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Sampling of Employment Retaliation Cases Against Colleges and Universities in the District of Columbia. Supplemental Testimony by Marcy Karin and Grace Emery for October 10, 2017 Committee of the Whole Hearing

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SAMPLING OF EMPLOYMENT RETALIATION CASES AGAINST COLLEGES AND UNIVERSITIES IN THE DISTRICT OF COLUMBIA

By Marcy Karin and Grace Emery
Supplemental Testimony for October 10, 2017 Committee of the Whole Hearing

Questions were raised at the hearing about the application of the Universal Paid Leave Amendments Act (UPLA) and existing employment laws to colleges and universities in the District, including whether there were any cases of retaliation against employees trying to enforce existing benefits and protections with this category of employers. In response, this testimony provides a sampling of cases involving allegations of retaliation, discrimination, and/or intimidation against employees of local universities who tried to take paid leave or exercise other employment rights.[1]

I. Examples of Cases Alleging Retaliation Against Deans and/or Professors

- *Kimmel v. Gallaudet Univ.*, 639 F. Supp. 2d 34 (D.D.C. 2009)

Karen Kimmel (a dean and tenured professor) alleged that she was discriminated against under the D.C. Human Rights Act (DCHRA) because her deafness or management of it did not conform to what was preferred or accepted by the university. She also alleged that she was retaliated against under the DCHRA and Title VI of the Civil Rights Act. After she complained of discriminatory treatment of African-American and minority students at the university and an attempt to challenge her own discriminatory treatment, including hiring counsel, the university reduced her responsibilities and denied a pay raise, among other allegations. In response to the university's motion to dismiss the complaint for failure to state a claim, the court allowed the retaliation and other claims to move forward.

- *Carney v. American Univ.*, 151 F.3d 1090 (D.C. Cir. 1998)

Darion Carney, who is African American, was the director of student services at American. She was named acting dean of students in 1989, but was not chosen for the permanent dean position. Two years after Carney returned to the role of director of student services, American eliminated her position during a period of downsizing. Carney informed American that she intended to sue for discrimination. In response, American offered Carney a settlement and said that she might be entitled to an additional three months' severance pay. American never gave Carney the additional severance pay. Carney brought a lawsuit claiming race discrimination and alleged that American's failure to give her the additional severance pay was retaliation for her lawsuit in violation of the DCHRA (and 42 U.S.C. § 1981). Reversing a lower court ruling on an evidentiary matter, Carney was allowed to proceed with the retaliation claim.

[1] The descriptions are taken from the allegations reported in the decisions.

II. Examples of Cases Alleging Retaliation Against Staff

- *Holmes v. Univ. of the Dist. of Columbia*, 244 F. Supp. 3d 52 (D.D.C. 2017)[2]

Kashawna Holmes's position as a Program Coordinator for UDC was not renewed while she was out on leave for a high-risk pregnancy. While the position was a "temporary sponsored program appointment" (meaning it was contingent on grant funding), Holmes's initial supervisor assured her that her job "was permanent for all practical purposes" and that her employment "simply continued" after her initial term expired. According to Holmes, a series of "uncomfortable" interactions demonstrated that her termination was prompted by her new supervisor's disapproval of her decision to have a child out of marriage and her use of pre-approved sick leave to seek medical care for her pregnancy. UDC contends that the supervisor's comments were innocent and unrelated to the choice not to renew her contract. The lawsuit asserts nine claims, including unlawful interference, discrimination, and retaliation under the DC Family and Medical Leave Act. UDC filed an unsuccessful motion to dismiss the lawsuit for failure to state a claim upon which relief can be granted, which allowed the case to move forward. The lawsuit is still pending.

- *McFarland v. George Washington Univ.*, 935 A.2d 337 (D.C. Cir. 2005)

John McFarland worked as the Marketing Manager for GW's Continuing Engineering Education Program ("CEEP"). A little over a year later, he applied for the position of CEEP director. He filed an informal grievance with GW's Equal Employment Activities Office when he was passed over for the position. His grievance alleged that his male supervisor had harassed him, discriminated against him on the basis of sex, and retaliated against him for having previously written a letter of complaint regarding the supervisor. The grievance did not result in a finding. McFarland was terminated shortly afterwards and filed a lawsuit alleging retaliation under the DCHRA (among other claims). After a jury trial, the Superior Court found as a matter of law that there were no violations. The appellate court affirmed the decision in favor of GW.

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These are just a few of the lawsuits brought by employees alleging retaliation, discrimination and/or intimidation against District colleges and universities as a result of seeking, using, or helping someone else use a right afforded under local employment law. Realistically, the number of cases makes it difficult to claim trends or draw concrete conclusions regarding the scope of retaliation. This is further compounded by the potential existence of underreporting of these types of bad acts as well as the reality that other faculty and staff claims may have been addressed through a collective bargaining agreement's grievance process or pursued through other internal company policies or administrative enforcement. Nonetheless, *this sampling illustrates that these cases exist*. Further, even if some employees have lost in court, they experienced sufficient retaliation from their perspective to go through the uphill battle of bringing litigation against their former university employers. There is no reason to assume the same types of perspectives, experiences, behaviors, and responses would not occur if the UPLA was amended to be an employer mandate or hybrid model.

[2] Although UDC is not subject to the UPLA, this case is included to help demonstrate the breadth of alleged retaliation by this category of employers in the District.