VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JULI BRISKMAN	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Case No. CL-2018-5335**
	)	
AKIMA, LLC	)	
	)	
Defendant.	)	
	)	

AKIMA, LLC'S REPLY MEMORANDUM
IN FURTHER SUPPORT OF ITS DEMURRER

Edward Lee Isler, Va. Bar No. 27985
Micah E. Ticatch, Va. Bar No. 83351
ISLER DARE, P.C.
1945 Old Gallows Road, Suite 650
Vienna, Virginia 22182
(703) 748-2690
(703) 748-2695 (fax)
eisler@islerdare.com
mticatch@islerdare.com
Counsel for Defendant Akima, LLC

Defendant Akima, LLC ("Akima") hereby submits this Reply Brief in further support of its Demurrer to the Complaint. For the reasons stated below and in its Memorandum in Support of Demurrer ("Supporting Brief"), Plaintiff's Complaint should be dismissed with prejudice.

A. Plaintiff Cannot State A Claim For Wrongful Termination Under Virginia Law.

Plaintiff's wrongful discharge claim rests entirely on the false allegation that Akima terminated her because the Company feared some kind of retaliation by the federal government if it did not do so. Putting aside the fact that this allegation is not accurate, even if this supposition had some basis in truth, Plaintiff has not stated a claim under Virginia law.

1. Plaintiff Cannot Base Her *Bowman* Claim on an Alleged Constitutional Policy.

As noted in the Supporting Brief, the Virginia Supreme Court has defined a *Bowman* claim to be limited to those terminations that either: (i) violate a public policy that enables an employee to exercise a right under a statute; or (ii) violate a policy explicitly expressed in a statute. *See, e.g., Francis v. Nat'l Accrediting Comm'n.*, 293 Va. 167, 172-173 (2017); *Rowan v. Tractor Supply Co.*, 263 Va. 209, 213-214 (2002). Just as the Virginia Supreme Court held in *Lawrence Chrysler Plymouth Corp. v. Brooks,* 251 Va. 94 (1996), Plaintiff here "does not have a cause of action for wrongful discharge because [she] is unable to identify any Virginia statute establishing a public policy that [the employer] violated." *Id.* at 98-99 (emphasis added).

In this case, Plaintiff seems to concede that there is no "Virginia statute" that supports her wrongful discharge claim. Instead, she argues her claim is based on policies reflected in the U.S. and Virginia Constitutions. However, starting with *Bowman*, the Virginia Supreme Court has considered the wrongful discharge cause of action in more than a dozen cases, and in *none* of those cases has it identified the U.S. or Virginia Constitution as a basis for such a claim. Rather, as has been persistently reflected in the Court's decisions, including just last year in *Francis*, in order to state a claim the relevant policy must be reflected in a Virginia statute. Remarkably, Plaintiff

fails to explain (or even discuss) how her claim can be reconciled with the substantive results of *Dray, Rowan,* and *Francis*, all of which involved employees who were terminated for speaking with or petitioning the government. *See Dray v. New Mkt. Poultry Prods.*, 258 Va. 187, 192 (1999) (terminated for speaking to government inspector); *Rowan*, 263 Va. at 212 (terminated for pursuing criminal charges against co-worker); *Francis*, 293 Va. at 170 (terminated for obtaining Protective Order against co-worker); *see also Miles-Slater v. Computer Based Sys.*, 1991 WL 244691 (4th Cir. 1991) (govt. contractor employee speaking to govt. official). If policies prohibiting governmental interference with freedom of speech could provide the basis for a *Bowman* claim against a private employer, each of those plaintiffs would have succeeded in their claims, rather than failed.

In her Opposition, Plaintiff incorrectly asserts that it is an "open question for this Court" whether a policy reflected in the Constitution can be the basis of a *Bowman* claim. *See* Opp. at 5. However, Plaintiff inaccurately portrays Virginia case law. In its Supporting Brief, at 6, Akima cited four Circuit Court opinions that rejected *Bowman* claims based on a public policy purportedly arising under the Virginia or U.S. Constitution.[1] As best as can be discerned, Plaintiff's Opposition simply disregards each of these cases as wrongly decided. *See* Opp. at 6-7.

Plaintiff asks this Court to disregard recent Virginia Supreme Court precedent and the 4 Circuit Court opinions that previously addressed this issue. Plaintiff's request must be rejected. A *Bowman* claim cannot be based on policies arising under the U.S. or Virginia Constitution.

2. The Termination of Plaintiff's Employment Did Not Violate Any Public Policy of the U.S. Constitution or Virginia Constitution.

Even if conceivably the policies underlying the Free Speech Clauses could be used as the basis for a wrongful discharge claim, those policies only regulate the behavior of government

[1] *See Glaser v. Titan Corp.*, 1997 WL 1070646 (Fairfax 1997); *Vaughn v Dyncorp*, 38 Va. Cir. 516 (Fairfax 1994); *Brown v. Wal-Mart Stores, Inc.*, 52 Va. Cir. 480 (Spotsylvania 2000); *Dulles Mutual Benefit Ass'n v. Air Transit, Inc.*, 15 Va. Cir. 140 (Loudoun 1989).

actors, not private employers like Akima. *See* Supp. Br. at 7-8. Plaintiff appears to concede this basic principle of constitutional law, but argues that the "State Action Doctrine" somehow alters the analysis in this instance. *See* Opp. at 3 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).[2]

Plaintiff's analysis is flawed. In short, the State Action Doctrine only holds that, in rare circumstances where a nominally private enterprise acts as an agent of the government, the private entity may be subject to the same constitutional restrictions as the government itself. *See, e.g., Comm. of Pa. v. Bd. of Directors*, 353 U.S. 230, 231 (1957). However, in order for that Doctrine to apply, a plaintiff must show: (i) a "sufficiently close nexus between the State and the challenged action ... so that the action... may be fairly treated as that of the State itself"; and (ii) the State must have coerced the private parties' action. *See Blum*, 457 U.S. at 1004.

There are no allegations in the Complaint that would support either of these requirements being met in the instant case. Indeed, at the core of Plaintiff's argument is her assertion that "it is unconstitutional for a government contractor to fire an employee for constitutionally protected speech as a result of government coercion." Opp. at 4 (emphasis added). Even if one assumes this is a correct statement of law, there is absolutely no evidence here (nor can there be, because none exists) that any government official directed Akima to fire Plaintiff, and indeed, the Opposition seems to concede that fact. *See id.* Given the complete absence of any credible allegation of governmental coercion, the State Action Doctrine is simply not applicable.

Recognizing this deficiency in her argument, Plaintiff appears to be trying to extend the policy underlying State Actor Doctrine to situations where a contractor acts "preemptively" out

---

[2] The other case cited by Plaintiff for this proposition, *S.R. v. Inova Healthcare Serv.*, 49 Va. Cir. 119, 1999 WL 797192 (Fairfax Cir. Ct 1999), offers no support for Plaintiff's position. Rather, Judge Klein, in the very footnote cited by Plaintiff, actually supported Akima's position here by affirming that "[t]he Supreme Court of the United States has long held that there is a clear distinction between deprivation of constitutional rights by the state and purely private conduct against which the Fourteenth Amendment affords no protection." *Id.* at *10 n.3 (emphasis added) (citations omitted).

of some subjective "fear" or belief that the federal government *might* attempt to take some type of negative action against it in the future. Even if this factual allegation were true (which it is not), such a subjective belief by a private entity about what the government might do in the future does not somehow transform Akima into a state actor, and thus a wrongful discharge claim against a private actor based on the constitutional policies restricting governmental interference with free speech simply has no legal basis.[3]

Plaintiff has not cited any authority that would suggest differently. In sum, Akima is an entirely private enterprise and its termination of Plaintiff's employment is incapable of violating the policies encompassed in the free speech clauses of the federal and state constitutions.

B. Plaintiff's Contract Claim Must Be Dismissed Because She Has Failed to Allege Consideration So As to Establish A Binding Contract.

A demurrer to a contract claim must be sustained when the Complaint fails to allege valuable consideration. *See, e.g., Filak v. George*, 58 Va. Cir. 500 (Chesterfield 2002); *BWT Mgmt., Inc. v. Gayle*, 44 Va. Cir. 364 (Norfolk 1998); *Lyons Const. Co. v. TRM Dev. Corp.*, 25 Va. Cir. 352 (Fairfax 1991). As noted in the Supporting Brief, each of the three alleged representations supposedly made by Akima to Plaintiff on her final day of employment (4 weeks of additional pay; ability to indicate that Plaintiff resigned; and no dispute by Akima of any unemployment claim), were all for Plaintiff's benefit. Supp. Br. at 8-10.

In her Opposition, Plaintiff contends that her resignation itself was consideration. This is

---

[3] Plaintiff argues that the policy of preventing an employer from terminating an employee based on "fear of unlawful government retaliation" arises under both the U.S. and Virginia Constitutions. However, under Plaintiff's unsupported theory, the "retaliation" supposedly feared in this case was from the federal government – not Virginia. Thus, even if the Plaintiff's "fear of the government" theory could somehow extend constitutional provisions to Akima and form the basis for a public policy wrongful discharge claim, the only possible source of Plaintiff's alleged policy would seem to be the U.S. Constitution, and not the Virginia Constitution. To suggest that the public policy of the Commonwealth is premised on the U.S. Constitution is an even further reach given that courts have routinely held that even a federal statute cannot serve as the basis for a *Bowman* claim. *See, e.g., Wenig v. Hecht Co.*, 47 Va. Cir. 290, 1998 WL 972350 at *3 (Fairfax 1998) (citing *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94, 98-99 (1996)).

not correct. The Complaint makes clear that in the afternoon of October 31, Akima's Vice President "entered the room, and along with Mr. Frazier, notified Plaintiff she was being terminated from her employment." Complaint ¶ 27. After this conversation, and after she had *already been terminated*, Akima offered Plaintiff the ability to represent to others that "she resigned from her position, as opposed to being terminated from her position." *Id.* ¶ 40.

It is not unusual for an employer to extend this opportunity to an employee being terminated so that the employee can avoid the reputational damage that might arise from the stigma of an involuntary termination. Such an arrangement is clearly for the benefit of the employee and provides no benefit to the employer. In an attempt to deny this reality, Plaintiff argues that in resigning "[t]he benefit to Akima was to disassociate itself from Ms. Briskman." Opp. at 9. But this is simply not accurate. As the Complaint makes clear, at the time of her resignation, Akima had already terminated Plaintiff's employment – and thus had already "disassociated" itself from Plaintiff. Because the resignation did not cause that "disassociation," Plaintiff's argument that the resignation was valuable consideration fails.

In *Mink v. Marion Cty. Juvenile Dep't*, the only case that could be found directly on point, Supp. Brief at 9-10, the court held that allowing the employee to resign when facing involuntary termination was purely for the employee's benefit and thus did not constitute contractual consideration. 2009 WL 5173513, at *13-14 (D. Or. 2009). In response to *Mink*, Plaintiff failed to cite any contrary authority. Because there was no consideration to support a contract, the demurrer should be sustained and Plaintiff's Count II breach of contract claim dismissed with prejudice.

Dated: June 22, 2018

Respectfully submitted,

Edward Lee Isler, Va. Bar No. 27985
Micah E. Ticatch, Va. Bar No. 83351
ISLER DARE, P.C.

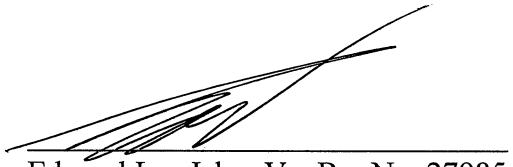
1945 Old Gallows Road, Suite 650
Vienna, Virginia 22182
(703) 748-2690
(703) 748-2695 (fax)
eisler@islerdare.com
mticatch@islerdare.com

Counsel for Defendant Akima, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was, this 22nd day of June 2018, served by e-mail and first class mail upon:

Maria C Simon, Esq.
Rebecca Geller, Esq.
Laurie Forbes Neff, Esq.
Lauren Jancuska, Esq.
The Geller Law Group, PLLC
400 Legato Rd., Suite 1100
Fairfax, VA 22033
msimon@theGellerLawgroup.com



Edward Lee Isler, Va. Bar No. 27985
Micah E. Ticatch, Va. Bar No. 83351
ISLER DARE, P.C.
1945 Old Gallows Road, Suite 650
Vienna, Virginia 22182
(703) 748-2690
(703) 748-2695 (fax)
eisler@islerdare.com
mticatch@islerdare.com
Counsel for Defendant Akima, LLC