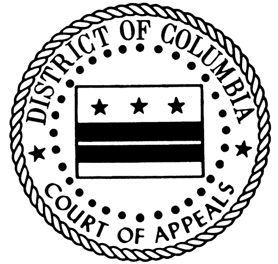

Clerk of the Court
Received 09/28/2023 04:39 PM
Filed 09/28/2023 04:39 PM

No. 22-CV-332

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DORIS CHIBIKOM,
APPELLANT,

v.

DISTRICT OF COLUMBIA, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES THE DISTRICT OF COLUMBIA AND GREGORY COFFMAN

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STATEMENT OF THE ISSUES

Appellant Doris Chibikom is employed as a Service Coordinator with the District of Columbia Department on Disability Services ("DDS"). DDS suspended her for nine days in late 2017 for delaying requests to authorize services for DDS clients with disabilities, thereby threatening disruption of those services and escalated costs to the District. She sued the District and her immediate supervisor, Gregory Coffman, claiming age and national origin discrimination and retaliation in violation of the D.C. Human Rights Act ("DCHRA"), D.C. Code § 2-1401 *et seq*. After discovery concluded, the Superior Court rejected Chibikom's claims and granted defendants summary judgment. The issues on appeal are:

1. Whether the trial court correctly granted defendants summary judgment on Chibikom's age and national origin discrimination claims, given the lack of evidence that DDS's explanation for her suspension and any other adverse action was pretextual or that its real reason was age and national origin animus.

2. Whether the trial court correctly granted defendants summary judgment on Chibikom's retaliation claim, given (i) the lack of evidence that her supervisor was aware that she had engaged in protected activity under the DCHRA, (ii) the lack of temporal proximity between any alleged protected activity and adverse employment actions, and (iii) Chibikom's failure to rebut the legitimate, non-retaliatory reasons for defendants' actions.

STATEMENT OF THE CASE

Chibikom sued the District and Coffman under the DCHRA on June 18, 2018. JA 20-33 (amended complaint). She alleged discrimination based on age and national origin, hostile work environment, and retaliation. In August 2019, the Superior Court dismissed the hostile work environment claim and ruled that any claims for alleged adverse employment actions that occurred on or before January 18, 2017 were statutorily time barred. JA 6. After discovery, the District and Coffman moved for summary judgment on the remaining claims. JA 15. On April 6, 2022, the Superior Court granted summary judgment in their favor. JA 17. Chibikom filed a timely notice of appeal on May 4. JA 80.

STATEMENT OF FACTS

For purposes of this appeal, the following facts are generally undisputed, except as otherwise noted.

1. Chibikom's Work For DDS.

Chibikom is a 54-year-old Cameroonian-born permanent resident of the United States, and she has been employed with DDS since July 2007. Supplemental Appendix ("SA") 45, 90-92. DDS oversees and coordinates services for District residents with disabilities, including intellectual and developmental disabilities, through a diverse network of private and non-profit service providers. *See* D.C. Code § 7-761.03. DDS is the operating agency for Medicaid's Home and Community Based Services Waiver Program, under which persons with intellectual

and developmental disabilities can live and receive services in the community instead of in an institution. *See Services for People with Intellectual and Developmental Disabilities*, DDS, https://tinyurl.com/39xp4hks (last visited Sept. 25, 2023). Under this program, the federal government reimburses the District 70 percent of the costs. *See Home and Community-Based Services Waiver Program*, DDS, https://tinyurl.com/bdcm56yd (last visited Sept. 25). DDS's overall mission is "[t]o provide innovative high quality services that enable people with disabilities to lead meaningful and productive lives as vital members of their families, schools, workplaces, and communities." *Mission Statement*, DDS, https://tinyurl.com/354pcddn (last visited Sept. 25, 2023).

As a DDS Service Coordinator since August 2008, Chibikom facilitates the arrangement of and payment for services by outside providers to individuals with disabilities. SA 46, 106 (¶ 3). An individual service plan (or ISP), which is modified at least annually, identifies the services a person needs, such as residential, day program, or behavioral support. SA 56. Once the service provider supplies the necessary documentation, the service coordinator must timely request and obtain authorization for any service before it begins. SA 56. If approval is not obtained in advance, service providers cannot be paid through the Medicaid Waiver Program, which, as a result, can delay the provision of services to individuals, leaving their needs unmet. SA 63-65, 108 (¶¶ 19-20). While providers can still be paid if a

service request is approved retroactively, service coordinators are strongly discouraged from making retroactive requests because Medicaid may not reimburse for those services, thereby tripling the cost to District and its taxpayers. SA 57A-57B, 108 (¶¶ 21-22).

Service coordinators must also meet with service providers and clients in the community. To keep their supervisors aware of their activities outside the office, service coordinators must submit "community itineraries," which are written documents that explain the details of their activities, such as times, locations, and purposes of the visits. SA 53-54, 136, 167. Service coordinators would also have to provide a phone number for each location so that their supervisors could contact them if they could not be reached by cell phone. SA 136. Supervisors would approve the itineraries in advance. SA 167.

2. Chibikom's Disagreements With DDS Management.

In early 2014, Coffman became Chibikom's immediate supervisor in his role as supervisory services coordinator. SA 52, 59. In August 2016, Chibikom filed a complaint with DDS's Equal Employment Opportunity ("EEO") Counselor Helena Trimmer against Coffman based on her poor performance evaluation that year. SA 30. According to Chibikom, her complaint alleged a hostile work environment, discrimination, and retaliation. SA 29-30. In January 2017, Chibikom participated in an informal meeting to try to resolve the issues related to her poor performance

evaluation. SA 30. In February, DDS upheld its 2016 performance rating decision. JA 24 (¶ 13).

Chibikom continued to complain throughout 2017 about her supervisors' oversight of her work. *See* JA 24-27, 31. In March, for example, she states that Coffman singled her out and monitored her location and status while she was working in the field. SA 11; JA 24 (¶ 14). She also asserts that, in April, Coffman rejected a community itinerary that she had submitted for approval based on his belief that it contained discrepancies from the information that she entered into DDS's internal database system. SA 6, 54. Both Coffman and Chibikom's second-level supervisor, Program Manager Shasta Brown, questioned Chibikom about this particular itinerary because the date of activity and date she entered her notes on the database did not align with the information she provided in the itinerary. *See* SA 6-7. While Chibikom denied having entered any information incorrectly, Coffman warned her not to put conflicting notes into the database about the same itinerary. SA 6-7.

Chibikom also complained about having a heavy workload, and in early May she requested overtime hours to complete her work. SA 14. Though Coffman was generally aware when employees requested overtime, he had no authority to approve or deny such requests. SA 59-60. Rather, it was Chibikom's third-level supervisor, Deputy Director Winslow Woodland, who considered and denied her request, stating

that she could not receive overtime pay for regular work. SA 55, 169. Coffman was not aware of any request for overtime made by any other employee that was approved. SA 59-60A. The only time he knew that overtime was authorized was to ensure the health and safety of DDS's clients when the entire office had to shut down for several days due to a winter weather emergency. SA 60A, 107 (¶ 13).

On May 15, Chibikom submitted a second complaint to Trimmer, asserting ongoing retaliation, harassment, and discrimination due to her age and national origin. SA 173-78; *see* JA 25 (¶ 17).[1] She complained that her supervisors—Coffman, Brown, and Woodland—held her to a higher standard, micromanaged her activities, and unfairly subjected her to disciplinary action. SA 173-77. She also complained that her supervisors were unprofessional and harassed her by making her complete community itineraries in a certain way. SA 173-76. On June 28, Chibikom participated in a mediation meeting with Trimmer and DDS Human Resources representatives Jessica Gray and Gria Hernandez to discuss her May 2017 complaint. SA 14, 29; *see* JA 26 (¶ 20). DDS concluded three weeks later that her claims were unsubstantiated. JA 26 (¶ 20); *see* SA 180. There is no evidence that Coffman was aware of Chibikom's May 2017 complaint prior to this lawsuit. *See*

[1] On June 2, Chibikom purportedly contacted "an EEO Counselor" to further claim that she had repeatedly refused to obey an order from Coffman she believed was "illegal." SA 16, 29. Chibikom does not explain this allegation and does not rely on it on appeal.

SA 135 (Coffman stating at the time of his deposition only that "I'm aware that she's filed multiple complaints alleging my discrimination against her").

Following the June 28 mediation meeting, Chibikom received a copy of a proposed reprimand based on an incident that occurred between her and Brown the previous month. SA 18. Specifically, Chibikom failed to comply with Brown's request to send her the community itineraries associated with two of her client referrals. SA 19. Chibikom claims that she was unable to respond immediately because she was in the field working on a high-risk case, but neither Brown nor Coffman could reach her or confirm her whereabouts. SA 15, 19. As a result of her non-compliance, Brown proposed that Chibikom be officially reprimanded. *See* JA 25-26.

On August 23, Chibikom sent a letter to Deputy Director Jared Morris, accusing Hernandez and Gray of unprofessional behavior, i.e., "intimidation and poor treatment." SA 182-84; *see* JA 26-27. Chibikom wrote the letter as a response to Hernandez's accusation that she had taken documents from Hernandez's desk without permission. JA 26. Chibikom denied that she had stolen any items and accused Hernandez and Gray of "initiat[ing] a communication of intimidation" rather than apologizing to her for their mistaken belief. SA 183. The letter does not allege discrimination or retaliation. *See* SA 182-84. There is no evidence that Coffman was aware that Chibikom sent this letter to Morris.

3. Chibikom's Nine-Day Suspension For Repeated, Months-Long Delays In Handling Service Requests For Clients.

On October 10, 2017, Coffman proposed that Chibikom be suspended from work for her mishandling of service requests for DDS clients. SA 58, 80-82. As the notice of proposed suspension explained, Coffman held a team meeting in April 2017 to inform Chibikom and the other service coordinators that the Medicaid Waiver program rules do not permit "backdating authorizations" for services and that, if a service is not authorized, the service coordinators "should inform providers to cease the service until they receive an approved authorization." SA 80. Coffman further instructed the team to submit any retroactive service requests to him and Brown, and the following month he sent a reminder email to the team about this procedure. SA 80.

The notice of proposed suspension further explained that, between July and September, Chibikom made retroactive services requests for four different clients. SA 80. These included a request for retroactive day program services for client E.J. that Chibikom did not submit for approval until two months after the service provider uploaded the necessary documentation; a request for nutrition support for client J.S. that she similarly submitted nearly two months late; requests for nutrition services and rehabilitation services for client C.C. that were a month-and-a-half to two months late; and a request for employment readiness services for client N.B. that was nearly a month late. SA 36-37, 80-81. Chibikom explained these delays

by saying that she was "busy" or just "forgot." SA 36-37, 80-81. As Coffman found, these explanations were "completely unjustifiable." SA 80-81. Retroactive requests are only for "extreme circumstances," none of which occurred here. SA 81. Further, because it was "illegal and improper for a provider to continue to provide services without an authorization," Chibikom should have notified such provider to discontinue services until authorized. SA 81.

Chibikom appealed the proposed discipline, and Lynne Person, an Operations Program Manager outside of Chibikom's line of supervision, reviewed the matter. SA 35, 109 (¶ 29). After considering Chibikom's written response, Person sustained the proposed suspension on December 1, 2017. SA 35-39. Person explained that although Medicaid Waiver Program regulations "have never allowed backdating payments to providers," DDS's Medicaid Waiver unit typically would—if the DDS service coordinator was at fault—"allow the retroactive request so that the provider is not penalized for the neglect of the Service Coordinator." SA 36. After considering the work of the other service coordinators in Chibikom's work group, Person found that Chibikom was the "only Service Coordinator to have submitted this number of [retroactive service] requests in [the] three-month period," and that she was the only one in her "group to have delayed submitting the service for approval by up to two (2) months." SA 37. Person further found Chibikom's

significant delays to be unjustified and "wholly unacceptable." SA 37. Chibikom's suspension was effective from December 5 to December 14. SA 37.

4. Chibikom's Poor Performance Continues Under A New Supervisor.

Following Coffman's acceptance of a new position in October 2017, he no longer supervised Chibikom. SA 52. Lisa Eley-Brame took over his supervisory duties on an acting basis until she was selected for the position permanently four months later. SA 73.

Chibikom alleges that Eley-Brame gave her a poor performance evaluation for the year ending in September 2018, which incorporated information that was already in her record, including from the time Coffman was her supervisor. SA 7-8. As part of that evaluation, Eley-Brame noted that Chibikom "struggled in some areas" but had "shown improvement" in other performance measures. SA 7-8, 68. The evaluation also recommended that Chibikom "continue to work towards increasing her performance measures in each area." SA 8. After her poor performance continued the following year, Chibikom was placed on a Performance Improvement Plan ("PIP") to ensure that she would timely follow up on providers' serious reportable incidents. SA 75-78. She successfully completed her PIP in September 2019. SA 75-78.

5. Chibikom's Suit And The Summary Judgment Decision.

Meanwhile, in June 2018, Chibikom filed this lawsuit, alleging national origin and age discrimination, a hostile work environment, and retaliation in violation of the DCHRA. JA 2. The District and Coffman moved to dismiss the complaint in part. JA 6. In August 2019, the Superior Court dismissed the hostile work environment claim for failure to state a claim. The court also ruled that, pursuant to the one-year statute of limitations, D.C. Code § 2-1403.16, which was tolled during the pendency of her EEO complaint, *see id.* § 2-1403.03, "[Chibikom's] discrimination and retaliation claims premised on actions that occurred on or before January 19, 2017[,] are time-barred." SA 195 (emphasis omitted).

Following discovery, the District and Coffman moved for summary judgment on the remaining claims of discrimination, and the Superior Court granted their motion after a hearing. JA 15, 79. It found the evidence insufficient to show discriminatory pretext behind her nine-day suspension or denial of overtime. *See* JA 56-58, 76. As the Court explained regarding the basis for the suspension:

> [Chibikom] had an excessive number of [service] requests that were way overdue costing the agency a lot of money. She was the only employee who had the number and the length of time, and there's nothing to show that that's a pretext. There's no evidence that rebuts the fact that she had more than anybody else, and they were of a longer duration than anyone else.

JA 76.

As to her overtime request, the court found that Chibikom failed to discredit the reason for its denial: that "there were no extraordinary circumstances" justifying overtime. JA 58. Instead, "she just needed overtime to do her ordinary work." JA 58. When the court pressed Chibikom for record evidence that she had been doing anything beyond her ordinary caseload, she argued that she had taken leave without her work being reassigned, noting about four days of leave that she had taken in April 2016, over a year before her overtime request. JA 58-59. However, as the court found, "the evidence is that work was only reassigned when people had taken off significant chunks of time," such as three or four weeks or maternity leave. JA 58-60. "Nothing in the record . . . shows [that Chibikom] took off a significant period of time." JA 58-59.

The court also found insufficient evidence to support Chibikom's claim of retaliation, concluding that there was no "causal connection between her complaints and the actions that DDS took." JA 74. The court first concluded that "there's no evidence that in 2017 that [Coffman] knew about [Chibikom's] EEOC activity" or "knew when he was her supervisor that she was filing these complaints." JA 61. Indeed, Chibikom's counsel agreed that Coffman's deposition testimony showed only that he was presently aware of her complaints, i.e., at the time of his deposition. JA 66; *see* SA 135. The court next rejected Chibikom's claims that her May 2017 complaint to Trimmer and August 2017 complaint to Morris amounted to "protected

activity." JA 74. Recognizing that the May 2017 complaint baldly asserted discrimination and retaliation, the court concluded that the complaints had no "factual support" for such assertions. JA 74-75. The court instead found that the "complaints [were] about management, supervisory responsibilities, and how close you [can] supervise someone and make notes on their itineraries[;] it's all a disagreement about her workload and management of her workload." JA 75.

Lastly, the court rejected Chibikom's contention that a "pattern of antagonism" demonstrated that defendants' non-discriminatory and non-retaliatory reasons for their actions were pretextual. JA 56. At best, the evidence showed "no more than a dysfunctional workplace where people didn't get along," and where supervisors were simply performing "discretionary management functions." JA 56. The court thus found that plaintiffs could not rebut defendants' non-discriminatory, non-retaliatory reasons and that both defendants were "entitled to summary judgment on both claims." JA 74.

STANDARD OF REVIEW

This Court reviews a "grant of summary judgment *de novo*, applying the same standard as the trial court in considering the motion for summary judgment." *Aziken v. District of Columbia*, 194 A.3d 31, 34 (D.C. 2018). "A party is entitled to summary judgment if, when the facts are viewed in the light most favorable to the non-moving party," there are "no genuine issue[s] of material fact and [] the moving

party is entitled to judgment as a matter of law." *Baker v. Chrissy Condo. Ass'n*, 251 A.3d 301, 305 (D.C. 2021) (internal quotation marks omitted).

Though the evidence is viewed in the light most favorable to the nonmoving party, "[c]onclusory allegations by the nonmoving party are insufficient to establish a genuine issue of material fact or to defeat the entry of summary judgment." *Sampay v. Am. Univ.*, 294 A.3d 106, 113 (D.C. 2023). "To survive a motion for summary judgment, a plaintiff" claiming employment discrimination or retaliation "must set forth sufficient evidence that, after considering both the plaintiff's evidence and drawing all reasonable inferences in their favor, the employee has created a genuine dispute of material fact on the question of whether the employer's proffered reasoning was pretextual." *Id.* at 118.

SUMMARY OF ARGUMENT

1. The Superior Court properly granted defendants summary judgment on Chibikom's claim of disparate treatment based on age and national origin. If, at summary judgment, a defendant employer provides a legitimate, non-discriminatory reason for an adverse action, it is the employee's burden to produce evidence both that the employer's explanation was pretextual and that the real reason for the adverse action was discriminatory. Under this framework, Chibikom cannot show discrimination based on her suspension or, if not forfeited, the denial of her overtime request.

First, the District offered ample evidence that Chibikom was suspended for nine days for a legitimate, non-discriminatory reason: mishandling service requests. As a DDS service coordinator, she was responsible for timely submitting requests to authorize services for persons with disabilities; however, during a three-month period, she delayed five such requests for as long as two months, imperiling the provision of those needed services and jeopardizing Medicaid reimbursement of the costs. The evidence shows that Chibikom was unique in both the number and length of delayed requests she made. A DDS official outside of Chibikom's chain of supervision independently reviewed the matter and sustained the suspension after finding that her excuses for these repeated delays were "wholly unacceptable." Meanwhile, DDS's general policy of denying overtime requests to complete regular work was also a plainly legitimate and non-discriminatory basis to deny Chibikom's request for overtime.

Second, there is no evidence that the District's legitimate reasons for suspending Chibikom or denying her overtime request were pretextual. She provided no evidence that these actions were motivated by age or national origin animus. Moreover, she could not show that the District was being dishonest when it explained the reasons for its actions. Her assertion that she was treated differently from other employees fails because she identifies, at most, a single delayed service request by another employee that is not remotely comparable to the misconduct

underlying her own suspension. She also identifies no other employee whose overtime request was granted under similar circumstances.

2. The trial court correctly granted defendants summary judgment on Chibikom's retaliation claim. Although she adverts to various retaliatory acts, all but the suspension have been forfeited on appeal by her lack of any developed argumentation. To the extent that her claims are preserved, Chibikom failed to establish a prima facie causal connection between her protected activities and the alleged retaliatory acts for three independent reasons: (1) she fails to show that the trial court erred in concluding that her May and August 2017 complaints were not protected activities, or that the June 2017 mediation involved meaningfully different complaints; (2) there is no evidence that Coffman, the alleged retaliator, was even aware of Chibikom's protected activities; and (3) there was no "temporal proximity" between any protected activity and an alleged retaliatory act.

Alternatively, even if Chibikom had established a prima facie case of retaliation, she failed to offer any evidence that the District's legitimate, non-retaliatory reasons were pretextual. The District's reasons for her suspension and the denial of her overtime request remain unrebutted. This holds true for other actions claimed as retaliatory, in which Coffman was not even involved.

ARGUMENT

I. Chibikom Failed To Show That She Was Discriminated Against Based On Her Age And National Origin.

The trial court properly granted summary judgment to defendants on Chibikom's claims of disparate treatment based on age and national origin in violation of the DCHRA.[2] Such claims of intentional discrimination are analyzed under the *McDonnell Douglas* burden-shifting framework. *Ukwuani v. District of Columbia*, 241 A.3d 529, 542 (D.C. 2020); *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06 (1973). In that framework, an "employee has the initial burden to state a *prima facie* claim, which raises a rebuttable inference of intentional discrimination that the employer may counter by articulating a legitimate, non-discriminatory rationale for the adverse action." *Ukwuani*, 241 A.3d at 542. The framework is simplified, however, if at summary judgment the employer advances a legitimate, non-discriminatory rationale for its actions. In that circumstance, the court "need not pause to analyze whether [the plaintiff] made out a *prima facie* case," but can focus directly on whether the plaintiff "show[ed] that the non-discriminatory reason provided by the employer is false and that the employer's action actually was

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[2] Chibikom does not challenge the Superior Court's dismissal of her hostile work environment claim, nor does she challenge the court's ruling that claims "premised on actions that occurred on or before January 19, 2017[,] are time-barred." SA 195. Any argument regarding those rulings is therefore forfeited. *See Stockard v. Moss*, 706 A.2d 561, 566 (D.C. 1997) ("It is the longstanding policy of this court not to consider arguments raised for the first time in a reply brief.").

motivated, in whole or in part, by a discriminatory reason." *Id*. This required showing is conjunctive: "the employee must show *both* that the reason was false, *and* that discrimination was the real reason." *Johnson v. District of Columbia*, 225 A.3d 1269, 1281 (D.C. 2020) (internal quotation marks omitted).

Applying this framework, Chibikom's discrimination claims fail. On appeal, she now asserts, at most, two discriminatory actions: her nine-day suspension in October 2017 and the denial of her May 2017 overtime request. Even assuming both claims have been adequately developed on appeal, the District put forth legitimate, non-discriminatory reasons for the two actions, and Chibikom lacked evidence that these reasons were false and that the real reasons were based on age or national origin discrimination.

A. DDS Suspended Chibikom Due To Her Mishandling of Service Requests, Not Discrimination.

The District provided unrebutted evidence of a legitimate, non-discriminatory reason for Chibikom's suspension: mishandling service requests. It is undisputed that she submitted an unusually high number of retroactive requests and completed many of the requests only after lengthy delays. SA 80-82. During just a three-month period between July and September 2017, Chibikom submitted five different retroactive service requests, affecting four DDS clients in several service areas, including nutrition, day program services, behavioral support, and employment readiness. SA 36-37. The delays were each at least a month and typically close to

two months. SA 36-37. They threatened not only the provision of these vital services to persons with disabilities, but also a tripling of costs to the District through the potential loss of Medicaid reimbursement. SA 57A-57B. There was also no dispute that Chibikom was the "only Service Coordinator to have submitted this number of [retroactive service] requests in [the] three-month period" and that she was also the only one "to have delayed submitting the service for approval by up to two (2) months." SA 37. Chibikom's deficient work performance amply justified her nine-day suspension.

Moreover, this suspension was sustained by Person, an official outside of Chibikom's direct line of supervision. SA 35-39. After considering Chibikom's written response to the proposed suspension, Person independently reviewed the matter and issued a detailed decision sustaining the discipline. SA 37. Person found that Chibikom's repeated delays in handling these service requests were "wholly unacceptable" and that her attempted justifications for the delays—that she was "busy" or that it was an "oversight"—were plainly inadequate. SA 37; *see, e.g.*, *Furline v. Morrison*, 953 A.2d 344, 356 n.43 (D.C. 2008) ("[I]f an adverse employment action is the consequence of an entirely independent investigation by an employer, the [alleged] animus of the retaliating employee is not imputed to the employer." (internal quotation marks omitted)).

Chibikom presented no evidence that the District's rationale for her suspension was pretextual. *Johnson*, 225 A.3d at 1282. In particular, she offered no direct evidence of discrimination based on age or national origin. Thus, to establish pretext, Chibikom needed to establish "that the reason proffered by the District [was] unworthy of credence by demonstrating *that it was not a genuine motivation*." *Id*. In other words, Chibikom cannot simply show that DDS's decision to suspend her was a "poor business judgment" or that it was "mistaken" in assessing her responsibility for the misconduct. *Id.* at 1282-83. She must show that her employer's proffered reasons are "phony." *Kumar v. D.C. Water & Sewer Auth.*, 25 A.3d 9, 19 (D.C. 2011). "The issue is not the correctness or desirability of the reasons offered . . . but whether the employer honestly believes in the reasons it offers." *Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (internal quotation marks and brackets omitted).

Chibikom lacked evidence that the District was being dishonest when it asserted its non-discriminatory reason for her suspension. As previously shown, DDS had a legitimate and compelling reason for suspending Chibikom for nine days due to her large number of long-delayed service requests. But at minimum, this reason—even if somehow mistaken—was not irrational or unworthy of credence. And because Chibikom "must carry both the burden of production on the issue of pretext and the ultimate burden of showing intentional discrimination at trial, if she

cannot point to evidence of this lack of candor, summary judgment is appropriate." *Johnson*, 225 A.3d at 1282.

To avoid this conclusion, Chibikom mistakenly contends that she was "treated differently" from other DDS employees for the "same exact conduct."[3] Br. 12. But her evidence shows neither pretext nor discrimination. She relies on a single January 2018 retroactive service request—purportedly made by Eley-Brame when she was acting supervisor—as a comparison to her misconduct. Br. 11; *see* SA 186. This comparison fails, however, because Chibikom did not (and could not) show that "all of the relevant aspects of [her] employment situation were nearly identical," including the "alleged misconduct." *Hollins v. Fed. Nat'l Mortg. Ass'n*, 760 A.2d 563, 578 (D.C. 2000). Rather, Chibikom was in a class of her own: she was the only service coordinator to have submitted multiple retroactive service requests—five in all—within a three-month period. SA 35-39. Her requests were also exceptionally delayed: although Eley-Brame's request was one month late, SA 159, three requests from Chibikom were submitted approximately two months late, SA 36-37. And there is no evidence that Eley-Brame's single delayed request was her fault, rather

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[3] As noted, the trial court ruled that allegations of discrimination and retaliation prior to January 2017 are time barred, including any acts of "disparate treatment" based on Coffman's criticism of Chibikom's English, or the recommendation that she take an English class, which allegedly occurred around 2014 or 2015. *See* SA 195-96, 200; Br. 6. Chibikom does not challenge that ruling on appeal.

than the fault of the service provider or another service coordinator, whereas there is no dispute that Chibikom was responsible for her delayed requests (even if she sought to excuse them). *See* SA 36-37, 80-81. Thus, even assuming that Eley-Brame submitted a single retroactive service request, Chibikom's far greater failings differentiate her conduct. Because she failed to show that she and Eley-Brame (or any other employee) were similarly situated, "it is not possible to raise an inference of discrimination." *O'Donnell v. Associated Gen. Contractors of Am., Inc.*, 645 A.2d 1084, 1089 (D.C. 1994).

Equally unpersuasive is Chibikom's assertion that she was never informed that an "excessive Service Coordinator caseload" did not justify submitting retroactive service requests. Br. 11. First, it is unclear how, even if true, this would demonstrate pretext or discrimination. Second, there is no evidence to support her allegation that her caseload was excessive. Third, the suggestion in the proceedings below was actually that Chibikom was never informed of "the *consequences* of untimely and excessive retroactive service requests." JA 71 (emphasis added). As District counsel responded, even if she had not been informed in advance of the consequences of such failings, that might only be, at worst, "bad management" practice. JA 71. It is no basis to find that the proffered reason for her suspension was pretextual. *See* JA 71-72; *McFarland v. George Wash. Univ.*, 935 A.2d 337, 355 (D.C. 2007). DDS could reasonably conclude that Chibikom—with ten years

of experience in her position—should have known that it was unacceptable for her to justify submitting repeated and long-delayed service requests on the basis that she was "busy" or "forgot." SA 36-37, 80-81.

Lastly, this Court should reject Chibikom's assertion that pretext or animus can be inferred from Coffman's failure to reassign her caseload when she took leave. Br. 9, 15-16. She identified one instance in which she took leave: four consecutive days of sick leave that she had taken in April 2016, over a year before her suspension. JA 59. The evidence is clear, however, that service coordinators had their caseloads reassigned only when they were away from work for extended periods of time, such as three or four weeks or maternity leave. SA 95-100, 103-05, 126. As the evidence shows, Chibikom's periods of leave were simply too short to warrant reassigning her work. *See* JA 58-60. Chibikom thus offers no evidentiary basis to doubt the District's legitimate reasons for not reassigning her caseload.

B. Chibikom's Claim For The Denial Of Overtime Also Fails.

Chibikom also cannot succeed in claiming that the denial of her May 2017 overtime request was discriminatory. To begin, it is unclear whether Chibikom believes that this was an independent adverse action or whether she is using the denial to somehow show that her suspension was pretextual. If she is attempting to bring a freestanding claim of discrimination, that argument is forfeited because it is not sufficiently developed in her opening brief. The argument is all of two sentences,

without any supporting analysis. Br. 12. In it, she baldly asserts that Deputy Director Woodland "grant[ed] similar overtime requests of younger American-born Service Coordinators." Br. 12. But Chibikom fails to cite any evidence that other employees were granted overtime in similar circumstances. Nor does she provide an evidentiary basis to conclude that the denial was based on discriminatory pretext. The Court should thus consider the issue forfeited. *See, e.g.*, *McFarland*, 935 A.2d at 351 ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks omitted)).

In any event, Deputy Director Woodland's basis for denying Chibikom's overtime request was legitimate and non-discriminatory. As Coffman explained, overtime requests are not generally permitted for "regular work." SA 55. Indeed, he could recall only one instance in which an overtime request had ever been approved, and that was when a winter weather emergency had shut down the office for several days. SA 60. In accordance with this practice, Deputy Director Woodland denied her request. Chibikom failed to rebut this legitimate, non-discriminatory reason. SA 59-60. Nor did she otherwise offer evidence that the denial was instead motivated by age or national origin animus. *See, e.g.*, *Furline*, 953 A.2d at 354 ("[A] plaintiff's mere speculations are insufficient to create a genuine issue of fact regarding an employer's articulated reasons for its decisions.").

Moreover, Coffman is the alleged discriminator, and he had no authority to grant or deny Chibikom's overtime request. SA 59-60. And there is no evidence to support her claim that Coffman "sabotage[d]" her overtime request with Woodland. Br. 12. Rather, the evidence shows that Coffman forwarded her request to Woodland verbatim. SA 170.

II. Chibikom Failed To Show That She Suffered Unlawful Retaliation.

The trial court also properly granted defendants summary judgment on Chibikom's claim that she was subjected to unlawful retaliation. Under the DCHRA, "it is an unlawful discriminatory practice for an employer to retaliate against a person on account of that person's opposition to any practice made unlawful by the DCHRA." *Howard Univ. v. Green*, 652 A.2d 41, 45 (D.C. 1994); *see* D.C. Code § 2-1402.61(b). To establish a prima facie case of retaliation, the plaintiff must show that: "(1) she was engaged in a protected activity, or that she opposed practices made unlawful by the DCHRA; (2) the employer took an adverse personnel action against her; and (3) a causal connection existed between the two." *Green*, 652 A.2d at 45. If the plaintiff satisfies this burden, the employer must then offer a legitimate, nonretaliatory reason for the adverse action. *Propp v. Counterpart Int'l*, 39 A.3d 856, 863 (D.C. 2012). If the employer does so, the burden "shifts back to the plaintiff to present evidence that the employer's proffered reason is pretextual." *Id.* "The ultimate burden of persuasion rests with the plaintiff to show

that the defendant acted with impermissible motive or intent." *Id.* (quoting *Chang v. Inst. for Pub.-Priv. P'ships, Inc.*, 846 A.2d 318, 329 (D.C. 2004)).

Chibikom's retaliation claims fare no better than her discrimination claims. On appeal, she limits her claimed retaliatory actions to the same claimed discriminatory ones—her suspension and the denial of her overtime request—and alludes to two others: the proposed official reprimand in June 28, Br. 13, and the 2019 PIP, Br. 15. The Court should deem forfeited any claimed retaliatory act other than Chibikom's suspension. As discussed, Chibikom does not adequately develop an argument that the denial of her overtime request was discriminatory, *see supra* pp. 23-25, and her suggestion that it was also retaliatory is equally perfunctory, Br. 13. Chibikom similarly fails to develop any arguments supporting her contention that the June 2017 proposed official reprimand and the 2019 PIP were retaliatory acts. Indeed, she spends just a single sentence alluding to each. *See* Br. 13 (simply noting that "she received her Proposed Official Reprimand on June 28, 2017" less than a month after "her protected disclosure"), 15 (asserting merely that the 2019 PIP was "clear reprisal for the prior protected activity."); *see also McFarland*, 935 A.2d at 351.

Even assuming these claims were adequately developed on appeal, they fail on the merits. Chibikom provided no evidence of a causal connection between any cognizable protected activity and the alleged retaliatory acts. Additionally, the

District offered legitimate, non-retaliatory reasons for its actions that she failed to rebut.

A. Chibikom failed to establish a prima facie causal connection between her complaints and the alleged retaliatory acts.

To the extent it is preserved, Chibikom's retaliation claim fails at the prima facie stage for three independent reasons: (1) she fails to show error in the trial court's determination that her May and August 2017 complaints were not protected activities, nor does she show that the June mediation was protected; (2) there is no evidence that Coffman was aware that she engaged in protected activity; and (3) there was no "temporal proximity" between any protected activities and allegedly retaliatory acts. *See Taylor v. D.C. Water & Sewer Auth.*, 957 A.2d 45, 54 (D.C. 2008) ("[A]n employee may establish the causal connection between the adverse employment action (assuming it exists) and the protected activity . . . by showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity." (internal quotation marks omitted)).

1. The trial court did not err in finding that the May and August 2017 complaints were not protected activities.

Chibikom relies on three protected activities: her May 2017 complaint, the mediation session in June 2017, and her August 2017 complaint. Br. 13. However, she cannot overcome the trial court's determination that her May and August 2017

complaints were not protected activities, and her claim regarding the June mediation session fails for similar reasons. To engage in a protected activity, an employee must: (1) hold a "reasonable good faith belief" that her employer violated the DCHRA, and (2) "alert the employer that she is lodging a complaint about allegedly discriminatory conduct." *Green*, 652 A.2d at 46; *accord Ukwuani*, 241 A.3d at 546. While the employee need not invoke any "magic words"—for a complaint of discrimination "may be inferred or implied from the surrounding facts"—the "onus is on the employee to clearly voice his opposition to receive the protections provided by the [DCHRA]." *McFarland*, 935 A.2d at 359 (brackets, emphasis, and internal quotation marks omitted) (quoting *Carter-Obayuwana v. Howard Univ.*, 764 A.2d 779 (D.C. 2001), and *Daka, Inc. v. McCrae*, 839 A.2d 682, 690 (D.C. 2003)). Thus, "[i]t is not enough for an employee to object to favoritism, cronyism, violation of personnel policies, or mistreatment in general, without connecting it to membership in a protected class." *Vogel v. D.C. Off. of Plan.*, 944 A.2d 456, 464 (D.C. 2008).

As the trial court found, "there's no indication that [Chibikom] engaged in protected activity" through the May and August 2017 complaints. JA 74. Those complaints were "about management, supervisory responsibilities, . . . [and] disagreement[s] about her workload and management of her workload." JA 75 (citing SA 172-78, 182-84). The May 2017 complaint specifically concerned disagreements with her supervisors over several community itineraries and also

claimed that DDS had long violated the District Personnel Manual in evaluating and disciplining her. *See* SA 172-78. The August 2017 complaint denied that she had stolen documents from the desk of Hernandez, a human resources representative, and accused Hernandez and Gray, another human resources representative, of "initiat[ing] a communication of intimidation" rather than apologizing to her for their mistake. SA 182-84. Although the May 2017 complaint—unlike the August complaint—invokes "discriminat[ion]" and "retaliat[ion]," SA 172, the trial court concluded that there was "no factual support" for these assertions. JA 61, 74.

Chibikom's opening brief fails to meaningfully challenge the trial court's determination. *See* Br. 12-13. It makes no attempt at all to justify the August 2017 complaint as a protected activity. Br. 13. As to the May 2017 complaint, Chibikom notes that it expressly alleges discrimination and retaliation. Br. 12. But this again simply characterizes her workplace grievances as discriminatory and retaliatory in nature without providing a reasonable, good faith basis for attributing them to conduct unlawful under the DCHRA. She fails to show that, in making her complaint, she had "an objectively reasonable basis for accusing" DDS of discrimination or retaliation in the matters of which she complained. *Ukwuani*, 241 A.3d at 549. As the trial court found—and Chibikom does not effectively dispute—such "factual support" is absent. JA 61, 74. Similarly, the June mediation session followed the May 2017 complaint and was aimed at resolving its allegations. Again,

there is no factual support for the contention that Chibikom had an "objectively reasonable basis" for alleging discrimination regarding any of the issues raised in the May 2017 complaint or re-raised in the June 2017 mediation. *See* SA 14, 29; *see also* SA 173-78 (labeling the May 2017 complaint with a June 2017 date).

2. Coffman had no actual knowledge that Chibikom engaged in protected activity.

Regardless of what protected activities Chibikom could establish, the trial court rightly concluded that she produced no evidence that Coffman knew of any of them. As the court stated, "there's no evidence that in 2017 that [Coffman] knew about her EEO[] activity" or "knew when he was her supervisor that she was filing these complaints." JA 61. That evidentiary gap is fatal because Coffman proposed Chibikom's suspension and, according to her, was also responsible for sabotaging her overtime request. *See* Br. 12. Yet "if the relevant decisionmaker did not have actual knowledge of [an employee's] protected activity, [the employee] could not establish that [s]he [faced an adverse action] *because of* that protected activity." *Bryant v. District of Columbia*, 102 A.3d 264, 268 (D.C. 2014); *see McFarland*, 935 A.2d at 357 (holding that, "in order to establish the element of causation in a

retaliation claim, an employee must show that the decision-makers responsible for the adverse action had actual knowledge of the protected activity").[4]

Chibikom nonetheless insists that Coffman "fully admitted" to having knowledge of her alleged protected activity. Br. 14. But the evidence was only that he presently knew—at the time of his deposition—that she had filed discrimination complaints. As he testified then, "I'm aware that she's filed multiple complaints alleging my discrimination against her," although "I don't recall what the nature or the form that all those were or are." SA 35. At the summary judgment hearing, the court recognized Coffman's use of the "present tense," JA 61, and Chibikom's counsel did not disagree, JA 66. On appeal, Chibikom further argues that "it strains credulity" that Coffman did not know of her repeated protected activities. Br. 14. But speculation is not evidence. Even assuming that he was generally aware that she had asserted various workplace grievances, there is still no evidence that he was aware at the time of their protected nature—namely, that she was connecting those grievances to unlawful discrimination. Accordingly, Chibikom's retaliation claims fail. *See McFarland*, 935 A.2d at 357; *Talavera v. Shah*, 638 F.3d 303, 313 (D.C.

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[4] Of course, to the extent Chibikom alleges that another supervisor besides Coffman was also responsible for retaliating against her, she would have to show that that supervisor had actual knowledge of the protected activities too. She does not develop any such alternative theory on appeal, and thus it would be forfeited.

Cir. 2011) (concluding that it would be a "speculative leap" to infer that the relevant decisionmaker knew of the protected activity through other supervisors).

3. Alternatively, there is no "temporal proximity" between the alleged retaliatory acts and protected activities.

Even if Chibikom had shown Coffman's knowledge of a protected activity, she cannot show "temporal proximity." To establish that her protected activity and the alleged retaliatory act were temporally proximate, "the temporal proximity must be very close." *Nicola v. Wash. Times Corp.*, 947 A.2d 1164, 1175 (D.C. 2008) (internal quotation marks and brackets omitted) (quoting *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001)). At the least, "a stretch of four months realistically cannot constitute temporal proximity in the ordinary sense of that phrase." *Johnson v. District of Columbia*, 935 A.2d 1113, 1120 (D.C. 2007); *see Breeden*, 532 U.S. at 273 (citing *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997)) (noting that a three-month period had been held insufficient to establish temporal proximity).

Chibikom fails to show that her suspension—the one retaliatory act preserved on appeal—was temporally proximate to a protected activity. Coffman proposed the suspension on October 10, 2017, which was nearly four months after her June 28 mediation meeting with EEO counselor Trimmer and human resources representatives Gray and Hernandez about her May 15 complaint. As measured from the complaint itself, the time span is five months. This is not temporal

proximity by any measure. *Johnson*, 935 A.2d at 1120. Although the August 23 complaint to Deputy Director Morris is more proximate, Chibikom fails to show this complaint was a protected activity and that Coffman, the relevant decisionmaker, had actual knowledge of it. *See supra* pp. 7, 12-13. Even if not forfeited, another of Chibikom's claimed retaliatory acts—her 2019 PIP—occurred well over a year after her last alleged protected activity, once again negating temporal proximity.[5]

Chibikom alternatively argues that, even without temporal proximity, evidence of a continuous "pattern of antagonism" establishes the necessary causal connection for her retaliation claim. Br. 14-15 (citing *Payne v. District of Columbia*, 4 F. Supp. 3d 80 (D.D.C. 2013), *vacated in part*, 2016 WL 10703762 (D.D.C. Mar. 7, 2016)). A causal connection "may be shown by an intervening pattern of antagonism . . . beginning soon after the protected activity and continuing to the alleged retaliation." *Tingling-Clemmons v. District of Columbia*, 133 A.3d 241, 248 (D.C. 2016) (internal quotation marks omitted). However, the events Chibikom cites as evidence of antagonism are the same types of workplace grievances she had made for several years *before* her May 2017 complaint or any other protected activity she claims in this case. *Compare* SA 1-33 (answers to interrogatories), *with* Br. 15

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[5] While Chibikom also claims that both the denial of her overtime request and the proposed official reprimand were temporally proximate to protected activities, as explained, she failed to develop argumentation that either act was retaliatory (or discriminatory). *See supra* pp. 25-26.

(alleging pattern of antagonism to include the denial of overtime, nine-day suspension, poor performance reviews, the lack of opportunity to be selected for a supervisory role, and being placed on a PIP). Thus, the alleged pattern cannot be attributable to the claimed protected activities.

Moreover, these events are not the "constant barrage of hostile actions against an employee" in which courts have recognized a pattern of antagonism. *Tingling-Clemmons*, 133 A.3d at 248. The case Chibikom herself cites makes clear that the evidence must reveal "repeated, escalating acts of retaliation." *Payne*, 4 F. Supp. 3d at 90; *accord Román v. Castro*, 149 F. Supp. 3d 157, 169 (D.D.C. 2016). But here, Chibikom merely shows disagreement with management decisions, without showing that those decisions lack any legitimacy and can only be explained as retaliatory. Nothing links Chibikom's protected activities to the alleged pattern of antagonism, "especially when [she] has produced no evidence that any of the [purported disclosures] were ever mentioned in the intervening period." *Johnson*, 225 A.3d at 1279 n.11. At most, Chibikom relies on the ordinary tribulations of the workplace, which do not suffice. *See Taylor v. Solis*, 571 F.3d 1313, 1323 (D.C. Cir. 2009) (incidents of workplace criticism and "petty slights" do not amount to the "pattern of antagonism" required for a reasonable jury to infer retaliation).

B. Chibikom failed to show that the District's legitimate, non-retaliatory reasons for its actions were pretextual.

Even if Chibikom had established a prima facie case of retaliation, the District provided legitimate, non-retaliatory reasons for its actions. To begin, Chibikom's suspension was based on her mishandling service requests. For the reasons discussed in Part I, Chibikom failed to show that this reason was unworthy of credence, especially where that suspension was independently reviewed and sustained by a DDS official outside her chain of supervision. Nor has Chibikom offered any evidence that Coffman's real reason for proposing her suspension was to retaliate for her complaints. Thus, even assuming (1) a protected activity, (2) Coffman's actual knowledge, and (3) temporal proximity, she still cannot show that the reason for her suspension was pretextual. *Sampay*, 294 A.3d at 118 ("While temporal proximity may be used to establish pretext, positive evidence beyond mere temporal proximity is required to defeat the presumption that the proffered explanations are genuine." (internal quotation marks and brackets omitted)).

For similar reasons, Chibikom's assertion that the denial of overtime was retaliatory lacks merit. *See supra* pp. 23-25. DDS's standard practice was to deny overtime requests to complete regular work, and there was no evidence that any such request had ever been granted under comparable circumstances. SA 55, 59-60. Chibikom offered no evidentiary basis to doubt the District's legitimate reasons for denying her overtime request (and also not reassigning her workload), and "courts

are not free to second-guess an employer's business judgment." *Sampay*, 294 A.3d at 118 (citing *Propp*, 39 A.3d at 870).

Finally, Chibikom offers no evidence (or argument) that retaliatory pretext motivated the June 2017 proposed reprimand or her 2019 PIP. Nor could she. It was Brown and Eley-Brame who executed those acts, respectively, not Coffman. And Chibikom made no record to show that the "actual decisionmakers" were motivated by retaliatory reasons or that they were "tainted by [Coffman's] involvement or influence." *Hamilton v. Howard Univ.*, 960 A.2d 308, 316 (D.C. 2008). Here, Brown's decision to reprimand Chibikom was based on Chibikom's failure to submit certain community itineraries that Brown had requested, and there is no indication that Coffman influenced that decision. *See* SA 18-19; JA 25-26. Moreover, it had been more than two years since Coffman left his role as Chibikom's supervisor when Eley-Brame placed Chibikom on a PIP in 2019. SA 89-90, 129. Regardless, Chibikom was placed on a PIP to improve her timeliness in following up on serious reportable incidents, a reason she entirely fails to rebut. SA 76-77. With no evidence to the contrary, there is no basis to doubt that either Brown or Eley-Brame's actions were anything other than legitimate, independent judgments.

CONCLUSION

This Court should affirm the Superior Court's judgment.

Respectfully submitted,

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September 2023

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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 taxpayeridentification 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.

/s/ Ethan P. Fallon
Signature

22-CV-332
Case Number

Ethan P. Fallon
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September 28, 2023
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CERTIFICATE OF SERVICE

I certify that on September 28, 2023, this brief was served through this Court's electronic filing system to:

David A. Branch
Counsel for Appellant

/s/ Ethan P. Fallon
ETHAN P. FALLON