SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

FELICIA M. SONMEZ	:	
	:	
v.	:	Case No. 2021 CA 002497 B
	:	
WP COMPANY LLC, *et al*.	:	

ORDER

Plaintiff Felicia M. Sonmez's complaint fails to state a claim upon which relief can be granted against defendant WP Company LLC, dba The Washington Post, and the six individual defendants (collectively "the Post"). The Court therefore grants the Post's motion to dismiss pursuant to Rule 12(b)(6). The Court denies the Post's special motion to dismiss under the D.C. Anti-SLAPP Act because Ms. Sonmez's claims do not arise out of speech that triggers the protections of the Act.[1]

I. BACKGROUND

On July 21, 2021, Ms. Sonmez filed her complaint against the Post and six of its editors: Martin Baron, Cameron Barr, Steven Ginsburg, Tracy Grant, Lori Montgomery, and Peter Wallsten. She asserts three claims: (1) illegal discrimination under the D.C. Human Rights Act ("DCHRA") based on her gender and her status as a victim of a sexual offense; (2) illegal retaliation under the DCHRA for protesting defendants' discriminatory actions; and (3) negligent infliction of emotional distress.

The key factual allegations in the 47-page complaint are as follows. In September 2017, when Ms. Sonmez was a reporter for the Los Angeles Times, she was sexually assaulted by another reporter for the Times, Jonathan Kaiman. With knowledge that Ms. Sonmez had

[1] The undersigned judge assumed responsibility for the pending motion while the calendar judge is on leave.

publicly spoken about the sexual assault by Mr. Kaiman, the Post hired Ms. Sonmez in June 2018. The Post initially assigned Ms. Sonmez to stories involving sexual misconduct by men, including sexual assault allegations against Brett Kavanaugh while he was a nominee to be an associate justice of the Supreme Court of the United States.

In August 2018, Mr. Kaiman resigned from the Times. On September 18, 2018 with the Post's approval, Ms. Sonmez made a public statement about Mr. Kaiman and the Times' investigation, including a statement that she "stand[s] in solidarity" with another woman assaulted by Mr. Kaiman.

After Ms. Sonmez's public statements, the Post did not allow her for over two months to cover stories involving the #MeToo movement, including taking her off the Kavanaugh story. Using Ms. Sonmez's terminology, the Court refers to this action as the "first ban." On November 7, 2018 after the mid-term election, the Post terminated the first ban, and it again started assigning Ms. Sonmez to stories involving sexual misconduct and the #MeToo movement.

On August 23, 2019, an article was published that was critical of Ms. Sonmez and another of Mr. Kaiman's victims who complained about his sexual misconduct. The story resulted in a number of abusive and threatening statements about Ms. Sonmez, including that if any woman deserves to be raped, she does. In response to these personal attacks, Ms. Sonmez made public statements defending herself. On September 4, 2019, the Post again suspended her from covering #MeToo-related stories. Again using Ms. Sonmez's terminology, the Court refers to this action as the "second ban."

In addition to the two bans, Ms. Sonmez alleges that the Post discriminated against her in other ways. In January 2020 after basketball star Kobe Bryant died in a helicopter crash, Ms.

Sonmez posted a link to a 2016 story containing allegations of sexual assault by Mr. Bryant. Ms. Sonmez was again subjected to threats and abusive statements, and editors did not respond to her pleas for security, forcing her to contact the Post's director of security. Shortly after these tweets, the Post suspended Ms. Sonmez with pay and issued a public statement about the suspension that included negative comments about her. Two days later, the Post lifted the suspension and told Ms. Sonmez that her tweets did not violate the Post's social media policy. Ms. Sonmez also alleges that she received a lower rating in her 2019 performance review because of her public statements, resulting in lower raise than she would otherwise have received.

On March 29, 2021, the Post lifted the second ban and allowed Ms. Sonmez to resume covering #MeToo-related stories.

On September 24, 2021 pursuant to an agreed-on briefing schedule, the Post filed a consolidated motion to dismiss pursuant to Rule 12(b)(6) and a special motion to dismiss under the D.C. Anti-SLAPP Act ("Motion"). On November 5, Ms. Sonmez filed her opposition ("Opp."). On November 23, the Post filed a reply ("Reply"). On March 18, 2022, the Court held a hearing pursuant to D.C. Code § 16-5502(d).

II. LEGAL STANDARD

A. Rule 12(b)(6)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Potomac Development Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (cleaned up). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (cleaned up). "When there

are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*. (cleaned up). The Court should "draw all inferences from the factual allegations of the complaint in the plaintiff's favor." *Carlyle Investment Management, LLC v. Ace American Insurance Co.*, 131 A.3d 886, 894 (D.C. 2016) (cleaned up). "A complaint should not be dismissed because a court does not believe that a plaintiff will prevail on its claim; indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Id*. (cleaned up).

"At the Rule 12(b)(6) stage, a court should not dismiss on statute of limitations grounds unless the claim is time-barred on the face of the complaint." *Logan v. Lasalle Bank National Association*, 80 A.3d 1014, 1020 (D.C. 2013); *see generally Francis v. Rehman*, 110 A.3d 615, 621 (D.C. 2015) (cleaned up).

B. Special motions to dismiss under the Anti-SLAPP Act

"The D.C. Anti-SLAPP Act provides a party defending against a SLAPP with procedural tools to protect themselves from meritless litigation." *Saudi American Public Relations Affairs Committee v. Institute for Gulf Affairs*, 242 A.3d 602, 605 (D.C. 2020) (cleaned up). One such tool is a special motion to dismiss. In a special motion to dismiss, "the defendant must make 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" within the meaning of D.C. Code § 16-5502(b). *Id*. (cleaned up).

"Once the defendant has made this prima facie showing, which is not onerous, the burden shifts to the plaintiff, who must demonstrate that their claim is likely to succeed on the merits." *Saudi American Public Relations Affairs Committee*, 242 A.3d at 606 (cleaned up). "[W]here the court grants a 12(b)(6) motion because no relief can be granted on a claim as a matter of law,

the plaintiff cannot show a likelihood of success on the merits of that claim for the purposes of the anti-SLAPP" special motion to dismiss." *American Studies Association v. Bronner*, 259 A.3d 728, 741 (D.C. 2021). Even if the complaint states a claim upon which relief may be granted, "the statute requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim." *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016). "[I]n considering a special motion to dismiss, the court evaluates the likely success of the claim by asking 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." *Id*. at 1232. Thus, "the anti-SLAPP special motion to dismiss is essentially an expedited summary judgment motion, albeit with procedural differences." *American Studies Association*, 259 A.3d at 740-41 (cleaned up). "If the plaintiff cannot carry their burden, the defendant's motion must be granted and the lawsuit dismissed with prejudice." *Saudi American Public Relations Affairs Committee*, 242 A.3d at 605 (citing D.C. Code § 16-5502(b)).

III. DISCUSSION

Section III.A explains why the Court grants the Post's Rule 12(b)(6) motion, and Section III.B explains why it denies the special motion to dismiss under the Anti-SLAPP Act.

A. The Rule 12(b)(6) motion to dismiss

Section III.A.1 addresses whether Ms. Sonmez's DCHRA claims are barred by the statute of limitations. Section III.A.2 explains why Ms. Sonmez does not state a plausible claim that the Post took adverse employment actions, or created a hostile work environment, because of her sex or status as a victim of sexual assault. Section III.A.3 explains why Ms. Sonmez does not state a

plausible claim of retaliation under the DCHRA. And Section III.A.4 explains why she does not state a plausible claim for negligent infliction of emotional distress.

1. Statute of limitations

The Post argues that Ms. Sonmez's claims under the DCHRA are untimely because they were not filed within the one-year statute of limitations. D.C. Code § 2-1403.16(a) requires a claim under the DCHRA to be filed within one year of the alleged unlawful discriminatory act or its discovery. *See Brown v. Capitol Hill Club*, 425 A.2d 1309, 1311 (D.C. 1981). The statute of limitations for negligence actions under D.C. Code § 12-301(a)(8) is three years, and the Post does not argue that Ms. Sonmez's claim for negligent infliction of emotional distress is untimely.

The first ban applied from September through early November 2018, so the one-year statute of limitations expired in the fall of 2019, almost two years before she filed this case in July 2021. Ms. Sonmez does not dispute that DCHRA claims based on the first ban are time-barred and that evidence relating to the first ban is admissible only as background evidence. *See* Opp. at 7.

The second ban began on September 4, 2019 when the Post told Ms. Sonmez that she again would not be allowed to report on stories relating to sexual misconduct, so the one-year limitations period on her claims concerning the second ban would ordinarily have ended on September 4, 2020. However, September 4, 2020 fell during the roughly one-year period when statutes of limitations were tolled due to the public health emergency. Through a series of orders issued by the Chief Judge on March 18, 2020, March 19, 2020, May 14, 2020, June 19, 2020, August 13, 2020, November 5, 2020, and January 13, 2021, the limitations period for all civil cases was tolled from March 18, 2020 through March 30, 2021, because of the public health emergency. In the March 30, 2020 Order, the Chief Judge ended tolling of the statute of

limitations in civil cases (with an exception for claims subject to a statutory moratorium that is not relevant here). The period from March 18, 2020 through March 30, 2021 includes 388 days. For deadlines that fall within the 388-day tolling period, the number of days remaining in the limitations period when tolling began on March 18, 2020 are added to the end of the tolling period. *See* January 21, 2021 Addendum to the General Order Concerning Civil Cases (available at https://www.dccourts.gov/sites/default/files/matters-docs/General%20Order%20pdf/addendum-to-the-general-order-final-1-21-21.pdf). "The term 'tolling' means that, 'during the relevant period, the statute of limitations ceases to run.'" *Christensen v. Phillip Morris USA, Inc.*, 875 A.2d 823, 836 n.9 (Md. App. 2009) (quoting *Chardon v. Soto*, 462 U.S. 650, 652 n.1 (1983)).

When tolling of the limitations period began on March 18, 2020, about six and a half months had elapsed after Ms. Sonmez's cause of action concerning the second ban accrued on September 4, 2019, so with a one-year statute of limitations, she had over five months to file suit after tolling ended on March 30, 2021. Ms. Sonmez filed this case on July 21, 2021, less than five months after March 30, 2021. Accordingly, her DCHRA claims based on the second ban are timely.[2]

[2] The Court agrees with the reasoning in *Berg v. Hickson*, Case No. 2021 CA 001977 V (D.C. Superior Court Aug. 19, 2021) (Opp. Ex. 1), concerning whether tolling occurs when the limitations period would otherwise start before March 18, 2020 and end after March 30, 2021. However, the Court need not reach this issue. Ms. Sonmez's DCHRA claims concerning the second ban are timely because the one-year limitations period would otherwise have expired during the 388-day tolling period.

2. DCHRA

a. Applicable legal principles

Through D.C. Code § 2-1402.11(a), the DCHRA makes it "an unlawful discriminatory practice" for an employer to take adverse action against an employee "wholly or partially for a discriminatory reason based upon … sex [or] status as a victim [of] a sexual offense." "To state a prima facie claim of disparate treatment discrimination, the plaintiff must establish that (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *Furline v. Morrison*, 953 A.2d 344, 352 n.24 (D.C. 2008) (cleaned up). An adverse employment action "must involve 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *See Kumar v. D.C. Water & Sewer Authority*, 25 A.3d 9, 17 (D.C. 2011) (quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). The elements of a hostile work environment claim are that (1) the plaintiff is a member of a protected class, (2) she was subjected to unwelcome harassment, (3) the harassment was based on membership in the protected class, and (4) the harassment is severe and pervasive enough to affect a term, condition or privilege of employment. *See Lively v. Flexible Packaging Association*, 830 A.2d 874, 888 (D.C. 2003).

Intent to discriminate or retaliate based on membership in a protected class may be shown by direct or indirect evidence. *See Furline*, 953 A.2d at 352; *McFarland v. George Washington University*, 935 A.2d 337, 346 (D.C. 2007). Direct evidence "includes any statement or written document showing a discriminatory motive *on its face*." *Lemmons v. Georgetown University Hospital*, 431 F. Supp. 2d 76, 86 (D.D.C. 2006) (cleaned up).

When the employer has offered evidence of a legitimate, non-discriminatory reason, "the employee must show *both* that the reason was false, *and* that discrimination was the real reason." *Hollins v. Fannie Mae*, 760 A.2d 563, 571 (D.C. 2000) (cleaned up) (emphasis in original). "As courts are not free to second-guess an employer's business judgment, a plaintiff's mere speculations are insufficient to create a genuine issue of fact regarding an employer's articulated reasons for its decisions.'" *See Hamilton v. Howard University*, 960 A.2d 308, 314 (D.C. 2008) (quoting *Furline*, 953 A.2d at 354, and in turn *Brown v. Brody*, 199 F.3d 446, 458-59 (D.C. Cir. 1999)). Among other things, "the plaintiff's attack on the employer's explanation must always be assessed in light of the total circumstances of the case." *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1291 (D.C. Cir. 1998) (en banc).

"One way to discredit an employer's justification is to show that similarly situated employees received more favorable treatment." *Wheeler v. Georgetown University Hospital*, 812 F.3d 1109, 1115 (D.C. Cir. 2016) (cleaned up).[3] After all, "the 'central focus of the inquiry' in such cases 'is always whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin.'" *George v. Leavitt*, 407 F.3d 405, 411 (D.C. Cir. 2005) (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)). "For a plaintiff to prove that she is similarly situated to another employee, she must demonstrate that all of the relevant aspects of her employment situation were nearly identical to those of the other employee." *Wheeler*, 812 F.3d at 1115-16 (cleaned up). "To raise an inference of discrimination based on comparator evidence, the plaintiff must demonstrate: (1) that all of the relevant aspects of his employment situation were nearly identical to those of the other

[3] It is generally appropriate to look to Title VII of the Civil Rights Act of 1964 in interpreting the DCHRA. *See Kumar*, 25 A.3d at 18; *Lively*, 830 A.2d at 874.

employee; and (2) that the comparator was charged with offenses of comparable seriousness but treated more favorably." *Townsend v. United States*, 236 F. Supp. 3d 280, 307 (D.D.C. 2017) (quoting *Burley v. Amtrak*, 801 F.2d 290, 301 (D.C. Cir. 2015)). However, proof of disparate treatment of similarly situated employees who are not part of the protected class is not the only way to prove discriminatory intent; for example, proof that the stated reason is completely false may be sufficient. *See George*, 407 F.3d at 411; *Aka*, 156 F.3d at 1289; *Kumar*, 25 A.3d at 18-19.

b. Discriminatory intent

The facts alleged by Ms. Sonmez do not support a plausible inference that the Post discriminated against her, or created a hostile work environment, wholly or partially because she is the victim of a sexual assault or a woman. The Post does not dispute that the complaint adequately alleges that Ms. Sonmez belongs to two protected classes because she is a woman and the victim of a sexual assault. Because the Court grants the Post's Rule 12(b)(6) motion on other grounds, it need not decide whether (1) the alleged bans and other actions about which Ms. Sonmez complains constitute adverse employment actions or (2) Ms. Sonmez states a plausible claim that the alleged hostile aspects of her work environment were severe and pervasive enough to affect a term of employment.

None of the alleged statements by any individual defendant constitutes direct evidence of discriminatory intent because none shows a discriminatory motive on its face. *See Lemmons*, 431 F. Supp. 2d at 86 (discussing direct evidence of discriminatory intent). Ms. Sonmez alleges that the Post told her that by speaking out publicly, she had "taken a side" on the issue of sexual assault, that reporting on issues of sexual misconduct would present "the appearance of a conflict of interest," and that the Post did not want the external perception that it had an advocate

covering an issue she experienced. *See* Complaint ¶ 45. The Post attributed all of the employment actions about which Ms. Sonmez complains to her public statements, not to her victim status or sex. Its stated reason – avoiding the appearance or a perception of bias by its reporters – is a basis for the bans that does not implicate the DCHRA.

Indeed, a news publication has a constitutionally protected right to adopt and enforce policies intended to protect public trust in its impartiality and objectivity. "In order to preserve [its managerial prerogative to control its editorial integrity,] a news publication must be free to establish without interference, reasonable rules designed to prevent its employees from engaging in activities which may directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity." *Newspaper Guild of Greater Philadelphia v. National Labor Relations Board*, 636 F.2d 550, 561 (1980) (cleaned up) (holding a newspaper's code of ethics, unlike other terms of employment, cannot be made a subject of mandatory collective bargaining). "Protection of the editorial integrity of a newspaper lies at the core of publishing control." *Id*. at 560. "A fundamental goal" of most news publications "is to appear objective in the eyes of its readers," and publications can prohibit any reporter from putting herself in a situation "in which readers might be led to believe that the news reporting is biased." *Nelson v. McClatchy Newspapers*, 936 P.2d 1123, 1124-25 (Wash. 1997); *see id*. at 1125 (citing the Post's code of conduct prohibiting actions "that could compromise or seem to compromise our ability to report and edit fairly").

Ms. Sonmez does not allege facts supporting a plausible circumstantial inference either that the Post's stated reason was false or that discrimination was the real reason. *See Hollins*, 760 A.2d at 571. Ms. Sonmez does not dispute that the Post has a policy to protect the fact and appearance of journalistic integrity and fairness by not allowing reporters to cover stories during

a period when their impartiality might reasonably be questioned. Nothing in the complaint suggests that the Post would, for example, not suspend a reporter who made a public statement about the personal impact of the recent murder of a relative from covering stories about violent crime, or a reporter who made a public statement about the continuing trauma caused by his family's eviction from covering landlord and tenant court, or a reporter who publicly campaigned for members of one political party from covering elections. Unless the newspaper's decision is infected by a discriminatory intent against a member of a protected class, judges and juries are not free to second-guess a newspaper's judgment about the assignment of reporters, just as they are not free to second-guess an employer's business judgment. *See Hamilton,* 960 A.2d at 314.[4]

Therefore, the issue is not whether the Post correctly applied to Ms. Sonmez its policy protecting the perception of impartiality – unless she alleges facts supporting a reasonable inference that the Post's invocation of its policy was a pretextual excuse for the imposition of bans because of her victim status or gender. The DCHRA applies only if an adverse employment action was motivated by an employee's membership in a protected class, and it does not protect against mistaken exercises of editorial judgment or other misguided decisions by employers. It is not reasonable to infer from the facts alleged by Ms. Sonmez that the Post lacked a reasonable basis for its conclusion that its readers could reasonably question Ms. Sonmez's impartiality because of her public statements. The Court does not suggest that the *only* reasonable inference is that the Post's decision was correct, and reasonable people may disagree

[4] Given the Court's resolution of the Post's motion on other grounds, the Court does not address the Post's argument that the First Amendment bars Ms. Sonmez's claims. *See* Motion at 25-28. At the hearing on March 18, 2022, the Post stated that its First Amendment argument is subsumed in its special motion to dismiss.

about whether Ms. Sonmez's public statements created an appearance issue. But the facts alleged by Ms. Sonmez do not demonstrate that the Post's concern was unreasonable on its face.[5] Ms. Sonmez must provide other circumstantial evidence that the stated reasons for the Post's actions were pretextual and that its real reason involved her victim status and sex, and this she does not do.

Ms. Sonmez insists that although the sexual assault that she suffered had profound lasting effects (Complaint ¶ 17), she was able at all times to report objectively on stories involving sexual misconduct. But when the issue is whether an appearance of partiality exists, it is irrelevant whether a person is in fact able to be objective. Accepting the truth of Ms. Sonmez's assurance of her objectivity, it does not follow that readers of the Post would have confidence that its stories were the product of objective reporting and that the stories were not affected even by implicit biases of a reporter who made public statements about her own personal experience with the subject of the story. News media companies have the right to adopt policies that protect not only the fact but also the appearance of impartiality.[6]

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[5] A rough analogy involving a judge may help to illustrate the point. Suppose a judge makes a post that relates to a sexual assault that occurred before she became a judge and that is similar to Ms. Sonmez's public statements, the judge has a pending employment discrimination case involving sexual misconduct, and the defendant moves to disqualify the judge. A reasonable judge could decide to recuse herself in these circumstances, even if it might not be reversible error to deny the motion. Despite a common concern about the appearance of impartiality, ethics rules for judges are different from those for journalists. For example, judges are ethically prohibited from making public statements on political or even controversial issues, whether or not the issue is likely to arise in a case before the court, and the Post apparently does not limit a reporter's public statements on controversial issues unrelated to stories that she covers. *See generally* Advisory Committee on Judicial Conduct, Advisory Opinion No. 14 on Public Statements, Protests, and Financial Support Concerning Controversial Causes (available at https://www.dccourts.gov/sites/default/files/divisionspdfs/Memo-to-Law-Clerks-re-Involvement-in-Controversial-Issues.pdf).

[6] Likewise, judges are required to recuse themselves when their impartiality might reasonably be questioned, even if they would be impartial in fact. *See* Rules 1.2 and 2.11(A) of the Code of Judicial Conduct for the District of Columbia Courts.

Ms. Sonmez alleges facts that make it affirmatively implausible that her victim status or gender was a reason for the Post's decisions concerning her assignments. Most importantly, Ms. Sonmez alleges that the Post hired her knowing that she was a victim of sexual assault and had publicly identified herself as a victim of sexual assault, and with this knowledge, the Post assigned her to stories involving sexual misconduct (including the Kavanaugh story) – until she made public statements that could be perceived as associating herself with the #MeToo movement as a victim herself. The only plausible inference from Ms. Sonmez's allegations is that the Post's concern about the appearance of partiality raised by her public advocacy triggered the bans, and the DCHRA does not prohibit discrimination based on public advocacy that may cause readers to question a reporter's objectivity and impartiality. Temporal proximity of two events "may lend support to an inference of a causal relationship." *Freeman v. District of Columbia*, 60 A.3d 1131, 1145-45 (D.C. 2012); *Propp v. Counterpart International*, 39 A.3d 856, 868 (D.C. 2012) (causation may be established if the second event occurred "shortly after" the first). The close temporal proximity between Ms. Sonmez's public advocacy and the imposition of each ban reinforces the inference that it was her public advocacy and not her victim status or sex that persuaded the Post to impose the bans. In addition, Ms. Sonmez alleges that the Post authorized her public statements (Complaint ¶ 33), and this authorization is inconsistent with any inference that the Post tried to muzzle her because she is a woman or that it forced her to hide her sexual assault.[7]

[7] This authorization cannot plausibly be understood as evidence that the Post's stated reliance on Ms. Sonmez's public statements was pretextual. *See* Opp. at 12. Ms. Sonmez does not allege that the Post told her that making these statements would not affect her assignments. By authorizing the statements that Ms. Sonmez chose to make, the Post did not give up its right to protect its reputation for objective and unbiased reporting.

Ms. Sonmez argues that her public statements are inseparable from her status as a sexual assault victim and from her gender as a woman, contending that her public statements defending herself against attacks on her credibility concerning the assault were "inextricably linked" with and "part and parcel of coming forward about a sexual assault." *See* Opp. at 8.[8] However, the Post's knowledge that Ms. Sonmez had been publicly identified as a victim of a sexual assault did not stop it from hiring her or from assigning her to stories involving male sexual misconduct in the workplace before the first ban, between the first and second bans, and after the second ban. In any event, women who are victims of sexual assaults do not always make public statements about their attackers or the employers of their attackers or that defend their own credibility. Ms. Sonmez does not allege any facts supporting a plausible inference that the Post would have responded differently if a male or female fellow reporter who was not a sexual assault victim had made the same posts. Regardless of a reporter's membership in a protected class, the Post has the same legitimate interest in assigning stories to reporters who have not made public statements that could raise a reasonable question about their impartiality.

Ms. Sonmez asserts, "Defendants' clear signal, which is contrary to the purposes of the DCHRA, is that if you are a female journalist who is sexually assaulted, you must hide your assault if you want to keep your career." Opp. at 9. However, the only plausible inference from the facts alleged in the complaint is that the Post allows female reporters who have been publicly identified as survivors of sexual assault to cover stories relating to sexual misconduct (not to mention other important stories), as Ms. Sonmez did when she was hired and as she did after the first and second bans ended. Indeed, Ms. Sonmez alleges that the Post acted "because she is a

[8] It may be worth noting that the tweet concerning Kobe Bryant after his death does not appear to have any connection with Ms. Sonmez's victim status or gender.

survivor of sexual assault *and ha[d] spoken out about her experience*." *See* Complaint ¶ 46 (emphasis added). Moreover, Ms. Sonmez kept her job after her public statements, she does not allege that the stories to which she was assigned during the first or second bans were second-rate stories, and her only complaint about her assignments during the bans is that they did not include stories with #MeToo-related ramifications.

In addition, Ms. Sonmez does not identify any comparator that supports a plausible inference of discrimination based on membership in a class protected by the DCHRA. Two of the reporters who allegedly got more favorable treatment than she did are also women. One reporter was an Asian-American female who was publicly attacked because of a story she wrote, not because of any public statements about her personal experiences. *See* Complaint ¶ 99. The other was another Asian-American female reporter who reported on anti-Asian hate crimes and made public statements condemning such crimes and stating that the media can do a better job covering them, but Ms. Sonmez does not allege that the reporter was herself a victim of an anti-Asian hate crime or made public statements about that assault. *See* Complaint ¶ 100. That the Post treated these two female reporters appropriately in Ms. Sonmez's view undermines any inference that it treats female reporters worse because of their gender.[9] Ms. Sonmez also alleges that the Post did not preclude a male reporter against whom sexual misconduct allegations were made from covering stories involving sexual misconduct, but she does not allege that he made any public statements about the issue (such as a statement expressing support for men in a position similar to his) – and Ms. Sonmez covered stories involving sexual misconduct until she

[9] Ms. Sonmez is correct that she may plead alternative and inconsistent legal theories. Opp. at 14-15. That does not change the fact that Ms. Sonmez allegation of more favorable treatment of two other female reporters is inconsistent with her contention that she was a victim of sex discrimination.

made public statements on the subject. Thus, the relevant aspects of Ms. Sonmez's employment situation are not comparable, much less nearly identical, to those of the other employees. *See Wheeler*, 812 F.3d at 1115-16; *Townsend*, 236 F. Supp. 3d at 307.

Ms. Sonmez alleges adverse employment actions other than the bans: her tweets concerning Kobe Bryant resulted in a two-day suspension with pay, a humiliating public statement that she had displayed poor judgment which undermined the work of her colleagues, and a failure to respond to her request for security services when her tweets resulted in a barrage of threats; and she got a lower rating in a performance evaluation resulting in reduced compensation. *See* Opp. at 19-23. The same basic analysis that applies to the bans also applies to these actions by the Post: Ms. Sonmez does not allege facts supporting a plausible inference that the Post took these actions not because of its stated reason relating to her public stands but instead because of her victim status or sex. The Post did not take any of these actions when it hired her knowing that she had been publicly identified as the victim of a sexual assault, and when it eventually took these actions, it took them only in close temporal proximity to new public statements. More specifically, Ms. Sonmez does not allege facts suggesting that the Post would have responded differently if a male reporter had made the same tweets concerning Kobe Bryant that she made and the tweets had generated the same response. Ms. Sonmez does not allege that her earlier performance reviews were poorer than they should have been, even though the Post then was aware of her victim status and sex, and the Post gave her a lower evaluation only after she made public statements not included in published stories. In addition, Ms. Sonmez does not allege that the Post did not give her a fair opportunity to cover the stories that she wanted to cover before the first ban, between the first and second bans, or after the second ended and before she filed this lawsuit about five months later.

3. Retaliation

The facts alleged by Ms. Sonmez do not state a plausible claim for retaliation under the DCHRA.

"To establish a prima facie case of retaliation, the plaintiff must demonstrate by a preponderance of the evidence that: (1) he was engaged in a protected activity or that he opposed practices made unlawful by the DCHRA, (2) the employer took an adverse action against him, and (3) a causal connection existed between his opposition or protected activity and the adverse action taken against him." *Propp*, 39 A.3d at 863.[10] "Under the DCHRA, it is an unlawful discriminatory practice for an employer to retaliate against a person on account of that person's opposition to any practice made unlawful by the DCHRA." *Id.* at 862 (cleaned up).[11]

For an employee's complaint to be protected against retaliation under the DCHRA, the employer must be aware that the complaint related to illegal discrimination. *See McFarland*, 935 A.2d at 359. No "magic words" are required, and the allegation of illegal discriminatory conduct may be "inferred or implied" from context. *See id.* (emphasis omitted, quoting *Howard University v. Green*, 652 A.2d 41, 47 (D.C. 1994)). "But the onus is on the employee to clearly voice her opposition to illegal discrimination; a vague charge of discrimination will not support a

[10] "To make out a claim for retaliation, the plaintiff need only prove she had a reasonable good faith belief that the practice she opposed was unlawful under the DCHRA, not that it actually violated the Act." *Grant v. May Department Stores Co.*, 786 A.2d 580, 586 (D.C. 2001) (cleaned up). The Court assumes without deciding that the complaint sufficiently pleads that Ms. Sonmez's belief that the ban violated the DCHRA was reasonable.

[11] An employer's retaliatory action is materially adverse if "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 68 (2006) (cleaned up). Thus, "a materially adverse action for purposes of a retaliation claim … encompasses a broader range of actions" than the term does for the purposes of discrimination claims. *See Richardson v. Petasis*, 160 F. Supp. 3d 88, 134 (D.D.C. 2015).

subsequent retaliation claim." *Vogel v. D.C. Office of Planning*, 944 A.2d 456, 465 (D.C. 2008) (cleaned up). "It is not enough for an employee to object to favoritism, cronyism, violation of personnel policies, or mistreatment in general, without connecting it to membership in a protected class, for such practices, however repugnant they may be, are outside the purview of the DCHRA." *Id*. at 464. Thus, "general complaints about workplace favoritism or other conduct not actionable under the DCHRA do not put the employer on the required notice." *McFarlane*, 935 A.2d at 359. Use of words like "bias," "prejudice," and "hostile work environment," "untethered to an allegation that the conduct occurred because of membership in a protected class, is not enough to transform a workplace complaint into protected activity." *Clemmons v. Academy for Educational Development*, 107 F. Supp. 3d 100, 130 (D.D.C. 2015).

Any retaliation claim involving the first ban fails for three reasons. First, for the reasons explained in Section III.A.1 above, the allegedly illegal conduct occurred outside the limitations period. Second, Ms. Sonmez complained about the first ban only after the Post imposed it, and she does not allege any retaliatory actions during the two months between this complaint and the Post's decision to lift the first ban in early November 2018. Third, Ms. Sonmez alleges that on September 18, 2018 she complained that the first ban was imposed "based on what happened to me in Beijing," Complaint ¶ 43, but at that time, protected classes under the DCHRA did not include victims of sexual assaults. It was only in 2019 after the first ban ended that the DCHRA was amended to prohibit discrimination against victims of sexual assault. *See* Employment Protections for Victims of Domestic Violence, Sexual Offenses, and Stalking Amendment Act of 2018, § 2(a) (amending D.C. Code § 2-1401.01), D.C. Law 22-281 (effective April 11, 2019).

The facts alleged by Ms. Sonmez relating to the second ban do not state a plausible claim for retaliation. The Post imposed the second ban about ten months after it lifted the first ban, and

it is not plausible to infer that the Post imposed the second ban because of Ms. Sonmez's complaints about the first ban about a year earlier, given the fact that the Post had ended the ban and assigned her to #MeToo-related stories in the meantime.

It is also not plausible to infer that any adverse action after imposition of the second ban was retaliation for Ms. Sonmez's complaint about the second ban – for two reasons. First, Ms. Sonmez alleges that her immediate protest of second ban was "for essentially the same reasons as the first." *See* Complaint ¶ 66. This conclusory allegation does not support a plausible inference that the Post understood her objection to the second ban to be a complaint that the Post was discriminating against her based on her victim status or gender. Ms. Sonmez does not allege that she told the Post that it would not have imposed a ban if a male reporter had made a public statement about a sexual assault that was committed against him or that he allegedly committed, or if a reporter made a public statement about a different subject that personally affected the reporter and the statement raised a concern about the appearance of the reporter's objectivity. Ms. Sonmez objected to the first ban because her personal experience did not affect her ability to cover stories involving sexual misconduct fairly and objectively, but that objection does not involve membership in a protected class (and victims of sexual assaults were not in a protected class when she protested the first ban) or meet the Post's concern about the appearance of impartiality. Her general complaint about the second ban does not support a plausible inference that she put the Post on the required notice. *See Vogel*, 944 A.2d at 465; *McFarlane*, 935 A.2d at 359; *Clemmons*, 107 F. Supp. 3d at 130.

Second, Ms. Sonmez does not allege facts supporting a plausible inference of a causal connection between her complaint about the second ban and the Post's subsequent actions

concerning her. *See Propp*, 39 A.3d at 863.[12] There is not close temporal proximity between her complaint about the second ban in September 2019 and either (a) the Post's actions in the wake of her tweet about Kobe Bryant in late January 2020 or (b) her performance review in April 2020. *See Johnson v. District of Columbia*, 935 A.2d 1113, 1120 (D.C. 2007) ("a stretch of four months realistically cannot constitute temporal proximity in the ordinary sense of that phrase"); *Vogel v. D.C. Office of Planning*, 944 A.2d 456, 462 (D.C. 2008) (where five months passed between the employee's complaint and termination, "a nexus between the two events could not be inferred from their temporal proximity alone"). Nor does Ms. Sonmez allege other facts supporting a plausible inference that the Post's stated reasons for its actions (involving her public statements) was pretextual. Ms. Sonmez alleges that her criticisms of other news media organizations' lack of transparency triggered the Post's ire. *See* Opp. at 26-27. If these criticisms triggered a materially adverse action, the action was not caused by her membership in a protected class.

4. Negligent infliction of emotional distress

Ms. Sonmez does not state a plausible claim that the Post negligently inflicted emotional distress through its actions.[13]

The general rule is that a claim of negligent infliction of emotional distress requires that the plaintiff be in a zone of physical danger created by the defendant. *Destefano v. Children's National Medical Center*, 121 A.3d 59, 69, (D.C. 2015); *Jones v. Howard University*, 589 A.2d

[12] Ms. Sonmez alleges that she again protested the second ban in May 2020, Complaint ¶ 93, but she does not allege an adverse employment actions after that date.

[13] The Court notes that none of the Post's allegedly actionable conduct, including the two bans, the suspension, and the performance evaluation, can be reasonably characterized as negligent, and "a plaintiff cannot seek to recover by dressing up the substance of one claim, [an intentional tort], in the garments of another, here negligence." *See District of Columbia v. Chinn*, 839 A.2d 701, 708 (D.C. 2003).

419, 424 (D.C. 1991). Ms. Sonmez does not contend that the Post's conduct put her in a zone of physical danger. Instead, she invokes the narrow exception created in *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789 (D.C. 2011) (en banc). This exception applies if "the plaintiff can show that (1) the defendant has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, of a nature that necessarily implicates the plaintiff's emotional well-being, (2) there is an especially likely risk that the defendant's negligence would cause serious emotional distress to the plaintiff, and (3) negligent actions or omissions of the defendant in breach of that obligation have, in fact, caused serious emotional distress to the plaintiff." *Id*. at 810-11. Examples of relationships that can result in liability for negligent infliction of emotional distress include the relationship of psychiatrist/therapist and patient, perhaps other doctor-patient relationships, a funeral home's handling of a corpse, and guardians appointed to protect those who are especially vulnerable such as children, the elderly, and the disabled. *See id*. at 813-14. *Hedgepeth* emphasized that "many other relationships, even if they involve fiduciary obligations, generally will not come within the rule, because neither the purpose of the relationship nor the fiduciary's undertaking is to care for the plaintiff's emotional well-being." *Id*. at 815. Whether such a duty exists is "an issue of law to be determined by the court." *Id*. at 811.

The relationship between a newspaper and a reporter is not the kind of special relationship that necessarily implicates the plaintiff's emotional well-being, nor is there an especially likely risk that a newspaper's negligence would cause serious emotional distress to its reporters. As a general matter, an employer-employee relationship does not qualify as a special relationship. *Robinson v. Howard University, Inc.*, 335 F. Supp. 3d 13, 31 (D.D.C. 2018); *Kennedy v. Berkel & Co. Contractors.*, 2020 U.S. Dist. LEXIS 150803, at *21 (D.D.C. Aug. 20, 2020); *see also Doe v. Bernabei & Wachtel, PLLC*, 116 A.3d 1262, 1269 (D.C. 2015) (the

attorney-client relationship generally does not support a claim for negligent infliction of emotional distress). The relationship between reporters and new organizations in general, or between Ms. Sonmez and the Post in particular, is not comparable to the relationships that *Hedgepeth* gives as (admittedly not exhaustive) examples of relationships that can trigger liability for negligent infliction of emotional distress. None of the factors alleged by Ms. Sonmez (Opp. at 34-35) means that her relationship with the Post "necessarily" implicates her emotional well-being or makes it "especially likely" that the Post's negligence would cause serious emotional distress.

B. The special motion to dismiss

The Court denies the Post's special motion to dismiss under the Anti-SLAPP Act because the Post has not made a prima facie showing that Ms. Sonmez's claims arose out an "act in furtherance of the right of advocacy on issues of public interest" within the meaning of D.C. Code § 16-5501(1),

The Anti-SLAPP Act would provide an alternate basis for dismissal if the Post had made such a prima facie showing and the burden therefore shifted to Ms. Sonmez to show a likelihood of success on the merits of her claims. Ms. Sonmez cannot carry this burden for two reasons. First, the Court grants the Post's Rule 12(b)(6) motion for the reasons explained in Section III.A above, and "where the court grants a 12(b)(6) motion because no relief can be granted on a claim as a matter of law, the plaintiff cannot show a likelihood of success on the merits of that claim for the purposes of the anti-SLAPP" special motion to dismiss." *American Studies Association*, 259 A.3d at 741. Second, even if Ms. Sonmez's complaint states a claim upon which relief may be granted (and it does not), she cannot carry her burden by "mere reliance on allegations in the

complaint," *Competitive Enterprise Institute*, 150 A.3d at 1233, and relying exclusively on her complaint, Ms. Sonmez has not proffered any admissible evidence that supports her claims.[14]

In D.C. Code § 16-5501(1), the Anti-SLAPP Act defines an "act in furtherance of the right of advocacy on issues of public interest" to mean:

> (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.[15]

The Post contends that Ms. Sonmez's claims involving the two bans arise from an act in furtherance of the right of advocacy on issues of public interest because a newspaper's decision about whether to assign a particular reporter to a story is an exercise of editorial discretion protected by the First Amendment.[16] However, the Post's decision not to assign Ms. Sonmez to

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[14] A successful movant under the Anti-SLAPP Act is presumptively entitled to attorney fees and other litigation costs, *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016), but the Post does not seek litigation costs under D.C. Code § 16-5504 in its special motion to dismiss.

[15] The term "issue of public interest" is defined in D.C. Code §16-5501(3) to mean "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," with the qualification that the term "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."

[16] The Court focuses on whether the two bans are acts in furtherance of the right of advocacy because these are the alleged adverse actions that the Post argues involve editorial discretion protected by the First Amendment. The other adverse employment actions alleged by Ms. Sonmez, including the suspension with pay and the performance evaluation, do not appear to involve the exercise of editorial discretion, and with one exception, they do not involve public advocacy on issues of public interest and are therefore not covered by the Anti-SLAPP for the reasons discussed in the text. *See American Studies Association*, 259 A.3d at 743 (the Anti-

#MeToo-related stores is not speech, and it therefore does not trigger the protections of the Anti-SLAPP Act. It is settled that "the party filing a special motion to dismiss a claim must show that *some form of speech* within the Anti-SLAPP Act's protection is the basis of the asserted cause of action." *American Studies Association*, 259 A.3d at 746 (emphasis added). "D.C. Code § 16-5501(1) provides a highly specific definition of the class of acts that the Anti-SLAPP Act shields," *id.*, and decisions about assignment of reporters do not fall within that definition because it is not a "form of speech."

American Studies Association, 259 A.3d at 747-48, relies in part on the legislative history of the Anti-SLAPP Act:

> As originally introduced in 2010, the statute would have permitted special motions to dismiss "any claim arising from an act in furtherance of the right of free speech," which was defined to include not only speech but also "[a]ny other conduct in furtherance of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest." This definition reasonably could have been construed to cover not only speech, but at least some related non-speech conduct as well (although that does not, in fact, appear from the Committee Report on the bill to have been intended). But at the suggestion of the ACLU, the Council removed the part of the definition encompassing "any other conduct" and replaced it with narrower language more clearly limited to speech: "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."

SLAPP Act "plainly required a claim-by-claim assessment" of each claim's individual likelihood of success or the sufficiency of the evidence supporting each claim). The exception is the Post's public statement about Ms. Sonmez's two-day suspension. Ms. Sonmez asserted at the March 18, 2022 hearing that the Post's public statement is not covered because it was directed primarily toward protecting the Post's commercial interests rather than toward commenting on or sharing information about a matter of public significance, but the Post carried its non-onerous burden to make a prima facie case that this public statement is protected by the Anti-SLAPP Act. *See Close It! Title Services v. Nadel*, 248 A.3d 132, 144-46 (D.C. 2021) (discussing the difference between statements concerning the public interest and statements concerning only private interests); *Saudi American Public Relations Affairs Committee*, 242 A.3d at 606 (discussing the non-onerous nature of the prima facie case).

Because the bans constitute non-speech conduct (albeit speech-related conduct protected by the First Amendment), they do not as a matter of law trigger the protections of the Anti-SLAPP Act.

For its contrary position, the Post relies heavily on *Hunter v. CBS Broadcasting Inc.*, 221 Cal. App. 4th 1510 (Cal. App. 2013), which held that selection of a newscaster qualified as an act in furtherance of a broadcaster's First Amendment rights protected by the California Anti-SLAPP Act. *Hunter* actually supports the Court's conclusion because it relies on a part of the definition of such acts in the California Anti-SLAPP Act that was purposefully dropped from the definition in the D.C. Anti-SLAPP Act. In *Hunter*, CBS did not rely on the first three of the four categories of protected activity that the California statute defined as acts in furtherance of public advocacy – the three categories involving actual speech and expressive conduct. Instead, CBS contended that the conduct underlying the would-be weatherman's claims fell the fourth category, which defines protected activity to include "any … conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id*. at 1520. Based on this provision, *Hunter* held that that "[a]n act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right." *Id*. at 1521. However, as explained in *American Studies Association*, 259 A.3d at 747-48, the corresponding language in the draft legislation in the District of Columbia was dropped, so protected activity under the enacted statute is limited to actual speech.

The Court does not doubt that a newspaper's decisions about assignment of reporters or about adoption and enforcement of a code of ethics for its reporters is protected by the First Amendment and that these actions are in furtherance of a newspaper's constitutionally protected freedom of the press. *See* Section III.A.2 above (discussing *Newspaper Guild of Greater*

Philadelphia, 636 F.2d 550, and *Nelson*, 936 P.2d 1123). However, in its definition of an "act in furtherance of the right of advocacy," the D.C. Anti-SLAPP does not reach as broadly as the First Amendment. Therefore, claims arising out of a news publication's exercise of editorial discretion concerning the assignment of reporters or enforcement of its code of ethics do not trigger the protections of the Anti-SLAPP Act because exercising this discretion is not actual speech or expressive conduct.

IV. CONCLUSION

Rule 41(b)(1)(B) states, "Unless the dismissal order states otherwise or as provided elsewhere in these rules, a dismissal by the court – except a dismissal for lack of jurisdiction or for failure to join a party under Rule 19 – operates as an adjudication on the merits." "Because 'an adjudication on the merits' is synonymous with a dismissal with prejudice, a trial court that dismisses a case under Rule 12(b)(6) without stating whether it is with or without prejudice operates as a dismissal with prejudice." *Colvin v. Howard University*, 257 A.3d 474, 485 (D.C. 2021) (cleaned up). Ms. Sonmez filed a 47-page complaint, and she does not suggest in her opposition to the Post's motion to dismiss that she could cure any of its shortcomings if she were given leave to amend. Dismissal with prejudice is therefore warranted.

For these reasons, the Court orders that:

1. Defendants' Rule 12(b)(6) motion is granted.
2. Defendants' special motion to dismiss is denied.
3. The case is dismissed with prejudice.

Anthony C Epstein

Anthony C. Epstein
Judge

Date: March 24, 2022

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