DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS

In the Matter of:

COMPLAINANT,
Complainant,

v. Docket Number 09-095-P (CN)

WELLS FARGO AND COMPANY,
Respondent.
_____/

FINAL DECISION AND ORDER

I. STATEMENT OF THE CASE:

Complainant is a White Latina female of Costa Rica national origin, who was 53 years of age at the time the acts of alleged discrimination occurred. From January 2, 2007 to February 13, 2008, Complainant was employed for Wachovia Corporation[1] ("Respondent") as a bilingual Mortgage Consultant. Complainant was assigned to work at the Respondent's branch office located at 1300 "I" Street, N.W., Washington, D.C. The Respondent as a corporation licensed to conduct business in the District of Columbia is subject to the jurisdiction of the District of Columbia Office of Human Rights and the District of Columbia Commission on Human Rights,

[1]On July 30, 2014, Wells Fargo and Company was substituted for Wachovia Corporation as the successor Respondent in this matter by order of the undersigned judicial officer.

and is not exempt for any reason from the laws of the District of Columbia prohibiting unlawful discrimination.

Complainant filed a complaint of discrimination on December 20, 2008 with the District of Columbia Office of Human Rights ((“the Office” or “OHR”) against Wachovia Corporation alleging:1) the Respondent subjected her to a hostile work environment on the basis of her race, national origin, and age; 2) subjected her to disparate treatment on the basis of her race, national origin and age; and 3) wrongfully retaliated against her for filing a District of Columbia Family Medical Leave Act (DCFMLA) claim by terminating her employment with their company.

Procedural History of the Case

The OHR conducted an investigation of Complainant’s complaint of discrimination and retaliation and on March 26, 2010, the Office issued a Letter of Determination (“LOD”) finding probable cause to believe the Respondent subjected Complainant to a hostile work environment on the basis of her race (White Hispanic) and age (53) in violation of the District of Columbia Human Rights Act (“DCHRA”). The Office did not find there was probable cause that the Respondent had subjected the Complainant to a hostile work environment on the basis of her national origin. In the LOD, OHR also found probable cause to believe the Respondent had wrongfully denied Complainant the use of DCFMLA leave and retaliated against her for requesting family medical leave by terminating her from their employ on February 13, 2008. Lastly, the LOD determined the Complainant failed to demonstrate that she was subjected to disparate treatment on the basis of her race (White Hispanic), national origin (Costa Rica), and age (53).

Attempts to conciliate the case were unsuccessful and the matter was certified to the District of Columbia Commission on Human Rights (“Commission”) for adjudication on

February 7, 2011. The matter was assigned to Administrative Law Judge Eli Bruch ("ALJ Bruch"). A Status Conference was held, a Scheduling Order was issued, and discovery was conducted by the parties. Following discovery a Motion for Summary Judgment was filed by the Respondent on May 25, 2012. Complainant filed an Opposition to the Motion for Summary Judgment on July 13, 2012. Respondent filed a Reply to the Opposition to the Motion for Summary Judgment on August 15, 2012.

ALJ Bruch left the Commission in June 2014 and the case was reassigned to the undersigned judicial officer. On July 23, 2014, a status teleconference was held with the undersigned judicial officer and counsel for the parties. On October 1, 2015, the undersigned judicial officer issued a Proposed Decision and Order granting the Respondent's Motion for a Summary Judgment. Complainant filed her Exceptions to the Proposed Decision and Order on October 14, 2015. Respondent filed their Response to Complainant's Exceptions to Proposed Decision and Order on October 29, 2015.

Upon careful review and consideration of the Respondent's Motion for Summary Judgment, the Complainant's Opposition to the Motion for Summary Judgment, the Respondent's Reply to the Complainant's Opposition to the Motion for Summary Judgment, Complainant's First and Second Notice of Supplemental Authorities in Support of her Opposition to Respondent's Motion for Summary Judgment, Respondent's First and Second Replies in response to Complainant's First and Second Notice of Supplemental Authorities in Support of Her Opposition to Respondent's Motion for Summary Judgment, the Proposed Decision and Order, Complainant's Exceptions to the Proposed Decision and Order and the Respondent's Response to Complainant's Exceptions to the Proposed Decision and Order and for the reasons set forth

below, the Commission grants the Motion for Summary Judgment in favor of the Respondent as to the Complainant's hostile work environment and DCFMLA retaliation claims.

II. SUMMARY JUDGMENT STANDARD OF REVIEW

A Summary Judgment is granted when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *See Celotex Corporation v. Catrell*, 477 U.S. 317, 318 (1986); *Bigwood v. U.S. Agency for Intern. Dev.*, 484 F. Supp. 2d 68, 72 (D.D.C. 2007); *Broderick v. Donaldson*, 338 F. Supp. 2d 30, 40 (D.D.C. 2004); *Grant v. May Department Stores*, 786 A.2d 580, 583 (D.C. 2001); *Bruno v. Western Union Financial Services, Inc*., 973 A.2d 713, 717 (D.C. 2009). "A party is entitled to a summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that moving party is entitled to judgment as a matter of law." *Steele v. Salb*, 93 A.3d 1277, 1281 (D.C. 2014). In reviewing summary judgment motions, the courts view the evidence in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 243 (1986). To prevail upon a motion for summary judgment, the moving party must clearly demonstrate that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. *See Beard v. Goodyear Tire and Rubber Co.*, 587 A. 2d 195, 198 (D.C. 1991).

The Commission will grant summary judgment only if the moving party is entitled to a judgment as a matter of law based upon facts not in dispute. *See Ferguson v. Small*, 225 F. Supp. 2d 31, 36 (D.D.C. 2002). If a moving defendant has made an initial showing that the record presents no genuine issue of material fact, the burden of production of evidence shifts to the nonmoving party to show that a genuine material issue exists. *See Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005). In opposing a summary judgment, a party

may not rely on vague allegations, but instead must present specific facts showing that there is a genuine issue for trial. *Fogg v. Fidelity National Title Insurance*, 89 A. 3d 510, 514 (D.C. 2014); *Graff v. Malawar*, 592 A.2d 1038, 1040 (D.C. 1991). The Complainant must show that she has "a plausible ground for the maintenance of a cause of action." *Bruno*, 973 A.2d at 717.

III. ISSUES

1. Whether Wachovia subjected Complainant to a hostile work environment based of her race (White Hispanic) and her age (53).
2. Whether Complainant was retaliated against for requesting District of Columbia Family and Medical Leave when she was terminated, effective February 13, 2008.

IV. RULINGS ON COMPLAINANT'S EXCEPTIONS

EXCEPTION TO THE COMMISSION'S LEGAL AUTHORITY TO ISSUE A SUMMARY JUDGMENT

In the Complainant's opening paragraphs of her Exceptions to the Proposed Decision and Order, she states the decision violates the statutory intent of the DCHRA that the Act is "a broad remedial statute to be generously construed." *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A. 2d 724, 731 (D.C. 2000); *accord Esteños v. PAHO/WHO Federal Credit Union*, 952 A.2d 878, 887 (D.C. 2008); *George Washington Univ. v. D.C. Board of Zoning Adjustment*, 831 A.2d 921, 939 (D.C. 2003). The Complainant argues in her Exceptions that the Commission does not have the legal authority to grant a Motion for Summary Judgment. The Commission disagrees with the Complainant's contention that

their office lacks such authority citing D.C. MUN. REG. tit. 4 § 426.1 that states,

> The Hearing Tribunal may order the dismissal of any certified complaint at any time after receipt by the Commission, upon the motion of a party, upon the recommendation of the hearing examiner or the designee of the Chairperson, or *sua sponte*. The order shall be considered a Final Decision and Order if the hearing of the complaint was delegated to one or more hearing examiners who do not constitute the Hearing Tribunal, and may be appealed in accordance with § 431.

The Complainant's exception is overruled.

ISSUE EXCEPTIONS

The Complainant asserts that the judicial officer misstated the issues presented in this case. The first issue listed in the Proposed Decision and Order is whether Respondent created a hostile work environment for Complainant based on her race (White Hispanic) and her age (53). The Complainant contends that this issue should have been stated, whether Respondent created a hostile work environment for Complainant based on her race and her national origin.[2]

Once OHR makes a finding of probable cause in their LOD in a complaint of discrimination and then certifies the case to the Commission for a *de novo* hearing, the Commission is limited to adjudicating only the issues where OHR has determined there is probable cause. *See* D.C. CODE §§ 2- 1403.06 (b) and 2-1403.10.

The LOD that was issued in this case made two findings of probable cause. The first probable cause finding is:

PROBABLE CAUSE to believe the Respondent subjected Complainant to a hostile work environment on the basis of race (White Hispanic) and age (53). The Office did not make a finding of probable cause that Respondent subjected Complainant to a hostile work

[2] The Commission understands there is ambiguity with regard to the issue of national origin based on OHR's finding the Respondent created a hostile work environment for Complainant on the basis of her being a White Hispanic. However based on the undisputed material facts presented in this case such a finding is not warranted.

environment on the basis of national origin and for that reason the Commission cannot adjudicate that issue.

Complainant's exception is overruled.

The second probable cause finding is:

PROBABLE CAUSE to believe Complainant was entitled to DCFMLA and Respondent retaliated against her for requesting DCFMLA when she was terminated, effective February 13, 2008. The Proposed Decision and Order incorrectly listed OHR's second probable cause finding as whether the Complainant was entitled to DCFMLA protected leave and the Complainant's exception correctly noted this error.

The Commission sustains the Complainant's exception and the second issue is amended to read as follows:

Whether Complainant was retaliated against for requesting District of Columbia Family and Medical Leave (DCFMLA) when she was terminated effective February 13, 2008.

FACTUAL EXCEPTIONS

1. Complainant takes exception to Finding of Fact 8 in the Proposed Decision and Order.

> 8. Upon being hired, Complainant was informed that one of the requirements of her job was to meet the company's minimum production standards of generating four mortgage loan transactions at $600,000 each month or $1.8 million each quarter. Witness 1 Depo. at 6, 18.

The Complainant does not dispute the truthfulness of the fact Complainant was "informed" when she was hired that one of the requirements of her job was to meet production standards as set forth in the cited paragraph. **Her exception to Finding of Fact 8 is overruled.** Complainant

contends in this exception that the Finding of Fact 10 in the Proposed Decision and Order states, "Since the Respondent's production standards were measured on a monthly basis, mortgage consultants' production for a prior month was not considered in determining their monthly production." Complainant argues that this finding contradicts Finding of Fact 8 of the Proposed Decision and Order. The Commission finds there is no contradiction. The monthly minimum production rate was $600,000 and the quarterly minimum rate (which represented three consecutive months) was $1.8 million.

2. Complainant takes exception to Finding of Fact 11 in the Proposed Decision and Order which states.

> 11. Respondent had a written policy that mortgage consultants who failed to meet their minimum production standards were to be subjected to a progressive disciplinary plan of verbal warnings, the implementation of a performance improvement plan ("PIP"), and written warnings. Witness 1 Depo. at 196.

As Complainant pointed out in this Exception the page number for the citation was incorrect. The correct citation is Witness 1 Depo. at 13-14. The Complainant does not contest the truthfulness of the Finding of Fact and her **Exception to Finding of Fact 11 is overruled.**

3. Complainant takes exception to Finding of Fact 21 in the Proposed Decision and Order.

> 21. Upon assuming the position of the Mortgage Banking Leader, Witness 1 imposed a set of performance standards and goals for the mortgage consultants under his supervision that emphasized the importance of closing loans rather than entering applications into the system which Complainant disagreed with. Comp. Depo. at 153-154.

The basis for the Complainant's exception is not with the stated Finding of Fact which she characterizes as being "partly true", but she objects to the fact there was no mention of two of Witness 1's changes in the department. The first change was concerning the mortgage consultants' production standards being raised from $600,000 to $1,500,000 a month. The second was Witness 1 bringing in "his own people (*i.e.* African Americans)." The Commission finds that the listed omissions are not material to the two issues that arise in this case. **The Complainant's Exception to Finding of Fact 21 is overruled.**

4. The Complainant takes exception to Finding of Fact 22 of the Proposed Decision and Order.

> 22. Shortly after Witness 1 became Complainant's immediate supervisor, he issued her a written warning for disrespecting another employee in an emailed communication which violated the Wachovia Code of Ethics. Comp. Depo. at 219. Prior to this incident the Complainant had never been disciplined by Wachovia. *Id.* at 222.

The Complainant acknowledged that Witness 1 issued her a written warning alleging she disrespected a co-worker in an email she sent to the employee. Complainant disputes the allegation she disrespected the co-worker, noting she regarded her remarks as justified because her co-worker's errors had caused her to lose a loan. **The Finding of Fact 22 of the Proposed Decision and Order is amended as follows.**

> 22. Shortly after Witness 1 became Complainant's immediate supervisor, he issued her a written warning alleging she had disrespected another employee in an emailed communication. Witness 1 found Complainant in violation of the Wachovia Code of Ethics. Comp. Depo. at 219. Complainant disagrees that she

disrespected the co-worker. Prior to this incident the Complainant had never been disciplined by Wachovia. *Id.* at 222.

4. Complainant takes exception to Finding of Fact 24 of the Proposed Decision and Order that states.

24. Other mortgage consultants, including African Americans and Whites were permitted to leave their business cards at local Wachovia branch locations other than those where they were assigned. Comp. Aff. at ¶ 46. The Complainant did not argue that these employees had also failed to meet their assigned goals.

Complainant contends that the last sentence in the finding was incorrect. The Complainant cited the names of several employees of the Respondent who were not White Hispanic, who failed to meet their production goals referring to Comp. Afft.[Compl. Ex 1]. Complainant does not make the argument that these employees who had failed to meet their production goals were allowed to leave their business cards at branches other than the ones to which they were assigned. In paragraph 46 of her Affidavit Complainant directly discusses how Employee 1 allowed "Caucasian and African American mortgage consultants" to leave their business cards at other branches and makes no mention of them being allowed to do so despite not having met their assigned production goals. In paragraph 35 of Comp. Afft. [Compl. Ex 1] the Complainant cites the name of one employee that did not meet her performance goals, but makes no mention whether she was allowed to leave her business cards at other branches than to the ones she was assigned to work. **The Complainant's Exception to Finding of Fact 24 is overruled.**

6. Complainant takes exception to Finding of Fact 26 of the Proposed Decision and Order.

26. On November 9, 2007, Complainant received her second written warning from Witness 1 for failure to meet the minimum production standards during the

> third quarter of 2007 which required an average closure of $600,000 in loans. Comp. Aff. at ¶ 66. Complainant does not dispute that she did not meet this production standard. *Id.*

Complainant does not dispute she received the second written warning and according to Comp. Aff at ¶ 67 she admits she did not meet the production goal of $1.8 million during the particular quarter at issue. It is noted that in this exception the Complainant says this finding is inaccurate because it omits several important facts, including prior to Witness 1's arrival Complainant was one of the bank's top producers. This Finding of Fact was listed as 18 in the Proposed Decision and Order. Additionally the Complainant says the decision does not address the comment made by Witness 1 that her co-workers were a young group and she did not fit in with them. This statement is also inaccurate. *See* Finding of Fact 27 of the Proposed Decision and Order. **Complainant's Exception to Finding of Fact 26 is overruled.**

7. Complainant takes exception to Finding of Fact 29 of the Proposed Decision and Order.

> 29. During her meeting with HR, Complainant told Witness 2 and Witness 3 that she did not want to take action against Witness 1 and Employee 1 for their alleged discriminatory behavior, she only wanted her comments noted for the record. Witness 2 Depo. at 3-4; Comp. Depo. at 291.

The citation should have read Witness 2 Depo. Exhibits 3 and 4. Complainant does not dispute the testimony of Witness 2 and Witness 3 that she only wanted her complaints about her Employee 1 and Witness 1 to go on the record and she did not want to take action against them. Complainant argues that she made additional complaints to HR concerning her Witness 1

following this meeting. These additional complaints were made on November 9, 2007 after her supervisors met with her and complained of her work performance and on November 13, 2007 after Witness 1 placed her on a Performance Improvement Plan for thirty days. **The Exception to Finding of Fact 29 is amended to read as follows**.

29. During her meeting with HR, Complainant told Witness 2 and Witness 3 that she did not want to take action against Employee 1 and Witness 1 for their alleged discriminatory behavior and she only wanted her comments noted for the record. Witness 2 Depo. Exhibits 3-4, Comp. Depo. at 291. Complainant made additional complaints against her supervisors on November 9 and 13, 2007 following a meeting with him to discuss her alleged poor work performance and her being placed on a Performance Improvement Plan for thirty days. *Id.*

8. Complainant takes exception to Finding of Fact 30 to the Proposed Decision and Order.

30. On November 13, 2007, Witness 1 put Complainant on a Performance Improvement Plan ("PIP") for thirty days. Comp. Aff. at 66.

The Complainant does not dispute the truthfulness of Finding of Fact 30 and her exception is overruled. The Complainant argues that her being placed on the Performance Improvement Plan was unwarranted and cited several non-White Hispanic employees who had a record of performance deficiencies that were worse than her performance record that were not placed on a PIP plan. It appears the Complainant is raising the issue of disparate treatment in this case with this argument. The Commission is limited to adjudicating the issues where OHR has made a finding of probable cause. The LOD found no probable cause that the Respondent engaged in

disparate treatment of the Complainant during her tenure with the company and the Commission is precluded from addressing the issue. *See* D.C. CODE §§ 2- 1403.06 (b) and 2-1403.10.

9. Complainant takes exception to Finding of Fact 32 to the Proposed Decision and Order.

> 32. On November 14, 2007, HR contacted Witness 1 and Employee 1 to investigate Complainant's complaints. Witness 2 Depo. at 6. Witness 1 informed the HR advisors that Complainant's production was in the bottom three in her market. Witness 2 Depo. at 30 – 36. Following their investigation, Witness 2 and Witness 3 determined that the Complainant's allegations were without merit and no further action was taken. *Id.*

The Complainant does not dispute the truthfulness of Finding of Fact 32 and her Exception is overruled. The Complainant disputes this finding contending that the Commission's found her claims of discrimination were without merit as an undisputed material fact. The Commission disagrees with this exception. The finding states, Witness 2 and Witness 3 found Complainant's allegations of discrimination to be without merit which is undisputed by the parties. The Commission did not find that it was an undisputed material fact the Complainant's allegations were without merit.

10. The Complainant noted that the Findings of Fact 34 – 37 to the Proposed Decision and Order were found in Complainant's Deposition Exhibit 29 and not Comp. Depo. at 29 as cited in the Proposed Decision and Order.

It is noted that the Complainant did not dispute the truthfulness of these Findings of Facts. **The Findings of Fact 34, 35, 36, and 37 are amended to read as follows,**

> 34. On November 19, 2007, Complainant requested DCFMLA for November 19

through November 30, 2007. Comp. Aff. at ¶84. Included in her request Complainant asked for short-term disability from Insurance Company. *Id.* Wachovia's HR office informed Complainant, in writing, that she was required to complete and send in a Health Care Provider form to their Service Center within the next fifteen calendar days (by December 4, 2007) and that failure to do so would result in her not being approved for a medical leave of absence. Comp. Depo. Ex. 29.

35. Complainant was also informed by HR that in order to submit her claim for Short Term Disability she had to work directly with Insurance Company to provide the information required to submit her claim and that failure to do so could result in her claim not being approved. Comp. Depo. Ex. 29.

36. Complainant was informed that since her employment began on January 2, 2007, she would only become eligible for DCFMLA starting on January 2, 2008. Thus as of the date she requested DCFMLA leave (November 19, 2007) she was ineligible. Comp. Depo. Ex. 29.

37. Respondent's HR Department also advised Complainant that if her leave was approved she would not be entitled to job protection and her position could be filled due to operational needs. Comp. Depo. Ex. 29. Wachovia's HR Department stated, if her position was filled, she would be able to apply for an open position when she was ready to return to work within twelve months from the date her leave began. *Id.* The HR Department also advised Complainant that she would be required to provide her manager with medical certification from her health care provider that she was able to return to work as a

condition of her continued employment. *Id.*

11. The Complainant takes exception to Finding of Fact 40 to the Proposed Decision and Order.

40. Witness 1 did not deny the Complainant's allegations, but he did request that she return her employer-issued laptop and data access pass. Witness 2 Depo. at 14, 23. Complainant was not permitted to work while out on Short Term Disability because it would violate company policy and her doctor's recommendation. Witness 2 Depo. at 4, 20.

Complainant does not dispute the truthfulness of Finding of Fact 40 and her exception is overruled. Complainant contends the Respondent did not require she return her employer-issued laptop and data access pass to Witness 1 and that his request for her to return these items was evidence of his malicious intentions toward her and his attempt to keep her from making sales while she was out on leave. This contention is not found to be supported by the Complainant's own treating physician's statement she submitted to her employer that indicated she was medically unable to work for the time she was to be on leave. *See* Facts at ¶33. If Complainant was unable to work she did not have any use for her employer-issued laptop and data access pass at that time and Witness 1's request for her to return these items was not unreasonable.

12. The Complainant takes exception to Finding of Fact 42 of the Proposed Decision and Order.

42. By November 30, 2007, the last day of her requested leave of absence, Complainant had not returned to work. Witness 1 Depo. at 2.

Complainant does not dispute the truthfulness of **Finding of Fact 42 of the Proposed Decision and Order and her Exception is overruled**. Complainant indicated that she did

report to work on Monday, December 2, 2007 and worked for three hours before he was ordered by Witness 1 to leave the premises or he would have the police escort her from the bank. *See* Fact at ¶ 43. It is an undisputed material fact that Complainant was advised by the Respondent's HR Department that she was required to provide her manager with medical certification from her health care provider that she was able to return to work as a condition of her continued employment. *See* Fact at ¶37. The Complainant does not contest the finding she failed to submit the requested medical documentation when she reported back to work.

13. The Complainant takes exception to Finding of Fact 43 of the Proposed Decision and Order.

> 43. Complainant did not submit the appropriate paperwork to return to work by the deadline of December 3, 2007.

Complainant does not dispute the truthfulness of **Finding of Fact 43 of the Proposed Decision and Order. Her exception is overruled.** Complainant admits to receiving one written request for the paperwork, but says it was in fine print.

14. The Complainant takes exception to Finding of Fact 44 of the Proposed Decision and Order.

> 44. Complainant never submitted the required paperwork for approval of her requested leave of absence despite several written requests by Wachovia for her to do so, thus her leave of absence was never approved. Comp. Depo. at 48-46; Witness 2 Depo. at 50.

The Complainant contends that the finding of fact is false stating there was only one written request for her to submit paperwork and it was in fine print. Complainant also notes that Doctor sent a letter to the Respondent on December 13, 2007 stating Complainant was unable to work

for the foreseeable future. *See* Finding of Fact 46 of the Proposed Decision and Order. Respondent had asked Complainant to submit the necessary paperwork by December 3. Doctor's letter was sent to the Respondent after the December 3 deadline had expired and after the Complainant's last day of requested leave (November 30). **Finding of Fact 44 is amended to read as follows**.

> 44**.** Complainant received one written request in fine print from Respondent asking her to submit her required paperwork to approve her absences from work by December 3, 2007. Complainant did not comply with that request by the December 3rd deadline.

15. The Complainant takes exception to Finding of Fact 47 of the Proposed Decision and Order.

> 47. Employee 1 informed Complainant on December 19, 2007 that since she was unable to return to work and was not eligible for leave under DCFMLA, her position had been filled. Comp. Depo. at 57. Complainant was also told that in accordance with the initial letter from Wachovia concerning her leave request, if she was able to return to work within 12 months from the date her leave started she would be eligible to apply for other positons within the company. Employee 1 further informed Complainant that after 20 days of her being determined able to return to work if no positions were available or she were ineligible for the positions she applied for, her employment with the Respondent would be terminated. *Id.*

The Complainant acknowledges Finding of Fact 47 is truthful and her exception is overruled.

16. The Complainant takes exception to Finding of Fact 49 of the Proposed Decision and Order.

49. On January 2, 2008, Complainant became eligible to file for DCFMLA, but once she became eligible she did not apply. Comp. Depo. at 29.

Complainant acknowledges that the statement is truthful, but maintains she was unaware that she had a right to apply because she was under the impression that her position had been filled and she had to reapply for a new job. **Her Exception to Finding of Fact 49 is overruled.**

COMPLAINANT'S EXCEPTIONS TO FACTS OMITTED

1. Employee 2 initially supervised Complainant and, for about seven months, she did not have any problems on the job at all. Complainant Depo. [Compl. Ex. 4] at 50, 136-137. Respondent does not deny that Employee 2 did not criticize Complainant's work. Resp. Supp. Resps. [Ex. 5], Resp. to Compl. RFA, No.7, p. 27.

   The Commission finds that the listed omission is not material to the two issues that arise in this case.

2. During Complainant's employment with Wachovia, she received praise and commendations for providing excellent customer service from Wachovia branch managers and their employees. Employee 2 and Employee 1 both praised her performance. Compl. Afft. [Compl. Ex. 1].

   The Commission finds that the listed omission is not material to the two issues that arise in this case.

3. By contrast, Employee 2 sometimes expressed his disappointment with some of the loan officers, whom Employee 1 had hired because they were not producing at satisfactory levels. Compl. Afft. [Compl. Ex. 1] ¶ 16.

   The Commission finds that the listed omission is not material to the two issues that arise in this case.

4. Beginning in August 2007, Employee 1 continuously subjected the Complainant to a discriminatory and hostile work environment because of her race, national origin, and age. Starting in August, Employee 2 displayed a negative attitude towards Complainant and other non-African-American employees. For example, he made statements to Comparator 1 (a Filipina), which caused her to cry and leave for the day. A few days later he caused Comparator 2 (a Brazilian) to cry and leave for the day. Later both women related to Complainant that Employee 1 had spoken rudely to them. Compl. Afft. [Compl. Ex. 1] ¶ 19.

   Commission finds that the listed omission is not material to the two issues that arise in this case.

5. Respondent took unfair actions, which impeded Complainant's efforts to generate mortgage sales, either deliberately or with that effect. See Comp. Opp. at 10, 12.

   Commission finds that the listed omission is not a finding of fact but calls for a conclusion of law.

6. On or about Monday, October 22, the Complainant held a lunch meeting with her top producing realtor, Realtor 1, and Witness 1. Witness 1 was quite critical of the Complainant during the lunch. After Witness 1 left, Realtor 1 said to Complainant, "Oh, [redacted], you're going to have a very hard [road] with this guy. He does not like it at all that you're Hispanic. He's acted on everything. . . . I'm sorry for you, honey." Compl. Int. Ans. [Compl. Ex. 3], No. 1, p. 9; Complainant Depo. [Compl. Ex. 4] at 253-254.

   The Commission finds that the listed omission is not material to the two issues that arise in this case.

7. In a meeting on or about November 5, Witness 1 accused the Complainant of incorrectly handling a loan to a Client 1, but the fault lay with Comparator 3 (African-American) and Comparator 4, Senior Processor for Wachovia's North Carolina Rock Center, not Complainant, because it was Comparator 3's duty to obtain approval and to

process the loans that Complainant had set up. This indicated that by November 5 Witness 1 was trying to create a pretext on which to discipline or discharge Complainant. Compl. Afft. [Compl. Ex. 1] ¶ 45; Compl. OHR Reb. Afft. [Compl. Ex. 2], p. 15; Compl. Int. Ans. [Compl. Ex. 3], No. 16, p. 50.

The Commission finds that the listed omission is not material to the two issues that arise in this case.

8. Before Witness 1 threatened to write up Complainant during the November 9 meeting and before he gave Complainant the PIP on November 13, *See* Finding of Fact 30, she informed him and Employee 1 that she had complained to HR about them. See Compl. Afft. [Compl. Ex. 1] ¶ 57; Compl. Int. Ans. [Compl. Ex. 3], No. 4, p. 16; Complainant Depo. [Compl. Ex. 4] at 269. As stated in Complainant's Opposition, at 20, in the November 9 meeting she told Witness 1, "I already have a case number with HR on you and him." Employee 1 got angry, stood up, and stated that he would write her up. He than began threatening the Complainant, indicating he would change her working conditions to impede her performance.

The Commission finds that the listed omission is not material to the two issues that arise in this case.

9. As mentioned above, Witness 1 discriminated against Complainant when he gave her the PIP for allegedly failing to meet her goals. Compl. Opp. at 25; Compl. Afft. [Compl. Ex. 1] ¶ 69; Compl. OHR Reb. Afft. [Compl. Ex. 2], pp. 7-8. Indeed, during the third quarter, none of the other employees in Complainant's office reached an average closed volume of $1.8 million. In fact, at the end of October, two of the six non-supervisory employees in the office had failed to close any loans during the entire year! Compl. Ex. 13. However, Employee 1 and Witness 1 did not then similarly place Comparator 5 or

Comparator 2 on a performance improvement plan. Employee 1 and Witness 1 allowed them to keep their jobs, without even placing them on a PIP. Compl. Afft. [Compl. Ex. 1] ¶ 69; Compl. OHR Reb. Afft. [Compl. Ex. 2], pp. 7-8. Further, at that time, only nine employees in the entire region had surpassed $5.4 million and had exceeded the required level of average close volume over the first three quarters. Compl. Ex. 13; Compl. Afft. [Compl. Ex. 1] ¶ 68. Further, they treated Complainant less favorably than they did Comparator 6. By October, Comparator 6's YTD closings were $4.7 million, approximately $700,000 less than Complainant. Compl. Ex. 13. Also, Comparator 6 had failed to close any deals in October-November 2007, so it is unlikely that she was able to meet the $1.8 million requirement. Yet Employee 1 and Witness 1 did not discipline Comparator 6 for poor production. Compl. Afft. [Compl. Ex. 1] ¶ 70. They just told her to work from home. Complainant Depo. [Compl. Ex. 4] at 234-235; Compl. OHR Reb. Afft. [Compl. Ex. 2], p. 8; Compl. Int. Ans. [Compl. Ex. 3], p. 12.

The Commission finds that the listed omission is not material to the two issues that arise in this case.

10. After Wachovia placed her on the PIP, Complainant became very depressed. Compl. Afft. [Compl. Ex. 1] ¶ 73; Complainant Dep. [Compl. Ex. 4] at 401- 402.

The Commission finds that the listed omission is not material to the two issues that arise in this case.

11. On November 13, Complainant sent Employee 3 an e-mail notifying her, among other things, that she was feeling "upset" and "very stress[ed]," and was experiencing a lot of [heart] palpitations. Compl. Ex. 19; Compl. Afft. [Compl. Ex. 1] ¶ 77; Complainant Depo. [Compl. Ex. 4] at 287.

The Commission finds that the listed omission is not material to the two issues that arise in this case.

12. On about November 14, Employee 3 told Witness 1 that Complainant had complained to her about him. She asked Witness 1 to clarify Complainant's goals and where she was with her sales in relation to the rest of his staff. Witness 1 told Witness 2 that Complainant was in the bottom three of her market. He indicated that there were two mortgage consultants who were on "par" with her. Immediately afterwards, Witness 2 talked with Employee 1 about Complainant. The conversation was very similar to her conversation with Witness 1. Witness 2 Dep. [Compl. Ex. 6] at 30-36.

    The Commission finds that the listed omission is not material to the two issues that arise in this case.

13. In around November 15, Complainant informed Employee 3 that she believed Witness 1 and Employee 1 were treating her differently because of her age, race, national origin, and weight. Compl. Afft. [Compl. Ex. 1] ¶79; Complainant Dep. [Compl. Ex. 4] at 171; Witness 2 Dep. [Compl. Ex. 6] at 24. This fact was important, of course, to Complainant's reprisal claims.

    The Commission finds that the listed omission is not material to the two issues that arise in this case.

14. On or about Friday, November 16, Complainant sent Employee 3 an e-mail telling her that she was "scare[d]" of retaliation against her for going to HR, and “did not think [she would] be able to handle it very well." Compl. Ex. 21; Compl. Afft.[Compl. Ex1} ¶81.

    The Commission finds that the listed omission is not material to the two issues that arise in this case.

15. The ALJ did find “Complainant subsequently sent Witness 1 an email stating her belief that he was pressuring her to quit and she hoped his harassment of her was not due to her age, national origin, and race, but she believed that it was. Comp. Aff. at ¶ 85. However,

she left out the facts that in this same November 20 e-mail, Complainant also informed him that his harassment of her was causing her mental distress and that she was also experiencing physical symptoms due to his harassment of her. Complainant further told him, "I still do not understand why [you told me] I do not fit [in] your group," and "[T]his is the first time I [had] been discriminate[d] [against]." Compl. Ex. 24. Complainant copied Witness 2 on this e-mail. Compl. Afft. [Compl. Ex. 1] ¶ 85; Complainant Depo. [Compl. Ex. 4] at 318-319.

The Commission finds that the listed omission is not material to the two issues that arise in this case.

16. Witness 2 went into "radio silence" in November, failing to return telephone calls which Complainant made to her on November 21 and 24. Compl. Afft. [Ex. 1] ¶ 88. She did not accept a phone call from Complainant until November 27, when Complainant recounted strange events surrounding her employment and again expressed her fear that Witness 1 was retaliating against her. *See* Compl. Opposition at 32.

The Commission finds that the listed omission is not material to the two issues that arise in this case.

17. On Tuesday, November 27, Insurance Company wrote Complainant a letter indicating that it was informed (by Wachovia) that Complainant had withdrawn her claim for STD disability benefits. Several days later, on or about December 7, Complainant sent a letter to Insurance Company, informing it that she had not withdrawn her claim and that she did wish to pursue it. Compl. Ex. 37; Compl. Afft. [Ex. 1] ¶89; Complainant Depo. [Compl. Ex/ 4] at 366-367; 390-391.

The Commission finds that the listed omission is not material to the two issues that arise in this case.

COMPLAINANT'S EXCEPTIONS ON THE LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Commission will address the Complainant's exceptions to the Legal Analysis and Conclusions of Law stated in the Final Decision and Order that is attached.

V. STATEMENT OF UNDISPUTED MATERIAL FACTS[3]

1. Complainant is a White Hispanic woman from Costa Rica, who is bilingual and speaks English with a Hispanic accent. Complainant's Affidavit (Comp. Aff.) at ¶ 2. During the events giving rise to her allegations, Complainant was 53 years old. Deposition Transcript of Complainant (June 14 -15, 2007) at 5 ("Comp. Depo.").
2. Complainant acquired a Master's in Business Administration and Marketing in Costa Rica, and worked as a loan officer for the Bank of America for two years followed by a four-year term as a bilingual Home Mortgage Consultant for Countrywide Home Loans. Comp. Aff. at ¶ 4.
3. Wachovia Corporation was a diversified financial services company that provided a broad range of banking, asset management, corporate and investment banking products and services at the time Complainant was in their employ. Deposition Transcript of Witness 1 (June 17, 2011) at 25 ("Witness 1 Depo.").
4. Wachovia maintains its principal office in Charlotte, North Carolina and has several branch offices throughout the country, including their location on 13th and "I" Street, Northwest in Washington, D.C. Witness 1 Depo. at 25.

[3] This decision involves a case at the summary judgment stage. As will be discussed further, all factual conflicts are resolved in Complainant's favor and all permissible inferences drawn on her behalf. Therefore, these "Findings of Fact" represent only those facts being used for purposes of summary judgment, and would not govern in any subsequent proceedings.

5. Complainant began to work for Wachovia Corporation on January 2, 2007 as a bilingual Mortgage Consultant at their branch located at 1300 "I" Street, N.W., Washington, D.C. Comp. Aff. at ¶ 10; Comp. Depo. at 124.
6. Employee 2, who was Complainant's immediate supervisor when she first began working for the Respondent, was White. Comp. Aff. at ¶ 10; Comp. Depo. at 124.
7. The Complainant's duties as a mortgage consultant included soliciting and recruiting new customers, promoting and marketing her services, processing loans and teaching Wachovia's "Pick a Pay" program to financial advisors in its local branches. Comp. Depo. at 124.
8. Upon being hired, Complainant was informed that one of the requirements of her job was to meet the company's minimum production standards of generating four mortgage loan transactions at $600,000 each month or $1.8 million each quarter. Witness 1 Depo. at 6, 18.
9. Wachovia Bank managers usually tracked mortgage consultants' productivity on a monthly basis to ensure that they maintained the bank's production standards. Witness 1 Depo. at 1, 14-15, 134.
10. Since the Respondent's production standards were measured on a monthly basis, mortgage consultants' production for prior months was not considered in determining their monthly production. Witness 1 Depo. at 196.
11. Respondent had a written policy that mortgage consultants, who failed to meet their minimum production standards were to be subjected to a progressive disciplinary plan of verbal warnings, the implementation of a performance improvement plan ("PIP"), and written warnings. Witness 1 Depo. at 13-14.

12. Complainant's employment offer specified that she would receive a forgivable draw of $4,000 per month for the first four months followed by an unforgivable draw of $2,000 per month which could be reduced if Complainant failed to meet her monthly performance goals. Comp. Depo. at 129.

13. Complainant's offer also contained the "Mortgage Consultant Payout Grid" which set forth the Mortgage Consultant Incentive Plan and specified that actual payout was contingent on performance. Comp. Depo. at 129.

14. During Complainant's tenure with Wachovia, the Respondent had a policy that prohibited discrimination and harassment in the workplace. Comp. Depo. at 205. Wachovia instructed employees who believed they were discriminated against to immediately report their complaints to a Human Resources Department ("HR") advisor or their immediate supervisor. Witness 1 Depo. at 25.

15. Wachovia also had a family medical leave policy while Complainant's was employed by the company that provided 16 weeks of FMLA to employees who had been working continuously for the bank at least 12 months and had worked at least 1,000 hours in the previous 12 months. Witness 1 Depo. at 25.

16. The Respondent also provided short term disability benefits for its employees with serious health conditions through Insurance Company (the company's Short Term Disability claims adjuster). Witness 1 Depo. at 25.

17. The Respondent's Attendance Policy that was in effect when Complainant was employed with the company stated an employee absent from work for three consecutive days without prior notification or approval would be considered to have abandoned their position of employment. Witness 1 Depo. at 25.

18. In June 2007, Complainant was ranked the fifth highest producer in the retail loan sales division in Wachovia's Capital East Area. Comp. Aff. at ¶1.
19. In August 2007, Employee 2 left the company and Employee 1 became Complainant's new supervisor. Employee 1 was an African American. Witness 1 Depo. at 11.
20. On October 12, 2007, Wachovia hired Witness 1, a 42 year old African American as the new Mortgage Banking Leader and he became Complainant's immediate supervisor replacing Employee 1. Comp. Depo. at 151, 153; Witness 1 Depo. at 11.
21. Upon assuming the position of the Mortgage Banking Leader, Witness 1 imposed a set of performance standards and goals for the mortgage consultants under his supervision that emphasized the importance of closing loans rather than entering applications into the system which Complainant disagreed with. Comp. Depo. at 153-154.
22. Shortly after Witness 1 became Complainant's immediate supervisor, he issued her a written warning alleging she had disrespected another employee in an emailed communication. Witness 1 found Complainant's action to be in violation of the Wachovia Code of Ethics. Comp. Depo at 219. Complainant disagrees that she disrespected the co-worker. Prior to this incident the Complainant had never been disciplined by Wachovia. *Id.* at 222.
23. On November 5, 2007, Complainant requested permission from Witness 1 to leave her business cards at local Wachovia branch locations with significant Spanish-speaking clientele. Comp. Aff. at ¶ ¶ 40-41. Witness 1 denied her

request stating his reason for doing so was she was not meeting her goals with the banks she was assigned. *Id.*

24. Other mortgage consultants, including African Americans and Whites were permitted to leave their business cards at local Wachovia branch locations other than those where they were assigned. Comp. Aff. at ¶ 46. The Complainant did not contend that these employees had also failed to meet their assigned production goals.
25. Shortly after this incident, Complainant contacted Wachovia's Human Resources Department ("HR") and spoke to HR Advisors Witness 2 and Witness 3 about her grievances with Witness 1 and Employee 1. Comp. Aff. at¶ 47. Complainant reported to Witness 2 and Witness 3 that Witness 1 told her she "did not know loans" and "that people do not understand you." Witness 2 Depo. at 3-4,6.
26. On November 9, 2007, Complainant received her second written warning from Witness 1 for failure to meet the Respondent's minimum production standards during the third quarter of 2007 which required an average closure of $600,000 in loans. Comp. Aff. at ¶ 66. Complainant does not dispute that she did not meet the production standard. *Id.*
27. Complainant met with Employee 1 and Witness 1 on November 9th to discuss her job performance. Comp. Depo at 171- 173. Witness 1 told the Complainant that she did not fit in with her co-workers because they were "young." *Id.*
28. After the meeting, Complainant contacted HR and complained that Witness 1 had made disparaging remarks about her English–speaking ability and commented that she did not fit in with the group of workers he supervised because of her age.

Comp. Aff. at ¶ 58. Witness 1's undisputed testimony at his deposition was he was not referring to Complainant's ability to speak English, but her ability to explain loans to bank customers. Witness 1 Depo. at 163-165.

29. During her meeting with HR, Complainant told Witness 2 and Witness 3 that she did not want to take action against Witness 1 and Employee 1 for their alleged discriminatory behavior, she only wanted her comments noted for the record. Witness 2 Depo. Ex. 3-4; Comp. Depo. at 291. Complainant made additional complaints to HR against her supervisor on November 9 and 13, 2007 following their meeting to discuss her work performance and her being placed on a Performance Improvement Plan for thirty days. *Id.*

30. On November 13, 2007, Witness 1 put Complainant on a Performance Improvement Plan ("PIP") for thirty days. Comp. Aff. at ¶ 66.

31. Complainant contacted HR the same day to complain that she was being retaliated against by her supervisors for making a complaint to HR. Comp. Aff. ¶ ¶ 74, 77.

32. On November 14, 2007, HR contacted Witness 1 and Employee 1 to investigate Complainant's complaints. Witness 2 Depo. at 6. Witness 1 informed the HR advisors that Complainant's production was in the bottom three in her market. Witness 2 Depo. at 30 – 36. Following their investigation Witness 2 and Witness 3 determined that the Complainant's allegations were without merit and no further action was taken by the Respondent. *Id.*

33. Later that same day, Complainant met with her physician, who wrote a letter stating she was medically unable to work between November 19, 2007 and November 30, 2007 due to stress, anxiety, and heart palpitations. Comp. Depo. at 411.

34. On November 19, 2007, Complainant requested DCFMLA from the Respondent for the period of November 19 through November 30, 2007. Comp. Aff. at ¶84. Included in this request, Complainant asked for short-term disability from Insurance Company. *Id.* Wachovia's HR office informed Complainant by written communication that she was required to complete and send in a Health Care Provider form to their service center within the next fifteen calendar days (December 4, 2007 was the deadline) and that failure to do so would result in her not being approved for a medical leave of absence. Comp. Depo. Ex. 29.

35. Complainant was also informed by HR that in order to submit her claim for Short Term Disability she had to work directly with Insurance Company to provide the information required to submit her claim and that failure to do so could result in her claim not being approved. Comp. Depo. Ex. 29.

36. Complainant was informed that since her employment began on January 2, 2007, she would only become eligible for DCFMLA starting on January 2, 2008. Thus as of the date she requested DCFMLA leave (November 19, 2007) she was ineligible. Comp. Depo. Ex. 29.

37. Respondent's HR Department further advised Complainant that if her leave was approved she would not be entitled to job protection and her position could be filled due to business or operational needs. Comp. Depo. at 29. Wachovia's HR Department stated, if her position was filled, she would be able to apply for an open

position when she was ready to return to work within twelve months from the date her leave started. The HR Department further advised Complainant that she would be required to provide her manager with medical certification from her health care provider that she was able to return to work as a condition of her continued employment. *Id.*

38. On November 19, 2007, Complainant took a leave of absence for health reasons. Wachovia did not provide sick leave or other compensation during Complainant's leave of absence. Comp. Depo. Ex. 29, Comp. Aff. at ¶91.

39. Complainant subsequently sent Witness 1 an email stating her belief that he was pressuring her to quit and she hoped that his harassment of her was not due to her age, national origin, and race, but she believed that it was. Comp. Aff. at ¶ 85. Witness 1 did not deny the Complainant's allegations, but he did request that she return her employer-issued laptop and data access pass. Witness 2 Depo. at 14, 23.

40. Complainant was not permitted to work while out on Short Term Disability because it would violate Respondent's company policy and her doctor's recommendation. Witness 2 Depo. at 4, 20.

41. On November 21, 2007, Complainant was informed that in accordance with Wachovia's 2007 Compensation Plan, her draw would be reduced from $2,000 per month to $500 per month. Comp. Depo. at 34. According to the plan, if an employee was in deficit status for four months or more or if the employee's deficit status exceeds $6,000 the draw was automatically reduced by the corporate office in Charlotte. Comp. Depo. at 2.

42. November 30, 2007, the last day of her requested leave of absence, Complainant

had not returned to work. Witness 1 Depo. at 2.

43. Complainant did not submit the appropriate paperwork to return to work by the deadline of December 3, 2007. Comp. Depo. at 376; Witness 1 Depo. Ex. 64; Witness 2 Depo. at 30, 36, 49. On December 2, 2007, the Complainant did report to her branch's office and was told by Witness 1 to leave immediately or the police would be contacted to escort her from the premises. Comp. Aff. at ¶ 95.

44. Complainant received one written request in fine print from Respondent asking her to submit her required paperwork to approve her absences from work by December 3, 2007. Complainant did not comply with that request by the December 3rd deadline. Comp. Depo. at 48-46; Witness 2 Depo. at 50.

45. The week of December 3, 2007, Wachovia stopped paying Complainant her $2,000 monthly draw. Comp. Aff. at ¶ 97.

46. On December 13, 2007, Doctor, a clinical psychologist who was treating the Complainant at the time sent a letter to Insurance Company explaining Complainant was unable to work for the foreseeable future and that she approved her working from home. Comp. Aff. at 104-105; Comp. Depo. at 41.

47. Employee 1 informed Complainant on December 19, 2007 that since she was unable to return to work and was not eligible for leave under DCFMLA, her position had been filled. Compo. Depo. at 57. Complainant was also told that in accordance with the initial letter from Wachovia concerning her leave request, if she was able to return to work within 12 months from the date her leave started she would be eligible to apply for other positons within the company. Employee 1 further informed Complainant that after 20 days of her being determined able to return to work if no

positions were available or she were ineligible for the positions she applied for her employment with the Respondent would be terminated. *Id.*

48. After receiving this communication from Employee 1, Complainant applied for another position with Wachovia, but she was not selected because she did not meet the job requirement of having two years of job-related experience. Comp. Aff. at ¶ 116.

49. On January 2, 2008, Complainant became eligible to file for DCFMLA, but once she became eligible she did not apply. Comp. Depo. at 29.

50. Complainant turned in her company issued laptop and data access pass to Wachovia on January 10, 2008. Comp. Depo. at 62. That same day Complainant informed the Respondent that she was relocating to Florida and provided them with her new mailing address. Comp. Aff. at ¶124.

51. On January 10, 2008, Wachovia sent the Complainant a letter informing her that they had not received documentation for her leave of absence and asked her to fill out and return a Health Providers form within 15 days. Comp. Aff. at ¶ 126. Complainant did not receive the letter until March 12, 2008 because it was mailed to her former address in Washington, D.C. *Id.*

52. By January 16, 2008, Complainant had moved to Florida. Comp. Depo. at 416.

53. Wachovia determined that since the Complainant had not provided any of the documentation as requested that she had voluntarily resigned her job effective on February 13, 2008 pursuant to the Respondent's Attendance Policy that stated an employee absent from work for three consecutive days without prior notification or approval would be considered to have abandoned their position of employment.

Witness 1 Depo. at 75 –76.

VII. DISCUSSION

1. Hostile Work Environment Claim

Complainant alleges that Respondent Wachovia discriminated against her on the basis of her race (White Hispanic) and age (53) in violation of the DCHRA. She further contends that the discriminatory conduct of her supervisors, Employee 1 and Witness 1 created a hostile work environment.

The DCHRA makes it unlawful to "discriminate against an individual with respect to his compensation, terms, conditions or privileges of employment," because of such individual's, race, color, religion, sex, age or national origin," among other protected categories. *See* D.C. Code § 2-1402.11 (a). The District of Columbia Court of Appeals as a general rule looks to the federal courts for guidance involving claims brought under the DCHRA. *Wallace v. Skadden, Arps, Slate, Meagher & Flom, et al*. 715 A.2d 873, n.31 (D.C. 1988).

Generally, an unlawful hostile work environment is the result of "a series of separate acts" which collectively create a discriminatory workplace. *Roof v. Howard University,* 502 F. Supp. 2d 108, 114-15 (D.D.C. 2007) *(citing Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002)). The test is whether the workplace is permeated with discriminatory intimidation, ridicule, and insult considered sufficiently severe or pervasive as to alter the conditions of the Complainant's employment and create an abusive working environment. *See Singletary v. District of Columbia*, 351 F. 3d 519, 526 (D.C. Cir. 2003) (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986)); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

Whether an environment is hostile is determined by the totality of the circumstances. *Daka, Inc. v. Breiner*, 711 A.2d 86, 93 (D.C. 1998). Simple teasing, offhand comments, and

isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998). "More than a few isolated incidents must have occurred, and genuinely trivial occurrences will not establish a *prima facie* case. However, no specific number of incidents, and no specific level of egregiousness need be proven. The trier of fact should consider the amount and nature of the conduct, the plaintiff's response to such conduct, and the relationship between the harassing party and the plaintiff." *See Howard University v. Best*, 484 A.2d 958, 980 (D.C. 1984); *Regan v. Grill Concepts, Inc.*, 338 F. Supp. 2d 131, 137 (D.C. 2004).

Complainant may establish a *prima facie* case of hostile work environment if she can demonstrate that: (1) she is a member of a protected class; (2) she has been subjected to unwelcome harassment; (3) the harassment was based on membership of a protected class; and (4) the harassment is severe or pervasive enough to affect a term, condition, or privilege of employment. Unwelcome harassment is conduct that the employee neither solicited nor invited and that the employee regarded as undesirable or offensive. *Lively v. Flexible Packaging Association, et al.* 830 A. 2d 874, 888 (D.C. 2003); *Daka, Inc. v. Breiner*, 711 A.2d at 92.

Race

Complainant satisfies the first element of her *prima facie* case of hostile work environment based on race as she is a member of the racially protected class (White Hispanic). With regard to the second element Complainant contends that she was subjected to unwelcome harassment by her supervisors, Employee 1 and Witness 1, who created an unpleasant work environment for her based on her race. Complainant notes that when she began her employment with the Respondent in January 2007 she worked under the supervision of Employee 2, who was White. In June of 2007, while working under Employee 2's supervision Complainant was ranked

the fifth highest producer in the retail loan sales division in the Respondent's Capital East Area. When Employee 2 left the company in August 2007 Employee 1 became her supervisor. On October 12, 2007, Witness 1 replaced Employee 1 as the Complainant's supervisor. Both Employee 1 and Witness 1 were African American men.

Shortly after Witness 1 became Complainant's supervisor he issued her a written warning for allegedly being disrespectful to another co-worker, a charge she denied. On November 9, Witness 1 issued Complainant a second written warning for failure to meet her performance goals which Complainant does not dispute. Complainant met with Witness 1 and Employee 1 on November 9 to discuss her performance and at that time she was placed on a performance improvement plan. She notes there were several other employees in her department, who were not White Hispanic that had not met their performance goals and were not issued warnings or placed on performance improvement plans by the Respondent.

This argument raises the issue of Complainant being subjected to disparate treatment on the basis of race. While the issue of disparate treatment was raised with the Office, the agency determined in their LOD that the Complainant failed to demonstrate that she was subjected to disparate treatment on the basis of her race (White Hispanic), national origin (Costa Rica), and age (53). As discussed earlier in this decision, the Commission may only adjudicate those issues certified by the Office where there is a finding of probable cause. The issue of disparate treatment cannot be considered by the Commission because OHR did not make a finding of probable cause on this issue. *See* D.C. CODE §§ 2- 1403.06 (b) and 2-1403.10.

Another example of unwelcome harassment on the basis of race the Complainant cites was Witness 1's denial of her request to distribute her business cards at local Wachovia branch

locations with significant Spanish-speaking clientele. It is noted that Witness 1 told the Complainant his reason for denying her request was because she had not met her goals with the banks she was assigned. Other mortgage consultants who were not White Hispanic were allowed to leave their business cards at Wachovia bank branches other than those they were assigned. However, the Complainant does not contend that these employees failed to meet their current goals of production.as she had. This argument also raises the issue of disparate treatment on the basis of race which the Commission for the previously stated reasons is precluded from addressing.

The fourth incident Complainant raised as demonstrating Witness 1's bias toward her on the basis of race is his comment, "Come on [redacted] you know nobody really understands what you mean." Complainant alleges this statement was a criticism of her English-speaking ability. Witness 1 stated in his deposition that he was not referring Complainant's English speaking ability, but her ability to explain loans to bank customers. The Complainant did not contest his testimony.

Other episodes of alleged unwelcome harassment on the basis of race include Employee 1 and Witness 1 making repeated disparaging remarks concerning Complainant's work performance and her work skills. While absent from work due to medical reasons, Witness 1 requested Complainant return her assigned laptop computer and data access pass. As discussed previously this request is found to be reasonable given Complainant had been advised by her treating physician that she was unable to work and presumably would not be using the devices to do work at home during her time off due to illness. On December 3, 2007, when she attempted to return to work after being out due to health issues, she was ordered by Witness 1 to leave or be escorted off of the premises. It is undisputed that Complainant was instructed to bring in medical

verification from her treating physician authorizing her to return to work. During Complainant's absence Witness 1 assigned loans she had been working on to other employees without giving her credit. On one occasion Complainant overheard three unidentified individuals at the workplace in conversation and one of the individuals remarked "You have to get rid of her." Complainant believed that the comment was made about her, but had nothing to support her allegation that these persons were referring her. Based on the undisputed material facts of this case Complainant is unable to substantiate her claim that she experienced unwelcome harassment with regards to the incidents she has cited on the basis of her race.

Age

Complainant satisfies the first element of her *prima facie* case of hostile work environment on the basis of age as she is a member of the protected class of aged workers at 53.

With regard to the second element Complainant contends that she was subjected to unwelcome harassment by her supervisors, Employee 1 and Witness 1, who created an unpleasant work environment for her based on her age. Witness 1 told Complainant that she did not fit in with her co-workers because of her age. The undersigned judicial officer finds Witness 1's remark about the Complainant's age to be unwelcome harassment, offensive, unsolicited and uninvited by Complainant. Complainant satisfies the second element of her prima facie case that she was subjected to unwelcome harassment on the basis of age.

Complainant has satisfied the third element of her *prima facie* case that the unwelcome harassment was based on her membership to a protected class (age). Witness 1's remark about Complainant not fitting in with her assigned team of co-workers because of their youth is considered to be unwelcome harassment due to a protected class (age). Complainant has shown that there was a link between the hostile behavior (Witness 1's remark) and the Complainant's

membership in a protected class (age). *Lawson v. PEPCO*, 721 F. Supp. 2d 1, 6 (D.D.C. 2010) (quoting *Na'im v. Clinton*, 626 F. Supp. 2d 63, 73 (D.D.C. 2009)); *Roberson v. Snow*, 404 F. Supp. 2d. , 404 F. Supp. 79, 96-97 (D.D.C. 2005).

The Complainant fails to satisfy the fourth element of her *prima facie* case that the harassment she experienced due to age is severe or pervasive enough to affect a term, condition, or privilege of employment. According to the undisputed facts in this case Witness 1 made one comment concerning Complainant's age that could be considered harassment. The standard for what constitutes harassment severe or pervasive enough to affect a term, condition, or privilege of employment is that "more than a few isolated incidents must have occurred, and genuinely trivial occurrences will not establish a prima facie case." Aside from Witness 1's remark about the Complainant not fitting in with her co-workers due to her age, Complainant fails to cite any other acts of harassment by her supervisors based on her age. The test is whether the workplace was permeated with discriminatory intimidation, ridicule, and insult considered sufficiently severe or pervasive as to alter the conditions of the Complainant's employment and create an abusive working environment. The Complainant has not presented an argument that her workplace was permeated with hostility to the level and the frequency that it created an abusive working environment. *See R.R. Passenger Corp. v. Morgan*, 536 U.S. at 122.

2. Retaliation under the DCFMLA

The District of Columbia Family and Medical Leave Act ("DCFMLA") applies to employers who employ twenty (20) employees or more in the District of Columbia. D.C. CODE §32-515. An employee becomes eligible for DCFMLA benefits after the individual has been employed by the employer for one year without a break in service and has worked one thousand (1,000) hours or more during the twelve (12)-month period immediately preceding the request.

D.C. CODE § 32-501. Under the DCFMLA, eligible employees are provided with a total of sixteen (16)-workweeks of medical leave during any twenty-four (24)-month period when an employee becomes unable to perform the functions of his or her position due to a serious health condition. D.C. CODE § 32-503.

To establish a *prima facie* case of unlawful retaliation under the DCFMLA, the Complainant must show 1) she has engaged in a protected activity 2) she suffered adverse employment action and 3) the protected activity and adverse employment action were casually connected. *See Chan v. Institute for Public-Private Partnerships, Inc., et al.*, 846 A. 2d 318, 323 (D.C. 2004)

The Respondent, by their own admission, employs twenty (20) employees or more in the District of Columbia. The Complainant, who was hired by the Respondent on January 2, 2007, did not become eligible for DCFMLA benefits until January 2, 2008. At the time she requested DCFMLA (November 19, 2007) she was not eligible because she had not worked for the Respondent for more than one year. On January 2, 2008, when she did become eligible for benefits she did not apply for DCFMLA. Therefore, she has failed to meet element one of the *prima facie* case of unlawful retaliation under the District of Columbia Family Medical Leave Act.

Complainant has raised the argument that even if her DCFMLA claim was filed prematurely (prior to the one-year anniversary of her hire date) she should still be able to assert a retaliation claim if she was subjected to an adverse employment action for requesting post-eligibility FMLA leave. The evidence in the record does not support her contention. The period of time that Complainant requested DCFMLA was from November 19, 2007 to November 30,

2007. Respondent denied her request because she did not meet the statutory requirement that she be employed for one year prior to applying for DCFMLA leave.

Complainant maintains she suffered adverse action when she was involuntarily separated from her former job because of her filing for DCFMLA on November 19th. The Commission agrees that Complainant's pre-eligibility request for post-eligibility leave could be protected by DCFMLA. *See Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269, 1276 (11th Cir. 2012) and *Morkoetter v. Sonoco Products Company*, 936 F. Supp. 995, 999 (N.D. Ind.). The distinction between the facts in these cases and the facts in the matter before the Commission is a causal link between the employees' request for future DCFMLA and their termination which has not been established in this case. In Complainant's situation the period of time she had requested to take DCFMLA had already passed at the time of her separation from employment and she had made no further requests for DCFMLA after November 19th. On February 13, 2008, the date of Complainant's termination she did not have a request for DCFMLA pending and therefore such a request could not have been a factor in Respondent's decision to terminate her from their employ.

VIII. CONCLUSION OF LAW

It is concluded as a matter of law that Wachovia Bank did not subject Complainant to a hostile work environment based on her race or her age. It is further concluded that Wachovia Bank did not retaliate against Complainant for the filing of her DCFMLA claim by terminating her from their employ.

IX. ORDER

Based on the foregoing, the Commission **GRANTS** the Respondent's Motion for Summary Judgment against the Complainant's hostile work environment and DCFMLA claims.

Therefore, the Complainant's claims are **DISMISSED** with prejudice**.**

So Ordered this ____14th_____ day of ___October,_ 2016.

_____/s/___ Ali Muhammad _____

Commissioner Ali Muhammad

_____/s/_ _ Denise Reed_____

Commissioner Denise Reed

_____/s/_____John D. Robinson_____

Commissioner John D. Robinson