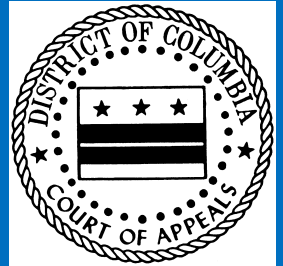


24-CV-0426



IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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YOSHIE S. DAVISON,

Appellant,

v.

AMERICAN PSYCHIATRIC ASSOCIATION, et al.

Appellees.

ON APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL ACTION NO. 2022-AB-005715

APPELLANT'S CORRECTED OPENING BRIEF

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STATEMENT OF JURISDICTION

Appellant Yoshie Davison filed this Notice of Appeal on May 1, 2024, JA 00504, from the April 1, 2024 Order and Opinion of the Superior Court of the District of Columbia granting Defendants American Psychiatric Association's and Dr. Saul Levin's Motion for Summary Judgment, which disposed of Appellant Davison's claims of race and sex discrimination and retaliation under the D.C. Human Rights Act and the D.C. Family and Medical Leave Act. JA 00504-520.

STATEMENT OF ISSUES

I. Whether the Superior Court erred in finding that Defendants/Appellees were entitled to summary judgment for the causes of action for race and sex discrimination under the DC Human Rights Act.

II. Whether the Superior Court erred in finding that Defendants/Appellees were entitled to summary judgment on the claims of interference and retaliation under the D.C Family and Medical Leave Act.

STATEMENT OF THE CASE

Appellant, an Asian American female, worked as the Chief of Staff for Appellees. JA 00504-520. Throughout her employment, Appellee Levin subjected her to discrimination based on her sex and race, including requiring her to retrieve breakfast foods for the office; referring to women as “honey” and making comments such as “not on my watch honey;” and yelling at her and berating her in the workplace. JA00003-11. On February 15, 2022, Appellant had her annual evaluation with Appellee Levin and during the meeting, he became irate and issued her a performance evaluation stating that her job was to “serve” him. JA00008-9. Appellant and Appellee Levin agreed to complete her performance review later that day, and there was also a discussion that Appellant would consider resigning with a severance payment. *Id.* After the meeting, Appellant took pre-planned vacation days, and on February 18, 2022, Appellant initiated a request for FMLA leave. *Id.* Later that day, after the close of business, Appellee Levin announced that he was accepting Appellant’s resignation and her employment was terminated. *Id.* Appellant filed suit under the DC Human Rights Act for discrimination based on race and sex and retaliation, and under the DC FMLA. The Trial Court granted summary judgment on all claims, finding insufficient evidence linking the actions taken against Plaintiff to discrimination and that Defendant Levin was not aware that Appellant requested FMLA leave when she was terminated, as Defendant claimed that it was not aware that Appellant had requested FMLA leave when Appellee Levin terminated her employment. JA 00504-520. The Trial Court’s

grant of summary judgment should be reversed because there was direct evidence of discrimination based on race and sex, and evidence of retaliation; that there was evidence to create a triable issue of fact on whether there was an FMLA violation because at his deposition, Appellee Levin claimed that he could not recall if anyone discussed if whether Appellant had requested FMLA leave at the time Appellant was terminated. This fact, compiled with the other facts supporting knowledge of Appellant's FMLA application, created a triable issue of fact.

STATEMENT OF FACTS

Ms. Davison is an Asian American female, who began working at the APA in 1998, having completed two tours with the APA bridging her service for a combined twenty-three-year tenure. JA 00489. Ms. Davison earned an undergraduate degree from the University of Virginia and a Master of Social Work from George Mason University. *Id.* Ms. Davison was employed as Chief of Staff for the APA and as the Chief of Staff, she reported directly to Dr. Levin and advised him on critical issues to ensure that the organization's priorities and directives were carried out and served as a liaison between Dr. Levin and staff. *Id.* Ms. Davison is a consummate professional and performed her job in an exceptional manner over the years. *Id.* Throughout her employment, Ms. Davison was viewed as an outstanding employee, and was known for her professionalism and exceeding expectations in her position. Despite her performance, due to the abrasive and discriminatory treatment of Ms. Davison by Dr. Saul Levin, Ms. Davison was forced out of her position by Dr. Levin, effective March 4, 2022. *Id.*

Dr. Levin became the Chief Executive Officer and Medical Director of the APA in October 2013. JA 00490. During his employment at the APA, Dr. Levin discriminated against Ms. Davison and other minority employees. *Id.* Dr. Levin displayed his disdain for minority employees, and female minority employees in particular. *Id.* Dr. Levin made it clear to Ms. Davison that he viewed her as being employed to serve him and comply with his orders, above the APA. *Id.* For example,

he ordered Ms. Davison to bring in donuts and breakfast items when staff members had birthdays, and he referred to her and other female physician members as “honey” and used phrases such as “not on my watch honey” when speaking to her and other female staff during staff meetings. *Id.*

Other minority staff and Ms. Davison endured years of abusive treatment and a toxic work environment from Dr. Levin. *Id.* There were many Black, Indigenous, and People of Color (“BIPOC”) at the APA, but Dr. Levin made no effort understand or respect them or their rights and has questioned whether Asians were considered to be part of BIPOC. *Id.* Ms. Davison had to remind Dr. Levin, frequently, that Asians are part of this group, but he would only mention Blacks, Indigenous People, and Latinos, despite the recent violent attacks on Asian Americans in the United States. *Id.* Dr. Levin did not appreciate that Asians fit into the BIPOC category and should not be unlawfully discriminated against. During the COVID 19 pandemic, there was also a Board of Trustees work group that proposed taking Asians out of the minority group category at the APA. *Id.* In addition, there are BIPOC physician members who continue to express concerns about structural racism throughout the organization and concerns that Dr. Levin and leadership are not taking the issue seriously and continue to resign from the APA. *Id.* For example, Dr. Jessica Isom resigned from the APA in February 2022 and stated, “I will no longer tolerate anti-Blackness in the American Psychiatric Association.” *Id.*

In addition to Ms. Davison’s executive level Chief of Staff duties where she

regularly communicated with Board members and APA staff, Ms. Davison saw her role largely as hearing staff concerns about where the organization was headed with a lack of leadership and erratic and abusive behavior of Dr. Levin which created a toxic work environment. JA 00491.

Dr. Levin's behavior began to become intolerable before the onset of the COVID- 19 pandemic. *Id.* Ms. Davison observed that Dr. Levin was placing an inordinate amount of pressure on several BIPOC senior staff members, including the Director of Diversity and Health Equity, Ranna Parekh, MD, MPH; Director of Research, Philip Wang, MD, DrPH; and APA Foundation Executive Director, Dan Gillison. *Id.* Ms. Davison attempted to explain to Dr. Levin that he had lost a number of his senior staff members already and he would lose more as they would not accept his pressure and abusive treatment and would leave the organization. *Id.* Dr. Levin became irate and confronted Ms. Davison in the parking garage of the office about this issue and raised his voice at her. This incident was witnessed by the previous CFO. *Id.* These BIPOC senior staff members resigned from their positions in June 2019, September 2019, and January 2020, followed by other senior staff who departed in March 2020 and May 2021. *Id.*

Dr. Levin subjected Ms. Davison to disparate treatment based on her sex and race in compensation and work assignments. JA 00491. Because of Dr. Levin's management style, there were frequent vacancies for chiefs of departments. *Id.* This was so common that the APA developed a practice of selecting interim chiefs when

there were vacancies and providing additional compensation in the form of a monthly stipend when staff were asked/required to serve as an interim chief. *Id.* Ms. Davison was required to serve as the interim CSO for over a year without additional compensation. Ms. Davison observed that five of her colleagues who were required to assume interim responsibilities were provided monthly stipends, but Ms. Davison, one of two Asian staff members, was required to perform interim duties without the stipend. *Id.* Ms. Davison was told by Dr. Levin that she would not be provided additional compensation because her interim assignment was not a “heavy lift,” even though it required that she review performance evaluations, timesheets, multiple reports, budgets, work with staff and area liaisons and work on other time sensitive work. In addition, there was also another vacancy in the office as the Special Assistant position had been vacant for two years where the Executive Assistant and Ms. Davison had to take on additional duties and also took turns covering these duties when one person was out of the office, adding even more to the workload. *Id.*

With the onset of the COVID-19 pandemic, Dr. Levin disregarded the safety concerns raised by staff members. JA 00492. For example, at a staff meeting on May 28, 2020, Dr. Levin gave conflicting information on infection rates, what groups were at risk, and how to stay safe. *Id.* When Ms. Davison attempted to provide clarifying information at this meeting, Ms. Davison was promptly dismissed by Dr. Levin in the presence of other staff. *Id.* Dr. Levin later called Ms. Davison and accused her of undermining him and made other threatening accusations against

her, despite the fact that she was simply trying to protect him by providing the correct information to staff. *Id.*

Dr. Levin compounded Ms. Davison's normal job duties with two additional roles, one as an interim CSO for over a year which involved reviewing performance evaluations, timesheets, multiple reports, budgets, working with staff and area liaisons and other time sensitive work; and the second involved rotating with the Executive Assistant to take on responsibility for a vacant Special Assistant position that carried additional duties. *Id.* Over Ms. Davison's protest, this was all without additional compensation. *Id.*

In December 2020, Dr. Levin insisted that Ms. Davison provide him with a list of all Black staff so he could host Black staff listening sessions which were eventually held in August of 2021. JA 00493. Dr. Levin made promises to do the same for other BIPOC staff but did not do so and was offended at suggestions to do so for other minority groups. *Id.*

Dr. Levin disingenuously claimed that the level of communication was lacking between Ms. Davison as the Chief of Staff and his role as the CEO. JA 00493. Ms. Davison worked with the Executive Assistant to set up weekly meetings with Dr. Levin, the Special Assistant, and the Executive Assistant to go over upcoming meetings and also additional prep meetings with bulleted talking points for each meeting where Dr. Levin had to talk. *Id.* Ms. Davison would also make a point to call and text him during breaks or at lunch or even after work regularly in

addition to the one-on-one meetings. *Id.*

Dr. Levin's behavior became even more abusive in 2022, further adding to the toxic work environment. JA 00493. In February 2022, for example, Dr. Levin accused a Black female employee of not sharing what she had talked to Ms. Davison about and yelled at her. *Id.* In fact, everything had been shared with him. *Id.* Ms. Davison later discussed this issue and the argument about the appointments list with Dr. Levin and told him that yelling at staff was unacceptable and should not occur. *Id.* Prior to this, Dr. Levin also yelled at Ms. Davison and yet another Black female staffer of going behind his back. *Id.* This incident regarded the Education Chief search in which Dr. Levin accused Cheretta Clerkley, Interim Education Chief, and Ms. Davison of colluding behind his back regarding options for the search. *Id.* Ms. Clerkley and Ms. Davison were in shock when Dr. Levin lashed out in this manner, especially since he was the one who asked us to work on the search together and he wanted to see the proposed plan with suggested options which was exactly what Ms. Clerkley and Ms. Davison showed him. *Id.*

After organizing the listening session with the black staff members, Dr. Levin promised to organize similarly for other minority groups. JA 00494. Ms. Davison reminded him of this, and other staff reminded him of this, but he never followed through on this promise and in fact, would get angry anytime Ms. Davison brought it up. *Id.* Asian Americans, he would say, are not people of color who can be considered a minority deserving of listening sessions despite personal experiences

of hostility and discrimination just like Black Americans do. *Id.*

On February 15, 2022, Ms. Davison was scheduled for her annual 2021 performance evaluation with Dr. Levin. JA 00494-495. During the meeting, Dr. Levin claimed that he did not know what Ms. Davison was doing with her time at work and accused her of not doing anything productive. *Id.* Dr. Levin unfairly compared his calendar to Ms. Davison calendar, despite the fact that a metrics report showed a 97.5% achievement rate in 2021. *Id.* Appalled, shocked, and distressed by the treatment, Ms. Davison asked for a Human Resources representative to attend the rest of the meeting. *Id.* Since the Human Resources Director was out on leave, the new CFO, Kevin Madden, was asked to sit in on the meetings. *Id.* While waiting for Mr. Madden to join the meeting, Dr. Levin kept repeating his criticism of Ms. Davison further stating that she “haven’t been good for a while” and that Ms. Davison had not been doing her job despite the fact that she had scored high during her previous performance evaluations and led the staff to achieve 97.5% on the performance metrics set up by Dr. Levin himself. On top of this, he suggested Ms. Davison take on even more large initiatives without compensation. Ms. Davison, frustrated by the treatment she was subjected to by Dr. Levin, indicated that she could end her employment on March 4, 2022, or after the March 12-13 Board meeting with a severance package but did not officially resign or offer her resignation. *Id.* Dr. Levin responded: “Fine then, talk to the CFO about a package.” *Id.* After which, Mr. Madden arrived to observe the meeting but did not know what

to say because of the arguing and yelling from Dr. Levin, and Dr. Levin continued with his irate behavior in the presence of Mr. Madden. *Id.* In the Customer Service Section of the performance evaluation, for example, Dr. Levin stated that “HE is [her] customer and [she is] there to SERVE him.” *Id.* Ms. Davison responded that this was not part of her role and in her twenty three years of employment, she had not heard that before. *Id.* Dr. Levin responded by becoming even angrier when she objected to that language in her evaluation. *Id.* Dr. Levin also compared her to Jon Fanning, a white male who had left the organization a year earlier, in the written portion of her review and made it clear he preferred to work with white men. *Id.* Ms. Davison was humiliated by Dr. Levin at this meeting and felt harassed and discriminated against based on an explicit statement that an Asian American female was there to serve him. *Id.* The meeting at the halfway point, however, had to end because of another planned meeting, and Dr. Levin stated the meeting would resume at the end of the day, but it did not resume and was rescheduled to February 22, 2022, following her scheduled vacation. *Id.* Mr. Madden was shocked by Dr. Levin’s behavior during the meeting and later confided with Ms. Davison that this was not how employee reviews were to be conducted. *Id.* I left the meeting confused and distraught. *Id.*

After the evaluation meeting (February 15th a Tuesday), Kevin Madden privately offering a suggestion to Ms. Davison that if he were in Ms. Davison’s shoes, he would go on the pre-planned vacation, get some rest, and when she comes

back to the office, she should talk to Saul Levin about how she needs to take a break as she was burned out and that it was a good idea to take a few weeks off. JA 00495.

Ms. Davison decided to seek medical help and started the FMLA process with Human Resources the morning of February 18, 2022. *Id.*

On February 16, 17 and 18, 2022, Ms. Davison took a preplanned and scheduled vacation. *Id.*

On February 18, 2022, after her unnecessarily stressful performance review, Ms. Davison applied for Family and Medical Leave Act leave to take time off due to the stress and anxiety from the continuous hostile work environment over the last two years, which severely impacted her mental health. JA 00495-496. Ms. Davison began the application process with Flora Oliphant in APA's Human Resources department and received FMLA documents from Human Resources including paperwork for her physician to fill out along with her position description. *Id.* When she began the FMLA leave process with Ms. Oliphant, she or Dinera Dussembaev (whom she copied on the email), discussed this with Colleen Coyle, APA Legal Counsel, who deals with senior staff personnel issues, and upon receiving this information notified Dr. Levin. At that time, Ms. Davison had over 600 hours of sick leave available and over 200 hours of annual leave. *Id.*

That evening (February 18, 2022) at 5:40 p.m. after Ms. Davison initiated her FMLA leave request, Ms. Davison received an email from Dr. Levin accepting her "resignation" from the February 15, 2022 meeting, stating: "Dear Yoshie, I am

saddened by your resignation as we have worked well together for many years. As I see this, I gave you a good evaluation with the recommendation that communications between us need to be more frequent and more informative. This is a topic I have been discussing with you throughout the COVID pandemic and before without improvement. I understand you do not agree that communication has been spotty. Since we cannot find common ground on how to go forward in improving communications, I will accept your resignation effective March 4, 2022. I will see you in the office on Tuesday, lets discuss. Saul.” JA 00496. Ms. Davison responded to Dr. Levin’s email, stating that she did not officially resign and that she had already started the FMLA process with Human Resources and had understood that they were meeting on February 22, 2022 to go over the rest of her evaluation and to go over her FMLA leave: “Saul, I did not submit a formal resignation and I’ve already started FMLA process with HR earlier today. We should meet Tuesday like we planned and I’d like HR to be there with me. Yoshie.” *Id.*

It was highly unusual and not standard practice at all to email the entire HR Team on a Friday evening, of a holiday weekend no less, about an FMLA matter. JA 00496.

On February 21, 2022, Ms. Davison saw her doctor who treated her for anxiety disorder and stress rash. Ms. Davison also provided her physician with her FMLA paperwork to fill out. JA 00497. The FMLA forms indicated that Ms. Davison had until March 4, 2022 to submit the paperwork. *Id.*

On February 22, 2022, Ms. Davison entered a meeting to which she believed was a continuance of the February 15, 2022 meeting regarding her performance evaluation and FMLA leave with Dr. Levin and Mr. Madden. *Id.* Instead, Dr. Levin handed Ms. Davison a separation letter which falsely stated that she resigned effective March 4, 2022 unless offered a severance package in which she would resign effective March 14, 2022 and that her FMLA request was not relevant: “Dear Yoshie: This letter clarifies your employment status with APA. On February 15 during your evaluation, you told me and Kevin Madden that you intended to resign effective March 4th, unless we agreed to provide you with a severance, in which case you would stay until March 14th, after the Board meeting. Your reaction to your recent performance evaluation, including your decision to resign, shows me that our relationship is no longer productive for us or for APA. After considering the options you gave, on February 18th, I told you that we would accept your resignation effective March 4th. The fact that you called HR asking about FMLA leave is not relevant. FMLA is intended for employees who need to take a leave from work and intend to return to work. By resigning, you obviously do not intend to return to APA. As an aside, I had no idea that you asked HR about FMLA when I emailed you to accept your March 4 option. Please spend the coming weeks before March 4th working with Colleen and Kevin to wrap up any pending items.” *Id.*

In response to the letter, Ms. Davison stated, “I was really shocked to see this because threatening to quit under duress is different than resigning” reiterating that

she had not officially resigned nor offered her resignation. JA 00497-498. Dr. Levin responded, “There was no duress” and Ms. Davison responded, “Wait, what? Telling your Asian/BIPOC/female COS I was here to serve you, that I wasn’t doing my job, and that I wasn’t productive because my calendar wasn’t as full as yours when we have different roles put me under duress and is discriminatory.” *Id.* Ms. Davison expressed her frustration regarding how she was being treated at work and how she had to get medical help from how poorly the meeting was conducted and from the stress and anxiety and had started the FMLA process with Human Resources since she needed her doctor to fill out her paperwork and was surprised that a mental health organization would not be more understanding. *Id.* Ms. Davison also showed the stress rash she developed due to working in a toxic work environment to Dr. Levin and Mr. Madden. *Id.* Dr. Levin, however, claimed that he “didn’t know anything about the FMLA request and so it didn’t matter.” *Id.* Mr. Madden who was the Human Resources representative that day and also a white male, also claimed that Ms. Davison’s request had not been approved and that her physician paperwork had not been submitted yet, despite the fact though the FMLA form indicated that she had until March 4, 2022, to submit the paperwork. *Id.* Despite this, Dr. Levin declared that Ms. Davison was resigning from her position and that March 4, 2022, would be her last day of employment. *Id.* Dr. Levin also announced to staff that she had tendered her resignation and was departing from the APA effective March 4, 2022. *Id.* Ms. Davison believes that Dr. Levin was so enraged and retaliated against

her by forcing her resignation before she could submit her FMLA paperwork from her physician. *Id.*

On February 23, 2022, Ms. Davison received her filled-out FMLA paperwork from her physician, a day after Dr. Levin had already forced her resignation and well ahead of the March 4, 2022 deadline. JA 00498.

SUMMARY OF ARGUMENT

On April 1, 2024, the Trial Court issued an Order and Opinion granting summary judgment to Defendants. JA00504-519. Plaintiff filed a four-count complaint alleging disparate treatment and a hostile work environment based on her race and sex, and a claim of retaliation under the D.C. Human Rights Act, and a violation of the DC FMLA. JA 00001-19. Plaintiff alleged that she was subjected to disparate treatment and a hostile work environment based on her race and sex when: 1) Defendant Levin forced Plaintiff to serve as an Interim Chief without additional compensation while providing additional compensation to other employees who were not in her protected class when they served as Interim Chef; 2) Plaintiff was subjected to yelling and screaming and confrontations by Defendant Levin including when she voiced her concerns about what she perceived as Defendant Levin's discriminatory treatment of staff and dismissed for speaking at a meeting, and when shew as accused of "going behind his back" when completing assignments; 3) Plaintiff was issued an allegedly false performance review which included comments that was employed at APA to serve Defendant Levin; 4) Plaintiff

was ordered to bring donuts and breakfast items to the office on various occasions and serve as Defendant Levin's personal assistant rather than the Chief of Staff; 5) Defendant Levin, shortly following Plaintiff's requests for FMLA leave, accepted Plaintiff's resignation despite Plaintiff's belief that she did not resign nor offer her resignation; 6) Plaintiff was denied FMLA Leave to her work through Defendant Levin's alleged abuse, and finally, 7) Plaintiff was constructively discharged from employment. JA 00509-510.

In granting summary judgment on race discrimination in pay claims, the Trial Court ruled that Ms. Davison did not establish a prima facie case discrimination in pay because the individuals she identified were not comparators. JA00509-517. The Trial Court further held that the remaining actions were not linked to her race, and the events Ms. Davison complained about were not severe and pervasive and therefore she could not establish a hostile work environment claim or a constructive discharge claim. *Id.*

With respect to the sex discrimination claims, the Trial Court again held that the actions complained about did not meet the severe and pervasive standard for a hostile work environment claim or constructive discharge claim. *Id.* Concerning the retaliation claim, the Trial Court ruled that Ms. Davison did not establish any causal connection between her protected activity and the adverse action. *Id.* Finally, the Trial Court concluded that Ms. Davison could not establish an FMLA case of interference or retaliation because she provided no evidence of a causal connection

between the protected activity and alleged adverse action or evidence that Defendant Levin had notice of Ms. Davison's FMLA inquiry at the time of the alleged adverse action. *Id.*

The Trial Court's grant of summary judgment should be reversed because Appellant presented direct evidence of discrimination based on sex and race, and retaliation for opposing discrimination; and she was terminated because she was attempting to take FMLA leave.

ARGUMENT

I. The Trial Court Erred in Concluding that Davison Could Not Establish Sex and Race Discrimination Claims

“A plaintiff may prove her Title VII discrimination or retaliation claim with direct evidence,” which can include “a statement that itself shows racial bias in the employment decision.” *Nurriddin v. Bolden*, 818 F.3d 751, 758 (D.C. Cir. 2016); *see Coats v. DeVos*, 2323 F. Supp. 3d 81, 87-88 (D.D.C. 2017). “[W]hen the plaintiff offers direct evidence discriminatory intent, that evidence will generally entitle a plaintiff to a jury trial.” *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 576 (D.C. Cir. 2013).

The record contained direct evidence of discrimination. It was undisputed that Ms. Davison who was the Chief of Staff, was forced pick up breakfast and donuts for the office and events, and worked for Dr. Levin who made sexist

comments to her such as “not on my watch honey;” and subjected her to yelling and screaming and confrontations; and wrote on her 2021 performance review that she was there to “serve” him. These incidents explicitly referred to Ms. Davison’s sex and race tied those characteristics to a relevant employment decision, i.e. a lowered performance evaluation which led to her constructive discharge. The comments were not “stray remarks in the workplace . . . made by nondecision-makers or by . . . decisionmakers unrelated to the decisional process itself.” *Brady v. Livingood*, 567 F. Supp. 2d 1, 6, (D.D.C. 2006), *aff’d sub nom. Brady v. Off. Of Sergeant at Arms*, 520 F.3d 490. Levin admitted that his statements were made to women in the office, and admitted to statements about Ms. Davison being there to serve him. A reasonable jury could thus conclude that Levin’s statement directly proved that the lowered performance evaluation and discharge was discriminatory “without any need for interference.” *Hajjar-Nejad*, 37 F. Supp. 3d at 125.

Even if Levin’s statements were not “direct evidence . . . sufficient alone to defeat a defendant’s motion for summary judgment,” *Hajjar-Nejad*, 37 F. Supp. 3d at 124, there was indirect evidence supporting the same conclusion. Ms. Davison set forth “evidence suggesting that her employer treated other employees of a different race and sex . . . more favorably in the same factual circumstances.” *Burley v. Nat’l Passenger Rail Corp.*, 801 F.3d 290, 301 (D.C. Cir. 2015).

As an Asian American, Ms. Davison had her own personal experiences with

Dr. Levin's prejudices on race. In his deposition, he admitted to being confronted by Ms. Davison about his question or his position that Asians should not be receiving any kind of protection or participate in the listening sessions. JA 00373 Levin Dep. 12:20-21 to 13:3; Ex. A (admitting to holding discussions with Ms. Davison about whether Asian Americans should be considered part of BIPOC). This comes after a question in the deposition for him to define his understanding of BIPOC, to which his response clearly includes Asian Americans: "minoritized groups of Black, Hispanic, Asian, and Indigenous people." *Id.* The evidence confirmed that he proceeded to carry his prejudices out against Asians including Ms. Davison.

The Trial Court held that Ms. Davison's discrimination in the pay claim failed because she did not identify comparators because the males she compared herself to held different positions. The Trial Court missed Ms. Davison's claims. She alleged that her job was Chief of Staff and she was required to perform her job and take on additional duties of vacant positions for periods of time and was not compensated, but male employees received additional compensation when they took on additional duties. Dr. Levin failed to compensate her appropriately after he compounded her work duties with those of vacancies in the organization. JA00491. See ¶ 8 of her Declaration, Ex. Q ("the APA developed a practice of selecting interim chiefs when there were vacancies and providing additional compensation in the form of a monthly stipend when staff were asked/ required to

serve as an interim chief. I was required to serve as the interim CSO for over a year without additional compensation”). Ms. Davison goes on, “I, one of two Asian staff members, was required to perform interim duties without the stipend. I was told by Dr. Levin that I would not be provided additional compensation because my interim assignment was not a ‘heavy lift,’ even though it required that I review performance evaluations, timesheets, multiple reports, budgets, work with staff and area liaisons and work on other time sensitive work.” *Id.* Ex. Q, Declaration of Yoshie Davison, ¶ 8.

She continues, “In addition, there was also another vacancy in the office as the Special Assistant position had been vacant for two years where the Executive Assistant and I had to take on additional duties and also took turns covering these duties when one person was out of the office, adding even more to the workload.” *Id.* This latter additional vacancy that she split with another staff member actually singles out Ms. Davison as over and above the discrimination experienced by the other Asian Americans. Her work was now compounded by not just one, but two new roles, all without any additional compensation. In his deposition, Dr. Levin when asked about this, merely responds that he “did not think she was there long enough to review performance evaluations.” JA 00380. Levin Dep. 40:18; Ex. A. This is a classic question of fact as to his credibility and what the Court believes as to his knowledge of what his Chief of Staff was doing.

Ms. Davison presented evidence that a jury could conclude that Appellees

discriminated against her based on her race and sex, and the Trial Court erred in granting summary judgment.

II. The Trial Court Erred in Granting Summary Judgment on the FMLA Claim.

The Trial Court granted summary judgment to Defendants on the FMLA claim, resolving the most important factual dispute in the case. All of the facts in the record suggested that Dr. Levin knew that Ms. Davison was taking FMLA leave after the incident at her performance review meeting. She was distraught after her meeting with Dr. Levin so much that she was considering resignation and was told by Dr. Levin to speak to Kevin Madden about a severance payment, and had to be consoled and Kevin Madden told her to take her planned leave and then return and tell Dr. Levin that she needed to leave, which would have been FMLA leave. While she was out on leave, she initiated a request for FMLA leave, and while she was on leave, after work hours on Friday, February 18, 2022, Dr. Levin sent her an email purporting to accept her resignation. What followed were letters which appear to have been crafted by legal counsel to avoid liability to the organization.

At his deposition, Dr. Levin could not recall if anyone other than Ms. Davison communicated to him that Ms. Davison had requested or inquired about FMLA leave. See Ex. A, 82:4- 7, Question: “You indicated that you learned from Ms. Davison that she requested FMLA leave. Did anyone else communicate to you

that Ms. Davison requested or inquired about FMLA leave?” Answer: (82:20) “I don’t recall.” Again, more likely than not, Dr. Levin learned about her FMLA application prior to his attempt to “accept” her “resignation” from words uttered in sheer frustration days before. *Id.*

In light of this evidence in the record, a jury could infer that Dr. Levin had actual knowledge of Ms. Davison’s FMLA request or could reasonably deduce that she was seeking FMLA leave, and he terminated her to avoid APA having to pay her while she was on FMLA leave.

CONCLUSION

Appellant respectfully requests that this Court reverse the judgment for Appellees entered by the trial court.

Date: February 18, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2025, I caused a copy of Appellant's Corrected Opening Brief to be served electronically via the Court's e-filing system on counsel for Appellees' listed below:

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