Circuit Court for Carroll County
Case Nos. C-06-CV-19-000433 & C-06-CV-19-000463

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1082 & 1083

September Term, 2020

LYNN E. AJSTER (a/k/a LYNN E. SNYDER)

v.

MARYLAND STATE HIGHWAY ADMINISTRATION

Kehoe,
Nazarian,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: September 24, 2021

*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.

Appellant Lynn Ajster brought an unlawful termination case against appellee Maryland State Highway Administration ("SHA") before Maryland's Office of Administrative Hearings ("OAH"). She presents the following questions for our review:

> "1. Was there substantial evidence to support the OAH's decisions, particularly in light of the legal rights and protections available to an employee like appellant?
> 2. Were the OAH's decisions arbitrary and/or capricious?
> 3. Did the OAH err in deciding that lesser forms of progressive discipline were not warranted?
> 4. Did the OAH engage in an unlawful procedure and/or commit an error of law in declining to compel appellee to search for, and produce, additional documents in response to the OAH's subpoenas?"

Based upon the record before us, we shall hold that there was substantial evidence to support the decisions of the ALJ, and that lesser forms of discipline were not required by law. As to the enforcement of appellant's subpoena, we shall hold that appellee did not conduct a reasonable search for the requested documents. Accordingly, we shall neither affirm nor reverse but shall remand this matter to the OAH for further proceedings consistent with this opinion.

I.

Appellant was an administrative assistant employed by appellee, a sub-division of the Maryland Department of Transportation ("MDOT"). She worked at appellee's facility in Westminster for many years.

On March 18, 2019, appellant was suspended pending termination, and was

terminated shortly thereafter. In addition, appellee disqualified appellant from future employment with the department for a period of five years. Appellant filed timely appeals to OAH. The consolidated appeals for the suspension pending termination, the termination, and the disqualification from future employment were heard before an ALJ on July 25, 2019. The ALJ conducted a full hearing including live witnesses.

Prior to the hearing, appellant served subpoenas on appellee, seeking "communications written by workers and management . . . [written] in real time to the various situations involving appellant." In response, appellee filed a motion to quash, which the court denied. Not satisfied with appellee's responses, at the start of the hearing, appellant argued that appellee had failed to comply with those subpoenas. The ALJ overruled appellant's objection and found that appellee acted reasonably.

Appellant was the sole witness on her behalf. She testified as follows. On February 12 or 13, 2019, she reported another employee at her facility for taking an hour-long lunch break but only reporting thirty minutes. Appellant was called in to meet with two of her superiors to explain this report. On February 14, again she was called into one of her superior's offices, and one of those superiors, Darion Branham, "towered over her," yelled at her, and berated her. Because she had been abused by a husband, this was triggering for her. She then went on a scheduled leave from the 15th to the 19th.

Appellant said that she was sick during that scheduled leave, and she had not recovered at the time she was supposed to return to work. She obtained a doctor's note, which said she should not work through March 3, and on March 4, she returned to work

and turned in the note. Between February 19 and March 3, there was a snowstorm, and appellant was not in contact with her office. She was unaware that her office made numerous attempts to reach her during that snowstorm.[1] To explain her failure to make contact with her office, she explained that during that time she was taking medicine that made her drowsy.

When appellant returned to work, her superiors called her into several meetings to discuss her unavailability during the snowstorm. She did not want to participate in those meetings because she felt that she had done nothing wrong, and she refused to participate in closed-door meetings. She denied recording meetings, and she denied making inappropriate, insubordinate, and insulting comments to co-workers. She testified that several male employees had missed snowstorms without incident, a superior had made age-related comments to her (she was seventy years old at the time), and another female employee at that facility had been harassed so much that the employee had a nervous breakdown.

Appellee called several witnesses in its case, including Daniel Houck, the person who decided to terminate appellant. He testified that he terminated appellant because of "insubordination and misconduct in the workplace." He related that appellee investigated appellant's claims of unfair treatment, harassment, interrogation, and disrespect, and the investigations revealed no evidence to support appellant's claims. Other witnesses for

[1] According to appellee's counsel at oral argument, appellant worked at a facility responsible for plowing roads during snowstorms; she was an essential employee and was supposed to come in for work, or be in contact with her office, during a snowstorm.

appellee testified that appellant recorded the meetings on her telephone and that she was argumentative, combative and uncooperative. Witnesses for appellee testified that appellant refused to answer written questions because they were not on official letterhead and were not signed. She allegedly made loud and disruptive personal phone calls from her desk. In those calls she accused a superior of stealing tires, harassing her, and listening in on her. She allegedly told co-workers to "watch your back," said to three superiors that she "had a problem with you three idiots," and said to a superior "you make me sick to my stomach, how does it feel to be harassed."

The ALJ issued two written decisions, one on August 8, 2019 and the second, on August 22, 2019. The ALJ concluded that appellee followed the proper procedures in suspending appellant, and her suspension without pay pending final disposition of the charges for termination was necessary to protect the interests of SHA. The ALJ concluded that appellee lawfully terminated appellant's employment and that appellee lawfully disqualified appellant from future employment with MDOT for a period of five years.

The ALJ made the following significant findings:

> "1. [T]he [appellee] has proven the [appellant] was insubordinate to her supervisors . . . failed to obey a lawful and reasonable direction given by a supervisor or superior . . . and committed an act of misconduct or a serious breach of discipline . . . by refusing to speak with her superior without threatening to record them, threatening general harm to the workplace, using abusive language toward her supervisors, and refusing to meaningfully participate in the multiple fact-finding meetings and mitigation conferences held in March 2019."
> "2. Appellee "failed to prove [appellant] violated COMAR 11.02.08.06B(6)."

> "3. Appellee "provided persuasive evidence that the [appellant]'s behavior in the office had become so distracting and hostile she needed to be removed from the office."
> "4. Appellant "did not credibly rebut the reasons given for the suspension."
> "5. Appellant offered "no alternatives to suspension pending termination. She only [requested] the suspension be overturned and she be permitted to return to the office. Under the circumstances…this is not a feasible alternative."
> "6. Appellant's "insubordination and disrespect was directed not just at her two immediate supervisors . . . Her actions . . . indicate she would be unable to transfer to another office within [MDOT] and comply with reasonable behavior standards for employees. Accordingly, I conclude the five-year employment ban should be upheld."
> "7. Appellant "did not prove the five-year employment ban was inconsistent with law or TSHRS policy. She argued only that a five-year employment ban on a seventy-year-old employee amounts to a lifetime ban. This is insufficient to prove the disqualification should be overturned."

Appellant filed a petition for judicial review in the Circuit Court for Carroll County. The circuit court affirmed in a consolidated opinion. Appellant noted a timely appeal to this Court.

II.

Appellant presents four questions for our review. We shall consider appellant's first two questions together: whether the decisions of the ALJ were (1) supported by substantial evidence, and (2) arbitrary and capricious.[2] Appellant argues that the ALJ's finding that

[2] Appellant argues (in her brief) that the ALJ's decisions were arbitrary and capricious—and therefore must be reversed. First, she argues that the ALJ failed to weigh the evidence properly because the ALJ applied the wrong burden of proof, shifting the burden improperly to appellant, when in fact appellee bore the burden of proof. Second, appellant

the appellee lawfully suspended, terminated, and disqualified appellant from future employment for five years was without substantial evidentiary support in the record. It is appellant's position that appellant's age and gender were the real reasons for appellee's decision to terminate appellant. Appellant maintains that in disciplining her for taking medical leave, appellee violated the Americans with Disabilities Act, the Rehabilitation Act, Maryland's Fair Employment Practices Act, the Family and Medical Leave Act, and the First Amendment to the United States Constitution. As to any statements appellant made, she argues that several of her statements for which she was disciplined should be characterized as complaints of discrimination and as such, they were protected speech that could not be a basis for discipline. She relies on *Mumm v. Charter Twp. of Superior*, 727 F. App'x 110 (6th Cir. 2018), for the proposition that federal law protects an employee's threats to sue their employer.

Appellant argues the ALJ erred in determining that lesser forms of progressive discipline were not warranted because appellee was bound by its progressive discipline policy, which appellant claims, stated "[u]sually, the least severe form of discipline is applied and with continuing violations of the same type, more severe discipline is applied."

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argues that the ALJ's decision was based upon a belief that appellant had recorded meetings with her supervisors without their consent, which the ALJ characterized as "outrageous behavior that cannot be tolerated in the workplace." This decision, according to appellant, was arbitrary and capricious. Appellant notes that she testified that she never recorded the meetings, and that she *asked* only to record the meetings. Because appellee had no existing policy at the time of these meetings as to recording meetings, according to appellant, recording meetings cannot be a proper basis for terminating appellant.

At oral argument, appellant conceded that the ALJ's decisions were neither arbitrary nor capricious.

Appellant argues that appellee suspended appellant, in 2011, for "facts" that are the same basis it used to terminate her in the instant case. According to appellant, appellee violated its policy because it shows appellee could have imposed a less severe form of discipline.

Finally, appellant argues that the ALJ erred in finding that appellee had complied reasonably with appellant's subpoena request because there are unspecified, unproduced documents and, outside of appellant's supervisors, no other employees had responded to the subpoena request. Appellant asserts that appellee's search efforts must have been insufficient because appellee did not have its IT department conduct the search and produced only self-serving communications amongst management. Appellant's position is that the subpoena was designed to obtain communications written by workers and management that were "less manicured, if you will, and more reactive, in real time, to the various situations involving Appellant. Appellant received almost no such documents and is hard-pressed to believe that more don't exist." Brief for appellant at 32-3. The failure to comply with the subpoena request, according to appellant, affected the outcome of the case.

Appellee responds that the "insurmountable evidence" fully supports the ALJ's decisions affirming appellant's suspension, termination and future employment disqualification. Characterizing appellant's entire argument as an attempt by appellant to re-litigate before this Court the facts determined by the ALJ, appellee highlights that appellant fails to argue that the record lacks substantial evidence but instead insists that her version should have been accepted. Appellee's primary argument is that the ALJ made

credibility determinations against appellant and believed that appellant is arguing that this court should accept her version of events instead of appellee's version, which is not something a reviewing court can do on a substantial evidence review. Finally, appellee argues that any insubordinate comments by appellant were not protected by the First Amendment to the United States Constitution because they were not related to a "matter of public concern," which is a requirement for a public employee's speech to enjoy First Amendment protection.

In response to appellant's argument that the ALJ acted in an arbitrary or capricious manner, appellee argues that the ALJ's decisions were supported by substantial evidence, and hence, were neither arbitrary nor capricious.

Turning to the progressive discipline issue, appellee argues that the claim is meritless. Appellee relies first upon the applicable standard of review, citing *MTA v. King*, 369 Md. 274, 293 (2002), which says that the role of a court reviewing discipline imposed by a state agency is limited and does not include disproportionality or abuse of discretion. Appellee reiterates the holding in *King*, which states that as long as an administrative sanction does not exceed the agency's authority, is not unlawful, and is supported by competent, material and substantial evidence, there can be no judicial reversal or modification based on disproportionality or abuse of discretion, unless that was so extreme and egregious that it can be deemed arbitrary and capricious. Additionally, appellee argues "because each of the causes included in COMAR 11.02.08.06(B) may be determined to be of sufficient magnitude to allow for termination, any consideration of progressive

discipline is unnecessary." Appellee argues that progressive discipline was not merited here for three reasons. First, appellant was hostile when she met with her supervisor to attempt to resolve the disputes that led to the termination. Second, appellant was given a two-week 'reflection period' immediately prior to her termination and her behavior did not change during that time. Third, appellant was suspended in 2011 for the same facts that gave rise to this case and that is an aggravating factor, not a mitigating one.

Finally, in response to appellant's argument that the trial court abused its discretion in refusing to order appellee to conduct a further search in response to appellant's subpoenas, appellee points out that appellant failed below to assert with any level of specificity documents that were not produced and simply asserted below, and before us, she is "hard-pressed to believe that more [responsive documents] don't exist." That is insufficient, concludes appellee.

III.

Pursuant to statutory authority, the Secretary of Transportation has established a "human resources management system for employees of the Department and its units." Md. Code Ann., Transp. § 2-103.4(a) (West 2021). The Secretary is required to adopt regulations governing the human resources management system. *Id.* at § 2-103.4(d)(1). The Secretary adopted these regulations in COMAR 11.02.

Under these regulations, an appointing authority within the Department may suspend a Career Service employee, "if the suspension is necessary to protect the interests

of the Department." COMAR 11.02.08.05-1(A). An appointing authority may also, for cause, terminate a Career Service employee from employment. COMAR 11.02.08.06(A). Cause exists when an "employee's action . . . amounts to insubordination." COMAR 11.02.08.06(B)(2). Cause also exists where an "employee has failed to obey a lawful and reasonable direction given by a supervisor or superior." COMAR 11.02.08.06(B)(7). Lastly, cause exists where an "employee has committed an act of misconduct or a serious breach of discipline." COMAR11.02.08.06(B)(8).

The Transportation Service Human Resources Policy (TSHRS) adopts COMAR and statutory requirements for disciplinary procedures. Under the policy, a terminated employee may be disqualified from employment with the Department for up to five years. TSHRS Policy §§ 6A.11.1.1, 6A.11.2. It is the Department's policy to apply progressive discipline when warranted. TSHRS Policy § 7N.1.3. However, "a particular form of discipline may be bypassed, depending on the severity and . . . number of prior violations . . . and [an] employee's work history." *Id.* "The severity of discipline . . .is to be consistent with the nature and severity of the offense." TSHRS Policy § 7N.3.9.

IV.

We turn first to the subpoena enforcement question, in our view the meritorious issue in this appeal. We hold that the ALJ abused its discretion in failing to find that appellee did not make a reasonable inquiry and to exercise due diligence to satisfy the subpoena and to conduct the search for the requested documents and emails. COMAR

28.02.01.13(E) provides that before the OAH, "[a] party who has filed a timely discovery request under this regulation but who has not received a reply may, after providing reasonable notice to the opposing party, file a motion seeking to compel a response and/or a motion for sanctions." We find no cases interpreting that regulation; we look to the Federal Rules of Civil Procedure as guidance.

The party seeking to compel discovery bears the burden of proving that a discovery response has been inadequate. *Barnes v. Dist. of Columbia*, 289 F.R.D. 1, 6 (D.D.C. 2012). "The fact that a party may disbelieve or disagree with a response to a discovery request, however, is not a recognized ground for compelling discovery, absent some indication beyond mere suspicion that the response is incomplete or incorrect." *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992). Disclosure of documents pursuant to a discovery request need not be perfect, *City of Rockford v. Mallinckrodt ARD Inc.*, 326 F.R.D. 489, 492 (N.D. Ill. 2018), but it must be reasonable. *Zenith Ins. Co. v. Texas Inst. for Surgery, L.L.P.*, 328 F.R.D. 153, 161 (N.D. Tex. 2018). And, while the party seeking discovery bears the initial burden of showing that discovery has been inadequate, there is a temporary shift of the burden of persuasion where the response is that no responsive documents are found, or where a dispute arises out of the completeness of the production that is made. *V5 Techs. v. Switch, Ltd.*, 332 F.R.D. 356, 366-7 (D. Nev. 2019). Then, the party subpoenaed must explain the search conducted with sufficient specificity to allow the Court to decide whether the party made a "reasonable inquiry and exercised due diligence." *Id.* Assuming a timely request, insufficient time is not a satisfactory excuse if the subpoenaed party did

not seek appropriate temporal extensions. *Novelty, Inc. v. Mountain View Mktg., Inc.*, 265 F.R.D. 370, 376 (S.D. Ind. 2009). The United States District Court for the District of Nevada explained as follows:

> "A nonparty subpoena may require the production of identified categories of documents in the subpoenaed person's 'possession, custody, or control.' Fed. R. Civ. P. 45(a)(1)(iii); see also *in re Citric Acid Litig.*, 191 F.3d 1090, 1107-08 (9th Cir. 1999). A person subpoenaed for the production of documents is under an affirmative duty to seek that information reasonably available to her. *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 189 (C.D. Cal. 2006). This duty is discharged through the formulation and completion of a reasonable search conducted with due diligence. *Rogers v. Giurbino*, 288 F.R.D. 469, 485 (S.D. Cal. 2012); see also *St. Jude Med. S.C., Inc. v. Janssen-Counotte*, 305 F.R.D. 630, 639 (D. Or. 2015). '[A]n earmark of a recipient's inadequate inquiry is the obvious absence of documents and other written materials that the recipient reasonably would be expected to have retained in the ordinary course of its business.' *Meeks v. Parsons*, Case No. 1:03-cv-6700-LJO-GSA, 2009 U.S. Dist. LEXIS 90283, 2009 WL 3003718, at *4 (E.D. Cal. Sept. 18, 2009)."

V5 Techs., 332 F.R.D. 356, 366-7 (D. Nev. 2019). Significantly, with respect to electronically stored information, the court in *DR Distrib., LLC v. 21 Century Smoking, Inc.*, 513 F.Supp.3d 839, 963 (N.D. Ill. 2021) noted that "[t]he absence of a custodian review is strong evidence that counsel did not conduct a reasonable inquiry."

Appellant challenges the adequacy of appellee's response to appellant's subpoena for internal emails. Appellee's explanation for the search was that appellee did not have its IT department search for responsive emails because the department was short-staffed and had insufficient time. But appellee did not ask for a temporal extension. Appellee

permitted the parties involved in the immediate controversy to conduct the search for emails, arguably the fox guarding the hen house. Although appellee's response need not have been perfect, *City of Rockford*, 326 F.R.D. 489, 492, the excuse of not having enough time, without having asked for a temporal extension, is not a satisfactory excuse. *See Novelty*, 265 F.R.D. 370, 376. We hold that the ALJ abused her discretion.

We turn now to the remedy. When appropriate, we may remand the case for further proceedings, without affirming, reversing or modifying the judgment. *See* MD Code, State Government, § 10-222(h)(1) (2021); Md. Rule 8-604(a)(5). The Rule provides as follows:

> "If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court."

Justice requires further proceedings. We will neither affirm nor reverse, but will remand the case to the circuit court with directions to remand the case to the OAH and the ALJ to enforce the subpoena and to require appellee's custodian of records to require appellee's IT department to conduct a reasonable electronic search.

V.

We need to address the remaining questions presented in the event that further discovery reveals no evidence that would affect the decision of the ALJ.

We turn first to the question of substantial evidence. We hold that on the record before us there was substantial evidence to support the ALJ's decision that appellant was terminated for insubordination, and that appellant's speech at the heart of this case was not protected by the First Amendment.

We review directly the ruling of the ALJ for substantial evidence, rather than the decision of the circuit court. *Merryman & F.O.P. v. Univ. of Baltimore*, 473 Md. 1, 26 (2021). In so doing, we "give appropriate deference to the opportunity of the ALJ to observe the demeanor of the witnesses and reject credibility assessments only if [given] strong reasons." *Neutron v. Dept of Environment*, 166 Md. App. 549, 583 (2006). 'Substantial evidence' is present if "a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Motor Vehicle Admin. v. Barrett*, 467 Md. 61, 72 (2020) (quoting *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 512 (1978). The evidence need not have been strong enough to eliminate a benign version of events set forth by one of the parties; rather it must have been strong enough to make the controversy between the two versions of events "fairly debatable." *Md. Reclamation Assoc. v. Harford Cnty.*, 468 Md. 339, 367 (2020).

The ALJ's decision that appellant was terminated because of insubordination was supported by substantial evidence. At the hearing, Mr. Houck, appellant's superior who made the decision to terminate her, testified that she was terminated because of "insubordination and misconduct in the workplace," and he supplied factual bases for those conclusions. He testified that investigations into her claims of maltreatment turned up no

evidence. Appellant testified to the opposite. The ALJ found Mr. Houck's testimony credible and appellant's testimony incredible. We do not re-weigh the evidence, nor do we make credibility findings as the ALJ is in the best position to make those determinations.

Appellant argues that there was neither reason for appellee to call her into a meeting on March 4, 2019 nor to investigate her because appellant had submitted a doctor's note covering her leave through March 4. Appellant maintains that appellee's real reason for terminating her was because of her age or her gender. She alleges that she had been bullied, harassed, and attacked by appellee prior to coming back to work on March 4, and her having to meet with Mr. Branham on March 4, the same man who had attacked her a little over two weeks earlier, excuses her refusal to participate respectfully in that meeting.

Appellant presented evidence that Mr. Branham called appellant into the March 4 meeting to investigate appellant's failure to report to work on March 3. Although appellant's doctor's note covered a period through March 3, appellant told appellee only that she would be out through March 1. There is substantial evidence in the record that the appellee was trying to address this miscommunication during the March 4 meeting.

Appellee presented evidence that appellant's coworkers avoided engaging with her to avoid confrontation. Appellant made disparaging or arguably slanderous statements about Mr. Branham. She engaged in a combative manner with her supervisors over a two-week period and called her supervisors "idiots" to their faces.

If believed by the ALJ, which it was, the evidence is sufficient. There is substantial evidence on the record to support the ALJ's finding that appellee's suspension of appellant

was necessary to protect appellee's interests and that appellee's suspension of appellant was lawful under COMAR 11.02.08.05-1(A).

Turning to the ALJ's finding that appellee terminated appellant lawfully, we hold that there was substantial evidence to support the ALJ's decision. There is undisputed evidence in the record that appellee attempted to record meetings with her supervisors without permission. Although it may be that appellant had not recorded the meetings, there was evidence before the ALJ of appellant's hostile behavior in acting as if she were recording the meetings. Appellant would not answer questions at these meetings, called employees names, and acted with hostility and distrust towards appellee employees. Her behavior and language did not change for two weeks. Appellant wondered aloud if Mr. Branham had stolen any tires before or at the Westminster shop. She said she would "sue management's asses," "take Mr. Branham down," "get everybody," and "close the office." She told other employees as they were leaving to watch their backs. She told an office visitor that management was trying to get her into trouble for telling the truth. The ALJ found Ms. Wilde and Mr. Houck's testimony to be the most trustworthy as they both worked primarily in different branches than the appellant. Additionally, while Ms. Wilde had good relationship with appellant, she and Mr. Houck testified to appellant's disruptive and hostile behavior.

The ALJ heard the witnesses testify and chose to accept appellee's evidence and version of the events over that of appellant's testimony. There is substantial evidence in the record to support the ALJ's findings that appellant was insubordinate to her supervisors

in violation of COMAR 11.02.08.06(B)(2), failed to obey a lawful and reasonable direction given by her supervisor in violation of 11.02.08.06(B)(7), and committed an act of misconduct or a serious breach of discipline in violation of COMAR 11.02.08.06(B)(8).

Appellant alleges that the ALJ erred in upholding appellee's five-year disqualification from employment with MDOT. The ALJ found that appellee had, under TSHRS Policy §§ 6A.11.1.1 and 6A.11.2., lawfully disqualified appellant from future employment for five years. The ALJ reasoned that appellant acted with insubordination and disrespect to Ms. Wilde and Mr. Houck, both of whom worked primarily in branches different than appellant. Appellant's conduct was such that she would not be able to transfer to another branch thereby justifying the five-year ban. Again, the ALJ made a credibility determination; the ALJ accepted appellee's version of the facts and events and found against appellant. There is substantial evidence in the record to support the ALJ's finding that the appellee's five-year disqualification of the appellant was lawful.

We turn now to the First Amendment sub-issue. We reject appellant's argument that any words she spoke at the office were protected by the First Amendment. To constitute protected speech in the workplace, the speech must be a matter of public concern. Courts have explained this distinction as follows:

> "We apply a test derived from Pickering v. Bd. of Educ., 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968), in which we consider: (1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and (3) whether the

> employee's speech was a substantial factor in the employee's termination decision."

Billioni v. Bryant, 998 F.3d 572, 576 (4th Cir. 2021) (quoting *McVey v. Stacy*, 157 F.3d 271, 277–8 (4th Cir. 1998)). "Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community. By contrast, if the speech at issue merely implicates a 'purely personal' topic, the First Amendment does not apply." *Carey v. Throwe*, 957 F.3d 468, 475 (4th Cir. 2020) (cleaned up) (quoting *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (*en banc*)).

Appellant's remarks in the instant case were not matters of public concern and were not protected speech. *Billioni*, 998 F.3d 572, 576. Appellant has presented nothing that leads to even a plausible belief that any of the comments she was terminated for touched on issues of "social, political, or other interests to the community" rather than being "purely personal." *Carey*, 957 F.3d 468, 475. Accordingly, we hold there is no merit in appellee's First Amendment argument.

Finally, we address appellant's argument about *Mumm*, 727 F. App'x 110, 113. In *Mumm*, the Sixth Circuit wrote that "[a] plaintiff's objection to an employment practice is protected activity if her supervisors should have reasonably understood that [she] was making a complaint of sex discrimination." *Mumm*, 727 F. App'x at 112. (Internal citations and quotation marks omitted). The court held that the plaintiff's statement to her employer that "she should have been paid as much as Keith Lockie and would sue if [her employer] did not rectify the pay discrimination between Keith and [her]" was a "clear enough" "threat to sue over pay disparity" "to qualify as protected activity." *Id*. at 113.

Appellant's assertion that *Mumm* stands for the proposition that threats to sue an employer are protected by federal law reads *Mumm* far too broadly. Rather, *Mumm* stands for the proposition that the statements in *that* case were *sufficiently clear complaints of sex discrimination* to become protected.

Appellant does not specify which of her statements she believes would be protected under *Mumm*. Appellant argues, at best, her comments "could be characterized as threats to sue her employer." "Could be characterized" is insufficient to qualify for *Mumm* protection because *Mumm* requires that the statements at issue must meet a threshold of clarity. *Id.* at 112 (quoting *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1312-3 (6th Cir. 1989)) ("a vague charge of discrimination is insufficient to constitute opposition to an unlawful employment practice") (cleaned up). Even if the statements appellant is referring to are those where she said that she would sue "[m]anagement's asses," would "take [Mr. Branham] down," would "get everybody," and would "close this office down," these statements are not clear threats to sue over sex discrimination—or indeed any sort of discrimination. Rather, they are merely general threats to sue. On what basis? It is not clear.

VI.

Although counsel conceded at argument that the ALJ was not arbitrary and capricious, we address the issue briefly. "The 'arbitrary and capricious' standard is highly contextual, but generally the question is whether the agency exercised its discretion

unreasonably or without a rational basis." *Prince George's Cnty. v. Palmer Rd. Landfill*, 247 Md. App. 403, 416-7 (2020).

Appellant points to nothing, either in its brief or at oral argument, to support an argument that the decision was arbitrary and capricious. We hold that the ALJ decision, with the exception of the subpoena enforcement ruling, was based upon substantial evidence. Progressive discipline was not required, and therefore, the discipline imposed by appellee was neither arbitrary nor capricious.

We address appellant's shifting burden of proof argument. She argues that the ALJ erred because the ALJ shifted the burden of proof upon appellant. She is wrong. The ALJ did not misapply the burden of proof. The record shows that the ALJ said, within the opening minutes of the hearing, "Okay. So, [appellant] in this situation the [appellee] bears the burden of proof in the suspension pending termination and the charges for termination."

Moreover, the ALJ made it clear in the written rulings that appellee bore the burden of proof.

The ALJ ruled on three questions presented:

> "1. Did the [appellee] properly suspend the [appellant] pending charges for termination?"
> "2. Did the [appellee] lawfully terminate the [appellant]'s employment?"
> "3. If so, did the [appellee] lawfully disqualify the [appellant] from future employment with the [appellee] for five years?"

The ALJ placed the burdens of production and persuasion first on appellee to "[provide] persuasive evidence" that appellant's "suspension pending termination [was] necessary to protect the interests of the [appellee]" and to show that "the [appellee

followed] the proper procedure to suspend the [appellant] pending termination." Then, the ALJ shifted the burdens of production and persuasion to appellant to rebut the reasons given for suspension, to mitigate the circumstances, or to offer alternatives to suspension. Because the ALJ put the initial burdens of production and persuasion on appellee, the ALJ placed the burden of proof on appellee. We disagree with appellant's contention that the ALJ put the burden of proof erroneously on her with respect to question one.

With respect to questions two and three, the ALJ explained as follows:

> "[T]he [appellee] has proven the [appellant] was insubordinate to her supervisors . . . failed to obey a lawful and reasonable direction given by a supervisor or superior . . . and committed an act of misconduct or a serious breach of discipline . . . by refusing to speak with her superior without threatening to record them, threatening general harm to the workplace, using abusive language toward her supervisors, and refusing to meaningfully participate in the multiple fact-finding meetings and mitigation conferences held in March 2019."

It is clear that the ALJ understood the burdens, and the ALJ placed the burden on appellee properly.

As to appellant's contention that her termination was illegal because it was based solely upon the recording issue, appellant is wrong in her premise. A reading of the ALJ's decision shows that the decision was not based solely upon the recording issue.

VII.

Finally, we address appellant's progressive discipline argument. Appellant argues that appellee decided to fire appellant a little over a week after appellant returned to work

and that her alleged behavior was insufficient to support termination because the ALJ used the same facts to justify appellant's suspension and appellant's termination. Appellant maintains that a suspension would have sufficed as it would have given appellant time to calm down. Lastly, appellant argues that appellee's disciplinary policy states that usually the least severe form of punishment should be employed, and, although an employee's work history is one factor in determining whether to bypass progressive discipline, appellant had a stellar work history.

Appellant's arguments are unpersuasive. Before addressing appellant's arguments, we note that appellant does not argue that there is insufficient evidence in the record to support the ALJ's finding that progressive discipline was unnecessary. Appellee may have drafted its disciplinary measures of appellant prior to March 18, but appellee gave appellant an opportunity to rectify her behavior. Nonetheless, appellant continued to engage in the behavior for which she was disciplined.

It makes no difference that the ALJ's decisions to uphold both the suspension and termination of appellant were based on similar facts. The legal standards for the suspension and the termination of appellant differed. There is substantial evidence in the record to support the ALJ's finding that the suspension of appellant was necessary to protect appellee's interests. Independently, there is substantial evidence in the record to support the ALJ's finding that appellant's termination was justified based on COMAR 11.02.08.06(B)(2), (7) and (8).

Regarding appellant's argument that a suspension would have sufficed, as the ALJ pointed out, appellee would have considered progressive discipline *if* appellant had cooperated during meetings. However, appellant continued to act with hostility and distrust, and her behavior and language did not change around the office for a two-week period.

Regarding appellant's argument that appellee's policy supports progressive discipline, the ALJ reasoned that appellant had displayed the same rude behavior as she had with her colleagues in 2011. An employee's work history is a factor, within MDOT policy, that supports severe discipline. The record supports the ALJ's finding that appellant's behavior was severe, and justifies the discipline imposed.

Finally, as pointed out by appellee, this Court may not reverse an administrative decision based on an alleged disproportionality of sanctions unless that decision is arbitrary and capricious. Inasmuch as there is substantial evidence in this record to support the sanctions imposed, we hold appellee's decision to forgo progressive discipline was justified.

JUDGMENTS OF THE CIRCUIT COURT FOR CARROLL COUNTY NEITHER AFFIRMED NOR REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REMAND THE CASE TO THE OFFICE OF ADMINISTRATIVE HEARINGS FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED

EQUALLY BETWEEN APPELLANT AND APPELLEE.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1082s20cn.pdf