Circuit Court for Baltimore City
Case No. 24-C-19-001618

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 034

September Term, 2021

DANIEL WORTHY

v.

CHIMES DISTRICT OF COLUMBIA, INC., ET AL.

Wells, C.J.,
Zic,
Ripken,

JJ.

Opinion by Zic, J.

Filed: December 28, 2022

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

** This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Daniel Worthy, appellant, appeals an order from the Circuit Court for Baltimore City granting summary judgment in favor of appellees: Chimes District of Columbia, Inc. ("Chimes"), Robert J. Bryan, Joni M. Dorsett, Gerard Cotter, and Pamela Meadows. Collectively, Mr. Bryan, Ms. Dorsett, Mr. Cotter, and Ms. Meadows are the "individual appellees." This case arises out of Chimes' termination of Mr. Worthy, a Black[1] man, who was a Chimes employee from January 2012 to March 2018. Mr. Worthy filed suit against appellees, alleging violations of the Maryland Fair Employment Practices Act ("FEPA") on several grounds as well as violations of the Maryland Whistleblower Statute. FEPA largely adopts Title VII of the Civil Rights Act of 1964, which, in part, prohibits workplace discrimination, and Maryland's Whistleblower Statute closely parallels portions of the federal Whistleblower Protection Act.

QUESTIONS PRESENTED

The issues on appeal have been rephrased and reframed as follows:[2]

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[1] The parties' briefs interchangeably use the terms "African American" and "Black," and "Caucasian" and "White." We recognize the critical distinctions and overlap among these terms. In an effort to be respectful to all and for consistency, this opinion uses the terms "Black" and "White" throughout.

[2] Mr. Worthy phrased the issues as follows:

A. Did the trial court err when it granted summary judgment prior to a trial when material facts were in dispute?

B. Whether the court erred when it failed to sustain Worthy's claims related to his termination.

C. Whether the circuit court erred when it excluded substantial evidence of appellees failure to accommodate Worthy's disability.

1. Whether the circuit court erred by holding Mr. Worthy cannot prove that Chimes violated FEPA on the basis of hostile work environment, discrimination, failure to accommodate, or retaliation.

2. Whether the circuit court erred by holding Mr. Worthy cannot prove that appellees aided or abetted violations of FEPA.

3. Whether the circuit court erred by holding Mr. Worthy cannot prove that appellees violated the Whistleblower Statute by retaliating against Mr. Worthy for allegedly refusing to violate the law within his employment.

For the reasons explained below, we answer all three questions in the negative and affirm the circuit court's grant of summary judgment in favor of appellees.

BACKGROUND

Mr. Worthy's Employment with Chimes

Chimes provides training and employment through various contracts with state and federal entities. One of Chimes' largest contracts is with the Maryland Aviation

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D. Did the court err when it held that Worthy was not a victim of disability, race and color discrimination?

E. Whether the circuit court erred when it found that Worthy was not a victim of retaliation on the basis of his race and disability despite substantial evidence showing temporal proximity between his protected activity and adverse action taken by appellees.

F. Did the lower court err when it found that Worthy was not a victim of a hostile work environment in stark departure from Maryland case precedent and authorities?

G. Whether the circuit court erred when it held that individual appellees could not be held personally liable under § 20-601 FEPA and the Maryland Whistle Blower Act.

H. Whether the circuit court erred when it failed to find that appellee chimes were liable for violation of the Maryland Whistle Blower Protection Act. Md. Code Ann., State Finance and Procurement § 11-303.

Administration ("MAA"). Under the MAA contract, Chimes performs janitorial services for the Baltimore/Washington International Airport ("BWI"). Chimes hired Mr. Worthy as the Staffing and Training Manager at BWI under the U.S. Department of Veterans Affairs' Veteran Readiness and Employment (Chapter 31) Program in January 2012.[3] On July 27, 2012, Valerie Madore, employment coordinator for the U.S. Department of Veterans Affairs, emailed Chimes asking for the following accommodations for Mr. Worthy: a flexible work schedule, ergonomic workspace, scooter or other mobility if walking cannot be decreased, reduction or elimination of physical exertion, and scheduling periodic breaks away from his workstation.[4]

Chimes promoted Mr. Worthy to Project Manager in June 2014. As Project Manager, Mr. Worthy was required to be available on a 24-hour basis and was accordingly issued a company cell phone. In this position, Mr. Worthy's primary

[3] Mr. Worthy has "10% disability for the thumb, 20% for the left leg, 20% right leg and by 2015 he was rated to 100% disability including the mental health concerns."

[4] Mr. Worthy testified that, until the January 8, 2018 meeting where Chimes denied Mr. Worthy's request to have a stenographer present in the meeting, Chimes usually accommodated Mr. Worthy.

functions involved supervising,[5] training,[6] scheduling, inspecting,[7] and reporting janitorial and custodial services activities. Gerard Cotter, Executive Vice President of Chimes, stated in his affidavit that Chimes expected Mr. Worthy to be physically present at BWI on "Monday through Friday during regular business hours." On October 30, 2015, Mr. Worthy had a "mental breakdown" during a work meeting with Terry Collard, a corporate employee. Mr. Worthy was hospitalized as a result. Mr. Worthy testified that, after leaving the hospital, he emailed Ms. Collard to request a medical accommodation to work from home. He also testified that this request was granted. In May 2017, Chimes issued Mr. Worthy a laptop and hotspot to be available on a 24-hour basis.[8]

On November 15, 2017, Mr. Worthy met with Mr. Cotter and Pamela Meadows, Senior Vice President of Human Resources, at which time they placed Mr. Worthy on an

[5] As Project Manager, Mr. Worthy was required to supervise all shifts through the Assistant Project Managers, Shift Manager, and Zone Managers. Mr. Worthy was required to supervise the Supply, Equipment, and Inventory Control Managers to ensure all shifts were properly supplied, equipment was in proper working order, equipment was cleaned and maintained to the proper standards, and inventory was taken monthly. Mr. Worthy was also required to supervise the Maximo Manager to ensure performance of that person's responsibilities.

[6] Mr. Worthy was required to supervise the Training Manager to ensure all employees were properly trained and records were properly maintained and available.

[7] Mr. Worthy was also required to make weekly terminal inspections with Administration and check periodically or before leaving for the day with Administration to handle unforeseen problems as they arose.

[8] Mr. Worthy testified that the laptop and hotspot were issued as an accommodation to work from home. Chimes, however, sent Mr. Worthy a letter on March 20, 2018, stating that they provided a laptop and hotspot to Mr. Worthy in response to his complaints about poor and unreliable internet service at BWI.

indefinite, unpaid suspension for suspected timecard fraud. On November 21, 2017, Ms. Meadows sent Mr. Worthy an email with a C-17 form[9] attached, indicating that Chimes had "information to support that [Mr. Worthy] falsely recorded [his] hours worked."

Ms. Meadows scheduled a meeting for December 12, 2017, rescheduled it for January 2, 2018, and rescheduled it again for January 8, 2018. Both postponements were due to Mr. Worthy's unavailability on the suggested dates. Then, on January 8, 2018, Mr. Worthy appeared for the meeting but requested, for the first time, that a notetaker he provided be present in the meeting. The meeting, therefore, did not take place at that time. Ms. Meadows sent a letter on January 11, 2018, explaining that Chimes would consider his request. On February 2, 2018, Chimes sent a letter to Mr. Worthy as an alternative to a meeting, to provide him an opportunity to respond to the investigative findings. In this letter, Chimes identified multiple timecard disparities from the beginning of September 2017 through November 2017.[10]

On February 9, 2018, Mr. Worthy responded to this letter in detail with explanations for the timecard discrepancies including: he had been granted an accommodation to work from home due to his disability, was not required to clock in or out of BWI, spent the majority of his time in pre-security areas of the airport, acted as an

[9] The Employee Communication C-17 form evaluates employees' performance.

[10] In this time frame, Mr. Worthy's phone locations showed that he was in various towns in Maryland during work hours: Contee Road in Laurel, south of Laurel, northwest and west of Odenton, north of Fort Meade, south and north of Jessup, east of Fairland, and south of Savage. The locations identified showed that Mr. Worthy was at Contee Road in Laurel on several occasions.

"undercover boss," and left his Chimes-issued cell phone with his children when he went to work. Ms. Meadows responded via letter to Mr. Worthy on March 20, 2018, stating that Mr. Worthy's explanations "do not sufficiently explain the concerns." For example, Ms. Meadows stated that "Chimes never authorized [Mr. Worthy] to telecommute,"[11] and Mr. Bryan instructed Mr. Worthy to clock in and out at BWI rather than leaving the sign-in sheet blank.

Within this letter, Ms. Meadows also addressed Mr. Worthy's claim that their investigation was retaliatory following his complaints about discriminatory comments. Ms. Meadows initially noted that Mr. Worthy's letter was the first time she heard of these claims and that he did not raise the concerns of discrimination at their prior meetings. She then addressed his concerns, stating that Chimes investigated them thoroughly, and she detailed Chimes' conclusion that Mr. Worthy's claims could not be substantiated. Ms. Meadows restated Chimes' expectation that Mr. Worthy, as BWI Project Manager, would be physically present at BWI during his work hours. For these reasons, Ms. Meadows terminated Mr. Worthy, effective March 20, 2018.

Sharon Pardo, a White female employee, temporarily replaced Mr. Worthy as Project Manager during Mr. Worthy's suspension. In January 2018, approximately 45 to

[11] Chimes' statement that Mr. Worthy was not authorized to telecommute contradicts Mr. Worthy's statement that he had been approved to work from home. Mr. Worthy, however, cites only to his own testimony and to the issuance of a hotspot and laptop two years after his request to work from home to support his position that he had been authorized to telecommute. Chimes asserts that the hotspot and laptop enabled Chimes employees to contact Mr. Worthy even when he was not scheduled to work, and that the devices were not issued as a work-from-home accommodation.

60 days after Mr. Worthy's suspension, Chimes hired Larry Carter, a Black man, who took the permanent position of Project Manager in place of Mr. Worthy. Also, Chimes terminated two other Black employees and two White employees for misconduct—timecard fraud and corporate credit card theft—at or about the same time Chimes terminated Mr. Worthy.

Alleged Harassment and Discriminatory Behavior by Chimes Employees

Mr. Worthy testified that on or about September 1, 2017, following the beginning of the new MAA contract, he voiced complaints of discrimination to Robert J. Bryan, who was Chimes' Director of Operations and Mr. Worthy's supervisor. Mr. Worthy testified that he complained of pay disparity between Kevin Downey, a White male Chimes manager, and Black Chimes managers because Mr. Downey received $10,000 "outside of the contract pay" that other managers did not receive. Additionally, Zoe Walters, a Black female manager, testified that she was disciplined for a documentation deficiency related to badges, but Mr. Downey, who was the authorized signer of the documentation, was not disciplined for the deficiency. Mr. Worthy testified that he voiced to Joni Dorsett, Director of Human Resources, Ms. Walters' complaints about disparate discipline as between her and Mr. Downey.

Additionally, starting in October 2017, several employees on the MAA contract with BWI complained about comments made by Chimes' Financial Analyst, Jane Gallaher, Director of Operations, Mr. Bryan, and onsite corporate trainer, Michael

Allenbaugh.[12] Ms. Walters, Shon Felder, and Tiana Howard, all Chimes employees, testified that Ms. Gallaher said to Kevin "Chip" Zgorski, "She's a pretty, young Black thing. Your guess is as good as mine,"[13] with reference to Ms. Walters and why she was promoted to Maximo Manager.[14]

Mr. Felder testified that he, Ms. Walters, Ms. Howard, and Doretha Tolliver, another Chimes employee, witnessed Ms. Gallaher also say, "this is what Caesar has his monkeys doing," with reference to Mr. Worthy and his subordinates, the majority of whom were Black.[15] Additionally, Mr. Worthy and Phillip Allen, a Chimes Shift Manager, testified that they overheard Mr. Bryan say to Raegan Brewer, Chimes' Director of Business Development, "Look at him, he's a gorilla. How am I supposed to control a gorilla?" with reference to Mr. Worthy. Mr. Worthy testified that he confronted Mr. Bryan after the comment was made, and Mr. Bryan responded, "Come on, man, you know I'm from PG, I'm basically [B]lack." Mr. Felder and Mr. Allen testified that Mr. Bryan frequently made comments at BWI saying, for example, to "crack the whip" on

[12] Mr. Allenbaugh trains employees against discrimination and harassment.

[13] Each employee phrases this comment slightly differently, but they all contain the words "pretty, young Black thing."

[14] On October 20, 2017, Ms. Walters testified that she filed an incident report regarding the "pretty, young Black thing" comment and submitted the document to Mr. Worthy. Additionally, in her affidavit, Reagan Brewer, Chimes' Director of Business Development, testified that after a meeting with Mr. Worthy at BWI, she witnessed that Ms. Walters approached Mr. Worthy, visibly distraught, and told him about the "pretty, young Black thing" comment.

[15] Ms. Howard testified that she filed an incident report and gave it to Ms. Walters. Ms. Walters testified that she then gave that report to Mr. Worthy.

Black employees.[16] Furthermore, Mr. Worthy testified that on October 26, 2017, Mr. Bryan told Mr. Worthy, "You're not the only monkey walking around claiming to have a disability" when Mr. Worthy expressed that he was having difficulties with his legs and head. Mr. Worthy also testified that on November 1, 2017, Mr. Allenbaugh told Shanelle Daniels, a Black female employee, to "shut up before I slap the [B]lack off of you."[17]

Additionally, Mr. Worthy testified that, on November 17, 2017, he told Mr. Bryan that he would be reopening his workers' compensation case and would need to take Family Medical Leave for surgery on his wrist,[18] to which Mr. Bryan responded that that decision would not be in Mr. Worthy's best interest because "now is just not the right time." On November 9, 2017, Mr. Worthy met with Mr. Bryan and Ms. Dorsett, and Mr. Worthy testified that during the meeting he told them he felt the workplace was hostile and aggressive, he presented Mr. Felder's incident report about Mr. Allenbaugh's comment to Ms. Daniels, and he mentioned Ms. Walters' request for an apology from Ms. Gallaher regarding the "pretty, young Black thing" comment. Mr. Worthy testified that during the meeting, Mr. Bryan said, "What if I told you right now cut the crap or I'll slap the [B]lack off of you?" and that Ms. Dorsett told Mr. Worthy that the employees "should stop pushing these issues and be happy with the job and salaries that you're

[16] Mr. Felder testified that he submitted an incident report to Mr. Worthy.

[17] Mr. Worthy testified that he received an incident report from Mr. Felder regarding this incident. Ms. Pardo signed a witness statement stating that she heard this comment and witnessed the incident.

[18] Mr. Worthy's workers' compensation case from 2015 arose when a truck crashed into his office at BWI and injured his hand.

making." The "issues" to which Ms. Dorsett referred were the complaints about workplace discrimination.

On November 10, 2017, Mr. Worthy filed an incident report to Ms. Dorsett regarding "racist insults" made by Mr. Bryan. That same day, Mr. Bryan called Mr. Worthy and told him that he did not want Mr. Worthy to pursue these issues and that Mr. Worthy would meet with Mr. Cotter on November 15, 2017 to discuss "everything that has taken place." During the meeting on November 15, Mr. Worthy was placed on an indefinite, unpaid suspension for suspected timecard fraud. Also, Ms. Brewer stated in her affidavit that on or about November 19, 2017, Mr. Bryan advised her to leave Mr. Worthy alone or Mr. Bryan "was going to make [her] disappear," and "Mr. Worthy would suffer a similar fate."

Procedural History

Mr. Worthy's Complaint contained seven counts: (I) Disparate Treatment, (II) Failure to Provide Reasonable Accommodations in Violation of State Government § 20-606, (III) Race and Color Discrimination in Violation of State Government § 20-606, (IV) Hostile Work Environment in Violation of State Government § 20-606, (V) Aiding and Abetting in Violation of State Government § 20-606, (VI) Retaliation in Violation of State Government § 20-606, and (VII) Violation of State and Procurement § 11-303, also known as the Whistleblower Statute.

Mr. Worthy alleged Counts I through IV, VI, and VII against all appellees. He alleged Count V against the individual appellees but not Chimes. On September 20, 2019, the circuit court dismissed Counts I, II, III, IV, and VI as to the individual

appellees without a hearing because none was requested. Then, following a hearing on January 11, 2021, the circuit court granted summary judgment in favor of appellees on the remaining counts—Counts I, II, III, IV, and VI as to Chimes, Count V as to individual appellees, and Count VII as to all appellees. This timely appeal followed.

STANDARD OF REVIEW

We review de novo the circuit court's decision to grant summary judgment. *Messing v. Bank of Am.*, 373 Md. 672, 684 (2003); *Heneberry v. Paroan*, 232 Md. App. 468, 477-78 (2017). Appellate courts "ordinarily may uphold the grant of summary judgment only on the grounds relied on by the trial court." *Ashton v. Brown*, 339 Md. 70, 80 (1995).

Pursuant to Maryland Rule 2-501(f), summary judgment is appropriate "if the motion and response show that there is no genuine dispute as to any material fact and that the [moving] party . . . is entitled to judgment as a matter of law." Consequently, "we must first ascertain, independently, whether a dispute of material fact exists in the record on appeal." *Macias v. Summit Mgmt., Inc.*, 243 Md. App. 294, 313 (2019). In this regard, we note that to survive a motion for summary judgment, "a plaintiff's claim must be supported by more than a 'scintilla of evidence,'" so a reasonable jury must be able to find for the plaintiff based on the evidence presented. *Hansberger v. Smith*, 229 Md. App. 1, 13 (2016) (quoting *Blackburn Ltd. P'ship v. Paul*, 438 Md. 100, 108 (2014)). "A material fact is one that, 'depending on how it is decided by the trier of fact, will affect the outcome of the case,'" and "[t]he burden is on the party opposing a motion for summary judgment to 'show disputed material facts with precision in order to prevent the

entry of summary judgment.'" *Macias*, 243 Md. App. at 315 (quoting *Warsham v. James Muscatello, Inc.*, 189 Md. App. 620, 634 (2009)). If no such dispute exists, "we construe the facts properly before the court, and any reasonable inferences that may be drawn from them, in the light most favorable to the non-moving party." *Remsburg v. Montgomery*, 376 Md. 568, 579-80 (2003).

DISCUSSION

I. THE CIRCUIT COURT CORRECTLY HELD THAT MR. WORTHY CANNOT PROVE THAT APPELLEES VIOLATED FEPA ON THE BASIS OF HOSTILE WORK ENVIRONMENT, DISCRIMINATION, FAILURE TO ACCOMMODATE, OR RETALIATION.

The Maryland Fair Employment Practices Act ("FEPA") is modeled after federal disability law, namely Title VII of the Civil Rights Act of 1964. *Peninsula Reg'l Med. Ctr. v. Atkins*, 448 Md. 197, 218-19 (2016). Therefore, Maryland courts look to the federal courts' substantial guidance on the interpretation and application of Title VII to interpret and apply FEPA. *Atkins*, 448 Md. at 218-19. Under FEPA, an employer may not "fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of . . . race, color, . . . , or disability." Md. Code Ann., State Gov't § 20-606(a)(1). Section 20-601(d) defines "employer" as follows:

> (i) a person that:
>
> 1. is engaged in an industry or business; and
> 2. A. has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year; or
>
>   B. if an employee has filed a complaint alleging harassment, has one or more employees for each

> working day in each of 20 or more calendar weeks in the current or preceding calendar year; and
>
> (ii) an agent of a person described in item (i) of this paragraph.

State Gov't § 20-601(d)(i)-(ii). Chimes manages federal, state, and local commercial contracts to provide custodial and janitorial services and has nearly 5,000 employees. Therefore, it qualifies as an "employer" under FEPA. The individual appellees are agents of Chimes insofar as they act on behalf of Chimes. Therefore, they, too, may qualify as "employers" under FEPA. *See Papanicolas v. Project Execution and Control Consulting, LLC*, 151 F. Supp. 3d 628, 630 (D. Md. 2015) (citing *Payne v. U.S. Airways*, 987 A.2d 944 (Vt. 2009)).

Mr. Worthy alleged that Chimes violated FEPA on the basis of hostile work environment, discrimination, failure to accommodate, and retaliation. He also alleged that the individual appellees violated FEPA on the basis of retaliation. We will discuss each claim in turn.

A. Hostile Work Environment

Mr. Worthy alleged that Chimes violated FEPA because he was subject to a hostile work environment. He bases his claim on several racially derogatory comments made by three Chimes employees in late 2017. Chimes argues that the conduct does not rise to the level that other courts have identified as sufficiently severe or pervasive to create a hostile work environment. Chimes further argues that the harassment could not be imputed to Chimes because Chimes had taken appropriate steps to prevent and correct the behavior by disseminating an effective anti-harassment policy. The circuit court

found that the alleged conduct was not sufficiently severe or pervasive to establish this claim.

"A hostile environment exists '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult . . . .'" *Boyer-Liberto v. Fontainebleau, Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal quotation marks omitted)). To demonstrate that a hostile environment exists with respect to racial harassment, a plaintiff "must show that there is (1) unwelcome conduct; (2) that is based on the [plaintiff's] . . . race; (3) which is sufficiently severe or pervasive to alter the [plaintiff's] conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer." *Okoli v. City of Baltimore*, 648 F.3d 216, 220 (4th Cir. 2011). This is both an objective and subjective analysis. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). The analysis asks whether a reasonable person would perceive the environment as hostile due to discrimination and whether the plaintiff did, in fact, perceive it as hostile. *Id.* "The standard for proving a hostile work environment is intended to be very high," but it strikes a balance between requiring a tangible injury before allowing legal action and making all offensive conduct actionable. *Jeffers v. Thompson*, 264 F. Supp. 2d 314, 331 (D. Md. 2003) (citing *Porter v. Nat'l ConServ, Inc.*, 51 F. Supp. 2d 656, 659 (D. Md. 1998), *aff'd*, 173 F.3d 425 (4th Cir. 1999)); *Harris*, 510 U.S. at 21 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)) (noting Title VII's language does not limit application to economic or tangible discrimination).

1. The Alleged Conduct was Objectively and Subjectively Unwelcome.

Courts first look to whether conduct is objectively "unwelcome." *E.E.O.C. v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 175 (4th Cir. 2009) (finding employee's complaints to coworkers, supervisors, and company's president that racial and sexual harassment was "objectionable" would allow a reasonable jury to conclude conduct was unwelcome). An employee's outward expressions of offense help courts find that the conduct was also subjectively unwelcome. *Mosby-Grant v. City of Hagerstown*, 630 F.3d 326, 337 (4th Cir. 2010) (citing *Cent. Wholesalers, Inc.*, 573 F.3d at 175) (finding employee's numerous complaints to director of Western Maryland Police Academy indisputably established conduct was unwelcome).

Here, the conduct at issue consists of alleged comments made by Chimes employees in October and November 2017 and disparities of pay and discipline between White and Black employees. Ms. Walters, Mr. Felder, and Ms. Howard, all Chimes employees, testified that Ms. Gallaher said to Mr. Zgorski, "She's a pretty, young Black thing. Your guess is as good as mine," with reference to Ms. Walters and why she was promoted to Maximo Manager. Mr. Felder testified that he, Ms. Walters, Ms. Howard, and Ms. Tolliver also witnessed Ms. Gallaher say, "this is what Caesar has his monkeys doing," with reference to Mr. Worthy and his subordinates, the majority of whom were Black.[19] Additionally, Mr. Worthy and Mr. Allen testified that they overheard Mr. Bryan

[19] Ms. Howard testified that she filed an incident report and gave it to Ms. Walters. Ms. Walters testified that she then gave that report to Mr. Worthy.

say to Ms. Brewer, "Look at him, he's a gorilla. How am I supposed to control a gorilla?" with reference to Mr. Worthy. Mr. Worthy confronted Mr. Bryan after the comment was made, and he testified that Mr. Bryan responded, "Come on, man, you know I'm from PG, I'm basically [B]lack." Mr. Felder and Mr. Allen testified that Mr. Bryan frequently made comments at BWI saying, for example, to "crack the whip" on Black employees."[20] Additionally, Mr. Worthy testified that on October 26, 2017, Mr. Bryan told Mr. Worthy, "You're not the only monkey walking around claiming to have a disability." Mr. Worthy also testified that on November 1, 2017, Mr. Allenbaugh told Ms. Daniels to "shut up before I slap the [B]lack off of you."[21]

Based on these allegations and assertions, a reasonable jury could conclude that the comments were unwelcome, and Mr. Worthy has expressed that he subjectively perceived the conduct as offensive.

2. The Conduct Was Based on the Race and Color of Mr. Worthy and His Coworkers.

The content and context of alleged conduct inform whether the conduct was based on a plaintiff's race or color. *See, e.g.*, *Cent. Wholesalers, Inc.*, 573 F.3d at 175 (finding conduct was based on plaintiff's race when defendant used racially derogatory language (e.g., n****r) and plaintiff encountered violent displays (dolls hanging from nooses) in the workplace). Also, the inquiry regarding a hostile work environment "may exceed the

[20] Mr. Felder testified that he submitted an incident report to Mr. Worthy.

[21] Mr. Worthy testified that he received an incident report from Mr. Felder. Sharon Pardo signed a witness statement stating that she heard this comment and witnessed the incident.

individual dynamic between the complainant and his supervisor." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (2001). Therefore, we may consider conduct directed at others in the work environment, not only that which is directed at the plaintiff. *Magee v. DanSources Tech. Serv., Inc.*, 137 Md. App. 527, 559 (2001) (holding jury could infer there was a "connotation of sex" in the workplace and plaintiff was targeted because of her gender where "much," but not all, of the conduct was directed at plaintiff); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 696 (4th Cir. 2007) (finding "[e]vidence of a general atmosphere of hostility toward those of the plaintiff's gender is considered in the examination of all the circumstances" for a hostile work environment claim). "We are, after all, concerned with the 'environment' of workplace hostility." *Spriggs*, 242 F.3d at 184. Although conduct about which a plaintiff is unaware is irrelevant to the inquiry, "conduct directed at others is relevant if the plaintiff knew of the conduct." *McIver v. Bridgestone Am., Inc.*, 42 F.4th 398, 408 (2022). Here, a reasonable jury could conclude that each of the alleged comments was based on the race or color of Chimes employees. A reasonable jury could further conclude that Mr. Worthy knew of each of these alleged comments.

3. The Conduct Was Not Sufficiently Severe or Pervasive to Establish a Claim Under FEPA.

Mr. Worthy alleged seven harassing comments by three coworkers, all of which occurred in fall 2017. Mr. Bryan worked at the corporate level (superior to Mr. Worthy's position), which increases the severity of his alleged conduct. Even given Mr. Bryan's status, however, these isolated occurrences do not rise to the level of severity or

pervasiveness required to establish a claim under FEPA. To determine whether the conduct was sufficiently severe or pervasive, courts ask whether a reasonable jury could perceive the conduct as abusive or hostile and whether the plaintiff did, in fact, perceive the conduct as such. *Cent. Wholesalers, Inc.*, 573 F.3d at 175; *Harris*, 510 U.S. at 22.

To prevail on this claim, the plaintiff must subjectively perceive the environment as abusive; if the plaintiff does not, then the conduct has not changed the plaintiff's condition of employment. *Harris*, 510 U.S. at 22-23. Mr. Worthy testified that he reported all these complaints of harassment to Mr. Bryan and Ms. Dorsett, and he stated that he personally found the workplace hostile. A reasonable jury could conclude that Mr. Worthy subjectively perceived his environment as abusive.

The objective determination looks to the totality of the circumstances, which "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (whether the environment is objectively hostile or abusive is "judged from the perspective of a reasonable person in the plaintiff's position"). No single factor is dispositive. *E.E.O.C. v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008). However, "[u]nlike a typical claim of intentional discrimination based on a discrete act, a hostile-work-environment claim's 'very nature involves repeated conduct.'" *McIver*, 42 F.4th at 407 (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002)). The severity of harassing conduct may increase if it is committed by a supervisor because the use of derogatory language by a

supervisor "impacts the work environment far more severely than use by co-equals." *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993). A supervisor's authority imbues "harassing conduct with a particular threatening character." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998). "Mere offensive utterances," though, are insufficiently severe to establish this claim, even if they are in themselves highly offensive and even if they originate with supervisors. *Harris*, 510 U.S. 17, 23 (1993); *Roberts v. Fairfax Cnty. Public Sch.*, 858 F. Supp. 2d 605, 611 (E.D. Va. 2012) (holding two isolated uses of a racial slur, though "deplorable," were insufficient to permeate the plaintiff's work environment).

The ultimate inquiry is whether the conduct is so extreme that it "amount[s] to [a] discriminatory change[] in the 'terms and conditions of employment.'" *Faragher*, 524 U.S. at 788; *Sunbelt Rentals, Inc.*, 521 F.3d at 315 (stating conduct must amount to change in conditions of employment). For example, in *Manikhi v. Mass Transit Administration*, 360 Md. 333 (2000), the Supreme Court of Maryland (at the time named the Court of Appeals of Maryland)[22] found that the plaintiff-employee had stated a cause

[22] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See, also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

of action[23] when she provided detailed allegations that a coworker had daily teased and threatened her in a sexual manner, exposed himself to her, and inappropriately touched her. *Id.* at 348-49.

In contrast, another court held that the conduct was insufficiently severe when the plaintiff-employee alleged that he was personally subjected to one racist comment, overheard White coworkers using a racial slur thirteen times in four years, and was exposed to racist graffiti daily. *Skipper v. Giant Food Inc.*, 68 F. App'x 393, 398 (4th Cir. 2003). The court found that, in the context of a significant amount of other non-racist graffiti, the racist graffiti was not sufficiently severe to establish a claim for hostile work environment. *Id.* at 398.

Here, Mr. Bryan was Mr. Worthy's supervisor, but the four alleged comments were isolated occurrences during a two-month span within Mr. Worthy's employment with Chimes for over five years at that time. Also, neither Ms. Gallaher nor Mr. Allenbaugh, the other two speakers, were Mr. Worthy's supervisors. Ms. Gallaher allegedly made two comments within a few days, and Mr. Allenbaugh made one comment. Although all such comments are deplorable, this case is more analogous to *Roberts v. Fairfax County Public Schools*, where the plaintiff identified two isolated occurrences of discrimination, than *Manikhi v. Mass Transit Administration*, where the plaintiff was harassed daily. Mr. Worthy identifies seven comments that are unrelated to

[23] Although this case was at the motion-to-dismiss stage, the court's findings provide guidance for applying the "severe or pervasive" standard. *Manikhi*, 360 Md. at 349.

one another, and Chimes even disciplined one of the three speakers for the discriminatory comment. Also, in *Skipper*, the court did not find that the claim had been established even where the plaintiff was daily subjected to racist graffiti. 68 F. App'x at 398. We cannot hold that the alleged conduct was objectively severe or pervasive enough to rise to the level of changing Mr. Worthy's conditions of employment and creating a hostile work environment. We agree with the circuit court's conclusion that Chimes is entitled to judgment as a matter of law on these grounds.

4. This Court Declines to Address Imputability.

Because the circuit court granted summary judgment on the basis that the conduct was not severe or pervasive enough to establish a claim under FEPA and we affirm on those grounds, we decline to address the issue of whether the alleged conduct is imputable to Chimes.

B. Discrimination on the Basis of Race, Color, and Disability

In support of this claim, Mr. Worthy contends that the record contains both direct and circumstantial evidence of discrimination on the basis of race, color, and disability. Chimes argues that none of the statements to which Mr. Worthy refers constitute direct evidence of discrimination, so he must instead establish a prima facie case of discrimination based on circumstantial evidence. Chimes asserts that Mr. Worthy was terminated because Chimes reasonably concluded that Mr. Worthy had committed timecard fraud. Chimes argues that Mr. Worthy has not presented sufficient evidence that this stated reasoning was pretextual.

In *Williams v. Maryland Department of Human Resources*, 136 Md. App. 153 (2000), this Court defined "direct evidence" of discrimination as statements by the decision maker that reflect animus toward the relevant group and are related to the adverse employment action. *Id.* at 163, 73 (finding plaintiff's statement that supervisor indicated "a lady had to be selected" for the job constituted direct evidence of discrimination); *Taylor v. Va. Union Univ.*, 193 F.3d 219, 243 (4th Cir. 1999) (finding police chief's statement that he would never send a woman to the Police Academy was direct evidence of discrimination); *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 61 n.4 (1st Cir. 2000) (finding supervisor's statement was direct evidence when it indicated that he based employment decisions on age: "us older guys sometimes work better than the younger people").

In the absence of direct evidence, Maryland courts look to circumstantial evidence and apply the framework established in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). *Id.* at 802-04; *Williams*, 136 Md. App. at 164. In *McDonnell Douglas*, the United States Supreme Court laid out a burden-shifting framework that first requires the plaintiff to establish a prima facie case of discrimination, then asks the employer to articulate a nondiscriminatory reason for the adverse employment action, and, finally, provides an opportunity for the plaintiff to demonstrate that the employer's stated reason is pretextual. 411 U.S. at 802-04.

Under the *McDonnell Douglas* standard, to establish a prima facie case of discrimination, a plaintiff must show: (1) he is a member of a protected class, (2) he suffered an adverse employment action, (3) he was performing his job duties at a level

that met his employer's legitimate expectations at the time of the adverse employment action, and (4) the circumstances of the adverse action or discharge "raise a reasonable inference of unlawful discrimination." *Nerenberg v. RICA of Southern Md.*, 131 Md. App. 646, 664 (2000).

As a Black man with a disability, Mr. Worthy is a member of more than one protected group. State Gov't § 20-606(a)(1)(i) (prohibiting employment discrimination on the basis of "race, color, . . . or disability"). Also, Chimes terminated Mr. Worthy, which constitutes an adverse employment action. State Gov't § 20-606(a)(1) (prohibiting discriminatory discharge, among other adverse employment actions). Notably, as to the third element, "[i]t is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996). Therefore, Mr. Worthy's own testimony cannot raise a genuine dispute of material fact on this point.

The fourth element reflects the need for some relationship between membership in a protected group and the adverse employment action, even when relying on circumstantial evidence of discrimination. *Nerenberg*, 131 Md. App. at 664. If a plaintiff is replaced by a member of the relevant protected class, an inference of nondiscrimination may arise. *Miles v. Dell, Inc.*, 429 F.3d 480, 486 (4th Cir. 2005). Therefore, "as a general rule . . . , plaintiffs must show that they were replaced by someone outside their protected class in order to make out a prima facie case" if the firing and replacement hiring decisions are made by the same person. *Miles*, 429 F.3d at 486, 489. Because Ms. Meadows and Mr. Cotter terminated Mr. Worthy but did not make the

replacement hiring decision, Mr. Worthy need not demonstrate that he was replaced by someone outside his protected class, but he may still establish discrimination by other means.

We first address whether Mr. Worthy established a prima facie case of discrimination on the basis of race and color or disability. We then address Chimes' stated reason for termination and whether Mr. Worthy presented sufficient evidence to establish the reason was pretextual.

1. Race and Color Discrimination

In support of his race-discrimination claim, Mr. Worthy argues that the offensive comments made by three Chimes employees and Mr. Worthy's termination constitute direct evidence of discrimination. He then argues that circumstantial evidence also supports a finding of race discrimination. Mr. Worthy asserts that the fact that his permanent replacement was a Black man, which would suggest nondiscrimination, is undermined because that permanent replacement was not hired until after Mr. Worthy complained of discrimination to Mr. Bryan and Ms. Dorsett, and his interim replacement was White. Chimes, on the other hand, argues that Mr. Worthy has not presented any direct evidence or sufficient circumstantial evidence of race discrimination.

Three of the seven alleged comments were about Mr. Worthy alone. Although all such comments are repugnant, these particular comments were not made by Ms. Meadows or Mr. Cotter, who had the decision-making authority to terminate Mr. Worthy. The comments were also unrelated to the act of terminating Mr. Worthy but rather were made during normal work activities by coworkers who had no authority to terminate Mr.

Worthy. Therefore, these comments do not constitute direct evidence of discrimination under the *Williams* standard.

We now turn to the *McDonnell Douglas* analysis. As noted above, the first and second elements are satisfied. Furthermore, based on our review of the record, the evidence does not indicate that Mr. Worthy was meeting Chimes' legitimate expectation that Mr. Worthy would truthfully represent the hours he worked for Chimes. Chimes presented its concerns regarding suspected timecard fraud to Mr. Worthy in November 2017 and provided him with an opportunity to respond to the concerns in December 2017. Per Mr. Worthy's request, this meeting was postponed twice, and it occurred on January 8, 2018. Chimes sent Mr. Worthy a letter detailing the concerns as an alternative accommodation for his requested stenographer or notetaker at the meeting. Mr. Worthy's response to this letter did not, according to Chimes, "sufficiently explain the concerns." Chimes denies, for example, that Mr. Worthy had been granted permission to telecommute during his scheduled hours, and Mr. Worthy has not demonstrated a genuine dispute of material fact on this third element.

Moreover, although the firing and replacement hiring decisions were not made by the same person,[24] meaning there is no affirmative inference of nondiscrimination, Mr.

[24] Sharon Pardo, a White woman, temporarily replaced Mr. Worthy as Project Manager during his suspension, and Larry Carter, a Black man, permanently replaced Mr. Worthy as Project Manager. Ms. Meadows terminated Mr. Worthy but did not hire either Ms. Pardo or Mr. Carter, so the inference of nondiscrimination does not apply here. *Miles*, 429 F.3d at 489.

Worthy has not presented evidence to otherwise establish discrimination.[25] A plaintiff may, but is not required to, identify a similarly situated comparator in support of the plaintiff's discrimination claim. *Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 545 (4th Cir. 2003). Mr. Worthy has not identified such a comparator. Also, any inference of discrimination is undermined here because Ms. Meadows testified that she was unaware of the racially derogatory comments at the time she initiated the timecard-fraud investigation in November 2017. She testified that she first learned of the allegations when she received Mr. Worthy's February 9, 2018 letter. Furthermore, Mr. Worthy presented insufficient evidence to suggest that Ms. Meadows knew about the allegations prior to November 2017 or to suggest that Ms. Meadows herself made discriminatory comments or decisions. In the absence of evidence—either direct or circumstantial—of a relationship between Mr. Worthy's membership in a protected class and the adverse employment action, there can be no inference of discriminatory termination.

Neither the third nor fourth element of this analysis is satisfied, so the circuit court correctly found that Mr. Worthy did not establish a prima facie case for discrimination on the basis of race or color.

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[25] We note that "appellate courts cannot be expected to either (1) search the record on appeal for facts that appear to support a party's position, or (2) search for the law that is applicable to the issue presented." *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594, 618 (2011).

2. Disability Discrimination

In support of his disability-discrimination claim, Mr. Worthy contends that Chimes terminated him in March 2018 in response to his January 2018 request for accommodations. Chimes argues that the mere fact that an employer is aware of an employee's disability does not establish discriminatory termination, and a plaintiff must demonstrate that the employer intended to discriminate. Chimes further argues that Mr. Worthy has not presented evidence upon which the court could rely to conclude that Chimes intentionally discriminated against Mr. Worthy.

Under the *Williams* standard, the record does not contain direct evidence of discrimination on the basis of disability. Although one alleged comment by Mr. Bryan may indicate animus towards Mr. Worthy's disability,[26] there is no evidence that Ms. Meadows or Mr. Cotter made similar statements, or even that they were aware of Mr. Bryan's statement. Therefore, we turn to the *McDonnell Douglas* framework.

As in his race-discrimination claim, Mr. Worthy satisfied the first two elements of this framework, but he has not satisfied the third or fourth. The record does not support a conclusion that Mr. Worthy was meeting Chimes' legitimate expectation that he would truthfully represent the hours he worked for Chimes. Mr. Worthy has not created a genuine dispute of material fact on this point. Furthermore, "to establish a prima facie case of intentional [disability] discrimination," an employee must establish that (1) he "had a disability," (2) "notwithstanding the disability, he . . . was otherwise qualified for

[26] "You're not the only monkey walking around claiming to have a disability."

the employment, with or without reasonable accommodation," and (3) he "was excluded from employment on the basis of his . . . disability." *Peninsula Reg'l Ctr. v. Adkins*, 448 Md. 197, 239 (2016). Although the record may satisfy the first two elements, the employee must also satisfy the third element by establishing intent, which is a factual question. *Id.* Here, there is insufficient evidence to support an inference of intentional discrimination based on disability, and Mr. Worthy has not raised a genuine issue of material fact as to Chimes' intent. Therefore, the circuit court correctly found that Mr. Worthy did not establish a prima facie case for discrimination on the basis of disability.

3. Chimes Stated that Mr. Worthy Was Terminated Because He Committed Timecard Fraud, and Mr. Worthy Has Not Raised a Genuine Dispute of Material Fact that this Reasoning Was Pretextual.

If a plaintiff successfully establishes a prima facie case, the burden shifts to the employer "to show that it would have [made the same employment decision] had it not been motivated by discrimination." *Williams*, 136 Md. App. at 164. Notably, though, "once an employer has given a nondiscriminatory reason for the adverse employment action and 'done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.'" *Lockheed Martin Corp. v. Balderrama*, 227 Md. App. 476, 505 (2016) (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)). Therefore, the inquiry that "the appellate court should focus on," is "the ultimate question whether [the employee] has established discrimination" by the employer against the employee. *Balderrama*, 227 Md. App. at 505.

If the employer provides a nondiscriminatory reason for the adverse action, regardless of whether the plaintiff has established a prima facie case, the plaintiff has an opportunity to demonstrate that the employer's reasoning was pretextual. *Id.* at 164; State Gov't § 20-606(a)(1) (prohibiting failure or refusal to hire, discharge, and other discrimination against individuals based on "race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability"). To demonstrate pretext, the plaintiff-employee must show, by a preponderance of the evidence, both that the stated reason was false and that discrimination was the real reason for the adverse employment action. *Balderrama*, 227 Md. App. at 504; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). For example, in *Reeves*, the plaintiff-employee demonstrated pretext by making a "substantial showing" that the reasons given for his firing, including intentionally falsifying records, were false. 530 U.S. at 143-46. The plaintiff-employee demonstrated that he "properly maintained attendance records," and the false record on which the company relied to terminate him related to a day during which he was hospitalized, so he could not have been responsible for the error on his timecard or paycheck. *Id.* at 145. He further demonstrated that the company had simply adjusted other employees' paychecks when they "were paid for hours they had not worked," so the court found that the company's reason for discharging the plaintiff-employee was pretextual. *Id.*

Here, Chimes provided a nondiscriminatory reason for terminating Mr. Worthy: Chimes reasonably concluded Mr. Worthy had engaged in timecard fraud because, upon being presented with concerns about discrepancies in his timecard records, Mr. Worthy

failed to provide sufficient explanations. To support his argument of pretext, Mr. Worthy merely notes that he complained of discrimination in the workplace prior to the commencement of the timecard-fraud investigation. Mr. Worthy failed to present evidence to prove that he did not commit timecard fraud and failed to affirmatively prove that Chimes was motivated by discrimination. The circuit court, therefore, correctly granted summary judgment in favor of Chimes on Mr. Worthy's discrimination claims.

C. Failure to Provide Reasonable Accommodations

In support of this claim, Mr. Worthy states that he would have been able to perform the essential functions of his position if he had been accommodated, but Chimes denied his requests for accommodations and did not engage in the interactive process. Chimes argues that the circuit court correctly found that Chimes' alternative accommodation was sufficient under FEPA, and asserts that Mr. Worthy had informed Chimes that he was unable to perform essential functions of his position as of January 2018. Furthermore, Chimes notes that Mr. Worthy did not communicate that he believed the alternative accommodation was ineffective until he filed this litigation.

State Government § 20-606(a)(4) states that an employer may not "fail or refuse to make a reasonable accommodation for the known disability of an otherwise qualified employee." To establish a prima facie case for a failure to accommodate claim, an employee must show: "(1) [he] was an individual with a disability; (2) [his] employer had notice of [his] disability; (3) that with reasonable accommodation, [he] could perform the essential functions of the position; and (4) that the employer failed to make such accommodations." *Peninsula Reg'l Med. Ctr. v. Atkins*, 448 Md. 197, 213 (2016).

The first two elements are satisfied here because Chimes had notice that Mr. Worthy had a disability because he was hired as part of the U.S. Department of Veterans Affairs' ("VA") Veteran Readiness and Employment (Chapter 31) Program and was rated to "100% disability." Pursuant to the VA's requests, Chimes afforded Mr. Worthy workplace accommodations starting in approximately 2012.

In order to satisfy the third element, an employee must be "otherwise qualified" for a job, meaning the employee would be qualified using an accommodation. *Gaither v. Anne Arundel Cnty.*, 94 Md. App. 569, 583 (1993). Here, Chimes argues that Mr. Worthy was not "otherwise qualified" to serve as Project Manager as of January 8, 2018, when he "told Chimes he could not perform [his job] functions," such as independently listen, speak, and take notes for the "day-to-day administration" of the MAA contract. To make this argument, Chimes relies on Mr. Worthy's request for a notetaker in the January 8, 2018 meeting. Mr. Worthy has not presented evidence to indicate that he, in fact, is able to complete these tasks despite his request for a notetaker during that meeting. Because the burden is on the employee to establish that he is "otherwise qualified," Mr. Worthy did not satisfy this element. *Id.*

As for the fourth element, to impose a duty upon employers to provide accommodations, employees must both notify employers of their disabilities and communicate their desire for an accommodation. *Atkins*, 448 Md. at 213 (citing *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346-47 (4th Cir. 2013)). Although Chimes was aware that Mr. Worthy was disabled, Mr. Worthy did not notify Chimes of any need for assistance with notetaking or typing until January 8, 2018, when he presented to the

meeting with Ms. Meadows and Mr. Cotter. The process by which employers and employees determine the appropriate reasonable accommodation is known as the "interactive process," and an employer's duty to engage in the interactive process "is generally triggered when an employee communicates to his employer his disability and his desire for an accommodation for that disability." *Wilson*, 717 F.3d at 346-47. The employer is required to seek a reasonable accommodation in good faith, but the employee is not entitled to the exact accommodation requested. *Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407, 415-16 (4th Cir. 2015); *Kotyna v. Lafayette College*, 47 F. Supp. 3d 225, 242 (E.D. Pa. 2014).

When Mr. Worthy requested that a notetaker of his choosing be present for the meeting on January 8, 2018, Chimes denied this request because the ongoing investigation into suspected timecard fraud was confidential. The concerns of fraud had the potential to implicate Chimes' contract with the MAA, so Chimes had an interest in the investigation remaining confidential. As an alternative accommodation, Chimes sent Mr. Worthy a letter detailing the timecard discrepancies from September 2017 to November 2017, to provide him with an opportunity to explain. Mr. Worthy responded to this letter and did not object to this accommodation at the time. Because an employee is not entitled to the exact accommodation requested, Mr. Worthy has not presented evidence to suggest that Chimes offered this alternative accommodation in bad faith, and Mr. Worthy did not object to this accommodation until he filed this litigation, Mr. Worthy has not established this element. Therefore, the circuit court correctly granted summary judgment in Chimes' favor on this claim.

Mr. Worthy also contends that the court dismissed his claims "because he had applied to the Social Security Administration [("SSA")] for Social Security Disability Income" ("SSDI"). That is an inaccurate reading of the court's ruling, however. The Americans with Disabilities Act ("ADA") "prohibits discrimination only against a 'qualified individual with a disability.'" *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 177 (4th Cir. 2011) (citing 42 U.S.C. § 12112(a)). A "qualified individual" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions" of the job. 42 U.S.C. § 12111(8). An individual who applies for disability benefits may still be a "qualified individual" under the ADA. *Fox*, 247 F.3d at 177. In *Cleveland v. Policy Management Systems Corporation*, 526 U.S. 795 (1999), the United States Supreme Court decided that the statutes establishing rights under the ADA and SSDI do not conflict to the point of judicially estopping a recipient of disability benefits from "asserting that he is a qualified individual with a disability." *Id.* at 800-02. The Supreme Court noted that the statutes pursue different purposes when defining whether an individual is "disabled": the SSA does not consider "the possibility of 'reasonable accommodation,'" but the ADA does. *Id.* at 803. However, the Supreme Court stated that "the court should require an explanation of any apparent inconsistency" between a "sworn statement asserting 'total disability'" and "the necessary elements of an ADA claim." *Id.* at 807. A reasonable jury must be able to conclude that "the plaintiff could nonetheless 'perform the essential functions' of [his] job, with or without 'reasonable accommodation.'" *Id.* at 807.

Here, the circuit court found that a plaintiff "must explain why the SSDI contention is consistent with [his] ADA claim that [he] could . . . 'perform the essential functions' of [his] previous job, at least with 'reasonable accommodation.'" The court did not find that Mr. Worthy could not bring an ADA claim because he received SSDI benefits, but rather found that Mr. Worthy had not explained why his SSDI contention (that he required disability benefits) was consistent with his ADA claim (that he could perform the essential functions of this particular job). The circuit court's requirement that Mr. Worthy resolve this apparent inconsistency is in line with the ruling in *Cleveland v. Policy Management Systems Corporation*. Again, the circuit court correctly granted summary judgment in Chimes' favor on this claim.

D. Retaliation

Mr. Worthy alleged that Chimes violated FEPA because his termination was retaliatory, in response to his complaints of workplace discrimination. Mr. Worthy contends that the timeline of his complaints regarding workplace discrimination, his suspension, and the investigation into his suspected timecard fraud demonstrates that the suspension and investigation were retaliatory. Mr. Worthy further contends that he established that "his firing was a pretext for retaliation."

Chimes argues that Mr. Worthy was terminated because he engaged in timecard fraud and that Mr. Worthy has not presented evidence to rebut this non-retaliatory reasoning or explain the inconsistencies in his timecard records. Chimes also argues that Mr. Worthy did not establish that the relevant decision makers regarding his termination and investigation had notice of his complaints of discrimination.

State Government § 20-606(f) provides that "[a]n employer may not discriminate or retaliate against any of its employees . . . because the individual has . . . (2) made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subtitle." This section prohibits employers from retaliating against employees because they engaged in protected activity, such as reporting workplace discrimination or harassment. State Gov't § 20-606(f).

The *McDonnell Douglas* framework laid out above also applies to retaliation claims. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 650 (4th Cir. 2002). It first requires the plaintiff to establish a prima facie case of retaliation, then asks the employer to articulate a nondiscriminatory reason for the adverse employment action, and, finally, provides an opportunity for the plaintiff to demonstrate that the employer's stated reason was pretextual. *McDonnell Douglas*, 411 U.S. at 802-04. "To establish a prima facie case of discrimination based on retaliation, a plaintiff must" show that (1) "[he] engaged in a protected activity," (2) "[his] employer took an adverse action against [him]," and (3) "[his] employer's adverse action was causally connected to [his] protected activity." *Edgewood Mgmt. Corp. v. Jackson*, 212 Md. App. 177, 199 (2013). A "protected activity" is conduct designed to raise issues of workplace discrimination, including prohibited conduct under FEPA. *See, e.g.*, *Thompson*, 312 F.3d at 650 (identifying filing of internal discrimination complaints as protected activity). Here, Mr. Worthy complained to his corporate supervisors of workplace harassment, which is prohibited conduct under State Government § 20-606. This complaint constitutes a "protected activity." Adverse employment acts are acts that "adversely affected the

'terms, conditions, or benefits' of [the plaintiff's] employment." *Id.* at 650-51 (quoting *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001)). Mr. Worthy was terminated, which is certainly an adverse employment action. Mr. Worthy has established the first two elements of this claim.

To satisfy the third element and establish the causal link between the first two elements, though, requires sufficient evidence to raise at least a reasonable inference of causation. *Jackson*, 212 Md. App. at 199. Therefore, the protected activity must occur before the adverse employment action. *Dowe v. Total Action Against Poverty*, 145 F.3d 653, 657 (4th Cir. 1998). However, time-lapse may undercut the inference of causation. *King v. Rumsfeld*, 328 F.3d 145, 151 n.5 (4th Cir. 2003) (finding two-month time-lapse between employer's notice of employee's complaint and the adverse employment action significantly weakened the inference of causation). Also, an employer cannot "take action because of a factor of which it is unaware," so "the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish the third element of the prima facie case." *Dowe*, 145 F.3d at 657.

Here, Mr. Worthy filed an incident report to Ms. Dorsett on November 10, 2017 regarding "racist insults" made by Mr. Bryan. Although Ms. Dorsett is part of Chimes' Human Resources Department, Mr. Worthy has not presented evidence to demonstrate that either Ms. Meadows or Mr. Cotter had notice of Mr. Worthy's incident report. Also on November 10, 2017, Mr. Bryan called Mr. Worthy and told him that he did not want Mr. Worthy to pursue these issues and that Mr. Worthy would meet with Mr. Cotter on November 15, 2017 to discuss "everything that has taken place." On November 15,

2017, Mr. Worthy did, in fact, meet with Ms. Meadows and Mr. Cotter, at which point they placed Mr. Worthy on unpaid, indefinite suspension for suspected timecard fraud. Additionally, Ms. Brewer stated in her affidavit that on or about November 19, 2017, Mr. Bryan advised her to leave Mr. Worthy alone or Mr. Bryan "was going to make [her] disappear," and "Mr. Worthy would suffer a similar fate." Despite these seemingly threatening comments by Mr. Bryan, Mr. Worthy has not provided evidence that Ms. Meadows or Mr. Cotter had notice of Mr. Worthy's complaints of harassment or that Mr. Bryan took part in or influenced their decisions to suspend and terminate Mr. Worthy. Absent evidence of such notice, we cannot find that Mr. Worthy established a prima facie case for retaliation as to Chimes because there is insufficient support in the record for the requisite causal link. The circuit court correctly granted summary judgment in Chimes' favor on this claim.

II. The Circuit Court Correctly Held that Mr. Worthy Cannot Prove that the Individual Appellees Aided or Abetted FEPA Violations.

In support of this claim, Mr. Worthy argues that FEPA provides for individual liability, and he points to the derogatory comments allegedly made. The individual appellees argue that they cannot be held liable for aiding or abetting because the record does not support a finding of direct liability as to Chimes. They further argue, in line with the circuit court's ruling, that State Government § 20-601 does not provide for individual liability.

FEPA states,

> A person may not:

> (1) aid, abet, incite, compel, or coerce any person to commit a discriminatory act;
>
> (2) attempt, directly or indirectly, alone or in concert with others, to commit a discriminatory act; or
>
> (3) obstruct or prevent any person from complying with this title or any order issued under this title.

State Gov't § 20-801. A "discriminatory act" is any act prohibited under the relevant subtitle. State Gov't § 20-101(d). Subtitle 6, entitled "Discrimination in Employment," prohibits, among other conduct, discrimination, retaliation, and failure to provide reasonable accommodations. State Gov't §§ 20-101, 20-606. Mr. Worthy does not identify under which subsection of this provision he grounds his claim for aider-and-abettor liability.

Even when an individual cannot be liable for FEPA violations under a theory of direct liability, an individual may be liable under a theory of aiding and abetting. State Gov't § 20-801. To support such a claim, the evidence must show that the individual supported discriminatory acts of another, such as the individual's employer, as opposed to proving direct incidents of discrimination by the individual. *Dici v. Commonwealth of Pa.*, 91 F.3d 542, 552-53 (3d Cir. 1996) (interpreting a provision of Pennsylvania law similar to State Government § 20-801). Mr. Worthy has provided evidence only of alleged direct discrimination; he did not provide evidence that the individual appellees assisted or intended to assist Chimes in the commission of discriminatory acts. We therefore affirm the circuit court's grant of summary judgment in favor of the individual appellees with respect to this claim.

III. THE CIRCUIT COURT CORRECTLY HELD THAT MR. WORTHY CANNOT PROVE THAT APPELLEES VIOLATED THE WHISTLEBLOWER STATUTE.

Mr. Worthy asserts that Chimes and the individual appellees are liable under Maryland's Whistleblower Act. He asserts that the record demonstrates that Chimes, Mr. Bryan, and Mr. Cotter attempted to force Mr. Worthy to use state labor on a federal contract, to which Mr. Worthy objected. Mr. Worthy maintains that he objected to this practice because it would result in overbilling on the contract for work not completed by Chimes. Mr. Worthy further maintains that Chimes suspended and terminated him after he complained about unlawful billing practices. The individual appellees argue that the Whistleblower Statute does not provide for individual liability.

State Finance and Procurement § 11-303, adopted in 2004, prohibits employers "that enter into contracts with a unit of State government" from taking or refusing to take action "as a reprisal against an employee" who exercises specific protected rights, such as reporting suspected misconduct or refusing to participate in violations of the law.[27] Md.

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[27] The Maryland statute reads as follows:

> An employer may not take or refuse to take any personnel action as a reprisal against an employee because the employee:
>
> (1) discloses information that the employee reasonably believes evidences:
>
> i. an abuse of authority, gross mismanagement, or gross waste of money;
>
> ii. a substantial and specific danger to public health or safety; or
>
> iii. a violation of law;

Fiscal Note, 2004 Sess. H.B. 1044. Although no Maryland court has interpreted this statute, it closely parallels portions of the federal Whistleblower Protection Act ("WPA"), adopted in 1989. 5 U.S.C. § 2302(b)(8); Pub. L. 101-112, § 11.[28] Under WPA, an employee "must prove by a preponderance of the evidence that he made a protected disclosure that contributed to the agency's action against him." *Smith v. Gen. Servs. Admin.*, 930 F.3d 1359, 1365 (Fed. Cir. 2019). The Federal Circuit recently found that an unsupported, conclusory statement did not "state a plausible claim" that a protected disclosure was made, noting that the plaintiff did not provide the underlying complaint and merely made a "barebones allegation." *Smolinksi v. Merit Sys. Prot. Bd.*, 23 F.4th

> (2) objects to or refuses to participate in any activity, policy, or practice in violation of law; or
>
> (3) following a disclosure under item (1) of this section, seeks a remedy provided under this subtitle.

[28] The federal statute reads, in relevant part, as follows:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority— . . .
>
> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) any violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . . .

1345, 1350-51 (2022). If the employee establishes a "prima facie case of reprisal for whistleblowing, the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken 'the same personnel action in the absence of such disclosure.'" *Miller v. Dep't of Justice*, 842 F.3d 1252, 1257 (Fed. Cir. 2016) (quoting *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012)). The Federal Circuit has referred to this as showing "independent causation." *Miller*, 842 F.3d at 1257.

Although Mr. Worthy does not identify under which subprovision he makes this claim against appellees, the facts he has presented indicate that he claims the appellees violated State Finance and Procurement § 11-303(1)(iii) and/or § 11-303(2). For a claim under § 11-303(1)(iii), Mr. Worthy must first establish a prima facie case by proving by a preponderance of the evidence that he disclosed information he reasonably believed to evidence a violation of law. Under § 11-303(2), he must prove that he objected to or refused to participate in an activity, policy, or practice in violation of law. Under either subprovision, he must also establish that Chimes took adverse action against him. He was, indeed, terminated, so that portion of the prima facie case is established. Also, Mr. Worthy testified that corporate employees at Chimes instructed him to overbill on the MAA contract by using state labor on the federal contract. Mr. Worthy did not provide any documentation, however, to indicate that he made a disclosure regarding these objectionable instructions. Nor did he present other evidence to corroborate that corporate employees issued such instructions or that Mr. Worthy opposed such instructions. Mr. Worthy's termination and testimony alone, taken together, constitute a

"barebones allegation" and do not establish a prima facie case of "reprisal for whistleblowing." We further find that Chimes has set forth sufficient evidence to establish by clear and convincing evidence that Chimes terminated Mr. Worthy for suspected timecard fraud. The Federal Circuit has laid out three factors to consider when determining whether the employer has carried its burden:

> [T]he strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

Carr v. Soc. Sec. Admin., 185 F.3d 1318, 1323 (Fed. Cir. 1999).

The record supports a finding that Chimes terminated Mr. Worthy for suspected timecard fraud and that other employees, who have not made complaints like Mr. Worthy's, have been terminated for suspected timecard fraud. Furthermore, the evidence presented is insufficient to support a finding that Chimes had a motive to retaliate against Mr. Worthy. We conclude, therefore, that even if Mr. Worthy established a prima facie case under this statute, the appellees have carried their burden. Accordingly, we affirm the circuit court's grant of summary judgment in favor of appellees with respect to this claim.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.