APPEAL NO. 22-CV-385

In The
District of Columbia
Court of Appeals

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

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Instead of simply addressing the law and Ms. Sampson's Complaint, DCRB spends much ink casting aspersions on Ms. Sampson, injecting its own allegations outside the Complaint, defining all inferences unilaterally in its own favor, and declining to support many of its arguments with on-point case law. As fully argued below, DCRB's Brief does nothing to refute Ms. Sampson's arguments.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DISMISSING COUNT I

A. Ms. Sampson Made Multiple "Protected Disclosures"

DCRB feigns difficulty understanding Ms. Sampson's disclosures, and argues some are waived without explaining this footnote. Ms. Sampson waived nothing.

i. Protected Disclosures of DCRB's Accounting Practices

Ms. Sampson made protected disclosures regarding DCRB's accounting practices in December 2019 and in 2020-2021. JA13-15, ¶¶ 34-39, 46-48, 53; [*Samp. Br.* at 16-18]. First, Ms. Sampson alleged "gross mismanagement" through a substantial risk of "adverse impact on the [DCRB's] ability to accomplish its mission"- managing the pension fund. JA6-7, 10, ¶¶ 6-7, 24; *D.C. v. Poindexter*, 104 A.3d 848, 855 (D.C. 2014). DCRB first identifies a different "mission," but it's basis is outside the Complaint. [*DCRB Br.*, at 14, n. 3]. DCRB then argues it was never found to have engaged in "misconduct," so the allegations are only speculative "policy disagreements." But Ms. Sampson's disclosures were based on *objectively*

verified data analyzed by audit professionals, who based on objective accounting principles formed an "auditor's consensus" of significant accounting deficiencies, high risks of improper payments, and DCRB's ongoing inability to reconcile its balances for ten years.[1] JA13-15, ¶¶ 35-46, 62; *Bell v. E. River Family Strengthening Collaborative, Inc.*, 480 F. Supp. 3d 143, 153 (D.D.C. 2020). DCRB still cannot explain its balances not matching *for ten years*. JA15, ¶ 48.[2]

These disclosures were not speculative policy preferences, but "non-debatable mistakes" objectively corroborated by the auditors consensus. *Poindexter*, 104 A.3d at 855.[3] This is "gross mismanagement" because DCRB's operations are handicapped by systemic lack of internal controls, inaccurate financial reports, and

[1] DCRB argues the reports "do not pertain to DCRB's investments of pension fund assets…but to its daily operations." [*DCRB Brief* at 15]. It is unclear what DCRB is referring to and there is no citation, so DCRB is again injecting its own facts.

[2] DCRB also ignored *Waiting v. Blue Hills Bank*, a directly on point case holding these same arguments raised jury questions. 2017 U.S. Dist. LEXIS 39597, at *31-32 (D. Mass. Feb. 8, 2017). DCRB instead relies on *Zirkle v. D.C.*, 830 A.2d 1250, 1260 (D.C. 2003) (plaintiff "never raised any objection- and indeed helped create" the rule, so it was "inconsistent, and therefore unreasonable, for appellant to believe that the new OTR policy was illegal."), and *Taylor v. Fannie Mae*, 65 F. Supp. 3d 121, 126-27 (D.D.C. 2014) (plaintiff never complained and issue retracted).

[3] DCRB also argues that Ms. Sampson cannot hold objectively reasonable beliefs based on her 35 years of legal experience and DCRB "training and experience." On the contrary, it was precisely this experience and financial training that supported and informed the objective reasonableness of her disclosures. *Coleman v. D.C.*, 794 F.3d 49, 59 (D.C. Cir. 2015) ("Her expertise in these matters supports the reasonableness of her belief…[o]r at least a reasonable jury could so find.)

failures to reconcile accounts or accurately disclose investment information for ten years. D.C. Code § 1-741(a)(1).[4]

Second, these facts also qualify as "abuse of authority" because they reveal an "arbitrary or capricious exercise of power…that adversely affect[ed] the rights of" the D.C. Plan members and taxpayers. *Poindexter*, 104 A.3d at 857; JA13-16, ¶¶ 38-41, 48. DCRB responds that Ms. Sampson only speculates, ignoring the material error that DCRB cannot explain why its balances have not matched for ten years. JA14-15, ¶¶ 42, 48. DCRB also demands financial detail well-beyond the notice pleading standard, and "simply ignores" that Ms. Sampson already did this. *Coleman*, 794 F.3d at 59 (argument that disclosures were "rumor" and "too vague and unsupported…simply ignores the specific content and details").

Third, the Superior Court abused its discretion applying an exacting "magic words" standard relying too heavily on the disclosures' literal verbiage. JA77; *Holbrook*, 259 A.3d at 90. DCRB claims "mischaracterize[ation]," but Ms. Sampson only argued for the correct standard- if a "complaint…may be inferred or implied from the surrounding facts, then a whistleblower need not employ any 'magic words'" to trigger the statute. *Holbrook*, 259 A.3d at 90; *Taylor*, 65 F. Supp. 3d at 126-27 ("Taylor need not show that the protected activity related 'definitively

[4] DCRB claims Ms. Sampson cannot "subsequently characterize" her disclosures, despite only relying on her contemporaneous knowledge in support. *Holbrook v. D.C.*, 259 A.3d 78, 90 (D.C. 2021) ("no incongruity between [complaining] 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]").

and specifically' to one of the six enumerated categories"). Here, the disclosures themselves and the "surrounding facts" satisfy these requirements.

Finally, the Superior Court further abused its discretion by ignoring the 2010 Amendment and ruling that a true disclosure "cannot concern information that is already known," and that Ms. Sampson was only "repeating concerns" from others. JA78. There was no prior "public complaint" on the same subject or "specific details," so this does not defeat the disclosure. JA13-14, ¶¶ 34-39, 26; *Winder*, 905 F. Supp. 2d at 40. DCRB argues these are "distinctions without differences" because Ms. Sampson only "continuously urged" DCRB to respond, but Ms. Sampson did far more. JA13-15, ¶¶ 34-39, 46. And even if there was overlap, this still does not defeat the disclosure, nor was Ms. Sampson disclosing "publicly known" information. *Williams*, 9 A.3d at 490, n. 5; *Winder*, 905 F. Supp. 2d at 40. DCRB further responds the amendment is "irrelevant" because McConnell & Jones was not an "employee" despite the "auditor's consensus" including multiple employees, nor is the amendment even limited to employees. JA13-19, ¶¶ 35-46, 62; § 1-615.52(a)(6). DCRB also implies McConnell & Jones is the public, but an auditor is not "the public." DCRB's attempts to avoid the 2010 Amendment fail.

ii. Protected Disclosures Regarding Management Fees

Ms. Sampson made four protected disclosures of systematic underreporting of management fees. JA18-23, ¶¶ 58, 63, 70, 72, 78-83; [*Samp. Brief* at 26-27]. First, these facts plausibly support "gross mismanagement" because they go to the

heart of DCRB's mission- to prudently manage the pension fund. JA6-7, 10, ¶¶ 6-7, 24. The Superior Court abused its discretion in ruling that Ms. Sampson stated a "possible" gross mismanagement disclosure, but fell short of "plausible." JA80.

DCRB responds that underreporting management fees and expenses by over $77 million is *de minimis* because it only accounts for .68% of DCRB's amount under management, but relies on *2022* financial statements outside the Complaint. As with the majority of its arguments DCRB cites no case law, and its preferred standard would absolutely "dissuade" an employee from disclosing financial mismanagement *unless it indisputably* involved more than $77 million in financial fraud, or else suffer DCRB's retaliation without redress. *Williams v. D.C.*, 825 F. Supp. 2d 88, 99 (D.D.C. 2011). Ms. Sampson also alleged DCRB *intended* to deceive its Trustees, and knew exactly what it was doing *and why*- a "senior executive responded that the Trustees would not vote to approve new private market fund investments if they understood the true investment cost," and DCRB intended to prevent that understanding to obtain their approval. JA20, ¶ 67. DCRB also argues it disclosed the management fees elsewhere, but Ms. Sampson's disclosure was DCRB's intentional and systematic underreporting of management fees *in its financial statements and City Council budget documents*. Even DCRB's argument reveals that the $77 million in unreported fees was not clearly disclosed elsewhere, and were only "netted against investment income" which does the opposite- *it*

conceals the fees within the income. A reasonable attorney in Ms. Sampson's shoes could easily conclude that DCRB omitting $77 million in fees from its financial statements was gross mismanagement. *Davis*, 258 A.3d 847, 855 (D.C. 2021).[5]

Second, these facts plausibly support "abuse of authority" as the concealment was an "arbitrary or capricious exercise of power" adversely affecting D.C. Plan members and taxpayers. DCRB feigns difficulty following this argument, and again demands detailed financial allegations well-beyond notice pleading, but struggle as it might still musters the response that its leadership gained nothing from this concealment. But it resulted in personal advantage to Morgan-Johnson, DCRB executives, and Trustees because the finances managed by DCRB appear more favorable *by over $77 million* for FY2018 alone, and only the performance of DCRB's external managers would suffer from the $77 million offset to income. JA16, 19, ¶¶ 49, 62. DCRB's intentional concealment of that "true investment cost" to get what it wanted from its Trustees was the "arbitrary exercise of power."

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

[5] DCRB also spills much ink attempting to distinguish *Holbrook*, which is analogous. 259 A.3d at 88, 91. Here, Ms. Sampson objected to DCRB's concealment of the management fees because she reasonably believed they "create[ed] a substantial risk of significant adverse impact" on DCRB's mission.

degradingly responds this "is not how investing works" because it means no income could justify $77 million in fees. As long-time DCRB Counsel, Ms. Sampson is aware "how investing works," and DCRB knows her argument is that DCRB's concealment of $77 million in fees from its own Trustees was intended to prevent the Trustees from "under[standing] the *true investment cost*," and DCRB was therefore "spending [undisclosed] money recklessly." JA20, ¶ 67 (emphasis added). This is reckless because "DCRB is aware that the District government must rely upon complete and accurate information when authorizing and appropriating [DCRB] funds" and its Trustees "have a fiduciary obligation to manage DCRB costs and approve its expenditures," yet DCRB's budget is "at least $50 million" over the approved budget. JA19, 21, ¶¶ 61, 71-75, 83.

On top of this, DCRB's *own Chief Investment Officer c*ould not calculate the total management fees. JA18, ¶ 60. DCRB's external auditor also concluded that DCRB "likely has never independently calculated" the management fees, the financial accounts and balances were not reconciled, and "DCRB should scrub and reconcile each of its accounts." JA14, ¶¶ 40-41.[6] *Even DCRB's CFO* "was uncertain

[6] DCRB also argues ¶ 42 and ¶ 78 are contradictory, but the Risk and Compliance Director "confirmed that partnership agreements clearly laid out management fee calculations (¶ 78) yet DCRB still likely "never independently calculated or recalculated" these fees (¶ 42). Ms. Sampson's argument is that DCRB *routinely failed to follow* the required management fee calculations from its own partnership agreements, which the Director confirmed. There is no contradiction.

of the magnitude" of the deficiencies without a forensic audit. JA15, ¶ 44. Ms. Sampson is not speculating, nor is this a policy disagreement. Ms. Sampson relied on her own observations that are objectively supported by the "auditors consensus." JA13-15, 19, ¶¶ 35-46, 62. DCRB completely eliminating this information from its Annual Report, contradicting basic financial disclosures made by public pension funds, is far more than a "policy disagreement."

Ms. Sampson also identified laws and accounting principles supporting her disclosure. DCRB's Director of Internal Audit independently audited the Finance Department and assessed a D- rating, highlighting "lax internal controls" with the potential for "inappropriate or unauthorized payments." JA13, ¶¶ 34-38. DCRB's external auditor confirmed that DCRB had likely never "calculated" these fees, that "[p]ursuant to DC Code § 1-903.06 an auditor is required to review 'reportable transactions'" based on government standards, and "[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.[7] Ms. Sampson sufficiently alleged violations of these laws and accounting principles, which required complete and accurate

[7] The auditor also "expressed concerns" about "DCRB's lack of internal controls that could lead to potential errors within…net asset balances," DCRB's financial accounts and balances not "reconciling," DCRB could receive a letter documenting deficiencies in internal control," the financial statements needing restating, and that DCRB "should scrub and reconcile each of its accounts." JA14, ¶¶ 40-42.

reporting of the management fees. Surely even DCRB agrees that its own auditors and financial executives "know how investing works," just as Ms. Sampson does.

iii. Protected Disclosures Regarding Executive Compensation

In Spring 2021, Ms. Sampson stated an abuse of authority disclosure through "DCRB's failure to accurately disclose Ms. Morgan-Johnson's total compensation." The Superior Court ruled that Ms. Sampson failed to allege it "was inaccurate" (JA80), despite the Complaint squarely contradicting this ruling. JA16, ¶ 50-51. It is reasonable to infer that DCRB intended its Executive Director to truthfully testify about her compensation, as the only other inference is *intentionally false* testimony which also supports Ms. Sampson. JA16, ¶¶ 50-51.

DCRB again obfuscates, claiming providing testimony to the Council is not an arbitrary exercise of power but "part of its normal operations" and no one "asked DCRB" to provide it. DCRB misses the obvious point- the disclosure was not the *act* of DCRB testifying, but *the substance* of DCRB's testimony being false and resulting in increased compensation. JA16-17, ¶¶ 50-51, 55.[8] DCRB also argues that the testimony did not adversely affect anyone's rights, but the D.C. taxpayers and Plan Members paid for this compensation increase. Ms. Sampson also argued the Trustees sought 50% increased compensation for themselves, and that their misleading testimony may have been caused the increase. JA17, ¶ 52. DCRB

[8] The Superior Court also ruled that the full compensation information was a "matter of public record" so cannot be a "protected disclosure" (JA81). DCRB now parrots this argument, but the DCWPA Amendment forecloses it.

responds by claiming "may have" is "pure speculation," attempting to hold Ms. Sampson to a higher burden than notice pleading. But this is a well plead allegation raising reasonable inferences, which DCRB cannot unilaterally define.

iv. Protected Disclosures Regarding Grand Jury Subpoenas

Through complying with Subpoenas I and II, Ms. Sampson "disclos[ed] information…[she] reasonably believes evidences…a violation of a federal, state, or local law, rule, or regulation." D.C. Code § 1-615.52(a)(6)(D); [*Samp. Brief* at 35-37]. DCRB argues that an FBI Investigation is not evidence of illegality, again defining inferences in its favor despite the highly reasonable inference that this is the FBI's 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…as that is its job.").

DCRB also argues waiver, but its authority is far narrower than argued.[9] The actual standard is "an appellant is not limited to the precise arguments made below in support of any claim he properly made there." *Smith v. U.S.*, 203 A.3d 790, 798 (D.C. 2019) (emphasis added). Ms. Sampson's Opposition and Complaint argued she stated a claim based on disclosing the existence of and compliance with the Subpoena. [*Opp.* at 14-16, 22-23, 26]; JA25, ¶¶ 92-93. The Superior Court granted DCRB's Motion and Ms. Sampson appealed. Ms. Sampson waived nothing.

[9] *Iron Vine Sec., LLC v. Cygnacom Sols., Inc.*, 274 A.3d 328, 343 (D.C. 2022) ("did not argue to the trial court that the…Provision was unenforceable"); *Oparaugo v. Watts*, 884 A.2d 63, 75 (D.C. 2005) ("never requested" trial court "take judicial notice of the material it now seeks to use on appeal").

Ms. Sampson also made protected disclosures to her supervisors that she complied with the Subpoenas and requested to discuss the FBI Investigation, which DCRB refused to conceal it from its Trustees. JA2425-25, ¶¶ 85-88. Ms. Sampson then disclosed her intent to comply with Subpoena III, and one week later was placed on enforced leave to prevent that compliance. JA25, ¶ 91. DCRB argues these are not disclosures, but "simply complying with a subpoena could be considered 'protected activity'…particularly if… the employer discouraged the employee from complying." *Perius v. Abbott Labs*, 2009 U.S. Dist. LEXIS 55590, at *23-24 (N.D. Ill. June 26, 2009). DCRB not only discouraged, but *threatened* Ms. Sampson with termination for compliance. JA29, ¶ 110(a); JA24-29, ¶¶ 87-91.

B. DCRB COMMITTED PROHIBITED PERSONNEL ACTIONS

i. Investigation of Ms. Sampson

DCRB falsely claimed misconduct to justify a retaliatory sham investigation. JA27-28, ¶¶ 103-05; D.C. Code § 1-615.52 (retaliation includes "conducting…an investigation of an employee"); *McCall v. D.C. Hous. Auth.*, 126 A.3d 701, 711, n. 19 (D.C. 2015). Ms. Sampson clearly alleged a sham investigation. JA37, ¶¶ 138, 149; JA28, ¶ 106. DCRB retained Mr. Loots despite it "violat[ing] standard protocols," and a "conflict of interest" due to Trustees poisoning any impartiality by claiming Ms. Sampson was a "'troublemaker' who the Board wanted to terminate." JA12-13, ¶ 32. Mr. Balistrieri intended it to be a retaliatory sham to discredit the disclosures, imply wrongdoing, and prohibit communication with staff to prevent

Ms. Sampson proving her disclosures. JA28, 35, 41, ¶¶ 105-106, 149, 162. Ms. Sampson further alleged hostile treatment different "from the manner in which he treated other employees" who made no disclosures. JA42, ¶ 164. Mr. Balestrieri also told Ms. Sampson's colleagues she needed to be 'investigated for wrongdoing,'" and would not return due to "lapses in judgment.'" JA34, ¶ 126.

DCRB only responds by referring to a single allegation (¶ 103), cites no case law, and completely ignores the remaining allegations and *McCall*. DCRB argues that the Complaint "on its face" claims the investigation was unrelated. But Ms. Sampson received a letter on October 4 claiming a failure to disclose to DCRB's Trustees "important material information concerning agency investments and operations in performing your fiduciary duties as General Counsel of DCRB." *Id.* The letter never identified this "important material information" or Ms. Sampson's involvement, falsely stated Ms. Sampson was a fiduciary, and failed to state specific reasons for enforced leave. *Id.* Ms. Sampson further alleged the reasons were to pressure disclosure if she was a whistleblower, and to preemptively silence any future disclosures. *Id.* at ¶¶ 91, 104. These allegations are not only sufficient, but "presumptively actionable." *Williams*, 825 F. Supp. 2d at 96.[10] At a minimum Ms. Sampson, raised reasonable inferences of a retaliatory sham investigation.

[10] DCRB also argues that Ms. Sampson does not dispute that the investigation is unrelated to her disclosures. JA82. Ms. Sampson absolutely disputed this, the

ii. Hostile Work Environment

Ms. Sampson stated a hostile work environment based on DCRB's campaign of retaliatory harassment, but the Superior Court abused its discretion in declining to rule. JA82. DCRB only opposes the "severe and pervasive" element, and as expected isolates each allegation then claims it is "hard to see" how Ms. Sampson states a hostile work environment. If DCRB re-calibrated its vision by accurately arguing the law and Complaint, it would find its sight much improved.

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. DCRB's own case law even states that "no specific number of incidents and no specific level of egregiousness" are required, and "the trier of fact should consider…the amount and nature of the conduct, the plaintiff's response to such conduct, and the relationship between the harassing party and the plaintiff." *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 888 (D.C. 2003). The Court further explained "the fundamental difference" is emphasis on "both the cumulative effect of incidents comprising that claim, and its unitary nature," because a hostile environment "focuses on the entire mosaic." *Id.* at 889-90. Here, Ms. Sampson alleged this "mosaic" in granular detail. JA29-34, ¶¶ 109, 110(a-g), 111-127.

Complaint and Opposition squarely contradict it, and the Superior Court abused its discretion. JA34, 37, 39, 41 ¶¶ 125-128, 138, 149, 162; [*Opp.*, at 28-34].

DCRB also ignores the fundamental differences between discrimination and retaliation, where the "'adverse action' concept has a broader meaning." *Baird v. Gotbaum*, 662 F.3d 1246, 1249 (D.C. Cir. 2011) (retaliation claims "not limited to discriminatory actions that affect the terms and conditions of employment…but reach any harm that well might have dissuaded" employee from "making a charge of discrimination"). Ms. Sampson therefore alleged a sufficiently severe hostile work environment "that well might have dissuaded a reasonable worker from" engaging in protected activity. *Baird*, 662 F.3d at 1249. At a minimum, DCRB's pervasive harassment of Ms. Sampson leads to a reasonable inference for DCRB employees that any protected disclosures in the future would be met with swift and dispositive retribution. JA35, ¶ 131 ("sen[t] a clear message to DCRB staff that there are no whistleblower protections for any employees since even the DCRB General Counsel and Ethics Counselor can be silenced, defamed, retaliated against, and barred from her position."); *Bowyer*, 910 F. Supp. 2d at 193. DCRB repeatedly "recommend[ing]" and "threaten[ing]" termination is also an independent prohibited action, as is DCRB barring Ms. Sampson from serving as acting Executive Director despite serving before her disclosures. § 1-615.52(5)(A) ("failure to…take other favorable personnel action."); JA30-31, ¶¶ 110(e, g), 111-17.

Afraid of these statutory definitions, DCRB attempts to shift the Court's focus towards stricter Title VII standards. *Mungin v. Katten Muchin & Zavis*, 116 F.3d

1549 (D.C. Cir. 1997) (no hostile work environment even alleged); *Stewart v. Evans*, 275 F.3d 1126, 1133-34 (D.C. Cir. 2022) (Title VII claim). DCRB again isolates these allegations into silos and attacks each one independently- the exact opposite of how a hostile work environment is analyzed. DCRB further argues that changes in responsibilities and pervasive exclusion from one's own job duties are not prohibited actions, but once again does so in isolation and also ignores that the pervasive exclusion of Ms. Sampson *is* a prohibited action in and of itself.[11]

DCRB further argues these actions were "within DCRB's discretion." But an employment action being discretionary of course does not mean specific actions applied to specific individuals are legal. DCRB unsurprisingly cites no authority for this argument, because no employment action could ever be illegal. These inquiries are "highly dependent on the 'particular circumstances' of plaintiff's employment." *Jackson v. Dist. Hosp.* 2022 U.S. Dist. LEXIS 156674, at *22 (D.D.C. Aug. 31, 2022); *Holbrook*, 259 A.3d at 87 ("paints with too broad a brush. Instructions on how to treat a particular employee's personnel requests can absolutely be illegal").

[11] *McCall v. D.C. Hous. Auth.*, 126 A.3d 701, 706 (D.C. 2015) ("legislative intent to forbid all retaliation against whistleblowers, regardless of the method"); *Allen v. Napolitano*, 774 F. Supp. 2d 186 (D.D.C. 2011) (denying summary judgment because plaintiff was deprived of "information critical to her duties" and "described in detail the alleged purpose of each meeting where she believed her exclusion as retaliatory"); *Thomas v. Vilsack*, 718 F. Supp. 2d 106, 124 (D.D.C. 2010) (denying summary judgment when plaintiff excluded from important communications). These are the exact types of allegations summarized above.

To borrow DCRB's playbook, this "is not how causal analysis works." *Coleman*, 749 F.3d at 61-62 ("Asking whether a misbehaving employer *could* have taken the same employment action for a legitimate reason, rather than whether the employer *did* so, would enfeeble the Act's most basic protection…[and] open the door to after-the-fact justifications" for retaliatory actions) (emphasis original).

C. MS. SAMPSON PLAUSIBLY ALLEGED CAUSATION

Ms. Sampson alleged direct causation, but the Superior Court abused its discretion by not addressing it. DCRB first accuses Ms. Sampson of "short-circuit[ing]" causation by relying on direct evidence- a confusing and false response. *Holbrook*, 259 A.3d at 93 (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."). DCRB then argues Ms. Sampson did not allege DCRB threatened "Sampson or her employment," apparently never reading the Complaint. Trustee Clark told anyone who would listen that Ms. Sampson "should be terminated" and he "would fire" her, and told Ms. Sampson's subordinates and colleagues she needed to be "investigated for wrongdoing." JA29, 34, ¶¶ 34, 110(a), 124-127. Only two months after the enforced leave, Mr. Clark informed the Board "he has gotten rid of toxic people," with only Ms. Sampson "gotten rid of" during this period. JA34, ¶¶ 127-28.

DCRB responds that Mr. Clark had no termination authority over Ms. Sampson, but cites no supporting case law and again defines inferences in its favor. DCRB's Board also appoints the Executive Director having this authority, supporting "cat's paw" causation. *Furline v. Morrison*, 953 A.2d 344, 355, n. 39 (D.C. 2008). And 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" provide even further direct causation allegations. JA26, 29-34, ¶¶ 98, 110, 115-16, 120-129. In these circumstances, "it is not hard to infer" causation. *Holbrook*, 259 A.3d at 93; *Kachmar v. SunGard Data Sys.*, *Inc.*, 109 F.3d 173, 178-79 (3d Cir. 1997) (statements that discrimination complaints could negatively impact job prospects sufficient to infer causation).[12]

Ms. Sampson also plausibly alleged temporal proximity, but the Superior Court abused its discretion in limiting its analysis to only summer 2021. JA82-83. Ms. Sampson also *never* solely relied on temporal proximity. DCRB responds that all but three of the disclosures occurred more than four months before the enforced leave, but Ms. Sampson plausibly alleged direct causation, a "hostile work environment," and an "intervening pattern of antagonism" between late 2019 and

[12] For the same reasons Ms. Sampson argued causation through "an intervening pattern of antagonism directed toward the whistleblowing employee beginning soon after the disclosure and continuing to the alleged retaliation." *Tingling-Clemmons v. D.C.*, 133 A.3d 241, 247 (D.C. Cir. 2016).

October 4, 2021, followed by the sham investigation. Courts have also found error where "[i]n concluding that there was insufficient temporal proximity…the district court failed to take account of protected activity…long after the original protected activity." *Singletary v. D.C.*, 351 F.3d 519, 524 (D.C. Cir. 2003). The Superior Court and DCRB committed this same error.[13]

DCRB further argues insufficient causation between her September 16 disclosure (JA22, ¶ 78) and prohibited actions (JA27, 34, ¶¶ 103, 126), and makes the same argument for the early September 2021 disclosure (JA25, ¶¶ 88-90, 93). DCRB argues Ms. Sampson did not allege Mr. Balistrieri had knowledge of these disclosures,[14] but ignores Mr. Balistrieri's incessant comments about Ms. Sampson from the his first day of employment through the enforced leave and investigation. JA31, 34, ¶¶ 103, 115, 125-129, 131. As to the Subpoenas, Mr. Balestrieri met with Ms. Sampson on September 8, and between September 8 through October 4 expressed hostility towards Ms. Sampson, accused her of not being a team player, acted threateningly, and attempted to intimidate her, all leading up to the leave and sham investigation. JA25-27, ¶¶ 89-90, 98-103. DCRB demands Ms. Sampson "produce a smoking gun," well beyond notice pleading as it is "enough… to offer

[13] DCRB also relies on *Walker v. D.C.* to argue Ms. Sampson failed to provide the "requisite more." Ms. Sampson provided plenty "more" as argued in these Briefs.

[14] DCRB's argument is confusing because the Superior Court agreed Ms. Sampson sufficiently alleged knowledge of her "protected disclosures concerning accounting practices and investment management fees." JA 83-84; JA23, ¶¶ 81, 103.

circumstantial evidence that could reasonably support an inference" of awareness of protected activity. *Holbrook*, 259 A.3d at 93. The "nature" of the complaint is what matters. *Howard Univ. v. Green*, 652 A.2d 41, 48 (D.C. 1994).

These periods of September 8 to October 4 or September 16 to October 4 are only 18 and 26 days, well within the period if relying solely on temporality, let alone here with multiple plausible causation theories. *Nicola v. Washington Times*, 947 A.2d 1164, 1175 (D.C. 2008); *Payne*, 722 F.3d at 354 (D.C. Cir. 2013); *Johnson*, 935 A.2d at 1120. The causal connection is also further strengthened by DCRB's false reasons for placing Ms. Sampson on leave and the sham "investigation."[15]

II. DISMISSAL WITH PREJUDICE WAS AN ABUSE OF DISCRETION

In D.C. "there is a "virtual presumption" to grant leave to amend "unless there is a good reason to the contrary." *Taylor*, 957 A.2d at 51; *Belizan v. Hershon*, 434 F.3d 579, 584 (D.C. Cir. 2006) (standard for dismissal "with prejudice is high," and only warranted if the Court "determines that the allegation of other facts…could not possibly" cure it). The Superior Court abused its discretion in dismissing Count I with prejudice without these required findings. *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996). DCRB argues that Ms. Sampson filed no motion to amend, so waived the issue. DCRB misunderstands the assignment of error- the Superior

[15] DCRB also relies on inapplicable case law. *Black v. D.C.*, 134 F. Supp. 3d 255, 263 (D.D.C. 2015) (causation impossible because no complaint until months after discipline); *Nicola*, 947 A.2d at 1176 (overwhelming performance issues).

Court granting DCRB's opposed Motion and dismissing the case with prejudice, which Ms. Sampson now appeals. There was nothing to "forfeit."[16]

DCRB further argues that Ms. Sampson's case law involved a filed Motion, again misunderstanding the error and further ignoring *Rudder.* 666 F.3d 790, 794-95 (D.C. Cir. 2012) (error to dismiss with prejudice "because it could not be said [that] the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency," so "exacting standard is not met."); *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("proper exercise of discretion requires that the district court provide reasons"). These cases support Ms. Sampson.

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*

[16] DCRB's claim the Superior Court invited Ms. Sampson to file an amendment is also unavailing. Ms. Sampson sought "to amend the complaint to include the facts regarding DCRB's estoppel after which the Rule12(b)(6) sufficiency of Counts Four through Seven can then be addressed." [*Opp.* at 35]. This is what is referenced in the status conference motion, because unlike Count I the Superior Court analyzed amendments to these Counts before dismissing with prejudice.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 9th day of November, 2022, I filed the Reply Brief of Appellant with the Clerk of the District of Columbia Court of Appeals. I further certify that the Reply Brief was served this 9th day of November, 2022, via the D.C. Court of Appeals E-filing system.

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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.

/s/ Carla D. Brown
Signature

22-CV-132
Case Number(s)

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11/9/2022
Date

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