Station endorsing a particular gubernatorial candidate, in violation the law. Although these members violated the applicable State Police Commission Rule 14.2, the Commission took no action against them even though the Commission was obligated to do so under the law.

On February 27, 2016, Plaintiff contacted the Director of Louisiana State Civil Service Commission regarding the prohibited political activities, who confirmed Plaintiff's understanding that any such political activities violated Louisiana law, La. Const. Art. X, §47 and State Police Commission Rule 14.2.<sup>7</sup>

---

<sup>4</sup> Para. ¶ 5.

<sup>5</sup> Para. ¶ 6.

<sup>6</sup> Para. ¶ 6a.

<sup>7</sup> Para. ¶ 7.

On March 4, 2016, written charges were filed with the State Police Commission against the Commission members who violated the law, which were supported by printouts from the Board of Ethics' Computerized Data Management System.<sup>8</sup> On March 7, 2016, Plaintiff reported the improper political activities to the Louisiana Board of Ethics.

On March 8, 2016, and March 9, 2016, Plaintiff met with the State Police Commission to report her findings that three (3) State Police Commission members had made improper campaign contributions.<sup>9</sup> She presented her report, campaign finance records reflecting the violations, and disclosed that she had reported the matter to the Louisiana Board of Ethics for further investigation. Yet, the State Police Commission refused to take action as it is mandated to do by law. Instead, Plaintiff was directed by Chairman Kyle to cancel the next Commission meeting on March 10, 2016, so the matter would not be publicized at a public venue. Plaintiff opposed that Order, to no avail.

In spite of Plaintiff's reports and protests, that the Commission and its members violating Louisiana law, she was specifically barred by the State Police Commission to take further action against the members or the Commission and ordered to cease any further opposition or reports.<sup>10</sup>

On April 14, 2016, Plaintiff listed the matter of prohibited political activities on the State Police Commission Agenda as an item to investigate and address. However, the Commission refused to meet and refused to act.<sup>11</sup>

In the interim, Plaintiff met with the Governor's counsel on March 28, 2016, who advised her that the State Police Commission members and its Chairman, who violated the law, would be given the opportunity to resign rather than be subject to disciplinary action.<sup>12</sup> When Plaintiff contacted the then Chairman regarding the Governor's counsel's statements, he stated he will not resign and that the Governor will have to remove him.

On April 15, 2016, Plaintiff created a letter to each president of the appointing universities, notifying them of the three (3) vacancies on the State Police Commission.<sup>13</sup> She was instructed to destroy the letter and instead, the members and Chairman of the State Police Commission were replaced by appointment of three (3) new members who were selected by the Governor in violation

---

<sup>8</sup> Para. ¶ 7a.

<sup>9</sup> Para. ¶ 7b.

<sup>10</sup> Para. ¶ 9a.

<sup>11</sup> Para. ¶ 10.

<sup>12</sup> Para. ¶ 11.

<sup>13</sup> Para. ¶ 12a.



of La. Const. Art. X, §43. Plaintiff protested the appointments as in violation of Louisiana law. Again, the State Police Commission failed to take any action against these violations.

On February 29, 2016, an email was disseminated announcing the appointment of Major Jason Starnes as Interim Undersecretary for Office of Management & Finance, replacing Jill Boudreaux who, although she had resigned, remained on payroll through April 11, 2016, as an "active employee."<sup>14</sup> Upon receipt of the email from then Colonel Mike Edmonson, Plaintiff advised Edmonson that Starnes could not remain in the Undersecretary position which was in violation of State Police Commission Rule 14.3 which prohibits the appointment, promotion, transfer, or in any way employment of any classified member of the State Police to any position which is not within the State Police Service. The Undersecretary position for the Office of Management & Finance is within Public Safety Services and not within State Police Service. On March 6, 2016, Plaintiff protested the purported appointment of Starnes to the Interim Undersecretary position to Lt. Col Charlie Dupuy, Deputy Superintendent and to Starnes himself as being in violation of law. Thereafter, on May 11, 2016, a formal complaint regarding Starnes' appointment was filed with the State Police Commission and which was docketed by Plaintiff. The Commission's May 11, 2016, meeting lacked a quorum. On May 27, 2016, then Colonel Edmonson contacted Plaintiff regarding the complaint and, in the process, disparaged the complainant.

On or around the August 11, 2016, time frame, Plaintiff was advised that Edmonson and at least four (4) of his top Deputies had received pay increases as much as 32% without authorization and in violation of law, namely La. Const. Article X §48.<sup>15</sup> On October 12, 2016, Plaintiff notified the State Police and State Police Commission, including Chairman Doss that the Commission had not received the proper approval by the Governor to implement the newly proposed pay plan, pursuant to La. Const. Article X, Part IV, §48.<sup>16</sup> Chairman Doss ignored her complaints refused to act which is in derogation of Louisiana law. During a November 10, 2016, Commission meeting, Plaintiff was specifically asked about these pay increases where she advised they must be properly approved, otherwise, they were unlawful.<sup>17</sup>

---

<sup>14</sup> Para. ¶ 13.

<sup>15</sup> See Para. ¶ 19.

<sup>16</sup> See Para. ¶ 20a.

<sup>17</sup> See Para. ¶ 21a.

As a result of Plaintiff's protected activities regarding the same, defendant took reprisal against her by harassing her and her constructive discharge.<sup>18</sup>

## II. LAW AND ARGUMENT

### A. Legal Standard

La. C.C.P. Art. 931 provides that "[N]o evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action." The Exception of No Cause of Action is triable on the face of the pleadings. In analyzing this exception, all well-pleaded facts in the Petition must be accepted as true.<sup>19</sup> The exception should be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim that would entitle him to relief. Further, every reasonable interpretation must be accorded to the language used in the Petition in favor of sustaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at trial.<sup>20</sup> Any doubts are resolved in favor of the sufficiency of the petition.<sup>21</sup>

What an Exception of No Cause of Action does not do is make credibility decisions, weigh evidence, or substitute for trial. Further, it is not a vehicle by which parties may use to circumvent limitations on evidence or possible defenses. Yet, that is precisely what defendant does here, improperly raising discretionary immunity under La. R.S. 9:2798.1. **This is an affirmative defense which defendant has not yet plead. Further, it bears the significant burden of proving, which it fails.**<sup>22</sup>

**Importantly, if the petition states a cause of action as to any ground or portion of the demand, the exception of no cause of action generally should be overruled.**<sup>23</sup> (Emphasis added) The purpose of this general rule is to prevent a multiplicity of appeals which forces an appellate court to consider the merits of the action in a piecemeal fashion.<sup>24</sup> Furthermore, the law applicable to sustaining an exception of no cause of action mandates that when the grounds for the

<sup>18</sup> Paras. ¶¶ 15-28.

<sup>19</sup> *La. PSC v. La. State Legislature*, 12-0353 (La. App. 1st Cir. 4/26/13), 117 So.3d 532, 537.

<sup>20</sup> *Badeaux v. Southwest Computer Bureau, Inc.*, 05-0612 (La. 3/17/06), 929 So.2d 1211, 1217.

<sup>21</sup> *Winkler v. Coastal Towing, L.L.C.*, 01-0399 (La. App. 1st Cir. 4/11/02), 823 So. 2d 351, 355.

<sup>22</sup> *Dennis v. Wiley*, No. 2009 CA 0236 (La. App. 1 Cir. 11/11/09), 22 So.3d 189, 194; *Sauceberry v. Webre*, 2017 La. App. Unpub. LEXIS 147 \*1, \*11 (La. App. 1 Cir. 5/5/17); *Hines v. Garrett*, 04-806 (La. 6/25/04), 876 So.2d 764 (holding the burden of proof of an affirmative defense lies with the proponent).

<sup>23</sup> *Spiers v. Davidson*, 233 La. 239, 96 So. 2d 502 (La. 1957); *Harwood Oil & Mining Co. v. Black*, 240 La. 641, 124 So. 2d 764 (La. 1960); *Matte v. Continental Trailways, Inc.*, 278 So. 2d 60 (La. 1973); *Hero Lands Co. v. Texaco, Inc.*, 310 So. 2d 93 (La. 1975); *Rodriguez v. American Bankers Insurance Co. of Florida*, 386 So. 2d 652 (La. 1980); *Leenerts Farms, Inc. v. Rogers*, 421 So. 2d 216 (La. 1982).

<sup>24</sup> *Rodriguez v. American Bankers Insurance Co. of Florida*, 386 So. 2d 652 (La. 1980).

objection pled by peremptory exception can be cured by an amendment to the petition, the judgment sustaining the exception shall order the amendment.<sup>25</sup>

**B. Plaintiff's "Employer" Under La. R.S. 23:967**

**Louisiana's anti-reprisal statute is a general statute with the broadest application in the Country.**<sup>26</sup> La. R.S. 23:967 provides, in pertinent part:

- A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:
- (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
  - (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.
  - (3) Objects to or refuses to participate in an employment act or practice that is in violation of law.

Hence, the definition of "employer" is given the broadest application. This principle is important because as she alleged in Paragraphs 1-2, Plaintiff's "employer" is the State of Louisiana, which includes the Governor, as head of the Executive Branch of which the State Police Commission is a part, the Civil Service Commission, the Legislature, and the State Police Commission, through its Board Members.

The State Police Commission is part of the Executive Branch and was created by La. Const. Art. X, Part IV, §43. Art. X pertains to Public Officials and Employees and Part 4 thereof specifically to the State Police Commission. The State Police Commission, however, is not an entity wholly separate from the State of Louisiana. Rather, the State Police Commission is simply an agency, board, or commission which is part of and comprises the State of Louisiana. As set out at La. R.S. 36:7, the State Police Commission is defined as an agency of the Executive Branch:

- A. As used in this Section, 'board' includes each board, commission, committee, council, or other multi-member entity within the executive branch of the state government which is established by the constitution or laws of this state or by executive order and on which any of the membership is appointed.

As part of the State in the Executive Branch and as set forth at La. Const. Art. X, §51, the State Police Commission is funded solely by adequate annual appropriations by the Legislature. As established by La. R.S. 36:53(H), the State Police Commission is under the Department of Civil Service within the Executive Branch, providing:

The State Police Service (Article X, Sections 41 through 51 of the 1974 Louisiana Constitution) is placed within the Department of State Civil Service and shall

<sup>25</sup> La. Code Civ. Proc. Ann. art. 934; *Espree v. Tobacco Plus, Inc.*, 772 So. 2d 389 (La. Ct. App. 2000).

<sup>26</sup> See *Schroeder v. Greater New Orleans Fed. Credit Union*, 664 F.3d 1016, 1026 (5th Cir. 12/19/11); *Escousse v. State Farm Mutual Auto. Ins. Co.*, 2000 U.S. Dist. LEXIS 18404 \*1, \*6 (M.D.L.A. 7/10/00).



exercise and perform its powers, duties, functions, and responsibilities in the manner provided for agencies transferred in accordance with R.S. 36:801.1.<sup>27</sup>

Further, the State, or even its ancillary, the State Police Commission, can only act through its employees, agents, assigns.<sup>28</sup> La. Const. Art. IV, §1 specifically provides the executive branch of the State of Louisiana consists of "all other executive offices, agencies, and instrumentalities of the state." Hence, it is disingenuous to suggest, for a second time, that Plaintiff's protected activities made to the Governor, as head of the Executive Branch of which the State Police Commission is a part, to the Civil Service Commission, the Legislature, and to the Commission itself at various meetings, by emails, and direct communications do not qualify as reports, oppositions, or complaints to her employer, the State of Louisiana. They do.<sup>29</sup>

### C. No Discretionary Immunity

Plaintiff reported, opposed, and complained about violations of law which fall outside the ambit of discretionary immunity. La. R.S. 9:2798.1 provides, in pertinent part:

B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their **policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.**

(emphasis added)

Here, defendant fails to prove this affirmative defense.

Discretionary immunity has been limited to only at the "**policy making or ministerial level, not at the operational level.**"<sup>30</sup> (emphasis added). It does not apply here where the law itself is mandatory and affords no discretion. In *Gregor v. Argenot Great Cent. Ins. Co.*, No. 02-C-1139 (La. 5/20/03), 851 So.2d 959, 964, the plaintiffs filed a wrongful death suit against defendant DHH as a result of the decedent who died eating raw oysters. The defendant alleged it was entitled to discretionary immunity under La. R.S. 9:2798.1. However, at trial this argument was rejected and the trial court held DHH negligently enforced the Sanitary Code. Defendant

<sup>27</sup> See also La. R.S. 36:801.1 regulating the transfer of the State Police Commission and other boards, commissions, and agencies within the Executive Branch.

<sup>28</sup> La. R.S. 42:1 defines "public office" as: "means any state . . . office, elective or appointive, or any position as member on a board or commission, elective or appointive, when the office or position is established by the constitution or laws of this state." "Public officer" is any person holding a public office in this state.

<sup>29</sup> See: *Painter v. State, through Office of the Governor*, 2012-1676 (La. 12/14/12); 104 So.3d 450 remanding for full opinion, proceeding at *Painter v. State, through Office of the Governor*, 2012 CW 224R (La. App. 1<sup>st</sup> Cir. 6/13/13), 2013 La. App. Unpub. LEXIS 401. Painter was the Commissioner/Executive Director of the Alcohol Tobacco Control Commission. He sued the State, through Office of the Governor [Executive Branch], as his "employer" for the purposes of his claims under La. R.S. 23:967 as although he was directly affiliated with ATC, ATC is a part of the State and an Agency, Board, or Commission of the State. Notably, in *Painter*, his claims were rejected not on the basis that his protests to the Governor and Governor's office were not protected, but, rather, because Painter did not actually issue the license to SMG for Champion's Square, then he did not demonstrate a violation of law. 2013 La. App. Unpub. LEXIS 401, at \*23-\*26

<sup>30</sup> *Gregor v. Argenot Great Cent. Ins. Co.*, No. 02-C-1139 (La. 5/20/03), 851 So.2d 959, 964.



appealed. Thus, the issue before the Louisiana Supreme Court was the definition of “policy” and “discretion” under the statute. *Gregor* applied the principles of statutory interpretation/construction in interpreting La. R.S. 9:2798.1, and defined “policy” and “discretionary” according to their plain meanings holding:

BLACK’S at 1041 defines ‘public policy’ as follows:

That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. The principles under which the freedom of contract or private dealings is restricted by law for the good of the community. The term “policy”, as applied to a statute, regulation, rule of law, course of action, or the like, refers to its probable effect, tendency, or object, considered with reference to the social or political well-being of the state.

In MIRRIAM-WEBSTER’S at 901 the word ‘policy’ is defined as ‘a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.’ MIRRIAM-WEBSTER’S at 703 defines ‘making’ as ‘the act or process of forming, causing, doing, or coming into being.’ Thus, ‘policymaking’ in the public sector means the planning of a course of action for the social or political well-being of the state.

BLACK’S at 419 defines the word ‘discretion’ as follows:

When applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. As applied to public officers means power to act in an official capacity in a manner which appears to be just and proper under the circumstances.

In MIRRIAM-WEBSTER’S at 332 the noun ‘discretion’ is defined as ‘power of free decision or latitude of choice within certain legal bounds.’ The word ‘discretionary’ is the adjective form of the noun ‘discretion.’

Hence, the Louisiana Supreme Court in *Gregor* confirmed that defendant DHH was not entitled to discretionary immunity because it was obligated to enforce the Sanitary Code.<sup>31</sup>

Likewise, the Commission is obligated to enforce its own rules and regulations rather than merely promulgate them. The Legislative and Constitutional commands are mandatory – as is the case with the Sanitary Code. As Plaintiff alleges in Paragraphs 3, the Louisiana Constitution Article X Part IV, §46, §48, §50 and State Police Commission Rules 2.4 and 2.9 obligate the Commission to investigate, issue charges, subpoena witnesses/documents, conduct and decide appeals/hearings, enforce its own rules and regulations, and make sure its members abide by all applicable pay plans, discipline rules and regulations, and applicable laws. Louisiana Constitution Article §48 mandates the Commission approve all pay to State Police officers without exception.

<sup>31</sup> See also *Greené v. Alvarado*, 2015 CA 1960 consolidated with 2015 CA 1961 (La App. 1 Cir. 12/27/16), 210 So.3d 321, 330-331 (holding that DOTD was not entitled to discretionary immunity under a statutory duty to maintain roadways in safe conditions and in operation of those duties.).

As in *Gregor*, these functions regulate the operations of the Commission.<sup>32</sup> There does not exist a choice as to whether the Commission performs them. As a result, they are neither policy nor discretionary tasks and no discretionary immunity does not exist.

**D. Protected Activity of Violations of Law by Defendant**

Defendant painstakingly goes through each violation of law Plaintiff opposed and/or reported in an attempt to conjure a reason why it fails as a matter of law. These machinations fall flat.

Plaintiff reported that defendant violated the law by engaging in improper political activity.

Pursuant to La. Const. Article X, §47:

- A. **Party Membership; Elections.** – No member of the commission and no state police officer in the classified service shall participate or engage in political activity . . . make or solicit contributions for any political party, faction, candidate, or any political campaign. . .
- B. **Contributions.** - No person shall solicit contributions for political purposes form any classified state police officer or use or attempt to use his position to punish or coerce the political action of a classified state police officer.
- C. **Political Activity Defined.** - . . . political activity means an effort to support or oppose the election of a candidate for political office or to support a particular political party in an election.

Likewise, the State Police Commission Rule 14.2 prohibits all members of the State Police Commission from the following:

- 1. Participate or engage in political activity, including, but not limited to, any effort to support or oppose the election of a candidate for political office or support or oppose a particular party in an election. . . .
- 4. Make or solicit contributions for any political purpose, party, faction or candidate;
- 6. Take active part in the management of the affairs of a political party, faction, candidate, or any political campaign.
- 8. Directly or indirectly, pay or promise to pay any assessment, subscription, or contribution for any political party, faction, or candidate, nor solicit or take part in soliciting any such assessment, subscription or contribution, and no person shall solicit any such assessment, subscription or contribution of any classified employee in the State Police Service.

Yet, in Paragraphs 4, 5, 6a, and 7, this is precisely what Plaintiff opposed that the Commission, through Members Kyle, Goldring, and Pitcher, engaged in political campaign violations. It is the Commission's mandatory obligation to police itself which, after opposition by Plaintiff, it refused to do.

<sup>32</sup> Defendant's cited cases are distinguishable. *La. Horsemen's Benevolent & Protective Ass'n 1993 v. Fair Grounds Corp.*, 2012 La. App. Unpub. LEXIS 657 \*1, \*10-11 (La. App. 1 Cir. 5/2/12) afforded discretionary immunity for an agency regarding "policymaking" provisions directing it to make rules/regulations. The Louisiana Constitution and State Police Commission Rules direct the Commission to do much more.

While defendant makes the surprising argument that the Commission was not aware of its own unlawful conduct, it admits, in the very same paragraph, Plaintiff reported these violations to the Commission on March 8 and 9, 2016. As alleged in Paragraphs 7-13, she further engaged in protected activity by reporting these violations to defendant, through the Governor's Office, Louisiana Board of Ethics, Louisiana Commissioner of Administration, and Director of Louisiana State Civil Service Commission.

Plaintiff also reported defendant's failure to abide by La. Const. Article X, Part IV, §47 and §48 with respect to a classified State Police Trooper who engaged in prohibited political activity.<sup>33</sup> As pled in Paragraphs 7, 9a, and 10, plaintiff reported defendant's refusal to act after her reports, including to the Director of Louisiana State Civil Service Commission and Director of Administration.<sup>34</sup> Yet, the law required the Commission to act.

Defendant violated the Louisiana Constitution by appointing three (3) replacement members to the Commission without the required nominations by law. La. Const. Article X, § 43 provides, in pertinent part:

**C. Nominations.** — The presidents of Centenary College at Shreveport, Dillard University at New Orleans, Louisiana College at Pineville, Loyola University at New Orleans, Tulane University of Louisiana at New Orleans, and Xavier University at New Orleans, after giving consideration to representation of all groups, each shall nominate three persons. **The governor shall appoint one member of the commission from the three persons nominated by each president.** One member of the commission shall be elected by the classified state police officers of the state from their number as provided by law. A vacancy for any cause shall be filled by appointment or election in accordance with the procedure or law governing the original appointment or election, and from the same source. **Within thirty days after a vacancy occurs, the president concerned shall submit the required nominations. Within thirty days thereafter, the governor shall make his appointment. If the governor fails to appoint within thirty days, the nominee whose name is first on the list of nominees automatically shall become a member of the commission. If any nominating authority fails to submit nominees in the time required, or if one of the named institutions ceases to exist, the governor shall make the appointment to the commission.**

(emphasis added)

Plaintiff alleges this did not occur, as set forth in Paragraph 12a, the Governor appointed new Members to three (3) vacancies without nomination(s) from the universities, passage of the vacancy for thirty (30) days, and the passage of thirty (30) days after the vacancies were submitted. Rather, Plaintiff was instructed by the defendant Commission to destroy the letter notifying the universities of the vacancies before any of this occurred, which she also opposed.

---

<sup>33</sup> Para. ¶ 6a.

<sup>34</sup> Para. ¶¶ 7, 9a, 10.



In addition, Plaintiff engaged in protected activity regarding defendant's violation of law by appointing a State Police Officer to a position outside the State Police Service. According to State Police Commission Rule 14.3:

(g) No classified member of the State Police shall be appointed, promoted, transferred or in any way employed in or to any position which is not within the State Police Service.

Plaintiff reported a violation of this rule on March 6, 2016, directly to defendant when Starnes, a classified member of the State Police, was appointed on February 29, 2016, as Interim Undersecretary for Office of Management & Finance, a department within Public Safety Services. Appointments must be confirmed by the Commission. Yet, here, the Commission simply turned a blind eye.

Plaintiff also reported to defendant its violations of law regarding implementation of pay increases. La. Const. Article X, Part IV, §48 provides, in pertinent part:

**C. Wages and Hours.** — Any rule or determination affecting wages or hours shall have the effect of law and become effective **only after approval by the governor and subject to appropriation of sufficient funds by the legislature.**

(emphasis added)

In direct violation of the Constitution, Plaintiff alleges in Paragraph 20a that she reported to the Commission, including Chairman Doss, that the Governor had not approved the implementation of a newly proposed pay plan. While defendant attempts to introduce some sort of "transmittal sheet", **it is black letter law that the Court cannot consider evidence outside of the face of the pleadings.**<sup>35</sup> **This "transmittal sheet" cannot be given any consideration.**

Plaintiff further alleges, in Paragraph 22a, she reported violations of the State Police Commission Rule 9.1:

(a) The probationary period shall be an essential part of the examination process and shall be used for the most effective adjustment of a new employee and for the elimination of any probationary employee whose performance does not meet the required performance standard of work. A probationary period shall be served by all employees from the date of appointment to the State Police service and extending through 12 months from the date of graduation from the State Police Training Academy. For employees who are non-competitively reemployed, such probationary period shall be 12 months from the date of reemployment.

Rule 15.3:

(a) The Director shall prescribe personnel action forms which appointing authorities shall use to report such personnel actions and status changes as he may require. The Director shall inform the appointing authorities which personnel actions and status changes must be reported to him.

<sup>35</sup> La. C.C.P. Article 931.



(b) Personnel action forms approved by the Director shall constitute authorization for payment by the appointing authority of compensation of an employee at the rate specified on the appropriate form as long as he remains an employee in a pay status. The appointing authority shall furnish a copy of each such form to the employee concerned.

Plaintiff alleged that she complained directly to the Commission that employees with over one (1) year service were paid as a "probationary employees" and that personnel action form(s) for several employees were unapproved by the appointing authority. As the Commission is charged with the mandatory responsibility to oversee and control all such functions, the Commission's refusal to act is a violation of the law by the Commission itself. Again, defendant attempts to side-step liability by claiming it was LSP's or even her responsibility for these errors. That is not the law. It is the Commission's responsibility and it violated the law by refusing to act in derogation of the law's mandates.

Lastly, defendant misconstrues Plaintiff's allegations in Paragraphs 15, 16a, 18 regarding Member Doss' false accusations against her, which she actually alleges, were made out of reprisal because of her protected activities.

**E. Defendant's Second Attempt at a *Garcetti*-Like Argument is clearly misplaced**

Defendant incorrectly argues that Plaintiff is not a whistleblower because reporting/investigating was part of her "regular and routine duties." What defendant asks this Court to ignore is the fact the Louisiana Constitution and Louisiana State Police Commission Rules charge defendant with the ultimate obligation to perform the very same functions it is accused of refusing to do. Frankly, the *Garcetti* considerations for the purposes of a 1<sup>st</sup> Amendment §1983 retaliation claim have no application to claims under La. R.S. 23:967. They are the proverbial apples versus oranges.

Defendant's argument is clearly and unequivocally inappropriately posited upon the United States Supreme Court decision in *Garcetti v. Ceballos*, 547 U.S. 410, 1226 S.Ct. 1951, 164 L.Ed.2d 689 (2008) because *Garcetti* does not apply. *Garcetti* was a First Amendment retaliation case dealing strictly with the notion of Constitutional limitations on the speech of a public employee under *Pickering* considerations and whether or not government employee speech was "protected" in the first instance. This rationale does not even apply here because a La. R.S. 23:967 reprisal claims is fundamentally different from a First Amendment retaliation claim made under §1983. Specifically, whereas what constitutes "protected speech" for the purposes of a 1<sup>st</sup> Amendment/§1983 claim is otherwise undefined except by jurisprudence, La. R.S. 23:967 defines

for itself what is or is not protected activities in Subparts 1, 2, and 3. The rationale of *Garcetti*, i.e., that a public employee's speech may be "protected" so long as the Supreme Court's *Pickering* balancing test applies, has no meaning under La. R.S. 23:967 because 23:967 already self-defines what is protected activity for its own purposes.

This is exactly why no Court has ever applied the *Garcetti* analysis to any claim arising under La. R.S. 23:967. They are apples and oranges.

For example, in *Swear v. Lawson*, 288 F.Supp. 3d 669 (E.D. La. 1/12/18), *Williams v. Hosp. Serv. Dist. of W. Feliciana Parish*, 2017 U.S. Dist. LEXIS 160740 \*1 (M.D. La. 9/28/17), and *Dane v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. College*, 2010 U.S. Dist. LEXIS 94645 \*1 (M.D. La. 6/15/10), the plaintiffs brought claims for First Amendment retaliation and claims for reprisal under La. R.S. 23:967. In all three (3) cases, the Courts applied two (2) totally different standards to the claims because the claims are, themselves, entirely distinct. This is why these courts correctly gave no consideration to *Garcetti* in their analyses of the plaintiffs' 23:967 claims. Yet, when analyzing the plaintiffs' 1<sup>st</sup> Amendment retaliation claims, those courts did look to *Garcetti* for those claims only. On its face, not only does 23:967 self-define what is "protected activity" for its own purposes, but it is also very broad having been enacted to cover a gamut of scenarios where the employee (regardless of whether or not that employee is a public versus private employee) opposes unlawful conduct in the workplace and is subjected to reprisal because of that activity. It matters not, for example, whether or not the unlawful activity is of "prominent public concern" as it does for 1<sup>st</sup> Amendment retaliation claims – only that the 23:967 employee make the showing that the underlying conduct is unlawful. Here, Ms. Derbonne unquestionably meets that burden.

Furthermore, defendant's reliance on *Odeh*, *Matthews*, and now *Cheshire* is misplaced. *Odeh v. City of Baton Rouge*, 2017 U.S. Dist. LEXIS 139349 (M.D. La. 8/29, 2017) was but one of several preceding District Court opinions including a prior opinion denying summary judgment. Although at footnote 138, the District Court makes passing/dicta-like reference to *Garcetti*, on later appeal to the Fifth Circuit at *Odeh v. City of Baton Rouge*, 731 Fed. Appx. 288 (5<sup>th</sup> Cir. 4/24, 2018), the Court made it clear it was not entertaining any of *Odeh*'s arguments regarding La. R.S. 23:967 because he had failed to properly brief them. In other words, the Fifth Circuit gave no consideration to the *Garcetti*-like argument the Commission proposes today.

As to *Odeh's* footnote 138 in the District Court opinion, its reference to the Writ decision granted in part and denied in part in *Matthews v. Military Dep't*, 970 So.2d 1089, 1090 (La. App. 1<sup>st</sup> Cir. 9/24/07) is misplaced. The *Matthews* Court granted writs regarding the plaintiff's allegations expressing "his concern" about the State's **potential** liability which did not, according to the Court, constitute protected activity primarily because the plaintiff did not and could not establish the plaintiff reported or opposed an actual violation of law. This is a requirement under 23:967 whether under Subparts 1, 2, or 3. Notably, however, the *Matthews* Court refused to grant the Exception of No Cause of Action on plaintiff's 23:967 claims "relative to the State's mishandling of hurricane funds" (which did constitute a violation of law). Thus, *Matthews* did not deny the plaintiff's 23:967 claim because her protected activity was within the scope of her job duties. Rather, *Matthews* dealt with the 23:967 requirement of an actual violation of law – not the position nor status of the employee. The Court in *Cheshire v. Air. Method Corp.*, 2016 U.S. Dist. LEXIS 68861 \*1 (W.D. La. 5/5/26), granted summary judgment as to the plaintiff's La. R.S. 23:967 claims, ultimately on the basis of the plaintiff's inability to prove the reasons for discharge given by the employer were pretext.<sup>36</sup> *Cheshire* merely "recognized" the defendant's *Garcetti*-like argument made in brief but did not, as suggested by present defendant, "rely" on it.<sup>37</sup>

If defendant's argument within the confines of La. R.S. 23:967 were to hold water, then no employee would ever be protected against reprisal because every employer would simply claim he/she had an obligation to report the unlawful conduct. This would mean that whistleblowing in a Louisiana workplace would never be protected contrary to the letter, intent, and application of La. R.S. 23:967. Under defendant's attempted interpretation, every public employee, for example, who reports discrimination/harassment under an employer policy requiring them to do so, would be barred from anti-reprisal protection. Likewise, agency heads who report sexual harassment in the workplace would be prohibited from raising a La. R.S. 23:967 claim because would then, according to present defendant, be considered part of their job duties and any and all ensuing reprisal against that public employee would go unremedied.<sup>38</sup> This is an absurd interpretation of 23:967. It was certainly never the Legislature's intent to chill a public employee's opposition, reporting, or testimony regarding an unlawful workplace act or practice. In fact, 23:967 was

---

<sup>36</sup> The Court determined that the plaintiff failed to establish a prima facie case because he "either failed to assert a violation of state law, the violation was not reported to [defendant], the law was not actually violated, or the violation was committed by a co-worker or third party. . . . However, for the sake of thoroughness the Court will complete the burden-shifting analysis below."

<sup>37</sup> *Cheshire*, 2016 U.S. Dist. LEXIS 68861 at \*14, f.n. 4.

<sup>38</sup> See La. R.S. 42:344.

specifically designed to encourage all employees, public and private alike, to speak out without fear of reprisal. La. R.S. 23:967 is, after all, deliberately intended to be "broad" in scope and that breadth is designed to protect workers from reprisal for blowing the whistle on illegal actions.

### III. CONCLUSION

This case is analyzed solely on the face of the pleadings for the purposes of defendant's Exception of No Cause of Action. This analysis proceeds without regard to credibility, weighing of the evidence, or argument of counsel as to which allegations the Court should or should not consider. Plaintiff clearly sets for her cause of action under La. R.S. 23:967, warranting denial of the Exceptions.

Parenthetically, it is noted and perhaps cannot be stressed enough, *Garcetti*, which is solely a 1<sup>st</sup> Amendment/§1983 claim, has no application to claims under La. R.S. 23:967. They are apples and oranges. You can cherry pick quotes for any opinion, but understanding the why and how to each decision is the important task. Here, the why and how of *Garcetti* clearly, unequivocally, and indelibly demonstrate its utter inapplicability to 23:967 claims.

Respectfully submitted;

By: 

Jill L. Craft, #20922

W. Brett Conrad, Jr., #37239

Jill L. Craft, Attorney at Law, LLC

330 Government Street

Baton Rouge, Louisiana 70802

(225) 663-2612

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served a copy of the above and foregoing upon Trial Counsel of record for all parties hereto via email and First-Class United States mail, properly addressed with sufficient postage affixed thereto on this 19<sup>th</sup> day of July, 2019.

Baton Rouge, Louisiana, this 19<sup>th</sup> day of July, 2019.

