

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

NANCY M. MARKEY, :
Plaintiff :
v. :
: C.A. No. 2020-
TOWN OF WESTERLY, by and through :
its Finance Director Dyann Baker, alias, :
and J. MARK ROONEY :
Defendant :

COMPLAINT

I. Introductory Statement

1. This action is brought by Plaintiff Nancy M. Markey (“Plaintiff”) seeking compensatory, liquidated, and punitive damages, counsel fees, costs and other equitable relief arising out of unlawful discrimination, interference, and retaliation committed by her former employer, the Defendant Town of Westerly, and Defendant J. Mark Rooney in violation of the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601 *et seq.*, the Rhode Island Parental and Family Medical Leave Act (“RIPFMLA”), R.I. Gen. Laws § 28-48-1, *et seq.*, the Family First Coronavirus Response Act (“FFCRA”), Pub. L. No. 116-127, 134 Stat. 178 (2020), and/or the Rhode Island Whistleblower Protection Act (“RIWPA”), R.I. Gen. Laws § 28-50-1, *et seq.*

II. Parties

2. Plaintiff Nancy M. Markey is a resident of the Town of Middletown, County of
Newport, and State of Rhode Island.

3. Defendant Town of Westerly (“Town”) is a municipal corporation duly authorized and organized under the laws of the State of Rhode Island and is sued by and through its Town Finance Director, Dyann J. Baker, CPA, MBA, alias, who is currently acting as Defendant Town’s Treasurer, the official designated by state law, R.I. Gen. Laws § 45-15-5, to be named in a suit for relief against Defendant City.

4. At all relevant times, the Town was a public agency, state department, or state agency as defined under the FMLA and RIPFMLA and was Plaintiff's employer as defined under the FMLA, RIPFMLA, FFCRA, and the RIWPA.

5. Defendant J. Mark Rooney ("Def. Rooney") is a resident of the Town of Westerly, County of Washington, and State of Rhode Island.

6. At all relevant times, Def. Rooney was acting directly or indirectly in the interest of the Town in relation to the Plaintiff and was therefore Plaintiff's employer as defined under the FMLA, RIPFMLA, and the FFCRA.

7. As used herein, the term "Defendants" refers to the Town and Def. Rooney collectively and jointly.

III. Jurisdiction

8. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1367, 2201 and 2202.

IV. Venue

9. Pursuant to the requirements set forth in 28 U.S.C. § 1391, venue is proper in this Court insofar as Defendant is doing business in Rhode Island and therefore is deemed to reside in the District of Rhode Island and a substantial part of the acts and/or omissions giving rise to the claims asserted herein occurred in the District of Rhode Island.

V. Material Facts

Employment Position

10. Plaintiff was hired by the Town as the Human Resources Director on October 22, 2018.

11. Throughout her employment, Plaintiff reported to the Town Manager, Def. Rooney, who was her direct report and had complete authority over the conduct of her duties, including the power to hire and fire her.

12. Plaintiff's normal work schedule was 37.5 hours a week, Monday through Thursday.

13. As the Director of Human Resources, Plaintiff was responsible for performing or overseeing all traditional human resources and labor relations functions and supervising a Human Resources Specialist, Haley Hamilton ("Ms. Hamilton"), and served as the Town's HIPPA representative, along with the Leave Administrator.

14. In July 2019, Def. Rooney rated Plaintiff's job performance as "Exceeds Expectations" and her annual salary was increased from \$85,000.00 to \$90,125.00, one of the largest increases given to employees based on cost of living and job performance.

15. Def. Rooney often praised Plaintiff's job performance and frequently sought her advice and counsel on important matters.

Factual Background to Dispute

16. On March 4, 2020, Plaintiff left work due to abdominal pain and asked Ms. Hamilton to notify Def. Rooney that Plaintiff was leaving to go to the doctor.

17. Later that day, Plaintiff confirmed with Ms. Hamilton that she had, in fact, immediately notified Def. Rooney that Plaintiff was leaving work due to illness.

18. Plaintiff also requested that Ms. Hamilton send her FMLA paperwork in case she needed to be out of work for more than a couple of days.

19. Plaintiff additionally notified Jeanna Welshman ("Ms. Welshman"), the designated Town of Westerly Leave Administrator, that Plaintiff might be needing a personal medical leave under the FMLA.

20. On or about March 5, 2020, Ms. Welshman sent Plaintiff a copy of Form WH-381, Notice of Eligibility and Rights and Responsibilities under the FMLA, confirming her eligibility for an FMLA leave and requesting Plaintiff submit the FMLA paperwork by March 20, 2020.

21. After being seen by her primary care physician and undergoing lab work and testing, on March 5, 2020, Plaintiff notified Def. Rooney that her physician had advised her that she could not return to work for a least a week.

22. On or about March 6, 2020, Plaintiff emailed Ms. Hamilton and the Director of Finance, Dyann Baker (“Ms. Baker”), temporary procedures for human resource functions needing her authority, signature, or review in her absence.

23. Plaintiff also texted Def. Rooney on his cellphone requesting that he call her and emailed him an update on her status; however, Def. Rooney did not call Plaintiff, as requested, or any day thereafter, during her FMLA leave.

24. Plaintiff remained available to Def. Rooney, Ms. Hamilton, and Ms. Baker to answer questions via phone or email, while on leave.

25. On March 9, 2020, Gina Raimondo, the Governor of Rhode Island (“Governor”), issued Executive Order 20-02 declaring a State of Emergency due to the dangers to health and life posed by COVID-19.

26. At a follow-up visit with her physician on March 13, 2020, Plaintiff had her FMLA paperwork completed indicating that she was eligible for FMLA leave, identifying her serious health condition as acute anxiety and abdomen pain, and clearing her for work on March 20, 2020.

27. Plaintiff notified Def. Rooney that she would be returning to work on March 23, 2020, her next scheduled workday.

28. On March 18, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act and Families First Coronavirus Response Act (FFCRA) were signed by the President of the United States, providing paid sick and emergency leave to employees meeting certain conditions in connection with COVID-19, which became effective April 2, 2020.

29. On March 22, 2020, the Governor issued Executive Order 20-09 (E.O. 20-09), ordering employers to implement CDC guidelines, which included insuring that employees who were sick remained home and to conduct regular cleaning and disinfecting of frequently touched objects and surfaces.

30. E.O. 20-09 included an order that all business service personnel, defined to include human resources professionals, who could work from home were required to do so.

31. E.O. 20-09 also prohibited the gathering of more than 10 people in any public or private space such as a large conference room, meeting hall, or auditorium, and authorized the Director of the Rhode Island Department of Health (RIDOH) to take any action and to make and enforce any rules and regulations necessary to implement her order.

32. Upon Plaintiff's return to work on March 23, 2020, Plaintiff confirmed with Ms. Welshman that she had accepted her FMLA paperwork and return to work clearance; ***Ms. Welshman did not request any additional medical documentation or express any concerns regarding the FMLA leave.***

33. Plaintiff's FMLA paperwork also indicated that due to the nature of her condition, Plaintiff might need Intermittent Leave in the future, due to flareups, during which Plaintiff would not be able to be physically present at work, but may be able to work remotely on a limited basis.

34. That same day, Plaintiff met with Def. Rooney in his office, during which meeting he welcomed Plaintiff back and told her that it had been hard on him while Plaintiff was on medical leave.

35. ***At no time during their meeting, did he express any concerns about Plaintiff leaving work on March 4th, her FMLA paperwork, or her return to work documentation.***

36. During the meeting, Plaintiff observed that Def. Rooney was exhibiting symptoms of the coronavirus, questioned whether he should be at work, and suggested he get tested for COVID-19, just to be safe.

37. Def. Rooney responded that he was fine and did not have a primary care doctor in Rhode Island.

38. Plaintiff was also advised by Def. Rooney that, in addition to her traditional human resources responsibilities, Plaintiff was to serve as the point person for all COVID-19 employee-related matters.

39. One of her first completed tasks following that notification was the creation of forms for employees to utilize to request the various paid leaves under the FFCRA to insure a timely implementation of the Act.

40. Plaintiff emailed the forms and CDC recommendations to employees, held informational sessions explaining the leave options and corresponding form, and assured employees that the Town would follow all CDC recommendations and would notify employees of any positive cases in the workforce, reiterating that employees who did not feel safe at work could take paid vacation or personal leave.

41. In accordance with E.O. 20-09, Plaintiff posted notices with CDC recommendations in the workplace.

42. Plaintiff learned that, while she was on medical leave, Ms. Hamilton informed Public Works employees, if they were over 60 years old or had a pre-existing condition that would make them more susceptible to COVID-19, then they could leave work and stay out of work for up to 13 weeks.

43. Because several employees in the Public Works Department took advantage of this offer and left work without any documentation or supporting medical notes, Plaintiff drafted letters to these employees requesting documentation supporting their absence and setting forth the paid time off available to them based on their documentation, union contracts, and/or Town accrued leave policies.

44. Some of the Public Works employees out of work due to the new policy had no paid time off available to them and filed for Temporary Disability Insurance (TDI) and/or unemployment benefits.

45. When Def. Rooney learned employees were filing for unemployment as a result of his policy, he informed Plaintiff he wanted to fire anyone filing for unemployment.

46. Plaintiff responded that he could not fire an employee for filing for unemployment, the Town could only challenge the unemployment.

47. He instructed Plaintiff to challenge all unemployment claims and began questioning employees' documented medical conditions.

48. On March 23, 2020, two employees were telecommuting for the duration of the COVID-19 pandemic due to pre-existing health conditions.

49. Prior to the pandemic, the Town did not have a telecommuting policy, so Plaintiff also created a telecommuting form for employees who requested to telecommute for the duration of the pandemic, or an extended period of time, with a daily log for employee accountability.

50. The telecommuting form Plaintiff created was to be initiated by the employee's supervisor—whose responsibility it was to send the form to the employee, if appropriate—signed by the employee, a Human Resources representative, and Def. Rooney, ***but the telecommuting form was not required for employees working from home for only a few days.***

51. No employee, who was out of work waiting for COVID-19 results and working from home, had been asked to complete the telecommuting form.

52. At the end of March, Town Hall was closed to the public and only people making appointments were permitted to enter the building.

53. On or about March 23, 2020, Ms. Hamilton visited Plaintiff's office asking if they were going to be permitted to work from home, as human resource employees, in accordance with E.O. 20-09.

54. Later that day, Plaintiff met with Def. Rooney requesting if Ms. Hamilton could work at home in accordance with E.O. 20-09, which he immediately denied.

55. Def. Rooney told Plaintiff that he did not take the coronavirus seriously, that more people die from the flu, and that people in the Northeast are "wusses."

56. On March 28, 2020, the Governor issued E.O. 20-13 and E.O. 20-14, which ordered that all gatherings of more than five (5) people in any public or private space, including auditoriums, large conference rooms and meeting halls, were prohibited and included the link to the RIDOH website concerning self-quarantine regulations.

57. On or about March 30, 2020, Ms. Hamilton again asked Plaintiff if she could work from home; Plaintiff told her she would again ask Def. Rooney and went to his office.

58. On or about March 30, 2020, while Plaintiff was waiting for Def. Rooney to return to his office, Donna Giordano, ("Ms. Giordano"), Town Clerk, also arrived at Def.

Rooney's office and told Plaintiff that she was going to ask him if her employees could stop making appointments with the public during the pandemic.

59. Plaintiff suggested they meet with Def. Rooney together to try to impress upon him the Governor's desire for employees to work from home.

60. When Def. Rooney arrived, Ms. Giordano and Plaintiff both expressed their concerns about employees reporting to work contrary to the Governor's orders.

61. In direct violation of E.O. 20-09, 13, and 14, Def. Rooney said everyone must continue coming to work and Town Clerk staff must continue to make appointments with the public stating that was the way the Town Council wanted it.

62. Ms. Giordano questioned Def. Rooney about how little the Town Council thought of the employees, not keeping their health and safety paramount, to which Def. Rooney responded, "You have no idea how little they think of you!"

63. Plaintiff suggested Def. Rooney let employees work from home, except for some key employees and offered to be one of the employees who continued to work in Town Hall.

64. Again, contrary to of E.O. 20-09, 13, and 14, Def. Rooney rejected the suggestion, becoming angry, and said he did not want to hear any more about COVID-19.

65. Plaintiff said she felt it was her obligation to let him know that the Governor did not want employees at work and reminded him that Westerly was the one of the only Towns with its beaches open.

66. In response, Def. Rooney made derogatory comments about the Governor's handling of COVID-19 and called people in the Northeast "babies."

67. When Plaintiff reported to Ms. Hamilton that Def. Rooney had again denied her request to work from home, she burst into tears.

68. Plaintiff told her to fill out the telecommuting form and Plaintiff would submit it to Def. Rooney and see what happened.

69. Later that day, Def. Rooney returned Ms. Hamilton's telecommuting form to Plaintiff, signed, and approved.

70. As the employee COVID liaison, Plaintiff met with numerous employees who expressed concerns with Def. Rooney's handling of COVID-19, which in many cases violated applicable law, including E.O. 20-09, 13, and 14.

71. One of the employees, the Assistant Public Works Director, Peter Chiaradio ("Mr. Chiaradio"), informed Plaintiff that many of his workers were concerned the Town would hide positive COVID-19 cases from the workers.

72. As a result of Mr. Chiaradio's stated concerns, Plaintiff sent an email to all employees assuring them the Town would follow all CDC recommendations and follow any recommended notification process for positive cases.

73. On April 6, 2020, there were two employees out of work with COVID-19 symptoms waiting for their COVID-19 test results, including the Payroll Supervisor ("Employee A") and Def. Rooney's Executive Assistant ("Employee B").

74. That morning, Def. Rooney called Plaintiff on her cellphone and informed her that he was going to the Westerly Hospital Emergency Room to get a "stat" COVID-19 test because he was still experiencing COVID-19 symptoms.

75. Plaintiff asked Def. Rooney if Employee B knew his COVID-19 test results and Def. Rooney responded that Employee B did not.

76. After hanging up with Def. Rooney, Employee A called and informed Plaintiff that the test results were positive for COVID-19 and provided the names of employees with whom s/he had been in direct contact, which included Plaintiff.

77. Employee A asked Plaintiff not to disclose to other employees that s/he had COVID-19 and Plaintiff responded that Employee A had the right to keep his/her identity private, but that Plaintiff should tell the employee's supervisor, Ms. Baker, and Def. Rooney.

78. Employee A agreed that Plaintiff could disclose his/her name to those people.

79. When Plaintiff told Ms. Baker that Employee A had tested positive, she responded, "Great, now we have two positive employees in Town Hall."

80. Plaintiff asked her who the other employee was, and Ms. Baker responded, Employee B, Def. Rooney's direct report.

81. Ms. Baker then disclosed that Def. Rooney had called her at home the night before and told her Employee B had tested positive for COVID-19 and ordered her not to tell Plaintiff.

82. Plaintiff expressed disbelief that Def. Rooney would lie to her, and Ms. Baker warned her that was not the only thing he lied to her about and that he also said Plaintiff needed to be "*reined in*" because Plaintiff was creating panic over COVID-19.

83. Ms. Baker and Plaintiff then called Def. Rooney on his cellphone and advised him of Employee A's test results and Plaintiff informed him that Plaintiff knew about Employee B's positive results.

84. Ms. Baker asked if she could notify her staff, and Def. Rooney angrily responded, "You are not to tell a Goddamn soul until I get back! Do you understand? You are not to tell a Goddamn soul!"

85. Ms. Baker and Plaintiff then discussed how to handle employees in Town Hall, deciding that employees had to be sent home, or at least notified, and be given the option of going home.

86. When Def. Rooney returned to Town Hall after being tested, he told Plaintiff that he could not get the instant test, so he would not know the results for several days.

87. Plaintiff told Def. Rooney it was her understanding that he had to self-isolate pending his test results, but he refused to self-isolate or limit his interaction with employees and ordered Plaintiff not to tell anyone he had been tested.

88. Ms. Baker, Def. Rooney, and Plaintiff then discussed how to handle the two positive COVID-19 Town Hall employees, wherein Plaintiff suggested he close Town Hall to employees, or give employees the opportunity to go home and cover Town Hall with a few key employees as Plaintiff had previously suggested.

89. Now that there were two positive COVID-19 employees, Plaintiff asked if Def. Rooney believed COVID-19 was serious; he responded that only old or sick people had to worry about COVID-19.

90. Plaintiff responded that was not true, as her son had a 28-year-old friend, former star athlete, who recently died from COVID-19.

91. Def. Rooney told Plaintiff that he was not doing anything until an 11 o'clock call with the Cities and Towns.

92. Plaintiff insisted employees needed to be notified immediately and allowed to go home if they wanted to do so.

93. Def. Rooney then stood and yelled, "Who the fuck do you think you are?"

94. Plaintiff responded, "the HR Director," and said that she had promised employees they would be notified of any positive COVID-19 employees in the workforce and that employees had the right to know so they could take added steps to protect themselves.

95. *Plaintiff told Def. Rooney he may fire her for doing so, but she felt a duty and obligation to employees and their health and safety, and she would be informing employees about the two positive cases in Town Hall.*

96. Def. Rooney, still standing, yelled, “You’re not telling anyone anything. *You are going home.*”

97. Plaintiff asked who would tell the employees if Plaintiff went home; Def. Rooney said he would tell them, and he repeated, “You aren’t telling anyone anything, *you are going home.*”

98. Plaintiff responded that she would go home after she heard what he told the employees.

99. Def. Rooney then said to Plaintiff he was getting very angry as a result of the COVID-19 discussion, and he felt like he was going to hit someone if he was pushed about COVID-19 any further, but he then claimed, of course, he would never do that.

100. A few minutes later, Def. Rooney repeated that he felt like hitting someone, but of course, he never would.

101. The Chief of Police then entered the room with a box of masks that Plaintiff had requested to distribute to employees and joined the discussion of protocols for handling positive COVID-19 cases.

102. Because no one was sure of the official protocols, the Chief said he would ask during the 11:00 call.

103. While waiting for the call, the Chief informed them that there were two positive COVID-19 state employees, one at the DMV and one at a courthouse, and that the State had closed both facilities for cleaning.

104. Plaintiff asked Def. Rooney if he was going to close Town Hall and clean it, but he replied, “No!” and that he was not interested in hearing about CDC requirements.

105. Ms. Baker and Plaintiff sat in on the 11:00 am conference call and learned that none of the participants in the call knew the formal protocol for when there were positive COVID-19 employees in the workplace.

106. Def. Rooney then decided he was going to immediately tell staff about the two positive employees and told Plaintiff to gather all the employees in Town Council Chambers.

107. Plaintiff told Def. Rooney that the Governor had ordered no more than five people could gather and suggested he hold small group meetings, but Def. Rooney rejected her suggestion, saying it would take too long and Council Chambers was set up for social distancing.

108. Ms. Baker and Def. Rooney then began to discuss Employee A’s possible contacts and Plaintiff said she had obtained their names and warned that they could not identify Employee A by name when meeting with the employees.

109. They both responded that they had to use names so employees would know if they had contact with the COVID positive employees, but Plaintiff repeated, she had the contact names and that Employee A specifically requested that his/her name not be disclosed.

110. Plaintiff then asked about Employee B’s contacts and Def. Rooney told her they were not talking about Employee B.

111. When the more than 20 employees were gathered in the Council Chambers, Def. Rooney disclosed that Employee A—identifying the employee by name—had tested positive for COVID-19, but he did not mention that he had been tested for COVID-19 because of symptoms.

112. The Chief of Police then spoke up, informing the group that Employee B—identifying the employee by name—had also tested positive.

113. Plaintiff later sent the Chief of Police the portion of the ADA that prohibits employers from disclosing the name of an employee with COVID-19.

114. Def. Rooney then disclosed Employee B's confidential pre-existing medical conditions, saying that if Employee B could survive COVID-19, with all his pre-existing medical conditions, then no one in the room should fear COVID-19, and said that once you got COVID-19, you could never get it again.

115. At this point, Plaintiff left the room and went to her office to gather her things to go home, as ordered, when Def. Rooney entered her office.

116. Plaintiff thanked him for telling the employees about the positive COVID-19 employees and stated it was the right thing to do; however, Plaintiff told him that he should not have lied to her about Employee B's test results.

117. He responded that he had not told her because he was afraid that she "would do something [he] didn't like, if [she] knew."

118. Plaintiff asked when she had ever done anything without running it by him first.

119. On her way home, Plaintiff called her physician's office to see if she should be tested for COVID-19 based on her contacts with Employees A, B, and Def. Rooney and because Plaintiff's husband is a cancer survivor and considered at greater risk if subjected to COVID-19.

120. Later that day, in a phone call, Plaintiff informed Def. Rooney that her physician had ordered a COVID-19 test for her the next day, April 7, 2020, and that this would require her to self-isolate and work from home, as required by her physician, the RIDOH, and CDC, pending her test results and that she did not expect to receive the results before April 10th.

121. Since Plaintiff's work schedule for that week was only 3 days, Monday through Wednesday, due to Good Friday, Plaintiff informed Def. Rooney she would only be working

remotely for two days, and if her test was negative, she could return to work by the next Monday; she confirmed the information in a follow-up email.

122. ***However, Def. Rooney became angry, yelling that he wanted to see a copy of the doctor's orders submitted to the testing site and her test results, and said Plaintiff was not eligible for pay under the FFCRA.***

123. No other employee had been required to produce a copy of their doctor's orders to the testing facility or their actual COVID-19 test results, prior to this conversation.

124. Pursuant to the FFCRA, employees are entitled to two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work (and unable to telework) because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis, including while waiting for COVID-19 test results.

125. Beginning the morning of April 7, 2020, Plaintiff received requests from Def. Rooney to perform work from home and Plaintiff was directed to call-in for a Department Head meeting on April 9, 2020.

126. ***At no time did Def. Rooney—as Plaintiff's direct supervisor—send Plaintiff or request that Plaintiff complete a telecommuting form before she performed the work he requested or performed her normal work responsibilities,*** which only would have been required by the protocols Plaintiff set up ***if*** she was telecommuting for more than a few days.

127. Suddenly and unexpectedly, on the afternoon of April 7, 2020, Plaintiff received an email from Def. Rooney claiming Plaintiff's questioning of his handling of COVID-19 in the April 6th meeting had been disrespectful and insubordinate, that Plaintiff left work on March 4th and on April 6th without consulting him or giving him the common courtesy of a phone call

informing him that Plaintiff was leaving, and that Plaintiff had not provided her FMLA paperwork in a timely manner.

128. Def. Rooney did not claim in his April 7, 2020 email that Plaintiff's leaving work on March 4th or April 6th violated Town policy or procedure or that her partial absences on those days were considered unauthorized.

129. Plaintiff responded by email to each of his allegations refuting his characterizations of her behavior, correcting misstated facts, and denying that her actions were insubordinate.

130. Specifically, Plaintiff responded that she did not know why Def. Rooney was bringing up her FMLA leave at that time, but that she had provided the paperwork in a timely manner and suggested he contact Ms. Welshman, the Leave Administrator, to confirm.

131. Plaintiff also stated that she was not aware of any policy requiring employees to notify the Town Manager before leaving work due to illness, and Plaintiff reminded Def. Rooney that he had ordered her to go home on April 6th.

132. Finally, Plaintiff informed Def. Rooney that she had the right to be tested for COVID-19 without the fear of retaliation.

133. Def. Rooney did not contact Ms. Welshman, ***but she sent him an email confirming that Plaintiff's FMLA paperwork had been submitted in a timely manner, at Plaintiff's request.***

134. On April 8, 2020, Employee A sent Plaintiff and Ms. Baker an email outlining her concerns about returning to work and requesting that her office and Town Hall be cleaned, which Plaintiff conveyed to Def. Rooney.

135. In response, Def. Rooney demanded names of *all* employees making such requests, specifics about the requests, and that each emailed request be forwarded to him directly.

136. Later that very same evening, April 8, 2020, after an exchange of emails wherein, among other things, Plaintiff expressed her concern and shared the concern by other employees of retaliation from Def. Rooney for requesting that Town Hall be cleaned after each positive COVID-19 result, Plaintiff complied with Def. Rooney's demand and disclosed the names of all the employees who so requested.

137. *In that same email, Plaintiff notified Def. Rooney that she would be complaining to various state agencies about the Town's failure to comply with COVID-19 related executive orders and the retaliation she was experiencing for complaining about and opposing such conduct.*

138. On April 9, 2020, Plaintiff emailed a letter to the Governor, CDC, RIDOH, Rhode Island Department of Labor and Training ("RIDLT"), and the U.S. Department of Labor ("USDOL") outlining her concerns with Def. Rooney's handling of COVID-19 and her fear of retaliation by Def. Rooney against herself and other employees.

139. That same day, Plaintiff called into the Department Head meeting, as directed, and Def. Rooney advised that the Town would be very liberal about timeframes for submitting physician notes.

Retaliation

140. On April 10, 2020, Plaintiff received negative results from her COVID-19 test.

141. When Plaintiff attempted to email Def. Rooney that her results were negative, she discovered that she had been locked out of her Town email account.

142. On April 11, 2020, Plaintiff received a letter signed by Def. Rooney ***dated April 9th—the day after Plaintiff's email disclosing her intent to complain to various state agencies about the Town's failure to comply with COVID-19 related executive orders***—putting her on

indefinite leave for purported failure to follow Town policies with regard to properly approved leave from work and alternative working arrangements and insubordination.

143. That letter included as grounds for placing Plaintiff on administrative leave her complaints about and opposition to Town conduct in violation of COVID-19 related executive orders and complaints of retaliation by Def. Rooney for expressing the same, which Def. Rooney called “unprofessional.”

144. That April 9, 2020 letter also falsely claimed, as grounds for placing Plaintiff on administrative leave, Plaintiff’s alleged failure a) to comply with FMLA documentation requirements, which Def. Rooney knew to be false because Ms. Welshman had confirmed with him that all paperwork had been properly submitted; and, b) to provide the results of her April 7, 2020 COVID-19 test result (presumably *prior to April 9, 2020* when the letter was written), which he knew to be false because he had been informed that Plaintiff was not expected to receive the result before *April 10, 2020*.

145. In any event, at no time did Defendants’ claim that her FMLA or FFCRA documentation was deficient and request corrected, additional, or supplemental documentation as required by applicable law, before denying her leave requests and terminating her employment.

146. The letter contained specific information identifying Plaintiff’s confidential medical condition and quotes from her FMLA paperwork, which had been kept in her confidential employee medical file in the Human Resources Office, to which only HR representatives and the Leave Administrator had access.

147. In addition to the privacy protections provided to employees under the FMLA, the Town has a written policy¹ prohibiting anyone from accessing an employee’s confidential

¹ Defendant Town written policy is required by the Rhode Island Confidentiality of Health Care Information Act to establish security procedures to “(1) Limit authorized access to personally identifiable confidential healthcare information to persons having a “need to know” that information; additional employees or agents may have access to that information that does not contain information from which an individual can be

medical file without written permission from the employee, which authorization had not been given by Plaintiff.

148. The Leave letter stated that Def. Rooney had consulted with the Town Council in March concerning getting a short-term temporary replacement during Plaintiff's FMLA leave, presumably also disclosing her confidential medical condition or information to members of the Town Council.

149. Upon information and belief, no department head had been disciplined by Def. Rooney for leaving work due to illness without *personally* notifying him.

150. While on administrative leave, Plaintiff was notified that the Town had engaged an outside law firm to investigate Plaintiff's claims of retaliation and Plaintiff was scheduled to be interviewed by the investigator on April 29, 2020.

151. On April 28, 2020, Plaintiff's father was admitted to a hospital in Arkansas with COVID-19 symptoms and Plaintiff requested that her interview be rescheduled so she could fly to Arkansas; however, Plaintiff was advised that if she did not meet with the investigator on April 29th, the investigator would issue a decision on her retaliation claim without interviewing her, despite Plaintiff being the complainant.

152. Plaintiff delayed her trip to Arkansas and was interviewed by the investigator on April 29, 2020.

153. Plaintiff's father died of COVID on May 4, 2020.

154. While handling her father's affairs in Arkansas, Plaintiff was notified that she must participate in a pre-termination hearing via Zoom on May 18, 2020.

155. The notice, dated May 13, 2020, stated Plaintiff's pending discipline was based on the findings of the Town's investigation into her claims of retaliation.

identified; [and] (2) Identify an individual, or individuals, who have responsibility for maintaining security procedures for confidential healthcare information," among other requirements. R.I. Gen. Laws § 5-37.3-4(c).

156. Plaintiff's request for a copy of the investigation findings, critical to preparing an adequate response, was denied by the Town.

157. On May 18, 2020, while on bereavement leave, Plaintiff participated in the pre-termination call via Zoom, without using the video option.

158. Plaintiff read a prepared statement responding to the limited information she had been provided concerning her administrative leave and pending termination and complaining that Def. Rooney's access to her confidential medical file and information was a violation of her privacy rights under the FMLA and Town policy.

159. On May 19, 2020, Plaintiff received a termination letter dated May 18th signed by Def. Rooney containing many of the same justifications as were articulated in the letter received on April 11, 2020 placing Plaintiff on administrative leave.

160. The letter cited false and fabricated grounds for her termination, including her alleged failure to address her decision to leave work on March 4th (when she left due to a documented acute illness) and April 6th (when ordered to leave by Def. Rooney) and stated that her decision to telework was not approved by the Town Manager (which was not required by Town protocol because of its short duration).

161. Additional false and fabricated reasons cited in the May 18th letter was Plaintiff's alleged failure to provide a "new" return to work medical note by April 9 (which **was never requested** nor mentioned as grounds for placing her on administrative leave) and failure to provide COVID-19 test results by April 9 (which was impossible because the results were not available to Plaintiff until April 10th, of which Def. Rooney was well aware)—despite Def. Rooney's assurance at the April 9, 2020 Department Head meeting that the Town was going to be very liberal about timeframes for submitting physician notes.

162. Plaintiff's termination letter additionally included a response to Plaintiff's claim of privacy violations, in which Def. Rooney did not deny that he was not authorized to access her confidential medical information at the time he accessed it, but instead claimed that sometime after his unauthorized access to Plaintiff's medical information he made himself the "acting human resources director," which made his previously unauthorized access authorized.

163. Finally, Def. Rooney's letter continued to assert that Plaintiff had been insubordinate and stated that her prepared statement read during the hearing was untruthful and her demeanor was argumentative and unprofessional towards him as the Town Manager.

164. Plaintiff's above-referenced statement included Defendants' failure to comply with COVID-19 related executive orders and the retaliation she was experiencing for complaining about and opposing such conduct as well as complaining about unlawful access to her confidential healthcare information by Def. Rooney.

165. Following her termination, on June 5, 2020, Plaintiff was contacted by an investigator from the USDOL to make a formal statement about her termination and her claim that she had been terminated for her use of approved medical leave in violation of the FMLA.

166. Upon information and belief, USDOL contacted the Town of Westerly during its investigation and informed Defendants that their termination of Plaintiff for use of FMLA leave was unlawful.

167. In response to the USDOL's investigation, Plaintiff received a letter dated July 20, 2020 signed by Def. Rooney, wherein he attempted to retroactively rescind one of the grounds the Town had expressly relied upon to justify the Plaintiff's termination.

168. In that July 20, 2020 letter, Def. Rooney stated, "You were eligible for said FMLA leave, and as you know, you were approved to take said FMLA leave during your tenure.

Your use of FMLA leave, in March, 2020, was not related to your termination, which occurred on May 18, 2020.”

169. Instead, the letter claimed that Plaintiff’s termination was entirely predicated on Plaintiff’s “insubordination” and retracted “any reference to FMLA that appeared in the” previously sent administrative leave and termination notifications.

170. Thus, Defendant effectively confirmed that Plaintiff’s termination had been in violation of her FMLA rights.

171. Defendant additionally doubled-down on its decision to terminate Plaintiff solely for “insubordination” associated with ***her complaints about and opposition to Defendants’ violations of state and federal requirements for responding to the COVID-19 pandemic and attempts to ensure that the Town complied with the same.***

Post-Termination Retaliation

172. Following Plaintiff’s termination, Defendants retaliated against Plaintiff by contesting and appealing Plaintiff’s award of unemployment benefits by the RIDLT without any valid basis.

173. On June 23, 2020, the Director of the RIDLT issued a decision that Plaintiff was entitled to unemployment benefits because the investigation conducted by the RIDLT failed to show evidence of intentional wrongdoing by Plaintiff.

174. Defendants appealed that decision on July 6, 2020, stating that Plaintiff was terminated for insubordination and failure to follow leave and attendance policies.

175. On August 24, 2020, a Referee for the Board of Review for the RIDLT conducted a hearing on Defendants’ appeal.

176. During that hearing, Def. Rooney continued to repeatedly assert that part of the justification for Plaintiff’s termination was her failure to timely return FMLA paperwork and her

leave of absence without receiving explicit permission from Def. Rooney—despite the USDOL determination that this was unlawful and his prior letter of July 20, 2020 stating that her “use of FMLA leave, in March, 2020, was not related to [her] termination.”

177. On August 28, 2020, the Referee for the Board of Review issued a decision finding that Plaintiff had credibly testified to following the routine processing for her leaves of absence on March 4th and April 6th and there was no evidence of intentional policy violation.

178. In ruling that there was no evidence to support denial of unemployment benefits, the Referee found that no issue had been raised by Defendants concerning the March 4th leave until the confrontation on April 6th when it was subsequently used to support Defendants’ decision to terminate Plaintiff.

179. The Referee further found that any alleged insubordination was centered on disagreement over the handling of the COVID-19 protocols that eventually led to her termination, which did not constitute misconduct in connection with the workplace.

180. On September 10, 2020, Defendants again appealed the DLT decision to award Plaintiff unemployment benefits.

181. As justification for its second appeal, Defendants again cited Plaintiff’s “departure from work on two (2) separate occasions without advising her supervisor or first obtaining his permission,” and wrote, “*The Town reiterates that Ms. Markey intentionally violated Town policies and acted insubordinately because she did not agree with the Town Manager's handling of the COVID-19 pandemic for the Town.*” (Emphasis added).

182. The DLT Board of Review subsequently adopted the findings and conclusions of law of the Referee and upheld the Plaintiff’s award of employment security benefits.

183. Defendants' continued obsession with Plaintiff's leave of absence on March 4th, which it had already declared to be properly approved pursuant to the FMLA, exemplifies Defendants' malicious and intentional retaliation against Plaintiff for her use of FMLA leave.

Violation of the FMLA and RIPFMLA

184. Pursuant to both the FMLA and RIPFMLA, Plaintiff was entitled to return to work for Defendant following her medical leave pursuant to, *inter alia*, the same terms and conditions of employment she had enjoyed prior to the commencement of her medical leave.

185. Defendants decision to terminate Plaintiff's employment was clearly made after Plaintiff placed Defendant on notice that she would need FMLA/RIPFMLA leave, including possible intermittent leave.

186. Defendants termination of Plaintiff after she took a brief medical leave in March on the false ground that she failed to submit proper FMLA documentation gives rise to a *prima facie* case of unlawful interference with Plaintiff's rights under the FMLA and RIPFMLA.

187. Defendants termination of Plaintiff after she took a brief medical leave in March gives rise to a *prima facie* case of unlawful discrimination against Plaintiff for exercising her rights under the FMLA and RIPFMLA.

188. Defendants inclusion of Plaintiff's use of FMLA leave in March as justification for her termination and to oppose her application for unemployment benefits after being informed by the USDOL that it was an impermissible grounds for termination, among other things, also gives rise to a *prima facie* case of unlawful retaliation against Plaintiff for exercising her rights under the FMLA and RIPFMLA.

Violation of the FFCRA

189. Included in the FFCRA, Congress passed the Emergency Paid Sick Leave Act (EPSLA), which requires: "An employer shall provide to each employee employed by the

employer paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because: ... (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.” Families First Coronavirus Response Act, PL 116-127, March 18, 2020, 134 Stat 178.

190. The EPSLA also makes it “unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who—(1) takes leave in accordance with this Act,” *id* at § 5104, and provides that a violation of this provision shall “be considered to be in violation of section 15(a)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)); and (2) be subject to the penalties described in sections 16 and 17 of such Act (29 U.S.C. 216; 217) with respect to such violation.” *Id.* at § 5105.

191. Plaintiff was entitled to paid leave under the provisions of the EPSLA following the order from her primary care physician that she obtain a COVID-19 test and self-quarantine until she received the results.

192. Plaintiff notified her employer immediately upon receiving her doctor’s order that she would be self-isolating and working remotely pending the results of her test.

193. However, in placing Plaintiff on administrative leave, Defendants specifically claimed that her decision to work remotely had not been authorized, thus entitling Plaintiff to paid sick leave under the provisions of the EPSLA.

194. Defendants’ decision to place Plaintiff on administrative leave pending termination while she was awaiting results from her COVID-19 test gives rise to a *prima facie* case of unlawful discrimination against Plaintiff for exercising her rights under the FFCRA.

195. Defendants’ termination of Plaintiff after she invoked her rights under the EPSLA to self-isolate while awaiting results from her COVID-19 test pursuant to her primary care

provider's instruction gives rise to a *prima facie* case of unlawful discrimination and retaliation, against Plaintiff for exercising her rights under the FFCRA.

Retaliation Under Whistleblower Protection Act

196. Plaintiff was terminated in whole or in part for threatening to report and reporting in writing to the Governor, the RIDLT, and the RIDOH violations of state and federal law and/or regulations by the Defendants, including but not limited to the Defendants' failure to comply with COVID-19 related executive orders, including E.O. 20-09, 13, and 14, and the retaliation she was experiencing for complaining about and opposing such conduct, which is protected conduct under R.I. Gen. Laws § 28-50-3(1).

197. Plaintiff was terminated in whole or in part for refusing to violate or assist in violating COVID-19 related executive orders relative to workplace attendance, conditions, and safety, including E.O. 20-09, 13, 14, as well as other violations of state and federal law and/or regulations, which is protected conduct under R.I. Gen. Laws § 28-50-3(3).

198. Plaintiff was terminated in whole or in part for reporting verbally and/or in writing to the Defendants violations of state and federal law and/or regulations, including but not limited to a) the Defendants' failure to comply with COVID-19 related executive orders, including E.O. 20-09, 13, and 14, b) the Defendants' violation of the confidentiality of employee health care information, and c) the retaliation she was experiencing for complaining about and opposing such conduct, which is protected conduct under R.I. Gen. Laws § 28-50-3(4).

199. Indeed, Plaintiff's above complaints about violations of federal and state laws and regulations and retaliation for complaining about and opposing the same were explicitly cited as acts of "insubordination" to justify her termination and continue to be Defendants' justification for its retaliatory opposition to and multiple appeals of Plaintiff's award of unemployment benefits.

VI. General Employment Law Allegations

Pretext and Discriminatory Animus

200. Defendants intent to discriminate against Plaintiff on account of protected conduct is established, in part, by conduct evidencing that Defendants' reasons for terminating her were pretextual and unlawfully motivated, including: a) failure to follow its own policies and procedures, b) inexplicable deviation from its normal practices and procedures, c) asserting after the fact justifications for her termination, d) asserting false justifications for her termination, e) treating Plaintiff differently than other similarly situated employees; and, f) asserting implausible, inconsistent, and contradictory justifications for her termination.

201. The temporal proximity of adverse employment action against Plaintiff in relation to her protected conduct, including placing Plaintiff on indefinite administrative leave as a prelude to termination less than twenty-four (24) hours after she notified Def. Rooney of her intent to complain to the Governor and various state agencies about the Town's failure to comply with COVID—19 related executive orders, also supports an inference of discriminatory intent.

Individual Liability

202. In addition to an employer, supervisors and agents of an employer may be held liable for violations under the FMLA, RIPFMLA, and the FFCRA, where they act, directly or indirectly, in the interest of an employer in relation to employees.

203. As the Town Manager of Defendant Town, Def. Rooney was responsible for and controlled the "benefits, terms, and conditions" of Plaintiff's employment, which includes authority over her exercise of protected rights and the power to terminate her employment.

204. As such, Def. Rooney exercised supervisory authority over Plaintiff and was responsible, in whole or part, for the violations alleged herein while acting in the Town's

purported interest and is therefore subject to liability under the FMLA, RIPFMLA, and the FFCRA.

Motivation to Discriminate/Retaliate

205. Adverse employment action based in whole or even in part on account of engaging in protected conduct constitutes prohibited retaliation.

206. Defendants' acts and/or omissions as aforesaid violated clearly established statutory rights of Plaintiff, of which the Defendants knew or should have known.

207. Furthermore, at all relevant times, the Defendants knew or should have known that its conduct would cause or contribute to the deprivation of the Plaintiff's clearly established statutory rights under the FMLA, RIPFMLA, FFCRA, and RIWPA.

208. At all relevant times, Defendants acted intentionally, willfully, wantonly, maliciously, and/or with reckless or callous indifference or gross negligence amounting to deliberate indifference to the Plaintiff's statutory protected rights.

209. As a proximate result of Defendants' wrongful and/or unlawful discriminatory acts and/or omissions, including, but not limited to those described herein, Plaintiff suffered, is now suffering, and will continue to suffer emotional and economic injury, including, but not limited to, pecuniary losses, loss of income, loss of benefits, pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, humiliation, damage to her professional and personal reputation, and has incurred and will continue to incur expenses for legal services, and other great harm.

VII. Claims for Relief

210. Plaintiff incorporates in the counts below the allegations contained in ¶¶1 through 209 above.

Count One
Family and Medical Leave Act,
29 U.S.C. § 2601, *et seq.*
Interference, Discrimination, and Retaliation

211. Defendants, by their individual and/or concerted acts and/or omissions, including, but not limited to those described herein, violated Plaintiff's rights under the FMLA, causing the Plaintiff to suffer damages as aforesaid, and thereby deprived Plaintiff of rights secured under the FMLA.

Count Two
Rhode Island Parental and Family Medical Leave Act,
R.I. Gen. Laws § 28-48-1, *et seq.*
Interference, Discrimination, and Retaliation

212. Defendants, by their individual and/or concerted acts and/or omissions, including, but not limited to those described herein, violated the Plaintiff's rights under the RIPFMLA, causing the Plaintiff to suffer damages as aforesaid, and thereby deprived the Plaintiff of rights secured under the RIPFMLA.

Count Three
Family First Coronavirus Response Act,
Pub. L. No. 116-127, 134 Stat. 178 (2020)
Discrimination and Retaliation

213. Defendants, by their individual and/or concerted acts and/or omissions, including, but not limited to those described herein, violated the Plaintiff's rights under the FFCRA, causing the Plaintiff to suffer damages as aforesaid, and thereby deprived the Plaintiff of rights secured under the FFCRA, enforceable pursuant to the FLSA, 29 U.S.C. § 201 *et seq.*

Count Four
Rhode Island Whistleblower Protection Act,
R.I. Gen. Laws § 28-50-1, *et seq.*
Retaliation

214. Defendant Town, by its acts and/or omissions, including, but not limited to those described herein, took adverse employment action against the Plaintiff in violation of the

RIWPA, causing Plaintiff to suffer damages as aforesaid, and thereby deprived Plaintiff of rights secured under the RIWPA.

VIII. Prayers for Relief

WHEREFORE, Plaintiff prays that this Court grant the following relief:

1. A declaratory judgment declaring the acts and/or omissions of Defendant, including, but not limited to those complained of herein, to be in violation of the FMLA, RIFMLA, FFCRA, and/or RIWPA.
2. An injunction directing Defendants to take such affirmative action as is necessary to refrain from such conduct and to ensure that the effects of these unlawful employment practices are eliminated and not repeated.
3. An injunction or other equitable relief, including, but not limited to, an award of back pay, front pay or reinstatement, and other compensation and/or benefits, and to make Plaintiff whole for all earnings and benefits Plaintiff would have received but for Defendants' unlawful conduct.
4. An award of compensatory damages.
5. An award of exemplary and/or punitive damages.
6. An award of liquidated damages.
7. An award of prejudgment interest, reasonable attorneys' fees, and costs.
8. An award of such other and further relief as this Honorable Court deems just and proper.

IX. Demand for Jury Trial

Plaintiff hereby demands a trial by jury on all counts so triable.

X. Designation of Trial Counsel

Plaintiff hereby designates Richard A. Sinapi, Esquire, as trial counsel.

Plaintiff,
By her attorneys,
SINAPI LAW ASSOCIATES, LTD.

December 22, 2020

/s/ **Richard A. Sinapi**
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