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

Roslyn Waddy, Appellant,	)	
v.	)	Case Number: 22-LC-23 (CV, DA)
The Library of Congress, Appellee.	)	

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

DECISION OF THE BOARD OF DIRECTORS

The appellant, Roslyn Waddy, petitions the Board for review of the Merits Hearing Officer's (MHO) orders denying her claims against her employing office, the Library of Congress (Library), which alleged that it unlawfully discriminated against her by failing to accommodate her religious beliefs; harassed her because of those beliefs and the perception that she was disabled; and terminated her for refusing to comply with the Library's COVID-19 Health and Safety Protocols for non-vaccinated employees. For the reasons set forth below, we DENY the appellant's petition and AFFIRM the MHO's orders to the extent they are consistent with this decision. We also VACATE the MHO's addendum order awarding costs to the Library.

I. Background and Procedural History

A detailed recitation of the undisputed material facts in this case, which are summarized here, are set forth in the MHO's October 25, 2022 Order on Summary Judgment and her December 14, 2022 Final Order. The appellant was a Reference Librarian in the Serial & Government Publications Division (SER) of the Library's Collections & Service Group (LCSG). She performed reference services, developed collections, and provided research, consultation, and liaison services for the public. Regular contact with the public was an essential part of her job.

November 2021 to May 20, 2022

On November 3, 2021, the Library issued a COVID-19 vaccine mandate that obligated all Library employees to receive a COVID-19 vaccine unless the Library

granted an exemption request on medical or religious grounds. On November 24, the Library granted the appellant's exemption request from the vaccine mandate, and notified her that she was required to follow the Library's COVID-19 health and safety protocols for unvaccinated employees, which included weekly testing for COVID-19 beginning in January 2022.

On December 20, 2021, the appellant notified the Library that she would not submit to testing for COVID-19 due to her religious beliefs. She wrote: "Per my approved religious exemption … 'I have a sincerely held religious objection to the use of all vaccines, including medical tests, treatments and intrusions that would defile my holy temple body.' And, therefore, I will not be testing."

The Library notified the appellant via email that she was required to comply with the testing protocol and that she was not approved for an exemption from the testing requirement. The notice stated in part:

> The Library is committed to protecting the health and safety of the Library workforce without substantially burdening an employee's exercise of religious beliefs. When combined with other protocols, testing is the least restrictive means of providing a safe environment. Therefore, to the extent that your email dated December 20, 2021, is a request for an exception to the testing requirement your request is <u>not approved</u>.

(Emphasis in original.) The appellant did not thereafter submit to COVID-19 testing.

On January 19, 2022, the Library issued a notice to the appellant that failure to comply with the testing mandate would result in her termination. On February 7, the Library offered the appellant saliva testing as an alternative to nasal swab testing and further invited the appellant to identify alternative accommodations to COVID-19 testing. The appellant refused the saliva testing, stating that it violated her religious beliefs. Later in February, the appellant started requesting and using approved paid leave.

On March 2, the Library issued a policy notice to its employees based on revised guidance from the Centers for Disease Control (CDC). Under the new guidance, masking and testing would be required when weekly community levels of the virus were "medium" and "high," while masking and testing would be optional when community levels were "low." The Library subsequently advised unvaccinated employees each week whether they were required to test and wear masks while on-site, based on the CDC community levels.

After taking approved leave, the appellant returned to on-site work at the Library (unvaccinated and not required to test or wear a mask) from April 4-15, as community levels remained "low." On April 18, after community levels increased back to "medium," the Library notified the appellant not to come on-site and asked her to provide further information to support her claim of a sincerely held religious objection to testing. On April 29, the Library notified the appellant that her request for a religious accommodation

was moot since community levels again returned to "low" and the Library's testing program was again paused.

May 20, 2022 through August 2022

On May 20, 2022, the Library resumed mandatory testing for unvaccinated employees, as the community levels increased to "medium." On the same day, the Library informed the appellant that it would provide her an alternative to testing and, therefore, it did not decide her request for an exemption to testing. Specifically, the Library notified her that, in lieu of testing, she was required to wear a Library-provided N95/KN95 mask at all times while on-site, except while eating and drinking alone.

In response, the appellant rejected the Library's proposed mask accommodation and stated that she was only willing to wear her own supplied mask. The appellant did not claim that the Library's proposed mask accommodation conflicted with her sincerely held religious beliefs. The Library did not permit the appellant to wear her own supplied mask.

On June 24, the Library sent the appellant a notice proposing her termination for refusing to comply with the Library's Health and Safety Protocols, including the Library's reasonable accommodation of wearing a Library-issued N95 mask. On August 2, 2022, the Library issued a decision terminating the appellant from her position with the Library, effective August 12, 2022.

The appellant filed her initial claim with OCWR on June 23, 2022, and amended her claim on June 28, 2022, and again on September 6, 2022. The narratives in her claim forms and supporting documentation raised claims that the Library discriminated against her on the basis of religion and perceived disability, as well as unlawful reprisal for activity protected by the Congressional Accountability Act (CAA).

Following discovery, the parties filed cross motions for summary judgment. The Merits Hearing Officer (MHO) denied the Library's motion for summary judgment on the appellant's claim of religious discrimination (failure to accommodate) for the period November 2021 to May 20, 2022 (before the Library's masking accommodation), but granted the Library's motion on the appellant's accommodation claims for the period May 20, 2022 through August 2022 (during the Library's masking accommodation). The MHO also entered summary judgment for the Library on the appellant's other claims of disparate treatment discrimination based on religion and disability, but she denied the motion with respect to the appellant's claim of discriminatory harassment based on her religion.[1]

[1] As stated above, the appellant had also alleged that the Library retaliated against her for engaging in protected activity. The MHO's Order also dismissed with prejudice those retaliation claims as withdrawn.

A hearing was held on November 16-17, 2022 on the appellant's remaining claims. At the conclusion of the appellant's case-in-chief, the MHO entered judgment on partial findings in favor of the Library on the claim of harassment based on religion. Following the hearing, the MHO issued a final order entering judgment in favor of the Library on the appellant's remaining claim of religious discrimination (failure to accommodate) for the period prior to the masking accommodation, i.e., November 2021 to May 20, 2022. Thereafter, the MHO issued an order denying the Library's motion to sanction the appellant but granting its motion for costs.

The appellant has filed a petition for review of the MHO's orders with the Board, and the Library has filed an opposition thereto. The appellant has also filed a motion requesting that the MHO stay the order granting costs. For the reasons set forth below, we DENY the appellant's Petition for Review (PFR) and VACATE the MHO's order granting costs.

II. Standard of Review

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

III. Analysis

A. The Merits Hearing Officer Correctly Entered Summary Judgment for the Library on the Appellant's Claims of Religious Discrimination (Failure to Accommodate) for the Period May 20 through August 2022, Her Other Claims of Disparate Treatment Discrimination, and Her Disability Discrimination Claims.[2]

1. Summary Judgment Standard

We review a decision granting a motion for summary judgment de novo. *Leggett v. Library of Congress*, No. 20-LC-18 (CV), 2021 WL 4424091, at **3-4 (OCWR Sep. 20, 2021);.*Torres-Velez v. Office of the Architect of the Capitol*, No. 17-AC-36 (FL, RP, CV), 2019 WL 10784232, at *4 (OCWR Sep. 23, 2019). Summary judgment is appropriate if there are no genuine issues of material fact, and the movant is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

[2] We discuss below the MHO's entry of judgment on partial findings in favor of the Library on the claim of harassment based on religion, and the MHO's post-hearing final order entering judgment in favor of the Library on the appellant's failure to accommodate claims concerning the period of November 2021 to May 20, 2022.

247 (1986); OCWR Procedural Rule 5.03(d). In determining whether the nonmoving party has raised a genuine issue of material fact, the Board must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor. *U.S. Capitol Police & Lodge 1, FOP/U.S. Capitol Police Labor Comm.*, No. 16-LMR-01 (CA), 2017 WL 4335144, at *3 (OOC Sep. 26, 2017); see also *Talavera v. Shah*, 638 F.3d 303, 308 (D.C. Cir. 2011).

To defeat a motion for summary judgment, the non-moving party must "designate specific facts showing that there is a genuine issue for trial," *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), and the moving party can establish its entitlement to judgment by showing the lack of evidence to support the non-moving party's case, *Conroy v. Reebok Int'l*, 14 F.3d 1570, 1575 (Fed. Cir. 1994); *Eastham v. U.S. Capitol Police Bd.*, No. 05-CP-55 (DA, RP), 2007 WL 5914213, at **3-4 (OOC May 30, 2007) (affirming summary judgment when complainant "failed to proffer evidence" that would permit the inference of unlawful conduct required to establish complainant's prima facie case). The non-moving party is required to provide evidence in support of her claims, not merely assertions, allegations, or speculation. *See Solomon v. Architect of the Capitol*, No. 5 02-AC-62 (RP), 2005 WL 6236948, at *8 (OOC Dec. 7, 2005). However, at the summary judgment stage, neither this Board nor the hearing officer may make credibility determinations or weigh the evidence. *See Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290, 296 (D.C. Cir. 2015).

2. The Appellant Has Waived any Arguments concerning the Order on Cross-Motions for Summary Judgment.

As an initial matter, we note that although the appellant states in her brief on review that she is contesting, *inter alia*, the MHO's October 25, 2022 Order on cross-motions for summary judgment, she has not provided any arguments in support of her position that the Board should overturn that order. Section 8.01(c)(1) of the Board's Procedural Rules provide that briefs to the Board "shall identify with particularity those findings or conclusions in the Merits Hearing Officer's decision that are being challenged and shall refer specifically to the portions of the record and the provisions of statutes or rules that are alleged to support each assertion made on appeal." The appellant's brief fails to satisfy these requirements. Accordingly, the Board finds that she has waived any arguments concerning the MHO's Order on cross motions for summary judgment. *Cf. Evans v. U.S. Capitol Police Bd.*, 2015 WL 9257408, *8 (OCWR December 9, 2015) ("arguments not raised on appeal before the Board are waived.")); *Swann v. The Office of the Architect of the Capitol*, Case No. 15-5001, 2015 WL 5210251 (D.C. Cir. 2015) (citing *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004) ("Ordinarily, arguments that parties do not make on appeal are deemed to have been waived.").

Furthermore, for the reasons set forth below, we find that appellant's generalized contentions in her brief provide no basis for disturbing the MHO's Order granting the Library's motion for summary judgment for the Library on her claims of religious discrimination (failure to accommodate) for the period May 20 through August 2022, disparate treatment discrimination, and disability discrimination.

3. The MHO Correctly Granted the Library's Motion for Summary Judgment on the Appellant's Claims of Religious Discrimination (Failure to Accommodate) for the Period May 20 through August 2022 and on the Appellant's other Disparate Treatment Claims.

Section 201 of the Congressional Accountability Act ("CAA") governs employment discrimination claims. It provides, in relevant part: All personnel actions affecting covered employees shall be made free from any discrimination based on (1) race, color, religion, sex, or national origin within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2). 2 U.S.C. § 1311(a). Title VII, as amended, prohibits two categories of employment practices. It is unlawful for an employer:

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a).

These two proscriptions, often referred to as the "disparate treatment" and the "disparate impact" provisions, are the only causes of action under Title VII. *Abercrombie & Fitch Stores, Inc., v. Equal Emp. Opportunity Comm'n,* 575 U.S. 768, 771-72 (2015).

In this case, the appellant's allegations of religious discrimination based on failure to accommodate her beliefs are disparate treatment claims.[3] Under Title VII, a plaintiff alleging disparate treatment based on a failure to accommodate "must first set forth a prima facie case that (1) she had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) she informed her employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected her to an adverse employment action because of her inability to fulfill the job requirement." *Francis v. Perez*, 970 F. Supp. 2d 48, 59-60 (D.D.C. 2013); *see also Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004). If a plaintiff "makes out a prima facie

[3] *See id.* at 789 (Thomas, J. dissenting) ("The Court today rightly puts to rest the notion that Title VII creates a freestanding religious-accommodation claim.").

failure-to-accommodate case, the burden then shifts to [the employer] to show that it 'initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship.'" *Peterson,* 358 F.3d at 606.

Here, as the MHO recognized, the parties do not dispute that: (1) the appellant has a sincere religious belief that conflicted with the Library's COVID-19 vaccine and testing mandates; (2) the Library immediately granted the appellant's request for an accommodation to the vaccine mandate and exempted her from taking any COVID-19 vaccines; (3) the appellant made the Library aware of her religious objection to the virus testing mandate when, in November 2021, she requested an exemption from both the vaccine and testing mandates as religious accommodations; (4) for the period subsequent to May 20, 2022, the Library offered the appellant a complete exemption to both the vaccine and testing mandates; (5) the appellant did not (and does not) claim that the Library's masking accommodation violated her religious beliefs; (6) the appellant insisted that she would provide her own mask and would not wear a N95/KN95 mask provided by the Library;[4] and (6) the Library rejected this modification to its masking mandate. The record also establishes that the appellant suffered an adverse action when she was terminated because of her failure to comply with the LOC's protocols.

The issue, then, is whether these undisputed facts establish that the Library initiated good faith efforts to accommodate reasonably the appellant's religious practices or that it could not reasonably accommodate her without undue hardship. *U.S. Airways, Inc. v. Barnett*, *supra*, 535 U.S. at 401-402. As discussed below, these facts compel the conclusion that the Library's masking accommodation from May 20, 2022 and continuing until the appellant's termination was reasonable as a matter of law.

The Board will analyze a religious accommodation claim based on the facts in existence at the time in which the operative events occurred. *See Prach v. Hollywood Supermarket, Inc.*, No. 09-13756, 2010 WL 4608781, at *1 (E.D. Mich. 2010) (holding that the reasonableness of a religious accommodation is generally determined on a case-by-case basis according to the facts as they existed at the time of employment). We agree with the MHO that the masking accommodation that the Library offered the appellant on May 20, 2022 allowed her to refuse the COVID vaccine and testing. This "effectively eliminated the religious conflict" as of May 20, 2022. *See Breshears v. Oregon Department of Transp.,* No. 2:22-cv-01015-SB, 2023 WL 136550, at *3 (D. Or. Jan. 9, 2023) (quoting *Am. Postal Workers Union, San Francisco Loc. v. Postmaster Gen.*, 781

[4] The appellant states in her appellate brief without citation that she offered to "wear a N95/KN95 mask that she provided." The statement that appellant offered to wear a N95/KN95 mask is not supported by the record, as appellant advised the Library only that "I am willing to mask at all times while onsite unless eating or drinking when no one else is around, *provided that I wear my own supplied mask.*" (Library's Exhibit 36 in support of motion for summary judgment) (emphasis added)).

F.2d 772, 776 (9th Cir. 1986)); *see also Telfair v. Fed. Exp. Corp.*, 934 F. Supp. 2d 1368, 1384 (S.D. Fla. 2013), *aff'd*, 567 F. App'x 681 (11th Cir. 2014) ("An accommodation is reasonable as a matter of law, if it in fact eliminates a religious conflict in the workplace[.]"). As such, the undisputed facts do not support the appellant's claim that the Library subjected her to an adverse employment action because of her religious beliefs for the period May 20 through August 2022.

With respect to the appellant's apparent position that the Library should have permitted her to wear her own mask rather than a N95/KN95 mask provided by the Library, it is well-settled that Title VII does not require an employer to accept an employee's preferred accommodation. *See Am. Postal Workers Union*, 781 F.2d at 776 ("The position advanced by [the plaintiffs] stands for the proposition that an employer must accept any accommodation, short of 'undue hardship,' proposed by an employee, regardless of whether the employee rejects an accommodation proposed by the employer solely on secular grounds. Title VII does not compel that conclusion."); *see also Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) ("We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation."); *Telfair*, 934 F. Supp. 2d at 1384 ("[I]f the conflict is eliminated the employee has no right to insist upon a different accommodation that he prefers." (citing *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1031-32 (8th Cir. 2008)).

Here, as the MHO concluded, the Library offered an accommodation—using a N95/KN95 mask provided by the Library—that eliminated the conflict between the Library's vaccine/testing requirements and the appellant's beliefs, and the Library's accommodation for the appellant's religious beliefs was reasonable as a matter of law. *See Ansonia*, 479 U.S. at 70; *Telfair*, 934 F. Supp. 2d at 1384. "[W]here the employer has already reasonably accommodated the employee's religious needs, the [Title VI] statutory inquiry is at an end." *Ansonia*, 479 U.S. at 68. Accordingly, the MHO properly granted the Library's motion for summary judgment on the appellant's failure to accommodate disparate treatment claims for the period May 20 through August 2022.

To the extent that the appellant raised other discrimination claims regarding masking, the MHO correctly granted the Library's motion for summary judgment concerning them. The appellant argued below that she was the only employee required to wear a mask provided by the Library. A disparate treatment claim may be established by proof that the appellant was treated less favorably than other similarly situated employees because of her religious beliefs. *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003). Here, however, the record is devoid of facts that would permit a finding that the Library's masking policy discriminates against her because of her religion.

First, the appellant did not identify any employee of the Library who had requested an exemption from both COVID vaccines and testing who was permitted to

work on-site either without wearing an N95/KN95 mask or a mask not provided by the Library. Indeed, as the MHO noted, the Chief Operating Officer of the LCSG testified in his deposition that that he did not require the use of an Library-issued mask for any other employees because "[he] had no other employees requesting masking as an alternative to vaccination and testing . . . ." Thus, the Library was entitled to judgment on this claim as a matter of law.

Second, the restrictions the appellant identifies, including wearing Library-issued N95 or KN95 masks and testing requirements, are restrictions imposed on all Library employees who are unvaccinated as opposed to employees who are vaccinated. Thus, the appellant has simply identified ways in which the Library's COVID-19 Health and Safety Protocols for non-vaccinated employees distinguishes between employees based on their vaccination status. Because the appellant has not produced evidence that would permit a reasonable finder of fact to conclude that the Library's Protocols, on their face or as applied, treats her differently from employees exempted on non-religious grounds, the Library was also entitled to summary judgment on this claim.

4. The MHO Properly Granted the Library's Motion for Summary Judgment on the Appellant's Claim of Disability Discrimination

As stated above, the appellant also alleged that the Library discriminated against her due to her perceived disability. Specifically, she alleged that the Library:

> perceives that those individuals who do not vaccinate, test or wear a mask are suffering from an ADA and Rehabilitation Act-defined disability (communicable disease) and are discriminating against them due to the perception that the unvaccinated either currently have or will imminently become infected with COVID-19.

Under the "regarded as" theory of disability, an employee must show that she was subjected to an action prohibited under the Americans with Disabilities Act (ADA) because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.'" *Epps v. Potomac Electric Power Company*, 389 F.Supp.3d 53, 63 (D.D.C. 2019); *see Ingram v. District of Columbia Child and Family Services Agency,* 394 F. Supp. 3d.119, 126 (D.D.C. 2019).

The Merits Hearing Officer granted the Library's motion for summary judgment as to the claim of disability discrimination, finding no evidence in the record that would permit a finding that the Library believed that the appellant had COVID-19 or was disabled at any relevant time. We agree. Because the undisputed facts in the record would not permit a reasonable factfinder to conclude that the Library took any action against the appellant because of an actual or perceived physical or mental impairment on her part, the Library was entitled to judgment on her disability claim as a matter of law.

B. We Affirm the MHO's Judgment as Matter of Law in favor of the Library on the Claim of Harassment based on Religion.

We next turn to the MHO's judgment as a matter of law for the Library on the appellant's claim of harassment based on religion, which was issued after the close of her case-in-chief at the administrative hearing.

1. Standard of Review

As the MHO recognized, the Library's motion for judgment as a matter of law was akin to a motion for judgment under Rule 52(c) of the Federal Rules of Civil Procedure, which provides:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Our reviewing court has stated that to grant a motion for judgment as a matter of law (JMOL) under Rule 52(c) a district judge must weigh the evidence and resolve credibility issues. Therefore, it reviews the district court's JMOL findings of fact as if entered at the conclusion of all the evidence, for clear error. *Yamanouchi v. Danbury,* 231 F.3d 1339, 1343 (Fed. Cir. 2000); *see also Fairchild v. All American Check Cashing,* 815 F.3d 959, 964 (5th Cir. 2016) ("When the district court enters a Rule 52(c) judgment, we review its factual findings for clear error and its conclusions of law de novo."); *Mullin v. Fairhaven,* 284 F.3d 31, 36 (1st Cir. 2002) ("In our review of Rule 52(c) judgments, we evaluate the district court's conclusions of law de novo . . . and typically examine the district court's underlying findings of fact for 'clear error.'"); *Rego v. ARC Water,* 181 F.3d 396, 400 (3rd Cir. 1999); ("Thus, in a Rule 52(c) case, a court of appeals reviews a district court's findings of fact for clear error . . . and its conclusions of law de novo.").

The Board reviews hearing officers' findings of fact entered at the conclusion of all the evidence under the substantial evidence standard. 2 U.S.C. § 1406(c); *Evans v. Office of the Architect of the Capitol,* No. 16-AC-18 (CV, RP), 2018 WL 4382909, *4 (OCWR Sep. 12, 2018). The Supreme Court has stated that a court reviewing for substantial evidence should accept such factual findings if they are supported by the record as a whole and should not supplant those findings merely by identifying alternative findings that could be supported by that record. *Arkansas v. Oklahoma,* 503 U.S. 91, 112 (1992). Accordingly, we will review the MHO's JMOL findings of fact under the substantial evidence standard as if entered at the conclusion of all the evidence, and we will review her conclusions of law de novo.

2. The MHO's Determination that the Appellant Failed to Establish her Claim of Harassment based on Religion is Supported by Substantial Evidence.

To establish a *prima facie* case of discriminatory harassment, an appellant must prove by preponderant evidence that: (1) she suffered an adverse employment action (2) because of her religious beliefs. *Baloch v. Kempthorne,*550 F. 3d 1191, 1196 (D.C. Cir. 2008). To make out a hostile work environment claim, the appellant 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." *Pillai v. U.S. Capitol Police,* No. 19-CP-27 (AG, CV, RP), 2021 WL 1963840, at *9 (OCWR May 6, 2021); *Williams v. Office of the Architect of the Capitol,* No. 14-AC-11 (CV, RP), 2017 WL 5635714, at *8 (OOC Nov. 21, 2017); *see also Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23, (1993) (whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances). A hostile work environment claim requires proof that the environment was objectively hostile or abusive - *i.e*., an environment that a reasonable person would find hostile or abusive - and which was subjectively perceived as such. *Harris,* 510 U.S at 21-23; *see also Faragher v. City of Boca Raton,* 524 U.S. 775, 787 (1998); *Baird v. Gotbaum,* 792 F.3d 166, 172 (D.C. Cir. 2015) ("[T]he standard for severity and pervasiveness is an objective one.") (citing *Harris,* 510 U.S. at 21). These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." *Faragher* 524 U.S. at 787.

The appellant contends that each time she was reminded that her failure to comply with the Library testing mandate might or would result in termination, this was harassment consisting of direct threats to her employment because of her religious beliefs. She argued that she was afraid of losing her job because she exercised her right to raise a sincere religious objection to the virus testing requirements. After considering all of the appellant's evidence, the MHO concluded that she offered insufficient evidence to support the claim of harassment. Specifically, the MHO concluded that the total number of occasions when the Library advised the appellant of the negative consequences of her refusal to submit to virus testing – seven times in writing and once by telephone – were insufficiently pervasive to establish a case for harassment. Further, the MHO determined that the repeated reminders from the Library, which the appellant contended were "threats" to her employment, were nothing more than personnel notices by the Library intended to advise the appellant of the potential consequences of her refusal to comply with Library policy.

We agree. In this instance, the MHO's conclusion that the actions about which the appellant complains are not sufficient to support a Title VII claim of harassment are supported by uncontested testimony that the notices sent to the appellant were routine Library practice, intended to alert any employee who failed to comply with Library

policies of the consequences of doing so. As the Seventh Circuit Court of Appeals has held:

> If we interpreted these simple personnel actions [counseling statements as negative performance evaluations] as materially adverse, we would be sending a message to employers that even the slightest nudge or admonition (however well-intentioned) given to an employee can be the subject of a federal lawsuit. . . . We also would be deterring employers from documenting performance difficulties, for fear that they could be sued for doing so.

Sweeney v. W., 149 F.3d 550, 557 (7th Cir. 1998); *see also, St. Louis v. New York City Health & Hosp. Corp.*, 682 F. Supp. 2d 216, 234 (E.D.N.Y. 2010) ("Plaintiff's receipt of negative job evaluations and disciplinary warnings resulting from the failure to meet a work requirement, without more, do not support a claim of sex-based hostile work environment."). We find no basis to disturb the MHO's conclusion that these notices are insufficient to support a claim of harassment.

We also find supported by substantial record evidence the MHO's conclusion that the appellant had no legitimate reason to be concerned about losing her job during the period in question. As the MHO stated, the actions by the Library undermined the appellant's assertions that she felt threatened by the warning notices she received and that she believed that she was in imminent danger of being terminated. For example, despite receiving repeated notices regarding the consequences of violating the Library testing mandate, she was informed that any termination process would begin with a written notice and would take some time before it might go into effect. Further, as the MHO noted, the appellant was well aware that the Library was taking steps to try to accommodate her, short of a testing exemption. For example, the Library excused her from testing during the first week of January; she was offered an alternative saliva test in early February; when she declined the saliva test, the Library asked her to identify an alternative accommodation. Thereafter, she was certain enough of her continued employment that she requested many hours of leave, all of which were approved. Further, as the MHO recognized, the appellant and all other employees were excused from testing from March 8 through April 15, 2022, and, later, when COVID levels increased in mid-April, 2022, the Library ordered the appellant to leave the workplace, but gave her administrative leave to cover the hours when she was unable to work and permitted her to telework during the week of April 18. When COVID levels dropped again, she, along with all other employees, were excused from testing from April 29 through May 20, 2022; and, finally, on May 20, 2022, she was offered a masking accommodation in lieu of testing.

We agree with the MHO that this evidence does not support a finding that the actions of the Library permeated the workplace with discriminatory intimidation, ridicule,

or insult. Indeed, as the MHO recognized, the appellant testified that no one at the Library said anything derogatory about her religious beliefs; the conditions of the work environment were not altered by the Library's notices regarding what might occur if she failed to comply with the testing requirements; and there was no evidence presented at all that any of the notices were issued because of the appellant's assertion of religious objections to Library policies. Accordingly, we conclude that the MHO correctly granted the JMOL motion on the appellant's harassment claim.

C. We Affirm the MHO's Post-Hearing Determination that the Appellant Failed to Establish Her Claim of Religious Discrimination (Failure to Accommodate) for the Period November 2021 to May 20, 2022.

As discussed above, the MHO denied the Library's motion for summary judgment on the claim of religious discrimination (failure to accommodate) for the preceding period of November 2021 to May 20, 2022 stating:

> The [Library] has not established, as a matter of law, that before offering the [appellant] a masking accommodation on May 20, 2022, the delay in offering any accommodation was excused by its reasonable efforts to identify one, or by the fact that it was unable to reasonably accommodate the [appellant's] requests for an exemption from testing without undue hardship on its operations under the changing pandemic circumstances.

As a result, the appellant's religious discrimination (failure to accommodate) claim for the period of November 20, 2021 to May 20, 2022 proceeded to an administrative hearing. At the conclusion of the evidentiary hearing, the MHO issued a Final Order entering judgment for the Library on these claims.

After the parties submitted their briefs on PFR, the Supreme Court decided *Groff v. DeJoy*, 143 S. Ct. 2279 (2023), in which it reconsidered the religious accommodation standard under Title VII.[5] Prior to *Groff*, the Court held in *TWA v. Hardison*, 432 U.S. 63 (1977), that requiring an employer "to bear more than a de minimis cost" amounted to an undue hardship. Under the revised standard in *Groff*, "undue hardship" is shown when a burden "is substantial in the overall context of an employer's business" when taking "into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer." *Groff*, 143 S. Ct. at 2294-95 (citations omitted). As discussed below, the Library clearly made this showing here.

[5] Both parties submitted supplemental briefs in response to the Board's Order inviting them to address the impact of *Groff*, if any, on this appeal.

In determining that the Library did not discriminate against the appellant, the MHO considered evidence and testimony concerning the Library's actions from when the appellant requested an exemption from testing to when the Library offered her the accommodation of wearing a Library-issued N95 or K95 mask. Based on the testimony of the Library's Supervisory Clinic Manager and Senior Nurse Consultant, the MHO concluded that the initial denial by the Library of the appellant's request for a virus testing exemption during the period from November 2021 through January 2022 was justified, given its legitimate concerns about its ability to protect the health of Library employees. The MHO concluded that scientific evidence that the Library reviewed showed how the pandemic was evolving, proving that from November 2021 to the end of January 2022, any exemption from virus testing would have imposed an undue hardship on LOC operations because it would have put the workforce at significant risk of infection and grave illness. Further, the MHO determined that testing was the least restrictive means the Library had to protect its workforce from a highly transmissible virus in the absence of vaccination.

We agree with the MHO that the Library was justified in denying appellant a testing exemption from November 2021 through January 2022 as the Library had "legitimate concerns about its ability to protect the health of employees" due to the "very high transmissibility of the Omicron variant" during this time. An outbreak of COVID-19 among its staff would have had severe ramifications on the ability of the Library to conduct business. The MHO correctly determined, therefore, that "any exemption from virus testing would have imposed an undue hardship on [Library] operations because it would have put the workforce at significant risk of infection and grave illness." Accordingly, the evidence cited by the MHO is more than sufficient to support a finding that the appellant's requested accommodation would have resulted in a substantial burden in the overall context of the Library's business, and was therefore unreasonable.

Although the appellant contends that the Library could have reasonably accommodated her by permitting her to telework indefinitely, the MHO correctly determined that this was not a reasonable accommodation, as regular contact with the public, who were once again granted access to Library facilities, was an essential part of her job. *See, e.g., Doak v. Johnson,* 798 F.3d 1096, 1105 (D.C. Cir. 2015) (employee's accommodation "claim fails nevertheless because, even with her desired schedule accommodation, [she] would have been unable to perform an essential function of her job: being present in the office to participate in interactive, on-site meetings during normal business hours and on a regular basis"); *Buie v. Berrien*, 85 F. Supp. 3d 161, 176–77 (D.D.C. 2015) (plaintiff could not perform the essential functions of a mediator position remotely because that position required her presence in the office, and it involved constant interaction with the public); *Abram v. Fulton County,* 598 Fed. App'x 672 (11th Cir. 2015) (physical presence at reception desk was essential function of disabled employee's position, and thus employee's request to work from home was not a reasonable accommodation in the context of her ADA discrimination claims). Moreover,

as the MHO determined, the appellant's absence could only be accommodated by requiring a coworker to cover her on-site duties for 60 percent of her weekly hours, because she could not perform those essential duties from home. As such, the only potential accommodation that would allow the appellant to perform the essential functions of her position was an indefinite reprieve from those functions—an accommodation that is unreasonable as a matter of law. *Cf. Robert v. Bd. of Cnty. Comm'rs of Brown Cnty., Kans.*, 691 F.3d 1211, 1218–19 (10th Cir. 2012) (indefinite reprieve from performing fieldwork not a reasonable accommodation under the ADA as a matter of law). Again, the record evidence is clearly sufficient to support a finding that the appellant's requested accommodation would have resulted in a substantial burden in the overall context of the Library's business.

The MHO next considered the Library's actions from February 2022 to March 8, 2022, during which the Library offered the appellant a saliva-based test and permitted her to telework on days when she was assigned to work on-site. Based on the testimony of the Library's Supervisory Clinic Manager and Senior Nurse Consultant and the appellant, the MHO determined that the lack of accommodation from the testing mandate during this time period was "reasonably explained by the Library's good faith offer of a saliva-based test that it could not know in advance would conflict with the (appellant's) religious beliefs" and by the Library's "efforts to identify another alternative that would permit the Library to protect its workforce and patrons while allowing the (appellant) to avoid testing." The MHO also noted that between March 8, 2022 and April 15, 2022 there was no delay in providing a reasonable accommodation to the appellant, as she was either on voluntary leave or not required to test due to the low COVID-19 community levels at that time. Finally, the MHO noted that between April 15, 2022 and May 20, 2022, the Library in fact accommodated the appellant by allowing her to telework and then pausing the testing requirements while the COVID-19 community levels were low.

Based on the foregoing, the MHO concluded that the Library's actions between November 2021 and May 10, 2022 were "reasonable and fully justified by the changing pandemic circumstances" and that the "Library acted in good faith in attempting to identify a reasonable accommodation to the (appellant's) religious objections to testing, while meeting its obligation to protect its workforce from a once in a century deadly pandemic." We agree. Again, the MHO's findings of fact and conclusions of law find ample support in the record and we find no basis in the appellant's petition for review to disturb them. Although there may be circumstances in which a long-delayed accommodation could be considered unreasonable and hence actionable, *see Mogenhan v. Napolitano*, 613 F.3d 1162, 1168 (D.C. Cir. 2010); *Buie*, 85 F. Supp. 3d at 175–76 (D.D.C. 2015), we agree with the MHO that, under the unique and evolving circumstances of this case, no such delay occurred.[6]

[6] Accordingly, we need not address in this case the Library's contention below and on review that delay can never be actionable in Title VII religious accommodation cases.

Finally, the appellant also suggests that the MHO's determination should be set aside because it "rests on the Library's health justifications" and according to the appellant "these justifications cannot stand" because Library patrons were not required to be tested or vaccinated. The MHO correctly rejected these contentions, stating that "the Library's insistence on testing its unvaccinated employees was completely consistent with its duty to protect the workforce . . . . Failing to require testing of employees, over whom the LOC clearly had authority, would have unreasonably increased the risk of infection among employees during a deadly phase of the pandemic." Furthermore, the MHO based her findings and conclusions concerning the Library's health justifications on witness testimony, and we decline to disturb the MHO's determination to credit such testimony, 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"').

Accordingly, we affirm the MHO's determination that the appellant failed to establish her claims of religious discrimination for the period November 2021 to May 20, 2022.

D. We Vacate the MHO's Order Granting the Library's Motion for Costs.

On January 5, 2023, the Office entered into the record an addendum order issued by the MHO denying a motion for sanctions against the appellant but granting the Library's motion for costs. On January 13, 2023, the appellant filed her PFR and also filed a motion requesting that the MHO stay the order granting costs. The MHO thereafter issued a Suggestion of Remand based on her determination that she had been divested of jurisdiction over any pending matters, including the motion to stay the order for costs. OCWR Proc. R. § 8.01(a). In it, the MHO stated that the order granting costs relied solely on consideration of an applicable OCWR procedural rule,[7] without any

[7] The Order granting costs cited Procedural Rule 9.01(a), which provides:

> Request. No later than 30 days after the entry of a final decision of the Office, the prevailing party may submit to the Merits Hearing Officer who decided the case a motion for the award of reasonable attorney's fees and costs, following the form specified in paragraph (b) below. The Merits Hearing Officer, after giving the

briefing by the parties on applicable relevant statutes, and further, that remand would permit the MHO to reconsider the issue of costs after appropriate briefings by the parties. The issue, as stated by the MHO is whether the Library is entitled to recover costs as a "prevailing party," given language in relevant statutes, rules, and cases. The Library opposes the appellant's motion for a stay, contends that remand is unnecessary, and urges that the Board affirm the award of costs.

Because, as discussed below, resolution of this issue rests solely on a matter of statutory interpretation, we have determined that the interests of efficiency are best served if the Board addresses this issue *sua sponte* without remand or further briefing by the parties.

Section 225(a) of the CAA, 2 U.S.C. § 1361(a), provides:

> If a covered employee, with respect to any claim under this chapter, or a qualified person with a disability, with respect to any claim under section 1331 of this title, is a prevailing party in any proceeding under section 1405, 1406, 1407, or 1408 of this title, the hearing officer, Board, or court, as the case may be, may award attorney's fees, expert fees, and any other costs as would be appropriate if awarded under section 2000e–5(k) of title 42.

There is no question that the proceedings below concerned a claim under 2 U.S.C. § 1405. However, the express language of section 225(a) provides that the hearing officer may award costs as would be appropriate if awarded under section 2000e–5(k) of title 42 *if* a covered employee is a prevailing party with respect to any claim. In other words, the hearing officer's authority in this regard is statutorily conditioned on a covered employee becoming a prevailing party. We decline the Library's invitation to interpret the Board's Procedural Rules in a manner that exceeds the plain language of Section 225(a).

Here, the appellant is not a prevailing party with respect to any claim. Accordingly, the MHO lacked the statutory authority under section 225(a) to award costs.

Accordingly, the MHO's January 5, 2023 Order awarding costs is hereby VACATED.

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respondent an opportunity to reply, shall rule on the motion. Decisions regarding attorney's fees and costs are collateral and do not affect the finality or appealability of a final decision issued by the Office.

ORDER

We DENY the appellant's petition, and AFFIRM the MHO's orders granting judgment for the Library to the extent they are consistent with this decision, and VACATE the MHO's addendum order awarding costs to the Library.[8]

It is so ORDERED.

Issued, Washington, DC

September 15, 2023

[8] In light of this ruling, the Board denies the appellant's request for oral argument in this case.