Circuit Court for Montgomery County
Case No. 428814-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2567

September Term, 2017

STACEY JONES

V.

JOHNS HOPKINS
COMMUNITY PHYSICIANS, INC.

Meredith,
Kehoe,
Berger,

JJ.

Opinion by Berger, J.

Filed: July 2, 2019

This appeal arises from a lawsuit filed in the Circuit Court for Montgomery County by Stacey Jones, appellant, against Johns Hopkins Community Physicians, Inc. ("Hopkins"), her former employer, alleging that Hopkins discriminated against her on the basis of her race and gender in violation of the Maryland Fair Employment Practices Act, Md. Code (2014), § 20-606 *et seq.* of the State Government Article, and Chapter 27 of the Montgomery County Code. The lawsuit also included claims for retaliation and a hostile work environment. Following discovery, Hopkins moved for summary judgment, which the circuit court granted.

In this appeal, Jones presents four questions for our review, which we have rephrased as follows:

1. Whether the circuit court erred by sustaining Hopkins' objections to certain exhibits attached to Jones' opposition to Hopkins' motion for summary judgment.

2. Whether the circuit court erred by granting Hopkins' motion for summary judgment on Jones' discrimination claim.

3. Whether the circuit court erred by granting Hopkins' motion for summary judgment on Jones' retaliation claim.

4. Whether the circuit court erred by granting Hopkins' motion for summary judgment on Jones' hostile work environment claim.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

The facts, set forth in the light most favorable to Jones, who was the non-moving party at summary judgment, are as follows. Jones, an African-American female registered

nurse, began working for Hopkins on November 14, 2011. She was assigned to work at Hopkins' Montgomery Grove facility in Rockville, Maryland. The Montgomery Grove facility is part of a network of primary care and specialty service medical facilities operated by Hopkins. Jones' role as a registered nurse included direct patient care, and her scheduled work hours were 8:00 a.m. to 4:30 p.m. In September 2013, Hopkins hired Derek Sauer, a Caucasian male, to serve as the practice administrator at the Montgomery Grove facility. As the practice administrator, Sauer was Jones' direct supervisor. Following Sauer's hire, Jones was disciplined at various points and was ultimately terminated on May 28, 2015.

Jones' September 29, 2014 Absence and Subsequent Written Warning with Decision-Making Leave

The first instance of discipline occurred on September 29, 2014. Although the parties characterize this incident somewhat differently, they largely agree as to the basic facts of the incident. On September 29, 2014, shortly before 9:00 a.m., Jones went into the kitchen for a cup of water. Jones asserts that she had become nauseated at work and had vomited in the restroom prior to entering the kitchen. Sauer saw Jones in the kitchen, followed her in, and stood in the doorway. Sauer attempted to engage Jones in conversation, but Jones told Sauer that she could not speak to him.[1]

Jones did not inform Sauer that she had vomited or was otherwise feeling ill, nor did Jones obtain permission from Sauer to leave the workplace. Jones asserts that she felt

[1] Jones asserts that Sauer blocked the exit from the kitchen and "demanded" to speak with her.

"overwhelmed, nauseated, and anxious" and that she told Sauer that she "had to leave." Jones clocked out and left the building. After leaving the building, Jones telephoned her husband and waited for him to pick her up. Jones did not at any point inform Sauer about whether or when she intended to return to work, nor did Jones contact Sauer later that day after arriving at home. At her deposition, Jones testified that she did not believe that her supervisor was entitled to know when she was going to return until she contacted him or next appeared at work.

After arriving at home, Jones telephoned Alisha McGowan, an African-American female who works in Hopkins' human resources department. Jones told McGowan what had occurred at work that morning. McGowan informed Jones that she had violated Hopkins' policy by leaving the workplace and that Sauer would discipline Jones the next day.

Jones returned to work the next day and Sauer issued Jones a "Written Warning with Decision-Making Leave" based upon her violation of Hopkins' HR Policy 603, Section 3. The policy delineates that an unauthorized absence from an assigned work area for more than one hour is a "major violation" that normally warrants the response of a "Written Warning with Decision-Making Leave" for a first offense. Jones asked Sauer to remove the infraction, but Sauer declined to reconsider the Written Warning.

Jones appealed Sauer's decision to a third-level reviewer, Melissa Helicke. Helicke, a Caucasian female, was then Hopkins' Vice President of Practice Operations. Jones met with Helicke and told her that she had observed Sauer treat a Hispanic female medical

office assistant, Vanessa Serrano, more favorably than Jones had been treated when a similar incident had occurred. Jones asserted that, on October 10, 2014, Serrano left work without giving Sauer an explanation for her absence. Serrano left after an afternoon staff meeting during which Sauer announced that another staff member had been promoted to a position that Serrano believed that Sauer had promised to her. On December 10, 2014, Helicke ultimately upheld the Written Warning with Decision-Making Leave that Jones had received.

The December 9, 2014 Written Counseling

Following the September 29, 2014 incident, various Hopkins' medical providers documented further professionalism and performance issues with Jones. In November 2014, Dr. Clara Hill, a Caucasian female, sent an email to Sauer and Dr. Obafemi Okuwobi, the medical director of the facility, about the facility's procedure for prescription refill requests. Dr. Hill articulated that it was her understanding that it was the responsibility of nurses, after receiving a refill request, to check and see whether a patient had been seen within the prior year and document what they learned.

Dr. Hill reported that she had received three refill requests where Jones had not completed the required screening. Dr. Hill discussed the policy with Jones, but Jones told Dr. Hill that "nurses don't have time to check all the [prescription] requests." Dr. Hill recounted that Jones said that she "could make an exception for me 'as a courtesy.'" Dr. Okuwobi, an African-American male, agreed with Dr. Hill's concerns. Jones maintains that she had never been asked to check Dr. Hill's prescription refill requests and that she

did not fail to complete this task as assigned. Jones asserts that Sauer affirmatively sought out complaints about her performance. Dr. Hill's email referred to a prior meeting at which it was "discussed that you needed documentation of issues."[2]

Another incident occurred at a November 21, 2014 staff meeting. Nurses were informed that they should print provider schedules for the following day by a certain time the preceding afternoon. Sauer reported that Jones' "initial response in front of the staff and providers was that it could not be done, when in fact it should be done." Jones asserts she responded to the requirement that nurses print out provider schedules by saying that she "would do [her] best."

On December 8, 2014, Leora Allen, a Caucasian female certified nurse practitioner, sent an email to Sauer and Dr. Okuwobi about "multiple concerns" about Jones' performance. Specifically, Allen described an incident that occurred on November 20, 2014 when a patient was scheduled for a pelvic examination at the end of the day. It was after 4:30 p.m., and the medical assistant had already left for the day. Allen asked Jones if she could assist with the pelvic examination, and Jones responded that she was supposed to be off the clock but then offered to help. Allen reported that Jones did not prepare the necessary equipment for the exam.

While the patient was undressing in preparation for the exam, Jones approached Allen and told her that Heather Haase, a medical assistant, would be assisting her instead.

[2] This email was sent to both Sauer and Dr. Okuwobi, and it is unclear whether the pronoun "you" is intended to refer to Sauer, Dr. Okuwobi, or both.

In her email, Allen explained that she "did not want to take the [medical assistant] away from her assigned provider who was seeing patients." Allen subsequently learned that a different medical provider "ended up triaging her own patient because Heather [Haase] was helping me for 10 minutes." Allen explained that she expects "leadership abilities" from nurses. Jones maintains that Allen failed to communicate that she expected Jones to stay and assist with the exam and that Jones' delegation to Haase was appropriate.

Based upon the above-referenced concerns, and after discussion with Hopkins' human resources department, Sauer issued a Disciplinary Action Form and Counseling for Jones on December 9, 2014 for "unsatisfactory job performance, or otherwise not performing up to standards." Sauer counseled Jones about the November 14, 2014 email from Dr. Hill, the November 21, 2014 staff meeting, and the November 20, 2014 incident regarding the pelvic examination. Jones did not appeal.

Events Giving Rise to Jones' May 28, 2015 Termination

Various other incidents were documented in the months following the December 9, 2014 counseling. On February 17, 2015, Dr. Shuchismita Bhatt, a South Asian female pediatrician, sent an email to Sauer and Dr. Okuwobi for the purpose of "shar[ing] [her] concerns regarding our nurse Stacey Jones." Dr. Bhatt explained that when she first started working at Montgomery Grove, she viewed Jones as a "leader of our [POD], assuming as an RN she would have a larger knowledge base compared with the [medical assistants] and also a level of competency that would allow her to coordinate the [medical assistants] and

fill in when the [medical assistants] were busy with patient care."[3] However, Jones did not meet with Dr. Bhatt's expectations. Dr. Bhatt detailed "a few specific examples that demonstrate[d]" Jones shortcomings.

Dr. Bhatt described one incident when Jones failed to take a pediatric patient's temperature in a manner consistent with Hopkins' policy and also documented the temperature inaccurately. Jones also did not complete a flu test as requested by Dr. Bhatt, but rather asked a medical assistant from the other [POD] to do so, causing "a significant delay in care for this patient." Dr. Bhatt described other incidents where Jones caused delays in patient care or otherwise failed to demonstrate the competence expected, including Jones' failure to draw up vaccines as requested and failure to recognize a disparity between the medication concentration specified in an order for acetaminophen and the medication concentration of a bottle of acetaminophen in the office. Dr. Bhatt further documented an incident when Jones described a toddler's 104-degree fever as a "seizure level fever." Dr. Bhatt explained that this toddler had no history of febrile seizures and was clinically stable. Dr. Bhatt characterized Jones' reaction as being "panicked."

In April 2015, Jones and the other registered nurse at the facility, Shardra Harrison, switched PODs. Sauer instructed the two nurses to introduce themselves to the providers and "huddle" with each provider in the POD and the assigned medical assistant at least once per week. "Huddles" typically consist of a five- to ten-minute briefing among staff

[3] The facility was organized in two "PODs," each of which was comprised of an interdisciplinary team including physicians, nurse practitioners, a registered nurse, medical assistants, and medical office assistants.

to discuss workflow and operational issues. Huddles are intended to improve communication and promote teamwork that enhances patient-centered care. Huddles were incorporated into the Hopkins patient care model in 2014.

On May 1, 2015, Sauer sent an email to Dr. Margaret Oberman, inquiring as to whether Jones had introduced herself to Dr. Oberman and if Jones had participated in a huddle. Dr. Oberman responded the next day, Saturday, May 2, 2015. Dr. Oberman reported that Jones "has not huddled with us/despite me inviting her to do so." Dr. Oberman expressed additional concerns about Jones' "lack of engagement" on May 26, 2015. Dr. Oberman reported that she "personally invited RN Jones on two separate occasions to huddle with myself and my medical assistant in the morning to discuss patient care/business of the day," but Jones "has not approached me, nor has she engaged in any of our morning huddles to date." Dr. Oberman reported additional concerns relating to an appointment that Jones classified incorrectly, Jones' failure to provide daily provider schedules, and Jones' delegation of an EKG, which Dr. Oberman had asked Jones to perform, to a medical assistant.

Jones denies that she failed to huddle with any provider. Jones acknowledges that Dr. Oberman asked her to huddle with her, but Jones explains that she planned to huddle with her providers "on their late days." Dr. Oberman's late days were on Mondays, and Jones maintains that she planned to huddle with Dr. Oberman on Mondays. Jones was unable to huddle with Dr. Oberman, however, because on Monday, May 11, 2015, Jones was out of the office; on Monday, May 18, 2015, Dr. Oberman was out of the office; and

on Monday, May 25, 2015 the office was closed for the Memorial Day holiday. Jones further takes issue with Dr. Oberman's assertion that Jones failed to print the provider schedule. Jones acknowledges that Dr. Oberman asked Jones for the schedule on May 19, 2015, but Jones asserts that she explained to Dr. Oberman that Shardra Harrison was responsible for the schedule per an agreement between Jones and Harrison.[4]

Hopkins' Investigations of Jones' Complaints and Jones' Termination

Jones and other employees raised various concerns about Sauer. In February 2014, Bethany Martinez, a non-African-American medical assistant, complained to Hopkins' human resources department that Sauer had failed to accommodate her illness. Martinez was subsequently moved to a different provider, but expressed continued concern that Sauer was making her daily work environment "uncomfortable." Martinez expressed that Sauer continued "to treat [her] in a cold manner on a daily basis" and "alienated [her] from everyone in the office."

On June 24, 2014, eight Montgomery Grove staff members submitted a written complaint with Hopkins' Office of Organizational Equity expressing concerns about Sauer. The eight staff members included individuals of various genders, races, and national origins. Jones was not one of the eight employees. The written complaint alleged an "unprofessional environment," privacy concerns relating to a requirement that nurses keep their office doors open, and the making of "jokes and comments" that made some staff

[4] Jones asserts that she and Harrison coordinated together and agreed that Jones would take telephone calls while Harrison printed the provider schedules.

"uncomfortable." Nurses also complained that Sauer entered their offices without knocking.

Alanna Dennis, an African-American female who served as Hopkins' Equal Employment Opportunity Compliance Consultant, investigated the allegations. Dennis interviewed staff members and reviewed emails, text messages, and other documentation. Dennis set forth multiple factual findings, analysis, and outcomes, including but not limited to the following:

> - That during this investigation, Mr. Sauer admitted to having made "jokes" and comments about the staff including, but not limited to, making an isolated remark on one occasion to a male direct report in front of another coworker comparing the employee in appearance to a drug dealer.
>
> - That Mr. Sauer admitted to having asked his staff questions about themselves such as whether they were married and/or had a boyfriend or girlfriend in an effort reportedly to get to know the staff. He also indicated that when he became aware some staff members were not comfortable with the questions he stopped. Mr. Sauer further explained that *prior* to the . . . internal investigation he had been disciplined and counseled by his chain of command as a result of an earlier HR led compliance related investigation.
>
> - That none of the witnesses reported having heard Mr. Sauer engage in any derogatory jokes or comments that were race-based, national origin based or sexual in nature.
>
> - That Mr. Sauer admitted to telling some of the nurses (who were within his leadership team) that he did not like the work ethic of one of his subordinates.
>
> - The majority of the Montgomery Grove staff witnesses reported their perception of Mr. Sauer as having poor communication skills, allegedly lacking leadership skills, appearing unwilling to follow through and hold staff

> accountable, and appearing to have favorites. During the course of the investigation, I also directly observed Mr. Sauer's communication and people skills in need of additional training [and] I did not find any factual evidence of any nepotism or favoritism and it should also be noted that several of the perceived "favorites" were staff members of different national origin, gender and races.

Dennis further documented "reportedly low" morale among the Montgomery Grove staff.

Dennis concluded that there was no evidence to substantiate a violation of Hopkins' Equal Employment Opportunity/anti-discrimination and harassment policy. Nonetheless, Dennis commented that "there were several reported concerns regarding Mr. Sauer's lack of management, people and communication skills that suggest to this investigator that Mr. Sauer should be placed on a performance improvement plan to improve his overall organization and leadership skills of a culturally diverse workforce and to improve his team-building skills." Dennis further recommended that departmental leadership consider, "in consultation with HR, [counseling] Mr. Sauer for the following inappropriate conduct, including, but not limited to, Mr. Sauer's expression of his personal dislike of one of his direct report's work ethic to another subordinate outside the direct chain of command; Mr. Sauer's touching of a female subordinate's neck (again although the touch was not perceived as sexual the female staff member did not believe it was appropriate); and for Mr. Sauer's inappropriate 'joking' at the workplace in which he compared a male subordinate to a drug dealer."

Dennis explained that "Mr. Sauer's lack of judgment in engaging in the above inappropriate conduct and/or jokes has been perceived as inappropriate and an abuse of his

power and authority by several members of his staff." Dennis recommended that Sauer complete sexual harassment training and training focusing on leadership in a diverse workplace. Dennis sent a copy of her summary report to Carl Morgan, Regional Operations Director for Hopkins' Greater Washington locations, as well as to Leslie Rohde who was then Hopkins' Director of Human Resources (and a Caucasian female). Morgan subsequently counseled Sauer.

On December 15, 2014, Jones reported her concerns about Sauer to Rohde. Jones explained that she was writing "in an effort to make [Hopkins] aware of the continued intimidating and now retaliatory actions placed against [her] by" Sauer. Rohde interviewed Jones about her concerns on December 23, 2014. Based upon the information Jones provided, Rohde did not identify any basis to conclude that Sauer had violated any human resources policy. Rohde advised Jones that she had the right to file an internal complaint with the Hopkins Office of Organizational Equity and provided Jones with the appropriate form to do so. Jones did not file an internal complaint with the Office of Organizational Equity.

On May 1, 2015, Rohde received a memorandum from five employees, including Jones and two other African-American employees. The memorandum alleged that Sauer's actions had "caused an extremely hostile and intimidating work environment." The memorandum further alleged that Sauer was "very deceitful, shows favoritism and defames our character and work ethic." On May 19, 2015, human resources representative Beth Wilson sent an email to Jones requesting additional information. Jones submitted a

complaint form in which she alleged that she, as an African-American, faced harsher penalties than other non-African-American employees. Jones requested "further investigation of acts" that she "deem[ed] to be exploitation and Mr. Sauer's mentioning of bringing a 'gun' into the office." Jones discussed her complaint with Beth Wilson, a Caucasian female human resources generalist.

On May 27, 2015, Sauer interviewed medical assistant Rosa Martorell regarding Jones' competency to perform an EKG. Martorell reported that Jones asked her to assist with the EKG because Jones did not know how to properly operate the machine. Martorell further reported that Jones' EKG lead placement was not correct and the leads needed to be realigned.

On May 28, 2015, Jones was disciplined for "unsatisfactory job performance or otherwise not performing up to standards." This was Jones' third disciplinary action within the prior year. Pursuant to Hopkins' progressive discipline policy, Jones' employment was terminated. Jones appealed her termination, and the termination was upheld.

On August 28, 2015, Jones completed a Discrimination Intake/Inquiry Form for the Montgomery County Office of Human Rights. Hopkins received no notice of the administrative complaint until January 2016. On January 1, 2017, Jones filed the complaint giving rise to the instant appeal. Following discovery, Hopkins moved for summary judgment. After a hearing, the circuit court granted Hopkins' motion for summary judgment. This appeal followed.

Additional facts shall be set forth as necessitated by our discussion of the issues on appeal.

STANDARD OF REVIEW

The entry of summary judgment is governed by Maryland Rule 2-501, which provides:

> The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

Md. Rule 2-501(f).

The Court of Appeals has articulated the appellate standard of review of a trial court's grant of a motion for summary judgment as follows:

> On review of an order granting summary judgment, our analysis "begins with the determination [of] whether a genuine dispute of material fact exists; only in the absence of such a dispute will we review questions of law." *D'Aoust v. Diamond*, 424 Md. 549, 574, 36 A.3d 941, 955 (2012) (quoting *Appiah v. Hall*, 416 Md. 533, 546, 7 A.3d 536, 544 (2010)); *O'Connor v. Balt. Cnty*., 382 Md. 102, 110, 854 A.2d 1191, 1196 (2004). If no genuine dispute of material fact exists, this Court determines "whether the Circuit Court correctly entered summary judgment as a matter of law." *Anderson v. Council of Unit Owners of the Gables on Tuckerman Condo.*, 404 Md. 560, 571, 948 A.2d 11, 18 (2008) (citations omitted). Thus, "[t]he standard of review of a trial court's grant of a motion for summary judgment on the law is *de novo*, that is, whether the trial court's legal conclusions were legally correct." *D'Aoust*, 424 Md. at 574, 36 A.3d at 955.

Koste v. Town of Oxford, 431 Md. 14, 24-25 (2013).

"[T]he purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried.'" *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 534 (2003) (quotation and citation omitted). "'[T]he mere existence of a scintilla of evidence in support of the plaintiffs' claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the [trier of fact] could reasonably find for the plaintiff.'" *Crickenberger v. Hyundai Motor Am.*, 404 Md. 37, 45 (2008) (quoting *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 738-39 (1993)). "'[W]hile a court must resolve all inferences in favor of the party opposing summary judgment, "those inferences must be reasonable ones.'" *Id.* (quoting *Beatty*, *supra*, 330 Md. at 739).

DISCUSSION

I.

In its written memorandum opinion and order, the circuit court addressed Hopkins' objections to certain exhibits attached to Jones' opposition to Hopkins' motion for summary judgment. The court explained:

> [Hopkins] has raised hearsay objections to various of [Jones'] exhibits for which a proper evidentiary foundation was not laid, and which were not attached to or referenced in any sworn affidavit or deposition . . . The objection will be sustained as to pages H1788-93, H0331, H1720, H025-026, H0356-57, and H1200. These documents have not been shown to have a proper evidentiary foundation, and are not considered.

The documents to which Hopkins' objections were sustained were: (1) a memorandum with the title "Written Counseling" addressed to Sauer from Regional Operations Director

Carl Morgan which contained summaries of various out-of-court comments; (2) one page of a memorandum from Equal Employment Opportunity Compliance Consultant Alanna Dennis addressing the June 23, 2014 complaint about Sauer signed by eight Montgomery Grove staff members; (3) the June 23, 2014 complaint signed by eight Montgomery Grove staff members; (4) a fragment of an email from Sauer to an unidentified recipient; (5) notes taken by a human resources representative about a complaint regarding Sauer's behavior from an anonymous caller; and (6) investigation notes dated April 1, 2014 that summarized various staff member comments. Jones asserts that the circuit court erred in sustaining Hopkins' objections to the above-referenced exhibits. As we shall explain, we are not persuaded by Jones' allegation of error.

In her brief, Jones asserts that "[t]here is no requirement that a party demonstrates the admissibility of *each* piece of evidence during . . . summary judgment." (Emphasis in original.) Jones cites no authority for this proposition. Indeed, this statement is contrary to the law. A party's "opposition to a motion for summary judgment must be supported by 'facts that would be admissible in evidence . . . .'" *Halliday v. Sturm, Ruger & Co.*, 138 Md. App. 136, 152, (2001), *aff'd*, 368 Md. 186, 792 A.2d 1145 (2002) (quoting *Bond v. NIBCO*, 96 Md. App. 127, 134 (1993)). *See also O'Connor v. Baltimore Cty.*, 382 Md. 102, 111, (2004) ("To properly oppose a motion for summary judgment, the facts presented must not only be detailed but also admissible in evidence."). There are various methods by which facts may be placed before the court, "including by affidavit, deposition transcript, answers to interrogatories, admissions of facts, stipulations, and, under some

circumstances, pleadings." *Id.* (citing *Vanhook v. Merchants Mut. Ins. Co.*, 22 Md. App. 22, 26-27 (1974)). Materials submitted in support of a motion for summary judgment or in opposition to such a motion must present admissible evidence. *Vanhook*, *supra*, 22 Md. App. At 26.

The Court of Appeals has quoted favorably the discussion set forth by P.V. Niemeyer & L.M. Richards in Maryland Rules Commentary 252 (2d ed. 1992):

> [A] document can be made part of the motion [for summary judgment] only through affidavit, deposition, or answers to interrogatories that adequately lay the proper foundation for the document's admission into evidence. Authenticity and relevancy of the document must be shown. Attaching documents to a motion for summary judgment without the necessary affidavit is no more acceptable than standing up in open court and attempting to offer the same documents into evidence without a witness or a stipulation.

Imbraguglio v. Great Atl. & Pac. Tea Co., 358 Md. 194, 203-04 (2000).

In her brief, Jones raises multiple arguments as to why the various documents were admissible. She asserts that the content of the documents was relevant to establish Sauer's discriminatory and retaliatory animus toward Jones, but Hopkins does not dispute the relevance of the documents. Jones further asserts that the excluded documents should not have been excluded because they were admissible as statements of a party opponent or as business records. First, we observe that even if we were to assume *arguendo* that all of the challenged documents were admissible pursuant to the party opponent and/or business record exceptions to the hearsay rule, all of the documents contain additional hearsay that must fall within an exception to the hearsay rule. *Bernadyn v. State*, 390 Md. 1, 19 n.6

(2005) ("[U]nder the common law and the Maryland Rules, each level of hearsay must satisfy an exception to the rule of exclusion before it is admissible.") (citing *Hadid v. Alexander*, 55 Md. App. 344, 350 (1983)); Md. Rule 5-805 ("If one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule.").

Moreover, the circuit court expressly explained that its ruling was premised upon a conclusion that "a proper evidentiary foundation was not laid" for the challenged exhibits, "which were not attached to or referenced in any sworn affidavit or deposition." As we discussed *supra*, it is "only through affidavit, deposition, or answers to interrogatories that adequately lay the proper foundation for a document's admission into evidence" that a "document can be made part of the motion [for summary judgment]." *Imbraguglio, supra*, 358 Md. at 203-04 (quoting P.V. Niemeyer & L.M. Richards, Maryland Rules Commentary 252 (2d ed. 1992)).

Jones failed to authenticate the challenged documents as required by Md. Rule 5-901 ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). *See also Zilichikhis v. Montgomery Cty.*, 223 Md. App. 158, 195 (2015) (holding that a party "failed to establish any foundation for [a] document's admission into evidence" when the party "point[ed] to no formal admissions, stipulations, deposition testimony, or affidavit showing the authenticity or relevance of the

document."). Because Jones failed to properly authenticate the challenged documents, the circuit court did not err by sustaining Hopkins' objections to the exhibits.[5]

II.

We next consider Jones' assertion that the circuit court erred by granting Hopkins' motion for summary judgment on Jones' discrimination claim. Maryland courts analyze claims of race and gender discrimination applying the framework set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-02 (1973);

[5] On appeal, Jones asserts that Hopkins failed to establish the admissibility of evidence attached to its own motion and, therefore, Hopkins failed to "me[et] its own posited standard or admissible evidence at the summary judgment stage." Jones did not raise issues relating to the admissibility of the exhibits attached to Hopkins' motion before the circuit court. Accordingly, this issue is not properly before us on appeal. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.").

Jones further asserts that the circuit court erred by failing to exclude three arguments raised by Hopkins in an email sent to the circuit court the day following the hearing on the motion. The email "addres[ed] herein three points about which [the court] inquired during yesterday's oral argument." Jones filed a motion to strike Hopkins' email, arguing, *inter alia*, that Hopkins had inappropriately failed to file its letter with the clerk of the circuit court. Thereafter, Hopkins filed the letter with the circuit court, and the circuit court denied Jones' motion to strike as moot. Jones contends that the circuit court erred by failing to clarify whether it considered the post-argument letter substantively.

Jones cites no authority for the proposition that a post-argument email sent to a circuit court judge, on which opposing counsel was copied, is *per se* inappropriate. Nor are we aware of any such authority prohibiting such a communication. Furthermore, given that we review the circuit court's determination as to Hopkins' summary judgment motion *de novo*, whether the circuit court did or did not consider the substance of the January 9, 2018 email is irrelevant to our disposition of the issues raised in this appeal.

Nerenberg v. RICA of Southern Maryland, 131 Md. App. 646, 661-62 (2000).[6] Pursuant to the *McDonnell Douglas* framework, a plaintiff must first, in the absence of direct evidence, prove by a preponderance of the evidence the four prongs of a *prima facie* case set out in [*McDonnell Douglas*, *supra*, 411 U.S. at 801-02]." *Nerenberg*, *supra*, 131 Md. App. at 661. If the plaintiff succeeds in establishing a *prima facie* case, then the burden of production "shifts to the defendant to articulate some legitimate, non-discriminatory explanation which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995). "When the employer does so, the complainant then must prove, by a preponderance of the evidence, that the employer's stated reason for the termination was a pretext." *State Comm'n on Human Relations v. Kaydon Ring & Seal, Inc.*, 149 Md. App. 666, 676-77 (2003).

In order to establish a *prima facie* case of discrimination, Jones must prove:

> 1) that [Jones] was in a protected class; 2) she was discharged; 3) at the time of the discharge, she was performing her job at a level that met her employer's legitimate expectations; and 4) her discharge occurred under circumstances that raise a reasonable inference of discrimination.

Nerenberg, *supra*, 131 Md. App. at 663. (quoting *Ennis*, *supra*, 53 F.3d at 58). As we shall explain, viewing the evidence in the light most favorable to Jones, the evidence adduced regarding the third and fourth prongs of the *McDonnell Douglas* test does not support an

[6] Maryland courts have a "history of consulting federal precedent in the equal employment area." *Taylor v. Giant of Maryland, LLC*, 423 Md. 628, 652 (2011).

inference that Hopkins' employment decision to terminate Jones' employment was based on illegal discriminatory criteria. Absent that inference, Jones is unable to establish a genuine issue of material fact to defeat Hopkins' summary judgment motion.

Even when we consider the facts in the light most favorable to Jones, the evidence is clear that Jones failed to meet her employer's legitimate job performance expectations. Jones does not dispute that Hopkins characterizes the unauthorized absence from an assigned work area for more than one hour as a "major violation." Nor does Jones dispute that she left work before her shift ended on September 29, 2014 and that she did not tell her supervisor the reason she was leaving, when she would return, or if she would return.

Jones attempts to show discrimination by comparing the way she was treated after leaving work without permission to the circumstances of a different employee. "Proof of an intent to discriminate based on race may be shown circumstantially by proof of disparate treatment by an employer of similarly situated employees." *Kaydon Ring & Seal, supra*, 149 Md. App. at 702. Jones asserts that Vanessa Serrano, a Hispanic female, similarly left work without providing an explanation to Sauer on October 10, 2014. Although Sauer disciplined Jones for leaving work on September 29, 2014, Sauer did not discipline Serrano.

Jones asserts that she and Serrano were similarly situated, and, therefore, that discriminatory intent can be inferred based upon their disparate treatment. Although "one who alleges discrimination need not identify and reconcile every distinguishing characteristic of the comparators," *Taylor v. Giant of Maryland, LLC*, 423 Md. 628, 655

(2011), the similarity "must be clearly established in order to be meaningful." *Lightner v. City of Wilmington*, 545 F.3d 260, 265 (4th Cir. 2008).

In our view, the evidence, viewed in the light most favorable to Jones, fails to establish that Jones and Serrano are comparators. Serrano went to Sauer's office to inform him that she was leaving after learning that Sauer had selected another employee for a promotion she believed had been promised to her. Sauer testified that he understood the reason for Serrano's departure. In contrast, Jones failed to provide an explanation for her departure to Sauer. Serrano left the office in the afternoon, while Jones left the office at approximately 9:00 a.m. Most importantly, Serrano was a medical office assistant whose responsibilities were primarily administrative in nature, while Jones, as a registered nurse, provided direct patient care. "[T]wo coworkers treated differently for the same offense might not be similarly situated if they have different job responsibilities or circumstances." *Booth v. Leggett*, 186 F. Supp. 3d 479, 486 (D. Md. 2016). Serrano's and Jones' job responsibilities were not sufficiently similar to render them comparators, nor were the circumstances underlying their absences from the office. Therefore, no discriminatory intent can be inferred based upon the allegedly disparate treatment of Serrano and Jones.[7]

[7] Jones additionally asserts that discriminatory intent can be inferred based upon the way she was treated in comparison to Heather Haase and Bethany Martinez, both of whom were non-African-American employees. Jones asserts that when Haase failed to perform according to expectations, she was repeatedly warned and provided with opportunities for trainings and remediation. Jones further asserts that when Haase was disciplined, she was subjected to less severe discipline than Jones.

Jones and Haase were not sufficiently similar to render them comparators. Jones was a registered nurse with over eight years of experience, while Haase was a medical

Other evidence similarly fails to support Jones' assertion that she was performing her job at a level that met her employer's legitimate expectations at the time of her termination. Jones does not dispute that Dr. Clara Hill, Dr. Obafemi Okuwobi, and Nurse Practitioner Leora Allen complained about Jones' professionalism and performance in November and December of 2014 in connection with Jones' failure to properly apply the correct refill request policy, Jones' negative attitude at a November 21, 2014 staff meeting, and the incident on December 8, 2014 when Jones was asked to assist with a pelvic examination but instead delegated the assistance to a medical assistant.

Jones does not specifically challenge Dr. Okuwobi's or nurse practitioner Allen's assessments of her performance, but she does dispute Dr. Hill's assessment, arguing that Dr. Hill's allegations were "false or misleading." Nonetheless, it is the employer's assessment of the employee's performance that matters, not the employee's self-serving statements. *Williams v. Maryland Dep't of Human Res.*, 136 Md. App. 153, 174 (2000)

assistant, who required no Maryland license, and who had been a Hopkins employee for less than four months when she was disciplined. In addition, Hopkins expected Jones, as a registered nurse, to mentor and assist Haase. Given the differences in Jones' and Haase's roles and experience level, as well as the expectations for Jones' and Haase's and positions, no discriminatory intent can be inferred based upon the allegedly disparate treatment.

Jones asserts that she was treated differently than Bethany Martinez as well, arguing that Martinez was transferred to another supervisor after the investigation of Martinez's complaint about Sauer, while Jones was not transferred. Both complaints, however, were investigated pursuant to Hopkins' policy based on the specific circumstances of the complaints. Furthermore, each complaint containing different allegations. Unlike Jones' complaints, Martinez's complaint was focused upon Sauer's failure to accommodate her illness. The specific recommendations and outcomes of the investigations were different, but there is no evidence to suggest that the complaints were investigated differently due to discrimination.

("[A] disgruntled employee's self-serving statements about his qualifications and abilities generally are insufficient to raise a question of fact about an employer's honest assessment of that ability."). Dr. Hill expressed significant concerns about Jones' response that she would be willing to check prescription refill requests "as a courtesy" rather than as a matter of policy. Jones's only response to Dr. Hill's concerns is her own self-serving testimony. This is insufficient to raise a question of fact about Dr. Hill's assessment of Jones' performance.

Furthermore, the issue before the court is not whether Jones agrees with Dr. Hill's assessment of Jones' performance, but rather whether Dr. Hill's assessment was made in good faith. If a plaintiff "presents no evidence to assail the honesty of the employer's belief that its reasons are correct, the court cannot find those reasons to be discriminatory, even if it disagrees with the soundness of the employer's decision based on those reasons." *Nerenberg, supra*, 131 Md. App. at 675. There is nothing in the record to suggest that Dr. Hill's assessment of Jones' performance was less than genuine or in any way motivated by discrimination.

Even following the December 9, 2014 counseling, multiple providers continued to raise concerns about Jones performance. Jones does not dispute the concerns raised by pediatrician Dr. Shuchismita Bhatt about Jones' failure to comply with Hopkins' policy when taking a toddler's temperature or her failure to complete a flu test as requested by Dr. Bhatt, which Dr. Bhatt explained caused "a significant delay in care for this patient." Nor does Jones challenge Dr. Bhatt's various other examples of incidents when Jones'

performance caused delays in patient care or failed to demonstrate the competence Dr. Bhatt expected from a registered nurse. Jones also does not dispute that she did not participate in huddles as required with Dr. Oberman. Instead, Jones offers an explanation for why she believed that participation in huddles was not possible because either Jones or Dr. Oberman were out of the office on Mondays in May. Jones does not explain why she was unable to huddle with Dr. Oberman on a different day.

Jones does not dispute that the various allegations of performance concerns were lodged by a wide range of medical providers at Montgomery Grove, nor does she dispute that the aforementioned events occurred. Rather, it is only Jones' characterization of the events and interpretation of the events that differ from those of Hopkins. Different interpretations of the evidence do not create issues of material fact as to Jones' failure to perform up to the legitimate expectations of her employer. *Nerenberg*, *supra*, 131 Md. App. at 666. Courts do "not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination." *DeJarnette v. Corning Inc*., 133 F.3d 293, 299 (4th Cir. 1998) (quotation and citation omitted); *see also Nerenberg*, *supra*, 131 Md. App. at 675 ("[W]hen an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not [the court's] province to decide whether the reason was wise, fair, or even correct, ultimately so long as it was truly the reason for the plaintiff's termination.") (quotation and citation omitted).

In addition, we are not persuaded by Jones' assertion that her termination was inconsistent with prior positive reviews she received. Indeed, Hopkins acknowledges that Sauer gave Jones a positive review on January 14, 2014. A plaintiff alleging discrimination cannot, however, overcome summary judgment by demonstrating that she performed well in certain contexts when the overall record fails to establish that the employee was performing at a level that met her employer's legitimate expectations. *See Nerenberg*, *supra*, 131 Md. App. At 667 (explaining that "even qualified praise" for an employee "do[es] not create issues of material fact as to [the employee's] failure to perform up to the legitimate expectations of her employer).

Jones is unable to demonstrate that she was performing her job as a registered nurse at a level that satisfied Hopkins' legitimate expectations. Nor was Jones able to point to evidence that would establish that her discharge occurred under circumstances that raise a reasonable inference of discrimination. Accordingly, Jones failed to establish a *prima facie* case of discrimination, and the circuit court properly granted summary judgment as to the discrimination claim.

III.

Jones further asserts that the circuit court erred by granting summary judgment to Hopkins on Jones' retaliation claim. In order to establish a *prima facie* case of discrimination based upon retaliation, Jones must prove that (1) she engaged in a protected activity; (2) her employer took an adverse action against her; and (3) the adverse action

was causally connected to her protected activity. *Lockheed Martin Corp. v. Balderrama*, 227 Md. App. 476, 505 (2016).

There is no dispute that Jones engaged in protected activity by submitting complaints about Sauer alleging that he discriminated against her on the basis of race and gender. *See id.* at 506 ("'An employee's complaint about an employer's allegedly discriminatory conduct, whether through formal or informal grievance procedures, constitutes protected oppositional activity,' as long as the employer shows 'that he or she held a good faith, subjective, and objectively reasonable belief that the employer engaged in discriminatory conduct.'") (quoting *Edgewood Management Corporation v. Jackson*, 212 Md. App. 177, 201-02 (2013)). Nor is there any dispute that Hopkins took adverse actions against Jones by terminating her employment. *See id.* at 509 (explaining that in order "to constitute 'actionable retaliation,' the challenged conduct must be 'materially adverse,' i.e., an action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006) (additional internal quotation omitted)). An employee generally cannot establish that his or her termination was in retaliation for protected conduct if the person responsible for the termination decision was not aware of the protected conduct. *Id.* at 515 (citing *Balas v. Huntington Ingalls Indus., Inc.*, 711 F.3d 401, 410-11).

We turn, therefore, to whether Jones presented evidence to support a conclusion that the adverse action was causally connected to her protected activity. In the present case,

Jones asserts that although there was no direct evidence that Sauer retaliated against her due to her protected activity, she has presented sufficient circumstantial evidence to support such an inference. The circuit court disagreed, concluding that there was no competent evidence beyond speculation and conjecture that Sauer knew of Jones' protected activity and terminated her employment for that reason. As we shall explain, we agree with the circuit court.

Jones asserts that Sauer had "some knowledge" of Jones' complaints about his alleged race and gender discrimination, but Jones fails to substantiate this claim. First, we observe that not all of Jones' complaints about Sauer constitute protected activity. "Not every complaint about discrimination or unfairness, however, qualifies as protected activity. A vague complaint alleging mere prejudice or general unfairness is insufficient; it must allege discrimination connected to a protected class." *Balderrama*, *supra*, 227 Md. App. at 507. Jones points, for example, to her October 3, 2014 memorandum to human resources regarding the disciplinary action for leaving the office without authorization on September 29, 2014. In her memorandum, she complains of Sauer causing her to "feel[] overwhelmed" after she became ill at work. This memorandum did not, however, allege discrimination connected to a protected class. Jones further points to her October 23, 2014 letter to Sauer, which she asserts "placed [Sauer] on notice" that she had to see a doctor concerning "the stress of this as well as other stressful situations [she had] encountered

since working for [Sauer]." Again, this letter does not constitute protected activity because it does not allege specific discrimination based upon race or gender.[8]

Jones asserts that there is sufficient evidence to support an inference that Sauer knew about her complaints of discrimination to Carl Morgan based only upon the relationship between Morgan and Sauer. Jones emphasizes that Morgan "championed" Sauer because he hired Sauer based on the recommendation of a mutual friend. In our view, the circumstances surrounding Sauer's hiring and the fact that Sauer and Morgan shared a mutual friend is insufficient to support a reasonable inference that Morgan told Sauer about Jones' allegations of discrimination. In our view, such an inference would be purely speculative.

Jones further asserts that the temporal proximity between her complaints about Sauer and her termination is sufficient to raise an inference of Sauer's knowledge of her complaints as well as an inference that Sauer decided to terminate her employment due to her complaints. "Temporal proximity between a complaint and an adverse employment action can, in some cases, be used to survive summary judgment . . . ." *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 309 (4th Cir. 2006). When actions that led to discipline and/or termination occurred before the employee engaged in protected activity,

[8] Jones relies on additional complaints that do not constitute protected activity for similar reasons, including a June 23, 2014 letter to the compliance division signed by eight employees; an email exchange between Bethany Martinez and Alisa McGowan on February 25, 2014; an additional email exchange between Martinez and McGowan on March 10, 2014; and investigation notes dated April 1, 2014 summarizing interviews conducted by human resources representatives with employees.

however, temporal proximity between a complaint and adverse employment action cannot give rise to an inference of retaliation. *Id.* "'Where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.'" *Id.* (quoting *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001)). In the present case, the evidence is overwhelming that various medical providers raised significant concerns about Jones' performance well before Jones complained about any discrimination. Furthermore, as we discussed *supra* in Part II, there is ample evidence that Hopkins had legitimate, good faith business reasons for Jones' termination. Accordingly, viewing the evidence in the light most favorable to Jones, we hold that there is insufficient evidence to support Jones' claim of unlawful retaliation.

IV.

Jones' final contention is that the circuit court erred by granting Hopkins' motion for summary judgment on Jones' hostile work environment claim. To establish a hostile work environment claim, a plaintiff must show that the challenged conduct is (1) unwelcome; (2) based on race, gender, or protected activity; (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) imputable on some factual basis to the employer. *Magee v. DanSources Tech. Servs.*, 137 Md. App. 527, 550 (2001). Our review of the record reflects that Jones has not presented sufficient evidence to support her hostile work environment claim.

In order to form the basis for a hostile work environment claim, the harassing conduct must be sufficiently extreme as "'to amount to a change in the terms and conditions of employment.'" *E.E.O.C. v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)). Teasing and offhand comments generally do not amount to discriminatory changes in the terms and conditions of employment. *Id.* Nor do "complaints premised on nothing more than rude treatment by [coworkers], callous behavior by [one's] superiors, a routine difference of opinion and personality conflict with [one's] supervisor" form the basis for a hostile work environment claim. *Id.* at 315-16 (internal quotations and citations omitted) (alterations in original). Conduct is sufficiently severe when "the environment was pervaded with discriminatory conduct aimed to humiliate, ridicule, or intimidate, thereby creating an abusive atmosphere." *Id.* (internal quotation and citation omitted).

Whether conduct is sufficiently severe or pervasive in the context of a hostile work environment claim is a fact-intensive inquiry and depends upon the totality of the circumstances. *Faragher*, *supra*, 524 U.S. at 787. Factors to be considered include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (internal citation and quotation omitted). "[N]o single factor is dispositive, as [t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts

performed[.]" *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 421-22 (4th Cir. 2014) (quotation and citation omitted). The standard is objective. *Id.* at 421.

Viewing the evidence in the light most favorable to Jones, the evidence fails to establish that the work environment was sufficiently extreme as to amount to a change in the terms and conditions of employment. Jones complains of Sauer's "overbearing conduct," overzealous monitoring of employees, and listening at office doors. Jones asserts that Sauer would ask her coworkers where to find her when he was unable to locate her himself, which "publicly embarrassed" her. Additional conduct that Jones cites as the basis of her hostile work environment claim includes allegations that Sauer (1) once touched a female employee (although not Jones herself) in a non-sexual manner; (2) Jones "had a reputation" for speaking with women about their personal lives; (3) stood in the way when Jones attempted to leave the office on September 29, 2014; and (4) once mentioned bringing a firearm to the office.[9]

In our view, these allegations are not sufficiently severe to give rise to a hostile work environment claim. The monitoring of employees by a supervisor does not create a hostile work environment. *See Jones v. Fam. Health Ctrs. of Balt., Inc.*, 135 F. Supp. 3d 372, 279 (D. Md. 2015) (finding that an allegation of excessive monitoring by a supervisor "was neither severe nor pervasive" in the context of a hostile work environment claim). Jones' allegations premised upon Sauer's interactions with other employees are largely based

[9] The record is silent as to the context in which the alleged comment about the firearm was made.

upon hearsay and other unauthenticated documents, which, as we discussed *supra* in Part I, were properly disregarded by the circuit court. Furthermore, assuming *arguendo* that there was evidence to support the allegations of Sauer's "reputation" for speaking with women about their personal lives as well as his touching of a female employee, these allegations are not so severe as to amount to a change in the terms and conditions of Jones' employment.

Further, we are not persuaded that Sauer created a hostile work environment by standing in the doorway when Jones attempted to leave the office on September 29, 2014. *See Khoury v. Meserve*, 268 F. Supp. 2d 600, 614 (D. Md. 2003), aff'd, 85 F. App'x 960 (4th Cir. 2004) (finding that evidence was insufficient to establish a hostile work environment claim when a coworker "yelled at [the p]laintiff, told her she was incompetent, pushed her down in her chair, and blocked the door to prevent [the p]laintiff from leaving while he continued to yell at her").

Jones emphasizes her "deteriorated mental state" and the stress she suffered due to her work situation, but the objective standard does not take into account Jones' individual reaction to the work environment. Rather, the standard is whether the work environment was objectively severe. As we have explained, our review of the record indicates that it was not. An employee is not entitled to "refinement and sophistication in the workplace," and even "treatment that was often disrespectful, frustrating, critical, and unpleasant" is not sufficiently severe to create a hostile work environment. *Id.* The circuit court,

therefore, did not err by granting Hopkins' motion for summary judgment as to the hostile work environment claim.

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