IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

H. DIANA KOPICKO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 03-1172-KAJ
	)	
DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

I. INTRODUCTION

Before me are several motions filed by the plaintiff, H. Diana Kopicko, and a motion to dismiss (Docket Item ["D.I."] 12) filed by the defendant, the State of Delaware's Division of Services for Children, Youth and Their Families ("DSCYF" or the "State"). The plaintiff's motions consist of two motions for leave to amend the complaint (D.I. 3, 9) and three motions for appointment of counsel (D.I. 16, 21, 27).[1] For the reasons that follow, the plaintiff's motions are denied, and the defendant's motion is granted.

II. BACKGROUND

The plaintiff has experience working as a rape counselor and as a social worker with a background in crisis intervention and interviewing victims of sexual abuse. (*See* D.I. 23 at 1.) She was hired by the State in May of 1997 as a "Casual Seasonal Senior

[1]The plaintiff also filed a motion for an extension of time to file a brief in response to the State's motion to dismiss (D.I. 20), which was in effect granted. The plaintiff filed her answering brief (D.I. 23) on July 30, 2004.

Family Services Specialist". (*Id.* at 4.) Later, in July of 1997, the plaintiff was hired as a full-time merit employee of DSCYF. (*Id.* at 5.) Apparently there was a probationary period at the outset of the employment relationship. (*See* D.I. 13 at ¶ 10.) Within that probationary period, on December 31, 1997, the State terminated her employment. (*See* D.I. 23 at 6.)

In her complaint the plaintiff alleges she was "fired because she questioned her supervisor's decisions that left children at risk." (D.I. 1) Since her firing, the plaintiff has vigorously pursued a claim for wrongful termination through the State's administrative agency and court systems. As related by the defendant in its motion to dismiss,

> [The plaintiff] presented her case before the State Merit Employee Relations Board, ("MERB") which held two days of hearings, taking testimony from six witnesses and admitting 32 documents into evidence. The MERB upheld DSCYF's action in terminating plaintiff's employment, finding that the reasons for the termination of plaintiff during her probationary employment were all merit as opposed to non-merit factors and that they formed a reasonable basis for the determination that the performance during the probationary period had been unsatisfactory. (MERB Decision attached as part of Exhibit B.) Plaintiff appealed the MERB decision to the Superior Court, where President Judge Ridgely upheld the MERB Decision on the basis of the well-developed record below, finding no error of law and that there was substantial evidence on the record to support the Board's conclusion that plaintiff was not terminated for impermissible non-merit factors. *Kopicko v. Delaware Dept. of Services for Children*, 2003 WL 21976409 (Del. Super. 2003). ... That decision was appealed to the Delaware Supreme Court, which likewise affirmed the MERB decision, indicating that after "having carefully considered the parties' briefs and the record below, we conclude that the MERB's decision is supported by substantial evidence and is free from legal error." *Kopicko v. State Dept. of Services for Children, Youth and their Families*, 2004 WL 691901 (Unpublished Decision)(Del. 2004).

(D.I. 13 at ¶ 10.)

Plaintiff also sued DSCYF in the Delaware Superior Court, challenging her dismissal as a breach of the implied covenant of good faith and fair dealing. *See Kopicko v. Delaware,* No. 521, 2000 (Del. May 28, 2004) (Attached to D.I. 14; referred to herein as "Supreme Court Order"). The Superior Court granted summary judgment to the defendant, holding that sovereign immunity barred the plaintiff's claims. *Kopicko v. DSCYF*, 200 WL 33108936 (Del. Super.) The Supreme Court stayed proceedings in the appeal to allow the plaintiff an opportunity to exhaust her administrative remedies, *Kopicko v. DSCYF*, 805 A.2d 877 (Del. 2002), which she did as outlined above. The Supreme Court later dismissed that appeal on the basis of collateral estoppel and lack of subject matter jurisdiction of the suit originally in the Superior Court. (*See* Supreme Court Order at ¶ 5.)

Plaintiff evidently decided to open yet another litigation front against the defendant by filing the present action in December of 2003, alleging essentially the same dissatisfaction with the DSCYF's decision to terminate her, but couching it in the language of a claim under the "U.S. Whistle Blower Protection Act". Defendant has also filed two motions for leave to amend her complaint (D.I. 3, 9), in which she alters certain of her allegations about "discriminatory practice" and about the relief she seeks, but she continues to base her claim upon the "U.S. Whistle Blower Protection Act".

After some fits and starts with the service of the complaint, the State filed its motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) (D.I. 12). The motion cites a variety of reasons for dismissing the action, including lack of subject matter jurisdiction, the statute of limitations, insufficiency of service of process, Eleventh

Amendment immunity, sovereign immunity, and collateral estoppel and *res judicata*. The defendant's motion and supporting memorandum of points and authorities was filed on May 13. No response was forthcoming from the plaintiff until I issued an order on July 15, 2004 stating that the plaintiff would have to file an answering brief on or before July 30, 2004, or otherwise show cause why the case should not be dismissed for failure to prosecute. (D.I. 15.) Five days later, the plaintiff filed a motion for appointment of counsel (D.I. 16) which is opposed by the State (D.I. 18).[2] In addition, however, the plaintiff has filed an answering brief to the motion to dismiss filed by the State (D.I. 23). Thus, I presently have before me the plaintiff's motion for appointment of counsel and the defendant's motion to dismiss.

III. STANDARDS

The State has moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). A challenge under Rule 12(b)(1) to subject matter jurisdiction in a case requires the court to ask "whether the complaint alleges facts on its face which, if taken as true, would be sufficient to invoke the district court's jurisdiction." *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996). Under Rule 12(b)(6), a motion to dismiss a complaint for failure to state a claim can only be granted if, "taking the allegations of the complaint as true, and liberally giving the plaintiff the benefit of all inferences that may be drawn therefrom, it appears beyond doubt that the plaintiff can prove no set of facts upon which relief could be granted." *Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 175 (3d Cir. 1988). The

[2]As previously noted, *supra* at 1, the plaintiff has filed two additional motions seeking the same relief. (D.I. 21,27.)

moving parties bear the burden of persuasion. *See Kehr Packages, Inc. v. Fidelcor, Inc.,* 926 F.2d 1406, 1409 (3d Cir.1991); *Locklear v. Remington*, 2003 WL 21003722 at *1 (D. Del. 2003). However, "[t]he pleader is required to 'set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist.'" *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993) (citing 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 340 (2d ed. 1990)). The Court need not "accept legal conclusions either alleged or inferred from the pleaded facts." *Id.* (quoting *Mescall v. Burrus,* 603 F.2d 1266, 1269 (7th Cir.1979)).

IV. DISCUSSION

The State aptly notes that the plaintiff has nowhere identified the jurisdictional basis for her complaint. She cites what she calls the "U.S. Whistle Blower Protection Act", but gives no statutory reference. The only statute that appears to fit what the plaintiff is trying to get at is the Whistle-Blower Protection Act of 1989, Pub.L. 101-12 (codified at various sections of Title 5 of the United State Code). However, that statute does not cover state employees. Rather, it is designed to protect federal employees. *See* 5 U.S.C. § 2105 (defining "an employee" for purposes of Title 5 as including people in federal civil service, or someone subject to the supervision of a federal civil servant, or someone "engaged in the performance of a Federal function" under a law or Executive act). Indeed, in passing that act, Congress noted that it wanted to "strengthen and improve protection for the rights of Federal employees ... ." *See* Public Law 101-12, April 10, 1989, 103 Stat 16 (set forth in note to 5 U.S.C. § 1201). I am thus compelled to conclude that, as the State contends, the complaint contains no basis for this court to exercise jurisdiction in this matter. The amendments the plaintiff seeks

to make to her complaint do not correct the jurisdictional defect in any respect and are therefore immaterial to that conclusion. The complaint must therefore be dismissed, and the motions to amend the complaint and for appointment of counsel must be denied as moot .[3]

V. CONCLUSION

Accordingly, it is hereby ORDERED that the defendant's motion to dismiss (D.I. 12) is GRANTED, and the plaintiff's motions to amend the complaint (D.I. 3, 9) and for appointment of counsel (D.I. 16, 21, 27) are DENIED as moot.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

August 13, 2004
Wilmington, Delaware

[3]Because I conclude that the challenge to subject matter jurisdiction is dispositive, I need not address the remaining arguments for dismissal advanced by the defendant.