Circuit Court for Carroll County
Case No. 06-C-12-60697

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 886

September Term, 2017

MARYLAND DEPARTMENT OF HEALTH
AND MENTAL HYGIENE

v.

ANEITA HENRY

Arthur,
Shaw Geter,
Kenney, James A., III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: August 15, 2018

*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.

This appeal arises from an employment discrimination and retaliation action filed in the Circuit Court for Carroll County against appellant, the Maryland Department of Health and Mental Hygiene ("DHMH"). Appellee, Aneita Henry, a charge nurse employed with DHMH, claimed the hospital, through various personnel measures, had engaged in employment discrimination actionable under the Maryland Fair Employment Practices Act ("MFEPA"), and had retaliated against her in violation of Title VII of the federal Civil Rights Act of 1964, amongst other claims. She sought compensatory, consequential, punitive, and nominal damages, as well as attorney's fees and costs. DHMH filed a motion for summary judgment, which was denied. The bench trial began on July 15, 2013 and continued on intermittent dates through January 22, 2015. Appellants moved for judgment, which was also denied. On December 23, 2015, the court issued a memorandum opinion and found DHMH liable for disparate treatment under MFEPA, and for retaliation under Title VII. The damages hearing occurred on June 3, 2016. On June 5, 2017, the Court entered judgment against DHMH in the total amount of $300,000 in compensatory damages, plus attorney's fees and other costs. This appeal followed.

We have condensed and reworded appellant's questions presented as follows[1]:

[1] Appellant presented the following questions for our review:

1. Did the circuit court lack jurisdiction over Mrs. Henry's MFEPA discrimination claims to the extent that she failed to file those claims within six months of their occurrence, as required by statute?
2. Did the circuit court similarly err in finding liability under MFEPA for discriminatory actions that occurred more than two years before Mrs. Henry filed her complaint in circuit court?
3. Did the circuit court lack jurisdiction over Mrs. Henry's Title VII retaliation claims to the extent that she failed to file those claims within 300 days of their occurrence, as required under Title VII?

1. Did the circuit court err in finding liability under Henry's MFEPA disparate treatment claim and Title VII retaliation claim when it lacked jurisdiction because she failed to exhaust her administrative remedies or file those claims within the statute of limitations?

2. Did the circuit court improperly award Henry a double recovery by determining that the same set of actions were discriminatory under MFEPA and retaliatory under Title VII and assessing damages under both?

For the reasons discussed below we affirm.

BACKGROUND

Appellee Aneita Henry was first employed by Springfield Hospital Center ("Springfield" or "Hospital"), an impatient psychiatric hospital operated by the Maryland Department of Health and Mental Hygiene ("DHMH"), in 1989. She was promoted several times, ultimately obtaining her registered nurse ("RN") license and becoming an RN-C or "charge nurse" in July of 2008. For all times pertinent to the instant matter, appellee was employed as a RN-C. Appellee is African-American, of Jamaican descent.

A charge nurse at Springfield has the general responsibility of running the unit, including providing direct care to patients; performing medication checks; supervising staff, including delegating tasks; assessing the needs of the unit; advocating for patients and staff; and communicating with management. Appellee served as the RN-C for the Hitchman B ("HB") unit during the nightshift, from 11:00 p.m. through 7:00 a.m. The Hitchman Building has four units – A, B, C, and D – and is part of the Recovery Program along with the McKeldin Building and its four units. The HB unit houses the geriatric

4. Did the circuit court improperly award Mrs. Henry a double recovery by determining that the same set of actions were both discriminatory under MFEPA and retaliatory under Title VII and assessing damages under both?

psychiatric ("geri-psych") patients, with whom appellant worked throughout her career at Springfield.

The Department of Nursing is managed by the Nursing Administration Team ("NAT"), consisting of the Director of Nursing ("DON") Gloria Merek and four Assistant Director of Nursing ("ADON"). An ADON is assigned to oversee every program. ADON Karen Unger was responsible for the Recovery Program, overseeing appellee. ADON Jennifer Bunce managed the Infection Control and Preventative Health Units. ADON Pamela Dorsey was responsible for managing the Acute Care Program, as well as overseeing the Nursing Staffing Center. They served under Merek from 2008 through 2011. Merek, Unger, and Bunce are Caucasian. Dorsey is African-American. Nurse Managers, or RNMs, oversee the staff on a daily basis, broken down by shift. They are not, however, located in the unit, but rather, in a separate building.

As the DON, Merek is responsible for patient care; developing policies for governance of the nursing department; and staffing of the units, including managing some 352 employees. Merek is also responsible for handling disciplinary matters and performance issues within the nursing department.

The nursing department works with the Human Resources Department ("HR") to handle disciplinary actions. Patricia Johnson acted as the Director of HR from August of 2008 through February of 2010. She is African-American, and during her tenure, supervised an all Caucasian team. Connie Schaeffer served as Johnson's Deputy Director of HR and her "Second in Command," and has served in HR since 2007. Johnson testified that Schaeffer dealt mainly with disciplinary matters, while she had general oversight.

Schaeffer testified her duties include, but are not limited to, oversight, processing new hires, separations, reviewing any requests for disciplinary actions, review and signing off on performance evaluations, and representing the agency (DHMH) at grievance appeal hearings.

Schaeffer explained the disciplinary process as follows: if a supervisor feels there is a concern regarding an employee that may warrant an investigation, the Department will schedule a meeting with the employee to get an explanation, conduct an investigation, and thereafter present the results to HR and make a recommendation, if applicable. If discipline is warranted, Schaeffer prepares a Notice of Disciplinary Action and gives the notice to the employee. A Personnel Account Record ("PAR") form is used by the staff to write up any disciplinary concerns to be presented to HR. In a given year, Schaeffer estimates she processes and approves between 200-250 PARs for the entire hospital, and estimates that around two-thirds come from the nursing department.

An employee may also receive an Instructional Memorandum or Counseling notice. These are considered to be educational in nature and are not disciplinary. Copies of these documents would generally not be provided to HR, but would be maintained in the Nursing Department's personnel files and could be considered by nursing management in performance evaluations.

Yearly performance evaluations are authored by an employee's supervisor and encompass attendance, duties, performance, and any disciplinary actions. For RN-Cs, performance evaluations are completed by the RN Supervisor and provided to the Director of Nursing. If an employee desires, they may complete a self-assessment portion of the

evaluation. The scale for evaluations is: Outstanding, Exceeds Standards, Meets Standards, Needs Improvement, and Unsatisfactory. Only performance reviews with Needs Improvement ratings are reviewed by HR prior to dissemination to the employee. If an employee receives an unsatisfactory rating, the employee is to be notified that they could be terminated if the next performance evaluation remains at an unsatisfactory level. Schaeffer testified that there is no procedural requirement to warn an employee of a possible negative rating. If an employee receives an Unsatisfactory or Needs Improvement rating, their annual pay increment is denied.

If an employee wishes to challenge a performance evaluation rating, they may file a grievance. A hearing will be conducted and the employee is afforded the opportunity to present their case as to why the rating is inappropriate, and the supervisor can present an argument as to the basis for the rating. Schaeffer testified that if an HR administrator was not available, she would hear the grievance. A written decision is then issued by HR and may be appealed to the DHMH Office of Employee Relations.

In September of 2008, approximately two months after her promotion, appellee received an Instructional Memorandum from RNM Robin McCormack, who oversees the HB nightshift, regarding allegations made by a Direct Care Assistant ("DCA") that appellant made an insulting comment to a third employee. Henry met with McCormack to discuss the matter, and expressed frustration that she was "written up" based upon pure hearsay, and that other nurses routinely use curse words without being counseled. Henry declined to sign the memorandum, and wrote on the bottom "it is malicious & punitive & petty…everyone has said things…you're out to get me & most African-Americans…I

consider this harassment." Henry, on September 22, 2008, filed a grievance with her union representative, claiming racial discrimination.

Until that point, appellee had never received a negative employment evaluation throughout her almost 20 years of employment with Springfield. On or about October 21, 2008, however, for the first time, she received an annual performance rating of "Needs Improvement." Henry's mid-cycle review in April of 2008 found she "Meets Standards," and she testified she had not been warned of any performance issues or potential for a negative rating prior to receiving her annual evaluation. Schaeffer reviewed the performance evaluation, discussed it with the Nursing Department, and signed off on the evaluation before it was presented to appellee. As a result, appellee was denied an annual pay increment in November of 2008.

Following receipt of the evaluation, Henry was called to meet with her head nurse, Denise Berry; Robert Vaughn, nurse manager for HB; and Anne Milstred, liaison for HR. Henry disputed several marks, and in particular took issue with the charge of being late to shift. She testified she was once written up by RNM McCormack for arriving one minute late to shift and that this incident was part of her low performance rating. Milstred advised appellee that if she did not raise her evaluation to a level of "Meets Standards," they would recommend termination.

Henry thereafter met with HR Director Johnson, reiterated her issues with her rating, and further argued it was evidence of racial discrimination. Johnson investigated the ratings and determined the "Reports to Work on Time" rating could be improved, as Henry had only received a counseling in that regard, and noted there seemed to be a discrepancy

between the "Interacts Positively with Co-Workers" rating of "Needs Improvement," and the "Is Courteous to Customers and Co-Workers" standard where she "Meets Standards."

In November, Henry filed a grievance regarding her performance evaluation, and several of Henry's co-workers wrote to nursing administration with comments about her professionalism. Schaeffer, who heard the grievance, as a result of the evidence presented, determined that certain scores within the performance evaluation should be raised, and subsequently modified Henry's evaluation in January of 2009. The amended evaluation gave appellant a rating of "Meets Standards," and the previous evaluation was removed from her personnel file. She was also granted her annual pay increment. While Henry was not satisfied with the amended performance evaluation, she did not file an appeal to the DHMH Office of Employee Relations.

Additionally, in October of 2008, Merek reported Henry to the Maryland Board of Nursing ("Board") Complaints and Investigation Division, citing "a pattern of substandard nursing practice regarding violation of the NPA delegation and non-compliance with the policy and procedure for Springfield Hospital Center." The Board governs all nurse licensure and competency in the State of Maryland, and has the ability to revoke licensure. The complaint listed Schaeffer and Milstred as witnesses, though Schaeffer later testified she had no involvement in the referral of Henry to the Board. All persons listed as witnesses or persons with knowledge are Caucasian. The complaint alleged Henry

> [o]n 10/8/07…directed a DCA to complete the assignment sheet for the unit. This task cannot be delegated because the DCA/CAN had to make an assessment of the patient's acuity and the staff's competences. On 8/23/08, the RN signed off on the milieu rounds sheets without reviewing the documentation. On 8/23/08, the RN was overheard referencing an employee

> as a troublemaker. On 9/23/08, the RN failed to complete the milieu observation sheet as directed. On 9/24/08, the RN obtained a lab specimen but did not label in front of the patient (NPSG) and sent the unlabeled specimen to the lab so the specimen had to be destroyed and the patient "stuck" again. The RN has had several non-professional interactions with her co-workers and does not role model the correct professional behaviors associated with an RN Charge.

The Board thereafter informed Henry an investigation would be conducted. Henry initially did not know what the complaint regarded. A union representative represented her in the matter, and argued she had been targeted due to racial animosity. Regarding her failure to label the 'specimen,' Henry testified she labeled the sealed bag containing the sample, and that a Caucasian nurse who had once made a similar mistake had not been reprimanded for the error. After an investigation, the BON ultimately voted to take no action against Henry, as the evidence did not support a violation.

In February of 2009, Henry received two counseling memos, one from RNM Berry and one from ADON Bunce, alleging Henry failed to report overtime work hours in advance. Thereafter, around February 10, 2009, Henry emailed Johnson, cc'ing Merek, indicating she wanted to file a harassment charge. She wrote that, over the previous months, she received many letters of instruction, PARs, reprimands, and "intimidating memos," that no other staff had received. Henry continued that the harassment had interfered with her ability to function at work, as management looked for trivial mistakes to use against her. She felt she was singled out because she was black and of Jamaican descent. Johnson responded that she would investigate, but testified she understood Henry's complaint to be one of general harassment, and did not investigate it as a matter of racial discrimination. At the conclusion of her investigation, on March 18, 2009,

Johnson informed Henry there was not enough information to substantiate a claim of harassment.

On July 15, 2009, Henry was suspended for three days, following alleged unprofessional behavior and inappropriate comments. Henry testified that in May of 2009, DCA Beverly Johnson, who had previously worked the nightshift at HB, informed her that another DCA, Errol Thornton, had kissed her and sexually harassed her. Henry was unable to speak on the matter at that moment, and told DCA Johnson they would talk later. A few days later, Henry spoke with Johnson about the incident, and inquired whether the kiss could have been misinterpreted. She denied Johnson's allegation that she had asked "[w]hy would you want to file against Errol Thornton, he is a nice black man." Henry testified Johnson became upset, believing Henry was defending Thornton. She further denied Johnson's allegation that she had advised her not to file a sexual harassment complaint, but instead told her she could not be a part of the complaint, because she was not a witness to the incident.

Despite no investigation being completed, by either the Nursing Department or HR, Henry received an official reprimand and three-day suspension. She thereafter filed a grievance with her union. Henry testified she spoke with Director Johnson and RNM Carolyn Reed about the incident, claiming she had once again been singled out because of racial discrimination. As of the time of the trial, appellee's grievance process was still pending, though she had served the three day suspension.

In early December 2009, the Hospital conducted a mock drill, simulating a patient emergency which required all staff to respond quickly. The mock drills are used as

performance improvement tools and the dates and times for the drills are kept secret, so employees respond as if it were a true emergency. The drill was conducted at approximately 6:25 a.m., just as Henry was about to conduct a blood sugar test on a patient. Her unit housed the emergency equipment which was required to be delivered to the drill. When the code activated, Henry grabbed one of the two carts containing emergency equipment, called to another nurse, Jackson, to grab the other, and ran to the code. On the way, she saw another nurse, Godfrey, and instructed her to report to the code as well. When Henry and Godfrey arrived in the conference room, they realized it was a drill. Henry testified she reported within the five minute response time, and other staff members responded after her. Assistant Director Dorsey was present at the code. Dorsey inquired as to the location of the defibrillator, which was on the cart Jackson was to bring to the code. Henry testified another nurse, Yuan, ran up the hall to assist Jackson with the cart, took the bag containing the defibrillator, and placed it on the table in the conference room. As not all staff and equipment arrived at the code within the first 5 minutes, the drill was unsuccessful.

Henry subsequently received a reprimand after a PAR was submitted, alleging she failed to respond timely to the drill, had improperly placed an emergency bag on the drill table, and made inappropriate statements regarding the timing of the drill. Dorsey alleged Henry was late to the drill, was angry regarding the timing of the drill, and that she had thrown the bag containing the emergency equipment onto the drill table. In response, Henry filed another grievance, arguing she was again singled out because of her race. She denied that she was late to the drill and that she had put the emergency equipment on the

table, but she admitted she had mentioned the timing of the drill was inconvenient, as the HB unit was very busy.

An investigation ensued and several nurses present at the drill provided written statements. The statements, including Yuan's, and the sign-in sheet from the drill, corroborated Henry's claim she had timely arrived at the drill and that Yuan had placed the emergency equipment on the table. RNM Reed, who was also present at the drill, testified Henry was not angry or unprofessional, but simply voiced her concern regarding the timing of the drill, which was also corroborated by the other nurses' statements.

At the conclusion of the investigation, HR Director Johnson, in February of 2010, emailed Barry Stabile, the Chief Operating Officer, and Schaeffer, stating "[t]he nursing department is not willing to settle; however, the documentation is not in management's favor and does not support the charges of unprofessional behavior during the drill." ADON Dorsey testified she did not want to settle because Henry represented nursing management, and she expected her to behave as a role model for other staff. Two other members of the emergency committee, Dr. Sevilla and Kim Metzger, concurred with Dorsey.

While awaiting a response on the mock-drill grievance, during the nightshift of January 19, 2011, TD, a direct care assistant, was pulled in to assist in HB with several patients. Henry testified that, upon her arrival, she provided TD with her assignments, including an instruction to check on her patients in 15 minute increments. Henry thereafter witnessed TD using her phone, and when Henry attempted to direct TD to complete her assigned tasks, TD refused, cursed, and walked off. The next day, Henry completed a PAR against TD, which she submitted to her supervisor, RN-Supervisor ("RNS") Sherie Hames.

Henry also reported the incident to RNM McCormack. TD later admitted to using her cell phone, and received a reprimand.

Several days later, on or about January 25, 2011, Henry was issued a reprimand by RNS Hames, initiated and approved by Milstred. Henry alleges this was in retaliation for the PAR she filed against TD. The written reprimand alleged Henry assigned TD difficult and acute patients and that Henry failed to list the patients on the assignment sheet. The PAR alleged, of the four patients assigned to TD, two had recent hospitalizations and all needed frequent assessments and extended care, which TD was not qualified to do. Further, it was not clear who provided care for those patients between the hours of 11:00 p.m. and 3:00 a.m., as TD had only arrived on the unit between 3:00 a.m. and 4:00 a.m.

Director Merek testified she did not specifically remember authorizing the reprimand, but was certain it was discussed by the nursing administrative team. Merek recalled the PAR contained an allegation Henry had assigned TD to a patient who had very recently arrived from Carroll County Hospital Center, with the possibility of having his legs amputated. She stated said patient was also non-verbal and had lesions covering his legs, and should have been assigned to the other licensed nurse on duty, Godfrey.

Henry again filed a complaint with HR that she had been targeted due to racial animosity. She questioned the classification of the patients as "acute," as all HB patients were "chronic" and in the unit for long-term care. She further testified all of the patients assigned to TD that night were stable, and she was simply to check on them. TD was qualified to perform this task, as it is within her job description as a DCA, and she had been pulled into the nightshift on several occasions. At trial, Henry presented a portion of the

BON Guidelines Handbook, which provides a nurse may delegate a nursing task to an unlicensed individual, but that the nurse retains responsibility for the individual's actions. She further testified if something acute had occurred while TD was checking on the patients, she knew to alert the charge nurse. Henry stated all patients were monitored every 15 minutes throughout the entirety of her shift, as, prior to TD's arrival, she had assigned a different staff member each hour to conduct checks. She testified she regularly only assigned patients to a particular staff member for the morning hours, when patients needed to be woken up and taken to the day hall. Finally, she again testified other nurses routinely followed the same procedure for completing assignment sheets without reprimand.

Immediately following the incident with TD, on January 21, 2011, Merek issued a directive to nursing management that a second licensed nurse would no longer be pulled in to assist the HB nightshift. The customary practice for all Hitchman units had been that if only one licensed nurse was scheduled for the nightshift, a second licensed nurse would be pulled in to help, based on the acuity of the patients and amount of work required. The new directive, however, applied only to the HB nightshift, with all others permitted to maintain or pull in a second licensed nurse.

Director Merek testified the directive did not mean Springfield would not follow its staffing policy, requiring the manager to assess the unit and send a second licensed nurse if necessary, but, rather, that a second licensed nurse would not automatically be sent to HB. She stated prior to the policy change, nurse managers would 'arbitrarily' pull in licensed nurses to work the nightshift, and that the assignment caused 'terrible morale' because the pull-in nurses would complain they were forced to do the brunt of the work.

She also stated several of the complaints from staff were related to Henry. Further, although the staffing minimums for the number of licensed nurses on only this shift changed, she stated the directive brought HB into line with the licensed staffing minimums as the other Recovery units and an additional DCA was added to the HB nightshift from 6:00 a.m. to 2:30 p.m., to assist with getting the patients up for the day. Finally, she testified the directive applied to all nurses on the HB nightshift, not just Henry.

Henry testified the no-pull directive was again targeted at her, due to racial animosity. At the time, she was one of three charge nurses who regularly worked the nightshift on HB, all three were African-American. For a given shift, the charge nurse was required to check doctor's orders, administer medications, perform treatments, provide direct care to patients, supervise nursing staff, and perform her administrative duties. The average population in the unit was 22-24 geriatric patients. She found it difficult and overwhelming to work the nightshift as the only licensed nurse, and after assessing the acuity and needs of the unit, would request a second nurse from the RNM when the amount of work required it. On several occasions after the no-pull directive was issued, she requested a second nurse from RNMs McCormack, Reed, and Berry. They declined most requests, except when they concluded Henry was so overwhelmed it was dangerous for her to be the only licensed nurse on the shift.

There was testimony that, during the meeting discussing the no-pull directive, Merek referred to Henry as "toxic," and commented the new policy was in response to an event involving Henry, which Merek denied. Several RNMs, including Reed, McCormack, and Claudia Thomas, questioned the change. Merek testified she met with

the RNMs and ordered that, if the staff provided data evidencing a need for the second license nurse, she would re-evaluate the policy. She stated she received no data, only "bare" requests to return to prior staffing minimums. Further, she stated she had conducted evaluations of HB in February and March of 2011, after RNM Reed raised questions about staffing, and found a second licensed nurse was not needed, despite McCormack and Reed's claims to the contrary.

McCormack specifically testified to her concerns about staffing regarding another instance in March of 2011, when Henry requested a second licensed nurse. Henry stated several of the patients were awake. There was an unusually high amount of patient care activity and nursing intervention needed on the shift. Upon receiving her request, McCormack called Bunce, who advised her to go to the unit and check the acuity herself before sending a second nurse. After a second request from Henry, and Henry's insistence that if she did not receive help, she would need to go to the emergency room herself, McCormack pulled in a second licensed nurse. In her email to Bunce justifying the pull, McCormack indicated the primary reason she did not initially pull in a second licensed nurse was fear of receiving a reprimand. McCormack further testified she, thereafter, spoke with Merek and told her the unit should have a second license requirement.

Reed testified to an instance on March 1, 2011, in which she pulled in a second licensed nurse to HB, at Henry's request. Reed assessed the unit, determined the acuity was high, and provided the second nurse. She thereafter wrote an email to Merek, explaining her decision and suggesting the emergency equipment be moved from HB. Reed had previously discussed her concerns with HB's heavy end of the month workload,

and the implications for the nightshift staffing. Reed was not reprimanded for pulling in the second nurse, and Merek moved the emergency equipment to Hitchman A.

Shortly thereafter, on January 28, 2011, Kajal Kaneria, a DCA, was pulled in to work the HB nightshift. Kaneria testified that, prior to that night, she did not know Henry. Kaneria testified that upon arrival to the unit, she did not see an assignment sheet, and Henry failed to provide her with an assignment or direction. She thereafter testified she saw Henry push a patient in an effort to get her to go to the bathroom. At her supervisor's insistence, Kaneria completed a "pull-sheet" for the shift, in which she also alleged Henry was "rude" and not "treating patient [s] right," that the "patients are abused by staff," the HB atmosphere was "not normal," and that staff behavior was "not appropriate."

Upon hearing the accusations on her next scheduled day of work, Henry's blood pressure elevated so, she asked to be excused from work. She thereafter drove herself to a different hospital, where, following an examination, her doctor directed she remain out of work until February 9, 2011.

Henry ultimately denied the accusations, testifying she had verbally counseled and directed Kaneria to perform her duties after observing she was not, and, as a result, Kaneria became upset and resentful. She further testified that another nurse, Evelyn Hall, had taken the patient in question to the bathroom, and further denied any inappropriate behavior. Henry's account was corroborated by Hall, who confirmed she had been the one to take

the patient in question to the restroom that morning. The complaint was investigated by the Springfield Hospital Police Department, and determined to be unfounded.[2]

On March 21, 2011, Rick Puller, a RNM since 2004, performed a time study on the HB nightshift. Puller's general role was to supervise the nursing staff in his assigned building, as well as oversee nurse functions and patient care. He was also the program manager for the Hitchman building, and, therefore, DON Merek asked him to perform the time study with the intent to better understand the needs of the nightshift.

Following his study, Puller sent an email to Director Merek, Assistant Director Unger and Nurse Supervisor Hames, with his findings. Henry was the charge nurse the night Puller conducted his study. He wrote that the DCAs stayed busy all night, but Henry was "going in circles." He also wrote that Henry had not completed the assignment sheet until around 12:00 a.m., because she had forgotten something in either her car or locker. In his opinion, she should have completed the assignment sheet immediately after receiving the report for the prior shift. Ultimately, while the staff stayed busy throughout the night, Puller did not feel the workload was out of the ordinary. He testified that he told Merek the staffing pattern sufficed, and that Henry had good qualities, could handle the workload, and did her best. He also testified that, while HB patients may require more care than others, he felt DCAs could handle these tasks, and would have spoken up if he believed the nightshift needed a second licensed nurse. Merek testified she concluded from Puller's study Henry was using poor time management, but did not change the directive.

[2] Appellee also initiated an action against Kaneria for defamation, and was successful. That count is not included in the instant appeal.

Carolyn Reed, a Nurse Manager, was called as an expert witness by Henry in the areas of staffing nursing management and nursing units. She had worked as a Nurse Manager for 19 years, and had been head nurse for the HB unit for approximately 7 years prior to trial. Reed testified that she had previously performed time motion studies, and although Merek had not asked her to perform such a study for HB, she had completed one. It was her opinion that HB needed a second licensed nurse, given the level of tasks that could only be performed by licensed nurses. All patients in the unit may be classified as difficult due to their 'geri-psych' nature, and the unit had a high number of medical authorization reports that needed to be completed and checked by a licensed staff member. She testified the amount of work was such that it would be overwhelming for one person to handle, and it went against the standard of care to only have one licensed staff member.

As such, concerning the no-pull directive, it was her opinion that Henry was being punished, and confronted Merek. She testified to other examples of disparate treatment within the nursing department as well. Earlier in her tenure at Springfield, the then director of nursing had shared with Reed she did not want to promote another African-American woman to manager, and requested Reed "write her up for every infraction possible." When Reed refused to do so, she was transferred to HB, where her duties were a "step-down," though she kept the same title and pay. Feeling it was discriminatorily based, she filed complaints with the EEOC and Board of Nursing. After an investigation, Reed was transferred back to the staffing office with no explanation. Reed spoke with her supervisor, Dorsey, who admitted that the Hospital's actions did appear racist. When Reed questioned why Dorsey failed to intervene, Dorsey replied "when in Rome, do as the Romans do."

Around March 31, 2011, Henry received yet another reprimand, this time for alleged unprofessional conduct, alleging she was loud and disruptive during the March 15, 2011 nightshift, when she requested a second licensed nurse, as she was overwhelmed. Hames was the initiating supervisor on the PAR, as the RN Supervisor for HB. It stated Henry had "created a loud and uncomfortable environment for both patients and staff on" HB. It claimed Henry was yelling because she believed the unit was out of control, and that, when staff yells, it only further incites the patients. It was also reported that Henry refused to listen to staff when they tried to assist her, and concluded her behavior was inappropriate and unprofessional under the leadership policy.

Keith Exum, an African American evening shift charge nurse on HB witnessed Henry's behavior, and emailed Merek. His statement claims Henry's behavior occurred around the time of the shift change, but did not say that she had yelled at or refused to listen to staff. Leslie Scheller submitted a statement, indicating she did not think Henry did anything inappropriate in front of staff or patients. Mary Jackson said Henry was loud, but did not curse anyone. Tammy White indicated Henry began to raise her voice. Henry admitted she was stressed upon arriving to shift and noticing several patients were awake, and that the unit was not in good order.

That same night, Henry also received an "education" as a result of a second PAR, also generated by RNS Hames. Hames claimed that, upon receipt of a second licensed nurse mid-shift, Henry had failed to add the nurse to the assignment sheet. Henry disputed this, claiming she had added the second licensed nurse, and Hames must have altered it. She provided management with a copy of the assignment sheet, including the second

licensed nurse, but Hames claimed she had altered it after the fact. The PAR was initiated two weeks after the fact, which Hames said was because she noticed the discrepancy during her normal review of the paperwork.

Henry had a performance evaluation in June of that year, prepared by Hames, in which she received an overall "Meets Standards" score, notwithstanding that four of the sub-scores were rated as "Unsatisfactory." Each of those scores were explained as being the result of various reprimands Henry had received. She made a notation on the evaluation form that, despite being overall satisfactory, she believed the unsatisfactory sub-scores were discriminatory, and in retaliation for her complaints of their previous discriminatory actions. Merek testified she was not aware of this evaluation, as she only reviews those that have an overall unsatisfactory rating. Henry's comments regarding her evaluation, however, came to Schaeffer's attention in June or July of 2011. She stated she did not investigate the discrimination or retaliation claims, as she was aware Henry had filed an EEO Complaint, and believed her claims would be investigated by DHMH.

More than a year after she filed her grievance regarding the mock drill, on August 30, 2011, Schaeffer emailed Merek, again recommending settlement. She informed Merek Henry had a copy of Johnson's February 2010 email stating the documentation did not support the discipline. As a result, the NAT met to discuss the matter, and decided Henry's case should be settled. Dorsey testified she views discipline not as punishment, but as a method to improve an employee's behavior. As there had not been a subsequent occurrence of unprofessional behavior, Dorsey agreed the matter should finally be settled. DON Merek testified she was not aware of why the resolution took so long.

Finally, on September 9, 2011, Henry received notice that she would be permanently transferred to the Solomon D ("SD") unit. Henry testified she was shocked by the transfer. SD is a step down unit, as it is more of a long-term care unit. Merek testified Henry was transferred because nursing administration believed her skills could be utilized in that unit, and it would provide her with a second licensed nurse, while keeping her on her preferred nightshift. Henry would also maintain her position as a charge nurse, level of pay, and shift time. Nevertheless, Henry was concerned about the patients in the SD unit, as they were younger and have more incidents of violence than HB.

Dorsey testified she was in need of a charge nurse, and told Henry she wanted her to transfer, as she believed it would be beneficial to both the Hospital and Henry. Dorsey, however, denied Henry's claims that she told Henry she would be better off under a black ADON.

Henry filed Charges of Discrimination with the Maryland Commission on Human Relations (the "Commission") and the U.S. Equal Employment Opportunity Commission ("EEOC") on May 19, 2011. On December 6, 2011, the EEOC issued Henry a Notice of Right to Sue, and terminated the processing of her charge.

She thereafter filed her complaint in the Circuit Court for Carroll County on January 26, 2012, alleging, amongst other things, the Hospital had engaged in employment discrimination under the Maryland Fair Employment Practices Act ("MFEPA") and retaliation under Title VII of the Civil Rights Act of 1964. The bench trial began on July 15, 2013 and continued on intermittent dates through January 22, 2015. Appellants moved

for judgment, which was denied.[3] On December 23, 2015, the court issued a memorandum opinion and found DHMH liable for disparate treatment under MFEPA and Title VII, and for retaliation under Title VII. After the damages hearing on June 3, 2016, the court entered judgment against DHMH in the total amount of $300,000 in compensatory damages, plus attorney's fees and other costs, on June 5, 2017.

We will include such additional facts below as are necessary.

STANDARD OF REVIEW

Maryland Rule 8-131(c) states: "[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." "It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." We "must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed." *Clickner v. Magothy River Assoc. Inc.*, 424 Md. 253, 266 (2012) (internal citations omitted). "Questions of law, however, require our non-deferential review" and we determine whether the court was legally correct. *Id.* (internal citations omitted).

DISCUSSION

I. The circuit court had jurisdiction over Henry's MFEPA discrimination claim and her Title VII retaliation claim.

As there are several aspects to appellant's contentions, we will address each in turn.

[3] Appellants had also initially moved for partial dismissal, which was also denied.

A. Timeliness

Under the Maryland Fair Employment Practices Act, "a complainant may bring a civil action against the respondent alleging an unlawful employment practice, if:" "the complainant initially filed a timely administrative charge[;]" "at least 180 days have elapsed since the filing of the administrative charge[;]" and "the civil action is filed within 2 years after the alleged unlawful employment practice occurred." Md. Code Ann., State Gov't § 20-1013(a).

Maryland law also imposes specific form and content requirements for an administrative charge or complaint. Under § 20-1004(b), the complaint, filed with the Maryland Commission on Human Relations, "shall (1) be in writing; (2) state the name and address of the person alleged to have committed the discriminatory act; (3) contain any other information the commission requires; and (4) be signed by the plaintiff under oath." *Crockett v. SRA Intern.*, 943 F. Supp. 2d 565, 570-71 (D. Md. 2013) (citing COMAR 14.03.01.03(D)(7)); *see also* S.G. § 20-1004. Section 20-1004(c) also requires the complaint be filed with the Commission within six months after the date of the alleged discriminatory act.

Title VII requires a plaintiff file a charge with the EEOC in deferral states such as Maryland within 300 days from the date of the allegedly discriminatory act. 42 U.S.C. § 2000e-5(e)(1).

Henry filed complaints with the Commission on May 17, 2011, and the EEOC on May 19, 2011, in which she alleged discrimination based on race, color, national origin, as well as retaliation, by DHMH, occurring from 2008 through April of 2011. Her complaint

in the instant matter was filed in the circuit court on January 26, 2012, more than 180 days after the filing of the charges, and within two years after the last alleged discriminatory act.

Appellants argue that the court erred in considering any of the discriminatory actions from before November 19, 2010 for her MFEPA claim, as they occurred more than 6 months before Henry filed her complaint with the Commission; or before July 23, 2010 for the Title VII claim, as they occurred more than 300 days before she filed her complaint with the EEOC. They argue that, under § 20-1004(c) and § 2000e-5(e)(1), the court lacked jurisdiction over those actions, but do not allege insufficiency of the evidence.

DHMH contends Henry's "instances of alleged discrimination…are discrete, easily identifiable acts," and therefore, the court erred in finding the continuing violation doctrine applied. Henry, conversely, argues "the separate acts of discrimination are 'closely enough related' to form a continuing violation," a test adopted by the Court of Appeals in *Prince of Peace Lutheran Church v. Linklater*, 421 Md. 664, 694 (2011). Furthermore, she contends the court did not base its awards on actions outside of the time limit, except for one, and, even assuming this was error, it was harmless.

The circuit court, in its memorandum opinion, stated:

> To be considered as part of a continuing violation, the plaintiff must demonstrate that it 'would have been impossible for a reasonably prudent person to learn that [an employment action] was discriminatory.' *Crockett v. SRA International*, 943 F. Supp. 2d 565 (2013) (citations omitted). Henry presented to the Court instances of frequent picayune acts by her employer including but not limited to formal disciplines that gave rise to the basis of her Complaint. Taken alone, an alleged violation on its face may not appear to be discriminatory in nature, however when considered cumulatively, the acts demonstrate a pattern. The Court finds sufficient acts occurred after January 1, 2010 to consider in its analysis, however will consider acts dating back to January 2008.

While the court acknowledged the continuing violation doctrine, we are not persuaded the court found the continuing violation doctrine applied. Instead, we find, under *National R.R. Passenger Corp. v. Morgan*, the time-bar did not prevent "an employee from using," or the court from considering, "the prior acts as background evidence in support of a timely claim." 536 U.S. 101, 113 (2002) (discussing the continuing violation doctrine in a discrimination and retaliation action). The court explicitly noted there were "sufficient acts…after January 1, 2010 to consider in its analysis[,]" but would "*consider*" acts dating back from January 2008. Moreover, as discussed further below, the sole instance mentioned by the court in its award of damages that could be time-barred by either the MFEPA or Title VII was the incident involving the 2009 Mock Drill. However, Henry's complaint regarding that event was not completed until late 2011. As it was an on-going situation, we find it was not time-barred from consideration.

We therefore find the court had jurisdiction to address appellee's claims.

B. Condition Precedent to Suit

Appellant further argues any actions occurring prior to January 26, 2010 could not form the basis of appellee's MFEPA claim because they were required to have been filed within two years of its occurrence. They contend § 20-1013(a)(3)'s two year requirement is not merely a statute of limitations, but a condition precedent to suit, and therefore, cannot be "waived" by the continuing violation doctrine. As such, they argue, the case must be remanded for a reconsideration of damages. Appellee again argues the court did not base its award on any untimely act.

Section 20-1013(a)(3) states "a complainant may bring a civil action against the respondent alleging an unlawful employment practice, if" "the civil action is filed within 2 years after the alleged unlawful employment practice occurred."

The court based its award of damages for appellee's discrimination claim on:

> the events ensuing from the 2009 Mock Drill and the resulting grievance which was not resolved until late 2011[;] the January 2011 incident resulting from Henry's PAR against TD and [her] receipt of [a] PAR for the same evening as a result of completing [the assignment] sheet (in what she testified to was a similar manner as other nurses who did not receive PARs) [;] [the] March 31, 2011 reprimand notwithstanding [that] the statements of Hospital staff contradicted management's claims[;] and the March 2011 time/motion study of Henry during one shift which conflicted with testimony of Carolyn Reed[;] all of which the Court finds were targeted actions at [Henry] and that an award of compensatory damages for disparate treatment in the amount of $150,000 is appropriate.

The only instance considered with which appellant takes issue is the court's consideration of the 2009 Mock Drill and the resulting grievance.[4] However, as we and the court noted, that grievance was on-going until August 2011. The court, moreover, found sufficient acts of discrimination occurred after January 1, 2010 to support its award. Therefore, if its inclusion was error, we find it was harmless. *See Barksdale v. Wilkowsky*, 419 Md. 649, 662 (2011) (internal citations omitted) (finding in order to prove error was not harmless, complainant must prove prejudice was "substantial" and "probable.").

II. The circuit court did not award Henry a double recovery.

[4] Appellants included several 'actions' in their discussion that could be properly considered that were not included in the court's discussion of the award of damages for appellee's discrimination claims.

DHMH argues the court erred in finding the same set of facts were both discriminatory under MFEPA and retaliatory under Title VII. It argues the court's determination results in a double recovery, which is not permitted, citing *Shapiro v. Chapman*, 70 Md. App. 307 (1987). DHMH further contends the causation standards for the separate claims prohibit a court from awarding damages for retaliation and discrimination based on the same conduct. As discrimination based on a person's status in a protected class, and retaliation against that person for complaining about the discrimination, result from two different motives, they contend, appellee's double recovery was error. DHMH also argues this establishes the court erred in granting appellee's retaliation claim, as, if the acts are discriminatory, they cannot pass the high "but-for" causation standard required. As such, they contend, that finding should be reversed.

Appellee, conversely, argues the court was statutorily authorized to provide for recovery for each of appellee's statutory claims, under § 2000e-5. Furthermore, she argues, *Shapiro* and the cases cited by appellants are distinguishable, in that they concern different kinds of claims than those at issue here.

An MFEPA claim for employment discrimination on the basis of membership in a protected class, such as race or national origin, may be proved by a mixed-motive approach, or that the discriminatory intent was a motivating factor, in the employer's action. Title VII retaliation claims, conversely, require a plaintiff to establish the desire to retaliate was the but-for cause of the challenged employment action, citing *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013).

The court, in its Memorandum Opinion regarding damages, entered on June 5, 2017, held:

> [Henry] seeks the maximum amount of compensatory damages, $300,000 for her race discrimination claim and $300,000 for her retaliation claim…
>
> The Court finds that [Henry] is entitled to compensatory damages as a result of the mental anguish, emotional pain, suffering, and distress endured…as a result of discriminatory and retaliatory acts by her employer…
>
> The Court previously found that the [appellant] DHMH engaged in the unlawful employment practice of racial discrimination in the form of disparate treatment against Ms. Henry and as a result of such disparate treatment, including, but not limited to: the events ensuing from the 2009 Mock Drill and the resulting grievance which was not resolved until late 2011[;] the January 2011 incident resulting from Henry's PAR against TD and [her] receipt of [a] PAR for the same evening as a result of completing [the assignment] sheet (in what she testified to was a similar manner as other nurses who did not receive PARs) [;] [the] March 31, 2011 reprimand notwithstanding [that] the statements of Hospital staff contradicted management's claims[;] and the March 2011 time/motion study of Henry during one shift which conflicted with testimony of Carolyn Reed[;] all of which the Court finds were targeted actions at [Henry] and that an award of compensatory damages for disparate treatment in the amount of $150,000 is appropriate.
>
> The Court previously found that the [appellant] DHMH engaged in the unlawful employment practice of retaliation against Ms. Henry, for acts including, but not limited to[:] the No Pull Directive[;] reprimand following TD incident[;] June 2011 Performance Evaluation, in which Henry received 4 unsatisfactory grades[;] [the] reported allegation of discrimination related to the evaluation which were never investigated[;] and her ultimate transfer for the Solomon D unit, the Court finds that an award of compensatory damages for retaliation in the amount of $150,000 is appropriate.

It is clear, then, that the court did not base the awards on the same events. The court explicitly listed different instances of discrimination and retaliation in support of its awards. The sole event listed as both a discriminatory and retaliatory action is the reprimand Henry received in January 2011, after the incident with TD. However, we find

there were sufficient instances of varying degrees of egregiousness to support either of the court's two awards.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.