In The
District of Columbia
Court of Appeals

Clerk of the Court
Received 09/19/2022 04:18 PM
Filed 09/19/2022 04:18 PM

ERIE SAMPSON,

***Appellant*,**

v.

DISTRICT OF COLUMBIA RETIREMENT BOARD, *ET AL.*,

***Appellees*.**

ON APPEAL FROM CASE NO. 2021 CAB 4942 IN THE DISTRICT OF COLUMBIA COURT OF APPEALS, THE HONORABLE ANTHONY C. EPSTEIN, JUDGE PRESIDING

BRIEF OF APPELLANT

Carla D. Brown*
David E. Murphy
CHARLSON BREDEHOFT COHEN & BROWN P.C.
11260 Roger Bacon Drive, Suite 201
Reston, Virginia 20190
(703) 318-6800
cbrown@cbcblaw.com
dmurphy@cbcblaw.com

Counsel for Appellant

LIST OF PARTIES AND COUNSEL

Plaintiff-Appellant:	Erie Sampson
Plaintiff-Appellant's Counsel:	Carla. D. Brown David E. Murphy CHARLSON BREDEHOFT COHEN BROWN & NADELHAFT, P.C.
Defendants- Appellees:	District of Columbia Retirement Board, *et al*.,
Defendants-Appellees' Counsel:	Miguel F. Eaton Alice E. Bradford Eric Dreiband JONES DAY
Rule 26.1 Disclosure Statement:	Pursuant to Rule 7.1, Plaintiff Erie Sampson was not required to file a Disclosure Statement with the trial court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

JURISDICTION

The appellant is Erie Sampson and the appellee is the District of Columbia Retirement Board ("DCRB"). This appeal arises from Orders of the Superior Court of the District of Columbia ("Superior Court") that dismissed and disposed of all of Ms. Sampson's claims. Ms. Sampson has the right to appeal under D.C. Code § 11-721(b), and this Court has jurisdiction under D.C. Code § 11-721(a)(1).

STATEMENT OF THE ISSUES

1. It was reversible error for the Superior Court to dismiss Count I on the grounds that Ms. Sampson did not state a plausible claim for retaliation under the District of Columbia Whistleblower Protection Act ("DCWPA").

2. It was reversible error for the Superior Court to dismiss Count I of Ms. Sampson's Complaint with no leave to amend without making any finding that no set of facts could possibly state a plausible claim for DCWPA Retaliation.

STATEMENT OF THE CASE

Ms. Sampson filed a Complaint in the Superior Court for the District of Columbia alleging multiple claims, including a claim for DCWPA Retaliation (Count I). DCRB moved to dismiss the Complaint, and on April 27, 2022 the Superior Court granted DCRB's Motion and dismissed Count I. For the reasons stated below, Ms. Sampson respectfully requests that this Court reverse the Superior Court's April 27, 2022 Order and remand the case.

STATEMENT OF FACTS

I. DCRB'S MISSION AND MS. SAMPSON'S EMPLOYMENT

DCRB is an independent agency within the D.C. government that manages an $11 billion pension trust fund for the D.C. Police, Firefighters, and Teachers' Retirement Funds ("Retirement Fund")- a safety net for employees after a career of public service. JA2, 10, ¶¶ 6, 24. As of October 1, 2021, DCRB administers pension benefits for 21,335 participants and beneficiaries. JA7, 10, ¶¶ 7, 24.

Ms. Sampson began her career with DCRB on September 8, 2008 as General Counsel and Ethics Counselor, reporting directly to DCRB's Executive Director with a "dotted line" reporting to DCRB's Trustees. JA6, 10, ¶¶ 4, 22. Prior to 2019, DCRB did not have an independent compliance or internal audit program. JA10, ¶ 25. DCRB's Executive Director Sheila Morgan-Johnson ("Executive Director Morgan-Johnson") and Ms. Sampson agreed that compliance and audit functions must independently monitor DCRB's activities. *Id.* So Executive Director Morgan-Johnson expanded Ms. Sampson's duties to include creating and managing this new unit within an expanded Legal Department, along with direct oversight of compliance and internal audit by full-time employees. *Id.*

II. MS. SAMPSON'S DISCLOSURES OF FRAUDULENT ACCOUNTING

Ms. Sampson hired a CPA and experienced public pension auditor as the Director of Internal Audit. JA13, ¶ 34. In November 2019, the Director prepared a

preliminary risk assessment of the Finance Department, including an independent audit of observations and concerns regarding lax internal controls and questionable accuracy and validity of DCRB's financial reports. JA13, ¶¶ 34-35. Executive Director Morgan-Johnson asked how the Internal Audit Director would rate DCRB's Finance Department, and the response was a grade of "D-." JA13, ¶ 36.

On December 6, 2019, the Director presented the results to Executive Director Morgan-Johnson, DCRB's CFO and Controller, and Ms. Sampson. JA13-14, ¶¶ 37-38. Ms. Sampson then disclosed the final financial risk assessment to Executive Director Morgan-Johnson and DCRB's Trustees, and used it and later audit findings to advocate for compliant financial protocols. JA13-14, 17, ¶¶ 38-39, 53. Also in December 2019, DCRB's external auditor, McConnell & Jones, expressed concerns to Ms. Sampson about DCRB's lack of internal controls that could lead to errors within individual Retirement Funds and their net asset balances, that DCRB could receive a management letter documenting internal control deficiencies, the FY 2018 financial statements may need to be restated, and all accounts should be scrubbed after the audit's completion. JA14, ¶¶ 40-41. In December 2019, Ms. Sampson disclosed these deficiencies to DC's Office of the Chief Financial Officer to assess the impact on the District's budget. JA17, ¶ 54.

On January 16, 2020 at DCRB's Audit Committee meeting, McConnell & Jones informed the Trustees that "DCRB likely has never independently calculated

or recalculated the investment management fees paid to its private market investment managers and that DCRB's financial accounts were not reconciled," and that audited financial statements revealed that the opening balances did not reconcile with trial balances. JA14, ¶ 42. Some Trustees' doubted and questioned the legitimacy of these findings, but DCRB's CFO Shelborne confirmed their legitimacy dating back to FY 2009, but was uncertain of the magnitude of these deficiencies and would not know until a forensic audit was completed. JA15, ¶ 44.

From January 2020 to March 2021, Ms. Sampson continuously urged Executive Director Morgan-Johnson and the Trustees to address these *objectively substantiated* deficiencies. JA15, ¶ 45. For example, in March 2021 Ms. Sampson disclosed DCRB's failure to reconcile its financial accounts to CFO Musara and Executive Director Hsu to allow DCRB to assess the impact on the overall District budget. JA17, ¶ 54. And in response to the recommendation for DCRB to "scrub and reconcile each of its accounts," Ms. Sampson and DCRB's Controller jointly prepared a solicitation for an independent forensic accounting to uncover the root causes of why DCRB could not reconcile its account balances for over a decade. JA15, ¶ 46. But CFO Musara then changed the scope to a consulting report, so DCRB *still* cannot explain why its balances do not reconcile. JA15, ¶¶ 47-48.

Additionally, during preparations for the Council of the District of Columbia's ("D.C. Council") FY 2021 budget hearing, Ms. Sampson advised

Executive Director Morgan-Johnson to accurately disclose her total 2020 compensation, because DCRB budget documents included her salary but excluded her 457(f) deferred compensation and enhanced 401(a) retirement contributions. JA16, ¶ 50. DCRB Trustees testified to increase the DCRB executive director salary, but failed to disclose the total compensation, intentionally misleading Councilmembers into raising the salary cap. JA16, ¶ 51. The Trustees also used this concealment to seek additional compensation for themselves. JA17, ¶ 52. So in Spring 2021, Ms. Sampson disclosed to the D.C. Council that DCRB failed to accurately report the Executive Director's total compensation. JA17, ¶ 55.

III. MS. SAMPSON'S DISCLOSURES OF CONCEALED FEES

In April 2019, Ms. Sampson hired DCRB's Director of Investment Risk and Compliance, with 20 years of experience in pension systems. JA18, ¶¶ 56-57. Ms. Sampson's objective was to create a formal compliance and risk assessment program to support DCRB's legal and regulatory compliance. *Id.* This Director and Ms. Sampson disclosed to Executive Director Morgan-Johnson and CFO Shelborne their concerns of DCRB's incomplete management fee reporting. *Id.*

In November 2019, Ms. Sampson, as DCRB's temporary Executive Director, instructed Chief Investment Officer Patrick Sahm ("CIO Sahm") to detail the total public and private investment management fees and expenses for DCRB's FY 2021 Trustees budget presentation. JA18, ¶ 59. CIO Sahm initially responded

that he was unable to calculate these totals, but Ms. Sampson emphasized they were a critical component of DCRB's budget because it must be transparent and include *total* fees since the Trustees have a fiduciary duty to the Fund's participants to manage and approve DCRB's fees and expenses. JA19, ¶¶ 60-61.

CIO Sahm estimated that DCRB paid $93 million in management fees in 2018. JA19, ¶ 62. But in its FY 2018 annual financial report DCRB only disclosed management fees from *public* market managers of $15.2 million, therefore concealing and ***massively underreporting $77.8 million***. *Id.* Prior to December 2019, DCRB executives never disclosed the total management fees to DCRB Trustees. *Id.* So Ms. Sampson ensured that the $93 million estimate would be disclosed in the FY 2021 budget presentation. JA19, ¶ 63. Ms. Sampson and the Director of Risk and Investment Compliance disclosed to Executive Director Morgan-Johnson and the Trustees that estimated management fees and expenses should be included in the budget presentation. JA19-20, ¶ 65.

In February 2020, the Director of Risk and Investment Compliance explained how investment management fees could be calculated, and recommended that DCRB solicit a fee validation consultant, which the Board approved. JA20, ¶ 66. Throughout 2020 and 2021, Ms. Sampson asked DCRB's Investment Department to calculate and report total management fees and expenses. JA20, ¶ 67. A senior executive responded that the Trustees *would not*

approve new private fund investments if they understood the true investment cost, but Ms. Sampson responded that as fiduciaries the Trustees required this expense data. *Id.* But Executive Director Morgan-Johnson and CIO Sahm excluded the total estimated fees from DCRB budget presentations. JA20, ¶ 68.

During Spring 2021, Ms. Sampson and the Director of Risk and Investment Compliance further disclosed to CFO Musara concerns of excluding the total management fees from DCRB budget documents and presentations, and volunteered to assist finalizing the solicitation. JA20, ¶ 70. In February and March 2021, Ms. Sampson and this Director also disclosed to Executive Director Morgan-Johnson, CFO Musara, and other DCRB executives concerns about whether investment management fees were validated and reported accurately in DCRB's annual report. JA21, 23, ¶¶ 72, 83. DCRB is aware that the D.C. government must rely upon complete and accurate information when authorizing and appropriating funds for DCRB, so Ms. Sampson disclosed that the financial reports misled D.C. officials, Plan members, and taxpayers. JA21, 23, ¶¶ 73, 83.

In March 2021, prior to an Executive Leadership Team Meeting ("ELT Meeting"), Executive Director Morgan-Johnson called an executive meeting based on Ms. Sampson's disclosures and excluded Ms. Sampson. JA21, ¶ 74. Ms. Sampson attended the ELT Meeting disclosing her concerns, so Executive Director Morgan-Johnson agreed to edit the financial report's transmittal letter, but not the

management fee section. JA21, ¶ 75. In March and April 2021, DCRB executives and Trustees testified before the D.C. Council, but failed to disclose the exclusion of private management fees from DCRB's appropriated budget. JA16, ¶ 49.

During the September 16, 2021 Audit Committee meeting, Ms. Sampson disclosed to DCRB Trustees that the FY 2021 financial statements from CFO Musara were inaccurate since investment management fees and expenses were reported as $20 million. JA22, ¶ 78. The Director of Risk and Compliance stated that partnership agreements clearly lay out the management fee calculation. *Id.* CFO Musara responded that all management fees were not included, but failed to indicate how the additional $70+ million would be reported, *or how DCRB was authorized to spend tens-of-millions of dollars outside of its budget*. JA22, ¶ 79.

In June 2021, Ms. Sampson and the Director of Risk and Investment Compliance met with Interim Executive Director Betty Ann Kane to disclose concerns about DCRB's failure to monitor private investment management agreements and proposed solutions, but Ms. Kane took no action. JA23, ¶¶ 80, 83. In July 2021, Ms. Sampson and the Director of Risk and Investment Compliance disclosed these concerns to CIO Sahm, and he admitted that DCRB has never monitored its private investment management agreements. JA23, ¶ 81. So DCRB's Board generally approves 12 to 14 new fund investments annually (each between $30-$100 million), but without knowing the total fees paid. JA23, ¶ 82.

IV. FEDERAL GRAND JURY SUBPOENAS SERVED ON DCRB

In May 2020, Ms. Sampson was served with a federal grand jury subpoena in connection with an FBI investigation of DCRB ("Subpoena I"). JA24, ¶ 85. Ms. Sampson promptly informed Executive Director Morgan-Johnson, Board Chair Hankins, and Trustee Clark, initiated compliance with the Court-ordered document production, and fulfilled DCRB's obligations. *Id.* In August 2020, Ms. Sampson was served with a second subpoena ("Subpoena II"), disclosed her intent to comply, and fulfilled DCRB's obligations. JA24, ¶ 86. As DCRB's Custodian of Records, Ms. Sampson was required to disclose DCRB documents to the FBI and the DC OIG. JA25, ¶ 92. In August 2021, Ms. Sampson was served with a third subpoena ("Subpoena III") and again disclosed her intent to comply. JA25, ¶ 88. During Ms. Sampson's first meeting with Executive Director Balestrieri, she documented the FBI Investigation, her intent to comply with Subpoena III, and her financial and investment management concerns. JA25, ¶¶ 88-93.

V. DCRB'S CAMPAIGN OF RETALIATION AGAINST MS. SAMPSON

DCRB Executives and Trustees retaliated against Ms. Sampson due to her protected disclosures through a campaign of persistent adverse actions including:

1. Ms. Sampson being excluded from executive and closed Board meetings (JA24, 29-31, ¶¶ 84, 110(e), 112);
2. False Characterizations of Ms. Sampson as a threat, a liar, "toxic," not a "team player," could not be trusted, not credible, "lapses in judgment," and a "troublemaker" (JA26, 29-34, ¶¶ 98, 110(b)-(c), 115-16, 121, 123, 126);

3. Marginalizing Ms. Sampson's role at DCRB, including removal of responsibilities, dismantling her department, ending her compliance and internal auditing responsibilities, and no longer permitting her to serve as Acting Executive Director (JA29-30, 31-32, ¶¶ 109, 110(d)-(g), 117);

4. Calls for Ms. Sampson to be fired and "gotten rid of" and defamatory statements, including fabrication of the FBI investigation and needing to be investigated for wrongdoing" (JA29, 32-35, ¶¶ 109-110(a), 119-131).

This campaign reached a crescendo in Fall 2021. On September 8, Ms. Sampson had an initial meeting with new Executive Director Balestrieri on his second day of employment, and he immediately communicated with her in a hostile manner and misquoted her on limiting distribution of Subpoena III. JA25, ¶¶ 89-90, 117. Mr. Balestrieri informed Ms. Sampson that the Legal & Compliance Department was immediately dismantled, reassigned three dedicated FTEs (including the Director of Risk and Investment Compliance) to other departments, and was hostile to Ms. Sampson during a meeting she led on compliance with Subpoena III. JA25, ¶ 90. Mr. Balestrieri's emails also became hostile, and he intimidated and harassed Ms. Sampson for small issues, such as not updating her email signature. JA27, ¶ 101.

On October 4, 2021- less than 30 days of joining DCRB- Executive Director Balestrieri placed Ms. Sampson on enforced leave. JA27, ¶ 103. Despite no prior discussion, the letter stated that Ms. Sampson "[did not disclose] to DCRB's Board of Trustees important material information concerning agency investments and operations in performing your fiduciary duties as General Counsel." *Id.* But the letter failed to identify this "important material information," Ms. Sampson's

involvement, or the mistaken belief she was a Board fiduciary. Mr. Balestrieri also threatened to fire Ms. Sampson if she communicated with any D.C. or federal employee or DCRB's outside counsel while on leave. JA32, ¶ 118. Ms. Sampson was also prohibited from accessing any District systems, including her own work product and laptop to communicate. *Id.* This enforced leave was intended to silence Ms. Sampson and prevent further disclosures of DCRB's gross malfeasance or her Subpoena compliance. *Id.*; *see also* JA25, 28, 37, ¶¶ 91, 104, 139.

SUMMARY OF ARGUMENT

The DCWPA was enacted for employees exactly like Ms. Sampson. As DCRB's General Counsel and Ethics Counselor, Ms. Sampson was charged with creating and managing a brand new internal audit and compliance program. It was an extremely important job, given DCRB's "mission" to oversee an $11 billion pension fund for over 21,000 retired police officers, firefighters, and teachers.

After hiring highly qualified professionals and getting this new program off the ground, Ms. Sampson disclosed and began addressing a "parade of horribles" in DCRB's pension administration, substantiated by objectively-verified data from multiple independent third-party professionals and DCRB's own financial experts. So Ms. Sampson made protected disclosures regarding DCRB's accounting practices, failure to fully report investment management fees, the failure to fully report Executive Director Morgan-Johnson's full compensation when seeking a

raise, and compliance with three grand jury subpoenas related to an FBI investigation of DCRB. These disclosures met the DCWPA's criteria for gross mismanagement, gross misuse and waste of public funds, and abuse of authority.

DCRB reacted to Ms. Sampson's protected disclosures *in exactly the manner prohibited by the DCWPA*- a retaliatory campaign of hostility and persistent adverse actions, culminating in incessantly calling for her to be "gotten rid of," dismantling the Legal Department, placing Ms. Sampson on enforced leave, and conducting a sham investigation. It is crystal clear DCRB's motivating factor in Ms. Sampson suffering these adverse actions was retaliation for her protected disclosures, and to silence any further disclosures of DCRB's gross misconduct.

Despite Ms. Sampson plausibly stating a claim for DCWPA Retaliation, the Superior Court committed reversible error by dismissing Count I. But the Superior Court further abused its discretion when it dismissed Count I with prejudice, despite the "virtual presumption" of leave to amend in D.C. Superior Court, and without conducting any analysis that no set of facts could cure the claimed deficiencies. This was "not an exercise in discretion," but "merely abuse of that discretion." *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996).

For these reasons, Ms. Sampson respectfully requests this Court reverse the Superior Court's dismissal of Count I and remand the case for Ms. Sampson to pursue her well-plead complaint of DCWPA Retaliation.

ARGUMENT

First, the Superior Court erred when it granted DCRB's Motion to Dismiss Count I because Ms. Sampson sufficiently alleged a plausible claim for DCWPA Retaliation. Second, the Superior Court abused its discretion when it dismissed Count I without leave to amend without finding that the claim was incurable.

I. THE SUPERIOR COURT ERRED IN DISMISSING COUNT I

The DCWPA requires that "[a] supervisor shall not take, or threaten to take, a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure." D.C. Code § 1-615.53(a). The DCWPA further identifies its exact policy goals- "the public interest is served when employees of the District government are free to report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal." D.C. Code § 1-615.51 (the "policy [is] to…express their views without fear of retaliation…[and] [e]nsure that rights of employees to expose corruption, dishonesty, incompetence, or administrative failure are protected.").[1]

[1] *Williams v. District of Columbia*, 9 A.3d 484, 490 (D.C. 2010) (The DCWPA's premise is for "District employees [to] function as the eyes and ears of District taxpayers…[and] to protect employees who risk their own personal job security for the benefit of the public"); *Wilburn v. District of Columbia*, 957 A.2d 921, 924 (D.C. 2008) ("purpose of whistleblower statutes is to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it.").

The Plaintiff must allege: (1) A covered protected disclosure; (2) An actual or threatened prohibited personnel action or retaliation against them; and (3) The protected disclosure was a contributing factor to the retaliation. *Ukwuani v. D.C.*, 241 A.3d 529, 551 (D.C. 2020) (quoting *Wilburn*, 957 A.2d at 924). This Court "review(s) dismissals for failure to state a claim…*de novo*." *Jaswant Sawhney Irrevocable Trust, Inc. v. D.C.*, 236 A.3d 401, 405 (D.C. 2020).

Generally, a complaint must "show[] that the pleader is entitled to relief," and "[a]ll factual allegations…must be presumed true and liberally construed in the plaintiff's favor" even if "recovery is very remote and unlikely." *Close It! Title Servs. v. Nadel*, 248 A.3d 132, 138 (D.C. 2021). While the claim must be "plausible on its face" and permit "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the plaintiff "is not required…to include detailed factual allegations." *Id.*; *Jaswant*, 236 A.3d at 405.

A. Ms. Sampson Made Multiple "Protected Disclosures"

The DCWPA provides "expansive protections" for whistleblowers, and is "designed to encourage disclosures concerning a broad universe of government misconduct." *Bowyer v. District of Columbia*, 910 F. Supp. 2d 173, 197 (D.D.C. 2011). The DCWPA defines a "protected disclosure" as any disclosure of information by an employee (including in the ordinary course of an employee's duties) to a supervisor or a public body that the employee reasonably believes

evidences gross mismanagement, gross misuse or waste of public resources or funds, or abuse of authority in connection with the administration of a public program or the execution of a public contract. D.C. Code § 1-615.52(a)(6).

A "gross mismanagement" disclosure is "a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission." *District of Columbia v. Poindexter*, 104 A.3d 848, 855 (D.C. 2014). An employee must also disclose "such serious errors…that a conclusion the agency erred is not debatable among reasonable people." *Id.*

A "protected disclosure" on the basis of a "gross misuse or waste of public funds" is a "more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." *Davis v. District of Columbia*, 258 A.3d 847, 858 (D.C. 2021). "The paradigmatic case of waste is one in which the government spends money recklessly." *Id*.

A "protected disclosure" on the basis of an "abuse of authority in connection with administering a public program or the execution of a public contract" is an "arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Poindexter*, 104 A.3d at 857.

The DCWPA requires both a subjective and objectively reasonable belief that the disclosed information is protected by the statute. *Davis*, 258 A.3d at 854

("[w]hether the information conveyed to…superiors [is] 'protected' turns not on whether it *actually* evidenced 'gross mismanagement' or 'gross misuse or waste of public resources or funds,' but on whether [the plaintiff] *reasonably believed* that it did.") (emphasis original). The employee must "hold such a belief at the time the whistle is blown, and the belief must be both sincere and objectively reasonable." *Ukwuani*, 241 A.3d at 551; *Johnson v. D.C.*, 225 A.3d 1269, 1276 (D.C. 2020). The belief's reasonableness turns on whether "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence one of the categories of protected disclosures." *Poindexter*, 104 A.3d at 854.

i. Protected Disclosures Regarding DCRB's Accounting Practices

Ms. Sampson made a "protected disclosure" in December 2019 when she disclosed "the final financial risk assessment to DCRB Trustees" and "report[ed] financial deficiencies" to Executive Director Morgan-Johnson and DCRB Trustees. JA13-14, 17, ¶¶ 34-39, 53. This final assessment began in late 2019, when the DCRB Director of Internal Audit (a CPA and an experienced public pension auditor) prepared a preliminary financial risk assessment of DCRB's Finance Department, including an independent audit of observations and specific concerns regarding "lax internal controls" and "questionable accuracy" of DCRB's financial reports. JA13, ¶¶ 34-35. Ms. Sampson then disclosed the "final financial risk

assessment" to the DCRB Trustees, "highlight[ing] lax internal controls that had the potential to result in inappropriate and unauthorized payments" and "includ[ing] recommendations for several risk mitigation measures," and Ms. Sampson then used this "assessment and subsequent audit findings to advocate for necessary and compliant financial improvements." JA13-14, ¶¶ 38-39.

Ms. Sampson made two further "protected disclosures" by reporting "DCRB's failure to reconcile its financial accounts," and "express[ing] concerns about DCRB's financial deficiencies to allow the OCFO to assess the impact on the overall District government budget." JA17, ¶ 54. DCRB's external auditor, McConnell & Jones, "expressed concerns to Ms. Sampson about DCRB's lack of internal controls" that could lead to errors within individual Retirement Funds and the Retirement Fund asset balances, and also raised concerns that DCRB could receive a management letter documenting internal control deficiencies; that the FY 2018 financial statements may need to be restated; and that after the completion of the audit, DCRB should scrub and reconcile each of its accounts. JA14, ¶¶ 40-41. CFO Shelborne also confirmed the legitimacy of McConnell & Jones' findings and concerns, but "was uncertain about the magnitude of these accounting deficiencies and would not know until a forensic audit was completed." JA15, ¶ 44. So between January 2020-March 2021, Ms. Sampson "continuously urged" Executive Director Morgan-Johnson to address the "substantiated accounting deficiencies,"

and along with the DCRB Controller "prepared a solicitation for an independent forensic accounting analysis to uncover the root causes" of why DCRB's opening balances did not match the trial balances for over a decade. JA15, ¶¶ 46-48.

These actions met the requirements of a "gross mismanagement" DCWPA disclosure. First, these significant and fully objectively corroborated, serious accounting deficiencies "create[d] a substantial risk of significant adverse impact on the [DCRB's] ability to accomplish its mission." *Poindexter*, 104 A.3d at 855. DCRB's "mission" is to oversee and manage an $11 billion pension trust fund for the retirement income of over 21,000 public employees- a safety net following a career of public service. JA6-7, 10, ¶¶ 6-7, 24. Yet DCRB's own "final financial risk assessment" highlighted "lax internal controls that had the potential to result in inappropriate and unauthorized payments." JA13-14, ¶¶ 38-39. DCRB's own auditor, McConnell & Jones, also expressed concerns to Ms. Sampson about "DCRB's lack of internal controls" and deficiencies that could lead to net asset balance errors, the FY 2018 financial statements needed to be restated, and DCRB "should scrub and reconcile each of its accounts." JA14, ¶¶ 40-41. DCRB Trustees still cannot explain why DCRB's closing balances have not matched its opening balances *for over a decade*. JA15, ¶ 48 (emphasis added).

Clearly "a substantial risk of significant adverse impact on [DCRB]'s ability to accomplish its mission" exists when the agency's operations are handicapped by

the objectively corroborated findings of a systemic lack of internal controls, inaccurate and misleading financial reports, and failure to accurately reconcile financial accounts *for ten years*. Moreover, full disclosure of investment information to Plan members and the public is necessary for DCRB stakeholders to evaluate whether pension fiduciaries are sufficiently performing their fiduciary duties based on their legal obligation to manage the DCRB trust fund prudently.[2] Full disclosure of investment information is also important to avoid "cherry-picking" only favorable information and concealing less favorable information from these disclosures. Ms. Sampson therefore plausibly alleged a substantial risk of significant adverse impact on DCRB's ability to accomplish its mission.

Second, these facts also qualify as "abuse of authority" disclosures because they reveal an "arbitrary or capricious exercise of power…that adversely affect[ed] the rights of any person"- the D.C. Plan members and taxpayers. *Poindexter*, 104 A.3d at 857. Plan members have the right for their pension income to be managed in an environment free of such pervasive "lax internal controls" with the potential of "inappropriate and unauthorized payments" that could lead to net asset balance

[2] D.C. Code § 1-741(a)(1) ("The Board…shall discharge responsibilities with respect to a Fund as a fiduciary…[and] shall retain such fiduciary responsibility for the exercise of careful, skillful, prudent, and diligent oversight of any person so designated as would be exercised by a prudent individual acting in a like capacity and familiar with such matters under like circumstances.").

errors in their accounts, especially when to date DCRB *still* cannot explain its balances failing to match for over a decade. JA13-14, 15-16, ¶¶ 38-41, 48.

Third, the Superior Court also erred when it ruled that "accounting issues" relating to the books of DCRB's pension fund "do not necessarily involve gross mismanagement or abuses, and Ms. Sampson did not allege that the pension fund…was in significantly worse shape than its financial reports indicated." (JA77-78). The Superior Court then relied on *Ukwuani* in finding a lack of reasonable belief that the accounting issues were "gross mismanagement." 241 A.3d at 553 ("a mere policy disagreement…is not enough to show…gross mismanagement").

But Ms. Sampson's disclosures regarding DCRB's fraudulent and incomplete accounting were far more than mere "policy disagreements"- they were objectively reasonable beliefs based on *objectively*-verified data provided by *independent* third-party professionals as well as *by DCRB's own finance professionals* (the Director of Internal Audit, Director of Investment Risk and Compliance, Chief Financial Officer, Chief Investment Officer, Controller, and auditor McConnell & Jones), who formed a "consensus" based on objective accounting principles. JA13-15, 19, ¶¶ 35-38, 40-41, 44-46, 62.[3]

[3] *Compare Davis*, 258 A.3d at 854 ("a disinterested observer" with plaintiff's "knowledge of the essential facts" could "reasonably conclude" gross mismanagement and misuse or waste of public funds), *with Poindexter*, 104 A.3d at 855 ("there was no consensus among the majority of educational institutions… and the report presented by petitioner highlighting certain critiques of the program

Ms. Sampson's disclosures, based on objective data verified by DCRB and independent sources, were of "non-debatable mistakes" that were "erroneous beyond debate." *Poindexter*, 104 A.3d at 855. This error is similar to *Holbrook v. D.C.*, where the Superior Court also relied on *Poindexter* but was reversed because "appellant's objections were not mere differences of opinion over policy decisions; they were objections to unlawful discriminatory treatment." 259 A.3d 78, 91 (D.C. 2021).[4] And in *Waiting v. Blue Hills Bank*, the plaintiff argued that "disclosures of accounting irregularities, internal control violations, and general dysfunction in the finance department" qualified as a "significant matter…not debatable among reasonable people." 2017 U.S. Dist. LEXIS 39597, at *31-32 (D. Mass. Feb. 8, 2017). The court held that it was for the "jury to weigh the significance of Waiting's objections and the Bank's policies, practices, and responses" to the complaints, as the record did not support "finding, as a matter of law, that Waiting did not reasonably believe that he was reporting 'gross mismanagement.'" *Id*.

---

did not suggest that the program was 'erroneous beyond debate'"), *and Ukwuani*, 241 A.3d at 553 ("Appellant's 'purely subjective perspective' on the agency's permitting process is insufficient" for a DCWPA protected disclosure).

[4] *Contrast with Bell v. E. River Family Strengthening Collaborative, Inc.*, 480 F. Supp. 3d 143, 153 (D.D.C. 2020) ("Bell does not explain (through providing an accounting or otherwise) how the allegedly stolen hours created 'a substantial risk of significant adverse impact on…ability to accomplish its mission'"); *and Zirkle v. D.C.*, 830 A.2d 1250, 1260 (D.C. 2003) (belief "was not that of an objectively reasonable person, but rather that of a rigid partisan whose beliefs and conduct were being challenged by his superiors").

These disclosures also revealed sincere current beliefs of "gross mismanagement" and "abuse of authority." *Ukwuani*, 241 A.3d at 551 (belief must be held "at the time the whistle is blown," and must be "sincere and objectively reasonable"); *Holbrook*, 259 A3d at 89 (sufficient evidence of genuine contemporaneous belief when appellants "told their supervisors that the treatment was unfair and disparate when compared to the treatment of other employees"). For the same reasons, these disclosures also revealed more than "de minimis wrongdoing or negligence." *Holbrook*, 259 A.3d at 91; *Davis*, 258 A.3d at 855 ("maladministration that is truly egregious and indisputable" satisfies the disinterested observer test).

Fifth, the Superior Court erroneously ruled that Ms. Sampson's disclosures did not qualify as "gross mismanagement" because they did not include "language about 'gross' abuse or 'violations' or any similar language," so cannot "evidence a contemporaneous belief." JA77 (*relying on Johnson*, 225 A.3d at 1277). But in *Holbrook*, this Court recently squarely rejected "several aspects of [the Superior Court's] argument, along with its bottom line," as the Superior Court apparently erroneously required the use of specific "magic words" to trigger the statute. 259 A.3d at 90 ("appellants' failure to use legal terminology or to specifically mention the DCHRA in their objections is not fatal"); *Wilburn*, 957 A.2d at 926 (recognizing "similar language" to the *verbatim* disclosures from D.C. Code § 1-

615.52(a)(6) can be sufficient); *McFarland v. George Wash. Univ.*, 935 A.2d 337, 360 (D.C. 2007) ("protected activity under the DCHRA does not require the recitation of 'magic words'"). As long as a "complaint of unlawful discrimination may be inferred or implied from the surrounding facts, then a whistleblower need not employ any 'magic words,'" which in this case would be words such as "gross mismanagement" or "abuse of authority." *Holbrook*, 259 A.3d at 90; *Carter-Obayuwana v. Howard Univ.*, 764 A.3d 779, 791 (D.C. 2001); *Langer v. Dep't of Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2021) (surrounding circumstances determined if statements "implicat[ed] an identifiable violation of law").

Here, Ms. Sampson alleged "similar language" to "gross mismanagement." *See, e.g.*, JA9, ¶ 19 ("Ms. Sampson also seeks to protect District taxpayers…who want to eliminate fraud, waste, and abuse from District government"); JA17, ¶ 53 ("Ms. Sampson then used this [final financial risk] assessment and subsequent external audit findings to advocate for necessary financial improvements," and "made protected disclosures by reporting financial deficiencies"); JA17, ¶ 54 ("Ms. Sampson made protected disclosures…about DCRB's failure to reconcile its financial accounts," and "expressed concerns about DCRB's financial deficiencies to allow the OCFO to assess the impact on the overall District government budget"). These allegations are more than sufficient. *Holbrook*, 259 A.3d at 90 ("no incongruity between appellants complaining to their supervisors that they

wanted to treat Jones and Parker the same as other employees, and their later descriptions that those objections were to DOC's unlawful discriminat[ion]").

Finally, the Superior Court committed further reversible error when it ruled that a "true disclosure under the WPA cannot concern information that is already known to the recipient or other supervisors," and that Ms. Sampson was only "repeating concerns" from others. JA78 (*citing to Johnson,* 225 A.3d at 1277-79, n.7; *Williams,* 9 A.3d at 489-90). But these are gross overstatements of the requirements of a "protected disclosure," as the plain language of the DCWPA as amended in 2009 defines a "protected disclosure" as "without restriction to…prior disclosure made to any person by an employee or applicant." D.C. Code § 1-615.52; *Bowyer*, 910 F. Supp. 2d at 194, n. 16 ("The 2010 amendments to the DCWPA broadened the definition of 'protected disclosure'"); *Williams*, 9 A.3d at 490, n. 5 ("the language we have italicized reflects the Council's focus on protecting employees or applicants who risk their job security to disclose information that might have already been disclosed by another employee"); *Rodriguez v. D.C.*, 2013 Super D.C. LEXIS 20, at *17 (D.C. Super. 2013) ("[A]n employee does not make a protected disclosure by providing information that is already *publicly known*.") (emphasis added). And in *Holbrook*, this Court further noted that the "federal authorities" holding that disclosure to the "wrongdoer herself is not whistleblowing…seem to have been abrogated by 2012 amendments

to the federal Whistleblower Protection Act which clarify that reports to the wrongdoer herself may yet qualify as protected disclosures." 259 A.3d at 88, n. 6.

The Superior Court's statement of law is therefore incomplete, and is instead accurately stated as: a true DCWPA disclosure cannot be based on information that is already known to the recipient "that is the subject of discussion among, and that has already been the subject of complaints by, *members of the general public.*" *Williams*, 9 A.3d at 490, n. 5 ("Stated differently, retaliation against an employee *who relays public complaints* about a perceived abuse…does not appear to be the particular evil at which the DC-WPA was aimed") (emphasis added).

Here, there was no prior "public complaint" on the same subject, so this does not defeat a "protected disclosure." Also, the Director of Internal Audit first prepared a *preliminary* "financial risk assessment" and only presented it to Executive Director Morgan-Johnson, CFO Shelborne, the DCRB Controller, and Ms. Sampson before resigning. JA13-14, ¶¶ 34-39. It was then *Ms. Sampson* who disclosed the "final financial risk assessment" to the *DCRB Trustees.* JA13-14, ¶¶ 38-39. And while McConnell & Jones presented its *initial concerns* to the DCRB Trustees, it was *Ms. Sampson* who continually urged Executive Director Morgan-Johnson to address the "substantiated accounting deficiencies," and who sought a forensic root-cause accounting analysis. JA15, ¶ 46; *Winder*, 905 F. Supp. 2d at 40 ("it does not necessarily demonstrate that he was also aware of the specific details

disclosed by Plaintiff…[and] it was therefore probable that some of these details were not public knowledge available…prior to the meeting").

For these reasons, Ms. Sampson plausibly alleged protected disclosures regarding fraudulent accounting.

ii. Protected Disclosures Regarding Investment Management Fees

Ms. Sampson made another "protected disclosure" in November 2019 when she disclosed to DCRB's Board of Trustees that DCRB was systematically and improperly underreporting DCRB's total investment management fees and expenses. JA18-19, ¶¶ 58, 63. Ms. Sampson also made a "protected disclosure" in February-March 2021 by disclosing to DCRB's Executive Director, Interim Executive Director, and CFO Musara that DCRB's financial reports were misstating DCRB's actual investment management fees and expenses. JA20, ¶¶ 70, 72, 83. This disclosure was based on *objectively* verified data from CIO Sahm, who confirmed that DCRB's financial reports for 2018 underreported fees and expenses by *$77.8 million.* JA19, ¶ 62. Ms. Sampson warned the Executive Director, Interim Executive Director, and CFO Musara that such underreporting could result in District officials, Plan members, District taxpayers, and District bondholders being significantly misled. JA21, JA23, ¶¶ 73, 83.

Ms. Sampson then made a further "protected disclosure" in June-July 2021 by disclosing to Trustee Clark and DCRB's Interim Executive Director that DCRB

was not validating its investment management fees, that Trustees were misled by statements about reconciliation, and that DCRB's Investment Department did not monitor agreements it had with private investment managers (confirmed by CIO Sahm). JA23, ¶¶ 80-83. Ms. Sampson made yet another "protected disclosure" in September 2021 when she disclosed to DCRB's Trustees that the FY2021 financial statements from CFO Musara were inaccurate because they underreported DCRB's management fees by *tens of millions of dollars*. JA22, ¶ 78.

First, these facts plausibly support a "gross mismanagement" disclosure because they "create[] a substantial risk of significant adverse impact on the agency's ability to accomplish its mission…not debatable among reasonable people." *Poindexter*, 104 A.3d at 855. The Superior Court agreed this was a "possible" gross mismanagement disclosure, but fell short of being "plausible." JA80. But plausibility does not require "detailed factual allegations," and must only permit drawing "reasonable inference that the defendant is liable for the misconduct alleged." *Nadel*, 248 A.3d at 138. Ms. Sampson's disclosures went to the heart of DCRB's mission- to oversee and manage an $11 billion pension trust fund for the retirement income of over 21,000 public employees. JA6-7, 10, ¶¶ 6-7, 24. There is a more than plausible "substantial risk of significant adverse impact on [DCRB]'s ability to accomplish its mission" when DCRB fails to monitor its private investment agreements (as admitted by its own CIO Sahm, JA23, ¶ 81),

intentionally underreports management fees and expenses *by over $77 million*, and when DCRB Trustees cannot "explain why DCRB's closing balances have not matched its opening balances for over a decade." JA15, ¶ 48.

Second, these facts plausibly support an "abuse of authority" disclosure, as the concealment of these fees reveals an "arbitrary or capricious exercise of power…that adversely affects the rights of any person"- the D.C. Plan members and taxpayers. *See supra,* at 19-20; *Poindexter*, 104 A.3d at 857. This concealment also resulted in personal advantage to Executive Director Morgan-Johnson, DCRB executives, and Trustees because the financial ledgers seem more favorable *by over $77 million* for FY2018 alone. JA16, 19, ¶¶ 49, 62. Disclosure of DCRB's failure to monitor its agreements with private investment managers as confirmed by CIO Sahm (JA23, ¶¶ 80-83) is also an abuse of authority through DCRB's "execution of a public contract." D.C. Code § 1-615.52(a)(6).

Third, these facts plausibly support a "gross misuse" protected disclosure, as this is a "more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government" and is evidence of the "government spend[ing] money recklessly." *Davis*, 258 A.3d at 858.

These disclosures reveal more than "de minimis wrongdoing or negligence." *Holbrook*, 259 A.3d at 91. Disclosing that DCRB had underreported management fees *by $77.8 million in just FY2018* reveals "such serious errors by the agency that

a conclusion the agency erred is not debatable among reasonable people." *Poindexter*, 104 A.3d at 855. DCRB's intent to deceive and mislead the Trustees was also abundantly clear- a "senior executive responded that the Trustees would not vote to approve new private market fund investments if they understood the true investment cost." JA20, ¶ 67; *Davis*, 258 A.3d at 855 ("maladministration that is truly egregious and indisputable" satisfies disinterested observer test).

But the Superior Court again committed the same *Holbrook* error when it ruled that full fee disclosure was only Ms. Sampson's "preference" and a "policy disagreement." JA79; 259 A.3d at 91 ("appellant's objections were not mere differences of opinion over policy decisions; they were objections to unlawful discriminatory treatment"); *Waiting*, 2017 U.S. Dist. LEXIS 39597, at *31-32 ("disclosures of accounting irregularities, internal control violations, and general dysfunction in the finance department" qualify as a "significant matter…not debatable among reasonable people," which is a jury issue and not a matter of law). DCRB completely eliminating this information from its annual report, contradicting financial disclosures made by many public pension funds and the District's other Benefits fund, reveals far more than a mere "policy disagreement." Indeed, the Risk and Compliance Director confirmed that partnership agreements clearly laid out management fee calculations. JA22, ¶ 78. And even CFO

Shelborne "was uncertain of the magnitude of these accounting deficiencies and would not know until a forensic audit was completed." JA15, ¶ 44.

The Superior Court further ruled that Ms. Sampson cited no laws or accounting principles requiring DCRB to report publicly the amount of this fee. JA79. But Ms. Sampson alleged that DCRB's own Director of Internal Audit (an experienced public pension auditor and CPA) performed an independent audit and assessed a rating of D- for DCRB's Finance Department, along with highlighting "lax internal controls that had the potential to result in inappropriate or unauthorized payments." JA13, ¶¶ 34-38. Ms. Sampson further alleged that McConnell & Jones, DCRB's auditor, confirmed that DCRB had likely "never independently calculated or recalculated the investment management fees paid to its private market investment managers," and "[p]ursuant to DC Code § 1-903.06 an auditor is required to review 'reportable transactions' as defined by the US Department of Labor standards," and that "[f]or ERISA-type plans an auditor would review a Form 5500 that requires direct and indirect investment fees to be reported." JA14, ¶ 42 & n. 3. McConnell & Jones also "expressed concerns… about DCRB's lack of internal controls that could lead to potential errors within…net asset balances," found that "DCRB's financial accounts were not reconciled…and noted instances in which the opening balances per the audited financial statements did not reconcile with the trial balance," and "raised concerns

that DCRB could receive a management letter documenting deficiencies in internal control, that the FY2018 financial statements may need to be restated, and that after completion of the audit DCRB should scrub and reconcile each of its accounts." JA14, ¶¶ 40-42. Ms. Sampson therefore alleged laws and accounting principles requiring transparent, complete, and accurate reporting of these fees.

Finally, the Superior Court found that "Ms. Sampson did not allege that DCRB provided misleading information about the amount of fees in this category," or that anyone "was actually misled…into thinking these fees were insignificant." JA79. But as argued above, Ms. Sampson extensively alleged that the information "appeared to mislead District officials, Plan members, District taxpayers, and the general public," as "DCRB is aware that the District government must rely upon complete and accurate information when authorizing and appropriating funds for DCRB." JA21, ¶¶ 73-75, 83. Additionally, Ms. Sampson alleged that a "senior executive responded that the Trustees would not vote to approve new private market fund investments if they understood the true investment cost." JA20, ¶ 67. DCRB's failure to disclose $70+ million in management fees for FY 2018 alone creates a reasonable inference of misleading the City Council.

For these reasons, Ms. Sampson made protected disclosures regarding the failure to accurately report investment management fees.

iii. Protected Disclosures Regarding Executive Compensation

Ms. Sampson made another "protected disclosure" in Spring 2021 when she disclosed "DCRB's failure to accurately disclose Ms. Morgan-Johnson's total

compensation." JA17, ¶ 55. During DCRB's preparations for the FY 2021 City Council hearing, Ms. Sampson advised Executive Director Morgan-Johnson and Interim Executive Director Hsu "to accurately disclose Ms. Morgan-Johnson's total compensation paid in 2020" because DCRB budget documents excluded the 457(f) deferred compensation payment and her enhanced 401(a) retirement contributions. JA16, ¶ 50. But DCRB Trustees failed to disclose her total compensation at the City Council hearing, and therefore intentionally misled and induced Councilmembers to raise the salary limit. JA16, ¶ 51. Ms. Sampson then made her "protected disclosure" to the City Council of "DCRB's failure to accurately disclose Ms. Morgan-Johnson's total compensation." JA17, ¶ 55.

These facts plausibly support an "abuse of authority" as an "arbitrary or capricious exercise of power by a[n] …employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Poindexter*, 104 A.3d at 857. Ms. Sampson "disclos[ed] to the City Council about DCRB's failure to accurately disclose Ms. Morgan-Johnson's total compensation," resulting in increased compensation for executive directors and Trustees. JA17, ¶¶ 51-55. The Superior Court agreed this "would necessarily result in personal gain to the…Executive Director" (JA80; JA17, ¶¶ 51-52), as it also would for the Trustees as "preferred other persons."

But the Superior Court somehow found that Ms. Sampson failed to allege that the information provided by DCRB "was inaccurate or indicated that her only

compensation was her salary." JA80 (*relying on Holbrook*, 259 A.3d at 89-90). The Complaint squarely contradicts this finding. JA16, ¶ 50 ("DCRB budget documents included Ms. Morgan-Johnson's salary but excluded the Board-approved 457(f) deferred compensation payment and her enhanced 40l(a) retirement contributions."); JA16, ¶ 51 ("Trustees failed to disclose Ms. Morgan Johnson's total compensation and thereby intentionally misled Councilmembers in voting to raise the DCRB executive director salary limit."); JA17, ¶ 55 ("During the Spring of 2021, Ms. Sampson made a protected disclosure to the City Council about DCRB's failure to accurately disclose Ms. Morgan-Johnson's total compensation."). It is also a more than reasonable inference that the compensation disclosed to the City Council was intended to accurately "indicate" Executive Director Morgan-Johnson's current total compensation, because "DCRB Trustees testified about the need to increase the DCRB executive director salary cap" while "fail[ing] to disclose Executive Director Morgan-Johnson's total compensation" through testimony or the "DCRB budget documents." JA16, ¶¶ 50-51.[5]

Finally, the Superior Court erred when it again ruled that Ms. Sampson failed to use the *verbatim* "magic words" in her disclosure (JA81), committing the

[5] The Court also noted that Ms. Sampson did not allege the salary increase "was unjustified," which is irrelevant to this protected disclosure- the failure *to accurately and completely disclose* Executive Director Morgan-Johnson's *current* total compensation when seeking a salary increase was an "abuse of authority."

same error of law as addressed above. *See supra*, at 22-24. The Superior Court also ruled that the full compensation information was publicly available on DCRB's website, and "matters of public record" cannot be a "protected disclosure." JA81. But as argued above, there are no allegations that this compensation information was already "the subject of complaints by concerned members of the general public" *Williams*, 9 A.3d at 490, n. 5 (the language "reflects the Council's focus [is] *not* on protecting employees' or applicants' conveyance of information that is the subject of discussion among, and that has already been the subject of complaints by…the general public").

For these reasons, Ms. Sampson made "protected disclosures" regarding the failure to disclose Executive Director Morgan-Johnson's total compensation.

iv. Protected Disclosures Regarding Grand Jury Subpoenas

Ms. Sampson engaged in "protected disclosures" through her compliance with the requirements of Subpoenas I-III. First, Ms. Sampson alleged that in her administrative capacity as DCRB's Custodian of Records she received Subpoena I in May 2020 and Subpoena II in August 2020, initiated the compliance process, and fulfilled DCRB's disclosure obligations. JA24, ¶¶ 85-86. Ms. Sampson requested to confer with DCRB's trustees in a closed meeting to discuss the FBI investigation and Subpoenas I and II, but Mr. Hankins and Mr. Clark were reluctant and repeatedly questioned Ms. Sampson's need for this discussion. JA24-25, ¶ 87. Ms. Sampson was therefore required to and did make protected

disclosures through compliance with the FBI Investigation and Subpoenas I and II. JA25-26, ¶¶ 92-93. Second, Ms. Sampson alleged that she received Subpoena III in August 2021 through her administrative capacity as DCRB's Custodian of Records, and informed the DCRB Trustees of Subpoena III and her intent to work with DCRB to comply with the court-ordered document production. JA25, ¶ 88.

These facts support engagement in "protected disclosures" by Ms. Sampson. Nevertheless, the Superior Court, citing no case law, ruled that Ms. Sampson's compliance with the Subpoenas though legally-required disclosure was not a "protected disclosure" because informing senior DCRB management of the intent to comply and eventual compliance with the Subpoenas "did not blow the whistle on misconduct," and did not involve any malfeasance, gross mismanagement, waste of public funds, abuse of authority, or a violation of law." JA81.

But in *Perius v. Abbott Labs*, the court stated that "simply complying with a subpoena could be considered 'protected activity'…particularly if…the employer discouraged the employee from complying." 2009 U.S. Dist. LEXIS 55590, at *23-24 (N.D. Ill. June 26, 2009)[6]; *Shaw v. City of Ecorse*, 770 N.W. 2d 31, 38 (Mich Ct. App. 2009) ("Conversely, Bedo argues that he was engaged in protected activity when he testified under subpoena at a court proceeding…We agree.").

[6] While acknowledging the possibility of protected activity through subpoena compliance, *Perius* found no "protected activity" because the employee "d[id] not believe that his employer ha[d] committed fraud on the government and d[id] not comply with a subpoena with the purpose of uncovering such fraud," so the employee did not "engage in protected activity." *Id.* This case is a stark contrast.

Therefore, Ms. Sampson's compliance with Subpoenas I and II, and her disclosure of that compliance to the Trustees, was a DCWPA "protected disclosure."

Additionally, through complying with Subpoenas I and II, Ms. Sampson "disclos[ed] information…that the employee reasonably believes evidences…a violation of a federal, state, or local law, rule, or regulation." D.C. Code § 1-615.52(a)(6)(D). As extensively alleged and argued above, Ms. Sampson reasonably believed the conduct at issue was related to the FBI Investigation and the Subpoenas therefore evidenced a violation of law, rule, and regulation, so the documents she was required to disclose were in support of that reasonable belief. Courts have held that these types of allegations sufficiently allege "protected disclosures," especially because "it would seem likely" that the FBI was investigating violations of law "as that is its job." *Housey v. Macomb Cty. Prob. Court*, 2014 Mich. App. LEXIS 608, at *3 (Mich. Ct. App. Apr. 8, 2014) ("While it is not clear whether the JTC investigation involved violations of law…it would seem likely that it would, inasmuch as that is its job."); *Anderson v. Vill of Oswego*, 109 F. Supp. 2d 930, 934 (N.D. Ill. 2000) ("we think public policy is sufficiently implicated where the plaintiff alleges he was fired for obeying a subpoena and testifying against his employer in a contract dispute"); *Casissa v. First Republic Bank*, 2010 U.S. Dist. LEXIS 72438, at *7-8 (N.D. Cal. July 19,

2010) ("Dobranski's instruction to do nothing, along with the alleged suppression of the subpoena, could have resulted in the violation of federal law.").

A "disinterested observer" could also reasonably conclude that DCRB's conduct regarding the Subpoenas and investigation of DCRB rose to "gross mismanagement." JA24-25, ¶¶ 85-92; *Housey*, 2014 Mich. App. LEXIS 608, at *3 ("it would seem likely" FBI was investigating violations of law "as that is its job").

The Superior Court also ruled that Ms. Sampson did not allege that any supervisors attempted to prevent her from complying with Subpoenas I and II or that DCRB did not comply with Subpoena III. But Mr. Clark explicitly reported that Ms. Sampson should be terminated for complying with Subpoenas I and II because she was "not looking out for the best interests" of DCRB. JA29, ¶ 110(a). Ms. Sampson also alleged that she requested to confer with DCRB's Trustees in a closed meeting to discuss the FBI investigation and Subpoenas, but Mr. Hankins and Mr. Clark were reluctant and repeatedly questioned Ms. Sampson's need for this discussion. JA24, ¶ 87. Ms. Sampson then further alleged that Mr. Balestrieri communicated with her in a hostile manner, misquoted her on a recommendation to limit further distribution of the subpoena to DCRB staff, was hostile in a DCRB staff meeting led by Ms. Sampson regarding compliance with Subpoena III, and weeks later placed Ms. Sampson on enforced leave. JA25, ¶¶ 89-91. Mr. Clark also told Trustees that Ms. Sampson "was lying about the existence of an FBI

Investigation and that Ms. Sampson merely had information about DCRB's potential mishandling of an annuitant's check." JA29, ¶ 110(b).

These allegations contradict the Superior Court's ruling, and support that Ms. Sampson engaged in "protected disclosures." *Casissa*, 2010 U.S. Dist. LEXIS 72438, at 7-8* ("Dobranski's instruction to do nothing, along with the alleged suppression of the subpoena, could have resulted in the violation of federal law").

For these reasons, the factual allegations described above support that Ms. Sampson engaged in "protected disclosures" regarding Subpoenas I-III.

B. MS. SAMPSON SUFFERED PROHIBITED PERSONNEL ACTIONS

The DCWPA forbids District employers from taking "prohibited personnel action or otherwise retaliat[ing] against an employee because of the employee's protected disclosure." D.C. Code § 1-615.53(a). A "prohibited personnel action" includes but is not limited to "recommended, threatened, or actual termination…or retaliating in any other manner against an employee." D.C. Code § 1-615.52(a)(5)(A); *McCall v. D.C. Hous. Auth.*, 126 A.3d 701, 706 (D.C. 2015) ("these are catch-all provisions…that demonstrate a legislative intent to forbid all retaliation against whistleblowers, regardless of the method of punishment").

The Complaint sufficiently alleged three recognized "prohibited personnel actions" that DCRB imposed on Ms. Sampson. The Superior Court agreed that placing Ms. Sampson on "paid administrative leave" on October 4, 2021

"constitutes a prohibited personnel action when taken in retaliation for a protected disclosure." JA82; JA25, 27, 32, ¶¶ 91, 103, 118. But the Court also ruled that it "need not" and "does not" decide whether the other two adverse actions alleged by Ms. Sampson qualified as "prohibited personnel actions," which in turn adversely affected the Court's causation analysis and prejudiced Ms. Sampson.

i. Investigation of Ms. Sampson

DCRB placed Ms. Sampson on enforced administrative leave in retaliation for her "protected disclosures," and attempted to justify this by falsely claiming misconduct that warranted an investigation. *See, e.g.*, JA27-28, ¶¶ 103-05. The DCWPA *explicitly defines* that "retaliating" includes "conducting or causing to be conducted an investigation of an employee…because of a protected disclosure." D.C. Code §§ 1-615.52(a)(5)(B)(i-ii); *McCall*, 126 A.3d at 711, n. 19 ("a phony impersonating-an-officer investigation…would satisfy the definition of a 'prohibited personnel action'"); *Williams v. District of Columbia*, 825 F. Supp. 2d 88, 96 (D.D.C. 2011) (investigation was "presumptively actionable so long as the employee's protected disclosure was a 'contributing factor' in the investigation").

Ms. Sampson plausibly alleged that Mr. Balestrieri placed her on enforced leave "in order to conduct a sham investigation into an indeterminate wrongdoing by Ms. Sampson." JA37, ¶¶ 138, 149. DCRB retained private investigator James Loots ("Mr. Loots") to conduct the sham investigation, despite being "in violation

of standard protocols for investigating employee misconduct at DCRB" and Mr. Loots having a "conflict of interest in his ability to conduct an impartial investigation of Ms. Sampson since the Trustees told him that Ms. Sampson was a 'troublemaker' who the Board wanted to terminate." JA12-13, ¶ 32; *see also* JA28, ¶ 105 ("Mr. Balistrieri's investigation subverted normal channels for investigating potential employee misconduct within the District government").

Ms. Sampson also alleged that "Mr. Balestrieri intentionally misinformed Ms. Sampson's subordinates and colleagues that she needed to be 'investigated for her wrongdoing' and she would not return to DCRB due to her 'lapse in judgment.'" JA34, ¶ 126. Ms. Sampson further alleged that Mr. Balestrieri hired a private investigator (instead of using one available through the D.C. government) since he knew the investigation was a sham initiated solely to retaliate against her, to imply she was guilty of wrongdoing, to discredit her protected disclosures, to remove her from the workplace so she could not prove her allegations, and to cut her off from communications with her staff. JA35, 41, ¶¶ 149, 162; *see also* JA42, ¶ 164 ("Mr. Balestrieri and Mr. Clark employed improper methods…solely to retaliate against Ms. Sampson and ruin her reputation and credibility so that his complicity in covering up conduct noted herein would not be discovered, and overall treating Ms. Sampson in a hostile manner and differently from the manner in which he treated other employees who had not reported…illegal conduct").

These detailed factual allegations are similar to what this Court held "satisf[ied] the definition of 'prohibited personnel action'" in *McCall*. 126 A.3d at 711, n. 19 ("Seeking to silence McCall by placing him on administrative leave for a phony impersonating-an-officer investigation…would satisfy the definition of a 'prohibited personnel action'"). For these reasons, Ms. Sampson plausibly alleged that the retaliatory investigation of her was a "sham" and therefore a "prohibited personnel section," and the Superior Court erred in declining to rule on this issue.

ii. Hostile Work Environment

As argued above and in the Complaint, DCRB undertook a campaign of harassment, retaliation, and persistent adverse actions against Ms. Sampson during the period of her disclosures (late 2019 through October 4, 2021), and multiple of these actions qualify as a "prohibited personnel action" both by themselves and in the aggregate. *McCall*, 126 A.3d at 705-708 ("a hostile work environment- if created in response to an employee's protected disclosure- constitutes retaliation in a form contemplated and prohibited by D.C. Code § 1-615.53" because an employer is prohibited from "*retaliating in any other manner* against an employee because an employee makes a protected disclosure) (emphasis original); *Bereston v. UHS of Del., Inc.*, 180 A.3d 95, 112, n. 53 (D.C. 2018) (supporting retaliatory hostile work environment under the DCWPA.); *see also Williams v. Admin. Review Bd.*, 376 F.3d 471, 477 (5th Cir. 2004); *Carmack v. Fulton County*, 2021

Ga. Super. LEXIS 1538, at *9-10 (Ga. Super Ct. Feb. 1, 2021); *Bodman v. Maine, Dep't of Health & Human Servs.*, 720 F. Supp. 2d 115, 126 (D. Me. 2010).

In the District of Columbia, a hostile work environment is comprised of "a series of separate acts that collectively constitute 'one unlawful employment practice.'" *McCall*, 126 A.3d at 705-06. First, Ms. Sampson sufficiently alleged she was a member of the protected class (whistleblowing employees) as argued above. Second, Ms. Sampson sufficiently alleged facts supporting that she was subject to unwelcome harassment based on this whistleblower protected class, and that it was severe and pervasive enough to affect the terms of her employment. *See supra*, at 9-11; JA28-35, ¶¶ 107-131. This case is similar to *McCall*, where the Court held that the plaintiff stated a claim for retaliatory hostile work environment based on the alleged "campaign of harassment," including an "attempt to have an officer incriminate" the plaintiff, "excessive scrutiny, unfounded accusations that he was frequently late to work, [and] isolation from the assistance of other officers." 126 A.3d at 707. Third, Ms. Sampson alleged sufficient facts supporting plausible inferences that this harassment was based on her membership in a protected class of whistleblowers, as argued below. *See infra*, at 43-49.

For these reasons, Ms. Sampson suffered the "prohibited personnel action" of a hostile work environment.

C. MS. SAMPSON PLAUSIBLY ALLEGED CAUSATION

To plausibly allege causation, the protected disclosure need only have been a "contributing factor in the alleged prohibited personnel action." D.C. Code § 1-615.54(b). The statute defines "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." D.C. Code § 1-615.52(a)(2). It is "quite common that causation elements…[are] proved by circumstantial rather than direct evidence." *Holbrook*, 259 A.3d at 92. Here, Ms. Sampson plausibly connected her protected disclosures with DCRB's three adverse personnel actions against her in multiple ways, but the Superior Court only addressed a temporal proximity theory of causation.

First, the DCWPA requires "[e]mployer awareness" of the protected disclosure. *Kolowski v. District of Columbia*, 244 A.3d 1008, 1013 (D.C. 2020). Ms. Sampson "d[oes] not need to produce a smoking gun," as it is "enough…to offer circumstantial evidence that could reasonably support an inference" of awareness of "protected activity." *Holbrook*, 259 A.3d at 93. The Superior Court agreed that Ms. Sampson sufficiently alleged DCRB's knowledge of her "protected disclosures concerning accounting practices and investment management fees," but not for her disclosure "to the Council about elements of the Executive Director's compensation package other than her salary." JA 83-84. But Ms. Sampson had disclosed the exact same content to Executive Director Morgan-Johnson and

Interim Executive Director Hsu (JA16, ¶ 50.), which is sufficient. *Howard Univ. v. Green*, 652 A.2d 41, 48 (D.C. 1994) ("the employee must first prove she sufficiently alerted management to *the nature* of her complaint.") (emphasis added); *Holbrook*, 259 A.3d at 93 (it is "enough…to offer circumstantial evidence that could reasonably support an inference" of awareness of "protected activity.").

Second, the facts of this case support direct causation without even delving into a "temporal proximity" analysis, but the Superior Court did not address this avenue. If an "employer threatens to fire any employee who refuses to obey an order, and then follows through on that threat, it is not hard to infer that the employee's termination was casually related to that refusal." *Holbrook*, 259 A.3d at 93; *see also Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 178-79 (3d Cir. 1997) (employer's statements that its employee's complaints about gender discrimination could negatively impact the employee's job prospects was sufficient to infer the employee's termination was casually related to those complaints). Here, the constant characterizations of Ms. Sampson as a threat, a liar, "toxic," not a "team player," could not be trusted, not credible, "lapses in judgment," and a "troublemaker," and the incessant calls for her to be fired and "gotten rid of," directly connect her disclosures with the personnel actions that were taken against her. *See supra*, at 9-11 (*citing to* JA26, 29-34, ¶¶ 98, 110, 115-16, 120-129); *Holbrook*, 259 A.3d at 93 ("not mere conjecture to infer that an employer who

threatens to fire employees if they refuse to retaliate against two colleagues, and then fires four employees who refused…was aware of their refusals to comply").

This causal connection is further strengthened by DCRB's bogus reason for placing Ms. Sampson on enforced leave (that she breached a non-existent fiduciary duty) and the following sham "investigation." These facts are again similar to *Holbrook*, where the Director stated he was "tired of complaints and stuff coming from [them]," that "the train was leaving the station," if staff "did not get onboard…they wouldn't be on the train," and that when the appellants "refused to hop aboard, they were fired, which is precisely what their bosses warned them would happen if they did not start being team players." 259 A.3d at 92. This is "particularly true where, as in this case, the employer's stated reason for [placing] whistleblowing employees [on enforced leave] are dubious." *Id.* at 93.

Third, the "likelihood of a causal connection may be shown by an intervening pattern of antagonism directed toward the whistleblowing employee beginning soon after the disclosure and continuing to the alleged retaliation," another avenue unaddressed by the Superior Court. *Tingling-Clemmons v. District of Columbia*, 133 A.3d 241, 247 (D.C. Cir. 2016). For example, a whistleblower suffering a "constant barrage of written and verbal warnings…and disciplinary action, all of which occurred soon after plaintiff's initial complaints and continued until his discharge" can cause the employee and employer relationship "to

deteriorate and set a pattern of behavior that [DCRB] followed in retaliating against [Ms. Sampson's] later" disclosures. *Robinson v. Se. Pa. Transp. Auth.*, 982 F.2d 892, 895-96 (3d Cir. 1993) (*cited with approval in Tingling-Clemmons*, 133 A.3d at 248); *see also Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) ("A play cannot be understood on the basis of some of its scenes but only on its entire performance, and…a discrimination analysis must concentrate not on individual incidents, but on the overall scenario."). Here, Ms. Sampson alleged an extensive "pattern of antagonism" and "disciplinary actions" that continued through being placed on indefinite enforced leave and the sham investigation. *See supra*, at 9-11, 38-43 (JA26-34, ¶¶ 98, 110, 115-16, 120-129).

Finally, causation can be established through temporal proximity if "the adverse personnel action took place shortly after that activity." *Tingling-Clemmons*, 133 A.3d at 247. This was the Superior Court's only causation analysis (JA82-84), but Ms. Sampson did not rely solely on temporal proximity. *Walker v. D.C.*, 279 F. Supp. 3d 246, 277 (D.D.C. 2017) ("there is a point in time where temporal proximity becomes too remote, *without more*, to permit an inference of causation"); *Payne v. D.C. Gov't*, 722 F.3d 345, 354 (D.C. Cir. 2013) (once the period between a protected disclosure and adverse action "stretche[s] to two-thirds of a year, there is no 'temporal proximity'…*nothing else appearing*"); *Singh v. AARP, Inc.*, 456 F. Supp. 3d 1, 11-12, n. 3 (D.D.C. 2020) ("In *Payne*…the

D.C. Circuit noted that the lack of temporal proximity would not have been fatal to the plaintiff's claim *if he provided other convincing evidence of causation*, which he failed to do. In contrast, Ms. Singh is not basing her claim on temporal proximity, so a lack of temporal proximity is not fatal," and "the line of cases that the defense cites are inapplicable") (emphasis added for all). Therefore, it was error for the Superior Court to only address a temporal proximity theory and ignore other means Ms. Sampson plausibly alleged causation.

For similar reasons, the Superior Court's proximate causation analysis was also fatally flawed because it relied on the finding that "[t]he alleged retaliation, however, began only in the summer of 2021, and DCRB placed her on paid administrative leave on October 4, 2021." JA82-83. But as argued above, Ms. Sampson suffered the adverse action of a "hostile work environment" between late 2019 and October 4, 2021. *See supra*, at 41-43. Additionally, Ms. Sampson engaged in protected disclosures on September 16, 2021 when she disclosed to DCRB Trustees that the FY 2021 financial statements presented by CFO Musara were inaccurate because they failed to report private investment management fees. JA22, ¶ 78. Ms. Sampson then suffered the adverse actions of enforced leave on October 4, 2021, followed by a sham investigation. JA27, 34, ¶¶ 103, 126.

Ms. Sampson also made another protected disclosure to Executive Director Balestrieri in September 2021 regarding Subpoena III. JA25, ¶¶ 88-90, 93.

Executive Director Balestrieri's employment at DCRB only began on September 7, and he met with Ms. Sampson on September 8 regarding Subpoenas I-III. Between September 8 through October 4, a period of less than one month, Executive Director Balestrieri was hostile to Ms. Sampson, accused her of not being a team player, and acted threateningly attempting to intimidate her, all leading up to enforced leave on October 4. JA25-27, ¶¶ 89-90, 98-103.

These periods of September 8 to October 4 or September 16 to October 4 are only 18 and 26 days, respectively, *well within* the several month time period this Court has held is sufficient for a claim relying solely on temporal proximity (and significantly less than the time periods the Superior Court held insufficient), let alone for Ms. Sampson where temporal proximity is but one of multiple alleged means of plausible causation. *Nicola v. Washington Times Corp.*, 947 A.2d 1164, 1175 (D.C. 2008); *Payne*, 722 F.3d at 354 (D.C. Cir. 2013); *Johnson*, 935 A.2d at 1120; *McCormick v. D.C.*, 752 F.3d 980, 985-86 (D.C. Cir. 2014).

Courts have also specifically found error where "[i]n concluding that there was insufficient temporal proximity between the defendants' alleged retaliatory actions and Singletary's protected activity, the district court failed to take account of protected activity that Singletary undertook long after the original protected activity." *Singletary v. District of Columbia*, 351 F.3d 519, 524 (D.C. Cir. 2003). As just argued above, the Superior Court made the same error here.

For these reasons, Ms. Sampson plausibly alleged causation between her "protected disclosures" and the "adverse personnel actions."

II. THE SUPERIOR COURT ERRED IN DENYING LEAVE TO AMEND

The Superior Court declined to grant leave to amend Count I but stated no basis for this extreme ruling, a ruling this Court reviews "for abuse of discretion." *Sibley v. St. Albans School*, 134 A.3d 789, 797 (D.C. 2016). While leave to amend is within the Court's discretion, "there is a 'virtual presumption' a court should grant leave to amend unless there is a good reason to the contrary." *Taylor v. D.C. Water & Sewer Auth.*, 957 A.2d 45, 51 (D.C. 2008). The standard for "dismissing a complaint with prejudice is high," and "[a] dismissal with prejudice is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Belizan v. Hershon*, 434 F.3d 579, 584 (D.C. Cir. 2006) (While "a complaint that omits certain essential facts and thus fails to state a claim warrants dismissal"…this does not warrant "dismissal with prejudice."); *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012) ("[d]ismissal with prejudice is the exception, not the rule.")

Here, the Superior Court made no finding that it was impossible to cure any claimed deficiencies, but still dismissed Count I with prejudice. Multiple D.C. Courts have found clear reversible error in these circumstances. *Firestone*, 76 F.3d at 1209 ("error in the district court's complete failure to provide reasons for refusing to grant leave to amend" because "outright refusal to grant the leave

without any justifying reason appearing for the denial ***is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules***") (emphasis added); *Belizan*, 434 F.3d at 584 ("the district court neither adverted to *Firestone* nor undertook the inquiry required by that decision…[to] determine whether…other facts consistent with the challenged pleading" could state a claim); *Parker v. Baltimore & Ohio R.R.,* 652 F.2d 1012, 1018-1020 (D.C. Cir. 1981) (reversing denial of leave to amend and remanding to either grant leave or provide sufficient reasons for denial). The Superior Court *did* provide reasons it declined to grant leave to amend on Ms. Sampson's common-law claims, further compounding the error in failing to do so for Count I. JA86-87.

For these reasons, the Superior Court dismissing Count I with prejudice is a clearly defined "abuse of discretion." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (the "proper exercise of discretion requires that the district court provide reasons").

CONCLUSION

For the reasons stated, Ms. Sampson respectfully requests that this Court reverse the Superior Court's Order dismissing Count I.

/s/ Carla D. Brown
Carla D. Brown*
David E. Murphy
CHARLSON BREDEHOFT
COHEN & BROWN P.C.
11260 Roger Bacon Drive, Suite 201
Reston, Virginia 20190
(703) 318-6800
cbrown@cbcblaw.com
dmurphy@cbcblaw.com
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 19th day of September, 2022, I filed the Brief of Appellant and Joint Appendix with the Clerk of the District of Columbia Court of Appeals. I further certify that the Brief and Joint Appendix were served this 19th day of September, 2022, via the D.C. Court of Appeals E-filing system.

/s/ Carla D. Brown
Counsel for Appellant

ADDENDUM

TABLE OF CONTENTS

Addendum Page

D.C. Code § 1-615.51. Findings and Declaration of Purpose

The Council finds and declares that the public interest is served when employees of the District government are free to report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal. Accordingly, the Council declares as its policy to:

(1) Enhance the rights of District employees to challenge the actions or failures of their agencies and to express their views without fear of retaliation through appropriate channels within the agency, complete and frank responses to Council inquiries, free access to law enforcement officials, oversight agencies of both the executive and legislative branches of government, and appropriate communication with the public;

(2) Ensure that acts of the Council enacted to protect individual citizens are properly enforced;

(3) Provide new rights and remedies to guarantee and ensure that public offices are truly public trusts;

(4) Hold public employees personally accountable for failure to enforce the laws and for negligence in the performance of their public duties;

(5) Ensure that rights of employees to expose corruption, dishonesty, incompetence, or administrative failure are protected;

(6) Guarantee the rights of employees to contact and communicate with the Council and be protected in that exercise;

(7) Protect employees from reprisal or retaliation for the performance of their duties; and

(8) Motivate employees to do their duties justly and efficiently.

D.C. Code § 1-615.52. Definitions

(a) For purposes of this subchapter, the term:

(1) "Contract" means any contract for goods or services between the District government and another entity but excludes any collective bargaining agreement.

(2) "Contributing factor" means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.

(3) "Employee" means any person who is a former or current District employee, or an applicant for employment by the District government, including but not limited to employees of subordinate agencies, independent agencies, the District of Columbia Board of Education, the Board of Trustees of the University of the District of Columbia, the District of Columbia Housing Authority, and the Metropolitan Police Department, but excluding employees of the Council of the District of Columbia.

(4) "Illegal order" means a directive to violate or to assist in violating a federal, state or local law, rule, or regulation.

(5)

(A) "Prohibited personnel action" includes but is not limited to: recommended, threatened, or actual termination, demotion, suspension, or reprimand; involuntary transfer, reassignment, or detail; referral for psychiatric or psychological counseling; failure to promote or hire or take other favorable personnel action; or retaliating in any other manner against an employee because that employee makes a protected disclosure or refuses to comply with an illegal order, as those terms are defined in this section.

(B) For purposes of this paragraph, the term :

(i) "Investigation" includes an examination of fitness for duty and excludes any ministerial or nondiscretionary factfinding activity necessary to perform the agency's mission.

(ii) "Retaliating" includes conducting or causing to be conducted an investigation of an employee or applicant for employment because of a protected disclosure made by the employee or applicant who is a whistleblower.

(6) "Protected disclosure" means any disclosure of information, not specifically prohibited by statute, without restriction to time, place, form, motive, context, forum, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties by an employee to a supervisor or a public body that the employee reasonably believes evidences:

(A) Gross mismanagement;

(B) Gross misuse or waste of public resources or funds;

(C) Abuse of authority in connection with the administration of a public program or the execution of a public contract;

(D) A violation of a federal, state, or local law, rule, or regulation, or of a term of a contract between the District government and a District government contractor which is not of a merely technical or minimal nature; or

(E) A substantial and specific danger to the public health and safety.

(7) "Public body" means:

(A) The United States Congress, the Council, any state legislature, the District of Columbia Office of the Inspector General, the Office of the District of Columbia Auditor, the District of Columbia Financial Responsibility and Management Assistance Authority, or any member or employee of one of these bodies;

(B) The federal, District of Columbia, or any state or local judiciary, any member or employee of these judicial branches, or any grand or petit jury;

(C) Any federal, District of Columbia, state, or local regulatory, administrative, or public agency or authority or instrumentality of one of these agencies or authorities;

(D) Any federal, District of Columbia, state, or local law enforcement agency, prosecutorial office, or police or peace officer;

(E) Any federal, District of Columbia, state, or local department of an executive branch of government; or

(F) Any division, board, bureau, office, committee, commission or independent agency of any of the public bodies described in subparagraphs (A) through (E) of this paragraph.

(8) "Supervisor" means an individual employed by the District government who meets the definition of a "supervisor" in § 1-617.01(d) or who has the authority to effectively recommend or take remedial or corrective action for the violation of a law, rule, regulation or contract term, or the misuse of government resources that an employee may allege or report pursuant to this section, including without limitation an agency head, department director, or manager.

(9) "Whistleblower" means an employee who makes or is perceived to have made a protected disclosure as that term is defined in this section.

D.C. Code § 1-615.53. Prohibitions.

(a) A supervisor shall not take, or threaten to take, a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order.
(b) Except in cases where the communication would be unlawful, a person shall not interfere with or deny the right of employees, individually or collectively, to furnish information to the Council, a Council committee, or a Councilmember.

D.C. Code § 1-615.54. Enforcement.

(a)

(1) An employee aggrieved by a violation of § 1-615.53 may bring a civil action against the District, and, in his or her personal capacity, any District employee, supervisor, or official having personal involvement in the prohibited personnel action, before a court or a jury in the Superior Court of the District of Columbia seeking relief and damages, including:

(A) An injunction;

(B) Reinstatement to the same position held before the prohibited personnel action or to an equivalent position;

(C) Reinstatement of the employee's seniority rights;

(D) Restoration of lost benefits;

(E) Back pay and interest on back pay;

(F) Compensatory damages; and

(G) Reasonable costs and attorney fees.

(2) A civil action shall be filed within 3 years after a violation occurs or within one year after the employee first becomes aware of the violation, whichever occurs first.

(3) Section 12-309 shall not apply to any civil action brought under this section.

(b) In a civil action or administrative proceeding, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by § 1-615.53 was a contributing factor in the alleged prohibited personnel action against an employee, the burden of proof shall be on the defendant to prove by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by this section.

(c) Notwithstanding any other provision of law, a violation of § 1-615.53 constitutes a complete affirmative defense for a whistleblower to a prohibited personnel action in an administrative review, challenge, or adjudication of that action.

(d) An employee who prevails in a civil action at the trial level, shall be granted the equitable relief provided in the decision effective upon the date of the decision, absent a stay.

(e)

(1) If a protected disclosure assists in securing the right to recover, the actual recovery of, or the prevention of loss of more than $100,000 in public funds, the Mayor may pay a reward in any amount between $5,000 and $50,000 to the person who made the protected disclosure; provided, that any reward

shall be recommended by the Inspector General, the District of Columbia Auditor, or other similar law enforcement authority.

(2) This subsection shall not create any right or benefit, substantive or procedural, enforceable at law or equity, by a party against any District government agency, instrumentality, officer, employee, or other person.

D.C. Code § 1-741. Fiduciary Responsibilities

(a)

(1) The Board, each member of the Board, and each person defined in § 1-702(20) shall discharge responsibilities with respect to a Fund as a fiduciary with respect to the Fund. The Board may designate one or more other persons who exercise responsibilities with respect to a Fund to exercise such responsibilities as a fiduciary with respect to such Fund. The Board shall retain such fiduciary responsibility for the exercise of careful, skillful, prudent, and diligent oversight of any person so designated as would be exercised by a prudent individual acting in a like capacity and familiar with such matters under like circumstances.

(2) A fiduciary shall discharge his duties with respect to a Fund solely in the interest of the participants and beneficiaries and:

(A) For the exclusive purpose of providing benefits to participants and their beneficiaries;

(B) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent individual acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) By diversifying the investments of the Fund so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) In accordance with the provisions of law, documents, and instruments governing the retirement program to the extent that such documents and instruments are consistent with the provisions of this chapter.

(b) In addition to any liability which he may have under any other provision of this subchapter, a fiduciary with respect to a Fund shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same Fund:

(1) If he knowingly participates in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach of fiduciary responsibility;

(2) If, by his failure to comply with subsection (a)(2) of this section in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach of fiduciary responsibility; or

(3) If he has knowledge of a breach of fiduciary responsibility by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(c) Except as provided in subsections (f), (g), and (h) of this section, a fiduciary with respect to a Fund shall not cause the Fund to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect:

(1) Sale or exchange, or leasing, of any property between the Fund and a party in interest;

(2) Lending of money or other extension of credit between the Fund and a party in interest;

(3) Furnishing of goods, services, or facilities between the Fund and a party in interest; or

(4) Transfer to, or use by or for the benefit of, a party in interest, of any assets of the Fund.

(d) Except as provided in subsection (h) of this section, a fiduciary with respect to a Fund shall not:

(1) Deal with the assets of the Fund in his own interest or for his own account;

(2) In his individual or in any other capacity act in any transaction involving the Fund on behalf of a party (or represent a party) whose interests are adverse to the interests of the Fund or the interests of its participants or beneficiaries; or

(3) Receive any consideration for his own personal account from any party dealing with such Fund in connection with a transaction involving the assets of the Fund.

(e) A transfer of real or personal property by a party in interest to a Fund shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the Fund assumes or if it is subject to a mortgage or similar lien which a party in interest placed on the property within the 10-year period ending on the date of the transfer.

(f) The prohibitions provided in subsection (c) of this section shall not apply to any of the following transactions:

(1) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the Fund, if no more than reasonable compensation is paid therefor;

(2) The investment of all or part of a Fund's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a state, if such bank or other institution is a fiduciary of such Fund and if such investment is expressly authorized by regulations of the Board or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the Board to make such investment;

(3) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a state if such bank or other institution is a fiduciary of such Fund and if:

(A) Such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by federal or state supervisory authority; and

(B) The extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Mayor after consultation with federal and state supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of the retirement program. Such ancillary services shall not be provided at more than reasonable compensation;

(4) The exercise of a privilege to convert securities, to the extent provided in regulations of the Council, but only if the Fund receives no less than adequate consideration pursuant to such conversion; or

(5) Any transaction between a Fund and a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a state or federal agency, or a pooled investment fund of an insurance company qualified to do business in a state, if:

(A) The transaction is a sale or purchase of an interest in the fund;

(B) The bank, trust company, or insurance company receives not more than reasonable compensation; and

(C) Such transaction is expressly permitted by the Board, or by a fiduciary (other than the bank, trust company, insurance company, or an affiliate thereof) who has authority to manage and control the assets of the Fund.

(g) Nothing in subsection (c) of this section shall be construed to prohibit any fiduciary from:

(1) Receiving any benefit to which he may be entitled as a participant or beneficiary in the retirement program, so long as the benefit is computed and paid on a basis which is consistent with the terms of the retirement program as applied to all other participants and beneficiaries;

(2) Receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with respect to the Fund; or

(3) Serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(h) The Board may from time to time avail itself to exemptive relief from all or part of the restrictions imposed by subsections (c) and (d) of this section for administrative exemptions which have been previously granted by the United States Department of Labor. Prior to utilizing exempted transactions, the Board shall hold a public hearing on the proposed exemption. Notice of the time, place, and subject matter of the public hearing shall be published in the D.C. Register at least 15 days in advance of its scheduled date in order to afford interested persons an opportunity to present their views. The proposed exemption shall be published in the D.C. Register and submitted to the Council along with a synopsis of the results of the public hearing, and written findings by the Board that the exemptions are:

(1) Administratively feasible;

(2) In the best interests of the funds and of their participants and beneficiaries; and

(3) Protective of the rights of participants and beneficiaries of these funds.

(h-1) Unless the Council disapproves the proposed exemption submitted under subsection (h) of this section by resolution within 30 days of receipt by the Council, the exemption shall be deemed approved. If a resolution of disapproval has been introduced by at least one member of the Council within the 5-day period (excluding Saturdays, Sundays, and holidays) following its receipt, the period of Council review shall be extended by an additional 15 days (excluding Saturdays, Sundays, and holidays) from the date of its receipt. If the resolution of disapproval has not been approved within the 15-day extended period, the proposed exemption shall be deemed approved.

(i) For purposes of subsections (c) and (d) of this section, the assets of a Fund shall not include assets in a pooled separate account of an insurance company qualified to do business in a state or assets in a collective investment fund of a bank or similar financial institution supervised by the United States or any state, provided that:

(1) The interest of all Funds in the separate account or collective investment fund does not exceed 5% of the total of all assets in the account or fund; and

(2) At the time a transaction that would otherwise be prohibited by subsection (c) or (d) of this section is entered into, and at the time of any subsequent renewal which requires the approval of the bank or insurance company, the terms of the transaction are not less favorable to the pooled

separate account or collective investment fund than the terms generally available in an arm's length transaction between unrelated parties.

D.C. Code § 1-903.06. Annual Audit.

(a) The examination performed by the independent qualified public accountant engaged pursuant to § 1-732(a)(3)(A) shall be conducted in accordance with generally accepted auditing standards and shall involve such tests of the books and records of the Funds and the Retirement Program as are considered necessary by the accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules required by subsection (b) of this section and the summary material required under § 1-907.03 present fairly, in all material respects, the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report required pursuant to § 1-907.02. In offering his opinion, the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary if he so states his reliance.

(b)

(1) The financial statement shall contain a statement of assets and liabilities, and a statement of changes in net assets available for benefits under the retirement program, which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the Retirement Program, including any significant changes in the Retirement Program made during the period and the impact of the changes on benefits; the funding policy (including the policy with respect to prior service cost), and any changes in the policy during the year; a description of any significant changes in benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; and any other matters necessary to fully and fairly present the financial statements of the Funds.

(2) The statement required under paragraph (1) of this subsection shall have attached the following information in separate schedules:

(A) A statement of the assets and liabilities of the Funds, aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year;

(B) A statement of receipts in and disbursements from the Funds during the preceding 12-month period, aggregated by general source and application;

(C) A schedule of all assets held for investment purposes, aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether the party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) A schedule of each transaction involving a person known to be a party in interest, the identity of the party in interest and his relationship, or that of any other party in interest, to the Funds, and a description of each asset to which the transaction relates; the purchase or selling price if a sale or purchase, the rental rate if a lease, or the interest rate and maturity date if a loan; expenses incurred in connection with the transaction; and the cost of the asset, the current value of the asset, and the net gain or loss on each transaction;

(E) A schedule of all loans or fixed income obligations that were in default as of the close of the fiscal year or were classified during the year as uncollectible and the following information with respect to each loan on the schedule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan; the amount of principal and interest received during the reporting year; the unpaid balance; the identity and address of the obligor; a detailed description of the loan (including date of making and maturity, interest rate, the type and value of collateral, and other material terms); and the amount of principal and interest overdue (if any) and an explanation thereof;

(F) A list of all leases that were in default or were classified during the year as uncollectible, and the following information with respect to each lease on the list (including a notation as to whether parties involved are known to be parties in interest): the type of property leased (and, if fixed assets such as land, buildings, and leaseholds, then the location of the property); the identity of the lessor or lessee from or to whom the Funds are leasing; the relationship of the lessors and lessees, if any, to the Funds, the government of the District of Columbia, any employee organization, or any other party in interest; the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost; the date the property was leased and its approximate value at that date; the gross rental receipts during the reporting period; expenses paid for the leased property during the reporting period; the net receipts from the lease; the amounts in arrears; and a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) The most recent annual statement of assets and liabilities of any common or collective trust maintained by a bank or similar institution in which some or all the assets of the Funds are held, of any separate account maintained by an insurance carrier in which some or all of the assets of the Funds are held, and of any separate trust maintained by a bank as trustee in which some or all of the assets of the Funds are held, and for each separate account or a separate trust, such other information as may be required by the Retirement Board to comply with this subsection; and

(H) A schedule of each reportable transaction, the name of each party to the transaction (except that, for an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold), and a description of each asset to which the transaction applies; the purchase or selling price if a sale or purchase, the rental rate if a lease, or the interest rate and maturity date if a loan; expenses incurred in connection with the transaction; and the cost of the asset, the current value of the asset, and the net gain or loss on each transaction.

(3) For purposes of paragraph (2)(H) of this subsection, the term "reportable transaction" means a transaction to which the Funds is a party and which is:

(A) A transaction involving an amount in excess of 5% (or other percentage that may be established from time to time by the United State Department of Labor for "reportable transactions") of the current value of the assets of the Funds;

(B) Any transaction (other than a transaction respecting a security) that is part of a series of transactions with or in conjunction with a person in a fiscal year, if the aggregate amount of the transactions exceeds 5% (or other percentage that may be established from time to time by the United States Department of Labor for reportable transactions) of the current value of the assets of the Funds;

(C) A transaction that is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of the transactions in the fiscal year exceeds 5% (or other percentage that may be established from time to time by the United States Department of Labor for reportable transactions) of the current value of the assets of the Funds; or

(D) A transaction with, or in conjunction with, a person respecting a security, if any other transaction with or in conjunction with the person in the fiscal year respecting a security is required to be reported by reason of subparagraph (A) of this paragraph.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

David E. Murphy
Signature

No. 22-CV-385
Case Number(s)

David E. Murphy
Name

September 19, 2022
Date

dmurphy@cbcblaw.com
Email Address