22-CV-0332

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DORIS CHIBIKOM

Appellant,

v.

DISTRICT OF COLUMBIA GOVERNMENT, *et al.*

Appellees.

ON APPEAL FROM JUDGMENTS OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CASE NO. 2018 CA 004349-B

BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

This case stems from Appellant's employment with the District of Columbia Department of Disability Services (the "Agency" or "DDS"). On June 18, 2018, Appellant filed a civil Complaint against Appellees, alleging that Appellees subjected Appellant to national original and age discrimination in violation of the District of Columbia Human Rights Act("DCHRA") D.C. Code §§ 2-1401,et seq. (Count I); a discriminatory hostile work environment in violation of the District of Columbia Human Rights Act ("DCHRA") D.C. Code §§ 2-1401,et seq. (Count II); and retaliation in violation of the District of Columbia Human Rights Act ("DCHRA") D.C. Code §§2-1401,et seq. (Count III); Complaint ("Compl.") at ¶¶ 24-41. JA 20.

Appellee filed a motion for summary judgment and oral arguments were held on April 5, 2022. Summary judgment was granted in favor of the Appellees on April 6, 2022. This appeal follows.

STATEMENT OF THE FACTS

Appellant Chibikom was hired in 2007 by the District of Columbia Department of Disability Services and became the Service Coordinator in 2008, responsible for making site visits with service providers. During the relevant period, she was one of nine Service Coordinators, including one other older African immigrant and two younger American born employees. Appellee Greg Coffman became Appellant's first-line supervisor in mid-2014; Shasta Brown and Windlow Woodland became Appellant's second and third-line supervisors in 2012 respectively.

Appellant's quality of work was well recognized and she was promoted to Supervisory Service Coordinator. Her primary function was to provide supervisory oversight to the assigned Service Coordinators, including reviewing case notes for thoroughness and accuracy; resolving service delivery and health care concerns that are not fully addressed by subordinates; and elevating issues of concern and potential problems to the supervisor.

Shortly after Appellee Coffman became Appellant's supervisor in 2014, he began to harass Appellant and subject her to disparate treatment compared to her younger and American-born co-workers. He would criticize Appellant's English regularly, including on her performance evaluation, and recommended that she take an English class. Appellant is able to express herself in English but speaks with a Cameroonian accent. Appellee Coffman routinely criticized African immigrant employees at DDS for their English skills, but did not criticize American-born Service Coordinators regardless of their actual English proficiency or job performance. Pl.'s Ex. 1 at 94 (Answer to Appellee's Interrogatories).

On March 29, 2017, Appellant met with Appellee Coffman regarding her concerns about unrealistic deadlines and unfair practices that negatively affected her work, including the so-called "ISP high season" in which Service Coordinators were given unrealistic assignments, which was particularly the case for Appellant. *Id*. at 36. When she confronted Appellee Coffman about this, he responded that the Agency's goals were out of his hands, and that Appellant should just "be smarter" and improve on her work performance. *Id*.

Appellee Coffman scrutinized the work of Appellant and another older African immigrant (Service Coordinator Irene Phillips) far more than their younger and/or American-born coworkers. For example, while Appellant was in the field visiting stakeholders, Appellee Coffman called and continually monitored Appellant's location. Pl.'s Ex. 2 at P0301-303. On the other hand, he did

not monitor the locations of Appellant's younger American-born coworkers. *Id*. at 18:14-22, 19:1-9.

Appellee also discriminated against Appellant by failing to reassign Appellant's work when she went on leave. This goes against DDS's own standard policy stating that when a service coordinator is on leave, the Agency is required to provide coverage for the caseload so as not to overwhelm the employee upon return. Deposition Transcript of Greg Coffman, at 52:5-16. Nevertheless, standard DDS policy was followed in providing coverage in the cases of younger American-born service coordinators. Appellees even went to the extent of hiring contractors to handle the caseloads of younger American-born service coordinators on leave, including for Ms. Smith and Ms. Barnes when they took leave between May 2017 and September 2017. *Id*. Appellee Coffman chose not to reassign the caseload for Appellant when she took leave, resulting in an unmanageable workload upon return from leave. *Id*. at 34:18-22, 35:1-15. As many as six times Appellant had authorized absences between 2014 – 2017 and Appellees refused to reassign Appellant's duties each time. Pl.'s Ex. 1 at 10-25 (Answers to Appellee's Interrogatories).

Appellee Coffman, aware of Appellant's extensive case load, refused a most reasonable request for overtime without any sufficient justification, and internal emails reflect that he mischaracterized her work load to his own superiors at that time, who ultimately denied her request. Pl.'s Ex. 5 at 25-27 (emails to Mr. Woodland, downplaying her work load). Appellant's Opposition Brief at 11. Mr. Woodland denied Appellant's request on May 22, 2017 without providing any explanation for the denial. Pl's Ex. 1 at 37. Appellant's Opposition Brief, at 12. Simultaneously, Appellee Coffman continued to provide assistance to Appellant's younger American-born Service Coordinators by allowing them both a) overtime, and b) assistance from contractors during times they took leave.

On May 15, 2017 Appellant named Appellee Coffman and others as discriminating officials and alleged that their unreasonable disciplinary actions against her were discriminatory and retaliatory based on her national origin, age, and prior EEO activity (first complaint filed on December 5, 2016). Pl.'s Ex. 6 at P0295-P0300. App. Opp. Br. at 15. On August 21, 2017, Ms. Trimmer issued Appellant a Notice of Right to File a Discrimination Complaint regarding her second EEO complaint. Pl's Ex. 7 at P0314-P0315. On August 23, 2017, Appellant filed a complaint with the Deputy Director of DDS, due to discriminatory and retaliatory actions from Appellees and due to an insufficient investigation by the Agency's EEO counselor. Pl.'s Ex. 1 at 67.

On October 11, 2017, Appellant was asked to meet with DDS' human resources department who then issued her a notice of a proposed nine-day suspension for allegedly requesting retroactive payments for providers despite being told that this practice was no longer allowed. Pl.'s Ex. 9 at P0461-0463. Appellant's Opposition Brief, at p. 10. This policy change came in the spring and summer of 2017, a policy she had ever since followed with careful attention to the relevant procedural guidelines and requirements. By contrast, two younger and American-born Service Coordinators *under Appellee Coffman's supervision* (Lisa Eley-Brame and Shauntice Smith) were not disciplined even though they actually did submit retroactive service requests after the policy change.

Demonstrating their discriminatory and retaliatory animus against Appellant, Appellees assigned Appellant a nine-day suspension when others who had made the same alleged violation were not disciplined. Pl's Ex. 9 at P0461-463. Appellant's Opposition Brief, at p. 10.

ISSUES IN THE CASE

1. Whether there is evidence sufficient to support a finding that adverse employment actions taken against the Appellant show disparate treatment from her American-born colleagues under the D.C. Human Rights Act.
2. Whether evidence of antagonism and unfair treatment following protected activity is sufficient to support an inference of a causal link.
3. Whether a reasonable jury could find that the stated reason for a nine-day suspension was mere pretext when other employees did not receive discipline for the conduct in question.
4. Whether the temporal proximity of less than two months from the reporting of discriminatory treatment to a nine-day work suspension sufficiently establishes enough of a causal nexus to show pretext under the D.C. Human Rights Act.

ARGUMENT

I STANDARD OF REVIEW

At the dispositive motions stage of the proceedings, the court is not to make credibility determinations or to weight the evidence. *Lively v. Flexible 10 Packaging Ass'n,* 765 A.2d 954, 960 (D.C. 2001). The court, therefore, "should review all the evidence in the record," viewing the evidence in the light most favorable to the non-moving party and according that party the benefit of all reasonable inferences. *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 150 (2000); see also Anderson, 477 U.S. at 255. Only if, after examining the evidence, the court finds a party has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," is summary judgment appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Jackson v. Finnegan*, 101 F.3d 145, 150 (D.C. Cir. 1996).

II A REASONABLE JURY COULD HAVE FOUND THAT THE STATED REASON FOR A NINE-DAY SUSPENSION WAS MERE PRETEXT WHEN OTHER EMPLOYEES DID NOT RECEIVE DISCIPLINE FOR THE CONDUCT IN QUESTION.

As an initial matter, Appellant's nine-day suspension in December 2017 was assigned without pay. Pl's Ex. 1 at 109. This suspension and loss of wages "materially affect[ed] the terms, conditions, and privileges of [Appellant's] employment." *Walden v. Patient-Centered Outcomes Research Inst*., 304 F. Supp. 3d 123, 133 (D.D.C. 2018). Furthermore, the District Court for the District of Columbia has held that suspensions without pay plainly constitute adverse employment actions. *See Banks v. District of Columbia*, 498 F. Supp. 2d 228 (D.D.C. 2007) (noting that a suspension without pay "can certainly be described as an adverse employment action").

As it relates to Appellees Coffman and the D.C. Government, both were directly involved in the adverse action taken to suspend Appellant without pay for nine days. Therefore, specifically with reference to the suspension issue, both parties are properly before the court. See JA 070.

As discussed at the oral argument, Appellant specifically referenced the nine-day suspension as an adverse action taken by Mr. Coffman for discriminatory reasons. JA 070**.** The alleged justification for the suspension makes little sense when it is shown that the very thing complained of the Appellant had occurred with the other employees. Appellant was allegedly suspended in December 2017 for violating a policy in making "Medicaid retractive service requests." Defs' Motion for Summary Judgment at 12. There is no evidence in the record that *anyone* told Appellant during the decade she worked for DDS that an excessive Service Coordinator caseload was not a sufficient justification for a retroactive waiver request. At oral argument on the dispositive motion, counsel for the Government acknowledges asmuch: it might be "bad management" not to inform of policy violations . . . "I don't think there's any obligation of the Government to show that we somehow informed her in advance of the policy." JA 071. Moreover, following Appellant's assignment of a nine-day suspension, other DDS employees, including Ms. Eley-Brame, continued to make retroactive service requests without reprimand. Brown Depo. at 80:6-22, 81:1-8. Appellant was the only DDS employee to receive any disciplinary action for making retroactive service requests, while her American-born and younger colleagues continued to make retroactive service requests without reprimand. For example, only a month after Appellant's suspension, Ms. Eley-Brame made a retroactive service request on January 16, 2018 in an email titled "Retroactive Request-EH" that was approved by her supervisor the next day. Pl's Ex. 11 at P0429. Appellant's Opp. Br. at 13. Yet Appellant was disciplined

for the same exact conduct. This leaves little doubt that the justifications for Appellant's suspension are false and not worthy of belief. Put simply, she was treated differently.

A Appellant has shown she was treated less favorably than her similarly situated colleagues outside of her protected category inescapably leading to an inference of discrimination.

Appellant was targeted when Mr. Coffman directed her to request overtime on May 18, 2017, only to then sabotage her overtime request with Mr. Woodland by incorrectly claiming in an email that Appellant's request was only for her regular work. Pl's Ex. 5 at 25-27. Mr. Woodland then denied Appellant's overtime request without explanation while granting similar overtime requests of younger American-born Service Coordinators. Pl's Ex. 1 at 37.

B Appellant has established that she engaged in a protected activity under the DC Human Rights Act.

The Court below errs in finding that there is no indication that Appellant engaged in a protected activity. JA 74. Because Appellant filed an official EEO complaint alleging that Appellee Coffman and the Agency were unlawfully discriminating against her based on her age and national origin and provided relevant documents to HR representative Jessica Grey, Appellant has "satisfied all the prerequisites for protected activity" under the DCHRA. *Carter-Obayuwana*, 764 A.2d at 791. Appellant described having been "retaliated, harassed and discriminated upon on an ongoing basis . . . because of my age, national origin" and previous complaints of discrimination. Pl's Ex. 6 at P0295. Appellant specifically described "opposing discrimination practices" as part of the reason why the Agency was retaliating against her. *Id.* Here, a reasonable factfinder could determine that Appellant undoubtedly complained of unlawful discrimination.

III APPELLANT ESTABLISHED A CAUSAL LINK BETWEEN HER PROTECTED ACTIVITY AND THE ADVERSE EMPLOYMENT ACTIONS.

In oral argument, the Court found there is no causal connection between the protected activity and an adverse action, however it failed to explore the antagonism and the pretext factors laid out below. Causal connection need not just be established by temporal proximity. Even if it is, the case at bar demonstrates it was very close in time- within 6 weeks the suspension occurred after the August 23, 2017 complaint to Deputy Director Jared Morris about discrimination. JA 50:8 – 11.

The non time-barred protected activities in this case include Appellant's EEO complaint of May 15, 2017, a mediation session held on June 28, 2017, and a second complaint to Deputy Director Morris on August 23, 2017. Pl's Ex. 6 at P0295-P0300.

"A Appellant may show causation through direct evidence or circumstantial evidence, such as by showing . . . a close temporal proximity between the employer's knowledge and adverse actions." *Clayton v. District of Columbia*, 931 F. Supp.2d 192, 202 (D.D.C. 2013). Here, Appellant made a protected disclosure in the form of her EEO complaint on May 15, 2017, just days before Mr. Woodland denied Appellant's request for overtime on May 22, 2017. Pl's Ex. 1 at 37. It was also less than a month after her protected disclosure that she received her Proposed Official Reprimand on June 28, 2017. *Id.* Within four months of her complaining to Deputy Director Morris, Appellant received a nine-day suspension. Pl's Ex. 9 at P0461-P0463. App. Opp. Br. at 17. Although a maximum lapse between protected activity and retaliatory action has not been established, courts have often accepted temporal proximities of three to five months. *See Castle v. Bentsen*, 867 F. Supp. 1, 3 (D.D.C. 1994). Under these circumstances, where the suspension has already been shown to be a much harsher treatment than anyone else in the office

for the same conduct, less than four months is sufficient temporal proximity to show it's more likely related to the protected activities.

A Aside from temporal proximity, Appellant need only show awareness of the protected activity as demonstrated here.

The Court below found there was no awareness by management of Appellant's EEO activity and premised the granting of summary judgment on the retaliation claim on this. JA 66:8-9. As shown in the following paragraph, Mr. Coffman, who had a part in the nine-day suspension, did know about the protected activity of Appellant.

Even if the adverse actions were not so close in time to the protected activity, Appellant can still show causal nexus by demonstrating that the Appellees had some "awareness" of the protected activity. *Mazloum v. District of Columbia Metropolitan Police Dept*., 517 F. Supp. 2d 74 (D.D.C. 2007). After two official EEO complaints and one lodged with the deputy director, and a mediation session, it strains credulity that the key actors, Appellee Coffman and Ms. Brown, did not have knowledge of these meetings. At his deposition, Mr. Coffman fully admitted to knowledge of Appellant's protected activity, including multiple complaints of discrimination. Coffman Depo. at 24:15-22, 25:1-3. Appellant's Opposition Brief at 15.

B The evidence shows that causation can still be shown through an intervening pattern of antagonism.

Even if the adverse actions were not so close in time to the protected activity, Appellant could still show causation through an intervening pattern of antagonism by Appellees. "[W]here there is a lack of temporal proximity, circumstantial evidence of a pattern of antagonism following protected conduct can also give rise to the inference." *Payne v. Dist. of Columbia*, 4 F. Supp. 3d 80, 89 (D.D.C. 2013). Appellant has established a pattern of antagonism by Appellees after she

engaged in protected activity. Pl's Ex. 8 at P0192- P0193. App. Opp. Br. at 15. This pattern includes Mr. Coffman's sabotaging of Appellant's May 2017 request for overtime to ensure that it was denied by Mr. Woodland, as well as several acts by Appellees, including denying Appellant the opportunity to be selected acting Supervisory Service Coordinator in October 2017, assigning a nine-day suspension on October 10, 2017, providing lower annual performance reviews, and placing Appellant on a Performance Improvement Plan (PIP) in June 2019. Pl's Ex. 1 at 37, 110; see also Pl's Ex. 9 at P0461; Pl's Ex. 10 at 00001201-1204; Eley-Brame Depo. at 77:1-21. Appellant's Opposition Brief at 12. Between the dates of June 1, 2017 and August 11, 2017 Appellant further detailed a pattern of antagonism within her complaint to Deputy Director Morris. Pl's Ex. 8 at P0192-P0193. Appellant's Opposition Brief, at 15.

Not only was there evidence of antagonism, but the antagonism became heightened, particularly after August of 2017 as laid out in the Statement of the Facts. Such "repeated, escalating acts of retaliation," that concluded with the nine-day suspension and PIP assignment were clear reprisal for the prior protected activity and constituted a pattern of antagonism sufficient to support an inference of causation. *Payne,* 4 F. Supp. 3d 80, 90. *See also Taylor v. Solis*, 571 F. 3d 1313, 1322-23 (D.C. Cir. 2009) (explaining a court can infer a causal relationship between protected activity and adverse actions through a pattern of antagonism).

C Appellant has established evidence of retaliatory pretext.

The Appellees deviated from standard policy in not reassigning Appellant's workload to another DDS employee or contractor while she was on leave. Mr. Coffman failed to reassign Appellant's caseload while she went on leave, resulting in Appellant having an unmanageable workload upon return, through no fault of her own. Phillips Depo. at 34:18-22, 35:1-15. Appellant's Opposition Brief, at 11,13. For the other service coordinators, however, treatment

was markedly different. Mr. Coffman hired contractors to manage their case loads for all those who did not engage in protected activity, such as Shauntice Smith and Tyisha Barnes. Coffman Depo. at 52:5-16. Appellant's Opposition Brief, at 11. The courts are clear that deviations from standard procedures may "give rise to an inference of pretext" at the summary judgment stage. *Harrington*, 668 F.3d 25, 33. Here the deviation from standard procedure of failing to reassign Appellant's workload was done with retaliatory animus and is sufficient to give rise to an inference of pretext. See Jones, 999 F. Supp. 2d 185, 191.

Prior to her assigned suspension, Appellant was never informed that retroactive service requests for an excessive Service Coordinator caseload were prohibited. Pl's Ex. 1 at 106-109. App. Opp. Br. at 20. By contrast, *following* Appellant's suspension, other DDS employees including Ms. Eley-Brame continued to make retroactive service requests without reprimand. Pl's Ex. 11 at P0429; see also Brown Depo. at 80:6-22, 81:1-8. App. Opp. Br. at 20. Appellant was the *only* employee to receive adverse actions to retroactive service requests. This means that other employees (of different national origin) did know about the policy, or should have known, and yet were not disciplined for violating it.

The disparate treatment of Appellant gives rise to an inference of retaliatory pretext sufficient to survive summary judgment. As the foregoing paragraphs demonstrate, Appellant has properly established her *prima facie* claim of retaliation. To establish a prima facie case of retaliation under the DCHRA, an employee must show: "(1) [s]he was engaged in protected activity; (2) the employer took an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse action." *Bryant v. District of Columbia*, 102 A. 3d 264, 268 (D.C. 2014). Her EEO complaint and complaint to the deputy director easily fulfill the first requirement. The case law in the District is settled that a work suspension without pay fulfills

the second requirement. And the third requirement can be made in this case either temporally, by awareness, increased antagonism, and evidence of pretext, all of which are established by the evidence. In the case of awareness, Appellees are on record admitting that they knew of the EEO complaints.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for trial.

Date: July 19, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2023, the foregoing Appellant's Brief was served electronically via the Court's electronic case management system on counsel for the Appellees:

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