IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KELLIE DIMAIO and KELLIE DIMAIO)	
and JOHN DIMAIO, JR., as Parents)	
and Natural Guardians for DD, a minor,)	
Plaintiffs,)	
V.)	C.A. No. N12C-02-131 JRJ
CHRISTIANA SCHOOL DISTRICT)	
Defendant.)	

ORDER

AND NOW, TO WIT, this <u>6th</u> day of <u>December</u>, 2012, upon consideration of Defendant's Motion to Dismiss, and Plaintiffs' opposition thereto, **IT APPEARS TO THE COURT THAT**:

- 1. On February 9, 2012, Plaintiffs, Kellie DiMaio and Ms. DiMaio together with her husband, John DiMaio, Jr., on behalf of their son, DD, a minor, filed a Complaint alleging: Violation of the Delaware Whistleblower's Protection Act (Count I); Breach of covenant of good faith and fair dealing (Count II); Negligence (Count III); and Gross negligence (Count IV). On May 10, 2012, Defendant, Christiana School District, filed a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6).
- For the reasons articulated during oral argument on November 29, 2012,
 Defendant's Motion to Dismiss Count I is **DENIED**.
- 3. With regard to Count II, in Delaware, there is a "heavy presumption that a contract for employment, unless otherwise expressly stated, is at-will in nature,

with duration indefinite."² Nevertheless, "every employment contract contains an implied covenant of good faith and fair dealing."³ But "the doctrine of at-will employment is broad and the implied covenant is to be narrowly construed."⁴ "Courts have been reluctant to recognize a broad application of the Covenant out of a concern that the Covenant could thereby swallow the Doctrine and effectively end at-will employment."⁵ Thus, the Delaware Supreme Court has carved out a distinct and finite set of exceptions. These are:

- (1) Where the termination violated public policy;
- (2) Where the employer misrepresented an important fact and the employee relied 'thereon either to accept a new position or remain in a present one';
- (3) Where the employer used its superior bargaining power to deprive an employee of clearly identifiable compensation related to the employee's past service; and
- (4) Where the employer falsified or manipulated employment records to create fictitious ground for termination.⁶

According to the Delaware Supreme Court, "Pressman's categories are exclusive."⁷

4. Plaintiffs rely on the first and fourth listed exceptions to the doctrine of at-will employment. Regarding the "violation of public policy" exception, Plaintiffs claim that "Defendant breached the covenant of good faith and fair dealing by

¹ The minor plaintiff is referred to as "DD" in order to protect his privacy.

² Rizzitiello v. McDonald's Corp., 868 A.2d 825, 830 (Del. 2005), citing E.I. DuPont de Nemours and Co. v. Pressman, 679 A.2d 436, 440 (Del. 1996), citing Merrill v. Crothall-American, Inc., 606 A.2d 96, 101 (Del. 1992).

³ *Id.*, citing *Merril*, 606 A.2d at 101.

⁴ *Id.* at 830-31.

⁵ Pressman, 679 A.2d at 442.

⁶ Lord v. Souder, 748 A.2d 393, 400 (Del. 2000), citing Pressman, 679 A.2d at 442-44.

terminating [Plaintiff] for reporting bullying behavior which violates public policy." In Delaware, "a plaintiff must satisfy a two-part test to demonstrate a breach of the covenant of good faith and fair dealing under the violation of public policy exception." First, "the employee must assert a public interest recognized by some legislative, administrative or judicial authority." ¹⁰ employee must occupy a position with responsibility for advancing or sustaining that particular interest."11

- 5. The Legislature has recognized the reporting of bullying in Delaware's school systems as a valid public interest. The Delaware Legislature has mandated that every school district "shall prohibit bullying "12 The Delaware Legislature has also mandated that each district "shall establish a policy which, at a minimum, includes . . . [a] requirement that each school have a procedure for the administration to promptly investigate in a timely manner and determine whether the bullying has occurred "13 Thus, the first part of the test is met. The Court also finds that, as a paraprofessional, Ms. DiMaio has a position with responsibility for advancing and/or sustaining the anti-bullying policy. Because Plaintiffs' claim falls under one of the four listed exceptions, Defendant's Motion to Dismiss Count II is **DENIED**.
- 6. With regard to Count III, under the Delaware Tort Claims Act, Plaintiffs must allege the absence of one or more of the following elements in order to overcome

⁷ *Id.* at 401.

⁸ Complaint at ¶ 88.

⁹ Lord, 748 A.2d at 401.

¹⁰ *Id*.

¹² 14 Del. C. § 4112D(b)(1). ¹³ *Id.* at § 4112D(b)(2)(f).

sovereign immunity: "(1) the action was discretionary in nature; (2) the action

was done in good faith; [or] (3) the action was done without gross or wanton

negligence." ¹⁴ Count III of Plaintiff's Complaint fails to allege the absence of

one or more of the above elements. 15 Consequently, Defendant's Motion to

Dismiss Count III is **GRANTED**.

7. With regard to Count IV, at oral argument on November 29, 2012, the Court

granted Plaintiffs 10 days to amend their Complaint. Therefore, Defendant's

Motion to Dismiss Count IV is **DEFERRED**.

For the foregoing reasons, Defendant's Motion to Dismiss is **DENIED IN PART**,

GRANTED IN PART, and DEFERRED IN PART.

IT IS SO ORDERED.

Jan R. Jurden, Judge

cc: Prothonotary

¹⁴ Smith v. Christina Sch. Dist., 2011 WL 5924393 at * 3 (Del. Super. Nov. 28, 2011), citing Stevenson v. Brandywine Sch. Dist., et al., 1999 WL 742932, at *2 (Del. Super. July 9, 1999), citing Sprout v. Ellenburg Capital Corp., 1997 WL 716901 (Del. Super. Aug. 16, 1997); 10 Del. C. § 4001.

¹⁵ See Lee v. Johnson, 1996 WL 944868 at *2 (Del. Super. June 4, 1996).