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CAUSE NO. DC2214263

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2022 OCT 13 AM 10:34
FELICIA PITRE
DISTRICT CLERK
DALLAS COUNTY
STEPHANIE CLARK

ANDREA WHELAN,

Plaintiff,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Defendant.

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IN THE DISTRICT COURT

L-193rd

JUDICIAL DISTRICT

DALLAS COUNTY, TEXAS

Def
438⁰⁰

PLAINTIFF'S ORIGINAL PETITION & JURY DEMAND

TO THE HONORABLE DISTRICT COURT JUDGE:

Plaintiff Andrea Whelan sues Defendant Dallas Independent School District for retaliation in violation of the Texas Whistleblower Act and the National Defense Authorization Act ("NDAA"), 41 U.S.C. § 4712. In support thereof, she shows the following:

I. PARTIES

1. Plaintiff Andrea Whelan is an individual who resides in Denton County, Texas.
2. Defendant Dallas Independent School District ("Dallas ISD") is a local governmental unit or municipality located in Dallas County, Texas. Dallas ISD can be served through its superintendent, Stephanie Elizalde, at 9400 North Central Expressway, Dallas, TX 75231.

II. DISCOVERY CONTROL PLAN

3. Plaintiff intends that this suit be governed by discovery control plan level two.
4. Plaintiff affirmatively pleads that this suit is not governed by the expedited actions process in Texas Rule of Civil Procedure 169 because Plaintiff seeks relief in excess of \$250,000, as well as non-monetary relief.

5. Specifically, Plaintiff seeks monetary relief over \$250,000 but not more than \$1,000,000.

III. JURISDICTION AND VENUE

6. Jurisdiction is appropriate because Dallas ISD is a local governmental entity under the Tex. Gov. Code Ann. § 554.001(2)(C) and Plaintiff was a public employee as defined under Tex. Gov. Code Ann. § 554.001(4).
7. Sovereign immunity has been expressly waived for whistleblower claims against state government entities under Tex. Gov. Code Ann. § 553.0035.
8. Venue is appropriate because the actions giving rise to this suit occurred in Dallas County.

IV. FACTS

9. Andrea Whelan first became an employee of Dallas ISD in August 2013.
10. Ms. Whelan worked as an investigator for the Office of Internal Audit.
11. In or around 2020, Ms. Whelan's job title was changed from investigator to auditor.
12. By 2021, Ms. Whelan's immediate supervisor was Don Woods.
13. By that time, the Chief of Internal Audit was Robert Rubel, and the Deputy Chief was Eva Narten.
14. In or about August 2021, Ms. Whelan received a positive annual performance evaluation.
15. In 2021, as part of her investigative duties as an Auditor II, Ms. Whelan uncovered evidence of grade and attendance irregularities at Samuell High School.
16. In particular, Ms. Whelan found that Samuel High School students received course credit without meeting state mandated attendance requirements or producing any meaningful work during the 2020-2021 school year.

17. Ms. Whelan's review of District records revealed there was substantial pressure placed on school administrators, during the 2020-2021 school year, to boost student achievement and attendance numbers.
18. For example, an email message forwarded to Samuell High School Principal Jennifer Tecklenburg, through School Leadership Executive Director Joanne Frantzen, stated: "Attached is the number of unexcused absences from 9-8 to 10-5; the list is growing exponentially each day. Please review the list with your campuses...regarding getting these handled as needed. This directly affects our attendance rate, which affects our funding rate."
19. School Leadership Director Michelle Thompson told Ms. Whelan there were "massive" numbers of attendance corrections districtwide during the 2020-2021 school year.
20. Ms. Whelan's investigation also exposed major deficiencies in the District's student information system (PowerSchool), which allowed students with failing grades and excessive absences to improperly receive passing grades and course credit.
21. PowerSchool's lack of proper controls to prevent grade and attendance record manipulation negatively affected the reliability of the student data the District reported to the state and Federal governments.
22. The over-reporting of attendance has a direct impact on state funding.
23. In particular, it causes a district to receive more state funding that it is legally entitled to receive.
24. In August 2021, Ms. Whelan reported her findings associated with the investigation at Samuell High School, in a draft Report of Investigation (Internal Audit case #2324).
25. However, under the direction of Mr. Rubel and Ms. Narten, the report was completely re-written, without the input or participation of Ms. Whelan.

26. The revised version of the investigative report, dated September 13, 2021, and bearing Mr. Rubel's signature, omitted almost all the details from the original draft, and reversed Ms. Whelan's findings to conclude the allegations of grade and attendance manipulation were unsubstantiated.
27. Mr. Rubel and Ms. Narten presided over the complete re-write of the report without seeking any sort of legal review of the original report and supporting evidence.
28. Ms. Whelan subsequently conducted a second investigation at Samuell High School, involving the alleged falsification of grades for Special Education (SPED) students who failed to report to class or complete assignments and allegations that the school failed to provide required SPED services to students.
29. In a draft report of investigation submitted in December 2021 (Internal Audit case #2544) Ms. Whelan reported, "a dozen instances in which failing first semester grades of students with excessive absences were improperly changed to passing, in the latter part of June 2021, based on principal approved Grade Correction forms."
30. Ms. Whelan documented an interview with a reading teacher who said Principal Tecklenburg directed her to submit Grade Correction forms for multiple students, to change legitimately failing grades to passing.
31. Relative to one student for whom Principal Tecklenburg reportedly sought to change failing grades to passing, the teacher told Ms. Whelan the student only reported to her class twice and did "absolutely nothing."
32. The December 2021 report also conveyed information Ms. Whelan received from other (current and former) Samuell High School teachers, who said they were directed to falsify attendance records to show students were present when, in fact, they were not.

33. Ms. Whelan's December 2021 draft report further stated: "At the end of the school year, Principal Tecklenburg opted not to take steps to withhold credit for any second semester courses...Tecklenburg's decision meant hundreds of SPED and non-SPED students, whose attendance fell below 75%, received unearned credit for courses in violation of state law."
34. Among the findings associated with SPED services, Ms. Whelan's report conveyed that a class of autistic and language impaired students was under-served, from at least April 1, 2021, until the end of the school year (June 18, 2021) because a 19-year-old teacher assistant (TA) led the classroom, in the absence of a certified SPED teacher, which federal law requires.
35. Ms. Whelan's report further stated: "Adding to concerns about the operation of this classroom, without a certified SPED teacher, the OIA learned of the transfer of a Grady Spruce High School SPED student, following his January 2021 assault against a TA. The TA passed away at the hospital several days following the incident, which was one of a series of assaults this student committed against staff members."
36. Relative to Ms. Whelan's report on case #2544, Ms. Narten altered or eliminated Ms. Whelan's findings, cutting almost all details out of it.
37. For example, the revised report, dated February 16, 2022, omitted all the information and evidence of the falsification of student grade and attendance records.
38. The removal and alteration of language from the original report made it apparent Mr. Rubel and Ms. Narten were seeking to eliminate or minimize all the findings.
39. On February 3, 2022, Ms. Whelan sent Mr. Rubel, Ms. Narten, and Mr. Woods an email discussing the edits to cases #2324 and #2544 to remove references to grade and attendance manipulation.

40. In that email, she stated “[b]ased on the language in IIA Standards 2400 and 2421 (quoted below), it appears to me that removing this evidence and information, concerning the principal’s illegal conduct, would not be in keeping with the responsibilities of our office. I’m hoping you reconsider.”
41. This constituted a protected report under 41 U.S.C. § 4712.
42. Around this time, Ms. Whelan also verbally told Mr. Rubel that edits to the report on case #2544 did not accurately reflect her findings.
43. In early February 2022, Ms. Whelan’s immediate supervisor Mr. Woods conducted a mid-year review of her performance and did not note any performance problems whatsoever.
44. However, on February 23, 2022, Mr. Rubel sent Ms. Whelan a multi-page memo with a barrage of questions and criticisms about her report on case #2544.
45. Of particular note, Mr. Rubel claimed that Ms. Whelan’s finding on the knowing “falsification of academic records” was “malicious and inflammatory.”
46. From this, it was particularly clear Mr. Rubel was upset that Ms. Whelan had uncovered and continued to pursue these issues related to the funding Dallas ISD received.
47. Ms. Whelan responded to all of Mr. Rubel’s questions and criticisms in writing.
48. Dallas ISD put Ms. Whelan on a one-week performance improvement plan (“PIP”) from March 2, 2022, to March 9, 2022.
49. This PIP directly contradicted Mr. Woods’ assessment of Ms. Whelan’s performance from the month before, instead claiming that she showed an “[i]nability to independently perform as expected for an Auditor II,” among other generalized assertions that she was not performing well.
50. The PIP gave extremely vague directives such as to “improve performance as expected.”

51. The only concrete expectation it laid out was that Ms. Whelan had to submit a draft of a report for case #2729 by March 9, 2022.
52. Ms. Whelan met that deadline.
53. The PIP also referred to several deadlines Ms. Whelan had supposedly already missed that were simply fictional and were never communicated to her.
54. The PIP claimed that Richard Siu would oversee the PIP and provide feedback; however, Mr. Siu made no effort to communicate with Ms. Whelan regarding the PIP.
55. On March 7, 2022, Ms. Whelan made a report to the Texas Education Agency (“TEA”) regarding grade and attendance manipulation she discovered, its impact on Dallas ISD’s funding, and Internal Audit’s refusal to address the issues.
56. The report to the TEA included information regarding an investigation of alleged grade falsification at a different school (the Young Men’s Leadership Academy), which Ms. Whelan was actively pursuing at the time.
57. Through the normal course of that investigation (case #2729), Ms. Whelan immediately discovered attendance irregularities relative to the student at issue - significant disparities between the numbers of absences shown on report cards vs. what was on the PowerSchool stored edit reports.
58. The TEA report recounted Ms. Narten’s direction to Ms. Whelan not to pursue any attendance matters associated with the case or report the attendance related concerns already discovered.
59. The report to the TEA constituted a protected report under the Texas Whistleblower Act.
60. The same day, Ms. Whelan notified Mr. Rubel in writing that she had made this report to the TEA.

61. On March 10, 2022, Mr. Woods told Ms. Whelan that he appreciated her investigative work.
62. On March 11, 2022, Mr. Rubel suspended Ms. Whelan and recommended her termination because of supposed performance issues.
63. The suspension letter noted Ms. Whelan had failed the PIP but gave no explanation as to how, stating only that she had “[i]nadequate performance.”
64. On March 23, 2022, Ms. Whelan’s counsel sent Dallas ISD’s counsel Ramona Soto a letter via email notifying Ms. Soto of Ms. Whelan’s legal claims under the NDAA and Texas Whistleblower Act.
65. After that, on or about March 28, 2022, Dallas ISD created a memo claiming Ms. Whelan had violated an array of district policies and laws by emailing herself evidence to be used in her grievance.
66. The memo implicitly (and falsely) accused Ms. Whelan of publicizing said information.
67. It also referred to her supposedly violating a February 21, 2019, Letter of Caution that by its own terms was supposed to have been removed from her file by August 2019—yet was not.
68. Numerous other Internal Audit employees, including Mr. Rubel, would have violated some of the policies the memo accused Ms. Whelan of violating simply by virtue of working from home during the pandemic.
69. After Ms. Whelan would not accept a settlement offer, Dallas ISD terminated her on March 30, 2022.
70. On top of supposed performance issues, Dallas ISD added the aforementioned claims of violations of law and policy to its justification for firing Ms. Whelan.
71. In doing so, Dallas ISD retaliated against Ms. Whelan for preserving evidence related to her legal case.

72. On April 20, 2022, Ms. Whelan timely filed a grievance after her termination.
73. As part of that grievance, Ms. Whelan again alerted Dallas ISD to the retaliation for her protected reports, citing the specific laws violated.
74. Ms. Whelan also requested relief including, among other things, reinstatement.
75. Dallas ISD subsequently failed to meet its own deadlines for it to process Ms. Whelan's grievance.
76. By the eventual Level II grievance, over the objection of Ms. Whelan, Dallas ISD changed the hearing officer from an uninvolved individual (Ebonye McGee) to Mr. Rubel, the individual against whom the grievance was filed.
77. Dallas ISD appointed Mr. Rubel as hearing officer at least partly to provide him cover from explaining his actions.
78. This was made clear by the fact that at the Level II grievance Mr. Rubel cited his status as the hearing officer to justify refusing to answer questions about when he assigned Ms. Whelan the deadlines he claimed she missed.
79. Mr. Rubel refused to answer those questions because in fact he never assigned those deadlines to Ms. Whelan.
80. Mr. Rubel refused Ms. Whelan's request that he recuse himself.
81. Dallas ISD claimed that, as the Chief of Internal Audit, Mr. Rubel was the only person who could hear Ms. Whelan's grievance.
82. However, Dallas ISD's claim is contradicted by the fact that when Ms. Whelan filed a grievance in the past, an individual other than the Chief of Internal Audit heard it.

83. At the Level II grievance hearing, counsel for Dallas ISD, Carlos Lopez, encouraged Mr. Rubel to render a decision based on facts not in evidence, even going so far as to note to him, “[y]ou’re the only one who knows, at the end of the day, your true motivations.”
84. The manner in which Dallas ISD conducted the Level II grievance violated its internal policies, including DGBA (Local), which states that grievances should be conducted “in a fair and impartial manner” and “[t]he hearing officer shall maintain the integrity of the hearing environment.”
85. Dallas ISD further violated DGBA (Regulation), which states “[a] hearing officer who has a conflict of interest *will* disqualify himself or herself and be excused” (emphasis added).
86. After Mr. Rubel predictably investigated his own actions and decided he did nothing wrong, Ms. Whelan timely filed an appeal to a Level III grievance hearing before a subcommittee of the Board of Trustees.
87. Dallas ISD policy states that “[t]he Board subcommittee’s decision shall serve as the final decision of the Board” for such a hearing.
88. In or about June 2022, Ms. Whelan filed a report with the U.S. Department of Education Office of Inspector General regarding her termination being in violation of 41 U.S.C. § 4712.
89. At the Level III grievance on September 15, 2022, Ms. Whelan alerted the Board of Trustees to her protected reports under the Texas Whistleblower Act and NDAA, as well as the violations of Board policy that took place at the Level II grievance hearing.
90. At said Level III hearing, both counsel for Dallas ISD Kathryn Long and Trustee Edwin Flores (the latter of whom is ostensibly supposed to be an impartial decision maker) supplied additional justifications for firing Ms. Whelan beyond the justifications Dallas ISD has stated upon her termination.

91. These included Mr. Flores openly urging the Board of Trustees to fire Ms. Whelan due to additional supposed performance issues from years past.
92. Mr. Flores expressed open animosity toward Ms. Whelan.
93. The manner in which Dallas ISD conducted the Level III grievance, including suddenly alleging additional performance issues, also violated internal policies such as DGBA (Local), which states “[n]o additional evidence shall be taken unless the grievant can demonstrate that the additional evidence (documents or testimony) was not available to the employee at the time of the hearing.”
94. On the motion of Mr. Flores, Dallas ISD’s Board of Trustees unanimously rejected Ms. Whelan’s grievance and affirmed her termination on September 15, 2022.
95. This decision, too, was mere pretext for retaliation.
96. Ms. Whelan has met all conditions precedent to filing suit, which she timely files.

V. RETALIATION UNDER THE TEXAS WHISTLEBLOWER ACT

97. Ms. Whelan re-alleges and incorporates the allegations contained in the above paragraphs as if fully stated herein.
98. Defendant violated the Texas Whistleblower Act when it terminated Ms. Whelan.
99. Ms. Whelan was a public employee under the Texas Whistleblower Act.
100. Defendant Dallas Independent School District is an employer under the Texas Whistleblower Act.
101. Ms. Whelan was reasonable in her belief that, among other things, Defendant was concealing the misrepresentation and misreporting of attendance and grade data in order to unlawfully obtain federal and state funding beyond what it was entitled to.

102. Ms. Whelan made a good faith report of a violation of law when she reported her concerns regarding the above to the Texas Education Agency.
103. The Texas Education Agency is an appropriate law enforcement authority with the ability regulate under or enforce the law alleged to have been violated or investigate or prosecute a violation of law.
104. Ms. Whelan suffered an adverse employment action when she was terminated.
105. Ms. Whelan's termination was a direct result of her report of a violation of law to an appropriate law enforcement authority.
106. Ms. Whelan fully exhausted the applicable internal grievance procedure related to the termination of her employment.
107. Because of the actions of Defendant, Ms. Whelan suffered damages within the jurisdictional limits of this Court.

VI. RETALIATION UNDER THE NDAA

108. Ms. Whelan re-alleges and incorporates the allegations contained in the above paragraphs as if fully stated herein.
109. Defendant is a grantee or subgrantee of the federal government.
110. By concealing, misrepresenting, and misreporting attendance and grade data in order to unlawfully obtain federal and state funding beyond what it was entitled to, Defendant was and is violating laws, rules and regulations related to a federal contract or grant.
111. Ms. Whelan reported a violation of law, rule, or regulation related to a federal contract or grant to management officials and other employees of Defendant who have the responsibility to investigate, discover, or address misconduct.

112. Ms. Whelan reported information that she reasonably believes is evidence of gross mismanagement of a federal contract or grant to management officials and other employees of Defendant who have the responsibility to investigate, discover, or address misconduct.
113. Ms. Whelan reported an abuse of authority relating to a federal contract or grant to management officials and other employees of Defendant who have the responsibility to investigate, discover, or address misconduct.
114. Ms. Whelan was fired for making these reports.
115. Ms. Whelan exhausted administrative remedies with the Office of Inspector General for the U.S. Department of Education with regard to reprisal for making these reports.
116. Because of the actions of Defendant, Ms. Whelan suffered damages within the jurisdictional limits of this Court.

VII. JURY DEMAND

117. Plaintiff demands a trial by jury and has tendered the appropriate fee.

IIX. PRAYER

118. WHEREFORE, Plaintiff Andrea Whelan requests that Defendant Dallas Independent School District be cited to appear and answer, and that, after trial by jury, she take judgment against Defendant as follows:

- a. Judgment against Defendant ordering it to take such reasonable actions as may be necessary to remedy the effects of Defendant's violations of law;
- b. Judgment against Defendant for lost wages and benefits, both back pay and front pay;

- c. In the alternative to front pay, judgment against Defendant placing Plaintiff in the position of employment she would have enjoyed but for the retaliation, if deemed feasible;
- d. Judgment against Defendant for compensatory damages including emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life;
- e. Pre-judgment interest at the appropriate legal rate on all amounts awarded;
- f. Interest after judgment at the appropriate legal rate on all amounts awarded until paid in full;
- g. Judgment against Defendant for Plaintiff's reasonable attorneys' and experts' fees;
- h. Costs of suit; and
- i. Such other and further relief to which Plaintiff may justly be entitled.

Andrea Whelan

Signature

October 13, 2022

Date

Andrea Whelan

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