NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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May 2, 2024

LETTER OPINION

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

Dear Counsel:

This cause is before the Court on Defendants' Pleas in Bar to Plaintiff's Amended Complaint, the Court having to determine whether the pleas may proceed or whether a separate evidentiary hearing and even a jury trial is alternatively required as the mode of procedure the Court must employ. The question of when an evidentiary hearing is

required in resolution of a plea in bar, even when the facts at hand are not in dispute, turns on whether the Court is called upon merely to discern the legal consequences of such facts, or whether instead the Court must first make evidentiary inferences before reaching its legal conclusions. The Court finds regarding the attempts to hold Defendants Ross and Rowan liable for whistleblower retaliation for subsection "a. the June 2016 Verbal Counseling" of Count I of Plaintiff's Complaint ("Subsection A"), the allegations make clear as a matter of law Subsection A violates the statute of limitations, and such claim must therefore be dismissed. With respect to whether Defendants enjoy sovereign immunity regarding tort claims advanced under a negligence standard in Counts II, IV, and VII, whether intracorporate immunity bars the conspiracy claims in Counts III and VIII, and whether qualified privilege bars the defamation claims in Count IV, this Court finds it must make evidentiary inferences to determine the motivations and intent of Defendants from what appears to be largely undisputed fact, and thereby to sit as trier of fact as to such claims. In addition, whereas in this case Plaintiff has prayed for a jury trial, absent waiver, the default mode of adjudication for those Pleas in Bar which require an evidentiary hearing is to have them determined by a jury.

Accordingly, the Court shall enter a separate order dismissing Plaintiff's claim against Defendants Ross and Rowan for whistleblower retaliation under Subsection A of Count I of the Complaint and continue the remaining Pleas in Bar concerning the balance of the Counts for trial by jury.

BACKGROUND

Plaintiff filed his original Complaint on May 25, 2021, against Defendants George Mason University ("GMU"), Rowan, and Ross, claiming whistleblower retaliation, fraud, defamation, and common law conspiracy to defame and retaliate. Plaintiff's Amended Complaint became operative on April 15, 2022, adding Defendants Kissal, Sanavaitis, and Ly as parties. *See Ahari v. Morrison*, 275 Va. 92, 96 (2008). Defendants filed demurrers which were resolved by this Court's orders entered on December 20, 2023. The below chart summarizes the surviving claims post-demurrers:

	WR[1]	Fraud[2]	Consp. Fraud.[3]	Def.[4]	IIED[5]	Const. Disc.[6]	Wrong. Disc.[7]	Consp. P, R, D[8] Def.[4]	CD.[6]	WD.[7]	IIED[5]
Kissal					[9]						
Ly											
Sanavaitis											
GMU											
Ross											
Rowan											

Not claimed against this party	
Demurrer sustained with leave to amend	
Demurrer sustained without leave to amend	
Demurrer overruled	

[1] Whistleblower retaliation (Count I)
[2] Fraud (Count II)
[3] Conspiracy to defraud (Count III)
[4] Defamation (Count IV)
[5] Intentional infliction of emotional distress (Count V)
[6] Constructive discharge (Count VI)
[7] Wrongful discharge (Count VII)
[8] Conspiracy to punish, retaliate and defame (Count VIII)
[9] Plaintiff makes no allegations Defendant Kissal committed IIED. Rather, Plaintiff seeks to hold her liable based on conduct done as part of the alleged conspiracy. Conspiracy to commit IIED is not a viable claim. The Court gave Plaintiff leave to amend to withdraw any such contention with respect to Defendant Kissal.

Plaintiff subsequently filed a Motion to Reconsider with respect to two findings in the order concerning Defendants GMU's and Sanavaitis' demurrers. Plaintiff requested the Court reconsider its findings that GMU cannot be held liable under The Fraud and Abuse Whistle Blower Protection Act ("FAWPA") and that the FAWPA cannot support a *Bowman* claim. On February 8, 2024, the Court issued an order affirming its previous findings for the reasons as stated in its Letter Opinion of February 6, 2024. By agreement of the parties, the Court refrained from requiring Plaintiff to amend his Complaint until after the Court had an opportunity to consider the Pleas in Bar filed by Defendants. On April 26, 2024, the Court held a hearing wherein it detailed its view that the bulk of such Pleas required a jury trial, taking one discrete statute of limitations defense under consideration.

ANALYSIS

For a plea in bar,

> [t]wo possible standards of review apply, depending on whether the plea's proponent elects to meet [their] burden by presenting evidence or relying on the pleadings. In the former situation, in which the "parties present evidence on the plea ore tenus, the circuit court's factual findings are accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly wrong or without evidentiary support." In the latter situation, "where no evidence is taken in support of a plea in bar, the trial court, and the appellate court upon review, consider solely the pleadings in resolving the issue presented. In doing so, the facts stated in the plaintiff's [complaint] are deemed true."

Fines v. Rappahannock Area Cmty. Servs. Bd., 301 Va. 305, 311-12 (2022) (quoting *Massenburg v. City of Petersburg*, 298 Va. 212, 216 (2019)).

In the instant case, the parties presented the Court with a hybrid situation, wherein Plaintiff stands on his Complaint and Defendants sought to introduce evidence by affidavit, to which Plaintiff voiced a preliminary hearsay objection. Plaintiff posited the Court should proceed with the hearing and deny Defendants' Pleas in Bar and allow Defendants to adjudicate those defenses anew at trial. There are two problems with such a suggestion. First, as this Court has stated on prior occasion, "a denial of a plea in bar raising a defense pretrial is an equally binding decision" as would conversely be the case for a dismissal after a plea in bar. *Whitehall Farm, L.L.C. v. Whitehall Farms, L.L.C.*, 109 Va. Cir. 190, 197 (Fairfax 2021). In most instances, "once an *affirmative defense* is adjudicated by plea in bar, the defense's sufficiency is determined on the merits, and should not be permitted to be raised again at trial as the defendants have chosen their mode of final determination of the issue presented." *Id.* at 198-99.

Second, when facts are in dispute at the plea in bar stage, and at least one party has prayed a jury trial, the default mode of procedure for resolving pleas in bar is via jury trial. *See Our Lady of Peace, Inc. v. Morgan*, 297 Va. 832, 847 (2019) (holding that all disputed factual issues, including the scope of employment, should be decided at trial by a jury in the context of Plaintiff having requested a jury trial for adjudication of the claims in their complaint). Defendants contend the affidavits they sought to use or any testimony that would be adduced is not in conflict with the facts stated in Plaintiff's voluminous Complaint, questioning without objecting whether a jury trial is indeed required to determine the Pleas in Bar. In *Fox v. Deese*, the Supreme Court of Virginia noted "whether the defendants were acting within the scope of their employment is an issue that requires

an evidentiary hearing." 234 Va. 412, 428 (1987). The implicit reason for this holding is that even if the evidence is fairly fixed, at a minimum, in such context a trier of fact must make evidentiary inferences in application of the law. In addition, in the instant case, Plaintiff is not waiving his right to a jury trial, so thus, if an evidentiary hearing is required as to any of the Pleas in Bar, the mode of procedure must be by jury trial.

The Court must therefore determine which Pleas in Bar require an evidentiary hearing, and which may be determined by the Court. The limiting principle for determining Pleas in Bar without an evidentiary hearing as a matter of law is that they must address facts that are not in dispute, further do not require the making of evidentiary inferences therefrom, and for which the Court need only interpret the applicability of legal principles. The Court proceeds to address the Pleas in Bar in turn to determine which may be resolved by the Court and which must be afforded a jury trial.[10]

I. Statute of Limitations

Defendants Ross and Rowan challenge a discrete claim to be in violation of the statute of limitations, namely, whistleblower retaliation, Count I of Plaintiff's Amended Complaint, Subsection A, "the June 2016 Verbal Counseling."

Inasmuch as the Amended Complaint detailed the Subsection A claim as a distinct cause of action, Defendants cite *Irvine v. Barrett*, 119 Va. 587 (1916), and *Vines v.*

[10] At such jury trial, Plaintiff can present evidence but also remains free to instead stand on the facts of his Complaint, which as already discussed, are deemed to be true for purposes of a plea in bar proceeding if Plaintiff chooses not to introduce evidence. However, Defendants are permitted to introduce evidence which gives color to how such facts are to be interpreted such as addressing the motive or intent of Defendants in taking the actions of which Plaintiff complains. If neither party introduces evidence at the plea in bar jury trial, the Court may instruct the jury the facts which they are to consider in application of the jury instructions are limited to those asserted in the Complaint.

Branch, 244 Va. 185 (1992), for the proposition that if evidence advanced for the original complaint is not sufficient to support an amended complaint's new claims and the measure of damages is different for the new claims, then the amended complaint does not relate back to the original complaint, and thus the statute of limitations has not been tolled. Based on Virginia Code § 8.01-6.1, Defendants further assert an amended complaint will not relate back if the new claim does not arise out of the same conduct, transaction, or occurrence set out in the original complaint.

According to *Vines*, the test for determining if a new cause of action is alleged in the amended complaint is whether "'a recovery had upon the original complaint would be a bar to any recovery under the amended complaint, or [whether] the same evidence would support both, or [whether] the same measure of damages is applicable.'" 244 Va. at 189 (quoting *Irvine*, 119 Va. at 591). Under Virginia law,

> an amendment of a pleading changing or adding a claim or defense against a party relates back to the date of the original pleadings for purposes of the statute of limitations if the court finds (i) the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading, (ii) the amending party was reasonably diligent in asserting the amended claim or defense, and (iii) parties opposing the amendment will not be substantially prejudiced in litigating on the merits as a result of the timing of the amendment.

Va. Code § 8.01-6.1.

Virginia courts are split regarding whether § 8.01-6.1 codifies or departs from the test asserted in *Vines*. In 2009, this Court found § 8.01-6.1 departs from *Vines* with respect to how the first prong of § 8.01-6.1 is analyzed. *Clark v. Britt*, 79 Va. Cir. 60, 66 (Fairfax 2009) (finding "[t]he language of § 8.01-6.1 expands a plaintiff's ability to amend the rights of action contained within a complaint, so long as those rights are bound by the

conduct, transaction, or occurrence set forth in the original pleading. These concepts constitute the cause of action and are greater in scope than the individual recharacterization or specificity of a particular fact"). The holding in *Clark* is further supported by the fact § 8.01-6.1 was enacted in 1996, whereas the rulings in *Irvine* and *Vines* were issued years prior. *Clark* found the first prong of § 8.01-6.1 was satisfied because the two motions involved "the same basic conduct, the circumstances at the Britt residence that led to Ms. Kerr's death." 79 Va. Cir. at 66 ("The transaction or occurrence of a potential struggle clearly was averred in both motions for judgment regardless of the rights of action asserted. The amended complaint alleges the same set of operative facts, including a claimed struggle, that give rise to the differing rights of action asserted.").

The second prong of § 8.01-6.1, due diligence, "means '[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.'" *Wallace v. Zoller*, 52 Va. Cir. 80, 86 (Winchester 2000) (quoting Black's Law Dictionary 411 (rev. 5th ed. 1979)).

Finally, the third prong, substantial prejudice, "contemplates actual prejudice, such as the loss of evidence. The ordinary inconveniences and expenses that are incidental to the defense of any claim do not constitute substantial prejudice." *Clark*, 79 Va. Cir. at 67; *see also Munro v. Munro*, 105 Va. Cir. 268, 272-73 (Fairfax 2020) (finding relation back would have caused substantial prejudice where "Defendant appeared to be on notice of Plaintiff's intent to terminate spousal support" but had relied on the original pleadings in

deciding to litigate rather than attempt settlement and had "expended resources in pursuit of litigation").

Under the FAWPA, the statute of limitations for whistleblower retaliation is three years. Va. Code § 2.2-3011(D). A whistleblower retaliation claim must be brought not later than "three years after the date the unlawful discharge, discrimination, or retaliation occurs." *Id.* In other words, a whistleblower retaliation claim does not accrue until a tangible employment action affecting the benefit of the bargain for the employee occurs.

Plaintiff alleges Defendant Ross issued a verbal counseling on June 20, 2016, in response to Plaintiff's reporting of the malfunctioning dash cameras. Under the foregoing analysis, the Subsection A claim does relate back to Plaintiff's original Complaint under both § 8.01-6.1 and *Vines*. Both the original Complaint and the Amended Complaint include substantially the same allegations for this subsection. *See* Compl. ¶ 17; Am. Compl. ¶ 17. Moreover, Defendants will not be substantially prejudiced in having to litigate the merits of this claim.

While the Subsection A claim relates back to the original Complaint, the statute of limitations for this subsection has nevertheless already run. Plaintiff argues State Policy 1.60 tolls the statute of limitations because counseling *letters* are only effective upon formal disciplinary action supported by such counseling letters; however, State Policy 1.60 does not delay the effective date of any *verbal* counseling. Additionally, even if State Policy 1.60 tolled the statute of limitations for a verbal counseling, Plaintiff does not allege the June 2016 verbal counseling was used to support formal disciplinary action taken against him. Because the statute of limitations was not tolled for the Subsection A claim,

the statute of limitations period expired on June 20, 2019. Plaintiff's original Complaint was filed in 2021, and thus the statute of limitations period had already expired for the Subsection A claim. The Plea in Bar to Count I, Subsection A must thus be granted.

II. Sovereign Immunity

Defendants argue sovereign immunity bars tort claims advanced under a negligence standard in Counts II, IV, and VII of Plaintiff's Amended Complaint because GMU is an agency of the Commonwealth of Virginia, and the Virginia Tort Claims Act ("VTCA") has waived tort claims for the Commonwealth only. "[A]s a general rule, the sovereign is immune not only from actions at law for damages but also from suits in equity to restrain the government from acting or to compel it to act." *Hinchey v. Ogden*, 226 Va. 234, 239 (1983). "'[O]nly the legislature acting in its policy-making capacity can abrogate the Commonwealth's sovereign immunity.'" *Azfall ex. rel. Azfall v. Commonwealth*, 273 Va. 226, 230 (2007) (quoting *Commonwealth v. Luzik*, 259 Va. 198, 206 (2000)). A "'waiver of immunity cannot be implied from general statutory language'" but must be "'explicitly and expressly announced'" in the statute. *Id.* (quoting *Hinchey*, 226 Va. at 241). Courts have held statutory language must explicitly and expressly waive sovereign immunity of the Commonwealth's agencies for those agencies to be held liable for torts. *See Motley v. Virginia*, No. 3:16cv595, 2017 U.S. Dist. LEXIS 43717, at *11 (E.D. Va. Mar. 24, 2017).

Under the VTCA,

> the Commonwealth shall be liable for claims for money only accruing on or after July 1, 1982 . . . on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under

> circumstances where the Commonwealth . . . , if a private person, would be liable to the claimant for such damage, loss, injury or death.

Va. Code § 8.01-195.3. As such, the VTCA has only waived sovereign immunity for the Commonwealth but not for agencies of the Commonwealth.

Plaintiff argues the change in the language of Virginia Code § 23-14 (2016), now reflected in Virginia Code § 23.1-1101, undermines the holdings of such cases as *Cuccinelli v. Rector, Visitors of University of Virginia*, 283 Va. 420 (2012), *The Rector and Visitors of the University of Virginia v. Carter*, 267 Va. 242 (2004), and *DiGiacinto v. Rector & Visitors of George Mason University*, 281 Va. 127 (2011). Those cases determined public universities in Virginia, including George Mason University, are agencies of the Commonwealth.

Although those cases relied on then-existing Virginia Code § 23-14, they remain persuasive authority for classifying GMU as an agency of the Commonwealth. *See Fogleman v. Commonwealth*, No. 0841-22-2, 2023 Va. App. LEXIS 627, at *6 (App. Ct. Sept. 19, 2023) ("Agencies of the Commonwealth, *including public universities*, are entitled to the same sovereign immunity.") (emphasis added). Moreover, GMU is listed as agency number 35 in the Virginia Administrative Code. 8 VAC § 35. To hold the change from § 23-14 to § 23.1-1101 means the General Assembly intended for GMU to now be classified as an agency for every other purpose but not under the VTCA would interpret the new statute to create a functional inconsistency the General Assembly did not enact.

> If a proposed construction would create "functional inconsistencies" within a statute, *Cuccinelli*, 283 Va. at 430, courts must select the definition that allows the statute to be viewed "as a consistent and harmonious whole so as to effectuate the legislative goal." *Virginia Elec. & Power Co. v. Bd. of Cnty. Supervisors*, 226 Va. 382, 387-88, 309 S.E.2d 308 (1983).

Commonwealth v. Burkard, 112 Va. Cir. 1, 7 (Fairfax 2023). Both the Virginia Administrative Code at 8 VAC §§ 35, 40-180-10, and the Virginia Code at § 23.1-1101, refer to GMU as an "institution." The VTCA in Virginia Code § 8.01-195.2 defines an agency as "any . . . *institution* . . . of the government of the Commonwealth of Virginia." (Emphasis added). In addition, even if GMU were not classified as an agency of the Commonwealth, as previously discussed, a waiver of sovereign immunity must be explicit. The VTCA only waives sovereign immunity for the Commonwealth, and GMU is not the Commonwealth itself. Thus, assuming the individual Defendants were acting within the scope of their employment, GMU is protected by sovereign immunity.

However, Plaintiff argues the individual Defendants were acting outside the scope of their employment and thus are not protected by sovereign immunity. "[W]here immunity 'is claimed by an agent of the state, rather than by the state as an entity, it will not be extended to acts which constitute a wanton and intentional deviation from the duties the agent has been assigned to undertake.'" *St. Martin v. McCracken*, 101 Va. Cir. 257, 261 (Chesapeake 2019) (quoting *Tomlin v. McKenzie*, 251 Va. 478, 481 (1996)). Defendants maintain the facts in Plaintiff's Complaint do not support the conclusory allegations ascribed thereto. But in this situation, the Court is called upon to determine the motivations of Defendants in carrying out their duties, which requires the consideration of inferences attributed by the dueling parties to the evidence, and thus, a jury must consider this aspect of the defense, absent waiver. *See Our Lady of Peace, Inc.,* 297 Va. at 847.

III. Intracorporate Immunity

Defendants assert intracorporate immunity bars Plaintiff's conspiracy claims in

Counts III and VIII of the Amended Complaint. "'To constitute a conspiracy there must be a combination of two or more persons; * * * a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy.'" *Bull v. LogEtronics, Inc.*, 323 F.Supp. 115, 131 (E.D. Va. 1971) (internal citations omitted). "[A] 'corporation and its employee[s] do not constitute the 'two or more persons' required for a civil conspiracy.'" *Id.* at 131-32 (internal citations omitted). Moreover, "[i]ntracorporate immunity is not destroyed when a corporation and its agents are sued as individuals." *Johnson v. Bella Gravida, LLC*, 105 Va. Cir. 350, 353 (Fairfax 2020). If Defendants were not acting within the scope of their employment, however, then intracorporate immunity is not a bar to the conspiracy claims, an issue that must be determined in an evidentiary hearing. *See Fox*, 234 Va. at 428. Thus, this defense must be adjudicated by a jury, absent waiver. *See Our Lady of Peace, Inc.*, 297 Va. at 847.

IV. Qualified Privilege

Defendants allege qualified privilege bars Plaintiff's defamation claims in Count IV of the Amended Complaint. "'[A] communication, made in good faith on a subject in which the communicating party has an interest or owes a duty, is qualifiedly privileged if the communication is made to a party who has a corresponding interest or duty.'" *Hodges v. Aquia Harbour Prop. Owners Ass'n, Inc.*, 23 Va. Cir. 178 (Stafford 1991) (quoting *Smalls v. Wright*, 241 Va. 52, 54 (1991)). "[Q]ualified privilege may be defeated by proof that the defamatory statements were made maliciously." *Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 134 (2003). Although courts decide whether a communication is privileged as a matter of law, "the question whether a defendant 'was actuated by malice, and has

abused the occasion and exceeded [the] privilege' is a question of fact for a jury." *Id.* at 135 (internal citations omitted).

Qualified privilege has been applied to communications within the employment context. *See e.g., Kroger Co. v. Young*, 210 Va. 564, 567 (1970) (holding the trial court erred in ruling statements made "by an employer to his employees of the reason for the discharge of a fellow employee" were not qualifiedly privileged). "When an employer discusses the character of its employee with its employee's potential employers, he is protected by a qualified privilege if such a conversation is made in good faith and if the statements are not made with malice." *Sarno v. Clanton*, 59 Va. Cir. 384, 386 (Norfolk 2002).

Here, Plaintiff alleges Defendant Rowan defamed him on three separate occasions: (1) the June 2020 Demotion, (2) the June 2020 Command Staff Meeting, and (3) the February 2021 Grievance Response. The June 2020 demotion email allegedly stated Plaintiff had failed to maintain the certifications necessary to possess the rank of Corporal and thus must be demoted to Master Police Officer. Am. Compl. ¶ 54(b). At the June 2020 Command Staff Meeting, Defendant Rowan allegedly commented Plaintiff was "'guilty of acts that warrant termination.'" *Id.* at ¶ 56(a)(i)-(iii). Finally, Plaintiff alleges that after he filed his February 2021 Grievance, Defendant Rowan made comments regarding Plaintiff's January 26 counseling. *Id.* at ¶ 101(a). As the Chief of Police at GMU, Defendant Rowan had "the authority to forgive or punish violations of GMU policy with wide latitude." *Id.* at ¶ 16(d). Plaintiff's allegations regarding Defendant Rowan's communications all relate to the employment of Plaintiff, an officer under Defendant

Rowan's command. Thus, the allegedly defamatory communications made by Defendant Rowan may be qualifiedly privileged, absent malice.

Plaintiff also alleges Defendant Ross defamed him on twelve separate occasions: (1) the July 2020 IP, (2) the October 2020 PIP, (3) the October 2020 PE, (4) the January 2021 Written Counseling, (5) the January 2021 PE, (6) the January 2021 Summary Report, (7) the September 2021 Termination, (8) the September 2021 DCJS Decertification Notice, (9) the Brady List Notice, (10) the 2021 FBI Background Check, (11) the 2020 Virginia ABC Background Check, and (12) the 2018 MWAA PSD Background Check. Each of these 12 occasions involved statements concerning deficiencies in Plaintiff's job performance and reasons for Plaintiff's termination. Defendant Ross "exercises senior administrative duties," is Deputy Chief, "assists, in an unknown capacity, with internal affairs investigations within the GMU PD," and was one of Plaintiff's supervisors. *Id.* at ¶¶ 7, 15(b), 20(f). Therefore, all of these alleged defamatory incidents may be qualifiedly privileged, absent malice.

Finally, Plaintiff alleges Defendant Sanavaitis made defamatory statements in the June 2021 IA report. *Id.* at ¶ 116. The comments included in the report concerned Plaintiff's behavior and comments during the internal affairs interview. Defendant Sanavaitis was assigned to investigate Plaintiff and thus the IA report was one of Defendant Sanavaitis' job duties. Defendant Sanavaitis' comments in the IA report may thus be qualifiedly privileged, absent malice.

However, because the issue of whether Defendants acted with malice and exceeded the privilege requires determining which evidentiary inferences can be made

even from uncontroverted evidence, determination of the qualified privilege defense requires an evidentiary hearing and is a question for the jury, absent waiver. *See Our Lady of Peace, Inc.*, 297 Va. at 847.

CONCLUSION

The Court has considered whether Defendants' Pleas in Bar to Plaintiff's Amended Complaint may be determined by bench hearing or whether a separate evidentiary proceeding and even a jury trial is alternatively required as the mode of procedure the Court is required to employ. The question of when an evidentiary hearing is required in resolution of a plea in bar, even when the facts at hand are not in dispute, turns on whether the Court is called upon merely to discern the legal consequences of such facts or whether instead, the Court must first make evidentiary inferences before reaching its legal conclusions. The Court finds regarding the attempts to hold Defendants Ross and Rowan liable for whistleblower retaliation for subsection "a. the June 2016 Verbal Counseling" of Count I of Plaintiff's Complaint, the allegations make clear as a matter of law the subsection violates the statute of limitations, and such claim must therefore be dismissed. With respect to whether Defendants enjoy sovereign immunity regarding tort claims advanced under a negligence standard in Counts II, IV, and VII, whether intracorporate immunity bars the conspiracy claims in Counts III and VIII, and whether qualified privilege bars the defamation claims in Count IV, this Court finds it must make evidentiary inferences to determine the motivations and intent of Defendants from what appears to be largely undisputed fact, and thereby to sit as trier of fact as to such claims. In addition, whereas in this case Plaintiff has prayed for a jury trial, absent waiver, the default mode

of adjudication is for those Pleas in Bar which require an evidentiary hearing to be determined by a jury.

Consequently, the Court shall enter a separate order dismissing Plaintiff's claim against Defendants Ross and Rowan for whistleblower retaliation under Subsection A of Count I of the Complaint and continue the remaining Pleas in Bar concerning the balance of the Counts for trial by jury.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court