APPEAL NO. 24-CV-426

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

YOSHIE S. DAVISON,

Appellant,

v.

AMERICAN PSYCHIATRIC ASSOCIATION, *et al.*,

Appellees.

On Appeal from Final Judgment of the
Superior Court of the District of Columbia
Civil Action No. 2022-CAB-005715

BRIEF OF APPELLEES

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STATEMENT OF JURISDICTION

Appellant Yoshie S. Davison filed this Notice of Appeal on May 1, 2024, JA 00504[1], from the April 1, 2024 Order and Opinion of the Superior Court of the District of Columbia granting Defendants/Appellees American Psychiatric Association's and Dr. Saul Levin's Motion for Summary Judgment, JA 00504-520, which disposed of all claims Ms. Davison asserted against the American Psychiatric Association and Dr. Levin in her Complaint. JA 00001-20.

[1] All citations are to Bates Numbered pages in the Joint Appendix ("JA") Ms. Davison filed on February 18, 2025.

STATEMENT OF THE CASE

Defendant Saul Levin, M.D. was the CEO for the American Psychiatric Association ("APA") during the time period relevant to this lawsuit. JA00051; JA00244. The APA employed Ms. Davison as its Chief of Staff for many years. JA00245-46. Ms. Davison reported to, and was the "eyes and ears" of, Dr. Levin. JA00102. After a positive relationship for many years, their communication became strained during the pandemic. JA00052-54; JA00126-27. On February 15, 2022, Dr. Levin gave Ms. Davison a "meets expectations" performance rating, noting their communication issues in multiple places throughout the review. JA00109; JA00194-203. In response, it is undisputed that Ms. Davison said she was resigning. JA00145-46; JA00148; JA00226. She gave Dr. Levin the choice of her last day being March 4, shortly before APA's annual board meeting, or March 14, directly after the annual board meeting, in exchange for a severance package. *Id.* On February 18, Dr. Levin emailed Ms. Davison choosing March 4 as her resignation date. JA00157-58; JA00230. Earlier that day, Ms. Davison asked an HR employee about possible FMLA leave. JA00153-54; JA00269; JA00272. It is undisputed that Dr. Levin was not aware of this conversation when he sent Ms. Davison the email selecting March 4. JA00056; JA00151-52; JA00159-60; JA00252-54.

Ms. Davison filed suit against the APA and Dr. Levin in Superior Court alleging: (1) DCFMLA interference, (2) race- and sex-based hostile work

environment and constructive discharge, (3) retaliatory termination, and (4) violation of the DCHRA for alleged unequal pay because she did not receive a stipend for temporarily supervising other departments.

At the close of discovery, Defendants moved for summary judgment on all counts. As explained in Defendants' motion, the undisputed record facts proved: (1) Dr. Levin was not aware of Ms. Davison's DCFMLA request when he accepted her resignation; (2) Ms. Davison's hostile work environment claim is based on several work-related arguments that are not connected to Ms. Davison's protected characteristics nor close to being severe and pervasive conduct; (3) Ms. Davison resigned, she was neither terminated nor constructively discharged; (4) Ms. Davison's alleged protected activity occurred about 15 months before her resignation and had no causal connection to the end of her APA employment; and (5) Ms. Davison identified no adequate comparators for her equal pay claim and no evidence to suggest Dr. Levin's decision not to give her stipend was related to her race or gender. The Superior Court agreed and, on April 1, 2024, granted summary judgment to APA on all counts after finding no genuine issue of material fact.

Ms. Davison now appeals the lower court's decision relying on misstated facts and conclusory allegations, rather than identifying record facts to support her arguments or any errors of law by the Trial Court. She argues the lower court erred by granting the APA summary judgment for (1) Ms. Davison's sex and race

discrimination claims, and (2) Ms. Davison's FMLA Claim, and (3) whether Dr. Levin might have been told about Ms. Davison's DCFMLA request prior to accepting her resignation.[2] Nowhere does Ms. Davison identify a genuine issue of material fact in the record or any error of law. Therefore, the Court should deny this appeal and affirm the lower court's ruling.

[2] Ms. Davison asserts only two issues on appeal (Appellant Yoshie S. Davison's Corrected Opening Brief ("Davison Br.") at p. 2), but the body of her Brief indicates she seeks review of these three issues.

STATEMENT OF FACTS

A. Ms. Davison Was Dr. Levin's Chief of Staff, and They Worked Productively for Many Years.

Ms. Davison, an Asian-American woman, began working at the APA in 1998. JA00190-92. In June 2010, Ms. Davison resigned from the APA to pursue an opportunity with the American Academy of Child and Adolescent Psychiatry. JA00094-95. Dr. Levin, a white man, became the APA's Chief Executive Officer and Medical Director ("CEO") in October 2013. JA00051; JA00244. In January 2014, Dr. Levin rehired Ms. Davison as Deputy Director of Leadership and Advocacy Initiatives. JA00096. In July 2014, Dr. Levin promoted Ms. Davison to be his Chief of Staff ("COS"), reporting directly to him. JA00051; JA00096; JA00245-46. As COS, Ms. Davison was part of the core executive group and provided strategic leadership for the Office of the CEO/Medical Director ("OCEO"). JA00185-88. Her job duties included:

> (a) work[ing] with the CEO/MD to define strategic directions and initiatives; provid[ing] leadership and guidance…; [and] working with CEO/MD and other senior leaders to develop and implement organizational plans, deliverables, and reasonable objectives;
> (b) resolv[ing] member and staff concerns on behalf of the CEO/MD…; [p]rioritiz[ing] and review[ing] reports and presentations for the CEO/MD; and
> (c) [p]romot]ing] an integrated communications network [through the APA],… oversee[ing] CEO/MD office representation of [several] committees [including] Diversity… Communications… and other staff committees…, [and] represent[ing] [OCEO] during the planning of all employee

> events, including Diversity…, annual Holiday Party,… Staff Lunch and Learn, and other employee activities.

Id.

From July 2014 through January 2020, Ms. Davison and Dr. Levin had a close, highly functional relationship. JA00051; JA00105-06. Dr. Levin considered Ms. Davison to be an integral part of his Office, communicating with him frequently as a "conduit" between his office and the APA, distilling reports from "different divisions, directors, and staff" into "precise, to the point, and correct" reports. JA00052; JA00246. Ms. Davison admits she served as Dr. Levin's "eyes and ears" for all things happening within the APA. JA00102. Prior to January 2020, Dr. Levin and Ms. Davison spoke multiple times a day, often stopping by each other's office, which were next to each other at the APA's facilities, to discuss matters of all sorts. JA00052; JA00104-05. Dr. Levin and Ms. Davison also often traveled together on business trips, and Dr. Levin even urged Ms. Davison to bring her mother with them on a trip to Japan. JA00105-06.

B. Dr. Levin's and Ms. Davison's Communication Deteriorated Especially During the Pandemic.

In 2020, Dr. Levin and Ms. Davison had several disagreements about the salary to offer Dr. Nitin Gogtay – an Asian-American man who was the APA's top choice to fill its vacant Chief of Research position – including a conversation that led to an argument in the APA's parking garage. JA00052-53; JA00114-15;

JA00128-31. The argument occurred because Dr. Levin wanted the APA to offer Dr. Gogtay a higher salary than was allowed by the budget, while Ms. Davison insisted doing so would violate the APA's HR policy. JA00129-31. During the argument, Dr. Levin became frustrated with Ms. Davison's position and told her "Excuse me. I'm the CEO. I can pay him whatever I want." JA00132. Ms. Davison later told Dr. Levin the APA had vacancies in Chief positions due to the "pressure,… oversight[,] and micromanagement" he applied to his direct subordinates, and other Chiefs would leave in the near future if such behavior continued. JA00113-15; JA00135-36. Ms. Davison believes the following Chiefs left due to this pressure Dr. Levin exerted: Dr. Tristan Gorrindo and David Keen (both White men); Dr. Ranna Parekh (Asian-American woman), Dr. Phillip Wong (Asian-American man); and Dan Gillison (Black man). JA00053-54; JA00057; JA00060; JA00136-37.

In February 2020, Dr. Levin gave Ms. Davison her 2019 annual performance review, in which he gave her a score of 4.72 out of 5 and wrote: "[o]ur communications… have changed since the discussion on HR and DOR [Director of Research]. I am hoping we can get back to our previous level and openness of communication." JA00217-24. Ms. Davison admitted and agreed the level of communication between her and Dr. Levin dropped after their arguments in early 2020. JA00127. She also agreed Dr. Levin sincerely wanted to return to their

previous level of good communication following their argument about Dr. Gogtay's salary offer. JA00126-27.

In March 2020, before Ms. Davison and Dr. Levin could fix their communication issues, the APA began fully remote work due to the onset of the COVID-19 pandemic. JA00053-54; JA00127. Ms. Davison admitted this change to remote work resulted in even less communication between herself and Dr. Levin. JA00122-24. Dr. Levin felt the levels of communication between himself and Ms. Davison while working remotely were insufficient for a CEO-COS relationship. JA00054; JA00118-19. He noted this repeatedly in Ms. Davison's 2020 performance review, stating:

> (a) Telework has made this harder as we were unable to walk into each others office to discuss the work, issues and staff concerns.
> (b) [W]e were… hampered by not being able to walk into each others office and quickly discuss [issues]… Let us seek to have more regular zoom calls so we can talk about the problems together.
> (c) I agree we did not do well during COVID so far in communicating. Let us… build in times for us to talk together daily. I commit to ensuring the work I am doing you know about. I know you will do the same.
> (d) We both need to do better in daily discussions on the regular work that goes on in your office and mine… Let us work to correct this.

JA00205-15.

On April 20, 2021, Dr. Levin, through Chief Financial Officer ("CFO") Kevin Madden, offered Ms. Davison a bonus if she signed a "Stay Agreement," which Ms.

Davison recognized was an attempt by APA and Dr. Levin to incentivize her to stay at the APA. JA00165-168; JA00237-41. Ms. Davison rejected the Stay Agreement and, on April 22, 2021, she sent an email to Dr. Levin stating "we should discuss a severance package as it is evident that we are at an impasse and our working relationship continues to be strained." JA00163-64; JA00168; JA00234-35. Ms. Davison had actually offered her resignation in exchange for a severance package "once or twice before" she sent this April 22, 2021 email. JA00164-65.

C. Ms. Davison Resigned after Receiving a "Meets Expectations" Performance Review.

In February 2022, Dr. Levin gave Ms. Davison her 2021 annual performance review, rating Ms. Davison's performance in 2021 as 3.82/5 ("Meets Expectations"). JA00; JA00194-203. Throughout the written review, Dr. Levin once again repeatedly noted the communication issues he and Ms. Davison had been having over the past years and looked forward to improving communications in the future:

(a) Our communications were hit and miss and not on a regular basis. I need you to keep me informed as to what the discussions were with the chiefs and staff… I hope we can get back to this communications (sic) we had in the past. Let's work on this…

(b) I believe… what was lacking was our communicating even if it was for 5-10 minutes a day after the day ended… I look forward to us working on this in person but also when we are working from home.

(c) I agree you did [development and coaching] with the chiefs and staff, but you were not communicating what you were doing in coaching. I look forward to us doing this in 2022.

(d) [W]e need to get back to our nightly post work day discussions and catch up.

Id.

On February 15, 2022, Ms. Davison and Dr. Levin met to discuss this performance review. JA00140. It is undisputed Dr. Levin went into the meeting with no intention of terminating Ms. Davison's employment with APA, nor any expectation she would leave APA—instead, Dr. Levin was committed to working with Ms. Davison to restore their communication style to its prior successful level. JA00055. However, during the meeting, Ms. Davison became upset when Dr. Levin questioned her productivity. JA00141; JA00494. She then became even more upset when she and Dr. Levin discussed the "Customer Service" portion of her review after Dr. Levin stated he was Ms. Davison's "customer" and she was there to "serve" him. JA00141-42. Ms. Davison requested another person attend the meeting, at which point CFO Kevin Madden joined. JA00142-43; JA00260. After Mr. Madden joined, Dr. Levin continued with the performance review and repeated the same concerns about their communication. JA00143. Dr. Levin then ended the meeting. JA00144.

As the meeting was ending. Ms. Davison resigned from APA, stating: "Well, I could make my last day March 4 or work through the March 12-13 Board Meeting with a severance package." JA00145-46; JA00148; JA00226; JA00263. Dr. Levin responded "talk to [Mr. Madden] about a [severance] package," and all three left the meeting. JA00146-47. Both Dr. Levin and Mr. Madden understood Ms. Davison's

statement to be an unequivocal resignation, with Dr. Levin able to choose what Ms. Davison's last day would be. JA00251; JA00261-62; JA00266. Ms. Davison raised no facts to dispute Dr. Levin's or Mr. Madden's understanding of her statement. JA00359.

Ms. Davison admits she asked for a severance package in exchange for a later final day of employment specifically due to the upcoming Board meeting, because she knew it would "look bad" for Dr. Levin "if just prior to the board meeting his chief of staff resigned." JA00148-50. Dr. Levin felt this was inappropriate by Ms. Davison. JA00255-56; JA257. He therefore selected March 4 as Ms. Davison's last day. JA00056.

On February 18, 2022, at 5:40 PM, Dr. Levin sent Ms. Davison an email accepting her resignation as of March 4, 2022. JA00157-58; JA00230. At 6:18 PM, 38 minutes later, Ms. Davison sent an email response to Dr. Levin, copying Mr. Madden, stating "Saul I did not submit a formal resignation and I've already started the FMLA process with HR earlier today." *Id.*

Unbeknownst to Dr. Levin, on the morning of February 18, 2022, while out of the office on Paid Time Off, Ms. Davison called Flora Oliphant, APA's benefits coordinator, seeking information about the FMLA process. JA00056; JA00151-54; JA00252-54; JA00269; JA00272-73. On February 18, 2022, at 11:13 AM, Ms. Oliphant sent Ms. Davison an email with information on the FMLA process, copying

and telling ***only*** HR employee Dinera Dussembaev about Ms. Davison's request. JA00155-56; JA00228; JA00269; JA00273-76; JA00279. Ms. Davison admitted she did not tell Dr. Levin, Mr. Madden, or any other executive, about her request for information about FMLA leave prior to her 6:18 PM email on February 18, 2022. JA00151-52; JA00159-60. Dr. Levin's undisputed testimony is that he had no knowledge of Ms. Davison's communications with Ms. Oliphant or her FMLA inquiry when he sent the email accepting March 4 as her resignation date at 5:40 p.m. JA00360-61. Ms. Davison has no evidence to dispute Dr. Levin's testimony and cannot identify anyone who told Dr. Levin about her request for information about FMLA leave prior to his 5:40 PM email that day. *Id.*[3] On February 22, 2022, Dr. Levin gave Ms. Davison a letter memorializing her February 15, 2022 resignation. JA00161-62; JA00232. Ms. Davison's last day of employment with APA was March 4, 2022. JA00056.

D. The Bases for Ms. Davison's Claims.

Ms. Davison admits she does not know why Dr. Levin accepted her resignation, and that she does not know whether race or sex played any part in Dr. Levin's decision to accept her resignation. JA00170; JA00365. She further admits

[3] Mr. Madden was also unaware of Ms. Davison requesting FMLA information prior to receiving Ms. Davison's 6:18 PM email on February 18, 2022, and confirmed she had made any such a request only *after* receiving her 6:18 p.m. email. JA00264.

Dr. Levin never made any derogatory comments about her race or sex, and that he never made any sexualized comments to her. JA00181-83; JA00365.

Ms. Davison bases her hostile work environment claims on eight arguments about work-related issues with Dr. Levin, including the argument about the salary offer for Dr. Gogtay, searches for a new Chief of Research and other appointees, communicating APA's return to the office, Dr. Levin assigning her oversight of HR, who would participate in a hiring search, and Ms. Davison's compensation. JA00115-19; JA00133-34; JA00138-39; JA00166-67. She also bases her sex-based hostile work environment claim on additional comments Dr. Levin made using the words "hon" or "honey" and the phrase "not on my watch, honey" about every other month prior to the pandemic, then only once after the pandemic began. JA00178-80; JA00182-83. She also bases this claim on Dr. Levin asking her to bring in cake for staff events about once a month pre-pandemic, and about four times over the last two years of her employment. JA00176-78.

Ms. Davison bases her retaliation claim on alleged protected activity 15 months before her resignation in December 2020: telling Dr. Levin that, although he was holding listening sessions with APA's Black employees in the wake of George Floyd's murder, he was not holding such sessions for other minority groups. JA00016; JA00170.

Ms. Davison's compensation claim alleges that, between 2019 and 2022, APA had several vacancies in Department Chief positions, and Dr. Levin appointed Chiefs from other departments to act as Interim Chiefs for the vacant positions. JA00004-6; JA00012-5. Dr. Levin decided to provide extra compensation in the form of stipends to only two Chiefs appointed to take on these interim positions: (1) Dr. Tristan Gorrindo, APA's Director of Education, who assumed duties as Interim Chief of Diversity and Health Equity between February and August 2020; and (2) John McDuffie, Chief of Publishing Operations, who assumed duties as Interim Chief of Communication between March and May 2021. JA00057-58; JA00172-73; JA00248. Dr. Levin provided extra compensation to these Interim Chiefs because he felt the added responsibilities were outside their respective areas of expertise and their base salaries were less than others with similar positions at APA. JA00057-59; JA00068-70; JA00072-75; JA00077-80; JA00082-85.

Between January 2020 and May 2021, Dr. Levin assigned Ms. Davison to oversee APA's human resources. JA00059-60; JA00100-01; JA00174-75. Between March 2021 and March 2022, Dr. Levin also assigned Ms. Davison to oversee the governance team, which had previously been under APA's Chief Strategy Officer. *Id.* He did not provide Ms. Davison extra compensation for these interim roles because he did not believe these roles encompassed duties outside Ms. Davison's duties in her role as COS, and because he believed she was already compensated

more generously than other Chiefs of Staff at other organizations. JA00059-60. Dr. Levin also appointed two other individuals, Mr. Madden (white male) and APA's general counsel Colleen Coyle (white female) to be interim heads of HR, and he did not provide them additional compensation for taking on those interim roles. *Id.*

SUMMARY OF ARGUMENT

Ms. Davison alleged the APA violated the DCFMLA by interfering with her leave rights and retaliated against her for inquiring about FMLA leave. These claims failed at summary judgment because it is undisputed that Dr. Levin did not know about Plaintiff's FMLA inquiry when he accepted her resignation.

Ms. Davison also alleged a hostile work environment based on her race (Asian) and sex (female). However, Ms. Davison admitted that Dr. Levin never made any inappropriate racial or sexual comments to her. Ms. Davison's claim is based almost entirely on a handful of work-related arguments or other statements which have no connection to her protected characteristics. The Trial Court found only one comment was related to gender – Dr. Levin occasionally using the expression "not on my watch, honey." This comment, with or without the handful of work-related arguments, does not come close to meeting the requirements of "severe and pervasive conduct" to establish a hostile work environment claim. These claims fail as a matter of law.

Ms. Davison also alleges APA terminated her due to her race, sex, and in retaliation for alleged protected conduct from 2020. These claims also failed because Ms. Davison indisputably resigned and cannot come close to establishing constructive discharge. Her alleged protected activity also occurred in December 2020, 15 months before she resigned in 2022. This attenuated complaint cannot form

the basis of a retaliatory discharge claim, even if she were terminated and did not resign.

Ms. Davison also alleges APA did not pay a stipend that other executives received for taking on additional, but admittedly distinct, interim roles of their own. Under the DCHRA, this pay claim is analyzed under the Equal Pay Act rubric, which precludes Plaintiff from comparing herself to executives in other positions. More importantly, white and male executives in a similar position to Plaintiff also did not receive this stipend, and APA's actions were all based on legitimate and non-discriminatory reasons.

Ms. Davison appealed the lower court's grant of summary judgment on all counts. However, on appeal, she relies only on conclusory statements of discriminatory bias, conjecture of retaliatory animus, and a misapprehension of the grounds for dismissing her equal pay claims—all of which the lower court directly rejected. Ms. Davison identifies no material factual dispute to show the lower court erred in granting summary judgment on all counts. Thus, her appeal lacks merit and should be denied.

ARGUMENT

I. Standard of Review.

The Court reviews the Superior Court's Order granting summary judgment to APA *de novo*, applying the same standard as the Superior Court used in considering the motion for summary judgment. *Cesarano v. Reed Smith LLP*, 990 A.2d 455, 463 (D.C. App. 2010) (citations omitted). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A dispute is "genuine" and precludes summary judgment only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. "Conclusory allegations by the nonmoving party are insufficient to establish a genuine issue of material fact or to defeat the entry of summary judgment." *Hamilton v. Howard Univ.*, 963 A.2d 308, 313 (D.C. App. 2008), citing *Hollins v. Federal National Mortgage Assoc.*, 760 A.2d 563, 570 (D.C. 2000).

II. The Trial Court Did Not Err When It Granted Summary Judgment on Ms. Davison's FMLA Interference and Retaliation Claims.

D.C. Courts evaluate FMLA retaliation claims under the familiar burden-shifting framework established *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *See Waggel v. George Wash. Univ.*, 957 F.3d 1364, 1375 (D.C. Cir. 2020).[4] To

[4] D.C. courts analyzing the DCFMLA rely upon federal FMLA authority. *Guillen-Perez v. District of Columbia*, 415 F. Supp. 3d 50, 68 (D.D.C. 2019).

succeed under this framework, Ms. Davison must first be able to establish a prima facie case of FMLA retaliation or interference. *Id.* If she can do so, "the employer must produce evidence of a legitimate, non-discriminatory reason for its action. If the employer does so, the employee is obligated to produce evidence that the employer's purported legitimate reason was pretextual, and that 'the real reason for the adverse action was retaliation.'" *Holloway v. D.C. Gov't*, 9 F. Supp. 3d. 1, 8 (D.D.C. 2013), quoting *Roseboro v. Billington*, 606 F. Supp. 2d 104, 109-10 (D.D.C. 2009).

A. Ms. Davison Cannot Establish a Prima Facie Claim of DCFMLA Retaliation.

Under the *McDonnell Douglas* framework, "an employee may establish a prima facie case creating a presumption of retaliation by showing (1) that [s]he exercised rights afforded by the FMLA, (2) that [s]he suffered an adverse employment action, and (3) that there was a causal connection between the exercise of [her] rights and the adverse employment action." *Holloway*, 9 F. Supp. 3d at 8, citing *Roseboro*, 606 F. Supp. 2d at 109 (internal quotation omitted). "A materially adverse action is one that might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Cole v. Powell*, 605 F. Supp. 2d 20, 26 (D.D.C. 2009) (cleaned up).

1. *Ms. Davison Cannot Show an Adverse Employment Action.*

As to the second element, resignation is presumed voluntary, and cannot be

considered an adverse employment action, unless shown otherwise. *See Marcus v. Yellen*, 2022 U.S. Dist. LEXIS 157484, *69 (D.D.C. Aug. 31, 2022), citing *Aliotta v. Bair*, 614 F.3d 556, 566 (D.C. Cir. 2010) (holding resignations are presumptively voluntary). "[A]bsent some indication that the employer was trying to drive the employee from the workplace entirely or that the employee 'quit just ahead of the fall of the axe,' the law will not permit a resignation to be transformed into a discharge." *Kalinoski v. Gutierrez*, 435 F. Supp. 2d 55, 78 (D.D.C. 2006), quoting *Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir. 1998).

Here, the undisputed facts prove Ms. Davison was not constructively discharged, but instead resigned.[5] It is undisputed, at the February 15, 2022 meeting, Ms. Davison resigned effective either March 4 or March 14 (with a severance package), with Dr. Levin able to pick Ms. Davison's final day. JA00145-46; JA00148; JA00226; JA00263. Ms. Davison admits she offered Dr. Levin her resignation and the choice of which would be her last day, and that she does not know how Dr. Levin interpreted this statement. *Id.*; JA00170. In fact, Dr. Levin and Mr. Madden both interpreted Ms. Davison's statement as an unequivocal resignation, and the lower court agreed. JA00251; JA00261-62; JA00266; JA00512 n. 2. Although Ms. Davison later attempted to retract her resignation, her attempt to

[5] For the reasons stated in Section IV below, Ms. Davison cannot show constructive discharge as a matter of law.

do so after-the-fact is irrelevant, as the trial court noted:

> "It is important to note that it is undisputed that [Ms. Davison] offered [Dr.] Levin her resignation dates, and her later declared intent cannot change this fact. *See Watson v. D.C. Water & Sewer Auth.*, 923 A.2d 903, 907 (D.C. App. 2007) (holding that "[o]nce an employee voluntarily resigns from her job, the employer's decision not to accept a subsequent withdrawal of that resignation does not transform the employee's act into an involuntary one.")."

JA00512 n. 2.

It is also undisputed Dr. Levin went into the February 15, 2022 meeting with no intention of terminating Ms. Davison's employment with APA, nor any expectation she would leave APA. JA00055. In her brief, Ms. Davison relies on the conclusory assertion she was constructively discharged, but she identified *no facts to support that assertion*. Thus, as in *Kalinoski*, "absent some indication that the employer was trying to drive the employee from the workplace entirely or that the employee "quit just ahead of the fall of the axe," —and especially in light of the undisputed evidence to the contrary—"the law will not permit a resignation to be transformed into a discharge." *Kalinoski*, 435 F. Supp. 2d at 78. The lower court did not err in finding Ms. Davison cannot show she suffered an adverse employment action.

2. *Ms. Davison Cannot Establish a Causal Connection.*

As to the third element, it is axiomatic that an employee "must show that the decision-makers responsible for the [alleged] adverse action had actual knowledge

of the protected activity" to establish a causal connection. *Kolowski v. District of Columbia*, 244 A.3d 1008, 1014 (D.C. App. 2020), quoting *McFarland v. George Washington Univ.*, 935 A.2d 337, 357 (D.C. App. 2007).

Here, the undisputed record shows that Dr. Levin (the decisionmaker) was not aware of Ms. Davison engaging in any FMLA-related activity when he emailed Ms. Davison on February 18, 2022, accepting the March 4 separation date. JA00056; JA00252-54. Ms. Davison admits she cannot dispute the fact that Dr. Levin first heard of her FMLA inquiry 38 minutes ***after*** he sent the February 18 email. JA00360-61. Instead, as the trial court noted, Ms. Davison "simply puts forth the conclusory argument and speculation that [Dr.] Levin must have known" about her FMLA inquiry. JA00512. Because Ms. Davison admitted no personal knowledge of Dr. Levin being told about her FMLA inquiry, and her conclusory assertion to the contrary conflicted all record evidence, the trial court properly found "no genuine dispute as to any material fact at issue" in Ms. Davison's FMLA claim. JA00151-52; JA00159-60; JA00514.

On Appeal, Ms. Davison relies solely on the conclusory (and fact-free) assertion that Dr. Levin must have had knowledge of her FMLA inquiry. She raises no evidence to support this assertion and ignores the trial court's explicit rejection of her baseless speculation. Instead, she points to a single conversation between Ms. Davison and Mr. Madden—which Dr. Levin *did not witness*—and Dr. Levin stating

he "could not recall" anyone telling him about Ms. Davison's FMLA inquiry. Davison Br. at 23-24. However, neither fact contradicts Dr. Levin's testimony that he did not know about Ms. Davison's FMLA inquiry. This speculation cannot overcome the undisputed record, including Dr. Levin's, Mr. Madden's, Ms. Oliphant's and even Ms. Davison's testimony. At bottom, Ms. Davison does not believe Dr. Levin and is asking the Court to reverse based on that speculation alone. As this Court explained in *Kolowski*, this belief is not enough to prevent summary judgment:

> "[A]lthough credibility determinations are left to the province of the jury, not the judge, the non-moving party cannot avoid summary judgment merely by impugning the honesty of the moving party's witness. That is, when an argument in opposition to a motion for summary judgment boils down to an allegation that defense witnesses are lying and when challenges to witnesses' credibility are all that a plaintiff relies on, and [s]he has shown no independent facts—no proof—to support [her] claims, summary judgment in favor of the defendant is proper."

Kolowski, 244 A.3d at 1014.

The exact same situation is present here. Thus, the trial court did not err in concluding there was no genuine issue of material fact as to Ms. Davison's FMLA retaliation claim and that Defendants were entitled to judgment as a matter of law.

B. Ms. Davison Cannot Establish a Claim of DCFMLA Interference.

To establish a *prima facie* case of DCFMLA interference, "a plaintiff must show (1) employer conduct that reasonably tends to interfere with, restrain, or deny

the exercise of FMLA rights, and (2) prejudice arising from the interference." *Waggel*, 957 F.3d at 1376. "An employee terminated for reasons not related to his or her FMLA request or leave, accordingly, lacks an interference claim, even if termination effectively denies an FMLA leave request." *Savignac v. Day*, 486 F. Supp. 3d 14, 43-44 (D.D.C. 2020).

Here, Ms. Davison's claim is that Dr. Levin and the APA accepted her resignation before she could request or take FMLA leave. However, as explained above, it is undisputed Dr. Levin was not aware of Ms. Davison's FMLA activity when he accepted her resignation. The only possible interpretation of the record is that Ms. Davison's employment ended "for reasons not related to her FMLA request." *Savignac*, 486 F.Supp.3d at 43-44. Even if accepting her resignation "effectively denies an FMLA leave request," Ms. Davison's interference claim must fail. *Id.* Thus, as the trial court held, Ms. Davison cannot "establish FMLA interference because [she] provides no evidence that can create a causal connection between the protected activity and alleged adverse action, nor does she provide evidence that [Dr.] Levin had notice of [her] FMLA inquiry at the time" he accepted her resignation. JA00518-19.

On appeal, Ms. Davison once again relies on the unsupported and speculative assertion Dr. Levin did, in fact, know of her FMLA inquiry when he accepted her resignation. This speculation fails because she presents "no independent facts—no

proof—to support [her] claims, summary judgment in favor of the defendant [was] proper." *Kolowski*, 244 A.3d at 1014.

Thus, the trial court also did not err in concluding there was no genuine issue of material fact as to Ms. Davison's FMLA interference claim and that APA was entitled to judgment as a matter of law.

C. Ms. Davison Cannot Show Pretext for DCFMLA Violations.

Defendants' legitimate reason for accepting Ms. Davison's resignation is simple: she gave Dr. Levin a choice of resignation dates, and he chose one. To show this stated reason was mere pretext for retaliation, Ms. Davison was required to "demonstrate that retaliation [or interference] was not just 'a mere factor among many,' but the 'determinative factor' or 'real' and 'true reason' behind the adverse action." *Roseboro*, 606 F. Supp. 2d at 109-10.

The same issue fatal to Ms. Davison's *prima facie* claim is equally fatal to her attempt to show pretext. As explained above, Ms. Davison's request for FMLA information could not possibly have been the "determinative factor" or "true reason" behind Dr. Levin accepting her resignation effective March 4 because Dr. Levin was not aware of her FMLA inquiry. JA00056; JA00252-54; *Roseboro*, 606 F. Supp. 2d at 109-10. Ms. Davison raises no new arguments with respect to pretext than she did regarding her *prima facie* claim, and for the reasons explained above, her argument fails.

Thus, the trial court did not err in finding "no genuine dispute as to any material fact at issue in Count IV" and granting summary judgment in APA's favor.

III. The Superior Court Did Not Err in Granting Summary Judgment on Ms. Davison's Race-Based and Sex-Based Harassment Claims.

Ms. Davison appeals from the trial court's grant of summary judgment on Counts I and II of her Complaint which allege, in part, a hostile work environment based on race and sex. Hostile work environment under the DCHRA based on either protected characteristic requires a showing "(1) that [Ms. Davison] is a member of a protected class, (2) that [she] has been subjected to unwelcome harassment, (3) that the harassment was based on membership in the protected class, and (4) that the harassment is severe and pervasive enough to affect a term, condition or privilege of employment." *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 888 (D.C. App. 2003). Ms. Davison's claims failed because she cannot meet the third or fourth elements.

A. Ms. Davison Cannot Tie Dr. Levin's Alleged Statements to Her Protected Characteristics.

As to the third element, Ms. Davison "must always prove that the conduct at issue was not merely tinged with offensive… connotations, but actually constituted discrimination… because of the employee's protected status." *Clemmons v. Acad. for Educ. Dev.*, 70 F. Supp. 3d 282, 295 (D.D.C. 2014), quoting *Peters v. District of Columbia*, 873 F. Supp. 2d 158, 188-89 (D.D.C. 2012) (excluding from

consideration personnel decisions that lack a linkage of correlation to protected characteristics). Alleged harassment "aris[ing] from personal conflicts between plaintiff and her… supervisor… rather than arising from any discriminatory animus," is insufficient to sustain a claim under the DCHRA. *Clemmons*, 70 F. Supp. 3d at 298, quoting *Nichols v. Truscott*, 424 F. Supp. 2d 124, 140 (D.D.C. 2006).

Here, the record shows a handful of alleged arguments over several years between Ms. Davison and Dr. Levin, which Ms. Davison admits have nothing to do with her race or sex. JA00115-19; JA00133-34; JA00138-39; JA00166-67; JA00365. Instead, the record shows these arguments were all related to work. *Id.* For instance, Ms. Davison's lower performance reviews were explicitly tied to the undisputed less-frequent communication between Ms. Davison and Dr. Levin. JA00194-203. The argument in the garage explicitly related to a disagreement over a salary to offer Dr. Gogtay, independent of any protected characteristics. JA00052-53; JA00114-15; JA00128-31. Ms. Davison also admitted Dr. Levin's management style, led other Chiefs (including several white men) to resign, undercutting any plausible inference of racial or sexual animus. JA00053-54; JA00057; JA00060; JA00113-15; JA00135-37; s*ee Clemmons*, 70 F. Supp. 3d at 298. Other incidents, such as Dr. Levin asking Ms. Davison to get food for APA events and accepting Ms. Davison's resignation, have no ties to her protected characteristics whatsoever.

In granting summary judgment, the trial court evaluated each of these

arguments and specifically noted their work-related nature and lack of indicia of racial or sexual animus in essentially all of them. JA00511-13. Indeed, of the eight incidents relied upon for Ms. Davison's race- and sex-based harassment claims, the Court found seven of them were devoid of animus based on *any* protected characteristic and so were deficient to sustain this claim. JA00511-13; JA00515 ("For the reasons stated in [analyzing Ms. Davison's race-based claim], arguments two (2) through eight (8) weigh in favor of summary judgment for [APA]."). As such, the trial court found Ms. Davison could not establish a race- or sex-based hostile work environment claim as a matter of law. JA00513-14, citing *Baird v. Gotbaum*, 792 F.3d 166, 169 (D.C. Cir. 2015) ("name-calling, rude emails, lost tempers and workplace disagreements" are "uncognizable" under DCHRA) and *Baloch v. Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir. 2008) (sporadic verbal altercations and disagreements do not establish a hostile work environment).

On appeal, Ms. Davison disagrees with the trial court, arguing five of the alleged incidents contained explicit race and sex discrimination, or at least create an inference of race and sex discrimination.[6] Davison Br. at 19-20. Ms. Davison arguments are not based on any record facts, and she has no record citations that

[6] These five incidents are: (1) Dr. Levin "forcing" her to pick up breakfast for APA staff meetings, (2) Dr. Levin calling female employees "hon" or "honey" on occasion, (3) the work-related yelling arguments, (4) Dr. Levin saying Ms. Davison was there to "serve" him during her 2021 performance review, and (5) the lower score in her 2021 performance review. Davison Br. at 19-20.

contradict the trial court's ruling. This is because the record facts show that the work-related arguments and requests that Ms. Davison get food for APA staff meetings contain no indicia, whatsoever, of racial or sexual animus. JA00511-12. Likewise, Ms. Davison points to no evidence, on appeal or below, that her "meets expectations" performance review and Dr. Levin saying she was there to "serve" him are linked to her race or sex, exactly as the trial court ruled. *Id*. This is especially so because Ms. Davison admits the "serve" comment was directly tied to the "customer ***service***" portion of her performance review. Instead, just as she did at summary judgment, Ms. Davison relies only on the conclusory assertion Dr. Levin would not have done so if Ms. Davison were a white man. Davison Br. at 19-20. But such an unsupported and conclusory allegation cannot establish a genuine issue of material fact. *See Hamilton*, 963 A.2d at 313.

Thus, the trial court did not err in finding Ms. Davison failed raise a genuine issue of material fact as to whether all but one alleged incident[7] was based on her protected characteristics, and all such incidents cannot form the basis of a hostile work environment claim.

B. Ms. Davison Cannot Show Severe or Pervasive Behavior.

As for the fourth element, to show sufficiently "severe and pervasive"

[7] The trial court found Dr. Levin referring to women in the workplace as "hon" or "honey" and occasionally stating "not on my watch, honey" related to a gender but were not severe or pervasive, as explained below. JA00515-16.

discriminatory actions, Ms. Davison must identify conduct that "alter[s] the conditions of her employment and create[s] an abusive working environment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998). Courts use an objective standard "to consider the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with the employee's work performance." *Harris v. Forklift Sys.*, 510 U.S. 17, 18 (1993).

Initially, Ms. Davison does not address this issue in her Brief, and on that basis this Court can affirm the trial court's ruling on these claims. Nevertheless, the record shows the work-related arguments, with or without the "honey" comments, fall far below meeting the "severe and pervasive" standard. As the trial court noted, Ms. Davison admits Dr. Levin never said anything derogatory about her race and does not allege that he ever threatened her in any way. JA00365; JA00516. Indeed, Ms. Davison even acknowledged her claim "all comes down to the February 15, 2022 performance evaluation meeting and what truly happened there…"—a solitary event that cannot establish "severe and pervasive" conduct. *See Faragher*, 524 U.S. at 788 ("[I]solated incidents (*unless extremely serious*) will not amount to… changes in the terms and conditions of employment") (emphasis added).

Regarding sex, Ms. Davison testified that Dr. Levin used the term "hon" or

"honey" only ***once*** in the last two years of her employment and this comment was not sexual in nature. JA00178-80; JA00182-83. The trial court correctly found such infrequent and mild comments "do not satisfy the "severe and pervasive" standard." JA00515-16, citing *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 753 (4th Cir. 1996) and *Akonji v. Unity Healthcare, Inc.*, 517 F. Supp. 2d 83, 97-99 (D.D.C. 2007) (touching plaintiff, trying to kiss her, calling her beautiful, and asking her to accompany him on trip, "although by no means ideal" were "not sufficiently severe or pervasive"). Ms. Davison's claim she was asked to bring in cake similarly fails, as she admits this occurred every other month prior to the pandemic, and only four times in the last two years of her employment. JA00176-78. All remaining incidents consist of only isolated incidents, which cannot satisfy the "severe or pervasive" standard in even more extreme circumstances. *See Rattigan v. Gonzales*, 503 F. Supp. 2d 56, 80 (D.D.C. 2007) (comment about possible demotion, rumor of disloyalty, and threatened castration insufficiently severe or pervasive); *Faragher*, 524 U.S. 775 at 788.

The trial court did not err in finding no genuine issue of material fact and granting judgment to APA on Ms. Davison's hostile work environment claims.

IV. The Superior Court Did Not Err in Finding Ms. Davison Resigned and Was Not Constructively Discharged.

Counts I and II also alleged, in part, that Ms. Davison's separation was due to her race or sex.

A. Ms. Davison Resigned and Cannot Show Constructive Discharge as a Matter of Law.

The first element of a prima facie case of discrimination is that Ms. Davison suffered an adverse employment action. *Ferguson v. Wash. Metro. Area Transit Auth.*, 630 F. Supp. 3d 96, 113 (D.D.C. 2022). It is undisputed, and the record conclusively shows, Ms. Davison resigned, which cannot be an adverse employment action absent constructive discharge. *See Kalinoski*, 435 F. Supp. 2d at 78, citing *Lindale*, 145 F.3d at 955. To show constructive discharge, Ms. Davison must show (1) she experienced a hostile work environment and (2) that her "working conditions [were] so intolerable that a reasonable person would have felt compelled to resign." *Steele v. Salb*, 93 A.3d 1277, 1282 (D.C. App. 2014).

As explained above, Ms. Davison cannot show she suffered from a hostile work environment as a matter of law. The insufficiencies of her hostile work environment claims are fatal to her claim of constructive discharge. *Steele*, 93 A.3d at FN. 3 ("to prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment."). Indeed, courts routinely dismiss constructive discharge claims when the plaintiff bases that claim on the same insufficient grounds as a harassment claim. *See*, e.g., *Joyner v. Sibley Mem. Hospital*, 826 A.2d 362, 372-73 (D.C. 2003). For this independent reason alone, the trial court did not err in concluding Ms. Davison resigned, was not constructively discharged, and thereby

cannot establish a discriminatory discharge claim.

Moreover, the record shows Ms. Davison resigned immediately after receiving a performance rating of 3.85 out of 5, a "meets expectations" rating. As a matter of law, performance-related conduct even much more severe than such a benign review cannot establish constructive discharge. *See Nuriddin v. Bolden*, 674 F. Supp. 2d 64, 94 (D.D.C. 2009) ("removal of important assignments, lowered performance evaluations, and close scrutiny of assignments" is not "sufficiently intimidating or offensive in an ordinary workplace context.").

Ms. Davison must show, under an objective lens, that "a *reasonable* employee would have concluded that the conditions made remaining in the job unbearable" and thus would have felt compelled to resign. *Kalinoski*, 435 F. Supp. 2d at 78, quoting *Lindale*, 145 F.3d at 956. The record cannot support any finding of constructive discharge. Dr. Levin and Ms. Davison had gotten in prior, more heated arguments before (e.g. the Dr. Gogtay salary argument), and Ms. Davison had continued in the job afterwards. Ms. Davison simply chose to resign from APA of her own volition after receiving a decent-but-not-stellar performance review, which is nowhere close, as a matter of law, to a constructive discharge.

Notably, Ms. Davison does not raise any facts or mistakes by the trial court regarding her alleged constructive discharge. Instead, she relies on the same conclusory assertion of constructive discharge, with no supporting facts. For this

reason as well, the trial court did not err in determining Ms. Davison's constructive discharge claim, and claim of discriminatory termination, fail as a matter of law.

B. Even if Ms. Davison Could Establish Constructive Discharge, Her Race/Sex Termination Claims Still Fail as a Matter of Law.

"[W]here an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for [its] decision, the [Court] need not—and should not—decide whether the plaintiff actually made out a *prima facie* case…" *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). The Court must evaluate whether Ms. Davison "produced sufficient evidence for a reasonable jury to find that [APA's] asserted non-discriminatory… reason was not the actual reasons and that [APA] intentionally discriminated… against [her]." *Walker v. Johnson*, 798 F.3d 1085, 1092 (D.C. Cir. 2015).

Even if Ms. Davison's separation constituted an adverse employment action, there is zero record evidence suggesting race or sex was the reason. Ms. Davison admits Dr. Levin never made any derogatory comments about her race or sex. JA00365. Her resignation occurred during her performance evaluation meeting, and it is undisputed Dr. Levin had no intention of terminating Ms. Davison in that meeting. JA00055. Instead, Dr. Levin wanted to improve his communication levels with Ms. Davison and resume their productive working relationship. *Id.*

It is also undisputed that Dr. Levin chose the earlier of two resignation dates

Ms. Davison offered because he was offended that she leveraged the fact that her resignation before the next Board meeting would make him look bad to the Board. JA00056. Indeed, she admitted to realizing and leveraging that exact fact because she wanted a severance package. JA00148-50. Nothing in these facts indicates race or sex played any part, whatsoever, in Dr. Levin's decision. Indeed, Ms. Davison does not even argue to the contrary in her Brief.

Thus, for this reason as well, the trial court did not err in finding Ms. Davison could not establish a discriminatory termination claim as a matter of law.

V. The Superior Court Did Not Err in Granting Defendants Summary Judgment on Ms. Davison's Retaliation Claim.

In Count III, Ms. Davison alleged that Dr. Levin constructively discharged her in February 2022 due to alleged protected activity in 2020. JA00016; JA00170. This claim is analyzed using the same approach as Ms. Davison race/sex termination claims, namely in that once an employer produces a non-retaliatory reason for the employee's removal—as APA has done here—the court is required to analyze that reason for pretext of retaliation rather than first analyzing the prima facie claim. *Ajisefinni v. KPMG LLP*, 17 F. Supp. 3d 28, 46 (D.D.C. 2014) (applying *Brady* in the retaliation context). Here, Ms. Davison's retaliation claim fails for the same reasons as her discriminatory discharge claim – she resigned and was not constructively discharged as a matter of law.

In addition, and as the trial court found, Ms. Davison has no record evidence

to show her alleged protected activity ***in 2020*** had anything to do with her February 2022 performance review or Dr. Levin choosing March 4 as her last day. JA00517. First, Ms. Davison's claim fails as a matter of law because her alleged protected activity in December 2020 has no temporal proximity to her resignation 15 months later. *Harris v. Trustees of the Univ. of the D.C.*, 567 F. Supp. 3d 131, 160 (D.D.C. 2021) (granting summary judgment because three months between protected activity and adverse employment action is insufficient to show temporal proximity); *see also Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-4 (2001) (*per curiam*) (citing with approval circuit cases rejecting temporal proximity of three and four months as evidence of causation). This is especially true here because Dr. Levin approved offering Ms. Davison a Stay Agreement and bonus in 2021, between the alleged protected activity and Ms. Davison's resignation, because he wanted her to remain at APA. DMF ¶¶ 28-29. It makes no sense that Dr. Levin would want Ms. Davison to remain employed in 2021 but then decide to retaliate against her in February 2022.

Second, Ms. Davison's claim fails because the undisputed record shows Dr. Levin had no intention of terminating Ms. Davison's employment in February 2022 and had wanted their communications to improve. JA00056. Ms. Davison has no evidence to the contrary, and she admitted as much. In light of these facts, no reasonable jury could find Dr. Levin accepting Ms. Davison's resignation was in any way tied to her alleged protected activity from 15 months before. Thus, the trial court

did not err in finding no genuine issue of material fact, and granting summary judgment to APA, on Ms. Davison's retaliatory termination claim.

VI. Ms. Davison Cannot Establish a Disparate Pay Claim.

Ms. Davison also asserted claims of pay disparity in Counts I and II, based on the allegation APA did not give her a stipend for taking on additional duties, while other Chiefs received stipends when they took on other additional duties. Pay claims under the DCHRA are governed and "construed harmoniously with" the framework of disparate pay under the federal Equal Pay Act. *Frett v. Howard Univ.*, 24 F. Supp. 3d 76, 85 (D.D.C. 2014); *Franks v. Edison Elec. Inst.*, 2022 U.S. Dist. LEXIS 60930 (D.D.C. March 31, 2022).

A. Ms. Davison Cannot Establish a *Prima Facie* Case of Pay Disparity.

To establish a *prima facie* case, Ms. Davison must show that APA "paid her . . . counterparts more money 'for equal work'—that is, for jobs requiring 'equal skill, effort, and responsibility' and 'performed under similar working conditions.'" *Musgrove v. Gov't of the Dist. of Columbia*, 458 Fed. Appx. 1, 2 (D.C. Cir. 2012). Courts look to the "actual job requirements and performance" of the positions to determine whether they are "substantially related and substantially similar in skill, effort, responsibility and working conditions." *Baker-Notter v. Freedom Forum, Inc.*, 2022 U.S. Dist. LEXIS 45882, *20 (D.D.C. Mar. 15, 2022).

Ms. Davison based her claims on the fact that she was not paid a stipend for

temporarily overseeing the HR department and the Chief Strategy Office, "while members outside her protected class were given stipends when asked to take on larger workloads." JA00511. Her claim fails for several reasons.

First, it is undisputed APA did not pay Colleen Coyle or Kevin Madden a stipend for temporarily overseeing HR, that Ms. Coyle and Mr. Madden are both white, and that Mr. Madden is male. JA00059-60. These are the employees most similarly situated to Ms. Davison, and they were treated exactly like Ms. Davison.

Second, it is also undisputed Ms. Davison's alleged comparators—Dr. Tristan Gorrindo and John McDuffie—assumed ***different*** interim positions than Ms. Davison. Neither oversaw HR or the Strategy Office; instead, Dr. Gorrindo oversaw Diversity and Health Equity, and Mr. McDuffie oversaw Communications. JA00057-58. Neither alleged comparator had the same "actual job requirements" as Ms. Davison, and so they are inappropriate comparators as a matter of law. *See Baker-Notter*, 2022 U.S. Dist. LEXIS 45882 at *20.

Third, it is also undisputed that Ms. Davison's Chief of Staff position is entirely different from Dr. Gorrindo's permanent Chief of Education position and Mr. McDuffie's permanent Chief of Publishing Operations position. JA00068-70; JA00072-75; JA00077-80; JA00082-85. As a matter of law, Ms. Davison cannot base a pay claim on a comparison to executives in different C-level positions because "unique upper-management positions… foreclose relief under the EPA." *Randall v.*

Rolls-Royce Corp., 742 F. Supp. 2d 974, 985-86 (S.D. In. 2010); *Martinez v. Davis Polk & Wardwell LLP*, 713 Fed. Appx. 53, 55 (2d. Cir. 2017) (summary judgment as plaintiff had "unique position" that forecloses "equal work inquiry"); *Musgrove*, 458 Fed. Appx. at 2 (principals in different schools cannot maintain pay claim).

And fourth, the undisputed facts confirm Dr. Gorrindo and Mr. McDuffie were inappropriate comparators for other reasons. For instance, Mr. McDuffie ***made less*** than Ms. Davison overall, meaning he cannot be used to support Ms. Davison's equal pay claim. *See Musgrove*, 458 Fed. Appx. at 2 (a plaintiff must show her employer "paid her . . . counterparts *more money* 'for equal work.'") (emphasis added). Ms. Davison's COS salary was $275,562, while Mr. McDuffie's base salary was $225,195, and his stipend was $8,666.67 for two months. JA000058-60. Furthermore, Dr. Gorrindo also possessed a medical doctorate degree, which Ms. Davison did not. JA000057-58. For this reason as well, he is an inappropriate comparator. *Musgrove*, 458 Fed. Appx. at 2.

In her Brief, Ms. Davison attempts to rewrite the analysis of equal pay claims entirely, hoping to do away with the comparator requirement that is fatal to her claim. Davison Br. at 21. She cites no legal authority for this proposition because no such authority exists. Instead, she attempts to draw the court into a "comparable worth" analysis, essentially asking the court to judge whether her assumption of interim duties was equally or more valuable than others who did the same. This

proposed analysis contradicts D.C. law (and all other U.S. law) on pay claims, as "comparable worth" claims are not cognizable under the DCHRA as a matter of law. *See Baker-Notter v. Freedom Forum, Inc.*, 2022 U.S. Dist. LEXIS 45882, *26 (D.D.C. Mar. 15, 2022), citing *Washington Cnty. v. Gunther*, 452 U.S. 161, 166 (1981). Thus, her argument on appeal fails.

Simply put, because Ms. Davison failed to identify any appropriate comparators, the trial court did not err in finding her equal pay claim failed as a matter of law.

B. Ms. Davison Has No Evidence that Dr. Levin's Stipend Decisions Were Based on Race or Gender.

Even if Ms. Davison could show a *prima facie* case of pay disparity—which she cannot—she cannot show Defendants' legitimate reasons for these decisions were pretext for discrimination. The record shows Dr. Levin provided Dr. Gorrindo and Mr. McDuffie stipends for assuming their interim roles because (1) he felt they were under-compensated compared to their peers, and (2) the departments they were being asked to oversee were not closely related to their regular duties. JA000057-59. Meanwhile, Dr. Levin did not feel Ms. Davison's salary or assumption of the interim HR and Chief Strategy Office duties warranted a similar stipend. JA000059-60. As such, "the appropriate inquiry to determine if the factor[s] put forward [are] pretext, is whether the employer has used the [non-discriminatory] factor[s] reasonably in light of the employer's stated purpose as well as its other practices."

Franks, 2022 U.S. Dist. LEXIS 60930 at *9.

Here, the facts show APA's and Dr. Levin's actions were reasonable. Ms. Davison's job description shows she had numerous personnel-related duties and duties relating to overall APA strategy—overlapping with the duties she assumed in HR and in the Chief Strategy Office. JA000087-90. The record also shows Dr. Levin believed Ms. Coyle and Mr. Madden, both of whom assumed the same HR duties as Ms. Davison had a similar overlap in duties and thus did not receive a stipend. JA000059-60. Ms. Davison asserted no evidence to the contrary, whatsoever.

In her Brief, Ms. Davison argues Dr. Levin created a "question of fact as to his credibility" by testifying he "did not think [Ms. Davison] was in her position long enough to review performance evaluations." Davison Br. at 22. This argument is a red-herring and has no relevance to Dr. Levin's stipend decisions or the trial court's reasoning in granting summary judgment. There is no record evidence to suggest that Ms. Davison reviewing performance evaluations impacted whether she received a stipend, or that Dr. Levin provided stipends on a per-task basis. Instead, the record shows he based his decisions on whether (1) the Chief was underpaid compared to their peers and (2) the interim duties assumed overlapped with the Chief's permanent position. JA000057-60. Dr. Levin's knowledge of whether Ms. Davison reviewed performance evaluations is irrelevant and cannot create a genuine issue of material fact. *See Anderson*, 477 U.S. at 248 (a dispute of fact is only "genuine" "if the

evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

Notably, Ms. Davison's Brief does not even attempt to address the differences between her position and her comparators' positions because these are entirely different roles, which by itself entitles Defendants to summary judgment on this claim. *See*, e.g., *Randall*, 742 F. Supp. 2d at 985-86. Thus, for all these reasons, the lower court did not err in finding no genuine issue of material fact as to Ms. Davison's pay disparity claim.

CONCLUSION

For all the reasons stated above, Appellees the American Psychiatric Association and Dr. Saul Levin respectfully request this Court uphold the Judgment and Order of the D.C. Superior Court granting summary judgment to Appellees on all counts.

Date: April 3, 2025

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2025, the foregoing Appellees' Response Brief was electronically filed with the Clerk's Office through the Court's electronic filing system, which will serve the same upon Appellant's counsel of record:

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