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No. 22-CV-25

In the District of Columbia Court of Appeals

Zuri Berry,

Appellant,

v.

American University, Current Publication, Sasha Fernandez, Sasha-Ann Simons, Letese' Clark, Alana Wise, Karen Everhart, and Julie Drizen,

Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division, Nos. 2020 CA 004366 B & 2021 CA 002726 B
(The Honorable Fern Flanagan Saddler & Honorable Maurice A. Ross)

Appellees' Opening Brief

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Rule 28(a)(2) Disclosure

The parties in the trial and appellate proceedings, and their respective counsel, are:

1. Defendant-Appellees American University, Current Publication, Sasha Fernandez, Sasha-Ann Simons, Letese' Clark, Alana Wise, Karen Everhart, and Julie Drizen are represented by Charles D. Tobin and Alia L. Smith of Ballard Spahr LLP;

2. Defendant-Appellee American University is also represented by Laurel Pyke Malson and Eli Berns-Zieve of Crowell & Moring LLP;

3. Plaintiff-Appellant Zuri Berry is represented by David A. Branch of the Law Offices of David A. Branch & Assocs., PLLC.

Rule 26.1 Disclosure

American University is a non-profit corporation with no parent corporation, and no publicly held company owns 10% or more of its stock.

"Current Publication" is not a legal entity. It is an editorially independent journalistic service of the American University School of Communication, and its interests herein are represented by American University.

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STATEMENT OF THE ISSUES

1. Did the lower courts correctly determine that *all* of the claims asserted by Plaintiff-Appellant Zuri Berry ("Berry") in the consolidated cases *Berry v. Current Publication et al.* ("*Berry I*") and *Berry v. American University* ("*Berry II*") were subject to D.C's Anti-SLAPP Act, D.C. Code §§ 16-5502, *et seq*., given that all the claims arose from public speech or expressive conduct about a matter of public concern, namely, the treatment of Black women at WAMU, a prominent donor-funded news organization?

2. Did the lower courts properly dismiss all of Berry's claims – defamation and false light (in *Berry I* and *Berry II*), tortious interference with business relationships (in *Berry I*), and violation of the D.C. Human Rights Act (in *Berry II*) – pursuant to the Anti-SLAPP Act on the grounds that Berry did not demonstrate a "likelihood of success on the merits" of any of his claims? Specifically, were the courts correct in determining that (a) the statements/expressions at issue in the defamation, false light, and tortious interference claims were non-actionable opinions, substantially true, or not published by the defendants, (b) the claims in *Berry II* were barred by the doctrine of *res judicata* because they arose out of the same set of operative facts as the claims asserted in *Berry I*, and (c) Berry failed to, and could not possibly, plead facts sufficient to state a claim for violation of the D.C. Human Rights Act?

3. Did the lower courts in both cases properly dismiss each of Berry's causes of action for failure to state a claim under D.C. Super. Ct. Rule 12(b)(6), given that all are also non-actionable as a matter of law?

4. Did the lower courts properly award the prevailing defendants their attorneys' fees pursuant to the Anti-SLAPP Act, given that prevailing Anti-SLAPP movants are presumptively entitled to recover their attorneys' fees and Berry did not identify any reason why the amount of the award was unwarranted?

The answer to all of these questions is "yes."

STATEMENT OF THE CASE

The appeal involves two highly related cases that were consolidated below: *Berry I* and *Berry II*. The Plaintiff-Appellant in both cases is Zuri Berry ("Berry"), a Black man and the former Senior Managing Editor of WAMU, the public radio station owned and operated by American University.

Proceedings in *Berry I*

In *Berry I*, Berry asserted claims of defamation, invasion of privacy-false light, and tortious interference with business relationships, against several Defendants: American University; *Current*,[1] an editorially independent, nonprofit

[1] In his *Berry I* complaint, Berry called the publication "Current Publication" and purported to make it a Defendant under that name. *Current*, however, is not a legal entity and therefore not a proper defendant. Its interests are represented by *Current*'s publisher, American University.

news service of the University that reports on public media nationwide; and numerous women who worked for WAMU and *Current*. JA 23-50. He based his claims on statements allegedly made by former WAMU colleagues, and published in an article in *Current*, opining that Berry was a "bully," "condescending," a "micromanager," and generally abusive toward women, and that Black women said that they departed WAMU because of him. *Id.*

Defendants-Appellees (collectively the "AU Defendants") filed a special motion to dismiss pursuant to the D.C. Anti-SLAPP Act, D.C. Code §§ 16-5502, *et seq*., which provides for the early dismissal of lawsuits targeted at First Amendment-protected expressions on a matter of public interest, where the plaintiff cannot show that he is "likely to succeed" on the merits. JA 51-80. In response, Berry first moved the Superior Court for leave to take discovery to oppose the motion, but the Honorable Fern Flanagan Saddler denied Berry's request, citing *Fridman v. Orbis Business Intelligence Ltd.*, 229 A.3d 494, 512 (D.C. 2020) (explaining that "discovery normally [is not] allowed" in connection with Anti-SLAPP motions). JA 1223-25. After the Anti-SLAPP motion itself was fully briefed, Judge Saddler granted it in full, ruling that: (1) the Anti-SLAPP Act applied because the statements at issue were made "in a public forum" and were related to "highly publicized" "public discourse concerning WAMU's alleged long history of racism and sexism," as well as to "issues surrounding 'toxic' work environments and the treatment of

women in the workplace" more generally, and (2) Berry could not "meet his burden to show that he is likely to succeed on the merits" on any of his claims because (a) the challenged statements were "non-actionable opinion" or, in the alternative, were "substantially true," and (b) he failed to show that several of the individual defendants made the challenged statements in the first place. JA 480-94. In addition, Judge Saddler also ruled that Berry's claims were subject to dismissal under D.C. Super. Ct. R. Civ. P. 12(b)(6) for failure to state a claim. JA 492.

Proceedings in *Berry II*

While AU's Anti-SLAPP motion in *Berry I* was still pending, Berry filed *Berry II*, naming AU as the sole defendant. JA 636-58. In *Berry II*, as in *Berry I*, Berry asserted claims of defamation and false light/invasion of privacy. The defamation and false light claims in *Berry II* challenged the same statements as in *Berry I*, *i.e.*, statements by women that they considered Berry a poor manager and abusive toward women, especially Black women. JA 655 ¶ 52. *Berry II* also asserted a claim for race and sex discrimination under the D.C. Human Rights Act ("DCHRA"), D.C. Code §§ 2–1401.01 *et seq*., likewise arising out of the same allegedly "defamatory" publications. JA 654 ¶ 47. In his complaint in *Berry II*, Berry sought the same general relief as he had in *Berry I*: retraction of the *Current* article, a permanent injunction "against further acts of defamation and invasion of privacy false light," and "all equitable monetary damages available under the law."

Compare JA 49 (*Berry I*), *with* JA 710 (*Berry II*); *see also* JA 657. Given these similarities, Judge Saddler, *sua sponte*, quickly consolidated the two cases, JA 771-72, and thereafter the consolidated matter was transferred to the Honorable Maurice A. Ross.

Again, AU brought a Special Motion to Dismiss all three claims in *Berry II* – violation of the DCHRA, defamation, and false light – under the Anti-SLAPP Act. Judge Ross granted the motion in full, holding:

(1) all the claims in *Berry II* were barred by the doctrine of *res judicata* because they all arose "from the same nucleus of facts" that were "alleged (and were adjudicated) in *Berry I*," JA 1073;

(2) the claims in *Berry II* were also barred under the Anti-SLAPP Act because (a) they arose from communications made about him in the context of "public discourse concerning WAMU's alleged long history of racism and sexism," and (b) Berry was unlikely to succeed on the merits, given that (i) the claims were *res judicata*, (ii) they all involved non-actionable opinions or substantially true statements, and (iii) the DCHRA claim was not, and could not be, properly pled, JA 1075; and

(3) Judge Ross also held, in the alternative, that Berry had failed to state a claim under Rule 12(b)(6) for largely the same reasons that he was unable to demonstrate "likelihood of success on the merits," JA 1076.

Fee Awards in *Berry I* and *Berry II*

After the rulings granting the Anti-SLAPP motions in *Berry I* and *Berry II*, Judge Ross granted the Defendants' petitions for attorneys' fees, to which prevailing defendants are "presumptively" entitled under the Anti-SLAPP Act. JA 613-14, 1195. In both cases, Judge Ross complimented defense counsel's work and found that the defense expenses "were reasonable," JA 1288, including because of the amount of briefing involved and because the attorneys billed at substantially discounted rates, far below market, JA 1284-88.

STATEMENT OF FACTS

Most of the "facts" Berry sets forth in his appellate brief have little to do with the narrow legal issues before this Court. In reviewing the trial courts' correct decisions dismissing these consolidated cases and awarding the Defendants their reasonable attorney's fees and costs, the Court should be aware of the following information reflected in the record under review:

Berry's Relationships With Women at WAMU

From January 2019 until January 22, 2021, Berry was the Senior Managing Editor of WAMU. JA 25-26 ¶ 5, 637 ¶ 5. He "supervised a staff of four to six women," most of whom were women of color. JA 25-26 ¶ 5, 638 ¶ 6. Defendants-Appellees Letese' Clark and Alana Wise, both Black women, reported directly to Berry. JA 25-26 ¶ 6.

Berry had poor relationships with each, characterizing them in hostile terms in the proceedings below. *See, e.g.*, JA 26-34 ¶¶ 7-8, 11-12, 19, 21-23; JA 281 ¶ 70; *see also* Berry App. Br. at 9 (describing Ms. Clark as "insubordinate," "unproductive," "unprofessional[]," "curt," and "disrespectful"); *id.* at 15 (describing Ms. Wise as having "serious performance problems"). Although Berry alleged that he reported concerns about their work performance to his own supervisors and others at WAMU, he conceded that no disciplinary action was taken against either woman. *See, e.g.*, JA 29 ¶ 14 (conceding that Berry's supervisor disagreed with him that "action be taken" against Ms. Clark); JA 35 ¶ 24 (no "disciplinary measures" taken against Ms. Wise).

These women provided uncontested testimony in the Superior Court that because of Berry's behavior toward them – which they described as abusive, overbearing and condescending – both left WAMU in early 2020. *See* JA 146-48 (Decl. of Letese' Clark) ¶¶ 16-17 ("I departed WAMU . . . after continued mistreatment by Zuri Berry"); JA 136 (Decl. of Alana Wise) ¶ 17 ("I quit . . . solely because of Zuri Berry".) They both later submitted complaints about him to American University's Human Resources department. JA 41 ¶ 38; JA 648 ¶ 33. In her HR complaint, Ms. Clark reported that Berry "weaponized [her] performance review," "questioned" her character, "constant[ly] micromanag[ed]" her, and was a "poor communicat[or]." JA 147-48. Ms. Wise, in her HR complaint, reported that

she was "continuously berated, my work belittled, and my credentials questioned" by Berry "in ways that were not only unproductive, but ultimately untrue." JA 139-40 (describing Berry's "bullying" and "lack of leadership").

Other women at WAMU had similar problems with Berry. Defendant-Appellee Sasha-Ann Simons, also a Black woman, was a reporter in the same WAMU newsroom as Berry until March 2020 when she left to work at 1A, a WAMU news program produced on a different floor from and with a different staff. JA 149 (Decl. of Sasha-Ann Simons) ¶ 1. She attested in the Superior Court, without contradiction, that she left the WAMU newsroom because she felt frustrated and uncomfortable with Berry and, as she characterized it, the generally "toxic" newsroom environment that he enabled. JA 152 ¶ 18. She wrote a memo to Berry's boss, the WAMU News Director, describing how she "escaped this newsroom deliberately" and detailing Berry's abusive behavior, especially towards diverse women journalists, JA 155-56:

> [In 2019], I watched the lack of support for women journalists of color continue. Several talented Black and Asian journalists have left the organization -- mainly the newsroom in the past 12 months alone. Many of them, I call friends. Their growth was stifled, their judgment questioned -- at times they were even berated in front of others, their credentials in the industry were criticized, their ideas shot down, and they were all micromanaged by the same person. Zuri Berry is well aware of all the complaints that have been made with HR and with Jeffrey [Katz, the News Director] about his management style. [Other supervisors] are also aware that Zuri has been

> problematic. If his direct reports dared speak up to him about his unfair treatment, like Letese [Clark], Zuri would punish with your performance review as his weapon. These women cried out for help, and yet nothing was done then and still hasn't been done.

Likewise, WAMU editors Carmel Delshad and Mary Tyler March also complained about Berry. JA 42 ¶ 40; JA 651-52 ¶ 39. Ms. Delshad, a woman of color and an editor at WAMU, felt "demean[ed] and humiliate[ed]" when, with no precedent, Berry asked her to take notes in a meeting. *See* JA 171 (Decl. of Carmel Delshad) ¶ 4. Ms. March, a white woman, felt publicly embarrassed when, on multiple occasions, Berry broadcast demeaning comments to her on the newsroom communication system. *See* JA 159-60 (Decl. of Mary Tyler March) ¶¶ 4-6. Journalists Elly Yu and Jenny Abamu, also women of color, left WAMU during this period as well, again citing a "toxic" environment in the newsroom. JA 30 ¶ 16.

The July 1, 2020 Meeting and Aftermath

After the departures of all these women – Mses. Clark, Wise, Abamu, and Yu from the station, and Ms. Simons from the newsroom where Berry worked – WAMU "held a video conference/meeting to discuss the work atmosphere" relating to "the departure of women of color at the station." JA 35-36 (*Berry I* Compl.) ¶ 25, JA 644-45 (*Berry II* Compl.) ¶ 22. As Berry himself acknowledged, such "disarray" and "tension" in the newsroom" (JA 639 ¶ 8) had long been a subject of "publicity" (*id.* ¶ 7, JA 640 ¶ 11). And Berry also acknowledged that the issues at WAMU

became particularly acute in the summer of 2020 because the departures of these women of color came in the midst of the national "discussion about the deaths of Black men and women at the hands of police" (JA 640 ¶ 10) as well as the #metoo movement (JA 640-41 ¶ 11, discussing "misogyny at WAMU"). *See also* JA 641 ¶ 12, citing DCist article from the summer of 2020 that "WAMU is in the midst of reckoning with a toxic work culture"). At the meeting, open to all WAMU staff, News Director Jeffrey Katz read Ms. Simons' memo, and, according to Berry, the meeting "ended up being an attack on Mr. Katz and Mr. Berry and their leadership," as well as a discussion of "general . . . dissatisfaction." JA 36 ¶ 26, JA 153 ¶ 21, JA 155-56, JA 645 ¶ 23.

Following the meeting, Berry sent an apology email to all WAMU staff, in which he admitted:

- "I failed you and I failed the women of color in our newsroom" and "I've contributed to [their] exodus."
- These "failures are embarrassing" and he regrets "not doing more to retain . . . women of color."
- Many of the "complaints" about his behavior were "raised with" him, and that he was attempting "to change [his] approach."

JA 157-58; JA 646 ¶ 25.

Shortly after this, following the complaints from Ms. Clark, Ms. Wise, Ms. Simons, and others, WAMU "stripped" Berry of his direct reports, initiated an investigation into his conduct, issued to him a "Notice of Complaint," and placed

him on administrative leave. JA 37 ¶ 29, JA 41 ¶ 38, JA 646 ¶¶ 26–27, JA 650-51 ¶ 37. The Notice cited examples of various ways in which Berry allegedly created a hostile environment, including by "dismissing the ideas of women," "yelling" at and "raising his voice with women," "making condescending comments," "micromanaging," "hovering over a female employee," and "bully[ing]," among other things. JA 41 ¶ 38, JA 650-51 ¶ 37.

According to Berry, the interim Chief Content Officer also "disclosed to staff that [he] was under investigation" and "openly discussed the accusations being made against" him. JA 645-46 ¶ 24. The allegations also were allegedly "discussed in detail" at another "all-staff meeting" several weeks later. JA 649 ¶ 34.

Article in American University Publication *Current*

On July 20, 2020, *Current* published an article, "WAMU Licensee Investigates Editor Blamed for Departures of Women of Color" (the "Article"). JA 37-38 ¶ 31, JA 647-48 ¶ 30, JA 173 (Decl. of Julie Drizin Decl.) ¶ 5, JA 176-80 (Article). It was written and reported by Defendant-Appellee Sasha Fernandez. In addition to Fernandez, Berry also sued *Current*'s Executive Director, Julie Drizin, and its Managing Editor, Karen Everhart. In relevant part, the Article reported that:

- Berry "has been the subject of multiple complaints from staffers."
- His conduct is being investigated by the station.
- "Three female journalists of color" said that their decisions to leave the newsroom "were prompted by Berry's behavior toward them." And

"they shared experiences of feeling undermined, micromanaged, and mistreated."

- "One of the reporters and another WAMU employee . . . said they had filed complaints with Human Resources about" Berry.

- *Current* reached out to the station, which declined to comment, and to Berry directly, who did not respond.

The Article also quoted from Berry's apology email, including Berry's admission of his "failures" and his promise "to change [his] approach." JA 178.

Berry's Termination

Following completion of the Office of Human Resource's investigation, AU terminated Berry from employment on January 22, 2021. JA 652 ¶ 41. The memorandum notifying Berry of his termination stated that the investigation "corroborated many of the complainants' allegations and concluded that [his] conduct violated certain University policies and was inconsistent with the University's expectations of senior managers." JA 335-36. Noting several instances in which he had engaged in "overall behavior that was detrimental to staff," used an "inappropriate" management style, and exhibited "lack of judgment," the memo cited "a consistent pattern of not meeting" AU's core competency to "Act Ethically and With Integrity" and "multiple instances of Conduct Detrimental to Others and Failure to Meet Baseline Requirements." *Id.*

Berry's termination, as well as the allegedly "toxic" culture at WAMU more generally, continued to attract public attention. *See, e.g.*, Andrew Beaujon, *WAMU*

Dismisses Two People as Result of Investigation Into Workplace Culture, WASHINGTONIAN (Jan. 22, 2021) ("WAMU Dismisses"); WAMU Press Release, *AU Announces WAMU Leadership Changes, Outlines Path Ahead,* Aug. 7, 2020 ("AU Announces"); *see also infra* at 21, n.4 (citing other news coverage).

Plaintiff's Claims

As explained *supra* (*see* "Statement of the Case"), Berry brought two lawsuits arising from the facts described above. In *Berry I*, he alleged a defamation claim against American University, Ms. Clark, Ms. Wise, Ms. Simons, Ms. Fernandez, Ms. Everhart and Ms. Drizin. He also asserted parasitic claims for "false light" and "tortious interference with current and prospective business or contractual relationships" based on the same alleged expressions.

The statements/expressions Berry challenged as false and defamatory boil down to those in *Current* and elsewhere that Berry was, *e.g.*, "dismissive," "micromanaging," a "bully," and that he "yelled" at a subordinate and "hovered" over another's desk. JA 43-44 ¶ 43. He claimed also to have been defamed when Ms. Simons allegedly "accused him in her letter of being the sole reason for the departure of four women of color from WAMU and why the culture was toxic." *Id*.

In *Berry II*, Berry again asserted defamation and false light claims, based on the same types of statements he alleged to be defamatory in *Berry I*. Specifically, he alleged that AU made "false statements accusing Mr. Berry of being abusive to

women," including when staffers complained that he contributed to the "toxic" culture of the newsroom, and that he "undermined," "micromanaged," "mistreated," "dismissed," "bull[ied]" and was "condescending" to women, and when AU placed him on leave and terminated him. JA 645-656 ¶¶ 23, 30, 37, 52, 53. In *Berry II*, Berry additionally asserted a claim for violation of the D.C. Human Rights Act, with the gravamen of that claim focusing again on AU's expressions, *i.e.*, that AU "disclosed" or "announced" at a staff meeting that he was "under investigation," "while refusing to identify Caucasian managers who were under investigation" and then "terminat[ing his] employment." JA 645-46 ¶ 24, JA 654 ¶ 47.

In both cases, AU brought Special Motions to dismiss under the D.C. Anti-SLAPP Act, or, in the alternative, pursuant to D.C. Super. Ct. Rule 12(b)(6). The Superior Court granted both motions and likewise awarded AU its attorneys' fees in both cases, pursuant to D.C. Code § 16-5504. JA 480-94, 613-14, 1072-77, 1195.

SUMMARY OF THE ARGUMENT

The courts below correctly determined that all of Berry's claims – defamation and false light (in *Berry I* and *Berry II*), tortious interference (in *Berry I*), and violation of the DCHRA (in *Berry II*) – arose from AU's expression on a matter of public interest and thus fell within the ambit of the Anti-SLAPP Act, shifting the burden to Berry to show a "likelihood of success on the merits" for each of the claims to survive. On appeal, Berry does not dispute that the Anti-SLAPP Act applies to

the claims in *Berry II*, thus effectively conceding its application to those claims.

As for the claims in *Berry I*, he argues that the Anti-SLAPP Act does not apply because the statements published in *Current* and otherwise challenged are outside the public interest and because his case is not a "classic" SLAPP case involving a big corporate plaintiff attempting to stifle the speech of an individual. He also argues that the Superior Court erred in *Berry I* in denying his request for discovery to respond to the Anti-SLAPP motion. But allegations by multiple women of color of workplace misconduct at WAMU – the District's public radio station, a prominent donor-funded employer, and the subject of intense coverage for its workplace issues involving alleged racism and sexism – is clearly within the public interest, and application of the Anti-SLAPP Act is not dependent on the size or resources of the parties. The court's denial of discovery is fully consistent with the Anti-SLAPP Act's general prohibition on discovery except in extraordinary circumstances, which Berry did not present.

The courts below likewise correctly determined that Berry failed to show a likelihood of success on the merits of any of his claims in either *Berry I* or *Berry II*. Berry in this appeal nowhere actually challenges the case-dispositive conclusions of the Superior Court. He does not argue in his appeal brief that the lower courts erred in finding as a matter of law that, because the challenged statements are all subjective opinions or are substantially true, the statements are not actionable. Berry's appeal

also does not meaningfully challenge Judge Saddler's ruling in *Berry I* that Berry failed to show that several of the individual defendants actually made the challenged statements. Finally, Berry does not challenge the findings that the claims for false light and "tortious interference" also fail because they are parasitic of the defamation claim, and thus fall along with it.

As for the DCHRA claim in *Berry II*, Judge Ross correctly held that Berry was "unlikely to succeed" because he failed to plead any nexus between his termination – the only actionable "adverse employment action" alleged – and the alleged discrimination and also failed to identify a similarly situated comparator accused of similar conduct and not disciplined as Berry was. He also correctly held that the DCHRA claim, as well as the others asserted in *Berry II*, were unlikely to succeed because they are barred by the doctrine of *res judicata* – that is, they arose from the same set of facts as in *Berry I* and should have been asserted, if at all, in that case, and not in an entirely separate one.

The courts below were also correct in determining in both cases that all of Berry's claims were subject to dismissal for "failure to state a claim" under D.C. Super. Ct. R. 12(b)(b) for essentially the same reasons they were not likely to succeed on the merits under the Anti-SLAPP analysis.

Finally, both courts below properly awarded AU its reasonable legal expenses incurred in connection with defending *Berry I* and *Berry II*. Awards of attorneys'

fees are presumptive under the Anti-SLAPP Act, and, on appeal, Berry presents no basis for concluding that either court below abused its discretion in awarding them.

ARGUMENT

I. THE COURTS BELOW CORRECTLY DETERMINED THAT THE D.C. ANTI-SLAPP ACT APPLIED TO ALL OF BERRY'S CLAIMS

The D.C. Anti-SLAPP Act "protect[s] the targets" of "Strategic Lawsuits Against Public Participation." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014). SLAPPs "masquerade as ordinary lawsuits," but their "true objective is to use litigation as a weapon to chill or silence speech." *Id.* The Act creates "substantive rights with regard to a defendant's ability to fend off a SLAPP," including early dismissal of non-meritorious cases and recovery of attorneys' fees. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016); D.C. Code § 16-5504(a).

The party invoking the Act first must "make a prima facie showing" that the claims at issue "arise from an act in furtherance of the right of advocacy on issues of public interest," *i.e.*, that the claims arise from communications "to the public" on matters of public interest. D.C. Code §§ 16-5501(A)-(B), 16-5502(b). Making this prima facie showing is "not onerous." *Saudi Am. Pub. Rels. Affairs Comm. v. Inst. for Gulf Affairs* ("*Saudi Am.*"), 242 A.3d 602 (D.C. 2020). Once the moving party makes that showing, the burden then shifts to the nonmoving party to make the much "meatier" showing "that the[] claim is likely to succeed on the merits." *Id.* at 610;

D.C. Code § 16-5502(b). If the non-moving party cannot meet that burden, the court dismisses the case with prejudice. D.C. Code § 16-5502(d).

The courts below determined that the Anti-SLAPP Act applied to all claims asserted in both *Berry I* and *Berry II*. JA 485-88, 1075 ¶¶ 2-3. On appeal, Berry challenges only the application of the Anti-SLAPP Act to his claims in *Berry I*, not to those in *Berry II.* That is, his appellate brief explicitly argues that "the Anti-SLAPP Act Does not Apply to Berry I," Berry App. Br. at 25, but makes no similar argument with respect to *Berry II.* Berry has thus waived any argument that the defamation, false light, and DCHRA claims he asserted in *Berry II* are not subject to the Act. *See Rose v. United States*, 629 A.2d 526, 535 (D.C. 1993) ("It is a basic principle of appellate jurisprudence that points not urged on appeal are deemed to be waived."); *District of Columbia v. Patterson*, 667 A.2d 1338, 1346 n.18 (D.C. 1995) ("All arguments for reversal must appear in the opening brief, so that the appellee may address them.").[2]

With respect to the claims in *Berry I*, Berry argues that Judge Saddler erred in applying the Act because (1) he did not bring a "classic" SLAPP case, *i.e.*, one filed by a large corporation intending to silence an individual – even though D.C.

[2] Given that Berry has not challenged the issue on appeal, AU does not brief it here. But for the reasons stated in AU's briefing below (and as explained herein with respect to *Berry I*), the Anti-SLAPP Act applies to each claim asserted in *Berry II* – defamation, false light, and violation of the DCHRA. *See* JA 790-94, 1010.

law is quite clear that the Anti-SLAPP Act applies far beyond that setting, and (2) in his view – despite his own statements in the record to the contrary – the communications at issue were not connected to a "matter of public interest." Berry App. Br. at 24-26. Berry also alleges that Judge Saddler erred in rejecting his request to take discovery to respond to the AU Defendants' Anti-SLAPP motion. *Id.* at 25. None of these arguments has merit, as the court below correctly held.

A. Application of the Act Does Not Depend on the Size or Resources of the Parties

Berry first argues that *Berry I* "does not fall within the contours of the Anti-SLAPP Act" because the case does not involve a "large private corporation" targeting "individuals with fewer resources" for speaking out on matters of public concern. Berry App. Br. at 26-27. But this Court has specifically rejected that exact argument, explaining "the protections of the [Anti-SLAPP] Act apply to [all] lawsuits" that are "deemed to be SLAPPs," regardless of the size or means of the parties. *Doe v. Burke*, 133 A.3d 569, 573-74 (D.C. 2016) (also recognizing that "distinction" between "classic" SLAPP suits and other lawsuits based on speech is "illusory"); *accord Khan v. Orbis Bus. Intelligence Ltd.*, 2023 D.C. App. LEXIS 102, at *12 (Apr. 13, 2023). Thus, the only relevant question is whether "the claims at issue arise from" public speech on an issue of "public interest." D.C. Code §§ 16-5501(A) & (B), 16-5502(b). If they do, then the Act applies, and the court goes on to determine whether the non-moving party can show a likelihood of success on the

merits. D.C. courts have routinely found that claims asserted by individuals against the media or other corporations/organizations fell within the scope of the Act, and the court below did not err is also doing so here. *See, e.g.*, *Fells v. SEIU*, 281 A.3d 572 (D.C. 2022); *Am. Studies Ass'n v. Bronner*, 259 A.3d 728 (D.C. 2021); *Fridman*, 229 A.3d 494; *Cunningham v. Berlitz Languages, Inc.,* 2021 D.C. Super. LEXIS 6 (Feb. 18, 2021); *TS Media, Inc. v. Public Broad. Serv.*, 2018 D.C. Super. LEXIS 160 (May 15, 2018); *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249 (D.D.C. 2013); *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29 (D.D.C. 2012).

B. The Communications at Issue Here Were Made "In Furtherance of the Right of Advocacy on Issues of Public Interest"

Berry next argues that the Superior Court in *Berry I* erred in finding that the communications at issue were within the "public interest," Berry App. Br. at 27-29, asserting instead that they concern purely "private interests." *Id.*

But as with the law's broad application in cases involving all types of parties, the Anti-SLAPP statute "expansively defines an issue of public interest," a term which should be "liberally interpreted." *Saudi Am.*, 242 A.3d at 611. Undeniably, issues surrounding "toxic" work environments and the treatment of women in the workplace – particularly in a high-profile field like listener-funded public radio in a major metro area – are related to matters of public interest. The public interest is especially acute here, where the allegations involved multiple Black women calling out Berry (a senior manager) for his management style, resulted in public action by

the station,[3] and prompted other news coverage.[4] In a similar Superior Court case, the Honorable Anthony Epstein concluded that PBS's statements regarding allegations of misconduct toward women, in the midst of the emerging #metoo movement, were within the public interest and thus protected by the D.C Anti-SLAPP Act. *TS Media, Inc.*, 2018 D.C. Super. LEXIS 160; *see also, e.g.*, *Wentworth v. Hemenway*, 2019 Cal. App. Unpub. LEXIS 3880, at *2 (Cal. Ct. App. June 5, 2019) (woman's statements to media regarding professor's improper conduct were protected by California anti-SLAPP law).

Despite all this, Berry maintains on appeal that his claims relate to a "private employment dispute" which do not come within the Anti-SLAPP Act's protections. Berry App. Br. at 29. But he himself acknowledges the specific public interest in the workplace environment at WAMU, citing examples of news and social media reporting and public discussions reflecting the public interest in the "management

[3] *See* AU Announces and WAMU Dismisses, *supra* at 12-13.

[4] In addition to *Current*, other D.C. media reported on concerns the WAMU newsroom, including the HR investigation into Berry's conduct. *See, e.g.*, Andrew Beaujon, *WAMU Reorganizes Newsroom Amid Staff Turmoil*, WASHINGTONIAN (July 21, 2020); Joe Concha, *Manager of DC-based NPR affiliate resigns amid workplace complaints*, THE HILL (Aug. 7, 2020); Elahe Izadi and Paul Farhi, *A public radio station was already in turmoil. Then its own news site dropped an explosive report*, WASHINGTON POST (Aug. 5, 2020) (detailing issues at WAMU regarding "equity and newsroom culture, and noting that AU "launched an investigation into a senior managing editor blamed by some staffers for the departures of women of color").

decisions" there. *See, e.g.*, JA 639 ¶ 7 (citing *Washington Post* coverage of internal "turmoil" at the station); *id.* at 640 ¶ 9 (alleging "long-standing issues at WAMU" and "past complaints of how management mistreated people of color"); *id.* ¶ 10 (alleging that issues became more acute in light of the "racial reckoning underway" in the country in the summer of 2020); *id.* (alleging "history" of "problems" and "misogyny" at WAMU, citing employees' social media posts about the issues); *id.* at 641 ¶ 12 (citing DCist article reporting that "WAMU is in the midst of a reckoning with a toxic work culture"). He even issued a detailed and lengthy statement to the press publicizing his termination. *See* WAMU Dismisses, *supra* at 12-13. Berry has plainly placed his experiences within the larger public debate about how the District's most prominent donor-funded employer treats women and employees of color – clearly a public issue under Anti-SLAPP law.

Berry attempts to distinguish the *TS Media* case (where the Superior Court held that allegations concerning workplace behavior by the plaintiff toward women at PBS were within the public interest) as distinguishable because the plaintiff there was a public figure. *See* Berry App. Br. at 29-30. But the Anti-SLAPP statute does not require that the plaintiff be a public figure. Instead, it turns on the *content* of the statements – whether the expression is "connect[ed] to" the "public interest." *See* D.C. Code § 16-5501 (Act covers any statement made in public setting "in connection with an issue of public interest"); *see also, e.g.*, *Saudi Am.*, 242 A.3d at

612-13 (rejecting plaintiff's argument that "conflict between the parties" was "a purely interpersonal matter," even though "[t]o be sure, the statements mostly focused on [plaintiff] as an individual"). And Berry does not cite a single case, from any jurisdiction, suggesting that multiple allegations of misogynistic misconduct by a manager at a high-profile news organization – which has already made news for its workplace issues – is outside the public interest.

For all these reasons, Judge Saddler was entirely correct below in holding that:

> [Information concerning WAMU's] investigation regarding … Berry's conduct throughout his employment related to WAMU's negative reputation that was highly publicized in the past. Further, the statements were related to public discourse concerning WAMU's alleged long history of racism and sexism, and constitute an "act in furtherance of the right of advocacy on issues of public interest," as defined by D.C. Code § 16-5501(2) and (3).

JA 487.

C. The Court Below Properly Denied Berry's Request for Discovery

Without citing any cases, statutes, or other authority, Berry also asserts that the court below in *Berry I* erred in denying his request for discovery in order to oppose AU's Anti-SLAPP motion.[5] *See* Berry App. Br. at 25. It did not.

Under the Anti-SLAPP Act, discovery "shall be stayed until the motion is disposed of." D.C. Code § 16-5502(c)(1). This is because the Act is specifically

[5] Berry did not seek discovery in connection with *Berry II*.

intended "[t]o mitigate 'the amount of money, time, and legal resources' that defendants . . . must expend." *Fridman*, 229 A.3d at 502; *see also Mann*, 150 A.3d at 1231 (rights under the Act "would be lost" if defendant were subject to unnecessary discovery). In very "limited" circumstances, the court may allow "targeted discovery," but only where "it appears likely" that such discovery "will enable the plaintiff to defeat the motion" and where "the discovery will not be unduly burdensome." D.C. Code § 16-5502(c)(2). This Anti-SLAPP discovery standard is "difficult" for a plaintiff to meet and "favors the defendant," thus discovery is not "ordinarily . . . permitted." *Fridman*, 229 A.3d at 512-13.

Berry did not meet the demanding standard in the court below, and certainly does not do so here, where he has completely failed to "articulate how targeted discovery [would have] enable[d] him to defeat" AU's Anti-SLAPP motion. *Fridman*, 229 A.3d at 512-13. Nor could he have done so. A significant basis for the dismissal in *Berry I* was that the statements alleged in that complaint simply were not actionable as a matter of law. *See* JA 454-65 (Opp. to Mot. for Discovery). For this reason, Judge Saddler dismissed *Berry I* under the Anti-SLAPP Act because Berry could not demonstrate that he was likely to succeed on the merits of his claims, *and* she alternatively dismissed the lawsuit under D.C. Super. Ct. R. 12(b)(6) because Berry had failed to state a claim. *See* JA 494. No amount of discovery would change the non-actionable nature of the challenged expressions. Therefore, the

Berry I court correctly concluded that discovery would not "enable him to defeat" the Anti-SLAPP motion. JA 1223-24.

II. THE COURTS BELOW CORRECTLY CONCLUDED THAT BERRY FAILED TO MEET HIS BURDEN TO SHOW LIKELIHOOD OF SUCCESS ON THE MERITS

As noted, after AU and the AU Defendants demonstrated that the Anti-SLAPP Act applied to all the claims in both cases, the burden shifted to Berry to show that he was likely to succeed on the merits of his claims. In determining "likelihood of success," courts "ask[] whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Mann*, 150 A.3d at 1232; *accord Khan*, 2023 D.C. App. LEXIS 102, at *3. A plaintiff's burden to show "likelihood of success" is a much "meatier" burden than the "prima facie" showing required of defendants that that Act applies in the first place. *Saudi Am.*, 242 A.3d at 613.

To recap, the courts below reviewed the following claims: defamation and false light (in *Berry I* and *Berry II*), tortious interference with business relationships (in *Berry I* only), and violation of the DCHRA (in *Berry II* only). As the courts below both held, Berry did not demonstrate a likelihood of success on any of them.

A. The Courts Below Correctly Held that the Challenged Statements Are Not Actionable in Defamation

To state a claim for defamation, a plaintiff must establish each of the following elements, that: (1) the statements at issue were published by the defendants, (2) they carry a defamatory meaning (*i.e.*, they are injurious to reputation), (3) they are false (statements are not considered "false" if they are opinions or are substantially true) and (4) the defendant published the statements with some degree of "fault." *Blodgett v. Univ. Club*, 930 A.2d 210, 222 (D.C. 2007). Both courts below agreed with AU and granted the Anti-SLAPP motions on the grounds that (1) the statements were opinions or were substantially true (*i.e.*, that Berry could not establish their "falsity") and (2) with respect to some defendants, that he could not establish "publication."

Neither the courts below, nor AU, asserted lack of defamatory meaning or fault as a basis for dismissal. Nevertheless, Berry devotes the majority of the argument in his brief to arguing these two irrelevant topics. *See* Berry App. Br. at 30-32 (discussing defamatory meaning);[6] *id.* at 32-40 (discussing fault). His appeal

[6] Because "defamatory meaning" – whether the statements "injure the plaintiff in his trade" or otherwise make him appear "odious, infamous, or ridiculous," *Klayman v. Segal*, 783 A.2d 607, 613 (D.C. 2001) – is not at issue in this case, Berry's discussion of *Clampitt v. American University*, 957 A.2d 23, 40 (D.C. 2008) (cited in Berry App. Br. at 31-32) is inapposite. There, a former WAMU executive brought a defamation claim against AU based on her bosses' specific allegations that she had mismanaged station funds. *Clampitt*, 957 A.2d at 40. The *Clampitt* Court addressed the question of whether such statements were capable of defamatory meaning, and did not address the separate question of "opinion," which is what is before the court here, *see infra* at 27-32. Further, specific allegations of

does not at all address the elements of opinion/falsity or publication – the actual elements at issue here – and thus he has waived any right to challenge the findings of the courts below on these issues. *See Rose*, 629 A.2d at 535; *Patterson*, 667 A.2d at 1346 n.18. Moreover, he certainly did not (on appeal or below) make anything close to the required showing that he was likely to succeed on the merits.

1. The Challenged Statements Are Non-Actionable Opinions

A statement is a non-actionable opinion if it is "so imprecise or subjective that it is not capable of being proved true or false." *Farah v. Esquire Magazine*, 736 F.3d 528, 534-35 (D.C. Cir. 2013). In that assessment, the court considers the statement in its full context, *see Moldea v. N.Y. Times Co.*, 22 F.3d 310, 314-15 (D.C. Cir. 1994), including whether a reader or listener would understand that the speaker was "expressing a subjective view" or objective facts. *See Guilford Transp. Indus. v. Wilner,* 760 A.2d 580, 597 (D.C. 2000). Whether a statement is non-actionable opinion is a question of law for the court. *See, e.g.*, *Farah*, 736 F.3d 528; *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1 (D.D.C. 2013).

The gravamen of Berry's claims is that AU (and certain of its former employees) made "false statements accusing [him] of being abusive to women" and

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financial impropriety by a person's supervisor (in *Clampitt*) are very different from subjective characterizations by subordinates that their boss is, for example, "condescending" or a "micromanager" (here).

contributing to the "toxic" culture of the newsroom by, for example, "undermining," "micromanaging," "mistreating," "dismissing," "bullying," and "condescending" to women; by "hovering" over one subordinate's desk; and by "yelling" at another. And he claims that AU seemingly endorsed these comments by publicly placing him on leave and terminating his employment. JA 43-44 ¶ 43; JA 645-56 ¶¶ 23, 30, 37, 52, 53. But courts consistently recognize in defamation cases that characterizations like these are subjective interpretations based on personal perceptions, not facts subject to proof as true or false. They are protected expressions reflecting the speaker's point of view. *See, e.g.*, *Ollman v. Evans*, 750 F.2d 970, 980 (D.C. Cir. 1984) ("loosely definable" or "variously interpretable" statements cannot in most contexts support an action for defamation); *Armstrong v. Thompson*, 80 A.3d 177, 188 (D.C. 2013) (allegations by co-worker that plaintiff was under investigation for "serious issues of misconduct … reflected one person's subjective view of the underlying conduct and were not verifiable as true or false"); *Rosen v. Am. Israel Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1256-58 (D.C. 2012) (statement that plaintiff's "behavior did not comport with the standard" expected of employees was non-actionable opinion because it was open to "multiple interpretations" (citing *McClure v. Am. Fam. Mut. Ins. Co.*, 223 F.3d 845, 856 (8th Cir. 2000) (statements that employees were "disloyal" and "disruptive" were non-actionable opinion))).

Indeed, numerous defamation decisions from around the country have held that language the same as or similar to the statements challenged here is clearly too subjective to be actionable. *See, e.g.*, *Hays v. Gagliardi*, 2017 Cal. App. Unpub. LEXIS 7985, at *15 (Cal. Ct. App. Nov. 21, 2017) ("statements that [plaintiff] was 'condescending and rude' [are] clearly an impression or opinion that does not convey any statement of fact"); *Dragulescu v. Va. Union Univ.*, 223 F. Supp. 3d 499, 510 (E.D. Va. 2016) (statements that plaintiff "spoke 'disparagingly,' had a 'meltdown' or 'temper tantrum,' or did not 'properly contribute to [her employer's] mission' are 'statements that are relative in nature'" and therefore nonactionable); *Mallory v. S & S Publrs.*, 168 F. Supp. 3d 760, 771 (E.D. Pa. 2016) (accusing plaintiff of throwing a "hissy fit" is not actionable); *Mills v. Iowa*, 924 F. Supp. 2d 1016, 1033 (S.D. Iowa 2013) (statement that plaintiff was "micromanager" was opinion); *Carozza v. Blue Cross & Blue Shield of Mass.*, 14 Mass. L. Rep. 88 (Mass. Super. 2001) (characterization of plaintiff as "angry" non-actionable opinion); *Hupp v. Sasser*, 490 S.E.2d 880, 887 (W. Va. 1997) ("bully" is "totally subjective" and therefore not actionable).[7] Berry himself, in his own characterizations to this Court and to the trial

[7] *See also, e.g.*, *Kerr v. Marshall Univ. Bd. of Governors,* 824 F.3d 62, 75 (4th Cir. 2016) (calling plaintiff "unqualified" and "unsatisfactory" were nonactionable opinions; expression of defendant's "judgment that [plaintiff] is 'dishonest and unethical'" likewise nonactionable); *Chambers v. Travelers Cos.*, 668 F.3d 559, 565 (8th Cir. 2012) (statement at meeting that plaintiff was terminated for "'continuing issues'" – on the heels of allegations describing him as "dysfunctional," contributing to "low or non-existent" team morale, and with a

courts of his workplace relationships, has described the women who complained about him as "rude," "sniping," "unprofessional," and "atrocious," (JA 281 ¶ 70, 638 ¶ 7, 642 ¶ 14) – all non-actionable, subjective descriptions that mirror the types of statements that he challenges in this litigation.

Not only are the challenged statements that Berry was a "bully," that he "yelled," that the environment was "toxic," and so on not actionable on their face, the context in which they were made – the workplace – reinforces that the speakers were conveying their subjective viewpoints. For example, in one recent case, the plaintiff complained about allegedly defamatory statements made by her co-workers and supervisors accusing her of "engaging in a pattern of unprofessional behavior."

"management style [of] 'blame and shame'" – could not "support a defamation claim because it is 'insufficiently precise and cannot be proven false'"); *Jones v. Compass Bancshares Inc.*, 339 F. App'x 410, 412 (5th Cir. 2009) (characterization of plaintiff as "screaming and using obscenities" was "vague and subjective," and thus non-actionable); *Turner v. Wells*, 198 F. Supp. 3d 1355, 1372 (S.D. Fla. 2016) (noting that "[n]umerous courts have held . . . that a defendant's characterization of a plaintiff's actions as 'unprofessional' is nonactionable pure opinion," and finding that statement that plaintiff exhibited 'pattern of abusive, unprofessional behavior' also nonactionable); *Turner v. Devlin*, 848 P.2d 286, 287–89 (Ariz. 1993) (defendant's characterization of plaintiff's tone of voice as "demanding" was a "subjective impression" and therefore non-actionable opinion); *Grillo v. Smith*, 193 Cal. Rptr. 414, 416–17 (Cal. Ct. App. 1983) (claim that plaintiff "shouted" and "was angry" at defendant, in a professional setting, fell "clearly on the opinion side of the line"); *see generally* Robert D. Sack, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 2:4.1 (5th ed. 2023) (leading treatise, by the Honorable Robert D. Sack, who serves on the United States Court of Appeals for the Second Circuit, explaining that allegation "that someone was upset, angry, or impatient when he or she was not" is not actionable).

Anderson v. Sch. Bd. of Gloucester Cty., 2020 U.S. Dist. LEXIS 94645, at **94-96 (E.D. Va. May 29, 2020). The court readily determined that because this "statement regarding [plaintiff's] unprofessional behavior 'depends largely on a speaker's viewpoint' concerning professionalism in the workplace," it was a non-actionable "expression of opinion," as "courts [have] uniformly h[e]ld." *Id.* (citing cases). Indeed, case law is replete with holdings that heated statements made in the context of workplace controversies are non-actionable opinions. *See, e.g.*, *Ulrich v. Moody's Corp.*, 2014 U.S. Dist. LEXIS 145898, at **36-38 (S.D.N.Y. Mar. 31, 2014) (statements critical of plaintiff's conduct at work in a "performance improvement plan" held to be non-actionable opinion, citing numerous other cases in which similar employment-related criticisms – *e.g.*, that a plaintiff was "unprofessional" or "incompetent" – were also held non-actionable); *Lewis v. McTavish*, 673 F. Supp. 608, 609-611 (D.D.C. 1987) (allegations that plaintiff had an "inability to communicate," an "unwillingness to compromise," and lacked "knowledge and skill" were "imprecise," "unverifiable," and presented in a forum – a complaint about professional performance – "where opinions are expected"); *cf. Guilford*, 760 A.2d at 597 (statements made "in the context of a labor dispute" are usually understood to be subjective opinions).

Both of the trial courts here correctly analyzed the statements Berry challenged. Judge Ross in *Berry II*, applying the case law, held: "The statements

[Berry] challenges [in] his complaint are subjective comments based on personal perceptions and feelings that cannot be proven true or false and are therefore nonactionable in defamation." JA 1076 ¶ 5. Judge Saddler, in *Berry I*, noted both the non-actionability of the statements on their face and the workplace context that reinforces the opinionative nature of the statements:

> The statements [Berry] highlights as defamatory in his complaint are subjective comments based on personal perceptions and feelings that cannot be proven true or false and are therefore nonactionable. Moreover, the context of the article makes it clear that these former employees were describing their personal experience while working at WAMU.

JA 492. Berry's appellate brief contains no argument that contradicts the conclusions of either court below. Indeed, Berry does not even address the provable fact/non-verifiable opinion dichotomy or the inherently subjective nature of workplace complaints at all.

2. Berry Did Not Demonstrate "Material Falsity"

The courts below also held, in the alternative, that Berry had not demonstrated a likelihood that he could succeed in establishing the statements were materially false. Establishing falsity is the plaintiff's burden in any defamation action. *See, e.g.*, *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) (on matters of public concern, "plaintiff bear the burden of showing falsity"); *Kendrick v. Fox Television*, 659 A.2d 814, 819 (D.C. 1995) ("in a defamation case the plaintiff has

the burden of proving that the challenged statements are . . . false").

Moreover, a plaintiff cannot prevail even if a statement is not literally true, "so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 247 (2014). And because of the First Amendment principles at stake in defamation actions, "[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988).

With its Anti-SLAPP motions, AU provided the lower courts with sworn statements from eight employees and former employees at WAMU, six of them women, regarding Berry's "dismissive" attitude, his "condescension, his "hovering," his "bullying," and his other inappropriate behavior as a supervisor and co-worker. JA 132-72. For example, the affiants attested that:

- **Berry was authoritarian, disrespectful, dismissive, and condescending.** *See*, *e.g.*, JA 135 (Wise Decl.) ¶ 15 (describing occasion where Berry "yelled at" her); JA 138 (Wise email) (describing Berry's "tone" as "disrespectful and unprofessional"); JA 150-151 (Simons Decl.) ¶¶ 6, 8 (Berry's "presence . . . had a very authoritarian quality"); JA 165 (Decl. of G. Bullard, senior WAMU manager) ¶¶ 6, 8 (Berry was "top-down," "did not brook dissent," and journalists would "appear quite upset" after being spoken to by him); JA 144-146 (Clark Decl.) ¶¶ 10, 12, 15 (Berry spoke "in ways that were rude and disrespectful," he "routinely ignored, dismissed, and belittled [Ms. Clark's] suggestions and input," he generally "mistreat[ed] and undermin[ed] her," and he once "yelled at [her] in front of the whole newsroom"); JA 170 (Decl. of V. Chamberlin) ¶ 4 (Berry's "tone" was "condescending"); JA 167-168 (Decl. of C. Chester) ¶¶ 5–6 (Berry's "tone" was "demeaning" and "dismissive," and he would "demean" and "undermine" Ms. Clark); JA 160-161 (March Decl.) ¶¶ 5, 11 (Berry publicly made comments to Ms. March that were "demeaning

and out of line," and "appeared to me to target women of color …with his condescending behavior and impatience"); JA 171 (Delshad Decl.) ¶ 4 (Berry's conduct was "demeaning and humiliating").

- **Berry was a micromanager.** *See, e.g.*, JA 144 (Clark Decl.) ¶¶ 7–8 (Berry constantly demanded to know Ms. Clark's whereabouts, asked her about "minute details" of stories, and changed her work without telling her); JA 167-168 (Chester Decl.) ¶ 5 (Berry would ask Ms. Clark "if she had done very basic things"); JA 151 (Simons Decl.) ¶¶ 8–9 (Berry would "remind [Ms. Clark] to do basic tasks that a journalist of her experience certainly did not need to be reminded of" and seemed to try "to control [her] every move"); JA 133-134 (Wise Decl.) ¶¶ 5, 7 (Berry controlled and dictated Ms. Wise's time, inserted himself into projects for others, and made "digs about small, unimportant things"); JA 160-161 (March Decl.) ¶¶ 7–9 (describing examples of micromanaging behavior).

- **Berry was a poor and unsupportive supervisor in ways that were "detrimental" to others.** *See, e.g.*, JA 145 (Clark Decl.) ¶ 11 (describing Berry's failure to provide "background"); JA 161-163 (March Decl.) ¶¶ 13, 18 (Berry stifled Ms. Clark's ability to work on long-term projects and "often did not work with" his direct report "to accomplish" and carry out her ideas); JA 169-170 (Chamberlin Decl.) ¶ 3 (Berry "was not a good communicator" and did not "help cultivate my work to achieve" performance goals); JA 152, 154 (Simons Decl.) ¶¶ 16, 17, 24 (Berry's "poor management style stifled the growth of many young journalists" and caused reporters to request not to be assigned to him); JA 136 (Wise Decl.) ¶ 16 (Berry made Ms. Wise feel "unwelcome" and "offered no guidance, advice, mentorship or help").

- **Berry was known to "hover."** *See, e.g.,* JA 144 (Clark Decl.) ¶ 9 (Berry would "hover over [Ms. Clark] in ways that [she] found menacing," and she felt that she "could not escape him."); JA 161 (March Decl.) ¶ 12 (Berry "was constantly looming over [Ms. Clark's] desk and speaking to her in a condescending or terse way"); JA 168 (Chester Decl.) ¶ 6 ("I sometimes witnessed him hovering over Ms. Clark's desk and invading her personal space."); JA 150-151 (Simons Decl.) ¶ 7 (Berry "would loom over the seats/desks of his subordinates"); JA 136 (Wise Decl.) ¶ 18 (Berry would "hover" over the desk of Ms. Clark).

Berry himself acknowledged many of these problems in his email apology to all WAMU staff following the July 1, 2020, meeting, asking for the women's forgiveness, stating "I failed you and I failed the women of color in our newsroom." *See* JA 157-58 (also admitting that he had "contributed to the exodus" of women of color, that he regretted "not doing more to retain" them, and that he was attempting "to change [his] approach"); *see also* JA 335-36 (Termination Memo corroborating complaints about Berry). Moreover, while he paints these women's observations about him as innocuous, he concedes their substantial truth – admitting, for example, that he would stand in close proximity to Ms. Clark's workstation and that he spoke to Ms. Wise in a "firm" tone, but refusing to acknowledge that these behaviors could be perceived as "hovering" and "yelling." JA 280 ¶ 68, 283 ¶ 78.

With this compelling and undisputed record, Judge Saddler correctly held in *Berry I* that, to the extent the challenged statements were not opinions, they:

> are substantially true based on the sworn statements from eight employees and former employees at WAMU regarding their experience, and [Berry's behavior toward them, and [his] apology email acknowledging these recurring issues and complaints. [Berry] was unable to demonstrate how these statements were materially false apart from minor inaccuracies not amounting to the requisite material falsity essential to a defamation claim.

JA 492-93; *accord* JA 1075 (order in *Berry II*). Berry's appellate brief and arguments below, again, have not meaningfully addressed these key alternative holdings of both trial courts. In the face of this overwhelming evidence of Berry's

poor workplace conduct, Berry failed to show that the challenged statements – *e.g.*, he was "condescending," "a micromanager," unsupportive, etc. – were materially false. For this reason as well, this Court should affirm the orders below.[8]

3. With Respect to Some of the Defendants, Berry Did Not Even Establish the Element of "Publication"

Berry's failure to demonstrate likelihood of success on the issue of opinion/falsity is sufficient grounds, by itself, for granting the Anti-SLAPP motions

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[8] In addition to claiming that statements regarding his "dismissive," "bullying" and "condescending" behavior are actionable, Berry makes the unfounded claim that Ms. Simons "accused" him "of being the sole reason for the departure of four women of color from WAMU and why the culture was toxic." JA 43-44 ¶ 43. Ms. Simons' memo, however, said no such thing. To be sure, she strongly criticized Berry's behavior and suggested that it was a contributing factor to "woman after woman exit[ing] our newsroom door." JA 155-56. But it says nowhere that Berry was the "sole reason for the departure of four women of color." Nor does it claim that Berry was the "sole reason" that "the culture was toxic." On the contrary, it points to various individuals – including, but certainly not limited to, Berry – who she says contributed to "this toxic place." *Id.* A defendant obviously cannot be liable for a statement it did not publish. *See, e.g., Zimmerman v. Al Jazeera Am*., LLC, 246 F. Supp. 3d 257, 286-87 (D.D.C. 2017). In any event, such a statement would be substantially true if it had been made. *See* JA 146 (Clark Decl.) ¶¶ 16, 17 (Berry "was a major factor in my departure" . . . "because I no longer could tolerate the work environment at WAMU that Mr. Berry and others had created"); JA 136 (Wise Decl.) ¶ 17 ("I quit . . . solely because of Zuri Berry"); JA 154 (Simons Decl.) ¶ 24 (Berry "was a factor in my decision to leave the newsroom").

Likewise, Berry appears to challenge a statement he claims *Current* made that "a slew of complaints [were] filed against" him. JA 39-40 ¶ 34. What *Current* actually reported was that he was "the subject of multiple complaints," JA 176-80, a statement which, as Berry himself acknowledged, was substantially true, *see* JA 41 (*Berry I* Compl.) ¶ 38 ("Ms. Wise, Ms. Clark and Ms. Simons filed complaints against Mr. Berry."); *see also* JA 160 ¶ 6 & JA 172 ¶ 5 (noting complaints filed against Berry by Ms. March and Ms. Delshad).

in full as to the defamation claims. But with respect to most of the individual defendants, there is another basis for dismissal as well: Berry did not establish that they actually *published* the allegedly defamatory statements.

First, Berry has effectively conceded that, as Judge Saddler found, JA 489-90, he did not establish the element of publication with respect to Mses. Clark, Wise and Simons. In his appellate brief, Berry argues that "Appellees Current, Fernandez, Everhart, and Drizin Negligently Published and Adopted False and Defamatory Statements Concerning Berry," but makes no similar argument as to Mses. Clark, Wise and Simons. As such, he has waived any argument that Mses. Clark, Wise and Simons published any defamatory statements. *See Rose*, 629 A.2d at 535; *Patterson*, 667 A.2d at 1346 n.18.

Second, Berry did not allege in his complaint, did not establish below, and does not argue on appeal that Ms. Drizin or Ms. Everhart (the Executive Director and Managing Editor, respectively, of *Current*) had anything to do with the publication of the *Current* article. Thus, Berry obviously did not establish "likelihood of success" with respect to these defendants, and, again, he waived this issue on appeal as well. *See Rose*, 629 A.2d at 535; *Patterson*, 667 A.2d at 1346 n.18. Moreover, Ms. Drizin and Ms. Everhart presented uncontroverted testimony below that they were not, in fact, involved with the publication of the Article. *See* JA 174 (Drizin Decl.) ¶¶ 6-7 (not involved in editing the Article and "did not read

the article before it was published"); JA 175 (Everhart Decl.) ¶ 5 ("not involved in overseeing the reporting, drafting or editing of" Article). Thus, they cannot be held liable for its allegedly defamatory statements. *See*, *e.g.*, *Zimmerman,* 246 F. Supp. 3d at 286-87 (there can be no liability where defendant was "not involved in the writing of the article or the final editorial processes") (citing *Tavoulareas v. Piro*, 759 F.2d 90, 136 (D.C. Cir. 1985)). The fact that Ms. Drizin and Ms. Everhart hold top positions at the publication does not mean they can be held individually responsible for an article they had nearly nothing to do with. Supervisors or corporate officers are not liable for the alleged tortious actions of subordinates – vicarious liability runs to the corporate employer, not to employees or executives. *See Meyer v. Holley*, 537 U.S. 280, 285-86 (2003).

For this reason as well, the Court should affirm the decisions below, and uphold the dismissal of the claims in *Berry I* against Mses. Clark, Wise, Simons, Everheart, and Drizin.

B. Plaintiff's Parasitic Claims for "False Light" and Tortious Interference with Current and Prospective Business or Contractual Relationships" Also Fail

As with other issues in this case, Berry failed to brief on appeal any argument that the courts below erred in dismissing his claims for "false light" (in *Berry I* and *II*) and "tortious interference" (in *Berry I*). Again, he has waived any argument that

these claims should not have been dismissed. *See Rose*, 629 A.2d at 535; *Patterson*, 667 A.2d at 1346 n.18.

Moreover, the courts below were clearly correct (JA 488, 1075-76) because it is well-settled that where a defamation claim fails, "other tort claims based upon the same allegedly defamatory speech" also fail. *Farah*, 736 F.3d at 540; *see also Blodgett*, 930 A.2d at 222-23 (rejecting claims for defamation and false light, explaining that "a plaintiff may not avoid the strictures and burdens of proof associated with defamation by resorting to a claim of false light"); *Arpaio v. Cottle*, 404 F. Supp. 3d 80, 86 (D.D.C. 2019) (where a "plaintiff's defamation claim fails," his claim for tortious interference based on the same facts "must fail as well").

C. The Court Below Correctly Held that the *Berry II* Claims Were Also Not Likely to Succeed Because They Are Res Judicata

In addition to granting AU's Anti-SLAPP motion in *Berry II* on the grounds that Berry could not establish a valid defamation or false light claim, Judge Ross also found that these claims – as well as the DCHRA claim – were unlikely to succeed on the merits under the doctrine of *res judicata*. *See* JA 1073-74. This doctrine "forecloses 'successive litigation'" of claims that all arise from the same set of facts and that should have been presented as part of the same suit. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quotation omitted).

On appeal, Berry does not challenge the holding below that *res judicata* bars the defamation and false light claims he asserted in *Berry II*, Berry App. Br. at 40-

41, and thus he has waived any argument on this point. *See Rose*, 629 A.2d at 535; *Patterson*, 667 A.2d at 1346 n.18. He incorrectly maintains, however, that the DCHRA claim was properly filed in a separate lawsuit. But because that claim arose out the same nucleus of facts as alleged in *Berry I*, he was precluded from bringing that claim in *Berry II*. As Judge Ross recognized, *res judicata* "operate[s] to bar in the second action not only claims which were actually raised in the first, but also those arising out of the same transaction which could have been raised." JA 1074 (citing *Patton v. Klein*, 746 A.2d 866, 870 (D.C. 1999)). The doctrine "prevent[s] a party from splitting a single transaction into its several theories of recovery and 'holding one in reserve while he presses another to judgment.'" *Gilles v. Ware*, 615 A.2d 533, 539 (D.C. 1992). That is precisely what Berry tried to do here.

As with the defamation and false light claims, Berry's DHCRA claim is premised on AU's "publication" of the allegedly defamatory statements about his "mistreatment of women." *See* JA 654 (*Berry II* Compl.) ¶ 47 (basing DCHRA count on "announce[ment] at a staff meeting on July 31, 2020" that Berry was "under investigation" based on "false[ ] accus[ations]"). He specifically pleads that he was discriminated against because AU allegedly discussed or condoned public discussion of his employment behavior and status, while not engaging in the same speech with respect to his white colleagues. *Id*. His DCHRA claim, as with the other claims he asserted, thus arises from expression.

Because Judge Saddler ruled in *Berry I* that expressions about Berry's behavior were not actionable – and they are the same expressions that give rise to Berry's DCHRA claim – the DCHRA claim is completely derivative and likewise cannot stand, as Judge Ross correctly held in *Berry II*. *See* JA 1075 (statements underlying Berry's DCHRA claim "arise[ ] from speech, because the claim is grounded in AU's *communications* about him and is derivative of his claims for defamation and false light") (emphasis in original). Berry may not "frustrate the doctrine of res judicata by cloaking the same cause of action in the language of another theory in a subsequent proceeding." *Gilles*, 615 A.2d at 539; *see also Prunte v. Walt Disney Co*., 2005 U.S. Dist. LEXIS 49974, at *9 (D.D.C. Mar. 31, 2005) (dismissing allegedly "'new' cause of action" where, "at bottom all plaintiff's claims are dependent on his original," now-dismissed claim); *see generally Carr v. Rose*, 701 A.2d 1065, 1071 (D.C. 1997) (purpose of claim preclusion is "to conserve limited judicial resources, establish certainty and respect for court judgments, and protect the party relying on the judgment from vexatious litigation. In keeping with these purposes, the doctrine must be liberally construed and applied without technical restriction"). As Judge Ross held, Berry "had every opportunity to raise this "discrimination" claim in *Berry I*, but declined to do so," and thus the claim is now barred. JA 1074.

On appeal, Berry argues that the doctrine does not apply here because when "Berry II was filed, Berry I was well past the dispositive motion briefing and there was no option available to Berry to amend Berry I and certainly no guarantee that a motion to amend would have been granted by the court." Berry App. Br. at 41. This statement is misleading. Berry's termination (the impetus, according to his argument, for his decision to file *Berry II*) occurred *on January 22, 2021*, less than a month after AU filed its Anti-SLAPP motion in *Berry I*, JA 51, and *more than seven months before briefing was completed* on August 13, 2021, JA 409. Berry had plenty of time during the pendency of *Berry I* to bring the claims asserted in *Berry II*, but he *chose* to wait August 5, 2021, to add his new claim in a new lawsuit.

Additionally, as a matter of law, Berry's statement that "there was no option to amend" is also flatly incorrect. D.C. Super. Ct. Rule 15(a)(3) permits a party to move to amend at any time, and provides that the "court should freely give leave." And his suggestion that the rules of *res judicata* do not apply because there was "no guarantee that a motion to amend would have been granted by the court," Berry App. Br. at 41, is unsupported by any authority whatsoever, and it makes no sense.

For this reason as well, the court below correctly held that the claims in *Berry II* were unlikely to succeed on the merits. (And, all apart from the "likelihood of success" analysis under the Anti-SLAPP Act, *res judicata* independently barred the claims in *Berry II*.)

D. The Court Below Correctly Held the DCHRA Claim Was Not Likely to Succeed on the Merits

To show a likelihood of success on a claim for race discrimination under the DCHRA, Berry was required to make a showing that (1) he is a member of a protected class,[9] (2) he suffered an adverse employment action, and (3) the unfavorable action gives rise to an inference of discrimination – *i.e*., that AU took the challenged "adverse employment action" because of his "membership in a protected class." *Easaw v. Newport*, 253 F. Supp. 3d 22, 28 (D.D.C. 2017); *see also Ukwuani v. D.C.*, 241 A.3d 529, n.14 (D.C. 2020).

The only materially adverse action alleged in *Berry II* is his termination. The *Berry II* court found, however, that Berry failed to "plead any nexus between his termination and the alleged discrimination, nor [did he] identif[y] a similarly situated comparator who was accused of similar conduct and not so disciplined," thus dooming his claim. JA 1076. In other words, Berry failed even to *plead* facts (much less making a showing of likelihood of success) to support a reasonable inference that he was terminated *because of his race*.[10] JA 1075. Indeed, not only did Berry

[9] AU does not dispute that Berry is a member of a protected class.

[10] Although Berry included a reference to sex discrimination in the section-header to Count I in the *Berry II* Complaint (JA 653), he alleged no facts whatsoever regarding any similarly situated non-male employee who was treated differently than he was. Thus, his Complaint cannot plausibly be read to assert a claim for discrimination on the basis of sex.

not allege that he was terminated because of his race, he affirmatively asserted that he was terminated instead *because he filed the defamation complaint against AU in Berry I,* activity not protected by the DCHRA. JA 654.

Apart from his termination (which he attributes to *non-discriminatory* reasons), Berry does not allege any other legally significant adverse employment action from which he suffered. *See D.C. Dep't of Pub. Works v. D.C. Office of Human Rights*, 195 A.3d 483, 491 (D.C. 2018) (holding that a legally significant adverse employment action is one that has "materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm"). In his brief, Berry argues that his placement on administrative leave constituted an "adverse employment action." Berry App. Br. at 44. However, as explained below (JA1013), courts have reached "near-universal consensus" that placing an employee on paid administrative leave does not alone constitute an adverse employment action. *Hornsby v. Watt*, 217 F. Supp. 3d 58, 66 (D.D.C. 2016) (collecting cases), *aff'd*, 2017 U.S. App. LEXIS 22849 (D.C. Cir. Nov. 14, 2017).

The case on which Berry relies to establish that his leave was an "adverse employment action" – *Richardson v. Petasis*, 160 F. Supp. 3d 88 (D.D.C. 2015), *see* Berry App. Br. at 44 – is wholly inapplicable here given the court's reliance on the "unusual nature" of the conditions placed on that employee's leave in *Richardson*.

Richardson, 160 F. Supp. 3d at 118.[11]

Having failed to allege a legally cognizable adverse employment action or facts that would plausibly give rise to an inference of race-based discrimination, Berry asserts the novel theory that a "lowered standard" applies to pleading DCHRA claims. Specifically, he argues that his burden can be satisfied "by compiling 'bits and pieces of information' in support of an inference of DCHRA violations." Berry App. Br. at 41, 42 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–12 (2002) and *Poola v. Howard Univ.*, 147 A.3d 267, 278 (D.C. 2016)). But Berry's reliance on *Poola* actually supports affirming the judgment below. As Berry notes, *Poola* requires that plaintiffs establish "a nexus" between the employer's alleged discriminatory motive and the challenged adverse employment action. Berry App. Br. at 41 (citing *Poola*, 147 A.3d at 279). And, as noted, Berry alleges no such link between his placement on leave and termination and his race.[12] Indeed, the *Berry II*

[11] Indeed, the *Watt* court, recognizing the "near-universal consensus" that placing an employee on paid administrative leave does not, in and of itself, constitute a materially adverse employment action, characterized *Richardson* as "the only contrary authority." *Watt*, 217 F. Supp. 3d at 66. And *Richardson* is distinguishable. The *Richardson* court grounded its determination on the fact that the employee's leave required her to perform certain tasks, which she was prevented from performing, causing her to resign. Berry made no such allegation here; he acknowledged that he was placed on leave pending completion of an investigation into complaints about his conduct.

[12] The factual allegations in *Poola* are a far cry from this case. *Poola* involved considerable detail about how male, African-American administrators treated the plaintiff and other female, non-African-American professors less favorably than

Complaint alleges *the opposite*: that he was placed on leave while AU investigated complaints regarding his conduct, and that he was terminated for filing the *Berry I* defamation lawsuit. *See* JA064. In short, "[a]s between th[e] obvious alternative explanation" for Berry's placement on leave, "the purposeful, invidious discrimination [Berry] asks us to infer . . . is not a plausible conclusion." *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009).

III. THE COURTS BELOW ALSO CORRECTLY HELD, IN THE ALTERNATIVE, THAT BERRY'S COMPLAINTS WERE SUBJECT TO DISMISSAL PURSUANT TO RULE 12(b)(6)

Both courts below held that even if the Anti-SLAPP Act did not apply (which it does), all of Berry's claims would still be subject to dismissal for failure to state a claim upon which relief may be granted pursuant to D.C. Super. Ct. Rule 12(b)(6). JA 488-93 (Order in *Berry I*); JA 1076 (Order in *Berry II*). With respect to *Berry I*, Berry does not challenge this finding, and therefore, once again, he has waived his right to do so. *See Rose*, 629 A.2d at 535; *Patterson*, 667 A.2d at 1346 n.18. For the reasons stated by Judge Saddler, and for the same reasons that Berry could not show

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their male, African-American counterparts, including examples of belittlement and harassment. *See* 147 A.3d at 273–74, 278–79. Here, in contrast, Berry's complaint negated any inference of discrimination. The trial court found, for example, that "the record reflects a non-discriminatory basis for [Berry's] termination, which [Berry] does not allege was pretextual. *See* JA1076. And Berry concedes that under *Poola* dismissal is appropriate in light of "an alternative explanation from the complaint that makes discrimination implausible." Berry App. Br. at 41.

likelihood of success on the merits – including (among other things) that (1) the challenged statements were non-actionable opinions as a matter of law, (2) Berry did not properly plead the element of "publication" with respect to each of the defendants, and (3) the "false light" and "tortious interference" claims were impermissibly duplicative of the defamation claim – dismissal pursuant to Rule 12(b)(6) is also proper.

With respect to *Berry II*, as noted, Berry abandoned his defamation and false light claims (which, in any event, fail for the same reasons as those same claims do in *Berry I*). In addition to the one-year limitations period which bars all claims that arose prior to August 5, 2020, Berry's DCHRA claim fails for the reasons explained by Judge Ross, and for the same reasons it was unlikely to succeed on the merits: Berry "neither plead any nexus between his termination and the alleged discrimination, nor identified a similarly situated comparator who was accused of similar conduct and not so disciplined [and,] [m]oreover, the record reflects a non-discriminatory basis for his termination, which [Berry] does not allege was pretextual." JA 1076.

IV. THE COURTS BELOW DID NOT ABUSE THEIR DISCRETION IN AWARDING ATTORNEYS' FEES TO AU UNDER ANTI-SLAPP ACT

Finally, Berry challenges the courts' awards of attorneys' fees to AU as successful movants under the Anti-SLAPP Act. Berry App. Br. at 46-48. Fee awards are reviewed on appeal for abuse of discretion. *Khan*, 2023 D.C. App.

LEXIS 102, at *10. Indeed, in a very recent SLAPP case, this Court reaffirmed that it "generally defers to the broad discretion of the trial judge in the calculation and award of attorney's fees and . . . requires a very strong showing of abuse of discretion to set aside the decision of the trial court" awarding fees. *Id.*

Here, Berry does not dispute that, as the prevailing moving parties, AU and the other defendants are "presumptively" entitled to an award of their "costs of litigation, including reasonable attorney fees." *See Doe v. Burke*, 133 A.3d 569, 572 (D.C. 2016); D.C. Code § 16-5504(a). Still, he makes three arguments that the awards were not proper here, all of which can be readily rejected.

First, he argues that "special circumstances" render the awards unjust here because the cases do not involve an attempt to silence a person attempting to engage in "grassroots activism" or "public policy debates." Berry App. Br. at 46-47. This Court has repeatedly rejected this very argument, including, most recently, just last month. *See Khan*, 2023 D.C. App. LEXIS 102, at *11-12 ("presumption in favor of an award of attorney fees applies even when the lawsuit is not a 'classic' SLAPP suit that 'has been determined to be frivolous or intended to stifle speech by causing undue litigation costs'").

Second, he argues that the amount of the awards were "inflated" and that some of the charges were "excessive, redundant, or otherwise unnecessary." Berry App. Br. at 47. But he provides no explanation at all for why the fees were supposedly

"inflated" in *Berry I* and, with respect to *Berry II*, suggests only that the fees should have been less because AU "made essentially the same arguments" as it had in *Berry I*, *id.*, without actually identifying any work that was allegedly duplicative. Moreover, the "reasonableness" of the time spent and the charges made is underscored by the fact that the bills were paid, and the charges undisputed by the clients. *See* JA 524 ¶ 12, JA 1091 ¶ 11, JA 1132 ¶ 11. *See, e.g.*, *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 2021 U.S. Dist. LEXIS 62863, at *37 (S.D.N.Y. Mar. 31, 2021) ("that the fees were actually paid in the ordinary course of business is strong evidence" of reasonableness (cleaned up)); *Amphastar Pharms. Inc. v. Aventis Pharma SA*, 2020 U.S. Dist. LEXIS 251236, at *84 (C.D. Cal. Nov. 13, 2020) (fact that defendants "actually paid" their lawyers the amounts sought is "important evidence" of reasonableness).

Finally, he takes issue with the fact that, in the *Berry II* motion, AU "did not segregate or categorize" the time spent "on the D.C. Anti-SLAPP Act claim in contrast with the time spent … on the discrimination claim." Berry App. Br. at 48. This argument makes no sense. The Anti-SLAPP motion applied to *each* of Berry's claims, *including the discrimination claim*. *See* JA 1075 (Order in *Berry II*, holding that discrimination claim was subject to Anti-SLAPP Act, and Berry failed to show likelihood of success on the merits of that claim). Accordingly, attorneys' fees were recoverable (and awarded) on each of Berry's claims, including the discrimination

claim. There was thus no need to "segregate" the work according to the specific claims in the complaints. In any event, the time descriptions contained in the bills do indicate how the work was performed. *See* JA 1096-1128, 1135-1174.[13]

Berry here offers no valid reasons why Judge Ross's determination – that defense expenses "were reasonable," JA 1288, especially given that the cases involved extensive briefing and that the attorneys billed at substantially discounted rates, far below market, JA 1284-88 – was an "abuse of discretion." His fee decisions should be affirmed.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court reject Berry's appeal and affirm all decisions below.

[13] Berry also complains that "there were several entries … in which they attorney, date, description of the professional work, and hours are all redacted." Berry App. Br. at 48. In the few instances where entire entries were redacted, AU was not seeking to recover for that time. *See* JA 523 (Decl. of C. Tobin in *Berry I*) at n.1; JA 1132 (Decl. of C. Tobin in *Berry II*) at n.1; JA 1191-92 (further explaining same). Otherwise, the only redactions made were minor ones imposed to protect the attorney-client privilege. *See, e.g.,* JA 523 ¶ 9; JA 1132 ¶ 9.

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Respectfully submitted,

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ADDEDNDUM

D.C. Code § 16-5501. Definitions.

For the purposes of this chapter, the term:
(1) "Act in furtherance of the right of advocacy on issues of public interest" means:
(A) Any written or oral statement made:
(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
(ii) In a place open to the public or a public forum in connection with an issue of public interest; or
(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.
(2) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.
(3) "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.
(4) "Personal identifying information" shall have the same meaning as provided in § 22-3227.01(3).

D.C. Code § 16-5502. Special motion to dismiss.

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.
(b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.
(c)
(1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.
(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

D.C. Code § 16-5504. Fees and costs.

(a) The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees.
(b) The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay.

D.C. Code § 2-1402.11. Prohibitions.

(a) General. — It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, credit information, or homeless status of any individual:
(1) By an employer. —
(A) To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his or her compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his or her employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his or her status as an employee; and
(B) To fail to treat an employee affected by pregnancy, childbirth, a pregnancy-related or childbirth-related medical condition, breastfeeding, or a reproductive health decision, the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as an employee not so affected but similar in

the employee's ability or inability to work, including the requirement that an employer shall treat an employee temporarily unable to perform the functions of the employee's job because of the employee's pregnancy-related condition in the same manner as it treats other employees with temporary disabilities; provided, that this subparagraph shall not be construed to require an employer to provide insurance coverage related to a reproductive health decision;

(2) By an employment agency. — To fail or refuse to refer for employment, or to classify or refer for employment, any individual, or otherwise to discriminate against, any individual; or

(3) By a labor organization. — To exclude or to expel from its membership, or otherwise to discriminate against, any individual; or to limit, segregate, or classify its membership; or to classify, or fail, or refuse to refer for employment any individual in any way, which would deprive such individual of employment opportunities, or would limit such employment opportunities, or otherwise adversely affect his or her status as an employee or as an applicant for employment; or

(4) By an employer, employment agency or labor organization. —

(A) To discriminate against any individual in admission to or the employment in, any program established to provide apprenticeship or other training or retraining, including an on-the-job training program;

(B) To print or publish, or cause to be printed or published, any notice or advertisement, or use any publication form, relating to employment by such an employer, or to membership in, or any classification or referral for employment by such a labor organization, or to any classification or referral for employment by such an employment agency, unlawfully indicating any preference, limitation, specification, or distinction, based on the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, gender identity or expression, family responsibilities, matriculation, genetic information, disability, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, credit information, or homeless status of any individual.

(C) To request or require a genetic test of, or administer a genetic test to, any individual as a condition of employment, application for employment, or membership, or to seek to obtain, obtain, or use genetic information of an employee or applicant for employment or membership.

(D) To directly or indirectly require, request, suggest, or cause any employee to submit credit information, or use, accept, refer to, or inquire into an employee’s credit information.

(b) Subterfuge. — It shall further be an unlawful discriminatory practice to do any of the above said acts for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason based on the actual or perceived: race,

color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, matriculation, genetic information, disability, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, credit information, or homeless status of any individual.
(b-1) [Not funded].
(c) Accommodation for religious observance. —
(1) It shall further be an unlawful discriminatory practice for an employer to refuse to make a reasonable accommodation for an employee's religious observance by permitting the employee to make up work time lost due to such observance, unless such an accommodation would cause the employer undue hardship. An accommodation would cause an employer undue hardship when it would cause the employer to incur more than de minimis costs.
(2) Such an accommodation may be made by permitting the employee to work:
(A) During the employee's scheduled lunch time or other work breaks;
(B) Before or after the employee's usual working hours;
(C) Outside of the employer's normal business hours;
(D) During the employee's paid vacation days;
(E) During another employee's working hours as part of a voluntary swap with such other employee; or
(F) In any other manner that is mutually agreeable to the employer and employee.
(3) When an employee's request for a particular form of accommodation would cause undue hardship to the employer, the employer shall reasonably accommodate the employee in a manner that does not cause undue hardship to the employer. Where other means of accommodation would cause undue hardship to the employer, an employee shall have the option of taking leave without pay if granting leave without pay would not cause undue hardship to the employer.
(4) An employee shall notify the employer of the need for an accommodation at least 10 working days prior to the day or days for which the accommodation is needed, unless the need for the accommodation cannot reasonably be foreseen.
(5) In any proceeding brought under this section, the employer shall have the burden of establishing that it would be unable reasonably to accommodate an employee's religious observance without incurring an undue hardship, provided, however, that in the case of an employer that employs more than 5 but fewer than 15 full-time employees, or where accommodation of an employee's observance of a religious practice would require the employee to take more than 3 consecutive days off from work, the employee shall have the burden of establishing that the employer could reasonably accommodate the employee's religious observance without incurring an undue hardship; and provided further, that it shall be considered an undue hardship if an employer would be required to pay any additional compensation to an employee

by reason of an accommodation for an employee's religious observance. The mere assumption that other employees with the same religious beliefs might also request accommodation shall not be considered evidence of undue hardship. An employer that employs 5 or fewer full-time employees shall be exempt from the provisions of this subsection.

(c-1) Victims and family members of victims of domestic violence, a sexual offense, or stalking. —

(1) It shall be an unlawful discriminatory practice to do any of the acts prohibited in subsection (a) or (b) of this section based wholly or partially on the fact that:

(A) An employee attended, participated in, prepared for, or requested leave to attend, participate in, or prepare for a criminal, civil, or administrative proceeding relating to domestic violence, a sexual offense, or stalking of which the employee or employee's family member was a victim, including meetings with an attorney or law enforcement officials;

(B) An employee sought physical or mental health treatment or counseling relating to domestic violence, a sexual offense, or stalking of which the employee or employee's family member was a victim; or

(C) An individual caused a disruption at the employee's workplace or made a threat to an employee's employment, relating to domestic violence, a sexual offense, or stalking of which the employee or employee's family member was a victim.

(2) t shall be an unlawful discriminatory practice for an employer to refuse to make a reasonable accommodation for an employee who is a victim or a family member of a victim of domestic violence, a sexual offense, or stalking when an accommodation is necessary to ensure the person's security and safety, unless such an accommodation would cause the employer undue hardship.

(3)

(A) It shall be an unlawful discriminatory practice for an employer to disclose any information related to an employee's status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking provided to the employer by the employee, including a statement or any other documentation, record, or corroborating evidence.

(B) It shall not be a violation of subparagraph (A) of this paragraph to make a disclosure that is:

(i) Requested or voluntarily authorized in writing by the employee;

(ii) Ordered by a court or administrative agency or otherwise required by law;

(iii) Provided to a law enforcement agency;

(iv) Necessary to protect other employees from imminent harm;

(v) To the extent necessary, to provide a reasonable accommodation to the victim; or

(vi) [Not funded].

(C) In the event of a disclosure, the employer shall notify the employee of the disclosure.
(4) For the purposes of this subsection, the term:
(A) "Reasonable accommodation" includes a transfer, reassignment, modified schedule, leave, changed work station, changed work telephone or email address, installed lock, assistance in documenting domestic violence, a sexual offense, or stalking that occurs in the workplace, or the implementation of another safety procedure in response to actual or threatened domestic violence, a sexual offense, or stalking.
(B) "Undue hardship" means any action that requires significant difficulty or expense when considered in relation to factors such as the size of the employer, its financial resources, and the nature and structure of its operation.
(c-2) Harassment. —
(1) It shall further be an unlawful discriminatory practice to engage in harassment based on one or more protected characteristics specified in subsection (a) [of this section], including sexual harassment.
(2) For purposes of this subsection:
(A) "Harassment" means conduct, whether direct or indirect, verbal or nonverbal, that unreasonably alters an individual's terms, conditions, or privileges of employment or has the purpose or effect of creating an intimidating, hostile, or offensive work environment.
(B) "Sexual harassment" means:
(i) Any conduct of a sexual nature that constitutes harassment as defined in subparagraph (A) of this paragraph; and
(ii) Sexual advances, requests for sexual favors, or other conduct of a sexual nature where submission to the conduct is made either explicitly or implicitly a term or condition of employment, or where submission to or rejection of the conduct is used as the basis for an employment decision affecting the individual's employment.
(3) In determining whether conduct constitutes unlawful harassment under this subsection, a finder of fact shall consider the totality of the circumstances and view conduct based on multiple protected characteristics in totality, rather than in isolation. Conduct need not be severe or pervasive to constitute harassment, and no specific number of incidents or specific level of egregiousness is required. The finder of fact shall consider the following factors; provided, that this list is not exhaustive and the presence or absence of any single factor shall not be determinative:
(A) The frequency of the conduct;
(B) The duration of the conduct;
(C) The location where the conduct occurred;
(D) Whether the conduct involved threats, slurs, epithets, stereotypes, or humiliating or degrading conduct; and

(E) Whether any party to the conduct held a position of formal authority over or informal power relative to another party.
(4) The finder of fact may find that conduct constitutes unlawful harassment regardless of the following circumstances:
(A) The conduct consisted of a single incident;
(B) The conduct was directed toward a person other than the complainant;
(C) The complainant submitted to or participated in the conduct;
(D) The complainant was able to complete employment responsibilities despite the conduct;
(E) The conduct did not cause tangible physical or psychological injury;
(F) The conduct occurred outside the workplace; or
(G) The conduct was not overtly directed toward a protected characteristic.
(d) Prohibited acts that otherwise would constitute unlawful discriminatory practices based upon the credit information of an individual under subsections (a) or (b) of this section shall not apply:
(1) Where an employer is otherwise required by District law to require, request, suggest, or cause any employee to submit credit information, or use, accept, refer to, or inquire into an employee's credit information.
(2) Where an employee is applying for a position as or is employed as a police officer with the Metropolitan Police Department, as a special police officer or campus police officer appointed pursuant to § 5-129.02(a), or in a position with a law enforcement function;
(3) To the Office of the Chief Financial Officer of the District of Columbia;
(3A) To the District of Columbia Retirement Board;
(4) Where an employee is required to possess a security clearance under District law;
(5) To disclosures by District government employees of their credit information to the Board of Ethics and Government Accountability or the Office of the Inspector General, or to the use of such disclosures by those agencies;
(6) To financial institutions, where the position involves access to personal financial information; or
(7) Where an employer requests or receives credit information pursuant to a lawful subpoena, court order, or law enforcement investigation.
(e) For the purposes of this section, the term:
(1) "Credit information" means any written, oral, or other communication of information bearing on an employee's creditworthiness, credit standing, credit capacity, or credit history.
(2) "Financial institution" shall have the same meaning as provided in § 26-551.02(18).

(3) “Inquire” means any direct or indirect conduct intended to gather credit information using any method, including application forms, interviews, and credit history checks.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellees' Opening Brief was sent via this Court's e-filing system on June 2, 2023 to all counsel of record.

/s/ Charles D. Tobin
Charles D. Tobin (#455593)

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.

/s/Charles D. Tobin
Signature

22-cv-25
Case Number(s)

Charles D. Tobin
Name

June 2, 2023
Date

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Email Address