OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS
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JUAN COBBIN, Claimant/Appellee, v. UNITED STATES CAPITOL POLICE, Respondent/Appellant.	Case Number: 21-CP-10 (CV, RP)

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

DECISION OF THE BOARD OF DIRECTORS

The United States Capitol Police (USCP) petitions for review of the post-hearing Decision and Order of the Merits Hearing Officer (MHO) finding that it discriminated and retaliated against the appellee Juan Cobbin, African American, when it transferred him out of the USCP's K-9 Division and replaced him as K-9 training supervisor with a white officer with objectively inferior qualifications. We exercise jurisdiction pursuant to 2 U.S.C. § 1406. Because the MHO's decision is supported by substantial evidence, we affirm, except as provided below.

I. Background and Procedural History

Cobbin began his employment with the USCP in October 2001. He was promoted to sergeant in 2008. He began working in the K-9 division in the USCP's Operations Service Bureau where he became a certified K-9 handler in 2009. He was the first African American sergeant in K-9. In 2013, he was assigned to lead K-9 training.[1] He was the first African American to do so since K-9 training was established. Between 2009 and 2021, Cobbin was continuously assigned to the K-9 unit, and between 2013 and 2021, he was either serving as a sergeant in K-9 operations, as a K-9 trainer, or as the sergeant in charge of the K-9 training division. During his tenure in the K-9 division, Cobbin earned several training and handling certificates, and he regularly received outstanding performance evaluations.

[1] It is undisputed that the K-9 training supervisor position is a civilian position and not a permanent position for a sworn officer.

On May 10, 2021, Cobbin filed a claim with the Office of Congressional Workplace Rights (OCWR) alleging that the USCP removed him from his position as head of K-9 training, and transferred him to a non-K-9 position in a different Bureau at the Library of Congress, because of his race and in retaliation for engaging in activities protected by the Congressional Accountability Act. Specifically, Cobbin alleged that he was transferred for complaining to his supervisors and the USCP's Office of Professional Responsibility (OPR) about allegedly racially-tinged emails authored by white K-9 officers in their capacity as union members. Cobbin contended that the emails, which had been circulated on USCP's email server, unfairly singled out African American supervisors for criticism, expressly referred to him as "a joke," and stated that he should not be listened to by his USCP leadership on matters such as the deployment of canines during Black Lives Matters protests and the insurrection of January 6, 2021.

After a 5-day hearing, the MHO determined that Cobbin had proven both claims, finding that Cobbin had objectively far superior qualifications as a K-9 training supervisor than his white replacement, that K-9 was in need of Cobbin's skills as a training supervisor, that the official who recommended the transfer had knowledge of Cobbin's OPR complaint, and that the reasons proffered by the USCP for Cobbin's transfer were pretextual.[2]

On petition for review, the USCP contends that the MHO's findings and conclusions are unsupported by substantial evidence, arbitrary and capricious, and contrary to law. 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); *Rouiller v. U.S. Capitol Police,* Case No. 15-CP-23 (CV, AG, RP), 2017 WL 106137, at *6 (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

[2] The MHO awarded Cobbin compensatory damages and reimbursement for lost hazardous duty pay, comp time earnings, usage of sick leave, and commuting expenses prior to his retirement effective October 31, 2021, and also granted him leave to file a petition for reasonable attorney fees.

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, 112 (1992).

III. Analysis

A. The MHO's Determination that Cobbin was Reassigned from K-9 due to Race Discrimination and Retaliation is Supported by Substantial Evidence.

Section 201 of the Congressional Accountability Act ("CAA") governs employment discrimination claims. It provides, in relevant part, that "[a]ll personnel actions affecting covered employees shall be made free from any discrimination based on (1) race, color, religion, sex, or national origin within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2)." 2 U.S.C. § 1311(a). The Supreme Court recently held in *Babb v. Wilkie*, 140 S. Ct. 1168, 1171, (2020) that the language "free from any discrimination based on age" in the Age Discrimination in Employment Act's (ADEA) federal-sector provision did not require but-for causation; rather, evidence that age played a part in an employment decision was sufficient for liability. The federal-sector provisions in the ADEA and Title VII are identical, so we have no difficulty following the Courts of Appeals for the 7th and 11th Circuits in concluding that *Babb's* causation standard applies equally to claims brought under section 201 of the CAA. *See Babb v. Sec'y, Dep't of Veterans Affs.,* 992 F.3d 1193, 1205 (11th Cir. 2021); *accord, Huff v. Buttigieg,* 42 F.4th 638, 645 (7th Cir. 2022).[3]

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.

[3] Although the Board has not previously addressed this issue, it does not change the result here: the MHO determined not only that race discrimination played a part in the USCP's determination to transfer Cobbin out of K-9, but that discrimination (and retaliation) were but-for reasons for the transfer. Because Cobbin satisfied the higher standard requiring proof of but-for causation, he also satisfied the lower causation standard set forth in *Babb.*

2 U.S.C. § 1317. In *Britton v. Office of the Architect of the Capitol,* No. 02-AC-20 (CV, RP), 2005 WL 6236944, **3-5 (OOC 2005), the Board held that a Title VII-based framework should be applied when analyzing retaliation claims brought under the CAA. Accordingly, where, as here, a hearing has been held and the record is complete, the issue for the MHO is 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 discrimination or retaliation. *Evans v. U.S. Capitol Police Bd.,* Case No. 14-CB-18 (CV, RP), 2015 WL 9257402, at *5 (Dec. 9, 2015); *Id.; see Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 255-56 (1981). In this case, therefore, we review the evidence as a whole to determine whether the MHO's determination that Cobbin met this burden is supported by substantial evidence in the record. For the reasons set forth below, we conclude that it does.

In concluding that the USCP discriminated against Cobbin and retaliated against him when it reassigned him from K-9 to the Library, the MHO focused first and foremost on the evidence of the disparity between Cobbin's qualifications and those of his white replacement. The Supreme Court has held that "qualifications evidence may suffice, at least in some circumstances," to show that an employer's proffered explanation is pretext for discrimination. *Ash v. Tyson Foods, Inc.,* 546 U.S. 454, 457 (2006). Further, in *Aka v. Washington Hospital Center,* the Court of Appeals for the District of Columbia Circuit held that "[i]f a factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture." *Aka v. Wash. Hosp. Ctr.,* 156 F.3d 1284, 1289, 1291 (D.C. Cir. 1998) (en banc). However, a disparity in qualifications, standing alone, can support an inference of discrimination only when the qualifications gap is "great enough to be inherently indicative of discrimination"—that is, when the plaintiff is "markedly more qualified," "substantially more qualified," or "significantly better qualified" than the successful candidate. *Holcomb v. Powell,* 433 F.3d 889, 897 (D.C. Cir. 2006) (internal quotation marks omitted).

Applying this standard here, we find substantial, undisputed evidence in the record to support the MHO's finding that Cobbin had far more formal training and education, significantly greater technical expertise, and broader experience than his white replacement. Whether this evidence is sufficient to infer discrimination or retaliation based on qualifications alone is a question we need not resolve. Our task is to "review the record taken as a whole," and claimants are not limited to comparing qualifications; they may seek to expose other flaws in the employer's explanation. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150 (2000) (internal quotation marks omitted); *Holcomb,* 433 F.3d at 897; *see also Ash,* 546 U.S. at 458 (noting approvingly the 11th

Circuit's suggestion that "superior qualifications may be probative of pretext when combined with other evidence").

Here, the MHO relied not only on comparative qualifications evidence to conclude that the USCP's non-discriminatory and non-retaliatory reasons for its actions were pretextual—he also found USCP witnesses provided shifting justifications as to the reasons for reassigning Cobbin, as well as inconsistent testimony regarding management meetings and discussions concerning possible replacements for Cobbin to head K-9 training. The USCP petition fails to establish any grounds for disturbing the MHO's determinations in this regard. *See 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'").

Finally, we reject the USCP's position that Cobbin's discrimination and reprisal claims were unproven because the official who recommended the transfer attributed his decision to a concern about morale and denied knowledge of Cobbin's complaints about the emails to his supervisors and OPR. The MHO also found that the morale problem referenced by the USCP was attributable to the racially tinged email and Cobbin's pending OPR complaint about that email, as opposed to events that were remote in time and not tied to Cobbin. Discrimination may be proven when the decision to take adverse action is based on "uncritical reliance" on facts provided by a biased source. *Singh v. Cordle,* 936 F.3d 1022, 1038 (10th Cir. 2019). Similarly, a decisionmaker's denial of knowledge about protected activity is merely evidence for the factfinder to consider. *Jones v. Bernanke*, 557 F.3d 670, 679 (D.C. Cir. 2009); *Gordon v. New York City Bd. of Educ.,* 232 F.3d 111, 116-17 (2d Cir. 2000). Even considering such a denial, it is sufficient for a claimant to demonstrate, as Cobbin did here, that "the employer" at large was aware of the protected activity and that the adverse action took place shortly after the protected activity. *Jones*, 557 F.3d at 679; *Gordon,* 232 F.3d at 117 (factfinder can find retaliation even if the agent denies direct knowledge of a plaintiff's protected activities "so long as the jury finds that the circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the orders of a superior who has the requisite knowledge"); *Talavera v. Shah,* 638 F.3d 303 (D.C. Cir. 2011) (where an employee relies on circumstantial evidence to demonstrate that the official who made the personnel decision had knowledge of the protected

activity, that evidence must "reasonably support an inference" that the decision-maker knew of the protected activity and cannot be evidence from which a reasonable factfinder would have to speculate that the decision-maker knew). Again, whether evidence of temporal proximity would be sufficient alone to prove retaliation is a question we need not conclusively resolve in this case. Rather, we find only that this evidence is properly considered in concluding that the MHO's determination is supported by substantial evidence in the record as a whole.

In summary, the MHO's findings are firmly supported by substantial evidence of Cobbin's superior qualifications, the other flaws in the USCP's explanation for its actions, and the temporal proximity between his protected activities and the USCP's decision to transfer him out of the K-9 division. The state of the record called upon the MHO to make credibility findings, and he did so. Although the MHO could have credited the testimony of the USCP and found for it, he was likewise free to credit the contrary evidence and find against it. 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. *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 conclude that this aspect of the MHO's Decision and Order is supported by substantial evidence and was obtained in accordance with law.

B. We Modify MHO's Order Directing the USCP to Compensate the Appellee for Sick Leave.

Lastly, as noted above, the MHO awarded Cobbin compensatory damages and reimbursement for lost hazardous duty pay, comp time earnings, usage of sick leave, and commuting expenses prior to his retirement effective October 31, 2021. Among other things, the USCP challenges the award of the value of the 141 hours of sick leave that Cobbin used between the time he was transferred to the Library of Congress and the day he retired.

First, the USCP argues that the award was improper because nothing in the record evidence indicates that Cobbin used this leave because of an illness attributable to his transfer or that he was suffering from a medical condition that was caused or otherwise attributable to the USCP's decision to transfer him. We disagree. We find no basis to disturb the MHO's determination that Cobbin's use of sick leave was attributable to the USCP's discrimination and retaliation. Restoration of sick leave taken as a result of discrimination, or to avoid the harms from discrimination, is appropriate equitable relief. *See, e.g., Bouchell v. Runyon*, EEOC Appeal No. 01932122, 1994 WL 747971, *6 (June 23, 1994) (ordering agency to restore to appellant any annual and sick leave that she took

as a result of the sexual harassment); *Olson v. Cisneros*, EEOC Appeal No. 01922417, 1994 WL 746557, *15 (EEOC June 16, 1994) (same). Second, the USCP contends that, even assuming that Cobbin was entitled to equitable relief for the sick leave that he took, the proper remedy is to order restoration of such leave, not monetary compensation for it.

We agree. Federal employees are not compensated for unused sick leave when they retire. Rather, unused sick leave at retirement is converted into creditable service for purposes of retirees' pension calculations. 5 U.S.C. § 8415(m)(2)(A). Accordingly, we VACATE that portion of the MHO's remedial order requiring the USCP to pay Cobbin the value of the 141 hours of sick leave, and instead ORDER the USCP to take all actions necessary restore to Cobbin 141 hours of sick leave and to facilitate the re-calculation of his pension benefit.

We have considered the USCP's remaining arguments and do not find them persuasive. Because substantial evidence supports the MHO's conclusion that Cobbin's transfer was both discriminatory and retaliatory, we affirm.

ORDER

We AFFIRM IN PART the Merit Hearing Officer's Decision and Order except as modified herein.

It is so ORDERED.

Issued, Washington, DC

September 27, 2023