No. 22-CV-473

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MONIQUE WILSON,

***Appellant*,**

v.

DISTRICT OF COLUMBIA GOVERNMENT and PAUL BLAKE,

***Appellees*.**

ON APPEAL FROM JUDGMENT OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CASE NO. 2019-CA-000838-B

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Appellant Monique Wilson, a Grade 12 Budget Analyst, employed in the D.C. Office of the Chief Financial Officer, was supervised by Paul Blake for approximately three months before she was placed on a 90-day Performance Improvement Plan ("PIP") and then terminated 21 days into her 90-day PIP. Shortly after she began reporting to him, she complained that he was creating a hostile work environment in July 2018, and his treatment of her was making her physically ill. Less than three months later, she was placed on PIP that led to her termination. The Trial Court erred in granting summary judgment on Appellant's disparate treatment and hostile work environment discrimination claims based on race and sex and retaliation, and in granting summary judgment on Appellant's D.C. Family and Medical Leave Act Claims and D.C. Accrued Sick and Safe Leave Act Claims.

ARGUMENT

I. Appellant Did not Concede that Rice Honestly Believed She Should be Terminated for Poor Performance.

The District argues in its brief that Appellant conceded that Ms. Rice honestly believed that she should be terminated for poor performance. Appellees' Brief at 26. Appellant did not concede that Ms. Rice honestly believed that she should be terminated for poor performance. In fact, Appellant has no way of conceding or refuting what Ms. Rice believed, and this is not the relevant inquiry since Ms. Rice did not directly supervise Appellant and any belief Ms. Rice held about Appellant would have been formed in part by Mr. Blake, the alleged discriminating official. It is well established under the "Cat's Paw Doctrine" that an employer may be held liable for adverse employment made by a supervisor who lacks bias, but that supervisor was influenced by another individual who was motivated by such bias. *See Arendale v. City of Memphis,* 519 F.3d 587, 604 n. 13 (6th Cir. 2008).

II. The Trial Court Failed to Address Whether Blake Created a Hostile Work Environment Claim.

Although Appellant asserted a hostile work environment claim, the trial court, as the District concedes, failed to address whether Appellant stated a triable issue for her hostile work environment claim. For this reason alone, the Trial Court's grant of summary judgment should be reversed. The District claims that Appellant only identified five negative incidents over a four month period which involved "well-

justified criticism" of her performance. Appellees' Brief at 31. Appellant, however, in detail in her complaint to Cheatham, and the harassment far exceeded the isolated incidents identified by the District, and that the harassment was on almost a daily basis in not only how Blake verbally spoke with her but also, the tone of his emails, his facial reactions and displeasure with her and all manner of communication. JA00206.

With respect to sex discrimination, Mr. Blake's targeting of Appellant for constant berating and badgering necessarily sounds in discrimination discriminating against individuals on the basis of sex. *See EEOC v. Abercrombie & Fitch Stores, Inc*., 575 U.S. 768, 771, 135 S. Ct. 2028, 2031-32, 192 L.Ed.2d 35, 40-41 (2015).

III. The Trial Court Erred in Concluding that Appellant Did not Engage in Protected Activity.

Appellant complained about a hostile work environment in the workplace in her July 2018 email. JA00206. Such complaints are protected disclosures because they evidenced "a reasonable, good faith belief that [an] employment practice [s]he opposed was violative of [anti-discrimination laws]." *Dea v. Wash. Suburban Sanitary Comm'n*, 11 F. App'x 352, 357-58 (4th Cir. 2001). Appellant's belief that discrimination was afoot was reasonable in light of, but not limited to, Mr. Blake adverse disparate treatment female employees such as Ms. Wilson.

An act is considered retaliatory if it "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe*

Ry. v. White, 548 U.S. 53, 57, 126 S. Ct. 2405, 2409, 165 L.Ed.2d 345, 353 (2006). Notably, what constitutes retaliation includes but is affirmatively not restricted to tangible employment actions that alter the terms and conditions of employment because "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment[.]" *Id.*, at 63. Here, however, Appellant suffered the ultimate adverse, tangible employment action: termination. *See Ryan v. Putnam*, Nos. 22-55144, 22-55406, 2023 U.S. App. LEXIS 15791, at *3 (9th Cir. 2023) ("Termination [is] a quintessential adverse employment action").

In determining whether an act is retaliatory, courts may consider the close proximity between the employee's opposition to unlawful discrimination and the act in question. Appellant formally opposed unlawful discrimination in the workplace in July 2018 and took protected leave in October 2018. She was promptly terminated on October 31, 2018, 21 days into her 90-day PIP. Courts have found a two-week gap between protected activity and adverse employment as indicative of retaliation. *See Ali v. BC Architects Eng'rs, PLC,* 832 F. App'x 167, 173 (4th Cir. 2020) (quoting *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 575 (4th Cir. 2015) ("Ali's initial complaint and BC's failure to promote her, a mere two weeks passed between Ali's March 30 report and her firing; a 'close temporal proximity' that supports an inference of causation."); *Jackson v. Dist. Hosp. Partners, L.P.*, Civil Action No. 18-1978 (ABJ), 2019 U.S. Dist. LEXIS 128519, at *16 (D.D.C. Aug. 1, 2019)

("Plaintiff also asserts that he was fired only two weeks after he spoke out against the alleged workplace discrimination . . . The close temporal proximity supports an inference of retaliation."); *see also Thomas v. City of Annapolis*, 851 F. App'x 341, 350 (4th Cir. 2021) (a "four-month window [is] sufficient for establishing causation" between a protected activity and adverse employment action).

Further, the District's lack of meaningful investigation into Appellant's discrimination complaint, as evidenced by the failure to conduct an investigation may be viewed by a court as constituting evidence of discriminatory and retaliatory intent. *See Owens v. Circassia Pharm., Inc*., 33 F.4th 814, 829 (5th Cir. 2022) (noting an "employer's investigatory choices might, depending on the facts of a particular case, be suspicious in a way that renders" an adverse employment action pretextual).

IV. The Trial Court Erred in Concluding that Appellant Did not State Claims under the DC FMLA and DC ASSLA.

The District argues on appeal that Appellant cannot establish DC FMLA interference or retaliation because Rice decided to terminate Appellant before she requested DC FMLA. Appellant was placed on a PIP on October 10, 2018 and was terminated on October 31, 2018. The District's argument fails because Appellant became ill on October 10, 2018, and all of the leave that Appellant took after October 10, 2018 was protected under the DC FMLA and the DC ASSLA. It was not in dispute that the main reason Appellant was terminated 21 days into her 90-day PIP

was the amount of leave that she took. The Trial Court focused almost exclusively on perceived deficiencies in Appellant's performance and improperly substituted its judgment that no reasonable juror could find that Appellant was terminated because she requested and took leave. In terminating Appellant while she was on a 90-day PIP, 21 days into the PIP, after she requested and took sick leave, the District created a triable issue of fact of whether the termination was in violation of the DC FMLA and DC ASSLA.

CONCLUSION

For the reasons stated herein, the Trial Court's order granting summary judgment should be reversed and remanded to the Superior Court.

Date: January 8, 2024

Respectfully submitted,

/s/ David A. Branch

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CERTIFICATE OF SERVICE

I hereby certify that on 8th day of January 2024, that a copy of the foregoing was served electronically on counsel for Appellees listed below:

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/s/ David A. Branch
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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
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   - 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;
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     (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.

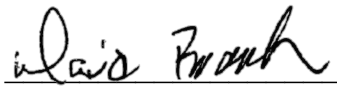
2. Any information revealing the identity of an individual receiving mental-health services.

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-473
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