No. 19-CV-826

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

JAMES HOLBROOK, *et al*.,
APPELLANTS,

V.

DISTRICT OF COLUMBIA,
APPELLEE.

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

BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA

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GLOSSARY OF ABBREVATIONS

CDF	Central Detention Facility
DOC	Department of Corrections
DCHRA	District of Columbia Human Rights Act
DCWPA	District of Columbia Whistleblower Protection Act
MSS	Management Supervisory Service
SUMF	Defendant's Statement of Undisputed Material Facts

GLOSSARY OF NAMES

Carolyn Cross	DOC Deputy Director
Thomas Faust	DOC Director
Orlando Harper	Deputy Warden
David Holmes	Major / Captain
Deon Jones	Correctional Officer, Former Plaintiff
Andra Parker	Correctional Officer, Former Plaintiff
Joseph Pettiford	Deputy Warden / Major
Simon Wainwright	Warden

STATEMENT OF THE ISSUES

Former supervisory correctional officers of the District of Columbia Department of Corrections ("DOC") James Holbrook, Larry Bishop, Sonji Johnson, and Collins G. Snow, Jr. (collectively the "Management Employees"), were fired from their at-will positions for either inappropriate conduct or in furtherance of DOC management priorities. Together, they filed suit under the District of Columbia's Whistleblower Protection Act ("DCWPA"), D.C. Code § 1-615.51 *et seq.*, claiming that they were retaliated against because they refused to refer certain personnel requests for two correctional officers—Deon Jones and Andra Parker—up the chain of command to the Office of the Major. Following discovery, the Superior Court granted the District summary judgment on those claims. The issues on appeal are:

1. Whether the Superior Court properly granted summary judgment because the Management Employees failed to produce sufficient evidence to support a finding that they had engaged in protected activity that contributed to their terminations.

2. Whether, in any event, the Management Employees would have been fired for legitimate reasons independent of any protected activity.

STATEMENT OF THE CASE

In August 2014, the Management Employees—together with Jones and Parker—filed suit against the District. Joint Appendix ("JA") 1-12. Each alleged

retaliation in violation of the DCWPA for refusing to comply with illegal orders or making protected disclosures, and Jones and Parker also alleged retaliation under the District of Columbia Human Rights Act ("DCHRA"), D.C. Code § 2-1401 *et seq*. JA 9-11. At the close of discovery, the Superior Court denied the District's motion for summary judgment as to Jones and Parker but granted it as to the Management Employees. JA 687-704. On the eve of trial, Jones and Parker settled their claims and dismissed their complaint. JA 706. The Management Employees now seek review of summary judgment as to them. JA 707.

STATEMENT OF FACTS

1. DOC And Its Command Structure.

The mission of DOC is to ensure public safety for residents of the District by providing an orderly, safe, secure, and humane environment for the confinement of pretrial detainees and sentenced inmates.[1] As relevant here, DOC operates the Central Detention Facility ("CDF")—also known as the D.C. Jail—which houses about a thousand male, pre-trial offenders; sentenced misdemeanants; and convicted felons awaiting transfer to the Federal Bureau of Prisons.[2] As in many correctional facilities, CDF Correctional Officers work within a strict hierarchy and "[must] adhere to verbal and written orders communicated through their designated chain of

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1 *See generally* DOC, Who We Are, https://doc.dc.gov/page/about-doc.

2 DOC, Frequently Asked Questions, https://doc.dc.gov/page/doc-frequently-asked-questions.

command" from the Director to the Warden on down. DOC Policy and Procedure 1010.5H (Oct. 16, 2019) (setting out the administrative levels of authority), https://tinyurl.com/y8tvayc5.

Under the DOC Director and his Deputy Director of Operations, the Warden "[o]versees daily security operations and services at all DOC facilities." DOC Policy and Procedure 1010.1H (Sept. 10, 2018), https://tinyurl.com/y8tvayc5. The Deputy Warden of Operations at the CDF oversees the "daily staffing and functions of the facility." *Id*. Under the Deputy Warden is the Office of the Major, with a Major assigned to each of three daily shifts. *See* DOC, Organization Chart, https://tinyurl.com/y8jcocun. Supervisory Correctional Officers (such as the Management Employees) report to the Office of the Major, usually through a Captain or Lieutenant, depending on their rank. DOC Policy and Procedure 1010.5H.

"It is incumbent upon all [DOC] employees to understand, recognize and determine when official communications and transactions must be cleared through the chain of command." *Id*. The "[f]ailure to follow . . . legitimate orders . . . places the security of the facility and the safety of officers and inmates in jeopardy." JA 57 (Def. Statement of Undisputed Material Facts ("SUMF") ¶20); JA 241 (Pl. Resp. SUMF ¶20 ("The importance of having a clear chain of command and adherence is not in dispute.")).

2. The Management Employees Disobey Director Faust's Directive For Handling Jones and Parker's Personnel Requests.

The Management Employees—Holbrook, Bishop, Johnson, and Snow—are former Supervisory Correctional Officers at the CDF. JA 56 (SUMF ¶15); JA 239 (Pl. Resp. SUMF ¶15 ("Admitted")). They held at-will, Management Supervisory Service ("MSS") appointments until their terminations in February 2012 (Johnson and Snow) and September 2013 (Holbrook and Bishop). JA 56 (SUMF ¶16); JA 239-40 (Pl. Resp. SUMF ¶16 ("Admitted")); *see* D.C. Code § 1-609.54(a). As MSS appointees, they "serve[d] at the pleasure of [the DOC Director] and [could] be terminated at any time" without cause. 6-B DCMR § 3813.1.

Between 2007 and 2013, the Management Employees periodically interacted with or supervised DOC Correctional Officers Jones or Parker. JA 54 (SUMF ¶¶1-4); JA 236 (Pl. Resp. SUMF ¶¶1-4 ("Admitted")). In 2011, Jones and Parker settled a suit that they had brought against DOC in 2007 alleging sexual orientation discrimination and retaliation. *See Jones v. D.C. Dep't of Corr.*, 2006 CA 008663 B (dismissed Oct. 14, 2011). Afterward, both continued to work for DOC—but for the most part outside the CDF. JA 54 (SUMF ¶¶3-4 (Between May 2011 and Summer 2013 each was "given temporary work details.")); JA 236 (Pl. Resp. SUMF ¶¶3-4 ("Admitted")). In their time away from the CDF, Jones and Parker continued

to complain about discriminatory or retaliatory treatment.[3] They each also filed for workers' compensation and requested light duty assignments. JA 55 (SUMF ¶¶5-7); JA 236-37 (Pl. Resp. SUMF ¶¶5-7 ("Admitted")).

When Jones and Parker were assigned posts at the CDF, DOC Director Thomas Faust and his management team instructed the Supervisory Correctional Officers—including the Management Employees—that Jones and Parker's leave requests and workers' compensation claims needed to be handled at a level higher than the front-line supervisors. JA 56-57 (SUMF ¶17); JA 240 (Pl. Resp. SUMF ¶17 ("Admitted")). The Supervisory Correctional Officers were to direct all such requests and claims to the Office of the Major. JA 57 (SUMF ¶18); JA 240 (Pl. Resp. SUMF ¶18 ("Admitted")).

Between 2010 and 2013, each of the Management Employees nevertheless—on one or two occasions—approved leave or substantiated workers' compensation claims for Jones or Parker. *See* JA 57 (SUMF ¶21 (Holbrook approved a leave request for Parker in January 2011 "even after he was given a direct order to stop.")); JA 241 (Pl. Resp. SUMF ¶21 ("Admitted")); JA 58-59 (SUMF ¶¶32-33 (Bishop "approved Parker's leave slip[] after being told to stop" and "approved a worker's compensation claim for Jones")); JA 244 (Pl. Resp. SUMF ¶¶32-33 ("Admitted"));

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[3] In 2019, Jones and Parker settled these claims, *see* JA 226-33 (Pl. Statement of Material Facts in Dispute ¶¶28-37 (Jones), ¶¶44-48 (Parker)). *See supra* p. 2.

JA 60 (SUMF ¶42 (Johnson "approved one of Parker's workers' compensation claims at some point prior to her termination.")); JA 247 (Pl. Resp. SUMF ¶42 ("Admitted")); JA 61 (SUMF ¶53 ("Snow approved one leave request for Jones some time in 2009 or 2010.")); JA 250-51 (Pl. Resp. SUMF ¶53 ("Admitted")).

In 2013, the Office of the Major also informed Holbrook and Bishop that it—rather than front-line supervisors like them—would assign Jones and Parker's specific posts at the CDF. Once, after Bishop reassigned Parker's post for the day, Major Pettiford told Bishop that he "wasn't authorized to move Parker." JA 144-45 (Bishop Dep. 30:8-31:22); JA 58 (SUMF ¶¶30-31); JA 244 (Pl. Resp. SUMF ¶¶30-31 ("Admitted")). At the time, Parker was contesting his post by providing human resources with "medical documentation stating [he] was unable to work due to [an] on the job injury [sustained previously] and medical post traumatic [stress] disorder." JA 233 (Pl. Statement of Material Facts in Dispute ¶48).

Bishop received a similar instruction not to assign posts for Jones, who was already assigned to the CDF's Northeast 3 unit but was also requesting accommodations for workplace injuries. JA 142-43 (Bishop Dep. 28:17-29:4 ("I never moved [Jones] out of Northeast 3 because I was instructed not to . . . [by] Major Nelson."); JA 228-29 (Pl. Statement of Material Facts in Dispute ¶¶35-37). In fact, according to Jones, Director Faust himself had "sign[ed] a memo placing Jones in [his Northeast 3 post]." JA 228 (Pl. Statement of Material Facts in Dispute

¶35); *see also* Br. 5-6. Accordingly, when Holbrook presented his supervisor with a request by Jones to transfer to a post under Holbrook's command in August 2013, Holbrook was told to "leave [Jones] alone." JA 57-58 (SUMF ¶¶23-25); JA 242 (Pl. Resp. SUMF ¶¶23-25 ("Admitted")). Holbrook nevertheless presented Jones's transfer request and "assumed that [it] would be elevated up the chain of command." JA 58 (SUMF ¶26); JA 242 (Pl. Resp. SUMF ¶26 ("Admitted")).[4]

3. The Management Employees' Terminations.

The Management Employees were terminated over the course of almost two years for stated reasons independent of any conduct involving Jones and Parker.

Johnson and Snow were fired in February 2012 for reasons unrelated to each other. DOC Director Faust terminated Johnson after he received and credited Warden Wainwright's report that she had acted aggressively and insubordinately during an altercation with inmates. JA 60-61 (SUMF ¶¶49-51); JA 249-50 (Pl. Resp. SUMF ¶¶49-51 ("Admitted only to the extent that this is what was reported" to Director Faust)); *see* JA 111-12 (1/25/2012 Warden's Memo to Faust).

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[4] Snow, Bishop, and Johnson each allege one additional instance of protected conduct: Snow alleges (at 29) that his presence on a witness list for Jones and Parker's 2007 lawsuit was a protected disclosure; Bishop alleges (at 11) that he attempted to report Major Pettiford's "improper behavior"; and Johnson alleges (at 13) a "refus[al] to follow her supervisor's instruction to reprimand Parker for his involvement in a 'miscount,'" JA 59 (SUMF ¶¶39-41); JA 246-47 (Pl. Resp. SUMF ¶¶39-41 ("Admitted")). None of this conduct is protected under the DCWPA. *See infra* Part I.B.3.

Specifically, the Warden reported to Director Faust that Major Holmes had ordered Johnson to "stand down" when Johnson attempted to pull him (the Major) away from an inmate he was detaining and yelled, "No you stand down, Major, you stand down." JA 60-61 (SUMF ¶50); JA 249 (Pl. Resp. SUMF ¶50). Stating that "[i]n an organization such as ours there must be a clear chain of command, and adherence to it is essential for good orderly operations," the Warden recommended Johnson's termination. JA 112. Johnson was discharged within a month of the incident and within two weeks of the Warden's memorandum. JA 127 (Johnson SF-50); JA 102-04 (Shell 30(b)(6) Dep. 43:10-45:17 ("Johnson was terminated as a result of her insubordination, unprofessional and inappropriate behavior" during the incident.)).

Snow was discharged because of a management decision and in furtherance of Director Faust's overall assessment of DOC. JA 61 (SUMF ¶55); JA 251 (Pl. Resp. SUMF ¶55 ("Snow received notification that he was terminated as part of a reduction in force.")); JA 129 (Snow SF-50); JA 105 (Shell 30(b)(6) Dep. 51:1-20).

Holbrook and Bishop were fired—nineteen months later—in September 2013 because DOC Director Faust believed that they had pursued inappropriate personal relationships with female subordinates. Director Faust memorialized this belief through a written memorandum setting out that Holbrook and Bishop had each engaged in or attempted to engage in such relationships. JA 58, JA 59 (SUMF ¶27 (Holbrook), ¶35, ¶37 (Bishop)); JA 242-43, JA 245 (Pl. Resp. SUMF ¶¶27, 35, 37

("Admitted" that "Director Faust . . . memorialize[d] his 'belief that Holbrook [and Bishop] had engaged in [sexual misconduct]."")). Director Faust explained that this misconduct "ignored and violated my direct orders[,] . . . [it] is directly detrimental to staff morale, performance, discipline and employee rights[,] . . . and I will not tolerate this conduct as a member of my MSS Management team." JA 109 (9/11/2013 Faust Memo to Holbrook); JA 110 (9/11/2013 Faust Memo to Bishop). Both Holbrook and Bishop received notice of their terminations shortly thereafter. JA 125 (Holbrook SF-50); JA 126 (Bishop SF-50); *see* JA 88-91, 100-01 (Shell 30(b)(6) Dep. 11:3-14:20, 26:10-27:15 ("[T]he reason for . . . [the] termination[s]" was the misconduct memorialized by Director Faust.)).

Consistent with historical practice for MSS employees, DOC processed the Management Employees' terminations without indicating that they were "for cause" or "disciplinary" reasons, and thus each remained eligible to receive severance pay according to Chapter 38 of the District Personnel Manual. JA 679, 681, 684 (Def. Reply to Pl. Resp. SUMF ¶¶29 (Holbrook), 38 (Bishop), 52 (Johnson)); *see* 6-B DCMR § 3813.3 (An MSS employee "may be paid severance pay upon termination for non-disciplinary reasons."); *id.* § 3899 (Definitions).[5]

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[5] The deposition testimony that supports the District's assertion (at JA 679, 681, 684) that DOC processed all MSS terminations without indicating they were "for cause" was inadvertently omitted from the summary judgment record; however the

3. The Management Employees File Suit, And The Superior Court Grants Summary Judgment Against Them.

In August 2014, the Management Employees as well as Jones and Parker filed suit claiming violations of the DCHRA (Jones and Parker) and the DCWPA. JA 1-12. The District answered and asserted, among other defenses, that the claims "may be barred by the applicable statute of limitations" and that "the District would have taken the same employment action" even "in the absence of the use of [an] alleged impermissible factor." JA 18; *see* JA 13-19.[6] After the close of discovery, the District moved for summary judgment as to all the plaintiffs, and argued with respect to the Management Employees that none had engaged in protected activity, that any alleged protected activity lacked a causal connection to a prohibited employment action, and that, in any event, they were terminated for legitimate independent reasons. JA 34; *see* JA 24-52.

Management Employees did not contest the fact of this practice in their opening brief, and in this Court the District filed an unopposed motion to supplement the record with this testimony.

[6] Johnson and Snow's terminations, as well as any other alleged discipline—except for Holbrook and Bishop's terminations in September 2013—are outside the one-year statute of limitations for known violations of the DCWPA. D.C. Code § 1-615.54(a)(2) (requiring plaintiffs to file "within 3 years after a violation occurs or within one year after the employee first becomes aware of the violation, whichever occurs first"). Johnson and Snow's allegation that they were unaware of the DCWPA violations until Holbrook and Bishop's termination for sexual misconduct established a "pattern," JA 8 (Compl. ¶32), lacks merit. In the event any claims outside the one-year period are remanded, the District reserves the right to seek their dismissal as time-barred.

The Superior Court granted the motion as to the Management Employees but denied it as to Jones and Parker. JA 704; *see* JA 687-704.[7] The court determined that none of the Management Employees was terminated or otherwise retaliated against due to a protected disclosure or because of a refusal to comply with an illegal order. The Management Employees' handling of leave requests, workers' compensation claims, or post assignments was not protected activity because the directive to send personnel requests to the Office of the Major "was not illegal," nor, in disagreeing with the directive, did the Management Employees disclose "any information regarding specific wrongdoing." JA 698-99 (Holbrook); *see* JA 700 (Bishop); JA 702 (Johnson); JA 703 (Snow). Rather, "[these] actions merely appear to demonstrate disagreement with directions from . . . superiors." JA 698 (Holbrook); *see* JA 700 (Bishop); JA 702 (Johnson).

The court determined that the only action that *might* be a protected disclosure was Bishop's alleged attempt to report "his superiors' improper behavior." JA 700-01. But even this alleged disclosure—two months away from Bishop's termination—was insufficiently proximate to create a material issue of fact as to

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[7] Noting that the District's motion had not challenged whether Jones and Parker had made protected disclosures, the Superior Court denied the motion as to them because there were disputed material facts as to whether they had been subjected to prohibited personnel actions. JA 692-93, 696-98. Jones and Parker's claims proceeded but were settled prior to trial. JA 706 (Order).

causation. JA 701-02 (Bishop); *see* JA 702-03 (finding the same as to Johnson's alleged disclosure four months prior to her termination that she would treat Parker's compensation claim the same as any other claim). Nor was there "any other evidentiary support" sufficient to show causation. JA 701; *see* JA703 (same). Specifically, the court rejected the Management Employees' assertion that their receipt of severance pay was relevant. Rather, that fact went only to "whether [they were] terminated 'for cause' and not whether [they were] terminated as a result of [a] protected disclosure." JA 703 (Johnson); *see* JA 702 (Bishop).

Because none of the Management Employees had made any protected disclosures that contributed to a prohibited personnel action, the Superior Court granted the District's motion for summary judgment without considering whether the Management Employees had also been terminated for legitimate, independent reasons. JA 704-05.

After Jones and Parker settled their claims and dismissed their complaint, the judgment against the Management Employees became final, and they filed a timely notice of appeal. JA 706 (Order); JA 707 (Notice of Appeal).

STANDARD OF REVIEW

The Court reviews the grant of summary judgment de novo. *Hamilton v. Howard Univ.*, 960 A.2d 308, 313 (D.C. 2008). Although the Court must examine the evidence in the light most favorable to the party opposing the motion,

"conclusory allegations by the [non-movant] are insufficient to establish a genuine issue of material fact or to defeat the entry of summary judgment." *Id*. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Brown v. George Wash. Univ.*, 802 A.2d 382, 385 (D.C. 2002).

SUMMARY OF ARGUMENT

1. The DCWPA protects employees from prohibited personnel actions for reporting discrimination, wrongdoing, or other objectively serious misconduct. To qualify as protected whistleblowing, the employee must have refused an illegal order or reasonably and genuinely believed that they were disclosing—as relevant here—a violation of law, an abuse of authority in connection with the administration of a public program, or a substantial and specific danger to public safety. The Management Employees have not made this showing. Their refusal to refer certain personnel requests to the Office of the Major, or their disagreement with that directive, satisfies none of these standards. The rank of the person handling such requests—whether a Lieutenant, Captain, or Major—is not governed by "the DCHRA" nor could such a directive be "illegal" under it. No reasonable juror with knowledge of the facts known to or readily ascertainable by the Management Employees could conclude otherwise. Indeed, there is no evidence that the Management Employees held any such belief at the time. Their bare, passing

assertion that this same conduct also blew the whistle on an abuse of authority in the administration of a public program, or a specific and substantial threat to public safety, lacks merit. At most, the Management Employees disagreed with—and proceeded to disobey—DOC Director Faust's directive that certain personnel matters be handled at a level higher than front-line supervisors. That is mine-run insubordination, not whistleblowing.

The Management Employees' remaining stray "disclosures" are also unprotected. And, in any event, none of the alleged conduct contributed to their terminations. There is no evidence that Director Faust was aware of any of the alleged protected conduct by the Management Employees, and none of these "disclosures" save two—one for Bishop and one for Holbrook—is close enough in time to suggest a causal connection. Even then, that proximity is insufficient because Holbrook and Bishop's sexual misconduct explains their terminations. The issue of severance pay is irrelevant. The Management Employees have failed to establish a prima face case.

2. In any event, the District has demonstrated that it, like any reasonable employer, would have terminated the Management Employees for legitimate reasons regardless of whether they had engaged in a protected activity. The Management Employees do not challenge the strength of the District's evidence on this point, instead reiterating the alleged temporal proximity of their conduct and that they

received severance pay. But that is insufficient as a matter of law where the District has provided explicit evidence of legitimate, independent reasons for its actions. Summary judgment is independently warranted for this reason.

ARGUMENT

I. The District Is Entitled To Summary Judgment Because The Management Employees Did Not Establish A Prima Facie Case Under the DCWPA.

The Superior Court properly granted summary judgment to the District on the Management Employees' claims that they suffered impermissible retaliation under the DCWPA. Contrary to their insistence (at 20) that the Act's "broad legal protections" extend to their conduct when viewed in its "totality," no reasonable juror could conclude that any of the Management Employees made a protected disclosure or refused to obey an illegal order, or that any such action contributed to their termination. They have thus failed to make out a prima facie case.

A. The DCWPA's burden-shifting framework.

The DCWPA was enacted to safeguard "the public interest [that] is served when employees of the District government are free to report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal." D.C. Code § 1-615.51. Nevertheless, the statute is not meant to be "a weapon in arguments over policy or a shield for insubordinate conduct." *Zirkle v. District of Columbia*, 830 A.2d 1250, 1260 (D.C. 2003). A purported whistleblower "must disclose such serious errors by the agency that a conclusion the

agency erred is not debatable among reasonable people." *Wilburn v. District of Columbia*, 957 A.2d 921, 925 (D.C. 2008).

To establish a case under the DCWPA, an employee must demonstrate that a supervisor took, or threatened to take, "a prohibited personnel action or otherwise retaliate[d] against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order." D.C. Code § 1-615.53(a). This showing is made through "a specific, burden-shifting structure." *Johnson v. District of Columbia*, 935 A.2d 1113, 1117 (D.C. 2007). At the first step, the employee must establish that they made a protected disclosure or refused to obey an illegal order and that such disclosure or refusal was a contributing factor in the personnel action—a so-called prima facie case. D.C. Code § 1-615.54(b); *Crawford v. District of Columbia*, 891 A.2d 216, 219 (D.C. 2006); *Zirkle*, 830 A.2d at 1260.

As relevant here (*cf.* Br. 20), the DCWPA defines a "protected disclosure" as involving a "violation of a . . . local law, rule, or regulation," an "[a]buse of authority," or a "danger to the public health and safety." D.C. Code § 1-615.52(a)(6). Under the DCWPA, violations of a law, rule, or regulation must not be "merely technical or minimal" in nature. *Id.* § 1-615.52(a)(6)(D). An abuse of authority is limited to disclosures "in connection with the administration of a public program or the execution of a public contract." *Id.* § 1-615.52(a)(6)(C). And threats to "public safety" must pose "a substantial and specific danger." *Id.*

§ 1-615.52(a)(6)(E). The DCWPA also prohibits a supervisor from taking action against an employee "because of [his] refusal to comply with an illegal order." *Id*. § 1-615.53(a). An "illegal order" is defined as "a directive to violate or to assist in violating a federal, state or local law, rule, or regulation." *Id*. § 1-615.52(a)(4).

Employees who allege a protected disclosure "must show that they had [both] a reasonable and [a] genuine contemporaneous belief that the actions they disclosed rose to the level of seriousness required under the DCWPA." *Johnson v. District of Columbia*, 225 A.3d 1269, 1276 (D.C. 2020). To assess subjective belief, courts look to the actual statements the employee made to his supervisors, "not [the] subsequent characterization of those statements during litigation." *Id*. (quoting *Wilburn*, 957 A.2d at 925). However, "[a] purely subjective perspective of an employee is not sufficient even if shared by other employees." *Zirkle*, 830 A.2d at 1260. The employee's belief must also be objectively reasonable, which occurs only if "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence," *e.g.*, illegality. *Zirkle*, 830 A.2d at 1259-60 (alteration added). Under this formulation, "the fact finder must consider whether the employee reasonably should have been aware of information that would have defeated his inference of official misconduct." *Freeman v. District of Columbia*, 60 A.3d 1131, 1152 (D.C. 2012) (emphasis omitted).

In addition, the employee must show that the protected disclosure was a contributing factor to the prohibited personnel action. A contributing factor is "any factor which, alone or in conjunction with other factors, tends to affect in any way the outcome of the decision." D.C. Code § 1-615.52(a)(2). "[T]he requisite causal connection may be established by showing that the employer had knowledge of the employee's protected activity, and the adverse personnel action took place shortly after that activity." *Tingling-Clemmons v. District of Columbia*, 133 A.3d 241, 247 (D.C. 2016) (internal quotation marks and ellipsis omitted). But "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality . . . uniformly hold that the temporal proximity must be very close." *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (internal quotation marks omitted). Thus, courts have routinely rejected temporal proximity as evidence of a causal connection when two or more months have passed between the protected activity and adverse employment action. *See Taylor v. Solis*, 571 F.3d 1313, 1322 (D.C. Cir. 2009) ("[A]n inference of retaliatory motive based upon the 'mere proximity' in time between Taylor's filing her first suit and the AWOL listing two and one-half months later would be untenable on the record here.").

If the employee establishes a *prima facie* case, then—at the second step—the burden shifts to the employer "to prove by clear and convincing evidence that the

alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in [protected activities]." D.C. Code § 1-615.54(b). In the absence of rebuttal evidence, this showing is dispositive. *McCormick v. District of Columbia*, 752 F.3d 980, 986-87 (D.C. Cir. 2014).

B. The Management Employees did not engage in conduct protected by the DCWPA.

The bulk of the Management Employees' claims relates to their refusal to follow Director Faust's directive to refer Jones and Parker's leave slips, workers' compensation forms, and post assignments to the Office of the Major. None of this activity—nor any of their remaining, stray allegations—is protected.

1. The Management Employees did not report a violation of the law or refuse to comply with an illegal order when, in response to a directive that certain personnel actions be referred to the Office of the Major, they continued to handle those requests or disagree with that directive.

The Management Employees claim that, at some point between 2009 and 2013, each of them approved or supported a leave request, a workers' compensation claim, or a post reassignment for Jones or Parker—contrary to the directive that all such actions should instead be referred to the Office of the Major. They assert that those actions, or their statements in relation to them, were refusals to obey an illegal order, *see* D.C. Code §§ 1-615.52(a)(4), 1-615.53(a), or disclosures of a violation of law, *see* D.C. Code §§ 1-615.52(a)(6)(D), 1-615.53(a). *See* Br. 20. Neither the facts nor the law supports those assertions.

First, the Management Employees nowhere explain how a directive that Jones and Parker's personnel requests be handled by the Office of the Major rather than a front-line supervisor is a directive to violate "the DCHRA" (Br. 20). *See* D.C. Code § 1-615.52(a)(4) (defining "illegal order"). Nor could they.

The DCHRA prohibits discriminatory actions that affect the basic terms and conditions of employment, and it prohibits retaliatory actions that are materially adverse. Specifically, "an adverse employment action must involve 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Kumar v. D.C. Water & Sewer Auth.*, 25 A.3d 9, 17 (D.C. 2011) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). A "materially adverse action" is one that is "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006); *Smith v. D.C. Office of Human Rights*, 77 A.3d 980, 993 (D.C. 2013) (quoting *Burlington N.*). Even this standard requires "significant" harm and excludes "petty slights [and] minor annoyances." *Burlington N.*, 548 U.S. at 68; *see, e.g.*, *Durant v. District of Columbia*, 875 F.3d 685, 698 (D.C. Cir. 2017) (finding "no merit [to the] claim that [the] supervisor's request for documentation . . . was materially adverse").

Among the many problems with the Management Employees' reliance on the DCHRA is the absence of any plausible adverse action. A directive that a Major—rather than one of the Management Employees—handle leave slips, assign posts, or substantiate workers' compensation claims in itself imposes no hardship on, let alone materially injures, Jones or Parker. Contrary to the Management Employees' insistence (at 16) that "the DOC upper management's orders regarding Jones or Parker were unlawful retaliation," they were not, as a matter common sense or as a matter of law. Indeed, the record reflects that the Management Employees lacked knowledge of, or interest in, how Jones or Parker's claims or requests were ultimately resolved. For example, Holbrook did not know what happened to the leave slips he passed on to his supervisors. JA 474 (Holbrook Dep. 31:2-12). He also "assumed" that Jones's request for a post under him would go up the chain of command. JA 58 (SUMF ¶26); JA 242 (Pl. Resp. SUMF ¶26 ("Admitted")). After Bishop reassigned Parker's post for the day, he "wasn't aware of [what happened after] that because he was not "doing the roster" then. JA 148 (Bishop Dep. 34:10-20). Nor is there evidence that the directive was implemented for a discriminatory

or retaliatory reason.[8] The DCHRA simply does not mandate *who* in the chain of command at the CDF handles certain personnel requests.

Altogether, that is dispositive of the Management Employees' claim that they refused a "directive to violate . . . [the] law." D.C. Code § 1-615.52(a)(4). Unlike the definition of "protected disclosure," which includes "any disclosure of information" the employee "reasonably believes" evidences the enumerated misconduct, *id*. § 1-615.52(a)(6), the DCWPA does not protect an employee who refuses to comply with a *legal* order—whatever his reasonable belief. *See id*. § 1-615.52(a)(4). Had the D.C. Council intended to define "illegal order" as one the employee reasonably believed to be illegal, it would have said so. Understandably, the Council did not say so because that would have transformed the DCWPA into a license for employees to disregard lawful directives. Indeed, in *Zirkle*, this Court

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[8] The DCHRA governs adverse actions *only* where they are taken for prohibited reasons. "The DCHRA does not prohibit disparate treatment of employees based on tenure, sponsorship, connections or the like." *Vogel v. D.C. Office of Planning*, 944 A.2d 456, 465 (D.C. 2008). In evaluating claims under the DCHRA, "neither a court nor a jury sits as a super-personnel department that re-examines an entity's business decisions." *McFarland v. George Wash. Univ.*, 935 A.2d 337, 350 (D.C. 2007) (internal quotation marks omitted). The Management Employees provide nothing but conjecture that referring requests to the Office of the Major was discriminatory or retaliatory. *Compare Freeman*, 60 A.3d at 1152 ("Rumor and suspicion do not provide an objectively reasonable foundation for an accusation of illegal government conduct."), *with* JA 220 (Pl. Statement of Disputed Facts ¶4 ("Holbrook became aware that there was a culture among the supervisors to alienate Deon Jones and Andra Parker.")).

applied these very different standards back-to-back, finding first that the supervisor's order was not actually illegal, then finding that the employee's protected-disclosure claim failed because he did not reasonably believe the order was illegal. 830 A.2d at 1258-60. Here, because the Management Employees were not ordered to violate the law—specifically "the DCHRA" (at 20)—they cannot claim DCWPA protection from a "refusal to comply with an illegal order," D.C. Code § 1-615.53(a).

In any event, the Management Employees marshal nothing to support that they reasonably or genuinely believed that the directive they allegedly refused, or disagreed with, violated the DCHRA. *See* D.C. Code § 1-615.52(a)(6)(D); *cf. Rodriguez v. District of Columbia*, 124 A.3d 134, 145 n.6 (D.C. 2015) (where the employee "failed to present evidence of either a reasonable belief or actual illegality," declining to decide whether the DCWPA "requires that an employee have refused to comply with an order that is actually illegal or whether it is sufficient that the employee reasonably believed the order to be illegal").[9]

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[9] Indeed, other than the DCHRA, the Management Employees have not identified a law, rule, or regulation that this directive allegedly violates. Their "failure . . . to point to a specific law, rule, or regulation that was violated is fatal to [their] claim." *Baumann v. District of Columbia*, 795 F.3d 209, 220 (D.C. Cir. 2015) (citing *District of Columbia v. Poindexter*, 104 A.3d 848, 858 (D.C. 2014); *cf. Zirkle*, 830 A.2d at 1259 n.12 (refusing to hear new ground for illegality where it was not raised in the court below).

Given that the Management Employees were experienced supervisory officers well-versed in the chain of command, it is implausible that they reasonably believed that *the DCHRA* governed a directive that a Major rather than a Captain handle a request for a day off, among other mine-run personnel matters. *Cf. Zirkle*, 830 A.2d at 1260 (looking to the employee's "background and expertise" to determine whether the belief was reasonable). Moreover, despite now alleging (at 4) that they had "each observed and objected to [this] . . . illegal . . . treatment of Jones and Parker" over the course of several years, none ever sought clarification as to whether the directive they disagreed with violated the DCHRA or any other law. *Freeman*, 60 A.3d at 1152 (reasonableness "requires consideration of all the evidence presented, including that which detracts from a reasonable belief" (internal quotation marks omitted)). "An employee cannot attain whistleblower status by dispensing with due diligence and remaining unjustifiably ignorant of information that would have refuted or cast doubt on his charges." *Id*. To the extent the Management Employees ever believed the directive violated the law, that unjustifiable ignorance is precisely what they sustained here.

There is also no evidence that the Management Employees actually believed that the personnel directive that they refused or otherwise expressed opposition to was unlawful. This, too, is fatal because the DCWPA "makes clear that an employee must have had such a belief *at the time the whistle was blown* in order to state a

claim." *Freeman*, 60 A.3d at 1143 (emphasis in original). The Management Employees' own accounts of their contemporaneous reactions demonstrate that they merely resisted the perceived encroachment on their own authority and preferred to treat every employee the same.

Holbrook testified that, after being "verbally chastised . . . for granting Mr. Parker leave," he "made it clear to [the Major and Deputy Warden] that, you know, sir, I'm treating him as I would any other employee." JA 132-33 (Holbrook Dep. 31:13-32:11); *see* Br. 8-9, 21. Holbrook similarly never mentioned that he thought he was refusing an illegal order or protesting a violation of the law when supporting Jones's request for a transfer of posts. Rather, he told the Major only that he was "trying to treat [Jones] the same as I would any other officer." JA 137 (Holbrook Dep. 50:12-19); *see* Br. 22 (quoting JA 221 (Pl. SUMF ¶7: Holbrook "did not feel" his supervisor's response was "appropriate and fair")).[10] Bishop similarly objected only to the departure from "normal procedures":

> [Deputy Warden Carolyn Cross] wanted us to not grant any leave to Jones and Parker without it going through the Major's office. And my question was that that's not the normal procedures because the

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[10] Holbrook mentions in passing (at 8) that he "knew that complying with [the directive as it related to Parker's leave] would be in violation of the collective bargaining agreement." But this belief also lacks any contemporaneous support. In any event, neither he nor any other Management Employee identifies any provision of the collective bargaining agreement that was violated, nor do they develop any argument that violating the agreement would violate a "law, rule, or regulation" within the meaning of the DCWPA, D.C. Code § 1-615.52(a)(4); *see supra* n.9.

> captain[s] approve all leave. Why would theirs be different? Why do we have to go through you to get—and she was like just do what I tell you to do.

JA 150 (Bishop Dep. 39:2-9); JA 160 (Bishop Dep. 56:20-22 ("I just did what they didn't want me to do, like, they didn't want me to approve leave[.]")).

After refusing to walk back her handling of a workers' compensation claim for Parker, Johnson also failed to do more than "explain[] to her superiors that she would not do anything unethical to an employee and that she would not treat Parker any differently than other employees." JA 225 (Pl. Statement of Disputed Facts ¶22). Finally, when Snow was "chastised" for approving leave for Jones, Snow "didn't think [it] was fair" that Captain Holmes asserted that granting such leave was *Holmes's* prerogative. JA 250-51 (Pl. Resp. SUMF ¶¶53-54); JA 180 (Snow Dep. 22:6-18).

No reasonable juror could find that the Management Employees believed that any of these statements disclosed violations of law that they neither mentioned nor implied. Their "choice of language belies [any] claim that [they] intended to convey" violations of law or that they thought that they were refusing to comply with an illegal order. *Wilburn*, 957 A.2d at 926; *cf. Vogel v. D.C. Office of Planning*, 944 A.2d 456, 464 (D.C. 2008) ("It is not enough for an employee to object to . . . [a] violation of personnel policies . . . or mistreatment in general, without connecting it

to membership in a protected class, for such practices, however repugnant they may be, are outside the purview of the DCHRA.").

Rather, the undisputed record evidence dictates these are not true "disclosures" that implicate the kinds of government misconduct the DCWPA is meant to combat. As this Court recently explained, disclosures are "not protected, nor are they truly disclosures" when employees do not "disclos[e] anything unknown to defendants, but rather resist[] the policies [leadership] had decided to promulgate." *Johnson*, 225 A.3d at 1279. "The DCWPA is intended to protect employees who disclose matters of public import rather than to authorize judicial review of personnel decisions or second-guessing of administrative priorities." *Id*. That second-guessing is all the Management Employees have put at issue here.

2. The Management Employees did not report an "abuse of authority" or a "substantial and specific danger" to public safety when, in response to a directive that certain personnel actions be referred to the Office of the Major, they continued to handle those requests or disagree with that directive.

The Management Employees also assert—without developed or sustained argument (at 20)—that these same "disclosures" are protected because they involve an "abuse of authority in connection with the administration of the DOC" or "safety issues." These claims lack merit for at least two reasons.

First, the Management Employees nowhere explain how any of their actions come within the scope of either DCWPA provision, and "'[i]ssues adverted to in a

perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'" *Johnson*, 225 A.3d at 1276 n.5 (quoting *McFarland v. George Wash. Univ.*, 935 A.2d 337, 351 (D.C. 2007)). "'It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.'" *Id*. (quoting *Gabramadhin v. United States*, 137 A.3d 178, 187 (D.C. 2016)). The Management Employees' failure to make a cogent argument requires this Court to go no further.

Second, and in any event, the Management Employees nowhere disclosed an "[a]buse of authority" in "the administration of a public program" or a "substantial and specific danger" to the "public . . . safety." D.C. Code § 1-615.52(a)(6)(C), (E).

An "[a]buse of authority" occurs when—"in connection with the administration of a public program," *id*. § 1-615.52(a)(6)(C)—there is "'an arbitrary or capricious exercise of power by [an official or employee] that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.'" *District of Columbia v. Poindexter*, 104 A.3d 848, 857 (D.C. 2014) (quoting *Embree v. Dep't of Treasury*, 70 M.S.P.R. 79, 85 (1996)).[11] Nothing about the Management Employees' allegations satisfies this definition.

[11] In construing the DCWPA, this Court has "found it helpful to consider how its federal counterpart . . . and similar state whistleblower laws have been interpreted." *Freeman*, 60 A.3d at 1141.

Even if the allegations could be construed as involving the "administration of a public program," none of the Captains, Majors, or Deputy Wardens with whom the Management Employees communicated were exercising—let alone abusing—their "authority" when they reiterated Director Faust's directive or chastised those who knowingly disobeyed it. Rather, they were simply executing through the chain of command the "[DOC] Director['s] instruct[ion]." JA 56 (SUMF ¶17); JA 240 (Pl. Resp. SUMF ¶17 ("Admitted")); *see Poindexter*, 104 A.3d at 857 (no "exercise of authority" under those circumstances). And as to "abuse," the Management Employees have put forward no evidence of how the directive "adversely affect[ed] the rights of any person" or resulted in "personal gain or advantage" to anyone involved. *Id.* (internal quotation marks omitted). That is particularly so where there is no evidence that the claims for leave or workers' compensation were disproportionately *denied* by the Office of the Major. *Cf. supra* p. 21.

Accordingly, no disinterested observer with knowledge of the essential facts known to, and readily ascertainable by, the Management Employees could reasonably conclude that referring Jones and Parker's claims and requests to the Office of the Major constituted an abuse of authority in connection with the administration of a public program. Nor does the record contain any evidence that

any of the Management Employees genuinely believed that they were reporting such an abuse. *See supra* pp. 25-26.[12]

As to the Management Employees' passing claim (at 20, 22) that their alleged disclosures also involved "safety issues," they fail to explain how their opposition to referring Jones and Parker's personnel requests to the Office of the Major involved a "substantial and specific danger to" the "public . . . safety," D.C. Code § 1-615.52(a)(6)(E). Even if actions in a "prison setting" implicate "safety" in some broad sense (*cf*. Br. 22), the Management Employees' interest in handling requests or claims themselves, rather than passing them up the chain of command, reveals no objectively reasonable belief in a "public safety" threat of the requisite specificity or magnitude. Indeed, this Court has explained that "substantial and specific danger[s] to the public health and safety" must rise above "arguments over policy" and

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[12] Relying on *Winder v. Erste*, 905 F. Supp. 2d 19 (D.D.C. 2012), Holbrook suggests in passing (at 22) that "gross mismanagement could result from certain agency personnel problems," but he nowhere else mentions "[g]ross mismanagement." D.C. Code § 1-615.52(a)(6)(A). For good reason. The rank of the person handling Jones and Parker's personnel requests is not "a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission," *Poindexter*, 104 A.3d at 855. In any event, *Winder* is inapposite. *Compare* 905 F. Supp. 2d at 37 ("Winder's various complaints about DCPS hiring and staffing practices . . . fall short of 'protected disclosures.'"), *with id*. at 41 ("Winder's allegation that he told Erste he refused to file a false affidavit, coupled with his complaint to the Inspector General disclosing the filing of the allegedly false affidavits by [others], is serious enough to constitute a 'protected disclosure' under the [DCWPA].").

"disclose such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people." *Rodriguez*, 124 A.3d at 142-43 (internal quotation marks omitted); *cf. Chambers v. Dep't of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (holding that a "substantial and specific" danger under the federal WPA requires allegations of a "likelihood of harm," "when the alleged harm may occur," and "the nature of the harm"). No such threat is identified or substantiated here.

3. The Management Employees' remaining stray "disclosures" did not report a violation of law, an "abuse of authority," or a "substantial and specific danger" to public safety.

Snow, Bishop, and Johnson each allege one other stray instance of protected conduct. But none of it is protected by the DCWPA.

Snow asserts (at 29) that his presence on a witness list for Jones and Parker's 2007 lawsuit—of which he was not even aware until after his 2012 termination—is protected conduct. *See* JA 61 (SUMF ¶¶56-57); JA 251-52 (Pl. Resp. SUMF ¶¶56-57 ("Admitted")). However, as the Superior Court determined, "Snow's name on a witness list does not implicate conduct by Snow . . . and does not disclose any information covered by the statute." JA 703-04. Before this Court, Snow offers no argument or evidence to the contrary—only speculation (at 29) that a jury could view his "neutral behavior"—that is, his *inaction*—as demonstrative of protected conduct.

That argument is refuted by the DCWPA's enumeration of what constitutes a "protected disclosure." *See* D.C. Code § 1-615.52(a)(6).

Next, Bishop alleges (at 11, 26) that he called Deputy Director Carolyn Cross to report Major Pettiford's "improper behavior," but his meeting with Cross was cancelled. JA 223 (Pl. Statement of Material Facts in Dispute ¶13); JA 353-54 (Bishop Interrog. ¶10); JA 582-83 (Bishop Dep. 58:1-59:2). This is not a protected disclosure because Bishop wanted to report improper behavior—toward *him*:

> [Cross] said that she would meet me because I want to complain about how Pettiford is . . . treating me[,] . . . the treatment I was receiving. . . . I used to be, like, the go-to person if you needed something[,] . . . [but] [t]hey started shunning me off.

JA 582-83 (Bishop Dep. 58:1-59:2). Reporting an interpersonal conflict is not protected under the DCWPA. *Cf. Johnson*, 225 A.3d at 1278, 1284 (requiring a "particular disclosure" rather than a "generalized" or "personal" grievance).[13]

Finally, to the extent Johnson attempts to revive (at 13, 28) a claim that she had forfeited at summary judgment alleging a "refus[al] to follow her supervisor's

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[13] The Superior Court "assum[ed]" that this disclosure was protected because it thought that Bishop wanted to report Pettiford's behavior "toward Jones and Parker." JA 700. But Bishop testified that "it didn't really bother me how they w[ere] treating [Jones and Parker]." JA 582 (Bishop Dep. 58:1-10). And, even if Bishop's complaint was what "Major Pettiford was . . . making [him] do to [Jones and Parker], not approving their leave" (JA 151 (Bishop Dep. 40:1-4)), that would not be whistleblowing for the reasons discussed above. In any event, the Superior Court correctly held that the "two-month period that elapsed . . . between [Bishop's call to Cross and Bishop's termination] does not create a material issue of fact as to causation." JA 701; *see supra* pp. 11-12.

instruction to reprimand Parker for his involvement in a 'miscount,'" her claim fails. JA 59 (SUMF ¶¶39-41); JA 246-47 (Pl. Resp. SUMF ¶¶39-41 ("Admitted")); *see* JA 208-10 (Pl. MSJ Opp. (making no mention of the claim)); JA 224-26 (Pl. Statement of Material Facts in Dispute ¶¶18-25 (same)). As the Superior Court correctly determined, disobeying an order is not whistleblowing. *See supra* p.11. Indeed, Johnson nowhere substantiates (at 27-28) that the order she refused was illegal, or explains how her statement to her supervisor that he was "wrong" about the identity of the person responsible for the miscount reports a violation of law, an abuse of authority in the administration of a public program, or a substantial and specific threat to public safety.[14] Even if the claim were not forfeited, it lacks merit.

C. The Management Employees' alleged protected conduct did not contribute to their terminations.

The Management Employees also fail to establish that their alleged protected conduct contributed to their terminations.[15]

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[14] In any event, this event occurred in "late Spring 2011"—about eight months prior to Johnson's termination. JA 336 (Johnson Decl. ¶2). It thus lacks temporal proximity sufficient to establish causation. *Payne v. District of Columbia*, 722 F.3d 345, 354 (D.C. Cir. 2013) (citing *Johnson*, 935 A.2d at 1120).

[15] Although the Management Employees mention other alleged discipline in passing, any claims relating to such actions have been doubly forfeited. In the Superior Court, the Management Employees opposed the District's summary judgment motion by insisting only that they were unlawfully terminated. *See, e.g.*, JA 203 ("Plaintiff Holbrook made Protected Disclosures and suffered a retaliatory termination."); JA 206 (contesting that "Bishop did not make any protected

As this Court has explained, under the DCWPA, "[a]s with other retaliation claims, the requisite 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." *Tingling-Clemmons*, 133 A.3d at 247 (internal quotation marks and ellipsis omitted). None of the Management Employees has satisfied this standard. First, they have not shown that Director Faust was aware of *any* of their alleged protected activity. "Without evidence, circumstantial or otherwise, that 'the decision-maker[] responsible for the adverse action had actual knowledge of the protected activity,'" the Management Employees have "failed to create a disputed fact question about whether the decision was retaliatory." *Coleman v. District of Columbia*, 794 F.3d 49, 64 (D.C. Cir. 2015)

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disclosures under the DCWPA and [thus] was properly terminated"); JA 208 ("Johnson engaged in protected activity and was terminated in retaliation."); JA 210 ("Snow engaged in protected activity under the DCWPA and was improperly terminated."). They do the same in this Court. *See, e.g.*, Br. 21-22 ("Holbrook was terminated shortly thereafter in retaliation for statement [supporting Jones's transfer]."); Br. 23 (arguing the "temporal proximity of [Holbrook's] termination"); Br. 24 (disputing whether Bishop was "properly terminated"); Br. 26 (same); Br. 27-28 (arguing a "causal link between Johnson's disclosures . . . and her termination"); JA 29 (alleging "improper motive" based on the proximity of Snow's termination to Johnson's). Any claims relating to other alleged discipline thus cannot be considered now. *Randolph v. D.C. Zoning Comm'n*, 83 A.3d 756, 760 (D.C. 2014) ("Because petitioners failed to raise this issue during the contested case below . . . or in their initial brief, we will not consider it."); *Johnson*, 225 A.3d at 1276 n.5 ("[un]developed argument[s] . . . are deemed waived").

(quoting *McFarland*, 935 A.2d at 357); *McCormick*, 752 F.3d at 986 ("[T]he only official against whom he had made a disclosure and who might therefore be suspected of retaliation, did not make the decision to take the adverse employment action."). This is dispositive as to all the Management Employees.

Second, and in addition, neither Johnson nor Snow can establish temporal proximity. Johnson's most proximate alleged disclosure—related to her approval of a workers' compensation claim for Parker—occurred "in or about October 2011"—four months prior to her termination in February 2012. *See* JA 224 (Pl. Statement of Disputed Facts ¶21); JA 60 (SUMF ¶42); JA 247 (Pl. Resp. SUMF ¶42 ("Admitted")). This is insufficient as a matter of law. *Johnson*, 225 A.3d at 1279 n.11 ("[A] stretch of four months realistically cannot constitute temporal proximity."); JA 703 (Opinion); *see supra* p. 18.[16] The only alleged disclosure for which Snow provides a date occurred "in 2009 or 2010"—"[a]pproximately 3 *years*"

[16] Johnson does not dispute this, instead alleging (at 27-28) an "on-going campaign of retaliatory acts." However, there is no "pattern of antagonism directed toward [her] beginning soon after the disclosure and continuing to the alleged retaliation." *Tingling-Clemmons*, 133 A.3d at 247 (internal quotation marks omitted). The other two retaliatory acts Johnson claims (at 27), involving allegedly unsubstantiated written counseling, occurred months later—in "December 2011 and January 2012." Thus, as in *Johnson*, "[n]o reasonable jury could find that [the decision-maker was] motivated by these disclosures when terminating [the employee] long after the events in question, especially when [the employee] has produced no evidence that any of the issues were ever mentioned in the intervening period." 225 A.3d at 1279 n.11.

prior to his termination. JA 61 (SUMF ¶¶53, 55 (emphasis added)); JA 250-51 (Pl. Resp. SUMF ¶¶53, 55 ("Admitted")). And, as to Snow's appearance at an indeterminate time on the witness list of Jones and Parker's lawsuit, Snow nowhere explains why he would be terminated in 2012 for appearing on a witness list of a 2007 lawsuit that settled in 2011—and no factfinder could reasonably conclude that he was. *See* JA 61 (SUMF ¶56); JA 251 (Pl. Resp. SUMF ¶56 ("Admitted")); *see also Johnson*, 225 A.3d at 1279 n.11 (where appellant was "unable to specify a date when the . . . 'disclosure' may have occurred[,] [she] has not carried her burden to show temporal proximity that can support an inference of causation").

As to Holbrook and Bishop, each allege a single minor event shortly preceding their termination.[17] But even if this was protected conduct—and it is not, *see supra* Parts I.B.1, I.B.2—an inference of retaliation cannot rest solely on 'temporal proximity'" where "the opportunity for retaliation conflicts with the [employer's] explicit evidence of an innocent explanation of the event"—here Holbrook and Bishop's sexual misconduct. *Johnson*, 935 A.2d at 1120 ("the existence of the excessive force complaint" was explicit evidence); JA 109 (9/11/2013 Faust Memo

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[17] Holbrook supported Jones's transfer to a post under his command the month prior to his termination. JA 57-58 (SUMF ¶¶23-25); JA 242 (Pl. Resp. SUMF ¶¶23-25 ("Admitted")). Bishop signed Jones's workers' compensation paperwork several weeks prior to his termination. JA 223 (Pl. Statement of Disputed Facts ¶14); JA 58-59 (SUMF ¶33); JA 244 (Pl. Resp. SUMF ¶33 ("Admitted")).

to Holbrook); JA 110 (9/11/2013 Faust Memo to Bishop). No prima facie case forms under these circumstances. *Freeman*, 60 A.3d at 1145.

Finally, contrary to the Management Employees' assertions (at 24, 26, 28), it does not matter that Holbrook, Bishop, and Johnson received severance pay. DOC processed all its MSS terminations without indicating that they were "for cause." *See supra* p. 9. And, as the Superior Court determined, even if their paperwork had included such a designation, it would still be "[ir]relevant" to what each must prove under the DCWPA—that they were "terminated *as a result of the protected disclosure[s]*." JA 703 (emphasis added). "The evidence proffered in opposition to a motion for summary judgment must be, on its own, clearly responsive to the factual requirements for proving liability." *Johnson*, 935 A.2d at 1122. The Management Employees' receipt of severance does not meet this standard. Accordingly, even viewing the evidence in the light most favorable to them, no reasonable juror could conclude that any of the Management Employees made protected disclosures that contributed to their terminations.

II. In The Alternative, The District Is Entitled To Summary Judgment Because The Management Employees Were Terminated For Legitimate Independent Reasons.

Even if the Management Employees had carried their burden at the prima facie stage of their case—and they have not—the District has shown that there is "no disputed question of fact that [their terminations] would have occurred for legitimate

reasons independent of [their] protected disclosure[s]." *Coleman*, 794 F.3d at 60; D.C. Code § 1-615.54(b); *see Wilburn*, 957 A.2d at 924 ("As an appellate court, we may affirm the trial court's dismissal order on any basis supported by the record." (internal quotation marks omitted)).[18]

The District has provided well-documented explanations for why each of the Management Employees was fired. As Holbrook and Bishop acknowledge, they were terminated, along with other male Supervisory Correctional Officers, because DOC Director Faust believed that they had pursued inappropriate personal relationships with female subordinates. JA 58, JA 59 (SUMF ¶¶27 (Holbrook), 35, 37 (Bishop)); JA 242-43, JA 245 (Pl. Resp. SUMF ¶¶27, 35, 37 ("Admitted" that "Director Faust . . . memorialize[d] his 'belief that Holbrook [and Bishop] had engaged in [sexual misconduct]."')). Director Faust terminated Johnson after receiving and crediting the Warden's report that Johnson was aggressive and

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[18] Although the Superior Court did not reach the issue, the District argued at length that it had legitimate, independent reasons for firing the Management Employees, and they had every opportunity to develop a record in response. Indeed, their opening brief already repeats the arguments that they made in their summary judgment opposition, ensuring the merits will be fully briefed in this Court. *Compare* JA 206 ("[G]iven the temporal proximity of Holbrook's support of Jones and his termination, as well as the fact that he received severance, it is clear that Holbrook's termination was not legitimate and independent from his support of Jones and Parker."), 208 (same as to Bishop), 210 (same as to Johnson), 211 (temporal proximity as to Snow), *with* Br. 23-34 (Holbrook), 26 (Bishop), 28 (Johnson), 29 (Snow).

insubordinate during an altercation with inmates. JA 60-61 (SUMF ¶¶49-51); JA 249-50 (Pl. Resp. SUMF ¶¶49-51 ("Admitted only to the extent that this is what was reported" to Director Faust)); *see* JA 111-12 (1/25/2012 Warden's Memo to Faust). Finally, Snow was terminated because of a management decision and in furtherance of Director Faust's overall assessment of DOC. JA 61 (SUMF ¶55); JA 251 (Pl. Resp. SUMF ¶55 ("Snow received notification that he was terminated as part of a reduction in force")).

Although the Management Employees claim that these reasons are based on inaccurate understandings of the underlying facts,[19] they cast no doubt on Director Faust's good faith belief in them. The D.C. Circuit, applying the DCWPA, has explained that this is what counts: it is not whether the incident occurred as reported, but rather "whether the Department of Corrections terminated [the employee] because its investigation found that [it] had." *McCormick*, 752 F.3d at 986. The Court's duty is not "to sit as a super board of employment, reviewing the decision of the employer on the underlying facts." *Id*. However, this is precisely what the Management Employees ask here by offering no more than their "unsubstantiated beliefs" about what really happened, without genuinely disputing what the employer

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[19] *See* JA 243, 245, 249, 252 (Pl. Resp. SUMF ¶27 (Holbrook: Director Faust's belief "inaccurate"), ¶35 (Bishop: Director Faust's belief "inaccurate"), ¶49 (Johnson: "denies that the alleged event took place"), ¶60 (Snow: reason was "pretext")).

believed happened. This "do[es] not constitute competent evidence of causation" sufficient to defeat summary judgment. *Johnson*, 935 A.2d at 1120-21; *cf. Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 496 (D.C. Cir. 2008) (Where an employee "raises the specter that the [employer] . . . made up the incident" and "says it's the jury's job to decide factual and credibility questions," he "misunderstands the relevant factual issue," which is "whether *the employer honestly and reasonably believed* that the . . . incident occurred." (internal quotation marks omitted)).

Finally, contrary to the Management Employees' assertions, they cannot prevail by reprising their arguments about temporal proximity or severance pay. Temporal proximity alone is insufficient to prevent judgment as a matter of law. *Johnson*, 935 A.2d at 1118 (summary judgment is "meritorious" if the employee "could not counter the . . . [employer's] unrelated, legitimate reason"). And the fact that Holbrook, Bishop, and Johnson received severance is irrelevant for roughly the same reason it is irrelevant to their prima facie case: DOC processed the paperwork for terminations of MSS employees without indicating—or regard for—whether the discharge was "for cause." JA 679, 681, 684 (Def. Reply to Pl. Resp. SUMF ¶¶29 (Holbrook), 38 (Bishop), 52 (Johnson)). The paperwork can thus support no inference as to why the terminations occurred. *See supra* pp. 9, 37.

Without any evidence to undermine the District's clear demonstration that each of the Management Employees was fired for an independent lawful reason, judgment in the District's favor is warranted. *McCormick*, 752 F.3d at 986.

CONCLUSION

The judgment should be affirmed.

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CERTIFICATE OF SERVICE

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