NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139



January 30, 2024

Mr. John B. Flood
BerlikLaw, LLC
1818 Library St, Suite 500
Reston, VA 20190

Mr. John D. Perry
Womble Bond Dickinson US, LLP
8350 Broad Street, Suite 1500
Tysons, VA 22012

Ms. Mariam W. Tadros
Womble Bond Dickinson US, LLP
8350 Broad Street, Suite 1500
Tysons, VA 22012

Re: Jamie L Moore v. Copper River Shared Services, LLC, Case No. CL-2023-9565

Dear Counsel:

This matter came before the Court on October 13, 2023, on Defendant Copper River Shared Services, LLC's demurrer against its former employee, Jamie L. Moore. Ms. Moore filed her complaint on June 29, 2023, alleging workplace discrimination and retaliation under the Virginia Human Rights Act and the Virginia Whistleblower Protection Law.

This demurrer requires the Court, as a matter of first impression, to determine the legal standard for claims brought under the Virginia Human Rights Act ("VHRA") and Virginia Whistleblower Protection Law ("VWPL") and reconcile the statutory language of these statutes with Virginia's common law history of at-will employment.

**OPINION LETTER**

I find that Plaintiff has alleged sufficient facts to meet the legal burden of her VHRA and VWPL claims and that Plaintiff's request for damages is proper. Defendant's demurrer is overruled in its entirety.

## BACKGROUND

Plaintiff is a prior employee of the defendant, Copper River Shared Services, LLC. In the Spring of 2020, Plaintiff suspected that the company's CEO was engaging in illegal fraudulent activities, specifically, using company funds to purchase personal property in Northern Virginia. In May 2020, Plaintiff reported the suspicious conduct to the Chairman of the Board, Mr. Hopkins, who then notified the senior executive team. Three days later, the company discharged the CEO. Prior to this event, Plaintiff alleges that the CEO and other senior executives at the company referred to Plaintiff, an Asian American woman, as the "black widow" of the company, named her department the "widow's den", and described her as "hostile" and "opinionated" due to her assertive nature.

After the 2020 restructuring, Plaintiff was promoted to Vice President of Human Resources, and a new CEO, Mr. McLaughlin, was appointed. Plaintiff asserts that Mr. McLaughlin openly, and in front of female employees, referred to male employees as "brother". Plaintiff requested Mr. McLaughlin stop using this gender-based language in the office. Mr. McLaughlin did not stop using this language and proceeded to invite only male employees to business and social events such as happy hours, lunches, and invitations to his lake house. Mr. McLaughlin and other company executives would also take male employees out to lunch to discuss deficient workplace performance rather than initiate formal disciplinary actions.

On January 15, 2021, Defendant terminated Plaintiff due to "poor performance". The Defendant did not notify the Plaintiff of any performance issues or provide an opportunity to improve prior to her termination. After her termination, Plaintiff filed a charge of discrimination and retaliation with the Office of Civil Rights of the Virginia Attorney General's Office. Plaintiff was issued a notice of right to sue after an investigation of her charge.

On June 29, 2023, Plaintiff filed suit alleging that she was terminated because she had reported the prior CEO's fraudulent behavior and was discriminated against because she is an Asian American woman who opposed sex-based discrimination in the workplace. Specifically, Plaintiff asserts wrongful retaliation under the Virginia Whistleblower Protection Law (Count I), discrimination in violation of the Virginia Human Rights Act (Count II), retaliatory discharge in violation of the Virginia Human Rights Act (Count III), and requests the Court award back pay, front pay, lost employment benefits, compensatory damages, and punitive damages.[1] Defendant filed this demurrer as to all counts.

[1] *See* Va. Code § 40.1-27.3 *and* Va. Code § 2.2-3905(B).

## STANDARD OF REVIEW

"The purpose of a demurrer is to determine whether a motion for judgment states a cause of action upon which the requested relief may be granted." *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 712 (2006). "A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." *Glazebrook v. Board of Supervisors*, 266 Va. 550, 554 (2003). Thus, the facts from the complaint are taken as true for the purposes of demurrer. *Russo v. White*, 291 Va. 23, 24 (1991).

## ANALYSIS

### I. The Retaliation and Discrimination Claims Under the VHRA

Defendant challenges Counts II and III of Plaintiff's complaint, asserting that the VHRA requires a plaintiff to exhaust all administrative remedies before bringing suit, and that Plaintiff failed to establish *prima facie* claim of retaliation and discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

### A. The VHRA – Background

The Virginia Human Rights Act ("VHRA"), now codified as Code § 2.2-3900-3909, was enacted in 1987 to "[s]afeguard all individuals within the Commonwealth from unlawful discrimination in employment". Va. Code § 2.2-3900(B)(2). However, the enactment of the VHRA did not provide a private right of action and when faced with a claim of discriminatory discharge, courts followed the common law analysis outlined in *Bowman v. State Bank of Keysville*. 229 Va. 534, 539 (1985). *Bowman* permitted a private right of action where an employee's termination violated a "right conferred by statute [that] is in furtherance of established public policy." *Id.* And, despite the VHRA not creating "any new causes of action", the Supreme Court affirmed that the VHRA is the type of public policy that falls within "the narrow Bowman exception." *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 105 (1994).

In 1995, the General Assembly amended the VHRA to effectively reject the *Bowman* and *Lockhart* decisions by precluding all discriminatory termination private actions "except as specifically provided" in the VHRA. Va Code § 2.1-725(D)(1995).

In 2020, Senator Adam Ebbin introduced the Virginia Values Act, which amended the VHRA to include new protected classes of persons, repealed the 1995 preclusion provision, and added definitions, exceptions, and procedural language for discrimination and retaliation claims. Virginia Values Act, SB 868, Va. Gen. Assemb. (2020 Session). The Supreme Court of Virginia has not had the opportunity to address the VHRA since the enactment of the 2020 Amendments. Thus, this Court is now required to address the new provisions to determine the required procedural conditions, if any, under the VHRA and to define the proper standards of causation a

plaintiff must show under a retaliatory discharge claim and discriminatory discharge claim in violation of Code § 2.2-3905 of the VHRA.

### B. VHRA and Exhausting Administrative Remedies

Defendant argues that Plaintiff's VHRA claims should be dismissed because Plaintiff has failed to exhaust all available administrative remedies and therefore is precluded from bringing a VHRA claim before such remedies are satisfied.

Under Virginia civil procedure, a procedural default that does not affect the legal sufficiency of the facts alleged cannot be brought via demurrer because a demurrer "does not consider whether [a plaintiff] exhausted her administrative remedies." *Parikh-Chopra v. Strategic Mgmt. Servs., LLC*, 109 Va. Cir. 155, 157 (2021). However, for the purpose of clarity, the Court will address the issue of exhausting administrative remedies under the VHRA prior to bringing a private action. Relying on the plain language of the VHRA and evidence from Senate floor sessions, the Court finds that the VHRA's administrative provisions stand for the proposition that a person *may* use the administrative remedies provided in the VHRA, but is not required to exhaust them before pursuing a private action. Therefore, Plaintiff properly brought her private causes of action under the VHRA.

#### 1. Plain Meaning of Code § 2.2-3907 and § 2.2-3908

Under Code § 2.2-3907, "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice *may* file a complaint in writing under oath or affirmation with the Office of Civil Rights of the Department of Law (the Office)." Va. Code § 2.2-3907(A) (emphasis added). After the filing of a complaint and completed investigation by the Office, the Office "shall promptly issue a notice of the right to file a civil action to the complainant." Va. Code § 2.2-3907(H). Once a complainant receives this notice, then the complainant "may commence a timely civil action in an appropriate general district or circuit court[.]" Va. Code § 2.2-3908.

Generally, when interpreting the construction of statutes, "the word 'shall' is primarily mandatory in its effect and the word 'may' is primarily permissive." *Ross v. Craw*, 231 Va. 206, 212 (1986). However, "courts, in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe 'may' and 'shall' as permissive or mandatory in accordance with the subject matter and context." *Pettus v. Hendricks*, 113 Va. 326, 330 (1912).

To determine whether the use of "may" in Code § 2.2-3907 and § 2.2-3908 mandates a plaintiff to file a complaint to the Office and undergo an investigation before filing a private cause of action requires this Court to analyze the sections in the context of the Virginia Human Rights Act as a whole. The subsequent section, Code § 2.2-3909, addresses private causes of action in the context of pregnancy and related childbirth medical conditions. That section provides, "[a]n employee or applicant who has been denied any of the rights afforded under subsection B may bring an action in a general district or circuit court having jurisdiction over the

employer that allegedly denied such rights." Va. Code § 2.2-3909(E). It would make little sense to interpret the use of "may" in a broader section, § 2.2-3907, which applies to all discrimination, as a mandatory provision that precludes a plaintiff from bringing immediate action, yet a later section within the same chapter, § 2.2-3909, explicitly permits a plaintiff to bring a private action without mention of the requirement to exhaust administrative remedies.

The "'rational meaning of a statute is to be preferred over [a] strained construction', and a statute should never be construed in a way that leads to absurd results." *Meeks v. Commonwealth*, 274 Va. 798, 802 (2007) (quoting *Commonwealth v. Zamani*, 256 Va. 391, 395 (1998)). To read the use of the word "may" as mandatory, rather than permissive, would result in an aggrieved party alleging pregnancy-related discrimination to be afforded more expansive rights than a person discriminated on the basis of race, which contradicts the purpose of the Virginia Human Rights Act.

**2. Legislative Intent**

Even if the plain language of the Virginia Human Rights Act was unclear, fortunately, the advent of technology, specifically the video recordings of Senate live sessions, aids this Court in concluding the General Assembly's intent to use "may" as a permissive term in Code § 2.2-3907 and § 2.2-3908. During the introduction of the Virginia Values Act, which added the administrative provisions that are in dispute in this case, the following conversation ensued between Senator Ebbin, the author of the bill, Senator McClellan, the co-patron of the bill, and Senator Reeves:

> Senator REEVES: What is the process we use now for civil action by private parties?
>
> Senator EBBIN: Right now, my understanding is that, if you have five or less employees, you can discriminate on any basis you want in Virginia . . . [T]hen, if you have five through fifteen employees, in Virginia, [*sic*] you are liable if you have fired someone only, not any other kind of employment discrimination under Virginia law, and then you can take action, except, that does not include some of the categories that are enumerated such as sexual orientation or gender identity . . . [R]ight now, at the federal level, you can only file suit or deal with the Equal Employment Opportunities Commission if you have more than 15 employees . . . [W]hat we're doing is saying, in Virginia, that you can "A", go to the Attorney General if you choose and have the Attorney General certify [the case] as founded or unfounded . . . [I]f it's unfounded, it discourages frivolous lawsuits, if it's founded, the Attorney General may sue in their own right but, in reality, they're not likely to sue unless it is a whole class of people . . .
>
> Senator REEVES: I guess what I'm trying to get at is, we are a right-to-work state. And so, I hire somebody, and I fire somebody based on lack of skill set, theoretically, couldn't they bring civil action?

> Senator MCCLELLAN: We have a private cause of action right now, if you discriminate against any of the protected classes that currently exist, then, if you're fired on that basis, race, gender, pregnancy, disability, . . . and the employer has more than five employees, you have a private right of action to sue them right now. What this [amendment] is doing is adding to that protected class.

Senate Proceedings, General Laws and Technology (SR3) - January 29, 2020 - 30 min. after adjournment at 1:26:11-1:29:30, https://virginia-senate.granicus.com/MediaPlayer.php?view_id=3&clip_id=2959.

Therefore, considering this evidence of legislative purpose and the plain language of the statute as a whole, it is clear that the General Assembly had no intention to constrain a plaintiff's right to bring a cause of action by adding a mandatory precursory administrative procedure scheme. Thus, I conclude, that the General Assembly's use of the term "may" envisions an optional avenue of relief that an aggrieved person can pursue but does not *require* a person to do so prior to bringing a private cause of action. The Plaintiff in this case properly brought an action under the VHRA, and even so, exhausted her optional administrative remedies beforehand, thus, Defendant's demurrer on this ground is overruled.

**C. Retaliation and Discrimination Claims Under the VHRA**

Defendant next challenges Plaintiff's complaint by asserting that because her claims of retaliation and discrimination do not meet the federal standards of "but for" causation, they fail to state a claim. Because the Court is tasked with determining whether Plaintiff's complaint was "legally sufficient" when evaluating a demurrer, the Court must also determine the legal standard of each claim.

This Court holds that claims under the VHRA follow the framework outlined in *Univ. Of Tex. Southwestern Med. Ctr. v. Nassar*. 570 U.S. 338 (2013). I conclude that *Southwestern* is the more appropriate analytical framework for this case, as compared to the burden-shifting test outlined in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), because, as concluded by other state courts, where anti-discrimination statutory schemes include procedural provisions, "courts should apply the framework prescribed by statute." *Lawson v. PPG Architectural Finishes, Inc*. 12 Cal. 5th 703, 707 (2022). Under the plain language of the VHRA, a claim of wrongful discrimination arising under Code § 2.2-3905(B)(1)(a) requires a plaintiff only to demonstrate that they possess one of the enumerated personal characteristics and that the employer used this protected personal characteristic as a "motivating factor" to harm the plaintiff, even if other lawful factors also motivated the conduct. And, to succeed under a claim for wrongful relation under Code § 2.2-3905(B)(7)(i), a plaintiff must demonstrate that they were an employee of the employer, they opposed an unlawful discriminatory practice, and the employer would not have taken adverse action against the plaintiff but for the plaintiff opposing an unlawful discriminatory practice. In the instant case, the plaintiff has pled sufficient facts under each burden to survive demurrer.

## 1. Plain Meaning of Code § 2.2-3905

It is well-established that, in construing statutes, "courts are charged with ascertaining and giving effect to the intent of the legislature" and that such "intention is initially found in the words of the statute itself." *Crown Central Petroleum Corp. v. Hill,* 254 Va. 88, 91 (1997). Plaintiff brings a claim of discrimination under Code § 2.2-3905(B)(1)(a) and § 2.2.-905(B)(7)(i) of the Virginia Human Rights Act. Thus, the Court will analyze each section using the aforementioned canon of statutory interpretation.

Under Code § 2.2-3905(B)(1)(a),

> It is an unlawful discriminatory practice for an employer to discharge or otherwise discriminate against any individual with respect to such individual's compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, military status, disability, or national origin[.]

Under Code § 2.2-3905(B)(7)(i),

> It is an unlawful discriminatory practice for an employer to discriminate against any employee or applicants for employment . . . because such individual has opposed any practice made an unlawful discriminatory practice by this chapter[.]

Code § 2.2-3905(B)(7)(i), the anti-retaliation provision, seeks to secure the primary objective of preventing the discrimination outlined under Code § 2.2-3905(B)(1)-(2) by encouraging employees to freely oppose such discrimination. However, each section addresses a separate "class" of protection. The discrimination provision, "seeks to prevent injury to individuals based on who they are", or their personal characteristics, whereas the retaliation provision "seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 63 (2006).

In either instance, a person is discriminated against, and, in this case, the discrimination results in a wrongful discharge. "Wrongful discharge . . . is an action sounding in tort. While there are components of a contractual relationship, wrongful discharge remains a tort, and tort principles must apply." *VanBuren v. Grubb*, 284 Va. 584, 592 (2012). Thus, the principles of causation govern the relationship between wrongful discharge and the employer's alleged discriminatory conduct.

Generally, to discriminate means to distinguish between two things either "in favor of or against." Robert K. Fullinwider, The Reverse Discrimination Controversy 11–12 (1980). And, although not all discrimination is harmful, discrimination which is categorically differential treatment, meaning the "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored" is the type of treatment which the Virginia

Human Rights Act seeks to ameliorate. *Discrimination*, *Black's Law Dictionary* (11th ed. 2019). *See also, e.g.*, Va. Code § 2.2-3901 ("Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all purposes as persons not so affected but similar in their abilities or disabilities"). Thus, it follows, that the phrase "discriminate against" used in both Code § 2.2-3905(B)(1)(a) and § 2.2-3905(B)(7) refers to a circumstance where an employee, due to their conduct or personal characteristics, is treated differently as compared to other employees that did not engage in the protected conduct or do not possess the protected personal characteristics.

The instant case turns on the "because of" phrasing in each section and the level of causation required to prove each type of discrimination. Prior to the 2020 amendments, the Virginia Human Rights Act contained no language indicating the burden of proof a plaintiff must show in a cause of action nor did it contain language addressing an employee being wrongfully discharged for opposing an unlawful employment practice. However, the 2020 amendments added Code § 2.2-3905(B)(6), which provides that it is an unlawful discriminatory practice for:

> Except as otherwise provided in this chapter, an employer to use race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin as a motivating factor for an employment practice, even though other factors also motivate the practice.

As written, the "motivating factor" provision of the statute describes the causation burden in circumstances where an employee is discriminated against based on the precise enumerated categories described in Code § 2.2-3905(B)(1)(a) yet omits any language describing retaliatory conduct. "[W]hen the General Assembly has used specific language in one instance but omits that language or uses different language when addressing a similar subject elsewhere in the Code, [the Court] must presume that the difference in the choice of language was intentional." *Morgan v. Commonwealth*, 301 Va. 476, 482 (2022). Thus, it follows, that a "motivating factor" causation standard is only applicable in personal characteristic discrimination, not for the protected conduct discrimination described in Code § 2.2-3905(B)(7). *See Univ. of Tex. Southwestern Med. Ctr. v. Nassar,* 570 U.S. 338, 353 (2013) (where the text of a "motivating factor provision . . . begins by referring to 'unlawful employment practices', then proceeds to address only . . . actions based on the employee's status, i.e., race, color, religion, sex, and national origin" the motivating factor causation only applies to that provision).

In contrast, the VHRA contains no procedural language addressing the retaliatory conduct described in Code § 2.2-3905(B)(7). Due to this omission, I conclude the General Assembly intended that the common law "but for" standard is to be applied to claims arising under Code § 2.2-3905(B)(7). *See Shaw v. Titan*, 255 Va. 535, 544 (1998) (where the General Assembly did not include language in the VHRA addressing causation, the Virginia "common law standard of proximate causation" was appropriate) *and Jordan v. Clay's Rest Home*, 253 Va. 185, 192 (1997) (rejecting plaintiff's proposed adoption of the *McDonnell Douglas* causation standard where the wrongful discharge statute contained no language indicating a burden-shifting framework and a

court must adhere to the "Commonwealth's strong commitment to the employment-at-will doctrine"). "But for" causation does not require that an employee show their protected conduct was the sole cause of the employer's harmful action, it only requires, through circumstantial or direct evidence, that the employee's allegations, if true, "could support a jury finding that [the employee] was discriminated against because" they opposed a discriminatory workplace practice. *Shaw*, 255 Va. at 543.

Therefore, the burdens of proof a plaintiff must prove under Code § 2.2-3905(B)(1)(a) and § 2.2-3905(B)(7) are as follows.

In a case of discriminatory discharge based on a personal characteristic under Code § 2.2-3905(B)(1)(a), an employee must demonstrate that (1) they possess an enumerated protected characteristic, (2) the employer discharged the employee, and (3) the employer used the protected trait as a "motivating" factor for the action taken against the employee.

In reference to Plaintiff's wrongful discharge claim under this provision, Plaintiff has met her *prima facie* burden. Under the first and second prong, Plaintiff alleges that she possesses a protected trait under Code § 2.2-3905(B)(1)(a), namely, her sex and race, and was wrongfully discharged. Under the third prong, Plaintiff alleges that she was targeted with labels such as "black widow" and "hostile", both of which she attributes to being an Asian American female, and that male employees were treated more favorably prior to her discharge, as shown by the explicit invites to networking opportunities and happy hours which were not extended to female employees. These facts are sufficient to allow a jury to determine whether Defendant used Plaintiff's race and/or sex as a motivating factor for her discharge.

Next, in a case of discrimination based on an employee's protected conduct under Code § 2.2-3905(B)(7), an employee must demonstrate that (1) they opposed an unlawful discriminatory practice, (2) the employer treated the employee differently than other employees who did not oppose the discriminatory practice, and (3) the employee's protected conduct was the "but for" cause of the discriminatory treatment of the employee.

In this case, Defendant disputes the first prong, asserting that gender-related, subjective "remarks" are not unlawful discriminatory practices. However, this reading directly contradicts the language of the VHRA. The VHRA classifies an unlawful discriminatory practice as any instance where an employer "classif[ies] employees . . . in any way that would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect an individual's status as an employee* because of such individual's race, . . . [or] sex." Va. Code § 2.2-3905(B)(1)(b)(alteration added)(emphasis added). Plaintiff alleges that Defendant openly showed preference to male employees by characterizing these employees as "brother", whereas female employees were not referenced, and that this gender-based labeling made a female employee, Plaintiff, uncomfortable in the workplace. This conduct clearly falls within the definition of unlawful discriminatory practice.

Under the second and third prong, the complaint contains sufficient facts to show that Defendant treated Plaintiff differently than other employees who did not oppose Defendant's discriminatory practice and that her opposition was the "but for" cause of her discharge. Plaintiff alleges that she opposed the practice of gender-based language in the office and was subsequently discharged for "poor performance" with no notice after eleven years of employment, despite other male employees receiving ample opportunity to correct deficient performance. These facts, taken in the light most favorable to the plaintiff, could support a jury finding that Plaintiff was discharged because she opposed a discriminatory workplace practice.

Therefore, Plaintiff has alleged sufficient facts to state a claim of discrimination under the VHRA, and Defendant's demurrer to Counts II and III are overruled.

## II. Count I - The Virginia Whistleblower Protection Law

Under Code § 40.1-27.3, otherwise known as the Virginia Whistleblower Protection Law ("VWPL"), "[a]n employer shall not discharge, discipline, threaten, discriminate against, or penalize an employee, or take other retaliatory action regarding an employee's compensation, terms, conditions, location, or privileges of employment, because the employee . . . [o]r a person acting on behalf of the employee in good faith reports a violation of any federal or state law or regulation to a supervisor or to any governmental body or law-enforcement official." Va. Code § 40.1-27.3(A)(1).

Defendant challenges Plaintiff's VWPL claim on the basis that she failed to report the misconduct to a bona fide "supervisor", failed to allege sufficient facts supporting an inference that she was terminated because of her report, and failed to bring a timely VWPL claim.

### A. Definition of "Supervisor"

Addressing the first issue, the VWPL does not explicitly define the term "supervisor", thus the issue requires statutory interpretation. "In construing statutory language, we are bound by the plain meaning of clear and unambiguous language." *White Dog Publ'g, Inc. v. Culpeper Cnty. Bd. of Supervisors*, 272 Va. 377, 386 (2015). But where "a statute is subject to more than one interpretation, this Court must 'apply the interpretation that will carry out the legislative intent behind the statute.'" *JSR Mechanical, Inc. v. Aireco Supply, Inc.*, 291 Va. 377, 383 (2016) (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007)).

Generally, a supervisor is defined as an employee who has the "power to hire and fire" on an employer's behalf. *VanBuren v. Grubb*, 284 Va. 584, 596 (2012) (Kinser, C.J., dissenting); *see also Supervisor*, *Black's Law Dictionary* (11th ed. 2019) ("Under the National Labor Relations Act, a supervisor is any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, discipline, and handle grievances of other employees, by exercising independent judgment").

However, the word "supervisor" is not read in isolation and is included with the verb "reports" and prepositional "to". The word "to" carries several meanings, including direct proximity between people or "as a function word" to indicate a place of final arrival. Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/to (last visited Dec. 23, 2023). Thus, the ambiguity lies in whether the legislature intended the phrase to mean an employee must communicate their report directly to the person who has the power to fire them or includes the situation where an employee makes a report that is subsequently made known to their supervisor as a "place" of final destination.

Other courts have broadly construed the terms "reports" and "to a supervisor" in conjunction to mean the latter, in that, an employee who reports a violation to an authority within the company in a manner that puts the employee's supervisors on notice of the complaint has met the definition of issuing a report a supervisor. *See Hairston v. Nilit Am., Inc.*, No. 4:23-CV-00011, 2023 WL 5447370, at *5 (W.D. Va. Aug. 24, 2023) (holding that a plaintiff issued a complaint to a supervisor within the meaning of the VWPL where the plaintiff's supervisors were present during a team meeting where plaintiff generally explained the discriminatory conduct he was facing) *and Alexander v. City of Chesapeake*, 108 Va. Cir. 161, 163 (2021) (a plaintiff's report to the City Attorney imputed knowledge onto the City, the supervisor and employer of the plaintiff, to meet the requirements of the VWPL). These readings of the VWPL also support the well-known principle that when the legislature creates a whistleblower statute, the goal is generally "to encourage whistleblowers" to voluntarily report information of wrongdoing. *Commonwealth ex rel. Hunter Labs., LLC v. Quest Diagnostics Inc.*, 95 Va. Cir. 323, 327 (2017). A rigid reading of the VWPL, as proposed by Defendant, would contravene this goal by punishing a whistleblower who reports a violation to an authority figure within the company, knowing that the person has direct contact with her supervisors, simply because the employee did not go to her direct supervisor first.

Thus, although Plaintiff reported the fraud to the Chairman of the Board, who generally does not have the power to fire or hire Plaintiff, this report was subsequently communicated to Plaintiff's supervisors during a team meeting, who were then aware that Plaintiff issued a report against the CEO of the company.[2] It is the Court's opinion that this is sufficient to meet the reporting requirement outlined under Code § 40.1-27.3(A)(1).

### B. Causation Requirement of the VWPL

Without belaboring the canons of statutory interpretation as outlined at length earlier in this opinion, the Court concludes that the VWPL's use of "because", without other procedural language included in the statute, mirrors the retaliation analysis under Code § 2.2-3905(B)(7) and requires a plaintiff allege facts that demonstrate (1) she made a good faith report of a federal or state violation to a supervisor, (2) was discharged by her employer, and (3) her report was the "but for" cause of her discharge.

[2] According to the complaint, Plaintiff's report was communicated to the Board on a conference call, which included all members of the company's executive team and Plaintiff's supervisor.

Defendant does not dispute whether Plaintiff made a good faith report and, as discussed above, Plaintiff made this report to a supervisor, thus, Plaintiff has satisfied the first prong. It is also not disputed that Plaintiff was discharged by her employer, thus meeting the second prong. Under the third prong, Plaintiff has alleged specific facts, that, if proven, could allow a jury to find "but for" causation, specifically, that management, including Plaintiff's supervisors, were angry and embarrassed that Plaintiff reported the CEO's fraudulent behavior because, as alleged by Plaintiff, management knew of or condoned the CEO's behavior but was forced to fire the CEO due to Plaintiff's report.

Therefore, Plaintiff has alleged sufficient facts to assert a claim under the VWPL, and Defendant's demurrer is overruled as to Count I.

### C. Statute of Limitations Claim

Defendant alleges that Plaintiff failed to bring a timely claim within the statute of limitations as outlined under the VWPL. As discussed in Section I, a demurrer is not the proper vehicle for a procedural issue or affirmative defense, such as a statute of limitations claim, and may only be brought in a responsive pleading. *See* Va. Code § 8.01-235. And, in light of the conclusion above that Plaintiff has set out sufficient facts to survive demurrer, this issue shall not be addressed by the Court, and this ground of Demurrer is overruled.

## III. Remedies Under the VHRA and VWPL

Finally, Defendant demurs Plaintiff's request for damages and asserts that pre-judgment interest, compensatory damages for emotional distress, and front pay are not damages included under either the VHRA or VWPL.[3]

Under the VHRA, a prevailing party may recover "compensatory and punitive damages." Va. Code § 2.2-3908(B). And, under the VWPL, a court may award as a remedy "compensation for lost wages, benefits, and other remuneration, together with interest thereon, as well as reasonable attorney fees and costs." Va. Code § 40.1.-27.3(C). The term "lost wages" under the VWPL includes the terms "back pay and front pay". *Markley v. Liberty Univ.*, 2023 Va. Cir. LEXIS 63, at *8 (Va. Cir. Ct. Lynchburg Apr. 17, 2023). However, a trial court, in its discretion, may deny front pay where other compensatory damage awards make the plaintiff "whole". *Lewis v. City of Alexandria*, 287 Va. 474, 482-83 (2014).

Considering the case law and plain language supporting the award of front pay, compensatory damages, and punitive damages, and Defendant's lack of case law which would confirm otherwise, Plaintiff's request for damages was proper and it is at the discretion of the trial judge to determine which awards are appropriate.

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[3] Front pay "is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001).

## CONCLUSION

For these reasons, the demurrer as to all counts is overruled. An order memorializing this decision is attached.

Sincerely,

[redacted]

Robert J. Smith
Judge, Fairfax County Circuit Court

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

| | | |
|---|---|---|
| Jamie L Moore, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | CL-2023-9565 |
| v. | ) | |
| | ) | |
| Copper River Shared Services, LLC, | ) | |
| | ) | |
| Defendant. | ) | |

**ORDER**

THIS CAUSE came before the Court upon the Defendant's Demurrer on October 13th, 2023.

For the reasons stated in the attached letter, it is **ADJUDGED**, **ORDERED**, and **DECREED** that the Defendant's Demurrer is **OVERRULED** in its entirety.

ENTERED this 30th day of January, 2024.

[redacted]
Judge Robert J. Smith

**ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.**