No. 23-CV-781

DISTRICT OF COLUMBIA
COURT OF APPEALS

Alexander Zajac,
***Appellant*,**

v.

Finnegan, Henderson, Farabow, Garrett & Dunner LLP
***Appellee*,**

On Appeal from the Superior Court of the District of Columbia
Civil Division Case 2022 CA 002012 B (Honorable Robert R. Rigsby, Judge)

APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

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March 13, 2024

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APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

Appellee, Finnegan, Henderson, Farabow, Garrett & Dunner LLP ("Finnegan") by and through undersigned counsel, and pursuant to D.C. Ct. App. R. 27(c), hereby moves for summary affirmance of the D.C. Superior Court's July 25, 2023 order granting Finnegan's Motion to Dismiss, and its September 19, 2023, Order denying Appellant, Alexander Zajac's, Motion for Leave to Amend his Complaint, and closing the matter. Alternatively, this Court may accept this Motion as Finnegan's responsive brief if the Court denies the Motion, or defers consideration on the merits, pursuant to D.C. Ct. App. R. 27(c). In support, Finnegan states as follows.

SUMMARY OF THE RECORD

Mr. Zajac's appeal is a third, meritless attempt to raise his claims that were already properly denied and dismissed. In March 2023, Mr. Zajac filed a Complaint in D.C. Superior Court, alleging two counts of "wage theft" under D.C. Wage Payment and Collection Law ("DCWPCL"), codified at D.C. Code § 32-1301 *et. seq.*, against his former employer, Finnegan. He alleged that Finnegan violated the DCWPCL by (a) withholding a productivity bonus he claims he was owed, and (b) refusing to reimburse him for post-tax law school tuition expenses. Finnegan filed a Motion to Dismiss, pursuant to D.C. Super. Ct. R. Civ. P. 12(b)(6) on April 28, 2023, arguing that Mr. Zajac failed to state a claim upon which relief can be granted.

Pursuant to D.C. Ct. App. R. 27(c), Finnegan's Memorandum of Law in Support of its Motion to Dismiss, and Reply brief, filed with the D.C. Superior Court, are attached in Appendix at AP40-AP63.[1] As set forth in AP40-AP63, Mr. Zajac's claims fail and should be summarily affirmed in this Court for several reasons. First, the claimed productivity bonus about which he

[1] Appellant did not serve on Finnegan a designation of the parts of the record he intended to include in his appendix pursuant to D.C. Ct. App. R. 30(1). Accordingly, Finnegan incorporates Appellant's Appendix, and further supplements with its own Appendix, AP40-AP74, filed herewith.

complains was fully discretionary, and is therefore not a "wage" as defined by D.C. Code § 32-1301(3). Second, Mr. Zajac's claimed tuition reimbursement payment is also not a wage as defined by the referenced statute. Third, in any event, Mr. Zajac's claim for tuition reimbursement is barred by the statute of limitations. *Id.*

The D.C. Superior Court granted Finnegan's Motion to Dismiss, adopting Finnegan's arguments that Mr. Zajac's bonus and tuition expenses are not considered wages under D.C. Code § 32-1301(3). *See* July 25, 2023 Order of Robert R. Rigsby ("July 25 Order") (App'x at AP20-AP24). The D.C. Superior Court granted Mr. Zajac the opportunity to file a motion for leave to amend his complaint, which he filed on August 1, 2023, along with a proposed First Amended Complaint. Finnegan opposed the motion for leave to amend, arguing that leave to amend would be futile because Mr. Zajac's First Amended Complaint still failed to state a claim for the same reasons the D.C. Superior Court set forth in its original Order granting Finnegan's Motion to Dismiss. *See* August 15, 2023 Def's Opp. To Plaintiff's Motion For Leave To Amend His Complaint ("Opposition to Motion for Leave to Amend") (App'x at AP64-AP74). Further, Finnegan argued that the new "facts" Mr. Zajac alleged in his First Amended Complaint were contradictory to his original allegations. *Id.* The D.C. Superior Court agreed with Finnegan and denied Mr. Zajac's request for leave to amend, finding that the alleged new facts in Mr. Zajac's First Amended Complaint contradicted those in his original Complaint, and that the deficiencies with his original Complaint remained. *See* September 19, 2023 Order of Judge Rigsby ("Sept. 19 Order") (App'x at AP38-AP39). Mr. Zajac initiated this appeal following the D.C. Superior Court's Sept. 19 Order dismissing his Motion for Leave to Amend.

LEGAL STANDARD

I. Motion for Summary Affirmance

Summary affirmance is appropriate when "the basic facts are both uncomplicated and undisputed" and "the trial court's ruling rests on a narrow and clear-cut issue of law." *See Oliver T. Carr Mgmt., Inc. v. Nat'l Delicatessen, Inc.*, 397 A.2d 914, 915 (D.C. 1979) (per curiam); *Carl v. Tirado*, 945 A.2d 1208, 1209 (D.C. 2008) (per curiam); *see also Watson v. United States*, 73 A.3d 130, 131 (D.C. 2013) (noting that "the granting of summary disposition is not an extraordinary remedy," but instead "an essential part of this [C]ourt's system of case management that allows the [C]ourt to manage its very large case load," and that "[t]he standard for summary disposition is well-established"); *Bartel v. D.C. Bd. of Elections & Ethics*, 808 A.2d 1240, 1241 (D.C. 2002) (per curiam) (finding summary disposition appropriate since "the facts are simple and undisputed, and because the law is narrow and clear-cut").

II. Appellate Review of the D.C. Superior Court's Denial of Motion for Leave to Amend

The D.C. Court of Appeals reviews a trial court's denial of a motion to amend for abuse of discretion. *Colvin v. Howard Univ.*, 257 A.3d 474, 484 (D.C. 2021). Absent a clear showing of an abuse of discretion, the trial court's exercise of its discretion either way will not be disturbed on appeal. *Johnson v. Fairfax Vill. Condo. IV Unit Owners Ass'n*, 641 A.2d 495, 501 (D.C. 1994). "In considering a motion to amend, several factors guide the trial court's exercise of its discretion, as well as this court's determination of whether the trial court has abused its discretion in ruling thereon." *Id.* "Among these are: (1) the number of requests to amend; (2) the length of time that the trial has been pending; (3) the presence of bad faith or dilatory reasons for the request; (4) the merit of the proffered amended pleading; and (5) any prejudice to the non-moving party." *Id.*

III. Appellate Review of the D.C. Superior Court's Dismissal of the Original Complaint

Appellate review of a Rule 12(b)(6) motion "may not rely on any facts that do not appear on the face of the complaint itself." *Rayner v. Yale Steam Laundry Condo. Ass'n*, 289 A.3d 387, 396 (D.C. 2023). To survive a motion to dismiss, a claim must have facial plausibility, that is, "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Potomac Dev. Corp. v. Dist. of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Even under the D.C. Superior Court's liberal rules of pleading, a party must adequately allege the elements of a cause of action to avoid dismissal. *Leonard v. Dist. of Columbia*, 794 A.2d 618, 630 (D.C. 2002).

ARGUMENT

I. Summary Affirmance Should be Entered Because the D.C. Superior Court's Decision Rests on a Narrow and Clear-Cut Issue of Law.

The D.C. Superior Court's order granting Finnegan's Motion to Dismiss rests on a very narrow and clear-cut issue of law: what qualifies as "wages" under D.C. Code § 32-1301(3). As the D.C. Superior Court correctly noted, D.C. Code § 32-1301(3) defines the term "wages" as:

> (A) Bonus; (B) Commission; (C) Fringe benefits paid in cash; (D) Overtime premium; and (E) Other remuneration promised or owed: (i) Pursuant to a contract for employment, whether written or oral; (ii) Pursuant to a contract between an employer and another person or entity; or (iii) Pursuant to District or federal law.

See App'x at AP22.

There is a narrow body of D.C. case law further analyzing the statutory definition of wages under D.C. Code § 32-1301(3). This case law makes unequivocally clear that discretionary payments and reimbursements are not considered wages. *See Ronaldson v. Nat'l Ass'n of Home Builders*, 502 F. Supp. 3d 290, 297 (D.D.C. 2020), *amended on reconsideration by* 2021 WL 7210781 (D.D.C. June 3, 2021) (holding that discretionary payments are not considered wages under DCWPCL because such payments are not owed but given only by leave of the employer);

Brady v. Liquidity Servs., Inc., No. 18-CV-1040 (RCL), 2018 WL 6267766, at *4 (D.D.C. Nov. 30, 2018) (finding that the former employee's "target bonus" which was "paid annually *based on objectives set between* [the employee] *and* [his] manager" was discretionary) (citation omitted); *Dorsey v. Jacobson Holman, PLLC*, 756 F. Supp. 2d 30, 36-37 (D.D.C. 2010), *aff'd*, 476 F. App'x 861 (D.C. Cir. 2012) (finding that yearly bonus was discretionary and therefore not considered owed wages); *Rothberg v. Xerox Corp.*, No. 12-617 (BAH), 2016 WL 10953882, at *19 (D.D.C. Feb. 3, 2016), *aff'd*, 709 F. App'x 1 (D.C. Cir. 2017) (noting that, "unlike the [Maryland Wage Payment and Collection Law], which broadly requires employers to pay terminated employees 'all wages due for work that the employee performed before the termination,' the DCWPCL does not refer to 'work ... performed' but rather requires employers to pay 'wages earned'") (citations omitted). *Sivaraman v. Guizzetti & Assocs., Ltd*., 228 A.3d 1066, 1075 (D.C. 2020) (holding that DCWPCL "wages" do not include expense reimbursements).

Mr. Zajac cannot overcome this narrow and clear-cut issue of law regarding the definition of "wages" under D.C. Code § 32-1301(3). In both versions of Mr. Zajac's complaints, he made reference to documents which clearly stated that the productivity bonus at issue was discretionary, which the D.C. Superior Court properly highlighted in its Orders. *See* App'x at AP22 (holding that "because the aforementioned documents clearly state that said bonuses are discretionary, the Court is not persuaded that such a claim falls under the DCWPCL"). The very same document that Mr. Zajac attached to his Complaint also stated that Mr. Zajac would be reimbursed for his law school tuition expenses, only if he met certain conditions. App'x at AP54. Thus, like the discretionary bonus, the tuition reimbursement was a conditional rather than an automatic, up-front payment, and therefore is not a "wage" under D.C. Code § 32-1301(3). App'x at AP23.

A. Mr. Zajac Failed to State a Claim Because The Discretionary Bonus is not a "Wage" under the DCWPCL

In his brief, Mr. Zajac makes another misguided attempt to compare the discretionary productivity bonus to the gainsharing bonus at issue in *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114 (D.D.C. 2018), *aff'd on other grounds*, 952 F.3d 293 (D.C. Cir. 2020). In *Molock*, plaintiffs alleged that defendants owed them payment of the gainsharing bonus upon creation of a surplus in their department, which occurred on a monthly basis. *Id.*, 129. Specifically, Whole Foods awarded gainsharing bonuses to employees whose departments performed under budget by automatically distributing the surplus savings among the employees in that department. *Id.* The plaintiffs there alleged that defendants engaged in an unlawful labor-shifting scheme, thereby manipulating and undermining the gainsharing program. *Id.* This surplus bonus is distinguishable from the discretionary productivity bonus at issue here, and is analogous to the discretionary productivity bonus at issue in *Dorsey v. Jacobson Holman, PLLC*, which was "given only by leave of the employer." 756 F.Supp. 2d at 36-37. Indeed, the court in *Molock* explicitly distinguished the *Dorsey* case. *Molock,* 952 F.3d at 134. As the D.C. Superior Court properly held, the facts Mr. Zajac alleged in his original and proposed Amended Complaint demonstrate that the productivity bonus at issue is discretionary, and therefore not a "wage."

B. Mr. Zajac Failed to State a Claim Because The Tuition Reimbursement is not a "Wage" under the DCWPCL

Mr. Zajac also makes the same attempt as he did before the D.C. Superior Court to distinguish his claim for tuition reimbursement from the reimbursement at issue in *Sivaraman v. Guizzetti & Assocs., Ltd.*, 228 A.3d 1066 (D.C. 2020). However, for the same reasons as explained in Finnegan's Motion to Dismiss and Opposition to Mr. Zajac's Motion for Leave to Amend, the reimbursements are analogous for purposes of determining whether the tuition reimbursement is a "wage" under DCWPCL. The Federal Tax Code Mr. Zajac cites is entirely unrelated to the

definition of wages under DCWPCL, and the provision of the Code of Federal Regulations that Mr. Zajac cites in his brief (2 C.F.R. § 200.466) is similarly unrelated to the DCWPCL definition of "wages."[2] As the trial court correctly held, Mr. Zajac 's tuition reimbursement was a conditional, and not an up-front payment, and thus is not a wage under the DCWPCL.

The D.C. Superior Court has already reviewed and assessed Mr. Zajac's arguments to the contrary on two prior occasions – through his Opposition to Finnegan's Motion to Dismiss and subsequent Motion for Leave to Amend his Complaint. He should not be granted a third bite at the apple to rehash his futile and baseless legal arguments before this Court.

II. The D.C. Superior Court Did Not Abuse its Discretion in Denying Mr. Zajac Leave to Amend His Complaint

Should this Court deny Finnegan's Motion for Summary Affirmance, or defer consideration, this Court should affirm the decision of the D.C. Superior Court. The D.C. Superior Court did not abuse its discretion in dismissing Mr. Zajac's original complaint, and him leave to amend. When Judge Rigsby first granted Finnegan's Motion to Dismiss, dismissing Mr. Zajac's Complaint, he provided Mr. Zajac with the opportunity to file a motion to amend, along with a proposed amended complaint. Although D.C. Super. Ct. R. Civ. P. 15(a)(3) instructs that leave to amend "should [be] freely give[n]," it is not required if the amendment would be futile. *Miller-McGee v. Wash. Hosp. Ctr.*, 920 A.2d 430, 436 (D.C. 2007). Only after providing Mr. Zajac with the opportunity to file a proposed Amended Complaint did the Superior Court determine that amendment would be futile. First, as Judge Rigsby found, the alleged facts contradicted those in the original Complaint. *See Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 171 (D.D.C. 2013), *aff'd*, 796 F.3d 1 (D.C. Cir. 2015) ("[A] plaintiff, however, may not plead facts in their amended

[2] Mr. Zajac cites 2 C.F.R. § 200.466, which governs providing tuition remission to students as part of Federal awards provided specifically by Institutions of Higher Educations. This plainly is unrelated from the tuition reimbursement that Finnegan provides.

complaint that contradict those in their original complaint."). While Mr. Zajac now contends that he "intends to use discovery to prove oral promises" with respect to the productivity bonus as alleged in his Amended Complaint (Brief of Appellant, pgs. 5-6), the D.C. Superior Court already properly held that the allegations of oral promises Mr. Zajac included in his Amended Complaint were directly contradictory to Mr. Zajac's allegations in his original complaint, warranting a denial of Mr. Zajac's request to amend in and of itself. *See* AP38-AP39 ("For example, Plaintiff originally alleged that his Student Associate offer letter distinguished discretionary merit bonuses from productivity bonuses. Compl. ¶ 15. In the Amended Complaint Plaintiff recalculated this allegation to state that as a Student Associate, he was "orally promised a mandatory productivity bonus," and that the offer letter was not binding. Proposed First Am. Compl. ¶¶ 14-15, 17").

Second, the underlying issues with the Complaint—that the bonus and tuition reimbursement are not considered "wages" to state a DCWPCL claim—were still present. For these reasons, Judge Rigsby correctly found that granting leave to amend would prove to be futile. This finding was not an abuse of discretion.

III. This Court Should Not Consider Mr. Zajac's New Breach of Contract Claims.

Mr. Zajac now contends that he should be permitted to proceed on a breach of contract theory as to the productivity bonus and tuition reimbursement. This argument fails on appeal, as Mr. Zajac did not include a breach of contract claim in his original or in his proposed Amended Complaint. "Generally speaking, 'matters not properly presented to a trial court will not be resolved on appeal.' 'A court deviates from this principle only in exceptional situations and when necessary to prevent a clear miscarriage of justice apparent from the record.'" *Linen v. Lanford*, 945 A.2d 1173, 1180 n.4 (D.C. 2008) (citation omitted). No such exceptional situation exists here; as explained above, Mr. Zajac had sufficient opportunity to raise his claims in his original complaint, in his opposition to Finnegan's Motion to Dismiss, and in a proposed Amended

Complaint. He failed to do so, and because this "breach of contract" claim was not raised before the D.C. Superior Court, it should not be resolved here.

Even if Mr. Zajac had pled a breach of contract claim in his proposed Amended Complaint, that proposed amendment would have been futile. Both of Mr. Zajac's offer letters make clear that he was an "at-will" employee, and that the offer letters do not constitute a contract. Specifically, both his Student Associate Offer Letter and Associate Offer Letter state: "Please be advised that this offer letter does not constitute a contract of employment, and employment at the firm is at-will." App'x at AP16-AP17; AP52-AP63. This plain language is dispositive of any breach of contract claim related to Plaintiff's tuition reimbursement or productivity bonus.

Mr. Zajac 's claims are also distinguishable from *Peck v. SELEX Sys. Integration, Inc.*, 270 F. Supp. 3d 107 (D.D.C. 2017), *aff'd*, 895 F.3d 813 (D.C. Cir. 2018). In *Peck*, the Court found that the employee was entitled to a closing commission he paid for sale of his home under the terms of a relocation agreement with his employer, pursuant to which the employer agreed to compensate the employee for costs associated with sale of his primary residence. 270 F. Supp. at 115-116. The relocation agreement stated that, as a condition to receiving relocation benefits, the employee had to remain employed by employer for at least two years; however, the repayment clause only required the employee to repay the employer if he voluntarily left employment prior to two years, which he did not—he was terminated. *Id.* The Court found he was entitled to the closing commission on that basis. *Id.* The productivity bonus and tuition reimbursement at issue here are distinguishable from the relocation costs at issue in *Peck*, and Mr. Zajac alleged no facts in his original or in his proposed Amended Complaint that any agreement with Finnegan entitled him to automatic, up front-costs tied to accepting employment.

CONCLUSION

For the reasons set forth in the D.C. Superior Court's July 25 and September 19 Orders, and in this Motion, it is clear that Mr. Zajac failed to state a claim upon which relief can be granted. Because this appeal involves simple facts and clear-cut and narrow issues of law, Finnegan respectfully requests that this Court summarily affirm the decision of the Superior Court pursuant to D.C. Ct. App. R. 27(c). Alternatively, the D.C. Superior Court did not abuse its discretion in denying Mr. Zajac's Motion for Leave to Amend his Complaint, finding that amendment was futile, and the D.C. Superior Court's holding should be affirmed on that basis.

Dated: March 13, 2024

Respectfully Submitted,

/s/ Trina Fairley Barlow

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2024, a copy of the foregoing Motion was filed electronically with the Clerk of Court for the District of Columbia Court of Appeals using the Appellate E-Filing System, and served via regular mail on the Appellant, Alexander Zajac, at the following address:

Alexander Zajac
225 Lastner Lane
Greenbelt, MD 20770

/s/ Trina Fairley Barlow
Trina Fairley Barlow

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18
U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Cori B. Schreider
Signature

23-CV-781
Case Number(s)

Cori Schreider
Name

3/13/24
Date

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