



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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CITY OF FAIRFAX

October 4, 2021

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Re: Frank v. True Color Painters, LLC, CL 2021-7835

Dear Mr. Kitts and Mr. McClanahan:

This matter is before the court on the demurrer of Defendant to Plaintiff's First Amended Complaint ("FAC") on the grounds that: a Bowman action does not lie; punitive damages are not properly alleged; and attorney fees are not recoverable. For the reasons that follow, the demurrer as to the Bowman action and punitive damages is OVERRULED and SUSTAINED as to attorney fees.

FIRST AMENDED COMPLAINT^1

In pertinent part, the FAC alleges that: "TCP withheld wages properly owing and due to Mr. Frank" (FAC ¶ 7); "Mr. Frank's first paycheck was withheld for several days" (FAC ¶ 9); Mr. Frank sent a text message to TCP stating that it needed "'to make sure people are getting paid on time'" and that "'[f]rom what I've heard a lot of

1 As the case is before the court on a demurrer, the court must accept as true "all properly pleaded material facts." Ward's Equipment v. New Holland North America, 254 Va. 379, 382 (1997).

people are getting upset about it'" (FAC ¶ 16); "TCP responded to this text message by terminating Mr. Frank's employment" (FAC ¶ 17); "Upon his termination, TCP did not provide Mr. Frank with payment of any accrued vacation or other ancillary economic benefits such as bonuses and incentive compensation" (FAC ¶ 18); and "Mr. Frank's termination was a direct result of his complaints regarding TCP's failure to provide compensation as required by law." FAC ¶ 19.

ANALYSIS

Bowman Claim

The FAC purports to be an action pursuant to *Bowman v. State Bank of Keysville*, 229 Va. 534 (1985), which established the principle that, where a right is "conferred by statute" and "is in furtherance of established public policy, the employer may not lawfully use the threat of discharge of an at-will employee as a device to control" the employee's right under the statute. 229 Va. at 540.² Defendant contends that the FAC does not state a cause of action against it because Plaintiff was "executive personnel" within the meaning of Code § 40.1-29(A)(1)³ and was thus not within the class of persons protected by Code § 40.1-29.

² *Bowman* involved retaliatory discharges based on violations of public policy by the defendants:

Code § 13.1-32 conferred on these plaintiffs as stockholders the right to one vote, for each outstanding share of stock held, on each corporate matter submitted to a vote at a meeting of stockholders. This statutory provision contemplates that the right to vote shall be exercised free of duress and intimidation imposed on individual stockholders by corporate management. In order for the goal of the statute to be realized and the public policy fulfilled, the shareholder must be able to exercise this right without fear of reprisal from corporate management which happens also to be the employer. Because the right conferred by statute is in furtherance of established public policy, the employer may not lawfully use the threat of discharge of an at-will employee as a device to control the otherwise unfettered discretion of a shareholder to vote freely his or her stock in the corporation.

229 Va. at 540.

³ "All employers operating a business or engaging an individual to perform domestic service shall establish regular pay periods and rates of pay for employees *except executive personnel*." (emphasis added).

While Plaintiff argues that he was not an executive and is thus within the class of persons protected by Code § 40.1-29, the court need not resolve that issue because the public policy upon which Plaintiff relies is set out in Code § 40.1-29(C):

No employer shall withhold any part of the wages or salaries of any employee except for payroll, wage or withholding taxes or in accordance with law, without the written and signed authorization of the employee.⁴

As the FAC alleges that Defendant withheld Plaintiff's "wages properly owing and due to" Plaintiff (FAC ¶ 7), Plaintiff has stated a *Bowman* claim; accordingly, Defendant's demurrer as to failure to state a *Bowman* claim is OVERRULED.

Punitive Damages

Defendant argues that the FAC does not allege any "facts that would support his demand for punitive damages" in that the FAC "does not allege the kinds of willful, malicious, oppressive, wanton, or reckless behavior that would support a punitive damages award." *Demurrer* at 4.

With regard to the alleged wrongful behavior in the case at bar -- Defendant's wrongful termination of Plaintiff -- the FAC alleges that "the basis of [Plaintiff]'s termination was in retaliation for reporting" violations "of Code § 40.1-29, et seq." to Defendant. FAC ¶¶ 27-28, 30. In the court's view, the allegation of "termination in retaliation for reporting" violations "of Code § 40.1-29, et seq." sufficiently alleges that Defendant's behavior was willful, malicious, oppressive, wanton, or reckless. As a result, Defendant's demurrer as to punitive damages is OVERRULED.

Attorney Fees

Plaintiff relies upon *Kemp v. Miller*, 166 Va. 661 (1936), for his claim for recovery of attorney fees.

In *Kemp*, there had been previous litigation for specific performance of a contract so that in the then-pending litigation, Kemp:

filed special pleas of *res adjudicata*, estoppel, and set-off, claiming under the last named plea the principal sum of \$3,457.48 which he had paid out for *counsel fees* and other expenses in the specific performance suit, and claimed he was

⁴ The FAC asserted a *Bowman* claim "pursuant to VA. CODE § 40.1-29, et seq." (FAC ¶ 22), i.e., the claim was not limited to Code § 40.1-29(A).

entitled to recover from Miller as *damages* for Miller's failure to clear the title to the real estate before instituting the suit for specific performance.

Kemp v. Miller, 166 Va. 661, 673 (1936) (emphasis added).

Kemp held that the "rule in Virginia as to the recovery of counsel fees as *damages* is well established":

except where the injury is wanton or malicious and exemplary damages are recoverable, the allowance of fees paid counsel for defending the original proceedings is not proper.

166 Va. at 680 (emphasis added).

In the case at bar, as Plaintiff is not seeking attorney fees as damages for previous litigation, but as attorney fees for the instant case, *Kemp* does not apply.⁵ Accordingly, Defendant's demurrer as to attorney fees is SUSTAINED.

An appropriate order will enter.

Sincerely yours,


Richard E. Gardiner
Judge

⁵ This court concurs with *Poe v. Boyd*, 19 Cir. L109627, 1992 WL 884737 (1992) ("The Court is unconvinced that *Kemp* was intended to extend to requests for attorney's fees in an original suit.").

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TAYLOR FRANK)
)
Plaintiff)
)
v.) CL 2021-7835
)
TRUE COLOR PAINTERS, LLC)
)
Defendant)

ORDER

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

THE COURT, for the reasons set forth in the court's letter opinion of today's date, hereby OVERRULES the demurrer as to the *Bowman* claim and punitive damages, and SUSTAINS the demurrer as to attorney fees.

ENTERED this 4th day of October, 2021.



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:

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