VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

JULI BRISKMAN Plaintiff, v. AKIMA, LLC Defendant.	:	Case No. 2018-5355

PLAINTIFF'S BRIEF IN OPPOSITION TO DEMURRER

Plaintiff, Juli Briskman, by and through counsel, hereby submits this Brief in Opposition to Defendant Akima, LLC's Demurrer, and in support thereof states as follows:

The relevant facts are simple. Akima forced Ms. Briskman to resign after she was photographed protesting the President in her personal time. Compl. ¶¶ 14-30. Akima did not force Ms. Briskman to resign because it found her off-duty, peaceful protest obscene—that was mere pretext. Compl. ¶ 7. Akima's real motivation was fear of unlawful government retaliation. Compl. ¶¶ 6-7, 44-45. And then, after promising Ms. Briskman four weeks of severance, Compl. ¶¶ 30, 49, Akima failed to carry out its end of the bargain and only paid two, Compl. ¶ 50-51.

The Court must accept those material facts as true when ruling on Akima's Demurrer. *See Cobbs v. Commonwealth,* 55 Va. Cir. 1, 2001 WL 322728, at *1 (Chesterfield 2001). Thus, because the Complaint alleges that Ms. Briskman was terminated due to fear of unconstitutional governmental retaliation (and not obscenity), the legal question posed here is just the same as it would be if Ms. Briskman had been photographed attending the Women's March with a funny sign or taking a knee with military veterans as the President's motorcade passed by: can a Virginia

employer terminate an employee because the employer is afraid that the government might unconstitutionally retaliate against the employer?

So this Demurrer is decidedly not about the middle finger. It is about whether the fundamental guarantee in both the U.S. Constitution and the Virginia Constitution that Virginians can protest the government free of fear of unconstitutional government retaliation—a right that means very little if your employer can preemptively terminate you out of fear that the government might break the law—will remain viable. To protect that vitally important right, a right that the Virginia General Assembly has described as the "*only effectual guardian of every other right*," 4 Jonathan Elliot, *Debates on the Federal Constitution* 529 (2d ed. 1836) (emphasis in original),[1] this Court should determine that the Virginia public policy exception to at-will employment prohibits companies from terminating employees out of fear that the government might unconstitutionally retaliate for constitutionally protected speech and overrule Akima's Demurrer.

I. Ms. Briskman properly pled wrongful termination

A. Ms. Briskman's forced resignation violated Virginia's public policy that Virginians should be able to engage in off-duty political speech without fearing illegal government retaliation.

Akima spends most of its brief arguing that it does not violate Virginia public policy to fire an employee for engaging in constitutionally protected speech. That may well be true. For example, the Constitution protects even offensive speech, such as that espousing racism; yet it surely would be permissible for an employer to fire an employee for racist speech. But the Court need not consider that issue, because it is not Ms. Briskman's argument.

Instead, Ms. Briskman argues that it violates Virginia public policy to fire an employee because of fear of illegal government retaliation for constitutionally protected speech. Restricting

[1] *Available at* https://memory.loc.gov/ammem/amlaw/lwed.html.

the public policy question to whether an employee can be fired because her employer fears unlawful governmental retaliation makes a considerable difference to the legal analysis. In particular, while an employee *doesn't* have a constitutional right not to be fired by an employer for engaging in constitutionally protected speech, an employee *does* have a constitutional right not to be fired by an employer because of unlawful governmental retaliation for constitutionally protected speech.

Case law supports this argument. The First Amendment to the United States Constitution and Article 1, Section 12 of the Virginia Constitution bar the government from retaliating against government contractors for the off-duty speech of their employees. *See, e.g., Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr,* 518 U.S. 668, 686 (1996) ("[W]e recognize the right of independent government contractors not to be terminated for exercising their First Amendment rights."); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996); *Elliot v. Commonwealth*, 267 Va. 464, 473-74, 593 S.E.2d 263, 269 (2004) (Article I, Section 12 of the Virginia Constitution is coextensive with the First Amendment to the United States Constitution). The state action doctrine recognizes that actions taken by private employers become the acts of the government when the government "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *see also S.R. v. Inova Healthcare Servs.*, 49 Va. Cir. 119, 1999 WL 797192, at *6 n.3 (Cir. Ct. 1999) (applying federal state action case law). If Akima fired Ms. Briskman as a result of government coercion that was motived by a desire to punish Ms. Briskman's off-duty political speech, doing so would have directly violated her constitutional rights.

The constitutional values underlying those cases are implicated even if—as it appears—Akima feared unlawful governmental retaliation and preemptively forced Ms. Briskman to resign. This is where the public policy exception to at-will employment comes in; even if Akima's preemptive termination means that Ms. Briskman does not have a direct constitutional claim, Ms. Briskman can still have a wrongful termination claim against Akima. *Cf. Niland v. Town of Middleburg*, 36 Va. Cir. 48, 1995 WL 17049073, at *4 (Loudon 1995) ("It is irrelevant that the Plaintiff may not have a private cause of action under the various acts she cites in her Motion for Judgment.").

The public policy exception to at-will employment serves as a safeguard to ensure that the at-will employment doctrine is not used to undermine core Virginia public policies. *Bowman* is a perfect example. In *Bowman*, the Virginia Code granted stockholders the right to vote their shares at a shareholders' meeting. *See Bowman v. State Bank of Keysville*, 229 Va. 534, 540, 331 S.E.2d 797, 801 (1985). The Virginia Supreme Court interpreted that right also to include the right to vote corporate shares "free of duress and intimidation." *Id.* Therefore, the Court recognized a wrongful termination action to ensure that employees could vote their shares free of the threat of coercion for the purpose of the statute "to be realized and the public policy fulfilled." *Id.*

The same is true here. Both the federal and state constitutions give government contractors the right to engage in off-duty political speech without fear of government retaliation. *See Umbehr*, 518 U.S. at 686. Moreover, the governmentally coerced actions of government contractors count as the acts of the state. *See Blum*, 457 U.S. at 1004. Thus, it is unconstitutional for a government contractor to fire an employee for constitutionally protected speech as a result of government coercion. The Court has held that there is a public interest in preventing the government from being able to "coerce support in this manner, unless it has some justification

beyond dislike of the individual's political association." *O'Hare*, 518 U.S. at 721. And just as in *Bowman*, that right can only be realized if employees aren't preemptively fired by their employers out of fear of unconstitutional coercion because, if they are, then the government is able to accomplish through indirect fear what it cannot achieve directly. So, just as in *Bowman*, a narrow "Scenario One" or "Scenario Two"[2] exception to the at-will employment doctrine is justified to ensure that employees of government contractors can attend off-duty political protests without fearing unlawful retaliation.

B. Both the United States Constitution and the Virginia Constitution set forth a public policy of Virginia that was violated by Ms. Briskman's forced resignation.

Against this, Akima argues that only Virginia statutes set forth the public policy of Virginia and that, even if either the U.S. Constitution or the Virginia Constitution did, Ms. Briskman's termination still did not violate a state public policy. This Court should reject both arguments because they are not consistent with Virginia case law.

At the outset, the Virginia Supreme Court has never squarely ruled on whether either the U.S. Constitution or the Virginia Constitution can serve as the basis of a *Bowman* claim. *See, e.g.*, *Mitchem v. Counts*, 259 Va. 179, 184 n.3, 523 S.E.2d 246, 248 n.3 (2000), *abrogated on other grounds in Robinson v. Salvation Army*, 292 Va. 666, 791 S.E.2d 577 (2016); *Doss v. Jamco, Inc.*, 254 Va. 362, 366, 492 S.E.2d 441, 443 (1997) ("[W]e express no opinion concerning the public policy of Virginia as it might be articulated in sources other than the Virginia Human Rights Act."). In the absence of controlling precedent, it is an open question for this Court.

This Court should decline to follow Akima's argument that neither constitution can ever serve as the basis for a *Bowman* claim. Akima improperly conflates the question of whether a

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[2] *See Francis v. Nat'l Accrediting Comm'n of Career Arts & Scis., Inc.*, 293 Va. 167, 172, 796 S.E.2d 188, 190-91 (2017).

constitution can *ever* set forth Virginia public policy of and whether that public policy *has been violated.* Take *Brown v. Wal-Mart Stores*, 52 Va. Cir. 480, 2000 WL 1093072 (Spotsylvania 2000), for example. The *Brown* court rejected relying on either constitution not because of anything about either constitution but rather out of a concern that a contrary ruling would mean that "every employment termination . . . would be actionable." *Id.* at *3.

This notion is certainly wrong as a matter of fact and the wrong way to approach the question. First, as to whether the Virginia and United States Constitutions reflect the public policy of Virginia, the answer must be yes. Both were agreed to by the people of Virginia through a process of popular sovereignty and both were understood to set forth the fundamental law of the Commonwealth. And it makes no sense for Virginia law to accord a greater importance to the penumbras of securities law in *Bowman* than either the First Amendment of the United States Constitution—which, it should not be forgotten, the Virginia ratifying convention *demanded* be added[3]—or Article 1, Section 12 of the Virginia Constitution—which the Virginia Constitution itself declares to be "among the great bulwarks of liberty." Thus a blanket rule elevating state statutes over—at the very least—core provisions of the Virginia Constitution would be to "elevate form over substance" because there "can be no doubt that the Virginia Constitution expresses, as *Bowman* and its progeny require, the public policy underlying existing laws designed to protect

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[3] *See* Ratification of the Constitution by the State of Virginia, June 26, 1781 ("That there be a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People in some such manner as the following . . . . Sixteenth, That the people have a right to freedom of speech, and of writing and publishing their Sentiments; but the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated."), *available at* http://avalon.law.yale.edu/18th_century/ratva.asp#1; *see also Gazette, Inc. v. Harris*, 299 Va. 1, 53, 325 S.E.2d 713, 748 (1985) (Poff, J., concurring in part and dissenting in part) ("This Commonwealth first proclaimed the free-press principle in 1776 in Article XII of the Virginia Declaration of Rights, and James Madison was largely responsible for inclusion of the First Amendment in the Constitution of the United States.").

the . . . personal freedoms . . . or welfare of the people in general." *McCarthy v. Tex. Instruments, Inc.*, 999 F. Supp. 823, 829 (E.D. Va. 1998) (internal citations and quotation marks omitted); *see also, e.g.*, *Dohme v. Eurand Am., Inc.*, 956 N.E.2d 825, 828-29 (Ohio 2011) (considering U.S. Constitution when determining public policy exception to at-will employment).

Second, the flood gates of employment litigation that the *Brown* court portended remain firmly closed when a court applies the *Bowman* analysis properly. Whether analyzing public policy set forth in a statute or in the Constitution, a court must ensure the precise public policy articulated is not being applied in an overbroad fashion. That is, simply because a statute or constitution includes a prohibition on the government doing something doesn't mean that prohibition is necessarily implicated by a particular termination. Indeed, Akima's best case—*Miles-Slater v. Computer Based Systems, Inc.*, No. 91-2586, 1991 WL 244691 (4th Cir. 1991)—demonstrates well why recognizing a constitution-based public policy claim would not result in either an explosion of employment cases or a significant expansion of employer liability.

The public policy set forth by the First Amendment and Article I, Section 12 of the Virginia Constitution is not that you can say whatever you want without any consequences. Rather, it is that a government may not coerce obedience to certain points of view. *See W. Va. St. Bd. of Edu. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *O'Hare*, 518 U.S. at 721. The termination in *Miles-Slater* does not implicate that public policy: the termination in *Miles-Slater* occurred because a problem employee petitioned the government (*Miles-Slater*, 1991 WL 244691, at *1-2)—not out of fear that the EPA would somehow act unconstitutionally against the employer. Thus, the *Miles-Slater* plaintiff would still lose under Ms.

Briskman's understanding of the public policy doctrine because the plaintiff's employer did not act out of fear of unlawful governmental retaliation.[4]

Ms. Briskman's case is fundamentally different. Akima forced Ms. Briskman to resign because it feared unconstitutional governmental retaliation. *See* Compl. ¶¶ 6-8, 28, 45-46. Akima's actions therefore endanger the precise public policy—Virginians should be free to protest the government without fear of the effects of unlawful retaliation by the government (Virginia's motto is *sic semper tyrannis* after all)—that is enshrined by both the First Amendment and by Article I, Section 12. This Court should accordingly recognize a narrow exception to the at-will employment rule stating that employees cannot be fired because an employer fears unconstitutional governmental action so that the "goal" of both the United States Constitution and the Virginia Constitution can "be realized" and their "public policy fulfilled." *Bowman*, 229 Va. at 540. And because Akima's alleged justification for firing Ms. Briskman results in the exact harm that both constitutions seek to avoid (the silencing of individuals out of fear of a tyrant's unlawful wrath), thereby "violat[ing] a policy enabling the exercise" of Ms. Briskman's constitutionally "created right," *Francis*, 293 Va. at 172, the Court should find that Ms. Briskman has properly alleged a *Bowman* claim and overrule Akima's Demurrer as to Count I.

II. Ms. Briskman properly pled breach of contract

Virginia has long applied the traditional elements of contract formation: there must be an offer and an acceptance. *Spiller v. James River Corp.*, 32 Va. Cir. 300, 304 (Cir. Ct. 1993); *see e.g., Dulany Foods, Inc. v. Ayers*, 220 Va. 502, 513, 260 S.E.2d 196 (1979). Additionally, the

[4] The result in *Dray v. New Market Poultry Products, Inc.*, 258 Va. 187, 518 S.E.2d 312 (1999) would also be the same under Ms. Briskman's understanding of the public policy doctrine because the *Dray* plaintiff did not allege that she was fired out of fear that the government would violate either the U.S. Constitution or the Virginia Constitution.

concept of a unilateral contract "where one party makes a promissory offer and the other accepts by performing an act has also been recognized" in Virginia. *Id*; *see, e.g.*, *Richmond Eng'g & Mfg. Corp. v. Loth*, 135 Va. 110, 115 S.E. 774 (1923). The offer of severance amounts to a promise, which, if accepted, fulfills the legal requirements of a contract. *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 541, 53 S.E.2d 804, 808 (1949).

Akima made a promissory offer to Ms. Briskman of four weeks of severance for her resignation. Compl. ¶ 30. Akima made that offer out of a desire to obtain the tangible benefit of separating itself from Ms. Briskman's actions. Compl. ¶ 30. Ms. Briskman was also promised that Akima would not object to her request for unemployment compensation and that she could say she quit as opposed to being fired. Compl. ¶ 30-31.

In its Demurrer, Akima alleged Ms. Briskman failed to properly plead consideration. It is well settled under Virginia law:

> Consideration is, in effect, the price bargained for and paid for a promise. It may be in the form of a benefit to the party promising or a detriment to the party to whom the promise is made. It matters not to what extent the promisor is benefited or how little the promisee may give for the promise. A very slight advantage to the one party or a trifling inconvenience to the other is generally held sufficient to support the promise.

Brewer v. First Nat'l Bank of Danville, 202 Va. 807, 815, 120 S.E.2d 273, 279 (1961); *Dulany Foods*, 220 Va. at 511; *see also* 4B M.J. *Contracts* § 33 (repl. 1974).

The benefit to Akima was to disassociate itself from Ms. Briskman. This was the consideration. The size and advantage of the consideration to Akima is irrelevant. At the time of her termination, Akima determined that this was indeed a benefit to itself. While Akima contends that it received no benefit from its dissociation and termination of employment, the facts as pled allege that Akima's desire and benefit was to disassociate itself from Ms. Briskman. At the time, Akima's consideration—obtaining a resignation letter and distancing itself from Ms. Briskman—

was of great significance, and was sufficient to support the oral contract. Through her simple act of penning her resignation letter, Ms. Briskman accepted Akima's offer of four weeks of severance. Accordingly, Akima's Demurrer as to Count II should be overruled.

WHEREFORE, Plaintiff respectfully requests:

(a) that the Court overrule Defendant Akima's Demurrer as to Counts I and II; and

(b) that the Court grant to Plaintiff such other and further relief as the Court determines fit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was, this 8th day of June 2018, served by e-mail and first class mail upon:

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