SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CHARLES J. DAVIS,	:	
	:	
Plaintiff,	:	**2005 CA 8772 B**
	:	**Judge Todd E. Edelman**
v.	:	**Next Date: March 1, 2011**
	:	**Next Event: Mediation**
DISTRICT OF COLUMBIA,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

On January 29, 2010, Defendant filed a Motion for Summary Judgment (hereinafter "Defendant's Motion"). Defendant's Motion raises both procedural and substantive defenses but is ripe only with respect to the procedural issues.[1] The Court has considered Defendant's Motion, Plaintiff's Partial Opposition to Defendant's Motion, Defendant's Reply to Plaintiff's Partial Opposition, and Plaintiff's Supplemental Opposition. In an oral ruling on October 29, 2010, the Court denied summary judgment as to the bulk of the procedural defenses raised in Defendant's Motion. At the joint request of the parties, the Court issues this Memorandum Opinion in further explanation of its October 29, 2010 ruling.

I. Factual and Procedural Background

Plaintiff had been employed for a number of years as a grants officer at the District of Columbia's Department of Human Services's (DHS) Office of Grants

[1] Pursuant to an oral ruling made on October 29, 2010, the Court has permitted Plaintiff to conduct a limited amount of additional discovery before responding to the remaining aspects of Defendant's Motion.

Management. In August 2001, he was reassigned to a position with the Youth Services Administration at the Oak Hill juvenile detention facility. DHS terminated Plaintiff by letter dated November 5, 2004, and his termination became effective November 23, 2004.

On May 2, 2005, Plaintiff sent Defendant a "notice of claim" letter, alleging that the termination was as a result of his age, race, gender, national origin, or political affiliation. The notice of claim concluded by indicating that Plaintiff planned to pursue "any and all legal claims that Mr. Davis has as a result of his wrongful termination," including remedies arising under the D.C. Human Rights Act (DCHRA), the federal Age Discrimination in Employment Act, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 1983, "and any other legal claims that have arisen as a result of the matters discussed above." (Pl.'s Compl., Ex. A.) Plaintiff filed a DCHRA claim against Defendant on November 7, 2005.

On November 15, 2006, Plaintiff sent a second notice of claim to Defendant. In addition to the contentions made in the May 2005 notice of claim, the November 2006 notice of claim also alleged that both the 2001 transfer to the Oak Hill facility and the 2005 termination amounted to retaliation against Plaintiff for speaking out about unlawful practices in the award of grants by DHS, and claimed that the actions against him had violated the District of Columbia Whistleblowers Protection Act (DCWPA). (Pl.'s Reply to Def.'s Opp'n to Pl.'s Mot. to Amend the Compl., Ex. A.)

In December 2006, Plaintiff filed a Motion to Amend the Complaint with an Amended Complaint attached. That motion was granted on August 20, 2007. The Amended Complaint includes three claims: the original claim of employment termination

in violation of the DCHRA, a claim that the District took numerous adverse actions[2] against Plaintiff in violation of the DCWPA, and a claim that Defendant violated public policy.[3]

II. Analysis

To prevail on a motion for summary judgment, the moving party must establish, based upon the pleadings, discovery, and any affidavits or other materials submitted, that there is no genuine issue as to any material fact and that it is therefore entitled to judgment as a matter of law. *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001); Super. Ct. Civ. R. 56(c). Here, Defendant has based a large portion of its Motion for Summary Judgment on procedural defenses. Specifically, Defendant argues that it is entitled to judgment as a matter of law because the DCWPA claim[4] is barred by (i) Plaintiff's failure to file a timely notice of claim containing the whistleblower and retaliation allegations, and (ii) Plaintiff's failure to bring the DCWPA claim within a one-year statute of limitations period.

Both of Defendant's arguments turn on whether the Whistleblower Protection Amendment Act of 2009, which went into effect in March of 2010, controls the notice of claim and statute of limitations requirements for this case. The 2009 amendments made

[2] Specifically, the Amended Complaint alleges that Defendant retaliated against Plaintiff by involuntarily reassigning him to Oak Hill; by failing to give him a formal transfer to Oak Hill or identify him on the Oak Hill organizational chart; by refusing to assign him grants management responsibilities at Oak Hill; and by terminating him.

[3] At the October 29, 2010 hearing, Plaintiff clarified that this is a claim for wrongful termination in violation of public policy.

[4] At the October 29, 2010 hearing, the Court denied the instant Motion as to both the DCHRA and public policy claims. The DCHRA claim was timely filed within the one-year statute of limitations period, and a D.C. Code §12-309 notice of the DCHRA claim was timely sent within six months of Plaintiff's termination. The public policy claim was timely filed within the three-year statute of limitations period, and the May 2005 notice of claim — which focused on Plaintiff's "wrongful termination" — satisfied the §12-309 requirement for this claim.

D.C. Code §12-309 — the statute requiring written notice to the District of Columbia six months prior to the filing of any action for unliquidated damages — inapplicable to DCWPA lawsuits. *See* D.C. Code § 1-615.54(a)(3). The amendments also extended the prior one-year statute of limitations for DCWPA claims, allowing the filing of such claims up to three years after a violation occurs or up to one year after the employee becomes aware of the violation, whichever occurs first. *See* D.C. Code § 1-615.54(a)(2). While Plaintiff urges the Court to apply the 2009 amendments to this case, Defendant argues that these amendments should not apply because they were not in place at the time Plaintiff's claims arose or at the time he filed this suit.

A. Retroactive Application of the DCWPA Amendment Act

Having considered the arguments of the parties, the Court is persuaded that the DCWPA amendments should apply in this case. Defendant correctly notes that, in the absence of a clear manifestation of legislative intent, there is a general presumption against the retroactive application of new laws. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). The presumption against statutory retroactivity is not, however, applied as strictly as Defendant's arguments make it appear: in recognition of the competing interpretive principle that a court should "apply the law in effect at the time it renders its decision," *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974), the strength of this presumption depends on the nature and scope of law being considered. The considerations weighing against retroactive application of laws apply with much less force when a new law impacts only upon procedure. While substantive laws create or impair substantive rights, procedural laws generally only "relate to the modes of

procedure or confirm or clarify existing rights." *See Edwards v. Lateef*, 558 A.2d 1144, 1146–47 (D.C. 1989); *see also Moore v. Agency for Int'l Dev.*, 994 F.2d 874, 878 (D.C. Cir. 1993). Furthermore, while reliance interests generally militate against the retroactive application of laws, courts have recognized "diminished reliance interests in matters of procedure." *Landgraf*, 511 U.S. at 275.

Because of these differences between procedural and substantive laws, applications of new procedural rules are generally not considered impermissible retroactive applications of the law. As the Supreme Court has stated, "[a] statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269–70 (internal quotations and citations omitted). Under this inquiry, new procedural rules may often be applied to lawsuits "arising before their enactment without raising concerns about retroactivity." *Id.* at 275 (internal quotations and citations omitted). *See also Lacek v. Washington Hospital Center*, 978 A.2d 1194, 1197–98 (D.C. 2009); *Edwards*, 558 A.2d at 1146–47 & n. 5.

In addition, the application of new procedural laws applies not just to subsequently-filed lawsuits based on conduct that predated their enactment, but to cases pending at the time the new rules take effect. "Unless a contrary legislative intent appears, changes in statute law which pertain only to procedure are generally held to apply to pending cases." *Montgomery v. District of Columbia*, 598 A.2d 162, 166 (D.C. 1991) (internal quotation and citations omitted). In *Montgomery*, the Court of Appeals drew on case law providing that "the procedure in an action is governed by the law

regulating it at the time any question of procedure arises"; applying different procedure depending on the time of the filing of the action would lead to "chaos." *Montgomery*, 598 A.2d at 166 (quoting *Lazarus v. Metropolitan Ry. Co.*, 40 N.E. 240, 241 (N.Y. 1895) and *People ex rel. Central New England Ry. Co. v. State Tax Comm'n*, 26 N.Y.S.2d 425, 426 (N.Y. 1941)).[5]

In short, to the extent that the 2009 amendments made procedural law changes to the DCWPA, they must apply to this case.

B. DCWPA Notice of Claim

The above-cited principles dictate that the 2009 amendment that abolished the notice of claim requirement for DCWPA cases must be applied in this case. Pre-filing notice statutes are procedural in nature, and changes in these statutes must be applied in lawsuits based on conduct that occurred prior to the enactment of the changes. *Lacek*, 978 A.2d at 1198. The legislative history of the DCWPA amendments also reveals that the District of Columbia Council viewed the elimination of the notice of claim requirement as a change in procedural law. A report on the amendments from the D.C. Council's Committee on Government Operations and Environment specifically characterized the abolition of the §12-309 requirement as the elimination of a "procedural barrier." Committee on Government Operations and Environment, *Report on B. 18-233*, at 6. In addition, that report contrasted the notice of claim amendment to the "substantive"

[5] In its Reply, Defendant argues that applying the 2009 amendments to Plaintiff's claim would mean that his claim would be treated differently from others filed in the same pre-Amendment time period which have already been resolved. (Def.'s Reply 2.) Defendant's argument does not address the numerous cases holding that new procedural laws should be applied to litigation pending at the time of passage. *See, e.g.*, *Coto v. Citibank FSB*, 912 A.2d 562, 564–67 (D.C. 2006); *Montgomery*, 598 A.2d at 166; *Moore*, 994 F.2d at 879.

amendments elsewhere in the bill. *Id.* at 7. Therefore, the 2009 amendment abolishing the D.C. Code §12-309 notice requirement should apply to this case, and the purported lateness of Plaintiff's notice of claim does not provide a basis for summary judgment on the DCWPA claim.[6]

C. DCWPA Statute of Limitations

The extended statute of limitations in the 2009 Amendment should also apply to this lawsuit. Changes in statutes of limitation that do not impinge on vested substantive rights also constitute changes in procedural law. *Olivarius v. Stanley J. Sarnoff Endowment for Cardiovascular Science, Inc.*, 858 A.2d 457, 463 (D.C. 2004). *See also Trinity Broadcasting Corp. v. Leeco Oil Co.*, 692 P.2d 1364, 1366 (Okla. 1984) (treating amendment extending the statute of limitations for securities violations as procedural change which may be applied retroactively). As with the elimination of the notice of claim requirement, the D.C. Council viewed the expansion of the statute of limitations as a procedural change, grouping it with the parts of the amended Act seeking to remove "procedural barriers to recovery" and contrasting it with "substantive changes" to the law. Committee on Government Operations and Environment, *Report on B. 18-233*, at 6.

[6] The Court notes that Senior Judge Braman has reached a similar conclusion in a pending case, *Cusick v. District of Columbia*, No. 2008-CA-6915 (D.C. Super. Ct.). In an oral ruling at a motions hearing, Judge Braman held that the 2009 amendment abolishing the §12-309 notice requirement applied to a DCWPA claim that arose in 2007 and was filed in 2008. Judge Braman relied largely on *Montgomery* and the cases cited therein, the legislative history of the DCWPA amendments, and the Uniform Law Commissioner's Model Statutory Construction Act. (Motions Hr'g Tr. 23:11–29:25 & 35:11–12, Aug. 17, 2010.) The Defendant has brought to the Court's attention that a judge of the United States District Court for the District of Columbia has reached a contrary conclusion, holding that the amendments to the DCWPA could not be applied retroactively. *See Payne v. District of Columbia*, No. 08-cv-00163, 2010 U.S. Dist. LEXIS 103039, at *29–31 (D.D.C. September 29, 2010). The opinion in *Payne*, however, reached these conclusions without considering the distinction between retroactive application of substantive and procedural laws, the legislative history of the DCWPA amendments, or the District of Columbia case law cited above. *Id.*

Therefore, in this case Plaintiff can proceed on DCWPA claims filed within three years after the violation occurred or within one year after Plaintiff first became aware of the violation, whichever occurred first. D.C. Code § 1-615.54(a)(2).

To the extent that Plaintiff premises the DCWPA claim on his termination, the Amended Complaint is clearly timely. Plaintiff filed this claim within three years of his termination and less than one year after he first learned (through a September 2006 response to an interrogatory) that the termination violated the DCWPA.

Insofar as the DCWPA claim sounds in other adverse actions during Plaintiff's employment, however, the statute of limitations question becomes more complicated. All of these other actions — Plaintiff's transfer to Oak Hill, failure to assign Plaintiff various duties, failure to identify him on an organizational chart, and so forth — took place in 2001, or at least well before Plaintiff's termination in 2004. Even assuming the existence a "discovery rule" for the tolling of the statute of limitations, by Plaintiff's own theory, he knew of these adverse actions and their retaliatory nature as they occurred. In contrast to his arguments relating to the termination, Plaintiff claims no new knowledge that those pre-termination adverse actions were based on retaliation; the only new information Plaintiff claims he gained through discovery relates to the connection between his ultimate termination and Defendant's purported retaliatory motive. Thus, for the non-termination adverse actions, the statute of limitations had run within one year of each of those events, i.e., at the very latest, within a year of November 2004. The DCWPA claim

was filed more than a year after November 2004, so to the extent these adverse actions were separate bases for the DCWPA claim, they are time-barred.[7]

Thus, as stated in open court on October 29, 2010, Defendant's Motion for Summary Judgment has been granted with regard to the aspect of Plaintiff's DCWPA claim based on alleged adverse employment actions taken prior to his termination. The Motion has been denied as to all other procedural defenses raised by Defendant. Defendant's Motion for Summary Judgment as to the substantive defenses has been denied without prejudice, pending further discovery and additional briefing according to the schedule set by the Court.

Todd E. Edelman
Associate Judge
(Signed in Chambers)

Date: November 23, 2010

Copy by e-serve to:
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[7] The Court does not agree with Plaintiff's argument that, to the extent the DCWPA claim is based on these non-termination adverse actions, it "relates back" to the original Complaint. This aspect of the DCWPA claim involves not only a separate legal theory, but entirely distinct facts and events.