

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

SCOTT BERISH,

Plaintiff,

v.

CASE NO.: 3:22-cv-21061-TKW-ZCB

CITY OF DESTIN,

Defendant.

ANSWER AND DEFENSES

Defendant City of Destin (hereinafter, "City"), hereby files its Answer and Defenses to Plaintiff's Amended Complaint [ECF1-1] and states:

NATURE OF THE ACTION

1. Admitted that Plaintiff has attempted to bring an action under the Florida Whistleblower Act, Chapter 112, Florida Statutes and 29 U.S.C. §621 et seq. However, all of Plaintiff's claims and any entitlement to relief under the cited laws are denied.

2. Admitted for jurisdictional purposes only.

THE PARTIES

3. Admitted that Plaintiff was employed by the City. Admitted that Plaintiff is over fifty years of age. All other characterizations and allegations are denied.

4. Admitted that the City duly exists under the laws of the State of Florida. Admitted that the City has employed the Plaintiff. The remaining allegations and characterizations are denied.

CONDITIONS PRECEDENT

5. Without knowledge, therefore, denied.

STATEMENT OF THE ULTIMATE FACTS

6. Admitted that Plaintiff was hired by the City in December of 2018. Admitted that Plaintiff was terminated on February 1, 2021. Admitted the Plaintiff's last position held was Deputy Director of Parks and Recreation. The remaining allegations and characterizations are denied.

7. Denied.

8. Denied.

9. Admitted that Plaintiff was hired as Parks Supervisor.

10. Denied.

11. Without knowledge, therefore, denied.

12. Admitted that Plaintiff was promoted to the position of Deputy Director of Parks and Recreation. The remaining allegations and characterizations are denied.

13. Denied.

14. Admitted that the Deputy Director position's office location was to be changed from the Community Center. The remaining allegations and characterizations are denied.

15. Without knowledge, therefore, denied.

16. Denied as characterized.

17. Denied.

18. Without knowledge, therefore, denied.

19. Admitted that the Deputy Director did not supervise the Recreation Supervisor position. The remaining allegations and characterizations are denied.

20. Admitted that Ryan Reed was promoted to Parks Supervisor. The remaining allegations and characterizations are denied.

21. Admitted that Ryan Reed was in his thirties when he became Parks Supervisor. All other characterizations and allegations are denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Admitted that Plaintiff wrote a performance evaluation for himself.

Admitted that Plaintiff provided his self-evaluation to Firth. The remaining allegations and characterizations are denied.

34. Denied.

35. Denied as characterized.

36. Denied as characterized.

37. Denied as characterized.

38. Denied.

39. Without knowledge, therefore, denied.

40. Admitted that Plaintiff was terminated for multiple issues including but not limited to insubordination. The remaining allegations and characterizations are denied.

41. Without knowledge, therefore, denied.

42. Denied.

43. Denied as characterized.

44. Without knowledge, therefore, denied.

45. Without knowledge, therefore, denied.

46. Without knowledge, therefore, denied.

47. Without knowledge, therefore, denied.

48. Without knowledge, therefore, denied.

49. Denied as characterized.

50. Denied.

51. Denied.

52. Denied.

53. Admitted that Plaintiff has retained counsel. The remaining allegations and characterizations are denied.

COUNT I
PUBLIC WHISTLEBLOWER RETALIATION

54. The City's responses to paragraphs 1 through 53 above are re-alleged and incorporated herein by reference.

55. Denied.

56. Denied as characterized.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

COUNT II
AGE DISCRIMINATION

62. The City's responses to paragraphs 1 through 53 above are re-alleged and incorporated herein by reference.

63. Denied.

64. Denied.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

69. Denied.

DEFENSES

1. Plaintiff cannot demonstrate that he engaged in any protected whistle-blower activity protected by the Florida Whistle-blower's Act, §112.3187, et seq., Florida Statutes, or that he made any "protected disclosure," as that is defined by Florida law.

2. Plaintiff cannot demonstrate that he made any protected disclosure under the Florida Whistle-blower's Act.

3. Plaintiff's January 14, 2021, email, as referenced in ¶¶ 36-37 of Plaintiff's Amended Complaint [ECF 1-1], is not a protected disclosure under the Florida Whistle-blower's Act. See Exhibit "A" hereto.

4. Plaintiff cannot demonstrate that he made any protected disclosure under Florida Whistle-blower's Act.

5. Plaintiff cannot demonstrate that any decision made by the City was related in any way to Plaintiff's alleged disclosure.

6. Plaintiff's Amended Complaint fails to state a cause of action for public employee whistle-blower retaliation because he did not disclose any actions enumerated in §112.3187(5), Fla. Stat.

7. There is no causal connection between the complained-of action against Plaintiff and his alleged statutorily protected expression.

8. Any actions taken by the City regarding Plaintiff would have been taken absent any alleged protected activity. See §112.3187 (10), Fla. Stat.

9. All decisions made with respect to Plaintiff were made in good faith for legitimate, non-discriminatory, non-retaliatory, non-pretextual reasons.

10. Plaintiff cannot establish a prime facie case that the City engaged in intentional discrimination or retaliation or that any of the City's actions were motivated by an impermissible, discriminatory, or retaliatory animus.

11. The City exercised reasonable care to protect those wanting to make Whistle Blower disclosures including the implementation of clear policies regarding Whistle Blower Complaints and reports of Retaliation. Plaintiff unreasonably failed to take advantage of any opportunities provided by the City to properly or confidentially report any alleged acts enumerated under Chapter 112, Florida Statutes.

12. All employment decisions made by the City regarding the Plaintiff were made for legitimate non-discriminatory reasons, including the explicit insubordination exhibited by the Plaintiff towards his supervisors.

13. Age was not a consideration in any employment decision made by the City concerning the Plaintiff.

14. Plaintiff cannot establish the required causal link between his Age and any alleged adverse employment action.

15. The City exercised reasonable care to prevent and promptly correct any discriminatory behavior, including the implementation of clear anti-discrimination policies. Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the City to avoid the alleged harm.

16. Under the facts and circumstances of this case, the City would have made the same employment decisions regardless of Plaintiff's age.

17. No similarly situated employees outside Plaintiff's class were treated more favorably than Plaintiff.

18. The termination of Plaintiff was based on legitimate non-discriminatory, non-retaliatory, non-pretextual reasons including but not limited to his insubordinate email sent to his Director, the City Manager, the Deputy City Manager, and the Human Resources Director, Exhibit "A" hereto, and his history of insubordination and communication issues, Exhibit "B" hereto.

19. To the extent that Plaintiff could have mitigated the amount of damages he allegedly suffered and has failed to do so, any damages awarded to Plaintiff must be barred, set off, and/or reduced accordingly by wages, commission, compensation, pay, benefits, and all other earnings or remunerations, profits and benefits regardless of form received by Plaintiff or which were earnable or receivable with reasonable diligence.

20. Plaintiff has failed to establish any policy, practice, or final policymaker caused him to experience any adverse employment action based on his age or due to retaliation.

21. Plaintiff has failed to establish that any policy was applied to him differently due to his age.

22. Plaintiff has failed to state a claim in that he has not alleged, and cannot prove, sufficient facts to demonstrate that any actions taken by the City were for the purpose of discriminating against Plaintiff.

23. Plaintiff has failed to state a claim in that he has not alleged, and cannot prove, sufficient facts to demonstrate that “but for” his age the City made any actions affecting Plaintiff.

24. Plaintiff has failed to state a claim in that he has not alleged, and cannot prove, sufficient facts to demonstrate any policy, practice, or final policymaker of the City discriminated against Plaintiff.

25. Plaintiff has failed to state a claim for discrimination as he has not alleged, and cannot prove, strong statistical evidence that establishes the existence of a practice or pattern that proves a discriminatory motive in the practices of the City thereby failing to establish a prima facie case of discrimination.

26. Plaintiff has failed to state a claim for discrimination as he has not alleged, and cannot prove, sufficient facts that establish that discrimination is the City’s standard operating procedure in order to demonstrate a discriminatory motive in the practices of the City thereby failing to establish a prima facie case of discrimination. See E.E.O.C. v. Joe’s Stone Crab, 220 F.3d 1263, 1286-87 (11th Cir. 2000).

27. Plaintiff has failed to state a claim for discrimination as he has not alleged, and cannot prove, that any facially neutral employment practice of the City has a significantly discriminatory impact on people over 50 years of age. He has failed to show any specific employment practice of the City that led to a disparate impact against Plaintiff.

28. Plaintiff's claims against the Defendant are frivolous, vexatious, without factual or legal basis, and brought in bad faith. Defendant is entitled to recover attorney's fees and costs pursuant to 42 U.S.C. §1988 and Rule 11, Federal Rules of Civil Procedure.

WHEREFORE Defendant the City of Destin denies any allegations or entitlement as alleged in the Prayer for Relief. Defendant demands that this action be dismissed, and Plaintiff take nothing for his Complaint herein; judgment be entered in favor of Defendant and against Plaintiff on all causes of action; and Defendant be awarded reasonable attorney's fees and costs.

Demand for Jury Trial

Defendant hereby demands trial by jury on all issues so triable.

Dated this 20th day of October 2022.

WARNER LAW FIRM, P. A.
/s/ Eric A. Krebs
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was filed this 20th day of October 2022, via CM/ECF which will send notice to all counsel of record.

Marie A. Mattox
MARIE A. MATTOX, P.A.
Counsel for Plaintiff

/s/ Eric A. Krebs
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