Circuit Court for Baltimore City
Case No. 24-C-19-005439

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 092

September Term, 2021

SHON FELDER

v.

CHIMES DISTRICT OF COLUMBIA, INC.

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.

Shon Felder, appellant, appeals an order from the Circuit Court for Baltimore City granting summary judgment to Chimes District of Columbia, Inc. ("Chimes"), appellee. This case arises out of Chimes' termination of Mr. Felder, a Black[1] man, who was a Chimes employee from January 2013 to January 2018. Mr. Felder filed suit against Chimes, alleging violations of the Maryland Fair Employment Practices Act ("FEPA") on several grounds. FEPA largely adopts Title VII of the Civil Rights Act of 1964, which, in part, prohibits workplace discrimination.

The issues on appeal have been rephrased and reframed as follows:[2] Whether the circuit court erred by finding Mr. Felder cannot prove that Chimes violated FEPA on the basis of hostile work environment, race discrimination, or retaliation. For the reasons explained below, we answer this question in the negative on all three bases and affirm the circuit court's grant of summary judgment in favor of Chimes.

[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. Felder phrased the issues as follows:

A. Whether the lower court erred when it held that Felder was not a victim of race discrimination. (Count I).

B. Whether the lower court erred when it held that Felder was not a victim of retaliation. (Count III).

C. Did the lower court err when it failed to sustain Felder's claim for a hostile work environment on the basis of race and color. (Count II).

BACKGROUND

Mr. Felder's Employment with Chimes

Chimes provides training and employment opportunities for people with disabilities through various contracts with state and federal entities. One of Chimes' largest contracts is with the Maryland Aviation Administration ("MAA"), to provide janitorial services to the Baltimore/Washington International Airport ("BWI"). Chimes first employed Mr. Felder from 1999 to 2003. Mr. Felder left Chimes in 2003 for family reasons, but he reapplied to work for Chimes in 2012. Chimes then employed Mr. Felder from January 2013 to January 2018. When hired in 2013 as Inventory and Training Supervisor, Mr. Felder's direct supervisor was Daniel Worthy, and his Project Manager was Douglas Rosenberger. Mr. Felder received multiple promotions between 2013 and 2017. In 2014, Mr. Felder was promoted to Assistant Manager of Equipment, Training, and Inventory, and Kevin "Chip" Zgorski was his direct supervisor. In September 2017, Mr. Felder was promoted to Supply, Equipment, and Inventory Manager ("Supply Manager") for Chimes' contract with the MAA, and Mr. Worthy was his direct supervisor. Gerard Cotter, Executive Vice President, stated in his affidavit that the Supply Manager is "one of the most senior positions on Chimes' contract with the MAA at BWI."

Chimes provided Mr. Felder with a private office in Chimes' suite at BWI, located behind the airport's security check points. Additionally, Chimes provided Mr. Felder with a corporate email account and cell phone to enable MAA officials and Chimes' leadership to more easily contact Mr. Felder. Mr. Cotter testified that Chimes expected

Mr. Felder to be present at BWI from Monday to Friday during regular business hours and to clock in at the beginning of his shift, whether he was working in front of or behind security checkpoints. Mr. Cotter also stated in his affidavit that Chimes expected Mr. Felder to always carry his corporate cell phone on his person. Additionally, in December 2015, Chimes notified all managers that they must clock in and out of work or they would be subject to disciplinary action. Because the MAA compensated Chimes based upon the total number of hours performed, Chimes submitted monthly invoices to the MAA detailing the number of hours worked by each individual employee on the contract.

In November 2017, Mr. Cotter and Pamela Meadows, Senior Vice President of Human Resources, met with Mr. Worthy, Mr. Felder's supervisor, to inform him they had discovered inconsistencies between Mr. Worthy's timecard records and the GPS data for his Chimes-issued cell phone. Mr. Cotter and Ms. Meadows suspended Mr. Worthy for suspected timecard fraud in order to further investigate these inconsistencies. Mr. Cotter testified that, in recognition of this potentially fraudulent behavior among Chimes' management, Chimes' corporate leadership reviewed timecards and GPS data for company cell phones issued to other management staff, including Mr. Felder. Ms. Meadows and Joni Dorsett, Human Resources Director, conducted these additional investigations at the beginning of December 2017. As a result of these investigations, Chimes identified at least 13 inconsistences between Mr. Felder's timecard records and the GPS data for his Chimes-issued cell phone for September 2017 through November 2017. For example, Mr. Felder's timecard would indicate he was clocked in at BWI, but his cell phone GPS data showed the cell phone was not at BWI. Also, Chimes noted

discrepancies between Mr. Felder's security badge swipes and his cell phone GPS data. Ms. Meadows testified that Mr. Felder's phone was tracked to, for example, Laurel, Owings Mills, and Arundel Mills during hours that Mr. Felder's timecards indicated he was clocked in at BWI. Chimes does not conduct business in any of those locations.

On December 13, 2017, Ms. Meadows and Ms. Dorsett interviewed Mr. Felder, among other managers, to discuss these inconsistencies. Ms. Meadows and Ms. Dorsett generated a report as a result of these interviews. In this report, they wrote that Mr. Felder "stated that there is no time [he] was clocked in and not at the airport." He also stated, however, that there were infrequent occasions that he had to leave the airport to go to a dump in Elkridge, Maryland; go to the corporate office at 4815 Seton Drive, Baltimore, MD 21215; meet vendors near BWI; or pick up supplies at Blind Industries and Services of Maryland at 3345 Washington Boulevard, Baltimore, MD 21227. Ms. Meadows and Ms. Dorsett again met with Mr. Felder on January 19, 2018 and January 22, 2018. During the meeting on January 19, Ms. Meadows stated the following in light of the timecard inconsistencies and Mr. Felder's failure to provide an explanation: "We have no choice but to conclude that your time was misrepresented. Can you explain this?" Mr. Felder simply responded, "No." Ms. Meadows then walked through each inconsistency and asked Mr. Felder for an explanation. In response, Mr. Felder indicated either that he had no explanation or that he could not recall why the GPS data would be inconsistent with his timecard or security-badge-swipe records. After a brief discussion with Ms. Dorsett, Ms. Meadows told Mr. Felder, "based on this information, this is grounds for termination" because such misrepresentations of the time he worked

amounted to theft of money. At that time, Ms. Meadows and Ms. Dorsett decided to suspend Mr. Felder until January 22, 2018, when he would be provided with access to his work email to review his records and have an opportunity to identify reasonable explanations for the discrepancies. Mr. Felder's suspension included suspended access to his office and his work email.

At the meeting on January 22, 2018, Ms. Meadows provided Mr. Felder with a Chimes computer and the relevant dates for his review. After only a few minutes, however, Mr. Felder stopped searching his records and told Ms. Meadows to ask his supervisor, Mr. Worthy, about Mr. Felder's whereabouts because "anything I was instructed to do, I was instructed by [Mr. Worthy]." Mr. Felder later testified, "I knew that I was gonna be fired. So I just – you know, I just stopped."[3] Ms. Meadows restated that Chimes would have to terminate Mr. Felder for timecard fraud.

The following day, on January 23, 2018, Ms. Meadows sent Mr. Felder a termination letter, stating that Mr. Felder failed to provide any explanation for the discrepancies between his cell phone GPS data and his timecard records and/or security-badge-swipe records. Ms. Meadows stated that, for this reason, "Chimes ha[d] no choice but to terminate [Mr. Felder's] employment." Mr. Felder did not raise concerns of discrimination, harassment, or retaliation at any of the three meetings with Ms. Meadows and Ms. Dorsett. Additionally, Ms. Dorsett stated in her affidavit that she was unaware,

[3] Throughout Mr. Felder's deposition, he maintained that he could not explain the discrepancies.

as of January 22, 2018, that Mr. Felder had previously raised concerns of workplace discrimination, harassment, or retaliation.

Because Chimes had overbilled on their MAA contract due to Mr. Felder's misrepresentations, Chimes reimbursed the MAA accordingly. Additionally, as a result of similar investigations into other employees' timecard records, security-badge-swipe records, and Chimes-issued cell phone GPS data, Chimes terminated two other Black employees and two White employees. Both Black employees who were terminated, similarly to Mr. Felder, complained of workplace discrimination and claimed to have engaged in protected activity; neither White employee made these claims.

Alleged Harassment and Discriminatory Behavior by Chimes Employees

Mr. Felder identified several offensive comments made by Chimes employees in late 2017. On November 1, 2017, Mr. Allenbaugh, Corporate Manager in the Human Resources Department, told Shanell Daniels, another Chimes employee, to "shut up . . . before I slap the [B]lack off of you." Mr. Felder testified that he witnessed this statement and that he filed an incident report with Mr. Worthy, but he did not personally report the incident to Human Resources. Mr. Worthy testified that Ms. Walters filed a report with him about Mr. Allenbaugh's comment, which she witnessed, and that he forwarded that report to the Human Resources Department. On November 3, 2017, Mr. Worthy emailed Ms. Dorsett to address Mr. Allenbaugh's comment and the consequences Mr. Allenbaugh would face. In this email, Mr. Worthy indicated that an apology would be appropriate but that Ms. Daniels had believed the interaction to be "light[-]hearted and comical." Mr. Allenbaugh apologized to Ms. Daniels on November 13, 2017.

Additionally, Mr. Felder testified that he witnessed Jane Gallaher, Director of Finance, state, "[H]ey, I told you she was a pretty Black thing," with reference to Ms. Walters. Tiana Howard, a Chimes employee, also testified that she witnessed this statement. Ms. Howard stated in her affidavit that she completed an incident report regarding this comment and gave the report to Ms. Walters. Mr. Worthy testified that Ms. Walters also completed an incident report regarding this comment, which she submitted to Mr. Worthy.

Mr. Worthy also testified that Ms. Gallaher said, "Look what Caesar has his monkeys doing," with reference to Mr. Worthy and his subordinates, a majority of whom were Black. Mr. Felder stated that he and Mr. Zgorski witnessed this comment, and Ms. Walters stated that she, Ms. Howard, and Doretha Tolliver, another Chimes employee, witnessed this comment.

Furthermore, Mr. Worthy testified that in late October or early November 2017, he signed a statement from Ms. Walters, in which she complained that Robert J. Bryan, a Black man and Chimes' Operations Manager, told Mr. Worthy, "Sometimes you have to crack the whip to get the job done and get them in line," with reference to Mr. Worthy's subordinates. Ms. Walters was one of Mr. Worthy's subordinates at the time, and she stated that she found the comment offensive. Mr. Worthy stated that he was "sure" he "sent this [report] up to Joni [Dorsett]," in Human Resources. Mr. Felder testified that he was present when Mr. Bryan made this comment. He further testified that Mr. Bryan defended his comment by saying, "I'm from PG. I'm Black. I can say that."

Mr. Felder also testified that he met with Mr. Worthy and Mr. Bryan on another occasion, and Mr. Bryan said to Mr. Worthy, "you're not the only monkey with a disability." Mr. Felder was present for both incidents involving Mr. Bryan, but Mr. Bryan did not personally direct any racially derogatory comments at Mr. Felder. On November 10, 2017, Mr. Worthy filed an incident report with Ms. Dorsett regarding all of Mr. Bryan's comments, stating that he was "beyond offended" by the comments.

Mr. Felder testified that he completed four incident reports complaining of discriminatory comments in the workplace. He stated that he kept a copy of each report for himself in his office and submitted a copy to Mr. Worthy, expecting that Mr. Worthy would forward the reports to the Human Resources Department. He also stated, however, that he was unaware as to whether Mr. Worthy actually forwarded the reports. Mr. Cotter testified that neither Mr. Worthy nor Mr. Bryan provided him with any incident reports made by Ms. Walters or Mr. Felder concerning discrimination.

Procedural History

Mr. Felder's Complaint contained three counts: (I) Race and Color Discrimination in Violation of State Government § 20-606, (II) Hostile Work Environment in Violation of State Government § 20-606, and (III) Retaliation in Violation of State Government § 20-606. Chimes filed a Motion for Summary Judgment on December 9, 2020. On January 11, 2021, following a hearing, the circuit court granted summary judgment in favor of Chimes on all three counts. 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

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, ..." 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.

I. THE CIRCUIT COURT CORRECTLY HELD THAT MR. FELDER CANNOT PROVE THAT CHIMES VIOLATED FEPA ON THE BASIS OF HOSTILE WORK ENVIRONMENT.

In support of this claim, Mr. Felder argues that the offensive comments were sufficiently severe and pervasive and that they interfered with his job performance. Mr. Felder reiterates the content and circumstances of the alleged comments and notes that he reported the comments to his supervisor.

Chimes argues that these six alleged comments do not meet the high standard for establishing a hostile work environment. Chimes also argues that there is no basis for imputing liability to Chimes because employers are not liable for all workplace harassment, Chimes disseminated an effective anti-harassment policy, and Mr. Felder did not properly report the alleged discrimination.

"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 *Central 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 six comments by three Chimes employees in fall 2017. Mr. Allenbaugh told Ms. Daniels to "shut up . . . before I slap the [B]lack off of you." Mr. Felder testified that he filed an incident report to Mr. Worthy about this

statement. Mr. Felder also testified that Ms. Gallaher told Mr. Zgorski that Ms. Walters was a "pretty Black thing." Mr. Worthy testified that Ms. Gallaher also said, "Look what Caesar has his monkeys doing," with reference Mr. Worthy. Additionally, Mr. Worthy testified that Mr. Bryan told him, "Sometimes you have to crack the whip to get the job done and get them in line," with reference to Mr. Worthy's subordinates. Mr. Felder testified that Mr. Bryan defended his comment by saying, "I'm from PG. I'm Black. I can say that." Mr. Felder also testified that, on a different occasion, Mr. Bryan said to Mr. Worthy, "you're not the only monkey with a disability." Mr. Felder testified that he completed four incident reports complaining of discriminatory comments in the workplace.

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

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

The content and context of alleged conduct inform whether the conduct was based on a plaintiff's race. *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). The inquiry regarding a hostile work environment, however, "may exceed the 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 Mr. Felder had known of each of these alleged comments and that the comments were based on the race or color of Chimes employees.

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

Mr. Felder alleged six harassing comments by three coworkers in fall 2017. 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. Felder testified that

he submitted to his supervisor four incident reports related to discriminatory comments. A reasonable jury could conclude that Mr. Felder 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 Admin.*, 360 Md. 333 (2000), the Supreme Court of Maryland (at the time named the Court of Appeals of Maryland)[4] found that the plaintiff-employee had stated a cause of action[5] when she provided detailed allegations that a coworker had continuously teased and threatened her in a sexual manner, exposed himself to her, and inappropriately touched her. *Id.* at 348-49.[6]

In contrast, the Fourth Circuit recently addressed a claim for hostile work environment based on racial discrimination but concluded that the plaintiff had not raised

[4] 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 . . . .").

[5] 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.

[6] In *Faragher*, the United States Supreme Court noted that the standards for racial and sexual harassment are not "entirely interchangeable," but the courts should seek "generally to harmonize the standards of what amounts to actionable harassment." 524 U.S. at 787 n.1.

a genuine dispute of material fact. *McIver v. Bridgestone Ams., Inc.*, 42 F.4th 398, 410 (4th Cir. 2022). In *McIver*, the plaintiff identified episodes of racial harassment in the workplace, including drawings of nooses at Black employees' workstations, caricature drawings in men's bathrooms, and monkeys made of tire tubing found hanging by nooses. *Id.* The court noted that this conduct was very severe, but none of it was directed at the plaintiff, it was not perpetrated by supervisors with hiring or firing authority, and it all occurred years prior to her filing a lawsuit. *Id.* 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. Felder's supervisor, but he did not have hiring or firing authority over Mr. Felder, and the alleged comments were isolated occurrences—they were infrequent and unrelated to Mr. Felder's termination. The other two speakers were not Mr. Felder's supervisors, and those comments were similarly isolated occurrences. Also, as in *McIver*, none of the comments were directed at Mr. Felder. Although the alleged conduct is deplorable, it does not amount to more than "mere offensive utterances"—does not contain threats or constitute a change to the terms and conditions of Mr. Felder's employment. This Court cannot hold that the alleged conduct was objectively severe or pervasive enough to rise to the level of creating a hostile work

environment. We agree with the circuit court 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.

II. THE CIRCUIT COURT CORRECTLY HELD THAT MR. FELDER HAS NOT RAISED A GENUINE DISPUTE OF MATERIAL FACT AS TO WHETHER CHIMES VIOLATED FEPA ON THE BASIS OF RACE DISCRIMINATION.

In support of his race-discrimination claim, Mr. Felder argues that the alleged comments made by three Chimes employees are direct evidence of discrimination. He then argues that circumstantial evidence also establishes race discrimination here, stating that Mr. Felder could not have provided an explanation for his timecard inconsistencies with such short notice and without longer access to his work email, and the timeline of Mr. Felder's complaints and the timecard-fraud investigation was "suspicious."

Chimes argues that none of the evidence in the record is direct evidence of discrimination, so Mr. Felder must instead establish a prima facie case of discrimination based on circumstantial evidence. Chimes maintains that Mr. Felder cannot establish a prima facie case of discrimination because he was not meeting Chimes' expectations at the time he was terminated and did not present evidence of intent to discriminate. Finally, Chimes states that Mr. Felder did not present evidence of pretext and points to other Chimes employees who were similarly terminated for timecard fraud.

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, 173 (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, Mr. Felder is a member of a protected group. State Gov't § 20-606(a)(1)(i) (prohibiting employment discrimination on the basis of "race" or "color"). Also, Chimes terminated Mr. Felder, 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. Felder'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 Ms. Dorsett terminated Mr. Felder but did not make the replacement hiring decision, Mr. Felder 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. Felder established a prima facie case of discrimination on the basis of race and color. We then address Chimes' stated reason for termination and whether Mr. Felder presented sufficient evidence to establish the reason was pretextual.

Here, none of the alleged comments were about Mr. Felder, and although all such comments are repugnant, none of these particular comments were made by Ms. Meadows or Ms. Dorsett, who had the decision-making authority to terminate Mr. Felder. The comments were also unrelated to the act of terminating Mr. Felder but rather were made during normal work activities by coworkers who had no authority to terminate Mr. Felder. 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. Felder was meeting Chimes' legitimate expectation that Mr. Felder would truthfully represent the hours he worked for Chimes. Chimes presented its concerns regarding suspected timecard fraud to Mr. Felder in December 2017 and provided him with an opportunity to respond to the concerns in January 2018. Because Mr. Felder did not provide an explanation for the inconsistencies between his timecard records and the GPS data for his Chimes-issued cell phone, Ms. Meadows and Ms. Dorsett concluded that he had committed timecard fraud. Accordingly, Ms.

Meadows issued a termination letter to him on January 23, 2018. Mr. Felder has not presented evidence to suggest that he was, contrary to Ms. Meadows' and Ms. Dorsett's belief, meeting Chimes' legitimate expectation that he would truthfully represent the time he worked.

Moreover, although the firing and replacement hiring decisions were not made by the same person, meaning there is no affirmative inference of nondiscrimination, Mr. Felder has not presented evidence to otherwise establish discrimination.[7] 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). Also, any inference of discrimination is undermined here because Ms. Dorsett testified that she was unaware of the racially derogatory comments. Mr. Felder presented insufficient evidence to suggest otherwise or to suggest that Ms. Meadows or Ms. Dorsett made discriminatory comments or decisions. In the absence of evidence—either direct or circumstantial—of a relationship between Mr. Felder's membership in a protected class and the adverse employment action, there can be no inference of discriminatory termination.

[7] 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).

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

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.*

Chimes provided a nondiscriminatory reason for terminating Mr. Felder: Chimes reasonably concluded Mr. Felder had engaged in timecard fraud because, upon being presented with concerns about discrepancies in his timecard records, Mr. Felder failed to provide sufficient explanations. Mr. Felder failed to present evidence to prove that he did not commit timecard fraud and failed to affirmatively prove discrimination. The circuit court, therefore, correctly granted summary judgment in favor of Chimes on Mr. Felder's race-discrimination claim.

III. THE CIRCUIT COURT CORRECTLY HELD THAT MR. FELDER HAS NOT RAISED A GENUINE DISPUTE OF MATERIAL FACT AS TO WHETHER CHIMES VIOLATED FEPA ON THE BASIS OF RETALIATION.

In support of this claim, Mr. Felder relies on the timeline for when he complained of workplace discrimination and was terminated a few months later. Mr. Felder contends

that the circuit court found that Mr. Felder did not report the discriminatory comments to Chimes' Human Resources Department, which, Mr. Felder says, was "in effect disregarding all evidence on the record."

Chimes argues that there was a legitimate reason for terminating Mr. Felder, and Mr. Felder did not meet his burden to establish pretext. Chimes contends that Mr. Felder cannot establish a prima facie case for retaliation because those who terminated Mr. Felder were unaware of his complaints prior to his termination. Chimes also maintains that Mr. Felder "cannot rely on the temporal proximity between his alleged fall 2017 complaints . . . and his January 2018 termination."

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. Felder complained to his supervisor of workplace harassment, which is prohibited conduct under State Government § 20-606. This complaint constitutes a "protected activity." Adverse employment actions 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. Felder was terminated, which is certainly an adverse employment action. Therefore, Mr. Felder 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. Felder asserts that he made complaints at or about the time of each alleged comment, all of which occurred in fall 2017, prior to his termination in January 2018. Mr. Felder testified that he witnessed Mr. Allenbaugh tell Ms. Daniels to "shut up . . . before I slap the [B]lack off of you," and that he filed an incident report with Mr. Worthy, but he did not personally report the incident to Human Resources. He also testified that he completed four incident reports complaining of discriminatory comments in the workplace. He, however, stated that he was unaware as to whether Mr. Worthy actually forwarded the reports to the Human Resources Department. The record does not demonstrate that Ms. Meadows or Ms. Dorsett had notice of Mr. Felder's complaints. Absent evidence that Ms. Meadows or Ms. Dorsett did, in fact, have notice that Mr. Felder engaged in a protected activity, we cannot find that he established a prima facie case for retaliation as to Chimes because there is insufficient support in the record for the requisite causal link. Furthermore, even if Mr. Felder could establish a prima facie case on this claim, Chimes articulated a nondiscriminatory reason for terminating him—timecard fraud. Mr. Felder has not presented evidence to demonstrate that this reason was pretextual. The circuit court correctly granted summary judgment in favor of Chimes on this claim.

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