22-CV-25

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

ZURI BERRY

***Appellant*,**

v.

AMERICAN UNIVERSITY, CURRENT PUBLICATION, SASHA FERNANDEZ, SASHA-ANN SIMONS, LETESE' CLARK, ALANA WISE, KAREN EVERHART, and JULIE DRIZEN

***Appellees*.**

ON APPEAL FROM JUDGMENTS OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CASE NO. 2020 CA 004366 B; CASE NO. 2021 CA 002726 B

APPELLANT'S CORRECTED CONSOLIDATED OPENING BRIEF

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JURISDICTIONAL STATEMENT

This is a consolidated appeal from Orders of Judge Fern Flanagan Saddler and Judge Maurice A. Ross of the Superior Court of the District of Columbia ("D.C. Superior Court", "Superior Court", or "Trial Court") in the matters 2020-CA-004366-B ("Berry I") and 2021-CA-002726-B ("Berry II"). Appellant Zuri Berry (hereinafter "Appellant" or "Berry") timely filed Notices of Appeal in Berry I on January 13, 2022, appealing the Trial Court's December 28, 2021 Order Granting Appellees American University, Current Publication, Sasha Ferandez, Sasha-Ann Simons, Letese' Clark, Alana Wise, Karen Everhart, and Julie Drizen's (hereinafter individually "Appellee" and collectively "Appellees") December 28, 2020 Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, ("D.C. Anti-SLAPP Act") or in the alternative, pursuant to D.C. Super. Ct. Rule 12(b)(6), JA0615-616 and April 4, 2022, appealing the Trial Court's March 9, 2022 Order granting Appellees' January 11, 2022 Petition for Attorney's Fees and Expenses, JA0617-618. Appellant further timely files Notices of Appeal in Berry II on April 4, 2022 appealing the Trial Court's March 14, 2022 Order granting Appellee American University's November 12, 2021 D.C. Anti-SLAPP Act Special Motion to Dismiss or in the Alternative, pursuant to D.C. Super. Ct. Rule 12(b)(6), JA1197-1198, and May 16, 2022 appealing the Trial Court's May 12, 2022 Order Granting

Appellee American University's March 24, 2022 Contested Petition for Attorneys' Fees and Costs, JA1199-1200.

STATEMENT OF THE ISSUES

I. Whether the Superior Court erred in granting Appellees' Berry I Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act or in the Alternative, Pursuant to D.C. Super. Ct. Rule 12(b)(6) in which the Court permitted the Appellees to submit multiple declarations and denied Appellant's request for targeted discovery and dismissed Appellant's claims of defamation, invasion of privacy, and tortious interference with current and prospective business or contractual relationships; II. Whether the Superior Court erred in granting Appellees' Berry I Petition for Attorney's Fees and Expenses; III. Whether the Superior Court erred in granting Appellee American University's Berry II Contested Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act or, in the Alternative, Pursuant to D.C. Super. Ct. Rule 12(b)(6) in which the Court dismissed Appellant's claims of race and sex discrimination under the D.C. Human Rights Act, D.C. Code § 2-1401 *et seq*., ("DCHRA") defamation, invasion of privacy, and false light.; and IV. Whether the Superior Court erred in Granting Appellee American University's Berry II Contested Petition for Attorneys' Fees and Costs.

STATEMENT OF THE CASE

Appellant Zuri Berry, an African American male and senior-level newsroom manager, was employed at WAMU, a radio station owned by Appellee American University, in January 2019 as a Senior Managing Editor in the newsroom. On July 20, 2020, Current, an editorial publication of the American University School of Communication, published an article titled, "WAMU Licensee Investigates Editor Blamed for Departures of Women of Color," citing anonymous sources, which identified Berry and included a photograph of him, written by Appellee Sasha Fernandez, and Editorial Intern. JA0647, JA0037. In the article, Berry was accused of being the sole reason for the departure of four women of color from WAMU. On October 15, 2020, Appellant filed a four-count complaint against Appellees American University, Current Publication, Sasha Ferandez, Sasha-Ann Simons, Letese' Clark, Alana Wise, Karen Everhart, and Julie Drizen for claims of defamation, invasion of privacy and false light, and tortious interference with current and prospective business or contractual relationships. JA0023-50. Appellant was terminated in January 2021, and filed Berry II in August 2021, alleging violations of the DCHRA among other claims. Both claims were dismissed under the D.C. Anti SLAPP statute and attorney's fees were awarded to the Appellees.

STATEMENT OF FACTS

Appellant Zuri Berry is a well-qualified, experienced, African American, senior-level newsroom manager. JA0637. Berry served as the President of the Sacramento Association of Black Journalists, Vice President of the Boston Association of Black Journalists, and Editor of the National Association of Black Journalists Journal. JA0637. Berry is not a public figure and began employment at WAMU in January 2019 as the Senior Managing Editor in the newsroom. JA0637, JA0025. WAMU is a radio station owned by Appellee American University. JA0637, JA0025. As the Senior Managing Editor, Berry was second in charge in the local newsroom and he reported to Jeffrey Katz, the news director and head of the department, who reported to the Interim Chief Content Officer, Monna Kashfi, who reported to J.J. Yore, WAMU's General Manager, until Mr. Yore left and Ms. Kashfi began reporting to Seth Grossman, Vice President of People and External Relations and Chief of Staff for the Office for the President. JA0637, JA0025. Andi McDaniel was previously the Chief Content Officer but resigned after taking maternity leave in 2020. JA0638, JA0026. In 2020, there were approximately thirty people in the newsroom department and eighty-two people in the content department. JA0638, JA0026. Berry supervised a staff of four to six women and most of the women were people of color and reporters. JA0638, JA0026. Over the first eighteen months of

his employment, Berry interacted with many employees across several departments at WAMU and was highly regarded for his professionalism and received an Outstanding performance evaluation after his first year of employment. JA0638, JA0026. Berry was the senior managing editor of WAMU at American University from January 2019 until he was terminated in January 2021. JA0638. He has a bachelor's degree in journalism from California State University, Chico (2007), and a master's degree in business administration from Queens University of Charlotte (2020). JA0638. Before joining WAMU, Berry was the managing editor for news and digital at WFAE in Charlotte, North Carolina, the deputy managing editor for news and multimedia at the Boston Herald, the manager of web content at FOX 25 in Boston, a staff writer and content producer for the Boston Globe's Boston.com, and a staff writer and online community manager for The Union newspaper in Grass Valley, California. JA0638. As the senior managing editor at WAMU, Berry had several direct reports, including reporters and producers, and including Appellee Letese' Clark, a producer/editor, and an African American female; Dominique Scarbrough, a reporter; Alana Wise, a fellow for the "Guns & America" program and an African American female; Jenny Gathright, a National Public Radio ("NPR") exchange reporter; Esther Ciammachilli; and Victoria Chamberlin. JA0638; JA0026. Mr. Berry later hired Ashley Lisenby, an African American female, for a

producer/editor position. JA0026. Berry also provided supervision over part-time reporters and editors, interns, and NPR exchange reporters including Barbara Sprunt, and Maureen Pao. JA0638. During his tenure at WAMU, all of Berry's direct full-time reports were women and he was always professional in his interactions with all staff, and never raised his voice nor yelled nor used profanity nor otherwise acted inappropriately. JA0638; JA0026. Berry also spearheaded the hiring of Ms. Lisenby, Ms. Gathright, and former WAMU reporter Daniella Cheslow, and was directly involved in the hiring of Ms. Chamberlin. JA0638.

American University is "the fifth largest nongovernmental employer in [Washington] D.C." JA0639. WAMU is a popular National Public Radio affiliate that has suffered from years of bad publicity about its management and operations ("turmoil at the station.") JA0639. When Berry started at WAMU, it quickly became apparent that staff members were upset with disarray in the newsroom because of turnover and departures. JA0639. Specifically, he was asked to be regularly present in the newsroom by reporters to deal with a reoccurring bottleneck in the editing process. JA0639. As Mr. Katz shrugged off Berry's reports of problems in the newsroom, it gave him the sense that employees at WAMU who were brought into the newsroom were having different experiences than their expectations of their roles. JA0639. Mr. Katz instructed Berry, through regular conversations as well as

during the hiring process, to focus on boosting daily news content at WAMU. JA0639. This was Berry's top priority, as Mr. Katz explained to him, but WAMU staff members expressed their misgivings about their roles and how they differed from their desired work. JA0639. An emphasis on general assignment and daily news reporting, which were newsroom-wide goals adopted in 2018 before his arrival, was widely despised and some staff members expressed open contempt for contributing to daily news. JA0639. This led to tension in the newsroom for Mr. Katz and Berry and many staff members, particularly those that reported to Gabriel Bullard, frequently missed their performance goals for daily news contributions and online news stories. JA0639.

As one of the senior most Black employees at WAMU, Berry was in a unique role. JA0640. This role included being a member of the diversity, equity, and inclusion committee ("DEi Committee") at WAMU. In his role on the DEi Committee, Berry either participated in or was aware of personnel issues that affected the diversity of the station. JA0640. It was common for Berry to hear complaints about long-standing issues at WAMU, including the dismissal of Black employees in non-content roles, the departures of several Black employees on the "IA" show, in the WAMU content department over the course of 2019, and past complaints of how management mistreated people of color. JA0640. It was Berry's

impression that management had done a poor job of retaining journalists of color since before his arrival in January 2019, including the short tenure of former news director Alicia Montgomery. JA0640. Berry, with other members of the DEi Committee at WAMU, wrote a staff-wide email that expressed the station's support for addressing matters of diversity and supporting staff. JA0640. Later, in 2020, the DEi committee called on the station general manager J.J. Yore, the focus of several complaints, to hold a staff-wide meeting to foster a discussion about the deaths of Black men and women at the hands of police, which he agreed to. JA0640. At the meeting, Berry relayed to the staff that several people of color in the newsroom had confided to him that they were struggling with focusing on work given the racial reckoning underway and that they had all, in some way or another, requested more opportunities to discuss these issues with more people. JA0640. It was an emotional meeting for WAMU employees as many Black staffers shared stories about how these deaths were affecting them. JA0640.

One employee Berry supervised was Letese' Clark and he began working with Ms. Clark in earnest as they sought to better understand the WAMU newsroom, and she sought to better understand the infrastructure behind public radio. JA0642. Ms. Clark was the producer for the afternoon broadcast and to get on the same page and build a rapport, Berry scheduled weekly meetings with her where he would regularly

take her out to lunch and pay for her meals as they discussed workplace issues. JA0026; JA0642. They would talk about the different dynamics of the newsroom, some of the frustrations that come from a big newsroom, the difference between public media and corporate media, and what his expectations of her were. JA0642. It was through these conversations with Ms. Clark that Berry outlined what he hoped she would achieve as a news producer and editor, to bring new story ideas to the newsroom's 9:00 a.m. and 2:00 p.m. meetings, to contribute reporting on matters that could be reasonably done from the office, to occasionally produce on-air reports, secure interview guests, to contribute online news reports, and help program the station's afternoon and morning newscasts. JA0642. Berry repeated these expectations to Ms. Clark on multiple occasions, but as early January 2019, Ms. Clark became insubordinate, unproductive, and acted unprofessionally to both Berry and her colleagues and demonstrated insubordinate behavior and was unproductive and unprofessional. JA0026; JA0642. Ms. Clark responded to Berry's inquiries and questions in a curt and disrespectful manner in front of other employees; complained constantly about Berry to other employees; spent time at her desk watching Netflix and reading books instead of working; skipped mandatory meetings to get food or lunch and took an afternoon off to get a haircut; and changed her work schedule and days and times she would be at work without requesting approval from Berry.

JA0026, JA0642. Berry documented the performance issues and attempted to address the issues with Ms. Clark and later brought these issues to the attention of his supervisor and Human Resources. JA0027, JA0642. The more Berry attempted to engage Ms. Clark to attempt to get her to become more responsive and productive, however, the less she worked. JA0027, JA0642. Specifically, Ms. Clark routinely skipped 2:00 p.m. staff meetings, which were designed to get the ATC producer up to speed for the afternoon newscasts. JA0027. This was unacceptable for Berry and Mr. Katz, and Berry told her that attendance at these meetings was not optional for her. JA0027. Berry spoke with Mr. Katz about how to move forward with Ms. Clark and Mr. Katz appealed to him to try and make things work and to adjust his style. JA0643. Berry proceeded to change his approach with Ms. Clark by limiting the number of face-to-face interactions with her outside of their scheduled meetings. JA0643. Ms. Clark, however, began skipping other meetings and canceled one-on-one meetings with Berry. JA0027; JA0643. On her Outlook calendar, Ms. Clark would block off her entire day so she could avoid meetings that required her presence, and on several occasions, Ms. Clark would leave without letting Berry or anyone else know when she would return including an instance in which she left work to get a haircut. JA0027. Ms. Clark would watch Netflix or read books at her desk during work hours instead of doing her work. JA0027. Even more importantly,

Ms. Clark did not contribute ideas for stories or interviews. JA0027. Ms. Clark had taken to brushing Berry off when he came to speak with her and check on stories and discuss other ideas. JA0643. She became increasingly rude and flippant, and Berry documented her missed meetings and conversations with her. JA0643.

Ms. Clark's performance review accurately reflected these issues and her overall hostility toward Mr. Berry and others. JA0028. It also reflected an unspoken truth: that she was disparaging Berry to other staff members. JA0028. Berry discussed these issues with Mr. Katz and Genevieve Croteau, the Human Resources representative. JA0028. Ms. Clark also had difficulties working with her colleagues and was one of two producers/editors on Berry's team, and she refused to engage with the other, Ashley Lisenby, in a meaningful way. JA0028. When Ms. Lisenby was hired as the morning producer/editor, Berry asked both of them to meet each day for a handoff, but after a couple of months, it became clear that Ms. Clark was not participating in this effort. JA0028. This alarmed Mr. Katz and Berry and Mr. Katz suggested that they turn this handoff into a formal meeting which he or Berry would attend. JA0028. Berry took on the bulk of these meetings, which turned into an 11:45 a.m. standup for the three of them (others would join voluntarily). JA0028. The same issues arose for Ms. Clark in these meetings: she did not contribute ideas or make suggestions for interviews, and she spoke very little. JA0028. Mr. Katz saw

this, as did others and Berry continued to try and address this issue with her. JA0028. There were other incidents that raised alarms for Berry including an incident in which Berry went to her desk to speak to Ms. Clark, she refused to acknowledge his presence and gave him the silent treatment. JA0028. Berry also attempted to engage Ms. Clark in a conversation in which Berry had to reiterate the importance of her role and why she needed to be available for the afternoon broadcast for which she was responsible. JA0028.

In July 2019, following her performance review, Ms. Clark was angry with Berry, and appealed to Mr. Katz. JA0028. Mr. Katz later asked Berry to change some of the scores in her review, and while Berry believed that his comments were accurate, he agreed to change some of the comments in her review. JA0028. Mr. Katz also asked Berry to try and make things work with Ms. Clark. JA0029. A couple of months later, Ms. Lisenby came to Mr. Katz and Berry and threatened to quit. JA0029. Ms. Lisenby was upset with the toxic environment after only five months in the job and specifically felt that the reporting staff was hostile and unwelcoming and that her role was confusing. JA0029. This was a difficult conversation for all involved because Ms. Lisenby had been a great contributor. JA0029. In the same meeting, Ms. Lisenby also pointed to another problem: Ms. Clark was not communicating with her and was unhelpful. JA0029. Ms. Clark ended her

employment in February 2020. JA0029. Before Ms. Clark ended her employment, she informed Mr. Katz that she was leaving the station and refused to speak with Berry about her departure. JA0029. Mr. Katz was alarmed by this and he met with Berry, and they discussed the numerous actions they had taken to accommodate Ms. Clark, including: 1) Berry altering his approach with Ms. Clark and providing more written communication and fewer face-to-face interactions and Berry changing his style of communication with her; 2) Berry starting a daily memo, at Ms. Clark's suggestion, so she could be informed of their morning meeting deliberations and be prepared when she started her day; 3) Berry initiating an 11:45 a.m. meeting to facilitate more communication between Ms. Clark, Ms. Lisenby, Mr. Katz, and himself; and 4) Berry offering to change Ms. Clark's hours back to 9:00 a.m. to 5:00 p.m., after switching to 11:00 a.m. to 7:00 p.m. when Ashley Lisenby was hired, but Ms. Clark declined. JA0029.

On June 27, 2020, Berry met with Ms. Clark, hoping to clear the air between them. JA0643. Ms. Clark laid a series of angry charges in Berry's lap and Berry was taken aback by her anger. JA0643. He was also confused about her criticism of their communication and his management of her. JA0643. Berry asked her more about this and noted their different styles, his having a preference to talk and her reluctance too. JA0643. Prior to their meeting, she had canceled their previous two meetings

where some of these issues could have been addressed. JA0643. Ms. Clark was friends with Appellee Sasha-Ann Simons, another reporter at WAMU, and Alana Wise, a former fellow. JA0030, JA0644. During her employment, Ms. Clark would huddle in senior editor Gabe Bullard's office with Ms. Simons and gossip about Berry. JA0030, JA0644. Ms. Clark's assigned workspace was in close proximity to two reporters: Elly Yu, an Asian American female, and Jenny Abamu, an African American female. JA0030, JA0644. These women did not report to Berry and later left their positions for elevated jobs or roles. JA0030, JA0644. It was reported to Berry that the two female reporters stated in their exit interviews that a toxic work environment was a factor in their decision to end their employment. JA0030, JA0644.

Berry also supervised Appellee Alana Wise through her editor. JA0643. Ms. Wise was the Guns & America ("G&A") reporter in the WAMU newsroom, a grant-funded position and always had an assigned editor in the WAMU newsroom under the supervision of Berry and a G&A editor. JA0030. Ms. Wise was supposed to split her time, 80/20, between the two with the majority going to G&A. JA0030. During her tenure, Ms. Wise had two editors for G&A: Jeremy Bernfeld, the director of the program, and AC Valdez, a senior editor. JA0030. Ms. Wise was already employed at WAMU in January 2019 when Berry began employment. JA0031. When Berry

started at WAMU, Mr. Katz warned Berry that Ms. Wise "needed a lot of work" and that he had not had enough time to manage her. JA0031, JA0643. Ms. Wise had serious performance problems, including a failure to produce stories with the required frequency and misuse of WAMU's credit card. JA0643. The WAMU management team, including Berry, initiated disciplinary action against Ms. Wise with the issuance of a September 2019 Expectations Memorandum, followed by a period of close monitoring. JA0644. American University Human Resources personnel Genevieve Croteau, Mr. Bernfeld, and Berry all determined that they would wait to talk with Ms. Wise when she returned. JA0032. They recognized that Ms. Wise was dealing with the loss of a family member and did not want to offend her again. JA0032. When Ms. Wise did return a few weeks later, Berry tried to be honest with her and said to her that it was important that they continue to communicate and that he understood what she was going through. JA0032. It was a brief conversation and Berry later learned that this was part of the investigation into his behavior and conduct in the newsroom in which Ms. Wise pointed to this contact and said Berry had allegedly done something wrong. JA0032. By January 2020, Berry received new complaints about Ms. Wise from several people. JA0034. AC Valdez expressed his frustration with Ms. Wise to Andi McDaniel and Jeffrey Katz. JA0034. A key project had almost been scrapped because Ms. Wise was taking too

long to deliver, and another member of the G&A team had also complained about Ms. Wise lying to her. JA0034. Monna Kashfi complained to Andi McDaniel about an appearance Ms. Wise had on the Kojo Nnamdi Show in which Ms. Wise was uncommunicative beforehand and ill-prepared. JA0034. Work performance problems with Ms. Wise continued into 2020, when on February 21, 2020, then-Chief Content Officer Andie McDaniel sent a message to Berry and Senior Editor AC Valdez complaining about Ms. Wise's lack of accountability and professionalism. JA0644. This led to a meeting invite for February 21, 2020 from Andi McDaniel to discuss the situation. Ms. McDaniel sent the following message:

> Zuri & AC:
>
> It's come to my attention recently that we're still facing ongoing performance issues with Alana Wise. Among the issues that have come up are: 1) her lack of accountability for her whereabouts-not replying to email or Slack and 2) her unprofessional handling of a recent Kojo performance (in which she was unreachable until just before the show went on air¬ a show that also included the police chief)
>
> I know the dynamics of the G&A partnership complicate this situation, but I want to be sure we're still actively holding her accountable and documenting issues. Ccing Jeffrey and Jeremy, both of whom I've spoken to about this. Can the 5 of us get together ASAP to compare notes and develop a plan? Cc-ing Kristy to schedule.
>
> Please come to the meeting prepared to review the latest HR communication we issued to her, and to talk about how she's doing relative to her performance plan.
>
> Thanks all, Andi

Berry performed his job without incident between February and June 2020 after the departure of Ms. Clark and Ms. Wise, and the work environment was considerably less tense. JA0644, JA035. Ms. Clark, Ms. Wise, and Ms. Simons, however, began to use social media to attack Mr. Berry's character. JA0644, JA0036. On July 1, 2020, the newsroom held a video conference/meeting to discuss the work atmosphere after several current and former staff members voiced their concerns on Twitter about the departure of women of color at the station. JA0644, JA0036. The conference was arranged by Jeffrey Katz and before the call, Genevieve Croteau and Carey Needham, the Associate General Manager, learned that a letter written by Appellee Sasha-Ann Simons would be read at the meeting and would target Mr. Berry, and advised Mr. Katz and Ms. Kashfi that they should not go forward with it. JA0645, JA0036. Monna Kashfi, then interim Chief Content Officer, appealed to Ms. Croteau and Mr. Needham to allow the meeting to proceed without their presence. JA0645, JA0036. Mr. Katz and Ms. Kashfi decided to go forward with the video conference with thirty-three people present. Mr. Needham and Ms. Croteau departed the meeting shortly after it started, and the meeting ended up being an attack on Mr. Katz and Mr. Berry and their leadership. JA0645, JA0036. Mr. Katz read a letter from Ms. Simons, a reporter in a different department who is a personal friend of Ms. Clark, which accused Berry of being the sole reason for the departure of four

women of color and why the culture in the department was toxic. JA0645, JA0036. Other participants on the call made general comments about their dissatisfaction with issues within their departments and the meeting was highly charged and emotional. JA0645, JA0036. Ms. Simons' letter included many statements which defamed Berry's character based solely on what was reported to her by Ms. Clark and Ms. Wise. JA0645, JA0036. Mr. Katz and Ms. Kashfi made no attempt to stop the defamatory statements even though they both knew that Ms. Clark and Ms. Wise had significant performance and conduct issues, and the statements made about Berry were false and unfounded. JA0645, JA0036. Berry's standing among his colleagues was irreparably damaged because of the false allegations which many of his colleagues heard for the first time on the call and were not based on facts. JA0645, JA0036.

Ms. Kashfi began employment shortly before Berry arrived and had previously led another department, the Kojo Nnamdi Show, and was currently serving as the interim Chief Content Officer and supervised the news director and department. JA0645, JA0037. Ms. Kashfi announced during the video call that she would take corrective action as soon as possible to address the issues before an investigation. JA0645, JA0037. She later met with Berry and discussed that there was a messaging issue and Berry made it clear that he objected to Ms. Kashfi

communicating with staff about his personnel matter. JA0646. Rather than maintain the confidentiality of the investigations until there was a conclusive finding to protect the rights of employees as was the practice at WAMU which was followed while Caucasian supervisors were accused of misconduct, Ms. Kashfi disclosed to staff that Berry was under investigation and certain staff members took that information and posted it on twitter. JA0646. Ms. Kashfi openly discussed the accusations being made against Berry despite the fact that she knew that the claims against him were false and made by employees with well documented histories of performance and conduct issues. JA0646. After the meeting, Berry sent an email with a general apology in an effort to reassure staff that he respected women of color and supported promotional opportunities for women of color. JA0646, JA0037. In response to his apology, Ms. Simons posted a message on Twitter, stating "How does one have the audacity to send a 634-word email 'apology' that in actuality says a bunch of nothing and deflects blame from them self? That takes a special skill, my friends." JA0646, JA0037.

On July 6, 2020, shortly after the July 1, 2020, meeting, Mr. Katz informed Mr. Berry that all of Berry's direct reports would be removed from him and that he would take on less of a managerial role while the station investigated the matter and on July 7, 2020, Berry's direct reports were formally stripped from him and an email

was sent to staff alerting them of an investigation into a colleague. JA0646, JA0037. Additionally, after the July 1, 2022 meeting, Ms. Simons communicated with an intern with the Current publication and shared the letter which she wrote and was read at the July 1, 2020 video conference in which she baselessly attacked and defamed Mr. Berry. JA0646, JA0037. Ms. Simons did not disclose to the intern that she was a personal friend of Ms. Clark, and neither Ms. Simons, Ms. Clark, nor Ms. Wise disclosed the significant performance and conduct issues of Ms. Clark and Ms. Wise. JA0647, JA0037. On or about July 16, 2020, Berry learned that AU's press arm, Current, wanted to run a story on the controversy. JA0647. WAMU, with guidance from AU, instructed Mr. Berry not to respond to the Editorial Intern, Sasha Fernandez, who was reaching out to him. JA0647. Berry followed his supervisors' instructions and did not respond to Ms. Fernandez's requests because he believed it would be inappropriate for him to discuss personnel matters, which he almost certainly would have had to do, in order to explain the context of any attack on him. JA0647. Berry also had not yet had the opportunity to speak with American University's Human Resources investigators to fully understand the scope of complaints against him. JA0647. He had no idea what was going to be included in the article, unlike senior managers at AU and WAMU. JA0647.

On July 20, 2020, Current, citing all anonymous sources, published an article titled, "WAMU Licensee Investigates Editor Blamed for Departures of Women of Color," citing all anonymous sources, which identified Berry and included a photograph of him, written by Appellee Sasha Fernandez, an Editorial Intern. JA0647, JA0037-38, JA0176-180. The article, via the use of exclusively anonymous sources, identified Berry as being "the subject of multiple complaints" over eleven months. *Id.* According to the article, "[t]hree female journalists who have left WAMU's newsroom since January 2019 told Current that their decisions were prompted by Mr. Berry's behavior toward them. They shared experiences of feeling undermined, micromanaged and mistreated, and they felt that Berry had received mild warnings but was allowed to continue his behavior." *Id.* The article continued in asserting that five women of color have left WAMU since January 2019, and that the news director, Mr. Katz, arranged a meeting with staff on July 1 to address tweets by staff who had left the station, and that Mr. Katz read a letter from an employee who wrote that Berry had "mistrusted and micromanaged women of color and did not support opportunities for their growth in the workplace;" that "Berry habitually questioned reporters' credentials when editing stories and undermined the employees' supervising editor, a woman of color, at every tum;" and that Berry "cultivated a culture of harassment and disrespect towards his female reporters,

particularly his female reporters of color." *Id.* The article thereafter asserted that "[i]n an email to newsroom staff the next day, Berry apologized and addressed the complaints filed against him. He acknowledged that many but not all of the complaints had been raised with him and that he discussed them with Katz and Genevieve Croteau, American University director of human resources. Berry said he had taken 'direct action to change my approach."' *Id.* The article continued in stating, "Another former staffer who requested anonymity because they feared retribution for speaking out said that they had met with Katz because they had seen how Berry's behavior was pushing out women of color… 'This guy is, like, toxic, and he's going to push these girls to quit,' she said. 'People don't quit jobs. They quit managers.'" *Id.*

On July 31, 2020, an all-staff meeting was held and the allegations against Berry were discussed in detail with staff and several staff members inquired about the investigation involving Berry and American University management stated that there were multiple investigations ongoing, but only discussed the investigation involving Berry. JA0649, JA0040. During this meeting, one staff member, producer Jonquilyn Hill, stated that there was a whisper network in the newsroom and Mr. Berry had been accused of creating a toxic work environment. JA0649, JA0040. On August 7, 2020, Berry was issued a Notice of Complaint by Deadre Johnson, Senior

Director of Employee Relations and Recruiting. JA0650, JA0041. Ms. Clark, Ms. Wise, and Ms. Simons filed complaints against Berry after the July 1, 2020 meeting and Berry was advised that the Office of Human Resources received complaints about his behavior and conduct with other staff members at the station on August 7, 2020. JA0650, JA0041. Ms. Johnson reported that Mr. Berry was accused of unprofessional conduct and behavior that created a hostile work environment based on gender and race, including the examples of: 1) regularly dismissing the ideas of women in meetings; 2) yelling and raising his voice with women; 3) making condescending comments and snide remarks to women; 4) micromanaging staff in uncomfortable ways such as hovering over a female employee while she was at her desk; 5) making a comment "look at you that's cute" in response to learning that a female employee had won an award; 6) instructing a female peer to take notes during a meeting; 7) using the PMP Year-End Discussion to bully a female staff member; and 8) engaging in overall behavior that was detrimental to female staff. JA0650, JA0041. Mr. Berry was informed that he was being placed on administrative leave effective August 10, 2020, while American University conducted an investigation and that American University anticipated that the investigation would be completed within sixty days. JA0651, JA0041. Mr. Berry was terminated January 22, 2021.

SUMMARY OF THE ARGUMENT

The Trial Court erred in granting the Special Motion to Dismiss in Berry I after Appellees attached multiple declarations to the Special Motion to Dismiss which effectively converted the motion to dismiss into a motion for summary judgment, while denying Berry's motion to allow targeted discovery and stay briefing of the Special Motion to Dismiss. The Trial Court erred in granting the Special Motion to Dismiss. The Anti-SLAPP Act was not intended to protect against Berry's lawsuit because the issue did not involve a matter of public interest. This Court has not extended the Anti-SLAPP Act to actions with similar claims. Berry stated a prima facie claim that Appellees negligently published and adopted false and defamatory statements about him. Berry also stated a prima facie claim that Appellees negligently published and adopted false and defamatory statements about him without a privilege. Berry asserted False Light and Tortious Interference Claims and did not split the claims in Berry I and Berry II as Berry I involved claims related to defamation which occurred July 2020 and Berry II related primarily to Berry's termination in January 2021, and the Special Motion to Dismiss had already been briefed in Berry I before Berry II was filed. The claims were so distinctly different that Berry was under no obligation to attempt to amend Berry I to include the claims in Berry II. Finally, the Trial Court erroneously believed it was required to award

attorney's fees and made no effort to evaluate the reasonableness of Appellees motions for attorney's fees.

ARGUMENT

I. The Trial Court erred in Denying Targeted Discovery, and the Anti-SLAPP Act Does not Apply to Berry I.

After Appellees filed the Special Motion to Dismiss and attached to its motion several declarations making accusations against Berry for the first time, Berry filed an Opposed Motion to Allow Targeted Discovery and to Stay Briefing of Appellees' Special Motion to Dismiss. JA0430-453. The Trial Court denied the motion to allow targeted discovery. JA0011. The claims made in the declarations effectively converted the Special Motion to Dismiss into a motion for summary judgment while denying Berry an opportunity to conduct limited discovery. Berry later filed an opposition to the Special Motion to Dismiss and disputed many of the assertions made in the declarations, but he was denied an opportunity to question the declarants on the factual assertions in their declarations. JA0181-408. The Trial Court considered the declarations in granting the Special Motion to Dismiss. JA480-495. The Trial Court simply held that the Anti-SLAPP Act is applicable in this case, and that Berry cannot meet his burden to show that he is likely to succeed on the merits of his defamation claim because the alleged defamatory statements are non-actionable opinion, substantially true, and/or not made or published by the

defendants. *Id*. The Trial Court erred in granting the Special Motion to Dismiss. The District of Columbia Anti-SLAPP Act was not meant to "protect" against the Berry I lawsuit. The District of Columbia enacted its Anti-SLAPP Act in 2010 to discourage "lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Abbas v. Foreign Policy Group*, 783 F.3d 1328, 1332 (D.C. Cir. 2015). Unlike some defamation cases, Berry's Complaint was specific, well pled, and replete with actionable facts, all compiled before discovery. Berry's case is entirely distinguishable from those targeted by the D.C. Anti-SLAPP Act, and D.C. Anti-SLAPP suits "are by definition meritless suits," typically brought by large private interests to deter common citizens from exercising their legal rights (or punishing them for doing so). *Blanchard [II] v. Steward Carney Hosp*., 483 Mass. 200, 207 (2019). A D.C. Anti-SLAPP suit is "typically filed by a deep-pocketed corporation against a citizen or group of citizens in order to silence criticism, punish a whistleblower, or win a commercial dispute."[1] The D.C. Anti-SLAPP Act was enacted to give courts a chance to look into the merits of a claim in order to prevent large private corporations from initiating meritless

[1] Andrew Friedman, "California's Anti-SLAPP Act Was Not Intended to Thwart FEHA Claims," *California Labor & Employment Law Review*, Vol. 31, No. 4.

litigation to stop individuals with fewer resources from public advocacy. Berry's lawsuit does not fall within the contours of the Anti-SLAPP Act.

A "meritorious case means one that is worthy of presentation to a court, *not* one which is sure of success." *Blanchard [II], supra*. (emphasis added). To weed out meritless claims brought in an effort to suppress speech, the D.C. Anti-SLAPP Act created certain procedural hurdles to trial for cases alleging defamation or libel. One such restriction is that defendants "may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). To support an D.C. Anti-SLAPP Act special motion to dismiss, initially the defendant must '"make a prima facie showing that the claim at issue' . . . 'arises from an act' . . . 'in furtherance of the right of advocacy on issues of public interest'." *CLOSE IT! Title Services v. Nadel*, No. 19-CV-195, No. 19-CV-646, page 19 (D.C. April 8, 2021) (citations omitted). The District of Columbia Court of Appeals further noted that an '"[i]ssue of public interest,' [is] defined as 'an issue related to health or safety,' or 'environmental, economic, or community well-being,' as well as to 'the District government,' a 'public figure,' or a 'good, product, or service in the market place.' *Expressly excluded from this definition are 'private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or*

sharing information about a matter of public significance'." *CLOSE IT! Title Services*, *supra*, page 19 (citations omitted) (emphasis added). Consequently, a defendant must establish that the issue is "a matter of 'public,' not 'private' interest." *CLOSE IT! Title Services*, *supra*, page 20 (citations omitted). Importantly, '"the public interest' does not equate with mere curiosity" and the "assertion of a broad and amorphous public interest is not sufficient," as an "issue of public interest must go beyond the parochial particulars" of a litigant. *Wilson v. Cable News Network*, 6 Cal. App. 5th 822, 832-833 (2016) (citations omitted). "It is not enough that the statement refer to a subject of widespread public interest; *the statement must in some manner itself contribute to the public debate.*" *Wilbanks v. Wolk*, 121 Cal. App.4th 883, 898 (2004) (emphasis added). "[T]he defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech." *City of Cotati v. Cashman*, 52 P.3d 695 (Cal. App. 2002). Appellees failed to make such a showing in this case. On the specific issue of whether the defamatory statements were "of public interest," Appellees argued the point in one sentence and then offered citations to case law that were not on point. JA0067-68. Furthermore, "if the statements assert or imply false facts that defame the individual, they do not find shelter under the First Amendment simply because they are

embedded in a larger policy dispute." *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1242-1243 (D.C. 2016).

Appellees failed to cite a single court decision that granted a D.C. Anti-SLAPP special motion to dismiss that bears any resemblance to the circumstances of this case. This suit concerns Appellees' defamatory statements against Berry, a private individual, within the context of a private employment dispute at WAMU. Courts in the District of Columbia have applied the D.C. Anti-SLAPP Act in very narrow circumstances — each of which fall squarely within the Act's targeted protection of speech in "furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502(a). *Competitive Enterprise Institute*, 150 A.3d at 1221 (suit against authors who criticized the work of a scientist in articles published on defendants' websites); *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016); *Doe No. 1 v. Burke*, 91 A.3d 1031, 1034 (D.C. 2014) (claims against Wikipedia contributor who added publicly available information about litigation arising from a mass shooting in Baghdad to a Wikipedia page about a lawyer involved in the litigation); *Saudi American Public Relations Affairs Committee v. Institute For Gulf Affairs*, 242 A.3d 602 (D.C. 2020) (case against organization quoted as attacking plaintiffs and calling its principle a "terrorist"). Importantly, this case also does **not** involve an employment dispute with a public figure (*compare TS Media v. Public*

Broadcasting Service, Case No. 2018 CA 001247 B), or a lawsuit against WAMU for its reporting on the actions of third parties. Thus, applying D.C.'s Anti-SLAPP Act here, where American University worked to divert their donor's attention from its long history of racist and sexist employment decisions to the sole senior Black manager in the newsroom – by divulging confidential details from his employment record supplanted with intentional lies, would stretch the Act to cover activity well outside existing interpretations of D.C.'s Anti-SLAPP Act.

II. Berry Established that He was Likely to Succeed on the Merits of his Case.

"In opposing a special motion to dismiss, the plaintiff must shoulder the burden of showing that his claim is likely to succeed on the merits. . . . [p]laintiffs are required to present more than the mere allegations in the complaint. The precise question the court must ask in ruling on a special motion to dismiss is whether a jury properly instructed on the law, *including any applicable heightened fault and proof requirements*, could reasonably find for the claimant on the evidence presented." *Fridman v. Orbis Bus. Intelligence Ltd*, 229 A.3d 494, 506-507 (D.C. 2020) (emphasis in original) (internal editing, quotation marks, and citations omitted). The D.C. Court of Appeals has also ruled that "A statement is defamatory 'if it tends to injure [the] plaintiff in his trade, profession or community standing, or lower him in the estimation of the community.' The statement 'must be more than unpleasant or

offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.'" *Competitive Enterprise Institute*, 150 A.3d at 1241 *citing Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 594 (D.C. 2000) *and Rosen v. Am. Isr. Pub. Affairs Comm., Inc.* , 41 A.3d 1250, 1256 (D.C. 2012). Further, "[i]f it appears that the statements are at least capable of a defamatory meaning, *whether they were defamatory and false are questions of fact to be resolved by the jury*." *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990) (emphasis added) *citing Olinger v. American Savings & Loan Ass'n*, 409 F.2d 142, 144 (D.C. Cir. 1969) (per curiam). The turmoil at WAMU that engulfed Berry had been ongoing for decades. *Clampitt v. American University*, 957 A.2d 23, 27 (D.C. 2008) (Clampitt was hired as Executive Director and General Manager of WAMU in 2000 and by 2003 was facing "dissension among the staff . . ."). In a situation remarkably similar to the case at bar, the dissension resulted in public outcry and recriminations. In October 2003, the *Washington Post* published a story about WAMU that describe WAMU as being "awash in red ink, with large operating deficits . . . such that major donors had . . . demand[ed] explanations." *Clampitt*, 957 A.2d at 27. Clampitt argued that American University and WAMU had "scapegoated" her. *Clampitt, supra*. American University fired Clampitt shortly thereafter. *Clampitt, supra*. The *Clampitt* Court held that: "Although this case arises in a private rather than public employment

context, it bears strong similarity to cases that have arisen in the public context, in which terminated employees have been permitted to go forward on claims that they were stigmatized (and thus deprived of a liberty interest) when their employers impliedly adopted statements made in allegedly defamatory derogatory press reports when terminating them in the wake of those reports." *Clampitt*, 957 A.2d 23, 41. The *Clampitt* Court, therefore, allowed the defamation case to move forward and the same result should have been followed here. Like *Clampitt*, Appellees here stigmatized Berry by repeating statements "without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will." *Clampitt*, 957 A.2d at 43 (internal quotation marks and citation omitted).

A. Appellees Current, Fernandez, Everhart, and Drizin[2] Negligently Published and Adopted False and Defamatory Statements Concerning Berry.

"An individual in a defamation action who is neither a public figure nor a public official may recover actual damages if he shows negligence on the part of the media defendant, and (2) no common law privilege was applicable to the instant case." *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 80 (D.C. 1980) citing

Gertz v. Welch, 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advance society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *citing New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)); *Vereen v. Clayborne*, 623 A.2d 1190, 1195 (D.C. 1993) (applying a negligence standard to non-media defamation of a private person). The *Gertz* Court went on: "the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Gertz*, 418 U.S. at 341 *citing Rosenblatt v. Baer*, 383 U.S. 75 (1966) (concurring opinion).

On July 20, 2020, Appellees Current, Fernandez, Everhart, and Drizin negligently[3] published an article, with Berry's picture, quoting extensively from anonymous sources but not Berry (a preliminary mistake here was not alerting Berry of the claims being made, or sending him questions to provide context to the request for a comment), or anyone who would speak on Berry's behalf, or provide context

[3] *Kendrick v. Fox Television*, 659 A.2d 814, 822 (D.C. 1995). ("negligent publication is the unreasonable failure, under the circumstances, to take care that the statement made was true. The defendant must exercise the degree of care which ordinarily prudent persons engaged in the same business usually exercise under similar circumstances.").

for the "story" by reviewing Berry's background (easily found online), or otherwise investigate the situation to learn if the story, as first envisioned, might be wrong and require reframing. JA0647, JA0037-38, JA0176-180. The negligent framing of Appellees' publication and adoption of these false and defamatory statements is found in their own ethical guidelines. Appellee Current claimed it "adheres to the SPJs' code of ethics, [but] failed its basic obligations as a journalistic institution in publishing anonymous attacks" Appellant. JA0302. Relevant to the article, the SPJ code of ethics calls for news organizations to: 1. Identify sources clearly. The public is entitled to as much information as possible to judge the reliability and motivations of sources; 2. Consider sources' motives before promising anonymity. Reserve anonymity for sources who may face danger, retribution or other harm, and have information that cannot be obtained elsewhere. Explain why anonymity was granted; 3. Diligently seek subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing; 4. Realize that private people have a greater right to control information about themselves than public figures and others who seek power, influence or attention. Weigh the consequences of publishing or broadcasting personal information; 5. Balance the public's need for information against potential harm or discomfort. Pursuit of the news is not a license for arrogance or undue

intrusiveness; and 6. Deny favored treatment to advertisers, donors or any other special interests. [4]

Appellees Current, Fernandez, Everhart, and Drizin wrote and published false and defamatory statements. JA0647, JA0037-38, JA0176-180. For example, Current wrote: "Katz read a letter from an employee who wrote that Berry in particular had mistrusted and micromanaged women of color and did not support opportunities for their growth in the workplace." *Id.* First, Current cannot hide behind the fact that it merely "reported" that Mr. Katz read the letter with the defamatory statements. Current chose to adopt the lies upon publication. *Id.* According to Berry, the statements are materially false, and Current was negligent in publishing it. According to Berry, he supported and encouraged growth and other accommodations for staff members in several instances, such as a change in schedule for Ms. Clark and Ms. Ashley Lisenby, encouraged more opportunities for stories and on-air reporting for these staff members as well as others, and provided recommendations for conferences, such as support for Ms. Delshad's application to the Corporation for Public Broadcasting's Editorial Integrity and Leadership Initiative at Arizona State University as well as private support Ms. Delshad's

[4] https://www.spj.org/ethicscode.asp (Last viewed on July 16, 2021).

application to the Poynter Leadership Academy for Women in Media with Mr. Katz. JA0304, 398-400. Ms. Simons, in her letter and repeated in her declaration, provided no examples of the accusations she levied at Appellant *Id*.

According to Berry, Ms. Lisenby was discouraged in the newsroom and voiced her frustration to Berry and Mr. Katz about an apparent lack of cohesion on our team a few months into working together and Berry and Mr. Katz responded by offering other opportunities within the organization, including temporarily working as a producer on The Kojo Nnamdi Show. JA0407. Appellees Current, Fernandez, Everhart, and Drizin baselessly tried to blame Berry for the departures of women of color supervised by Mr. Bullard (Ms. Abamu and Ms. Yu), and link those departures with Ms. Clark and Ms. Wise, who he did supervise. According to Berry, he "participated in the Diversity, Equity, and Inclusion Committee at WAMU and know that there were systemic problems within the organization, but blaming Berry for those systemic problems is wrong and misguided." JA0304

Appellees Current, Fernandez, Everhart, and Drizin also negligently attributed Berry to the broader problems at WAMU when it wrote: "Five women of color have left WAMU since January 2019, an exodus that prompted a series of tweets on the subject last month by current staff. Katz arranged two meetings with employees July 1 to address the tweets, according to two station sources who asked for anonymity

because the discussions were confidential." JA0175-180. As the Current "article" focuses on Berry ("WAMU licensee investigates editor blamed for departures of women of color"), Appellees Current, Fernandez, Everhart, and Drizin negligently created a false connection between Berry's "management with disparate treatment from other women on staff. Following its investigation, American University determined that there was "insufficient evidence to determine that there was a violation of the University's Discrimination and Sexual Harassment Policy' when it terminated [Berry]." JA0304-305; JA0402-403. "It also negates [Berry's] duties as Ms. Wise and Ms. Clark's supervisor during their tenure to address their poor behavior and performance. [He] was tasked with addressing these issues with each of them, but also in conjunction with other members of management. This included Mr. Valdez, formerly the senior editor for Guns & America, Mr. Bernfeld, the former director of Guns & America, Mr. Katz, the former news director, and Ms. McDaniel, the former chief content officer. As we documented in our complaint, all of these managers sought to take corrective action with defendant Wise,[5] whereas [Berry] also sought to take corrective action with Ms. Clark based on her poor behavior."[6] JA0304-305. Further, the Current article declared: "In an email to newsroom staff

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[5] JA0031-35; JA0644-646.
[6] JA0028-30; JA0640-643.

the next day, Berry apologized and addressed the complaints filed against him. He acknowledged that many but not all of the complaints had been raised with him and that he had discussed them with Katz and Genevieve Croteau, American University director of human resources. Berry said he had taken 'direct action to change my approach.' 'As someone who has always believed themselves to be an advocate for journalists of color, who has recruited and developed young journalists, and has served in multiple capacities as a spokesman and as a champion for diversity, my failures are embarrassing,' Berry wrote in the email, which was obtained by Current. 'I regret not doing more to retain the women of color in our newsroom and for contributing to a culture that valued productivity over people.'" JA0305; JA0175-180. "Ms. Fernandez used [Appellant's] email as a proxy for a response to the baseless allegations against [Appellant] . . . Critically, the defense seeks to mischaracterize the intent of [Berry's] words to fit their purpose, as an apology for poor behavior on [his] part. But that is a false association given the circumstances in which the email was sent, including [his] knowledge of defendants' wild claims, as well as [his] intent to reconcile with staff members at WAMU." JA0305-306. The Current article further claimed that '"[Berry] cultivated a culture of harassment and disrespect towards his female reporters, particularly his female reporters of color,' the employee said. '… [It] was just not an environment that warranted continuing to

work there."' JA0175-180. Appellee Fernandez negligently paraphrased the anonymous employee again: "The employee said that Berry habitually questioned reporters' credentials when editing stories and undermined the employee's supervising editor, a woman of color, 'at every turn.'" JA0175-180. According to Berry, these statements are false.

"Ms. Fernandez and Current, fail to cite any specific incident or corroborate their baseless claims . . . It was irresponsible of Current to publish such libelous claims, when it couldn't specify or produce evidence of harassment, disrespect, or bias against women and women of color, at the time of publication. Further, defendants cannot produce such evidence without relying on baseless claims . . . Thus[,] we are forced to prove a negative, in which the burden of [a] false claim with no basis in reality must be disproven. . . " JA0306. The notion that after such a short period of time at WAMU, Appellant could "cultivate a culture" there, of any sort, is a gross inaccuracy. Ms. Lisenby correctly observed that "[s]tatements made by my colleagues in meetings in the summer of 2020 and reporting by DCist detail an environment at WAMU that suffered from racism and sexism long before 2019." JA0408. When WAMU hired Appellant there was a deep-rooted culture of racism and misogyny and, keeping with the old maxim that "no good deed goes unpunished," Appellant was made to be the fall guy for his White superiors as he

tried desperately to help WAMU and his colleagues. In a continuance of these false claims, the Current article quotes an anonymous staffer as saying: "they left the station because American University Human Resources did not reassign them to another supervisor." JA0175-180. Appellees' statement here demonstrates the absurd level of negligence for, obviously, Appellee American University's Human Resources could not reassign a WAMU employee to a different supervisor. "Not only was this not the purview of American University HR, but it also fails to reflect that [Berry's] former direct reports — Ms. Clark and Ms. Wise — were either given opportunities to work in other departments or provided with space to work extensively on other projects. JA0307.

III. The Trial Court Erred in Dismissing Berry II.

In deciding Berry II, the Trial Court held that Berry could have amended the Berry I complaint to include a claim under the DCHRA, but instead he improperly split his claims between two actions and because Judge Saddler ruled that such claims are non-actionable, the derivative DCHRA claim cannot stand and Berry may not "frustrate the doctrine of res judicata by cloaking the same cause of action in the language of another theory in a subsequent proceeding." JA1074. The doctrine of res judicata, however, which bars a party from bringing a subsequent claim on a matter fully adjudicated, is inapplicable here. Berry I involved claims of defamation

resulting from the publication of false information about Berry in July 2020 in the Current publication. Berry II involved claims of race and sex discrimination under the DCHRA after Berry was terminated in January 2021. JA0636-658. At the time Berry II was filed, Berry I was well past the dispositive motion briefing and there was no option available to Berry to amend Berry I and certainly no guarantee that a motion to amend would have been granted by the court. *Id.*

A. Appellant stated a claim under the DCHRA.

In its motion to dismiss before the Trial Court, Appellee argued that Berry's DCHRA claim failed because Berry did not plead sufficient facts to support his claim of disparate treatment. JA799-800. At the motion-to-dismiss stage, however, "a plaintiff does not need to prove a *prima facie* case of discrimination." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–12, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). The D.C. Court of Appeals held that a well-pled discrimination claim just needs to "give[] the defendants notice of what her case is about," *Poola v. Howard Univ.*, 147 A.3d 267, 278 (D.C. 2016), and survives dismissal if the court could not identify an alternative explanation from the complaint that makes discrimination implausible. *Id.* at 279 (citations omitted). A "plaintiff must produce evidence that clearly indicates ... a nexus between [a discriminatory attitude at the workplace] and the employment action but it is inappropriate to apply [that] summary judgment standard

at the pleading stage." *Id.* (internal citations omitted). The DCHRA makes it illegal for an employer to discriminate on the basis of "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation." D.C. Code § 2-1402.11. To state a claim of discrimination under the DCHRA, a plaintiff must allege that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination. *See Brown v. Brody*, 199 F.3d 446, 452 (D.D.C. 1999). Berry is a member of a protected class based on his race and he suffered adverse employment actions at the hands of Appellee and asserted facts that give rise to an inference of discrimination under the DCHRA.

B. Mr. Berry was subjected to adverse employment actions based on his race and sex.

In its motion to dismiss before the Trial Court, Appellee argued that Berry's claims should be dismissed because Appellant's claims are not viable as they fail to establish a prima facie case of disparate treatment. JA799-800. Appellee's argument fails because, at the pleading stage, a plaintiff need not implement a "connect-all-the-dots approach to establish causation" and can satisfy the requirement by compiling "bits and pieces of information" in support of an inference of DCHRA violations. *Poola*, 147 A.3d at 280 – 81. This lowered standard applies to the

causation criterion "[b]ecause discrimination claims implicate an employer's usually unstated intent and state of mind." *Id*. at 281 (citation omitted). The *Poola* court found the employee's at time vague allegations about a culture of discrimination against non-African American employees still enhanced her allegation of discriminatory intent and causation. *Id*. at 280 (*citing Twombly* at 557). "[T]he plaintiff's obligation at the pleading stage is to put the defendant on notice of claims against it, which can be accomplished even in a complaint [that] is short on detail." *See McNair v. Dist. of Columbia*, 213 F.Supp.3d 81 (D. D.C. 2016) (finding that the plaintiff alleging adverse employment actions due to discrimination has satisfied the pleading standard despite lack of specific information). "Because discrimination claims implicate an employer's usually unstated intent and state of mind, rarely is there direct, smoking gun, evidence of discrimination; instead, plaintiffs usually must rely on bits and pieces of information to support an inference of discrimination, i.e., a mosaic of intentional discrimination." *Poola* at 147 A.3d 267 (D.C. 2016) (brackets, citations, and quotation marks omitted).

Adverse employment actions cause "a significant change in employment status, such as hiring, *firing*, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Douglas v. Donovan*, 559 F.3d 549, 552 (D.C. Cir. 2009) (emphasis added) (quoting

Taylor v. Small, 350 F.3d 1286, 1293 (D.C. Cir. 2003) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). Appellee did not address or deny that Berry was subjected to an adverse employment action in the form of administrative leave and ultimately his termination after Current published its false and defamatory article. Courts have consistently held "there is no dispute that termination is an adverse employment action." *Johnson-Parks v. D.C. Chartered Health Plan*, 925 F. Supp. 2d 102 (D.D.C. 2013); *See also Burlington*, 524 U.S. 742 at 761 (stating that adverse employment actions under Title VII include termination of employment). Additionally, Berry's placement on administrative leave, effective from August 10, 2020 to January 22, 2021, constituted an adverse employment action because it was of "unusually long duration" for a total of more than five months and "affected the terms of [Appellant's] employment." *Hornsby v. Watt*, 217 F. Supp. 3d 58 (D.D.C. 2016). Courts have held unusually long placements on administrative leave that end in an employee's termination to be adverse employment actions, and this Court should do the same. *See Richardson v. Petasis*, 160 F.Supp.3d 88, 117–18 (D.D.C. 2015) (placement on paid administrative leave constitutes an adverse employment action where the express terms of employee's leave resulted in termination of employment). Berry was treated differently than his Caucasian or female supervisors whose identities were not announced at staff meetings as being under investigation,

who were not placed on administrative leave for months pending the outcome of their investigations, and who were not similarly terminated like Berry. Such disparate treatment based on Appellant's race demonstrates that Appellant has properly stated his claim of discrimination under the DCHRA. "A plaintiff can establish an inference of discrimination 'by demonstrating that [he] was treated differently from similarly situated employees who are not part of the protected class.'" *Augustus v. Locke*, 934 F.Supp.2d 220, 232 (D.D.C.2013) (quoting *George v. Leavit*, 407 F.3d 405, 412 (D.C.Cir.2005). The evidence of Berry's disparate treatment, regarding his placement on administrative leave for five months his and ultimate termination "is sufficient to meet the minimum threshold to establish an inference of discrimination at the *prima facie* stage." *Richardson v. Petasis*, 160 F. Supp. 3d 88 (D.D.C. 2015).

C. There is no legal requirement to include comparators to show discrimination or retaliation.

The Trial Court held that Berry did not assert comparator evidence, but a plaintiff is not required to allege comparator evidence. JA1072-1077. A plaintiff may state a case of discrimination without comparator evidence and there are multiple methods of showing that the employer's proffered justification is unworthy of credence and an employee can show pretext even without comparator evidence. *See Mabry v. Capital One, N.A.*, No. 8:13-cv-02059-AW (D. Md. December 6,

2013) (compiling relevant cases); *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008) (stating that even evidence showing a culture of discrimination of former employees alleging discrimination by *other* supervisors may be relevant depending on the theory of the case, and the standard of similarly-situated employees is not the *only* method of viewing pretext).

IV. The Trial Court Erred in Awarding Appellees' Attorney's Fees.

The Trial Court awarded all attorneys' fees requested by Appellees in Berry I and Berry II. JA0613; JA1195. The District of Columbia follows the American Rule, which provides that "every party to a case shoulders its own attorneys' fees and recovers from other litigants only in the presence of statutory authority, a contractual arrangement, or certain narrowly-defined common law exceptions." *Psaromatis v. English Holdings I,* L.L.C., 944 A.2d 472, 490 (D.C. 2008). The D.C. Anti-SLAPP Act provides that the "court may award a moving party who prevails… the costs of litigation." D.C. Code Ann. § 16-5504. The court can deny an award of fees to a prevailing party if "special circumstances would render such an award unjust." 133 A.3d 569, 578 (D.C. 2016). There were special circumstances here which rendered an award unjust. First, the D.C. Anti-SLAPP Act was designed to protect "District residents" from being "intimidated or prevented" form engaging in "grassroots activism" and "political or public policy debates." *Council of the District of*

Columbia, Report of Committee on Public Safety and the Judiciary on Bill 18-893, 3-4 (Nov. 18, 2010). It was not designed to protect one of the largest employers in the District of Columbia, or the individual Appellees, in a civil lawsuit seeking money damages for publishing private information about a personnel matter. In this instance, American University and the individual Appellees were not the type of parties that the City Council intended to benefit when legislating this fee-shifting statues. Next, special circumstances were also present because of the excessively inflated amount of the fees sought by Appellees. Appellees were awarded $136.700.50 in attorney's fees in Berry I and then made essentially the same arguments and res judicata in Berry II and were awarded $217,368.04 in attorney's fees. JA0613; JA1195. The California Anti-SLAPP statute has ruled that a "fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1137, 17 P.3d 735, 745 (2001). Further, the Trial Court was under the mistaken belief that he was required to award Appellees' attorneys' fees. Under D.C. law, in seeking attorneys' fees, "hours that are 'excessive, redundant or otherwise unnecessary' must be excluded." *D.C. v. Hunt*, 525 A.2d 1015, 1016 (D.C. 1987). The D.C. Court of Appeals has emphasized "the importance that counsel exercise

billing judgment before a fee request is presented." *Tenants of 710 Jefferson St. NW v. D.C. Rental Housing Comm'n*, 123 A.3d 170, 188 (D.C. 2015).

With regard to Berry's discrimination claim, no attorneys' fees should have been awarded under the American Rule because "every party to a case shoulders its own attorneys' fees and recovers from other litigants only in the presence of statutory authority, a contractual arrangement, or certain narrowly-defined common law exceptions." *Psaromatis*, 944 A.2d 472, 490. Here, Appellees request for attorneys' fees should have been denied because Appellees did not segregate or categorize the time spent by Appellees' counsel on the D.C. Anti-SLAPP Act claim in contrast with the time spent by Appellee's counsel on the discrimination claim. As a result, it was impossible to determine the amount of time that Appellees' counsel worked on each specific claim. There were several entries within Appellee's counsel's Ballard's invoice summary in which the attorney, date, description of the professional work, and hours are all redacted, making it impossible to identify the billing attorney, the legal work performed, or the length of time billed for each entry. Appellant objected to each and every redacted entry within both Appellee's counsel's Crowell's statement of account and Ballard's invoice summary and these redacted entries (totaling $100,886.00) should have been deducted from Appellees' total requested amount for attorneys' fees, but the Trial Court failed to make any deductions.

CONCLUSION

For the foregoing reasons, Appellant Zuri Berry respectfully request that the Trial Court's Orders granting Appellees' Special Motions to Dismiss and Appellees' Petitions for Attorneys' Fees and Costs be reversed, and this matter remanded to the Trial Court for further proceedings.

Date: May 3, 2023

Respectfully submitted,

/s/ David A. Branch

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CERTIFICATE OF SERVICE

I certify that on May 3, 2023 I caused a copy of the forgoing Corrected Consolidated Opening Brief and to be served electronically via the Court's e-filing system on all counsel of record.

/s/ David A. Branch

David A. Branch, Esq.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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

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

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

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

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

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

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

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

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

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

Signature

22-CV-25

Case Number(s)

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