COURT OF APPEALS OF VIRGINIA

Record No. 1049-25-4

CHANDA WALDENMAIER
v.
DBDRIVEN.NET, LLC

Present: Judges Raphael, Lorish and Frucci
Argued at Arlington, Virginia

Opinion Issued November 4, 2026

FROM THE CIRCUIT COURT OF STAFFORD COUNTY
Michael E. Levy, Judge

Tamara L. Slater (Sara N. McDonough; Alan Lescht & Associates, P.C., on briefs), for appellant.

Mitchell P. Goldstein (C. Stephen Setliff; Setliff Law, P.C., on brief), for appellee.

PUBLISHED OPINION BY
JUDGE LISA M. LORISH

In 2020, the Virginia General Assembly made significant amendments to the Virginia Human Rights Act (VHRA). For one, the General Assembly added a new statute, Code § 2.2-3909, titled "Causes of action for failure to provide reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions." The law requires employers to "make reasonable accommodation to the known limitations of a person related to pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer." Code § 2.2-3909(B)(1). And it prohibits an employer from "[t]ak[ing] adverse action against an employee who requests or uses a reasonable accommodation pursuant to this section." Code § 2.2-3909(B)(2). The issue in this case is what causation standard applies to a discrimination claim based on the use of reasonable accommodations for pregnancy under Code § 2.2-3909(B)(2).

After DBDriven.net LLC (DBD) terminated Chanda Waldenmaier, Waldenmaier brought a claim under Code § 2.2-3909(B)(2), arguing that DBD terminated her because she obtained and used a reasonable accommodation that allowed her to work from home during her pregnancy. DBD moved for summary judgment. It argued that "but-for causation" applies to discrimination claims based on the use of reasonable accommodation for pregnancy under Code § 2.2-3909(B)(2) and that the "but-for" cause of Waldenmaier's termination was DBD's loss of the contract she had been working on. Waldenmaier, on the other hand, argued that the "motivating factor" standard from Code § 2.2-3905(B)(6) applied to her claim and that there were disputed facts over whether her use of reasonable accommodations was a motivating factor in DBD's decision to terminate her.

We agree that the "motivating factor" standard applies and conclude that the circuit court erred by granting summary judgment based on its application of a "but-for" causation standard. We thus reverse and remand so the court can apply the correct causation standard in ruling on DBD's summary judgment motion. Finally, Waldenmaier also contends that the trial court erred by not considering, at the summary judgment stage, the recording of a phone call that the court found was unauthorized and thus inadmissible at trial. *See* Code § 8.01-420.2. Here we agree with the trial court. On remand, only admissible evidence can be considered in resolving the summary judgment motion.

BACKGROUND

In this appeal from an order granting summary judgment, "[p]ursuant to Rule 3:20, we examine the facts as presented in the pleadings . . . and the party admissions." *Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 87 (2009). We "review the record applying the same standard a trial court must adopt in reviewing a motion for summary judgment, accepting as true those inferences

from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason." *Id.* at 88.

In February 2021, information technology provider DBD offered Chanda Waldenmaier a position as a junior-level business systems analyst. The offer letter allowed telework but noted that "your position will generally require you to work at some location other than your house." She began work in March 2021 and she worked full-time on DBD's largest contract, which was with the United States Marine Corps. Waldenmaier worked under equity partner and Chief Operating Officer Will Goldschmidt, a family friend who had recruited and mentored her.

Later that year, in November, Waldenmaier learned she was pregnant. On December 13, after experiencing pregnancy complications—including severe nausea and vomiting—she requested a short-term accommodation. She attached a doctor's note to her request, which recommended that she be "restricted to working remotely from home" to accommodate her continuing symptoms. She then moved several times to extend the accommodation by a few days. DBD granted each request in full.

Waldenmaier kept Goldschmidt and others notified about her health status via email throughout the next month. Goldschmidt responded, "Sorry to hear you are not feeling better. Thanks for keepus [sic] up to date as well." When her symptoms persisted, Waldenmaier's obstetrician recommended that she continue working remotely through her July due date. On January 18, Waldenmaier requested to extend her existing accommodation through July per her doctor's recommendation. She again informed Goldschmidt and others via email. DBD granted her request.

Then, on February 10, DBD "unexpectedly" received a stop-work order on its contract with the Marine Corps, resulting in an "immediate[] loss of over one-third of DBD's income." While DBD reassigned all of its employees who worked on the Marine Corps contract to other

billable projects, Waldenmaier received only non-billable, "administrative" work. Even when a spot with responsibilities related to Waldenmaier's previous role opened up on a billable project, Goldschmidt instead appointed his daughter, an intern, to the role.

A few days after the stop-work order, on February 16, Waldenmaier attended an in-person company social event because "she and her doctor thought it was safe for her to be in person on this singular occasion and because she valued her relationships with her colleagues." The next day, Waldenmaier, Goldschmidt, and four other colleagues participated in a training-related call. Waldenmaier alleges that during the call, Goldschmidt "chastised" her and indicated that they should see her more in the office "because she was able to attend the social event." Waldenmaier replied that "she would continue to follow her doctor's orders to telework per her consistent, ongoing difficulties."

Goldschmidt called Waldenmaier again the next day, February 18, via Microsoft Teams. Waldenmaier recorded their conversation without his knowledge or permission. Goldschmidt explained that he was calling because he wanted to offer his mentorship and "advice" as the "person that hired you" and "as the person that recruited you." He told Waldenmaier that he was "a little upset" after their last conversation, and "found it very strange that you—that you could come to a social event during the workday, but you can never come to work." He also expressed that he would never have brought her into the company if he did not "think highly" of her and "have a great deal of faith" in her abilities; he just wanted her to "get out of the house" and come see the office.

When Waldenmaier told Goldschmidt that she was following her doctor's orders and felt "stuck between a rock and a hard place," Goldschmidt responded, "Maybe you need to go back and tell your doctor that mentally or emotionally what the doctor has asked you to do is impacting you. Maybe the doctor gave you what she thought you wanted." Ultimately, he told

Waldenmaier that he was "not ignorant" to the complications she was having, but that her failure to "stay connected" to the office was "hurting" her position in the company and giving the impression that she didn't "want to be with any of us." He reiterated that, right now, "everybody who's got limitations hurt[s] the company."

The next month, on March 22, Goldschmidt informed Waldenmaier that she would be placed on indefinite, unpaid leave beginning May 1 but would retain her health insurance until six weeks postpartum. Then around April 29, DBD told her that, actually, "her employment status would change on May 1 from indefinite unpaid leave to termination" and she would retain health insurance through September. Waldenmaier was seven months pregnant at this point. She alleged that she "was informed there was a lack of available assignments," but nonetheless "observed her colleagues working on several active projects in need of personnel." DBD characterized it differently. It claimed that "there existed one other project to which [Waldenmaier] could have been assigned; however, that project did not require any more employees."

In a May 6 email to a fellow manager, Goldschmidt indicated that he was a decisionmaker in Waldenmaier's termination. He explained, "[W]e gave two people notice—[Waldenmaier] and [redacted]. No intent to let anyone else go." In response to an interrogatory about the factors contributing to the termination decision, DBD responded that it

> had to release 3 employees for lack of work. The factors considered were experience, time at the company, skillset and technical knowledge useful for meeting the requirements of existing contracts. As the most junior analyst, [Waldenmaier's] knowledge, skill set and experience did not match any of our remaining contracts, making it impractical to assign her to any other project.

Waldenmaier sued DBD in the Circuit Court of the City of Fredericksburg under Code § 2.2-3909 of the VHRA alleging she was fired because she exercised her pregnancy

accommodation. The circuit court transferred venue to Stafford County. After extensive discovery, DBD moved for summary judgment, arguing that Waldenmaier could not establish that her pregnancy accommodation was the but-for cause of her termination, as required by Code § 2.2-3909. Instead, DBD insisted that she was fired because of the loss of the Marine Corps contract and because she was "the most junior and least experienced business analyst." They added that the company had laid off two male employees as well. DBD moved *in limine* to exclude certain evidence, including the recording that Waldenmaier secretly made of her Teams call with Goldschmidt. Waldenmaier opposed summary judgment and the motion *in limine*.

The court granted DBD's motion for summary judgment, first concluding that Waldenmaier had to show that her use of a reasonable accommodation related to her pregnancy was the but-for cause of her termination. The court then concluded "it cannot be demonstrated that she would not have been terminated but for the pregnancy accommodation," noting that "[a]nother pregnant employee was retained," "[o]ther employees working remotely were retained," "[o]ther employees working in the office, male were laid off," her termination was "brought about by the loss of the [Marine Corps] contract, as well as her relative qualifications," and that this happened "more than three months after she requested and received the accommodation." The court also granted DBD's motion *in limine* to exclude the transcript of the Teams call. Waldenmaier noted her exception and timely appealed.

ANALYSIS

The circuit court concluded that a "but-for" causation standard applies to discrimination claims based on the use of reasonable accommodations for pregnancy under Code § 2.2-3909(B)(2). Based on this interpretation of the statute, the court granted summary judgment for DBD, concluding that there was no dispute of material fact that the "but for" cause of Waldenmaier's termination was DBD's loss of the Marine Corps contract. On appeal,

Waldenmaier argues that the circuit court applied the wrong standard and that, instead, the "motivating factor" causation standard applies to claims under Code § 2.2-3909(B)(2). As a result, Waldenmaier argues that summary judgment was inappropriate because there was a dispute of material fact about whether her use of a reasonable accommodation required by her pregnancy *contributed to* DBD's decision to terminate her employment. In the alternative, Waldenmaier argues that—even if but-for causation applies—the court erred in granting summary judgment because there are disputed facts about why she was terminated that should have been resolved by a jury. Finally, Waldenmaier also argues that the circuit court erred in its rulings related to the Teams call that she recorded, without the consent or knowledge of Goldschmidt.

We "review a circuit court's grant of summary judgment de novo." *Kosmann v. Brown*, 81 Va. App. 322, 332 (2024) (quoting *GEICO Advantage Ins. Co. v. Miles*, 301 Va. 448, 455 (2022)). "Summary judgment may not be entered if any material fact is genuinely in dispute." Rule 3:20. It is a "drastic remedy," not appropriate "if the evidence is conflicting on a material point or if reasonable persons may draw different conclusions from the evidence." *Fultz*, 278 Va. at 88.

This case requires us to interpret several statutes. Issues of statutory interpretation are reviewed de novo, and this Court "owe[s] no deference to the circuit court's interpretation of the statutory scheme." *Esposito v. Va. State Police*, 74 Va. App. 130, 133 (2022). When construing a statute, our primary objective is "to ascertain and give effect to legislative intent." *Commonwealth v. Zamani*, 256 Va. 391, 395 (1998). We assume that "the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute." *Jennings v. Commonwealth*, 82 Va. App. 692, 697 (2024) (en banc) (quoting *City of Virginia Beach v. ESG Enters., Inc.*, 243 Va. 149, 153 (1992)). "[If] the

language of the statute 'is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.'" *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425 (2012) (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007)).

Here, we find that Code § 2.2-3909(B)(2) relies on the "motivating factor" causation standard set out in Code § 2.2-3905(B)(6) and that this conclusion is supported by judicial interpretations of federal anti-discrimination legislation. As a result, we agree with Waldenmaier that the trial court erred in granting summary judgment. With that said, the court was correct in excluding from consideration at summary judgment the recording of the Teams call between Waldenmaier and Goldschmidt.

I. The "motivating factor" causation standard applies to claims under Code § 2.2-3909(B)(2).

We start by reviewing the history of the VHRA and the now-abrogated common-law tort for wrongful termination. Then we determine that the "motivating factor" standard in Code § 2.2-3905(B)(6), which applies to the entire chapter unless otherwise stated, applies to claims of discrimination based on the use of a reasonable accommodation under Code § 2.20-3909(B)(2). We also explain why this decision is consistent with the United States Supreme Court's decisions interpreting federal anti-discrimination statutes.

A. The VHRA evolved from supporting a common-law wrongful-termination tort to creating explicit causes of action.

The General Assembly enacted the VHRA in 1987 to "[s]afeguard all individuals within the Commonwealth from unlawful discrimination in employment." Code § 2.2-3900(B)(2). When it was first enacted, "the [VHRA did] not create any new causes of action." *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 105 (1994) (citing Code § 2.1-725). However, the Supreme Court at the time already recognized "a narrow public policy exception to this

Commonwealth's employment-at-will doctrine, which ordinarily permits either the employer or the employee to terminate the employment relationship without incurring liability." *Bradick v. Grumman Data Sys. Corp.*, 254 Va. 156, 158-59 (1997). The "exception appli[ed] to discharges which violate *public* policy," and was based on "the common law." *Id.* at 159. Thus, "former at-will employees" could "maintain common law actions for wrongful discharge" if the "conduct alleged would have violated Virginia's public policy against race and gender discrimination as reflected in the [VHRA]." *Id.* Such an action was understood to be a "common law cause of action in tort." *Shaw v. Titan Corp.*, 255 Va. 535, 542 (1998).

In 1995, the VHRA was amended to create private statutory causes of action against only small employers, those with 6-14 employees.[1] *Doss v. Jamco, Inc.*, 254 Va. 362, 368-69 (1997). The Supreme Court found that the amendments accomplished more than the mere "creation of a statutory cause of action against" small employers. *Id.* at 369. In enacting those amendments, "the General Assembly plainly manifested an intent to abrogate the common law with respect to causes of action for unlawful termination of employment based upon the public policies reflected in the Act." *Id.* at 372. Thus, following the 1995 amendment, the common-law tort for wrongful termination premised on the public policies reflected in the VHRA was no longer viable in Virginia. *Id.* at 370-72; *see also Hice v. Mazzella Lifting Techs., Inc.*, 589 F. Supp. 3d 539, 551 (E.D. Va. 2022) ("After *Doss*, courts consistently rejected the use of the VHRA as a basis for [common law] claims" of discrimination).[2]

[1] By applying to employers with 6-14 employees, the VHRA provided a cause of action for some employees that fell outside of Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. §2000e(b) ("employer" defined as having "fifteen or more employees").

[2] With that said, the VHRA does not "encompass the entire subject of common law causes of action for wrongful termination of employment" based on grounds other than discrimination. *Mitchem v. Counts*, 259 Va. 179, 187 (2000). A common law cause of action may be "based on the public policies against fornication and lewd and lascivious behavior . . . embodied in Code §§ 18.2-344 and -345." *Id.*

The VHRA was not significantly amended again until 2020. Now codified as Chapter 39 under Title 2.2, Code §§ 2.2-3900-3909, the VHRA continues to set out statements of policy and purpose against discrimination in Virginia. First, the General Assembly created protections for other groups of citizens and employees and added more robust private causes of action. For example, part of the VHRA now makes it an "unlawful discriminatory practice" for an employer

> to [f]ail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to such individual's compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, military status, disability, or ethnic or national origin.

Code § 2.2-3905(B)(1)(a). If an employer engages in status-based discrimination of this kind, an employee can bring a civil action through Code § 2.2-3908, so long as the procedural rules set out in that statute (including notice requirements) are met. *Id.*[3] The General Assembly eliminated the prior limitation that made this protection apply only to employees who worked for employers with 6-14 employees. *Id.*

In 2020, the General Assembly also passed the Virginia Pregnant Workers Fairness Act and the Virginia Values Act, which became part of the VHRA. 2020 Va. Acts chs. 1138-1140.

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[3] An aggrieved person (i) who has been provided a notice of his right to file a civil action pursuant to § 2.2-3907 by the Office or the Equal Employment Opportunity Commission or (ii) if 180 days have passed since a complaint was filed in the Office or a local human rights commission organized pursuant to § 15.2-965 and the aggrieved person has not been provided a notice of his right to file a civil action may commence a timely civil action in an appropriate general district or circuit court having jurisdiction over the person who allegedly unlawfully discriminated against such person in violation of this chapter. Any person may file an action that is not dual-filed after 180 days have passed since the complaint was filed with the Office of Civil Rights of the Department of Law.

Code § 2.2-3908(A)(2).

The Pregnant Workers Fairness Act[4] unambiguously gave pregnant employees the right to bring failure-to-accommodate claims against their employers. Now codified as Code § 2.2-3909, this statute, entitled "Causes of action for failure to provide reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions," states that:

> B. No employer shall:
>
> 1. Refuse to make reasonable accommodation to the known limitations of a person related to pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer.
>
> . . . .
>
> 2. Take adverse action against an employee who requests or uses a reasonable accommodation pursuant to this section. As used in this subdivision, "adverse action" includes failure to reinstate any such employee to her previous position or an equivalent position with equivalent pay, seniority, and other benefits when her need for a reasonable accommodation ceases.
>
> 3. Deny employment or promotion opportunities to an otherwise qualified applicant or employee because such employer will be required to make reasonable accommodation to the known limitations of such applicant or employee related to pregnancy, childbirth, or related medical conditions.

Code § 2.2-3909(B).

If an employer discriminates against an employee who requests, or uses, a reasonable accommodation for known limitations "related to pregnancy, childbirth, or related medical conditions," the statute contains a separate cause of action, with separate procedural requirements that are distinct from those set out in the general cause of action under Code § 2.2-3908:

[4] This Virginia Act predated the Federal Pregnant Workers Fairness Act, which took effect in June 2023. *See* 42 U.S.C. § 2000gg-1.

> An employee or applicant who has been denied any of the rights afforded under subsection B may bring an action in a general district or circuit court having jurisdiction over the employer that allegedly denied such rights. Any such action shall be brought within two years from the date of the unlawful denial of rights, or, if the employee or applicant has filed a complaint with the Office of Civil Rights of the Department of Law or a local human rights or human relations agency or commission within two years of the unlawful denial of rights, such action shall be brought within 90 days from the date that the Office or a local human rights or human relations agency or commission has rendered a final disposition on the complaint.

Code § 2.2-3909(E). Notably, an employee bringing a cause of action under this statute is not required to give notice of a potential claim to the Office of Civil Rights or a local human rights commission, although the employee may do so. *Cf.* Code § 2.2-3908 ("Any such civil action may only be filed, if at all, within 90 days of the complainant's receipt of a notice of his right to file a civil action pursuant to § 2.2-3907.").

Finally, a 2021 addition to the VHRA, Code § 2.2-3905.1, makes it an "unlawful discriminatory practice for an employer" to fail to reasonably accommodate a disabled employee, or to "[t]ake adverse action against an employee who requests or uses a reasonable accommodation pursuant to this section," or to "[d]eny employment or promotion opportunities to an otherwise qualified applicant or employee because such employer will be required to make reasonable accommodation for a person with a disability." If an employer engages in discrimination based on "[r]easonable accommodations for disabilities," an employee can again bring a civil action under Code § 2.2-3908, after meeting the procedural and notice requirements.

This case requires us to determine what standard applies to claims alleging that the plaintiff was discriminated against for using a pregnancy-related reasonable accommodation under Code § 2.2-3909.

B. Code § 2.2-3909 requires "reasonable accommodations for pregnancy" discrimination claims to show that the use of, or request for, a reasonable accommodation was a motivating factor in an adverse employment action.

As discussed above, before the VHRA created statutory causes of action for workplace discrimination, workplace discrimination was actionable as an intentional tort. And "but-for" causation is the default standard for proving causation in a tort case in Virginia. "Generally a person is not liable to another unless[,] but for his negligent act[,] the harm would not have occurred." *Wells v. Whitaker*, 207 Va. 616, 622 (1966) (citing, inter alia, William L. Prosser, Law of Torts 240 (3d ed. 1964)). "Tortious conduct must be a factual cause of harm for liability to be imposed," and "[c]onduct is a factual cause of harm when the harm would not have occurred absent the conduct." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26 (A.L.I. 2010).

Our Supreme Court thus affirmed in 1998 that a common law cause of action for wrongful termination in violation of the public policy of Virginia required an employee to prove "that he was discharged because of his race, gender, age, or any combination of these factors, rather than because of any non-discriminatory reasons." *Shaw*, 255 Va. at 544. While no "explicit instruction" to a jury using the words "but for" was required, the Court described the applicable standard as "incorporat[ing] Virginia's common law standard of proximate causation." *Id.* at 543-44 (citing *Wells*, 207 Va. at 622). The Supreme Court pointed to language in its prior decisions—"because of" and "on account of"—as establishing a but-for causation standard. *Id.* at 542 (quoting *Lockhart*, 247 Va. at 106 (the termination must have been "*because of* discrimination based upon gender or race")); *see also Bradick*, 254 Va. at 160-61 ("employee is discharged *on account of* his disability or the employer's perception of his disability" (emphasis added)).

There are no appellate decisions in Virginia that have analyzed what standard of causation applies to any portion of the VHRA since the common-law tort was abrogated in favor of statutory causes of action. When the General Assembly first added a private right of action to the VHRA for status-based discrimination in 1995, it said:

> No employer employing more than five but less than fifteen persons shall discharge any such employee *on the basis of* race, color, religion, national origin or sex, or of age if the employee is forty years or older.

Code § 2.1-275(B) (emphasis added). But then with the other amendments in 2020, the General Assembly added a new provision to the VHRA which makes it an "unlawful discriminatory practice for":

> Except as otherwise provided in this chapter, an employer to use race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or ethnic or national origin *as a motivating factor for* any employment practice, even though other factors also motivate the practice.

Code § 2.2-3905(B)(6) (emphasis added). This "motivating factor" provision appears in the same statute as the prohibition against status-based discrimination. But by stating that it applied "[e]xcept as otherwise provided in this chapter," the General Assembly expressed a clear intent for this to become the default standard across the VHRA. *Id.*

The specific statute prohibiting discrimination based on the use of reasonable accommodations for pregnancy—also added to the VHRA in 2020—is silent as to causation: "[n]o employer shall . . . [t]ake adverse action against an employee who requests or uses a reasonable accommodation pursuant to this section." Code § 2.2-3909(B)(2). But the motivating factor provision explicitly prohibits an employer from using "pregnancy, childbirth or related medical conditions . . . as a motivating factor for any employment practice, even though other factors also motivate the practice." Code § 2.2-3905(B)(6). Since this provision applies to

the entire chapter, we conclude that the prohibition on an employer using "pregnancy, childbirth or related medical conditions" as a motivating factor for any employment practice *includes* discrimination against an employee for requesting or using a reasonable accommodation due to "pregnancy, childbirth or related medical conditions." *Id.*

This conclusion follows naturally from the premise that reasonable accommodations are necessarily tied to the underlying condition or disability. And reasonable accommodations are necessary to ensure that workers experiencing a qualifying condition or disability can maintain their employment. In other words, there is no reasonable accommodation without a qualifying disability or underlying medical condition. Just as "[a] tax on wearing yarmulkes is a tax on Jews," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), a business that bars "guide dogs" bars blind people. So too, "where a handicapped employee needs medication to alleviate or manage the medical condition that renders her handicapped, and the employer fires her because company policy prohibits the use of this medication, the law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap." *Barbuto v. Advantage Sales and Mktg., LLC*, 78 N.E.3d 37, 47 (Mass. 2017).

As defined in Code § 2.2-3909(A), reasonable accommodations include:

> more frequent or longer bathroom breaks, breaks to express breast milk, access to a private location other than a bathroom for the expression of breast milk, acquisition or modification of equipment or access to or modification of employee seating, a temporary transfer to a less strenuous or hazardous position, assistance with manual labor, job restructuring, a modified work schedule, light duty assignments, and leave to recover from childbirth.

An employer who takes an adverse action against an employee who just gave birth to a child and needs reasonable breaks to express breast milk takes an adverse action because of "pregnancy, childbirth or related medical conditions." The VHRA simply does not create any meaningful space between discrimination based on the condition itself, and discrimination based on a

reasonable accommodation required by the condition. Discrimination based on the use of pregnancy-related accommodations is discrimination against pregnant employees.

Thus, the motivating factor provision, applicable to the entire chapter, supplies the relevant causation standard for Code § 2.2-3909(B)(2).

C. The United States Supreme Court's interpretation of Title VII does not change this analysis.

DBD argues that federal caselaw interpreting Title VII of the Civil Rights Act of 1964 supports its argument that but-for causation applies to Code § 2.2-3909(B)(2). We disagree. By adding the motivating factor provision, and making it the default standard across the VHRA, the General Assembly made its intention clear. The United States Supreme Court's interpretation of a federal statute is beside the point—Title VII uses different language to set out different causes of action based on different employer conduct. Even if we look past this to consider the reasoning in *Nassar,* it does not help DBD.

Title VII prohibits "two categories of wrongful employer conduct." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 342 (2013). The first, is "status-based discrimination" prohibiting "employer discrimination on the basis of race, color, religion, sex, or national origin, in hiring, firing, salary structure, promotion and the like." *Id.* (citing 42 U.S.C. § 2000e-2(a)). "The second type of conduct is employer retaliation." *Id.* Employers are prohibited from discriminating against any individual "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Retaliation claims are based on "the employee's opposition to employment discrimination" or "the employee's submission of or support for a complaint that alleges employment discrimination." *Nassar*, 570 U.S. at 347. By contrast, the VHRA provides

protection for retaliation claims by making it unlawful for labor organizations[5] (but not employers) "to discriminate against any member thereof or applicant for membership because such individual has opposed any practice made an unlawful discriminatory practice by this chapter or because such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." Code § 2.2-3905(b)(7).

In determining what causation standard applies to retaliation claims under Title VII, the Supreme Court rejected the argument that Title VII's "motivating factor" provision governed. *Nassar*, 570 U.S. at 353.[6] While the "motivating factor" standard applies to status-based discrimination claims under Title VII, traditional but-for causation is the rule for retaliation claims. *Id.* at 352. The Supreme Court's determination was rooted in the specific language of Title VII itself, which distinguished between discrimination based on "personal characteristics" and discrimination based on "wrongful employer conduct," including "the employee's opposition to employment discrimination, and the employee's submission of or support for a complaint that alleges employment discrimination." *Id.* at 347. More importantly, because Title

[5] A "labor organization" is "an organization engaged in an industry, or an agent of such organization, that exists for the purpose, in whole or in part, of dealing with employers on behalf of employees concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment" and "includes employee representation committees, groups, or associations in which employees participate." Code § 2.2-3905(A).

[6] While Title VII uses "because of" language that "typically imports, at a minimum, the traditional standard of but-for causation," the motivating factor portion of Title VII "relaxes this standard." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772-73 (2015). The motivating factor provision in Title VII states: "Except as otherwise provided in this subchapter [42 USCS §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). *Cf.* Code § 2.2-3905 (B)(6) ("It is an unlawful discriminatory practice for . . . [e]xcept as otherwise provided in this chapter, an employer to use race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or ethnic or national origin as a motivating factor for any employment practice, even though other factors also motivate the practice.").

VII's motivating-factor provision expressly applied only to "five of the seven prohibited discriminatory actions—actions based on the employee's status[,]" it did not apply to unlisted retaliation claims. *Id.* at 353.

DBD argues that the United States Supreme Court's conclusion that but-for causation applies to retaliation claims under Title VII should carry the day here, because Waldenmaier alleges she was fired—not for her status of being pregnant—but in retaliation for her use of reasonable accommodations. But even if the interpretation of this federal statute was relevant here, *Nassar* does not map onto this case because Waldenmaier has not brought a retaliation claim based on an "employee's opposition to employment discrimination" or "the employee's submission of or support for a complaint that alleges employment discrimination." *Nassar*, 570 U.S. at 347; *see* 42 U.S.C. § 2000e-3(a).[7] Discrimination based on the request for, or use of, reasonable accommodations is categorically different from retaliation for bringing or supporting a claim of employment discrimination. The Supreme Court concluded that retaliation claims under Title VII are "not wrongs based on personal traits," so the motivating factor provision did not apply. *Nassar*, 570 U.S. at 347-48. But claims grounded in the need for, or use of, reasonable accommodations *are* based on personal traits.

Reasonable accommodations are necessary to ensure that qualifying employees are treated equally in the workplace. Thus, an employer's adverse action based on an employee's use of a reasonable accommodation is indistinguishable from an action based on the underlying

[7] For this reason, we respectfully part ways with the suggestion that adverse action for requesting or using a reasonable accommodation is akin to a "retaliation" claim, and that the motivating factor provision "describes the causation burden in circumstances where an employee is discriminated against based on the precise enumerated categories described in Code § 2.2-3905(B)(1)(a) yet omits any language describing retaliatory conduct." *Moore v. Copper River Shared Servs., LLC*, 113 Va. Cir. 47, 55 (Fairfax Cnty. 2024).

disability or qualification itself.[8] The motivating factor provision in the VHRA applies to discrimination based on any protected characteristics, including disability, and "pregnancy, childbirth or related medication conditions." So it applies when an employee, such as Waldenmaier, claims she was fired for using a reasonable accommodation that was necessary because of her pregnancy.[9]

For these reasons, we reject the argument that *Nassar* requires a different interpretation of Code § 2.2-3909(B)(2).

D. The General Assembly's use of "because" in Code § 2.2-3909(B)(3) does not show that "but-for causation" is the correct standard for Code § 2.2-3909(B)(2).

Finally, DBD argues that the General Assembly's use of "because" in Code § 2.2-3909(B)(3) shows an intent for but-for causation to apply to all the listed forms of unlawful discrimination. It is true that the word "because"—without more—may suggest that "but-for causation" applies. *Shaw*, 255 Va. at 542. But when the legislature explicitly incorporates a different causation standard, the assumption that the but-for causation standard applies must give way to the express will of the legislature. One example of this is in Title VII, discussed above.

[8] In fact, federal anti-discrimination statutes directly equate the failure to make a reasonable accommodation with discrimination based on the underlying condition *causing the need for* a reasonable accommodation. For example, the Americans with Disabilities Act of 1990 defines discrimination "on the basis of disability" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" and "denying employment opportunities to . . . an otherwise qualified individual with a disability" based on the need to make a reasonable accommodation." 42 U.S.C. § 12112(b)(5)(A)-(B). And Title VII, which prohibits discrimination on the basis of religion, defines religion to "includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to" a "religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

[9] The causation standard that applies to Code § 2.2-3905(b)(7), the portion of the VHRA which prohibits labor organizations from retaliating because an "individual has made a charge, testified, assisted, or participated" in an investigation under the VHRA, is a question not before us today.

As set out in *Abercrombie & Fitch*, the "motivating factor" standard applies to substantive discrimination claims because Congress added a "motivating factor" standard to the statute. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772-73 (2015). This is true even though the statute continues to prohibit unlawful discriminatory practices "*because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (emphasis added). We do not need to decide in this case what causation standard applies to Code § 2.2-3909(B)(3) and observe only that the word "because" is not dispositive.

Even if the use of "because" were proof that "but-for causation" applied to claims under (B)(3), "when the General Assembly has used specific language in one instance but omits that language or uses different language when addressing a similar subject elsewhere in the Code, [the Court] must presume that the difference in the choice of language was intentional." *Morgan v. Commonwealth*, 301 Va. 476, 482 (2022) (alteration in original) (quoting *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337 (2011)). We "must rely on this presumption 'because under these circumstances, it is evident that the General Assembly "knows how" to include such language in a statute to achieve an intended objective,' and therefore, omission of such language in another statute 'represents an unambiguous manifestation of a contrary intention.'" *Id.* (quoting *Brown v. Commonwealth*, 284 Va. 538, 545 (2012)). Thus, even if the use of "because" in (B)(3) signified "but-for causation" for that section, we would have to presume the General Assembly intentionally chose not to use the same word in (B)(2).

To sum up, under Code § 2.2-3909(B)(2), an employee's request for, or use of, a reasonable accommodation "related to pregnancy, childbirth, or related medical conditions" may not be a motivating factor for any adverse action taken by the employer. For this reason, the circuit court erred in granting summary judgment based on the "but-for causation" standard, and we reverse and remand. Because we conclude that "but-for causation" does not apply here, we

do not address Waldenmaier's alternate argument[10] that—even under that standard—the circuit court erred.

II. The trial court did not err in its rulings regarding the February 18, 2022 call.

Waldenmaier made an audio recording of a conversation she had with Goldschmidt through Microsoft Teams[11] on February 18, 2022. DBD moved *in limine* to exclude the recording under Code § 8.01-420.2, which states:

> No mechanical recording, electronic or otherwise, of a telephone conversation shall be admitted into evidence in any civil proceeding unless (i) all parties to the conversation were aware the conversation was being recorded or (ii) the portion of the recording to be admitted contains admissions that, if true, would constitute criminal conduct which is the basis for the civil action, and one of the parties was aware of the recording and the proceeding is not one for divorce, separate maintenance or annulment of a marriage.

Before the trial court, Waldenmaier argued that a call over Microsoft Teams did not qualify as a "telephone conversation" under the statute, a point the trial court rejected after noting that the exchange began with "I'm calling you," which showed that "[h]e's treating it as a call," and "that's protected" by the statute and "would make it inadmissible." Waldenmaier does not make this argument again on appeal.[12] Instead, Waldenmaier now argues that, even if the recording

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[10] Here Waldenmaier argues that, under *Bostock v. Clayton County*, 590 U.S. 644, 656 (2020), there can be more than one but-for cause and that another cause could even be the "main" or "primary" cause without defeating but-for causation. *Id.* at 665.

[11] Waldenmaier described Microsoft Teams as "a video chat and voice-over internet protocol (VOIP program)" in filings before the circuit court.

[12] A panel of this Court recently explained in a comprehensive, though unpublished, opinion why a recording of a FaceTime call met the definition of "telephone conversation" under Code § 8.01-420.2. *Hassan v. Takacs*, No. 1877-23-4, 2025 Va. App. LEXIS 654 (2025). We agree that, as used here, "telephone" includes an apparatus that converts sounds into electrical signals to allow two people to communicate verbally over a distance. *Id.*, slip op. at 4-6, 2025 Va. App. LEXIS 654, at *6-7 (collecting dictionary definitions for "telephone"). We likewise agree that "[a] video call is 'a *phone call* that incorporates video technology, enabling participants to see and hear each other during the conversation.'" *Id.*, slip op. at 5, 2025

was properly excludable from trial under Code § 8.01-420.2, the trial court erred by not considering it at the summary judgment stage.[13]

Summary judgment in Virginia is governed by Rule 3:20: "If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, that the moving party is entitled to judgment, the court shall grant the motion [for summary judgment]." "The key phrase—'entitled to judgment'—requires the moving party to demonstrate that no 'material' facts are 'genuinely in dispute.'" *AlBritton v. Commonwealth*, 299 Va. 392, 403 (2021) (quoting Rule 3:20). "When used incorrectly, . . . summary judgment is a 'drastic remedy' that withdraws genuine issues of material fact from the factfinder, usually a jury." *Id.* at 404.

Rule 3:20 contemplates that a court will rule on a summary judgment motion after considering "orders, if any, made at a pretrial conference." We find that includes orders on the admissibility of evidence at trial because inadmissible evidence cannot create a genuine issue of material fact for the jury to resolve. It follows, then, that if evidence would be inadmissible for the factfinder to consider at trial, the court should not consider it in deciding whether to grant a motion for summary judgment. This does not mean that otherwise-admissible evidence about

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Va. App. LEXIS 654, at *7 (emphasis in original) (quoting *Video Call*, *Oxford English Dictionary*). A video call made through a phone or computer qualifies as a "telephone conversation."

[13] "When a judgment is reversed on a specific ground and remanded for a new trial—and assignments of error remain that relate to issues that are likely to recur in the new trial—it is appropriate for the appellate court to address the issues that will likely arise in the subsequent trial." *Jadeen Keivon Person v. Commonwealth*, 87 Va. App. 90, 109-10 (2026). Whether the court can consider the recording of the February 18, 2022 call in resolving DBD's summary judgment motion is likely to arise on remand.

the phone call, beyond the recording itself, must be excluded from consideration.[14] The trial court therefore did not err in excluding the recording of the call at the summary judgment stage.

CONCLUSION

For the reasons above, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

[14] Waldenmaier makes a related argument here—that the circuit court erred by ruling that no *evidence* about the call could be presented at trial at all. According to Waldemaier, this ruling would preclude testimony about the call, or use of the call as impeachment evidence. But the record shows that the court's ruling was appropriately narrow. DBD moved only to exclude the audio recording itself under Code § 8.01-420.2. And the trial court's written order granted "the motion to exclude the telephone recording from evidence." "A court generally speaks through its written orders." *Petrosinelli v. People for the Ethical Treatment of Animals, Inc.*, 273 Va. 700, 709 (2007). If any comments from the bench suggested a broader ruling, "the circuit court declined to incorporate its comments into its written order," *Galiotos v. Galiotos*, 300 Va. 1, 14 (2021), and the ruling was limited to exclusion of the recording itself.