OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS
LA 200, John Adams Building, 110 Second Street SE
Washington, D.C. 20540-1999

Venu Pillai, Appellant,	)	
v.	)	
United States Capitol Police, Appellee.	)	Case Numbers: 19-CP-27 (AG, CV, RP) 19-CP-59 (CV, RP)

Before the Board of Directors: Barbara Childs Wallace, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara L. Camens, Members.

DECISION OF THE BOARD OF DIRECTORS

This consolidated case is before the Board of Directors ("Board") pursuant to a petition filed by the pro se appellant, Venu Pillai, seeking review of the April 14, 2020 Order of the Hearing Officer that entered summary judgment in favor of his employing office, the United States Capitol Police ("USCP"). Upon due consideration of the Hearing Officer's Order, the parties' briefs and filings, and the record in these proceedings, the Board affirms the Hearing Officer's Order in its entirety.

I. Background and Procedural History

The Hearing Officer's decision contains a thorough recitation of the operative facts in this case, which are summarized herein.[1] The appellant, a 61-year old Asian-American male of East Indian origin, is a Budget Officer in the Budget Division of the USCP's Office of Financial Management ("OFM"). As the Budget Officer, he is responsible for budget formulating, execution, reporting, and auditing. The Director of OFM is 57 years old and is an African American. The appellant's immediate supervisor, who commenced her employment with the USCP in March 2018 as Deputy Director of OFM, is 59 years old and is Caucasian.

[1] The factual recitation in the Hearing Officer's decision is undisputed, as reflected by the USCP's Statement of Material Facts and the appellant's response thereto, with the following proviso: Where any genuine dispute existed, the Hearing Officer accepted as true the appellant's averments of fact, irrespective of the fact that they were not submitted in the form of a sworn affidavit or declaration.

In March 2018, prior to meeting formally with her division staff, the appellant's supervisor came to his office and asked "When are you going to retire?" When the appellant demurred, the supervisor told the appellant "I need to know" and left. Thereafter, the appellant perceived that his supervisor began harassing and discriminating against him, as discussed below.

During the first week of August 2018, the appellant's supervisor informed him that she had received a complaint about him from an analyst that he supervised. Specifically, the analyst informed the supervisor that the appellant made her uncomfortable by stating that she would not be allowed to make any mistakes. The appellant requested a meeting so that he could resolve whatever concern the analyst had. During this meeting, the appellant explained that he was communicating the priority that everything that the Budget Division produced must be without error and that, with recent changes in OFM management, the Budget Division no longer had the same collaborative relationship it had under previous management. During the meeting, the supervisor directed the analyst to raise her hand whenever she felt as if the appellant was bullying or threatening her in the future. The supervisor also instructed the appellant to reconsider his tone whenever the analyst signaled she was distressed by raising her hand.

Following this meeting, the appellant began having less personal interactions with the analyst. As the appellant testified, his conduct with the analyst changed "because [he] thought that [the analyst] had made a complaint against [him]"). In early September 2018, the analyst spoke to the appellant and told him that she did not make any formal complaints against him and that she had not wanted to attend the August meeting. The analyst testified that the reason she did not want to attend the meeting was because she was concerned that it would create conflict between her and the appellant; and also between the appellant and the supervisor. The appellant asked her to document in writing what happened. The analyst testified that the appellant told her that writing the memo "was the right thing to do because it was [her] fault that the [August] meeting" occurred. The analyst complied and drafted a memo, which was written like meeting minutes. The analyst testified that the appellant said the memo was unhelpful because it only indicated what happened during the meeting; whereas, he wanted something that would help him more. The analyst complied and wrote a second memo.

The appellant emailed USCP's Office of Professional Responsibility ("OPR"), which investigates alleged violations of the Department's Rules of Conduct, on October 15, 2018. The subject line of the appellant's email was "[c]oerced complaint against a supervisor," and his email referred to his belief that his supervisor had coerced the analyst to complain about him. The appellant did not specifically complain of discrimination or harassment based upon his race, national origin, age, or any other protected category in his written OPR complaint, and the substance of his written complaint referred only to the supervisor allegedly coercing the analyst to complain about him.

The appellant received a performance evaluation of "Meets Expectations" for the rating period October 2017 to October 2018. Previously, he had received "Outstanding" performance evaluations.

On November 2018, the appellant asked the analyst to revise her second memo. The analyst testified that the appellant offered to type the revised memo and have her sign it. The analyst rejected the appellant's revisions and testified that the information the appellant was asking her to include in the memo was "false information." Thereafter, the appellant's supervisor, who had been informed of the situation, asked the analyst to provide her with a written statement regarding the incident. The analyst did so. The supervisor asked the analyst to revise the statement to include information regarding how the appellant's request had impacted her. The analyst provided a revised statement to the supervisor. The supervisor thereafter issued the appellant a CP-550 Personnel Performance Note for "bullying [the analyst] into writing a memo to exonerate him." The appellant appealed his CP-550 to the OFM Director. The Director met with the appellant to discuss his appeal and determined that the CP-550 was valid. She denied his appeal.

Although the record contains no OPR document establishing that the appellant had specifically raised any claim of race, national origin, age, or retaliation discrimination, the appellant asserts that he subsequently reported to OPR that the CP-550 and the "meets expectations" performance evaluation was issued to him because of his race and age, and in retaliation for filing his original OPR Complaint on October 15. OPR investigated and informed the appellant that it did not find any violation of USCP rules of conduct.

On June 12, 2019, the appellant requested 10 days of leave from September 3 to September 17, 2019, via the USCP's leave request system. On June 13, the supervisor called the appellant into her office and explained that she and the Director decided to deny his leave request because of its timing and the length of the requested leave during the budget process. Following the supervisor and the appellant's meeting on June 13, 2019, the appellant sent the supervisor an email stating that the leave was for a religious purpose. Thereafter, the supervisor and the Director determined to grant the appellant's leave request, and the Budget Division revised its budget formulation schedule to accommodate the appellant's leave.

On October 24, 2019, the appellant filed a Complaint with the OCWR in Case No. 19-CP-27, alleging age, race, and national origin discrimination, and also alleging that he was unlawfully retaliated against when he was issued the CP-550 and the performance evaluation after having filed his complaint with OPR. On December 23, 2019, the Appellant filed a second Complaint with the OCWR in Case No. 19-CP-59, which also alleged discrimination on the basis of age, race and national origin, and also alleging that he was unlawfully retaliated against when his initial leave request was denied after having filed his initial request for counseling with the OCWR in March 2019.

The Hearing Officer consolidated the two cases. Following discovery, the USCP filed a motion for summary judgment on all claims. On April 14, 2020, the Hearing Officer granted summary judgment in favor of the USCP on all claims. The appellant has filed a petition for review ("PFR") of the Hearing Officer's Order; the USCP has timely filed a brief in opposition to the appellant's PFR, and the appellant has timely filed a reply to the USCP's responsive brief.

II. Standard of Review

The Board's standard of review requires it to set aside a Hearing Officer's decision if it determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with the law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406(c); *Rouiller v. U.S. Capitol Police*, Case No. 15-CP-23 (CV, AG, RP), 2017 WL 106137, at *6 (Jan. 9, 2017). In making determinations under subsection (c), the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. 2 U.S.C. § 1406(d).

III. Summary Judgment Standard

We review a decision granting a motion for summary judgment *de novo*. *Torres-Velez v. Office of the Architect of the Capitol*, No. 17-AC-36 (FL, RP, CV), 2019 WL 10784232, at *4 (OCWR Sep. 23, 2019); *Patterson v. Office of the Architect of the Capitol*, No. 07-AC-31 (RP), 2009 WL 8575129, at *3 (OOC Apr. 21, 2009). Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); OCWR Procedural Rule 5.03(d). In determining whether the nonmoving party has raised a genuine issue of material fact, the Board must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor. *U.S. Capitol Police & Lodge 1, FOP/U.S. Capitol Police Labor Comm.*, No. 16-LMR-01 (CA), 2017 WL 4335144, at *3 (OOC Sep. 26, 2017); *see also Talavera v. Shah*, 638 F.3d 303, 308 (D.C. Cir. 2011).

To defeat a motion for summary judgment, the non-moving party must "designate specific facts showing that there is a genuine issue for trial," *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), and the moving party can establish its entitlement to judgment by showing the lack of evidence to support the non-moving party's case, *Conroy v. Reebok Int'l*, 14 F.3d 1570, 1575 (Fed. Cir. 1994); *Eastham v. U.S. Capitol Police Bd.*, No. 05-CP-55 (DA, RP), 2007 WL 5914213, at **3-4 (OOC May 30, 2007) (affirming summary judgment when complainant "failed to proffer evidence" that would permit the inference of unlawful conduct required to establish complainant's prima facie case). The non-moving party is required to provide evidence in support of his claims, not merely assertions, allegations, or speculation. *See Solomon v. Architect of the Capitol*, No.

02-AC-62 (RP), 2005 WL 6236948, at *8 (OOC Dec. 7, 2005) (holding that at the summary judgment stage, claims must be supported by evidence, which distinguishes a decision on a motion for summary judgment from a decision on a motion to dismiss). However, neither this Board nor the Hearing Officer may make credibility determinations or weigh the evidence. *See Burley v. Nat'l Passenger Rail Corp.,* 801 F.3d 290, 296 (D.C. Cir. 2015).

IV. Analysis

As an initial matter, we note that the appellant has submitted an email from the aforementioned analyst as Exhibit A to his PFR. Because this email was drafted after the Hearing Officer's Order was issued, it was not part of the record below. The CAA is silent on whether the Board may consider non-record evidence on review. *See* 2 U.S.C. § 1406(d).

In any event, even if this exhibit were admitted into the record on review, the matters addressed in it—whether the analyst felt bullied or intimidated by the appellant, and whether the analyst went to the appellant's supervisor with complaints about the memo or whether the supervisor approached the analyst—were thoroughly briefed by the parties and considered by the Hearing Officer below. Because, as we discuss below, these issues are immaterial to the appellant's claims that he was discriminated against on the basis of his age, race, and national origin, and that he was retaliated against because of his protected activities, the exhibit does not provide a basis for overturning the Hearing Officer's decision.

A. The Hearing Officer Properly Granted the USCP's Motion for Summary Judgment on the Appellant's Discrimination Claims.

On review, the appellant reiterates his claims that the USCP discriminated against him on the basis of his age, race, and national origin (East Indian), by engaging in a pattern of demeaning conduct that eroded his supervisory authority and set him up for disciplinary action. Specifically, he asserts that: (1) his immediate supervisor expressed discriminatory animus against him shortly after coming to the organization by demanding to know if he planned to retire; (2) the USCP expressed discriminatory animus against him when it initially denied his request for 10 days of annual leave to return to India; (3) his immediate supervisor expressed discriminatory animus towards him by lowering his performance rating; (4) his immediate supervisor issued him a written admonishment (CP-550) containing fabrications, whereas his second-line supervisor granted his immediate supervisor a pass for engaging in comparable contemporaneous conduct; (5) his immediate supervisor undermined his supervisory authority by instructing his subordinates directly; (6) his immediate supervisor singled him out to print his own email and give it to her as a reminder; (7) his immediate supervisor asked him personally to deliver a budget book to a Capitol Hill staffer, denying him the opportunity to assign that

task to one of his subordinates; (8) his immediate supervisor publically demeaned him while dismissing him and his subordinate from an office as if they were children; and (9) his immediate supervisor instructed him at a staff meeting that he required her permission to contact one of his subordinates about urgent business while she was on leave.

As noted above, the Hearing Officer granted the USCP's motion for summary judgment on these claims. For the reasons that follow, the Board affirms.

1. Alleged Adverse Actions

Section 201 of the CAA governs employment discrimination claims. It provides, in relevant part:

> All personnel actions affecting covered employees shall be made free from any discrimination based on—
>
> (1) race, color, religion, sex, or national origin, within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2); [or]
>
> (2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a)[.]

2 U.S.C. § 1311(a). To establish a prima facie case of discrimination under section 201, the employee must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the action gives rise to an inference of discrimination. *Rouiller,* 2017 WL 106137, at *8 (citing *Udoh v. Trade Ctr. Mgmt. Assoc.*, 479 F. Supp. 2d 60, 64 (D.D.C. 2007)); *see also Baloch v. Kempthorne*, 550 F.3d 1191, 1196 (D.C. Cir. 2008); *but see Babb v. Wilkie,* 140 S. Ct. 1168, 1173–74 (2020) (holding in ADEA case that liability attaches if relevant personnel action is made in a way "tainted by differential treatment based on age"); *Hill v. Garland,* 2021 WL 965624, at *6 (D.D.C. Mar. 15, 2021) (citing *Babb*).

Of particular relevance here is the initial adverse personnel action requirement, which an employee satisfies by identifying "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." *Douglas v. Donovan*, 559 F.3d 549, 552 (D.C. Cir. 2009) (quoting *Taylor v. Small,* 350 F.3d 1286, 1293 (D.C. Cir. 2003)); *Hill,* 2021 WL 965624, at *6. In most employment discrimination cases, there is no dispute that the employee has suffered an adverse employment action, and the sole question is whether the action was tainted by discrimination. *See Baloch,* 550 F.3d at 1196. In this case, however, the USCP contests whether the appellant has suffered any adverse action. That is, the appellant was not fired

or denied a job or promotion, and he did not suffer any reductions in salary or benefits, which are the typical adverse actions in employment discrimination cases.

As to the appellant's allegations that his immediate supervisor demanded to know if or when he planned to retire, we agree that he has failed to identify any relevant personnel action that was made in a way "tainted by differential treatment based on age." *Babb*, 140 S. Ct. at 1173–74. Like other forms of employment discrimination, "[l]iability for discrimination under [the ADEA] requires an adverse employment action." *Patterson v. Johnson*, 505 F.3d 1296, 1298 (D.C. Cir. 2007) (quoting *Brown v. Brody*, 199 F.3d 446, 452–55 (D.C. Cir. 1999)). However, "'stray remarks,' even those made by a supervisor, are insufficient to create a triable issue of [age] discrimination where . . . they are unrelated to an employment decision involving the plaintiff." *Joyce v. Office of the Architect of the Capitol*, 106 F. Supp. 3d 163, 174 (D.D.C. 2015) (quoting *Simms v. U.S. Gov't Printing Office*, 87 F. Supp. 2d 7, 9 n.2 (D.D.C. 2000)). Accordingly, the courts have consistently held that the mere fact that an employer asked an employee about his retirement plans is insufficient in and of itself to raise an inference of discrimination under the ADEA. *See, e.g., id.; Ranowsky v. Nat'l R.R. Passenger Corp.*, 244 F. Supp. 3d 138, 145 (D.D.C. 2017) (stating that "[t]here is nothing discriminatory or suspicious about an employer asking an employee about retirement plans"), *aff'd*, 746 F. App'x 23 (D.C. Cir. 2018). The appellant's supervisor's inquiry concerning his retirement plans do not, therefore, support an inference of age discrimination.

The appellant's allegations regarding the denial of his request for annual leave also clearly fail to support an inference of discrimination, as there is no dispute that his leave request was later granted. The appellant thus has not shown that the initial denial constituted a materially adverse action. *Baloch*, 530 F.3d at 1198 (leave restrictions did not constitute materially adverse actions where restrictions never resulted in the appellant having to forego leave); *Lester v. Natsios*, 290 F. Supp. 2d 11, 28 (D.D.C. 2003) (in determining whether a challenged action constitutes an adverse employment action, a court should focus on "ultimate employment decisions" such as "hiring, granting leave, discharging, promoting, and compensating," not intermediate decisions "having no immediate effect upon employment decisions.") (quoting *Taylor v. FDIC*, 132 F.3d 753, 764 (D.C. Cir. 1997)).

Regarding the appellant's claims relating to an allegedly unfair performance appraisal, the U.S. Court of Appeals for the D.C. Circuit has noted that formal criticism or poor performance evaluations are generally not adverse employment actions if they do not affect the employee's grade or salary. *See Brown*, 199 F.3d at 458; *see also Russell v. Principi*, 257 F.3d 815, 819 (D.C. Cir. 2001) (negative performance evaluations are not adverse actions absent some effect on terms, conditions or privileges of employment). Here, the appellant did not receive a negative evaluation, but rather only an evaluation of "meets expectations." Although the evaluation was less than he had hoped it would be, it was certainly not adverse in an absolute sense. *See Brown*, 199 F.3d at 458 (overall "fully

satisfactory rating" in middle of possible grades not adverse action under Title VII); *Russell,* 257 F.3d at 819 (stating that "performance evaluations alone at the satisfactory level or above should not be considered adverse employment actions"); *Lester v. Natsios,* 290 F. Supp. 2d 11, 28–29 (D.D.C. 2003) (same). Hence, the appellant's "meets expectations" performance appraisal does not constitute an actionable adverse employment action.

Similarly, absent tangible job consequences such as lower pay, lower grade level, or ineligibility for promotional opportunities, the USCP's issuance of the CP-550 Personnel Performance Note also does not constitute a materially adverse action. Formal criticisms or reprimands, without additional disciplinary action such as a change in grade, salary, or other benefits, do not constitute adverse employment actions. *Stewart v. Evans,* 275 F.3d 1126, 1136 (D.C. Cir. 2002); *Baloch,* 550 F.3d at 1199 (letter of counseling and letter of reprimand do not in themselves constitute adverse employment actions). The appellant does not contend that the CP-550 in any way affected his pay, benefits, or privileges. It therefore cannot be considered an adverse employment action under the anti-discrimination provisions of the CAA.

Nor do the other miscellaneous discrete incidents that the appellant cites involve the types of tangible harm that can support a discrimination claim under the CAA. As stated above, the appellant contends that his immediate supervisor undermined his supervisory authority by instructing his subordinates directly, singling him out to print his own email and give it to her as a reminder, asking him personally to deliver a budget book to a Capitol Hill staffer, publically demeaning him while dismissing him and his subordinate from an office as if they were children, and instructing him at a staff meeting that he required her permission to contact one of his subordinates about urgent business while she was on leave. Many workplace slights or purely subjective harms — such as "dissatisfaction with a reassignment," "public humiliation," or "loss of reputation" — do not rise to the level of adverse actions. *Hill,* 2021 WL 965624 at *6 (citing *Forkkio v. Powell,* 306 F.3d 1127, 1130–31 (D.C. Cir. 2002)). The threshold is met only if the employee "experiences materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." *Czekalski v. LaHood,* 589 F.3d 449, 454 (D.C. Cir. 2009) (quoting *Forkkio,* 306 F.3d at 1131). So too here.
The Board agrees that these incidents are subjective harms and typical workplace slights that do not qualify as adverse actions, as the appellant does not connect them to any "materially adverse consequences" affecting the conditions of his employment or establishing objectively tangible harm.

2. Pretext

Even if we were to assume that one or more of the above events constituted adverse actions, however, we nonetheless agree with the Hearing Officer that the

appellant did not produce sufficient evidence that the USCP's asserted legitimate non-discriminatory reasons for its actions were not the actual reasons and that the appellant suffered discrimination on an impermissible ground.

As the Hearing Officer noted in his decision, the USCP has asserted legitimate, nondiscriminatory reasons for its actions. Thus, for example, the appellant's immediate supervisor asserted that she made the inquiry whether or when he was planning to retire for succession planning purposes, after she learned that the appellant was planning to attend a retirement seminar having participated in two previous ones. Further, the USCP asserts that it initially denied the appellant's leave request out of consideration of the organization's peak budget season requirements; however, when the appellant subsequently indicated that his leave request had a religious practice basis, the USCP approved it. As to the appellant's performance rating and the issuance of the CP-550, the USCP stated in its motion for summary judgment that both records documented a complaint that the USCP had received about the appellant's alleged misconduct toward a budget division employee. It also states that the appellant's autonomy as a Budget Officer was affected by several changes that its Office of Financial Management made to its processes, including hiring the appellant's immediate supervisor and making changes to the Budget Division. According to the USCP, these changes were to improve quality assurance and applied to all employees within the Budget Division.

Where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the Hearing Officer must resolve one central question on a motion for summary judgment: Has the employee produced sufficient evidence for a reasonable factfinder to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of the employee's membership in a protected class? *Torrez-Velez,* 2019 WL 10784232, at *6*; Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). To answer that question at the summary judgment stage, the Board assesses whether there is evidence from which a reasonable factfinder could find that the employer's stated reason for the personnel action is pretext and that "unlawful discrimination was at work." *Burley,* 801 F.3d at 296; *see also Barnett v. PA Consulting Grp., Inc.,* 715 F.3d 354, 358 (D.C. Cir. 2013).

Although the appellant clearly disagrees with the USCP's stated reasons for its actions, his disagreement is insufficient to carry his burden at summary judgment. As the USCP has articulated a non-discriminatory explanation for its actions, the issue is not "the correctness or desirability of [the] reasons offered . . . but whether the employer honestly believes in the reasons it offers." *See Rager v. U.S. Senate Sergeant at Arms,* No. 17-SN-28 (DA, FM, RP, CV) 2018 WL 4908519, *9 (OCWR October 3, 2018); *Gage v. Office of the Architect of the Capitol,* No. 00-AC-21 (CV), 2001 WL 36175210, 5* (OOC Nov. 14, 2001) (quoting *McCoy v. WGN Cont. Broad. Co.,* 957 F.2d 368, 373

(7th Cir. 1992)); *George v. Leavitt*, 407 F.3d 405, 415 (D.C. Cir. 2005). Thus, the law requires the appellant to provide sufficient evidence from which a reasonable factfinder could conclude that the OCWR's proffered nondiscriminatory reasons are false *and* that the true reasons were tainted by discrimination. *Brady*, 520 F.3d at 496; *Baloch*, 550 F.3d at 1198. Although the appellant contends on review that the USCP "has not proved that the persistent harassment I suffered did not have discriminatory motives," it is for to him provide evidence that the USCP's stated reason was in fact pretext for unlawful discrimination, as the ultimate burden of proving discrimination always remains with the complainant. *Torrez-Velez*, 2019 WL 10784232, at *6; *see also Evans v. U.S. Capitol Police Bd.*, No. 14-CP-18 (CV, RP), 2015 WL 9257402, at *7 (OOC Dec. 9, 2015).

Accordingly, because the USCP has asserted legitimate, nondiscriminatory reasons for its actions, we consider only whether the appellant "produced evidence sufficient for a reasonable jury to find that the employer's stated reason was not the actual reason and that the employer intentionally discriminated against [the appellant] based on" his age, race, or national origin. *Brady*, 520 F.3d at 495. The appellant, however, has produced no direct evidence of discriminatory animus by the USCP, and he has failed to produce any other evidence of discrimination that discredits the underlying reasons for its actions. Therefore, even assuming the appellant had suffered one or more adverse employment actions, he did not produce evidence sufficient to overcome summary judgment on the question whether he suffered impermissible discrimination.

3. Hostile Work Environment Claims

We turn next to the appellant's claim that he was the victim of a hostile work environment based on his age, race, and nationality. The Hearing Officer also granted the USCP's motion for summary judgment on this claim. We affirm.

To make out a hostile work environment claim, the appellant must show that he was subjected "to discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Torrez-Velez*, 2019 WL 10784232, at *9; *Rager*, 2018 WL 4908519, at ** 11-12; *Williams v. Office of the Architect of the Capitol*, No. 14-AC-11 (CV, RP), 2017 WL 5635714, at *8 (OOC Nov. 21, 2017); *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, (1993) (whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances). A hostile work environment claim requires proof that the environment was objectively hostile or abusive – i.e., an environment that a reasonable person would find hostile or abusive – and which was subjectively perceived as such. *Harris*, 510 U.S at 21-23; *see also Fargher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *Baird v. Gotbaum*, 792 F.3d 166, 172 (D.C. Cir. 2015) ("[T]he standard for severity and pervasiveness is an objective one.") (citing *Harris*, 510 U.S. at 21). These standards for judging hostility are sufficiently

demanding to ensure that Title VII does not become a "general civility code." *Faragher* 524 U.S. at 787.

Viewing the appellant's allegations in a light most favorable to him, we agree with the Hearing Officer that they are insufficient to support a claim of hostile work environment harassment. First, a necessary component of a hostile work environment claim is that the allegedly hostile behavior must be "discriminatory"—that is, it must be tied to the complainant's membership in a protected class. *Torrez-Velez,* 2019 WL 10784232, at *9*; Rager,* 2018 WL 4908519, at ** 11-12; *Williams,* 2017 WL 5635714, at *8; *Baloch*, 550 F.3d at 1201 (plaintiff's hostile work environment claim failed, in part, because "none of the comments or actions directed at [plaintiff] expressly focused on his race, religion, age, or disability"); *Gray v. Foxx*, 637 F. App'x 603, 608 (D.C. Cir. 2015) (plaintiff submitted evidence that her supervisor yelled at her and belittled her, but "[did] not connect his remarks to any protected status"); *Hyson v. Architect of Capitol*, 802 F. Supp. 2d 84, 104 (D.D.C. 2011) (stating that "because [plaintiff] is unable to tie the majority of her allegations to her gender or protected activity, the Court is unable to consider them"); *see also Jensen v. Potter*, 435 F.3d 444, 447 (3d Cir. 2006) (stating that "[m]any may suffer severe harassment at work, but if the reason for that harassment is one that is not prescribed by Title VII, it follows that Title VII provides no relief").

Here, the appellant does not allege that any USCP employee made derogatory comments about his age, race, or nationality. Rather, he cites only one discrete act related to his membership in a protected classifications, i.e., his age, in support of his hostile work environment claim: that his immediate supervisor demanded to know if or when the appellant was going to retire. As the Hearing Officer noted, there is no contention that she subsequently persisted with such inquiries, and a new manager could not be faulted in having such concern after learning that her supervisory subordinate had already attended at least one prior retirement seminar and was enrolled for another. We agree. The appellant's petition for review provides no basis for disturbing the Hearing Officer's finding and conclusions regarding this claim.

Second, although the appellant reiterates on review that his immediate supervisor took several actions that undermined his own supervisory authority, the courts have generally rejected hostile work environment claims based on work-related actions by supervisors. *See Williams,* 2017 WL 5635714, at *9*, see also, e.g., Wade v. District of Columbia,* 780 F. Supp. 2d 1, 19 (D.D.C. 2011); *Nurriddin v. Bolden,* 674 F. Supp. 2d 64, 94 (D.D.C. 2009) ("[T]he removal of important assignments, lowered performance evaluations, and close scrutiny of assignments by management [cannot] be characterized as sufficiently intimidating or offensive in an ordinary workplace context."); *Bell v. Gonzales,* 398 F.Supp.2d 78, 92 (D.D.C. 2005) (finding that actions such as exclusion from the informal chain of command, close monitoring of work, missed opportunities for teaching, travel, and high-profile assignments, and reassignment to another unit did not amount to a hostile work environment because "they cannot fairly be labeled abusive or

offensive"); *see also Houston v. SecTek, Inc.*, 680 F. Supp. 2d 215, 225 (D.D.C. 2010) ("Allegations of undesirable job assignment or modified job functions and of [supervisor's] unprofessional and offensive treatment are not sufficient to establish that [plaintiff's] work environment was permeated with discriminatory intimidation, ridicule, and insult.") (citation and quotation marks omitted). Under the circumstances, the work-related actions that the appellant cites were not objectively offensive, abusive, hostile or threatening.

The remaining actions that the appellant describes also fall far short of the kind of "severe or pervasive" harassing conduct he is required to show in order to prevail. *Harris,* 510 U.S. at 21-23. *See Brooks v. Grundmann*, 748 F.3d 1273, 1275 (D.C. Cir. 2014). Although the appellant contends that "[a]ny reasonable person will find my work environment offensive enough and hostile with the 'lengthy recitation of facts' I provided," general feelings of workplace discomfort or unease unrelated to membership in a protected classification are simply not enough to support a claim for hostile work environment. *See Williams,* 2017 WL 5635714, at *9; *Tucker v. Johnson*, 211 F. Supp. 3d 95, 101 (D.D.C. 2016).[2]

Accordingly, we affirm the Hearing Officer's grant of summary judgment for the USCP on the appellant's hostile work environment claim.

B. The Hearing Officer Properly Granted the USCP's Motion for Summary Judgment on the Appellant's Reprisal Claims.

The appellant also alleges that the USCP retaliated against him because of his protected activities. He specifically asserts that because he contacted the USCP's Office of Professional Responsibility ("OPR") on October 15, 2018, his immediate supervisor retaliated against him by issuing the CP-550 and the performance appraisal of "meets expectations." He also asserts that the initial denial of his leave request on June 13, 2019 was in reprisal for the request for counseling he filed with the OCWR on March 1, 2019.

As noted above, the Hearing Officer granted the USCP's motion for summary judgment on these claims. For the reasons that follow, the Board affirms.

[2] For the same reasons, the appellant cannot demonstrate that he was subjected to a hostile work environment in retaliation for engaging in protected activities under the CAA. *See generally, Solomon v. Office of the Architect of the Capitol,* No. 02-AC-62 (RP), 2005 WL 6236948, at *10 n.7 (Dec. 7, 2005) (recognizing that although there are different standards in proving a hostile work environment claim and a retaliation claim, a hostile work environment can be the basis for a retaliation claim).

Section 208(a) of the CAA governs reprisal claims. It provides:

> It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter.

2 U.S.C. § 1318. The Board has adopted a Title VII-based approach to analyze all reprisal claims under the CAA. *See Britton v. Office of the Architect of the Capitol*, No. 02-AC-20 (CV, RP), 2005 WL 6236944 (OOC May 23, 2005). Therefore, to establish a prima facie claim of reprisal under the CAA, the employee is required to demonstrate that: (1) he engaged in activity protected by Section 208(a) of the CAA; (2) the employing office took action against him that is reasonably likely to deter protected activity; and (3) a causal connection existed between the two. *Id.* If the employee so demonstrates, the employing office thereafter is required to rebut the presumption of reprisal by articulating a legitimate non-retaliatory reason for its actions. *Evans v. U.S. Capitol Police Bd.*, No. 14-CB-18 (CV, RP), 2015 WL 9257402, at *6 (OOC Dec. 9, 2015). The articulation of a legitimate, non-retaliatory reason for the adverse employment action shifts the burden to the employee to show that the employer's reason is merely a pretext for unlawful reprisal. *Id.; see Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981).

Here, the Hearing Officer determined that the appellant engaged in protected activity when he contacted OPR on October 15, 2018, alleging that his direct supervisor had coerced another employee to complain about him, noting that the appellant had cited discrimination in his written complaint and orally asserted racial and age discrimination to the OPR investigator. The Hearing Officer also determined that the appellant engaged in protected activity when he filed a request for counseling with the OCWR on March 1, 2019. We agree.

Although the appellant engaged in protected activities, we agree with the Hearing Officer that the appellant failed to demonstrate the USCP took any action against him that would be reasonably likely to deter protected activity. As discussed above, a performance appraisal of "meets expectations" might have been lower than the appellant desired, but such a rating is a satisfactory one that would not reasonably deter an employee from engaging in protected activity. *See Bowden v. Clough*, 658 F. Supp. 2d 61, 96 (D.D.C. 2009) ("such performance assessments are unlikely to objectively deter a reasonable employee from making Title VII or Retaliation Act claims"); *cf. Williams,* 2017 WL 5635714, at *12 ("Williams failed to establish that the comments on her overall 'Outstanding' performance evaluations were actions reasonably likely to deter protected activity"). In addition, we agree that the initial denial of the appellant's leave request

would not, on its face, be reasonably likely to deter protected activity. The initial denial of the lengthy leave request constituted a minor workplace annoyance that was not an actionable adverse event sufficient to support a reprisal claim. *See Rager*, 2018 WL 4908519, at *8 (*citing Williams*, 2017 WL 5635714 at 12 (2012)). Finally, as stated above, formal criticisms or reprimands, such as the CP-550 in this case, do not constitute adverse employment actions without additional disciplinary action such as a change in grade, salary, or other benefits. Thus we agree with the Hearing Officer that the issuance of the CP-550 would not be reasonably likely to deter protected activity.

Finally, the appellant has failed to provide sufficient evidence from which a reasonable factfinder could conclude that the USCP's proffered reasons for its actions, discussed above, were false and that the true reason was intentional retaliation. The Board may not "second-guess an employer's personnel decision absent demonstrably discriminatory [or retaliatory] motive." *See Paige v. Office of the Architect of the Capitol*, 2018 WL 4382908, 6 (2018) (quoting *Milton v. Weinberger*, 696 F.2d 94 (D.C. Cir. 1982)).

The appellant suggests only a possible inference of reprisal based on the progression of events. Viewing the evidence as a whole in the light most favorable to the appellant, we agree with the Hearing Officer's determination that no reasonable finder of fact would conclude that the USCP's stated legitimate reasons for its actions were not the actual ones or that they were a pretextual. *See Paige*, 2018 WL 4382908 at 8 (viewing the record as a whole, temporal proximity alone did not establish pretext in light of the employing office's articulated nondiscriminatory reason for its actions).

Although the appellant may disagree with the reasons given by the USCP, that disagreement provides insufficient grounds to find for him on appeal to the Board. Here, the USCP has articulated a non-retaliatory reason for its actions, and the appellant has offered no evidence that those reasons were pretextual or that his CP-550, performance appraisal, or the initial denial of his leave were causally related to his protected activities. Accordingly, we affirm the Hearing Officer's grant of summary judgment for the USCP on the appellant's reprisal claim. *See Eastham*, 2007 WL 5914213, at *4 (OOC May 30, 2007) (upholding summary judgment on retaliation claim when complainant "points to no evidence even remotely suggesting that the USCP's true motive . . . was retaliatory" and complainant's "briefs to the Board offer no legal or evidentiary basis for concluding that an inference of retaliatory motive is warranted").

Accordingly, the Hearing Officer properly granted summary judgment to the USCP on this claim.

ORDER

For the foregoing reasons, the Board affirms the Hearing Officer's Order entering summary judgment for the USCP on all claims.

It is so ORDERED.

Issued, Washington, DC, May 6, 2021