No. 22-CV-19

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DAMIAN STEVENSON,
Appellant,

v.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

And

GEORGE SPEARS

Appellees.

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

BRIEF OF APPELLEES DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY and GEORGE SPEARS

July 8, 2022

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Appellant Damian Stevenson ("Appellant" or "Mr. Stevenson") appeals from final orders of the Superior Court of the District of Columbia granting The District of Columbia Water and Sewer Authority ("DC Water") and George Spears' ("Mr. Spears") (collectively "Appellees") Motion for Summary Judgment and denying Mr. Stevenson's Motion for Reconsideration. The Orders of the Superior Court dispose of all Parties' claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the Superior Court erred in granting summary judgment to Appellees in finding that Appellant did not file a Statement of Material Facts in Dispute.[1]

II. Whether the Superior Court erred in granting summary judgment and finding that Appellees' facts were undisputed.

III. Whether the Superior Court erred in granting summary judgment on Appellant's race discrimination claim.

IV. Whether the Superior Court erred in granting summary judgment on Appellant's retaliation claim.

[1] Appellant's Statement of the Issues Presented for Review are expanded from its Notice of Appeal of January 11, 2022. JA395. By listing the same issues and responding in full to Appellant's Brief, Appellees are not waiving their right to argue the Court of Appeals' review should be limited to those questions posed in the Notice of Appeal.

V. Whether the Superior Court erred in denying Appellant's motion for reconsideration.

STATEMENT OF THE CASE

From on or about April 6, 2015, DC Water employed Mr. Stevenson as a Sewer Services Worker. On June 11, 2019, DC Water terminated Mr. Stevenson for violating DC Water's Workplace Violence Policy after repeated complaints by co-workers concerning Mr. Stevenson's threatening statements or actions. All told, Mr. Stevenson engaged in aggressive, hostile altercations with no less than seven different co-workers over the course of a 22-month period at the end of his employment. Mr. Stevenson then brought claims alleging discrimination and retaliation under the District of Columbia Human Rights Act ("DCHRA") and wrongful termination.

Appellees filed a Motion for Summary Judgment and Statement of Material Facts as to Which There is No Genuine Issue ("Appellees' Statement"), which demonstrated that there were no genuine issues of material fact in dispute. Appellees also showed they were entitled to judgment as a matter of law when Appellant failed to sufficiently demonstrate a *prima facie* case for its claims. The Superior Court granted Appellees' Motion for Summary Judgment, as Appellant's Opposition to Appellees' Motion for Summary Judgment ("Appellant's Opposition"), including his Statement of Material Facts in Dispute ("Appellant's

Statement"), was both procedurally and substantively deficient. Mr. Stevenson not only failed to correspond Appellant's Statement with the numbered paragraphs as submitted by Appellees, but more significantly, Mr. Stevenson failed to specifically articulate genuine issues of material facts that were in dispute. Instead, Mr. Stevenson provided the Superior Court with impertinent facts regarding his positive performance with DC Water and the alleged disciplinary issues of his former supervisor.

Thereafter, Mr. Stevenson filed a Motion for Reconsideration claiming, as he does in this appeal, the trial court failed to fully review his Opposition and Appellant's Statement. However, the Superior Court, directly addressed this allegation in its Order denying his Motion for Reconsideration, holding while Mr. Stevenson had filed a "Statement," he did not actually demonstrate disputes of any material facts as put forth in Appellees' Statement and Motion for Summary Judgment. In this appeal, Mr. Stevenson again seeks to resuscitate his claims, despite having the same fatal flaws – Mr. Stevenson's inability to plead genuine issues of material fact, coupled with his failure to demonstrate the *prima facie* elements of his claims. This Court should also reject Mr. Stevenson's baseless claims and affirm the Superior Court's two Orders.

STATEMENT OF FACTS

A. Mr. Stevenson is Employed by DC Water.

On April 6, 2015, Mr. Stevenson was hired to work for DC Water as a Sewer Services Worker 09/CDL. JA054 at ¶ 8. Throughout his employment, DC Water maintained an Equal Employment Opportunity Policy that expressly prohibits discrimination based on race and establishes an internal complaint procedure for those who believe they have been discriminated against. JA054 at ¶¶ 5-6. DC Water also maintains a Workplace Violence policy that prohibits violence, threats, and intimidation on DC Water's property. JA054 at ¶ 7. Mr. Stevenson was supervised at all relevant times by Foreman, Utility Services, Jayson Poland ("Mr. Poland"). JA055 at ¶ 12. Throughout his employment, Mr. Stevenson made multiple complaints about his co-workers, but between the date on which he was hired and February 25, 2019, he never experienced an adverse employment action. *See* JA055-9 at ¶¶ 15, 17-18, 20-22, 26-29, 44, 46-48, 50.[2] Similarly, several of Mr. Stevenson's co-workers reported numerous complaints against him over the same time period for making threatening statements or actions toward them for which Mr. Stevenson was not disciplined until February 25, 2019. JA056-8 at ¶¶ 23-24, 30-36, 38-41.

[2] Indeed, in February 2016, after an alleged incident between Mr. Stevenson and Kevin Jhingory, Mr. Poland required Mr. Jhingory to apologize to Mr. Stevenson. JA055 at ¶ 17.

B. Mr. Stevenson Threatens Several Co-Workers.

On January 10, 2019, General Foreman Kevin Jhingory filed an oral complaint with DC Water,[3] alleging Mr. Stevenson raised his middle finger toward him several times and later told him that he knew where Mr. Jhingory lived before repeating the name of his neighborhood, which Mr. Jhingory interpreted as a threat. JA059 at ¶¶ 51-53. In the same complaint, Mr. Jhingory complained that on January 10, 2019, Mr. Stevenson entered the restroom behind Mr. Jhingory, wedged the door shut, and stated "What's up nigga?" JA059 at ¶¶ 54-55. After hearing another individual in the restroom, however, Mr. Jhingory stated Mr. Stevenson told him "You lucky we got witnesses," and exited the restroom. JA059-60 at ¶¶ 56-57. In response to Mr. Jhingory's complaint, DC Water investigated the allegations and placed Mr. Stevenson on paid administrative leave on February 25, 2019. JA060 at ¶¶ 58, 62-63. On March 18, 2019, after completing its investigation, DC Water issued Mr. Stevenson a thirty (30) work-day suspension for his conduct. JA061 at ¶¶ 64-65.

Following his suspension, on April 30, 2019, Mr. Stevenson returned to work but immediately had altercations with two employees, Kevin Poge and Kenneth Morgan. JA061-2 at ¶¶ 66-71. Mr. Poge and Mr. Morgan filed two

[3] Mr. Jhingory followed this oral complaint with a written statement on January 16, 2019. JA059 at ¶ 51.

separate complaints against Mr. Stevenson for making threatening statements to them. JA061 at ¶¶ 68, 70. Specifically, on April 30, 2019, Mr. Poge, a union representative, complained that before he got into the building that morning to begin the workday, Mr. Stevenson approached him chanting "The Union is some shit and Poge will sell you out" and threatened him by telling him he knew where Mr. Poge lived and repeating Mr. Poge's home address. JA061 at ¶ 68. Mr. Morgan claimed Mr. Stevenson approached him that same morning talking about him and one of his family members; Mr. Stevenson bragged he "took the air out of [Mr. Morgan's] balloon" and "showed the public the monkey behind the curtain," referring to Mr. Morgan. JA061-2 at ¶¶ 70-71.

In total, Mr. Stevenson admitted to engaging in aggressive, hostile altercations with no less than seven different co-workers over the course of 22 months. In response to these new allegations, DC Water again placed Mr. Stevenson on paid administrative leave and after a full investigation, terminated his employment effective June 12, 2019. JA062 at ¶¶ 72-75.

C. Mr. Stevenson Files His Complaint Alleging Discrimination and Attempts to Make Up for Discovery Failures After the Deadline.

Mr. Stevenson filed a Complaint on February 28, 2020, alleging Appellees violated the DCHRA and DC Water violated "D.C. public policy" by suspending and later terminating his employment. JA013-14 at ¶¶ 17-25. The Parties participated in written and oral discovery. On September 14, 2020, DC Water and

Mr. Spears served their First Request For Production of Documents on Mr. Stevenson. JA SUPPL 005; JA SUPPL 014 at ¶6; JA SUPPL 029-41.[4] On October 23, 2020, Mr. Stevenson served his responses to DC Water's First Request For Production of Documents. JA SUPPL 006; JA SUPPL 014 at ¶ 7; JA SUPPL 044-61.

Discovery in this matter was scheduled to close on January 7, 2021, but was extended upon request of Mr. Stevenson. Discovery closed on February 8, 2021 and on March 10, 2021, Appellees filed their Motion for Summary Judgment. JA024. On April 21, 2021, Mr. Stevenson served a supplemental production of documents on DC Water and Mr. Spears (hereinafter "Late Supplemental Production"). JA SUPPL 014 at ¶ 9.

The Late Supplemental Production consists of 64 pages of documents marked as "CONFIDENTIAL" and containing two different sets of Bates stamps. *Id.* Most of these documents were produced by DC Water to Mr. Stevenson's counsel in a previous litigation matter not involving Mr. Stevenson and were marked as confidential under a 2016 protective order, which is still in place. JA SUPPL 015 at ¶10.

[4] As detailed further in its Motion to Supplement the Record, Appellees have filed Appellees' Supplemental Appendix, which is labeled JA SUPPL 001 through JA SUPPL 089.

On November 6, 2015, David Branch, counsel for Mr. Stevenson, filed a lawsuit in the Superior Court against DC Water, Jayson Poland, Regis Dunbar, and Cuthbert Braveboy on behalf of Donald Montgomery. *See Montgomery v. District of Columbia Water et al*., Case No. 2015 CA 008635 B.[5] On February 26, 2016, Mr. Montgomery and DC Water filed a Stipulated Protective Order, which Judge Robert Rigsby granted on March 18, 2016. JA SUPPL 013-14 at ¶ 3; JA SUPPL 017-26.

Pursuant to the Protective Order, any documents marked CONFIDENTIAL shall be used solely for conducting the litigation of Case No. 2015 CA 008635 B. JA SUPPL 021-2 ¶ 6-7. Additionally, upon final termination of the litigation, counsel was required to destroy or return to opposing counsel all documents marked CONFIDENTIAL. JA SUPPL 024 at ¶ 13. Moreover, the "Protective Order and the obligation to maintain confidentiality shall survive the termination of this Litigation [Case No. 2015 CA 008638 B] and shall continue in full force and effect." JA SUPPL 025 at ¶ 17.

D. Mr. Stevenson Files His Opposition Relying on the Late Supplemental Production and other Improper Documents.

On April 22, 2021, Mr. Stevenson filed his Opposition, substantially relying upon 13 supporting exhibits, of which 10 were either not produced during

[5] It has long been settled that a court may take judicial notice of its own records. *Washington v. United States*, 760 A.2d 187, 194 (D.C. 2000).

discovery, are confidential, and/or are inadmissible based on the protective order. JA206-326. Accordingly, Appellees then moved to strike Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, and 12 to Mr. Stevenson's Opposition. JA SUPPL 002-65; JA SUPPL 083-90. The Superior Court never ruled on Appellees' Motion to Strike. JA006-7.

On July 12, the Superior Court issued an Order granting Appellees' Motion for Summary Judgment, finding Mr. Stevenson had failed to establish his retaliation and discrimination claims under the DCHRA. JA344-56. Considering this finding, the Court concluded Mr. Stevenson's wrongful termination claim must also fail. *Id*.

Despite the Superior Court's clear and well-reasoned opinion, on August 9, 2021 Mr. Stevenson filed a Motion for Reconsideration, which was denied. Mr. Stevenson's principal argument in his Reconsideration Motion was the Superior Court "apparently did not see or review" his Statement and this error "caused the [Superior] Court to misapprehend the facts and accept as undisputed, facts which were actually in dispute[,]" creating an error of law. JA362. The Superior Court rejected this line of reasoning, stating it "did not fail to review Plaintiff's statement, misapprehend the facts, or err in considering the legal issues." JA393. On January 11, 2022, Mr. Stevenson filed his Appeal. JA395.

SUMMARY OF THE ARGUMENT

The Superior Court did not err when it granted summary judgment. The court, after reviewing the record, including Mr. Stevenson's woefully insufficient Opposition, found Mr. Stevenson had failed to demonstrate there were material facts in genuine dispute. Mr. Stevenson's inability to conform with Rule 56(b)(2)(B) of the District of Columbia Superior Court Rules of Civil Procedure and to dispute the uncontested facts put forward by Appellees was fatal to his argument against summary judgment and now to his Appeal. Further, Appellees were entitled to judgment as a matter of law as Mr. Stevenson was unable to demonstrate *prima facie* cases for his claims.

Similarly, the Superior Court did not err when it denied Mr. Stevenson's Motion for Reconsideration. Mr. Stevenson's principal argument is that the Superior Court failed to review his pleadings; however, this assertion is belied by the Order granting Summary Judgment and denying Mr. Stevenson's Motion to Reconsider. Instead of disputing Appellees' facts in the manner required by its Rules, the Court recognized Mr. Stevenson averred irrelevant additional information. JA347. Clearly, the Court read and reviewed Mr. Stevenson's alleged facts in making its ruling—it was just insufficient to raise genuine issues of material fact. There is no error of law here, thus, the Superior Court properly assessed the record and found no support for Mr. Stevenson's claims.

STANDARD OF REVIEW

The Court of Appeals reviews a grant of summary judgment "*de novo*, applying the same standard utilized by the trial court." *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001). Summary judgment "should be granted whenever it is shown 'that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994) (quoting Super. Ct. Civ. R. 56(c)). Though D.C. courts must view the evidence in the light most favorable to the non-moving party, mere conclusory allegations by the non-moving party are legally insufficient to preclude entry of summary judgment. *Tobin v. John Grotta Co.*, 886 A.2d 87, 89–90 (D.C. 2005) (citing to *Joeckel v. Disabled Am. Veterans,* 793 A.2d 1279, 1281 (D.C. 2002)). "Thus, a party opposing a motion for summary judgment must produce at least enough admissible evidence to make out a *prima facie* case in support of his claim." *Jane W. v. President and Dirs. of Georgetown College*, 863 A.2d 821, 826 (D.C. 2004) (internal citations omitted).

The moving party's "initial responsibility" when moving for summary judgment is to inform the court that the record "demonstrate[s] the absence of a genuine issue of material fact." *Musa*, 644 A.2d at 1002 (D.C. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). After the moving party meets this standard, the burden shifts to the non-moving party "to make a showing

sufficient to establish the existence of an element to that party's case, and on which that party will bear the burden of proof at trial." *Id.* (quoting *Celotex*, 477 U.S. at 323).

The Court of Appeals reviews orders denying motions for reconsideration under an abuse of discretion standard. *Tobin*, 886 A.2d at 90 (citing to *Forgotson v. Shea*, 491 A.2d 523, 528 (D.C. 1985)).

ARGUMENT

A. THE D.C. SUPERIOR COURT CORRECTLY GRANTED SUMMARY JUDGMENT

Because Mr. Stevenson failed to demonstrate there are genuine disputes of material fact or that he could demonstrate *prima facie* cases for his claims, DC Water and Mr. Spears were entitled to summary judgment. The Superior Court did not err in finding for Appellees.

1. Mr. Stevenson Failed to Object to Any of Appellees' Statement of Material Facts and therefore, the Facts are Not Disputed.

In his Opposition to Appellees' Motion for Summary Judgment, Mr. Stevenson failed to dispute any of Appellees' material facts not in genuine dispute. Rules 12-I(k) and 56(e) require that he state all material facts as to which he contended there existed a genuine issue. The failure of a party opposing summary judgment to provide support for contentions of a factual dispute should result in the Court's acceptance of the moving party's statement as undisputed absent clear

support for any such contention from the record. *Williams v. Gerstenfeld*, 514 A.2d 1172, 1176-77 (D.C. 1986). Here, support in the record for Appellees' Statement was contained in the depositions and affidavits which were correctly referenced in Appellees' statement; therefore, this Court should accept Appellees' Statement in resolving this appeal. *Vessels v. Dist. of Columbia*, 531 A.2d 1016, 1018 (D.C. 1987).

Despite Mr. Stevenson's attempts to manufacture a dispute, the material facts relevant to his claims are undisputed. Indeed, Mr. Stevenson admitted the following key facts, among others.[6] On June 1, 2017, Mr. Stevenson had an altercation with co-worker Terrance Hunter, and on August 4, 2017, Mr. Stevenson was issued a Letter of Direction for his inappropriate and inconsiderate behavior with Mr. Hunter. JA056 at ¶¶ 23-29. On June 27, 2017, Mr. Stevenson had a verbal altercation with co-worker James Herbert during a meeting. *Id.* at ¶ 24. On February 21, 2018, Mr. Stevenson had a verbal altercation with co-workers Mr. Herbert and Jonathan Wiley at a Union meeting. JA057 at ¶ 30. On or about June 15, 2018, Mr. Stevenson had a verbal altercation with co-worker Reginald Howell. *Id.* at ¶ 35. On or about September 7, 2018, Mr. Stevenson had another verbal altercation with Mr. Hunter. JA058 at ¶ 41. On February 5, 2019, Mr. Stevenson

[6] In the interest of brevity, Appellees have not summarized every paragraph of its Appellees' Statement which Mr. Stevenson failed to dispute.

and Mr. Herbert engaged in another verbal altercation. JA060 at ¶ 59. On April 30, 2019, the day Mr. Stevenson returned from suspension for an altercation with the General Foreman, Mr. Jhingory, he once again engaged in a verbal altercation with several co-workers. JA061-2 at ¶¶ 67-71. On April 23, 2018, Mr. Wiley filed a complaint against Mr. Stevenson. JA057 at ¶ 33. On July 25, 2018, Mr. Howell filed a complaint against Mr. Stevenson. *Id.* at ¶ 36. On January 16, 2019, Mr. Jhingory filed a complaint against Mr. Stevenson alleging workplace violence for incidents on January 9 and January 10, 2021. JA059-60 at ¶¶ 51-8.

Accordingly, Mr. Stevenson has admitted to engaging in aggressive, hostile altercations with no less than seven different co-workers over the course of 22 months—including on the day he returned from suspension for the exact same threatening behavior.

2. The "Evidence" Cited by Mr. Stevenson in His "Factual Allegations" Fails to Create a Disputed Material Fact.

First, Mr. Stevenson failed to comply with the Superior Court Rules in opposing Appellees' Motion for Summary Judgment. Not only did he not dispute any of Appellees' material facts, he failed to properly set forth his own purported facts. "A party opposing the motion must file a statement of the material facts that the opponent contends are genuinely disputed. The disputed material facts must be stated in separate numbered paragraphs that correspond to the extent possible with the numbering of the paragraphs in the movant's statement." DC Sup. Ct. R. Civ.

Pro. Rule 56(b)(2)(B) (2021). Instead, Mr. Stevenson devotes numerous pages of his Appellant Statement to discussing a non-comparator to obfuscate the relevant issues in this matter.

Second, Mr. Stevenson relies on unsupported, inadmissible evidence. In *Montgomery v. District of Columbia Water*, DC Water produced documents to Mr. Stevenson's counsel regarding Mr. Poland. JA SUPPL 014 at ¶ 5. This production included Exhibits 2-10 and 12, all of which were marked "CONFIDENTIAL" in accordance with the Protective Order.[7] *Id.* Mr. Stevenson's counsel has now improperly used these documents in the instant litigation. According to the terms of the Protective Order, these documents were to be used "***solely for the purpose of the conducting this Litigation***…" meaning only for the issues raised in Case No. 2015 CA 008638 B. JA SUPPL 021-2 ¶ 6-7 (emphasis added). The use of these documents in the current litigation is a clear violation of the March 18, 2016 Protective Order. As such, this Court should ignore Page 10 of Exhibit 4, pages 2-3 and 5-6 of Exhibit 7, page 3 of Exhibit 9, pages 3-6 of Exhibit 10, and Exhibit 12[8] and not consider them in ruling on this appeal.

[7] Appellees acknowledge that Exhibits 2, 3, pages 1-9 of Exhibit 4, Exhibits 5-6, pages 1 and 3 of Exhibit 7, Exhibit 8, pages 1-2 of Exhibit 9, and pages 1-2 of Exhibit 10 were provided to the Court during the litigation of the *Montgomery* matter and, therefore, they are no longer covered by the Protective Order.
[8] These exhibits and pages are labeled as follows in the Joint Appendix: JA270, JA292-3, JA295-6, JA309, JA313-6, and JA321.

Even if Mr. Stevenson can establish he properly obtained these documents, they should be ignored as they were not produced in the course of discovery. On September 14, 2020, Appellees propounded discovery upon Mr. Stevenson to which Exhibits 2-10 and 12 were clearly responsive. JA SUPPL 014 at ¶ 6; JA SUPPL 029-42 at Nos. 2, 7, 8, 9, 10, 12, and 16. When Mr. Stevenson filed his answers and provided his responsive documents on October 23, 2020, he did not object to Appellees' requests. JA SUPPL 044-61 at Responses to Nos. 2, 7, 8, 9, 10, 12, and 16.; JA SUPPL 014 at ¶ 8. Instead, Mr. Stevenson consistently referred to his "journal and audio files" and his "DC Water Employment File" and otherwise stated he was producing "all responsive documents." *Id*.

Under Rule 26(e) of the Superior Court Rules of Civil Procedure, a party responding to a request for production of documents is required to supplement its responses if it learns its production is incomplete. Specifically, Rule 26(e) provides:

> (1) In General. A party who has made an expert disclosure under Rule 26(a) —or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:
>
> (A) in a timely manner if the party learns in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing…

D.C. Sup. R. Civ. Pro. 26(e).

Here, ten of the exhibits attached by Mr. Stevenson to his Opposition were not

produced during discovery. Of the 64 total pages in this production, Exhibits 2, 3, 5, 6, 7, 8, 9, 10, and 12 were contained in this Late Supplemental Production, produced well after the close of discovery.[9]

Allowing Mr. Stevenson to rely on these exhibits in support of his Opposition is highly prejudicial as these documents were not made available during discovery. Discovery closed in this matter on February 8, 2021, and on March 10, 2021, Appellees filed their Motion for Summary Judgment and Points of Authorities in Support. It was not until April 21, 2021, one day before filing his Opposition, and more than two months after the close of discovery, that Mr. Stevenson served his Late Supplemental Production. However, as discussed above, these documents were certainly already in his counsel's possession during the course of discovery due to his involvement with the previous litigation against DC Water.

A party who fails to provide information required by Rule 26 generally cannot use that information as evidence or the court may impose other sanctions, unless the failure was substantially justified or is harmless. *Burns v. Levy*, Civil Action No. 13-898 (CKK), 2019 WL 6465142, at *18 (D.D.C. Dec. 2, 2019). Here, the failure to produce these documents is neither justified nor harmless. They are responsive to

[9] Exhibit 4 was not produced at any time prior to the filing of Appellant's Opposition. This exhibit appears to be handwritten notes but it is unclear who took them and in what context. Appellant has not explained the author or the context of these handwritten notes; as such, they are unauthenticated and inadmissible. Fed. R. Evid. 901(a); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).

Appellees' First Set of Requests for Documents and were in possession of Mr. Stevenson's counsel.[10] JA SUPPL 014 at ¶ 5; JA SUPPL 029-42 at Nos. 2, 7, 8, 9, 10, 12, and 16. As such, they should have been produced during discovery. Further, the documents are prejudicial as Appellees did not have them when preparing for Mr. Stevenson's deposition or when drafting their motion for summary judgment. Because Mr. Stevenson failed to comply with DC Superior Court rules on discovery, he should not be allowed to use responsive documents produced two months after the close of discovery and six weeks after Appellees filed their Motion for Summary Judgment. Therefore, Exhibits 2-10 and 12 of Mr. Stevenson's Opposition should be disregarded by this Court.

Third, Appellees contested the following "facts" as either false, irrelevant, or not raising a genuine dispute of material fact within Mr. Stevenson's Statement:

- Appellees denied Dunbar Regis made personnel decisions for both Mr. Poland and Mr. Stevenson. JA225. In support of his allegations, Mr. Stevenson relied on two letters – one from 2014 and one from 2019. *Id*. However, Mr. Stevenson completely ignores that the proposed actions by DC Water were not made by the Director of Sewer Services.[11] Mr. Stevenson's February 25, 2019 Notice of

[10] Appellees note that it is unlikely Mr. Stevenson ever had these documents in his possession as they contain information covering 2008-2015, prior to his employment with DC Water beginning in April 2015.

[11] As a member of the American Federation of State, County, and Municipal Employees Local 2091 Union, Mr. Stevenson was subject to the disciplinary

Proposed Disciplinary Action was signed by Mr. Poland and his May 16, 2019 Notice of Proposed Adverse Action – Removal was signed by Clement Oguns. JA060-1.

- Paragraphs 3 through 15 allege facts related to DC Water's investigations into complaints regarding Mr. Poland.[12] As discussed below, none of the supporting documentation has been authenticated nor does Mr. Stevenson have any direct knowledge of the events as they all occurred prior to his employment.[13] JA227. And critically, none of these alleged facts create a genuine material dispute so as to preclude the granting of summary judgment. As discussed below, Mr. Poland is not a true comparator and the documentation provided by Mr. Stevenson in Exhibits 2-10 and 12 is irrelevant to the issues in this matter.
- Appellees also denied the allegations in Paragraphs 3-15 to the extent Mr. Stevenson's rhetoric extends beyond the plain language in the cited documents and makes improper legal conclusions. For example, Mr. Stevenson cited generally to a civil case to support the allegation that Mr. Poland was

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process – including the multiple steps associated with discipline – as governed by the collective bargaining agreement (CBA). JA054-5 at ¶¶9-11. As a management employee, Mr. Poland is not covered by the CBA.

[12] Appellees again assert that none of these "facts" should be considered as the underlying documents were improperly obtained and not produced in the course of discovery.

[13] Notably, Mr. Stevenson fails to provide any documentation indicating concerns with Mr. Poland after 2015, and most consist of issues from more than 10 years ago.

terminated by a former employer almost 20 years ago. JA226. Not only are these allegations irrelevant and prejudicial, there is no support for them. Moreover, in support of his allegations that DC Water failed to address employees' concerns about Mr. Poland, JA226-7, the documentation establishes that after a full investigation DC Water concluded Mr. Poland had not engaged in any wrongdoing. JA275-289.[14]

- Appellees denied the allegations in paragraphs 16-21 as they are not supported by any record evidence, only a self-serving declaration from Mr. Stevenson essentially copying the allegations from his Complaint.
- Defendants denied the allegations in paragraph 22 as it is merely a conclusory statement with no evidentiary support.

Finally, none of the documentation regarding Mr. Poland has been authenticated. A trial court may only consider admissible evidence in deciding a motion for summary judgment. *See* Super. Ct. Civ. R. 56(e); *Beyene v. Coleman Sec. Servs., Inc*., 854 F.2d 1179, 1181 (9th Cir. 1988). Authentication is a "condition precedent to admissibility," and this condition is satisfied by "evidence sufficient to support a finding that the [item] in question is what the proponent claims." Fed. R. Evid. 901(a); *Orr v. Bank of Am., NT & SA*, 285 F.3d at 773. Each

[14] Additionally, to the extent that Mr. Stevenson is arguing DC Water never disciplined Mr. Poland, that is clearly not the case, as he was suspended for 20 workdays on December 23, 2014. JA320.

document submitted in support of summary judgment must either be properly authenticated, or must be self-authenticating under the Federal Rules. *Carmona v. Toledo*, 215 F.3d 124, 131 (1st Cir. 2000). The authentication requirement is rarely onerous; in many instances, a single sentence will suffice, indicating that the document is what it appears to be. *Goguen v. Textron, Inc*., 234 F.R.D. 13, 16-17 (D. Mass 2006). Mr. Stevenson fails to meet this basic standard as it is undisputed all of the documents predate Mr. Stevenson's employment with DC Water, which began on April 6, 2015. JA054 at ¶8; JA207.

"[A] plaintiff is not relieved of [his] obligation to support [his] allegations by affidavits or other competent evidence showing that there is a genuine issue for trial." *Calhoun v. Johnson*, 1998 WL 164780, at *3 (D.D.C. Mar. 31, 1998), *aff'd,* 1999 WL 82525 (D.C. Cir. Sept. 27, 1999). "Where the moving party supports the motion for summary judgment with affidavits, sworn or certified copies of documents, answers to interrogatories, deposition responses or other evidence submitted under oath, the opposing party may not rely on general pleadings or a denial, but rather must respond similarly by setting forth specific, material facts under oath which raise genuine issues of fact for trial." *Tobin*, 886 A.2d at 90 (citing to Super. Ct. Civ. R. 56(e); *New 3145 Deauville, L.L.C. v. First Am. Title Ins. Co.*, 881 A.2d 624, 627–28 (D.C. 2005); *Teru Chang v. Inst. for Public–Private P'ships, Inc.*, 846 A.2d 318, 323–324 (D.C. 2004)). Here, Mr. Stevenson

has provided no evidentiary support for Exhibits 2-10 and 12 of Appellant's Statement and the Exhibits should be disregarded.

3. The Superior Court Properly Determined Mr. Stevenson's Disparate Treatment Allegations were Time-Bared.

The statute of limitations for DCHRA claims is one year, starting from the date an employee discovered or reasonably should have discovered the allegedly discriminatory act. D.C. Code § 2-1403.16 (2020); *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 891 (D.C. 2003). Mr. Stevenson filed his Complaint on February 28, 2020. JA008. Thus, all disparate treatment claims under the DCHRA Mr. Stevenson discovered or reasonably should have discovered prior to February 28, 2019 are time-barred. *See Barrett v. Covington & Burling LLP*, 979 A.2d 1239, 1245 n.2 (D.C. 2009) (citing D.C. Code § 2-1403.16(a)).

In his Appellant Brief, Mr. Stevenson argues the *Barrett* case expands the statute of limitations to allow him to "include behavior outside the statute of limitation, so long as at least one incident occurred within the limit[.]" Mr. Stevenson's Br. 23-4. But this conclusion is misguided. A closer reading of the *Barrett* case makes clear this Court established a more permissive scope of the limitations period ***only for hostile work enforcement claims.*** *Barrett*, 979 A.2d at 1245-6. Mr. Stevenson has brought no such claim in this dispute and cannot amend his allegations now at this appellate stage.

Accordingly, to the extent Mr. Stevenson alleged any adverse action based on his allegations in Paragraphs 7-8 and 11-13 of the Complaint, all such allegations are time barred. Therefore, the only adverse action at issue in this matter is DC Water's and Mr. Spears' legitimate, non-discriminatory decisions to suspend and later to terminate Mr. Stevenson's employment after February 28, 2019.

4. The Superior Court Properly Ruled Mr. Stevenson Failed to Establish a Prima Facie Case for Discrimination, Retaliation, and Failed to Demonstrate Evidence of Pretext.

Mr. Stevenson's Complaint alleges racial disparate treatment under the DCHRA. JA013-4 at ¶¶17-20. Specifically, Mr. Stevenson alleges he was suspended and terminated "based on his race and in retaliation for filing a complaint of discrimination against Kevin Jhingory and attempting to report the threats of violence." *Id.* at ¶ 20. As discussed below, however, there is no evidence on the record to support Mr. Stevenson's claims.

The DCHRA (D.C. Code §§ 2-1401.01-1403.17) prohibits employers from discharging or otherwise discriminating against an individual with respect to the terms and conditions of employment based on the individual's membership in a protected category, including race. *See id.* § 2-1402.11(a)(1) (2020). In analyzing a claim of employment discrimination under the DCHRA, D.C. courts look to Title VII of the Civil Rights Act of 1964 ("Title VII") and its jurisprudence for guidance.

Knight v. Georgetown Univ., 725 A.2d 472, 478 n.5 (D.C. 1999); *Goos v. Nat'l Ass'n of Realtors*, 715 F. Supp. 2, 3 (D.D.C. 1989).

Where, as here, Mr. Stevenson does not offer direct evidence of discrimination and instead points to circumstantial evidence, courts apply the burden-shifting framework articulated by the Supreme Court of the United States for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[15] Under this framework, a plaintiff has the initial burden of demonstrating by a preponderance of the evidence a *prima facie* case of discrimination, which creates a presumption the adverse employment action taken was discriminatory. *See Furline v. Morrison*, 953 A.2d 344, 352 (D.C. 2008). If the plaintiff succeeds in making a *prima facie* case, the employer has the opportunity to rebut this presumption by articulating a legitimate reason for the adverse employment action. *Id.* Finally, if the employer offers such an explanation, the presumption of illegality drops out of the case and the burden of production shifts back to the employee to demonstrate the ostensibly legitimate reason was pretextual; that is, "that the employer's stated justification for its action 'was not its true reason but was in fact merely a pretext' to disguise discriminatory practice." *See Hollins v. Fannie Mae*, 760 A.2d 563, 571 (D.C. 2000). Although *McDonnell Douglas* shifts the burden of production between the parties,

[15] Discrimination claims brought under the DCHRA are also governed by the burden-shifting framework set forth in *McDonnell Douglas*. *See Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 802 (D.C. 2003).

the plaintiff retains the burden of persuasion at all times. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

Here, Mr. Stevenson has failed to provide any evidence from which a reasonable fact finder could infer Appellees acted in a racially discriminatory manner or in retaliation for protected activity.

a. Mr. Stevenson Cannot Establish a *Prima Facie* Case of Disparate Treatment Under the DCHRA Because Mr. Stevenson Failed to Establish His Termination Was Based on His Race.

To establish a *prima facie* case of disparate treatment discrimination Mr. Stevenson must establish: (1) he is a member of a protected class;[16] (2) he was qualified for the job in which he suffered the prohibited action;[17] (3) a prohibited action occurred despite his employment qualifications; and (4) the prohibited conduct was based on his protected characteristic. *Johnson v. Dist. of Columbia*, 225 A.3d 1269, 1280 (D.C. 2020). To prove the allegedly prohibited action was based on Mr. Stevenson's protected activity, Mr. Stevenson can raise such an inference by presenting evidence that a "similarly situated" employee who did not share the

[16] Appellees note the individuals Mr. Stevenson alleged carried out his termination, including Mr. Spears, Mr. Regis, and Mr. Jhingory, are all the same race as Mr. Stevenson. JA054-5, 62.; s*ee Hardy v. Marriott Corp.*, 670 F. Supp. 385, 392 (D.D.C. 1987) (finding "any claim of racial discrimination suspect" where the decision-maker is the same race as the plaintiff).

[17] Mr. Stevenson's inability to abide by DC Water's workplace policies made him unqualified for his role at DC Water. Further, it is not the Court's role to second-guess DC Water's decisions about Mr. Stevenson's qualifications.

protected characteristic engaged in the same conduct but was treated differently. *See Hollins*, 760 A.2d at 578.

The similarly situated requirement is "generally difficult to meet; the alleged comparator 'must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" *Toomer v. Carter* 2016 WL 9344023, at *28 (D.D.C. Mar. 24, 2016), *aff'd,* 2022 WL 301561 (D.C. Cir. Jan. 21, 2022) (quoting *Phillips v. Holladay Prop. Servs.*, 937 F. Supp. 32, 37 (D.D.C. 1996), *aff'd,* 1997 WL 411695 (D.C. Cir. June 19, 1997)). Mr. Stevenson is unable to make this showing, and therefore was unable to survive the Motion for Summary Judgment.

"An employee is considered similarly situated to the plaintiff for the purpose of showing disparate treatment when 'all of the relevant aspects' of the plaintiff's employment situation are 'nearly identical' to those of the other employee." *Hollins*, 760 A.2d at 578. The similarity between the two comparators "must exist in all relevant aspects of their respective employment circumstances, which would surely include both their rank in the company and the alleged misconduct." *Id.* The individuals Mr. Stevenson identifies as those allegedly similarly situated to him and receiving more favorable treatment do not meet this "generally difficult" standard. *See Toomer*, 2016 WL 9344023, at *28.

Further, to show that alleged misconduct is sufficiently similar, the plaintiff and the comparator must have "engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Hollins*, 760 A.2d at 578 (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)).

(1) Mr. Stevenson Is Unable to Establish Any Similarly Situated Individuals Were Treated Less Favorably Than He Was Treated.

Mr. Stevenson first alleges Mr. Poland, Mr. Stevenson's supervisor throughout his tenure with DC Water, is similarly situated to him but was treated more favorably because in 2011, "Mr. Poland was involved in a violent altercation with a DC Water employee" and in 2014, he "assaulted [a] DC Water employee."[18] JA012-3; JA055, 63. According to the Complaint, Mr. Poland received a one-week suspension and twenty-day suspension for these actions, respectively. JA012-3. Mr. Stevenson's allegations, while wholly relying on the alleged conduct in which Mr. Poland engaged and the punishment he received, fails to allege or establish *how* Mr. Poland is similarly situated to him. There is no question that Mr. Stevenson and Mr. Poland did not have the same supervisor at any time during their respective employments, much less at the time of their misconduct, because Mr. Poland was

[18] Notably, there is no record evidence that Mr. Stevenson has direct knowledge of any of this alleged conduct, which occurred prior to his employment with DC Water. JA054 at ¶8; JA063 at ¶¶79-80.

Mr. Stevenson's supervisor and Mr. Poland was supervised by Anthony Richards. JA055 at ¶ 14.

Moreover, the conduct in which Mr. Stevenson alleges Mr. Poland engaged may have been similar, but the context in which disciplinary action was apportioned was not. Mr. Stevenson admits he received similar disciplinary action as Mr. Poland: a suspension from work. JA012-3. The differentiating factor between Mr. Poland and Mr. Stevenson, however, is that not only were they working for different decision-makers at the time of their misconduct, but also there is no allegation or evidence that Mr. Poland's misconduct was a continuing issue like Mr. Stevenson's conduct. Indeed, Mr. Stevenson continued his misconduct on the *very morning* he returned to work after his 30-work-day suspension, JA061 at ¶ 67, proving to DC Water he was not interested in or capable of changing his wayward conduct. Accordingly, this distinguishing factor contributed to the decision to terminate Mr. Stevenson rather than simply suspend him again.

Mr. Stevenson further alleges another DC Water employee, Kevin Harney, also engaged in threatening conduct toward a female coworker by calling her a "fucking bitch" in August 2019, but was not subject to any resulting disciplinary action. JA012-3 at ¶ 16. As with Mr. Poland, Mr. Stevenson presents no evidence Mr. Harney is similarly situated to him in any way: there is no evidence Mr. Stevenson and Mr. Harney reported to the same supervisor and no evidence he held

the same or similar job as Mr. Stevenson. Further, sufficient evidence exists to show the conduct in which Mr. Harney engaged was materially different from Mr. Stevenson's conduct, justifying a different remedy.

As an initial matter, Mr. Stevenson presents no evidence Mr. Harney reported to the same supervisor or decision-maker. JA063 at ¶ 81. Mr. Harney was a Specialist, Easements and Covenants, and reported to Director, Permit Operations, Brian McDermott. *Id.* In fact, Mr. Stevenson has no personal knowledge about Mr. Harney's alleged actions. When asked for details about Mr. Harney and the allegation he called a female employee a "fucking bitch" and that no action was taken against him, Mr. Stevenson was unable to state what, if anything, he knew about that situation, and could only recall vague things such as "I've heard all types of rumors and allegations about racial discrimination between the employees. So that's all I want to leave it at, that's on my statement, sir." JA063 at ¶ 84. Mr. Stevenson's inability to produce evidence, testimony, or any other supporting information other than his self-serving allegation in his Complaint is damning to his claim Mr. Harney is a similarly situated employee.

Further, even if the Court were to take the allegation in the Complaint as true, despite the lack of any supporting evidence in the record, it is clear Mr. Harney's alleged conduct and Mr. Stevenson's misconduct are materially different. *Hollins*, 760 A.2d at 578. Mr. Stevenson's lone allegation about Mr. Harney is he called a

female employee a "fucking bitch." JA012-3 at ¶ 16. While these words are certainly inappropriate and unprofessional, to compare these words to a threat of violence similar to the statements and actions Mr. Stevenson repeatedly committed while employed is illogical. Additionally, Mr. Stevenson's allegations regarding Mr. Harney do not allege any repeated conduct similar to Mr. Stevenson, which clearly changes the context in which DC Water viewed this singular alleged misconduct. *See e.g., Duru v. Dist. of Columbia*, 303 F. Supp. 3d 63, 74 (D.C. 2018) (finding different disciplinary histories constitute differentiating or mitigating circumstances that distinguishes conduct or the employer's treatment of it).

The undisputed facts plainly show Mr. Stevenson is wholly incapable of producing any evidence similarly situated individuals outside of his protected class were treated more favorably than he was for similar conduct. This failure is fatal to his allegations of race discrimination under the DCHRA, and therefore summary judgment in favor of DC Water and Mr. Spears is appropriate.

b. Appellee's Articulated Reasons For Mr. Stevenson's Suspension and Termination Are Legitimate, Non-Discriminatory, and Not a Pretext for Discrimination.

Even if Mr. Stevenson were able to establish a *prima facie* claim for discrimination or retaliation—though he cannot—Appellees have met their burden of production to show that DC Water's decisions to suspend and terminate Mr.

Stevenson's employment were legitimate and non-discriminatory.[19] *See Slate v. Public Defender Serv.*, 31 F. Supp. 3d 277, 310-311 (D.D.C. 2014). When considering Appellees' legitimate, non-discriminatory justifications for its actions, the Court is "not free to second-guess an employer's business judgment," and does not "sit[] as a super-personnel department that re-examines an entity's business decisions." *See Furline*, 953 A.2d at 353-354; *McFarland v. George Washington Univ.*, 935 A.3d 337, 350 (D.C. 2007); *Brown v. Small*, 437 F. Supp. 2d 125, 132 (D.D.C. 2006). As detailed above, and as the undisputed facts of this matter show, Mr. Stevenson consistently engaged in inappropriate, disruptive, and threatening conduct toward his co-workers throughout his tenure at DC Water, and it was that conduct that resulted in his suspension and his termination. JA056-60.

Despite multiple complaints against him during his tenure with DC Water, Mr. Stevenson received ample opportunities to learn and grow in his job, including reassignment in October 2018 to a new position he admitted paid him more and gave him more opportunities for promotion. JA058 at ¶¶ 42-43. Further, Mr. Stevenson repeatedly acknowledged he was valued in his position by receiving lead roles for jobs because Mr. Poland trusted him to get the job done correctly and with minimal oversight. JA063 at ¶ 85. In January 2019, however, Mr. Stevenson's conduct

[19] Mr. Spears was not the decision-maker with regard to the decision to suspend or terminate Mr. Stevenson's employment. JA062 at ¶ 76.

escalated beyond a level of general disrespect to his co-workers and superiors, including using profane language and gestures, to a brazen act of intimidation against Mr. Jhingory at which time he wedged the door shut, used a racially derogatory term toward him, and approached Mr. Jhingory in a threatening manner. JA059-60. It is fortunate Mr. Stevenson stopped his approach to Mr. Jhingory when he heard another person in the restroom, as the incident could have escalated. After receiving and investigating the allegations against Mr. Stevenson, DC Water substantiated Mr. Jhingory's claims and determined a thirty work-day suspension was an appropriate remedy to correct Mr. Stevenson's behavior. JA060 at ¶¶ 62-63.

Unfortunately, this attempt by DC Water for Mr. Stevenson to improve his conduct was unsuccessful. On the very morning Mr. Stevenson returned from his suspension, he did not even get into the building before he confronted and provoked a co-worker by chanting "The union is some shit, and Poge will sell you out" in that employee's face. JA061 at ¶¶ 67-69. Once inside, Mr. Stevenson proceeded to make threatening remarks to other employees, including telling an employee that he knows where he lives and repeating the name of his neighborhood, and telling another employee that he "took the air our his balloon" by "show[ing other employees] the monkey behind the curtain." JA061-2 at ¶ 71. It was clear Mr. Stevenson had learned nothing from his suspension and his conduct would continue unabated unless DC Water took more decisive action. Accordingly, after investigating and substantiating

the allegations of Mr. Stevenson's coworkers, on April 30, 2019, DC Water terminated his employment. JA062 at ¶¶ 72-76.

Mr. Stevenson's actions alone resulted in his suspension and termination. Indeed, not only had DC Water not shown any propensity for retaliating against him for his prior complaints against co-workers, but the undisputed facts plainly show DC Water did not suspend and/or terminate other employees of Mr. Stevenson's same race, such as Mr. Jhingory, Mr. Coghill, Mr. Herbert, and Mr. Regis, for raising similar complaints, severely undercutting Mr. Stevenson's claims that it was his race and/or protected activity, and not his unacceptable workplace conduct, that resulted in his suspension and eventual termination.

Ultimately, Mr. Stevenson has not presented any evidence, either direct or circumstantial, that Appellees' legitimate, non-discriminatory actions were a mere pretext for underlying discrimination. Mr. Stevenson can prove pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Beckwith v. Career Blazers Learning Ctr.* 946 F. Supp. 1035, 1043 (D.C. Cir. 1996). Mr. Stevenson has not shown pretext through evidence of similarly situated individuals outside his protected class who were treated more favorably than he was treated, *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. 1995), nor that Appellees' reasons for his suspension and/or

termination is "unworthy of credence." *See Beckwith*, 946 F. Supp. at 1043. As shown above, Mr. Stevenson's attempts to show he was treated less favorably than similarly situated individuals outside his protected racial class are meritless. Further, the undisputed facts fail to show Mr. Stevenson was discriminated against on the basis of his race or his alleged protected conduct. JA059-62.

Accordingly, there are no genuine issues of material fact as to the circumstances that motivated Appellees' decisions to suspend and to terminate Mr. Stevenson, namely his own improper conduct, and therefore the Superior Court's granting of summary judgment was not in error.

c. Mr. Stevenson Cannot Establish a *Prima Facie* Case of Retaliation Under the DCHRA Because Mr. Stevenson Failed to Establish His Termination was Casually Connected to Any Protected Activity.

The DCHRA specifies it is an "unlawful discriminatory practice" to retaliate against an employee for having "exercised or enjoyed, or . . . aided or encouraged any other person in the exercise or enjoyment of any right granted or protected under [DCHRA]," or "because that person has opposed any [discriminatory] practice . . ." D.C. Code § 2-1402.61(a)-(b).

To overcome summary judgment for his claim of retaliation under the DCHRA, Mr. Stevenson must establish: (1) he engaged in a protected activity; (2) Appellees took an adverse employment action against him; and (3) there is a causal connection between the protected activity and the adverse action. *See Bryant*

v. Dist. of Columbia, 102 A.3d 264, 268 (D.C. 2014) (citing *Taylor v. Dist. of Columbia Water & Sewer Auth.*, 957 A.2d 45, 54 (D.C. 2008)). Mr. Stevenson can establish neither that he engaged in protected activity nor that a causal connection exists between his alleged protected activity and his suspension and termination.

(1) The Undisputed Facts Show Mr. Stevenson Did Not Engage in Protected Activity for Purposes of His Retaliation Claim Under the DCHRA.

To establish a retaliation claim, Mr. Stevenson must first demonstrate as part of his *prima facie* case that he engaged in statutorily protected activity. For activity to qualify as "protected," a plaintiff "is required to 'alert the employer [and make the employer aware of the fact] that [he] is lodging a complaint about allegedly discriminatory conduct.'" *McFarland*, 935 A.2d at 359. "The employee need not … employ any 'magic words' such as 'discrimination,' for 'the communication of a complaint of unlawful discrimination . . . may be *inferred* or *implied*' from the surrounding facts." *Id.* (emphasis in original). The onus, however, remains "'on the employee to clearly voice [his] opposition to receive the protections provided by the Act'; general complaints about 'workplace favoritism' or other conduct not actionable under the DCHRA do not put the employer on the required notice." *Id.* (quoting *Daka, Inc. v. McCrae*, 839 A.2d 682, 690 (D.C. 2003)).

Here, there is no evidence any of Appellees' actions regarding Mr. Stevenson's employment had anything to do with retaliation for allegedly reporting

race discrimination in the workplace. Mr. Stevenson's Complaint alleges he was suspended and terminated "in retaliation for filing a complaint of discrimination against Kevin Jhingory and attempting to report the threats in the workplace" to DC Water. JA013-4. Mr. Stevenson has not, however, specified any discriminatory actions taken against him nor any complaints he made in which he accused anyone at DC Water of race discrimination.[20] In fact, Mr. Stevenson admitted to the contrary, that he "did not narrow [his complaints] down to race, creed, handicap, or anything," evidencing his failure to "assert any facts that would support an allegation of [discrimination]." JA063 at 87; *see McFarland*, 935 A.2d at 360 (finding a failure to assert any facts to the employer supporting an allegation of discrimination barred the protection of the DCHRA).

Ukwuani v. Dist. of Columbia is informative here. In *Ukwuani*, the D.C. Court of Appeals refused to find the plaintiff engaged in protected activity where the plaintiff alleged retaliation for complaining of disparities between job classifications and pay, because the undisputed facts showed plaintiff's complaint to the employer failed to allege those disparities were *due to the race or national origin* of the lower paid employees. 241 A.3d 529, 547 (D.C. 2020). In its analysis, this Court held even

[20] Mr. Stevenson has not presented any evidence DC Water's Executive Director, Mr. Gaddis, or DC Water's unnamed general counsel, to whom he alleges he complained of alleged discrimination and of workplace violence, played any role in the decisions to suspend and later to terminate his employment.

if the plaintiff *believed* the disparity was discriminatory against him because of his race, his actual complaint to the employer did not reveal any such belief, and therefore the complaint was not protected under the DCHRA. *Id.*

Mr. Stevenson's complaints to DC Water, as he alleges them in his Complaint, discovery responses, and deposition testimony, are analogous to those lodged in *Ukwuani*. As he admitted in his deposition, Mr. Stevenson did not make any allegations of discrimination on the basis of "race, creed, handicap, or anything." JA063 at ¶ 87. As in *Ukwuani*, Mr. Stevenson may have *believed* that the mistreatments he claims to have suffered were because of his race, but there is no evidence to support his complaints "reveal[ed] any such belief" to DC Water or to Mr. Spears. Accordingly, his complaints of mistreatment in the workplace, without a connection to his membership in a protected class, cannot constitute protected activity as a matter of law. *See Vogel v. D.C. Office of Planning*, 944 A.2d 456, 464 (D.C. 2008) (finding that objections to general mistreatment, without connecting such objections to the plaintiff's protected classification, falls outside the purview of the DCHRA).

Similarly, Mr. Stevenson's allegations he reported workplace assault in January and February 2019 fail to garner protection under the DCHRA for want of any relation to his race. Mr. Stevenson specifically alleges he complained to DC Water (1) in January 2019 Mark Coghill approached him and said "I don't like that

sucker ass shit that you did" before allegedly trying to instigate a fight and following him off DC Water premises, and (2) in February 2019, he was assaulted by James Herbert when Mr. Herbert allegedly approached Mr. Stevenson and extended two fingers like a hand gun and pointed them at Mr. Stevenson's head. JA010-1; JA060. As explained above, however, even if Mr. Stevenson somehow believed these incidents were related to his race,[21] Mr. Stevenson failed to establish how his complaints of alleged workplace violence or assault "reveal[ed] any such belief" to DC Water. *See Ukwuani*, 241 A.3d at 547.

Mr. Stevenson's allegations of retaliation simply do not rise to the level of sufficiently establishing a *prima facie* case for lack of any DCHRA protected activity. Accordingly, because he cannot meet his burden to produce any genuine issue of material dispute as to his purported protected activity, summary judgment in favor of DC Water and Mr. Spears was appropriate and necessary, and the Court's granting of Appellees' Motion for Summary Judgment on his retaliation claims was not in error. *See e.g., Taylor v. Small*, 350 F.3d 1286, 1292 (D.C. Cir. 2003).

[21] Notably, Mr. Coghill and Mr. Herbert are both African-American. JA058 at ¶ 45; JA056 at ¶ 25.

(2) No Causal Connection Exists Between Mr. Stevenson's Alleged Protected Activity and His Suspension and Termination.

Even if the Court finds Mr. Stevenson's complaints to DC Water of general mistreatment or for workplace assault were sufficiently related to his race and therefore protected—which Appellees adamantly deny—Mr. Stevenson's claim for retaliation still fails because he cannot establish a sufficient causal relationship between the alleged protected activity and his suspension and termination. For purposes of meeting the requirements of his *prima facie* case, "the causal connection . . . may be established by showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity." *See Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 368 (D.C. 1993). "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. v. Green*, 652 A.2d 41, 47 (D.C. 1994)).[22]

As an initial matter, Mr. Stevenson stated in his deposition he complained to DC Water regarding his alleged mistreatment in August of 2018. JA057 at ¶ 37. D.C. courts have historically found, while temporal proximity may be used to establish a

[22] Mr. Stevenson also fails to allege the decision-makers involved in the decision to suspend and/or terminate his employment knew of his alleged complaints to DC Water. *McFarland*, 935 A.2d at 357 ("Even more damaging (indeed, fatal) to [the plaintiff's] theory is the complete absence of evidence showing that any individual responsible for . . . terminating [him]" knew about his protected activity).

causal connection, "a stretch of four months realistically cannot constitute temporal proximity" under the DCHRA. *See e.g.*, *Johnson v. Dist. of Columbia*, 935 A.2d 1113, 1120 (D.C. 2007); *see also Tingling-Clemmons v. Dist. of Columbia*, 133 A.3d 241, 247 (D.C. 2016) (a pattern of antagonism can imply a causal connection, but must occur "'soon after' the disclosure and continu[e] to the alleged retaliation."). Here, Mr. Stevenson concedes he allegedly complained to Delise Miller of mistreatment in August 2018, approximately ***seven months before his suspension in March 2019 and ten months before his termination in June***. JA057 at ¶ 37, 060-2. This amount of time between Mr. Stevenson's alleged complaint and the adverse employment actions he experienced are simply too attenuated to be considered temporally proximate, and therefore cannot serve as the basis of his retaliation claim. *See Johnson*, 935 A.2d at 1120.

Moreover, shortly after he raised his complaints to Ms. Miller in August 2018, Mr. Stevenson was reassigned to a new position where he received a pay raise and opportunities for additional promotions. Mr. Stevenson admitted he was temporarily reassigned on September 29, 2018 to work as a Technician III, a mere month after he raised the alleged complaints to Ms. Miller. JA058 ¶¶ 42-43. This admittedly beneficial reassignment shortly after his alleged protected activity makes it "highly improbable that [DC Water was] so offended by [Mr. Stevenson's] complaint as to

fire him in retaliation" but would first give him a new position that offered additional opportunities for promotion. *See McFarland*, 935 A.2d at 357.

Taking the undisputed facts in their totality, no causal connection exists to establish a claim for retaliation. Accordingly, because Mr. Stevenson cannot carry his burden for such a claim, this claim fails as a matter of law and DC Water and Mr. Spears were entitled to summary judgment.

(3) Mr. Stevenson Cannot Appeal the Superior Court's Decision on his Retaliation Claim as He Failed to Oppose Appellees' Arguments in his Opposition.

Mr. Stevenson cannot overcome summary judgment for his retaliation claims. However, even if he could, in his Opposition brief, Mr. Stevenson failed to address Appellees' retaliation argument and instead attempted to argue his discrimination and retaliation claims as one. The Superior Court noted this in its opinion, explaining that "***Mr. Stevenson does not specifically address DC Water's retaliation agreement***[.]" JA354 (emphasis added). Indeed, as noted above, Mr. Stevenson never even clarifies what the alleged protected activity is or how DC Water's decisions to suspend him and terminate his employment are connected to the supposed protected activity. In this Circuit, "it is well understood . . . that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." *Glass v. Lahood*, 786 F. Supp. 2d 189, 210

(D.D.C.), *aff'd*, 2011 WL 6759550 (D.C. Cir. Dec. 8, 2011), quoting *Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004). As Mr. Stevenson failed to establish any genuine disputed facts to support his retaliation claim and failed to even address Appellees' arguments in support of Summary Judgment, the Superior Court's order granting summary judgment on his retaliation claim should be affirmed.

d. Mr. Stevenson Cannot Establish a *Prima Facie* Case for Wrongful Termination.

In Count 2 of his Complaint, Mr. Stevenson alleges DC Water wrongfully terminated him in violation of public policy on the grounds his suspension and later termination followed his alleged report to Ms. Miller and Robert Kelly that he was assaulted in the workplace. JA014 at ¶¶ 23-25. This claim, however, is inapplicable to Mr. Stevenson because he was not an at-will employee, and, even if it were proper and applicable, he still lacks supporting facts to overcome summary judgment.

Generally, under D.C. law, an at-will employee "may be discharged 'at any time and for any reason, or for no reason at all.'" *See Clay v. Howard Univ*., 128 F. Supp. 3d 22, 27 (D.D.C. 2015) (quoting *Adams v. George W. Cochran & Co*., 597 A.2d 28, 30 (D.C. 1991)). Under narrow exceptions to this general rule, however, it can be deemed a violation of law to terminate an at-will employee "for reasons offensive to certain clearly-articulated public policies." *Perkins v. WCS Constr., Inc.*,

2020 WL 3128950, at *3 (D.D.C. June 12, 2020) (citing *Carl v. Children's Hosp.*, 702 A.2d 159, 160 (D.C. 1997 (*en banc*)).

As an initial matter, this claim is not properly before this Court and is inapplicable to Mr. Stevenson as Mr. Stevenson was not an at-will employee. *See Sun v. D.C. Gov't*, 686 F. App'x 5, 6 (D.C. Cir. 2017) (because Mr. Stevenson was not an at-will employee, "the common law claim of wrongful termination in violation of public policy is unavailable, and the District of Columbia Comprehensive Merit Personnel Act [CMPA] provides [his] sole remedy."). Mr. Stevenson was a member of the American Federation of State, County, and Municipal Employees Local 2091 (the "Union"), which maintained a CBA with DC Water and covered Mr. Stevenson's employment. JA054 at ¶¶ 9-10. Similarly, the CMPA governs the operative CBA between the Union and DC Water. *See* D.C. Code § 1-601.01 *et seq*. Accordingly, Mr. Stevenson was not an at-will employee. JA055 at ¶ 11.

Mr. Stevenson's claim fails here because he was not an at-will employee, and therefore his request for a remedy by applying an exception to the at-will employment doctrine is grossly misplaced. *See Sun*, 686 F. App'x at 6; *see also Herron v. Fannie Mae*, 2016 WL 1177918, at *14 (D.D.C. March 8, 2016), *aff'd,* 861 F.3d 160 (D.C. Cir. 2017) (finding the plaintiff's claims she was not an at-will employee contradictory to her claim for wrongful termination in violation of public

policy because "if [she] were not an at-will [employee], she would not have to rely on this exception."). As noted above, the common law tort of wrongful termination in violation of public policy is a narrow exception to the employment at will doctrine. *See e.g., Alibalogun v. First Coast Sec. Solutions, Inc*., 67 F. Supp. 3d 211 (D.D.C. 2014); *Adams*, 597 A.2d at 30. Here, however, pursuant to the CBA, Mr. Stevenson could only be discharged for cause. Accordingly, because Mr. Stevenson was not an at-will employee, this exception is inapplicable.

Further, because DC Water is covered under the CMPA, Mr. Stevenson's exclusive remedy for this common law tort claim was through the Office of Employee Appeals (OEA). *See Lewis v. D.C. DMV*, 987 A.2d 1134, 1137 (D.C. 2010) ("Under the [CMPA], such common law claims are preempted and [Mr. Stevenson's] sole recourse to challenge his termination was by appeal to the OEA") (citing *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999)). DC Water is a public utility and an independent authority formed through the D.C. Code, JA053 at ¶ 1, and its enabling statute specifies it is subject to the provisions of the CMPA. *See AFGE v. D.C. Water & Sewer Auth.*, 942 A.2d 1108, 1113 (D.C. 2007). Accordingly, Mr. Stevenson's claim for wrongful termination is preempted by the CMPA, should have been filed instead with the OEA, and is improperly before this Court.

Even if the Court finds Mr. Stevenson's claim for wrongful termination to be validly before the Court and applicable to his non-at-will employment status, he still

cannot overcome summary judgment. To succeed on a claim his termination was unlawful under the narrow exception he claims, he must both (1) point to "some identifiable policy that has been officially declared in a statute or municipal regulation, or in the Constitution," and (2) show that there is "a close fit between the policy and the conduct at issue in the allegedly wrongful termination." *Clay*, 128 F. Supp. 3d at 27 (internal citations omitted).

In *Perkins v. WCS Constr., Inc.*, the D.C. District Court considered a case in which the plaintiff overheard the employer's Vice President of Operations (VPO) state that he was "going to drive down to [a third party's] office, take out his gun, and shoot himself in the head . . . after [he] shoot[s the third party].'" 2020 WL 3128950, at *1. Afraid the VPO would act on his comments, the plaintiff wrote a letter to the Chief Financial Officer, as well as her office manager, stating what she heard, which prompted a human resources inquiry. *Id.*, at *1. The plaintiff later reported the statement to the Metropolitan Police Department's non-emergency line (roughly two months after they were made). *Id.* Approximately two weeks after she contacted the police, the plaintiff was terminated. *Id.*, at *2.

The Court concentrated its analysis on whether a "close fit between the policy . . . declared and the conduct at issue" existed, stating this question is largely one of causation, focusing on whether the employer provided alternative, non-pretextual justifications for termination. *Id.*, at *6 (citing *Stevens v. Sodexo, Inc.*, 846 F. Supp.

2d 119, 126 (D.D.C. 2012) ("Courts . . . have required not only that a plaintiff clearly articulate the applicable public policy, but also show a causal connection between protected activity in which that plaintiff engaged and his or her termination."); *Robins v. Securitas Servs., Inc*., 819 F. Supp. 2d 18, 20-21 (D.D.C. 2011) (finding no causal link based on evidence that employee was fired for deficient performance); *Brathwaite v. Vance Fed. Sec. Servs., Inc*., 613 F. Supp. 2d 38, 50 (D.D.C. 2009) (finding no causal link based on evidence that employee was fired for instigating a fight with another employee)).

The *Perkins* case, however, is clearly distinguishable from the undisputed facts at issue here. In *Perkins*, the plaintiff reported her allegations on numerous occasions, including to the DC police department. 2020 WL 3128950, at *2. Here, Mr. Stevenson made only a preliminary report to Mr. Kelly before taking his complaint to Ms. Miller, and neither threatened to nor actually filed any report for assault with the police. JA064. Further, in *Perkins*, the plaintiff brought direct evidence of direct discrimination; conversely, Mr. Stevenson proffers no such evidence. 2020 WL 3128950, at *6. Finally, and most importantly to this matter, the *Perkins* plaintiff had no noted disciplinary history that resulted in her termination, leaving the court no choice but to infer a causal connection between her complaints and her termination. *Id.* The undisputed facts in this matter, however, show Mr. Stevenson had a long, repeated, and largely unmitigated streak of engaging in

misconduct in the workplace, including multiple substantiated allegations of threats of violence toward the end of his tenure with DC Water. JA059-62; *see Brathwaite*, 613 F. Supp. 2d at 50 (finding no causal link based on evidence the employee was fired for instigating a fight with another employee).

Like his retaliation claim, Mr. Stevenson is simply unable to produce evidence sufficient to show his suspension and later termination were causally related to his report of alleged assault. Moreover, there is no genuine issue of material fact on this claim that would prevent the court from ruling in favor of DC Water on summary judgment. Accordingly, because no genuine fact dispute exists and Mr. Stevenson cannot establish a causal connection between his termination and the public policy on which he relies, his public policy claim fails as a matter of law and this Court should affirm the Superior Court's grant of summary judgment for this claim.

B. THE SUPERIOR COURT PROPERLY DENIED MR. STEVENSON'S MOTION TO RECONSIDER.

Mr. Stevenson requested reconsideration pursuant to Superior Court Rule 59(e) and thus, he was required to show an error of law. *Hahn v. D.C. Water & Sewer Auth.*, 727 A.2d 317, 319 n.2 (D.C. 1999) (citing to *In re Tyree*, 493 A.2d 314, 317 n. 5 (D.C. 1985) ("A motion for reconsideration asserting that the court committed an error of law will ordinarily be regarded as a motion under Super. Ct. Civ. R. 59(e) to alter or amend a judgment[.]")). As Mr. Stevenson failed to show

an error of law, the Superior Court did not abuse its discretion in denying his Motion to Reconsider.

In support of his Motion for Reconsideration, Mr. Stevenson alleged the Court erred when it stated "[i]n his Opposition brief, Mr. Stevenson did not file a statement of material facts that he contends are genuinely disputed." JA361. Mr. Stevenson continued that the Superior Court "apparently did not see or review" his Appellant Statement and this error "caused the Court to misapprehend the facts and accept as undisputed, facts which were actually in dispute."[23] JA362. Mr. Stevenson misstates the Court's Order and in a last ditch effort attempts to rehash unsupported assertions while intentionally ignoring that he failed to dispute ***any*** of the material facts outlined in Appellees' Statement.

Complying with Rule 56 of the D.C. Superior Court Rules, DC Water and Mr. Spears filed their Appellees' Statement stating 89 facts with support of record evidence. "A party opposing the motion must file a statement of the material facts

[23] Oddly, Mr. Stevenson also concludes his Motion by stating the Court's finding DC Water did not wrongfully terminate Mr. Stevenson is incorrect because "DC Water is in [sic] instrumentality of the District of Columbia. It is not bound by the Comprehensive Merit Personnel Policies of the District of Columbia government." Opp., p. 5. The Court did not deny Mr. Stevenson's claim on this basis; it concluded Mr. Stevenson's argument in his opposition to summary judgment that his wrongful termination claim was "built on DC Water's violation of the DCHRA" was improper because there can be no claim for wrongful termination where a cause of action is alleged discrimination pursuant to the DCHRA. Order, p. 11, citing *McManus v. MCI Comm. Corp.*, 748 A.2d 949, 957 (D.C. 2000), *cert. denied,* 531 U.S. 1183 (2001).

that the opponent contends are genuinely disputed. The disputed material facts must be stated in separate numbered paragraphs that correspond to the extent possible with the numbering of the paragraphs in the movant's statement." D.C. Super. Ct. R. Civ. P. 56(b)(2)(B) (2021). The Court correctly observed Mr. Stevenson failed to dispute Appellees' facts. JA346.

Mr. Stevenson's assertion the Superior Court failed to address his "facts" is belied by the Order. The Superior Court stated that instead of disputing Appellees' facts, he "added additional information regarding his positive performance evaluations and Jayson Poland, his former supervisor for project management and work site responsibilities." JA347. The Superior Court then summarized Mr. Stevenson's factual allegations for more than half a page. *Id.* Clearly, the Superior Court saw and reviewed Mr. Stevenson's alleged facts in making its ruling—it was just not persuaded by them. This is not a basis for a motion for reconsideration.

In failing to contest Appellees' facts, Mr. Stevenson admitted to engaging in aggressive, hostile altercations with no less than seven different co-workers over the course of 22 months. *Williams*, 514 A.2d at 1176-77 (the failure of a party opposing summary judgment to provide support for contentions of a factual dispute should result in the Court's acceptance of the moving party's statement as undisputed absent clear support for any such contention from the record).

Critically, Mr. Stevenson cites no case law supporting his Motion for Reconsideration. Instead, he once again asserts a false narrative accusing Appellees of discrimination and retaliation rather than taking responsibility for his violent, abusive conduct at DC Water. There is no error of law here. *Joeckel*, 793 A.2d at 1281. The Court properly assessed the record and found no support for Mr. Stevenson's claims. Accordingly, this Court should affirm the Superior Court's denial of Mr. Stevenson's Motion for Reconsideration. *Wallace v. Warehouse Emps. Union # 730*, 482 A.2d 801, 810-11 (D.C. 1984) (denying motion for reconsideration and finding no error in the granting of the motion for summary judgment as there were no genuine issues of fact).

CONCLUSION

For the reasons set forth above, the District of Columbia Water and Sewer Authority and George Spears respectfully request this Court affirm the decision of the Superior Court granting the District of Columbia Water and Sewer Authority and George Spears' Motion for Summary Judgment and the Superior Court's denial of Appellant's Motion to Reconsider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July 2022, I caused the Brief of Appellees the District of Columbia Water and Sewer Authority and George Spears to be electronically filed with the Court's electronic filing system and that a copy of the Brief was served by first class United States mail, postage prepaid, on the following:

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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

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

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

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

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

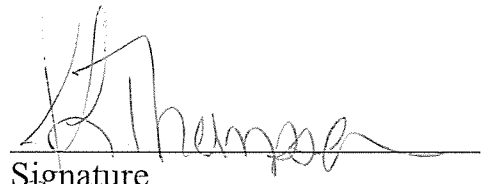
2. Any information revealing the identity of an individual receiving mental-health services.

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

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

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

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



Signature

22-CV-19
Case Number(s)

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July 8, 2022
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