

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS
NORTHERN DISTRICT

DOCKET NO.: _____

DONALD TOPHAM
34 Walnut Hill Road
Amherst, NH 03275

v.

MICHAEL CONLON,
IN HIS OFFICIAL CAPACITY AS HILLSBOROUGH COUNTY ATTORNEY
300 Chestnut Street
Manchester, NH 03101

&

HILLSBOROUGH COUNTY, NEW HAMPSHIRE
Suite 120, 329 Mast Road
Goffstown, NH 03045

JURY TRIAL REQUESTED

COMPLAINT

I. NATURE OF THE ACTION

1. This action is brought by Attorney Donald Topham against Hillsborough County Attorney Michael Conlon (the “Individual Defendant”) and Hillsborough County, NH, (the “County”) for wrongful termination. Hillsborough County Attorney Michael Conlon wrongfully terminated the Plaintiff in retaliation for the Plaintiff’s use of appropriate prosecutorial discretion- an act supported by public policy. Due to Attorney Conlon’s position as an elected official within the County of Hillsborough, and the position of his Office as an agency of

Hillsborough County, the County is liable for Attorney Conlon's unlawful actions pursuant to the doctrine of *respondeat superior* and pursuant to NH RSA 29-A:2, et al.

II. JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to NH RSA 491:7.

3. Venue is proper in northern Hillsborough County because the individual Defendant maintains an office address of 300 Chestnut Street, Manchester, NH 03101, which is situated in northern Hillsborough County. The Hillsborough County Board of Commissioners maintains an address of Suite 120, 329 Mast Road Goffstown, NH 03045. Additionally, the facts relevant to this matter transpired in northern Hillsborough County.

III. PARTIES

4. The Plaintiff, Attorney Donald Topham, is an adult New Hampshire resident with an address of 34 Walnut Hill Road, Amherst, NH 03275. He is an attorney barred to practice in the State of New Hampshire.

5. The Individual Defendant, Hillsborough County Attorney Michael Conlon, is an elected official in Hillsborough County, serving as the chief prosecutor of criminal cases pending in the Superior Court. The Individual Defendant maintains an official office address of 300 Chestnut Street, Manchester, NH 03101. The Individual Defendant is overseen by the Hillsborough County Board of Commissioners and the New Hampshire Attorney General.

6. The Defendant, Hillsborough County, New Hampshire, is a county in the State of New Hampshire organized pursuant to NH RSA 22 - 30-B.

IV. FACTS

7. The Plaintiff, Donald Topham began working for the Hillsborough County Attorney's Office in May of 2018. At that time, the Plaintiff was appointed to the position of Assistant County Attorney by then-County Attorney, Dennis Hogan.

8. In November of 2018, Michael Conlon was elected as the new Hillsborough County Attorney, and took over the position of top prosecutor for Hillsborough County in January of 2019. The Plaintiff continued to work as an Assistant County Attorney thereafter, under the new supervision of the Individual Defendant, Attorney Conlon.

9. Soon after Attorney Conlon took over the Hillsborough County Attorney's Office (the "HCAO"), the turnover rate of both attorneys and support staff, which had already been an ongoing issue, increased exponentially. It quickly became apparent that Attorney Conlon, who had little to no trial or criminal experience, could not competently manage the attorneys and support staff in the office. In approximately May of 2019, media outlets publicly reported that several staff members had left the HCAO due to a hostile work environment that had not been appropriately addressed, and instead enabled, by Attorney Conlon.

10. In addition to the ongoing issues with staff management, Attorney Conlon was largely uninvolved with the actual criminal prosecution of cases. For example, Attorney Conlon maintained no policies or protocols concerning his oversight or supervision of plea deals, trial litigation or the dismissal of cases. His lack of policies led to both suggestions and directives from the Attorney General's Office. It also led to growing tensions between the HCAO and various police departments throughout Hillsborough County.

11. Despite the lack of competent management and oversight by Attorney Conlon, the dedicated Assistant County Attorneys and the support staff of the HCAO continued to discharge the duties of the office in a diligent manner. First Assistants and experienced senior prosecutors,

such as Attorney Topham, carried the heavy burdens of the office and became the *de facto* leadership figures.

12. Throughout 2019, Attorney Topham continued to work on the felony prosecution of two parents, Joshua Garvey and Christen Gelinas, indicted for causing the untimely, drug-overdose death of their infant child in 2018. Multiple prosecutors had worked on the matter during its pendency, but staffing turnover and legal complexity ultimately caused the case to become Attorney Topham's exclusive responsibility.

13. In considering plea deals to offer Defendants Garvey and Gelinas, Attorney Topham comprehensively reviewed the evidence, researched similar cases, and even contacted another veteran prosecutor, then-Strafford Assistant County Attorney David Rotman, to seek his advice on a plea deal proposal. Attorney Rotman had pled out an individual who was responsible for an overdose death of an infant in 2017, allowing the individual to serve a sentence of thirty months of incarceration (2.5 years) to resolve that matter.

14. While examining the evidence involved in the Garvey/Gelinas cases, Attorney Topham became aware that the medical examiner was unable to offer a specific time of death regarding the infant victim. This created a significant problem with demonstrating who had custody of the child at the time of death and who, therefore, was criminally responsible.

15. With the research and analysis that Attorney Topham had compiled, he arranged a meeting to occur on August 21, 2019, with three officials from the Manchester Police Department to discuss proposed plea deals. During that meeting, Attorney Topham explained his analysis, the evidence in the case, and even presented a worksheet of sentences involving similar cases in New Hampshire and nationally. Despite presenting his analysis at length, the Manchester Police took the position that Attorney Topham should go to trial if he could not get a

plea deal of at least 20-40 years of incarceration for Joshua Garvey. Attorney Topham tried explaining that this was an unreasonable position but could not get the police officials to budge from their all-or-nothing posture.

16. Shortly after his meeting with the Manchester Police Department, Attorney Topham became aware, through a conversation with counsel for Ms. Gelinas, of potentially exculpatory evidence that had not been disclosed to him. More specifically, he learned that prior to the date of the child's death, Ms. Gelinas had called the Manchester Police Department and stated that Joshua Garvey was off buying drugs and the baby was not safe. In response to the call, the Manchester Police Department responded to Ms. Gelinas' location and arrested her for outstanding warrants, but allegedly did not check on the child. This evidence made an already difficult-to-prosecute case much harder to prove.

17. Despite not having the blessing of the Manchester Police Department, Attorney Topham took seriously his ethical obligations to serve as a minister of justice and to use independent legal judgment in exercising prosecutorial discretion. He therefore went forward with proposing two plea deals that were appropriate and well-supported based upon the totality of the circumstances.

18. Attorney Topham extended the offer for Joshua Garvey to plead guilty to negligent homicide and operating a drug house. Mr. Garvey accepted. The plea came with a 10-to-20-year state prison sentence, with the possibility of parole after five years if Mr. Garvey immediately entered and then successfully completed an extensive two-to-four-year residential drug treatment program operated by Delancey Street Foundation. If Mr. Garvey entered the program and failed, his original sentence would be imposed without a hearing.

19. To Ms. Gelinas, Attorney Topham offered a deal to plead guilty to drug charges and operating a drug house, which came with a prison sentence of 8 ½ to 16 years. Ms. Gelinas accepted.

20. At all times relevant, Attorney Topham complied with the NH Victim Bill of Rights pursuant to NH RSA 21-M:8-k. He confirmed that each of the grandparents of the victim either supported the plea deal or would not speak to the County Attorney's Office. Attorney Topham also communicated with the Victim/Witness Program regarding the plea.

21. On or about August 30, 2019, Mr. Garvey and Ms. Gelinas each entered guilty pleas, subject to the terms described, and were taken into the custody of the New Hampshire State Prison. The Judge accepted the pleas and negotiated terms without modification.

22. On or about Monday, September 2, 2019, Attorney Topham was called into County Attorney Conlon's office for a meeting. Attorney Conlon was very upset. He explained to Attorney Topham that he received a phone call from Manchester Police Chief Carlo Capano on Sunday night and that Chief Capano screamed at him about the plea deal involving Joshua Garvey. Attorney Topham explained the background of the plea, his research, the evidence and his recent conversation with the Manchester Police Department. He further explained that Attorney Conlon had never required prosecutors to seek his approval regarding plea deals previously. In response, Attorney Conlon, then crying, told Attorney Topham: "You should have called me so that I didn't get screamed at." Attorney Conlon then placed Attorney Topham on paid administrative leave.

23. On September 3, 2019, Attorney Topham received a letter from Attorney Conlon explaining that he was being reprimanded and placed on leave until a determination would be made regarding his continued employment. The letter ambiguously alleged four points of

supposed misconduct with no basis in policy or reality. It was clear that Attorney Conlon was punishing Attorney Topham for not following the instructions of the Manchester Police Department and was scapegoating Attorney Topham for the Police Department's mistrust of Attorney Conlon, which Attorney Conlon had earned himself over several months of ineffective leadership.

24. Notwithstanding Attorney Conlon's attempt at redirecting his own shortcomings onto Attorney Topham, on or about September 6, 2019, the New Hampshire Attorney General's Office assumed control, direction and supervision of the Hillsborough County Attorney's Office. The rationale for doing so was described in a letter from Attorney General Gordon MacDonald to Attorney Conlon. In part, the letter explained that Attorney Conlon failed to effectively lead and oversee his office as the highest authority by failing to have knowledge or involvement with critical case disposition decisions and failing to ensure that investigative agencies and victims were consulted.

25. The following cases were cited in support of Attorney General MacDonald's letter:

- The *Garvey* and *Gelinas* cases (as described above)
- *State v. Christopher Ahern* (Topham not involved)
- *State v. Damien Seace* (Topham not involved)

26. After assuming control of the office, the Attorney General appointed Attorney David Rotman as an Assistant Attorney General for the purpose of offering his expertise and oversight to the Hillsborough County Attorney's Office. It soon became public knowledge that Attorney Rotman had been consulted by Attorney Topham in the *Garvey* and *Gelinas* cases, and had previously pled out a defendant to a lighter sentence in a very similar case. In response to

public inquiry, Deputy Attorney General Jane Young explained that her office was centrally concerned about Attorney Conlon's lack of knowledge regarding case dispositions and his lack of communication with the Manchester Police Department, not the actual sentence terms or "numbers." It was evident that the Attorney General's office did not hastily take over Attorney Conlon's office in reaction to sentence terms that it didn't like, but rather, the Attorney General's actions were well-reasoned and supported by several months of growing concerns regarding the ineffective leadership of County Attorney Conlon. The Attorney General's Office tried to offer guidance and support to Attorney Conlon over several months to no avail.

27. While Attorney Topham was on paid administrative leave, he reported two issues involving the HCAO that he had previously not disclosed for fear of losing his job. First, he emailed a letter to New Hampshire Superior Court Chief Justice Nadeau regarding a practice taking place in grand jury proceedings that he believed to be unlawful. More specifically, non-witness testimony and demonstration was being supplied by HCAO to the grand jury in strangulation cases. Second, Attorney Topham wrote letters to the Hillsborough County Commissioners regarding an ongoing cyber-security issue in the HCAO, which had the potential to compromise the confidentiality of personal records pertaining to victims and defendants, as well as otherwise privileged information and communications.

28. On or about October 1, 2019, Attorney Topham received a letter from Attorney Conlon terminating his employment. Attorney Topham was provided no specific reason for his termination beyond "violation of the expectations of the management team." He was not even afforded the decency of an in-person termination discussion.

29. On or about Thursday, October 24, 2019, the Hillsborough County Chiefs of Police Association unanimously voted that it has no confidence in County Attorney Michael Conlon. Attorney Conlon's scapegoating of Attorney Topham had failed, once again.

30. Due to the Defendants' wrongful termination of the Plaintiff, the Plaintiff has suffered, and continues to suffer, a multitude of damages including, but not limited to, lost wages, lost benefits, emotional distress, reputational harm, lost earning capacity, loss of life enjoyment, humiliation, and attorney's fees and costs. The Plaintiff is further entitled to enhanced compensatory damages based upon the wanton, malicious, and/or oppressive manner in which the Defendants wrongfully terminated his employment.

COUNT I **WRONGFUL TERMINATION**

31. Plaintiff repeats and realleges each allegation contained in the paragraphs above.

32. Public policy supported Attorney Topham in utilizing appropriate prosecutorial discretion and independent legal judgment, separate from the desires of the Manchester Police Department, in extending plea agreements to Joshua Garvey and Christen Gelinas. Indeed, ABA Model Rule Comment 3.8, as included in the New Hampshire Rules of Professional Conduct, specifically states: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Additionally, New Hampshire Rule of Professional Conduct 5.4 highlights the importance of not permitting a non-lawyer to "...direct or regulate the lawyer's professional judgment..."

33. In retaliation for Attorney Topham utilizing appropriate prosecutorial discretion, independent judgment, and acting as a minister of justice, Attorney Conlon, in his official capacity as Hillsborough County Attorney and the Plaintiff's employer, first took the adverse

action of suspending Attorney Topham's employment and then terminated him. Attorney Conlon is therefore liable for wrongful termination.

34. Public policy also supported Attorney Topham in making a report to the Chief Justice of the Superior Court in regard to the HCAO's practice of offering demonstration and non-witness testimony to grand juries in strangulation cases. Public policy further supported Attorney Topham in reporting to the Hillsborough County Commissioners that the HCAO, which has access to many confidential records of defendants and crime victims, was failing to adequately protect its electronic files, email communications, calendars and network server. Insofar as Attorney Conlon terminated Attorney Topham wholly or in part for these protected reports, said action would independently constitute a wrongful termination of the Plaintiff.

35. Due to the fact that Attorney Conlon was acting in his official capacity as Hillsborough County Attorney and as an agent of Hillsborough County in carrying out his unlawful actions, Hillsborough County is liable for Attorney Conlon's actions pursuant to the doctrine of *respondeat superior*.

36. As a direct and proximate result of the Defendants' wrongful termination of the Plaintiff, the Plaintiff has suffered, and continues to suffer, a multitude of damages including, but not limited to, lost wages, lost benefits, emotional distress, reputational harm, lost earning capacity, loss of life enjoyment, humiliation, and attorney's fees and costs. The Plaintiff is further entitled to enhanced compensatory damages based upon the wanton, malicious, and/or oppressive manner in which the Defendants wrongfully terminated his employment.

COUNT II
VIOLATION OF THE NEW HAMPSHIRE WHISTLEBLOWERS' PROTECTION ACT
(NH RSA 275-E)

37. Plaintiff repeats and realleges each allegation contained in the paragraphs above.

38. In addition or in the alternative to the Plaintiff's claim of wrongful termination, the Plaintiff brings this claim for violation of the New Hampshire Whistleblowers' Protection Act against both Defendants.

39. The Plaintiff reasonably believed that it was a violation of law for the Hillsborough County Attorney's Office to offer demonstration and non-witness testimony to grand juries in strangulation cases. The Plaintiff therefore reported said conduct to the Chief Justice of the Superior Court in good faith.

40. Additionally, the Plaintiff reasonably believed that it was a violation of law for the Hillsborough County Attorney's Office, which has access to many confidential records of defendants and crime victims, to fail to adequately protect its electronic files, email communications, calendars and network server. The Plaintiff therefore reported said failure to the Commissioners of the Hillsborough County Board of Commissioners in good faith.

41. In response and retaliation to Attorney Topham's good-faith reports, Attorney Conlon terminated his employment. Therefore, Attorney Conlon, and the County via the doctrine of *respondeat superior*, are both liable for violation of the New Hampshire Whistleblowers' Protection Act.

42. As a direct and proximate result of the Defendants' unlawful termination of the Plaintiff, the Plaintiff has suffered, and continues to suffer, a multitude of damages including, but not limited to, lost wages, lost benefits, emotional distress, reputational harm, lost earning capacity, loss of life enjoyment, humiliation, and attorney's fees and costs. The Plaintiff is further entitled to enhanced compensatory damages based upon the wanton, malicious, and/or oppressive manner in which the Defendants wrongfully terminated his employment.

WHEREFORE, the Plaintiff, Donald Topham, respectfully prays this Honorable Court:

- A. Schedule this matter for trial by jury;
- B. Find the Defendant liable for wrongfully terminating the Plaintiff;
- C. Additionally or alternatively find the Defendants liable for violating the New Hampshire Whistleblowers' Protection Act;
- D. Award the Plaintiff all damages to which he is entitled as determined by a jury, including enhanced compensatory damages;
- E. Award the Plaintiff reasonable attorneys' fees and costs; and
- F. Grant such other and further relief as is just and equitable.

Respectfully submitted,
Donald Topham,
By his attorneys,
BACKUS, MEYER & BRANCH, LLP

Date: November 21, 2019

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