IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DANTE DESIDERIO,	
Plaintiff,	
v.	**Case No. 2022 CA 2830 B**
	Judge Juliet J. McKenna
NATIONAL CONGRESS OF AMERICAN INDIANS, *et al.*	
	Next Event: Initial Hearing
Defendants.	**Sept. 23, 2022**

DEFENDANTS' OPPOSED MOTION TO DISMISS OR, ALTERNATIVELY, TO COMPEL ARBITRATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Defendants National Congress of American Indians, *at al.* ("NCAI"), through counsel, submit this Motion to Dismiss or, in the alternative, to Compel Arbitration. Pursuant to Super. Ct. R. Civ. 12-I, Defendant NCAI sought Plaintiff's consent to the relief requested by this Motion; Plaintiff does not consent.

INTRODUCTION

The Court should dismiss this action because Plaintiff Dante Desiderio ("Mr. Desiderio" or "Plaintiff") fails to state a claim under Super. Ct. R. Civ. 12(b)(6).[1] Additionally, specifically

[1] Throughout this Motion and Memorandum in Support, NCAI references the Superior Court Rules of Civil Procedure. However, in anticipation of its filing of a Notice of Removal in the United States Federal District Court for the District of Columbia, NCAI notes that Federal Rules of Civil Procedure analogous to those relied upon here – namely Fed. R. Civ. P. 12(b)(1) and 12(b)(6) – are identical in language and intent to the corresponding Superior Court Rules.

as to his claim of earned paid time off ("PTO"),[2] Mr. Desiderio's claim is moot and should be dismissed pursuant to Super. Ct. R. Civ. 12(b)(1).

In the alternative, the Court should compel arbitration of his claims pursuant to the terms of the Employment Agreement (the "Agreement") entered into between Mr. Desiderio and NCAI and attached hereto as Exhibit 1.[3]

FACTUAL BACKGROUND

A. The Parties

NCAI is a 501(c)(4) nonprofit organization that provides services to American Indian and Alaska Native People(s) in the United States and works to protect their tradition and culture, secure benefits and services for them, secure their rights under treaties and agreements, promote their common welfare, and to educate the public regarding Indian and Native governments, people and rights. Complaint ¶ 15. NCAI also owns the National Congress of the American Indians Fund, a 501(c)(3) nonprofit organization that houses its educational efforts. Complainant ¶15.

NCAI is led by its Executive Committee. Its President, 1st Vice President, Recording Secretary, and Treasurer are elected by the entire membership. The twelve Regional Vice Presidents are elected by their respective regions.

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2 Although the Complaint does not so state, NCAI assumes for purposes of this brief that "PTO" as used at paragraphs 67 and 69 of the Complaint, refers to "paid time off."

3 In examining the sufficiency of the complaint, the court may consider the complaint itself and any documents it incorporates by reference. *Abdelrhman v. Ackerman*, 76 A.3d 883, 887 (D.C. 2013).

Mr. Desiderio was hired as NCAI's Executive Director on April 12, 2021. Complaint ¶ 12. He is a party to an employment agreement he negotiated with NCAI, which contemplated a term of employment from May 11, 2021 to May 11, 2024. *Id.* The Agreement provides that he reports to the President of NCAI's Executive Committee, that he "shall perform services as directed by the Executive Committee," and that he "shall direct and coordinate the various activities of the NCAI Congress and Fund organizations through the authority delegated by the Executive Committee." Exh. 1, Declaration of Larry Wright, Jr.; Exh. 2, Desiderio Agreement at pg. 2.

B. The Arbitration Provision

Mr. Desiderio's Agreement with NCAI includes a provision entitled "Resolution of Disputes" (the "Arbitration Provision"). Page 6 of the Agreement, under the heading "RESOLUTION OF DISPUTES," includes the language, "In the event of any Dispute [...] between Desiderio and NCAI, including all Disputes regarding Desiderio's rights under this Agreement or termination of this Agreement, or any extension or renewal thereof, and if the Dispute is not resolved informally by the Parties, Desiderio shall submit the Dispute to binding arbitration... "

The Arbitration Provision defines "Dispute" – as referenced above – as follows:

As used herein, "Dispute" means any and all demands, claims, or causes of action, whether related to or arising out of this Agreement, any applicable federal or state statute, regulation or executive order, or the common law, including demands, claims or causes of action for:

- *Breach of contract, wrongful termination, breach of the implied covenant of good faith and fair dealing, violation of public policy, retaliatory discharge, malfeasance, misfeasance, breach of trust, equitable or promissory estoppel,*

misrepresentation, defamation, invasion of privacy, tortuous [sic] interference with contract or contractual expectancy, etc.;

- *Employment discrimination, including claims based on Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, any applicable state law against discrimination, and all other applicable federal, state and local antidiscrimination laws, regulations and executive orders; and*
- *Damages for pain and suffering, emotional distress, liquidated damages, punitive damages, taxable costs, interest and reasonable attorneys' fees.*

Mr. Desiderio does not contend – and cannot contend – that the Agreement is not valid and enforceable.

C. The Complaint

On June 24, 2022, Mr. Desiderio filed a Complaint in this Court. On August 1, 2022, he filed an Amended Complaint, which he then served on NCAI on August 12, 2022 (the "Complaint"). The Complaint alleges three causes of action: (1) retaliation under the DCHRA, (2) "failure to pay wages in violation of DC [sic] wage payment and collection law," and (3) "retaliation in violation of DC [sic] wage payment and collection law." Complaint ¶¶ 57 – 79. While Mr. Desiderio has styled the latter two claims as violations of D.C. "wage payment and collection law," they are, in fact, breach of contract claims – as discussed at *Argument* § C.2, *infra* – and therefore subject to the arbitration provision of the Agreement.

STANDARDS OF REVIEW

A. Motion to Dismiss Pursuant to Rule 12(b)(1)

This Court may dismiss a claim where it determines that it does not have subject matter jurisdiction because the claim is moot. Super. Ct. R. Civ. allows parties to move to dismiss a claim where the Court lacks subject matter jurisdiction. Super. Ct. R. Civ.12 (b)(1). Where the

defendant challenges the court's subject matter jurisdiction, the court may consider facts outside of the pleadings without converting the motion into one for summary judgment. *FOP v. District of Columbia*, 2011 D.C. Super. LEXIS 11, *4-5, citing *Pardue v. Ctr. City Consortium Schs. of the Archdiocese of Wash., Inc.*, 875 A.2d 669, 674-75 (D.C. 2005). Moreover, unlike motions to dismiss based upon on other grounds, the facts are not construed in favor of the plaintiff. The plaintiff bears the burden of proving jurisdictional facts. *Id.* Where the lack of jurisdiction allegedly arises from matters outside the Complaint, it is a factual attack and the court is free to weigh the evidence without any presumptions regarding the complaint's truthfulness. *Id.*, *citing Bible Way Church v. Beards*, 680 A.2d 419, 426 n.4 (D.C. 1996). Moreover, a court, in deciding a Rule 12 (b)(1) motion, may review any evidence submitted by the parties, including affidavits, without converting the motion into a Rule 56 motion for summary judgment. *Id.*

When arguing that the Court does not have subject matter jurisdiction specifically due to mootness, two prerequisites that must be satisfied before a claim can be deemed moot: (1) it must be plain that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation, and (2) it must be concluded with assurance that there is no reasonable expectation will recur. *FOP v. District of Columbia*, 2011 D.C. Super. LEXIS 11, *4-5 (internal quotes and citations omitted).

B. Motion to Dismiss Pursuant to Rule 12(b)(6)

A complaint should be dismissed under D.C. Super. Ct. R. Civ. 12(b)(6) if it does not satisfy the requirement of Rule 8(a) that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." To determine whether a complaint survives a motion to dismiss, a court must determine (1) whether the complaint includes well-pled factual

allegations, and (2) whether such allegations plausibly entitle the plaintiff to relief. *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011). "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.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (U.S. 2009)). Although a court "must accept as true all of the allegations contained in a complaint," "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" do not suffice. *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1128-29 (D.C. 2015) (quoting *Iqbal*, 556 U.S. at 678). *Medrano v. Int'l Golden Foods*, 2021 D.C. Super. LEXIS 58, *4-5.

C. Motion to Compel Arbitration

A motion to compel arbitration invokes the well-established preference for arbitration when the parties have expressed a willingness to arbitrate. Federal and District of Columbia statutes "are in agreement on the issue of favoring arbitration when the parties have entered into a contract containing an arbitration clause." *Weatherly Cellaphonics Partners v. Hueber,* 726 F. Supp. 319, 322 n.5 (D.D.C. 1989); *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983) ("as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *Carter v. Cathedral Ave. Coop., Inc.,* 566 A.2d 716, 717 (D.C. 1989) (District of Columbia decisions "have recognized this same principle" (collecting cases)). The preference for arbitration is essentially a generalized inference of the parties' intent; courts will presume that an arbitration clause agreed upon by the parties was intended to foreclose judicial involvement in their disputes. *Friend v. Friend*, 609 A.2d 1137, 1139 (D.C. 1992).

As codified in the District of Columbia Revised Uniform Arbitration Act ("RUAA"), D.C. Code §§ 16-4401 to 16-4432 (2012 Repl.), and the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1996), District of Columbia and federal law broadly protect the right of a party to contract for the use of arbitration as an alternative dispute-resolution mechanism. The RUAA provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable," D.C. Code § 16-4406, and permits judicial enforcement of agreement to arbitrate, *id.* § 4407. This Court's case law has expressed a strong preference favoring arbitration when a contract contains an arbitration clause. *See, e.g., Carter v. Cathedral Ave. Coop., Inc.*, 566 A.2d 716, 717 (D.C. 1989) (describing a "presumption of arbitrability" when a contract contains a clause that covers the asserted dispute); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) ("as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). Thus, "[a] motion to compel arbitration invokes the well-established preference for arbitration when the parties have expressed a willingness to arbitrate." *TRG Customer Sols., Inc. v. Smith*, 226 A.3d 751, 755 (D.C. 2020), citing *Friend v. Friend*, 609 A.2d 1137, 1139 (D.C. 1992).

The proper approach for the Court to employ in reviewing a defendant's motion to compel arbitration "is to apply the same standard of review that governs Rule 56 motions." *Brown v. Dorsey & Whitney, LLP*, 267 F. Supp. 2d 61 (D.C.C. 2003). "In as much as the district court's order to arbitrate is in effect a summary disposition of the issue of whether or not there had been a meeting of the minds on the agreement to arbitrate," consideration of the motion

according to the standard used by District Court's resolving summary judgment motions pursuant to Fed. R. Civ. P. 56(c) "is appropriate." *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F. 2d 51, 54 n.9 (3d Cir. 1980); *Nelson v. Insignia ESG, Inc.*, 215 F. Supp. 2d 143, 147 (D.D.C. 2002) (holding that "summary judgment [was] the proper procedural mechanism to use in evaluating whether the plaintiff must submit to arbitration" (citation omitted)).

ARGUMENT

A. Plaintiff's Claim of Unpaid PTO is Moot and Should Be Dismissed

As a threshold matter, the portion of Mr. Desiderio's purported 'wage' claim (Count II) related to the payment of PTO should be dismissed as moot. This portion of Mr. Desiderio's Count II appears to rely on an unorthodox NCAI policy (instituted under Mr. Desiderio's leadership) that allowed for twice annual, interim payments to employees *during the course of their employment* of a certain amount of accrued but unused PTO. But this claim is moot for two reasons – first, Mr. Desiderio *was* issued an interim payment for accrued but unused PTO consistent with the policy; and second, Mr. Desiderio was subsequently compensated for *all* accrued but unused PTO at the time his employment with NCAI ended, which occurred after the Complaint was filed.

Specifically, Mr. Desiderio alleges, in support of Count II, that he was not paid two weeks of "earned PTO" *while a current NCAI employee.* Complaint ¶ 69. Mr. Desiderio also alleges that he was "ignored" when he asked to be paid out for 72 hours of earned leave, "which amounted to $9,519.23." Complaint ¶ 67. Under NCAI's policy as was in effect beginning in or about December 2021 and continuing through June and July 2022, each employee – including Mr. Desiderio – was eligible to "roll over" up to 80 hours of accrued but unused PTO as of each

May 31st and December 31st annually. Exh. 1, Wright Declaration, and Exh. A thereto (presentation re: New NCAI PTO Policy). Any accrued PTO beyond 80 hours was paid out to employees at their regular rate. *Id.* NCAI interprets Mr. Desiderio's allegations in Paragraphs 67 and 69 of his Complaint as indicating that he was not paid out for the full amount of accrued but unused PTO owed to him – which is to say, any hours beyond 80 as of each May 31st and December 31st.

NCAI's payroll records make clear that this is not the case – **Mr. Desiderio received the interim payment of accrued but unused PTO he alleges he did not receive**. Mr. Desidero's paystub dated May 27, 2022 reflects that he was paid $8,746.16 for 66.15 hours of accrued "vacation" – in addition to his regular salary payment of $10,576.92. Exh. 1, Wright Declaration and Exhs. B (Desiderio PTO Accounting) and C (Desiderio Paystubs) thereto. This is consistent with NCAI's internal recordkeeping tracking Mr. Desiderio's PTO leave, which show that Mr. Desiderio, as of May 21, 2022, had accrued 146.15 hours of PTO, and was therefore paid out for 66.15 hours as of May 27, 2022 – which was his accrual beyond 80 hours.[4]

Even Mr. Desiderio's allegations regarding the amount of accrued but unused PTO he contends he was not paid *while still an employee of NCAI* are inconsistent. He alleges in paragraph 67 of his Complaint that he was owed and denied a payment of 72 hours of accrued but unused PTO. But in paragraph 69, he alleges that he was owed and denied a payment of "two weeks of earned PTO." Regardless of his precise claims, because Mr. Desiderio was paid

[4] Remarkably, NCAI's internal recordkeeping tracking Mr. Desiderio's PTO leave reflects that during his 15 months of employment with NCAI, he did not use any PTO whatsoever.

out for 66.15 hours on May 31, he was not entitled to any additional payment (six hours, 72 hours or 80 hours) in July 2022.[5]

In addition to the fact that Mr. Desiderio *did* receive an interim payment of accrued but unused PTO which he claims he did not, Mr. Desiderio was ultimately was paid for *all* accrued but unused PTO available to him at the time his employment with NCAI ended, in accordance with NCAI policy. His paystubs reflect those payments. *See* Exh. 1.C (Desiderio Paystubs). Even if Mr. Desiderio initially suffered some harm here – which he did not – it is plain that the effects of any violation have been completely and irrevocably eradicated – because Mr. Desiderio was paid out for all PTO owing to him upon his separation from NCAI. *FOP v. District of Columbia*, 2011 D.C. Super. LEXIS 11, *4-5. Further, there is no reasonable expectation that it will recur, because Mr. Desiderio is no longer employed by NCAI. *Id.* Mr. Desiderio's claim as to his PTO is moot and must be dismissed pursuant to Rule 12 (b)(1).

B. Plaintiff Fails To State Any Claim For Which Relief Can Be Granted

Each of Plaintiff's three claims should be dismissed with prejudice for failure to state a claim for which relief can be granted under Rule 12 (b)(6).

1. Plaintiff Fails to State a Claim for Retaliation under the DCHRA

Plaintiff alleges that he was subject to unlawful retaliation under the DCHRA after he sent two memoranda to NCAI's Executive Committee and other NCAI Officers reporting that an

[5] It is also not clear to NCAI on what Mr. Desiderio is basing his statement at Paragraph 69 of the Complaint that he was not paid for "two weeks of earned PTO," and how that statement comports with the statements of Paragraph 67.

investigation being conducted into sexual harassment allegation was not being conducted in a fair and impartial manner; "interven[ed]" on behalf of two NCAI contractors; and "through his lawyer" wrote to a law firm hired by the Executive Committee to complain about the investigation. Complaint ¶ 61. None of these allegations satisfy the elements of a retaliation claim under the DCHRA, and so this claim should be dismissed.

The DCHRA prohibits an employer from retaliating against an employee "'for opposing an employment practice that is prohibited by the Act.'" *Ukwuani v. D.C.*, 241 A.3d 529, 546 (D.C. 2020). (citation omitted). To make out a *prima facie* case of retaliation, an employee must establish (1) that he engaged in a protected activity; (2) that his employer took an adverse action against him; and (3) that a causal relationship existed between that adverse action and the protected activity. *Id.*

Mr. Desiderio fails to state a claim for retaliation under the DCHRA because he does not allege that he engaged in legally recognized protected activity. Critically, by its terms, the DCHRA applies only to applicants and employees – but not to independent contractors. *Samuels v. Rayford*, No. CIV A 91-0365 (JHG), 1995 WL 376939, at *7 (D.D.C. Apr. 10, 1995) (finding that an independent contractor relationship is not included in the word "employment" for the purposes of the DCHRA).

First, Mr. Desiderio apparently alleges that he engaged in protected activity by "sending two memoranda to Defendant's Executive Committee and the Officers of the organization advising that the law firm hired by the Executive Committee [to investigate allegations of sexual harassment] was not conducting a fair, [sic] and impartial investigation in [Jane] Doe's complaint." Complaint ¶ 59. Mr. Desiderio has not plead that he participated in protected

activity under the DCHRA because he does not allege that he complained about a violation of the law. The DCHRA does not (and cannot reasonably be interpreted to) dictate the methods or practices an employer must use to investigate complaints of harassment or discrimination.[6] Mr. Desiderio does not allege that he complained that NCAI's investigation itself was discriminatory or harassing.[7]

Second, Mr. Desiderio apparently alleges that he engaged in protected activity by "intervening on behalf of [Max] Muller and [Pamela] Fagan in the face of the Executive Committee's race-based criticism of his hiring of two Non-Native American staff members, and by opposing the Executive Committee's race-based termination of two Non-Native American staff members." Mr. Desiderio has not plead that he engaged in protected activity because, here again, he does not allege that he complained about a violation of the law. Both Mr. Muller and Ms. Fagan were, at all times relevant to this complaint, **independent contractors** brought on *by Mr. Desiderio* to perform services for NCAI. At no time were they employees. Complaint ¶ 19. Likewise, they were not applicants for employment; Mr. Desiderio does not allege that they applied for any position with NCAI, nor that he believed them to have applied for a position with NCAI. The DCHRA, by its terms, provides protection against discrimination for employees and applicants. D.C. Code § 2–1402.11. An independent contractor, as a non-employee, does not have access to relief under the DCHRA. *Samuels v. Rayford*, No. CIV A 91-0365 (JHG), 1995

[6] NCAI vehemently disagrees with Mr. Desiderio's suggestion that its investigation into Ms. Doe's complaint was anything but fair and impartial.

[7] Although outside the scope of this Motion, as a factual matter, NCAI denies that the law firm hired by Mr. Desiderio (without the input of the Executive Committee), O'Hagan Meyer, conducted an investigation into Doe's complaint at all.

WL 376939, at *7 (D.D.C. Apr. 10, 1995) (requiring independent contractor plaintiff to prove that an "employer-employee relationship exists" to maintain claim under the DCHRA). And, where an individual did not apply for a position, s/he cannot claim discrimination in non-selection. *Thomas v. Gandhi*, 525 F. Supp. 2d 103, 108 (D.D.C. 2007).

Mr. Desiderio, as NCAI's Chief Executive Officer, knew that neither Muller nor Fagan were employees nor applicants for employment, because he himself executed the contracts with the business entities that actually employ Muller and Fagan. Exhs. 3 and 4.[8] It strains credulity for him to now assert that he believed he was complaining about a violation of applicable legal protection for NCAI's employees, and the Court should not credit that bald assertion here. Further, Mr. Desiderio clearly understands the importance of the distinction; he took pains in filing his Amended Complaint to strike references to these individuals as "employees" and instead to reference them as "staff members."

Finally, Mr. Desiderio apparently alleges that he engaged in protected activity when his lawyer "wr[ote] to the law firm hired by NCAI's Executive Committee on June 8, 2022 reiterating Plaintiff's complaint about the handling of the Executive Committee's investigation." Complaint ¶ 61. This is not protected activity under the DCHRA for the same reasons discussed above: a complaint about the supposed (non-discriminatory, non-retaliatory) shortcomings of an investigation into conduct of a third party does not constitute activity protected by the DCHRA.[9]

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[8] These contracts between Max Muller and NCAI, and Pamela Fagan and NCAI, respectively, are incorporated into the Complaint by reference, namely Plaintiff's many references to the nature of the (contractual) relationship between these individuals and NCAI; *see, e.g.*, Complaint ¶¶ 19, 21, and 25.

[9] NCAI is aware of no case law suggesting that submission of a grievance submitted to outside counsel for an organization, about that outside counsel's handling of an ongoing investigation as directed by the organization, constitutes a cognizable "complaint" under the DCHRA. In fact, the ongoing investigation being conducted by outside counsel, at the direction of the organization's Executive Committee, was an investigation into a harassment

2. Plaintiff Fails to State a Claim for Failure to Pay Wages

Plaintiff also alleges that NCAI violated the D.C. Wage Payment and Collection Law – by reframing a breach of contract claim as wage claim (presumably, to circumvent the arbitration requirement in the Agreement, which only carves out from mandatory arbitration statutory wage claims). Specifically, in support of Counts II and III, Mr. Desiderio relies upon two apparently unrelated allegations: that NCAI did not award him a 5% salary increase at his one-year anniversary, and that it did not pay him out for certain earned but unused PTO. Complaint ¶¶ 65 – 79. Neither assertions are sufficient to state a claim of a violation of D.C.'s Wage Payment and Collection Law. The Complaint also references an alleged failure by NCAI to "pay Plaintiff his earned wages (1) at least once per month; (2) within 10 working days of the covered pay period; and (3) on designated paydays." Complaint ¶ 70.

First, Mr. Desiderio's allegation that NCAI did not award him a 5% salary increase predicates itself on the assumption that he was "entitled" to this increase. Complaint ¶ 66. This is not the case. Mr. Desiderio's Agreement contemplated that he would be

> ***eligible*** for a five percent (5%) annual salary increase ***based on meeting the goals, metrics and milestones of the organization***, effective one year after the Employment Term begins and on the anniversary of the Employment Term every year thereafter.

See Exh. 2, Desiderio Employment Agreement, at pg. 9 (emphasis added). Mr. Desiderio was not "entitled" to an "automatic and mandatory" annual increase; rather, his ***eligibility*** for the increase was conditional on "qualitative and quantitative measures established by" NCAI and his characterization of any salary increase as "owed" to him is disingenuous at best. *Brady v.*

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complaint lodged against a contractor who had been hired by Mr. Desiderio – and was initiated by the Executive Committee following Mr. Desiderio's failure to adequately address that harassment complaint.

Liquidity Servs., Inc., No. 18-CV-1040 (RCL), 2018 WL 6267766, at *4 (D.D.C. Nov. 30, 2018). Mr. Desiderio has not presented well-pled factual allegations that plausibly allege that he was eligible for the increase, and he certainly has not presented well-pled factual allegations that allow the court to draw the reasonable inference assumption that he was "owed" such an increase even if "eligible" for it. He has not plead facts which have facial plausibility that allows the court to draw the reasonable inference that he was entitled to that increase.[10] *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011). Because his claim hangs on that assumption, it must fail.

Second, Mr. Desiderio alleges that NCAI did not pay him out for certain earned but unused PTO in accordance with organization policy. Complaint ¶ 69. In addition to failing as moot under Rule 12(b)(1), this claim fails because the Wage Payment Act "applies only when wages are not in dispute." *Chan Chan v. Children's Nat'l Med. Ctr.*, No. CV 18-2102 (CKK), 2019 WL 4471789, at *4 (D.D.C. Sept. 18, 2019) (quoting *Briscoe v. Costco Wholesale Corp.*, 61 F. Supp. 3d 78, 92 n.7 (D.D.C. 2014)). NCAI not only disputes that Mr. Desiderio was entitled to be paid out for earned but unused PTO under organization policy at the time he requested it (*see Argument* at § A, supra) but Mr. Desiderio's own inconsistent allegations regarding the *amount* of accrued but unused PTO to which he contends he is entitled further supports that the amount of wages is in dispute (compare Complaint ¶¶ 67, 69). Mr. Desiderio has failed to plead facts which have facial plausibility that would allow the court to draw the

[10] This Court applies its Rule 12(b)(6) consistent with interpretation of Fed. R. Civ. P. 12(b)(6), including application of the "plausibility" standard derived from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, (2007); *see, e.g.*, *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011)

reasonable inference that he was entitled to an undisputed amount of PTO and thus this dispute is not properly subject to a claim under the Wage Payment Act, and this claim must be dismissed.

3. Plaintiff Fails to State a Claim for Retaliation under D.C. Wage Law

Finally, Mr. Desiderio claims that NCAI retaliated against him for complaining about earned but unpaid wages. Complaint ¶¶ 76 – 79. This claim must fail for two reasons: Mr. Desiderio has not plead a claim that he was subject to a violation of the D.C. Wage Payment Law for the reasons described above at *Argument* § B.2, and he has not alleged that he was subject to legally material adverse employment action.

First, he alleges that this complaint was lodged in a June 8, 2022, letter from his attorney, in which the attorney "complained to NCAI about Plaintiff's unpaid, earned wages." Complaint ¶ 78. As Mr. Desiderio makes clear throughout his Complaint, these "unpaid wages" constituted the 5% annual raise for which he would be "eligible" pursuant to his Employment Agreement. Complaint at ¶¶ 66.[11] As discussed above, Mr. Desiderio's assertion that he was **owed** (or "due") this annual increase does not withstand even the thinnest scrutiny as a potential wage claim. To make out a claim of retaliation, Mr. Desiderio must assert that he made a complaint that NCAI engaged in conduct that he "reasonably and in good faith" believed violated the D.C. Wage Payment Law. D.C. Code § 32–1311. But here – where not only a plain reading of the Agreement reflects the potential pay increase is not guaranteed, and particularly given that this "complaint" was made to NCAI presumably upon the advice of his lawyer, who transmitted the complaint – Mr. Desiderio cannot plausibly have had a good faith belief that his Employment

[11] Mr. Desiderio does not allege that on June 8, 2022, through counsel he complained about any alleged non-payment of accrued but unused PTO.

Agreement entitled him to specific wages. Accordingly, he does not have a plausible claim of retaliation, because his underlying "complaint" was not made in good faith.

Even if Mr. Desiderio has sufficiently pled that he engaged in legally protected activity – though counsel, by complaining that he did not receive the pay increase for which he was eligible pursuant to the Agreement – Mr. Desiderio fails to allege that he was subject to an adverse employment action. Reading the Complaint in the light most favorable to him, he asserts merely that he was placed on administrative leave. Complaint ¶¶ 8, 78. A legally significant adverse employment action is one that has "materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." *D.C. Dep't of Pub. Works v. D.C. Office of Human Rights*, 195 A.3d 483, 491 (D.C. 2018). But Mr. Desiderio has not pled that he suffered objectively tangible harm. To the contrary, he has pled only that he was "plac[ed] on administrative leave, [which] forc[ed] him to forego his planned attendance" at a conference. Complaint ¶ 78. This is not a legally significant adverse employment action. *See Hornsby v. Watt*, 217 F. Supp. 3d 58, 66 (D.D.C. 2016) (noting a near-universal consensus" that that placing an employee on paid administrative leave does not constitute an adverse action, and concluding that placing an employee on paid administrative leave does not, in and of itself, constitute a materially adverse action for purposes of a retaliation claim).

C. Plaintiff Should Be Compelled to Arbitrate Each of His Claims

Notwithstanding Mr. Desiderio's apparent attempts to circumvent his obligation to resolve employment and contract-based disputes with NCAI in private arbitration (including by attempting to cast obvious breach of contract claims as 'wage' claims, which are exempted from

arbitration pursuant to the Agreement), any claims in the Complaint that survive the motion to dismiss are subject to arbitration.

Both Federal and DC law strongly support enforcement of arbitration agreements included in employment contracts. *See Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001) ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."); *Nur v. K.F.C. USA, Inc.*, 142 F. Supp. 2d 48, 50 (D.D.C. 2001) ("[f]ederal courts have recognized a strong policy favoring alternative means of dispute resolution"); FAA, 9 U.S.C. § 1 et seq. "As a result of this policy, any 'ambiguities' in the language of the [employment] agreement should be resolved in favor of arbitration." *Brown v. Dorsey & Whitney, LLP*, 267 F. Supp. 2d 61, 69 (D.D.C. 2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

This Court has two questions it must answer before it can order the Plaintiff to submit his claims to arbitration. These questions are as follows:

> (1) did the parties enter into a valid and enforceable arbitration agreement and, if they did,
>
> (2) does the arbitration agreement encompass the claims raised in the Complaint?

Nelson, 215 F. Supp. 2d at 149-50 (citing *Nur*, 142 F. Supp. 2d at 50-51); *Brown* 267 F. Supp. 2d at 70. In this case, based on undisputed facts and plain language of the Agreement, the answer to both of these questions is an unqualified yes.

1. The Parties' Agreement To Arbitrate Is Valid And Should Be Enforced

It is undisputed that the parties agreed to submit to arbitration any and all disputes relating to alleged breach of contract or employment discrimination. Exh. 2, Desiderio Employment Agreement, at pg. 6. It is a basic tenet of the law that "one who signs a contract which he had an opportunity to read and understand is bound by its provision." *Brown*, 267 F. Supp. 2d at 75; *see also Nur*, 142 F. Supp. 2d at 51.

Mr. Desiderio clearly acknowledges that the Agreement is valid; he has based his "wage" claims on language contained within it. He cannot, then, disclaim its detailed arbitration provision; his signature on the Agreement and its facial validity and enforceability render it controlling here. *Emeronye v. CACI Int'l, Inc.*, 141 F. Supp. 2d 82, 86 (D.D.C. 2001); *Brown*, 267 F. Supp. 2d at 83. In this case, there can be no question as to whether Mr. Desiderio executed an explicit arbitration agreement with clear and understandable terms on April 12, 2021.

2. The Arbitration Agreement Between the Parties Encompasses the Claims In the Complaint

In his Complaint, Mr. Desiderio sets forth three distinct claims, which fall into two categories: employment discrimination, and breach of contract. Both categories of claims are governed by the Arbitration Agreement. As a result, this action should be dismissed and Mr. Desiderio should be compelled to submit his claims to binding arbitration.

Mr. Desiderio styles his first claim as one of "Retaliation under D.C. Human Rights Act." Mr. Desiderio did not engage in protected activity under the DCHRA, and so he has failed to state a claim under that statute. *See* Argument § B.1 *supra*. However, if the Court finds that Mr.

Desiderio has stated a claim under the DCHRA, the Court must then compel the parties to arbitrate that claim. Mr. Desiderio's Arbitration Agreement explicitly covers "claims based on Title VII of the Civil Rights Act **[and] any applicable state law against discrimination, and all other applicable federal, state and local antidiscrimination laws**." Exh. 2 at pg. 6. (emphasis added). The DCHRA is unquestionably such a "state nondiscrimination" law.

Mr. Desiderio styles his second and third claims as violations of the D.C. Wage Payment and Collection Act. The D.C. Wage Payment and Collection Law defines "wages" to encompass "all monetary compensation after lawful deductions, owed by an employer, whether the amount owed is determined on a time, task, piece, commission, or other basis of calculation specifically including bonus and other remuneration **promised or owed pursuant to a contract for employment**, whether written or oral." D.C. Code § 32-1301(3) (emphasis added). In so phrasing the definition of "wages" to include monetary compensation "promoted or owed pursuant to a contract for employment," the assumes the existence or validity of an underlying contract. However, that assumption is a condition precedent – and thus a separate question – from whether wages are "owed." *See, e.g., Bartolo v. Whole Foods Mkt. Grp.*, 412 F. Supp. 3d 35 (D.D.C. 2019), in which the court, analyzing a D.C. Wage Theft Prevention Act claim, held that, because a fired employee's bonus was linked to the employer's performance and that performance did not justify the payment of any bonus at all, the employee had not "earned" this sum for wage payment purposes.

Mr. Desiderio no doubt hopes that the Court will disregard his hand-waving as to the nature of his claims and categorize them as claims under an "applicable state wage and hour act" – because such claims are *not* subject to arbitration under the Agreement. However, as discussed

above, these claims are not based in allegations of violations of any "wage and hour act;" instead, they allege breaches of Mr. Desiderio's contract with NCAI. Mr. Desiderio alleges, at core, that NCAI violated his employment contract when it failed to award him a 5% annual raise, and when it did not pay him (what he describes as) earned but unused PTO. Both of those allegations are based on the terms of his employment contract – not on any right he held under D.C. wage and hour laws.

CONCLUSION

Mr. Desiderio's claims under the DCHRA or the D.C. Wage Payment and Collection Law should be dismissed with prejudice. His claim as to unpaid PTO is moot, and should be dismissed pursuant to Rule 12(b)(1); in the alternative, that claim, as well as his other claims, should be dismissed pursuant to Rule 12(b)(6) because he has failed to state a claim upon which relief can be granted.

In the alternative, the Court should find that Mr. Desiderio entered into a binding arbitration agreement that controls the claims he has raised in this action. Under well-settled case law, this arbitration clause is enforceable and prevents Plaintiff from raising his claims in any court. Therefore, this Court should dismiss Plaintiff's claims with prejudice for lack of subject matter jurisdiction and compel arbitration.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2022, a true copy of the above document was served via CaseFileXpress on Plaintiff's counsel as indicated below.

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