

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

CONNIE CLAY,

Plaintiff,

v.

CITY OF RICHMOND,

and

PETULA BURKS,

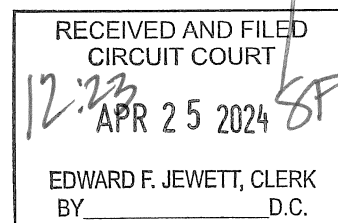
Defendants.

Case No. CL21-2354

DEMURRER

Pursuant to Rule 3:8(a) of the Rules of the Supreme Court of Virginia and Va. Code § 8.01-273, Defendants the City of Richmond (the “City”) and Petula Burks (“Burks”) (collectively “Defendants”), by counsel, hereby demur to the Complaint filed by Plaintiff Connie Clay because it does not contain plausible facts to support a legally cognizable claim of relief against Defendants under the Virginia Fraud and Abuse Whistle Blower Protection Act (the “Act”), Va. Code §§ 2.2-3009 *et seq.*, specifically § 2.2-3011—or under any legal theory of relief.

Accordingly, for the reasons discussed below and those stated more fully in a forthcoming memorandum of law to be filed in accordance with Rule 4:15,¹ this Court should sustain Defendants’ Demurrer and dismiss the Complaint.



¹ For the reasons stated in Defendants’ Motion Craving Oyer, which is filed contemporaneously herewith, the Court should enter an order requiring production of the documents referenced therein so they may be incorporated into the pleading record because each is referenced in, or integral to, the Complaint.

I. RELEVANT BACKGROUND²

1. Relevant to this action, “[a]ll state public bodies, including state authorities, that are subject to the provisions of [the Virginia Freedom of Information Act (“FOIA”)] and all local public bodies and regional public bodies” are required to designate “one or more Freedom of Information Act officers (FOIA officer) whose responsibility is to serve as a point of contact for members of the public in requesting public records and to coordinate the public.” Va. Code § 2.2-3704.2(A).

2. In July 2023, the city hired the Plaintiff to serve as one of its FOIA officers. (Compl. ¶ 8.)

3. Consistent with the training requirements set forth in Va. Code § 2.2-3704.3 (E), Plaintiff completed the training program provided by the Virginia Freedom of Information Advisory Council (the “Council”).³ (Compl. ¶ 11.)

4. According to Plaintiff, she alleges that this training taught her that “with few exceptions public records are to be open to inspection.” (Compl. ¶ 12.) Based on the face of the

² Reference to any allegations in the Complaint is done solely for purposes of this Demurrer. Defendants expressly deny each and every allegation of fact, conclusion of law, or other matter contained in the Complaint not expressly admitted or which implies that they violated Va. Code § 2.2-3011 or any other law or theory implying liability. Defendants further reserve the right to challenge any and all allegations in contained in the Complaint if this Demurrer is denied.

³ The Council, a state agency, is an office dedicated to help resolve disputes over Freedom of Information issues. (See Compl. ¶ 11;) *Virginia Freedom of Information Advisory Council*, <https://www.virginia.gov/agencies/virginia-freedom-of-information-advisory-council/>.

“The FOIA Council answers questions from private citizens, state and local public officials, and the media about access to public records and meetings. Under Virginia law, the presumption is that all documents in the possession of public officials and all meetings of state and local public bodies are open to citizens of the Commonwealth. Of course, there are exceptions and these exceptions can lead to good faith disagreements between citizens or media and public officials.” *Id.*

Complaint, it is unclear whether Plaintiff believes the only relevant “exceptions” to the City’s FOIA obligations are located in Va. Code § 2.2-3704, the only section cited. (*Id.*)⁴

5. At all relevant times, Burks was Plaintiff’s immediate supervisor. (Compl. ¶ 9.)

6. Plaintiff routinely consulted with Burks and other City officials on responding to FOIA requests. (*See, e.g.*, Compl. ¶¶ 13, 16, 18, 20, 23, 26, 28, 29, 38, 43, 52, 54, 59, 61, 62, 65.)

7. As early as August 2023, and although Plaintiff does not allege that she had previous work experience responding to FOIA requests, Plaintiff routinely disagreed with Burks and other officials on the scope of FOIA exemptions and document productions. (*See, e.g.*, Compl. ¶¶ 16-17, 19, 39, 43, 65.)

8. Plaintiff does not allege that she ever contacted the Council for guidance regarding her subjective disagreements with Burks and other City officials. Nevertheless, and without factual elaboration or reference to any particular code sections, Plaintiff alleges, by way of legal conclusion, “that the city routinely violated its FOIA obligation set forth in Va. Code § 2.2-3704 *et seq.*” (Compl. at 2.)

9. On January 18, 2024, Plaintiff requested a meeting with Burks to discuss the handling of two FOIA requests pending with the City’s Finance Department. (Compl. ¶ 65.)

10. In response, Burks met with Plaintiff the next day, January 19, 2024. Plaintiff “prepared a memo of items to discuss and delivered it to Burks a few hours before the scheduled meeting.” (Compl. ¶ 67.)

⁴ Notably, Virginia laws provide myriad exclusions and exceptions regarding disclosure of requested information not specified in Va. Code § 2.2-3704. *See, e.g.*, Va. Code §§ 2.2-3705.1, 2.2-3705.2, 2.2-3705.3, 2.2-3705.4, 2.2-3705.5, 2.2-3705.6, 2.2-3705.7, 2.2-3706, 2.2-3706.1, 2.2-3707. The Code of the City of Richmond, which is not referenced in the Complaint, also provides its own set of requirements.

11. During the meeting, Plaintiff alleges that Burks advised her that she was not a “good fit” and then terminated her without further explanation. (Compl. ¶ 68.)

12. By way of legal conclusion, Plaintiff further alleges that she “was terminated in retaliation for reporting and refusing to engage in illegal and unethical activities in violation of FOIA.” (Compl. ¶ 69.)

II. LEGAL STANDARD

13. “A demurrer tests whether the pleadings have stated a cause of action upon which the requested relief may be granted.” *Cockey v. Covanta Fairfax, Inc.*, 2021 Va. Cir. LEXIS 165, at *9 (Fairfax County 2021) (citing Va. Code § 8.01-273(A) (2020); *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 712, 636 S.E.2d 447 (2006)). “A demurrer admits the truth of all properly pleaded facts to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations.” *Id.* at 9-10 (citation omitted). “However, a Plaintiff’s conclusions of law are not admitted as correct.” *Johnson v. Bella Gravida, LLC*, 105 Va. Cir. 350, 351 (Fairfax County 2020) (citing *Ward’s Equip. v. New Holland N. Am.*, 254 Va. 379, 382, 493 S.E.2d 516 (1997)). “The decision whether or not to sustain a demurrer is a question of law.” *Id.* (citing *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 489, 706 S.E.2d 864 (2011)).

III. ARGUMENT

14. The Act prohibits an employer from “discharg[ing], threaten[ing], or otherwise discriminat[ing] against a whistle blower.” Va. Code § 2.2-3011(a). The Act defines a whistle-blower as:

[A]n employee who witnesses or has evidence of wrongdoing or abuse and who makes or demonstrates by clear and convincing evidence that [s]he is about to make a good faith report of, or testifies or is about to testify to, the wrongdoing or abuse to one of the employee’s supervisors, an agent of the employer, or an appropriate authority.

Va. Code § 2.2-3010. To qualify for protection under the Act, an employee must make a (1) good faith report of (2) wrongdoing or (3) abuse to “one of the employee’s supervisors, an agent of the employer, or an appropriate authority.” *Id.*

15. The Act defines “wrongdoing” as a violation, “which is not of a merely technical or minimal nature, of a federal or state law or regulation, local ordinance, or a formally adopted code of conduct or ethics of a professional organization designed to protect the interests of the public or employee.” Va. Code § 2.2-3010. The Act further defines “abuse” as “an employer’s or employee’s conduct or omissions that result in substantial misuse, destruction, waste, or loss of funds or resources belonging to or derived from federal, state, or local government sources.” *Id.*

16. The Complaint does not contain facts to support that the City, Burks, or any of the City’s employees engaged in conduct constituting wrongdoing or abuse under Va. Code § 2.2-3011. At best, the Complaint is littered with a smattering of examples to support only that Plaintiff and Burks disagreed over the scope of FOIA exemptions.

17. By way of illustration, Plaintiff alleges that Burks instructed her to withhold information requested related to the death of a City employee because there was an “active OSHA investigation.” (Compl. ¶¶ 42-43.) Plaintiff further alleges that she told Burks “there was no FOIA exemption that would allow the withholding of the records.” (Compl. ¶ 43.) As an initial matter, Plaintiff’s subjective opinion on the above appears wrong based on the face of the Complaint. Indeed, Va. Code § 2-3705.1(3) authorizes the City to withhold information “compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is

properly the subject of a closed meeting under § 2.2-3711,” which includes meetings on issues on which the public body “has a reasonable basis to believe” could result in litigation “commenced by or against a known party” (e.g., an OSHA violation and/or a potential wrongful death action). *See* Va. Code § 2.2-3711(7). Moreover, even in the light most favorable to Plaintiff, the above allegations do not support that she engaged in a good faith report of wrongdoing. As an attorney and based on her FOIA training, Plaintiff should have been familiar with the above-described exemption.

18. In a similar fashion, the Complaint lacks any factual enhancement to support that Plaintiff reported other wrongdoing related to her subjective disagreements on the scope of the City’s responses to FOIA requests. Put another way, Plaintiff has not alleged sufficient information to support that the City or Burks withheld information in violation of the statutory exemptions provided under Virginia FOIA. *See supra* n. 4.

19. In addition to lacking facts to establish herself as a whistle-blower under the Act, or to support conduct that constitutes wrongdoing or abuse under the Act, the Complaint lacks facts to support a causal connection between Plaintiff’s reports and an adverse action.

20. Indeed, there are absolutely no facts to connect the City’s decision not to hire Plaintiff for the Civilian Review Board Manager Position referenced in Paragraph 64 of the Complaint and any alleged whistle-blower conduct.

21. There are no facts to support that Burk’s decision not to approve a Plaintiff’s request to attend a Continuing Legal Education course was related to her complaints.

23. Stripped of conjecture, speculative labels, and legal conclusions couched as fact, the residual facts alleged in the Complaint do not support that Plaintiff was terminated for engaging in protected whistle-blower activity. To the contrary, the only plausible takeaway from the

Complaint was that Plaintiff indeed was not a “good fit” because she clashed with just about everyone she worked with and she refused to perform her job duties on several occasions, causing more work for others.

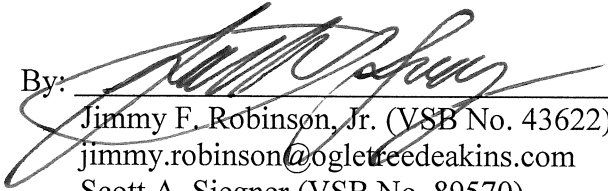
24. Accordingly, this Court should sustain Defendants’ Demurrer and dismiss this action because Plaintiff has not alleged facts to support a factually plausible or legally cognizable claim of relief under Va. Code § 2.2-3011 or any theory.

25. Defendants intend to file a Memorandum of Law in support of this Demurrer in accordance with the requirements of Rule 4:15 of the Rules of the Supreme Court of Virginia, and the undersigned counsel will coordinate with opposing counsel for Plaintiff to submit a briefing schedule for entry by the Court.

WHEREFORE, Defendants the City of Richmond and Petula Burks respectfully move this Court for an order sustaining their demurrer, dismissing this action in its entirety, and awarding such other and further relief as the Court deems just and appropriate.

Dated this 25th of April, 2024.

Respectfully submitted,
THE CITY OF RICHMOND
and PETULA BURKS

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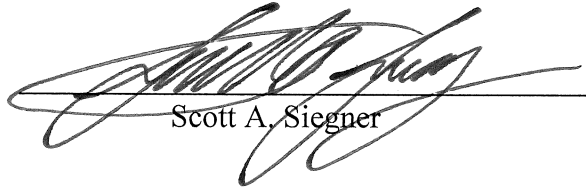
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2024, a true and accurate copy of the foregoing was emailed and mailed, first-class, postage prepaid to:

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