VIRGINIA:

In the Court of Appeals of Virginia on **Friday** *the* **22nd** *day of* **July, 2022**.

Levar M. Stoney, Mayor, and
Gerald M. Smith, Chief of Police,
Of the City of Richmond, Petitioners,

against Record No. 0912-22-2
Circuit Court No. CL21-3333

William V. Blackwell, Respondent.

Upon a Petition for Review Under Code § 8.01-675.5(B)

Before Judges Huff, Chaney and Senior Judge Haley

On June 22, 2022, the petitioners filed a petition for review under former Code § 8.01-675.5(B) challenging rulings by the Circuit Court of the City of Richmond denying pleas of sovereign immunity and qualified immunity.[1] For the reasons that follow, we deny the petition.

BACKGROUND

William V. Blackwell filed an amended complaint against Levar M. Stoney, Mayor of the City of Richmond, and Gerald M. Smith (Smith), the city's police chief, alleging wrongful termination in violation of public policy and Code § 40.1-27.3. Blackwell alleged that he joined the Richmond Police Department (RPD) in 1997. By January 2020, he had risen to the rank of major and served as chief-of-staff to then-Chief William Smith (William Smith). In June 2020, William Smith resigned during the turmoil of ongoing street protests in the city. On June 16, 2020, Stoney invited Blackwell to serve as interim police chief and encouraged him to apply to fill the vacancy permanently. Blackwell wavered, fearing "the security of his employment and his retirement pension." To assuage Blackwell's concerns, the city's Acting Chief Administrative Officer signed a letter to Blackwell "confirm[ing] that should you be removed as Interim

[1] The General Assembly has eliminated this Court's jurisdiction over such petitions unless filed before July 1, 2022. 2022 Va. Acts ch. 307.

Chief of Police, you will be returned to your former position." Blackwell accepted appointment as interim chief.

On June 24, 2020, Stoney asked Blackwell to assign officers to "stand watch while private contractors removed" Confederate monuments along Monument Avenue. Blackwell refused, telling Stoney that "such an action would violate Virginia law and could expose his officers to criminal liability" under Code §§ 15.2-1812 and 18.2-137. On June 26, 2020, Stoney met with Blackwell and RPD General Counsel David Mitchell; Blackwell and Mitchell "shared with Stoney their professional and legal advice that it would be illegal to have RPD officers involved in removal of the monuments." After Mitchell left the room at Stoney's request, Stoney told Blackwell "that [Stoney] was concerned for Blackwell's 'well-being and mental health,'" and "it would be best if Blackwell stepped down as Interim Police Chief." Blackwell resigned as interim chief, resuming his earlier rank of major. Smith replaced Blackwell as chief on July 1, 2020.

On February 2, 2021, Smith terminated Blackwell's employment. Blackwell's amended complaint alleged that "Stoney directed Smith to terminate Blackwell's employment in retaliation for reporting a violation of state law, refusing to engage in a criminal act, and refusing to violate state law," thereby contravening Code § 40.1-27.3, and "in violation of Virginia public policy prohibiting retaliatory discharge for refusing an order to commit a criminal act." Blackwell specifically alleged that "Stoney directed Smith to terminate Blackwell over Blackwell refusing Stoney's command to have RPD officers stand guard over the removal of the City's monuments." Blackwell included parallel allegations about Smith, alleging that he "terminated Blackwell's employment in retaliation for reporting a violation of state law, refusing to engage in a criminal act, and refusing to violate state law" and "terminated Blackwell over Blackwell refusing Stoney's illegal command to have RPD officers stand guard over the removal of the City's monuments." Blackwell claimed loss of pay, benefits, and future pension payments. He sought reinstatement, damages, attorneys' fees, costs, and interest.

Stoney and Smith filed a demurrer in which they argued, among other things, that Blackwell's claims against them were barred by sovereign immunity, common law qualified immunity, and Code § 15.2-1405.[2] Blackwell responded by arguing, among other things, that they were not immune because he had alleged an intentional tort. Stoney and Smith replied that the city's sovereign immunity extended to them because Blackwell's termination occurred within the scope of their employment. They also argued that although "[t]here is no disagreement that" qualified immunity and Code § 15.2-1405 do not "extend to . . . intentional or willful misconduct," "Blackwell ha[d] not alleged sufficient facts to establish intentional or willful misconduct."

At a hearing on their demurrer, Stoney and Smith reiterated that "if a [government] employee was acting with intentional or willful misconduct, they could be individually liable." They also repeatedly acknowledged that "[r]etaliation . . . is an intentional tort," that being "fired as retaliation for refusing to commit an illegal act" "would be an intentional tort," and that "[t]here is no dispute that retaliation is an intentional tort." But they argued that Blackwell "ha[d] to plead facts to plausibly establish" retaliation, and he had not alleged "facts to plausibly establish that there was a retaliatory motive . . . and causation between the protected activity and the eventual termination." Merely describing the termination as "retaliation is conclusory," they continued.

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[2] The statute provides that

> [t]he members of the governing bodies of any locality or political subdivision and the members of boards, commissions, agencies and authorities thereof and other governing bodies of any local governmental entity, whether compensated or not, shall be immune from suit arising from the exercise or failure to exercise their discretionary or governmental authority as members of the governing body, board, commission, agency or authority which does not involve the unauthorized appropriation or misappropriation of funds. However, the immunity granted by this section shall not apply to conduct constituting intentional or willful misconduct or gross negligence.

Code § 15.2-1405.

The circuit court disagreed, noting that Blackwell "pled that he was told to put men or women around the monuments to protect the [c]ity employees taking down the monuments and that it was illegal to do so, and in retaliation for that, he was fired." The court agreed with Stoney and Smith's acknowledgment that retaliation is an intentional tort. It opined that "[r]etaliation is itself a bad faith action." "It's a tort. You're retaliating to somebody for something that is alleged to have been legal." "You can't do retaliation by accident." "Retaliation by itself is an intentional action." The court ruled that "[s]overeign immunity, qualified immunity, [and] official immunity [do] not apply when they're intentional, bad faith torts."

On June 7, 2022, the circuit court entered an order denying the demurrer. Although the order does not expressly refer to Stoney and Smith's immunity arguments, the court ruled that Blackwell had pled "sufficient facts to establish that [his] termination was a result of his refusal to engage in criminal acts." The order thereby rejected Stoney and Smith's argument that Blackwell's allegations were insufficient to plead retaliation, which—in light of Stoney and Smith's acknowledgments that retaliation was an intentional tort and that they were not immune from liability for intentional torts—was the premise for their claims of immunity.

PETITION FOR REVIEW

Stoney and Smith argue in their petition that the city's full immunity extends to them because they could only make and carry out employment decisions in their respective official capacities, and they were acting within the scope of their employment. They also note that the cause of action for termination of employment in violation of public policy recognized in *Van Buren v. Grubb*, 284 Va. 584 (2012), and *Bowman v. State Bank of Keysville*, 229 Va. 534 (1985), has never been applied to a governmental employer. They argue that doing so would create a waiver of immunity not approved by the General Assembly. They also argue that they enjoy qualified immunity and immunity under Code § 15.2-1405 because they satisfy the four-factor test the Supreme Court of Virginia articulated in *Messina v. Burden*, 228 Va. 301 (1984).[3]

[3] The four, non-exclusive factors are "[(1)] the nature of the function performed by the employee; [(2)] the extent of the state's interest and involvement in the function; [(3)] the degree of control and direction

Accordingly, they continue, Blackwell cannot surmount the immunity hurdle because he failed to allege intentional misconduct. Citing *Coward v. Wellmont Health System*, 295 Va. 351, 358-59 (2018), they argue that the circuit court erroneously ruled that Blackwell's amended complaint was sufficient because the court failed to differentiate between express allegations and unreasonable, unstated inferences. They also assert that Blackwell failed to plead a plausible causal link between the June 2020 standoff and his termination in February 2021, seven months later.

ANALYSIS

An appellate court reviews a trial court's ruling on sovereign immunity *de novo*. *Pike v. Hagaman*, 292 Va. 209, 214 (2016). But by acknowledging that retaliatory termination is an intentional tort and that neither qualified immunity nor Code § 15.2-1405 shields government employees from liability for intentional torts, the petitioners reduce the issue presented in their petition to a question of sufficiency of pleading.[4] *See McMillion v. Dryvit Sys., Inc.*, 262 Va. 463, 470 (2001) (citing Code § 8.01-273) ("[O]ur consideration of the demurrer on appeal is limited to the grounds raised by" the petitioners.) An appellate court reviews a trial court's decision that a complaint is legally sufficient *de novo* as well. *Robinson v. Nordquist*, 297 Va. 503,

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exercised by the state over the employee; and [(4)] whether the act complained of involved the use of judgment and discretion." *Messina*, 228 Va. at 313 (citing *James v. Jane*, 221 Va. 43, 53 (1980)). "[I]n applying the . . . test to employees of other immune governmental entities, the word 'state' should be deleted and the proper description of the governmental entity substituted." *Id.*

[4] The petitioners' acknowledgment of the limits of qualified immunity and Code § 15.2-1405 did not encompass sovereign immunity. Rather, they argued that they were entitled to the city's full sovereign immunity because they acted in the scope of their employment. That argument, however, is without merit. "[A] municipality is immune from liability for intentional torts committed by an employee during the performance of a governmental function." *Niese v. City of Alexandria*, 264 Va. 230, 239 (2002). But sovereign immunity does not protect municipal employees who "commit[] *intentional* torts, irrespective of whether they acted within or without the scope of their employment." *Fox v. Deese*, 234 Va. 412, 424 (1987) (emphasis in original) (citing *Elder v. Holland*, 208 Va. 15, 19 (1967)).

The petitioners' reliance on *Virginia Student Power Network v. City of Richmond* (*VSPN*), 107 Va. Cir. 137 (Va. Cir. Ct. 2021) and *Booker v. City of Lynchburg*, No. 6:20-cv-00011, 2020 WL 4209057 (E.D. Va. July 22, 2020) (unpublished) for the contrary position is unavailing. Those cases involved immunity from claims arising under 42 U.S.C. § 1983. *VSPN*, 107 Va. Cir. 137, slip op. at *6-8; *Booker*, No. 6:20-cv-00011, slip op. at *5, *7. As our Supreme Court recently observed, "federal immunity doctrines . . . are independent from state immunity doctrines." *Viers v. Baker*, 298 Va. 553, 560 (2020).

514 (2019). We "accept as true all factual allegations expressly pleaded in the complaint and interpret those allegations in the light most favorable to the plaintiff." *Coward*, 295 Va. at 358. We "distinguish allegations of historical fact from conclusions of law. We assume the former to be true *arguendo*, but we assume nothing about the correctness of the latter because 'we do not accept the veracity of conclusions of law camouflaged as factual allegations or inferences.'" *Id.* at 359 (quoting *AGCS Marine Ins. v. Arlington Cnty.*, 293 Va. 469, 473 (2017)). We also give no weight to unreasonable inferences, which are those that are "strained, forced, or contrary to reason." *Id.* (quoting *County of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197, 200 (2002)).

Contrary to the petitioners' assertion, the amended complaint expressly alleged intentional misconduct. Blackwell expressly alleged that "Stoney directed Smith to terminate Blackwell's employment in retaliation for reporting a violation of state law, refusing to engage in a criminal act, and refusing to violate state law." He further alleged that "Stoney directed Smith to terminate Blackwell over Blackwell refusing Stoney's command to have RPD officers stand guard over the removal of the City's monuments." He similarly alleged that Smith "terminated Blackwell's employment in retaliation for reporting a violation of state law, refusing to engage in a criminal act, and refusing to violate state law" and "terminated Blackwell over Blackwell refusing Stoney's illegal command to have RPD officers stand guard over the removal of the City's monuments."

As the circuit court noted at the demurrer hearing, "at this point, we're judging allegations." "[I]n terms of allegations, he's alleged quite a bit here in terms of being asked to do these things and then immediately being demoted and then fired. And . . . the allegations . . . couldn't be clearer, that it was in retaliation." "[I]f I take every allegation as true, which I'm required to do, certainly he's pled sufficient facts, particularly at this stage." "Now, whether he can prove it, it's a whole other thing." "[W]hether it's proved, we'll see."

We agree with the circuit court that—for the limited purpose of addressing the sovereign immunity, qualified immunity, and Code § 15.2-1405 issues raised in Stoney and Smith's demurrer—Blackwell's express allegations of historical fact sufficiently alleged an intentional tort from which the petitioners are not

immune. *Cf. Coward*, 295 Va. at 258-59. We do not address the other issues Stoney and Smith raised in their demurrer. *See* Code § 8.01-626 ("The court may take such action [on a petition for review] as it considers appropriate under the circumstances of the case.")

CONCLUSION

We affirm the circuit court's ruling on the petitioners' demurrer solely on the questions of immunity at the current procedural posture. We deny the petitioners' petition for review without prejudice to their pursuit of an appeal at an appropriate time on this or any other issue(s) once a final order has been entered. *See* Code § 8.01-675.5(D).

A Copy,

Teste:

A. John Vollino, Clerk

By: 

Deputy Clerk