

OFFICE OF COMPLIANCE  
LA 200, John Adams Building, 110 Second Street, S.E.  
Washington, DC 20540-1999

Kevin Paige,	)		
	)		
Appellants	)		
	)	Case No.	16-AC-17 (CV, RP)
v.	)		
	)		
Office of the Architect	)		
of the Capitol,	)		
	)		
Appellee.	)		
	)		

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

**DECISION OF THE BOARD OF DIRECTORS**

This appeal is before the Board of Directors (“Board”) pursuant to the appellant Kevin Paige’s petition for review (“PFR”) of the Hearing Officer’s June 8, 2017 Decision and Order, which found unproven his claims that the Office of the Architect of the Capitol (“AOC”): (1) denied him the opportunity remotely to attend meetings through electronic means in reprisal<sup>1</sup> for his participation in the equal employment opportunity (“EEO”) complaint process; and (2) applied its time and attendance policy against him in reprisal for his participation in the EEO complaint process.

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 decision on all claims.

**I. Background**

Paige is an African-American male who has been employed by the AOC for 12 years. During the relevant time,<sup>2</sup> he was employed as a Utility Operator Supervisor at the Capitol Power Plant (“CPP”). In January 2015, following counseling and mediation, Paige filed a Complaint with the Office of Compliance (“OOC”), alleging discrimination and reprisal. In that case (“*Paige I*”), the Board affirmed the Hearing Officer’s decision that Paige failed to establish his claims. *See Evans & Paige v. Office of the Architect of the Capitol*, Case Nos.: 13-AC-56 (CV, AG, RP), 13-AC-71 (CV, RP), 2017 WL 10572561 at \*1 (March 13, 2017).

---

<sup>1</sup> Although Paige refers to his claim as alleging “retaliation,” we will refer to it herein using the statutory term “reprisal.” *See* 2 U.S.C. § 1317.

<sup>2</sup> The instant matter concerns events beginning in July and ending on December 28, 2015.

On October 26, 2016, following counseling and mediation, Paige filed the instant Complaint with the OOC, which set forth counts of unlawful reprisal and racial discrimination based on his supervisor's alleged failure to accommodate his work scheduling needs relating to his outside employment. Specifically, Paige alleged that the AOC engaged in unlawful discrimination based on race, and reprisal, by: (1) establishing employment conditions for him distinct from the employment conditions for other similarly situated-employees, and (2) applying a time and attendance policy to him distinct from other similarly-situated employees.

After the parties had completed discovery, the Hearing Officer issued an Order granting the AOC's motion to dismiss for failure to state a claim on Paige's allegations of racial discrimination, but denying its motion as to his allegations of reprisal.<sup>3</sup> As to Paige's discrimination claim, the Hearing Officer determined that his allegations concerning his work scheduling needs failed to plead any objectively tangible employment consequence and therefore failed to state a claim under Title VII. Paige does not contest the Hearing Officer's determination in this regard.

As to Paige's reprisal claim, however, the Hearing Officer determined that an employer's alleged interference with an employee's ability to obtain outside employment might reasonably deter one from engaging in further protected activity. He therefore denied the AOC's motion as to that claim, concluding that Paige had stated a claim upon which relief can be granted.

The reprisal claim thus proceeded to hearing on February 14 and 16, 2017. In a June 8, 2017 Decision & Order, the Hearing Officer determined that Paige had failed to establish this claim based on the following findings of fact, which, unless otherwise noted, are undisputed:

In October 2006, Paige entered into employment with the AOC as a wage grade Utility Operator Supervisor, eventually advancing to a general schedule pay position. William Phelps has been his immediate supervisor since 2013. In November 2007, Paige was assigned to work on a temporary project. Because of the hazardous nature of this project, team members received a 25 percent salary differential. Once the project was complete, the AOC terminated Paige's and the other team members' hazardous duty pay. Paige challenged the termination of hazardous duty pay in *Paige I*, raising claims of discrimination and reprisal. Paige's activities in *Paige I* are the basis of his current reprisal claim.

In the face of Paige's decreased income resulting from the loss of hazardous duty pay, he sought alternative employment. Although the AOC initially afforded Paige an annual retention

---

<sup>3</sup> Although the AOC's motion was captioned as one for summary judgment, it contained a footnote purporting to reserve its right to contest the statement of material facts in later proceedings, should its motion be denied. The Hearing Officer determined the reservation to be inconsistent with a proper motion for summary judgment, and instead treated the motion as a motion to dismiss for failure to state a claim. Paige does not challenge the Hearing Officer's dismissal of his discrimination allegations for failure to state a claim, and neither party contests the Hearing Officer's determination to construe the AOC's motion for summary judgment as a motion to dismiss. We find no basis for disturbing the Hearing Officer's order on these grounds.

bonus to remain in its employ, once the bonus terminated, he decided to obtain a second job, and began discussing his financial situation with Phelps.

In August 2017, Paige received a job offer from Johns Hopkins Hospital in Columbia, Maryland. Phelps told Paige that Hopkins is a good employer, and that he was “excited” for him. Phelps cautioned Paige, however, that a second job should not impact his CPP work. Paige assured Phelps that he would not do anything to jeopardize his job with the AOC. The AOC determined that Paige’s Hopkins job would not create a conflict of interests with his CPP job, and Paige accepted the Hopkins position.

Although, on appeal, Paige maintains that he informed Phelps that his Hopkins shift would interfere with his CPP shift, the Hearing Officer determined that Paige merely requested time and attendance flexibility for a “transition time” while he was adjusting to his new second job and his training period there. Phelps, not then aware of Paige’s full-time hours at Hopkins, agreed. Phelps assumed that the Hopkins employment was part-time because Paige mentioned pay periods of 40 hours, rather than 80 hours.

Paige’s established CPP schedule per 2-week pay period consisted of eight 9-hour days, one 8-hour day, with the tenth day off, for a total of 80 hours per pay period. He was permitted to telework from his “alternate work site,” his home, 1 day each pay period. Further, Paige, along with all AOC employees, was required to be on duty—either in person or in compliance with AOC telework policy—during core working hours established either by his jurisdiction or delegated first-line supervisor. The CPP’s established core working hours began at 7:30 a.m. Monday through Friday. Paige’s modified maxi-flex work schedule at CPP allowed him to report early and leave late, so long as he was present during core working hours and he completed his scheduled hours each day.

A short time after beginning his second job, Paige and Phelps agreed to a temporary “transition” arrangement whereby he might arrive after the beginning of core hours and take annual leave for missed work time. Paige frequently arrived to his CPP shift at 9:00 a.m., using 1 1/2 hours of annual leave. Phelps initially believed that Paige would exhaust his annual leave. However, Paige earned 8 hours of annual leave per pay period, and only used 6. Theoretically, therefore, he could have continued requesting leave indefinitely, contingent upon supervisor approval. Phelps never denied the Paige’s requests for annual leave during the relevant period; however, the transition period, which continued through December of 2015, lasted longer than Phelps anticipated.

After some time, Phelps felt that the Paige’s late arrivals were having a negative impact on operations. Throughout the “transition” period, Phelps prepared an unrefuted timeline disclosing several instances where Paige’s late arrivals delayed work and/or required the assignment of overtime work to other AOC employees and contractors. He and Paige discussed the issue a number of times, and Paige testified that he construed that scrutiny to be at times accusatory. Phelps indicated to Paige that he could not indefinitely permit him to take annual leave.

On December 9, 2015, Phelps requested that Paige provide him with a projected work schedule. Paige's established Hopkins work shift was 11:00 p.m. to 7:30 a.m. The draft schedule he presented to Phelps for December 2015 indicated that he would report to work at 9 a.m. on nine occasions, and that he would request leave in advance to cover his absence from core work hours.

On December 10, Phelps expressed concern to Paige that his late arrival would result in him missing several CPP staff meetings scheduled on Thursdays at 7:30 a.m. Phelps reiterated the AOC's core work hours policy and the need for Paige to complete his transition period. Paige expected Phelps to exempt him from the core work hours policy to accommodate his second employment, whereas Phelps believed that the AOC required him to adhere to the policy. Prior to this discussion, Paige had been attending the meetings remotely when driving from his second job, utilizing his automobile's hands-free Bluetooth feature. After this meeting, Phelps stopped allowing Paige to attend the Thursday morning meetings remotely, expressing concern for Paige's safety and quality of communication.

Phelps provided Paige's written Employee Performance Evaluation for the rating period of April 1, 2015 to March 31, 2016. He accorded Paige an overall rating of "Outstanding." He provided Paige a rating of "Fully Successful" for the critical element of working relationships, noting that he "usually attended the morning meeting."

After the hearing, the Hearing Officer issued a Decision and Order in which he determined that Paige failed to establish his reprisal claim, and entered judgment for the AOC. Specifically, the Hearing Officer determined that although interfering in an employee's second job could constitute a materially adverse action in a reprisal claim, Paige did not establish by the preponderance of evidence that such interference actually occurred. Further, the Hearing Officer, assuming, arguendo, that the AOC's treatment of Paige rose to the level of an actionable adverse action, nonetheless determined that the AOC articulated legitimate non-retaliatory reasons for its actions, and that Paige failed to prove that those reasons were a pretext for reprisal.

Paige has timely filed a PFR of the Hearing Officer's Decision and Order; the AOC has filed a Response in opposition to Appellant's PFR; and Paige has timely filed a reply to the AOC's Response.

## **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 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. Analysis

#### A. The Board's Analytical Framework for Reprisal Claims

Before addressing Paige's specific contentions on review, we must first clarify the Board's analytical framework and standards for evaluating such reprisal claims under the Congressional Accountability Act ("CAA") in cases in which a hearing has been held and the record has been fully developed. In denying Paige's reprisal claim, the Hearing Officer applied the evidentiary standards set forth in *Rouiller v. USCP*, 15-CP-23 (CV, AG, RP), 2017 WL 106137, at \*9-10 (Jan. 9, 2017), *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP), 2005 WL 6236944, at \*6 (May 23, 2005) and *Evans v. U.S. Capitol Police Bd.*, Case No. 14-CB-18 (CV, RP), 2015 WL 9257402, at \*6 (Dec. 9, 2015). Decision & Order at 5-6. In *Britton*, we noted that in drafting the CAA, Congress chose not to incorporate verbatim each of the retaliation provisions that exist in the labor and employment laws made applicable by the CAA. 2005 WL 6236944, at \*3; *see generally*, *Rouiller*, 2017 WL 106137, at \*9-10. Instead, Congress adopted Section 207(a), which 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. § 1317.

The Board ultimately adopted a Title VII-based approach to analyze all section 207 claims. *See Britton*, 2005 WL 6236944, at \*7. Therefore, the Board held that to establish a claim for reprisal under the CAA, the employee is required to demonstrate a prima facie showing that (1) he engaged in activity protected by section 207(a) of the CAA; (2) the employing office took a materially adverse action against him; and (3) a causal connection existed between the two. *Id.* If the employee so demonstrates, the employing office must then rebut the presumption of reprisal by articulating a legitimate non-retaliatory reason for its actions. *Evans*, 2015 WL 9257402, at \*6. The articulation of a legitimate, non-retaliatory reason for the adverse employment action shifts the burden of proof to the complainant to show that the employer's reason is merely a pretext for unlawful retaliation. *Id.*; *see Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981).

Where, as here, a hearing has been held and the record is complete, it is unnecessary 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 took a materially adverse action against him because he engaged in protected activity. *Evans*, 2017 WL 1057256, at \*5 (Mar. 13, 2017); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). In this case, the Hearing Officer denied the AOC's motion to dismiss Paige's reprisal claim. A 2-day hearing followed, and neither party has argued that the record was not fully developed on this claim. Rather than engaging in a burden-shifting analysis, therefore, we instead review the evidence as a whole to determine whether Paige met his burden

of proving by a preponderance of the evidence that the AOC took a materially adverse action in reprisal for Paige's participation in a protected activity. As explained below, the Hearing Officer correctly determined that Paige failed to meet this burden.

**B. The Hearing Officer's Determination that Paige Failed to Establish His Reprisal Claims is Affirmed.**

We now turn to the Hearing Officer's determination that Paige failed to establish his reprisal claim. We find the Hearing Officer's determination to be supported by substantial evidence. Therefore, we affirm.

*1. Substantial Evidence Supports the Hearing Officer's Determination that Paige Failed to Establish that He was Subject to a Materially Adverse Action.*

Both below and on review, Paige contends that the Board misconstrues CAA section 207(a) by requiring him to establish that he was subject to a "materially adverse action" in reprisal for his protected activity.<sup>4</sup> We disagree. In *Britton*, the Board defined "materially adverse action" in a reprisal claim as an action "reasonably likely to deter protected activity." 2005 WL 6236944, at \*7. In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006), the Supreme Court defined a "materially adverse action" as one that could "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 548 U.S. at 68. In the wake of *Burlington*, the Board found no functional difference between the standard articulated in *Burlington* and the Board's previously-articulated *Britton* standard. *Rouiller*, 2017 WL 106137, at \*9-10; *see also Turner v. U.S. Capitol Police*, 653 Fed. App'x. 1 (D.C. Cir. 2016) (*Britton* standard indistinguishable from standard applied by the district court, that a materially adverse action was one that could "dissuade a reasonable worker from making or supporting a charge of discrimination"). Reiterating the *Britton* standard of materiality, the Board in *Rouiller* noted that while a "broader standard . . . more fully serve[s] the policy reflected in Section 207, the CAA should not be understood as a 'civility code,' thereby expressing a requirement that the adverse action be material." *Rouiller*, 2017 WL 106137, at \*10 (quoting *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP), 2005 WL 6236944, at \*6 (May 23, 2005)). Paige's PFR provides no basis for the Board to revisit *Rouiller*.

In denying the AOC's motion to dismiss Paige's reprisal claim, the Hearing Officer determined that interference in outside employment "could constitute conduct that is reasonably likely to deter protected activity, *if proven*." Decision & Order at 6 (emphasis added). However, after the hearing, the Hearing Officer found that Paige failed to prove that he was subject to a materially adverse employment action because he failed to prove that such interference actually occurred.

We find substantial evidence in the record to support the Hearing Officer's determination that Phelps was supportive of Paige's efforts to obtain outside employment. For example, it is undisputed that Phelps provided Paige with several months of accommodation; he never denied

---

<sup>4</sup> Paige presented this argument in an amended memorandum in support of his PFR, which the AOC moved to strike. We deny the AOC's motion.

Paige's leave requests during the relevant time; he did not require Paige to submit a shift schedule until December 2015; and he continued to give Paige "outstanding" performance reviews.

Further, the Hearing Officer credited Phelps's testimony that he did not threaten to subject Paige to disciplinary action while he was also employed at Hopkins. Paige contends that the Hearing Officer erred in finding Phelps's testimony credible because: (1) Phelps incorrectly assumed that Paige's mention of 40-hour pay periods at his second job constituted a part-time work schedule; and (2) Phelps failed to request Paige's schedule until December. We disagree. Contention (1) is a reasonable, albeit incorrect, assumption, while contention (2) is consistent with the Hearing Officer's determination that Phelps attempted to accommodate Paige's scheduling needs. In any event, we decline to disturb the Hearing Office's credibility determination, which is firmly grounded in the record. *See, e.g., 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*, 08-AC-58 (CV, RP) (Jan. 21, 2011) (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) ("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'"); *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004) (court "will not disturb the Board's adoption of an ALJ's credibility determinations 'unless those determinations are hopelessly incredible, self-contradictory, or patently unsupportable'").

To the extent that Paige contends that the AOC's failure to indefinitely exempt him from its standard time, attendance, and teleworking policies was a materially adverse action, we also disagree. Paige has wholly failed to explain how being subject to the same attendance policies that apply to other employees would have dissuaded a reasonable person from engaging in the protected activity. *Cf. Gray v. Foxx*, 637 Fed. App'x 606, 608 (D.C. Cir. 2015) (removal from a presentation meeting did not qualify as a materially adverse action in reprisal case when the plaintiff offered no evidence that removal would have dissuaded a reasonable person from engaging in protected activity). Thus, the Hearing Officer correctly determined that Paige failed to demonstrate that, under the circumstances of this case, he was subject to a materially adverse action.<sup>5</sup>

---

<sup>5</sup> We stress that whether revocation of a flexible workplace schedule is a materially adverse action for a given employee in a given position is a case-by-case factual inquiry, not a foreordained legal conclusion. Therefore, a penetrating factual analysis is required to determine whether revocation of a flexible schedule would have dissuaded a reasonable person from engaging in protected activity. *See, e.g., Solomon v. Vilsack*, 763 F.3d 1, 14-16 (D.C. Cir. 2014) (employee produced sufficient evidence to preclude summary judgment on her claim that the revocation of her permission to work late was retaliatory); *cf. McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013) (stating in a case arising under the Americans with Disabilities Act ("ADA") that "[p]hysical presence at or by a specific time is not, as a matter of law, an essential function of all employment"); *Ward v. Massachusetts Health Research Inst., Inc.*, 209 F.3d 29, 34-35 (1st Cir. 2000) (employer must specifically prove that "a regular and reliable schedule" is an essential element of a position, which "requires a fact-intensive inquiry").

2. *Substantial Evidence Supports the Hearing Officer's Determination that Paige Failed to Establish that the AOC's Reasons for its Actions were a Pretext for Reprisal.*

The Hearing Officer, assuming, *arguendo*, that the AOC's treatment of Paige rose to the actionable adverse action level, found that Phelps presented legitimate reasons for requiring Paige to arrive to his CPP shifts on time: Paige's late arrivals violated the CPP's established core work hours policy, and his absences had an adverse impact on CPP operations. This finding is also supported by substantial evidence.

As the Hearing Officer determined, the AOC's core hours requirement was universally applied, and Paige failed to identify any instance where any comparator employee was allowed to be absent outside of core hours without taking authorized leave. Contrary to Paige's assertion that "his start time [did not] matter so long as he worked [the required] hours per day," the AOC's published policy clearly indicates that all employees must be present during core work hours. Although, as stated above, Paige sought to start work after the beginning of his core hours by utilizing his annual leave for that purpose, we agree with the Hearing Officer that the work schedule that Paige sought would have conflicted with the AOC's uniform time and attendance and core work hours policies. The AOC's published policy clearly indicates that Phelps was not required to grant leave, and Teresa Bailey, Chief Human Capital Officer for the AOC, testified without contradiction that, although employees are not required to disclose the purpose for which they request leave, supervisors have discretion to deny leave when granting it would adversely impact work operations.<sup>6</sup> Here, Phelps maintained an unrefuted timeline establishing instances where Paige's approved leave adversely impacted CPP operations.<sup>7</sup> Indeed, as the Hearing Officer noted, the AOC established that Paige's late arrivals interrupted or delayed scheduled work projects and resulted in the payment of otherwise unnecessary overtime on several occasions.

We also agree with the Hearing Officer that Phelps had legitimate, nonretaliatory reasons for his requirement that Paige, and all other employees, be present at his work unit's 7:30 a.m. meetings. Under AOC policy, all teleworkers are required to telework from their designated workplace. Work performed while driving in the car, or sitting aside the road, does not qualify as telework. Unrefuted testimony established that management is obliged to ensure that telework is performed in a safe environment. Therefore, Phelps legitimately required Paige to attend meetings in accordance with AOC telework policy, and Paige has pointed to no evidence in the record that Phelps was motivated by considerations other than those embodied in that policy. Paige's only claim of disparate treatment in this regard involved a colleague who was allowed to attend one 7:30 a.m. meeting remotely. However, as the Hearing Officer noted, that situation is

---

<sup>6</sup> Paige contends that the Hearing Officer should not have credited Bailey's testimony because she "had no hands on involvement in the instant matter other than her testimony." Because Bailey had "hands on involvement" in formulating and implementing AOC policies, the Hearing Officer properly credited her testimony concerning them.

<sup>7</sup> Paige contends that Phelps should have been more accommodating of his second job because the adverse impacts to CPP operations did not rise to the level of "undue hardship" under the ADA. Because Paige does not have a disability under the ADA, that statute is of no relevance here.



inapposite, as the proffered comparator was at the AOC's worksite attending another meeting when he participated in the 7:30 a.m. meeting remotely.

Although Paige strenuously disagrees with the AOC's explanation for holding him accountable to the CPP's core work hours and teleworking policies, he has not shown that this explanation is a mask for reprisal. Absent evidence, "the Board may not "second-guess an employer's personnel decision absent demonstrably discriminatory motive." *Gage v. Office of the Architect of the Capitol*, Case No. 00-AC-21 (CV), 2001 WL 36175210, at \*5 (Nov. 14, 2001) (quoting *Milton v. Weinberger*, 696 F.2d 94 (D.C. Cir. 1982)). Once the employer has articulated a non-discriminatory explanation for its action, as did the AOC here, the issue is not "the correctness or desirability of [the] reasons offered . . . [but] whether the employer honestly believes in the reasons it offers." *Id.* (quoting *McCoy v. WGN Cont. Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992)); see also *Pignato v. Am. Trans Air Inc.*, 14 F.3d 342, 349 (7th Cir.1994) ("It is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible. He must show that the explanation given is a phony reason.").

Paige nonetheless argues that the Hearing Officer erroneously failed to find a causal nexus between his protected activities in *Paige I* and the above AOC's actions based on their temporal proximity. The Hearing Officer acknowledged the temporal proximity: "Phelps, the alleged responsible official, was [Paige's] immediate supervisor during the time period covered by [*Paige I*] and was aware of the first complaint throughout the period [of the instant matter]." Decision & Order at 6. Moreover, the temporal proximity between *Paige I*, which was pending at the time of the relevant events, and the issuance of the memorandum of counseling, is some circumstantial evidence that the actions were taken issued because of Paige's protected activity. *Duncan v. Office of the Architect of the Capitol*, No. 02-AC-59, 2006 WL 6172579, \*10 (Sept. 19, 2006) ("temporal proximity between the protected activity and the adverse action provides significant evidence of causal connection.").

But we agree with the Hearing Officer that, viewing the record as a whole, temporal proximity alone does not establish pretext in this case in light of the AOC's articulated nondiscriminatory reason for its actions. See *Solomon*, 763 F.3d at 16 (because the plaintiff's case lacked "positive evidence beyond mere proximity," she failed to create a genuine issue of material fact concerning whether the motive for the ordered removal was retaliation); cf. *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 178 (3d. Cir. 1997) ("It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn."). We find no evidence in the record that the AOC's stated reasons for adhering to its core work hours and teleworking policies were not legitimate, or that they were a pretext masking prohibited reprisal. Absent any evidence that the AOC actually interfered with his second job, Paige's reprisal claim fails. See, e.g., *Solomon v. AOC*, Case No.: 02-AC-34(CV, RP), 2003 WL 25795031, at \*5 (reprisal claim failed because, despite establishing one element, employee failed to establish others).<sup>8</sup>

---

<sup>8</sup> Paige also refers in his PFR to the concept of "adaptive discrimination," a theory that discrimination adapts to law and to social norms prohibiting intentional discrimination, which accounts for the persistence of discrimination despite formal progress under the law. See Elise C. Boddie, *Adaptive*

## ORDER

For the foregoing reasons, the Hearing Officer's decision to grant judgment for the AOC on all claims is affirmed.

It is so ORDERED.

Issued, Washington, DC, September 12, 2018.

---

*Discrimination*, N.C. Law Rev., Vol. 94, No. 4, (2016). He fails, however, to explain how this theory supports his position on review that the Hearing Officer erred in denying his reprisal claim.