NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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February 6, 2024

LETTER OPINION

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RE: *Brian Morrison v. George Mason University, et al.*
Case No. CL-2021-7808

Dear Counsel:

The Court has before it two questions of apparent first impression: 1) whether George Mason University ("GMU") is an "employer" under The Fraud and Abuse Whistle Blower Protection Act ("FAWPA"), Virginia Code § 2.2-3009, *et seq.*, and 2) whether alleged violations of the FAWPA can support a *Bowman* wrongful discharge claim.

OPINION LETTER

Upon renewed review, this Court declines to alter its finding that GMU is not an employer under the FAWPA, because GMU is neither a "person" nor an "agent of the governmental agency." *See* Va. Code § 2.2-3010. Although Virginia Code § 1-230 includes a wide range of entities in its definition of "person," the legislature clearly intended to depart from this definition in the FAWPA. Further, GMU is also not an agent of a governmental agency; rather, GMU *is* the governmental agency.

Additionally, this Court reaffirms its finding that alleged violations of the FAWPA cannot support a *Bowman* wrongful discharge claim. Because the FAWPA itself provides a remedy for enforcing and vindicating the policy of the statute, the FAWPA cannot be the basis for a wrongful discharge claim.

Consequently, this Court shall deny Plaintiff's Motion to Reconsider the holdings of the Court that GMU cannot be held liable under the FAWPA, and that the demurrer to the wrongful discharge claim based on alleged violations of the FAWPA must be sustained without leave to amend.

BACKGROUND

Brian Morrison was an officer with the GMU Police Department ("GMU PD"). In 2016, Plaintiff allegedly made investigators aware of a problem with vehicle dash cameras that were malfunctioning and exhibiting recording problems. Plaintiff alleges a group of individuals at GMU engaged in corruption and retaliation that was first triggered by Plaintiff's reporting of the malfunctioning dash cameras. Plaintiff was transferred to a night shift at the Fairfax GMU Campus and was promoted to Corporal. Plaintiff alleges he was thereafter prevented from fulfilling the certification requirements to retain the rank of

Corporal. He was subsequently terminated on September 1, 2021. Plaintiff filed his First Amended Complaint on April 15, 2022, naming as Defendants GMU and five individuals: Emily Ross, Carl Rowan, Jr., Carol Kissal, Andrew Sanavaitis, and Thuan Ly. The individual defendants are affiliates or employees of GMU, most as GMU PD officers. The First Amended Complaint alleges, among other claims, whistleblower retaliation under the FAWPA and wrongful discharge.

Defendants GMU and Sanavaitis each filed demurrers to the First Amended Complaint, arguing the Complaint failed to state a claim for whistleblower retaliation and for wrongful discharge.[1] On December 20, 2023, this Court sustained the demurrers to those claims without leave to amend. The demurrer to the whistleblower retaliation claim against Defendant GMU was sustained based on the Court's finding GMU does not meet the definition of "employer" under Virginia Code § 2.2-3010. The demurrer to the wrongful discharge claim was sustained, in part, based on findings that alleged violations of the FAWPA cannot support a *Bowman* claim, and that allowing Plaintiff to sue on a claim for whistleblower retaliation and for wrongful discharge based on the whistleblower retaliation statute would impermissibly authorize duplicative claims. On January 10, 2024, Plaintiff filed a motion to reconsider these findings.

ANALYSIS

I. GMU Is Not an "Employer" Under the FAWPA's Plain Language, Consistent With Prior Controlling Precedent and Principles of Statutory Interpretation

[1] Although Plaintiff argued he did not attempt to hold Defendants GMU and Sanavaitis liable for wrongful discharge, Plaintiff did seek equitable relief from Defendant GMU pursuant to Count VII and to hold Defendant Sanavaitis jointly and severally liable for Count VII. Thus, the Court treated Count VII as being alleged against both Defendants.

Plaintiff principally argues[2] Defendant GMU is an employer for the purposes of the FAWPA under the plain language of Virginia Code § 2.2-3010 vis-à-vis Virginia Code § 1-230. Citing *Stribbling v. Bank of Valley*, 26 Va. 132 (1827), Plaintiff asserts GMU should be considered subject to liability under the FAWPA because legal entities—like corporations—are, writ large, considered to be encapsulated in the term "person" at common law. Plaintiff further contends GMU qualifies as an "agent of a governmental

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[2] Plaintiff also takes exception that the Court "ruled *sua sponte* that GMU was not a 'person' and dismissed 'Count I, Whistleblower Retaliation' as to GMU without leave to amend." Pl.'s Mot. to Reconsider at 1. The Court was presented with a lengthy unwieldy Complaint challenged by six demurrers, necessitating the issuance of orders of some seventy-three pages in length, including color coded charts, to sort through which of the laundry list of stated grievances amount to viable claims. Although with caution, this Court may consider issues raised by the Court sua sponte where doing so would obviate the waste of judicial resources. *See, e.g.*, *Eilber v. Floor Care Specialists, Inc.*, 294 Va. 438, 444 (2017) (noting a court may raise the doctrine of judicial estoppel on its own motion) ("The reasoning for this conclusion is plain: a court's ability to apply a doctrine intended primarily to protect the court itself should not be contingent upon the parties raising it in their pleadings."); *Collelo v. Geographic Servs.*, 283 Va. 56, 67-68 (2012) (noting a trial court may grant a Motion to Strike on a ground raised by the trial court sua sponte); *Jeffrey v. Lea*, No. 1641-22-3, 2022 Va. App. LEXIS 662, at *7-8 (Va. Ct. App. Dec. 20, 2022) (noting an appellate court may note the failure to join a necessary party sua sponte); *Coleman v. Coleman*, No. 0854-21-3, 2022 Va. App. LEXIS 83, at *2-3 (Va. Ct. App. Mar. 29, 2022) (noting an appellate court may consider the issue of subject matter jurisdiction sua sponte); *Martinson v. Evans*, No. CL-2017-12308, 2018 Va. Cir. LEXIS 18, at *4-5 (Fairfax Feb. 15, 2018) (Smith, J.) ("[A] trial court can raise the issue of standing *sua sponte*."). Further, this Court has the responsibility in presiding over the parties' impending jury trial "to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." *See Swisher v. Swisher*, 223 Va. 499, 503 (1982). It is therefore axiomatic that the Court must not instruct a jury as to a claim not properly actionable under the Complaint. The fact Defendants did not initially identify the "person" issue is of no consequence.

> Jurisdiction of the subject matter can only be acquired by virtue of the Constitution or of some statute. Neither the consent of the parties, nor waiver, nor acquiescence can confer it. Nor can the right to object for a want of it be lost by acquiescence, neglect, estoppel or in any other manner. . . . [A]nd the want of such jurisdiction . . . will be noticed by this [C]ourt *ex mero motu*.

See Shelton v. Sydnor, 126 Va. 625, 629-30 (1920) (citations omitted). The existence of a proper pleading upon which relief against the named parties can be granted is a matter of the Court's jurisdiction. *See Potts v. Mathieson Alkali Works*, 165 Va. 196, 207-228 (1935) ("Pleadings are as essential as proof, the one being unavailing without the other. A decree can not be entered in the absence of pleadings upon which to found the same, and if so entered it is void."). This Court thus properly intervened sua sponte as part of the duties incumbent upon any trial judge to ensure only those claims over which the Court possesses subject matter jurisdiction are adjudicated to verdict.

agency" because GMU is a sub-agency of the Rector and Visitors of George Mason University.

In response, Defendants GMU and Sanavaitis argue GMU is a governmental agency under the Virginia Administrative Code ("VAC"), and that under the plain language of the VAC and Virginia Code § 2.2-3010, GMU is not an "agent of a governmental agency" since it is the governmental agency itself. 8 V.A.C. 35. Defendants further contend Plaintiff's argument fails as a matter of law pursuant to the holdings in *Cuccinelli v. Rector & Visitors of University of Virginia*, 283 Va. 420 (2012), and *Fogleman v. Commonwealth*, No. 0841-22-2, 2023 Va. App. LEXIS 627, at *10 (Va. Ct. App. Sept. 19, 2023). Further, Defendants assert interpreting the FAWPA's definition of "employer" as including GMU would run afoul of the rule that sovereign immunity can only be expressly waived. *See Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 244 (2004).

Virginia Code § 2.2-3010 provides:

> "Employer" means a person supervising one or more employees, including the employee filing a good faith report, a superior of that supervisor, or an agent of the governmental agency.

To Plaintiff's point, Virginia Code § 1-230 further provides:

> "Person" includes any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof.

This definition "shall be used in the construction of this Code and the acts of the General Assembly, *unless the construction would be inconsistent with the manifest intention of the General Assembly*." Va. Code § 1-202 (emphasis added).

The Court's primary objective in interpreting a statute is "to ascertain and give effect to legislative intent, as expressed by the language used in the statute." *Berry v. Bd. of Supervisors*, 884 S.E.2d 515, 520 (Va. 2023) (internal quotation marks and citation omitted). Legislative intent is determined "from the words contained in the statute." *Id.* Words in a statute "are to be construed according to their ordinary meaning, given the context in which they are used," unless the statute provides for a specific definition. *Id.* "Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied." *Chesapeake Hosp. Auth. v. State Health Comm'r*, 301 Va. 82, 95 (2022) (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566 (1944)).

Here, the plain language of Virginia Code § 2.2-3010 substantiates a manifest intention on the part of the legislature to depart from the definition of a "person" in Virginia Code § 1-230. Section 2.2-3010 flatly defines an employer as a "person supervising one or more employees, including the employee filing a good faith report, a superior of that supervisor, or an agent of the governmental agency." It would defy logic to conclude a legal entity, rather than a natural person, could "supervise one or more employees." To this point, the Supreme Court of the United States has defined a "supervisor" as one who is "empowered by the employer to take tangible employment actions"—one who is empowered to "supervise." *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013). Because a legal entity, like GMU, is only a person in a conceptual sense, it follows a legal entity cannot logically engage in the act of "supervising."

Further, the inclusion of examples such as "the employee filing a good faith report, a superior of that supervisor, or an agent of the governmental agency," demonstrates the legislature's intent to depart from the broad definition of a "person" found in § 1-230. The canon of statutory interpretation *noscitur a sociis*—meaning "known by its associates"—provides "the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be read in harmony with its context." *Roberts v. Cnty. of Loudoun*, No. 1575-13-4, 2014 Va. App. LEXIS 248, at *9-10 (Va. Ct. App. June 24, 2014) (quoting *Edwards v. Commonwealth*, 53 Va. App. 402, 411 (2009) (*en banc*)) ("It does not provide that the words grouped together in a statute or ordinance must be construed *identically*."). Each of the examples provided by the statute reflects the legislature's manifest intention to restrict the imposition of liability to *natural* persons, regardless of their capacity or relationship to the claimant.

This interpretation is consistent with the prior holdings of appellate courts in the Commonwealth. "It is well-settled law that Commonwealth agencies are not bound by statutes of general application '*no matter how comprehensive the language*, unless named expressly or included by necessary implication.'" *Cuccinelli*, 283 Va. at 426-27 (refusing to conclude the University of Virginia was subject to liability under a prior iteration of the Virginia Fraud Against Taxpayers Act pursuant to a definition of the word "person" in a statute of general applicability, because the statute did not specifically or expressly include the Commonwealth within its scope). The *Cuccinelli* court explained:

> Since the General Assembly has expressly included the Commonwealth and its agencies when the General Assembly so intended and expressly excluded the Commonwealth and its agencies elsewhere in the Code, we cannot find that the [Virginia Fraud Against Taxpayers Act] expressly

> includes UVA under its definition of "person" merely because the definition includes corporations.

Id. at 428. In addition, the Court of Appeals of Virginia has recently determined the mere use of the word "person" when describing individuals subject to liability under the Virginia Human Rights Act ("VHRA") does not constitute an indication a government agency is subject to liability by reference to § 1-230. *Fogleman*, 2023 Va. App. LEXIS 627, at *10-12.

Even if governmental entities were liable under the FAWPA, the plain language of the statute expressly indicates agents of a governmental agency, rather than the governmental agency itself, would be the only ones liable. Here, GMU is the relevant governmental agency at issue. *See* 8 V.A.C. 35 (referring to GMU as "VAC Agency No. 35"); *see also DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 135 (2011) ("GMU is a public educational institution and *an agency of the Commonwealth*." (emphasis added)); *George Mason Univ. v. Floyd*, 275 Va. 32, 37 (2008) ("It is clear that GMU qualifies as an agency of the Commonwealth"). At no point in the First Amended Complaint does Plaintiff plead facts suggesting he was retaliated against based on his status as a whistleblower by the Board of Visitors through GMU as its agent.[3] This makes sense—Plaintiff was not employed by the Board of Visitors; Plaintiff was employed by GMU in its capacity as a governmental agency acting as a principal. It follows that even if GMU were to be viewed as an agent of the Board of Visitors this would not be enough to suggest GMU is an agent of a governmental agency for purposes of this claim.

[3] Further, the Board of Visitors is merely a regulatory body governing the administration and management of GMU. *See generally* Va. Code § 23.1-1301.

As a final argument, Plaintiff cites *Stribbling v. Bank of Valley*, 26 Va. 132 (1827), for the proposition GMU is an "artificial and legal person" like a corporation, and therefore should be "equally subjected to the pecuniary penalt[ies]" under the FAWPA. Pl.'s Mot. to Reconsider at 3. There, the Supreme Court determined "if corporations may be supposed to be exposed to the temptation of engaging in [usury], as well as natural persons," then they should be subject to laws penalizing usury committed by a "person." *Stribbling*, 26 Va. at 190. However, *Stribbling* is inapposite inasmuch as this Court is not dealing with a nearly two-centuries old usury statute, nor is it dealing with a private corporation. To the contrary, the Court is faced with a statute that has been amended as recently as 2016, for which there is a dearth of case law to understand its provisions, and under which a claimant seeks to hold a government entity liable. This latter fact is troublesome, insofar as both the Supreme Court of Virginia and the Court of Appeals of Virginia have previously set forth a clear statement rule for determining when a statute exposes government entities to liability. *See Cuccinelli*, 283 Va. at 426-27; *Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 244 (2004) ("Absent an express statutory or constitutional provision waiving sovereign immunity, the Commonwealth and its agencies are immune from liability for the tortious acts or omissions of their agents and employees."); *Fogleman*, 2023 Va. App. LEXIS 627, at *10 ("The sovereign is a person or party within the intendment of a statute only when *the General Assembly* names it expressly or by necessary implication." (quoting *Cuccinelli*, 283 Va. at 428)).

As a result, Plaintiff's reconsideration argument fails, and the Court reiterates its ruling that GMU, not being a natural person nor agent of a governmental agency, is not

an "employer" as defined in Virginia Code § 2.2-3010, and therefore is not subject to liability under the FAWPA.

II. Alleged Violations of The Fraud and Abuse Whistle Blower Protection Act Cannot Support a *Bowman* Wrongful Discharge Claim

"Virginia adheres to the employment at-will doctrine." *Francis v. National Accrediting Commission of Career Arts & Services, Inc.*, 293 Va. 167, 171 (2017). *Bowman v. State Bank of Keysville,* 229 Va. 534 (1985), created a narrow exception to this rule for cases in which an employer violates public policy in the discharge of an employee. There are only three recognized scenarios under which a wrongful discharge claim can be made under the *Bowman* exception:

(1) when an employer violated a policy enabling the exercise of an employee's statutorily created right; or

(2) when the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy; or

(3) when the discharge was based on the employee's refusal to engage in a criminal act.

Francis, 293 Va. at 172. The *Bowman* exception is limited to discharges that violate "the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general." *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94, 98 (1996). Virginia does not recognize "a generalized, common-law 'whistleblower' retaliatory discharge claim" as an exception to the employment at-will doctrine. *Dray v. New Market Poultry Prods., Inc.*, 258 Va. 187, 191 (1999).

Virginia Code § 2.2-3009 states, "It shall be the policy of the Commonwealth that citizens of the Commonwealth and employees of governmental agencies be freely able to report instances of wrongdoing or abuse committed by governmental agencies or independent contractors of governmental agencies." At first glance, it appears the FAWPA with its express policy could be the basis for a wrongful discharge claim under the second scenario; however, the FAWPA cannot be a basis for a *Bowman* claim because it provides an express remedy for instances of whistleblower retaliation.

Virginia courts have long held that "[when] a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise." *Concerned Taxpayers v. Cnty. of Brunswick*, 249 Va. 320, 330 (1995) (quoting *Vansant & Gusler, Inc. v. Washington*, 245 Va. 356, 360 (1993)); *see also School Bd. v. Giannoutsos*, 238 Va. 144, 147 (1989); *Gochenour v. Beasley*, 47 Va. Cir. 218, 224 (Rockingham 1998) ("It has been long held that a civil statute which prohibits certain activity and provides specific remedies for an aggrieved party is self-contained and it is not the intent of the Legislature that it would also serve as an 'articulated public policy of the Commonwealth of Virginia,' that could also serve as the basis of a *Bowman* type claim."); *Jenkins v. Heilig-Meyers Co.*, 57 Va. Cir. 448, 449-450 (Fredericksburg 1998) ("If the termination is in violation of stated public policy, the law does not permit the aggrieved employee to pursue a common law remedy when a statutory remedy is clearly enunciated. The statutory relief is therefore the exclusive remedy for the violation. To allow a broader remedy than the statute specifically provides would require a court to abandon

the principle of 'strict construction' and destroy the legislative scheme as contemplated and created by the General Assembly.").

Although the Supreme Court of Virginia has not yet addressed the exclusivity of remedy issue with reference to the FAWPA, courts in Virginia have ruled other statutes providing remedies cannot be the basis for a *Bowman* claim. *Conner v. Nat'l Pest Control Ass'n*, 257 Va. 286, 290 (1999) (finding the 1995 amendments to the VHRA "eliminated a common law cause of action for wrongful termination based on any public policy which is reflected in the VHRA"); *Jenkins*, 57 Va. Cir. 448 (finding the remedy provided in Va. Code § 40.1-51.2:2 is the exclusive remedy under Virginia law and cannot be a basis for a *Bowman* claim); *Judy v. National Fruit Prod. Co.*, 40 Va. Cir. 244, 244-45 (Winchester 1996) (sustaining demurrer to wrongful discharge claim because Va. Code § 40.1-51.2:2 provides the exclusive remedy); *Cauthorne v. King*, 30 Va. Cir. 202, 204 (Richmond 1993) ("[U]nder the Fair Housing Law, plaintiffs can exercise their own rights and aid or encourage others to exercise their rights without threat or intimidation. Additionally, the Fair Housing Law provides both rights and remedies, allowing for complaints to the Real Estate Board as well as civil actions. The public policy exception recognized in *Bowman* contemplated the absence of another remedy.").

Federal courts applying Virginia law have also ruled statutes providing rights and remedies for those rights cannot be the basis for a *Bowman* claim. *See Hice v. Mazzella Lifting Techs., Inc.*, 589 F.Supp.3d 539, 553 (E.D. Va. 2022) (rejecting the VHRA as a basis for a *Bowman* claim because "the VHRA provides its own remedial scheme and contemplates employees bringing a cause of action based on age and/or disability

discrimination under the statute"); *Tattrie v. CEI-Roanoke, LLC*, No. 7:23-cv-079, 2023 U.S. Dist. LEXIS 109674 (W.D. Va. June 20, 2023) (same); *Williams v. TMS Int'l, LLC*, No. 3:21cv260 (DJN), 2021 U.S. Dist. LEXIS 169544, at *14 (E.D. Va. Sept. 7, 2021) (finding Va. Code § 40.1-51.2:2 is the exclusive remedy for violations of the underlying public policy in the statute); *Carmack v. Virginia*, No. 1:18-cv-00031, 2019 U.S. Dist. LEXIS 58816, at *38 (W.D. Va. April 5, 2019) (finding the policy stated in Va. Code § 2.2-3000 could not be a basis for a *Bowman* claim because "the grievance procedure creates a formal process for resolving employment-related disputes").

Hence, this Court finds the FAWPA cannot be the basis for a *Bowman* claim. The FAWPA itself includes a remedy for whistleblower retaliation. Virginia Code § 2.2-3011(D) states,

> In addition to the remedies provided in § 2.2-3012, any whistle blower may bring a civil action for violation of this section in the circuit court of the jurisdiction where the whistle blower is employed. In a proceeding commenced against any employer under this section, the court, if it finds that a violation was willfully and knowingly made, may impose upon such employer that is a party to the action, whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than $500 nor more than $2,500, which amount shall be paid into the Fraud and Abuse Whistle Blower Reward Fund. The court may also order appropriate remedies, including (i) reinstatement to the same position or, if the position is filled, to an equivalent position; (ii) back pay; (iii) full reinstatement of fringe benefits and seniority rights; or (iv) any combination of these remedies. The whistle blower may be entitled to recover reasonable attorney fees and costs. . . . Any whistle blower proceeding under this subsection shall not be required to exhaust existing internal procedures or other administrative remedies.

Although § 2.2-3011 does not provide as exhaustive a remedy as some other statutes deemed to bar *Bowman* claims, the legislature's inclusion of a remedy clearly shows the FAWPA was intended to be the exclusive remedy for whistleblower retaliation.

Because "the goal of the statute can be fulfilled through the remedy provided by the statute itself," "[a]n additional remedy . . . is not needed." *Shields v. PC-Expanders, Inc.*, 31 Va. Cir. 90, 93 (Fairfax 1993). Allowing a *Bowman* claim based on the FAWPA would enable plaintiffs to "bypass a statute's remedial scheme, thereby subverting the legislature's intent. As a result, the legislature need not explicitly state that a statute provides an exclusive remedy to preclude a *Bowman* claim . . . . Rather, the legislature must merely 'clearly enunciate[]' a statutory remedy." *Williams*, 2021 U.S. Dist. LEXIS 169544, at *18 (citations omitted). Therefore, this Court finds the remedy provided in § 2.2-3011 was intended to be the exclusive remedy for whistleblower retaliation under the FAWPA. As a result, the Court reaffirms its ruling that the FAWPA cannot be the basis for a *Bowman* claim.

CONCLUSION

The Court has considered whether GMU can be held liable under the FAWPA and whether the FAWPA can be the basis for a *Bowman* claim. First, GMU cannot be held liable under the FAWPA. Because GMU is neither a person nor an agent of a governmental agency, GMU does not fit the FAWPA's definition of "employer." Second, the FAWPA cannot be the basis for a *Bowman* claim because the statute itself provides a remedy to vindicate the public policy the FAWPA seeks to advance.

Accordingly, this Court shall deny Plaintiff's Motion to Reconsider the holdings of the Court that GMU cannot be held liable under the FAWPA, and that the demurrer to the wrongful discharge claim based on alleged violations of the FAWPA must be sustained without leave to amend.

The Court shall enter a separate order incorporating the ruling herein, and until such time this cause continues and is not final.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER