SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

YVETTE SCOTT	)	
Plaintiff	)	
v.	)	**Case No. 2013 CA 001975 B**
	)	**Judge Herbert B. Dixon, Jr.**
AZURE, LLC	)	
Defendant	)	

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the court upon Defendant Azure, LLC's *Motion for Summary Judgment*. Upon consideration of the defendant's motion, the plaintiff's opposition, the applicable law, and the entire record herein, the court concludes that the motion should be denied.

BACKGROUND

On March 14, 2013, Plaintiff Yvette Scott filed a complaint for violation of the D.C. Whistleblower Protection Act (DCWPA) and wrongful termination in violation of public policy against Defendant Azure, LLC. In her complaint, the plaintiff states that in January 2011, she was hired as a residential counseling associate at a group home operated by the defendant for persons with mental health impairments. Pl.'s Compl. ¶¶ 7-9. The plaintiff continues that at all times relevant, she was qualified for her job and performed the duties of her job in a satisfactory manner. *Id*. ¶ 10. The plaintiff alleges that on March 8, 2012, she "took photos of another employee of Azure, Mr. Sao Vandi, inappropriately coercing a client with mental health impairments to massage his bare back and feet with lotion." *Id*. ¶ 12. The plaintiff claims that upon learning of Mr. Vandi's potentially unlawful conduct, she agreed with a co-worker, Ms. Dangelle Dixon, to inform the proper authorities about this incident and subsequently provided her a copy of the photos. *See id*. ¶¶ 13-15.

Thereafter, the plaintiff states that she had a meeting with the Human Resources (HR) Director for Defendant Azure on March 14, 2012 to discuss the behavior of Mr. Vandi. Pl.'s Compl. ¶ 16. The plaintiff avers that on March 21, 2012, Ms. Dixon submitted a CD to Azure's HR Director containing photos taken by the plaintiff of Mr. Vandi's abusive conduct. *Id*. ¶ 18. The plaintiff further claims that on March 30, 2012, she had a meeting with the defendant's HR Director and Chief Operating Officer, where she informed them that she photographed the March 8, 2012 incident of abuse involving Mr. Vandi and provided them to Ms. Dixon. *Id*. ¶ 22. The plaintiff asserts that Defendant Azure suspended her on April 10, 2012 for taking and holding photos of Mr. Vandi's inappropriate conduct with a resident. *Id*. ¶¶ 23-24.

Following her suspension, the plaintiff continues that on April 11, 2012, Ms. Dixon sent these photos depicting Mr. Vandi's abuse of a client to the D.C. Department of Health (DOH) "in order to notify the agency of the defendant's violations." Pl.'s Compl. ¶ 25. The plaintiff maintains that although she was allowed to return to work after a few days, the supervisors and owners of Defendant Azure soon after began a campaign to discover who sent the photos to the DOH. *See id*. ¶¶ 26, 28-31. The plaintiff states that shortly after her return from suspension, she "spoke with an investigator from [DOH] . . . and conveyed specific information about the incidents at the [group home] involving Mr. Vandi and the client." *Id*. ¶ 33. On the night of April 30, 2012, the plaintiff alleges that she was falsely accused of mishandling medical records and improperly opening a medical cabinet, for which she was fired on the spot. *See id*. ¶¶ 34, 36-37.

On January 10, 2014, Defendant Azure filed the instant motion, arguing *inter alia* that 1) the DCWPA is not applicable to the defendant since it is not a government agency or otherwise covered by that law; and 2) even if DCWPA were to be applicable, the plaintiff lacks evidence to support this claim as she has not made a protected disclosure and fails to demonstrate how her alleged protected disclosure contributed to Defendant Azure's decision to fire her. In opposition,

the plaintiff counters that she has made out a *prima facie* case for retaliation under the DCWPA so as to require a jury to examine the reasonableness of the defendant's alleged legitimate and non-retaliatory reasons for terminating her employment.

STANDARD OF REVIEW

Summary judgment serves an important role of conserving resources and costs associated with unnecessary and unwinnable trials by putting parties to their proof in advance of trial. As a procedural device, summary judgment is employed by courts to remove those cases in which parties cannot present supporting evidence even after a full opportunity for discovery. "Its essential role is 'to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required.'" *Mullin v. Raytheon Co.*, 164 F.3d 696, 698 (1st Cir. 1999) (quoting *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1st Cir. 1992)). Indeed, as Judge, later Justice, Cardozo has stated:

> The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.

Richard v. Credit Suisse, 242 N.Y. 346, 350, 152 N.E. 110, 111 (1926). Accordingly, pursuant to Superior Court Civil Rule 56 (c), the court is empowered to render summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

However, given that the granting of summary judgment results in final judgment on an issue or claim and denies a party the opportunity of a trial on the merits, summary judgment is applied cautiously and carefully. *See, e.g.*, *Patrick v. Hardisty*, 483 A.2d 692, 696 (D.C. 1984) ("Where there is the slightest doubt as to the facts, summary judgment is not in order.").

To prevail on a motion for summary judgment, the moving party bears the burden of demonstrating, based upon the record, the absence of any material fact in dispute and that the moving party is entitled to judgment in his favor as a matter of law. Super. Ct. Civ. R. 56 (c); *Hunt v. District of Columbia*, 66 A.3d 987, 989-90 (D.C. 2013); *Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1324 (D.C. 1995). If the moving party carries this initial burden, then the non-moving party must show that there exists a genuine issue of material fact in dispute. *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001) (citations omitted). In meeting this requirement, the non-moving party must proffer some significant probative evidence tending to support her contentions that a reasonable fact-finder could return a verdict in her favor. *See Brown v. 1301 K St. Ltd. P'ship*, 31 A.3d 902, 908 (D.C. 2011) (citation omitted). The non-moving party cannot satisfy this burden by simply relying on conclusory allegations or denials of her pleadings or arguing that a "metaphysical doubt" exists so as to establish a genuine issue of material fact that is in dispute. *See* Super. Ct. Civ. R. 56 (e); *Gilbert v. Miodovnik*, 990 A.2d 983, 988 (D.C. 2010) (citation omitted); *Boulton v. Inst. of Int'l Educ.*, 808 A.2d 499, 502 (D.C. 2002) (citing *Musa v. Cont'l Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994)).

ANALYSIS

A. DCWPA Claim

Under the DCWPA, a covered employer is prohibited from taking or otherwise threatening to take any action defined as a "prohibited personnel action" pursuant to D.C. Code §§ 1-615.52 (a)(5)(A), 2-223.01 (6) (2013) in retaliation against a covered employee for any "protected disclosure" as defined by D.C. Code §§ 1-615.52 (a)(6), 2-223.01 (7) or refusal to comply with an illegal order. *See Carter v. District of Columbia*, 980 A.2d 1217, 1225-26 (D.C. 2009). Accordingly, a plaintiff employee makes out a *prima facie* claim for violation of the DCPWA when he alleges "that he made a protected disclosure, that a supervisor retaliated

against him by taking a prohibited personnel action against him, and that his protected disclosure was a contributing factor to the retaliation or prohibited personnel action." *Williams v. District of Columbia*, 9 A.3d 484, 488 (D.C. 2010) (citation omitted).

Here, despite the fact that Defendant Azure is not a government agency, it is undisputed that the defendant is a District government contractor and a certified D.C. Home and Community-Based Medicaid Waiver Services provider pursuant to municipal regulations. *See* Pl.'s Compl. ¶ 6; Def.'s Answer § II, ¶ 6. Since the DCWPA defines "employee" and "supervisor" to cover employees and supervisors of every District government contractor, the defendant and its employees (including the plaintiff) and supervisors are governed by the law. *See* D.C. Code §§ 2-223.01 (3), (9).

With this in mind, the court further notes that the plaintiff has presented sufficient evidence that could allow a reasonable jury to find that she has met all of the elements for a DCWPA claim. More specifically, the plaintiff adequately substantiates her allegation that she made a protective disclosure by alleging that she and Ms. Dixon made a pact and were acting in concert when Ms. Dixon delivered a CD containing photos of Mr. Vandi's abusive conduct to Defendant Azure and later turned over those photos to the DOH. *See* D.C. Code § 2-223.01 (7)(D) (defining a "protected disclosure" to include "[a] violation of a federal, state, or local law, rule, or regulation . . . which is not of a merely technical or minimal nature"). Moreover, the parties do not dispute that the plaintiff was suspended for several days on April 10, 2012 and later terminated on April 30, 2012. *See* D.C. Code § 2-223.01 (6) (defining a "prohibited personnel action" to include termination and suspension). Finally, the plaintiff emphasizes the direct statements made by Defendant Azure's management (which are documented in audio and email formats), the closeness in time between the plaintiff's alleged protected disclosures and the adverse employment actions taken against her, and the defendant's potential motive given its

alleged failure to report as required by law to DOH all demonstrate that her protected disclosures were a contributing factor to the defendant's decisions to suspend her and later fire her.[1]

However, the court's inquiry into the defendant's request for summary judgment does not end here. "[A]fter a plaintiff makes a *prima facie* case that his 'protected disclosure' was a 'contributing factor' in his dismissal, the burden shifts to the defendant to show by clear and convincing evidence that the plaintiff's dismissal would have occurred for 'legitimate, independent reasons' even if he had not engaged in activities protected under the Act." *Crawford v. District of Columbia*, 891 A.2d 216, 219 (D.C. 2006). In this regard, the defendant asserts that the plaintiff was suspended due to "her dissemination and publication of exploitive pictures which she took of an Azure client" and "intended to help prevent any further dissemination or publication of the exploitative images." Def.'s Mem. in Supp. of Mot. for Summ. J. 2. Furthermore, the defendant explains it terminated the plaintiff's employment on April 30, 2012 because "the company's owners concluded that they did not believe Scott's explanation" for why she was assessing, copying, and disseminating medical records of the defendant's residents as well as for whether or not she had an unauthorized guest in the group home. *Id*. at 10. Defendant Azure further proffers that even if the plaintiff were not fired on the night of April 30, 2012 for her conduct, "she would have been terminated for failing to protect Azure's client when she saw what she believed might have been abuse or exploitation of that client by [Mr.] Vandi" given that her taking photos of that client only "furthered such exploitation." *Id*. at 11.

The plaintiff counters that the defendant's exact reason for terminating her employment has changed over time from a prior assertion that the plaintiff was seen by a co-worker distributing documents to her fiancé without authorization to now having an unauthorized visitor

[1] The court notes that a reasonable jury could also conclude that the plaintiff did not make a "protective disclosure" or that any such protected disclosure found played no contributing role to the prohibited personnel actions as alleged by the plaintiff.

in the group home. *See* Pl.'s Opp. 19-20. Moreover, the plaintiff highlights the pretextual nature of her termination in light of numerous prior emails between the defendant's supervisors showing an "immediate decision to terminate" and an intent to retaliate against the plaintiff, which deviated substantially from its prior treatment of employees. *Id*. at 21-22.

Notwithstanding the defendant's proffered explanations as to why the plaintiff was suspended and later terminated or the plaintiff's objections, the evidence and explanations presented by the parties will require credibility determinations to be made of various declarants and potential witnesses. Likewise, the defendant's explanations and the plaintiff's counter-arguments of pretext implicate the reasonableness of the defendant's actions and the existence of disputed genuine issues of material fact.

B. Wrongful Termination in Violation of Public Policy Claim

Within the District of Columbia, it is settled law that "an employer may discharge an at-will employee at any time and for any reason, or for no reason at all." *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (D.C. 1991) (citing cases). As a very rare and narrow exception to the at-will doctrine, the District of Columbia Court of Appeals has recognized the intentional tort action of wrongful termination in those circumstances where an at-will employee was wrongfully fired as a direct result of that employee's refusal to violate the law as stated in a statute or municipal regulation. *See id*. at 34. Accordingly, a plaintiff employee properly pleads a claim of common law wrongful termination when 1) she identifies a previously recognized public policy or "make[s] a clear showing, based on some identifiable policy that has been 'officially declared' in a statute or municipal regulation, or in the Constitution" that she seeks to follow; 2) "a close fit" is demonstrated between the proffered public policy and the conduct on which the alleged wrongful termination is based; and 3) the sole reason of her alleged wrongful discharge is her refusal to violate the law. *See Davis v. Cmty. Alternatives,* 74 A.3d 707, 709-10

(D.C. 2013) (quoting *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803-04 (D.C. 1999)) (articulating the first two prongs); *Adams*, 597 A.2d at 34 (requiring the plaintiff to meet the third prong).

Here, the plaintiff provides sufficient evidence to support her common law claim of wrongful termination. First, there are many statutes and municipal regulations, which expressly state that it is the public policy within the District of Columbia to forbid abuse or mistreatment of mentally-disabled persons and to mandate the reporting to the proper authorities of any instance, in which a someone mentally-disabled is being abused. *See* D.C. Code § 7-1305.10 (a) (prohibiting the mistreatment, neglect, or abuse in any form of persons with intellectual disabilities); D.C. Code § 7-1305.10 (e) (stating that all "[a]lleged instances of mistreatment, neglect or abuse of any individual shall be reported immediately to the [administrative supervisor]" and "[e]mployees of facilities who report such instances of mistreatment, neglect, or abuse shall not be subjected to adverse action by the facility because of the report"); D.C. Code § 22-933 (criminalizing the abuse of a vulnerable adult); 29 DCMR § 1906.1 (f) (requiring all recipient providers of Home and Community-Based Services Waiver for Persons with Mental Retardation and Developmental Disabilities has policies in place respecting their clients' right "[t]o be free from mental and physical abuse, neglect and exploitation from persons providing services"). Indeed, it is a stated goal and intent of the D.C. City Council "to assure that such habilitation [of each person with intellectual disabilities] is skillfully and humanely provided with full respect for the person's dignity and personal integrity." D.C. Code § 7-1301.02 (a)(2).

Next, a reasonable jury could conclude that the "close fit" between the plaintiff's actions which led to her being fired and this public policy exists given 1) the context and closeness in time between the plaintiff's and/or Ms. Dixon's efforts to report the abuse of a client with mental health impairments and Defendant Azure's decisions to suspend and then fire the plaintiff, 2)

various statements attributed to supervisors for the defendant by the plaintiff after they became aware that DOH received copies of the photos, and 3) the plaintiff's allegation that Defendant Azure and its supervisors wanted to retaliate against her for following the law and reporting the abuse that she saw, which caused DOH to open an investigation into the incident and brought increased scrutiny of the defendant.

Finally, in light of the plaintiff's allegations about why she was terminated and the evidence she proffers to support it, the court concludes that a reasonable jury could find that the defendant terminated the plaintiff's employment simply because she refused to allow the abuse of a mentally-disabled client to go unreported to the proper authorities.[2]

THEREFORE, it is by the court this 6th day of May 2014

ORDERED, that the defendant's *Motion for Summary Judgment* shall be and is hereby **DENIED**.

Herbert B. Dixon, Jr.
Judge
(Signed in Chambers)

Copies to:

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[2] Although the court denies the defendant's request for judgment as a matter of law as it pertains to the plaintiff's common law wrongful termination in violation of public policy claim, this ruling does not preclude the defendant from seeking the dismissal of this claim on the grounds that this common law claim has been directly superseded by an available statutory claim that has been averred, namely the plaintiff's DCWPA claim. *See McManus v. MCI Commc'ns Corp.*,748 A.2d 949, 957 (D.C. 2000).