Circuit Court for Baltimore City
Case No. 24-C-19-001616

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 253

September Term, 2021

ZOE N. WALTERS

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.

Zoe Walters, appellant, appeals an order from the Circuit Court for Baltimore City granting summary judgment to appellees: Chimes District of Columbia, Inc. ("Chimes"), Robert J. Bryan, Joni M. Dorsett, Jane Gallaher, and Pamela Meadows. Collectively, Mr. Bryan, Ms. Dorsett, Ms. Gallaher, and Ms. Meadows are the "individual appellees." This case arises out of Chimes' termination of Ms. Walters, a Black[1] woman, who was a Chimes employee from December 2014 to March 9, 2018. Ms. Walters filed suit against appellees, 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.

QUESTIONS PRESENTED

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

[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] Ms. Walters phrased the issues as follows:

> A. Whether the lower court erred when it failed to sustain Walters' disability discrimination claim—failure to accommodate.
>
> B. Did the trial court err when it failed to sustain Walters' claims of disability, race and gender discrimination?
>
> C. Did the circuit court err when it disregarded evidence of appellees' retaliation against Walters?
>
> D. Whether the lower court erred when it denied Walters' claim for lost wages.
>
> E. Did the lower court err when it denied Walters' claims for a hostile work environment.

1. Whether the circuit court erred by finding Ms. Walters cannot prove that appellees violated FEPA on the basis of hostile work environment, discrimination, failure to accommodate, or retaliation.

2. Whether the circuit court erred by finding Ms. Walters cannot prove that the individual appellees aided or abetted Chimes' violations of FEPA.

3. Whether the circuit court erred by finding Ms. Walters is not entitled to lost wages because she misled Chimes as to her need for FMLA medical leave.

For the reasons that follow, we answer all three questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

Ms. Walters' Employment with Chimes

Chimes hired Ms. Walters in December 2014 as an administrative assistant and office manager. On September 1, 2017, Chimes entered into a contract with the Maryland Aviation Authority ("MAA") for janitorial services at the Baltimore/Washington International Airport ("BWI"). Chimes promoted Ms. Walters to Maximo[3] Manager, a salaried position, as part of the Operations team on the contract. In this position, she reported to Daniel Worthy, Project Manager, but Pamela Meadows, Senior Vice President of Human Resources, had the ultimate authority regarding Ms. Walters' employment with Chimes.

F. Whether the lower court erred when it failed to sustain Walters' claim for aiding and abetting discrimination and retaliation in violation of FEPA against individual appellees Bryan, Dorsett, Gallaher and Meadow.

[3] "Maximo Manage" is the name of a technology that Chimes uses.

On November 15, 2017, Ms. Walters met with Ms. Meadows and Joni Dorsett, Human Resources Director, at which point they questioned Ms. Walters in connection with an investigation for suspected timecard fraud by Chimes employees. Ms. Walters testified that, during this meeting and because of her sex, she was accused of sexual relations with her supervisor. The following two days, Ms. Walters called out of work. Ms. Walters testified that Chimes then deactivated her access badge on or about November 17, 2017. Ms. Walters did not return to work at Chimes for the next several weeks. In December 2017, Chimes posted the Maximo Manager position as vacant on Glassdoor in the event Ms. Walters did not return to work, even though Ms. Walters had not been terminated at that point.

Ms. Walters requested FMLA leave from Chimes on November 22, 2017, and she provided documentation in December 2017 that indicated her need for medical leave due to her disability. The documentation required clarification on a few points,[4] which Chimes requested via letter on December 11, 2017. Ms. Walters received the same letter by email on December 19, 2017 and asked for an extension on the deadline to provide clarification on the FMLA documentation. On January 12, 2018, Ms. Meadows emailed Ms. Walters to confirm that Chimes received the clarifying documents on January 11,

[4] In a letter from Karen Holcomb, Benefits Coordinator, Chimes requested the following clarification by December 18, 2017: "The approximate date condition commenced is noted as Nov 2017. The specific date the condition commenced is required with month, date and year." Also, "Clarification is needed on what this means regarding your need of a part-time or reduced schedule." Chimes further requested medical documentation for Ms. Walters' hospitalization starting on November 16, 2017, "since [Ms. Walters'] certification states November 21, 2017, as the date of initial treatment for [her] condition."

and to notify Ms. Walters that Chimes granted her FMLA request and designated all her absences beginning on November 16, 2017 as FMLA leave. Ms. Meadows further noted that Chimes had received a doctor's note on December 8, 2017, which cleared Ms. Walters to return to work by January 2, 2018, but that Chimes received nothing further until January 11, 2018. In the same email, Ms. Meadows informed Ms. Walters that she could return to work at Chimes on January 16, 2018 and instructed her to report to corporate rather than BWI for a meeting with herself and Ms. Dorsett to continue their discussion from November 15, 2017.

On January 16, prior to the scheduled meeting, Ms. Walters called to request a stenographer at the meeting. Ms. Meadows responded that there would be a third party in the room recording the conversation. Ms. Walters testified that this compromise did not make her comfortable, and she did not appear for the meeting. Instead, she faxed a doctor's note to Chimes putting her on leave from work again until January 25. Chimes approved this leave and rescheduled the meeting for January 25, but Ms. Walters then called out sick from January 25 through February 26. She did not provide any additional documentation to support these absences. As of February 26, 2018, Ms. Walters had taken her full 12 weeks of FMLA-entitled leave (from November 16, 2017 to January 25, 2018) and four weeks of additional leave (from January 26 to February 26, 2018).

On January 26, 2018, Ms. Meadows sent a letter to Ms. Walters to remind her to communicate with Ms. Meadows directly, not her supervisors at BWI, regarding further medical absences and to remind Ms. Walters of her duty to inform Chimes of her plans for returning to work and any accommodations she would need. In this letter, Ms.

Meadows also requested that Ms. Walters provide Chimes with medical documentation for absences in the future rather than merely calling out sick. Ms. Meadows sent another letter to Ms. Walters on February 2, 2018, stating that Ms. Walters had properly left voicemails every day since January 29, but Ms. Walters also needed to provide a doctor's note to cover her absences. Ms. Meadows stated that Chimes needed to know when Ms. Walters would be able to "perform the essential functions" of her position. Ms. Meadows further stated that if Ms. Walters did not communicate by February 12, 2018, further absences would be considered unapproved leave, which could subject Ms. Walters to discipline and/or termination. On February 16, 2018, Ms. Meadows sent a third letter to Ms. Walters, stating that Chimes had not received documentation from Ms. Walters, so they had to treat her absences as unapproved leave. Ms. Meadows identified February 26, 2018 as the final deadline to provide documentation and stated that, otherwise, Chimes would assume Ms. Walters intended to resign. Ms. Walters has since confirmed that she received all these letters but did not respond to them.

In light of Ms. Walters' lack of communication, Ms. Meadows sent a termination letter to Ms. Walters on March 9, 2018. In this letter, Ms. Meadows stated that Ms. Walters had provided no documentation since January 25, had exhausted her 12 weeks of FMLA entitlement on February 8, and had stopped calling out sick on February 26.

Unbeknownst to Chimes until this litigation began, Ms. Walters had received an offer of employment with Doctors Community Hospital ("DCH") in October 2017. Once this litigation commenced, Chimes learned that Ms. Walters had accepted the position with DCH on November 29, 2017 and began working in that position full time on

January 2, 2018. Ms. Walters was working full time for DCH while receiving FMLA pay from Chimes during January and February 2018.

Alleged Harassment and Discriminatory Behavior by Chimes Employees

Ms. Walters identified various offensive comments made by Chimes employees that Ms. Walters testified she overheard in late 2017. She also identified instances of sexual harassment by Robert J. Bryan, a Chimes employee, that were directed toward her.

Mr. Bryan is the Operations Manager for Chimes, which is a supervisory position. Mr. Worthy testified that, in October 2017, Mr. Bryan told Mr. Worthy "to crack the whip to get the job done and get them in line," with reference to Mr. Worthy's subordinates, a majority of whom were Black. Phillip Allen, a Chimes employee at the time, also testified to overhearing this comment. Ms. Walters filed an incident report with Mr. Worthy, writing that this comment was "insulting, demeaning, and racist." Mr. Worthy testified that he forwarded the complaint to Human Resources. Mr. Bryan denied making this comment.

Ms. Walters also verbally complained to Mr. Worthy about sexual harassment directed at her by Mr. Bryan. She complained that Mr. Bryan would often massage and tickle her hands when they shook hands at meetings during the summer and fall of 2017, and she described Mr. Bryan as staring at her with "bedroom eyes" and a "smirk."

Jane Gallaher was the Chimes Director of Finance, which is a non-supervisory position. Ms. Walters testified that on October 20, 2017, Ms. Gallaher told a Chimes officer that Ms. Walters was "a pretty, young [B]lack thing." Ms. Walters testified that

she and three of her coworkers witnessed this, and that she complained to her supervisor, Mr. Worthy. Ms. Gallaher denied making this comment.

Ms. Walters also complained that on October 20, 2017, Ms. Gallaher told a Chimes officer, "this is what Caesar[5] has his monkeys doing," with reference to Mr. Worthy's management of his employees. Ms. Walters and one of her coworkers filed incident reports with Mr. Worthy about this remark, and Ms. Walters verbally reported the comment to the Director of New Business Development, Reagan Brewer. Ms. Gallaher denied making this comment.

Michael Allenbaugh is Chimes' Human Resources Director of Training. On November 1, 2017, Ms. Walters testified that Mr. Allenbaugh told a Black employee to "hush before I slap the [B]lack off of you." Ms. Walters testified that she and other coworkers complained of this to Mr. Worthy. Chimes disciplined Mr. Allenbaugh for this comment, and no other reports have been made against him for similar conduct since.

Mr. Worthy testified that he forwarded all Ms. Walters' complaints and reports to Human Resources. Ms. Walters stated that she did not personally report the comments to anyone but Mr. Worthy, except when she reported the "pretty young [B]lack thing" comment to Ms. Brewer, who does not work in the Human Resources Department.

Procedural History

Ms. Walters' Complaint contained nine counts: Disparate Treatment (Count I); Failure to Provide Reasonable Accommodations in Violation of State Government § 20-

[5] It appears that "Caesar" in this context was a reference to a character that led the apes in the science fiction franchise *Planet of the Apes*.

606 (Count II); Race and Color Discrimination in Violation of State Government § 20-606 (Count III); Hostile Work Environment Regarding Race and Color Discrimination in Violation of State Government § 20-606 (Count IV); Gender Discrimination in Violation of State Government § 20-606 (Count V); Hostile Work Environment Regarding Gender Discrimination and Sexual Harassment in Violation of State Government § 20-606 (Count VI); Aiding and Abetting in Violation of State Government § 20-801 (Count VII); Retaliation in Violation of State Government § 20-606 (Count VIII); and Constructive Discharge (Count IX).

Ms. Walters alleged each count against Chimes and the individual appellees. Appellees filed a Motion to Dismiss, and, without holding a hearing because none was requested, the circuit court dismissed Counts I, II, III, IV, and VI as to the individual appellees, and Count IX as to all appellees. Appellees filed a Motion for Summary Judgment on November 16, 2020. Following a hearing, the circuit court granted summary judgment to appellees on all remaining counts: Counts I through VIII as to Chimes and Counts V, VII, and VIII as to the individual appellees. This appeal timely followed.[6]

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.

[6] The clerk entered judgment on the electronic docket on February 26, 2021, and Ms. Walters filed her notice of appeal on February 10, 2021. It was entered on the docket on March 3, 2021, so her appeal is treated as timely filed on the same day. Md. Rule 8-602(f).

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 "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 MS. WALTERS 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, . . . , sex, . . . , 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)).

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

A. Hostile Work Environment

Ms. Walters alleged that Chimes violated FEPA because she was subject to a hostile work environment. She bases her claim on four racially and sexually derogatory comments made by Chimes employees that she overheard and sexual harassment directed at Ms. Walters by a Chimes employee. Ms. Walters argues that the circuit court erroneously found that the comments she perceived as offensive were not related to her race, color, or sex, and she states that she did, indeed, find the comments offensive.

Chimes argues that the circuit court correctly found the harassment was not severe or pervasive enough to create a hostile work environment under FEPA. Chimes also argues that, even if Ms. Walters established that the harassment met the standard for severity or pervasiveness, Chimes responded appropriately to the reported claims such that liability could not be imputed to Chimes. In support of this argument, Chimes points to its anti-harassment policy and notes that Ms. Walters had a duty to relay harassment complaints to Chimes' Human Resources Department.

"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 or sexual harassment, a plaintiff "must show that there is (1) unwelcome conduct; (2) that is based on the [plaintiff's] . . . race [or sex]; (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 Balt.*, 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).

The circuit court found that Ms. Walters' claim was "limited to a few comments made by coworkers, none of which were related to her race or gender, or were sufficiently pervasive to state a claim." Although we find that the comments could be

related to both the race and sex of Chimes' employees, including Ms. Walters, we agree that the conduct was not sufficiently severe or pervasive to establish a FEPA violation. Accordingly, we need not address whether the conduct was imputable to Chimes.

1. The Alleged Conduct was Objectively and Subjectively Unwelcome.[7]

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 the alleged comments by Mr. Bryan, Ms. Gallaher, and Mr. Allenbaugh, and the alleged sexual harassment by Mr. Bryan. Mr. Bryan allegedly told Mr. Worthy "to crack the whip to get the job done and get them in line," with reference to Mr. Worthy's subordinates, a majority of whom were Black. Ms. Gallaher allegedly told a Chimes officer that Ms. Walters was "a pretty, young [B]lack thing," and, on a different occasion, "this is what Caesar has his monkeys doing," with reference to Mr. Worthy's management of his employees. Mr. Allenbaugh told a Black

[7] The parties do not seem to dispute this element.

coworker to "hush before I slap the [B]lack off of you." Various Chimes employees reported this incident, including Ms. Walters, and Chimes disciplined Mr. Allenbaugh accordingly. Finally, Mr. Bryan allegedly touched Ms. Walters inappropriately when they shook hands at meetings during the summer and fall of 2017, and she described Mr. Bryan as staring at her with "bedroom eyes" and a "smirk." Ms. Walters maintains that she reported all these incidents to her supervisor, Mr. Worthy. Based on these allegations and assertions, a reasonable jury could conclude that the comments were unwelcome, and Ms. Walters has expressed that she subjectively perceived the conduct as offensive.

2. The Conduct Was Based on the Race and Sex of Ms. Walters and Her Coworkers.

The content and context of alleged conduct inform whether the conduct was based on a plaintiff's race or sex. *Compare Cent. Wholesalers, Inc.*, 573 F.3d at 175 (finding conduct was based on plaintiff's race and gender when defendant used racially and sexually derogatory language (e.g., n****r, b***h) and plaintiff encountered violent displays (dolls hanging from nooses) in the workplace), *with Ziskie v. Mineta*, 547 F.3d 220, 223-24 (4th Cir. 2008) (finding most employees used profanity and offensive language, therefore plaintiff could not establish that language used towards her was based on her gender).

Here, although the parties do not seem to dispute this element, the circuit court stated in its ruling that Ms. Walters' "claim is limited to a few comments made by coworkers, none of which were related to her race or gender." The inquiry regarding a hostile work environment, however, "may exceed the individual dynamic between the

complainant and [her] 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 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 and the alleged sexual harassment within Ms. Walters' workplace and about which Ms. Walters was aware was based on the race and/or sex of Chimes employees.

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

Ms. Walters alleged four harassing comments by three coworkers, all of which occurred in fall 2017, and sexual harassment by one coworker in summer and fall 2017. Mr. Bryan and Ms. Dorsett worked at the corporate level (superior to Ms. Walters' position), which increases the severity of their alleged conduct. Even given the status of Mr. Bryan and Ms. Dorsett, 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. Ms. Walters testified that she informed Mr. Worthy of various incidents, and she formally reported at least one comment by Mr. Bryan, in which report she wrote that she found the "crack the whip" comment "insulting, demeaning, and racist." She further wrote that "these regular comments make it extremely uncomfortable to come to work," which demonstrates that Ms. Walters subjectively perceived her work environment as hostile. A reasonable jury could conclude that Ms. Walters subjectively perceived her 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, even if in themselves they are highly offensive and even if they originate with supervisors, are insufficiently severe to establish this claim. *Harris*, 510 U.S. 17, 23 (1993); *Sunbelt Rentals, Inc.*, 521 F.3d at 315 (stating conduct must amount to change in conditions of employment); *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. 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)[8]

[8] 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

found that the plaintiff-employee had stated a cause of action[9] 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 the plaintiff. *Id.* at 348-49.

On the other hand, 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. Furthermore, the plaintiff was unable to identify the names of those who used the racial slurs, so the court found that this lack of reasonable specificity undermined the claim. *Id.* at 398. Here, although Ms. Walters can identify the speakers, the occurrences are too isolated and infrequent to create a hostile work environment.

Also, in *Raley v. Board of St. Mary's County Commissioners*, 752 F. Supp. 1272 (D. Md. 1990), the court held the plaintiff-employee failed to establish the requisite severity when the plaintiff's supervisor offensively touched her on two occasions, made

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….").

[9] 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.

sexual remarks to the plaintiff, and had been seen by the plaintiff kissing and touching other women in the office. *Id.* at 1274-75. The court held that the incidents were isolated and did not create an abusive environment. *Id.* at 1280. Mr. Bryan's alleged conduct, of occasionally tickling and massaging Ms. Walters' hand when she shook his hand at meetings, is inappropriate but far less severe and pervasive than the conduct in *Raley*.

Ms. Walters compares her circumstances to those in *Miles v. DaVita RX, LLC*. 962 F. Supp. 2d 825 (D. Md. 2013), but the conduct in that case involved overt, daily sexual comments and gestures by the plaintiff-employee's supervisor from the time the plaintiff-employee began employment for the entirety of at least two years. Unlike in *Miles*, where the plaintiff regularly endured sexually derogative and suggestive language and behavior for at least two years, Ms. Walters worked for Chimes for more than five years before these four comments occurred within a two-month timeframe. Also, Ms. Walters alleged four discriminatory comments by three Chimes employees—in a company of nearly 5,000 employees—who were not her direct supervisors. The present case and *Miles* cannot be likened in terms of severity or pervasiveness.

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 appellees are 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, Sex, or Disability

In support of this claim, Ms. Walters contends that the record contains both direct and circumstantial evidence of discrimination on the basis of race, color, sex, and disability. She also contends that she was subjected to disparate discipline as compared to White Chimes employees. Ms. Walters argues that the circuit court erred by finding that, in order to prevail on this claim, Ms. Walters was required to show comparators—similarly situated Chimes employees who were treated differently on the basis of race. Ms. Walters also maintains that she was subject to disparate pay and was accused of sexual relations with her supervisor because of her sex. Finally, Ms. Walters contends that Chimes subjected her to an unreasonable call-out policy, disallowed her from returning to work, and then terminated her because of her anxiety disorder. Ms. Walters asserts that the circumstances of her termination "raise a reasonable inference of unlawful discrimination based on race, disability and sex discrimination."

Chimes, on the other hand, argues that Ms. Walters was terminated because of her failure to communicate her ability or intention to return to work and that Ms. Walters has not provided evidence to demonstrate that this stated reason was pretextual. Chimes contends that Ms. Walters has provided no direct evidence of discrimination and that, in the absence of direct evidence, she must establish a prima facie case through circumstantial evidence. Chimes asserts that Ms. Walters cannot establish a prima facie case of discrimination under the relevant framework because she was not meeting

Chimes' legitimate expectations at the time of her termination, and she did not raise a reasonable inference of discrimination.

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 Corp. v. Green*, 411 U.S. 792 (1973). *Id.* at 802-04; *Williams*, 136 Md. App. at 164. In *McDonnell Douglas Corp.*, 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 that: (1) she is a member of a protected class, (2) she suffered an adverse employment action, (3) she was performing her job duties at a level that met her 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 woman with a disability, Ms. Walters is a member of various protected groups. State Gov't § 20-606(a)(1)(i) (prohibiting employment discrimination on the basis of "race, color, . . . sex, . . . or disability"). Also, Chimes terminated Ms. Walters, 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, Ms. Walters' 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 non-discrimination 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 terminated Ms. Walters but did not make the replacement hiring decision, Ms. Walters need not demonstrate that she was replaced by someone outside her protected class, but she may still establish discrimination by other means.

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

1. Race and Color Discrimination

In support of her race-discrimination claim, Ms. Walters points to four racially and sexually derogatory comments by coworkers that she overheard. Ms. Walters also describes an incident of allegedly disparate discipline between herself and Kevin Downey, a White man and Chimes employee. She contends that Mr. Downey was responsible for approving particular documentation that she completed, but that she, rather than Mr. Downey, was disciplined for deficient documentation. Mr. Worthy testified that there was, indeed, an incident where documentation was not properly completed and that Ms. Walters was disciplined but Mr. Downey was not. Ms. Walters presented no evidence beyond her own testimony, however, to suggest that these disciplinary choices were wrongful.

Chimes contends that Ms. Walters was not meeting Chimes' legitimate expectations at the time of termination because she had not communicated any intention

to return to work in over a month, so her leave was unapproved and, as Ms. Meadows warned Ms. Walters in a letter, could subject her to discipline, including termination.

Only one of the four alleged comments was specifically about Ms. Walters alone. While all such comments are repugnant, these particular comments were not made by Ms. Meadows, who had the decision-making authority to terminate Ms. Walters. The comments were also unrelated to the act of terminating Ms. Walters but rather were made during normal work activities by coworkers who had no authority to terminate Ms. Walters. 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 Ms. Walters was meeting Chimes' legitimate expectation that Ms. Walters would present to work on days for which she was scheduled. Ms. Walters had not provided medical documentation to support her absences since January 25. Furthermore, February 26 was the last day she notified Ms. Meadows that she would be absent from work, yet Ms. Walters continued not to present to work on days for which she was scheduled. Ms. Walters 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,[10] meaning there is no affirmative inference of nondiscrimination, Ms.

[10] Kim Jordan, a Black woman, temporarily assumed Ms. Walters' duties and Shanell Daniels, a Black woman, permanently replaced Ms. Walters as Maximo

Walters has not presented evidence to otherwise establish discrimination.[11] As the circuit court noted,[12] 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). Ms. Walters incorrectly reads the circuit court's statement to mean that identifying a comparator is required to prevail on a discrimination claim. The court merely stated that this was one way to raise an inference of discrimination. And although identifying a comparator is not required, Ms. Walters still must raise an inference of discrimination. Any such inference is undermined here because Ms. Meadows testified that she was unaware of the racially and sexually derogatory comments or the complaints of sexual harassment. Also, Ms. Walters presented insufficient evidence to suggest otherwise 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 Ms. Walters' membership in a

Manager. Ms. Meadows terminated Ms. Walters but did not hire either Ms. Jordan or Ms. Daniels, so the inference of nondiscrimination does not apply here. *Miles*, 429 F.3d at 489.

[11] 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).

[12] "Retaliation requires a plaintiff-employee to prove that the employer's reason for adverse action is actually a pretext for discrimination. . . . 'This can be accomplished by demonstrating that other employees "similarly situated" and not members of the protected class received more favorable treatment.'" (quoting *Giant of Md., LLC v. Taylor*, 188 Md. App. 1, 26 (2009)).

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 Ms. Walters did not establish a prima facie case for discrimination on the basis of race or color.

2. Sex Discrimination

In support of her sex-discrimination claim, Ms. Walters points to one comment by Ms. Gallaher and to various instances of sexual harassment by Mr. Bryan. Ms. Walters asserts that she was subject to disparate pay as compared to her male counterparts and contends that the Human Resources Department lodged against her false accusations of sexual relations with her supervisor. Again, however, Ms. Walters did not present evidence to create a genuine dispute of material fact on this point. She refers to Mr. Downey's higher pay, but she does not explain how this difference in pay constitutes discrimination. Similarly, although Ms. Walters testified that she believed she was being accused of sexual relations with her supervisor, Ms. Meadows testified that she merely asked Ms. Walters the same questions she had asked other subordinates of Mr. Worthy as part of Chimes' timecard-fraud investigation.

The record does not reflect that either Ms. Gallaher or Mr. Bryan were involved in the decision to terminate Ms. Walters, and their conduct was unrelated to Ms. Meadows' decision to terminate Ms. Walters. Therefore, their conduct does not constitute direct evidence of discrimination under the *Williams* standard, so we turn to the *McDonnell Douglas* analysis.

Ms. Walters asserts that her termination constituted an adverse employment action on the basis of sex. As stated above, however, the record does not support a conclusion that Ms. Walters was meeting Chimes' legitimate expectation that Ms. Walters would present to work on days for which she was scheduled. Ms. Walters has not created a genuine dispute of material fact on this point, and there is insufficient evidence to support an inference of discrimination. "Proof that the decision maker is a member of the same protected class as [the plaintiff] weakens any possible inference of discrimination." *James v. Verizon*, 792 F. Supp. 2d 861, 869-70 (D. Md. 2011). Ms. Meadows, the decision maker, and Ms. Walters, the employee, are both women, so any inference of discrimination based on sex is significantly weakened.

Neither the third nor fourth element is satisfied here, so the circuit court correctly found that Ms. Walters did not establish a prima facie case for discrimination on the basis of sex.

3. Disability Discrimination

In support of her disability-discrimination claim, Ms. Walters points to the call-out policy that Ms. Meadows required of her, the process by which Ms. Walters attempted to return to work, and her termination. All the relevant communications occurred between Ms. Walters and Ms. Meadows, the decision maker. Ms. Walters was required to inform Chimes any time that she was scheduled to work but would not be presenting for her shift, and she was required to provide medical documentation supporting extended absences. Ms. Walters cites only to her own deposition to support her contention that the call-out policy that Ms. Meadows required of her differed from the call-out policy to

which other employees abided. As for Ms. Walters' return to work, all the communications contained in the record indicate that Ms. Meadows offered various opportunities for Ms. Walters to return to work. The letters do not condition Ms. Walters' return on her attendance at the meeting with Ms. Meadows and Ms. Dorsett but rather ask that Ms. Walters participate in this meeting upon her return. Ms. Meadows makes no statement in these letters that indicates animus toward Ms. Walters' disability or need for accommodation; she instead shows a willingness to provide accommodations so long as Ms. Walters communicates her needs. None of Ms. Meadows' statements constitute direct evidence of discrimination under the *Williams* standard, so we turn to the *McDonnell Douglas* analysis.

Ms. Walters points to the timeline on which Chimes granted her FMLA leave, and she contends that Chimes unlawfully denied her request for a stenographer, barred her from returning to work, and terminated her because of her disability. Chimes requested supporting documents for Ms. Walters' FMLA request, but Ms. Walters did not present evidence to suggest that she provided Chimes with all the proper documentation prior to January 2018. Chimes was not obligated to grant her request before receiving the requisite documentation, so "failure" to grant the request sooner could not constitute an adverse employment action. Similarly, the letters from Chimes indicate that they were providing Ms. Walters with opportunities to return to work, so Ms. Walters did not suffer adverse employment action regarding her return to Chimes. The only adverse employment action, then, was Ms. Walters' eventual termination. As stated above, the record does not support a conclusion that Ms. Walters was meeting Chimes' legitimate

expectation that Ms. Walters would present to work on days for which she was scheduled. Ms. Walters has not created a genuine dispute of material fact on this point, and there is insufficient evidence to support an inference of discrimination based on disability.

As above, neither the third nor fourth element is satisfied, so the circuit court correctly found that Ms. Walters did not establish a prima facie case for discrimination on the basis of disability.

4. Chimes Stated That They Terminated Ms. Walters Because She Failed to Communicate, and Ms. Walters 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 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 Products, Inc.*, 530 U.S. 133, 143 (2000). For example, in *Reeves*, the plaintiff 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 demonstrated that he "properly maintained attendance records," and the false record on which the company relied to terminate the plaintiff related to a day during which the plaintiff 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 reasoning was pretextual. *Id.*

Chimes provided a nondiscriminatory reason for terminating Ms. Walters: that Ms. Walters failed to communicate her ability or intention to return to work at Chimes after taking 12 consecutive weeks of approved FMLA leave (from November 16, 2017 to

January 25, 2018) in addition to over five consecutive weeks of unapproved leave (from January 26, 2018 to March 9, 2018). The record contains letters from Ms. Meadows to Ms. Walters sent on January 26, February 2, and February 16, requesting medical documentation and a statement as to Ms. Walters' intention to return to work. The record reflects that Ms. Walters left voicemails for Ms. Meadows until February 26, 2018 but had not provided medical documentation since January 25.

To support her argument of pretext, Ms. Walters testified that Shanell Daniels, a Black woman, was Ms. Walters' subordinate when Ms. Walters held the Maximo Manager position, and Ms. Daniels was promoted to Maximo Manager when Ms. Walters was terminated. Ms. Walters contends that Chimes' decision to hire a Black woman in her place was to disguise their discriminatory termination of Ms. Walters. This bare statement, and failure to present evidence to prove that Chimes' reason for terminating Ms. Walters was false, is insufficient to raise a genuine dispute of material fact as to the reason for Ms. Walters' termination. The circuit court, therefore, correctly granted summary judgment in favor of Chimes on Ms. Walters' discrimination claims.

C. Failure to Provide Reasonable Accommodations

Ms. Walters alleged that Chimes violated FEPA because Chimes failed to provide reasonable accommodations for her disability when Chimes denied her a stenographer in a meeting, did not allow her to return to work, and terminated her. In support of her claim, Ms. Walters contends that Chimes had notice of her disability and Ms. Walters was qualified to serve as Maximo Manager at the time of termination, but that Chimes failed to engage in the interactive process to find a reasonable accommodation for her

disability. Chimes, however, argues that Ms. Walters was not qualified to serve in this position because she misled Chimes as to her need for medical leave, she did not communicate her ability or intent to return to work, and Chimes reasonably believed Ms. Walters had committed timecard fraud.

Also, Ms. Walters asserts that the denial of her stenographer request for the January 16, 2018 meeting constituted failure to accommodate. Chimes states that Ms. Meadows offered to instead have a third party present to record the meeting and argues that this alternative did not violate FEPA. Further, because Ms. Walters' doctors did not communicate a need for accommodation other than leave, Chimes argues that it could not have known in advance of this meeting to provide such an accommodation.

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) she was an individual with a disability; (2) her employer had notice of her disability; (3) that with reasonable accommodation, she 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 Ms. Walters had a disability that required an accommodation—specifically, medical leave. Once Chimes received medical documentation supporting Ms. Walters' request for medical leave on January 11, 2018, Chimes granted her FMLA request and designated all Ms. Walters' absences since November 16, 2017 as FMLA-approved.

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). Reading all facts in the light most favorable to Ms. Walters, at the time she requested one day off per week as an accommodation, Ms. Walters was otherwise qualified to serve as Maximo Manager—Chimes did not yet suspect that Ms. Walters was misrepresenting her need for medical leave or that she had committed timecard fraud, and, at that time, her communications via doctors' notes indicated that she could return to work on January 25.

To impose a duty upon employers to provide accommodations, though, employees must both notify employers of their disabilities and communicate their desire for accommodations. *Atkins*, 448 Md. at 213 (citing *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346-47 (4th Cir. 2013)). Ms. Walters communicated her need to work fewer hours per week, and Chimes granted her a 12-week entitlement under FMLA. However, Ms. Walters then did not appear at work when she was scheduled. As for her need for a stenographer in meetings with Human Resources based on her disability, Ms. Walters did not request this accommodation until she appeared for the meeting on January 16, 2018. 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 Ms. Walters requested a stenographer, Ms. Meadows denied her specific request but stated that there would be a third party present to record the meeting. Ms. Walters testified that this alternative was not comfortable for her, so she did not participate in the meeting or make another request for this kind of accommodation. Because employees are not entitled to the accommodation of their choice, and Ms. Walters did not provide evidence that Ms. Meadows offered the alternative accommodation in bad faith, Ms. Walters cannot prevail on this claim. The circuit court correctly granted summary judgment in favor of Chimes on this claim.

D. Retaliation

Ms. Walters alleged that Chimes violated FEPA because her termination was retaliatory, in response to her complaints of workplace discrimination. Ms. Walters contends that she complained to Mr. Worthy, on October 2, 2017, about disparate pay between Black and White employees at BWI, about Ms. Dorsett's disparate discipline of male and female employees, and about various racially and sexually disparaging comments made by Chimes employees. Ms. Walters maintains that Mr. Worthy relayed these complaints to Mr. Bryan.

Ms. Walters further argues that the individual appellees violated FEPA on the basis of retaliation. In support of this contention, she restates her allegations that Ms.

Gallaher,[13] Mr. Bryan,[14] and Mr. Allenbaugh[15] made offensive comments, and that Ms. Dorsett[16] and Ms. Meadows[17] were aware of these comments.

Chimes argues that Ms. Meadows was unaware of these complaints, so Ms. Walters cannot establish the causal link between the protected activity and adverse employment action, and, accordingly, she cannot prevail under the *McDonnell Douglas* framework. Chimes further argues that even if Ms. Meadows did have notice of the complaints, the temporal proximity was too attenuated to give rise to an inference of causation because the complaints were made in fall 2017, but Ms. Walters was not terminated until March 2018. Finally, Chimes argues that Ms. Walters has provided no evidence that Chimes' reason for terminating Ms. Walters was pretextual.

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,

[13] Ms. Gallaher allegedly called Ms. Walters a "pretty young [B]lack thing" and said, "this is what Caesar has his monkeys doing" with reference to Mr. Worthy and his subordinates, a majority of whom are Black.

[14] Mr. Bryan allegedly told Mr. Worthy to "crack the whip on them to get them in line" with reference to Mr. Worthy's subordinates.

[15] Mr. Allenbaugh allegedly told one of Ms. Walters' coworkers to "shut up before I slap the [B]lack off of you." Mr. Allenbaugh is not a party to this case.

[16] Ms. Walters asserts that Mr. Worthy reported Ms. Walters' complaints to Ms. Dorsett and Mr. Bryan. Mr. Worthy also testified that he relayed Ms. Walters' complaints to the Human Resources Department.

[17] Ms. Walters asserts that Mr. Worthy relayed her complaints to Ms. Meadows, and Mr. Worthy testified that he met with Ms. Meadows with respect to the "slap the [B]lack off of you" comment.

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: 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) "she engaged in a protected activity," (2) "her employer took an adverse action against her," and (3) "her employer's adverse action was causally connected to her protected activity." *Edgewood Mgmt. Corp. v. Jackson*, 212 Md. App. 177, 199 (2013); *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 650 (4th Cir. 2002) (stating retaliation claims are evaluated under this framework). 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, Ms. Walters complained to her supervisor of workplace harassment, which is prohibited conduct under State Government § 20-606. Adverse employment actions "include[] any retaliatory act 'if, but only if' that act adversely affected the 'terms, conditions, or benefits' of [the plaintiff's] employment." *Thompson*, 312 F.3d at 650-51 (quoting *Von Gunten*, 243 F.3d at 866). Ms. Walters was

terminated, which is certainly an adverse employment action. Therefore, Ms. Walters has established the first two elements of this claim.

Establishing the causal link between these elements, though, requires sufficient evidence to raise at least a reasonable inference of causation. 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, Ms. Walters maintains that the harassment occurred in October and November 2017, and she complained of the conduct during the same timeframe. Ms. Meadows terminated Ms. Walters in March 2018. The complaints preceded the termination, but several months elapsed between the two events. Furthermore, Ms. Meadows testified that in March 2018, she was unaware of Ms. Walters' complaints to her supervisor. Also, Ms. Walters stated in her deposition that she did not relay her complaints to anyone but Mr. Worthy, who is not a member of Human Resources, and Ms. Brewer, the Director of New Business, who is likewise not a member of Human Resources. Absent evidence that Ms. Meadows did, in fact, have notice of Ms. Walters' complaints of harassment, we cannot find that Ms. Walters established a prima facie case

for retaliation as to Chimes or Ms. Meadows because there is insufficient support in the record for the requisite causal link.

Ms. Walters also brought this claim against Mr. Bryan, Ms. Dorsett, and Ms. Gallaher, but none of the individual appellees directly participated in the decision to terminate Ms. Walters, which is the relevant adverse employment action. Furthermore, non-supervisory employees may have insufficient authority over the plaintiff to be liable. *See Tyson v. CIGNA Corp.*, 918 F. Supp. 836, 841 (D. N.J. 1996) (stating non-supervisory employees cannot be liable under Title VII due to insufficient authority). Given the express language of the statute and because FEPA was intended to be interpreted in harmony with Title VII, we agree: Non-supervisory employees cannot be liable under a theory of retaliation because they have insufficient authority, and supervisors cannot be directly, personally liable for retaliatory termination when the termination decision was not their own. *See Atkins*, 448 Md. at 218-19 (reviewing federal case law interpreting and applying federal disability legislation in order to interpret Maryland's FEPA). The circuit court correctly granted summary judgment on this claim as against all appellees.

II. THE CIRCUIT COURT CORRECTLY HELD THAT MS. WALTERS CANNOT PROVE THAT THE INDIVIDUAL APPELLEES AIDED OR ABETTED FEPA VIOLATIONS.

In support of Ms. Walters' claim that the individual appellees aided and abetted FEPA violations by Chimes, Ms. Walters asserts that Mr. Bryan sexually harassed her and made racially inappropriate comments; Ms. Dorsett ordered disparate discipline of Ms. Walters as compared to her male coworkers and failed to act on Ms. Walters'

complaints of workplace harassment; and Ms. Meadows interfered with Ms. Walters' FMLA rights and terminated Ms. Walters. Ms. Walters did not state any contentions against Ms. Gallaher as to this claim. Additionally, Ms. Walters did not cite to any case law to support this claim. In response, Chimes argues that FEPA simply does not provide individual liability for individuals who do not qualify as "employers."

FEPA provides,

> 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. Ms. Walters does not identify under which subsection of this provision she grounds her 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 relate to the individual supporting discriminatory acts of another, such as the individual's employer, as opposed to 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). Ms. Walters has provided evidence only of alleged direct discrimination; she did not provide evidence that the individual appellees assisted or intended to assist Chimes in the commission of discriminatory acts.

Chimes' argument that FEPA does not impose individual liability on non-employers is misplaced. Under State Gov't § 20-801, FEPA imposes liability on "a person" for that person's participation in the discriminatory acts of another person. *Dici*, 91 F.3d at 552-53. Because we agree with the circuit court that Ms. Walters failed to prove that Chimes violated FEPA, however, the individual appellees cannot have aided or abetted Chimes. We therefore affirm the circuit court's grant of summary judgment to the individual appellees with respect to this claim.

III. THE CIRCUIT COURT CORRECTLY HELD THAT MS. WALTERS IS NOT ENTITLED TO LOST WAGES BECAUSE SHE MISLED CHIMES AS TO HER NEED FOR FMLA MEDICAL LEAVE, AND, EVEN ASSUMING SHE COULD PREVAIL ON THE FEPA CLAIMS, ANY COMPENSATION-CALCULATION WOULD BE CAPPED AT AUGUST 20, 2020.

In support of this claim, Ms. Walters argues that the after-acquired evidence doctrine does not apply because Chimes did not advise Ms. Walters during discovery that they discovered information regarding an independent basis for her termination. Conversely, Chimes argues that this doctrine applies and caps Ms. Walters' entitlement. After Ms. Walters' termination, Chimes discovered that Ms. Walters held a second full-time position while employed by Chimes full time and that she misrepresented her need for medical leave, which constituted independent grounds for termination. Chimes contends that Ms. Walters' backpay would therefore be limited to the time between Ms.

Walters' termination on March 9, 2018 and when Chimes discovered Ms. Walters' misrepresentations on August 20, 2020 through discovery in this litigation.

The remedy for violations of anti-discrimination laws is restorative backpay, which aims to restore the victim to the position in which he or she would have been absent the discrimination. *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 764 (1976); *Shabazz v. Bob Evans Farm, Inc.*, 163 Md. App. 602, 630-31 (2005). If a court finds that an employer violated anti-discrimination laws, the court has broad discretion to fashion remedies for the victims of discrimination. *Franks*, 424 U.S. at 764. We agree with the circuit court that appellees cannot be liable under FEPA based on this record; therefore, Ms. Walters is not entitled to this remedy.

Furthermore, even if Ms. Walters could prevail on her FEPA claims, she could not recover backpay beyond August 20, 2020 under the after-acquired evidence doctrine. Under this doctrine, "[o]nce an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 362 (1995). The employer must establish that the wrongdoing would have been sufficient, independent grounds for termination. *Id.* at 362; *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 298 (4th Cir. 2009) (finding reasonable jury could conclude after-acquired evidence of employee's misrepresentations to a compliance officer constituted sufficient grounds for termination). If the employer establishes this, the court should calculate "backpay from the date of the unlawful

discharge to the date the new information was discovered." *McKennon*, 513 U.S. at 362; *Russell v. Microdyne Corp.*, 65 F.3d 1229, 1238 (4th Cir. 1995).

Chimes terminated Ms. Walters on March 9, 2018 and discovered on August 20, 2020 that Ms. Walters had been working full-time at the Doctor's Community Hospital while employed with Chimes. According to certified records from DCH, Ms. Walters worked many of the days in January and February 2018 when she had simultaneously represented to Chimes that she required medical leave. Ms. Walters has not disputed the authenticity or veracity of the DCH records. Chimes stated that such medical-leave fraud and abuse constituted independent grounds for termination, and Ms. Walters has not disputed this contention either. Therefore, backpay beyond August 20, 2020 would be inappropriate. We agree with the circuit court's grant of summary judgment on this claim and affirm on the basis that Ms. Walters cannot prove any FEPA violations, so she is not entitled to any remedy.

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