

KEITH R. JONES,

Plaintiff,

v.

NAVIENT,

Defendant.

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) C.A. No. N21C-10-020 WCC

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Decided: May 25, 2022

# MEMORANDUM OPINION

Margaret M. DiBianca, Esquire; Clark Hill PLC, 824 N. Market Street, Suite 710, Wilmington, Delaware, 19899. Attorney for Defendant.

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Before the Court is Defendant Navient’s Motion to Dismiss Plaintiff Keith R. Jones’ Complaint. For the reasons set forth in this opinion, Defendant’s Motion to Dismiss is **DENIED**.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Jones was employed as an account manager in the recovery department for Navient Solutions, LLC (“Navient”).<sup>1</sup> During his employment, Jones had reported to Navient management various concerns and issues within his department.<sup>2</sup> Those issues “ranged from degrading treatment, fairness, placement of accounts, application of policies and rules, retaliation, harassment, discrimination, solicitation of money by management, sabotage of [Mr. Jones’s] efforts to achieve commission and the showing of nude photos of other employees by a member of senior management to [Mr. Jones].”<sup>3</sup>

After Jones reported that conduct, on January 31, 2020, Navient placed Jones on a final written warning.<sup>4</sup> A few months later, in May of 2020, Jones filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) alleging that Navient discharged him on the basis of his race and sex, and in retaliation for

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<sup>1</sup> Compl., D.I. 1, ¶2 (Oct. 4, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at ¶3.

engaging in prior protected activity.<sup>5</sup> Jones was officially fired from Navient on November 16, 2020.<sup>6</sup> On July 6, 2021, the EEOC issued its decision and found that “there [was] no reasonable cause to believe that an unlawful employment practice ha[d] occurred” at Navient.<sup>7</sup>

Now, Jones contends that his firing was a violation of the Delaware Whistleblowers’ Protection Act (“DWPA”).<sup>8</sup> On October 6, 2021, Jones filed a Complaint against Navient seeking compensatory damages for lost salary and punitive damages based on Navient’s conduct.<sup>9</sup> Jones alleges claims of discrimination, retaliation, and wrongful termination in violation of the DWPA, and that he was subjected to and endured unfair treatment and harassment while employed at Navient.<sup>10</sup>

On November 2, 2021, Navient filed a Motion to Dismiss Plaintiff’s Complaint pursuant to Superior Court Rule 12(b)(6).<sup>11</sup> Navient contends that dismissal is proper because Plaintiff fails to make a *prima facie* DWPA claim.<sup>12</sup>

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<sup>5</sup> *Id.* at ¶4.

<sup>6</sup> *Id.*

<sup>7</sup> Compl. Ex. A., D.I. 1, 1 (Oct. 6, 2021)(Final Determination and Right to Sue Notice from State of Delaware Department of Labor).

<sup>8</sup> 19 Del. C. §1701 *et. seq* (2004).

<sup>9</sup> Compl. at 1.

<sup>10</sup> *Id.* at ¶8.

<sup>11</sup> Def.’s Mot. to Dismiss, D.I. 9, 1 (Nov. 2, 2021).

<sup>12</sup> *Id.* at p. 8, 9.

Plaintiff filed a response to Defendant’s Motion to Dismiss on December 10, 2021, reaffirming his position.<sup>13</sup>

## II. STANDARD OF REVIEW

When considering a Rule 12(b)(6) motion to dismiss, the Court “must determine whether the claimant ‘may recover under any reasonably conceivable set of circumstances susceptible of proof.’”<sup>14</sup> It must also accept all well-pleaded allegations as true and draw every reasonable factual inference in favor of the non-moving party.<sup>15</sup> This “reasonable conceivability” standard asks whether there is a “possibility” of recovery.<sup>16</sup> And, the Court need not give weight to conclusory allegations of fact or law.<sup>17</sup> At this preliminary stage, dismissal will be granted only when the claimant would not be entitled to relief under “any set of facts that could be proven to support the claims asserted” in the pleading.”<sup>18</sup>

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<sup>13</sup> Pl.’s Resp. to Def.’s Mot. to Dismiss, D.I. 15, 1 (Dec. 10, 2021).

<sup>14</sup> *Sun Life Assurance Co. of Can. v. Wilmington Tr., Nat’l Ass’n*, 2018 WL 3805740, \*1 (Del. Super. Ct. Aug. 9, 2018)(quoting *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

<sup>15</sup> *Id.*

<sup>16</sup> *Sustainable Energy Generation Grp., LLC v. Photon Energy Projects B.V.*, 2014 WL 2433096, at \*12 (Del. Ch. May 30, 2014).

<sup>17</sup> *Cantatore v. Univ. of Delaware*, 2021 WL 2745107, at \*2 (Del. Super. Ct. June 30, 2021).

<sup>18</sup> *See Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at \*3–4 (Del. Super. Ct. Apr. 16, 2014) (quoting *Clinton v. Enter. Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. July 29, 2009)).

### III. DISCUSSION

“The [DWPA], broadly speaking, prohibits an employer from retaliating against an employee for reporting certain violations of the law.”<sup>19</sup> “The DWPA acts to protect ‘employees who report violations of the law for the benefit of the public,’ as well as to ‘provide[] a check on persons in positions of authority, by ensuring that they do not take retaliatory action against subordinates who disclose misconduct.’”<sup>20</sup> “In order to qualify as a violation under the [DWPA], the employer misconduct must speak to the public health and safety or to fraud.”<sup>21</sup>

The elements for a *prima facie* DWPA claim are as follows: (1) the employee engaged in a protected whistleblowing activity; (2) the accused official knew of the protected activity; (3) the employee suffered an adverse employment action; and (4) there is a causal connection between the whistleblowing activity and the adverse action.<sup>22</sup>

Violations that give rise to DWPA claims are limited and include, “(1) workplace or environmental safety standards; (2) financial management or accounting

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<sup>19</sup> *Hayman v. City of Wilmington*, 2020 WL 6342604, at \*2 (Del. Super. Ct. Oct. 29, 2020).

<sup>20</sup> *Chance v. Kraft Heinz Foods Co.*, 2018 WL 6655670, at \*10 (Del. Super. Ct. Dec. 17, 2018).

<sup>21</sup> *Pratt v. M & T Bank Corp.*, 230 F.Supp.3d 343, 346 (D. Del. Jan. 19, 2017).

<sup>22</sup> *Chance*, 2018 WL 6655670, at \*10.

standards; or (3) campaign finances.”<sup>23</sup> More specifically, the DWPA defines a violation as:

an act or omission by an employer, or an agent thereof, that is materially inconsistent with, and a serious deviation from, (a) standards implemented pursuant to a law, rule, or regulation promulgated under the laws of this State, a political subdivision of this State, or the United States, to protect employees or other persons from health, safety, or environmental hazards while on the employer’s premises or elsewhere; or...(b) financial management or accounting standards implemented pursuant to a rule or regulation promulgated by the employer or a law, rule, or regulation promulgated under the laws of this State, a political subdivision of this State, or the United States, to protect any person from fraud, deceit, or misappropriation of public or private funds or assets under the control of the employer.<sup>24</sup>

If the alleged conduct falls outside of these parameters, then it may not form the basis for a DWPA claim.<sup>25</sup> At this stage, the standard for a DWPA claim is whether the Plaintiff, Jones, reported conduct which he reasonably believed to be a violation of law, even if he did not plead facts showing which law he believed Navient’s misconduct violated.<sup>26</sup>

In taking all reasonable inferences in the light most favorable to Jones, the Court finds that the complaint adequately pleads protected whistleblower activity. Jones appears to assert grievances he reported to Navient management regarding alleged improper acts, unfair treatment, and harassment. Arguably, Jones’s claims seem to

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<sup>23</sup> *Id.*

<sup>24</sup> 19 Del. C. §1702(b)(6).

<sup>25</sup> *Fender v. Del. Div. of Revenue*, 628 Fed.Appx. 95, 98 (3d Cir. Oct. 14, 2015).

<sup>26</sup> *Kelsall v. Bayhealth, Inc.*, 2015 WL 9312477, at \*2 (Del. Super. Ct. Dec. 18, 2015).

be violations of workplace safety and accounting standards. Moreover, although the alleged misconduct may be individual to Jones, “Delaware law recognizes that a workplace complaint about a private or interpersonal matter may demonstrate a violation of the DWPA.”<sup>27</sup> Therefore, the Court finds that Plaintiff adequately pled protected whistleblower activity and that he reasonably believed Navient’s conduct was a violation of law.

The Court also finds that, at this stage, Plaintiff adequately pleads a causal connection between the alleged protected whistleblower activity and his subsequent termination. To satisfy this element, Plaintiff must plead allegations from which the Court can infer that the “primary basis” for Plaintiff’s termination was his protected whistleblowing activity.<sup>28</sup>

Here, the complaint alleges that the primary basis for Jones’s termination was his reporting of numerous violations that eventually morphed into an EEOC complaint against Navient. And, although Navient contends that six months is too attenuated to support causation, the complaint asserts that during that time, Navient management was orchestrating a concerted effort to terminate Jones, which was ultimately successful.<sup>29</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Addison v. East Side Charter Sch. of Wilmington, Inc.*, 2014 WL 4724895, at \*5 (Del. Super. Ct. Sept. 19, 2014).

<sup>29</sup> Compl. at ¶4.

At this point in the litigation, Jones's allegations must be accepted as true until the factual record is more developed.<sup>30</sup> The Court finds that dismissal at this early stage would be inappropriate because Jones has alleged various protected whistleblower activities and has not had the opportunity to conduct discovery. The veracity of such allegations will be uncovered during discovery and at that point, the Court will be able to further assess Plaintiff's claims in a summary judgment context. Accordingly, Jones's Complaint will survive Navient's Motion to Dismiss.

#### IV. CONCLUSION

In considering all facts and reasonable inferences in the favor of Plaintiff, Defendant Navient's Motion to Dismiss pursuant to Rule 12(b)(6) is **DENIED**.

**IT IS SO ORDERED.**

/s/ William C. Carpenter, Jr.  
Judge William C. Carpenter, Jr.

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<sup>30</sup> *Chance*, 2018 WL 6655670, at \*11.