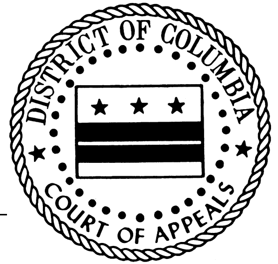

Clerk of the Court
Received 10/19/2022 03:54 PM
~~Resubmitted 10/19/2022 04:33 PM~~
Resubmitted 10/19/2022 05:16 PM
Filed 10/19/2022 05:16 PM

No. 22-CV-385

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 SUPERIOR COURT OF THE DISTRICT OF COLUMBIA,
THE HONORABLE ANTHONY C. EPSTEIN, JUDGE PRESIDING**

BRIEF OF APPELLEES

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Dated: October 19, 2022

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Rule 26.1 Disclosure Statement:	Pursuant to Rule 7.1, District of Columbia Retirement Board and Joseph W. Clark were not required to file a Disclosure Statement with the trial court. There were no intervenors or amici curiae in the trial court proceeding.

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STATEMENT OF JURISDICTION

Erie Sampson appeals a final order of the Superior Court of the District of Columbia that granted appellees' motion to dismiss. Accordingly, this Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review are as follows:

1. Whether the Superior Court correctly dismissed Count I of the Complaint because it did not state a plausible claim for retaliation under the District of Columbia Whistleblower Protection Act.

2. Whether this Court should grant Appellant leave to amend Count I, notwithstanding that she did not make that request in the Superior Court even after that court expressly invited her to do so.

STATEMENT OF THE CASE

Erie Sampson ("Sampson" or "Appellant"), while serving as the General Counsel and Chief Ethics Officer for the District of Columbia Retirement Board ("DCRB"), sued DCRB and its then-Chair of the Board of Trustees, Joseph W. Clark (collectively, "Appellees"). The gravamen of the Complaint is that DCRB placed her on paid administrative leave in retaliation for being a whistleblower regarding how DCRB manages its finances, how DCRB reports certain investment fees in its annual financial reports, and certain human resource issues. She alleges that she made these disclosures over the course of several years to DCRB executives, the

City Council and certain law enforcement agencies, all while serving as DCRB's General Counsel.

Defendants moved to dismiss pursuant to Super. Ct. Civ. R. 12(b)(6), and on April 27, 2022, the court granted the motion in its entirety and dismissed the Complaint with prejudice.

STATEMENT OF FACTS

DCRB is an independent agency of the District of Columbia government. JA6-7, ¶ 6. It has the exclusive authority to manage and control the assets of, and administer retirement benefits for, the pensions of the District's Police Officers, Firefighters and Teachers. D.C. Code §§ 1-701(b), 711(a). It is led by a 12-member Board of Trustees and an Executive Director. *Id.* §§ 1-711(b)(1)(A), (g)(2)(C). The current Executive Director is Gianpiero "JP" Balestrieri, who joined DCRB on September 7, 2021. JA34, ¶ 125. DCRB manages assets worth $11.4 billion; its actuarial funded status is 112.3%. Annual Comprehensive Financial Report

("ACFR") for Fiscal Years Ended Sept. 30, 2021 and 2020 for DCRB, at 3;[1] DCRB Quarterly Fund Summary for Period Ending March 31, 2022, at 3.[2]

A. Sampson's Allegations

At the time she filed this lawsuit, Sampson was DCRB's General Counsel. For reasons wholly unrelated to the allegations in the Complaint, Balestrieri placed her on administrative leave on October 4, 2021. In particular, she was placed on administrative leave so that an independent law firm could investigate whether Sampson failed to investigate and/or inform the Trustees (her client) about allegations (of which she was made aware) that could materially impact DCRB's investment decisions, and whether she instead reported those allegations to law enforcement without ever informing her client. JA27-28, ¶¶103-04. Sampson does not dispute this. *Id.*; JA82.

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[1] Available at: https://dcrb.dc.gov/sites/default/files/dc/sites/dcrb/publication/attachments/DCRB%20ACFR%202021%20Final%2020220330.pdf. The Court is permitted to take judicial notice of these documents, as they are referenced in Sampson's complaint (referenced at JA36, ¶ 137). *See, e.g.*, *Oparaugo v. Watts*, 884 A.2d 63, 76 n.10 (D.C. 2005) (court can consider documents that "were referenced in the complaint and are central to appellant's claim"); *Chamberlain v. American Honda Finance Corp.*, 931 A.2d 1018, 1025 (D.C. 2007) (court can consider contracts attached to a motion to dismiss because they were referred to within the complaint).

[2] JA23, ¶ 83; *see also* https://dcrb.dc.gov/sites/default/files/dc/sites/dcrb/publication/attachments/Quarterly%20Fund%20Summary%20for%20Period%20Ending%20March%2031%2C%202022.pdf.

Nevertheless, Sampson filed this lawsuit alleging that her paid administrative leave was unlawful retaliation for whistleblower activity, in violation of the Whistleblower Protection Act, D.C. Code §§ 1-615.51 to 1-615.59 ("the Act"). Specifically, she claims that she made protected disclosures regarding DCRB's accounting practices, JA13-14, 17, ¶¶ 34-39, 53-54, how DCRB reports certain investment fees in its annual financial reports, JA18-23, ¶¶ 58, 63, 70, 72-73, 78, 80-83, how DCRB characterized a former Executive Director's compensation, JA16-17, ¶¶ 50-53, and her own cooperation with federal grand jury subpoenas. JA24-26, ¶¶ 85-88, 92-93. She alleges that she made these disclosures while serving as DCRB's General Counsel over the course of several years to certain DCRB executives, the City Council, and certain law enforcement agencies. In addition, Sampson brought several other statutory and common law claims against Appellees that she is no longer pursuing.

B. The Superior Court's Order Dismissing the Complaint

Appellees moved to dismiss pursuant to Super. Ct. Civ. R. 12(b)(6), and on April 27, 2022, the court granted the motion in its entirety and dismissed the Complaint with prejudice. The court provided multiple, independently sufficient reasons for so holding.

First, the court first held that Sampson had not plausibly alleged that she made protected disclosures within the meaning of the Act. JA76-81. The court so held with respect to each topic that Sampson put at issue.

As to DCRB's accounting practices, the Superior Court held that Sampson's expressed "concerns" were not equivalent to pointing to gross mismanagement or other violations. JA77-78. Indeed, merely pointing to possible accounting issues at a multi-billion dollar pension fund did not mean that gross mismanagement or other abuses were at play because Sampson failed to plausibly allege DCRB was "in significantly worse shape than its financial reports indicated." *Id.* Sampson also failed to plausibly allege how such accounting deficiencies, even if present, "create[d] a substantial risk of significant adverse impact on the agency's ability to accomplish its mission." JA78 (citation omitted). Finally, Sampson only repeated concerns that the Director of Internal Audit and an external auditor had already raised, whereas a true protected disclosure under the Act cannot concern information already known to the recipient of the information. *Id.*

As to certain investment fees, the Superior Court recognized that Sampson cited no law, regulation or accounting principle that requires DCRB to publicly report the amount it pays in fees. JA79. Moreover, the Superior Court found Sampson had not alleged facts supporting a plausible inference that DCRB's fee approach involved serious error such that reasonable people could not debate that

the agency had erred. *Id.* Instead, Sampson merely highlighted a policy disagreement. *Id.* Absent allegations that DCRB had provided misleading fee information or that fees were excessive, Sampson failed to plead protected disclosures as to investment management fees. JA79-80.

As to the compensation of DCRB's Executive Director, the Superior Court found that Sampson failed to plead that DCRB provided an inaccurate picture of the Executive Director's compensation or that the salary increase sought was unjustified. JA80. After all, the Executive Director's salary, deferred compensation and retirement contributions were each available on DCRB's website, a fact which Sampson included in the Complaint. JA81.

And as to the grand jury subpoenas, the Superior Court noted that informing management of her compliance with such subpoenas did not constitute a protected disclosure because Sampson was not blowing the whistle on misconduct through her compliance. *Id.*

Second, the Superior Court went on to recognize that, while Sampson had plausibly alleged a prohibited personnel action on DCRB's part (her placement on administrative leave), she failed to allege facts supporting a plausible inference that her alleged disclosures were a contributing factor to her placement on leave, JA81-82, because she failed to allege that DCRB took such action in temporal proximity to the alleged disclosures. JA82-84. Moreover, the Court reasoned, the Complaint

provides an alternative reason that Sampson was placed on paid leave—to allow DCRB to investigate whether she failed in her duties as General Counsel to investigate and/or report to the Trustees (Sampson's client) serious allegations that could impact DCRB's investment decisions, and whether she instead reported those allegations to law enforcement (without notifying her client that she had done so). JA82.

Sampson responded to the court's dismissal of the complaint by filing a motion for a status conference. *See* Pl.'s Opposed Motion for Status Conference at 1. The court denied the motion and invited Sampson to file "a motion for leave to file an amended complaint," and explained that "[i]f Ms. Sampson intends to file such a motion, she should file it." *See* JA3 (Docket entry: "Order Denying Motion for a status conference Entered on the Docket Signed by Judge Epstein on 5 25 22."). Despite that express invitation, Sampson never filed a motion for leave to file an amended complaint.

Sampson now abandons six of her seven counts and appeals only Count I—retaliation in violation of the Act.

SUMMARY OF THE ARGUMENT

To establish a *prima facie* case under the D.C. Whistleblower Protection Act ("Act"), a public employee must prove that she made a protected disclosure, that a supervisor retaliated or took a prohibited personnel action against her, and that her

protected disclosure was a contributing factor to the retaliation or prohibited personnel action.

The Superior Court correctly held that the Complaint failed to state a *prima facie* case under the Act and therefore dismissed the Complaint with prejudice.

First, for a host of reasons, the Complaint does not plausibly allege that Sampson made any protected disclosure, as the Act requires. For the most part, Sampson highlights mere policy disagreements, which the Act does not protect. Sampson's concerns about DCRB's finances merely echoed concerns others (hired by DCRB) had raised as needing attention. Sampson may disagree with DCRB's decision to reject her recommended fixes, but the Act does not cover such disagreements. Likewise, Sampson's alleged disclosures about how DCRB reports certain investment fees does not evidence any gross mismanagement, abuse of authority, or violation of a law or accounting principle. Rather, such disclosures again reflect a simple difference of opinion about how DCRB should report such fees. Sampson's alleged disclosures about DCRB's reporting of a former Executive Director's compensation to the City Council and her compliance with grand jury subpoenas also fail because they do not evidence gross mismanagement, abuse of authority, or a violation of law.

Second, the Complaint fails to allege that DCRB took any adverse employment action against her as a result of her alleged protected disclosures. The

only alleged prohibited personnel action recognized by the Superior Court was placing Sampson on paid leave. But the Superior Court correctly held that there was no causal link between placing her on paid leave and her alleged disclosures for two reasons. First, the alleged disclosures did not take place in close temporal proximity to placing Sampson on leave. Second, the Complaint failed to adequately plead that the decision-maker was aware that she made protected disclosures.

Finally, there is nothing to Sampson's claim that she should be granted leave to amend her complaint, as she indisputably forfeited this argument. The Superior Court invited Sampson to file an amended complaint following its order dismissing her complaint, but Sampson never did so. As such, she has no basis for now asking this Court in the first instance to grant her that leave. Sampson forfeited this issue because she did not raise it below.

STANDARD OF REVIEW

Rule 12(b)(6) requires dismissal of a complaint if it fails to state a claim upon which relief may be granted; this Court reviews such determinations *de novo*. *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011). This Court must accept all factual allegations in the complaint as true, but is not bound to accept as true a legal conclusion couched as a factual allegation. *Id.* at 544. To survive a motion to dismiss, a plaintiff must show more than a "sheer possibility that a defendant has acted unlawfully" by "plead[ing] factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

ARGUMENT

I. The Complaint Fails to State a Claim Under the Act.

In her appellate brief, as in her Complaint, Sampson uses a "kitchen sink" approach, "mak[ing] it difficult to discern whether [she] is alleging background facts or 'protected disclosures.'" *Winder v. Erste*, 905 F. Supp. 2d 19, 34 (D.D.C. 2012); JA76. In sum, Sampson fails to state a claim for retaliation in violation of the Act because she alleges neither a "protected disclosure" as defined by the Act, nor facts to support a reasonable inference that any such disclosure was a contributing factor in her being placed on paid administrative leave.

The Act states 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 or because of an employee's refusal to comply with an illegal order." D.C. Code § 1-615.53(a). To establish a *prima facie* case, a public employee "must prove by a preponderance of the evidence [1] that [she] made a protected disclosure, [2] that a supervisor retaliated or took or threatened to take a prohibited personnel action against [her], and [3] that [her] protected disclosure was a contributing factor to the retaliation or prohibited personnel action." *Freeman v.*

District of Columbia, 60 A.3d 1131, 1141 (D.C. 2012) (citation and quotation marks omitted).

The Act's purpose is "to protect employees who possess knowledge of wrongdoing that is concealed and who step forward to help uncover and disclose that information." *Williams v. District of Columbia*, 9 A.3d 484, 489 (D.C. 2010) (cleaned up). But not every disclosure is protected by the Act. It protects only disclosures that a would-be whistleblower reasonably believes evidence "such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people." *Wilburn v. District of Columbia*, 957 A.2d 921, 925 (D.C. 2008). "Sometimes, however, a workplace complaint is just a workplace complaint," and such complaints are unprotected. *Coleman v. District of Columbia*, 794 F.3d 49, 53 (D.C. Cir. 2015).

A. Sampson Failed to Plausibly Allege Any Protected Disclosure.

The Act defines "protected disclosure" as a disclosure of information by a public employee 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 D.C. government and a D.C. government contractor that is not of a merely technical or minimal nature; or (E) a

substantial and specific danger to the public health and safety. D.C. Code § 1-615.52(a)(6).

Sampson claims that her disclosures fit into all of the categories above except the last one (public health and safety). However, the Superior Court correctly held that the Complaint does not contain a protected disclosure within any of these categories. Indeed, it was not until Sampson filed her response to Appellees' motion to dismiss that she even attempted to articulate the categories into which her disclosures supposedly fell.

This Court has defined the categories of protected disclosures under the Act. "*Gross mismanagement*" means "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) (citation omitted). "*Gross misuse or waste of public resources or funds*" is a "more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." *Id.* at 857 (citation omitted). "*Abuse of authority*" occurs when there is "an arbitrary or capricious exercise of power" by an 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." *Id*. (citation omitted). To plead a *violation of law, rule, or regulation*, a plaintiff must allege protected disclosures that implicate a violation of a law, rule, regulation,

or term of a contract. *See id.* at 858. The Superior Court was right: None of Sampson's representations fall within any of these categories.

1. The Superior Court Correctly Held that Sampson Did Not Make Any Protected Disclosures About DCRB's Accounting Practices.

Sampson alleges that she made three protected disclosures about DCRB's accounting practices. The first was in December 2019, when she allegedly "made protected disclosures by reporting financial deficiencies to [the then-Executive Director of DCRB] and DCRB Trustees." JA17, ¶ 54; Brief of Appellant Sampson ("Brief") at 16. Those supposed deficiencies that Sampson reported were based on a "financial risk assessment" conducted by DCRB's Director of Internal Audit that "highlighted lax internal controls that had the *potential* to result in inappropriate or unauthorized payments," JA13, ¶ 38, and "expressed concerns" by DCRB's external auditor about a "lack of internal controls that *could* lead to *potential* errors," JA14, ¶ 40 (emphases added).

Sampson alleges she made the other disclosures in December 2019 and February 2021, to the City's Office of the Chief Financial Officer ("OCFO"), regarding "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." JA17, ¶ 54; Brief at 17.

Sampson claims that these three disclosures evidence gross mismanagement and abuse of authority. Brief at 18-19. As the Superior Court correctly held,

Sampson is wrong. JA77-78 (citing *Johnson v. District of Columbia*, 225 A.3d 1269, 1277 (D.C. 2020); *Poindexter*, 104 A.3d at 857).

(a) Sampson's Supposed Disclosures Did Not Evidence Gross Mismanagement.

First, the Superior Court correctly held that none of these disclosures evidence gross mismanagement. *Id.* Sampson alleges no conduct by DCRB—an $11 billion pension fund that is 112% funded—that risks any impact, significant or otherwise, to its ability to accomplish its mission to "serve the interests of the District's Police Officers, Firefighters, Teachers and their Survivors and Beneficiaries by prudently investing Fund assets and delivering accurate and timely benefit payments with excellent member service." DCRB Mission Statement.[3]

Sampson suggests that the Superior Court's reason for finding that her disclosures did not evidence gross mismanagement was that the Complaint did not use "magic words." Brief at 22. Sampson mischaracterizes the Superior Court's holding and reasoning. It did not hold that magic words were needed, and in fact expressly recognized that language "similar" to the statutory framing could suffice. JA77. But as the court recognized, Sampson's allegations did not clear that bar because nothing about her disclosures suggested gross mismanagement or anything of the sort. JA77-78. Sampson's supposed "disclosures" merely cite reports by

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[3] *See* JA15-16, 19, 23, 25, 30 ¶¶ 43 n.4, 50 n.5, 62 n.8, 82 n.9, 87 n.10, 110 nn.11-12; *see also* https://dcrb.dc.gov/page/about-dcrb.

DCRB staff and its outside auditor—*i.e.*, reports that DCRB itself asked for so that it could institute better financial controls. To be clear, these reports do not pertain to DCRB's investments of pension fund assets but rather to its daily operations. Moreover, Sampson does not allege that any of these reports concluded that DCRB engaged in misconduct. Instead, these reports comment on the *possibility* of errors and unauthorized payments, which does not rise to the level of a "*substantial* risk of *significant* adverse impact on the agency's ability to accomplish its mission." *See Poindexter*, 104 A.3d at 855 (emphasis added). Instead, Sampson's allegations are purely speculative and conclusory and do not establish a plausible claim. *Tingling-Clemmons v. District of Columbia*, 133 A.3d 241, 245-46 (D.C. 2016) ("The requirement of facial plausibility 'asks for more than a sheer possibility that the defendant has acted unlawfully' . . . . To satisfy rule 8(a), plaintiffs must 'nudge their claims across the line from conceivable to plausible.'").

These disclosures also do not evidence gross mismanagement because they amount to mere policy disagreements, which the Act does not cover. DCRB did not ignore Sampson's reports. Sampson acknowledges that DCRB's CFO, as a result of these reports, asked an outside firm to review DCRB's financial controls and provide a "management consulting report with accounting recommendations for the Finance Department." JA15, ¶ 47. Sampson simply disagreed with the CFO's course of action and thought a different course of action should be taken. She expressed that

to DCRB leadership, and leadership rejected her suggestions. This is a textbook policy disagreement, and thus is not covered by the Act. *See Zirkle v. District of Columbia,* 830 A.2d 1250, 1260 (D.C. 2003) (quoting *Lachance v. White*, 174 F.3d 1278, 1381 (Fed. Cir. 1999)) ("The [Act] is not a weapon in arguments over policy or a shield for insubordinate conduct.").

(b) Sampson's Disclosures Were Not "True Disclosures" Under the Act.

The Superior Court also correctly held that Sampson did not make protected disclosures because "she was repeating concerns that DCRB's Director of Internal Audit and its external auditor . . . had already raised with senior management and the Board, and a true disclosure under the [Act] cannot concern information that is already known to the recipient or other supervisors." JA78 (citing *Johnson*, 225 A.3d at 1277 & n.7; *Williams*, 9 A.3d at 489-90).

Sampson argues that this was in error because the concerns she parroted were not already known to the entire public, and because her disclosures slightly differed from what DCRB leadership had already been told. Brief at 25-26. Sampson notes that the "*preliminary* financial risk assessment" was presented to the then-Executive Director, CFO and Controller whereas she presented the "final financial risk assessment" to the Trustees. *Id.* at 25 (emphasis original). Likewise, Sampson argues, the outside auditor presented only "*initial* concerns" to the Trustees whereas it was Sampson who "continually urged [the] Executive Director . . . to address" the

concerns raised by the auditors by pushing for a "forensic root-cause accounting analysis." *Id.* (emphasis original).

These are distinctions without differences. The preliminary and final financial risk assessments were both reported to DCRB leadership. JA13, ¶ 35 (Director of Internal Audit reported findings of the preliminary financial risk assessment to the Board's Audit Committee); *id.* ¶ 36 (Director of Internal audit presented the results of her final financial risk assessment to the then Executive Director, CFO, Controller and Sampson); JA14, ¶ 39 (Sampson "disseminated the final financial risk assessment to DCRB Trustees"). Same for the auditor's concerns. *Id.* ¶42 (outside auditors briefing Board's Audit Committee); JA15, ¶ 45 (from January 2020 to March 2021, Sampson "continuously urged" the Executive Director and Trustees to address the accounting deficiencies). Sampson's continuous urging of DCRB leadership to *respond* to those disclosures in her preferred manner does not convert her communications into disclosures covered by the Act.

For support, Sampson cites case law discussing amendments to the Act, which expanded the definition of "protected disclosure" to include "disclosure[s] of information . . . without restriction to . . . prior disclosure made to any person by an employee." D.C. Code § 1-615.52(a)(6). For example, Sampson cites *Williams* for the proposition that a purpose of the Act is to "protect employees . . . who risk their job security to disclose information that might have already been disclosed by

another employee." *Williams*, 9 A.3d at 490 n.5. The amendment does not help Sampson. Insofar as she was repeating information that had already been disclosed by DCRB's outside auditor—not any *employee*—the amendment is irrelevant. And even insofar as she was repeating information that had already been disclosed by other employees, she was not actually disclosing any information but instead was advocating that DCRB address already-disclosed information in her preferred manner. Again, the Act's amendment does not salvage Sampson's claim.

(c) Sampson's Supposed Disclosures Did Not Evidence Abuse of Authority.

The Complaint similarly does not plausibly allege that Sampson disclosed an "arbitrary or capricious exercise of power . . . that adversely affect[ed] 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. In its "Summary of Action," the Complaint states that this "action pertains to DCRB's retaliation against [Sampson] for her work to address fraud, waste and abuse of Retirement Fund assets in finance, investments and human resource departments." JA8, ¶ 17. But Sampson's disclosures about accounting issues did not suggest a single instance of any such fraud, waste or abuse. Rather, the most she supposedly disclosed was the *possibility* of errors and unauthorized payments. JA13-14, ¶¶ 38-41.

Sampson attempts to belatedly flesh this out in her Brief before this Court, speculating that there was "the *potential* of 'inappropriate and unauthorized

payments' that *could lead* to net asset balance errors in their accounts . . . ." Brief at 19-20 (emphases added). But completely absent from these statements is any allegation that anyone's rights *were* "adversely affect[ed]" by the supposed accounting issues, or that anyone at DCRB *has* experienced "personal gain or advantage." *Poindexter*, 104 A.3d at 857. Accordingly, such disclosures are not protected by the Act.

(d) Sampson Did Not Hold an Objectively Reasonable Belief That Her Disclosures Evidenced Wrongdoing Covered by the Act.

The Act demands that Sampson's belief about her alleged protected disclosures have been objectively reasonable. *Poindexter*, 104 A.3d at 854. To state a claim under the Act, a person "must have had such a [reasonable] belief *at the time the whistle was blown*," *Freeman*, 60 A.3d at 1143 (emphasis in original), not any "subsequent characterization of those statements in litigation." *Wilburn*, 957 A.2d at 925 (citation and quotation marks omitted). A reasonable belief for the purposes of the Act is one where a "disinterested observer with knowledge of the essential facts, *known to* and *readily ascertainable* by [Plaintiff] [could] reasonably conclude that the actions of the government evidence" one of the categories of protected disclosures. *Poindexter*, 104 A.3d at 854 (emphasis added).

Sampson fails to plausibly allege that she held an objectively reasonable belief, because no reasonable person—let alone someone with Sampson's

experience as an attorney for 35 years in public and private practice, including service as an Assistant Attorney General and as General Counsel of the D.C. Department of Public Works (JA6, ¶ 5)—could reasonably believe that her purported disclosures about DCRB's accounting practices evidenced gross mismanagement or abuse of authority. And Sampson's tenure at DCRB and "training and experience" as an attorney only compound the unreasonableness of any belief that she made protected disclosures under the Act. *Taylor v. Fannie Mae*, 65 F. Supp. 3d 121, 126 (D.D.C. 2014) (evaluating objectively reasonable belief in Sarbanes-Oxley Act "based on the knowledge available to a reasonable person in the same factual circumstances *with the same training and experience* as the aggrieved employee") (emphasis added).

The Complaint makes clear that Sampson merely parroted issues raised in reports by DCRB staff and outside consultants that DCRB itself asked for. *See*, *e.g.*, JA13, ¶ 36 (Director of Internal Audit presented the results final financial risk assessment to the Executive Director, CFO, Controller and Sampson); JA14, ¶ 39 (Sampson "disseminated the final financial risk assessment to DCRB Trustees"); JA14, ¶42 (outside auditors briefed Board's Audit Committee); JA15, ¶ 45 (Sampson "continuously urged" the Executive Director and Trustees to address the accounting deficiencies). Those reports do not conclude that DCRB engaged in any wrongdoing but instead note the *potential* for errors and unauthorized payments if

better controls are not instituted. Even viewing the Complaint in the light most favorable to Sampson, it was unreasonable for her to believe that her complaints amounted to a protected disclosure.

2. Sampson Did Not Make Any Protected Disclosures About Certain Investment Manager Fees.

Sampson fares no better with her allegations that she made four protected disclosures about DCRB's investment manager fees to DCRB executives and Trustees from November 2019 through September 2021. Brief at 26-28. The gravamen of these disclosures is that DCRB was "systematically and improperly underreporting" certain investment management fees and expenses. *Id.* at 26 (citing JA18-19, ¶¶ 58, 63). She "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." *Id.* (emphasis added). She argues these disclosures evidenced gross mismanagement, gross misuse and abuse of authority. *Id.* at 27-28.

To be clear, Sampson is *not* referring to fees paid to the investment managers that invest the vast majority of DCRB's pension investments (e.g., public equities, real estate and fixed income securities). DCRB discloses those fees publicly in its

Annual Comprehensive Financial Report ("ACFR").[4] Rather, she is referring to fees that DCRB pays investment managers that manage non-traditional assets and private assets. *Id*. at 27; JA19, ¶ 62. Such investments comprise only approximately 7% of pension fund assets. *See* ACFR for Fiscal Years Ended Sept. 30, 2020 and 2019 for DCRB, at 69. As shown in the table below excerpted from a recent ACFR, DCRB has plainly disclosed that it does not report such fees because they "are often netted against investment income." *Id.* at 70. "As a result, those expenses, including performance-based fees, are not included." *Id.*

Schedule of Fees and Commissions
As of September 30, 2020

During the fiscal year 2020, the Board paid the following fees and commissions:

Expense Category	Amount (Dollars in thousands)	Percent of Fund
Investment Managers *	$ 16,881	0.188 %
Investment Administrative Expense	582	0.006
Investment Consultants	596	0.007
Investment Custodian	473	0.005
Brokerage Commissions **	656	0.007
Total	$ 19,188	0.214 %

* Table includes fees paid to traditional investment managers and some non-traditional managers. Traditional investment managers are those that invest primarily in public equity, real assets, and fixed income securities. Fees for non-traditional, private market managers are often netted against investment income. As a result, those expenses, including performance-based fees, are not included.
** Includes separate account and commingled fund relationships.

Id. (highlights added).

Nevertheless, DCRB explains in its ACFR the method used to value investments, including private investments (see below). Specifically, the section

[4] *See* JA36 ¶ 137; *see also* https://dcrb.dc.gov/sites/default/files/dc/sites/dcrb/publication/attachments/CAFR%20FY2020.FNL_.pdf.

entitled "Method Used to Value Investments" states: "The fair value of private investment funds, including private equity and private real assets, is determined using unit values supplied by the fund managers, which are based upon the fund managers' appraisals of the funds' underlying holdings. . . . A significant number of investment managers provide account valuations net of management expenses. Those expenses are netted against investment income." *Id.* at 32.

Method Used to Value Investments

Investments are reported at fair value. Securities traded on a national or international exchange are valued at the last reported sales price at current exchange rates. The fair value of private investment funds, including private equity and private real assets, is determined using unit values supplied by the fund managers, which are based upon the fund managers' appraisals of the funds' underlying holdings. Such values involve subjective judgement and may differ from amounts which would be realized if such holdings were sold. The fair value of limited partnership investments is based on valuations of the underlying assets of the limited partnerships as reported by the general partner. A significant number of investment managers provide account valuations net of management expenses. Those expenses are netted against investment income.

Id. (highlights added).

The Superior Court correctly concluded that these were not protected disclosures, for multiple reasons. First, Sampson does not cite any law, regulation or generally accepted accounting principle that requires such fees be disclosed. JA79 (citing *Ukwuani v. District of Columbia*, 241 A.3d 529, 553 (D.C. 2020)). Second, Sampson does not allege that DCRB provided misleading information or that anyone was actually misled. *Id.* Third, Sampson does not allege that the fees were excessive or unreasonable or otherwise significantly out of proportion to the benefit reasonably expected to accrue to the government. *Id.* at 80 (citing

Poindexter, 104 A.3d at 857). Sampson fails to squarely address any of these findings in her appeal.

(a) Sampson's Supposed Disclosures Did Not Evidence Gross Mismanagement.

To start, Sampson fails in her argument that, by reporting that DCRB failed to state certain investment fees, she disclosed gross mismanagement that goes to "the heart of DCRB's mission – to oversee and manage an $11 billion pension trust." Brief at 27. Scale and context matter. The fees that are the subject of the relevant communications account for roughly 0.68% of the amount managed by DCRB (*i.e.*, $77 million divided by $11.4 billion). *Id.* at 26-27. Such a small percentage of assets cannot reasonably be deemed to indicate "a substantial risk of significant adverse impact on [DCRB's] ability to accomplish its mission." *Poindexter*, 104 A.3d at 855. That relatively small amount, when viewed in the context of DCRB's balance sheet (112% funded), further indicates that Sampson's disclosure does not evidence *gross* mismanagement. Furthermore, there is no allegation that Sampson's alleged disclosure about investment fees – or anything about investment fees – actually created any risk to DCRB's ability to accomplish its mission. The Superior Court correctly drew the line between possibility and plausibility, finding that the Complaint failed to meet even the meager burden on plaintiffs under Rule 8 to launch a plausible allegation. *See Tingling-Clemmons*, 133 A.3d at 246. This is another example of Sampson disagreeing with DCRB leadership about policy. Sampson

relies on *Holbrook v. District of Columbia*, 259 A3d 78 (D.C. 2021), to support her assertion that her alleged disclosures amount to objections to unlawful discriminatory treatment and are thus not policy disagreements. Brief at 21, 28-29. Yet a disagreement over what fees should be disclosed differs significantly from reports of overt orders to treat employees differently because they filed a lawsuit against their employer. *See Holbrook*, 259 A.3d at 88. Sampson's widespread reliance on *Holbrook* is misplaced, given the incomparability of Sampson's situation to *Holbrook* plaintiffs' refusal to follow orders that they illegally retaliate against two employees who sued their employer. Indeed, this Court in *Holbrook* determined that the plaintiff-whistleblowers "refus[ed] to comply with illegal orders and disclos[ed what] they reasonably believed evinced illegal conduct." *Holbrook*, 259 A.3d at 82. Mere accounting differences simply do not compare. Sampson cannot weaponize the Act to force DCRB to do something it is not required to by any law, regulation or generally accepted accounting principles. And she cannot weaponize the Act to supplement DCRB's judgment for her own.

(b) Sampson's Supposed Disclosures Did Not Evidence Abuse of Authority.

Sampson also argues that her disclosures regarding investment fees evidence abuse of authority. Her theory is that not reporting such fees "resulted in a personal advantage to [the former] Executive Director . . ., DCRB executives and Trustees

because the financial ledgers seem more favorable by over $77 million." Brief at 28.

That logic is hard to follow. It is unclear what is meant by "financial ledgers." More fundamentally, Sampson does not explain how investment fees factor into any such ledgers. There is no allegation that investment fees paid, which are mostly deducted from investment *gains*, negatively impact DCRB's balance sheet. To be clear, private market returns are reported net of any fees. *See* ACFR for Fiscal Years Ended Sept. 30, 2020 and 2019 for DCRB, at 32. For her part, Sampson does not even allege that reporting such fees would change DCRB's 112% funded status (it would not). In any event, Sampson's complaint does not in any way substantiate the bald-faced assertion that DCRB leadership has experienced any personal advantage—as the statute requires. D.C. Code § 1-615.52(a)(6)(C). Accordingly, Sampson's disclosures regarding investment fees do not evidence any abuse of authority.

(c) Sampson's Supposed Disclosures Did Not Evidence Gross Misuse.

Sampson also argues that her investment fee disclosures evidence gross misuse. She reasons that such disclosures represent 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 spending recklessly." Brief at 28 (cleaned up).

Such conclusory statements do not support her claim. Sampson makes no allegation about what is out of proportion. As the Superior Court explained, DCRB's ACFR expressly notes that it does not include certain types of fees because they are netted against investment gains. JA18 ¶¶ 58 (referring to DCRB's "limited reporting of investment management fees and expenses"), 62 ("DCRB has chosen to only include investment fees from public market managers, thereby obfuscating the true fee burden of the investment program."); JA79. Under Sampson's theory, no amount of investment gains would make $77 million in fees appropriate. That is not how investing works. And the allegation that such fees constitute the "government spending money recklessly" has no support in the Complaint. Fees that represent 0.68% of assets cannot reasonably be deemed a reckless expenditure. In any event, Sampson contradicts herself about DCRB's awareness of these fees. Whereas she speculates that DCRB's auditor confirmed that DCRB had likely "never independently calculated or recalculated the investment managements fees paid to the private market investment managers," Brief at 30; JA14, ¶ 42, she also notes that the Risk and Compliance Director "confirmed that partnership agreements clearly laid out management fee calculations." Brief at 29; JA22, ¶ 78.

(d) Sampson Held No Objectively Reasonable Belief That Her Disclosures Evidenced Covered Wrongdoing.

As discussed above, the Act requires Sampson's belief about her alleged protected disclosures to be objectively reasonable. *Poindexter*, 104 A.3d at 854. As

to DCRB's investment fees, the complete absence of any allegation that investment fees are being misappropriated is fatal to any claim that a disinterested observer could reasonably conclude that such actions by DCRB must be "erroneous beyond debate." *Poindexter*, 104 A.3d at 856 (citation omitted). No reasonable person could find that the sundry "could's" and "potential to's" and other speculative, conclusory allegations riddled throughout the Complaint meet the threshold of gross mismanagement, gross misuse or waste of public funds, abuse of authority, or a violation of a law, rule or regulation.

Statement after statement to various DCRB executives did not convince them to see things Sampson's way. This is telling. The executives with real responsibility and a fiduciary duty for their actions in handling pension plan assets[5] and signing the DCRB's ACFR considered her advice and rejected it. This is a textbook "[m]ere difference[] of opinion between an employee and [her] agency superiors," which is not a protected disclosure. *Winder*, 905 F. Supp. 2d at 36. Because Sampson's belief that she was making protected disclosures could not have been reasonable in light of the facts known to and readily ascertainable by her, she likewise fails to plausibly allege protected disclosures as to DCRB's investment fee reporting.

[5] Sampson concedes that she is not a fiduciary with respect to pension plan assets. JA12, ¶ 31.

3. Sampson Did Not Make Any Protected Disclosures About Executive Compensation.

Sampson next argues that she made a protected disclosure to the City Council after DCRB supposedly failed to accurately disclose a former Executive Director's compensation. Brief at 31-32; JA17, ¶ 55. In testimony before the City Council, DCRB noted the former Executive Director's salary but did not note other components of her compensation such as a deferred compensation payment and pension contribution. Sampson does not allege that the City Council or anyone else *asked* DCRB to provide information about such forms of compensation, merely that Trustees testified as part of the Fiscal Year 2021 performance hearing. JA16, ¶ 49. This testimony, Sampson argues, constituted an intentional misleading of the Council and an abuse of authority because it resulted in a raise for the former Executive Director, Brief at 32, and "*may have been*" an impetus for a raise for the Trustees. JA17, ¶ 52 (emphasis added).

It is difficult to discern how Sampson's communication to the Council evidences 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. DCRB providing testimony to the City Council is not an arbitrary exercise of power but rather part of its normal operations to help the City Council provide oversight. Such testimony did not adversely affect the rights of any person. Sampson alleges that

such testimony resulted in gains (*i.e.*, a salary increase) for the Executive Director. But as the Superior Court correctly recognized, Sampson does not allege that a salary increase was unwarranted, or that the increase itself was inordinate, or that DCRB testified falsely to induce the Council to increase her salary, or that DCRB suggested to the City Council that it was disclosing to them an exhaustive list of the compensation the Executive Director received. JA80 (citing *Holbrook*, 259 A3d at 89-90) (quotation marks omitted). Indeed, the Executive Directors' total compensation is listed on DCRB's website. JA16, ¶ 50 n.5.[6]

And to the extent Sampson attempts to link the Executive Director's salary increase with an increase in salary for the Trustees, that is pure speculation. Indeed, the most that the Complaint alleges is that the "Trustees' misleading testimony *may have been* an impetus for the City Council enacting legislation to increase Trustees' compensation." JA17, ¶ 52 (emphasis added). Sampson's Complaint thus offers no basis for concluding that the City Council's decision regarding the Executive Director's salary had any correlation whatsoever to its decision regarding the Trustees' salary.

[6] *See* JA16 ¶ 50, n.5; *see also* https://dcrb.dc.gov/sites/default/files/dc/sites/dcrb/publication/attachments/Board%20Minutes%20-%20July%2023%202020%20APPROVED.pdf.

4. Sampson Did Not Make Any Protected Disclosures About Grand Jury Subpoenas.

Finally, Sampson contends she engaged in "protected activity" simply by complying with three federal grand jury subpoenas and making disclosures to her supervisors about such compliance. Brief at 34. But Sampson waived the former theory below, and the Superior Court correctly rejected the latter.

To start with the argument that Sampson actually raised below: The Superior Court correctly held that Sampson's informing DCRB management of her compliance with the subpoenas was not a protected disclosure because it did not blow the whistle on misconduct by any other employee, does not involve any misfeasance, much less gross mismanagement, waste of public funds, abuse of authority, or a violation of law. JA81 (quotation marks omitted). The Court also noted that there is no allegation that any superior attempted to prevent her from complying. *Id.* Indeed, the only allegation Sampson makes regarding her superiors and their reaction to the subpoenas is the allegation that Messrs. Clark and Hankins questioned why Sampson needed to meet with the Trustees in a closed session to discuss the subpoenas. Brief at 34. Sampson's nebulous disclosures to supervisors about her subpoena compliance, JA26, ¶ 93, do not meet any of the standards for any variety of protected disclosure: telling a supervisor that she provided information requested by the government does not disclose gross mismanagement,

gross misuse, abuse of authority, a violation of law, or any other disclosure protected by the Act.

Perhaps sensing the lack of merit in her argument to the Superior Court on this issue, Sampson now argues that her subpoena responses are themselves protected disclosures because she "disclos[ed] information that [she] reasonably believe[d] evidence[d] a violation of federal, state, or local law, rule, or regulation." Brief at 36 (cleaned up). Sampson did not make this argument to the Superior Court and thus she cannot raise it for the first time here. *See, e.g.*, *Iron Vine Sec., LLC v. Cygnacom Sols., Inc.*, 274 A.3d 328, 343 (D.C. 2022) (quoting *Thornton v. Norwest Bank of Minnesota*, 860 A.2d 838, 842 (D.C. 2004)) (internal quotation marks omitted) ("It is fundamental that arguments not raised in the trial court are not usually considered on appeal."); *Oparaugo*, 884 A.2d at 75 ("Points not raised and preserved in the trial court will not be considered on appeal, except in exceptional circumstances that are not present here.").

Even if she could raise it here, her new claim is not a protected disclosure. Sampson maintains that she "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." Brief at 36. This makes no sense. First, the mere fact of an investigation by the FBI does not "evidence[]" a "violation of law, rule, and

regulation" *by DCRB*. Indeed, the Complaint does not even allege that the DCRB was a target of any FBI investigation. Second, grand jury subpoenas likewise routinely issue for the purpose of gathering information from third parties, and again, there is no allegation that DCRB was the target of any grand jury investigation. And, third, Sampson was a practicing lawyer for more than three decades, yet she says nothing about what "law, rule, and regulation" that she both believed DCRB violated and that relate to any grand jury subpoena.

* * *

For all of these reasons, the Superior Court correctly held that Sampson did not plausibly allege that she made any protected disclosures.

B. Sampson Did Not Plausibly Allege that DCRB Took a "Prohibited Personnel Action."

The Act prohibits supervisors 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). "Prohibited personnel action" includes, for example, "recommended, threatened, or actual termination, demotion, suspension, or reprimand; . . . or retaliating in any other manner against an employee because that employee makes a protected disclosure . . . ." *Id.* § 1-615.52(a)(5)(A). "Retaliating" includes "conducting or causing to be conducted an investigation of an employee because of a protected disclosure made by the employee who is a whistleblower." *Id.* § 1-615.52(a)(5)(B)(ii).

Sampson alleges that DCRB engaged in three prohibited personnel actions as retaliation for her protected disclosures (1) being placed on leave; (2) being investigated; and (3) hostile work environment. The Superior Court held that Sampson adequately pled one of these (*i.e.*, being placed on administrative leave) but found that her disclosures were not a contributing factor for DCRB taking such personnel action. JA81-84. Accordingly, the Superior Court did not analyze whether Sampson sufficiently alleged the other two. JA82. This, Sampson alleges, "adversely affected the Court's causation analysis." Brief at 39.

The Superior Court's analysis did not prejudice Sampson. The Complaint fails to plead plausibly that DCRB's investigation of Sampson was a prohibited personnel action or that she endured a hostile work environment. And although Appellees do not dispute that Sampson at least alleged that she was placed on leave because of her supposedly protected disclosures, she fails to plausibly allege that DCRB took *any* prohibited actions in response to any such disclosures. *Infra* § I.C.

1. Sampson Did Not Plausibly Allege That the Investigation Was a Prohibited Personnel Action.

Sampson has failed to plausibly allege that DCRB's investigation of her was motivated by any protected disclosure on her part. In fact, the Complaint, on its face, explains DCRB's reasoning for conducting the investigation and specifically mentions the wrongdoing at issue, noting that the investigation stemmed from her failure to disclose "to DCRB's Board of Trustees important material information

concerning agency investments and operations." JA27, ¶ 103. As the Superior Court correctly noted, the Complaint does not dispute that DCRB provided a legitimate explanation for the investigation. *See* JA82 ("Ms. Sampson does not dispute that DCRB's stated reason the investigation is unrelated to the misfeasance alleged in her complaint or that DCRB had a legitimate reason to investigate this matter."). An investigation commenced for reasons wholly unrelated to any disclosures cannot constitute a basis for liability under the Act. As such, Sampson failed to plausibly allege that DCRB's investigation of her misfeasance was retaliatory.

2. Sampson Did Not Plausibly Allege a Hostile Work Environment.

Sampson similarly failed to plausibly allege a hostile work environment, and thus was not "prejudiced" by the Superior Court's decision not to consider that allegation. To sufficiently allege a hostile work environment claim, the Complaint must allege that (1) Ms. Sampson "is a member of a protected class [here, whistleblowing employees as defined by the Act], (2) that [she] has been subjected to unwelcome harassment, (3) that the harassment was based on membership in the protected class, and (4) that the harassment is severe and pervasive enough to affect a term, condition or privilege of employment." *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 888 (D.C. 2003) (quoting *Daka v. Breiner*, 711 A.2d 86, 92 (D.C. 1998)). A workplace that is merely "not ideal" or "at times unpleasant" does not meet the "demanding standards" for a hostile work environment claim. *Bowyer v.*

District of Columbia, 910 F. Supp. 2d 173, 192 n.14 (D.D.C. 2012), *aff'd*, 793 F.3d 49 (D.C. Cir. 2015); *see also Stewart v. Evans*, 275 F.3d 1126, 1134 (D.C. Cir. 2002) (in Title VII context).

Sampson argues that a "campaign of harassment, retaliation, and persistent adverse actions against [her] during the period of her disclosures" serves as a "prohibited personnel action." Brief at 41. But that allegation fails to allege that the fourth element is satisfied—*i.e.*, that this purported "campaign of harassment" was so "severe and pervasive" that it affected a "term, condition or privilege of employment." She alleges that DCRB "dismantled" her legal department. JA13, 29, 31-32, ¶¶ 33, 109, 117. Yet, it is well within the Executive Director's discretion to reorganize the structure of DCRB by placing an investment-compliance department (staffed by non-lawyers) under the Chief Investment Officer rather than the General Counsel. The reorganization (which affected a number of employees beyond Sampson) did not affect Sampson's title or pay grade, and was never couched as a reflection on her performance. JA32, ¶ 117. Particularly given that this department did not even exist until ten years into Sampson's tenure at DCRB, it is hard to see how a change to its organization could have constituted "severe and pervasive" harassment that affected term, condition or privilege of Sampson's employment. JA18, ¶ 56.

The Complaint also baldly asserts that Sampson faced retaliation when her "role, responsibilities, budget, and resources" were "diminish[ed]." JA34, ¶ 129. But "changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes." *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1557 (D.C. Cir. 1997) (collecting cases); *see also Jackson v. Dist. Hosp. Partner, L.P.*, 2022 WL 3910501, at *8 (D.D.C. Aug. 31, 2022) ("[A]n actionable event is one that would affect the employee's position, grade level, salary, or promotion opportunities.") (cleaned up). This unsupported and vague assertion is thus insufficient to plead conduct that is severe and pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Finally, Sampson's assertion that Trustees "prohibited [her] from participating in closed Board meeting discussions," JA30, ¶ 110(e), likewise does not satisfy the "severe and pervasive" standard: DCRB Trustees have discretion over how to run their meetings, and Ms. Sampson is not entitled, nor does DCRB's governance structure require the General Counsel to attend, every Trustee meeting.

For all these reasons, Sampson failed to sufficiently plead the elements of a hostile work environment.

C. The Superior Court Correctly Held That Sampson Did Not Plausibly Allege a Causal Connection Between Any Alleged Protected Disclosure and Her Placement on Administrative Leave.

The Superior Court also correctly held that the Complaint fails to proffer any facts to establish the third prong of a *prima facie* whistleblower claim, *i.e.*, that any protected disclosure was a contributing factor to a prohibited personnel action. "'Contributing factor' means 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). When a plaintiff does not plausibly allege a causal connection between her protected disclosures and alleged retaliation, she fails to establish the required "contributing factor" prong. *Black v. District of Columbia*, 134 F. Supp. 3d 255, 263 (D.D.C. 2015). "[T]emporal proximity must be very close" to establish causation between protected activity and an adverse employment action. *Nicola v. Wash. Times Corp.*, 947 A.2d 1164, 1175 (D.C. 2008) (cleaned up).

Sampson failed to plausibly allege the contributing factor requirement for several reasons. First, all but three of her alleged disclosures are simply too remote from her placement on administrative leave. And even as to the other three, Sampson failed to plausibly allege that those disclosures had any connection to Balestrieri's decision to place her on leave—indeed, she does not claim that Balestrieri even *knew* about two of those disclosures, and does not claim that the third disclosure shows any connection between protected speech and Balestrieri's

decision weeks later. Second, Sampson also failed to plausibly allege a direct causal link between any of her disclosures and her placement on leave.

1. Temporal Proximity and Decision Maker Awareness

The Superior Court correctly held that the temporal proximity between Sampson's disclosures and her placement on leave was too remote to support a causal connection. Moreover, the decision maker responsible for Sampson's placement on leave had no knowledge of Sampson's protected disclosures.

Sampson failed to plausibly allege temporal proximity. There is "a point in time where temporal proximity becomes too remote, without more, to permit an inference of causation . . . ." *Walker v. District of Columbia*, 279 F. Supp. 3d 246, 277 (D.D.C. 2017). Sampson's allegations do not provide the requisite "more." Sampson, like the plaintiff in *Payne*, offers only "evidence that [she] made [an alleged] protected disclosure and that at a later time [she] suffered" placement on administrative leave. *Payne v. District of Columbia Gov't*, 722 F.3d 345, 354 (D.C. Cir. 2013) ("The fact that one event precedes another does not in itself evidence causation."). And for the purposes of this analysis, Sampson must have specifically alleged that "the decision-maker[ ] responsible for the adverse action"—that is, Balestrieri, who made the decision to place Sampson on leave—"had actual knowledge of" Sampson's supposedly protected activity.". *Coleman*, 794 F.3d at 64; *cf. McFarland v. George Washington Univ.*, 935 A.2d 337, 357 (D.C. 2007)

(same, in D.C. Human Rights Act context); JA25, ¶ 91 (alleging that "Mr. Balestrieri [] placed Ms. Sampson on enforced administrative leave").

The Complaint claims a number of alleged protected disclosures that span from December 2019, JA17, ¶ 53, through September 16, 2021, JA22, ¶ 78. It is difficult to discern a precise number because the Complaint identifies some particularly, *see*, *e.g.*, JA17, ¶ 53 (December 2019 protected disclosure to OCFO) while others are described generally. *See*, *e.g.*, JA25, ¶ 92 (protected disclosures "throughout the FBI Investigation").[7] For purposes of analyzing whether a complaint sufficiently states a claim, however, the focus must be on the particular allegations. *See, e.g.*, *Tingling-Clemmons*, 133 A.3d at 245 ("[The complaint] therefore must 'allege the elements of a legally viable claim, and its factual allegations must be enough to raise a right to relief above the speculative level.'") (cleaned up).

Here, all but three of the particularly pled alleged protected disclosures occurred more than four months before October 4, 2021 (when Sampson was placed

[7] Further complicating things, Sampson is not consistent in how she identifies her alleged protected disclosures. Whereas her opposition to the motion to dismiss claimed there were "at least nine disclosures under the Act" and then addressed just nine, the alleged disclosures in her appellate brief do not match up with the Complaint or the opposition to the motion to dismiss. Sampson cannot rely on arguments not raised below. *Iron Vine Sec., LLC v. Cygnacom Sols., Inc.*, 274 A.3d 328, 343 (D.C. 2022).

on paid administrative leave). JA25, ¶ 91.[8] The temporal gap between all alleged disclosures (except the Final Disclosures, as defined below) is too attenuated to constitute a violation of the Act. This Court has determined that gaps of eight months, *Payne*, 722 F.3d at 354, and even four months, *Johnson v. District of Columbia*, 935 A.2d 1113, 1120 (D.C. 2007), between the protected disclosures and the adverse personnel action are insufficient to meet the "contributing factor" prong. *See Winder*, 905 F. Supp. 2d at 35 ("[C]omplaints spread out over months or even years are insufficient to establish a causal connection"). These disclosures "exceed[] the two-thirds of a year held inadequate in *Payne*" and/or "the four months rejected in *Johnson*," and therefore cannot show the required temporal proximity. *McCormick v. District of Columbia*, 752 F.3d 980, 985 (D.C. Cir. 2014).

That leaves three disclosures: (i) a disclosure regarding investment fees in July 2021, JA23, ¶ 81; (ii) a disclosure to Balestrieri on September 8, 2021, JA25, ¶¶ 88 – 90, 93; and (iii) a disclosure to the Audit Committee on September 16, 2021, JA22, ¶ 78 (collectively, "Final Disclosures"). These allegations cannot bridge the causal gap, because Sampson fails to plausibly allege that those disclosures had anything to do with her placement on leave by Balestrieri—again, the relevant decision maker. *Coleman*, 794 F.3d at 64; *McFarland*, 935 A.2d at 357.

[8] These disclosures occurred on: December 2019 (JA13-14, 17, ¶¶ 34-39, 53); November 2019 (JA18-19, ¶¶ 58-59, 62-63); February – March 2021 (JA20-21, 23, ¶¶ 70, 72, 83); June 2021 (JA23, ¶ 80); and Spring 2021 (JA17, ¶ 55).

Balestrieri did not begin work at DCRB until September 7, 2021. JA34, ¶ 125. Sampson does not allege that he became aware of any disclosures that occurred before that date, including the July 2021 disclosure regarding investment fees. The Complaint thus fails to plead "actual knowledge" on his part as to that disclosure (or any of the earlier disclosures that, as explained above, fail the temporal-proximity requirement).

Nor does the September 8 disclosure suffice. All Sampson alleges is that she had "an introductory meeting" with Balestrieri, that he "communicated with [her] in a hostile manner" and that he "misquoted [her] on her recommendation to limit further distribution of the subpoena to DCRB staff." JA25, ¶ 89. These conclusory allegations do nothing to plausibly link any protected disclosure by Sampson to Balestrieri's decision placing her on leave. Sampson does not actually claim that she made any protected disclosure at this meeting, or that she discussed with Balestrieri any past such disclosure. Brief at 34-35; JA25, ¶ 89. And despite alleging that Balestrieri was "hostile" and "misquoted" her with respect to her "recommendation to limit further distribution of the subpoena," JA25, ¶ 89, she does not actually allege *what* Balestrieri said with respect to the subpoena's distribution, or how anything that he said at this meeting was linked to any supposedly protected disclosures Sampson had made. This "introductory meeting" provides no plausible

basis for concluding that Balestrieri placed Sampson on leave because of any protected disclosure she had made.

Finally, the September 16 disclosure does not help Sampson, either. She alleges that during an Audit Committee meeting on that day, she "expressed concerns to DCRB Trustees" that financial statements presented by the CFO were inaccurate. JA22, ¶ 78. But Sampson fails to plead that Balestrieri attended or ever heard about Sampson's statements at the Audit Committee meeting. *Id.* This disclosure therefore cannot provide the needed causal link.

Accordingly, Sampson cannot show a sufficient causal connection between her placement on leave and any of the disclosures at issue here.

2. Direct Causation

Sampson fails to allege how purported statements by DCRB Trustees and employees serve as any kind of link between her alleged disclosures and her ultimate placement on administrative leave. Sampson attempts to short-circuit the causation analysis by pointing to cases in which someone was threatened with repercussions because of protected disclosures, and thereafter suffered those repercussions. *See, e.g.*, *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 178 (3d Cir. 1997) (supervisor told employee "that she was not on 'the management track' *because of*" her complaints concerning her salary, her "campaigning on women's issues," and her handling of a female employee matter) (emphasis added); *Holbrook*, 259 A.3d

at 93 (employer "threaten[ed] to fire employees *if they refuse[d] to retaliate* against two colleagues, and then fire[d] four employees who refused to do so") (emphasis added). Here, by contrast, Sampson fails to allege a single instance in which anyone at DCRB threatened to take action against her *because of* her disclosures. Sampson's cherrypicked allegations on this point relate to concerns that Sampson was not adequately performing her job or more general disagreements with Sampson's approach to her role. *See, e.g.*, JA26, ¶ 98 ("Mr. Balestrieri accused Ms. Sampson of not being a team player because she questioned the . . . HR promotion process . . . ."); JA31, ¶ 115 (referring to Sampson as a "troublemaker," without further detail). Further, none of these alleged statements constituted threats against Sampson or her employment. And the only purported threat of termination is alleged against Mr. Clark, a Trustee, JA29, ¶ 110(a), who has no authority to place DCRB employees on leave and against whom Sampson makes no allegation of involvement in the leave decision. Such authority lies with the Executive Director. *See* D.C. Mun. Regs. tit. 7, § 1502.1 ("Assignments to, removal from, and the remuneration of the staff of the Board shall be determined by the Board's appointed Executive Director . . . ."); D.C. Code § 1-711(g)(2)(C) (recognizing Executive Director's authority to "manage the day-to-day operations" of DCRB).

* * *

The Superior Court correctly dismissed Sampson's claim under the Whistleblower Protection Act.

II. Because Sampson Never Sought Leave to Amend—Even When Expressly Invited to Do So by the Superior Court—She Is Entitled to No Such Relief from this Court.

Sampson asks this Court to hold that she should get a second chance to cure the myriad deficiencies in her Complaint. That request can be quickly rejected. After all, this is the first time in this litigation that Sampson is making that request. She never filed a motion for leave to amend before the Superior Court, despite that court's *express invitation* to do so. Three weeks after the Superior Court issued its Order dismissing the Complaint, Sampson filed a motion seeking a status conference for purposes of "set[ting] a briefing schedule for plaintiff's intended motion to amend the complaint." Pl.'s Opposed Motion for Status Conference at 1. The Superior Court denied the motion for a status conference and invited Sampson to simply file her "intended" motion for leave to amend. *See* JA3 (Docket entry: "Order Denying Motion for a status conference Entered on the Docket Signed by Judge Epstein on 5 25 22."). But Sampson never filed such a motion.

Sampson forfeited any argument about the Superior Court's decision to dismiss the case without considering her nonexistent amended complaint. "[U]nder well-established law, a party forfeits a claim by failing to raise it below when the party 'knew, or should have known' that the claim could be raised." *Keepseagle v.*

Perdue, 856 F.3d 1039, 1054 (D.C. Cir. 2017) (quoting *Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071, 1091 (D.C. Cir. 1984)). Sampson thus forfeited the ability on appeal to contest the court's dismissal of her Complaint with prejudice and cannot now seek from this Court the very relief she declined to seek below.[9] Accordingly, this Court should affirm the Superior Court's dismissal of Sampson's Complaint with prejudice.

CONCLUSION

For the foregoing reasons, Appellees DCRB and Mr. Clark respectfully request that the Court affirm the Superior Court's dismissal of the Complaint and find that the Superior Court properly dismissed the Complaint without granting leave to amend.

[9] Each of the cases Sampson cites in support of her argument involves a court's decision not to grant leave to amend the complaint when faced with a motion for leave to amend under Rule 15(a) or otherwise for reconsideration under Rule 59(e)—not a situation as here, where the court dismissed the complaint with prejudice and invited plaintiff to seek leave to amend, after which plaintiff filed no such motion.

Dated: October 19, 2022

Respectfully submitted,

<u>*/s/ Miguel Eaton*</u>

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 19, 2022, I filed the foregoing Brief of Appellees with the Court via the District of Columbia Court of Appeals electronic filing and service system (EFS), causing the following filings to be served on all counsel of record:

- Brief of Appellees
- Redaction Certificate Disclosure Form.

Dated: October 19, 2022

Respectfully submitted,

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