NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *Goli Trump* v. *Fairfax County School Board*, CL 2020-7078

Dear Mr. Bates and Mr. Praed:

This matter is before the court on Defendant's demurrer to Plaintiff's Second Amended Complaint ("SAC"). A hearing was held on April 8, 2022, at which the court requested supplemental memoranda from the parties, and the matter was taken under advisement. Defendant timely filed its supplemental memorandum on April 29, 2022, to which Plaintiff responded on May 20, 2022. For the reasons that follow, Defendant's demurrer is OVERRULED.

BACKGROUND

Trump brought this action against the Fairfax County School Board ("Board") pursuant to the relief from employment discrimination provision of the Virginia Fraud Against Taxpayers Act ("VFATA"), Code § 8.01-216.8, which provides in pertinent part:

> Any employee . . . shall be entitled to all relief necessary to make that employee . . . whole, if that employee . . . is discharged, . . . suspended, . . . or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . or associated others in furtherance of an action under this article or other efforts to stop one or more violations of this article. . . .

OPINION LETTER

The "VFATA is based on" the federal civil False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. *Lewis v. City of Alexandria*, 287 Va. 474, 490, n.4 (2014). Thus, the FCA cases "provide guidance" for VFATA cases. *Id.* The FCA equivalent of Code § 8.01-216.8 is 31 U.S.C. § 3730(h).

To plead a retaliation claim sufficiently pursuant to 31 U.S.C. § 3730(h) -- and Code § 8.01-216.8 -- and thus survive a motion to dismiss, a plaintiff must:

> allege facts sufficient to support a "reasonable inference" of three elements: (1) he engaged in protected activity; (2) his employer knew about the protected activity; and (3) his employer took adverse action against him as a result.

United States ex rel. David Grant v. United Airlines, Inc., 912 F.3d 190, 200 (4th Cir. 2018).

Grant further explained that, "[a]s to the first element, § 3730(h) defines two types of protected activity – acts "in furtherance of an [FCA action]" (the "first prong"), or "other efforts to stop 1 or more [FCA violations]" (the "second prong"). 31 U.S.C. § 3730(h)(1)." *Id.* The "protected activity" here is "efforts to stop one or more violations of this article . . . ." Code § 8.01-216.8.

The Board does not dispute that Trump engaged in "protected activity," *i.e.*, that she engaged in "efforts to stop one or more violations of this article"; the primary dispute concerns the second element -- whether Trump has pled sufficient facts to show that her employer, the Board, knew that she engaged in "protected activity." The Board asserts that, as a compliance employee, Trump has a heightened burden to plead that the Board was on notice of her protected activity and that she has not done so.

The Board also contends that Trump "cannot establish the third element -- causation -- because she fails to plausibly allege that the School Board terminated her because of VFATA protected activity." *Supplemental Brief* 2, n.1.

The Board has misconstrued what Code § 8.01-216.8 requires to plead the second element and thus has mistakenly concluded that Trump's SAC does not sufficiently plead that the Board knew of her protected activity. Moreover, Trump has plausibly alleged that the Board terminated her because of VFATA protected activity.

The Facts Alleged In Trump's Second Amended Complaint

As this matter is before the court on the Board's demurrer, the court accepts as true all the material facts set forth in the SAC. *Eubank v. Thomas*, 300 Va. 201, 206 (2021) ("We consider as true the facts alleged in the motion for judgment and the reasonable factual inferences that can be drawn from the facts alleged. . . . We do not evaluate the merits of the allegations, but only whether the factual allegations sufficiently plead a cause of action.").

In her SAC, Trump alleges the following. She was employed by the Board as the first Auditor General of the Fairfax County Public Schools ("FCPS") from September 28, 2015 to November 11, 2016. SAC ¶ 2. Trump would be "conducting audits and investigating fraud, waste and abuse" and she reported to the Board

itself. SAC ¶ 8.

On or about October 14, 2015, an FCPS finance office employee appeared in Trump's office to make a report of suspected wrongdoing concerning an energy conservation vendor. SAC ¶¶ 44, 47. The alleged wrongdoing was that the vendor's purported energy savings were not true and that the vendor was submitting false claims for payment to the FCPS. SAC ¶¶ 50, 53. The employee also told Trump that the Superintendent (and an Assistant Superintendent) had a prior relationship with the vendor. SAC ¶ 52.

On or about November 11, 2015, Trump met with Division Counsel and informed him what she had been told; he agreed he would treat her information as confidential under the attorney-client communication privilege. SAC ¶ 55-57. Despite Division Counsel's agreement to keep the information confidential, he informed the Superintendent that an anonymous complaint had been filed with the Auditor General. SAC ¶ 59. On November 23, 2015, Trump met a second time with Division Counsel (and an Assistant Division Counsel) to discuss the vendor's contract with the FCPS. SAC ¶¶ 65-66.

In May, 2016, Trump met again with the employee, whom Trump told she was continuing her investigation.

On or about June 17, 2016, a second employee -- an engineer in the facilities department who had direct responsibility for the energy management programs that were contracted to the vendor -- reported concerns similar to those of the first employee. SAC ¶¶ 102-103. The engineer complained that the Assistant Superintendent of FTS had ordered him to approve payment to the vendor, despite the fact that the vendor's invoices could not be reconciled, or even understood, by the facilities department. SAC ¶ 104. The engineer believed the invoices were false. SAC ¶ 107.

On or about July 20, 2016, OAG staff interviewed an engineer who had worked for the FCPS as an Energy Coordinator since 2006 until his departure in 2015. He reported that he quit his job because of the vendor contract, that the Assistant Superintendent of FTS was the driving force behind engaging the vendor, and that the contracting process the Assistant Superintendent of FTS used to retain the vendor deviated from the standard contracting procedures in that the FCPS did not form a committee to evaluate the merits of the vendor's contract and did not seek competitive bids from multiple vendors. SAC ¶ 111.

Both employees cooperated with the OAG throughout its investigation of the potential fraud. SAC ¶ 14. As of the end of July, 2016, Trump had not briefed the Board on the investigation because a briefing was not yet ripe. SAC ¶ 15.

On or about July 26, 2016, Trump received her first, and only, performance review from the Board; she received favorable overall comments. SAC ¶ 12.

On July 27, 2016, the FCPS terminated the engineer. SAC ¶¶ 13, 112. On July 28, 2016, Trump alerted FCPS Human Resources ("HR") that it was likely that the engineer's termination was in retaliation for his efforts to stop the fraud and false claims by the vendor; she disclosed to HR that the investigation included allegations of wrongdoing by senior leadership. SAC ¶¶ 16, 113. The next day, Trump was ordered by the Board Chair to obtain the approval of the Superintendent to continue the investigation. SAC ¶¶ 16, 115.

On August 1, 2016, Trump informed the Board Chair that she felt she could

not obtain the approval of the Superintendent to continue the investigation because the investigation included allegations of wrongdoing by a member of the Superintendent's Leadership Team, and that seeking the approval of the Superintendent would compromise the investigation (SAC ¶ 116); she also requested a closed session meeting with the full Board. SAC ¶¶ 17, 117.

On August 9, 2016, Trump reported her investigation to the Commonwealth's Auditor of Public Accounts, the State Inspector General, and the State Police (SAC ¶ 20); Trump also notified the full Board, by email, that she had reported her investigation to the three state agencies. SAC ¶ 120. On August 10, 2016, the Commonwealth's Auditor of Public Accounts notified Trump that it declined to investigate, but that she could continue to investigate. SAC ¶ 123. About the same time, the State Inspector General also declined to investigate. SAC ¶ 124.

Also on August 10, 2016, Trump advised the Board that her investigation arose from the "discovery of circumstances suggesting reasonable possibilities that fraudulent activities have occurred in FCPS" and she informed the Board that she was asking investigators from HR to work with her to continue the investigation. SAC ¶ 125.

On August 11, 2016, Trump met with the Assistant Superintendent of HR to discuss the investigation. SAC ¶ 126. The meeting resulted in a memo by the Division Counsel that was transmitted to the Board which stated that the scope of Trump's investigation was: "investigations into Leadership Team members' actions related to procurement of a vendor contract" and "investigations into the Leadership Team and any accompanying compliance concerns." The memo recommended that the Board retain an outside law firm to complete the investigation. *Id.*

On August 15, 2016, the Board met in closed session with the Superintendent, Division Counsel, and outside counsel, but without Trump. SAC ¶ 129.

Later that same day, Trump met in closed session with the full Board for nearly four hours. SAC ¶ 129. Although outside counsel remained, neither the Superintendent nor Division Counsel were present. SAC ¶ 129. Trump provided the Board thousands of pages from her investigative files and summaries of that investigation, showing that fraud was at the heart of the investigation with respect to both contract procurement and invoicing, as well as the Superintendent's (and an Assistant Superintendent's) alleged complicity. SAC ¶¶ 21, 131-134.

One of the documents provided to the Board was a 3 page *Overview* that outlined the information provided by the employees and the additional information gathered in the course of the OAG's investigation. SAC ¶ 132. The *Overview* concluded by listing Trump's observations of "suggestions of fraudulent activities":

> Evidence that the contractor overcharged FCPS.
>
> Evidence that the contractor's invoices are not supported by appropriate documentation.
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> Evidence suggesting that FCPS subject officers were made aware of the . . . overcharging . . . and failed to act in accordance with state

and local requirements for reporting acts of wrong-doing and/or Fraud, Waste and Abuse.

Evidence suggesting that subject officers coerced employees into paying invoices to the contractor.

Evidence suggesting subject officers improperly disciplined employees for raising concerns.

Evidence indicating that the contractor requested removal of employees, in succession, from oversight of the contract because of employees' questioning the contractor invoices as part of the employees' job duties, and subject officers heeded the contractor's requests.

Evidence suggesting that the contractor participated in acts of coercion, bribery and undue influence over subject officers, implicating criminal activity.

Evidence suggesting that gifts were provided to subject officers.

Evidence suggesting that a subject officer is marketing for the contractor in other states.

SAC ¶ 132.

Trump also handed out an 8 page powerpoint presentation which outlined the key indicators of fraud the OAG had discovered at both the contract negotiation stage and during the performance stage of the contract. SAC ¶ 133. In addition, Trump identified the Superintendent and Assistant Superintendent of FTS as two of the Team members. SAC ¶ 134.

During the meeting, Trump read a prepared script to the Board that included the following:

> OAG received allegations of suspected fraud, waste and abuse from an FCPS employee. That allegations made were related to performance of a contractor and performance of several FCPS Leadership Team around the contract. . . . OAG independently made some discoveries that concerned us about violations of laws or FCPS policies. OAG performed some due diligence on the contractor and found a history of allegations, risks, violations and improprieties in other school districts in the US. . . . Virginia DGS has prohibited use of this contractor on certain energy contracts. These are key risk indicators, and OAG was concerned about FCPS's involvement with this contractor.

SAC ¶ 131.

During the meeting, Trump was questioned by members of the Board about the decision to report the investigation outside the school system to the three state agencies. One Board member exclaimed that "someone is going to sue us." SAC ¶ 135.

At some point after the meeting, the Board turned the investigation over to an outside law firm. SAC ¶ 41.

On August 16, 2016, a Board member informed Trump that the Superintendent had come into the closed session the day before and told the Board that she had decided to put Trump on administrative leave. SAC ¶¶ 22, 136. Trump was placed on administrative leave on August 17, 2016 without explanation and barred from coming onto FCPS facilities. SAC ¶¶ 23, 139.

On August 24, 2016, Trump submitted a formal complaint to the Board, through HR and Division Counsel, in which she alleged that she had been retaliated against, and subjected to adverse employment action, because of her investigation. SAC ¶ 24.

On September 19, 2016, the Superintendent resigned, effective December 15, 2016. SAC ¶ 141. The outside law firm presented its findings to the Board on September 20, 2016. *Id.*

On November 3, 2016, the Board met in closed session and authored a memo to be placed in Trump's personnel file criticizing her decision on August 9, 2016 to report her investigation to the state agencies; the Board also voted to terminate her employment. SAC ¶¶ 26-27. On November 15, 2016, Trump received a letter from FCPS stating that she was "terminated, effective November 11, 2016."

ANALYSIS

FCPS's Authorities Regarding The Second Element

In support of its position regarding the second element -- whether the Board knew of Trump's "protected activity" -- the Board cites to *Miniex* v. *Houston Hous. Auth.*, No. 4:17-CV-624, 2018 WL 7021207 (S.D. Tex. Oct. 3, 2018), *report and recommendation adopted in part, overruled in part*, No. CV 4:17-00624, 2018 WL 6566653 (S.D. Tex. Dec. 13, 2018), in which the magistrate judge first held:

> While employees charged with investigating potential fraud are not precluded from bringing an FCA retaliation suit, they "'must make clear their intentions of bringing or assisting in an FCA action in order to overcome the presumption that they are merely acting in accordance with their employment obligations.'" *Yuhasz* v. *Brush Wellman, Inc.*, 341 F.3d 559, 568 (6th Cir. 2003) (quoting *United States ex rel. Ramseyer* v. *Century Healthcare Corp.*, 90 F.3d 1514, 1523 n.7 (10th Cir. 1996)).
>
> Such an employee must express "concerns to his superiors other than those typically raised as part of" her job. *Robertson* [v. *Bell Helicopter Textron, Inc.*, 32 F.3d 948], 952 [(5th Cir. 1994), *cert. denied*, 513 U.S. 1154 (1995)] (affirming grant of judgment as a matter of law) (denying whistleblower protection where employee "did nothing to rebut his supervisors' testimony regarding their lack of knowledge that he was conducting investigations outside the scope of his job responsibilities in furtherance of a *qui tam* action."); see also *Yuhasz*, 341 F.3d at 567 (affirming grant of motion to dismiss) (finding no notice where employee reported illegality and potential liability of certifications as part of his normal job duties); *Ramseyer*, 90 F.3d at 1523 n.7 (affirming grant of motion to dismiss) (finding no notice where plaintiff reported noncompliance with

> regulations as part of her job duties, and "took no steps to put defendants on notice that she was acting 'in furtherance of' an FCA action – *e.g.*, that she was furthering or intending to further an FCA action rather than merely warning the defendants of the consequences of their conduct."); *X Corp.* v. *Doe*, 816 F. Supp. 1086, 1096 (E.D. Va. 1993) (granting summary judgment) (finding no notice where in-house counsel raised concerns about compliance and possible exposure to *qui tam* litigation as part of his job).

Miniex, supra, at *7.

> The district court judge's review stated:
>
> Miniex accordingly has not demonstrated that *Robertson*'s holding has been abrogated, and the Court is unpersuaded that the Magistrate Judge erred by recommending adherence to *Robertson* in this regard. The Court concludes *Robertson*'s holding that an employer lacks notice of its employee's protected activity if the employee's protected conduct was "consistent with the performance of his dut[ies]," see 32 F.3d at 952, and applies this rule to Miniex, even though she may well be a fraud alert employee.

Miniex v. *Houston Hous. Auth.*, No. CV 4:17-00624, 2018 WL 6566653, at *4 (S.D. Tex. Dec. 13, 2018).

With all due respect to the district court judge, this court concludes that *Robertson*'s holding -- and indeed, the holdings of *Yuhasz*, *Ramseyer*, and *X Corp.* -- has been abrogated by subsequent legislation and is thus no longer good law.

As the magistrate judge explained, *Robertson* denied whistleblower protection because the employee "did nothing to rebut his supervisors' testimony regarding their lack of knowledge that he was conducting investigations outside the scope of his job responsibilities *in furtherance of a qui tam action.*" 32 F.3d at 952 (emphasis added). Thus, the emphasis in *Robertson* was on the fact that the plaintiff was acting in furtherance of a *qui tam* action because, at the time, 31 U.S.C. § 3730(h) read in pertinent part as follows:

> Any employee who is discharged, . . . suspended, . . . or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others *in furtherance of an action under this section*, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. (Emphasis added).

Accordingly, the only lawful acts in which a compliance employee could engage free from retaliation were acts "in furtherance of an action under this section," *i.e.*, acts in furtherance of a *qui tam* lawsuit.

In 2009 and 2010, however, the FCA was amended by the Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, § 4(d), 123 Stat. 1617, 1624-25 (2009) ("FERA") and the Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. 111-203, § 1079A(b)(2)(c), 124 Stat. 1376, 2079 (2010). After the amendments, 31 U.S.C. § 3730(h) read in pertinent part:

> Any employee . . . shall be entitled to all relief necessary to make that employee . . . whole, if that employee . . . is discharged, . . . suspended, . . . or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . or associated others **in furtherance of** an action under this section or **other efforts to stop 1 or more violations of this subchapter**. . . . (Emphasis added).

Accordingly, the limited focus of the relief from employment discrimination provision of the FCA -- bringing a *qui tam* action -- was expanded to encompass "efforts to stop 1 or more violations" of the FCA. The legislative history of the FERA confirms that conclusion:[1]

> To address the need to widen the scope of protected activity, Section 4(d) of S. 386 provides that Section 3730(h) protects all "lawful acts done . . . in furtherance of . . . other efforts to stop 1 or more violations" of the False Claims Act. **This language is intended to make clear that this subsection protects** not only steps taken in furtherance of a potential or actual qui tam action, but also **steps taken to remedy the misconduct through methods such as internal reporting to a supervisor** or company compliance department and refusals to participate in the misconduct that leads to the false claims, whether or not such steps are clearly in furtherance of a potential or actual qui tam action.

115 Cong. Rec. Page E1300 (June 3, 2009) (Extension of Remarks by Rep. Howard L. Berman) (emphasis added).

Accordingly, *Miniex* is an erroneous statement of the law to the extent that it holds compliance officers to a heightened burden regarding knowledge of the employer.

This understanding of the effect of the 2009 and 2010 amendments has been adopted by a majority of the federal courts which have considered the 2009 and 2010 amendments.

For example, in *Halasa* v. *ITT Educ. Servs., Inc.*, 690 F.3d 844 (7th Cir. 2012), the Seventh Circuit held that the 2009 amendments "amended the statute to protect employees from being fired for undertaking 'other efforts to stop' violations of the Act, such as reporting suspected misconduct to internal supervisors." 690 F.3d at 847-48.[2] The Fourth Circuit has similarly

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[1] Although legislative history "is irrevelant to an unambiguous statute," *United Air Lines, Inc. v. McMann,* 434 U.S. 192, 199 (1977), a court may "also look to a statute's legislative history as further evidence of congressional intent." *Sierra Club* v. *United States Army Corps of Engineers*, 909 F.3d 635, 645 (4th Cir. 2018).

[2] The district court had erroneously held that, "as Director of ITT Lathrop":

> Halasa is subject to the "heightened notice requirement for employees who are charged with investigating fraud." *Fanslow* [v. *Chicago Mfg. Center, Inc.*, 384 F.3d 469,] 484 [(7th Cir. 2004)]. Because Halasa was the local ethics and compliance officer for ITT Lathrop who had a duty to investigate and address any unlawful or unethical activity that took place on his watch, "the fact that [he] was alerting his supervisors to the possibility of

"recognized that the amended language [of the FCA] broadens the scope of protected activity," citing the above pages of *Halasa* (690 F.3d at 847-48). *Grant*, *supra*, 912 F.3d at 201.

Likewise, *Jones-McNamara* v. *Holzer Health Sys., Inc.*, No. 2:13-CV-616, 2014 WL 1671495 (S.D. Ohio Apr. 28, 2014), found that the 2009 amendment "effectuated a substantive change in the statute by utilizing broader language, basing the right to relief not only on pursuit or aid of a *qui tam* case, but on any conduct by or on behalf of the employee to stop FCA misconduct." *Id.* at *3. The court explained that the pre-2009 version of the statute "prohibited retaliation for engaging in protected activity, and the protected activity was bringing or furthering a *qui tam* action." *Id.* at *4. After the 2009 amendments, the statute encompassed:

> a distinctly broader category of protected activity. This could apparently take the form of **trying to stop the misconduct** by external means (*e.g.*, an FCA action) or **by internal means (*e.g.*, reporting violations up a company's chain of command in an effort to effectuate institutional course correction). As long as the employer knew about the efforts, a plaintiff fell within the scope of the statutory scheme's protections.**

Id. (Emphasis added).

The Sixth Circuit affirmed. In affirming the district court, the Sixth Circuit stated that the statutory amendment "remove[d]" the "requirement that protected conduct could 'lead[] to a viable FCA action'" and that "a plaintiff's activities must reasonably embody 'efforts to stop' FCA violations." *Jones-McNamara* v. *Holzer Health Sys.*, 630 F. App'x 394, 399 (6th Cir. 2015).

In *Miller* v. *Abbott Lab'ys*, 648 F. App'x 555 (6th Cir. 2016), the Sixth Circuit not only relied upon *Halasa*, but adopted Rep. Berman's statement that the FERA "protects not only steps taken in furtherance of a potential or actual qui tam action, but also steps taken to remedy the misconduct through methods such as internal reporting to a supervisor . . . ." 155 Cong. Rec. E1300 (June 3, 2009) (statement of Rep. Berman). 648 Fed. Appx. at 560. And the court went on to state that the "amended statutory language also explicitly confirms

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> [employees'] non-compliance with the rules would not necessarily put them on notice that he was planning to take a far more aggressive step and bring a qui tam action against them or report their conduct to the government." *Brandon* [v. *Anesthesia & Pain Management Assocs., Ltd.*, 277 F.3d 936,] 945 [(7th Cir.2002)].

Halasa v. *ITT Educ. Servs., Inc.*, No. 1:10-CV-437-WTL-MJD, 2011 WL 4036516, at *6 (S.D. Ind. Sept. 12, 2011), *aff'd*, 690 F.3d 844 (7th Cir. 2012).

> The Seventh Circuit affirmed, however, because Halasa:
>
> has no evidence that any of [the persons who made the decision to fire Halasa] knew of his protected conduct. Rather, the record shows that Halasa reported his findings only to Ortega, Hemphill, and Carpentier and there is no indication that any of these people passed along Halasa's findings to the decisionmakers.

690 F.3d at 848.

McKenzie's recognition that **§ 3730(h) protects internal reports of**, or other efforts to stop, **fraud on the government.**" *Id.* (Emphasis added).

A similar conclusion was reached in *Manfield* v. *Alutiiq Int'l Sols., Inc.*, 851 F. Supp. 2d 196 (D. Me. 2012), where the court observed that the pre-2009 version of the FCA retaliation provision "protected only those claimants who engaged in conduct that reasonably could lead to a viable FCA action." *Id.* at 201. The court thus held:

> Since a plaintiff now engages in protected conduct whenever he engages in an effort to stop an FCA violation, **the act of internal reporting itself suffices as both the effort to stop the FCA violation and the notice to the employer that the employee is engaging in protected activity.**

851 F. Supp. 2d at 204 (emphasis added).

Likewise, *Layman* v. *MET Lab'ys, Inc.*, No. Civ.A. RDB-12-2860, 2013 WL 2237689 (D. Md. May 20, 2013) held:

> When Congress enacted FERA, it did so to counter perceived restrictive judicial interpretations of the protected activity prong by extending protected acts to acts "in furtherance of ... other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h)(1) . . . . Congress stated that the "language is intended to make clear that [§ 3730(h)] **protects** not only **steps** taken in furtherance of a potential or actual *qui tam* action, but also ... **taken to remedy ... misconduct through methods such as internal reporting to a supervisor** or company compliance department." 155 Cong. Rec. E1295-03, E1300 (daily ed. June 3, 2009). **This is in contrast with pre-FERA standards pursuant to which protected activity did not include reporting to one's supervisor.**

2013 WL 2237689, at *7 (emphasis added).

In *Mikhaeil* v. *Walgreens Inc.*, No. 13-14107, 2015 WL 778179 (E.D. Mich. Feb. 24, 2015), the court held that an "internal report to a supervisor is undoubtably an 'effort.'" *Id.* at *7. Thus, the FCA

> no longer requires that conduct be 'in furtherance of an action under this section' to be protected. Rather, the FCA protects any "effort to stop 1 or more violations of this subsection." 31 U.S.C. 3730(h)(1). **This includes internal reporting to supervisors** "whether or not such steps are clearly in furtherance of a potential or actual qui tam action." 155 Cong Rec. E1295-03, at E1300. If an employee does not need to take steps clearly in furtherance of a potential or actual qui tam action to engage in protected activity, the employee, even if charged with investigating potential fraud, also does not need to "make clear their intentions of bringing or assisting in an FCA action," *Yuhasz*, 341 F.3d at 568, to satisfy the notice requirement.

Id. at *9 (emphasis added).

Also in 2015, the United States District Court for the Middle District of

Florida held:

> § 3730(h)(1) can be parsed into two clauses: the litigation clause and the opposition clause. . . . The litigation clause protects conduct "in furtherance of an action under [the FCA]." 31 U.S.C. § 3730(h)(1) (2012). On the other hand, by using the disjunctive "or," the opposition clause additionally protects conduct "in furtherance of ... other efforts to stop 1 or more violations of this subchapter." *Id.* Standing in contrast to § 3730(h)(1)'s litigation clause, the opposition clause's plain language unambiguously contemplates protecting conduct pursued outside the context of potential FCA litigation. This interpretation is further bolstered by the statute's legislative history, which confirms that conduct "such as internal reporting to a supervisor or company compliance department and refusals to participate in the misconduct" are protected under § 3730(h)(1). 155 Cong. Rec. E1295-03 (statement of Rep. Berman), 2009 WL 1544226.

Arthurs v. *Glob. TPA LLC*, 208 F. Supp. 3d 1260, 1265 (M.D. Fla. 2015).

Similarly, *Malanga* v. *NYU Langone Med. Ctr.*, No. 14CV9681, 2015 WL 7019819 (S.D.N.Y. Nov. 12, 2015), observed:

> [I]t is doubtful that those heightened pleading standards survive [the Fraud Enforcement and Recovery Act of 2009], which was enacted "to counter perceived judicial interpretations of the protected activity prong...." *Layman* v. *MET Labs., Inc.*, No. 12-cv-2860, 2013 WL 2237689, at *7 (D.Md. May 20, 2013). Those decisions establishing a higher pleading standard for fraud alert employees were concerned with ensuring that the employer was on notice of an employee's "intentions of bringing or assisting in an FCA action." *Ramseyer*, 90 F.3d at 1514 n. 7. Under FERA, a retaliation claim can be stated so long as the employee was engaged in efforts to stop an FCA violation, even if the employee's actions were not necessarily in furtherance of an FCA claim.

Id. at *3.

A like result was reached in *United States* v. *N. Adult Daily Health Care Ctr.*, 205 F. Supp. 3d 276 (E.D.N.Y. 2016):

> [U]nder the 2009 amendment to the FCA, complaining of regulatory violations may qualify as an "effort[ ] to stop 1 or more violations" of the FCA, see 31 U.S.C § 3730(h)(1). Thus, the proposition in *Yesudian* that "grumbling to the employer about ... regulatory violations ... does not constitute protected activity," 153 F.3d at 743, appears to no longer be valid.

205 F. Supp. 3d at 299.

And, *Lord* v. *Univ. of Miami*, 571 F. Supp. 3d 1299 (S.D. Fla. 2021), held:

> [A] compliance professional might establish notice . . . [by] "characterizing the employer's conduct as illegal or fraudulent[,]" [*Eberhardt*, 167 F.3d at 868] (alteration added); "recommending that

legal counsel become involved[,]" *id.* (alteration added); . . . .

571 F. Supp. 3d at 1314.

Despite this widespread application of the 2009 and 2010 amendments, the Board attempts to show that the pre-2009 case law still applies:

> Absent a higher pleading requirement regarding notice, the "retaliation provision would confer virtual immunity on an auditor . . . from discipline or termination related to [her] work, because all [her] work would be 'protected activity.'" *Ortiz* v. *Todres & Co., LLP*, No. 15 Civ. 1506 (LGS), 2019 WL 1207856 at *5 (S.D.N.Y. Mar. 14, 2019).

Supplemental Brief 3.

The Board's quotation from *Ortiz* omits, however, the preceding sentence. In full, *Ortiz* stated:

> "[A]n employee assigned the task of investigating fraud within a company must go beyond the assigned task and *put his employer on notice that an FCA action is a reasonable possibility.*" *Fisch*, 2012 WL 4049959, at *6 (internal quotation marks omitted). Otherwise, the FCA retaliation provision would confer virtual immunity on an auditor for a government contractor from discipline or termination related to his work, because all his work would be "protected activity."

Ortiz at *5 (emphasis added).

As is readily evident from the 2009 and 2010 statutory amendments, as well as the cases previously reviewed, after those amendments, it was no longer a requirement that an employee put his employer on notice that "an FCA action is a reasonable possibility." Thus, *Ortiz*'s holding that the "FCA retaliation provision would confer virtual immunity on an auditor for a government contractor from discipline or termination related to his work, because all his work would be 'protected activity'" was an incorrect statement of the law.[3]

The Board further argues that, in the 2009 and 2010 amendments, "Congress made no attempt to disturb the thoroughly developed case law that compliance employees have a heightened burden to satisfy the notice requirement." *Supplemental Brief* 5. This argument is directly contradicted by the legislative history and is contrary to the majority of the case law. As Rep. Berman explained of the 2009 amendment:

> *This language is intended to make clear that* **this subsection protects** not only steps taken in furtherance of a potential or actual qui tam

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[3] The Board argues that, "if a compliance employee were permitted to bring a retaliation claim like Trump's, then no compliance employee could ever be fired — whether for mismanagement, poor judgment, bad faith, or general incompetence — without risking a retaliation suit." *Supplemental Brief* 3. While firing a compliance employee for mismanagement, poor judgment, bad faith, or general incompetence could result in a retaliation suit, the mere fact that a baseless suit could be filed does not justify ignoring the 2009 and 2010 amendments. Indeed, such a suit would be without merit and the employee would be subject to sanctions under Code § 8.01-271.1.

> action, but also **steps taken to remedy the misconduct through methods such as internal reporting to a supervisor . . . .**

115 Cong. Rec. Page E1300 (June 3, 2009) (Extension of Remarks by Rep. Howard L. Berman) (emphasis added).

In support of its argument, the Board cites (*Supplemental Brief* 5) *Steele* v. *Great Basin Sci., Inc.*, No. 216CV00628JNPBCW, 2016 WL 6839384 (D. Utah Nov. 21, 2016) for the proposition that "the 2009 amendment did not fundamentally alter the standard . . . for determining when an employer is on notice that an employee has engaged in one of these protected activities." *Id.* at *4. But that "standard" was merely a generality that the employee "must allege specific facts that show the employer knew that the employee had engaged in a protected activity and that the employee was subjected to an adverse employment action because the protected activity." *Id.* at *5. The plaintiff's activity in *Steele* was "suggestions aimed at improving anti-contamination protocols," which:

> did not notify Great Basin that she was attempting to stop a violation of the FCA. There is no indication that her suggestions were aimed at curbing a fraud on the Government rather than at improving the quality and consistency of Great Basin's product. And there was no reason for Great Basin to believe that Ms. Steele was doing anything other than attempting to serve her employer by making these suggestions. . . . Moreover, in order to show that Ms. Steele was fired for efforts to stop violations of the FCA, she must plead facts that show that there was a fraud on the Government to be stopped. But Ms. Steele has not adequately pled that Great Basin was violating the Act.

Id. at *5.

Thus, because Trump was attempting to stop fraud, *Steele* does not bolster the Board's position.

Similarly, the Board's reliance (*Supplemental Brief* 5) on *United States* v. *Cookeville Reg'l Med. Ctr. Auth.*, No. 2:15-CV-00065, 2021 WL 4594784 (M.D. Tenn. Oct. 6, 2021) is misplaced as the court held only that a plaintiff "still must prove that the employer knew that the employee was engaging in protected activity." *Id.* at *8.[4]

The Board also cites *United States ex rel. Reed* v. *KeyPoint Gov't Sols.*, 923 F.3d 729 (10th Cir. 2019), for the proposition that "a compliance employee must allege facts that, viewed in her favor, make clear that her employer had been put on notice that she was trying to stop it from violating the False Claims Act and not merely doing her job." *Supplemental Brief* 6 (citing 923 F.3d at 767). The Board apparently understands this to mean that a compliance employee cannot bring a claim under the FCA because reporting fraud is part of her job.

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[4] The most recent case cited by the Board, *Ascolese* v. *Shoemaker Constr. Co.*, No. CV 18-1864, 2021 WL 3015410 (E.D. Pa. June 7, 2021), took no account of the 2009 FERA amendment, erroneously finding that "the knowledge prong requires the employee to put his employer 'on notice of the distinct possibility of False Claims Act litigation.' (Citation omitted)." 2021 WL 3015410, at *4.

The Board reads too much into the phrase "merely doing her job." On the previous page of the opinion, the court stated that "the right question regarding the notice element of the retaliation claim" is "whether Ms. Reed pleaded facts that plausibly show that KeyPoint was on notice that she had tried to stop its alleged False Claims Act violations." 923 F.3d at 766. The court went on to state that "compliance employees typically must do more than other employees to show that their employer knew of the protected activity." *Id.* at 767. This does not mean that compliance officers cannot bring a claim under the FCA because reporting fraud is part of her job. That is made clear in the court's explanation of the shortcomings of the plaintiff's complaint:

> For example, regarding Ms. Reed's conversation with the "OPM Contract Director," we do not know which "concerns" she voiced or whether voicing those unspecified concerns was inconsistent with her job duties. Aplt.'s App. at 32, ¶ 65. It is the same story with Ms. Reed's discussions with "the Regional Managers and certain Field Managers." *Id.* And, as to the Director of Training, we are especially hard-pressed to see how Ms. Reed's communications with that official would have alerted KeyPoint to the fact that she was seeking to prevent the company from committing a violation the False Claims Act. Specifically, Ms. Reed's complaint speaks of the problems that the Director of Training brought to Ms. Reed's attention – not the other way around. *See id.* at 32, ¶¶ 60-63. That the Director of Training reported problems to Ms. Reed tells us nothing about whether KeyPoint knew of Ms. Reed's efforts to stop a False Claims Act violation. Therefore, her complaint averments regarding the content of her communications with the identified KeyPoint officials do not aid her argument that KeyPoint was on notice of her protected activity.

923 F.3d at 770, n.21.

Having set forth the governing law, the court will review the allegations of Trump's complaint for sufficiency with regard to the second element -- whether Trump has pled sufficient facts to show that her employer, the Board, knew that she engaged in "protected activity" -- in light of the above case law.

The SAC Adequately Pleads That The Board Knew
<u>That Trump Engaged In "Protected Activity"</u>

The "protected activity" here is Trump's "efforts to stop one or more violations of this article . . . ." As the Board does not dispute that Trump engaged in "protected activity," the court turns to whether the SAC sufficiently alleges that the Board knew that Trump engaged in "protected activity."

The SAC alleges the following. Trump met in closed session with the full Board, a meeting which lasted nearly four hours. SAC ¶ 129. Trump provided the Board thousands of pages from her investigative files and summaries of that investigation, showing that fraud was at the heart of the investigation with respect to both contract procurement and invoicing, as well as the Superintendent's (and an Assistant Superintendent's) alleged complicity. SAC ¶¶ 21, 131-134.

One of the documents Trump provided to the Board was a 3 page *Overview* that outlined the information provided by the employees and the additional

information gathered in the course of OAG's investigation. SAC ¶ 132. The *Overview* concluded by listing Trump's observations of "suggestions of fraudulent activities":

> Evidence that the contractor overcharged FCPS.
>
> Evidence that the contractor's invoices are not supported by appropriate documentation.
>
> Evidence suggesting that FCPS subject officers were made aware of the . . . overcharging . . . and failed to act in accordance with state and local requirements for reporting acts of wrong-doing and/or Fraud, Waste and Abuse.
>
> Evidence suggesting that subject officers coerced employees into paying invoices to the contractor.
>
> Evidence suggesting subject officers improperly disciplined employees for raising concerns.
>
> Evidence indicating that the contractor requested removal of employees, in succession, from oversight of the contract because of employees' questioning the contractor invoices as part of the employees' job duties, and subject officers heeded the contractor's requests.
>
> Evidence suggesting that the contractor participated in acts of coercion, bribery and undue influence over subject officers, implicating criminal activity.
>
> Evidence suggesting that gifts were provided to subject officers.
>
> Evidence suggesting that a subject officer is marketing for the contractor in other states.

SAC ¶ 132.

Trump also handed out an 8 page powerpoint presentation which outlined the key indicators of fraud the OAG had discovered at both the contract negotiation stage and during the performance stage of the contract. SAC ¶ 133. In addition, Trump identified the Superintendent and Assistant Superintendent of FTS as two of the Team members. SAC ¶ 134.

During the meeting, Trump read a prepared script to the Board that included the following:

> OAG received allegations of suspected fraud, waste and abuse from an FCPS employee. That allegations made were related to performance of a contractor and performance of several FCPS Leadership Team around the contract. . . . OAG independently made some discoveries that concerned us about violations of laws or FCPS policies. OAG performed some due diligence on the contractor and found a history of allegations, risks, violations and improprieties in other school districts in the US. . . . Virginia DGS has prohibited use of this contractor on certain energy contracts. These are key risk indicators, and OAG was concerned about FCPS's involvement with this

contractor.

SAC ¶ 131.

Based upon these allegations, Trump has more than adequately pled that the Board knew of Trump's "efforts to stop one or more violations of this article" as she "report[ed] suspected misconduct to internal supervisors." *Halasa, supra*, 690 F.3d at 847-48. See also, *e.g.*, *Manfield, supra*, 851 F. Supp. 2d at 201("the act of internal reporting itself suffices as both the effort to stop the FCA violation and the notice to the employer that the employee is engaging in protected activity.").

The SAC Adequately Pleads That The Board Terminated Trump Because of Her VFATA "Protected Activity"

The third element of a VFATA retaliation claim is that the "employer took adverse action against him as a result" of the protected activity. *Grant, supra*, 912 F.3d at 200. The "as a result" language "requires proof of 'but for' causation." *United States ex rel. Cody* v. *ManTech Int'l, Corp.*, 746 F. App'x 166, 177 (4th Cir. 2018). To establish a prima facie case, the "but for" requirement may be satisfied by the temporal proximity between an employer's knowledge of protected activity and an adverse employment action as long as the temporal proximity is "'very close . . . .'" *Clark Cnty. Sch. Dist.* v. *Breeden*, 532 U.S. 268, 273 (2001). For example, *Brockdorff* v. *Wells Mgmt. Grp., LLC*, No. 3:15CV137-HEH, 2015 WL 3746241 (E.D. Va. June 15, 2015), held that "the timing of [the plaintiff's] termination -- three days after the incident -- is sufficient at this stage to demonstrate that Brockdorff was discharged as a result of her conduct." at *5.

The SAC alleges that Trump met in closed session with the full Board on August 15, 2016 for nearly four hours. SAC ¶ 129. Two days later, Trump was placed on administrative leave without explanation and barred from coming onto FCPS facilities. SAC ¶¶ 23, 139.

On August 24, 2016, Trump submitted a formal complaint to the Board through HR and Division Counsel in which she alleged that she had been retaliated against, and subjected to adverse employment action, because of her investigation. SAC ¶ 24.

The outside law firm presented its findings to the Board on September 20, 2016. *Id.*

On November 3, 2016, the Board met in closed session and authored a memo to be placed in Trump's personnel file criticizing her decision on August 9, 2016 to report her investigation to the state agencies; the Board also voted to terminate her employment. SAC ¶¶ 26-27. On November 15, 2016, Trump received a letter from FCPS stating that she was "terminated, effective November 11, 2016." SAC ¶ 28.

Thus, Trump has established a prima facie case that she was retaliated against because of her protected activity given that, within two days of meeting with the Board, she was placed on administrative leave without explanation and barred from coming onto FCPS facilities; that retaliation was followed up with further retaliation -- her employment was terminated -- 86 days later. The fact that the termination came 86 days later is of little moment for purposes of

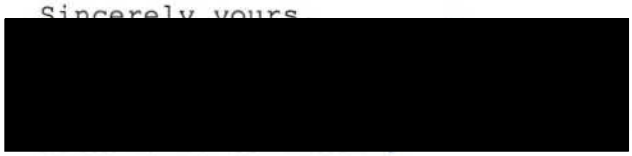
establishing a prima facie case that she was retaliated against because of her protected activity since the termination was merely a follow-up to being placed on leave two days after meeting with the Board.

CONCLUSION

Trump's SAC sufficiently alleges facts sufficient to support a "reasonable inference" that: (1) she engaged in protected activity; (2) the Board knew about the protected activity; and (3) the Board took adverse action against her as a result. Accordingly, Defendant's demurrer is OVERRULED.

An appropriate order will enter.

Sincerely yours,



Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GOLI TRUMP	)	
	)	
Plaintiff	)	
	)	
v.	)	CL 2020-7078
	)	
FAIRFAX COUNTY SCHOOL BOARD	)	
	)	
Defendant	)	

ORDER

THIS MATTER came before the court on Defendant's demurrer to Plaintiff's Second Amended Complaint.

THE COURT, for the reasons set forth in the court's letter opinion of today's date, hereby OVERRULES Defendant's demurrer, and hereby

ORDERS Defendant to file an answer within 21 days of the date of this order.

ENTERED this 18th day of August, 2022.

[redacted]
Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

Ryan M. Bates
Counsel for Defendant

Jon L. Praed
Counsel for Plaintiff