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

NKECHI GEORGE-WINKLER, Appellant, v. OFFICE OF CONGRESSMAN ROBERT D. ("BOBBY") SCOTT, U.S. House of Representatives, Appellee.	Case Numbers: 19-HS-30 (DA, FM, RP), 19-HS-74 (DA, FM, 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

The appellant, Nkechi George-Winkler, petitions for review of the January 9, 2023 post-hearing Decision and Order of the Hearing Officer finding that she failed to prove her reprisal claims against the employing office under section 208 of the Congressional Accountability Act (CAA), 2 U.S.C. 1317. We exercise jurisdiction pursuant to 2 U.S.C. § 1406. Because the Hearing Officer's decision is supported by substantial evidence, we affirm.

I. Background and Procedural History

On March 8, 2019, the appellant, a Senior Adviser in the employing office's Newport News office, filed a Complaint under the Administrative Dispute Resolution procedures in effect prior to the amendments to the CAA made by the CAA Reform Act. The Complaint alleged violations occurring between September 9, 2018, and March 8, 2019, of the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the anti-reprisal provisions of the CAA. On September 20, 2019, she filed a Claim under the CAA's post-Reform Act procedures, which encompassed alleged violations of the same provisions of the CAA occurring between March 24 and September 20, 2019. The Hearing Officer joined the cases with the parties' consent. Following discovery, the Hearing Officer granted the employing office's motion for

summary judgment on the appellant's ADA and FMLA claims, but denied its motion insofar as it concerned her reprisal claims.[1]

After a 25-day hearing, the Hearing Officer determined that the appellant failed to establish her reprisal claims, and he issued a Decision and Order dismissing her joint Complaint and Claim in its entirety. Specifically, the Hearing Officer determined that the appellant had failed to establish that the employing office took any action that was adverse to her because she had engaged in activity protected by the CAA. In so finding, the Hearing Officer credited the testimony and evidence presented by the employing office that the actions at issue were taken for legitimate, non-retaliatory reasons relating to her documented performance deficiencies.

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[1] The Hearing Officer's Order on summary judgment identified the reprisal claims for hearing as follows:

> 1. Management interfered with the appellant's performance by withholding essential information and emails and avoiding contact with her; reducing her assignments; and refusing to answer her questions.
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> 2. Management openly expressed a lack of trust in her.
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> 3. Management gave her a performance evaluation, without prior caution, significantly lower that her last rating, and barely above the successful level.
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> 4. Management deprived her of her prior opportunity to telework while permitting her comparator colleagues to perform telework.
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> 5. Management justified her relatively low annual bonus on the grounds that she was a disloyal and disruptive employee who encouraged other employees to file charges.
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> 6. Management ignored her request for advancement in the context of its November 2018 Office reorganization.
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> 7. Management instigated a sham ethics charge against her.
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> 8. The Chief of Staff abusively shouted at her several times causing her physical and emotional distress.
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> 9. Management conducted a surface investigation into her report that a male colleague spoke to her in an abusive manner that he did not display with male colleagues. Management declined to interview a witness she named by assuming she could not have witnessed the event because of her office location; and
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> 10. She received much smaller merit salary increases than her comparator colleague so that the once significant difference had almost disappeared.

On petition for review, the appellant contends that the Hearing Officer's findings and conclusions are unsupported by substantial evidence, arbitrary and capricious, and contrary to law.[2] We disagree.

II. Standard of Review

We must set aside the Hearing Officer's decision if we determine it 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); *Cobbin v. U.S. Capitol Police,* Case No. 21-CP-10 (CV, RP), slip op. at 2 (Sep. 27, 2023); *Rouiller v. U.S. Capitol Police,* Case No. 15-CP-23 (CV, AG, RP), 2017 WL 106137, at *6 (C.A.O.C. Jan. 9, 2017). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). The Supreme Court has stated that a court reviewing for substantial evidence should accept such factual findings if they are supported by the record as a whole and should not supplant those findings merely by identifying alternative findings that could be supported by that record. *Arkansas v. Oklahoma,* 503 U.S. 91, 113 (1992); *see also Cobbin,* slip op. at 2-3.

The question is not whether we would have made the same decision ourselves, or for that matter, whether there is a "scintilla" of evidence in the record that is contrary to the Hearing Officer's decision. The only issue for the Board is whether, on the record as a whole, there is substantial evidence to support the Hearing Officer's finding. *Johnson v. Office of the Architect of the Capitol,* Case No. 96-AC-25 (CV), 1998 WL 35281337, at *4, *10 (C.A.O.C. May 22, 1998).

III. The Hearing Officer's Determination that the Appellant Failed to Establish Her Reprisal Claims is Supported by Substantial Evidence.

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] The reprisal claims are the only claims challenged in the appellant's brief on review; accordingly, the ADA and FMLA claims dismissed on summary judgment are not before the Board.

2 U.S.C. § 1317. Claims arising under the CAA's anti-retaliation provision are analyzed under the framework and standards governing Title VII's anti-retaliation provision. *Moore v. Office of the Architect of the Capitol*, 828 F. Supp. 2d 254, 257 (D.D.C. 2011); *Herbert v. Architect of the Capitol,* 766 F. Supp. 2d 59, 74 n. 13 (D.D.C. 2011); *Britton v. Office of the Architect of the Capitol,* Case No. 02-AC-20 (CV, RP), 2005 WL 6236944, at **3-5 (C.A.O.C. May 23, 2005).

As the Hearing Officer noted, to establish a prima facie case of unlawful reprisal, the employee must demonstrate: (1) having engaged in activity protected by section 208(a) of the CAA; (2) suffering employing office action reasonably likely to deter protected activity; and (3) a causal connection between the two. Where the employee meets this burden, the employing office is required to rebut the presumption of reprisal by articulating a legitimate non-retaliatory reason for its actions. The articulation of a legitimate non-retaliatory reason for the adverse employment action shifts the burden to the employee to show that the employing office's reason is merely a pretext for unlawful reprisal. *Pillai v. United States Capitol Police,* Case No. 19-CP-27 (AG, CV, RP); 19-CP-59 (CV, RP), 2021 WL 1963840, at *11 (C.A.O.C. May 6, 2021).

The parties dedicate large tracts of their briefs addressing the Hearing Officer's findings of fact and conclusions of law as to each of these elements, reiterating their opposing positions on such questions as whether the appellant had engaged in protected activities prior to initiating CAA proceedings in 2019, or whether the actions she challenges are reasonably likely to deter protected activity. However, focus on these elements of a prima facie reprisal claim in isolation is somewhat misplaced in a post-hearing appeal.

Where a hearing has been held and the record is complete, it is unnecessary (and sometimes unhelpful) to follow the traditional burden-shifting order of analysis; rather, the question of whether the employee has established a prima facie case drops from the case and the inquiry shifts to whether the employee has demonstrated by a preponderance of the evidence that the employing office's proffered reason for its actions was a pretext for reprisal. *Evans v. Office of the Architect of the Capitol,* Case No. 16-AC-18 (CV, RP), 2018 WL 4382909, at *4 (C.A.O.C. Sep. 12, 2018); *see also Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 255-56 (1981). The employee's protected activity must be the but-for cause of the employer's alleged adverse action. *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 362 (2013); *see also Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media,* 140 S. Ct. 1009 (2020).

In this case, the Hearing Officer did not reject the appellant's claims because she failed to establish an element of her prima facie case;[3] he did so because, considering the evidence as a whole, he found that the employing office had legitimate, non-retaliatory reasons relating to the appellant's performance deficiencies for taking the actions at issue, and that it in fact took the actions because of those reasons.

Critically, the Hearing Officer stressed that the lengthy hearing in this case presented him with a unique opportunity to observe the demeanor of the parties' witnesses, and he determined as a result that the employing office's witnesses were more credible than the appellant:

> The vast majority of the hearing time featured the testimony of the Claimant and Respondent's Chief of Staff David Dailey. Other witnesses included Claimant's present and past supervisors, present and past coworkers, medical personnel, and members of the community. The hearing was extraordinarily lengthy due to the exhaustiveness of the examinations, the number and length of hearing exhibits, and the exigencies of an online hearing necessitated by the Covid Pandemic. Because of the marathon hearing length I had a rare opportunity, through vigorous examination and cross examination, to assess the witnesses' candor, objectivity and perspectives. Moreover, I examined witnesses when I deemed it necessary. I found Claimant and David Dailey to be truthful and sincere. However, during critical points in their testimony I found David Dailey's testimony and demeanor to be more reliable than I did Claimant's testimony. In this regard, while I doubt not that Claimant believed the truth of her testimony, I sensed that her perception was somewhat obscured by her pride and feelings of persecution. This is particularly true, as will be explicated infra, regarding Claimant not taking ownership of her scheduling work oversights and miscues. It also obtains regarding her feelings that her supervisors and coworkers spoke abusively to her.
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> I was struck by Claimant's loyalty and affection for Congressman Scott when she testified that her supervisors and not he were responsible for her alleged mistreatment. I was later moved by the distress in Claimant's face and voice after Congressman Scott testified that he had been her harshest critic and that he should have fired her years ago. There again the actual scenario was not that which Claimant perceived.

[3]Indeed, the Hearing Officer assumed for the sake of argument that the appellant had crossed the threshold of establishing that she engaged in protected activity prior to 2019. Decision and Order at 27.

Decision and Order at 1-2.[4]

The appellant's petition fails to establish any grounds for disturbing these demeanor-based credibility determinations, and her failure to do so is fatal to her appeal. *See Cobbin,* slip op. at 5; *see also Bieber v. Dept. of the Army,* 287 F.3d 1358, 1364 (Fed. Cir. 2002) (credibility determinations of an administrative judge are virtually unreviewable on appeal); *Sheehan v. Office of the Architect of the Capitol*, Case No. 08-AC-58 (CV, RP), 2011 WL 332312, at *6 (C.A.O.C. Jan. 21, 2011) (credibility determinations are entitled to substantial deference, because it is the Hearing Officer who 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records) (citing *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962)); *United Servs. Auto. Ass'n v. NLRB,* 387 F.3d 908, 913 (D.C. Cir. 2004) (court will uphold the Board's adoption of an ALJ's credibility determinations unless "those determinations are hopelessly incredible, self-contradictory, or patently unsupportable."). The appellant has produced no evidence that the Hearing Officer's credibility determinations were inherently improbable or unsupportable. Mere disagreement with such determinations is not a basis for overturning the Hearing Officer's decision.

The appellant also contends on review that the Hearing Officer ignored record evidence supporting pretext, and she refers to his pretext discussion as an "afterthought." We disagree. At the hearing stage, the appellant's burden of proving that the employer's reason is pretextual merges with her ultimate burden of persuading the trier of fact that she was the victim of reprisal. *Keys v. Donovan,* 107 F. Supp. 3d 62, 68 (D.D.C. 2015); *cf. Burdine,* 450 U.S. at 256. This may be accomplished either directly by persuading the factfinder that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Here, the Hearing Officer carefully considered the record evidence as a whole, credited the employing office's non-retaliatory explanations for its actions, and determined that the appellant had failed to meet her ultimate burden. In doing so, the Hearing Officer

[4] *See also id.* at 8 ("[C]redible testimony establishes that Claimant had presented numerous performance issues long before engaging in any alleged protected activity."); 26 & n.17 ("If Claimant meant race and sex discrimination, why did she not specify that to her managers when they asked her to do so?" "Claimant's expression that she was emotionally unable to do runs hollow in view of her confronting management and speaking her mind throughout the evidentiary record. I sense gamesmanship."); 28-29 ("I am convinced that what Claimant construed as malevolent management action was instead a responsible supervisory response crafted to deal with her demonstrated performance deficiencies. I am also persuaded from the testimony that the responsible managers had that intent when taking the actions Claimant has challenged herein."); 30 ("My close observation of Dailey during the most combative and aggressive cross examination periods disclosed a cool and measured temperament.").

necessarily considered the same record evidence to conclude that she failed to prove pretext.

Similarly, we find no grounds for granting review merely because the Hearing Officer failed to mention every piece of evidence introduced at this lengthy hearing. *See Marques v. Department of Health & Human Services,* 22 M.S.P.R. 129, 132 (1984) (recognizing that an administrative judge's failure to mention all of the evidence of record does not mean that she did not consider it in reaching his decision), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table). Rather, the Board has stated that when the hearing officer's decision is supported by substantial evidence and consistent with the law, "section 1405 does not require additional 'specificity and exactitude' in the Hearing Officer's conclusions." *Evans*, 2018 WL 4382909, at *7.[5]

In summary, the Hearing Officer's findings that the employing office took the actions in question for legitimate, non-retaliatory reasons are firmly supported by substantial evidence in the record. The state of the record called upon the Hearing Officer to make credibility findings, and he did so. Although the Hearing Officer could have credited the appellant's testimony and found for her, he was likewise free to credit the contrary evidence and find against her. Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence and does not warrant reversal. *Cobbin,* slip op. at 6; *Gomez-Rodriguez v. Dep't of the Army,* 2023 WL 3614815, at *3 (Fed. Cir. 2023) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)); *see also United States Capitol Police v. Office of Compliance,* 878 F.3d 1355, 1360 (Fed. Cir. 2018). We thus conclude that the Hearing Officer's Decision and Order is supported by substantial evidence and was obtained in accordance with law.

We have considered the appellant's remaining arguments and do not find them persuasive. Because substantial evidence supports the Hearing Officer's conclusion that the appellant failed to establish her reprisal claims, we affirm.

ORDER

The Hearing Officer's Decision and Order is AFFIRMED.

[5] The appellant asserts that when explaining his credibility determinations, the Hearing Officer was required to complete the "four tasks" imposed by the Merit Systems Protection Board on its administrative judges. Appellant's Br. at 2, citing *Hillen v. v. Dep't of the Army*, 35 M.S.P.R. 453, 458 (1987). The *Hillen* tasks are not required by the CAA or our established procedures. We have never required our Hearing Officers to follow a rigid process in explaining credibility determinations, and we decline to do so now.

It is so ORDERED.

Issued, Washington, DC

December 8, 2023