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District of Columbia

I. AT-WILL EMPLOYEMENT

A. Statute

There are numerous relevant provisions of the District of Columbia Code relating to "at-will" employment. *See* D.C. CODE § 2-1401.03 (providing exceptions for discriminatory practices that are not intentionally devised or operated to contravene the prohibitions of the Human Rights Chapter of the Code and can be justified by business necessity); § 2-1402.11 (prohibiting discrimination by employers, employment agencies or labor organizations 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, or political affiliation of any individual); § 11-1913 (providing protection of employment for jurors); § 12- 301(4) (providing a one year statute of limitation for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment causes of action); § 16-584 (providing that no employer shall discharge an employee for the reason that a creditor of the employee has subjected unpaid earnings of the employee to garnishment); § 23-542 (prohibiting the interception, disclosure, and use of wire or oral communications in the District of Columbia; amended penalty in 2012 to, "not more than the amount set forth in section 101 of the Criminal Fine Proportionality Amendment Act of 2012."); § 32-409 (providing that an employment agency, employment counseling service, employer-paid personnel service, or employment counselor shall receive written consent before disclosing a job-seeker's private information to anyone other than the Mayor, for the purpose of investigating compliance with the Code); § 32-1001 (providing that persons employed in the District of Columbia should be paid at wages sufficient to provide adequate maintenance and to protect health); § 32-1003 (setting the minimum wage in the District of Columbia at $ 10.50 per hour as of July 1, 2015, with incremental annual increases reaching $15.00 per hour by July 1, 2020); § 32- 1004 (providing for exceptions to the minimum wage requirements of § 32-1003 for any employee employed in a bona fide executive, administrative, or professional capacity, or any employee engaged in the delivery of newspapers to the home of the consumer); § 32-1008 (providing the duties of employers to keep employment records for three years); § 32-1012 (governing civil liability of employers who pay less than minimum wage); § 36-401 (providing definitions for the Trade Secrets Chapter of the Code)

B. Case Law

It has long been settled in the District of Columbia that an employer may discharge an at-will employee at any time and for any reason, or for no reason at all." *Wallace v. Eckert, Seamans, Cherin & Mellot, LLC*, 57 A.3d 943, 947 (2012) (quoting *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (D.C.1991)).

An employee is "at-will" if the employment contract is for no definite period of time. *Carl v. Children's Hosp.*, 702 A.2d 159, 163 (D.C. 1997) ("The common law that the courts of the District of Columbia have developed over the years is that employment is at will unless a contract or a statute provides otherwise, or unless there is a 'public policy' exception."). In that case, the employment is terminable at the will of either party absent clear evidence of the parties' intent to contract otherwise. *Dunaway v. Int'l Bhd. of Teamsters*, 310 F.3d 758, 766 (D.C. Cir. 2002) (internal citations omitted). To discern the intent of the parties in a breach of contract action, a court may "look to such factors as the express terms of the contract, evidence of surrounding circumstances, or the payment of additional consideration[,]" as well as to the absence of a definite term of employment. *Hartman v. C.W. Travel, Inc.*, 792 F.2d 1179, 1180–1181 (D.C. Cir. 1986) (internal citation omitted).

To rebut the presumption that employment is at-will under District of Columbia law, and thereby sustain a cause of action for wrongful discharge under a breach of contract theory, a plaintiff must provide evidence of clear contractual intent on the part of both the employer and the employee. *Daisley v. Riggs Bank, N.A.*, 372 F.Supp.2d 61, 68 (D.D.C. 2005) (internal citations omitted).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

In the District of Columbia, if an employer's personnel or policy manual distributed to all employees clearly limits its discretion to terminate an indefinite employment or sets forth certain procedures for the termination, such evidence will overcome the at-will presumption. *Sisco v. GSA Nat'l Capital Fed. Credit Union*, 689 A.2d 52, 54 (D.C. 1997). Such a promise, if supported by adequate consideration, creates a triable issue of fact as to the existence of an implied contract for continued employment. *Id.*; *see also Austin v. Howard Univ.*, 267 F.Supp.2d 22, 25 (D.D.C. 2003) ("Whether an employee handbook creates contractual rights for an employee is a question for a jury."); *Howard Univ. v. Lacy*, 828 A.2d 733, 737 (D.C. 2003); *Dantley v. Howard Univ.*, 801 A.2d 962, 965 (D.C. 2002); *Strass v. Kaiser Found. Health Plan*, 744 A.2d 1000, 1014 (D.C. 2000).

A manual that contains specific preconditions for termination is sufficiently clear to rebut thepresumption of at-will employment. *Washington Welfare Ass'n v. Wheeler*, 496 A.2d 613, 616 (D.C. 1985). But general references to permanent employees and reasons the management can terminatesuch employees is too ambiguous to rebut the presumption. *Perkins v. District Gov't Employees Fed. Credit Union*, 653 A.2d 842, 843 (D.C. 1995).

2. Provisions Regarding Fair Treatment

There are no provisions in the District of Columbia Code or relevant case law regarding fair treatment provisions providing an exception to the general rules regarding employment at-will.

3. Disclaimers

District of Columbia courts have held that an employer may avoid contractual liability arising from its policy statements by an additional statement that clearly and conspicuously disclaims contractual intent. *See Smith v. Union Labor Life Ins. Co.*, 620 A.2d 265, 269 n.1 (D.C. 1993) (finding employer could discharge employee with or without cause when handbook stated, "[t]his handbook is intended only for your information and guidance; it is not an employment contract"). However, the courts have also held that the inclusion of a contractual disclaimer does not lead inevitably to the conclusion that an employer is relieved of any obligation to comply with the manual's terms under District of Columbia law. *Austin v. Howard Univ.*, 267 F. Supp. 2d 22, 25 (D.D.C. 2003). "The legal effect of such a disclaimer is, in the first instance, a question for the court to decide." *Strass v. Kaiser Found. Health Plan of Mid-Atl.*, 744 A.2d 1000, 1011 (D.C. 2000) (citing *Smith v. Union Labor Life Ins. Co.,* 620 A.2d 265, 269 (D.C.1993)). The D.C. Court of Appeals has held that for preconditions to termination contained in an employer's written policies to be, "unenforceable at law, a manual purporting to restrict the grounds for termination must contain language clearly reserving the employer's right to terminate at will." *Sisco v. GSA Nat. Capital Fed. Credit Union*, 689 A.2d 52, 55 (D.C. 1997). Applying this rule, the court has often found that a jury question is created as to whether conditions in an employee handbook create contractual obligations on the part of the employer when the handbook contains a disclaimer and other statements that create an ambiguity as to the meaning or scope of the disclaimer. *Dantley v. Howard Univ.*, 801 A.2d 962 (D.C. 2002) (holding genuine issue of material fact regarding whether Employee Handbook created contract precluded summary judgment); *Strass v. Kaiser Found. Health Plan*, 744 A.2d 1000 (D.C. 2000) (holding that jury question was properly created as to whether statements in Employee Handbook created contract where disclaimer stated

that Employee Handbook was not, "a contract, but rather a statement of the intention of the [employer], in matters covered by the policies contained herein.").

Neither *Dantley* nor *Strass* provided any clear guidance on how an employer may clearly disclaim contractual intent so as to avoid submission of the issue to the jury. In *Howard University v. Lacy*, the Court of Appeals noted that even when an employee handbook has been found not to create a contract in prior litigation, this finding will not collaterally estop another employee from re-litigating the issue in the future. *Lacy*, 828 A.2d 733, 737 (D.C. 2003). Therefore, to avoid ambiguity creating a jury question in the first place, employers should avoid using any mandatory language, such as "shall" or "will" in discipline and termination policies, as well as including language that expressly affirms the employer's ultimate right to terminate the employee at any time and for any reason, regardless of any of the provisions contained within the handbook.

4. Implied Covenant of Good Faith and Fair Dealing

The District of Columbia recognizes an implied covenant of good faith and fair dealing, but not when such a claim is brought by an at-will employee. *Kerrigan v. Britches of Georgetowne, Inc.*, 705 A.2d 624, 626–627 (D.C. 1997); *Gomez v. Trustees of Harvard Univ.*, 676 F. Supp. 13, 15 (D.D.C. 1987).

A. Public Policy Exceptions

1. General

Under D.C. law, public policy is a narrow exception to the at-will employment rule. The DC Court of Appeals created a public policy exception to the "well established at-will doctrine" for, "wrongful discharge for refusing to violate the law," for the first time in *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 31 (D.C. 1991). The Court later clarified that the exception recognized by the Court in *Adams* was not meant to preclude recognition of other public policy exceptions in the future, should it be appropriate. *Carl v. Children's Hosp.*, 702 A.2d 159, 160 (D.C. 1997)("There is nothing in the *Adams* opinion that bars this court-either a three-judge panel or the court en banc from recognizing some other public policy exception when circumstances warrant such recognition.") In *Carl*, the Court recognized a public policy exception for wrongful termination of an employee based on her participation in the legislative and judicial process, contrary to the interests of her employer. *Carl v. Children's Hosp.*, 702 A.2d 159, 160-161 (D.C. 1997) (en banc). Circumstances will, "constitute grounds for a public policy exception if solidly based on a statute or regulation that reflects the particular policy to be applied." *Clay v. Dist. of Columbia*, CIV 03-466SBC, 2005 WL 641750 (D.D.C. Mar. 17, 2005), *vacated and remanded on other grounds*, 208 F. App'x 6 (D.C. Cir. 2006).

For one, an employer cannot terminate an at-will employee based on complaints that an employer is discriminating against the employee in violation of the D.C. Code. *Compare* D.C. CODE § 2- 1402.11 (prohibiting an employer from discharge any individual on the basis, in whole or in part, of his or her "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation"), *with* D.C. CODE § 2-1402.61(a) (prohibiting retaliation for the exercise of any of the human rights protected by the D.C. Code.); *See also Robertson v. District of Columbia*, 2269 A.3d 1022 (D.C. 2022) (holding that an D.C. court employee, alleging discrimination, had no remedy under the District of Columbia Human Rights Act ("DCHRA") for employment discrimination and failed to state a claim for employment discrimination).

To establish a prima facie case of retaliation under § 2- 1402.61(a), a plaintiff must show (1) that he or she was engaged in a statutorily protected activity, (2) that his or her employer took an adverse action, and (3) that there was a causal relationship between the protected activity and the adverse action. *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 368 (D.C. 1993). Retaliation can also be in the form of demanding repayment of a loan

to an employee for discriminatory reasons. *See, Arthur Young*, 631 A.2d 354 (holding that there was no error in a jury verdict finding an employer's demand for repayment of a loan to an employee in retaliation for the employee's complaints of discrimination, in violation of the D.C. Code § 2-1402.61, *formerly* § 1-2525).

2. Exercising a Legal Right

Terminating an employee for exercising a legal right is considered to be against public policy in the District of Columbia. *See Atl. Richfield Co. v. D.C. Comm'n on Human Rights*, 515 A.2d 1095, 1101 (D.C. 1986) (holding an employer's threat that it would see to it that the employee "would never work in the District of Columbia if she pressed her discrimination claim" was retaliatory, and thus, in violation of the District of Columbia Human Rights Act, D.C. Code § 2-1402.61, *formerly* § 1-2525). But *see, Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997) (holding plaintiff failed to state a claim for termination in violation of public policy when she filed a claim under the Pregnancy Discrimination Act ("PDA") based on her exposure to radiation during her pregnancy because the PDA stated that a woman affected by pregnancy shall be treated the same as other employees).

3. Refusing to Violate the Law

It is against public policy to terminate an employee for refusing to violate the law. Thus, an employee can claim wrongful discharge if he is terminated for his refusal to violate the law. *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991) (finding it was unlawful for an employer to discharge an employee for the employee's refusal to drive without a valid inspection sticker because the employee was forced "to choose between breaking the law and keeping his job"). See also *Riggs v. Home Builders Inst.*, 203 F. Supp. 2d 1 (D.D.C. 2002) (holding employee stated a claim for wrongful discharge in violation of public policy when he alleged that he was terminated for refusal to participated in political activities prohibited by federal tax laws).

4. Exposing Illegal Activity (Whistleblowers)

An employer wrongfully discharges an employee if the discharge is based on the employee exposing the employer's illegal activity. See, e.g., *Washington v. Guest Servs., Inc.*, 718 A.2d 1071, 1080 (D.C. 1998) (holding that cook stated a claim for wrongful discharge, in violation of public policy, when cook told her co-worker to stop spraying steel cleaner where the plaintiff was cooking, contaminating the food, which violates numerous express statutes, and employer fired cook for giving this instruction, which contradicted that of the manager); *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 807 (D.C. 1999) (holding employee stated wrongful discharge claim under public policy exception to the at-will employment doctrine where employee alleged that he recorded and reported employer's alleged bribe of government official, that he assisted Federal Bureau of Investigation (FBI) in the investigation of corrupt influence with respect to a federal government construction grant, and that he was terminated after he informed employer of pending arrests and his role in the investigation of the bribe).

III. CONSTRUCTIVE DISCHARGE

Under District of Columbia law, "constructive discharge occurs when the employer deliberately makes working conditions intolerable and drives the employee into an involuntary quit. There is no requirement that the employer intend to force the employee to leave…[n]or is there a requirement that the employee stay in an intolerable workplace for a particular period of time…Instead, courts have focused on the existence of aggravating conditions in the workplace which would lead a reasonable person to resign." *Atl. Richfield v. D.C. Comm'n on Human Rights*, 515 A.2d 1095, 1101 (D.C. 1986) (finding employee was constructively discharged where she was "subject to a continuous barrage of derogatory comments about her appearance, behavior, and morality" and that such conditions would have forced a reasonable person to resign); see also *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 362 (D.C. 1993) (finding two broad categories for determining constructive discharge: the first, where the employee was subjected to working conditions shown in *Atlantic Richfield*, and the second, "working conditions in which the employee 'reasonably expectedopportunities for advancement' but the employer's discriminatory actions or omissions 'essentially locked [the employee] into a position from which [the

employee] could apparently obtain no relief.'" (internal citations omitted); see generally *Hancock v. Bureau of Nat'l Affairs, Inc.*, 645 A.2d 588, 589 (D.C. 1994) ("a constructive discharge requires the employee's affirmative act of quitting whereas a regular discharge is accomplished by the employer's act of dismissing the employee."); *Russ. v. Van Scoyoc Assocs.*, 59 F. Supp. 2d 20 (D.D.C. 1999) (holding that intolerability of conditions for purposes of constructive discharge is assessed by an objective standard); *Walden v. Patient Centered Outcomes Research Institute*, 177 F.Supp.3d 336 (D.D.C. 2016) (holding that plaintiff's claim for constructive discharge was not valid as she resigned subsequent to rejecting the ability to adhere to the company's "performance improvement plan.").

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

Generally, there is a presumption that employment for an unspecified time is terminable at will. *Sorells v. Garfinkel's Brooks Bros., Miller & Rhoads, Inc.*, 565 A.2d 285, 289 (D.C. 1989) (internal citations omitted). This presumption, however, may be rebutted by "evidence that the parties intended employment to be for a fixed period." *Sullivan v. Heritage Found.,* 399 A.2d 856, 860 (D.C. 1979). "Such an intention may be gleaned from the facts and circumstances of the case and the conduct of the parties." *Id*.

Language must be unambiguous to overcome the presumption of at-will employment. Compare *Elliot v. Healthcare Corp.*, 629 A.2d 6, 8 n.3 (D.C. 1995) (finding manual specified that employees could use grievance procedures to protest suspensions or dismissals), with *Perkins v. Dist. Gov't Emps. Fed. Credit Union*, 653 A.2d 842, 843 (D.C. 1995) (finding language was ambiguous because it could have meant that the employer must give two weeks notice before termination for cause or it might have meant that the employer, "in [its] discretion," "may" invoke one of the alternatives or it may invoke none, exercising instead its traditional right to terminate the employment at will).

In the District of Columbia, there are statutory provisions that allow the District's government to exercise general discipline regarding its employees. The D.C. government's adverse and corrective disciplinary system has been replaced by a more positive approach towards employee discipline. D.C. CODE § 1-616.51. The statute includes:

(1) a provision that disciplinary actions may only be taken for cause;

(2) a definition of the causes for which a disciplinary action may be taken;

(3) prior written notice of the grounds on which the action is proposed to be taken;

(4) a written opportunity to be heard before the action becomes effective, unless the agency head finds that taking action prior to the exercise of such opportunity is necessary to protect the integrity of government operations, in which case an opportunity to be heard shall be afforded within a reasonable time after the action becomes effective; and

(5) an opportunity to be heard within a reasonable time after the action becomes effective when the agency head finds that taking action is necessary because the employee's conduct threatens the integrity of government operations; constitutes an immediate hazard to the agency, to other District employees, or to the employee; or is detrimental to the public health, safety or welfare.

Id.

B. Status of Arbitration Clauses

There is well-established preference to arbitrate disputes when parties have so agreed. *Benefits Commc'n Corp. v. Klieforth*, 642 A.2d 1299, 1303 (D.C. 1994) (internal citations omitted). This is true in the employment context. *Id.* (finding arbitration agreement applied to claims of alleged discrimination in violation of the D.C. Human Rights Act ("DCHRA") where the employer and employee have agreed to arbitrate disputes of that nature); *Umana v. Swidler & Berlin, Chartered*, 745 A.2d 334, 336 (D.C. 2000) (holding broad language of arbitration clause in employment agreement covered former employee's claim against law firm that he was wrongfully deprived of his partnership); *See TRG Customer Solutions, Inc. v. Smith*, 226 A.3d 751 (D.C. 2020) (holding that employees can waive the arbitration clause in a valid contract and that the employee effectively waived his right to invoke the arbitration clause under his employment contract).

V. ORAL AGREEMENTS

A. Promissory Estoppel

To hold a party liable under the doctrine of promissory estoppel there must be a promise which reasonably leads the promisee to rely on it to his detriment, with injustice otherwise not being avoidable. *Bender v. Design Store Corp.*, 404 A.2d 194, 196 (D.C. 1979) (internal quotation marks omitted). Thus, to allege promissory estoppel in the employment context, one must show that the employee relied on the promise of employment. Compare *Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith of Washington, D.C.* v. Beards, 680 A.2d 419, 432 n.7 (D.C. 1996) (affirming the trial court's finding that no basis for a promissory estoppel claim, even assuming that Bible Way Church had promised to employ the plaintiff for as long as she desired, since there was nothing to indicate that she had relied on such a promise), with *Riefkin v. E.I. Du Pont De Nemours & Co.*, 290 F. 286, 289 (D.C. Cir. 1923) (finding employee relied to his detriment on employer's promise that if the plaintiff would switch jobs then the employer would give "permanent employment" to plaintiff "so long as he rendered satisfactory service and was loyal to its interests" by giving up his position with the government, and thus, the employer could not terminate him merely because his services were no longer required).

B. Fraud

To make a claim for fraud in the District of Columbia, one must show: (1) false representation, (2) concerning a material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) upon which reliance is placed. *Wiggins v. District Cablevision*, 853 F. Supp. 484, 498 (D.D.C. 1994) (finding a former employee's claim that employer fraudulently marked employment records and termination forms to indicate that the plaintiff voluntarily quit, failed to allege, with particularity, how he relied to his detriment on the alleged false entry by defendants in the employment file). A claim for fraud must be stated with particularity); *Ehlen v. Lewis*, 984 F. Supp. 5, 9 (D.D.C. 1997) (plaintiff in a fraud claim must prove each and every element by the "clear and convincing evidence" standard).

C. Statutes of Fraud

In the District of Columbia, an action may not be brought to charge ... a person upon an agreement made that is not to be performed within one year from the making thereof, unless the agreement upon which the action is brought, or a memorandum or note thereof, is in writing, which need not state the consideration, and is signed by the party to be charged therewith or a person authorized by him. *Wemhoff v. Investors Mgmt. Corp. of Am.*, 455 A.2d 897, 898 n.1 (D.C. 1983).

Thus, an oral contract contemplating long-term employment is void under statute of frauds. *Gebhard v. GAF Corp.*, 59 F.R.D. 504 (D.C. Cir 1973); *Clampitt v. Am. Univ.*, 957 A.2d 23 (D.C. 2008) (finding private university employee's oral contract with university, providing that employee would hold the job until the age of 70 years, could not be performed within a year, and thus employee's action to enforce the oral agreement was barred by

statute of frauds). But if a party admits to the existence of an oral contract, the party waives their opportunity to interpose the Statute of Frauds. *Wemhoff*, 455 A.2d at 899.

VI. DEFAMATION

A. General Rule

"One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect [her] fitness for the proper conduct of [her] lawful business, trade or profession…is subject to liability without proof of special harm." *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 877-78 (D.C. 1998); *see Robertson v. District of Columbia*, 269 A.3d 1002 (D.C. 22022). "A statement is 'defamatory' if it tends to injure the plaintiff in [her] trade, profession or community standing, or lower [her] in the estimation of the community." *Wallace*, 715 A.3d at 877 (quoting *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990)). "If it appears that the statements are at least capable of a defamatory meaning, [then] whether they were defamatory and false are questions of fact to be resolved by the jury." *Id.* Not every uncomplimentary publication, however, is libelous. "[A]n allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiff appear odious, infamous, or ridiculous." *Johnson v. Johnson Publ'g Co.*, 271 A.2d 696, 697 (D.C. 1970) (citation omitted).

In *Wallace*, for example, an employee alleged that she was defamed, inter alia, in her performance evaluations. Specifically, she alleged that the defendants stated falsely that: she "played hookie"; that she produced work of "inferior quality," some of which was "not worth reading"; that she had an "attitude problem" and behaved in an unruly manner; and that, as an excuse for one of her absences from the office, she falsely claimed that the ceiling of her home had fallen. *Wallace*, 715 A.2d at 876-77. The court determined that the statements were capable of defamatory meaning, and therefore, the plaintiff's claim could survive a motion to dismiss. *Id.* at 878; see also *Crowley v. N. Am. Telecomm. Ass'n*, 691 A.2d 1169, 1172 (D.C. 1997) (holding former employee sufficiently alleged defamation by his former employer by stating in his complaint that his former supervisor told his former co-workers that an empty bullet casing found in hallway was probably left by former employee).

1. Libel

A complaint for libel must be filed within one year of the accrual of the cause of action. D.C. CODE § 12-301(4). In such cases, the claim arises on the date the defamatory statement was published, and the statute of limitations runs from that date. *Mullin v. Wash. Free Weekly, Inc.*, 785 A.2d 296, 298 (D.C. 2001); *Oparaugo v. Watts*, 884 A.2d 63, 72 (D.C. 2005) (citing *Mullin* and finding that "[a] complaint for libel must be filed within one year of the accrual of the cause of action . . . [i]n such cases, the claim arises on the date the defamatory statement was published, and the statute of limitations runs from that date").

2. Slander

A complaint for slander must be filed within one year of the accrual of the cause of action. D.C. Code § 12-301(4). In such cases, the claim arises on the date the defamatory statement was published, and the statute of limitations runs from that date. *Mullin*, 785 A.2d at 298; *Oparaugo*, 884 A.2d at 72.

B. Reference

There are no provisions in the District of Columbia Code or reported case law regarding negligent references or negligent referrals.

C. Privileges

The law has long recognized a privilege for anything "said or written by a master in giving the character of a servant who has been in his [or her] employment." *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 879 (D.C. 1998) (internal citations omitted); *see Greenya v. George Washington Univ.*, 512 F.2d 556, 563 (1975) (explaining that faculty members of educational institutions "enjoy a qualified privilege to discuss the qualifications and character of fellow officers and faculty members, if the matter communicated is pertinent to the functioning of the educational institution"). In the District of Columbia, this is a qualified privilege because it exists only "in the absence of malice." *Wallace*, 715 A.2d at 879. In order to overcome the privilege, it is "incumbent on the party complaining to show malice." *Id.* (internal citations omitted); *see Benic v. Reuters Am.*, Inc., 357 F. Supp. 2d 216, 221 (D.D.C. 2004) (holding defamation did not exist where an employer stated that the employee left as part of company restructuring, when in fact the employee was fired for managing badly).

"[A] person who consents to the publication of comments about himself has no cause of action [for defamation]." *Kraft v. William Alanson White Psychiatric Found.*, 498 A.2d 1145, 1150 (D.C. 1985). In*Wallace*, for example, the defendant alleged that the plaintiff implicitly consented to the communications— her evaluations— because she had asked to hear the evaluations of attorneys that had worked with her previously. 715 A.2d at 881. The court found the employee's alleged voluntary requests for these communications did not constitute consent to the alleged defamatory statements. *Id.* at 881-82; see also *Kraft*, 498 A.2d at 1148 (finding that the plaintiff was "on notice" that his supervisors would evaluatehis work based on "literature given to him by the foundation" and by his previous experience at the foundation).

D. Other Defenses

1. Truth

Truth is an absolute defense to defamation, and the employee bears the burden of proving that the alleged defamatory statement or action was false. *Moss v. Stockard*, 580 A.2D 1011, 1022 (D.C. 1990) (citing *Global Van Lines v. Kleinow*, 411 A.2d 62, 64 (D.C. 1980); *see also*, *Woodfield v. Providence Hosp.*, 779 A.2d 933, 938 (D.C. 2001) (finding employee could not bring a defamation suit where the employer released more information than was described in the employee manual. This additional information was true, and defamation requires the statements to be false rather than excessive).

2. No Publication

"Publication" in the law of defamation is the communication of defamatory matter to a third person or persons. *Carter v. Hahn*, 821 A.2d 890, 893 (D.C. 2003) (stating that defamation claim requires proof that the defendant published the statement without privilege to a third party). A plaintiff must prove that publication occurred outside the normal channels, or that the normal manner for handling such information resulted in an unreasonable degree of publication in light of the purposes of the privilege, or that publication was made with malicious intent. *Greenya v. George Washington Univ.*, 512 F.2d 556, 563 (D.C. Cir. 1975) (since faculty members of educational organizations have the privilege of discussing the qualifications of other officers and faculty members, the posting of a note to all members not to hire the appellant was pertinent to the functioning of the education organization). If plaintiff shows publication, however, then the burden is upon the defendant to show that the publication was incidental and reasonably necessary to communicating the defamatory matter to the person defamed. *Wash. Annapolis Hotel Co. v. Riddle*, 171 F.2d 732, 739 (D.C. 1948).

3. Self-Publication

Self-publication, an exception to the rule that the defendant cannot be held accountable if a plaintiff voluntarily republishes a defamatory statement, is not recognized in the District of Columbia. See *Austin v. Howard Univ.*, 267 F. Supp. 2d 22, 30 (D.C. Cir. 2003) ("The parties do not cite, nor has the court identified, any

authority which either suggests or affirmatively states that self-defamation is a cause of action recognized in the District of Columbia.").

4. Invited Libel

If one invites criticism and free expression by others of their opinion of his conduct and cause, "he should not be heard to complain if the criticism so invited is not gentle." *Fisher v. Wash. Post Co.*, 212 A.2d 335, 337 (D.C. App. 1965) (finding owner of local art gallery who invited local critic to viewexhibition could not complain that criticism extended to paintings' surroundings).

5. Opinion

In defamation actions, assertions of opinion on matters of public concern receive full constitutional protection if they do not contain a provably false factual allegation. U.S. Const. amend. I;see *Washington v. Smith*, 80 F.3d 555, 556 (D.C. Cir. 1996) (holding statement in college basketball season preview magazine that coach "usually finds a way to screw things up" and that coming season "will be no different" was not objectively verifiable and false and therefore could not constitute defamation). "A statement of opinion is actionable only if it has an explicit or implicit factual foundationand is therefore objectively verifiable." *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000).

6. Actual Harm to Reputation

Plaintiffs need not show actual harm to reputation in certain defamation actions, however, it is a general requirement in D.C. depending on the type of defamation plead. Washington, D.C., applies the general *Gertz* limitation to actual injury in defamation cases, and "actual injury" includes all usual tort damages, such as humiliation and suffering. *See Phillips v. Evening Star Newspaper Co.,* 424 A.2d 78 (1980)(internal citations omitted). A statement is defamatory as a matter of law ("defamatory *per se* ") if it is so likely to cause degrading injury to the subject's reputation that proof of that harm is not required to recover compensation. *Carey v. Piphus*, 435 U.S. 247, 262, 98 (1978); *Westfahl v. District of Columbia*, 75 F.Supp3d 365 (D.D.C. 2014) (holding certain false allegations in defamation *per se* cases require no showing of special damages).

Unlike other jurisdictions, defamation plaintiffs cannot rely merely on a showing of actual malice in order to prove allegations of special damages, and such damages include actual harm to one's reputation. *Robertson v. McCloskey*, 680 F.Supp. 498 414 (D.D.C 1988). However, D.C. courts have upheld the award of "nominal" compensatory damages in a defamation case and imposed punitive damages. *See Ayala v. Washington*, 679 A.2d 1057 (D.C. 1996). *Ayala* does not suggest that nominal damages in a defamation action is enough to show actual harm, rather, it simply provides an instance that D.C. has allowed the imposition of $1 compensatory damages to justify the imposition of punitive damages against a defendant. *Id.*

E. Job References and Blacklisting Statutes

There are no blacklisting statutes in the District of Columbia Code or reported case law on the issue.

F. Non-Disparagement Clauses

There are no provisions of the District of Columbia Code dealing with non-disparagement clausesor reported case law on the issue.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress Claims

Under District of Columbia law, "[to] succeed on a claim of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Kitt v. Capital Concerts, Inc.*,742 A.2d 856, 861 (D.C. 1999); *Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 211 (D.C. 1997). A claim for intentional infliction of emotional distress contemplates acts "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Duncan*, 702 A.2d at 211. Generally, employer-employee conflicts do not rise to the level of outrageous conduct. *Id.* at 211-212. This does not suggest, however, "that there can never be a claim for intentional infliction of emotional distress arising from an employer-employee relationship." *Id.* at 212 n.4; *see, e.g., Howard Univ. v. Best*, 484 A.2d 958, 986 (D.C. 1984) ("Creation of a hostile work environment by racial or sexual harassment may, upon sufficient evidence, constitute a prima facie case of intentional infliction of emotional distress."); *Hogan v. Forsyth Country Club Co*., 340 S.E.2d 116, 123 (N.C. App. 1986) (finding that a refusal to grant pregnancy leave or permission to go to hospital and cursing of pregnant employee, while improper, did not constitute outrageous conduct as a matter of law).

B. Negligent Infliction of Emotional Distress

In the District of Columbia, "a plaintiff can recover for negligent infliction of emotional distress in two situations: (1) when the distress results 'from a direct physical injury' and (2) when there is no physical impact, but the defendant's negligence places the plaintiff in a zone of physical danger where the plaintiff fears for his or her own safety." *Ryczek v. Guest Servs., Inc.*, 877 F. Supp. 754, 764 (D.D.C. 1995) (citing *Mackey v. United States,* 8 F.3d 826, 831 (D.C. Cir. 1993); *District of Columbia v. McNeill,* 613 A.2d 940, 943 (D.C .1992)). In Ryczek, a former employee sued her employer alleging sexual harassment by a female supervisor who, allegedly through verbal comments and sexually suggestive conduct, made it difficult for the employee to continue to work. Id. The court held that even if the plaintiff suffered emotional distress, there was no showing that the alleged touchings amounted to "direct physical injury," or that the plaintiff's safety was imminently endangered. *Id.* Accordingly, the plaintiff's claim for negligent infliction of emotional distress was rejected. *Id.*; see also *McMillan v. Nat'l R.R. Passenger Corp.*, 648 A.2d 428 (D.C. 1994) (finding that the employee failed to establish a prima facie case of negligent infliction of emotional distress because there was no evidence that he was in the zone of imminent physical danger); *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 759 n.9 (D.C. 2001) (concluding that appellee was not liable for negligent infliction of emotional distress as a result of security guard's alleged sexual touching of minor whom he had stopped on suspicion of shoplifting because there was no evidence that the minor ever feared for her physical safety and the conduct alleged by the minor was not negligence, but rather an intentional tort).

VIII. PRIVACY RIGHTS

A. Generally

Case law in the District of Columbia restates the basic constitutional principle that "[t]he Fourth Amendment protects an individual's reasonable expectations of privacy from unreasonable intrusions bythe state." *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1007 (D.C. 1985) (citing *United States v. Chadwick*, 433 U.S. 1, 7 (1977)).

Under D.C. Code § 32-409, an employment agency, employment counseling service, employer- paid personnel service, or employment counselor shall obtain the express written authorization of a job- seeker before disclosing the job-seeker's name, home address, or telephone number to any person otherthan the mayor.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

There are no eligibility verification and reporting procedures in the District of Columbia Code orreported case law on the issue.

2. Background Checks

Under the Fair Criminal Record Screening Amendment Act of 2014, an employer may not inquire into a job applicant's criminal background until making a conditional offer of employment. Fair Criminal Record Screening Amendment Act of 2014, Bill § 20-642 (D.C. 2014). Under this ban the box legislation, that conditional offer of employment may be withdrawn if there is a legitimate business reason in light of factors such as "[t]he specific duties and responsibilities necessarily related to the employment sought or held by the applicant; [t]he bearing, if any, the criminal offense for which the applicant was previously convicted will have on his or her fitness or ability to perform one or more suchduties or responsibilities; [t]he time that has elapsed since the occurrence of the criminal offense; [t]heage of the applicant at the time of the occurrence of the criminal offense; [t]he frequency and seriousness of the criminal offense; and any information produced by the applicant, or produced on his orher behalf, in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense." *Id*.

C. Specific Issues

1. Workplace Searches

Although an employee might have no reasonable expectation of privacy with respect to an occasional visit by a fellow employee, he would have such an expectation as to an afterhours search of hislocked office by an investigative team seeking materials to be used against him at a termination proceeding. *O'Connor v. Ortega*, 480 U.S. 709, 738 (1987). Each factual analysis shall be looked at on a case-by-case basis. *Dir. of Office of Thrift Supervision v. Ernst & Young*, 795 F. Supp. 7, 10 (D.D.C. 1992) (finding that Ernst & Young employees had no expectation of privacy in their work-related diaries).

2. Electronic Monitoring

In the District of Columbia, it is unlawful for anyone (except an operator of a switchboard, a person acting under color of law, or a person with consent) to willfully intercept any wire or oral communication. *See* D.C. CODE § 23-542.

3. Social Media

There are no provisions in the District of Columbia Code or reported case law dealing with social media.

4. Taping of Employees

There are no provisions in the District of Columbia Code or reported case law dealing with regulating privacy rights and taping of employees.

5. Release of Personal Information on Employees

There are no provisions in the District of Columbia Code or reported case law dealing with the release of personal information on employees.

6. Medical Information

D.C. Code § 7-2071.07(a) provides in relevant part:

The Health Care Ombudsman may review the records of a health benefits plan, the HealthCare Alliance, or other provider, pertaining to a consumer or the consumer's medical records if the consumer or the consumer's legal representative has provided written consent. The confidentiality of the records shall be maintained by the OmbudsmanProgram in accordance with all federal and state confidentiality and disclosure laws.

There is no other guiding law in the District of Columbia that trumps the Privacy Act, 5 U.S.C. §552a, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*., concerning what information employers can access and disclose of their employees.

7. Fair Credit Employment Amendment Act of 2016

Since April 7, 2017, the D.C. Human Rights Act prohibits employers from inquiring about, or otherwise making current or prospective employees submit, information about their credit. D.C. CODE § 2-1402.11(a)(4)(D); *see also* Fair Credit In Employment Amendment Act of 2016, 2016 District of Columbia Laws 21-256 (Act 21-673). Credit information is defined as "any written, oral, or other communication of information bearing on an employee's creditworthiness, credit standing, credit capacity, or credit history". *Id.* at (e).

IX. WORKPLACE SAFTEY

A. Negligent Hiring/Supervision/Retention

To establish a cause of action for negligent supervision, a plaintiff must show that the employer "knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee." *Phelan v. City of Mount Rainier*, 805 A.2d 930, 937-38 (D.C. 2002) (citing *Giles v. Shell Oil Corp.*, 487 A.2d 610, 613 (D.C. 1985)).

Potential recovery for negligent hiring or retention of an employee is not based on *respondeat superior,* but rather on proof of negligence on the part of the employer himself. *Id.* (citing *Morgan v. Psychiatric Inst. Of Wash.*, 692 A.2d 417, 423 (D.C. 1997); *see Schecter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 431 (D.C. 2006) ("One dealing with the public is bound to use reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an unfit employee. When an employer neglects this duty and as a result injury is occasioned to a third person, the employer may be liable even though the injury was brought about by the willful act of the employee beyond the scope of his employment. This principle has been applied in a variety of cases dealing with innkeepers, carriers, stores, apartment houses, and other businesses.").

B. Interplay With Worker's Compensation Bar

There are no provisions in the District of Columbia Code or reported case law dealing with the interplay with worker's comp. bar.

C. Firearms in the Workplace

Under the District of Columbia's Firearms Control Act, "The carrying of a concealed pistol on private property that is not a residence shall be presumed to be permitted unless the property is posted with conspicuous signage prohibiting the carrying of a concealed pistol, or the owner or authorized agent communicates such prohibition personally to the licensee." D.C. CODE § 7-2509.07 (2015). If employers choose to prohibit firearms on the premises they must notify their employees.

The District of Columbia may prohibit or restrict the possession of firearms on its property and any property under its control. D.C. CODE § 22-4503.02(a). Private persons or entities owning property in the District of Columbia may also prohibit or restrict the possession of firearms on their property; provided, that this subsection shall not apply to law enforcement personnel when lawfully authorized to enter onto private property. *Id.* at (b).

D. Use of Mobile Devices

Unless the device is equipped with a hands-free accessory, use of cell phones while driving is prohibited in the District of Columbia. *See* D.C. CODE § 50-1731.04(a). The provisions of this section shall not apply to the following: (1) Emergency use of a mobile telephone, including calls to 911 or 311, ahospital, an ambulance service provider, a fire department, a law enforcement agency, or a first-aid squad; (2) Use of a mobile telephone by law enforcement and emergency personnel or by a driver of an authorized emergency vehicle, acting within the scope of official duties; (3) Initiating or terminating a telephone call, or turning the telephone on or off. *Id.* at (b).

D.C. Code § 50-1731.05(a) prohibits school bus drivers from using any mobile or electronic devicewhile operating a moving bus carrying passengers, even if the driver is using a hands-free accessory. This does not apply if the driver must place an emergency call to school officials or other emergency services. *Id.*

X. TORT LIABILITY

A. Respondeat Superior Liability

The District of Columbia recognizes the principle of respondeat superior. An employer may be vicariously liable for the acts of its employees. *Penn Central Transportation Co. v. Reddick*, 398 A.2d 27, 29 (D.C.1979)." This doctrine, however, does not automatically attribute any acts of an employee to his employer . . . either (1) the employee's acts must have taken place within the scope of his employment or (2) arguably, he must have used his apparent authority or have been aided by his agency relationship in accomplishing them." *Doe v. Sipper*, 821 F.Supp. 2d 384, 387 (D.D.C. 2011).

B. Tortuous Interference with Business/Contractual Relations

To establish a prima facie case of intentional interference with contractual relations, a plaintiff must show: (1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement ofa breach of the contract; and (4) damages resulting from the breach. *Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 807 (D.C. 2003) (because no employment contract existed there, the prima facie case could not be established, and summary judgment was award to the defendant). If the prima facie case is established, then the burden becomes proving that the conduct was legally justified or privileged. *Id.* (*quoting Paul v. Howard Univ.,* 754 A.2d 297, 308-09 (D.C. 2000)); *Nickens v. Labor Agency of Metro. Wash*., 600 A.2d 813, 819 (D.C. 1991); *Sorrells v. Garfinckel's, Brooks Bros., Miller & Rhoads, Inc.*, 565 A.2d 285, 289 (D.C. 1989).

XI. RESTRICTIVE COVENANTS/NON-COMPETITION AGREEMENTS

A. General Rule

As of October 2022, no employer may require or request that a covered employee sign an agreement or comply with a workplace policy that includes a non-compete provision unless the employee(s): (1) receive(s) $150,000 or more, or (2) receives $250,000 if the employee(s) is a medical specialist. *See* D.C. CODE § 32-581 *et seq*. Additionally, no employer may retaliate against an employee (or threaten to retaliate against an employee) for refusal to comply or agree with a non-compete agreement. *Id.* For employees who can be restricted by non-compete agreements, such agreements must comply with the specific geographical limitation and notice requirements under D.C. law. *See* D.C. CODE § 32-581.03 (a)-(b).

D.C. has long held that covenants not to compete are viewed with disfavor, as they are a form of restraint of trade, but reasonable restrictions are enforceable. When deciding whether a covenant not to compete is valid, District of Columbia courts employ the Restatement (Second) of Contracts test. To prove an enforceable covenant not to compete, the plaintiff must show: (1) the restriction is reasonable as to time and area; (2)the restriction is needed for the protection of the plaintiff; and (3) the restriction is intended and agreed upon by the parties. *Gryce v. Lavine*, 675 A.2d 67 (D.C. 1996); *Ellis v. James v. Hurson Assocs.*, 565 A.2d 615 (D.C. 1989); *Nat'l Chemsearch Corp. v. Hanker*, 309 F.Supp. 1278 (D.D.C. 1970).

B. Blue Penciling

There are no provisions in the District of Columbia Code or reported case law governing blue penciling. *See Ellis v. James V. Hurson Assocs., Inc.*, 565 A.2d 615, 617-18 (D.C. 1989) ("We need not in this preliminary injunction appeal decide whether or not to adopt a 'blue pencil' rule in this jurisdiction.").

C. Confidentiality Agreements

There are no provisions in the District of Columbia Code or reported case law dealing with confidentiality agreements.

D. Trade Secret Statute

The District of Columbia Uniform Trade Secrets Act (DCUTSA), D.C. Code § 36-401 *et seq*.,provides in relevant part:

> (4) "Trade Secret" means information, including a formula, pattern, compilation, program,device, method, technique, or process, that:
>
> (A) Derives actual or potential independent economic value, from not being generally known to, and not being readily ascertainable by, proper means by another who can obtaineconomic value from its disclosure or sue; and
>
> (B) Is the subject of reasonable effort to maintain its secrecy.

See also Catalyst & Chem. Servs., Inc. v. Global Ground Support, 350 F. Supp. 2d 1, 7 (D.D.C. 2004) (findinggenuine issues of material fact existed with regard to secrecy, value, acquisition as part of a confidential relationship, and disclosure of the alleged trade secrets relating to an aircraft de-icing machine, in violation of D.C. Code § 36-401 *et seq*.). Information that is "generally known or readily ascertainable to the public" cannot constitute a trade secret. *Id.* at 8. The employer has a protectable interest in "trade secrets, confidential knowledge, expert training or fruits of employment." *Saul v. Thalis*, 156 F. Supp. 408, 412 (D.D.C. 1957).

All information reported to or otherwise obtained by the Mayor or the Commission in connectionwith an inspection, investigation, or proceeding under this chapter which contains, or which might reveal a trade secret, shall be considered confidential, except that information may be disclosed to other officers or employees when necessary to administer or enforce this chapter. The Mayor, Commission, or court shall issue orders to protect the confidentiality of trade secrets. D.C. CODE § 32-1119.

XII. DRUG TESTING LAWS

A. Public Employer

In *Turner v. Fraternal Order of Police*, the plaintiff, a District of Columbia police officer, challenged the police department's regulation, which allowed for drug testing, as an invasion of privacy under the Fourth Amendment. 500 A.2d 1005 (D.C. 1985). The court upheld the provision stating that the intrusion was not unreasonable, provided that the basis for the test is related to the officer's fitness for duty. *Id.* at 1009.

"The government may take all necessary and reasonable regulatory steps to prevent or deter that hazardous conduct. Because the gravamen of the evil is performing certain functions while concealing the substance in the body, it may be necessary, as is the case before us, to examine the body or its fluids to accomplish the regulatory purpose." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989) (holding that the necessity of drug testing was allowed where railway employees were engaged in safety- sensitive tasks).

In *District of Columbia v. Davis*, a District of Columbia employee was fired for insubordination, when a drug test determined that there were traces of marijuana in his system. 685 A.2d 389 (D.C. 1996). The court upheld the Office of Employee Appeal's determination that there was substantial evidence in the record to determine that off-duty use of marijuana in violation of Fire Department orders was incompatible with the nature of his employment. *Id.* at 392.

According to the D.C. Code, an employer may only test a prospective employee for marijuana use after a conditional offer of employment has been extended, unless otherwise required by law. D.C. CODE § 32-931(a).

B. Private Employers

There are no provisions in the District of Columbia Code or reported case law dealing with drug testing by private employers.

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

The District of Columbia Human Rights Act (DCHRA) is extremely broad. All employers and employees are covered under this statute, with one limited exception. Employers who employ 5 or less full-time employees are not required to provide accommodations for religious observation. D.C. CODE § 2- 1402.11(c)(5).

B. Types of Conduct Prohibited

Under D.C. CODE § 2-1402.11(a), an employer is prohibited from failing to hire, discharging, segregating, or otherwise discriminating against any individual with respect to employment on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation. It also bars discrimination based on these factors in any apprenticeship or job training programs or in any published notice relating to employment. Furthermore, the statute forbids an employer from failing to hire, discharging, segregating, or otherwise discriminating for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason. Finally, the statute makes it an unlawful discriminatory practice for an employer to refuse to make a reasonable accommodation for an employee's religious observance, unless you employ 5 or less full-time individuals. D.C. CODE § 2-1402.11(c)(5).

Also, employers may not discriminate based on an employee's credit history or worthiness. *Id.* at (a)(4)(D).

1. Retaliation

Under D.C. Code § 2-1402.61, it is an unlawful discriminatory practice to coerce, threaten, retaliate against, or interfere with any person in the exercise or enjoyment of, or on account of havingexercised or enjoyed any right granted or protected under the DCHRA.

2. Garnishment

Under D.C. Code § 16-584, no employer shall discharge an employee for the reason that a creditor of the employee has subjected or attempted to subject unpaid earnings of the employee to garnishment or like proceedings directed to the employer for the purpose of paying a judgment.

3. Workers' Compensation

Under D.C. Code § 32-1542, it is unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under the D.C. Workers' Compensation law.

C. Administrative Requirements

The mere probability of administrative denial of requested relief does not excuse the failure to pursue administrative remedies. *UDC Chairs Chapter v. Bd. of Trustees*, 56 F.3d 1469, 1475 (D.C. Cir. 1995) (citing *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 106 (D.C. Cir. 1986)). Exhaustion of administrative remedies pursuant to the Comprehensive Merit Personnel Act (CMPA), § 1-601.01, *et seq.*, is not a prerequisite to filing a complaint premised on 42 U.S.C. § 1983 violations. *Kelley v. District of Columbia*, 893 F.Supp. 2d 115, 119 n.1 (D.D.C. 2012) ("[e]xhaustion of administrative remedies under the CMPA is thus not a prerequisite to filing a complaint based on federal claims like Section 1983."). A fired District of Columbia corrections employee was not required to exhaust his administrative remedies pursuant to the CMPA because he based his complaint on violations of § 1983. *Savage v. District of Columbia*, No. 03CV184, 2004 U.S. Dist. LEXIS 4422 (D.D.C. Mar. 19, 2004).

However, the court has affirmed a grant of judgment as a matter of law, filed by the District of Columbia, where the plaintiff employee, alleging wrongful constructive discharge, did not exhaust his administrative remedies under D.C. Code § 1-601.01 *et seq. See Burton v. District of Columbia*, 835 A.2d 1076(D.C. 2003).

D. Remedies Available

An action by an employee to recover unpaid wages and liquidated damages may be brought in any court of competent jurisdiction. D.C. CODE § 32-1308(a). The court shall, in addition to any judgment awarded, allow costs of the action, including costs or fees of any nature, and reasonable attorney's fees, to be paid by the defendant. *Id.* at (b).

D.C. CODE § 2-1403.16 allows the court to grant any relief it deems appropriate, including the relief provided in §§ 2-1403.07 (after the complaint has been filed, if the office believes that the status quo must be maintained or there is a need to prevent irreparable injury then injunctive relief may be granted) and 2-1403.13(a) (allows for the payment of compensatory damages to the aggrieved person with no limit as to the amount awarded).

Employees were prohibited from bringing an action under D.C. CODE § 32-1302, to recover unpaid wages for overtime work they had performed, where the action was connected to a collective bargaining agreement, and was properly treated as an action under § 301 of the Labor Management Relations Act, codified at 29 U.S.C. §

185. *Marsans v. Commc'ns Workers of Am.*, No. 87-0782 1989 WL 43831 (D.D.C. Apr. 19, 1989).

The entire workweek, as opposed to individual hours within the workweek, is the relevant unit for determining compliance with the minimum wage prescriptions of the Fair Labor Standards Act and the District of Columbia Minimum Wage Act. *Dove v. Coupe*, 759 F.2d 167 (D.C. Cir. 1985).

An employee brought suit under the DCHRA alleging that the arbitration agreement excluding punitive damages should be held unenforceable. *Booker v. Robert Half Int'l, Inc.*, 315 F. Supp. 2d 94, 95 (D.D.C. 2004). The court agreed and reasoned that a limitation on the remedies available to a claimant undermines the rights protected by statutes such as Title VII and the DCHRA, and hence is an impermissible limitation on the substantive rights afforded by those statutes. *Id.* at 104-05; *see also*, *Daka, Inc. v. Breiner*, 711 A.2d 86, 98 (D.C. 1998) (explicitly holding that punitive damages are available in all discrimination cases under the DCHRA, and subject to only general principles in governing any award of punitive damages).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

An employer shall not deprive an employee of employment, threaten, or otherwise coerce an employee with respect to employment because the employee receives a summons, responds to a summons, serves as a juror, or attends court for prospective jury service. D.C. CODE § 11-1913. An employer who violates this subchapter may be fined up to $300 and imprisoned for not more than thirty (30) days. *Id.* For any subsequent offense, the employer may be fined not more than $5,000 and imprisoned for not more than 180 days. *Id.*

For case law regarding jury duty, *Carl v. Children's Hosp.* cites to an Oregon case, which held that an employer who fired an employee for going on jury duty contrary to the employer's wishes was liable for damages. *Carl*, 702 A.2d 159 (D.C. 1997) (citing *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (Or. 1975)).

B. Voting

There are no provisions in the District of Columbia Code or reported case law dealing with anemployee's right to vote during working hours.

C. Family/Medical Leave

D.C. Code § 32-502, provides in part:

(a) an employee shall be entitled to a total of 16 workweeks of family leave during any 24-month period for:

(1) the birth of a child of the employee;

(2) the placement of a child with the employee for adoption or foster care;

(3) the placement of a child with the employee for whom the employee permanently assumes and discharges parental responsibility; or

(4) the care of a family member of the employee who has a serious health condition.

Moreover, D.C. Code § 32-502(i)(2) provides that, "[a]ny employer who willfully violates this subsection shall be assessed a civil penalty of $1,000 for each offense."

Under both the District of Columbia Family Medical Leave Act, §§ 32-501 to 32-517, and the Family and Medical Leave Act, 29 U.S.C. §§ 2601 to 2654, an employee of a covered employer is entitled to take protected medical leave when unable to perform his or her job functions because of a "serious health condition"; and, under both acts, the existence of a "serious health condition" depends on the nature of care that is required to treat the illness. *Chang v. Inst. for Pub.-Private P'ships, Inc.*, 846 A.2d 318, 326-27 (D.C. 2004).

There are other reported cases mentioning family leave, but the family leave issue is not prominent in those cases. In *Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207 (D.C. 1998), the plaintiff, a pregnant woman who was exposed to radiation on the job, refused to be exposed to the radiation, and went on leave without specifying the type, *e.g.*, sick leave, family or leave of absence. The employer assigned her to family leave and terminated her when the leave time expired. The court granted summary judgment in favor of the employer because the plaintiff failed to state a claim upon which relief could be granted on either her public policy argument regarding pregnancy discrimination, her intentional infliction of emotional distress claim, or her breach of contract claim.

D. Pregnancy/Maternity/Paternity Leave

The District of Columbia's Protecting Pregnant Workers Fairness Act requires that employees provide reasonable accommodation to employee's whose job are affected by pregnancy, childbirth, a related medical condition, or breastfeeding, including:

(A) more frequent or longer breaks;

(B) time off to recover from childbirth;

(C) the acquisition or modification of equipment or seating;

(D) the temporary transfer to a less strenuous or hazardous position or other job restructuring such as providing light duty or a modified work schedule;

(E) having the employee refrain from heavy lifting;

(F) relocating the employee's work area; or

(G) providing private non-bathroom space for expressing breast milk.

See D.C. CODE § 32-1231.01 (2015).

E. Day of Rest Statutes

There are no provisions in the District of Columbia Code dealing with day of rest statutes. In *District of Columbia v. Robinson*, the defendant was accused of violating a Maryland law providing that "no person whatsoever shall work or do any bodily labor on the Lord's Day," and the defendant demurred as to the complaint. 30 App. D.C. 283, 284 (D.C. 1908). "[T]hat the said act of the Maryland legislature has never been enforced in this District [of Columbia], and by disuse has become obsolete," the court of appeals affirmed the lower court's ruling and dismissed the case on the defendant's demurrer. *Id.*

F. Military Leave

D.C. Code § 1-612.03(m-3), provides in relevant part: "An amount (other than travel, transportation, or per diem allowance) received by an employee for military service as a member of the reserve or National Guard

for a period for which he or she is entitled to military leave shall be credited against the pay payable to the employee for the same period."

D.C. Code § 5-704(h)(1), provides in relevant part:

> h)(1) Except as provided in paragraph (2) of this subsection, notwithstanding any other provision of this section, any military service (other than military service covered by military leave with pay from a civilian position) performed by an individual after December1956 shall be excluded in determining the aggregate period of service upon which an annuity payable under this act to such individual or to the surviving spouse or child is to bebased, if such individual or the surviving spouse or child is entitled (or would upon proper application be entitled), at the time of such determination, to monthly old age or survivorsbenefits under § 202 of the Social Security Act based on such individual's wages and self- employment income. If in the case of the individual or the surviving spouse such military service is not excluded under the preceding sentence, but upon attaining retirement age (as defined in § 216(a) of the Social Security Act) he or she becomes entitled (or would upon proper application be entitled) to such benefits, the District of Columbia RetirementBoard shall re-determine the aggregate period of service upon which such annuity is based,effective as of the 1st day of the month in which he or she attains such age, so as to exclude such service. The Secretary of Health and Human Services shall, upon the request of the Mayor, inform the Mayor whether or not any such individual or the surviving spouse or child is entitled at any specified time to such benefits; and the Mayor shall forward this information to the District of Columbia Retirement Board.

D.C. Municipal Regulation 6-B, § 1262, provides in relevant part: Military leave - authorized absence without loss of or reduction in pay, leave, or credit for time or service, for the performance of military service as provided in this section. There is no reported case law dealing with issues of military leave and District of Columbia law. All cases point to federal statutes for guidance. *Cf. Beeton v. District of Columbia*, 779 A.2d 918, 920, n.4 (D.C. 2001) (mentioning officers on military leave but dealing with issues of disparate treatment and defamation, not military leave); *see also, Lemon v. United States*, 564 A.2d 1368, 1377 (D.C. 1989) (finding that the grant of a second continuance to the government because one of its witnesses was on military leave was delay attributable to the prosecution, because it was the government's responsibility to assure the availability of its witnesses before agreeing to the trial date).

G. Sick Leave

The District of Columbia's sick leave is codified under D.C. Code §§ 32-531.01 to 531.16, which isknown as the Accrued Sick and Safe Leave Act of 2008, and amended by D.C. Law 20-89, Act 24-30, the Earned Sick and Safe Leave Amendment Act of 2021. When referring to "employer," these Acts include any legal entity that directly or indirectly employs or exercises control over the terms and conditions of employment of an employee, temporary services or staffing agencies, and the District government. In sum, the Acts provide that any individual employed by an employer, including tipped restaurant and bar employees are included within the statute unless specifically exempted. Those exempted include independent contractors, students, health care workers who participate in a voluntary premium pay program, volunteers at an educational, charitable, religious, or nonprofit organization, any lay member elected or appointed to office in a religious organization and engaged in religious functions, and casual babysitters.

A company's size dictates how leave is accrued for its employees. For a company or organizationwith 100+ employees, 1 hour for every 37 hours worked (capped at 7 days per calendar year); 25-99 employees: 1 hour for every 43 hours worked (capped at 5 days per calendar year); 1-24 employees: 1 hour for every 87 hours worked (capped at 3 days per calendar year). Tipped restaurant and bar employees accrue 1 hour for every 43 hours worked (capped at 5 days per calendar year), regardless of employer size. Leave accrues at the beginning of employment and can be used after 90 days of employment, and as accrued thereafter. If rehired within 12 months, previously accrued unused leave is reinstated and can be used immediately to the same extent employee was eligible to use leave before termination.

An employee can use sick leave to care for a physical or mental illness, injury or medical condition, or professional medical diagnosis, care, or preventive care of same, of an employee or employee's family member, defined as a spouse (including a domestic partner), spouse's parent, child (including foster and grandchildren, or child who lives with employee for whom employee has permanentparental responsibility), child's spouse, parent, sibling, sibling's spouse, or person residing with employee in a committed relationship.

H. Domestic Violence Leave

Under the Sick and Safe Leave Acts of 2008 and 2013, an employee can use sick leave if that employee or that employee's family member is a victim of stalking, domestic violence, or sexual abuse.

I. Other Leave Laws

Employers must provide notice to employees in all languages required by the Language Access Act of 2004 in all languages spoken by at least 3% or 500 individuals (whichever is less) in the District of Columbia population. Additionally, under the Sick and Safe Leave Acts, an employer may require at least 10 days written notice for foreseeable leave, or if unforeseeable, oral notice before the start of the workweek or shift for which leave is requested, and for emergencies, the sooner of within 24 hours of the emergency or before the shift. An employer also may require reasonable certification for three or more consecutive paid leave days. Upon termination, an employer is not required to pay out unused sick leave.

XV. STATE WAGE AND HOURS LAWS

A. Current Minimum Wage in State

A person is employed in the District of Columbia when that person regularly spends more than 50% of their working time in the District of Columbia or when that person's employment is based in the District of Columbia and that person spends a substantial amount of their working time in the District of Columbia and not more than 50% of their working time in any particular state. D.C. CODE § 32- 1003(b)(1)-(2).

The District of Columbia's minimum wage law is codified under D.C. CODE § 32-1003. As of July 1, 2020, the minimum hourly wage required to be paid to an employee by an employer is $15.00. *See* D.C. CODE § 32-1003(a)(5)(A)(v). Beginning on July 1, 2021 and no later than July 1 of each successive year, the minimum wage shall be increased in proportion to the annual average increase, if any, in the Consumer Price Index for all Urban Consumers in the Washington Metropolitan Statistical Area published by the United States Department of Labor's Bureau of Labor Statistics for the previous calendar year. Any increase shall be adjusted to the nearest multiple of $.05. D.C. CODE § 32-1003(a)(6)(A). As on July 1, 2024, the base minimum wage for all D.C. employers is $17.50, in accordance with D.C. Code § 32-1003. *Id.*; *See* District of Columbia Department of Employment Service, Office of Wage-Hour Compliance, < https://does.dc.gov/service/office-wage-hour-compliance-0#:~:text=Beginning%20July%201%2C%202024%2C%20the,%248.00%20per%20hour%20to%20%2410.00.> (Current as of February 12, 2024).

If the federal minimum wage (set pursuant to the Fair Labor Standards Act) is greater than the current minimum hourly wage set in D.C. Code § 32-1003(a)(5)(A), then the minimum hourly wage paid to an employee by an employer shall be the federal minimum wage, plus $1.00. D.C. Code Ann. § 32- 1003(a)(5)(B). In November of 2022, D.C. passed the District of Columbia Tip Credit Elimination Act of 2021, which phases out the tipped minimum wage over approximately four and a half years. Currently, tipped minimum wage shall not be less than $8.00 per hour. *See* D.C. Code § 32-1003 (f). As of May 2023, the tipped wage gradually increases until it is eliminated entirely:

- On July 1, 2024: $10.00 per hour
- On July 1, 2025: $12.00 per hour
- On July 1, 2026: $14.00 per hour
- On July 1, 2027: tipped minimum wage must meet D.C.'s standard minimum wage.

See D.C. Code § 32-1003 (f)(1)-(8).

The following employees are exempt from the District of Columbia's minimum wage laws codified in D.C. Code § 32-1003:

- workers with disabilities who have received a certificate from the United States Department of Labor that authorizes the payment of less than minimum wage. D.C. Code Ann. § 32- 1003(d);
- security officers working in an office building in the District of Columbia (employers of such security officers must pay wages, or any combination of wages and benefits, that are not less than the combined amount of the minimum wage and fringe benefit rate for the guard 1 classification established by the United States Secretary of Labor pursuant to the Service Contract Act of 1965, approved October 22, 1965 (79 Stat. 1034; 41 U.S.C. § 351), as amended.). D.C. Code § 32-1003(h);
- minors (individuals under the age of 18 years old) may be paid the minimum wage established by the United States Government, rather than the District's minimum wage. 7 DCMR § 902.4(g);
- students employed by institutions of higher education may be paid the minimum wage established by the United States Government, rather than the District's minimum wage. 7 DCMR § 902.4(f);
- individuals employed pursuant to the Job Training Partnership Act, the Older Americans Act, or the Youth Employment Act, must be paid the wages set forth in those laws. 7 DCMR § 902.4(b)-(d).

See D.C. Code Ann. § 32-1003; *see also* Office of the Attorney General for the District of Columbia website: https://oag.dc.gov/worker-rights/wage-and-hour-laws#MinWageExm (current as of February 12, 2024).

B. Overtime Rules

Any employee in the District of Columbia working more than forty (40) hours per week is entitled to at least 1.5 times the regular hourly pay for every hour over forty (40) worked in a week. D.C. Code Ann. § 32-1003(c).

The following employees are exempt from the District's overtime pay laws codified in D.C. Code

§ 32-1003.

- airline employees who voluntarily trade workdays with another employee for the primary purpose of using travel benefits available to those employees. D.C. Code § 32-1004(b)(6);
- any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, or trucks, if employed by a nonmanufacturing establishment primarily engaged in the business of selling these vehicles to ultimate purchasers. D.C. Code § 32-1004(b)(3);
- any employee who works for a retail or service establishment and: (1) the regular rate of pay of the employee is in excess of 1½ times the minimum hourly rate applicable to the employee codified in D.C. Code §32-1003; and (2) more than 1/2 of the employee's compensation for a representative period (not less than 1 month) represents commissions on goods or services. D.C. Code § 32-1003(e)(1)-(2);
- any employee employed by a railroad. D.C. Code § 32-1004(b)(2);
- any employee employed as a seaman. D.C. Code § 32-1004(b)(1);
- a worker employed as a private household worker who lives on the premises of the employer. 7 DCMR § 902.5;
- Companions for the Aged or Infirm. A worker employed as a companion for the aged or infirm. 7 DCMR § 902.5. Note that persons who spend more than 20 percent of their time on household work not directly related to caring for the aged or infirm shall not be deemed a companion for the aged or infirm. 7 DCMR § 999.2.

See D.C. Code Ann. § 32-1003; *see also* Office of the Attorney General for the District of Columbia website: https://oag.dc.gov/worker-rights/wage-and-hour-laws#DCOE (current as of February 12, 2024).

C. Time for Payment Upon Termination

Pursuant to D.C. Code Ann. § 32-1303, when an employer discharges an employee, if the employer must pay the employee's earned wages no later than the working day following thedischarge. If the employee who is terminated is also responsible for the employer's accounting, the employer has four (4) days from the date of discharge or resignation to determine the accuracy of theemployee's accounts and pay that employee accordingly. When an employee quits or resigns, the employer shall pay the employee's wages due upon the next regular payday or within seven (7) daysfrom the date of quitting or resigning, whichever is earlier.

D. Breaks and Meals Periods

The District of Columbia does not have a specific law governing breaks. Instead, it follows the governing Federal laws.

XVI. MISCELLANEOUS STATE STATUTES REGULATION EMPLOYMENT PRACTICES

A. Smoking in the Workplace

D.C. Code § 7-1703.02 Provides:

> (a) Any private or public employer in the District of Columbia ("District") shall, within 3 months of May 2, 1991, adopt, implement, and maintain a written smoking policy that contains the following provisions:
>
> (1)Designation of an area in the workplace where smoking may be permitted. In an area where smoking is permitted, a physical barrier or a separate room shall be used to minimize smoke in any nonsmoking area. Ventilation shall be in compliance with the District laws and rules that govern indoor ventilation.
>
> (2)Notification to employees orally and in writing by conspicuously posting the employer'ssmoking policy within 3 weeks after the smoking policy is adopted. Any person in the workplace shall be subject to the posted smoking policy of the employer.

See D.C. CODE § 32-1307.

To enforce these penalties the WTPAA, complaints are filed through the Mayor's office and an investigation is conducted to determine the extent and validity of the violation. D.C. CODE § 32-1308.01. The complainant has 3 years from the time of the violation to file. *Id.* at § 32-1308.01(a). Section § 32- 1311 provides remedies for retaliation from an employer for alleging complaints.

B. Health Benefit Mandates for Employers

The District of Columbia does not have a statute mandating that employers provide health benefits to employees.

C. Immigration Laws

The District of Columbia does not have a law requiring employers to confirm the legal employment status of new hires.

D. Right to Work Laws

The District of Columbia does not have a right to work law.

E. Lawful Off-Duty Conduct (including lawful marijuana use)

D.C. Code §§ 7-1671.01 to 7-1671.13 authorizes the recreational use of marijuana. The District of Columbia also offers medical marijuana registration cards for patients with qualifying medical conditions. D.C. CODE § 7-1671.05. However, the statute does not allow a person to neither undertake any task under the influence of medical marijuana when doing so would be negligence or professional malpractice nor operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of medical marijuana. D.C. CODE § 7-1671.03(d) (1)-(2).

The District of Columbia has recently enacted a law prohibiting employers from discriminating against off-duty cannabis use by employees, codified at D.C. Code Ann. § 32-951.01 *et seq.* Under the law, an employer "may not refuse to hire, terminate from employment, suspend, fail to promote, demote, or penalize an individual based upon" the employee's use of cannabis. However, an employer does not violate the law by taking such an action against an employee using cannabis if:

> (1) The employee is in a position designated as safety sensitive.

> (2) The employer's actions are required by federal statute, federal regulations, or a federal contract or funding agreement.
>
> (3) The employee used, consumed, possessed, stored, delivered, transferred, displayed, transported, sold, purchased, or grew cannabis at the employee's place of employment, while performing work for the employer, or during the employee's hours of work, unless otherwise permitted . . . [or]
>
> (4) [T]he employee is impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working, or during the employee's hours of work, that substantially decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy workplace as required by District or federal occupational safety and health law.

D.C. Code Ann. § 32-951.02(b). If an employer violates these provisions, an employee may file a complaint with the D.C. Office of Human Rights (D.C. Code Ann. § 32-951.05) and a private cause of action once those administrative proceedings have reached their conclusion (D.C. Code Ann. § 32-951.06). Employers who violate the law may be liable for a civil penalty up to $5,000, lost wages of the aggrieved employee, other compensatory damages, and attorneys' fees. D.C. Code Ann. § 32-951.06(c).

F. Gender/Transgender Expression

In the District of Columbia, it is an unlawful discriminatory practice for an employer or, where applicable, an employment agency or labor organization, to exclude, discharge, or fail or refuse to hire, orotherwise to discriminate against any individual, with respect to his/her compensation, terms, conditions,or privileges of employment, including promotion, discriminatorily based upon the sex, personal appearance, sexual orientation, or gender identity or expression. D.C. CODE § 2-1402.11. It is also unlawful to limit, segregate, or classify employees in any way which could deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee if discriminatorily based upon the sex, personal appearance, sexual orientation, or gender identity or expression. *Id.*