OFFICE OF COMPLIANCE
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Valerie F. Williams, Appellant, v. Office of the Architect of the Capitol, Appellee.	)	Case Nos: 14-AC-11 (CV, RP) 14-AC-48 (CV, RP) 15-AC-21 (CV, RP)

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

DECISION OF THE BOARD OF DIRECTORS

This consolidated appeal is before the Board of Directors ("Board") pursuant to the appellant Valerie Williams's ("Williams") petition for review ("PFR") of the Hearing Officer's March 9, 2016 Order, which granted in part and denied in part a motion filed by the appellee, the Office of the Architect of the Capitol ("AOC") to dismiss all counts of the three consolidated complaints herein. Williams also seeks review of the Hearing Officer's July 1, 2016 Memorandum Opinion and Final Order ("O&O"), which entered judgment for the AOC on her remaining claims.

Upon due consideration of the Hearing Officer's orders, the parties' briefs and filings, and the record in these proceedings, the Board affirms the Hearing Officer's decisions on all claims.

I. Background

Williams is an African-American woman who has been employed with the AOC for 22 years. At all relevant times, she was employed as an Electronics Mechanic in the Electronics Engineering Branch ("EEB") of the Project and Planning Management Division of the AOC. On February 9, 2012, Williams submitted a Request for Counseling to the Office of Compliance ("OOC") (Case No. 12-AC-82 (CV, RP)). That case ("*Williams I*") was settled and withdrawn, with the parties' "Confidential Settlement Agreement and Release" approved by the Executive Director of the OOC on April 19, 2013. Appellant Exhibit ("Ex.") 107.

On December 30, 2015, following counseling and mediation, Williams filed three additional Complaints with the OOC, which were subsequently consolidated. In each

Complaint, Williams alleged ten counts, as follows: I—racial harassment; II—sexual harassment; III-V—retaliatory harassment; VI—hostile work environment based on race; VII—hostile work environment based on gender; and VIII-X—hostile work environment based on allegedly retaliatory decisions by AOC "decisionmakers" based on Williams's engagement in protected activities. Appeal File ("AF"), Tabs 1-3.

After the parties had completed discovery, the Hearing Officer issued a prehearing Order granting the AOC's motion to dismiss Williams's discrimination claims in Counts I-II and VI-X of each complaint, but denying its motion as to the claims alleging retaliatory harassment in Counts III-V of each complaint. AF, Tabs 9, 13, 17-19. The matter thus proceeded to hearing on Counts III-V on March 22-24, 2016. In a July 1, 2016 Memorandum Opinion and Final Order, the Hearing Offer determined that Williams failed to establish her retaliatory harassment claims and entered judgment for the AOC. AF, Tab 38. The Hearing Officer also denied Williams's motion to amend and/or reconsider her dismissal of Williams's discrimination claims in Counts I-II and VI-X of each complaint.

Williams has timely filed a PFR of the Hearing Officer's March 9, 2016 and July 1, 2016 Orders, the AOC has timely filed a brief in opposition to Williams's PFR, and Williams has timely filed a reply to the AOC's responsive brief.

III. 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,* 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).

IV. Analysis

A. Summary of William's Contentions

As stated above, Williams has raised claims of harassment based on sex and race, retaliatory harassment, hostile work environment based on sex and race, and hostile work environment based on retaliation. The Board has recognized that the same evidence may be relevant to multiple claims. *See, e.g., 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). Here, the primary focus of Williams's harassment, hostile work environment and retaliation claims is on her second-level supervisor, Robert Gatewood, an African-American male, and, to a lesser extent, her first-level supervisor, John Bean, and all claims, however characterized, concern the same series of events,

which commenced on August 31, 2011. AF, Tab 1 at 3; Hearing Transcript ("HT") at 46, 90, 497, 516. Those events, which were the subject of extensive hearing testimony and are described in detail in the O&O, are summarized as follows:

On August 31, 2011, Williams was walking through an equipment room on the Senate side of the Capitol, when she was confronted by four coworkers who yelled at her to get out of the area. After she reported the incident to the EEB supervisor on the Senate side, she hand wrote and posted a sign that stated:

> CAUTION. Beyond this point: If people are in a huddle pretending to be working, do not enter; they are allowed to disrespect you, anyway they choose. That's the Rule, because that's how they are . . . you are supposed to conform! You've been warned!!

Williams testified that Gatewood recommended that she be suspended for 2 weeks and that her bonus be denied because she had posted the sign. Gatewood denied making such a recommendation. In any event, Gatewood's supervisor, Assistant Director William Miller, determined not to discipline Williams after consulting the AOC's Office of Equal Employment Opportunity ("EEO") about the incident. O&O at 4; HT 50-70; Appellant Exs. 1-5.

Williams claimed that Gatewood was determined to take away her eligibility for a bonus by implementing a policy in 2012 that employees with an overall rating of "Outstanding" were ineligible to receive a bonus if they received less than "Outstanding" in certain rating categories and in a certain number of those categories. Miller reversed the new policy and all eligible employees who received overall "Outstanding" ratings, including Williams, received their bonuses. O&O at 6; Appellant Ex. 14.

In June 2012, Williams submitted a workers compensation claim to Jeffery Bixby,[1] but the claim was delayed because of paperwork mistakes.[2] Williams testified that Gatewood asked her to sign certain documents in connection with the claim and a temporary reassignment to light duty; however, she refused because there were perceived errors in the documents. She testified that Gatewood raised his voice and began pounding the console in front of her with his fist, demanding that she sign the documents and that she called Miller and reported Gatewood's behavior. Gatewood denied Williams's assertions that he pounded the desk or raised his voice. O&O at 7; HT 264-70, 759-60.

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[1] On occasions, when the appellant was detailed to the Senate side of the Capitol, Bixby was her immediate supervisor. HT 50-51, 633.

[2] The Hearing Officer determined, and we agree, that Williams mistakenly testified that she submitted her paperwork to Bean. HT 113-20. *See* Appellant Ex. 105 (August 2, 2012 email from Miller stating that "Due to errors on reporting by both the employee and immediate supervisor (Jeff Bixby), the claim has been delayed.").

In December 2012, someone damaged Williams's work bench in the shop area of a House Office Building, and in January 2013, someone broke into her work locker. She reported both events to Bean, and Bean reported the incidents to an officer from the U.S. Capitol Police and to Gatewood. Gatewood went to see the locker, determined that someone had pried it open, and assigned Bean to further investigate the incident. Gatewood denied breaking into her locker, arranging for someone to do so, or knowing who was responsible. O&O at 7-8; HT 153-56, 771-72.

On an evening in June 2013 at approximately 10:00 pm, Williams received a telephone call on her cell phone from a number that was in a House Office Building, and the caller hung up. Williams became upset and considered the call harassment. She testified that she believed that Gatewood made the call and did so to harass her. Gatewood testified that he did not know Williams's personal cell phone number; he denied making the call, and he testified that his office was in a Senate Office Building, not a House Office Building. O&O at 7-8; HT 135-38, 770-73.

On July 17, 2013, Gatewood invited Williams and a co-worker to work with him on a project at Ft. McNair on July 23, 2013, beginning at 8:30 pm. Appellant Ex. 39. Williams refused the invitation, claiming that she was uncomfortable working with Gatewood in a remote location and because the time of the assignment was well after her shift ended at 4:00 pm. Gatewood informed Williams that the assignment was not optional. The initial work order incorrectly indicated the work was to be done at 8:30 pm, but at some point Williams was made aware that the work would actually be performed at 8:30 am. Williams still did not comply with the work order. She was not disciplined for her failure to do so. O&O at 10-11; HT 532-36.

According to Williams, on July 19, 2013, Gatewood approached her while she was working with Bean in an old telephone booth, stood close behind her, and made a sniffing sound. Williams stated that Gatewood was close enough to having been smelling her hair. Gatewood testified that he was standing 2-3 feet away from Williams, and he denied making any sniffing noise. Williams did not tell Gatewood that he was standing too close, or that she was feeling uncomfortable. O&O at 11-12; HT 229-36, 540, 763-64.

In September 2013, Williams contends that she was in Statuary Hall taping down cables, that Gatewood was walking along beside her, that this made her very uncomfortable, and that she eventually stood up and asked Gatewood what he was doing, whereupon he turned and walked away. Gatewood testified that he saw Williams taping cables, that he also was helping others tape cables, and that he offered his assistance to Williams who paused, but did not respond. Gatewood denied that Williams asked him what he was doing, and stated that he was unaware that he had made her uncomfortable. O&O at 12; HT 273-74, 540, 767.

Williams alleged that, during a furlough in October 2013, Gatewood contacted her and informed her that she was scheduled to work during the upcoming week. She asserted that this was improper because Bixby, as her point of contact, was the supervisor who should have contacted her. Gatewood testified that he contacted all of the employees for the upcoming shift

and that Bixby could not have been the point of contact because Bixby had also been furloughed. O&O at 12-13; HT 311, 541, 778-82.

During a snow storm in January 2014, Gatewood mistakenly reported Williams and several employees as absent, when in fact they were at work. Gatewood corrected this error on his own within 22 minutes. Gatewood's mistake did not lead to discipline or any other negative consequences for any employee who was mistakenly reported absent. O&O 13-14; HT 278-79; Appellant Ex. 57.

During another snow storm in February 2014, Gatewood sent an email and a text message notification alerting employees in the Electronics Mechanics division that they did not have to report to work. Williams asserts that she did not receive the email because she does not have a home computer and further, that she did not receive the text message on the "flip phone" that AOC issued her. As a result, she drove to work in dangerous conditions. Gatewood testified that he was not aware that Williams was unable to receive emails or text messages at home. O&O at 14; HT 285-286, 550, 784; Appellant Ex. 54.

Williams alleged that Gatewood also harassed her in August 2014 when he advised her that he believed her email signature, which contained the words "RACE U TO HEAVEN," was inappropriate, unprofessional, and a violation of AOC policy prohibiting religious gestures in the workplace. Gatewood testified that he also felt that "race you to heaven" was meant to be threatening towards him, because Williams had recently said to him "I just wish you were dead." O&O at 15, HT 792-93; Appellant Exs. 69-70.

In August 2014, Williams was sitting in the cafeteria eating a doughnut when an engineer, David Nguyen, and Bean approached her. Nguyen allegedly said that he had something to tell Williams and told her to put the doughnut down. When she did not put the doughnut down, Nguyen allegedly grabbed her wrist, forced her hand to the table and stabbed the doughnut with a plastic knife. Williams claimed that she asked Nguyen what he was doing, and that Nguyen and Bean were laughing as she left. She stated that she complained about the incident to Bean who told her not to report what Nguyen did. She also reported the matter to her fourth line supervisor, an ombudsperson and the Architect. O&O at 17-18; HT 466-75, 635; Appellant Exs. 94-96.

In October 2014, Gatewood assigned Williams to remove a box containing electrical equipment. She contended that Gatewood's alleged refusal to provide her with sufficient information put her in danger by exposing her to live electric wires. She supported her claim by stating that a wire "arced" while her co-worker was working on the task. Although the parties disagreed as to whether Williams possessed the experience, information and equipment required to perform the task safely, it is undisputed that Gatewood provided additional information, including pictures, and approved Williams's request for a co-worker to assist her. O&O at 15-17; HT 340, 372-97, 797-803, 818-19, 855-58; Appellant Exs. 76, 79, 80, 104.

Williams alleged that in October of 2014 she requested assistance while she performed work on a ladder, and Gatewood offered to assist her. Williams declined the offer, telling Assistant Director Miller that she was afraid that Gatewood would try to hurt her. Williams was eventually assisted by another co-worker who became available prior to the task being performed, and the work was completed without incident. Williams believed that the initial assignment to perform the work alone, and Gatewood's offer to assist, were intended to harass or retaliate against her. O&O at 18-19; HT 442; Appellant Exs. 88-89.

Williams also alleged that she was not provided the same overtime or training opportunities that her co-workers received. On one occasion, Williams was tasked to work in the Madison Library with Bean to use light meters to test equipment. Rather than gaining experience using this equipment, Bean assigned her and another male employee to clean up a room that was filled with debris and trash. Williams contends that the assignment was intended to harass or retaliate against her. O&O at 19, HT 565-66; Appellant Exs. 93, 101.

In a mid-year evaluation for 2011, a full-year evaluation for 2011 and a mid-year evaluation for 2012, Williams received an overall rating of "Outstanding" but a rating of "Fully Successful" in the "Work Relationships" category. A comment on these evaluations stated that Complainant was "direct, forward, yet courteous" in her relationships with co-workers. In June 2013, she received another annual performance evaluation in which she was rated overall as "Outstanding" but again received a rating of "Fully Successful" in the "Work Relationships" category, with a comment that she was "usually courteous, but occasionally abrasive in approach." According to Williams, Bean explained that the comment was based on a report that she had thrown a telephone at a co-worker. Bean learned from the co-worker that Williams had never thrown a telephone at him, but that Williams had slammed a phone and used inappropriate language when addressing the co-worker. Williams requested that the "abrasive" language be removed from the evaluation. Assistant Director Miller disagreed on the ground that her work relationships were accurately described as "sometimes abrasive." Gatewood denied that he drafted any portion of Williams's evaluation, but stated that he agreed with Bean's assessments. O&O at 8-9; HT 743; Appellant Exs. 27, 29, 35, 51; AOC Ex. 2.

B. The Hearing Officer's Dismissal of Counts I-II and VI-X of Each Complaint Prior to the Hearing Was Not Prejudicial Error.

In Count I of each Complaint, Williams alleged that the actions of her supervisors were "harassment based on [her] African American race; a discriminatory adverse employment action based on [the AOC's] unlawful violation of Section 201(a)(l) of the CAA and the prohibitions against discriminatory employment practices and activities set forth therein . . . ." Count II of each Complaint is identical to Count I, but Williams asserted therein that the discrimination was based on her "female sex and gender." AF, Tabs 1-3. In Count VI of each Complaint, Williams alleged that "the pattern of decisions [by the AOC] was an unlawful discriminatory employment practice and activity based on [her] African American race . . . which deprived [her] of . . . a workplace environment free of unlawful discrimination." Count VII of each Complaint is

identical to Count VI, but asserts that the discrimination is based on Williams's "female sex and gender."

Rule 5.03(a) of the OOC's Procedural Rules provides in relevant part that:

> A Hearing Officer may, after notice and an opportunity to respond, dismiss any claim that the Hearing Officer finds to be frivolous or that fails to state a claim upon which relief may be granted.

As noted above, on January 19, 2016, while discovery was underway, the AOC filed a motion to dismiss Williams's Complaints in their entirety for failure to state a claim upon which relief can be granted. On March 9, 2016, after the parties had completed discovery, the Hearing Officer issued a prehearing Order granting the AOC's motion to dismiss Williams's claims in Counts I-II and VI-X of each Complaint, but denying its motion as to the claims alleging retaliatory harassment in Counts III-V of each Complaint. The matter thus proceeded to hearing solely on Williams's retaliatory harassment claims in Counts III-V.

In dismissing Williams's claims in Counts I-II and VI-X of each Complaint, the Hearing Officer concluded that Williams failed to state claims upon which relief can be granted within the meaning of Federal Rule of Civil Procedure 8(a)(2) and OOC Procedural Rule 5.03(a). On review, Williams contends that the Hearing Officer's ruling was erroneous because, under the simplified notice pleading standard envisioned by the Rules, her only obligation was to plead allegations sufficient to put the AOC on notice as to her claims for relief. *See Solomon,* Case No. 02-AC-62 (RP), 2005 WL 6236948, at *9.

On May 25, 2017, we issued an Order for additional briefing on this issue. In it, we advised the parties that, assuming the Hearing Officer erred in dismissing Counts I-II and VI-X of each Complaint for failure to state a claim upon which relief can be granted, the Board must still determine whether such error was prejudicial. *See* CAA § 406(d), 2 U.S.C. § 1406(d); OOC Procedural Rule § 8.01(g); Fed. R. Civ. P. 61. We noted in the Order that the AOC filed its motion to dismiss for failure to state a claim while discovery was underway, and the prehearing ruling on that motion was issued after discovery was complete. Thus, the Hearing Officer's ruling appears to have had no impact on the scope of discovery. Further, all of Williams's claims, whether they allege discrimination or retaliation, appear to concern the same series of incidents commencing in August 2011. *See* PFR at 3-5. The Order noted that these incidents were the subject of extensive hearing testimony, and they are described in detail in the Hearing Officer's post-hearing Memorandum Opinion and Final Order, which entered judgment for the AOC on the William's retaliation claims in Counts III-V. We also noted that Williams did not identify in her PFR with any degree of specificity alleged facts or argument that she would have introduced to support Counts I-II and VI-X of each Complaint had they not been dismissed, nor did she otherwise explain how she was prejudiced by this pre-hearing ruling. We therefore requested the parties' positions on the following questions:

(1) Assuming, arguendo, that the Hearing Officer erred in dismissing Counts I-II and VI-X of each Complaint for failure to state a claim upon which relief can be granted, was such error prejudicial or was it harmless?

(2) What facts would the parties have relied upon to prove or disprove Counts I-II and VI-X of each Complaint, had they not been dismissed for failure to state a claim upon which relief can be granted? [3]

After carefully considering the parties' responses to our Order, we conclude that the Hearing Officer did not commit prejudicial error in dismissing Counts I-II and VI-X of each Complaint for failure to state a claim upon which relief can be granted.

In dismissing Counts I-II and VI-X of each Complaint, the Hearing Officer concluded that Williams failed to state facially plausible claims within the meaning of Federal Rule of Civil Procedure 8(a)(2). AF, Tab 19 at 17-22, 26-27. Rule 8(a)(2) provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Swierkiewicz v. Sorema,* 534 U.S. 506, 512 (2002), the Supreme Court held that such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." As Williams correctly notes, the Board's Procedural Rules at section 5.01(c)(1) require a short and plain statement comparable to that required by Federal Rule of Civil Procedure 8(a)(2): it requires the names and dates of those involved in the conduct that the employee claims violates the Act, a description of the challenged conduct and how that conduct violates the Act, and a statement of relief. Thus, in *Solomon,* the Board, quoting *Swierkiewicz,* ruled that an employee is only required to plead those facts sufficient to "give respondent fair notice of what petitioner's claims are and the grounds upon which they rest." No. 02-AC-62 (RP), 2005 WL 6236948, at *9. After the Board issued its decision in *Solomon,* the Supreme Court further clarified that "detailed factual allegations" are not required, but that Rule 8(a)(2) does call for sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 570 (2007)). A claim is facially plausible when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*

Despite the lenience of the foregoing standards, it is axiomatic that defendants remain entitled to know exactly what claims are being brought against them. *Omar v. Lindsey,* 243 F. Supp. 1339, 1345 (M.D. Fla. 2003). Further, like the Federal Rules, the Board's Procedural Rules encourage clarity and brevity. *See In re Westinghouse Sec. Litig.,* 90 F.3d 696, 702 (3d Cir. 1996) (citation omitted). Here, Williams's Complaints detailed the events at issue, provided relevant dates, and included the identities of at least some of the relevant persons involved. Nonetheless, they set forth a voluminous narrative of factual allegations that provide no clear

[3] We reject William's suggestion in her Response that the Board's Order was outside the scope of its authority or that its questions were "leading and unfairly couched in favor of the [AOC] to avoid remand."

indication as to the particular grounds upon which each of her multiple claims rest, making it more difficult for the AOC to frame responsive pleadings.

Assuming that Williams's Complaints satisfied the foregoing pleading requirements and that the Hearing Officer erred in dismissing these Counts I-II and VI-X of each Complaint, we nonetheless conclude that any such error was not prejudicial under the circumstances of this case. First, as noted above, the AOC filed its motion to dismiss for failure to state a claim on January 19, 2016, while discovery was underway, but the Hearing Officer's prehearing ruling on that motion was issued after discovery was complete. AF, Tabs 9, 13, 19. Thus, the Hearing Officer's ruling had no impact on the scope of discovery; Williams does not contend on review that she was denied the opportunity to engage in full discovery as a result of the AOC's motion; and she does not identify any additional material produced during discovery to support her claims in Counts I-II and VI-X of each complaint.

Second, although the Hearing Officer determined that in each of the Complaints, Williams had failed to state claims for racial harassment (Count I), sexual harassment (Count II), and hostile work environment (Counts VI-X), she did not strike any of the factual allegations supporting those claims. Because all of William's factual allegations also supported her surviving claims of retaliatory harassment (Counts III-V), *See* PFR at 3-5, she was permitted to offer evidence and testimony to prove those allegations at the hearing. Moreover, Williams did not identify in her response to the Board's Order any additional evidence that she would have introduced to support Counts I-II and VI-X of each Complaint had they not been dismissed. Indeed, in her response to the Board's request that she specify the facts she would have relied upon to prove or disprove those Counts had they not been dismissed, she cited only the testimony and the exhibits that were introduced at the hearing. *See* Petitioner's Objection and Response at 6-9.

Third, after carefully considering all of the evidence and testimony received in this case, the Hearing Officer denied William's motion at the end of the hearing to amend or reconsider her earlier order dismissing Counts I-II and VI-X. O&O at 33-34. In so ruling, the Hearing Officer effectively reconsidered William's discrimination claims with the benefit of all the evidence and testimony presented at the hearing. Because Williams does not identify any other evidence that she would have introduced to support her claims, remand would serve no purpose.

Fourth, as we discuss below, the Hearing Officer's conclusion that those claims were unproven is supported by substantial evidence. In the instant case, Williams does not allege quid pro quo sexual harassment because she does not allege that anyone at her job demanded any sexual favors, or anything at all, in return for job benefits. March 9, 2016 Order at 18. Moreover, Williams acknowledged that she was not raising claims of disparate treatment based on sex or race. Appellant's Opposition to Motion to Dismiss at 22. Thus, as the Hearing Officer determined, Counts I-II of each Complaint raise hostile work environment claims. March 9, 2016 Order at 17-18. To make out such a claim, Williams must show that she 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." *Baloch v.*

Kempthorne, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (citation and internal quotation marks omitted). In deciding whether the evidence meets that standard, the Board "looks to the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance." *Id.; 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). "In order to be actionable under the statute, an objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive." *Faragher v. City of Boca Raton,* 524 U.S. 775, 787 (1998); *see also 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." Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.

Faragher, 524 U.S. at 787 (citations omitted).

Williams's hostile work environment claims fail for several reasons. 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. *See 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) ("because [plaintiff] is unable to tie the majority of her allegations to her gender or protected activity, the Court is unable to consider them."). Williams does not allege that Gatewood, Bean, or any other AOC employee made derogatory comments about women or African-Americans or engaged in actions targeted towards women or African-Americans in the office, and most of her allegations are unsupported by any evidence of a link to her race or gender. Only two of her allegations—that Gatewood once stood very close to her and smelled her hair, and that he once stood over her and followed her as she lay down securing microphone cords to the floor—might be perceived of as an act related to Williams's sex. Aside from these isolated incidents, however, Williams failed to tie her allegations to her gender or race.

Furthermore, even viewing those allegations in a light most favorable to Williams, as discussed in more detail below, we agree with the Hearing Officer that they are insufficient to support a claim of environmental sexual harassment because they cannot fairly be labeled severe

or pervasive. March 9, 2016 Order at 19.[4] Indeed, Williams's allegations, taken as a whole, simply fail to rise to the level of an actionable hostile work environment. Williams contends that Gatewood and/or Bean created a hostile work environment by attempting to manufacture performance issues and incorporating them in her performance evaluations, unfairly scrutinizing her work, providing her undesirable work assignments, limiting her training opportunities, and denying her opportunities to earn overtime. The courts have generally rejected hostile work environment claims that are based on work-related actions by supervisors. *See, 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 taken by Gatewood and Bean were not objectively offensive, abusive, hostile or threatening.

The actions described in Williams's Complaints thus fall far short of the kind of "severe or pervasive" harassing conduct she is required to show in order to prevail. *Harris,* 510 U.S. at 21-23. As the Hearing Officer recognized, some of the conduct, as described by Williams, may have been inappropriate workplace conduct. But inappropriate conduct, without more, is insufficient to establish a hostile work environment claim. *See Baird*, 792 F.3d at 171 (plaintiff's allegations amounted to no more than "immaterial 'slights'" consisting of "occasional name-calling, rude emails, lost tempers and workplace disagreements—the kind of conduct courts frequently deem uncognizable under Title VII."); *Brooks v. Grundmann*, 748 F.3d 1273, 1275 (D.C. Cir. 2014) (although the behavior of plaintiff's colleagues may have been "unprofessional, uncivil, and somewhat boorish," it did not "sufficiently demonstrate the sort of severity or pervasiveness needed to prove a hostile work environment."). Williams also contends that Gatewood's behavior left her feeling generally uncomfortable and uneasy, but general feelings of workplace discomfort or unease are simply not enough to support a claim for hostile work environment. *Tucker v. Johnson,* —F. Supp. 3d—, 2016 WL 5674960, at *3 (D.D.C. Sep. 30, 2016). Thus, for example, when Williams stated that she refused to work with Gatewood at Ft. McNair, she did not make any allegation that, if proven, would establish that the assignment was inappropriate, intended to harass, or was in any way related to her sex or race.

[4] In any event, as we discuss below, the Hearing Officer determined that Williams's evidence and testimony in support of these allegations were "simply not convincing." O&O at 27.

Similarly, the Hearing Officer properly dismissed Counts VI-X of each Complaint, which also seek relief for an allegedly hostile work environment created by a "pattern of decisions" and motivated by race, gender and/or retaliation. As the Hearing Officer correctly observed with respect to these Counts, Williams failed to specify which "decisions" make up the severe or pervasive series of discriminatory or retaliatory actions about which she complains, and she alleged none based on her race or gender. March 9, 2016 Order at 26-27. Because the "decisions" refer to the same isolated sporadic events discussed above, Williams has failed to establish those claims.

Viewing the record as a whole, we conclude that Williams had a full and fair opportunity to engage in discovery and present evidence in support of all her claims despite the Hearing Officer's dismissal of Counts I-II and VI-X of each Complaint for failure to state a claim upon which relief can be granted. Because Williams nonetheless failed to prove these claims, any error in dismissing Counts I-II and VI-X was not prejudicial and does not warrant remand.

C. The Hearing Officer Correctly Determined that Williams Failed to Establish Her Remaining Retaliation Claims.

The three claims that were tried at the hearing were all claims of retaliatory harassment based on three different protected activities: (1) her participation in *Williams I* in 2012*;* (2) her opposition to discrimination based on her race; and (3) her opposition to discrimination based on her gender. O&O at 21. As discussed below, substantial evidence supports the Hearing Officer's determination that Williams failed to establish her claims.

1. The Board's Framework for Analyzing Retaliation Claims

Section 207(a) of the Congressional Accountability Act ("CAA") 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 has adopted a Title VII-based approach to analyze all section 207 claims. *See Britton v. Office of the Architect of the Capitol*, No. 02-AC-20 (CV, RP), 2005 WL 6236944 (May 23, 2005). Thus, to establish a claim for retaliation under the CAA, the employee is required to demonstrate that: (1) she engaged in activity protected by Section 207(a) of the CAA; (2) the employing office took action against her that is reasonably likely to deter protected activity; and (3) a causal connection existed between the two. *Britton,* 2005 WL 6236944, at *7.[5] If the employee so demonstrates, the employing office thereafter is required to rebut the

[5] When reviewing the allegations in the claims before it in *Rouiller*, the Board stated that it saw no functional distinction between the "reasonably likely to deter protected activity" standard in *Britton* and

presumption of retaliation by articulating a legitimate non-discriminatory reason for its actions. *Evans v. U.S. Capitol Police Bd.*, No. 14-CB-18 (CV, RP), 2015 WL 9257402, at *6 (Dec. 9, 2015). 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, however, 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's proffered reason for its actions was a pretext for retaliation. *See Clendenny v. Office of the Architect of the Capitol,* No. 14-115 (RDM), 2017 WL 627367, at *7 (D.D.C. Feb. 15, 2017); *Evans*, 2017 WL 1057255, at *5. Rather than engaging in a burden-shifting analysis, therefore, we instead review the evidence as a whole to determine whether Williams met her ultimate burden of proving her retaliation claims. As explained below, we find no basis for disturbing the Hearing Officer's determination that Williams failed to do so.

2. The Appellant Failed to Establish Her Retaliation Claims.

As to the first element of Williams's retaliation claims, the parties stipulated that her involvement the 2012 *Williams I* case was federally protected activity and that thereafter, she continued to participate in protected activities in each of the subsequently filed cases herein. Thus, the Hearing Officer correctly determined that Williams engaged in activities protected under the CAA, including: (1) initiation of, and participation in *Williams I*; (2) opposition to perceived racial and gender discrimination and alleged harassment by Gatewood and others, and (3) participation in each of the instant three cases. HT 92-93; O&O at 5, 23.

We find no error, however, in the Hearing Officer's conclusion that Williams failed to demonstrate that the AOC took any action against Williams that—either alone or in combination with other actions—would deter a reasonable employee from engaging in protected activity. O&O at 23-30. As the Hearing Officer found, many of Williams's complaints concerned isolated actions by co-workers, admittedly inappropriate in the workplace, such as the angry encounter with co-workers on August 31, 2011, when Williams was walking through an equipment room on the Senate side of the Capitol. We agree with the Hearing Officer that these incidents do not constitute AOC action against her, *Rouiller,* 2017 WL 106137, at **9-10; *Britton,* 2005 WL 6236944, at *7; and there is no indication in the record that they were part of a pervasive pattern of events that combined to prove harassment. *Cf. Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006) ("Petty slights, minor annoyances, and simple lack of good manners" do not constitute materially adverse actions).

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the "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination" standard articulated in *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53, 57 (2006). *Rouiller,* 2017 WL 106137, at *10.

Similarly, Williams failed to establish that the comments on her overall "Outstanding" performance evaluations were actions reasonably likely to deter protected activity. *Britton,* 2005 WL 6236944, at *7. Even had some individual performance ratings been low, the Hearing Officer correctly determined that Williams failed to present evidence that she has suffered objectively tangible harm due to them. Moreover, we find no basis to disturb the Hearing Officer's conclusion that Williams's ratings of "Fully Successful" in the category of "Work Relationships" were a fair assessment and deserved. O&O at 25.

Evidence indicating that an employer misjudged an employee's performance is, of course, relevant to the question of whether its stated reason is a pretext. *See Gage v. Office of the Architect of the Capitol,* No. 00-AC-21 (CV), 2001 WL 36175210, at *5 (Nov. 14, 2001). Nonetheless, the Board may not "second-guess an employer's personnel decision absent demonstrably discriminatory [or retaliatory] motive." *Id.* (quoting *Milton v. Weinberger,* 696 F.2d 94 (D.C. Cir. 1982)). Once the employer has articulated a non-retaliatory 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 George v. Leavitt*, 407 F.3d 405, 415 (D.C. Cir. 2005) ("an employer's action may be justified by a reasonable belief in the validity of the reason given even though that reason may turn out to be false."); *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."). We find no evidence here that the AOC's stated legitimate reasons for its evaluation of Williams's performance were not the actual ones, or that they are a pretext masking prohibited retaliation.

The Hearing Officer's determination that Gatewood took no action against Williams that was reasonably likely to deter protected activity is also firmly supported by substantial evidence. For example, although Williams testified that Gatewood attempted to deny her a bonus, the evidence established that she received all bonuses to which she was entitled. O&O at 26. Although the Hearing Officer found that Gatewood did propose to deny Williams one bonus as a form of discipline for the notice that she posted in August 2011, she further noted that his supervisor, Miller, counseled him to separate the need for discipline from the duty to fairly review performance and Gatewood complied. Thus, we agree with the Hearing Officer that there was nothing about this attempt to discipline her, albeit misguided, that proved retaliation. *Id.*

As for Williams's assertion that Gatewood yelled at her and slammed his fist on her desk when she refused to sign workers' compensation documents, the Hearing Officer determined that this testimony was not credible. O&O at 27. We find no basis to disturb the Hearing Officer's credibility determinations, which find ample support in the record. *See Patterson v. Office of the Architect of the Capitol*, No. 08-AC-48 (RP), 2011 WL 3647157 (July 27, 2011); *Sheehan v. Office of the Architect of the Capitol*, No. 08-AC-58 (CV, RP), 2011 WL 332312, at *6 (Jan. 21, 2011) (observing that 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); *Purifoy v. Dep't of Veterans Affairs,* 838 F.3d 1367, 1373 (Fed. Cir. 2016) (credibility determinations are entitled to deference not only when they explicitly rely on demeanor but also when they do so "by necessary implication"); *Palace Sports & Entm't v. NLRB,* 411 F.3d 212, 220 (D.C. Cir. 2005) (observing that the 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).[6]

Similarly, the Hearing Officer found "simply not convincing" Williams's accounts of the two occasions since Gatewood became her supervisor in 2009 when she contended that he came uncomfortably close to her, noting that her claims were uncorroborated and that she admittedly did not say anything to Gatewood on either occasion. O&O at 27. Williams's petition provides no basis to disturb this determination, and, in any event, she again offers no convincing explanation as to how Gatewood's alleged conduct would deter a reasonable employee from engaging in protected activity.

Further, the evidence demonstrates that the majority of the allegedly retaliatory actions were actually benign requests to perform tasks that are expected and required of electronics mechanics. For example, we agree with the Hearing Officer that nothing about such incidents as the assignment to work with Gatewood at Ft. McNair appeared to be improper or retaliatory. Indeed, as the Hearing Officer noted, Williams was permitted to refuse the assignment and she was not disciplined for her refusal. O&O at 27. Although Williams testified that Gatewood retaliated against her by exposing her to physical danger when he assigned her to dismantle an electrical box, and again assigned her to work on a tall ladder without assistance, substantial evidence supports the Hearing Officer's conclusion that in neither instance was she in any danger. O&O at 29; HT 442, 797-858, Appellant Exs. 76, 80, 87-89, 104. Thus, these assignments cannot be deemed actions against Williams that are reasonably likely to deter protected activity. Similarly, Williams failed to establish that Gatewood's other acts, such as reporting her absent on a snow day when she was at work, contacting her during a furlough, or challenging Williams's valediction in her work-related emails, would deter a reasonable employee from engaging in protected activity.

We find no basis in the record for finding that several of the other events about which Williams testified constituted AOC action at all. Williams has provided no evidence as to who damaged her work bench and locker, or who called her once in the evening and hung up the telephone when she answered. We agree with the Hearing Officer that, despite her suspicions, there was no evidence that Gatewood had anything to do with any of these events. O&O at 30. Similarly, although Williams claimed that she was denied training opportunities, she offered no evidence that the AOC ever denied a training request from her. HT 440-41, 556, 785-89. Thus, these incidents provide no support for Williams's retaliation claims.

[6] Similarly, we find no basis for disturbing the Hearing Officer's determination that Williams's account of the incident in the cafeteria with Nguyen was not credible. O&O at 35 n.12.

Finally, because we agree with the Hearing Officer that Williams failed to establish that the AOC took action that would deter a reasonable employee from engaging in protected activity, it is unnecessary to consider the last element of those claims, i.e., whether there was a causal connection between the AOC's actions and the appellant's protected activities. O&O at 30-33. There is no merit to Williams's argument that an inference of retaliation should be drawn from the fact that most of the actions described above occurred within very close temporal proximity to her protected activities. Even assuming close temporal proximity, an inference of retaliation would only be warranted if Williams had established that the incidents set forth in her Complaints would deter a reasonable employee from engaging in protected activity. Because she has failed to do so, we find no basis in the record for inferring a retaliatory motive here.

ORDER

For the foregoing reasons, the Board affirms the Hearing Officer's March 9, 2016 and July 1, 2016 Orders entering judgment for the AOC on all claims.

It is so ORDERED.

Issued, Washington, DC, November 21, 2017