SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

RICHARD ADAMS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	**2009 CA 006419 B**
v.	)	**Judge Anita Josey-Herring**
	)	**Calendar 11**
DISTRICT OF COLUMBIA, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Before the Court is "Defendant's Motion for Summary Judgment," filed March 9, 2011 by the District of Columbia.[1] Plaintiff Richard Adams filed an opposition on March 30, 2011. For the reasons set forth below, the motion is denied.

BACKGROUND[2]

Detective Adams began working as a patrol officer at the Metropolitan Police Department ("MPD") in 1981. Pl.'s Opp. at 2. He was promoted to Detective in 1993 and was assigned to the Missing Persons Unit of MPD's Youth Investigations Division ("YID") shortly thereafter. *Id.*; Compl. at ¶ 9. In that position, he is responsible for investigating and tracking missing children. Compl. at ¶ 10. Detective Adams is also responsible for completing all paperwork and case file documents associated with those cases. *Id.* at ¶¶ 20-22. During the early years of the assignment to YID, there were nine detectives attached to the unit, which received 40-50 cases per month. Pl.'s Opp. at 2. However, over time, staffing cuts reduced the number of detectives assigned to the Missing Persons Unit while the caseload increased dramatically. *Id.* Detective Adams contends that he reported

[1] Although Plaintiff initially sued several individual defendants, all counts against them have been dismissed on May 3, 2010 by this Court. Therefore, the use of "Defendant" shall refer only to the District of Columbia. Additionally, although suit was brought jointly by Detective Richard Adams and the Fraternal Order of Police, all references to "Plaintiff" herein shall be construed to refer to Detective Adams only, unless otherwise specified.

[2] The facts as set forth below are as set forth in the Plaintiff's Complaint and subsequent filings and are deemed established for the purposes of this order only.

the overwhelming caseloads and understaffing on many occasions, but that no action was taken by the MPD. *Id.* at 3-4.

On March 19, 2009, Fraternal Order of Police ("FOP") chairman Kristopher Baumann, a District of Columbia employee, wrote and delivered a letter to D.C. Inspector General, Charles Willoughby describing the MPD's mismanagement in investigating and tracking missing children and juvenile offenders. Pl.'s Opp. at Ex. 4 (hereinafter the "March 19 letter"). The letter, while mentioning Detective Adams by name when explaining the attachment of his case log to the letter, does not specifically state at any point that it was written on his behalf or at his request. *Id.* The letter set forth allegations that, *inter alia*: (1) missing children reports were not being assigned to investigating officers for months or years; (2) overwhelming numbers of cases were being assigned to each of the four detectives working in the YID; (3) the cases were assigned in a random manner when they were assigned at all; (4) the department and Chief Lanier had refused to take action on the officers' allegations. *Id.*

The day after the letter was received, seven additional officers were detailed to YID, effective March 22, 2009, to assist in organizing the office and closing files. Pl.'s Opp. at Ex. 7, Attachment 3; Pl.'s Opp. at 9. On March 23, 2009, Mr. Baumann sent a letter to Mr. Willoughby detailing this immediate response. Pl.'s Opp. at Ex. 7. The MPD, through the person of Lieutenant Bobby Ladson, conducted an audit of the YID; Plaintiff avers that the audit was not intended as an investigation of YID generally. Pl.'s Opp. at 10. Instead, it was a focused investigation of Detective Adams. *Id.* Several of the officers involved in the investigation confirmed this impression. Pl's Opp. at Ex. 5, 310-311; Pl's Opp. at Ex. 13, 124. Detective Adams also contends he was the only detective required to provide a statement during the audit. Pl.'s Opp. at Ex. 1, 59, 86. The audit concluded on March 27, 2009. Pl.'s Opp. at 10. Detective Adams asserts that no report was ever issued based on the audit.

Meanwhile, on April 18, 2008, MPD Officer Tiffany Jones, one of the seven officers assigned to YID in the wake of the March 19 letter, discovered 91 case reports from 2001-2008 in a file cabinet. Def.'s Mot. at 2. All of these files were assigned to Detective Adams and were not closed case files; some were signed by a supervisor and some remained unsigned. *Id.* Detective Adams' supervisors determined that he had failed to close and submit his case reports, in violation of MPD General Orders. Compl ¶ 21. Detective Adams did not deny failing to close and submit the case files, instead, he told his supervisors that the case reports were inadvertently left in a stack of papers on his desk. Pl.'s Opp. at Ex. 12, at p. 7. On May 22, 2009, Detective Adams submitted 223 open case files to his supervisors, including missing persons cases, persons in need of supervision cases, parental kidnapping cases, and physical abuse cases; many of these cases were stored under Detective Adams' desk in a box and were not being actively investigated at the time. *Id.* Detective Adams' stated reasons for the open files were: (1) he was unfamiliar with how to investigate child abuse cases; (2) the cases were not timely assigned to him; and (3) he inadvertently forgot to turn the cases in to an official due to the overwhelming case load. *Id.* at 8.

On July 8, 2009, Sergeant Hines issued a "Final Investigative Report with Recommendations Concerning the Neglect of Duty by Detective Richard Adams, of the Youth Investigative Division, IS# 09-001812," (the "Final Report") which charged Detective Adams with neglect of duty and willfully making an untruthful statement. *Id.* at 12. The report recommended that "Detective Adams receive Adverse Action and [be] demoted from Detective Grade II and removed from the Investigative Section of the Missing Persons Unit." *Id.* The Final Report noted that Detective Adams had failed to close and submit PD 252 reports for 14 cases during the period of February 10, 2008 and February 23, 2009 and had failed to conduct follow-up investigations on 223 cases between 2001 and 2008, which gave rise to the neglect of duty charge. *Id.* Further, the Final Report charged Detective Adams with willfully making an untruthful statement for allegedly informing his superiors that

the unclosed case files were located on his desk when, in fact, they had been found in a filing cabinet. *Id.*

The MPD also performed a separate investigation into the claims of managerial deficiencies at YID that were raised in the March 19 letter. Pl.'s Opp. at 12; *Id.* at Ex. 15. The report on that investigation, released May 22, 2009, confirmed the managerial negligence alleged in the March 19 letter. *Id.* at Ex. 15, 2. However, the MPD declined to impose adverse action against any of the supervisors in question, as the time for imposing discipline had passed: "[i]t is recommended this matter be closed with no further action taken." *Id.* at Ex. 15, 3. Later, an Assistant Chief, Winston Robinson, testified that Detective Adams' supervisors should have been disciplined in lieu of imposing adverse action on Detective Adams. Pl.'s Mot. at Ex. 14, 30-34.

On July 16, 2009, Detective Adams was served with a Notice of Proposed Adverse Action stating:

> . . . [I]n light of this matter your dependability is in question as it relates to properly investigating and performing your duties as a Detective Grade II. . . .
>
> Again, the nature of this offense was serious and it involved untruthful statements and a poor work ethic as a Detective Grade II. This particular incident has affected this office's confidence in your ability to perform future assigned duties in your current assignment. Moreover, your ability to be truthful and fully ethical is also in question.
>
> . . .
>
> There can be no reasonable doubt that you knew or should have known that it is unacceptable to make untruthful statements to an official of this Department. Moreover, you should have known that placing hundreds of investigative cases inside of a cabinet and failing to properly follow-up on the matters is unacceptable and dangerous for the complainants' welfare.
>
> . . .
>
> This review finds that there were no other mitigating circumstances that surfaced surrounding this incident, which would justify your inability to properly protect minor children and their welfare.
>
> This review also finds that the adequacy and effectiveness of alternative sanctions to deter such conduct in the future is not viable in the position of Detective Grade II.

> For the aforementioned violation with specifications, the Department proposes to remove you from your Detective Grade II position to the grade of Officer. In addition, the Department proposes to suspend you for a period of thirty (30) days.

Pl.'s Opp. at Ex. 18, at 3.[3] As a result, Detective Adams was required "to attend Professional Development Training, Ethics in Law Enforcement, in the upcoming 2010 fiscal year." *Id.* at Ex. 21, at 3. The order to attend ethics training was never rescinded. *Id.* at 19.

Detective Adams filed an appeal of the Final Notice of Adverse Action with Chief Kathy Lanier. *Id.* at 19. On October 29, 2009, Chief Lanier sent a notice of final agency action to Detective Adams, which noted:

> After a thorough review of the record and the investigative report developed in this matter, and upon consideration of your letter requesting a review, I have decided to ***grant*** your appeal. However, I am directing that your obvious failures to properly manage your cases be documented with a PD 62E that shall be taken into consideration when developing your performance evaluation.
>
> This represents final agency action in this matter.

Pl.'s Opp. at Ex. 22 (emphasis original). Chief Lanier later testified that she granted Detective Adams' appeal because the cases at issue were outside the 90-day window for imposing discipline and that the untruthful statement charge was not legitimate. *Id.* at Ex. 8, 49-51. Chief Lanier also testified that although she had granted the appeal, she required the PD 62E documentation because it "is not discipline, it's a letter of counseling." *Id.* at Ex. 8, 51.

Detective Adams filed the Complaint in the instant matter on September 4, 2009, asserting multiple claims against both the District of Columbia and several individual defendants. On May 3, 2010, the Court dismissed Detective Adams' Complaint as against all the individual defendants on the grounds of qualified immunity, as well as the First Amendment claim against the District of Co-

[3] Detective Adams notes that the charge of "willfully making an untruthful statement" was reduced to a charge of "conduct prejudicial to the reputation of the police force." Pl.'s Opp. at 17. The MPD official that drafted and signed the Notice of Proposed Adverse Action stated, in his deposition, that Assistant Chief Robinson recommended that the charge be changed because it carried an excessively heavy penalty, and would have required that Detective Adams appear for a hearing, at which a panel would have the power to recommend termination. Pl.'s Opp. at Ex. 19, 51.

lumbia. Therefore, the only remaining cause of action averred by Detective Adams is a Whistleblower Protection Act ("WPA") claim against the District of Columbia. In that sole surviving claim, Detective Adams alleges that the District of Columbia, through the Metropolitan Police Department, retaliated against him for making protected disclosures regarding the state of affairs at the Youth Investigations Division. Defendant District of Columbia filed the instant Motion for Summary Judgment on March 9, 2011, averring that the evidence demonstrates that that the MPD did not retaliate against Detective Adams for his disclosures; rather, he was disciplined for his failures to investigate missing person's cases assigned to him. Detective Adams filed an opposition on March 30, 2011, in which he states that the discipline was clearly retaliatory, and, in any event, there remain significant issues of disputed fact; therefore, summary judgment is inappropriate.

STANDARD OF REVIEW

A. Summary Judgment

Summary judgment is a means of putting parties to their proof before the expense and delay of a trial. The device removes from the court system cases in which parties cannot present supporting evidence even after full opportunity for discovery and is an essential tool of judicial management. Appropriate use of summary judgment conserves judicial resources; the financial and temporal resources of the parties; and the resources of the community, as citizens who would otherwise be drafted as jurors are spared this duty for non-meritorious cases. As the United States Court of Appeals for the First Circuit has observed:

> Summary judgment is a device that has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways. 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 (1st Cir. 1999) (internal quotation marks and citations omitted). At the same time the procedure serves important considerations, however, it is applied cautiously and carefully because it denies a party the opportunity to go to trial.

To prevail on a motion for summary judgment, the moving party must demonstrate, based upon the pleadings, discovery, and any affidavits or other materials submitted, that there is no genuine issue as to any material fact in dispute and that the movant is therefore entitled to judgment as a matter of law. *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001); Super. Ct. Civ. R. 56 (c). A trial court considering a defendant's motion for summary judgment must view the pleadings, discovery materials and affidavits or other materials in the light most favorable to the plaintiff and may grant the motion only if a reasonable jury could not find for the plaintiff as a matter of law. *Grant*, 786 A.2d at 583 (citing *Nader v. De Toledano*, 408 A.2d 31, 42 (D.C. 1979)); *Bailey v. District of Columbia*, 668 A.2d 817, 819 (D.C. 1995); *Graff v. Malawer*, 592 A.2d 1038, 1040 (D.C. 1991). Affidavits submitted by the parties "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Super. Ct. Civ. R. 56 (e).

The moving party has the initial burden of proving that there is no genuine issue of material fact in dispute. If the moving party carries this initial burden, then the non-moving party assumes the burden of establishing that there is a genuine issue of material fact in dispute. *Grant*, 786 A.2d at 583 (citing *O'Donnell v. Associated Gen. Contractors of Am., Inc.*, 645 A.2d 1084, 1086 (D.C. 1994)). The non-moving party may not simply rest on conclusory allegations or denials of the movant's pleadings to establish that a genuine issue of material fact is in dispute, but must show that there is sufficient evidence in support of the party's assertions to require a jury or judge to resolve the differing versions of truth. *Boulton v. Inst. of Int'l Educ.*, 808 A.2d 499, 502 (D.C. 2002). There must be "some significant probative evidence tending to support the complaint so that a reasonable fact-finder

could return a verdict for the non-moving party." *Lowrey v. Glassman*, 908 A.2d 30, 36 (D.C. 2006) (internal quotation and citation omitted).

If the non-moving party fails to establish that a genuine issue of material fact is in dispute, the moving party is entitled to summary judgment. *Boulton*, 808 A.2d at 501; Super. Ct. Civ. R. 56 (e).

***B. The Whistleblower Protection Act – D.C. Code §§ 1-615.51* et seq.**

The District of Columbia Whistleblower Protection Act ("WPA"), codified at D.C. Code §§ 1-615.51 *et seq.*, was created because the "Council found that 'the public interest is served when employees of the District government are free to report waste, fraud, abuse of authority, violations of law, or threats to public health and safety without fear of retaliation or reprisal.'" *Crawford v. District of Columbia*, 891 A.2d 216, 218 (D.C. 2006) (quoting D.C. Code § 1-615.51.). To that end, the WPA prohibits a supervisor from "threatening to take or taking a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order." D.C. Code § 1-615.53. The WPA defines a "prohibited personnel action" to include "recommended, threatened, or actual termination, demotion, suspension, or reprimand; involuntary transfer, reassignment or detail . . . or retaliating in any other manner against an employee because that employee makes a protected disclosure . . ." D.C. Code § 1-615.52 (a)(5). A "protected disclosure" is:

> any disclosure of information, not specifically prohibited by statute, by an employee to a supervisor or a public body that the employee reasonably believes evidences:
>
> (A) Gross mismanagement;
> (B) Gross misuse or waste of public resources or funds;
> (C) Abuse of authority in connection with the administration of a public program or the execution of a public contract.
> (D) A violation of a federal, state, or local law, rule, or regulation, or of a term of a contract between the District of Columbia and a District government contractor which is not of a merely technical or minimal nature; or

(E) A substantial and specific danger to the public health and safety.

D.C. Code § 1-615.52 (a)(6). A public body is statutorily intended to include the District of Columbia Office of the Inspector General. *Id.* at § 1-615.52 (a)(7)(A). A whistleblower is thus "an employee who makes or is perceived to have made a protected disclosure as that term is defined in this section." *Id.* at § 1-615.52 (a)(9). Therefore, the WPA protects employees that have allegedly been retaliated against because their supervisors perceived them to have made a protected disclosure. *See Special Counsel v. Dept. of Navy*, 46 M.S.P.R. 274, 278 (1990) (interpreting the federal WPA).[4]

The WPA also provides a specific structure that determines which party bears the burden at each stage of the WPA analysis:

> In a civil action or administrative proceeding, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by § 1-615.53 was a contributing factor in the alleged prohibited personnel action against an employee, the burden of proof shall be on the employing District agency to prove by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by this section.

D.C. Code § 1-615.54 (b). The District of Columbia Court of Appeals has adopted the burden-shifting structure set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). *Crawford v. District of Columbia*, 891 A.2d 216, 221 (D.C. 2006). In *Johnson v. District of Columbia*, 935 A.2d 1113 (D.C. 2007), the Court of Appeals expanded on that holding, noting that, initially, the plaintiff bears the burden of establishing a *prima facie* case of retaliation. *Johnson*, 935 A.2d at 1118. The burden then shifts to the defendant to articulate some legitimate reason for the alleged adverse action. *Id.* If the defendant can articulate such a reason for the alleged adverse action, plaintiff then bears the burden of proving that the explanation for the action is a pretext to retaliation. *Id.* In es-

[4] The Merit System Protection Board has likewise found that a protected disclosure may be made on behalf of another with respect to the Federal Whistleblower Protection Act, though that conclusion has never been adopted with respect to the D.C. WPA. *See Burrowes v. Dept. of Interior*, 54 M.S.P.R. 547, 551-552 (1992). Because the Court has been unable to locate, and the parties have not provided, any District of Columbia Court of Appeals or other precedent, the interpretation of the Board is persuasive to this Court, given the substantial similarity of the D.C. WPA and the federal WPA. *Compare, e.g.,* D.C. Code § 1-615.52 (a)(6) *with* 5 U.S.C. 2302 (b)(8).

sence, this means that a plaintiff is "obliged to challenge the motion for summary judgment with a proffer of admissible evidence that [the] protected activity . . . was a 'contributing factor' in the alleged prohibited action." *Id.* The WPA defines a "contributing factor" as "any factor which, alone or in connections with other factors, tends to affect in any way the outcome of the decision." D.C. Code § 1-615.52 (a)(2).

ANALYSIS

Defendant District of Columbia filed the instant motion on March 9, 2011, making the following arguments: (1) Detective Adams did not suffer an adverse employment action; (2) Detective Adams did not make a "protected disclosure" under the meaning of the DC WPA because he failed to make a disclosure to a "supervisor or public body"; (3) assuming the Court finds that Detective Adams can establish a *prima facie* case of retaliation under DC WPA, his claim still must fail because the District has a legitimate non-retaliatory reason for taking the challenged employment action. Detective Adams avers, in opposition: (1) that he has established a prima facie case of retaliation under the DC WPA; (2) that he made a protected disclosure under the DC WPA; (3) that the District did not have a legitimate non-retaliatory basis for the adverse employment actions taken against Detective Adams. The Court addresses the above arguments in turn.

Prima Facie *Retaliation Claim*

In order to assert a *prima facie* retaliation claim under the DC WPA, the plaintiff must demonstrate that he made a protected disclosure to a supervisor or a public body, a supervisor retaliated against him, and the protected disclosure was a "contributing factor" to the retaliation. *Wilburn v. District of Columbia*, 957 A.2d 921, 924 (D.C. 2008). The District of Columbia asserts that Detective Adams cannot maintain a *prima facie* case of retaliation under the DC WPA for two separate reasons. The first reason is that Detective Adams did not make a "protected disclosure" under the definition

of the DC WPA because Detective Adams did not make the disclosure in question to "a supervisor or a public body" as required. *See* D.C. Code § 1-615.52 (a)(6). There is no dispute between the parties that the head of the Fraternal Order of Police, Mr. Baumann, sent letters to the District of Columbia's Office of the Inspector General ("OIG") on March 19 and 23, 2009. These letters, although they make reference to Detective Adams by name, were purported to have been sent on the behalf of the Fraternal Order of Police. The District of Columbia relies on the fact that Detective Adams did not *personally* send the March 19 and 23 letters to the OIG to aver that Detective Adams cannot, as a matter of law, establish that he made a protected disclosure to a supervisor or public body, as required by the DC WPA. Def.'s Mot. at 8. Therefore, under the District's reasoning, the entire claim must fail. Detective Adams rebuts this allegation for two reasons: that the protected disclosure in this case satisfies the requirements of the DC WPA statute; second, and in the alternative, the DC WPA includes, not only those who made a protected disclosure, but also those that are "*perceived to have made*" a protected disclosure. The Court addresses the parties' arguments below.

The Nature of the Protected Disclosure

This is not the first time that the Court has addressed the instant issue. In an Order issued March 3, 2010 (the "March 3 Order"), the Court discussed, at length, whether the instant disclosure was of the nature protected under the DC WPA. However, because that discussion was in the context of a motion to dismiss, the evidentiary standard for the Plaintiff's claim to survive the instant motion is different. Therefore, the Court reviews the extent to which the instant disclosure qualifies as a protected disclosure under the DC WPA.[5]

[5] The District of Columbia does not argue, in this case, that the disclosures made by Mr. Baumann and, purportedly, Detective Adams would not satisfy the subject-matter requirements of D.C. Code §§ 1-615.52 (6)(A)-(E). Likewise, the District of Columbia does not dispute the "contributing factor" analysis. Therefore, the Court does not address these factors, although they would have to be proven at an eventual trial.

A protected disclosure is defined as "*[a]ny disclosure of information*, not specifically prohibited by statute, by an employee to a supervisor or a public body that the employee *reasonably believes*" evidences one of the five listed circumstances of misconduct. D.C. Code § 1-615.52 (6)(A)-(E) (emphasis added). Misconduct pursuant to the statute entails:

> (A) Gross mismanagement;
> (B) Gross misuse or waste of public resources or funds;
> (C) Abuse of authority in connection with the administration of a public program or the execution of a public contract;
> (D) A violation of a federal, state, or local law, rule or regulation, or of a term of a contract between the District government and a District government contractor which is not of a merely technical or minimal nature; or
> (E) A substantial and specific danger to the public health and safety.

Id. The statute makes no mention of the format in which the information must be presented. As the Court noted in the March 3 Order:

> In the instant case, Plaintiffs' case assignment list and the letter regarding an IAD request to "limit [Detective Adams'] inquires into the whereabouts of a missing juvenile," (Compl. at ¶ 13), were both attached to the March 19 letter itself. Furthermore, even if none of the attached supporting documents alone evidences one of the five circumstances delineated in D.C. Code § 1-615.52 (6)(A)-(E), the documents do not, and never did, exist in a vacuum. They were attached together and presented as a package with each piece performing a separate function. The letter appears to describe the terms of the alleged misconduct while the supporting documents provide factual backing to support a "reasonable [belief]" in serious MPD misconduct. D.C. Code § 1-615.52. Together, the documents coalesce to form a more complete disclosure, in much the same way that the allegation of specific facts combine with statutorily based assertions to provide a sufficient complaint. In both scenarios, the two elements are inextricably tied to one another.
>
> As the supporting documents to the March 19 letter are both adjoined to and substantively related to the March 19 letter from Baumann to the Inspector General, the supporting documents constitute a protected disclosure, submitted by [Mr. Baumann] directly to the Inspector General. *See* D.C. Code § 1-615.52(6) (defining a protected disclosure as "*any* disclosure of information" from an employee to a supervisor or public body) (emphasis added); *see also* D.C. Code § 1-615.52(a)(7)(A) (identifying the Inspector General as a public body). Therefore, it is of no consequence that Baumann did not indicate in his letter to the Inspector General that he was writing "specifically as Plaintiffs' agent," (Def. Mot. to Dismiss at 5) or that the Fraternal Order of the Police is or is not an employee as defined by the evidence pro-

> vided by D.C. Code § 1-615.52(3). Moreover, when the package including the letter are considered together, the information contained in the March 19 package of documents evidence at least one, if not several, of the five circumstances detailed in D.C. Code § 1-615.52 (6)(A)-(E).

March 3 Order at 7-8 (some brackets added for clarity). Therefore, the relevant question for the instant inquiry is whether or not the disclosure was properly made to a "supervisor or public body."

The District of Columbia primarily argues in the instant motion that the Court's reliance in the March 3 Order on the D.C. Circuit case, *Borrell v. U.S. Intern. Comm.'s Agency*, was misplaced. However, the Court only discussed to the *Borrell* decision in a footnote tertiary to the main discussion of the DC WPA's protected disclosure requirements, which stated, in full:

> Even if the March 19 letter was the only protected disclosure, the Court finds persuasive D.C. Circuit authority indicating that third party disclosures are permitted under the Whistleblower Protection Act. *See Borrell v. US. Intern. Communications Agency*, 682 F.2d 981, 988 n.5 (D.C. Cir. 1982) ("We note that to the extent the district court's opinion can be read to require a whistleblower to complain to superiors rather than colleagues, we disagree . . . A protected disclosure may be oral or written and to any person within or outside the agency.") *rev'd on other grounds by Spagnola v. Mathis*, 859 F.2d 223, 229-230 (D.C. Cir. 1988). Despite the non-binding nature of *Borrell*, "[t]his court has recognized that the federal whistleblower statute, 5 U.S.C. § 2302(b)(8) 'is instructive in interpreting similar state statutes,' including the DC-WPA." *Wilburn v. D.C.*, 957 A.2d 921, 925 (D.C. 2008). *See also Crawford*, 891 A.2d at 221 n.12 ("There is no evidence on the record indicating that the D.C. Council intended to apply a different liability standard in its whistleblower cases than that applied in all other federal and state whistleblower laws of which this court is aware.").

March 3 Order at 6 n. 2. However, the citation to the *Borrell* case was not the foundation of the Court's decision in the March 3 Order. Despite this, the Court disagrees with the District of Columbia's argument that, because the language in of the Civil Service Reform Act of 1978, which was interpreted by the *Borrell* Court, does not include a provision requiring that the disclosure be made to a supervisor or public body, as in the DC WPA, this Court's reliance on *Borrell* was misplaced. *See* 5 U.S.C. § 2302 (b)(8)(A). The District avers that the more restrictive language of the DC WPA makes

the *Borrell* Court's decision inapplicable to the instant facts. Def.'s Mot. at 9. While the Court notes the difference in the reporting requirements of the CSRA and the DC WPA, the Court does not find that they make a substantive difference in the analysis.

To the Court's knowledge, neither the District of Columbia Court of Appeals nor the D.C. Circuit has addressed whether the DC WPA's "supervisor or [ ] public body" requirement limits protected disclosures to those made directly by the disclosor to the disclosee – the supervisor or public body. It is undisputed that the instant case does not fit the simple pattern apparently foreseen by the DC WPA's drafters: that the disclosing employee would disclose directly to the supervisor or public body. However, the drafters remained silent about the instant situation, wherein the disclosing employee would enlist a third party, in this case Mr. Baumann, to disclose the information provided by the employee to the public body. In this case, it is undisputed that Mr. Baumann made the disclosure to OIG on behalf of Detective Adams; although the District argues that a strict interpretation of the words of the March 19 letter does not clearly state that Mr. Baumann was acting as Detective Adams' agent, it offers no rebuttal for the language of the letter, which states that "[t]he FOP and *its members involved in this matter* are making protected disclosures." *See* March 19 Letter at 1. Given the presence of Detective Adams' case log and correspondence from and involving Detective Adams (who was one of the FOP's members involved in the matter addressed in the March 19 letter), the Court can reach no conclusion other than that Mr. Baumann at least purported to make the disclosure to the OIG on behalf of Detective Adams. *Id.*

In the lack of guidance in the language of the statute and binding precedent, the Court looks to other bodies that have interpreted similar provisions. In *Burrowes v. Dept. of the Interior*, the Merit Systems Protection Board held, *inter alia*, that, when an individual makes a protected disclosure on another's behalf, the non-disclosing individual is likewise protected from retaliation. 54 M.S.P.R. 547, 551-52 (Merit Systems Protection Board 1992). In *Burrowes*, the Board addressed allegations by

administrative law judges that they were retaliated against after a petition was made to Congress by a former chief judge of their division, which requested a budget for the division that would be better insulated from political decisions. *Id.* at 551. Though the appeal was denied because the petition did not allege any of the types of information protected by the federal WPA,, the Board stated that "Judge McKenna's statements to Congressional 'staffers' would protect the appellants from retaliation on the basis of the disclosure, if Judge McKenna disclosed gross mismanagement or abuse of authority on their *behalf*." *Id.* The Court advisedly adopts the Board's reasoning in the instant circumstance. Mr. Baumann's March 19 letter to OIG protects Detective Adams from retaliation on the basis of the disclosure.

Further, as the Court noted in the March 3 Order, the purpose of the DC WPA was to "[e]nhance the rights of District employees to challenge the actions or failures of their agencies . . . without fear of retaliation." D.C. Code § 1-615.51 (1). The Court also cited the case of *Crawford v. District of Columbia* for the proposition that the DC WPA was intended to imply the same standard of liability as federal whistleblower statutes. *Crawford*, 891 A.2d 216, 221 n. 12 (D.C. 2006). For this Court to hold that Detective Adams cannot maintain an action under the DC WPA because he made a disclosure, which would have otherwise been protected under the DC WPA, to the wrong person would be contrary to the stated purpose of the DC WPA and public policy generally. For the above-stated reasons, the Court holds that Detective Adams has made a *prima facie* case that he made a protected disclosure within the meaning of the DC WPA.

"Perceived" Protective Disclosures

Under the DC WPA, a whistleblower is "an employee who makes or *is perceived to have made* a protected disclosure." D.C. Code § 1-615.52 (a)(9). Regardless of the above discussion, the Court notes that it seems clear from the affidavits and deposition excerpts provided by Plaintiff that the

District of Columbia perceived Detective Adams to have made the protected disclosure, regardless of whether he actually made the disclosure under the language of the statute. In light of the Court's above determination, that Detective Adams set forth a *prima facie* case that he made a protected disclosure within the meaning of the DC WPA, a lengthy discussion of this element is unnecessary at this point. However, the Court advisedly adopts the argument made by Detective Adams on pages 30-33 of his opposition to the instant motion.

Existence of an Adverse Employment Action

The second ground cited by the District of Columbia in support of its assertion that Detective Adams did not face an "adverse employment action," is belied by both the arguments of the Plaintiff and the statute itself. In order to establish a *prima facie* retaliation claim, Detective Adams must establish that he faced an adverse employment action. *Young v. Sutherland*, 631 A.2d 354 (D.C. 1993). The DC WPA precludes the District of Columbia from taking a "prohibited personnel action" against one who has made a protected disclosure; a prohibited personnel action includes "**recommended**, threatened, or actual termination, **demotion, suspension, or reprimand; involuntary transfer, reassignment or detail** . . . or retaliating in any other manner against an employee because that employee makes a protected disclosure . . ." D.C. Code § 1-615.52 (a)(5) (emphasis added).

In the above-captioned matter, the MPD recommended demotion, suspension, and involuntary transfer/reassignment as penalties for Detective Adams' alleged misdeeds. *See* Pl.'s Opp. at Ex. 12, at p. 12 ("Based on the facts and circumstances presented in this investigation, the undersigned official recommends that Detective Adams receive Adverse Action and demoted from Detective Grade II and removed from the Investigative Section of the Missing Person Unit."). Likewise, the Proposed and Final Notices of Adverse Action served on Detective Adams reiterated the MPD's

recommendation that he be demoted and suspended. *See* Pl.'s Opp. at Ex. 18, at p. 3; *Id.* at Ex. 20, at p. 3. The District concedes this in the instant motion, stating that "Plaintiff's supervisor recommended demotion and suspension." Def.'s Mot. at 13. It is clear to the Court that, under the plain language of the DC WPA, Detective Adams was subject to a "prohibited personnel action."

Defendant bases its argument that Detective Adams did not suffer an adverse employment action to the fact that Detective Adams' appeal was granted by Chief Lanier and the recommended penalty was rejected. *See* Def.'s Mot. at Ex. 4. Instead, Chief Lanier recommended that Detective Adams be given a PD 62E,[6] which is a performance objective form. *Id.* Because of this, the District avers, based on federal case law holding that an employment action does not reach the level of an actionable adverse action unless there is a tangible change in the duties or working conditions constituting a material employment disadvantage, that Plaintiff did not face unlawful retaliation and, therefore, his DC WPA claim fails as a matter of law. Def.'s Mot, at 12 (citing *Kilpatrick v. Riley*, 98 F. Supp.2d 9, 2000 WL 708391, *11 (D.D.C. 2000); *Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 456 (D.C. Cir. 1999); *Childers v. Slater*, 44 F. Supp.2d 8, 19 (D.D.C. 1999)).[7] However, the Court credits Detective Adams' assertion that the basis of his DC WPA claim is not a poor performance evaluation or formal criticism; rather, the recommended suspension, demotion and involuntary

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[6] Although it is not important for the purposes of this motion, the Court would be remiss not to mention Detective Adams' argument that the issuance of the PD 62E form is considered a form of non-appealable discipline by the police union. As the Fraternal Order of Police's Chairman, Kristopher Baumann, testified at his deposition in the instant matter:

> We consider it disciplinary action. What it is, is that it is a notice that the Department has engineered a way around – I think we have an arbitration out on this – that we can't appeal. So what they will do is they will issue the 62E, which basically is their ability to criticize an officer or a detective or a sergeant to accuse them of various, either violations of orders, transgressions, whatever it may be. There is no appeal process. They put it in their personnel file, and then the Department is able to use that on their personnel evaluation.

Pl.'s Opp. at Ex. 2, at p. 93. Although the District of Columbia argues strenuously that the PD 62E is not disciplinary in nature, the Court need not reach the question of whether or not the PD 62E constitutes an adverse employment action generally or a "prohibited personnel action" under the DC WPA due to the Court's conclusion that the MPD recommended adverse action.

[7] The Court notes that these cases do not analyze the DC WPA. Rather, they examine retaliation claims under Title VII employment discrimination statutes.

transfer, as are explicitly prohibited by the WPA, underlie his claim for unlawful retaliation. *See* D.C. Code § 1-615.52 (a)(5).

The Court therefore finds that Detective Adams has successfully averred a *prima facie* retaliation claim under the DC WPA.

Legitimate, Non-Retaliatory Reason for Adverse Employment Action

With a *prima facie* retaliation claim established under the DC WPA, the burden of persuasion shifts to the District of Columbia to demonstrate a legitimate, non-retaliatory reason for the adverse employment action. In the instant motion, the District sets forth such a basis. After the submission of the protected disclosure, Detective Adams' supervisors found 91 cases that he had failed to properly close and 223 cases that he had failed to investigate. Def.'s Mot. at Ex. 3. No other members of the YID were alleged to have hidden filed or filed to close or investigate files to the extent that the plaintiff failed to close or investigate files. *Id.* at Ex. 7. The MPD charged Detective Adams with neglect of duty and making a false statement. *Id.* at Ex. 6. Although multiple parties agreed that the false statement charge was unfounded (and it was later reduced), the neglect of duty charge seems plain based on the alleged failure of Detective Adams to close/investigate three hundred and fourteen cases.

Although the charges/discipline were overturned by Chief Lanier on appeal, the Court cannot say that the charges asserted against Detective Adams were illegitimate on their face. Further, the District avers that, had Detective Adams reported the three hundred and fourteen files that had not been closed/investigated, Detective Adams would have been investigated and the same actions would have been taken against him had no protected disclosure been made. Therefore, the District of Columbia has set forth facts to support a Legitimate, Non-Retaliatory Reason for the Adverse Employment Action.

The Legitimate, Non-Retaliatory Reason was a Pretext

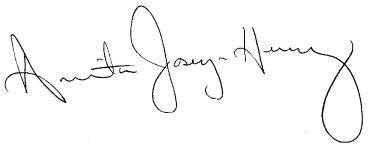
Since the District of Columbia has set forth facts sufficient to demonstrate that there existed a legitimate, non-retaliatory reason for taking adverse employment action against Detective Adams, the burden shifts to Detective Adams to demonstrate that the reason set forth by the District was a pretext for the retaliation. Detective Adams makes several factual allegations, supported by deposition testimony and documentary evidence, to demonstrate that the District of Columbia's stated non-retaliatory justification for the adverse employment action was pretextual: (1) The District did not investigate Detective Adams until after he blew the whistle; (2) the entire YID audit was pretext to provide a justification for retaliating against Detective Adams; (3) the District failed to investigate other officers' and supervisors' neglect of duty in the YID; (4) the District did not apply the 90-day rule limiting discipline to those infractions temporally close to the date of the discipline to Detective Adams, even though the District applied the 90-day rule to other managers and employees; (5) there never existed a ground upon which to base the false statements charge.

The Court, after a close review of the arguments set forth above and the District's corresponding arguments, finds that it is unable to determine as a matter of law that the District's non-retaliatory reason either was or was not a pretext for retaliation against Detective Adams. Therefore, the question of whether the alleged retaliation was justified by a legitimate, non-retaliatory reason is a question as to a material fact which must be reserved for the fact-finder at trial.

Conclusion

Accordingly, it is this 10th day of May, 2011, hereby

ORDERED, that the "Defendant's Motion for Summary Judgment," filed March 9, 2011 by the District of Columbia, is DENIED.



Anita Josey-Herring
Associate Judge
(Signed in Chambers)

Copies to:

Anthony M. Conti
Daniel J. McCartin
CONTI FENN & LAWRENCE LLC
36 South Charles Street, Suite 2501
Baltimore, Maryland 21201
Attorneys for Plaintiffs

Kimberly M. Johnson
Lucy Pittman
Darrell Chambers
Assistant Attorneys General
441 4th Street N.W.
6th Floor South
Washington D.C. 20001
Attorneys for Defendants

DCSC Motion No. 355015