22 – CV – 473

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MONIQUE WILSON

Appellant,

v.

DISTRICT OF COLUMBIA GOVERNMENT, *et al.,*

Appellees.

ON APPEAL FROM JUDGMENTS OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CASE NO. 2019-CA-000838-B

APPELLANT'S OPENING BRIEF

David A. Branch, Esq.
Law Office of David A. Branch & Associates, PLLC
1828 L Street N.W., Suite 820
Washington, D.C. 20036
(202) 785-2805
davidbranch@dbranchlaw.com

PARTIES AND COUNSEL

Appellant Monique Wilson

Monique Wilson
41 New York Ave., N.W.
Washington, D.C. 20001

Counsel for Appellant

David A. Branch, Esq.
D.C. Bar No. 438764
Law Office of David A. Branch
And Associates, PLLC
1828 L Street N.W., Suite 820
Washington, D.C. 20036
(202) 785-2805
davidbranch@dbranchlaw.com

Appellee District of Columbia Government

District of Columbia Government
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Appellee Paul Blake

Paul Blake
Office of the Chief Financial Officer
1101 4th St., S.W. #220
Washington, D.C. 20024

Counsel for Appellees

Caroline Van Zile, Esq.
Solicitor General- Washington DC
caroline.vanzile@dc.gov

Ashwin P. Phatak
Principal Deputy Solicitor General
Ashwin.phatak@dc.gov
Office of DC Attorney General
400 6th St., N.W., Suite 8100
Washington, D.C. 20001
(202) 442-9807
Ashwin.phatak@dc.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. STATUTES

II. CASES

JURISDICTIONAL STATEMENT

This is an appeal from Orders of Judge Alfred S. Irving, Jr. of the Superior Court of the District of Columbia (hereinafter "D.C. Superior Court", "Superior Court", or "Trial Court") in the matter 2019-CA-000838-B. Appellant Monique Wilson (hereinafter "Appellant" or "Ms. Wilson") timely filed a Notice of Appeal on [June 24, 2022]. *See* JA0455. Ms. Wilson appeals the Trial Court's Order Granting Appellees' District of Columbia Government ("D.C." or "the District") and Paul Blake (Mr. Blake) (hereinafter collectively "Appellees") Motion For Summary Judgment, entered May 25, 2022. *See* JA0395.

STATEMENT OF THE ISSUE

1. Whether the Superior Court erred in Granting Appellees' Motion for Summary Judgment, dismissing Appellant's District of Columbia Human Rights Act ("DCHRA") claims for race and sex discrimination and retaliation for opposing aforesaid discrimination; Accrued Sick and Safe Leave Act ("ASSLA") claim for interference and retaliation; and District of Columbia Family Medical Leave Act ("DCFMLA") claim for interference and retaliation.

STATEMENT OF THE CASE

Appellant Monique Wilson, an African American woman, was formerly employed with the District of Columbia Office of Finance and Resource Management (OFRM) as a Budget Analyst. After Appellant was subjected to discriminatory treatment on the basis of her race and sex, endured violations of her right to take leave, and subjected to retaliation for engaging in protected activity, Appellant filed a complaint against the District of Columbia and Paul Blake pursuant to the District of Columbia Human Rights Act ("DCHRA"), D.C. Code § 2-1401 *et seq*., the District of Columbia Family and Medical Leave Act D.C. Code Ann. § 32-501 *et seq*, and the District of Columbia Accrued Sick and Safe Leave Act D.C. Code § 32-531.01 *et seq.*

On May 27, 2021, Appellees filed a Motion for Summary Judgment, and after briefing, Judge Alfred S. Irving, Jr. issued an Order granting Appellees' Motion on May 25, 2022. *See* JA0395. As for Appellant's DCHRA claims, the Trial Court concluded Appellant's race and sex discrimination claims fell short due to the non-discriminatory reasons proffered for Appellant's termination; the same for her retaliation claim in addition to finding a lack of protected activity; and her hostile work-environment claim fell short due to a lack of evidence that her race and sex were a motivating factor in her treatment by management. *See* JA0402-JA0409.

The Trial Court additionally concluded that no reasonable jury could find for Appellant on her DCFMLA interference and retaliation claims due to the non-retaliatory reasons proffered for Appellant's termination. *See* JA0409-JA0411. Finally, the Trial Court concluded that Appellant's ASSLA interference claim could not move forward to trial because all requests for leave were approved and the retaliation claim was not viable to due the non-retaliatory reasons proffered for Appellant's termination. *See* JA0411-0412.

STATEMENT OF FACTS

Appellant Wilson began her employment as a Budget Analyst within the Office of Finance and Resource Management ("OFRM") February 6, 2017. *See* JA0301. Appellant initially reported to Jim Hurley when she started her employment in February 2017 until June 2018. During her time reporting to Mr. Hurley, Appellant Wilson was never subjected to any disciplinary action by a manager or supervisor. *Id.* Without any stated reason, Appellant Wilson was placed under the supervision of Paul Blake in June 2018. *Id.* Appellant Wilson was immediately informed of Mr. Blake's abusive behavior while supervising and managing employees when she informed several of her colleagues that she was being transferred. *See* JA0302. Within the first month under Mr. Blake's supervision, Appellant Wilson began having issues with Mr. Blake. *Id.* On July 13, 2018, for example, during the first forty-five (45) days while under Mr. Blake's supervision, Appellant Wilson received criticism of her performance for her lack of knowledge of her work duties verbally from Mr. Blake when she was asked questions regarding AFO PS shortage tasker. *Id*.

Mr. Blake also demeaningly criticized Appellant Wilson when she failed to provide an explanation for a PS shortfall for the Contract Appeal Board. *Id*. Appellant Wilson was provided minimal instruction as to how she should complete the exercise and Mr. Blake did not attempt to assist with ensuring the exercise was

done properly. *Id*. After only three hours of Appellant attempting the exercise, Mr. Blake stated that Appellant was far from completing the assignment, referring to it being problematic and called her prior performance ratings substandard. *Id.* Mr. Blake assumed that since Appellant Wilson had been working for the OFRM for a little over a year that she automatically knew exactly what to do, despite being provided minimal instruction. *Id.* When Appellant explained that she was recently assigned to that particular Agency less than a month prior from originally being assigned limited assignments for City Council and Department of Human Resources (BEO) and wanted help knowing the new agency better, Mr. Blake responded with a look of disgust and his facial expressions caused Appellant to feel unwelcome, along with the lack of proper guidance from someone who should have supervised her on her new tasks. *Id*.

Mr. Blake's tone when communicating with Appellant verbally and through email made her feel extremely uncomfortable and fearful of her work environment. *Id.* Mr. Blake's supervision of Appellant boiled down to Mr. Blake barking orders at her while providing little to no guidance or assistance. *Id.* If Appellant made a minuscule error on tasks, she was subjected to her character being belittled with comments from Mr. Blake like, “you've been with Government Services Cluster (GOC) for over a year and you can't even remember the name or the correct spelling of your assigned agency." *See* JA0303. Mr. Blake would give unrealistic

deadlines three hours before the end of a workday without guidance to Appellant, which caused her anxiety, stress, and made her feel physically ill. Mr. Blake also assumed Appellant knew how to analyze certain assignments with little to no input or instruction from him. *Id.* While Appellant Wilson was being subjected to such cruel treatment, she noted that Mr. Blake did not treat other employees, primarily the non-African American and male employees, with the same harsh treatment she received. *Id.*

Mr. Blake retaliated against Appellant Wilson when she returned to work on October 31, 2018, and submitted a FMLA leave request for November 1, 2018, through November 9, 2018. *Id*. Appellant Wilson was terminated immediately on the very same day without cause. *Id*. Appellant was terminated by Appellee District of Columbia as a result of her using medical leave in order to attend doctor's appointments and being accused by Mr. Blake of abusing her sick leave to attend appointments. *Id*.

Additionally, Appellees violated Appellant's right to access and use her accrued sick leave by questioning her reasons for sick leave and accusing her of abusing the policy. *Id*. When Appellant submitted her request to use her FMLA to Mr. Blake and other individuals on October 31, 2018, Mr. Blake failed to respond to her request and approve the FMLA which is required by law. *Id.* As previously

noted, Appellant was ultimately terminated by Appellees on October 31, 2018, due to Appellees' discriminatory and retaliatory motives.

SUMMARY OF THE ARGUMENT

The Trial Court erred when it granted Appellees' Motion for Summary Judgment because material facts were in dispute such that a reasonable jury could find for Appellant on all claims.

ARGUMENT

I. Summary Judgment Standards

Superior Court Rule 56(c) provides that summary judgment is appropriate "if particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Super. Ct. Civ. R. 56(c). There is a genuine issue as to a material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). If factual issues can "reasonably be resolved in favor of either party," there is a need for a trial. *Id*. At 250. The court, therefore, "should review all of the evidence in the record," *Reeves* v. *Sanderson Plumbing Prods*., Inc., 530 U.S. 133, 150 (2000), viewing the evidence in the light most favorable to the non-moving party and according that party the benefit of all reasonable inferences. *Anderson,* 477 U.S. at 255.

At this stage of the proceedings, the court is not to make credibility determinations or to weigh the evidence. *Reeves*, 530 U.S. at 150. If the evidence presented on a dispositive issue is subject to conflicting interpretations or reasonable persons might differ as to its significance, summary judgment is

improper. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Only if, after examining the evidence, the court finds that 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). Summary judgment will only be granted in clear cases. This was not a clear case and therefore it was inappropriate for the Trial Court to grant summary judgment.

II. The Trial Court erred in granting summary judgment on Appellant's DCHRA claims

A. A reasonable jury could find that Appellees discriminated against Appellant on the basis of her race and sex

1. Appellant established a prima facie case of discrimination

As a threshold matter, Appellant adequately established a prima facie case of discrimination, although the Trial Court placed the bulk of its reasoning on Appellees' proffered legitimate reasons for terminating Appellant discussed *infra*. An employee makes out a *prima facie* case of disparate treatment discrimination by establishing that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the adverse action gives rise to an inference of discrimination. *Czekalski, v. Peters*, 475 F. 3d 360 (D.C. Cir. 2007). Appellant has established that she, as a member of protected classes based on her race and sex, suffered adverse employment action by Appellees that gives rise to an inference of

discrimination. No party has ever disputed that Appellant is a member of a protected class. Furthermore, Appellant suffered adverse actions in the form of Mr. Blake's consistent abusive treatment and her termination by the District of Columbia.

As the foregoing paragraphs demonstrate, Appellant suffered adverse employment actions that give rise to an inference of racial and sex discrimination. Mr. Blake's criticism of Appellant went well beyond being critical of her work performance and reveals that Mr. Blake did not respect Appellant on a personal level and was unable to provide assistance on an assignment without belittling Appellant's competency. During her meeting with Ms. Cheatham on July 17, 2018, Appellant indicated that she had to call in sick on July 16, 2018, because she felt "anxious and ill" at the mere thought of coming into the office and interacting with Appellee Blake on that day. *See* JA0209-JA0210. Appellees' adverse actions culminated in Appellant's termination on October 31, 2018, and "neither party contests that [Appellant's] termination was an adverse action" in this matter. *See Armstrong v. Mineta,* Civil Action 04-01661 (HHK) (D.D.C. Jun. 19, 2006).

Standing alone, Appellees' adverse actions toward Appellant might not rise to the requisite level of discrimination. However, when coupled with the disparate treatment Appellant received compared to her co-workers, it is clear that she suffered discrimination based on her race and sex. Regarding comparator

evidence, Appellant can show that she was treated adversely compared to several similarly situated non-African American and non-female employees that worked under Appellee Blake's supervision. Awan Mohammed and Thanh Huynh were similarly situated employees previously under Appellee Blake's supervision prior to being transferred. *See* JA0347-JA3048 (Pl's Answers to Def's First Set of Interrogatories, Answer No. 6). Although, both employees were ultimately reassigned from Appellee Blake's supervision and Mr. Muhammed complained about Blake's management style, neither employee received a written warning or a PIP. *See* JA0041. Appellant, an African American female, was the only employee to receive both a written warning and a PIP while supervised by Appellee Blake.

The Trial Court incorrectly asserted that Mr. Muhammed's complaints about Appellee Blake's management style were essentially no different from Appellant's complaints. *See* JA0405. No evidence was placed in the record that either Mr. Muhammed or Mr. Huynh were subjected to the constant verbal abuse that Appellant suffered. Furthermore, Mr. Blake gave Appellant unrealistic deadlines three hours before the end of Appellant's workday without any management or guidance, a complaint neither Mr. Muhammed nor Mr. Huynh made. *See* JA0350-JA0351 (Pl's Answers to Def's First Set of Interrogatories, Answer No. 12).

Appellant, as an African American female was uniquely singled-out by Appellee Blake and was treated adversely compared to Appellant's identified non-African American non-female coworkers: Mr. Muhammed and Mr. Huynh. Appellees' adverse actions, including Appellant's termination, illustrate the disparate treatment taken against Appellant compared to her non-African American and non-female co-workers, including the termination of her employment. Because "a reasonable jury could find that these facts give rise to an inference of discrimination" on behalf of Appellees, Appellant has established *prima facie* cases of discrimination based on her race and sex. *Brownfield v. Bair*, 541 F. Supp. 2d 35 at 43 (D.D.C. 2008).

2. A reasonable jury could conclude that Appellee's justifications for Appellant's termination are mere pretext

The central issue regarding a motion for summary judgment in an employment discrimination case is whether the employee has produced sufficient evidence for a reasonable jury to find that the employer's alleged non-discriminatory reason was not the actual reason for the adverse action and that the employer intentionally discriminated against the employee on the basis of her protected class. *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (citations omitted). The Trial Court focused on this central question but erred in answering it.

Under the *McDonnell Douglas* framework, once the employer articulates an alleged legitimate non-discriminatory reason for its action, the Appellant is given an opportunity to prove by a preponderance of the evidence that Appellee's proffered reasons are merely a pretext for discrimination. *Burdine,* 450 U.S. 248 at 256. The Appellant "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* Evidence that an employer's asserted justification is false may permit the trier of fact to conclude that the employer unlawfully discriminated against the employee. *Reeves v. Sanderson Plumbing Products*, Inc., 530 U.S. 133 (2000).

In this matter, Appellees' alleged reasons for terminating Appellant are unworthy of credence as they were motivated by a discriminatory reason. Appellees assert that there were concerns regarding Appellant's ability to operate as Budget Analyst. *See* JA0053. It turns out, however, that Appellant met with Mr. Hurley three months prior to her first performance evaluation in October 2017. *See* JA0347 (Pl's Ex. 1, Pl's Answers to Def's First Set of Interrogatories, Answer No. 4). During this time, Appellant was not subjected to or recommended for any type of discipline, including but not limited to, being placed on a PIP, being suspended, leave without pay, disciplinary action or reprimand. *Id.* Throughout this discussion Appellant and Mr. Hurley emphasized the important of providing accuracy when

submitting reports and focusing on providing detailed work, however at no time was Appellant informed by Mr. Hurley that her work was unsatisfactory or that she would be receiving an unacceptable rating for her performance evaluation. *Id.*

Contrary to the Trial Court's findings, a reasonable jury could find that Appellant was significantly qualified for her position as a Budget Analyst in OFRM. Under *Hunt v. Dist. of Columbia,* the essential consideration is whether an employee "raised triable issues of fact necessary to answering th[e] question" of whether she could perform the essential function of her position. 66 A.3d 987 (D.C. 2013). Here, Appellant undoubtedly raised triable issues of fact establishing that she could perform the essential function of a budget analyst. Appellant's past experience as a Budged Analyst with the District of Columbia government illustrated Appellant's ability to perform her duties as a Budget Analyst. *See Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, 166 Cal.App.4th 952, 83 Cal. Rptr. 3d 190 (Cal. Ct. App. 2008) (noting that employee raised a triable issue of fact regarding her qualification for certain positions, including her past experience). Furthermore, as the foregoing paragraphs demonstrate the question of whether Appellant could perform her essential duties only began *after* Appellant's reassignment under Appellee Blake.

Appellant performed her duties in a satisfactory manner, and no significant issues with her performance occurred until she began reporting to Appellee Blake

in June 2018. Appellant performed these tasks despite not being given complete access to financial systems which would have allowed her to work independently with specific District agencies on budget related matters for the first six months after she was hired by Appellee District of Columbia. The Trial Court pointed to Appellant's two "Needs Improvement" ratings from her October 2017 and May 2018 performance evaluations. *See* JA0396. However, neither of these ratings led to any disciplinary action or reprimand on behalf of Appellee District of Columbia. Only *after* being assigned under the supervision of Appellee Blake's did Appellant receive a Written Warning and PIP on October 10, 2018. As a result, a jury could reasonably find that Appellees implausibly hold that Appellant's alleged work performance issues only qualified for disciplinary action after Appellee Blake was assigned as her supervisor. If, as Appellees claim, Appellant had such work performance problems prior to the assignment of Appellee Blake as her supervisor, the District of Columbia would surely have implemented disciplinary measures sooner. Furthermore, Appellant was terminated during her assigned PIP, demonstrating that its implementation was not for the benefit of assisting Appellant's work performance as she was denied the opportunity to successfully complete the PIP.

Because a reasonable factfinder could find Appellees' alleged non-discriminatory reasons for termination implausible and unworthy of credence, summary judgment was inappropriate. *See Waldron v. SL Indus., Inc.,* 56 F.3d 491 (3d Cir. 1995) (finding that employee's claims should have survived summary judgment as a jury could reasonably determine that the justifications for termination were implausible).

Courts have held that an agency or employer's failure to follow its own regulations or established procedure can provide sufficient evidence of pretext to survive a request for summary judgment. *See, e.g.*, *Lathram* v. *Snow*, 336 F.3d 1085, 1093–94 (D.C. Cir. 2003) (holding that unexplained inconsistency between hiring process used for alleged discriminatory hire and that used for other comparable positions created at the same time "[could] justify an inference of discriminatory motive"); *see also Cones* v. *Shalala,* 199 F.3d 512, 519 (D.C.Cir.2000). Here, Mr. Blake failed to provide Appellant with a performance evaluation after he was assigned as her supervisor in July 2018. *See* JA0347 (Pl's Ex. 1, Pl's Answers to Def's First Set of Interrogatories, Answer No. 4). Appellee Blake did however serve Appellant with her PIP on October 10, 2018. *Id.* This failure to provide Appellant with a standard performance evaluation from July 2018 onward directly contradicted Appellee District of Columbia's established procedure, as Appellant received a performance evaluation in 2017 and 2018, as

acknowledged by Appellees. *See* JA0054; *See also Mitchell v. National R.R Passenger Corp.*, 407 F. Supp. 2d 213 (D.D.C. 2005) (holding that employer's failure to follow its own policies constituted evidence of pretext).

Mr. Blake further deviated from the District's own regulations and procedures by assigning Appellant unrealistic deadlines three hours before the end of Appellant's workday without any management or guidance. *See* JA0350-JA0351 (Pl's Ex. 1, Pl's Answers to Def's First Set of Interrogatories, Answer No. 12). Such unexplained inconsistencies "can justify an inference of discriminatory motive" on behalf of employers. *See Lathram*, 336 F.3d. 1085 at 1093; *see also Miller v. Fairchild Indus*., *Inc.*, 885 F.2d 498, 506 (9th Cir. 1989). This reasonable inference of discrimination due to such unexplained inconsistencies, combined with Appellees' false statement regarding Appellant being unqualified for her position and Appellees' decision to terminate Appellant prior to the completion of her assigned PIP provide sufficient evidence of discriminatory pretext on behalf of Appellees. *See Lathram,* 336 F.3d. 1085 at 1091.

In the foregoing paragraphs, Appellant has established the weakness, implausibility and inconsistencies ingrained within Appellees' alleged non-discriminatory reasons for Appellant's termination. A reasonable factfinder could rationally find such alleged reasons unworthy of credence and “hence infer that the employer did not act for the asserted non-discriminatory reasons" as such

reasons represent mere pretext. *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) *(quoting Olson v. General Elec. Astrospace*, 101 F.3d 947, 951-52 (3d Cir. 1996)). Appellees' alleged non-discriminatory reasons for Appellant's termination were mere pretext for discrimination and Appellant has properly established her claim of a violation of the D.C. Human Rights Act. Accordingly, Appellees are not entitled to summary judgment and their Motion for Summary Judgment should be denied by this Court.

B. A reasonable jury could find that Appellees created a hostile work-environment for Appellant on the basis of her race and sex.

The Trial Court erred in concluding that Appellant failed to establish her hostile work environment claim. To establish a hostile work environment claim, Appellant must demonstrate that "(1) that [s]he is a member of a protected class, (2) that [s]he has been subject to unwelcome harassment, (3) that the harassment was based on membership in a protected class, and (4) that the harassment is severe and pervasive enough to affect a term, condition, or privilege of employment." *Nicola v. Washington Times Corp.*, 947 A.2d 1164, 1173 (D.C. 2008). It was uncontested that Appellant is a member of a protected class based on her race and sex. Furthermore, Appellant established that she was subjected to pervasive unwelcome harassment from the time Mr. Blake was assigned as her supervisor on May 30, 2018 until her termination on October 31, 2018. As

Appellant noted in her July 15, 2018 email with Ms. Cheatham, she was subjected to unwelcome harassment in the form of belittling insults toward Appellant's character that insinuate she is incapable of performing her job, "badgering" statements toward Appellant if she does not answer Appellee Blake's questions correctly, "unrealistic deadlines three hours before the end of the work day" which have caused Appellant persuasive stress and anxiety, and "verbal abuse" that "intimidates and causes [Appellant] extreme anxiety." *See* JA0206-JA0207. Moreover, during her meeting with Ms. Cheatham on July 17, 2018, Appellant indicated that she had to call in sick on July 16, 2018 because "the idea of coming into the office made her feel anxious and ill," demonstrating the severity of Appellee Blake's unwelcome harassment and the affect it had on Appellant's employment conditions. *See* JA0209-JA0210. As Appellant informed Ms. Cheatham, the hostile environment created by Appellee Blake caused Appellant "severe anxiety, leading to illness." *Id.* Furthermore, Ms. Cheatham acknowledged that Appellee Blake's "tone was inappropriate" toward Appellant and "went against the culture" that the District of Columbia has sought to establish. *Id*. Accepting these allegations as true, Appellant established a pattern of unwelcome harassment that was sufficiently severe and pervasive to "produce a constructive alternation in the terms or conditions of [her] employment." *Tucker v. Howard University Hospital,* 764 F. Supp. 2d 1 (D.D.C. 2011) *(quoting Burlington Indus., Inc. v.*

Ellerth, 524 U.S. 742, 752, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998)).

The Trial Court focused on the third element of a hostile work-environment claim —the nexus between harassment and membership in a protected class—and concluded Appellant failed to plausibly establish this fact. A reasonable jury could disagree. Appellant established sufficient facts to create a plausible casual connection between the aforementioned harassment and her status as a member of protected classes. Mr. Blake treated Appellant far less favorably than her non-African American male co-workers. As Appellant stated during her deposition, she informed Director of Financial Operations (DFO) Michael Bolden on several occasions that she believed Mr. Blake treated her adversely due to her sex. *See* JA0133 (Pl. Dep. 141:6-142:13). Appellant specifically mentioned three male employees under Mr. Blakes' supervision, Awan Muhammad, Aklilu Ayalew, and Thanh Huynh who were treated better than herself. *See* JA0135 (Pl. Dep. 146:5-147:22). Moreover, Appellant acknowledged that while the three male employees described Mr. Blake's management style as "very demanding," Appellant was the only employee that Mr. Blake made unjustified complaints about, scapegoated for issues not within her responsibilities, and demanded by stating that she did not know her job duties. *Id. See also* JA0209-JA0210. Appellant was the only employee under Mr. Blakes' supervision to receive a Written Warning and a PIP during the time from June 2018 until Appellant's

termination on October 31, 2018, and none of the male employee specifically mentioned by Appellant received either a written warning or a PIP during their time working under Mr. Blake. *See* JA0134 (Pl. Dep. 143:13-17). Accordingly, a reasonable jury could conclude that Mr. Blake's conduct directed at Appellant was palpably different than that directed at her non-African and non-female co-workers, establishing a nexus between the harassment and Appellant's protected characteristics.

C. A reasonable jury could find that Appellees retaliated against Appellant for opposing unlawful discrimination in the workplace.

The Trial Court erred in concluding that Appellant did not engage in a protected activity and therefore cannot avail herself of the anti-retaliation provisions of the DCHRA. Courts have held that in order to establish a *prima facie* case of retaliation, an employee "must show that (1) she engaged in a statutorily protected activity; (2) her employer took an adverse personnel action; and (3) a causal connection existed between the two. *See Jones v. Washington Metro. Area Transit Auth.*, 205 F.3d 428, 433 (D.C. Cir. 2000); *Mitchell v. Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985). In this matter, Appellant does not face a particularly high burden to establish a *prima facie* case of retaliation, as Appellant "merely needs to establish facts adequate to permit an inference of retaliatory motive." *Id*. As the following paragraphs will demonstrate, Appellant met her burden to establish a

prima facie case of retaliation and asserted facts more than adequate to permit an inference of retaliatory motive.

Contrary to to the Trial Court's finding, Appellant engaged in protected activity on July 15, 2018 when she detailed her discriminatory treatment and filed a complaint of harassment to Ms. Cheatham and Ms. Rice and on October 12, 2018 and when she filed a complaint with Human Resources Program Manager Tania Tydings.*See* JA0209-JA0210; *see also* JA0358 (Pl's Answers to Def's First Set of Interrogatories, Answer No. 21). The Trial Court erroneously concluded that these complaints focused exclusively on Mr. Blake's management style. However, instructive case law suggests that Appellant was indeed "lodging a complaint about allegedly discriminatory conduct" when she issued her complaints on July 15, 2018 and October 12, 2018. *Ukwuani v. Dist. of Columbia*, 241 A.3d 529 (D.C. 2020).

Moreover, Appellant "need only prove she had a reasonably good faith belief that the practice she opposed was unlawful under the DCHRA, not that it actually violated the Act." *Howard University v. Green,* 652 A.2d 41 (D.C. 1994). Appellant informed DFO Michael Bolden on several occasions that she believed Mr. Blake treated her adversely specifically on the ground of her gender. Def. Ex. 6, Pl. Dep. 141:6-142:13. Although Appellant did not put her good faith allegation in writing, nor was she asked to do so, Appellant "opposed and complained of activity which she reasonably, in good faith, believed was based on" gender

discrimination. *Howard,* 652 A.2d 41 at * 46. Appellant has met her burden to demonstrate that she properly engaged in protected activity regarding her claims under the DCHRA. *See United States v. Howard University,* 153 F.3d 731 (D.C. Cir. 1998) (reversing the grant of judgment as a matter of law on a retaliation claim because of a "good faith basis" for going forward with the protected activity at the time of the retaliation).

There was no dispute that Appellant's termination constituted the kind of adverse employment action upon which a viable retaliation claim may be built. In addition, the District of Columbia was made aware that Appellant engaged in protected activity when it took the adverse employment action of terminating Appellant. Specifically, Mr. Blake had knowledge of Appellant's engagement in protected activity prior to her termination. *See* JA0167 (Blake Dep. 53:4-15).

The timing of Appellant's termination also gives rise to an inference of retaliation. The United States District Court for the District of Columbia has held that "close temporal proximity alone is sufficient to establish the causation element of the prima facie case for retaliation." *Gray v. Foxx*, 74 F. Supp. 3d 55, 73 (D.D.C. 2014) (*citing Cones*, 119 F.3d at 519- 20). Although courts have not established a maximum time lapse between the protected activity and retaliatory action, courts have previously accepted temporal proximities of over a month in length. *See Jones v. Greenspan,* 402 F. Supp. 2d 294 (D.D.C. 2005) (finding that five weeks is

close temporal proximity to alleged causation). Appellant engaged in protected activity on October 12, 2018 by filing a formal complaint with Human Resources Program Manager Tania Tydings, only to be terminated nineteen (19) days after engaging in such protected activity. Such close temporal proximity can support an inference of causation and a "reasonably finder of fact could infer causation in that area without more." *Woodruff v. Peters*, 482 F.3d 521 (D.C. Cir. 2007) *(citing Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir.1985)).

As previously detailed in the above section on Appellant's discrimination claims, Appellees' alleged non-discriminatory and non-retaliatory reasons for terminating Appellant represent mere pretext. Appellees' proffered reasons for Appellant's termination are nothing more than a cover for their retaliatory motives in terminating Appellant after her engagement in protected activity. First, Appellant performed her duties in a satisfactory manner, and significant employment actions such as the issuance of a written warning and PIP by Appellee District of Columbia did not occur until *after* she engaged in protected activity on July 15, 2018. *See* JA0347 (Pl's Answers to Def's First Set of Interrogatories, Answer No. 4); *see also* JA0044. Second, Mr. Blake never provided Appellant with a Performance Evaluation from the time he became Appellant's supervisor onward, even though Mr. Blake was the person who served Appellant

with her PIP on October 10, 2018. *Id.* Courts have held that “an employer's deviation from its own standard procedures may serve as evidence of pretext," including Blake's failure to provide Appellant with a Performance Evaluation. *See Lathram,* 336 F.3d at 1093-94: *see also Cones*, 119 F.3d at 519-20. Third, Appellant's termination occurred within one month of her protected activity and prior to the expiration of the PIP she was assigned on October 10, 2018. Appellees' implausible argument that the extremely close temporal proximity between Appellant's protected activity and her termination is merely coincidental demonstrates the inherent "weaknesses [and] implausibilities” of Appellees' alleged non-retaliatory reasons. *Rioux v. City of Atlanta,* 520 F.3d 1269, 1278 (11th Cir. 2008). Fourth, Appellant's termination was based on inaccurate and false statements made by Mr. Blake regarding Appellant's use of medical leave. Mr. Blake falsely claimed that Appellant's absences had increased and that he was not informed of her requests for medical leave. In fact, Appellant had emailed Appellee Blake on October 11, 12, 17, and 19, 2018 regarding her absences in which she notified him of her medical leave. *Id.*

For these reasons, Appellant has satisfied her burden with respect to pretext and established “questions of material fact regarding whether the reasons proffered" for her termination were pretextual. *See Dillon v. Ned Mgmt.*, Inc., 85 F. Supp. 3d 639 (E.D.N.Y. 2015). Compelling evidence exists that Appellees had

personal motivations to remove Appellant from her position and retaliatory motivations based on her prior engagement in protected activity. Along with the incredibly close temporal proximity between Appellant's protected activity and her final termination, a jury could reasonably find Appellees' alleged non-retaliatory reasons for firing Appellant as pretextual and conclude that Appellant established a claim of retaliation for engaging in protect activity.

III. The Trial Court erred in granting summary judgment on Appellant's DCFMLA Claims

The District of Columbia Family Medical Leave Act ("DCFMLA") guarantees employees an amount of protected leave from work in certain circumstances, including for personal medical conditions or for care for a family member with serious health conditions and makes it "unlawful for any person to interfere with, restrain, or deny the exercise of or the *attempt to exercise* any right provided by this chapter." D.C. Code § § 32-502(a), 32-507(a) (emphasis added). "An employer may be held liable for violating the FMLA under two distinct claims: (1) interference, if the employer restrained, denied, or interfered with the employee's FMLA rights, and (2) retaliation, if the employer took adverse action against the employee because the employee took leave or otherwise engaged in activity protected by the Act." *Holloway v. D.C. Gov't*, 9 F. Supp. 3d 1, 7 (D.D.C. 2013) *(citing Deloatch v. Harris Teeter, Inc.*, 797 F. Supp. 2d 48, 64 (D.D.C. 2011).

Courts interpret the Family Medical Leave Act ("FMLA") and the DCFMLA similarly and both Acts make it unlawful for a covered employer to retaliate against employees for exercising rights protected under each Acts' respective positions. *See Winder v. Erste,* 511 F. Supp. 2d 160 (D.D.C. 2007); *see also* D.C. Code 32-507(a).

To establish a *prima facie* case regarding a violation of the DCFMLA, Appellant must demonstrate that (a) she engaged in protected activity; (b) she suffered an adverse employment action; and (c) the protected activity and the adverse employment action were causally connected. *See Winder,* 511 F. Supp. 2d at 184. The *McDonnell Douglas* burden-shifting framework applies to claims under the DCFMLA. Here, a reasonable jury could find that Appellees should be held liable for violating the DCFMLA under both distinct claims as Appellee interfered with Appellant's use of DCFMLA leave and retaliated against her by terminating her employment on October 31, 2018.

For the following reasons, Appellant established a *prima facie* violation of the DCFMLA. First, as this Opposition previously stated, Appellant engaged in protected activity on July 15, 2018 when she detailed her discriminatory treatment and filed a complaint of harassment to Ms. Cheatham and Ms. Rice and on October 12, 2018 when she filed a complaint with Human Resources Program Manager Tania Tydings. Second, as established in the foregoing paragraphs, there is no

dispute that Appellant was terminated on October 31, 2018 and that "termination is an adverse action." *See Minter*, Civil Action No. 10- 0516 (RLW). Third, Appellant's protected activity and Appellees' decision to terminate her employment were causally connected as Appellant's engagement in protected activity occurred within weeks of her termination and temporal proximity can support an inference of causation where two events are “very close" in time. *See Clark County School Dist. v. Breeden*, 532 U.S. 268, 273-74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001). *See also Woodruff v. Peters*, 482 F.3d 521 (D.C. Cir. 2006) (holding that a temporal proximity of less than a month would allow a reasonable factfinder to "infer causation in that area without more.").

In finding against Appellant on her DCFMLA claims, the Trial Court focused on the alleged non-discriminatory reasons for Appellant's termination. These alleged non-discriminatory reasons were mere pretext for interference and retaliation according to the *McDonnell Douglas* framework. As previously stated, Appellees' stated reasons for terminating Appellant were insufficient and represented only a mere pretext for discrimination and retaliation. Appellees admit that they knew about Appellant's alleged poor work performance and inability to perform essential functions prior to her submitted request for DCFMLA leave on October 30, 2018 and October 31, 2018, however Appellant was only terminated on October 31, 2018, *the very same day* she submitted her request for leave. *See*

JA0230. The incredibly close temporal proximity between Appellant's request for DCFMLA leave and her termination begs the question of why Appellees waited until the day after Appellant requested DCFMLA leave to terminate her employment. This temporal proximity of only mere hours demonstrates that Appellees' stated non-discriminatory reasons are pretextual. *See Garcia* v. *Profl Contract Servs*., 938 F.3d 236 (5th Cir. 2019) (finding that a reasonable jury could conclude that disparate treatment supported an inference of pretext and reversing the district court's grant of summary judgment.)

A reasonable jury could find that these events make clear that but for Appellant's October 30, 2018 and October 31, 2018 requests for leave, Appellant likely would not have been terminated on October 31, 2018. In this matter, the combination of "suspicious timing with other significant evidence of pretext" such as Appellant's request for DCFMLA leave, is "sufficient to survive summary judgment." *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 409 (5th Cir. 1999). Appellees interfered with Appellant's use of DCFMLA leave in retaliation for her engagement in protected activity by terminating her employment the very day she requested leave. For these reasons, Appellees were not entitled to summary judgment on Appellant's DCFMLA claims.

IV. The Trial Court erred in granting summary judgment on Appellant's ASSLA Claims

The District of Columbia Accrued Sick and Safe Leave Act ("ASSLA") prohibits an employer from discharging or discriminating "in any manner against an employee because the employee: (4) Uses paid leave provided under this subchapter." D.C. Code § 32-531.08(b)(4). As noted above, Appellant was terminated on the very same day she requested sick leave, a matter acknowledged by Appellees. *See* JA0046. Appellee District of Columbia interfered with Appellant's right to take leave for her medical appointments and terminated Appellant in direct violation of ASSLA in retaliation for Appellant taking leave during October 2018. The fact that Appellant's leave was approved on October 31, 2018, becomes irrelevant when Appellant was subsequently terminated on the very the same day. Furthermore, the timing of Appellant's termination "calls [Appellees]'... reasons for termination into doubt." *See Coulibaly* v. *Tillerson,* 273 F. Supp. 3d 16 (D.D.C. 2017). A jury could reasonably infer that by the time Appellant's request for leave under ASSLA was approved, Appellee District of Columbia had already decided that Appellant would be terminated due to her engagement in protected activity and protected requests for leave. *Id*. at 44. As an employer subject to such provisions, Appellee District of Columbia's termination of Appellant violated the District of Columbia Accrued Sick and Safe Leave Act.

See D.C. Code Ann. § 32-131.10 *et seq*.

ASSLA prohibits an employer from discharging an employee for complaining to the employer or anyone else. *See* D.C. Code §§ 32 - 5 31.08(b), (b)(2)(A), (b)(2)(D). There is a "rebuttable presumption" that the employer terminated the employee due to the complaint if the discharge occurred within ninety days of the complaint. *See* D.C. Code § 32 - 531.08(d). Here, the only question is whether Appellee District of Columbia has met its burden and presented sufficient evidence to rebut the presumption that Appellants' termination nineteen (19) days after she filed a formal complaint with the Human Resources Program Manager and only hours after requesting protected leave was retaliatory. *Id.*

D.C. Code § 32-531.08(d) requires an employer to show sufficient evidence to overcome a presumption of retaliatory motive. In this matter, Appellee District of Columbia failed to present sufficient evidence to meet the standard of D.C. Code § 32-531.08(d) because it relied entirely on disputed facts when it argued that Appellant was terminated due to performance issues. The "weakness [and] implausibilities" of Appellees' alleged non-discriminatory and non- retaliatory for Appellant's termination have already been documented above. A jury could reasonably find that Appellees' decision to terminate Appellant represents mere pretext for retaliation of Appellant's protected requests for leave under ASSLA.

Here "such evidence of temporal proximity supports an inference" that Appellee District of Columbia wanted to be rid of Appellant because of her prior protected activity, "especially when viewed in the context of the other evidence produced by Appellant" and the inadequacy and implausibility of Appellee's justifications. *See Burton v. Donovan*, 210 F. Supp. 3d 203 (D.D.C. 2016); *see also Clark County School Dist. v. Breeden,* 532 U.S. 268, 273-74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001).

The aforementioned close temporal proximity between Appellants' activities protected by ASSLA and her termination, coupled with the inadequacy of the District of Columbia's justifications for its actions, is more than sufficient for a reasonable jury to conclude that Appellant was terminated for engaging in activities protected by ASSLA. Appellant was terminated within hours after making her request for protected leave on October 31, 2018 and within ninety (90) days of Appellees learning that she had filed a protected complaint with Human Resources. Thus**,** Appellant properly established that Appellee District of Columbia violated ASSLA. Accordingly, Appellees' request for summary judgment should have been denied.

CONCLUSION

For the foregoing reasons, Appellant respectfully request that the Trial Court's decisions be reversed.

Date: July 14, 2023

Respectfully submitted,

/s/ David A. Branch

David A. Branch, Esq.
DC Bar No. 438764
Law Office of David A. Branch & Associates, PLLC
1828 L Street N.W., Suite 820
Washington, D.C. 20036
202.785.2805 phone
202.785.0289 fax
davidbranch@dbranchlaw.com

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July 2023 a copy of the foregoing Appellant's Opening Brief was served electronically on counsel for Appellees listed below:

Caroline S. Van Zile
Solicitor General
Office of the Attorney General
for the District of Columbia
400 6th Street, N.W., Suite 8100
Washington, D.C. 20001
Phone: (202) 724-6609
Fax: (202) 741-0649
Email: caroline.vanzile@dc.gov

Counsel for Appellees.

/s/ David A. Branch
David A. Branch

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

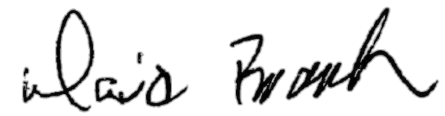
2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.



Signature

22 – CV – 473

Case Number(s)

David A. Branch

Name

7/14/203

Date

davidbranch@dbranchlaw.com

Email Address