No. 22-CV-473

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MONIQUE WILSON,
APPELLANT,

v.

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

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

BRIEF FOR THE DISTRICT OF COLUMBIA AND PAUL BLAKE

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STATEMENT OF THE ISSUES

The D.C. Office of the Chief Financial Officer ("OCFO") hired Monique Wilson to manage the budget of one or more District agencies, but she made so many mistakes that her supervisor could not trust her with that responsibility. After more than a year of on-the-job training, she was transferred to a new supervisor, Paul Blake, who finally gave her an agency to handle. But her performance did not improve and, four months later, the District terminated her employment. She requested extended medical leave three hours before she was notified of the action.

Wilson sued the District and Blake, claiming discrimination and retaliation in violation of the D.C. Human Rights Act ("DCHRA"), D.C. Code § 2-1401.01 *et seq.*, and retaliation in violation of the D.C. Family and Medical Leave Act ("DCFMLA"), D.C. Code § 32-501 *et seq.*, and the D.C. Accrued Sick and Safe Leave Act ("ASSLA"), D.C. Code § 32-531.01 *et seq.* The Superior Court granted the District's motion for summary judgment. Wilson's appeal raises five issues:

1. Whether she has offered sufficient evidence of race or sex discrimination, where she does not challenge the District's evidence of her poor performance and offers no evidence that this legitimate reason for her termination was pretextual.

2. Whether she has offered sufficient evidence of a discriminatory hostile work environment, where she describes only a handful of times that Blake criticized her performance and offers no evidence that he did so because of her race or sex.

3. Whether she has offered sufficient evidence of DCHRA retaliation, where she has offered no evidence that she reasonably believed her complaint that she suffered a discriminatory hostile work environment and, alternatively, no evidence of a causal link between that complaint and her termination.

4. Whether she has offered sufficient evidence of DCFMLA retaliation, where the termination decision was made before she even asked about medical leave.

5. Whether she has offered sufficient evidence of ASSLA retaliation, where she was never denied sick leave and offers no evidence of retaliation for using it.

STATEMENT OF THE CASE

Wilson filed her complaint in the Superior Court on February 7, 2019. Joint Appendix ("JA") 10. After discovery, the District moved for summary judgment on all claims. JA 7. The court heard argument on the motion on May 10, 2022, JA 413-41, and granted the motion for summary judgment on May 25, JA 395-412. Wilson filed this timely appeal on June 24. JA 455.

STATEMENT OF FACTS

Making all reasonable inferences in favor of Wilson, *see Washington v. Wash. Hosp. Ctr.*, 579 A.2d 177, 181 (D.C. 1990), the record establishes the following facts.

1. Soon After Wilson Is Hired, Her Supervisors Discover That She Is Unable To Perform The Basic Functions Of Her Job.

The Office of the Chief Financial Officer ("OCFO") supervises the budgetary functions of the District government. *See About OCFO*, OCFO, https://tinyurl.com/yrn8x98p. Within its Government Operations Cluster, the Office of Finance and Resource Management ("OFRM") manages the budgets of the District's subordinate agencies. *See GOC Fin. Operations & Sys.*, OCFO, https://tinyurl.com/s9hcsnjm. Within OFRM, agency fiscal officers supervise budget analysts, who are responsible for managing the budgets of multiple agencies. JA 161. Budget analysts create those agencies' monthly spending plans, conduct their financial review processes, and develop their annual budgets. JA 83, 161; *see GOC Fin. Operations & Sys.*, *supra*.

In February 2017, OCFO hired Wilson, an African-American woman, to serve as a budget analyst. JA 109, 116. This was a high-level, at-will position—Wilson was hired as a grade 12, step 10, with a salary of $97,337. JA 109, 116. And the job came with significant responsibility. For each agency Wilson would be assigned, she was expected to validate the accuracy of its budget requests, help its officials justify those requests, provide accurate budget projections, provide continuous oversight over specific budgetary programs, and prepare budgetary tables, reports, letters, and memoranda. JA 83; *see* JA 188 (summarizing duties).

The Government Operations Cluster was managed by Associate Chief Financial Officer Angelique Rice. JA 160. Michael Bolden served under her as OFRM's Director of Financial Operations, supervising Agency Fiscal Officers James Hurley and Paul Blake. JA 108. Wilson was placed under Hurley, who oversaw the budgets of the Office of the Mayor, the Office of the City Administrator, the Department of Human Resources, the Office of the Inspector General, the D.C. Council, and the Mayor's Office of Legal Counsel. JA 112.

Hurley expected that Wilson "would be assigned her own agency and quickly learn OFRM budgeting processes, requirements, and systems." JA 113. Instead, "much to [his] surprise and disappointment, [he] quickly found out that [she] did not understand budgetary principles and practices relevant to OFRM," "had problems learning and understanding agency budget operations," often "submitt[ed] inaccurate documents and reports," and was "[unable] to anticipate the need[s] of District agencies." JA 113. As a result, he did not assign Wilson responsibility for *any* agency. JA 114, 125. Instead, he asked Senior Financial Manager Yared Assefa to train her. JA 109, 113, 125-26. "However, Mr. Assefa would become frustrated with Ms. Wilson because she continued to make the same mistakes and was slow to learn agency and OFRM budge[t] processes and systems." JA 113; *see* JA 109.

2. After Seven Months Of On-The-Job Training, Hurley Issues Wilson A "Needs Improvement" Performance Rating And Places Her On A Performance Plan.

In October 2017, Hurley issued Wilson her first performance evaluation. On a scale of 1 to 5, he rated her a "2.35," "Needs Improvement," JA 143—a rating that indicates that the employee's performance "meets some expectations but requires further development in one or more areas," JA 139. He rated her 2.5 or lower for eight out of ten competencies, including "Customer Service," "Flexibility/ Adaptability," "Initiative," "Professionalism," "Teamwork," "Job Knowledge," "Dependability," and "Communications." JA 142.

Because a "Needs Improvement" rating requires "[f]ormal action" to "ensure improved performance," JA 139, Hurley placed Wilson on an "Individual Development Plan" and an "Individual Performance Plan," JA 146-49. These required her to learn the basic functions of her job: creating and delivering timely financial reports to agencies and OCFO leadership, loading an agency's budget correctly and on time, reprogramming agency budgets with correct documentation, and timely completing monthly reports and analyses. JA 148.

Wilson does not contest the validity of the "Needs Improvement" rating or dispute the legitimacy of Hurley's concerns about her performance. *See* JA 122 (deposition testimony); JA 70, 332 (identifying this as an "undisputed" material fact). She "was aware that [she] was making errors" and hoped to improve by

continuing to work with Assefa and "pa[ying] a little bit more attention to detail." JA 122. But, as she conceded during litigation, her performance "only improved in 'some instances.'" JA 70, 332 ("undisputed"); *see* JA 122 (deposition testimony).

3. After Six More Months Of On-The-Job Training, Hurley Again Issues Wilson A "Needs Improvement" Rating.

Over the next six months, Wilson "continue[d] to have the same performance issues, with little improvement." JA 114. In her mid-year evaluation, Hurley again assigned her the second-lowest rating, "Needs Improvement," and again rated her at 2.5 or lower for eight out of ten competencies. JA 151, 155. She still needed to "strengthen[] her understanding of job duties and responsibilities" and pay "careful attention to detail." JA 156. She also failed to meet the specific goals he had assigned her. He gave her a 2 (out of 5) for the first goal, which required her to complete "all activities related to the [assigned agencies'] budget formulation," and 2.5 for the second goal, "organizing and planning of time and resources." JA 152.

Wilson does not dispute Hurley's assessment of her progress or claim that his expectations were too high. *See* JA 70, 125, 332.

4. Wilson Is Transferred To Blake's Unit And Learns That Some Of His Subordinates Have Chafed Under His Management Style.

On June 22, 2018, Rice transferred Wilson from Hurley's unit to Blake's unit. JA 121; *see* JA 73, 334. "The intent of the move was to assign Ms. Wilson to smaller agencies with minimal financial complexities where her skill level and knowledge

could be appropriately (and successfully) applied. Mr. Blake ha[d] oversight of several such agencies." JA 181. Wilson testified that, when Bolden told her about the transfer, he explained that Hurley had "said [she] was making too many mistakes." JA 127. Wilson responded, "[T]here's no one on this floor that's perfect" "and if I'm making errors, then it is what it is." JA 127.

Wilson then spoke with some of Blake's former subordinates, JA 128-29, all of whom are African-American, *see* JA 110, 192. Aklilu Ayalew said his work "never met [Blake's] expectations." JA 128. "He was hostile; he was rude. He wasn't easy to approach." JA 128. Awan Mohammad[1] gave similar warnings, and Garrett Mushaw—who started working for Blake at the same time as Wilson—eventually "had the same issues." JA 129. "Blake would bark out orders. He was never thorough. He would never explain exactly what . . . he wanted." JA 129.

5. After Her First Encounter With Blake, Wilson Tells Bolden That She Thinks Blake Dislikes Her Because She Is A Woman.

Wilson testified that she complained to Bolden about Blake "during the transition period, when [she] got transferred, when [she] had [her] first encounter with Mr. Blake." JA 134. She told Bolden that she thought that Blake disliked her because of her gender. JA 134. The record is silent as to what, if anything, Blake did or said that caused her to make this complaint.

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[1] This employee's name is Mohammad Awan, but to maintain consistency with the record this brief will refer to him as "Mohammad," rather than "Awan."

When Wilson was asked how many times she told Bolden she thought Blake mistreated her because of her gender, she said, "I can't recall." JA 134. When asked whether it was more than once, she responded, "Probably. I'm not sure." JA 134.

6. Blake Assigns Wilson Her First Agency And Asks Her To Research Its Projected Personnel-Services Deficit.

When Wilson was transferred, Hurley gave Blake Wilson's performance evaluations and warned him that she was a "substandard employee." JA 191. He told Blake that Wilson was "forgetful," "missed assignments [and] deadlines," "sent reports to the wrong agencies," and that Assefa, who gave her "personal training," "became frustrated with her inability to grasp the basic task[s]." JA 191-92.

Despite these warnings, Blake assigned Wilson her first agency: the Contract Appeals Board ("CAB"). JA 130. A few weeks later, CAB's budget predicted a "PS deficit," meaning that the cost of personnel services would exceed its budget before the end of the fiscal year. JA 204. On July 12, 2018, Blake emailed Wilson instructions on how to handle the problem:

> Your agency is forecasting a PS deficit and [CAB's] Chief Judge Loud would like to know how that came to be – see the attached email. Your assignment is to provide an explanation for Judge Loud based upon your research of the issue.
>
> I suggest the following:
>
> Review the FY18 Budget Chapter.
>
> Analyze the FTEs as of 10/1/17 compared to the PS budget.
>
> Calculate an estimate for the COLA expenses from March.

> Review the FRPs [Financial Review Process reports].
>
> Read Judge Loud's email and confirm/revise his assumptions.
>
> Provide a detailed, concise summary of the PS budget.
>
> As the financial manager for AFO, you should know all the financial details of the agency. This exercise will assist you in that capacity. I will need an update of your progress by COB today.
>
> Let me know if you have any questions. Thanks.

JA 204.

Despite Blake's having sent this list of steps to take, Wilson attested that Blake "never once assisted [her] or gave [her] guidance" on the assignment. JA 349.

> After three hours of attempting to complete the task[] on my own, he stated to me I was "far from completing this deliverable and that it was problematic and my prior performance ratings were substandard." He never took the initiative to sit with me and explained to me the process to get this task[] done. His statement to me was "you've been with OFRM for a little over a year and a half and you could not complete this deliverable."

JA 349-50. When she told him that she had been assigned to CAB for less than a month and needed more time "to become familiar with their budget," "[h]is response was a look of disgust which made [her] feel unwelcome and he berated [her] as if [she] should have been able to complete this task[] without supervision." JA 350.

7. OFRM Denies Wilson's Request For A Transfer.

Three days later, on July 15, Wilson emailed Rice's chief of staff, Rhonda Cheatham, to request a transfer because "[Blake's] behavior and management style ha[d] been provoking and caused [her] severe anxiety." JA 206.

> Mr. Blake assigns me tasks with very little guidance or teamwork. His presence makes me feel very uncomfortable and fearful in my workspace due to his actions i.e. "the look of disgust" that he gives me if I don't know my job responsibilities, and by "badgering" my answers if I do not answer his questions correctly. He gives me unrealistic deadlines three hours before the end of the workday, which is provoking and causing me much anxiety without guidance and assuming that I know how to analyze assignments based on my past professional experience.
>
> If I make a mistake, he belittles my character by stating "you've been here for over a year and you can't remember the name or correct spelling of your agency", which was just assigned to me in June. This comment was made after I incorrectly spelled my assigned agency in a memorandum. This is a verbal abuse to me which intimidates and causes me extreme anxiety.
>
> Mr. Blake's actions, communications, and behavior have created a hostile work environment that diminishes the conditions of my performance, that makes me feel very uncomfortable and making it impossible for me to be productive in my job. It is abusive and not conducive for me to operate and affect the quality of my work which makes doing my job impossible.

JA 206-07.

When they met two days later to discuss the complaint, Wilson told Cheatham that she had "been having high anxiety." JA 133. But she "did not disclose" any "health condition," JA 353, or tell Cheatham that Blake's alleged mistreatment was based on her race or sex, *see* JA 132-34; JA 75, 336 ("undisputed"). When Cheatham explained that Blake's tone "was inappropriate, but . . . came short of abusive," Wilson "stated that it's also how he looks at her, like she is 'stupid' or 'incompetent.'" JA 209. Cheatham ultimately told Wilson that her transfer request was denied. JA 133.

8. Wilson Fails To Submit Monthly Reports To CAB And Erroneously Tells CAB That It Must Reprogram Money To Cover A Deficit.

Budget analysts must "analyze [their agencies'] budgets" and send them "monthly projections" "by the 10th of [each] month." JA 195. Wilson was given frequent reminders about this recurring deadline. JA 194, 195. The budget director sent monthly emails "remind[ing] budget analysts to send the monthly reports by the 10th"; Blake also sent Wilson email reminders; and Blake and Bolden both gave Wilson verbal reminders. JA 194. Despite this, on "several occasions," Wilson failed to send CAB its monthly report. JA 194.

On one occasion, Wilson "incorrectly looked at [CAB's] budget" and "informed the chief judge that he would have to reprogram money in his budget to cover a deficit." JA 195. But CAB "did not have to reprogram anything. That was not necessary." JA 195.

9. CAB's Purchase Card Is Suspended Because Wilson Fails To Submit A Funding Request For The Next Fiscal Year.

Like most District agencies, CAB has a credit card—referred to as a "purchase card" or "PCard"—to pay for equipment, services, supplies, and other expenses. *See Purchase Card Transactions*, Open Data DC, https://arcg.is/0Le5PP (public record of CAB's PCard use). The card is pre-funded at the beginning of each fiscal year—October 1—based on "funding attributes" submitted in August. *See* JA 193, 213.

Budget analysts are responsible for ensuring that their agencies submit their funding attributes on time. JA 193; *see* JA 212-13.

On August 20, 2018, a CAB employee emailed Wilson to ask whether CAB was "all set" with the "funding attributes." JA 213. He reminded her that "the deadline to submit to OFRM is this Friday" and asked her to tell him "if you need anything from [CAB]." JA 213. Blake also reminded her about this "on numerous occasions." JA 194. Wilson, however, did not submit the funding attributes, so CAB's purchase card was suspended on October 1. JA 193; *see* JA 212-13.

When Wilson was notified on October 2, she submitted the information. Later, Blake emailed her to ask, "Was there a reason for the delay in processing this?" JA 213. She responded, "As you were aware I was in training all last week. This was not brought to my attention until you arrive[d] this morning which I took care of immediately." JA 213. Blake then forwarded her CAB's August 20 email, explaining that this was "why [he] inquired if there was a reason for the delay." JA 212. He added: "As an fyi, attending training classes does not preclude you from your normal responsibilities and deadlines. However, that is not the issue here as you were informed in August—well before the training class." JA 212.

Wilson still refused to acknowledge her error. Instead, she responded with an email criticizing Blake's tone:

> No matter how I address your concerns and manage to get things done, you will always come back and try to discredit my character and

> question my ability to do my job as an Analyst. You sent me an email this morning upon your arrival to take care of this task and I completed it within 30 minutes, but yet your response is not thank you, or a job well done but you questioned me as to why was it just taken care and that being in training last week was not a good reason which you highly recommend that I attend. Yes, the deadline may have been Friday which, again[,] I was in training. . . .
>
> My suggestion to you is try to be nice and appreciate the hard work your staff presents and praise your staff on a job well done so sometimes instead of looking for faults in their work 80% of the time, re-evaluate your management style on how you can build a better relationship with your staff and take a look as to how you manage by uplifting their spirit to wanting to do more and to make your job easier without unintentionally creating an unnecessary hostile work environment.
>
> This is one of the reason[s] why management was brought to the workplace in the very beginning so staff who supports you can make you look like a shining star.

JA 212.

10. Blake Issues Wilson A Written Warning And Places Her On A Performance Improvement Plan.

On October 10, Blake and Cheatham met with Wilson to discuss her performance. JA 190. During the meeting, Blake issued Wilson a written warning "regarding the incomplete, inaccurate and late delivery of service in performing routine tasks expected of a . . . Budget Analyst." JA 215.

> The most recent and egregious instance occurred when you neglected to provide the Fiscal Year 2019 Purchase Card (P-Card) attributes for [CAB], which resulted in their card being suspended. You did not submit the attributes even though CAB reminded you via email on at least two occasions beginning in late August.

> Even after receiving numerous emails from the client agency, you did not address the issue until I sent CAB an email stating that you would resolve the issue "immediately."

JA 215. Blake also noted that Wilson had "failed to send the monthly reports to CAB, missed a deadline providing critical information regarding a projected personal services (PS) shortfall, taken days to produce reports which should have taken hours, and ha[d] generally shown a lack of productivity." JA 216; *see* JA 194-96 (Blake's testimony regarding these failures).

The warning also identified deficiencies in Wilson's "knowledge and skills." JA 216.

> [Y]our knowledge and procedural understanding of FRPs, reprogrammings, MOUs, P-Cards, and many other basic financial terms . . . is lacking. I have observed your difficulty in running basic reports in CFOSolve, performing expenditure reclassifications, using Calendar and writing memorandums.
>
> You have also demonstrated a lack of attention to detail. On several occasions you have submitted incomplete and/or inaccurate work, reports from the wrong month, and memos incorrectly identifying the agency. And, you continually referred to agencies as "programs" despite my explanation distinguishing the two.

JA 216; *see* JA 194-96 (Blake's testimony regarding these failures).

At the meeting, Blake also placed Wilson on a Performance Improvement Plan ("PIP"), which explained that she could achieve the necessary "Meets Expectations" rating if she timely completed her assigned tasks and met a list of specific measures. JA 216-17. The PIP was to last for 90 days, during which Blake

would meet with her weekly to monitor her progress, provide feedback, and counsel her in the areas where she needed improvement. JA 217.

11. Wilson Immediately Takes Two Days Of Unscheduled Leave And Submits A Complaint To Human Resources.

After the October 10 meeting, Wilson called Human Resources Program Manager Tania Tydings (now Tania Cobbs), explaining that she had "a crisis" because she had "a supervisor that [she was] not comfortable with." JA 131. She told Tydings that she had previously requested a transfer "because she felt that Mr. Blake was creating a hostile work environment" and said that Blake "would belittle and mock her whenever she made mistakes." JA 232.

Blake testified that Wilson never complied with his requirement that his employees record their planned absences on a "team calendar." JA 199. "I'd come to work and she wouldn't be there, and . . . I had no knowledge of whether she would be in attendance that day." JA 199.

Wilson did not report to work on October 11 or 12. JA 290. Instead, on October 11 at 10:27 a.m., she sent an email to Blake that said, "I will be out of the office today and tomorrow." JA 284. Although at some point she entered this as "sick leave" in the timekeeping software, JA 290, the program still listed Hurley as her supervisor, so Blake did not know how she classified her leave, JA 200.

On October 11, Wilson forwarded Tydings her July 15 transfer request and the PIP. JA 131. When they met the next day, she told Tydings that "the work

environment was hostile" because, "although Mr. Blake points out her mistakes, he does not acknowledge what she does correctly or give direct answers to questions, and he does not give her guidance or explain what it takes to succeed." JA 233.[2]

12. Rice Decides That Termination Is More Appropriate Than A PIP.

Soon after Wilson's transfer, Blake began reporting to Rice that "[t]hings weren't getting done," and Wilson's performance "wasn't satisfactory." JA 163. Rice already knew about Wilson's poor performance under Hurley, and Blake told her that "there had been no improvement." JA 163-64.

Rice did not know that Blake planned to put Wilson on a PIP. JA 168. When she learned he had done so, she asked Cheatham "why, given the performance issues," Wilson was not simply being terminated. JA 168. Rice did not think Wilson had ever performed at the level of a grade 12 budget analyst. JA 177; *see* JA 78, 339 ("undisputed"). Not only was the quality of her work substandard, she was handling only one agency—fewer than what was expected of her position. *See* JA 78, 339 ("undisputed"). Rice "didn't think [the PIP] was warranted," so, within the

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[2] During litigation, Wilson also made generalized descriptions of Blake's management style, untethered to any time or event. She testified that, if she asked questions, "he would give [her] this lame look . . . [of] disgust, like, you know, we've been through this, Monique; why do we have to keep going through this?" JA 132. "You've been here two years. You don't know how to do a re-cache. You don't know how to do reprogram. You don't know how to do a budget modification. Or you don't know how to put stuff in SOAR." JA 132. "And then he sends me these emails, these hostile emails. Well, you should have gotten it right. You've been working on this such-and-such. You missed the deadline." JA 133.

next day or two, she asked the OCFO's Director of Human Resources whether she "ha[d] to honor" the PIP. JA 168; *see* JA 169. After he confirmed that she did not, JA 169, she asked Cheatham to "draft a request for termination," JA 170.

Rice conferred with Cheatham (and "possibly" Bolden), JA 175, but nothing in the record suggests that either supervisor had any meaningful input into the termination decision. Blake was not notified. JA 79, 339 ("undisputed"). Wilson concedes that it was Rice who made the termination decision, *see* JA 78, 338 ("undisputed"), and that it was "based on [Wilson's] history of poor performance." JA 77, 338 ("undisputed"); *see* JA 170 (Rice's testimony).

13. Blake Criticizes Wilson For Asking CAB To Provide The Same Information It Had Given Her Earlier That Day.

As soon as each fiscal year ends on September 30, agencies must "close out" pending purchase orders so that services provided before that date can be paid from that fiscal year's budget. JA 198. Budget analysts are required to work with their agencies to submit "accruals" for these expenses by mid-October. JA 198.

On October 16, Blake emailed his staff a reminder that "accrual forms are due as soon as possible." JA 224. Later that day, he and Wilson met with CAB's Chief Judge to discuss "whether there were any outstanding goods or services" to close out. JA 198. "They said no. Everything was fine. No goods or services. Nothing to bill. Nothing to accrue." JA 198. After the meeting, Blake made sure that Wilson understood that she "[did not] need to accrue anything." JA 199.

Soon after that conversation, Wilson emailed the Chief Judge: "Accruals are due today will you be submitting any accruals for FY18?" JA 224. Blake asked her why she would send this email after "we just met with them and we established at a face-to-face meeting that there are no accruals." JA 199. He explained that her email was "damaging to [the Government Operations Cluster's] reputation" because "our client agencies expect us to put competent people on their assignments." JA 199. The next week, he reiterated these concerns in an email:

> It is imperative that we provide accurate, timely, and consistent financial information to our agencies. In addition, we should demonstrate knowledge of their financial situation even in our inquiries.
>
> In the email below, you requested accruals from [CAB] at 3:25pm on the deadline date. More significantly, you and I met on Tuesday morning to discuss this agency. I showed you in SOAR that the agency only had 1 purchase order with a balance of $33.24 and requested that you de-obligate that amount as the agency had submitted all invoices for FY18. Further, we met with the Contract Appeals Board at 12:30pm that day and they reaffirmed that all FY18 invoices had been submitted.
>
> It was completely unnecessary for you to send the email below to [the Chief Judge] for the reasons detailed above. . . . [Y]our email is at minimum redundant and could be interpreted as showing inattentiveness and/or a lack of understanding [of] the accrual process.

JA 223.

14. Wilson Tells Blake She Is Running Late, Then Does Not Come To Work.

On the morning of October 17, Wilson emailed Blake to say she was "running late and should be in around 10." JA 227. But she never showed up to work that day, nor did she make any effort to update Blake on her status. JA 198. At 4:35

p.m., he emailed her to ask whether she was okay. JA 227. She did not respond until the next day, when she said that she had been at a doctor's appointment the day before and would be out again the following day. JA 227. She later took sick leave for the October 17 absence and annual leave for the October 19 absence. JA 289.

15. Rice Submits A Formal Request For Wilson's Termination.

On October 22, Rice sent Human Resources a formal request for Wilson's termination "based on poor performance." JA 253-55. The memorandum, authored by Cheatham and signed by Rice, explains that "[d]espite repeated efforts to train, coach and assist Ms. Wilson to improve her performance, Ms. Wilson has continued to ask the same technical questions [and] miss deadlines, causing management to lose confidence in the accuracy and completeness of her work." JA 253. It then details Wilson's performance history, describing Hurley's frustration with her "inability to perform certain tasks, even after repeated training," and noting that, during that time, Bolden and another manager had also tried to train her. JA 253. "Each time, they believed Ms. Wilson had a better understanding after their meetings. And each time, their hopes quickly dissipated when she would make the same mistake the very next day." JA 253-54.

The memorandum also details—and documents—Wilson's continued poor performance under Blake's supervision. JA 254-55. It describes Wilson's repetition of errors even after correction, her failure to fund CAB's purchase card, and her

email criticizing Blake's tone, which "demonstrate[d] that she still does not understand why letting the card get suspended is unacceptable." JA 254.

The memorandum also faulted Wilson for taking two days of unscheduled leave—without giving Blake any reason—the day after she was placed on the PIP, and then taking a day of leave the next week without giving him *any* notice. JA 255. "Ms. Wilson's unscheduled leave reflects her lack of understanding of the requirements of her during this busy season, year-end close and budget formulation. Moreover, it's a horrible start to one's 90-day PIP." JA 255.

This memorandum was the last step Rice took to terminate Wilson—after that, she had no control over when Human Resources would finalize the action. JA 171.

16. Wilson Is Notified Of Her Termination Three Hours After She Tells Blake That She Plans To Seek Extended Medical Leave.

On October 23, Wilson called Human Resources Specialist Sanyu Reason to ask about DCFMLA leave. JA 356. Reason sent her the requested forms. JA 246.

On October 30, Wilson's doctor recommended that she take "whatever leave that [she] had left on the books," explaining that "he was going to place [her] on FMLA." JA 137. The next day, October 31, at 11:24 a.m., Wilson called Reason to let her know she had received the medical documentation but "had not submitted the supervisor form to Mr. Blake for signature." JA 356. Reason told her that she should first submit the necessary paperwork to Blake. JA 356. He had already emailed her that morning, stating that he had not been notified of her absence the previous day

and that, moving forward, she should give him 24 hours of advance notice before taking leave. JA 137. In response, she told him that she was planning on taking medical leave from November 1 through November 9 and asked him to sign the supervisor form. JA 137. She copied Rice and Bolden on the email. JA 137.

Less than three hours later, at 2:00 p.m., Wilson was given a letter of termination, effective at the close of business. JA 230, 357.

17. The Superior Court Enters Summary Judgment On All Claims.

The Superior Court granted the District's motion for summary judgment on all claims. JA 395-412. The court rejected Wilson's DCHRA discrimination claims because she failed to offer evidence showing that the District's legitimate, nondiscriminatory reason for terminating her was a pretext for discrimination. JA 403. The record was "replete with evidence demonstrating that Ms. Wilson was a poor match for the tasks of a Grade 12 Budget Analyst," JA 403, most of which she "d[id] not dispute," JA 404. And she offered no evidence that the male comparators she had proffered to show disparate treatment, Mohammad and Huynh, "had performed poorly such that they were similarly situated to [her]." JA 405.

Without addressing whether Blake had created a hostile work environment, the court held that Wilson failed to show "that [his] harsh criticism for performance was based on her membership in a protected class." JA 407. Instead, she "repeatedly acknowledge[d] that Mr. Mohammed, Mr. Huynh, and two other individuals, Akilu

Ayalew and Garrett Mushaw, all complained about of Mr. Blake's management style and that Mr. Blake treated her with the same harsh conduct." JA 405.

The court found insufficient evidence of DCHRA retaliation because "no reasonable jury could find that Ms. Wilson engaged in protected activity." JA 408. "Specifically, her complaints to Ms. Cheatham, Ms. Rice, and Ms. [Tydings] did not indicate, in any way, that Mr. Blake had treated her poorly based on her race or sex." JA 408. And while Wilson testified that she had spoken to Bolden about sex discrimination, the court held that this "informal, later-recanted, vague mention of gender discrimination" did not warrant DCHRA protection. JA 408-09.

The court entered summary judgment on Wilson's DCFMLA and ASSLA retaliation claims because she could not refute the District's legitimate reasons for her termination. "Given such reasons and the fact that Ms. Rice had decided to terminate [Wilson] at least two weeks prior to the request for FMLA," the District had proven that she "'would have been terminated in the absence of the FMLA request.'" JA 411 (quoting *Wash. Convention Ctr. Auth. v. Johnson*, 953 A.2d 1064, 1077-78 (D.C. 2008)). Similarly, under ASSLA, "[n]o reasonable jury could find that [her] requests for accrued leave contributed to her termination."[3] JA 412.

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[3] The court also held that Blake could not be held personally liable under ASSLA because, "in defining employer, the statute does not include supervisors." JA 411 (citing D.C. Code § 32-531.01(3)(A)). Wilson does not challenge this ruling.

STANDARD OF REVIEW

This Court reviews de novo the Superior Court's disposition of a motion for summary judgment. *Rosen v. Am. Isr. Pub. Affs. Comm.*, 41 A.3d 1250, 1255 (D.C. 2012). It must view the evidence in the light most favorable to the non-moving party, who is entitled to every reasonable inference. *Washington*, 579 A.2d at 181.

SUMMARY OF ARGUMENT

1. Wilson cannot prevail on her DCHRA discrimination claim because she concedes that Rice terminated her for poor performance. And even if she had not made that fatal concession, she offers no evidence—not even her own testimony—that she was successfully performing the basic functions of her job. After more than a year of on-the-job training, she was still assigned to work with only one, uncomplicated agency—far less than what was expected of a grade 12 budget analyst. And even with that minimal workload, she repeatedly missed deadlines, made substantive errors, and gave incorrect information to her client agency. Wilson thus cannot refute Rice's legitimate, nondiscriminatory reason for terminating her.

Wilson attempts to prove discrimination through Rice's decision *not* to terminate male, non-African-American budget analysts. But Wilson offers no evidence that they had similar performance problems, so Rice's decision to retain them cannot cast doubt on her nondiscriminatory reason for terminating Wilson.

2. Wilson has not shown that Blake created a hostile work environment. Nothing in the record suggests that his legitimate criticism of her job performance was the type of severe or pervasive harassment prohibited by the DCHRA.

Alternatively, Wilson has offered no evidence that Blake's alleged hostility was discriminatory. On the contrary, she testified that Blake was abrupt with and overly critical of *all* her proffered comparators, regardless of their race or sex.

3. Wilson cannot establish DCHRA retaliation because she did not engage in any DCHRA-protected activity. The complaints cited in her brief are unprotected because they did not allege a DCHRA violation. And while she did complain about gender discrimination to Bolden soon after her first encounter with Blake, she offers no evidence of what Blake said or did in that encounter, so she has not shown that she *reasonably* believed she was reporting a DCHRA violation.

Alternatively, Wilson has not shown any causal link between that complaint and Rice's termination decision. She offers no evidence that Bolden told anyone about the complaint. And even if Rice somehow knew, the record demonstrates—and Wilson concedes—that Rice terminated Wilson for poor performance.

4. Wilson has likewise failed to show that her termination violated the DCFMLA. The statute does not require employers to discontinue an unrelated termination to accommodate the employee's request for medical leave. And Rice's decision to terminate Wilson could not have been retaliatory because Rice could not

have known that Wilson would apply for DCFMLA leave mere hours before being notified of her termination.

Alternatively, as discussed, any inference of retaliation is rebutted by the overwhelming evidence that Rice terminated her for poor performance.

5. So too under ASSLA. Wilson was never denied her statutory right to use accrued sick leave. And she cannot show retaliation for using that leave because, again, she has conceded that Rice terminated her for poor performance and does not challenge the evidence corroborating that legitimate, nonretaliatory reason.

ARGUMENT

I. Wilson Cannot Establish That Her Termination Was Discriminatory Because She Does Not Dispute The Evidence Of Her Poor Performance Or Demonstrate That It Was A Pretext For Discrimination.

The DCHRA prohibits employers from discriminating based on an employee's protected traits, including race and sex. D.C. Code § 2-1402.11(a)(1). In considering such claims, this Court employs the same three-part, burden-shifting test articulated by the Supreme Court for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[4] *Cain v. Reinoso*, 43 A.3d 302, 306 (D.C. 2012). Once the employee raises an inference of discrimination, the burden shifts

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[4] In interpreting the DCHRA, this Court "customarily look[s] to federal anti-discrimination jurisprudence," *Kumar v. D.C. Water & Sewer Auth.*, 25 A.3d 9, 16-17 (D.C. 2011), "and ha[s] adopted those precedents when appropriate," *D.C. Dep't of Pub. Works v. D.C. Office of Human Rights*, 195 A.3d 483, 491 n.9 (D.C. 2018) (quoting *Nicola v. Washington Times Corp.*, 947 A.2d 1164, 1171 (D.C. 2008)).

to the employer to articulate a legitimate, nondiscriminatory reason for its action. *Id.* If it does, the burden shifts back to the employee to show that this stated reason was pretextual—"a disguise for discrimination." *Id.* at 307.

Strict adherence to this scheme is unnecessary. *Id.* at 307 n.13. Once the employer articulates its legitimate, nondiscriminatory reason, the Court "may proceed to answer the ultimate question—whether [the plaintiff] presented sufficient evidence for a jury to find that . . . discrimination 'actually motivated the employer's decision.'" *Id.* (quoting *Furline v. Morrison*, 953 A.2d 344, 353 (D.C. 2008)). To meet this burden, the employee can offer evidence "that the employer's explanation is unworthy of credence because it has no basis in fact" or that "the retaliatory animus more likely motivated [her] employer." *Rooney v. Rock-Tenn Converting Co.*, 878 F.3d 1111, 1117 (8th Cir. 2018).

Wilson has done neither. She concedes that Rice—the person who decided to terminate her—honestly believed that she should be terminated for poor performance. She does not dispute the overwhelming evidence that she could not perform the basic functions of her job despite more than a year of on-the-job training. And she offers nothing but speculation that Rice was instead motivated by race or sex.

A. Wilson concedes that Rice honestly believed she should be terminated due to poor performance and the undisputed evidence supports that concession.

An employee can show pretext with evidence that the decisionmaker did not "honestly believe[]" the nondiscriminatory reason she proffers. *Woodruff v. Peters*, 482 F.3d 521, 531 (D.C. Cir. 2007). Wilson, however, admits that Rice was the decisionmaker, JA 78, 338 ("undisputed"), and that "Rice believed that based on [Wilson's] history of poor performance [Wilson] should be terminated," JA 77, 338 ("undisputed"). She also admits that "Rice was concerned about the fact that [Wilson] was not carrying a substantial caseload . . . commensurate with her position," and that "Rice's opinion was that [Wilson] never performed at a Grade-12 level." JA 78, 339 ("undisputed"). These concessions are fatal to her claim. *See Gilbert v. Napolitano*, 670 F.3d 258, 264 (D.C. Cir. 2012) (affirming summary judgment because plaintiff conceded that the decisionmaker "'honestly' believe[d]" that the plaintiff had engaged in misconduct).

Alternatively, Wilson makes no effort to refute the overwhelming evidence of her poor performance. She did not disagree with the "Needs Improvement" performance ratings issued by Hurley. JA 122. She admitted that, after more than a year of one-on-one training, JA 122, she only improved in "some instances," JA 125; *see* JA 70, 332 ("undisputed"). And she does not dispute the evidence of her inadequate performance under Blake, including:

- Blake's testimony that she repeatedly failed to send CAB its budget report by the 10th of each month despite numerous reminders. JA 194-95.
- Blake's testimony that she wrongly told CAB that it would have to reprogram money to cover a deficit even though there was no deficit. JA 195.
- Documents showing her failure to timely fund CAB's purchase card despite CAB's warning of the deadline. JA 193-94, 213-14.
- Blake's testimony that she needlessly emailed CAB's Chief Judge for information that he had provided in a meeting only hours earlier. JA 199.
- Blake's testimony that she never put absences on the team calendar. JA 199.
- Emails showing her failure to give Blake reasons for unscheduled absences and, on one occasion, to even tell him she would be absent. JA 198, 227, 284.

Wilson argues that Rice's justification is "unworthy of credence" because Hurley did not discipline her for similar performance problems. Br. 15-16. But that is the nature of "progressive discipline." JA 180. Hurley tried to help her improve; he placed her on an Individual Development Plan and Individual Performance Plan. JA 148-49. Rice requested Wilson's termination because those efforts had failed. *See* JA 170 (Rice: "[T]here was an annual review, a midyear review, and then there were the accounts of the current performance issues.").

It is simply not true that "the question of whether [Wilson] could perform her essential duties only began *after* [her] assignment under Appellee Blake." Br. 16.

Hurley could not trust her to handle a single agency, which is the essential duty of a budget analyst. *See* JA 113. And Hurley told her that her work was unsatisfactory by giving her a "Needs Improvement" rating and placing her on an Individual Development Plan and Individual Performance Plan. Br. 16; JA 139-56.

Wilson has never claimed that she was performing her job at a level commensurate with her position and grade. She faults management for failing to train her, but she did not improve after more than a year of one-on-one training. She has simply offered no evidence—not even her own testimony—that could cast doubt on Rice's honest belief that she should be terminated for poor performance.

B. Wilson offers no evidence suggesting that Rice based her decision on Wilson's race or sex.

Pretext can also be inferred if the employee was treated less favorably than similarly situated employees who do not share her protected traits. "To show that employees are similarly situated, the plaintiff must demonstrate that all of the relevant aspects of their employment situations are nearly identical." *Little v. D.C. Water & Sewer Auth.*, 91 A.3d 1020, 1028 (D.C. 2014) (quoting *McFarland v. George Wash. Univ.*, 935 A.2d 337, 353 (D.C. 2007)). This "eliminate[s] other possible explanatory variables, such as . . . performance histories . . . which helps isolate the critical independent variable—discriminatory animus." *Good v. Univ. of Chi. Med. Ctr.*, 673 F.3d 670, 675-76 (7th Cir. 2012) (internal quotation marks omitted).

Wilson identifies two male budget analysts who were not terminated: Mohammed and Huynh.[5] But she has not shown that they, like her, performed poorly. *See Rooney*, 878 F.3d at 1119 (rejecting comparator because, "without a record of [his] performance . . . , there is no basis to conclude that he was 'similarly situated'" to plaintiff); *Amrhein v. Health Care Serv. Corp.*, 546 F.3d 854, 860 (7th Cir. 2008) (rejecting comparators due to "the disparity in their disciplinary history"). Because Wilson offers no evidence about these comparators' performance, she fails to even raise an inference of discrimination. *Cf. Johnson*, 225 A.3d at 1283 n.14 (rejecting retaliation inference because plaintiff "ha[d] not developed a record . . . to show why" any other employee "should be considered a relevant comparator").

Nor does the record support Wilson's other pretext arguments. She claims that Blake's "consistent abusive treatment" raises an inference of discrimination. Br. 12. But it was Rice, not Blake, who requested her termination, JA 77, 338 ("undisputed"); *see* JA 79 ("Blake . . . was not notified of the termination before it occurred."), 339 ("undisputed"), and Wilson does not argue that Blake gave Rice inaccurate information about her performance, *see, e.g.*, *Furline*, 953 A.2d at 357

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[5] Wilson repeatedly asserts that Mohammed and Huynh are not African-American. Br. 7, 13, 14, 22, 23. But she does not identify the race of either man, despite this being her burden. *See Johnson v. District of Columbia*, 225 A.3d 1269, 1283 n.14 (D.C. 2020). And the record shows that these employees *are* African-American, making them inapt comparators for race discrimination. JA 110.

(recognizing "subordinate bias" discrimination). She does not explain how Blake's decision to place her on a PIP affects the genuineness of Rice's belief that termination was more appropriate. *See* Br. 17, 19. And she offers no evidence that OFRM violated any regulations or procedures by failing to issue a performance evaluation before her October termination. *See* Br. 18; JA 170 (Rice's testimony that performance evaluations "wouldn't have been due until that December").

II. Wilson Has Not Shown That Blake Created A Hostile Work Environment Or, Alternatively, That It Was Based On Race Or Gender.

A. Blake's legitimate criticism of Wilson's performance did not create a hostile work environment.

To be actionable, a hostile work environment must be "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Barrett v. Covington & Burling LLP*, 979 A.2d 1239, 1246 (D.C. 2009) (quoting *Daka, Inc. v. Breiner*, 711 A.2d 86, 93 (D.C. 1998)). The harassment must consist of "[m]ore than a few isolated incidents[,] . . . and genuinely trivial occurrences will not establish a prima facie case." *Daka, Inc.*, 711 A.2d at 93 (quoting *Howard Univ. v. Best*, 484 A.2d 958, 980 (D.C. 1984)).

Wilson cannot satisfy this strict standard. Even making all reasonable inferences in her favor, she identifies only five negative incidents over a four-month period, each of which involved Blake's well-justified criticism of her performance.

First, on July 12, 2018, Blake asked Wilson to research CAB's personnel-services deficit and give him "an update of [her] progress by COB." JA 204. "After three hours," he told her that she was "far from completing this deliverable and that it was problematic and that [her] prior performance ratings were substandard." JA 349-50. He said, "you've been with OFRM for a little over a year and a half and you could not complete this deliverable." JA 350. When she told him she needed more time, he gave her "a look of disgust." JA 350.

Second, almost three months later, on October 2, Blake refuted Wilson's excuse for failing to fund CAB's purchase card by forwarding CAB's email that had notified her of the deadline and writing that "attending training classes does not preclude you from your normal responsibilities and deadlines." JA 212-13.

Third, on October 10, Blake issued a written warning describing her failure to meet deadlines and noting that she had "taken days to produce reports which should have taken hours" and "generally showed a lack of productivity." JA 215-16. He also wrote that she lacked "knowledge and procedural understanding" of "basic financial terms" and had "submitted incomplete and/or inaccurate works, reports from the wrong month, and memos incorrectly identifying the agency." JA 216.

Fourth, on October 22, Blake sent her an email explaining that she should not have asked CAB for the same information it had just provided in a face-to-face

meeting because her request was "at minimum redundant and could be interpreted as showing inattentiveness and/or a lack of understanding" of the process. JA 223.

Fifth, on some unspecified date, Blake said "you've been with Government Services Cluster . . . for over a year and you can't even remember the name or the correct spelling of your assigned agency." JA 351.

No reasonable jury could find that these five incidents created a hostile work environment. "Evaluation and criticism of one's work performance, while perhaps unpleasant, is not abusive." *Holloway v. Maryland*, 32 F.4th 293, 301 (4th Cir. 2022); *see Credeur v. Louisiana*, 860 F.3d 785, 796 (5th Cir. 2017) (finding it "significant that none of the [employer's] actions were 'physically threatening or humiliating' or even offensive"); *Hill v. Nicholson*, 383 F. App'x 503, 511 (6th Cir. 2010) (finding no harassment where "most of [the supervisor's] actions involved mere work-related criticisms and heightened performance expectations"). Indeed, courts have rejected claims based on much harsher criticism. *See, e.g.*, *Buchhagen v. ICF Int'l, Inc.*, 545 F. App'x 217, 219 (4th Cir. 2013) (finding no harassment even though plaintiff's supervisor "mockingly" yelled at her in one meeting, yelled and pounded a desk in another meeting, "repeatedly harp[ed]" on a single mistake, made "snide comments," and unfairly scrutinized her use of leave); *Fleming v. MaxMara USA, Inc.*, 371 F. App'x 115, 119 (2d Cir. 2010) (describing supervisors' conduct as "generally quite minor" even though they "wrongly excluded [plaintiff] from

meetings, excessively criticized her work, refused to answer work-related questions, arbitrarily imposed duties outside of her responsibilities, threw books, and sent rude emails to her"). Blake's criticisms of Wilson's performance may have been blunt, but he did not use the type of threatening, humiliating, or offensive language that could create an objectively hostile work environment.

Moreover, "[c]riticism of an employee's work performance . . . do[es] not satisfy the standard for a harassment claim" "where . . . the record demonstrates . . . legitimate grounds for concern." *Credeur*, 860 F.3d at 796. Wilson does not dispute the legitimate basis for each of Blake's communications. The July 12 incident is the only basis of her oft-repeated claim that Blake gave her "unrealistic deadlines three hours before the end of the workday." Br. 7; *see* Br. 13 (similar), 19 (similar), 21 (similar). But she offers no evidence that it was unreasonable for Blake to request "an update of [her] progress by COB." JA 204. Indeed, she has never indicated how long that assignment *should* have taken her. Blake's mention of her "substandard" performance evaluations was also accurate. *See* JA 143, 155. And his purported "look of disgust," JA 350, is not "the kind of severe and pervasive ridicule, intimidation, threats, or other abuse that would create a hostile work environment." *Bereston v. UHS of Del., Inc.*, 180 A.3d 95, 113-14 (D.C. 2018).

Blake's other criticisms were also legitimate. Wilson *did* fail to fund CAB's purchase card despite knowing about the deadline. JA 212. She *did* email her client

to ask for information he had just given her in a face-to-face meeting. JA 223. She *did* commit the numerous failures and errors detailed in her written warning, JA 215-17. *See, e.g.*, JA 193-95. And she was *still* misstating her client agency's name at deposition—repeatedly calling it the "Control" Appeals Board. JA 130.

There is no probative value to Wilson's conclusory testimony that Blake "berated" or "belittled" her. *See, e.g.*, JA 130, 350, 351. "If the subjective beliefs of plaintiffs in employment discrimination cases could, by themselves, create genuine issues of material fact, then virtually all defense motions for summary judgment in such cases would be doomed." *Yancick v. Hanna Steel Corp.*, 653 F.3d 532, 548 (7th Cir. 2011) (quoting *Mlynczak v. Bodman*, 422 F.3d 1050, 1058 (7th Cir. 2006)); *see Bird v. W. Valley City*, 832 F.3d 1188, 1206 (10th Cir. 2016) (disregarding as "conclusory" testimony that "some of the men don't work as hard but never get in trouble"); *Jones v. Spherion Atl. Enter., LLC*, 493 F. App'x 6, 9 (11th Cir. 2012) (same with testimony that supervisor "publicly embarrassed black women by rudely reprimanding them"); *Carrera v. Com. Coating Servs. Int'l, Ltd.*, 422 F. App'x 334, 338 (5th Cir. 2011) (same with testimony that supervisor was "consistently harassing and badgering with racial slurs and vulgarity").

Nor is there much probative value to Wilson's testimony of things Blake "would" say—without any indication as to whether, when, or how often he in fact said them. She testified that, when she asked for help, he "would give [her] this lame

look . . . [of] disgust, like, you know, we've been through this, Monique; why do we have to keep going through this?" JA 132. But she did not specify whether he actually said those words or—as her testimony suggests—this was her interpretation of his "look." JA 132. Her testimony then devolved into a litany of similar comments, without any indication of whether these were Blake's actual words, when he said them, or what prompted them: "You've been here two years. You don't know how to do a re-cache. You don't know how to do reprogram. You don't know how to do a budget modification. Or you don't know how to put stuff in SOAR." JA 132.

Ultimately, none of these uncertainties matter. Even if Blake said these things, Wilson offers no evidence that they were untrue or that his expectations were unreasonable. Blake's management style may well have made Wilson anxious, *see* Br. 21, but it did not create an objectively hostile work environment.

B. Alternatively, Wilson has offered no evidence that Blake's purported hostility was based on her race or sex.

"To support a hostile work environment claim, the plaintiff . . . must show [that the complaint-of conduct] had a [discriminatory] character or purpose." *Paschall v. Tube Processing Corp.*, 28 F.4th 805, 814 (7th Cir. 2022); *see Nicola*, 947 A.2d at 1173 ("[I]t is critical that, in bringing a hostile work environment claim, the plaintiff establish *discriminatory* harassment."). This is essential because "[e]veryone can be characterized by sex, race, [or] ethnicity . . . and many bosses are

harsh, unjust, and rude." *Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002). Although the discriminatory basis "need not be explicit, there must be *some* connection, for not every perceived unfairness in the workplace may be ascribed to discriminatory motivation." *Paschall*, 28 F.4th at 814 (internal quotation marks omitted); *see Stewart v. Evans*, 275 F.3d 1126, 1129, 1133 (D.C. Cir. 2002) (affirming dismissal despite supervisor's "profane tirade" because it "[could] not reasonably be construed as . . . having been motivated by a discriminatory animus").

Wilson has offered no evidence that Blake criticized her performance because of her race or sex. None of the language that he used suggests any discriminatory animus, *see* JA 132, 204, 212-13, 215-16, 223, 350, nor could such animus be inferred from Wilson's vague testimony regarding his "verbal tone" or "look," JA 351. Indeed, Wilson does not claim that *she* ever thought his criticisms were based on her race and her testimony suggests that, by the time of litigation, she no longer thought they were based on her sex. *See* JA 135 (Q: "Do you believe you were treated differently than your male coworkers?" A: "At that time I did." Q: "[Do] you still believe that?" A: "When I was under his supervis[ion], yes, I believed it.").

Wilson argues that she established sex-based animus through Blake's treatment of three male employees: Mohammad, Ayalew, and Huynh. Br. 22. But, as discussed, *see supra* p. 30, she has offered no evidence of deficiencies in these employees' performance, making them inapt comparators for Blake's criticisms of

her performance. *See Hollins v. Fed. Nat. Mortg. Ass'n*, 760 A.2d 563, 578 (D.C. 2000) (requiring "similarly situated" comparators to have "engaged in the same conduct"). And, in any event, Wilson concedes that these employees *also* endured Blake's "abusive behavior." Br. 5. Ayalew told Wilson that his work "never met [Blake's] expectations." JA 128. "He was hostile; he was rude. He wasn't easy to approach. No matter what [Ayalew] did, [Blake] always had issues with his work." JA 128. Wilson testified that Mushaw "had the same issues that I had with Mr. Blake." JA 129. And Mohammad also complained to Wilson about Blake's management style. JA 129. If anything, Wilson's evidence *disproves* that Blake treated her differently because of her sex. *See Tennial v. United Parcel Serv.*, 840 F.3d 292, 304 (6th Cir. 2016) (noting that the similar treatment of comparators "cuts against the argument that" such treatment was discriminatory).

Wilson claims that Blake favored these male employees by not subjecting them to "unjustified complaints," "scapegoat[ing] [them] for issues not within [their] responsibilities," or telling them that they "did not know [their] job duties." Br. 22. But she offers no evidence supporting this assertion. *See* Br. 22 (citing JA 209: Cheatham's notes on Wilson's complaints). Nor does the record show that they did not "receive[] a written warning or a PIP." Br. 13 (citing JA 41: motion for summary judgment), 22-23 (citing JA 134: Wilson's testimony about her own PIP). And Wilson relies on the absence of evidence as to whether her comparators were

subjected to "constant verbal abuse" or "unrealistic deadlines," Br. 13, even though *she* bears the burden of showing Blake's discriminatory animus. *See Furline*, 953 A.2d at 353-54. If the record is silent, she has not met that burden.

III. Wilson Cannot Establish DCHRA Retaliation Because Her Complaint To Bolden Of Sex Discrimination Was Not Reasonable And, In Any Event, There Is No Evidence That He Told Anyone Or Retaliated Against Her.

A. Wilson has not shown that she reasonably believed she was reporting sexual harassment when she told Bolden—after her first encounter with Blake—that Blake disliked her because of her sex.

A plaintiff claiming DCHRA retaliation must first show that she "engaged in statutorily protected activity." *Grimes v. District of Columbia*, 89 A.3d 107, 112 (D.C. 2014). "It 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 Planning*, 944 A.2d 456, 464 (D.C. 2008). Instead, to constitute "protected activity" under the DCHRA, "the plaintiff must alert the employer that she is lodging a complaint about allegedly discriminatory conduct." *Howard Univ. v. Green*, 652 A.2d 41, 46 (D.C. 1994).

Wilson admits that she did not complain to anyone at OFRM about race discrimination and that she complained to Bolden only about sex discrimination. JA 134. This Court should therefore reject any claim based on other complaints she made about Blake, including her July 15 complaint to Cheatham and Rice, JA 209-10, and her October 12 complaint to Tydings, JA 233. *See* Br. 24.

Wilson's complaint to Bolden is unprotected for a different reason: she has not satisfied her burden of showing that, when she made the complaint, she "reasonably believed" that Blake had violated the DCHRA. *Propp v. Counterpart Int'l*, 39 A.3d 856, 863 (D.C. 2012). To determine whether a complaint of a hostile work environment was objectively reasonable, a court must consider "the severity, pervasiveness, and duration of the alleged discrimination." *Reznik v. Incontact, Inc.*, 18 F.4th 1257, 1264 (10th Cir. 2021).[6] Wilson does not say, however, what prompted her to tell Bolden that Blake "had something against [her]" "[b]ecause [she] was a female." JA 134. She testified that she made this complaint "during the transition period, when [she] got transferred," "when [she] had [her] first encounter with Mr. Blake."[7] JA 134. But that transfer took place on June 22. JA 121, 162. Her first negative interaction with Blake occurred *three weeks later*, on July 12, when he instructed her to research CAB's personnel-services shortfall. JA 204; *see* Br. 5 (claiming that she "began having issues with" Blake "[w]ithin the first month

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[6] The analytical framework for retaliation is the same under the DCHRA and Title VII. *McFarland*, 935 A.2d at 346.

[7] The record does not support Wilson's claim that she complained to Bolden about sex discrimination "on several occasions." Br. 24. When asked "how many times" she made this complaint, she responded, "I can't recall," and when asked whether it was "[m]ore than once," she responded, "Probably. I'm not sure." JA 134; *see Hunt v. District of Columbia*, 66 A.3d 987, 990 (D.C. 2013) ("[A] plaintiff's mere speculations are insufficient to create a genuine issue of fact."). But even if she complained more than once, the record remains devoid of evidence that she ever had a reasonable basis to believe Blake engaged in sex discrimination.

under [his] supervision"). She has thus failed to satisfy her burden of proving she engaged in any DCHRA-protected activity.

B. Alternatively, Wilson has not shown a causal nexus between her complaint to Bolden and Rice's termination decision.

Wilson does not articulate any causal nexus between her June 2018 complaint to Bolden and her termination four months later. *See* Br. 24 (relying on her July 15 and October 12 complaints). Nor can she. "Employer awareness that the employee is engaged in protected activity is . . . essential to making out a prima facie case for retaliation." *McFarland*, 935 A.2d at 356 (quoting *Howard Univ.*, 652 A.2d at 46). "Constructive knowledge is not enough; the 'employee must show that the decision-makers responsible for the adverse action had actual knowledge of the protected activity.'" *Furline*, 953 A.2d at 354 n.36 (quoting *McFarland*, 935 A.2d at 357); *see Kolowski v. District of Columbia*, 244 A.3d 1008, 1014 (D.C. 2020) (requiring evidence of the decisionmaker's actual knowledge of protected activity to establish causal nexus).

Wilson does not claim that Bolden retaliated against her. *See* Br. 23-28. Nor does she claim that Rice—who made the termination decision, *see* JA 77, 79, 338—knew about Wilson's complaint to Bolden. *See* Br. 23-28. Instead, she argues that she was terminated in retaliation for her October 12 complaint to Tydings about Blake's decision to place her on a PIP. Br. 25-28. But, as discussed, *see supra* pp. 39-41, *that* complaint is not DCHRA-protected because it did not report

"discriminatory conduct." *Howard Univ*, 652 A.2d at 46; *see* JA 233 (Tydings declaration). Wilson has thus failed to raise even an inference of retaliation.

Moreover, any such inference would be refuted by Rice's nonretaliatory reason for terminating her. An employee can demonstrate pretext "by showing the proffered explanation has no basis in fact" or "that a prohibited reason more likely motivated the employer." *Gibson v. Geithner*, 776 F.3d 536, 540 (8th Cir. 2015). "In either case, the plaintiff must point to enough admissible evidence to raise genuine doubt as to the legitimacy of the defendant's motive." *Fiero v. CSG Sys.*, 759 F.3d 874, 878 (8th Cir. 2014) (internal quotation marks omitted).

As discussed, *supra* p. 27, Wilson has conceded that Rice believed that she should be terminated for poor performance. *See* JA 77, 78, 338, 339. And, as discussed, *supra* pp. 28-29, Wilson makes no effort to refute the overwhelming evidence that her productivity was far below reasonable expectations, that she repeatedly missed important deadlines, and that her work product was riddled with substantive errors. *See* JA 122, 125, 193-95, 198-99, 213-14, 227, 284. While she claims that she "performed her duties in a satisfactory manner," Br. 26, the interrogatory response she cites states only that Hurley did not discipline her, JA 347. And nothing else in the record—not even Wilson's own testimony—suggests that she was performing the basic functions of her job at a satisfactory level.

Nor has Wilson demonstrated pretext with evidence that OFRM "deviat[ed] from its own standard procedures." Br. 26-27. She again relies on Blake's failure to complete a performance evaluation, Br. 26-27, but the rating period ended on September 30, only a month before she was terminated. *See, e.g.*, JA 139 (2017 evaluation). Rice testified that Wilson's performance evaluation "wouldn't have been due until that December," JA 170, and Wilson has offered no evidence refuting this testimony, *see* Br. 26-27.

Wilson also argues that she has shown pretext because Rice terminated her "based on inaccurate and false statements made by Mr. Blake regarding [her] use of medical leave." Br. 27. But she does not point to any evidence indicating what Blake said about her use of leave, to whom he said it, when he said it, and whether it was accurate. And her description of the evidence is inaccurate—she did *not* send Blake emails that "notified him of her medical leave" on October 11, 12, 17, and 19. Br. 27. Her October 11 email, sent in the late morning, said only "I will be out of the office today and tomorrow" without offering any reason why. JA 284. She did not even *tell* Blake that she would be absent on October 17. JA 285. And when she belatedly excused that absence on October 18, she added, without explanation, that she would "also be out tomorrow" (October 19). JA 285. In any event, she took *annual* leave—not sick leave—on October 19. JA 289.

Rice testified that, in making the termination decision, her "main concern was [Wilson's] performance and accountability." JA 178. Wilson has offered no evidence that could cast doubt upon that reason. *See Johnson*, 225 A.3d at 1283 (finding no material dispute regarding an employer's documented reason for termination simply because the decisionmaker was also "troubled" by the employee's "immature" and "inappropriate" interactions with her supervisor). But even if a jury could find that Wilson's absences played a material role in Rice's decision, it could not reasonably conclude that Rice was influenced by Wilson's need to use sick leave, rather than her failure to properly seek it. *See Amedee v. Shell Chem., L.P.*, 953 F.3d 831, 835 (5th Cir. 2020) ("[A]s should go without saying, an employee's failure to show up for work is a legitimate reason for firing her.").

IV. Wilson Cannot Establish DCFMLA Interference Or Retaliation Because Rice Decided To Terminate Her Before She Requested DCFMLA Leave.

The DCFMLA protects an employee's right to take medical leave because of a serious health condition. D.C. Code § 32-503(a). Under its "interference" provision, a person cannot "interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided by [the statute]." *Id.* § 32-507(a).

But "an employer is not necessarily liable" for interference "anytime it fires an employee who has requested . . . FMLA leave." *Twigg v. Hawker Beechcraft*

Corp., 659 F.3d 987, 1006-07 (10th Cir. 2011).[8] "If dismissal would have occurred regardless of the request," she can be terminated even if it prevents her from using protected leave. *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 877 (10th Cir. 2004); *see Throneberry v. McGehee Desha Cnty. Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) ("[A]n employer who interferes with an employee's FMLA rights will not be liable if . . . it would have made the same decision had the employee not exercised [her] FMLA rights"); *Arban v. W. Publ'g Corp.*, 345 F.3d 390, 401 (6th Cir. 2003) ("An employee lawfully may be dismissed . . . if the dismissal would have occurred regardless of the employee's request for or taking of FMLA leave.").

Wilson argues that the District "interfered" with her right to medical leave by terminating her "mere hours" after she submitted her DCFMLA request. Br. 31. But Rice formally requested Wilson's termination nine days earlier, on October 22. JA 253. As Rice explained, "[t]erminations are rarely immediate," JA 168, and she had no control over when Human Resources would complete the paperwork, JA 171. And Wilson offers no authority suggesting she was entitled to take DCFMLA leave to forestall a termination that was already being processed.

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[8] Because the DCFMLA's anti-interference provision is "materially the same" as its federal counterpart, *Skrynnikov v. Fannie Mae*, 2022 U.S. App. LEXIS 16519, at *4 (D.C. Cir. June 14, 2022); *see* 29 U.S.C. § 2615(a)(1), this Court can "properly look to FMLA regulations and case law as persuasive authority," *Teru Chang v. Inst. for Pub.-Priv. P'ships, Inc.*, 846 A.2d 318, 327 (D.C. 2004).

The DCFMLA's "retaliation" provision prohibits an employer from terminating an employee because she "[o]pposes any practice made unlawful by [the DCFMLA]." D.C. Code § 32-507(b). Wilson claims that she engaged in such "protected activity" when she complained about Blake's management style on July 15 and October 12. Br. 29. But the statute protects only an employee's opposition to "any practice made unlawful *by this chapter*," D.C. Code § 32-507(b) (emphasis added)—meaning the DCFMLA, *see* D.C. Law 8-181, § 8, 37 D.C. Reg. 5043, 5051 (Aug. 3, 1990) (enrolled original: "made unlawful by this act"). Wilson's non-DCFMLA complaints therefore cannot support her DCFMLA retaliation claim.

Wilson's first DCFMLA-protected act was her October 31 request for extended medical leave. JA 356-57. By then, the termination decision had already been made. JA 253; *see Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (holding that employers "need not suspend previously planned" employment actions "upon discovering" protected activity, "and their proceeding along lines previously contemplated . . . is no evidence whatsoever of causality"). Wilson did not even ask Tydings for the DCFMLA forms until October 23, the day after Rice requested her termination. JA 253, 356; *see Trahanas v. Nw. Univ.*, 64 F.4th 842, 857 (7th Cir. 2023) ("[A] superior cannot retaliate against an employee for a protected activity about which he has no knowledge."). Rather than help her case, the "incredibly

close temporal proximity" on which Wilson relies, Br. 31, actually *disproves* any causal link between her DCFMLA request and her termination.

Alternatively, summary judgment is appropriate on both claims because Wilson does not (and cannot) dispute the legitimate performance-related bases for her termination. *See supra* pp. 27-29. The DCFMLA "does not immunize an employee from legitimate disciplinary action by her employer for reasons unrelated to the employee's [protected] leave." *Teru Chang*, 846 A.2d at 329 (quoting *Bond v. Sterling, Inc.*, 77 F. Supp. 2d 300, 304 (N.D.N.Y. 1999)); *see Hopkins v. Grant Thornton, LLP*, 529 F. App'x 1, 3 (D.C. Cir. 2013) (holding that "an employee may be dismissed . . . if the dismissal would have occurred regardless of the request for . . . FMLA leave").

V. Wilson Cannot Establish ASSLA Interference Because She Was Never Denied The Use Of Sick Leave And She Cannot Establish ASSLA Retaliation Because She Was Terminated For Poor Performance.

ASSLA protects an employee's right to use accrued sick leave without interference. D.C. Code § 32-531.08(a). Wilson claims, without any citation to the record, that the District "interfered with [her] right to take leave for her medical appointments." Br. 32. But the undisputed evidence shows that the District approved of all of her sick leave, including that taken on October 11, 12, 17, and 30. JA 288-90. And Wilson has not claimed that she was ever forced to work when she had requested sick leave. JA 288-90.

Wilson appears to argue that the District interfered with her right to use accrued sick leave by terminating her, which prevented her from taking sick leave after the termination was final. *See* Br. 32. But ASSLA cannot reasonably be interpreted to prohibit termination simply because the employee has accrued sick leave she might use if she is retained. After all, most terminated employees have accrued sick leave, and lawmakers could not have meant for that to immunize them from performance-based termination. *Cf. Bones*, 366 F.3d at 877; *Throneberry*, 403 F.3d at 977; *Arban*, 345 F.3d at 401. Wilson claims that she asked to use sick leave the same day she was terminated, Br. 32, but this is not accurate. The request she made was for DCFMLA leave, so any interference claim arising out of that request should be analyzed under that statute. *See* JA 137 (Wilson's testimony that, on October 31, she told Blake that "effective November the 1st . . . through the 9th, I'm requesting that you sign my FMLA form").

ASSLA also prohibits retaliation against an employee who opposes practices "made unlawful by this subchapter" or complains about practices "[p]ursuant or related to this subchapter." D.C. Code § 32-531.08(b)(2). The statute creates a rebuttable presumption of retaliation if an employer terminates an employee within 90 days of any such activity. D.C. Code § 32-531.08(d). Wilson argues that she is entitled to this presumption because she complained about Blake on October 12. Br. 33. But that complaint involved only Blake's management style, his written

warning, and his decision to place Wilson on a PIP, see JA 131-32, 134-35, 232-33, so the complaint was not "[p]ursuant or related to [ASSLA]," D.C. Code § 32-531.08(b).[9] Wilson also seeks a presumption of retaliation because she "was terminated on the very same day she requested sick leave." Br. 32. But she explicitly made her October 31 request under the FMLA, *see* JA 137, which has its own antiretaliation provision, *see* D.C. Code § 32-507(b).

To be sure, ASSLA prohibits retaliation against an employee because she uses her leave accrued "under this subchapter," D.C. Code § 32-531.08(b)(4), and Rice and Blake both expressed concerns about Wilson's absences after being placed on a PIP, *see, e.g.*, JA 171-72 (Rice), 199 (Blake). But Wilson did not satisfy her *own* responsibilities under ASSLA, which requires an employee to seek "foreseeable" leave "at least 10 days, or as early as possible, in advance" and, for "unforeseeable leave," to make an "oral request . . . prior to the start of the work shift." D.C. Code § 32-531.03. Wilson failed to comply with this statutory requirement for any of the leave she identifies in her brief: October 11, 12, 17, and 30. Br. 27; JA 288-91. On October 11, at 10:36 a.m., she simply sent Blake an email stating "Paul, I will be out

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[9] At deposition, after Wilson described her October 12 complaint, she added that Blake "had an issue with [her] being out." JA 134. It is clear from context, however, that she was not claiming that this was part of her October 12 complaint. JA 134. This conclusion is corroborated by Tydings's declaration, which details Wilson's complaint about Blake's management style without any mention of her absences or use of sick leave. *See* JA 232-35.

of the office today and tomorrow" without offering any reason why. JA 284. She did not even tell Blake she would be absent on October 17, instead offering a belated excuse the next day. JA 285. And Rice had already decided to terminate her when she took a half-day of leave on October 30, so even if the record showed that Blake complained about that absence (it does not), his complaint could not have contributed to Rice's decision. *See* JA 253.

In any event, any inference of retaliation, including ASSLA's statutory presumption, is "rebuttable." D.C. Code § 32-531.08(b)(4). The District is thus entitled to summary judgment on Wilson's ASSLA claim for the same reason it is entitled to judgment on every other termination-based claim she brings. Rice testified that, in making the termination decision, her "main concern was [Wilson's] performance and accountability." JA 178. Wilson does not dispute this—instead, she concedes that Rice terminated her for poor performance. *See* JA 77, 78, 338, 339. And even in the absence of that concession, the overwhelming evidence demonstrates that her productivity was far below reasonable expectations, that she repeatedly missed important deadlines, and that her work product was inadequate. *See* JA 122, 125, 193-95, 198-99, 213-14, 227, 284.

CONCLUSION

The Superior Court's entry of summary judgment should be affirmed.

Respectfully submitted,

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November 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;
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     (4) the year of the individual's birth;
     (5) the minor's initials; and
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2. Any information revealing the identity of an individual receiving mental-health services.

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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.

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/s/ Holly M. Johnson
Signature

22-CV-473
Case Number

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CERTIFICATE OF SERVICE

I certify that on November 13, 2023, this brief was served through this Court's electronic filing system to:

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