



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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CITY OF FAIRFAX

May 22, 2024

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Re: Matthew Harris vs. International Gourmet Foods
Case No. CL-2024-2326

Dear Counsel:

Pending before the Court is Defendant's Demurrer to the Plaintiff's requested damages for past and future impairment of power to earn money, emotional distress, and punitive damages resulting from the Defendant's violation of the Virginia Code § 40.1-27.3, which protects employees from certain retaliatory actions by an employer. After reviewing the pleadings and hearing the parties' oral arguments, the Court took the matter under advisement. Upon careful consideration of the applicable law, the demurrer is sustained in part and overruled in part.

OPINION LETTER

Background

Plaintiff, Matthew Harris, worked for the Defendant International Gourmet Foods (“IGF”) for three months as Director of Operations. Harris alleges that IGF instructed him to fire four employees, three of whom are black, on the grounds of attendance issues, but that there were similarly situated non-black employees with similar or worse attendance records whom IGF did not fire. Harris believes that IGF instructed him to terminate these employees because of their race. Subsequently, Harris hired a black man for an operations manager position. Harris alleges that within the first month of this employee’s tenure, IGF approached Harris stating they were concerned about this employee, because the employee was not following his training schedule. Harris alleges that IGF did not give this employee a training schedule. Harris believes that IGF evaluated the operation manager’s continued employment based on his race. Harris next alleges that IGF voiced concerns regarding the timeliness of the night staff, most of whom were black, but that the timecards did not reflect any tardiness. Harris believes IGF evaluated the night shift employees continued employment and disciplinary measures based on race. Following these three incidents, Harris approached IGF supervisors and reported that there was clear racial discrimination occurring. Harris further alleges that he reported workplace safety concerns, including forgery of refrigerator temperature checks necessary to prevent foodborne illness. Harris was subsequently terminated.

Harris alleges two violations of Code § 40.1-27.3, claiming he was terminated in retaliation for reporting race-based discrimination and also for reporting food safety violations. Harris seeks \$200,000 in compensatory damages for lost wages, back pay, past and future impairment of power to earn money, and emotional distress; \$350,000 in punitive damages; and a permanent injunction against future acts of discrimination against Harris. IGF demurred to: (1) Harris’s request for punitive damages; (2) “past and future impairment to earn money” damages; and (3) damages for emotional distress.

Analysis

Va. Code § 40.1-27.3(C) limits recovery to:

- (i) an injunction to restrain continued violation of this section, (ii) the reinstatement of the employee to the same position held before the retaliatory action or to an equivalent position, and (iii) compensation for lost wages, benefits, and other remuneration, together with interest thereon, as well as reasonable attorney fees and costs.

During oral argument, Harris withdrew his request for punitive damages. Remaining before the Court is whether damages for past and future impairment to earn money, and damages for emotional distress are recoverable under § 40.1-27.3(C)(iii).

Past and Future Impairment to Earn Money

IGF argues that past and future impairment to earn money is not recoverable under Code § 40.1-27.3 because it does not fall within the intended meaning of “other remuneration.” IGF further argues that “other remuneration” should not be construed to include all forms of compensatory damages and should be limited to a meaning similar or analogous to payment, compensation, and reimbursement for services and labor. Harris asks the Court to adopt a broad definition of the term “remuneration,” one that includes past and future impairment to earn money. Harris argues that there are several available definitions for the word “remuneration,” and that the Court should construe this term to mean “to pay an equivalent for” or “to pay an equivalent to for [sic] a service, loss, or expense.” Plt. Opp. at 3. (citing *Markley v. Liberty Univ*, 1 Va. Cir. 356, 363 (2023) (quoting *Merriam-Webster's Collegiate Dictionary* 1053 (11th ed. 2009))). Harris further argues that “taking the broader definition of the word “remuneration” to include loss of future earning potential would be consistent with the legislative intent of protecting employees who report illegal acts and discouraging employers from retaliating against them.

Code § 40.1-27.3 does not define the term “remuneration,” and neither the Virginia Court of Appeals nor the Virginia Supreme Court have addressed this issue. In construing this term, the Court applies Virginia’s familiar rules of statutory construction. “When the legislature leaves a term undefined, courts must give the term its ordinary meaning, taking into account the context in which it is used,” *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, 287 Va. 330, 341 (2014) (quoting *Dep’t of Taxation v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658 (1980)), unless “the terms are ambiguous or applying the plain language would lead to an absurd result.” *City of Va. Beach v. Va. Marine Res. Comm’n*, 70 Va. App. 68, 74 (2019) (quoting *Miller & Rhoads Bldg., LLC v. City of Richmond*, 292 Va. 537, 541 (2016)). Ambiguity exists when the language “is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness.” *Brown v. Lukhard*, 229 Va. 316, 321 (1985) (quoting *Ayres v. Harleysville Mut. Casualty Co.*, 172 Va. 383, 393 (1939)). Ambiguity also exists “if it admits of being understood in more than one way or refers to two or more things simultaneously.” *Id.* (citing *Lincoln National Life Ins. Co. v. Commonwealth Corrugated Container Corp.*, 229 Va. 132, 136-37 (1985)).

The word “remuneration” as used in Code § 40.1-27.3 is not ambiguous because, in the employment context, it has one generally understood and specific meaning, i.e., payment or compensation for work or services. See *Remuneration*, Black's Law Dictionary (10th ed. 2014) (defining remuneration as “payment, compensation, or reimbursement for services or labor”); *Remuneration*, Cambridge Academic Content Dictionary (1st ed. 2009) (defining remuneration as “payment for work or services).

The word “remuneration” contemplates *exchanging* one thing of value for the performance of work or services. Past and future impairment to earn money (i.e., diminished earning capacity) is not calculated by the salary or wages exchanged for the performance of the services or labor in the course of employment. Instead, such is a calculation of damages that compensates an employee for an injury sustained that affects the ability to earn the income they were physically and mentally able to earn before the injury. See, e.g., *Exxon Corp. v. Fulgham*, 224 Va. 235, 242 (1982). Had the legislature intended to provide compensation for this type of damage, it easily could have done so.

Harris argues that including past and future impairment to earn money in the damages recoverable under the statute would advance the purpose of the statute. Plf. Opp. at 5. However, this Court cannot insert words into the statute supplementing the language chosen by the General Assembly to describe the types of damages recoverable. See *Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 541-42 (2016) (the Court “must determine the legislative intent by what the statute says and not by what we think it should have said.” (quoting *Carter v. Nelms*, 204 Va. 338, 346 (1963)); *Wakole v. Barber*, 283 Va. 488, 495 (2012). And, in this case, the legislature did not write that “damages” are recoverable, but instead wrote that an employee can recover “compensation for lost wages, benefits, and other remuneration, together with interest thereon, as well as reasonable attorney fees and costs.” The General Assembly did not provide for the recovery of past and future impairment to earnings in enacting Code § 40.1-27.3.

For these reasons, the Court finds that past and future impairment to earn money does not fall within the plain definition, nor the legislature’s intended meaning of, the phrase “other remuneration,” and is therefore not recoverable under Code § 40.1-27.3 as a matter of law. Accordingly, the demurrer to these damages is sustained without leave to amend.

Emotional Distress

Damages for emotional distress are, with limited exception, “not recoverable unless they result directly from tortiously caused physical injury.” *Naccash v. Burger*, 223 Va. 406, 415 (1982). During oral argument, Harris represented to the Court that the claimed “emotional distress” damages are limited to the costs of mental and psychological treatment that Harris paid out-of-pocket because he lost his health insurance when he was terminated. Harris contends that these damages are recoverable because the statute provides for recovery of damages in the form of “lost...benefits.” IGF conceded that out-of-pocket medical expenses incurred by Harris as a result of losing health insurance coverage would be considered a loss of benefits. Therefore, the Court overrules the demurrer with the understanding that Harris’s “emotional distress” damages are limited to recovery of his out-of-pocket costs for mental and psychological treatment incurred as a result of his lost employer-provided health benefits.

Conclusion

IGF’s demurrer is sustained in part and overruled in part. The demurrer to past and future impairment to earn money damages is sustained without leave to amend, and the demurrer to “emotional distress” damages is overruled, as the damages sought are limited to out-of-pocket costs for mental and psychological treatment incurred as a result of lost employer-related health benefits. Moreover, in accordance with Harris’s concessions during oral argument, the request for punitive damages is withdrawn. An order to this effect is enclosed.

Sincerely,


Michael F. Devine
Circuit Court Judge

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MATTHEW HARRIS)
)
)
 Plaintiff,)
 v.) CL-2024-2326
)
)
 INTERNATIONAL GOURMET FOODS,)
)
)
 Defendant.)

ORDER

THIS CAUSE came before the Court on Defendant’s demurrer to elements of damages claimed by the Plaintiff. For the reasons stated in the Court’s Letter Opinion issued this day, it is hereby

ORDERED that the demurrer is sustained in part and overruled in part, as follows: the demurrer to past and future impairment to earn money damages is sustained without leave to amend, and the demurrer to emotional distress damages is overruled based upon Plaintiff’s representation that the emotional distress damages sought are limited to the out-of-pocket costs for mental and psychological treatment incurred as a result of lost employer-related health benefits. It is further

ORDERED that Plaintiff’s claim for punitive damages is withdrawn.

ENTERED this 22nd day of May, 2024.



Judge Michael F. Devine

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.