

IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

SHERMAN ARBOGAST and  
MARLENE ARBOGAST,

Plaintiffs,

VS.

CIVIL ACTION NO. 21-C-15

GABRIEL DEVONO, and  
THE BOARD OF EDUCATION OF THE  
COUNTY OF RANDOLPH

Defendants.

**ORDER DENYING PARTIAL MOTION TO DISMISS**

This matter came on for hearing on December 9, 2021 pursuant to the Defendants' Partial Motion to Dismiss Amended Complaint. Plaintiff Marlene Arbogast appeared in person and with her counsel James R. Fox. Defendants appeared through their counsel Susan Deniker.

The Defendants moved to dismiss Counts I-V and VII of the amended complaint pursuant to Rule 12(b)(1) of the West Virginia Rules of Civil Procedure for lack of subject matter jurisdiction and also moved to dismiss Counts I, II, III, VII and VIII pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

The Defendants contend that Counts I through V and VII of the amended complaint should be dismissed because Marlene Arbogast, as an employec of the Randolph County Board of Education must exhaust her administrative remedies under the Public Employees Grievance Procedure set forth in West Virginia Code §6C-2-1, et seq. and that Count VII should be dismissed because a cause of action does not exist for tortious interference with medical care. Defendants also move to dismiss Plaintiffs' claim for punitive damages.

Upon consideration of the pleadings, applicable law and argument of counsel, the Court finds that Plaintiffs have met their burden in demonstrating prima facie claims for each cause of action. Additionally, the issues raised by Defendants are more appropriate for consideration through a motion for summary judgment after completion of discovery and full development of the facts. Therefore, the Court **DENIES** the partial motion to dismiss these causes of action, but takes the motion to dismiss the claim for punitive damages under advisement to further consider the applicable law.

Based on the allegations of the amended complaint and Rule 12 of the West Virginia Rules of Civil Procedure requiring those allegations to be taken as true, the Court makes the following findings of fact and conclusions of law.

1. This case arises out of the termination of Marlene Arbogast's employment with the Randolph County Board of Education. She was the "head-cook" at Beverly Elementary. Her son was previously a preschool student in the Pre-K program at Beverly Elementary. Plaintiffs subsequently learned and reported to school officials that their son and other students were allegedly confined in a closet in the preschool room.

2. Marlene Arbogast alleges that while employed at Beverly Elementary, she was pressured and coerced by the superintendent and principal not to retain counsel and pursue litigation regarding the confinement and further alleges that these individuals threatened adverse employment actions if she disclosed the facts of the confinement or retained legal counsel. Plaintiffs also allege that she was threatened and punished for exercising her state and federal constitutional rights to free speech, right to retain counsel and access to the courts for legal redress.

3. Plaintiffs also allege that Defendant Devono interfered with Marlene Arbogast's medical care by attempting to obtain her medical records and confidential information and that his interference prevented her from receiving appropriate treatment.

4. Counts I and II of the Amended Complaint allege retaliatory and constructive discharge under the West Virginia Human Rights Act, West Virginia Code §5-11-9(7)(A) which declares it an unlawful discriminatory practice for an employer to engage in threats or reprisals with the purpose to harass, degrade, embarrass or cause physical or economic harm. Plaintiffs also allege constitutional violations in the termination of Marlene Arbogast's employment.

5. Marlene Arbogast alleges that after informing the superintendent that her son had been unlawfully confined in a preschool closet and intended to seek legal action, the superintendent and other school officials retaliated against her and ultimately, terminated her employment.

6. State employees are not required to file an administrative grievance as a prerequisite for filing a lawsuit under the Human Rights Act, because "the West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W.Va. Code §5-11-1. et seq." Syllabus Point 1, *Vest v. The Board of Education of the County of Nicholas*, 193 W.Va. 222, 455 S.E.2d 81 (1995).

7. Additionally, "a public employee may file a written grievance to the West Virginia Public Employees Grievance Board pursuant to W.Va. Code §61-2-4(a)(1); however, such filing is permissible and not mandatory under the clear wording of the statute." Syllabus point 6 of *Weimer v. Sanders* 232 W.Va. 367, 752 S.E.2d 398 (2013). "A plaintiff may, as an alternative to filing a grievance with the West Virginia Public Employees Grievance Board, initiate an action

in circuit court to enforce rights granted by the West Virginia Human Rights Act, W.Va. Code §5-11-1 et seq.” Syllabus point 9 of *Weimer*.

8. Count III of the amended complaint alleges violation of the “whistle blower” statute, West Virginia Code §6C-1-3 which prohibits employers from discharging, threatening, discriminating or retaliating against employees who make good faith reports of wrongdoing. In this case, Marlene Arbogast alleges that she was threatened and retaliated against for reporting the conduct of serious public concern involving a teacher allegedly confining her son and other students in a preschool closet, and that she ultimately lost her job due to the retaliation.

9. The amended complaint sets forth factual allegations that the employer warned her that it would be best for her job to keep this information to herself and that the employer pressured, intimidated and threatened her that disclosing the alleged wrongdoing or joining with other parents to demand action for the wrongdoing could affect her job.

10. Counts IV and V of the amended complaint allege violations of Marlene Arbogast's Constitutional rights to free speech, to retain counsel and seek redress from courts for damages caused to her family by the confinement of her son in a preschool closet. Plaintiff's argue that she was terminated for exercising these fundamental constitutional rights, and that these constitutional claims are outside the scope of the employee grievance statute.

11. “It is well-settled that a public employer ‘may not retaliate against a public employee who exercises her First Amendment right to speak out on a matter of public concern.’” *Corbett v. Duerring* 780 F.Supp.2d 486, 492 (S.D. W.Va. 2011) (citing, *inter alia Love-Lane v. Martin* 355 F.3d 766, 776 (4<sup>th</sup> Cir. 2004). To establish a prima facie case that a retaliatory employment action violated a public employee's free speech rights, the employee must set forth facts creating an inference that she spoke as a citizen, not as an employee, on a matter of public concern; that

the employee's interest in the expression at issue outweighs the employer's interest in providing effective and efficient services to the public; and a sufficient causal connection exists between the protected speech and retaliatory action. *Corbett v. Duerring* 780 F.Supp.2d 486 (S.D. W.Va. 2011); see also *Corbett v. Deurring* 2012 WL 1855193 (S.D. W.Va. 2012) (permitting a First Amendment claim without requiring exhaustion of administrative remedies).

12. Additionally, an employee's discharge is unlawful if it was in violation of her rights under the Constitution of West Virginia to petition for redress of grievances and to have courts of this State open to her for an alleged injury to her person, property or reputation. *McClung v. Marion County Commission* 178 W.Va. 444, 360 S.E.2d 221 (1987).

13. Plaintiffs allege that Marlene Arbogast, as the mother of a student who had been confined in a preschool closet spoke out on this matter of public concern, that she was speaking as a mother, and the interests in stopping this misconduct outweighed the employer's interest in protecting the wrongdoer or the efficient administration of the school system. In addition to alleging threats and intimidation by school administrators. Plaintiffs allege that Marlene Arbogast was terminated for disclosing this information.

14. Count VII of the amended complaint alleges tortious interference with Marlene Arbogast's medical care. Plaintiffs allege that Defendant Devono contacted her physician, demanded confidential medical information, and interfered with her physician/patient relationship and her ability to obtain necessary medical care.

15. According to Plaintiffs, Marlene Arbogast sought medical care due to stress and anxiety caused by her mistreatment at work. Plaintiffs allege that Defendant Devono used his position as superintendent to obtain information regarding her medical care.

16. Plaintiffs assert that liability exists because Defendant Devono was aware of the existence of the physician-patient relationship, that he intended to induce the disclosure of information that he knew was confidential, and that his actions disrupted her medical care and led to the disclosure of her information.

17. A defendant may move to dismiss when the plaintiff's complaint fails to state a claim upon which relief can be granted. W.Va. R.Civ.P.12(b)(6). "On a motion to dismiss the complaint is construed in the light most favorable to the plaintiff. However, a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations" *Brown v. City of Montgomery*, 233 W.Va. 119, 127, 755 S.E.2d 653, 661(2014) (citation omitted). "Generally, a motion to dismiss should be granted only where 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" " *Ewing v. Bd. Of Educ. Of Cty. Of Summers*, 202 W.Va. 228, 235, 503 S.E.2d 541, 548 (1998) (citations omitted). A bald statement that the plaintiff has a valid claim is insufficient to withstand a motion to dismiss under Rule 12(b)(6). *See Fass v. Nowasco Well Serv., Ltd.*, 177 W.Va. 50, 52-53, 350 S.E.2d 562, 563-64 (1986).

18. Considering the allegations as true and construing all inferences in a light most favorable to Plaintiffs as required by Rule 12, West Virginia Rules of Civil Procedure, *Mason v. Torrellas* 238 W.Va. 1, 792 S.E.2d 12 (2016), Plaintiffs have set forth sufficient factual allegations to support causes of action for retaliatory and constructive discharge under the Human Rights Act, violations of the whistle blower statute and Marlene Arbogast's Constitutional Rights, and for tortious interference with her medical care.

19. Additionally, the Court believes that the request to dismiss all claims for punitive damages requires additional consideration and review. According to the Defendants, the

Governmental Tort Claims Act, West Virginia Code 29-12A-7 precludes political subdivisions and their employees from being held liable for punitive damages. Plaintiffs cite *P.A. v. Fayette County Board of Education*, Case No. 2:19 CV-00705 (S.D. W.Va. 2019) to support their assertion that this immunity only applies to political subdivisions for claims within the scope of the grievance process, and even in those cases, the statute only protects the political subdivision, not the employee. Plaintiffs also assert that pursuant to §29-12A-18(e) neither Defendant is exempt from punitive damages for constitutional violations.

Based on these findings of fact and conclusions of law, the Court hereby **ORDERS** that the motion to dismiss Counts I through V and VII of the amended complaint is **DENIED**. The objections of Defendants are noted and preserved.

The Court further **ORDERS** that the motion to dismiss claims for punitive damages is taken under advisement.

The Clerk is directed to send certified copies of this Order to counsel of record.

Enter this 5 day of MAY 2022.

  
Judge David H. Wilmoth

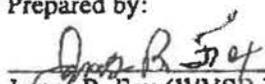
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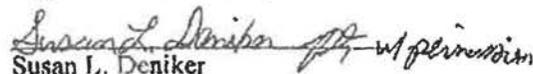
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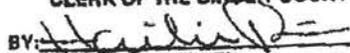
Philip D. Riggleman, Clerk

Approved as to form by:

  
James R. Fox (WVSB No. 5752)  
FOX LAW OFFICE, PLLC  
3359 Teays Valley Road  
Hurricane, WV 25526  
Counsel for Plaintiffs

  
Susan L. Deniker  
Steptoe & Johnson PLLC  
400 White Oak Boulevard  
Bridgeport, WV 26330-4500  
Counsel for Defendants

A TRUE COPY  
ATTEST:  
PHILIP D. RIGGLEMAN  
CLERK OF THE CIRCUIT COURT

BY:   
DEPUTY

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